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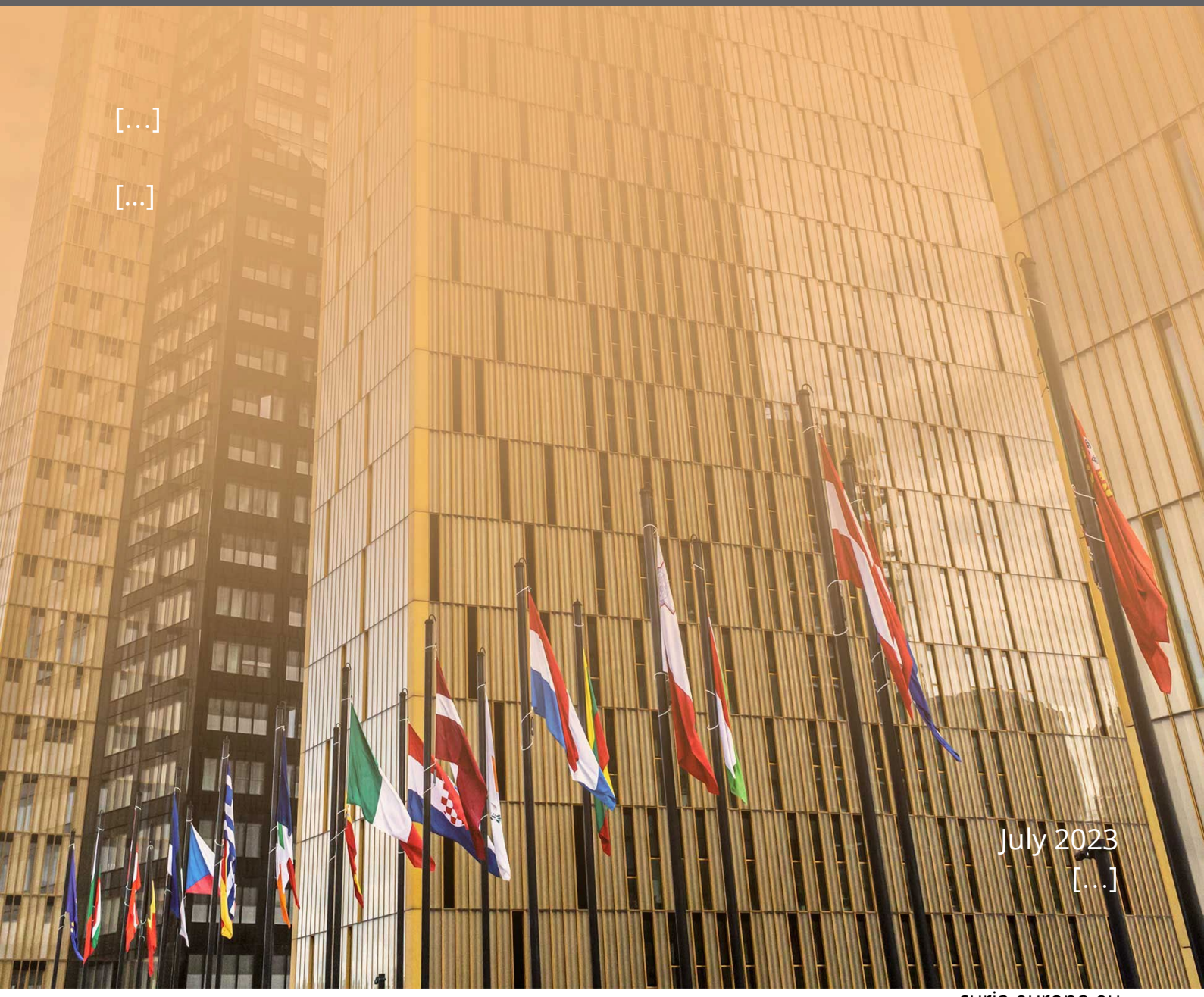
RESEARCH NOTE

RESEARCH AND DOCUMENTATION DIRECTORATE

Agreements conferring jurisdiction made between parties established in the same Member State



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INTRODUCTION

1. The Research and Documentation Directorate (RDD) received a request for a research note on whether, according to the decision-making practice of the higher and supreme courts of the Member States, Article 25 of Brussels I bis [1] applies where parties to a contract established in the same Member State agree to confer jurisdiction on the courts of another Member State to settle disputes relating to that contract and that contract is not otherwise connected with the other Member State.

2. The present research note covers the legal systems of twelve Member States: **Austria, Belgium, Estonia, France, Germany, Ireland, Italy,** the **Netherlands, Poland, Portugal, Slovenia** and **Spain**. [2]

3. With regard to the focus of the present note, it is important to emphasise that a large proportion of the case-law surveyed does not relate to Article 25 of Brussels I bis, but has been developed in the light of the corresponding provisions of the predecessors to Brussels I bis, namely Article 23 of the Brussels I Regulation [3] and Article 17 of the Brussels Convention. [4] We have also identified decisions based on Article 17, the corresponding Lugano Convention provision. [5] Case-law applying legal instruments other than Brussels I bis has been included in the present note in the light of judgments of the Court requiring consistent interpretation within the 'Brussels – Lugano' system. [6] Note, however, that the wording of Article 25 of Brussels I bis differs from the other provisions cited above in that it no longer requires at least one party to be domiciled in a Member State.

4. We have divided our comparative analysis, set out below, into two parts: First, we will examine the extent to which national case-law requires an agreement conferring jurisdiction to be cross-border in order for it to fall within the scope of Brussels I bis (I.). Secondly, we will present the approaches adopted by national legal systems to determine at what moment such a cross-border element must be assessed (II.).

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[1] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1) ('Brussels I bis').

[2] […]

[3] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1) ('Brussels I Regulation').

[4] Brussels Convention on the jurisdiction and the enforcement of judgments in civil and commercial matters, signed in Brussels on 27 September 1968 (OJ 1972 L 299, p. 32).

[5] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 16 September 1988 (OJ 1988 L 319, p. 9).

[6] See, for example, the judgments of 24 November 2022, in *Tilman* (C-358/21, EU:C:2022:923, paragraph 34, on choice of court agreements and of 10 September 2015, *Holterman Ferho Exploitatie and Others* (C-47/14, EU:C:2015:574, paragraphs 38-40.

I. CROSS-BORDER ELEMENTS FOR THE PURPOSES OF ARTICLE 25 OF BRUSSELS I BIS ACCORDING TO NATIONAL CASE-LAW

A. GENERAL OVERVIEW

5. It is important to note from the outset that the cross-border link prompting parties to opt for international jurisdiction should not be construed from the standpoint of EU law alone. Under their national law, the Member States included in our study adopt different approaches in that regard. Although a majority of those Member States do not lay down any explicit conditions for a particular link to a foreign *forum prorogatum*, [7] restrictions on the choice of foreign jurisdiction may be imposed based on other conditions, with some Member States presupposing a cross-border link to alter the international jurisdiction of a national court in favour of foreign courts. Those conditions may be broadly worded [8] or achieved by legislation based on specific factors. [9]

6. Under the European system, in almost all the selected Member States, [10] we have identified decisions by courts at various instances referring to the requirement of a cross-border element or the 'international nature' of the legal situation in question for the purposes of the applicability of Article 25 of the Brussels I bis Regulation, the corresponding provisions of the predecessor instruments or the Lugano Convention. [11] However, in the specific case covered by the present study, namely where parties established in the same Member State agree to confer jurisdiction on another Member State, without their contract having any other link to that Member State, the number of decisions of higher and supreme courts is very limited. That scenario therefore seems rare compared to other cases with other 'international' connections.

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[7] See, for example, **Belgium** (Article 7 of the Private International Law Code), **Spain** (Article 22ter, paragraph 4, of the Ley Orgánica del Poder Judicial (Organic Law on the Power of the Judiciary)), **Italy** (Article 4, paragraph 2, of the legge 31 maggio 1995 n. 218 (Law No 218/1995 of 31 May 1995)), Netherlands (Article 8, paragraph 2, Wetboek van Burgerlijke rechtsvordering (Dutch Civil Procedure Code)) and Poland (Article 1105 of the 'ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego (Civil Procedure Code)) in which choice of forum clauses refer expressly to the agreement conferring jurisdiction on foreign courts without laying down any cross-border requirement. In **Germany** (see for example, Articles 29 and 38 of the Zivilprozessordnung (Civil Procedure Code)), in **Austria** (Article 104 of the Juridiktionsnorm (Law on the territorial jurisdiction of ordinary courts in civil matters)) and in **Estonia** (Article 104 of the Tsiviilkohtumenetluse seadustik (Civil Procedure Code); see also the non-official English translation), the relevant provisions do not expressly refer to the prorogation of a foreign forum.

[8] Under **French** ordinary private international law, one of the conditions for a clause to lawfully alter international jurisdiction is that there must be 'a dispute of an international nature'; see, *inter alia*, Cour de Cassation (Court of Cassation), 1st Civ. Div., 25 November 1986, No 84-17.745, Bull. Civ. I, No 277, p. 265 (international carriage of goods; clause conferring jurisdiction on the Buenos Aires courts). In **Portugal**, Article 94, paragraph 1, of the Código de processo civil (Civil Procedure Code) requires, 'a link with more than one legal system.'

[9] In **Slovenia** (Article 52, paragraph 1, of the Zakon o mednarodnem zasebnem pravu in postopku (Law on private international law and procedure)), a party must be a foreign national or corporate entity which has its seat abroad.

[10] Except **Ireland** and **Poland**.

[11] Cross-border elements have also been examined in recent comparative studies on the application of Brussels I bis; see the European Commission study entitled 'Study to support the preparation of a report on the application of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I bis), January 2023 and a comparative study by the Asser Institute (2018-2022).

7. Based on our research, the selected Member States have been categorised into three groups: Member States in which case-law considers a choice of forum to be a sufficient cross-border element (A.), Member States in which a choice of forum has been considered not to be a sufficient cross-border element (B.) and Member States in which no case-law has been identified (C.).

B. MEMBER STATES IN WHICH CASE-LAW CONSIDERS A CHOICE OF FORUM TO BE A SUFFICIENT CROSS-BORDER ELEMENT

8. In a first group of Member States (**Austria**, **Estonia** and the **Netherlands**), previous decisions have considered a choice of forum to be sufficient, per se, for a legal situation to be considered cross-border, supporting the application of Article 25 of Brussels I bis, or the corresponding provision of a prior regulation or of the Lugano Convention.

9. That has been the case in **Austria** since an order of the Oberster Gerichtshof (Supreme Court) in 2007 based on the Brussels I Regulation. In that order, parties which had their seat in Germany entered an agreement conferring jurisdiction on the Handelsgericht Wien (Commercial Court, Vienna). Article 23 of the Brussels I Regulation was held to apply.[12] A recent decision, citing academic commentary, seems to confirm that broad approach in so far as 'in the context of agreements conferring jurisdiction, it is sufficient for the agreement conferring the jurisdiction of a Member State for Brussels I bis to apply.' [13] Before that about-turn in the case-law, the required cross-border element was deemed to be lacking where the only relevant factor was the prorogation of jurisdiction of another Member State, [14] which was heavily criticised by academic commentators. [15]

[12] Oberster Gerichtshof (Supreme Court), order of 5 June 2007, 10 Ob 40/07s, ECLI:AT:OGH0002:2007:0100OB00040.07S.0605.000.

[13] Oberster Gerichtshof (Supreme Court), order of 29 June 2020, 2 Ob 104/19m, ECLI:AT:OGH0002:2020:0020OB00104.19M.0629.000, paragraph 2. However, that case involved a clause conferring jurisdiction on an Austrian court under a contract between a party established in Austria and a party established in India. The Court emphasized that a cross-border link to a Member State or third country is, in principle, not relevant.

[14] See Oberster Gerichtshof (Supreme Court), order of 1 August 2003, 1 Ob 240/02d, ECLI:AT:OGH0002:2003:0010OB00240.02D.0801.000. Similarly, in an order of 21 April 2004, 9 Ob 151/03a, ECLI:AT:OGH0002:2004:0090OB00151.03A.0421.000, the Supreme Court held that the jurisdiction rules under the Brussels I Regulation and the Brussels and Lugano Conventions did not apply in a dispute involving parties domiciled in Austria which related to a package travel agreement in Turkey. This was not considered to be a relevant international element in deciding whether the Brussels I Regulation was applicable.

[15] See Klicka, T., 'Keine Prorogation eines ausländischen Gerichts bei reinen Inlandsfällen', *Juristische Blätter* 2004, p. 187.

10. The same approach can be found in case-law in the **Netherlands**, [16] starting with a judgment of the Gerechtshof 's-Gravenhage (Court of Appeal, The Hague) applying Article 17 of the Lugano Convention in a situation where parties domiciled in the Netherlands had agreed to grant jurisdiction to a court in a Contracting State, in that instance, Norway. [17] The Court of Appeal held that the cross-border requirement under the preamble [18] of that convention was satisfied on the basis that the parties' choice of forum departs from the jurisdiction of a court of a Contracting State under that convention and, in that instance, away from the jurisdiction of the Dutch courts. By following that judgment, the Gerechtshof Arnhem-Leeuwarden (Cour of Appeal, Arnhem-Leeuwarden) ruled in favour of applying Article 23 of the Brussels I Regulation when parties domiciled in the Netherlands chose a Belgian court to have jurisdiction. [19] The Court of Appeal, Arnhem-Leeuwarden, ruled that, in those circumstances, the situation was not purely internal to the Netherlands [20] and that the choice of a foreign court was, per se, the cross-border element. Decision of courts of first instance have rallied to that approach adopted by the higher courts, holding that Article 23 of the Brussels I Regulation and Article 25 of Brussels I bis apply in such circumstances. [21] The opposite approach [22] is now only rarely followed. [23]

[16] The Hoge Raad (Supreme Court) has not yet had the opportunity to rule on that issue.

[17] Gerechtshof 's-Gravenhage (Court of Appeal, The Hague), judgment of 28 June 2011, Maritime Logistics BV v. DNV BV, ECLI:NL:GHSGR:2011:BR1381, paragraph 8.

[18] The preamble of the Lugano Convention states, inter alia, that 'it is necessary […] to determine the international jurisdiction [of the courts of the high contracting parties].'

[19] Gerechtshof Arnhem-Leeuwarden (Court of Appeal, Arnhem-Leeuwarden), judgment of 27 October 2015, ECLI:NL:GHARL:2015:8119, paragraphs 3.10 and 3.12.

[20] That point was already made clear in the aforementioned judgment of the Gerechtshof 's-Gravenhage (Court of Appeal, The Hague), see note 17, although it was mentioned by way of obiter dictum. The Court of Appeal had added, for the sake of completeness ('volledigheidshalve'), that, in that case, the situation was not purely internal to the Netherlands, in particular as the claim was based on an arbitral award of the International Court of Arbitration of the International Chamber of Commerce.

[21] See Rechtbank Rotterdam (District Court, Rotterdam), judgment of 3 April 2015, ECLI:NL:RBROT:2015:1879, paragraph 3.5 (parties domiciled in the Netherlands chose the Commercial Court of Marseille, France, as their court of competent jurisdiction) and judgment of 1 April 2016, ECLI:NL:RBROT:2016:1860, paragraph 3.4 (parties domiciled in the Netherlands chose the Regional Court, Duisburg, Germany as their court of competent jurisdiction). Also, as regards the requirement of a cross-border element, note a decision of the Rechtbank Den Haag (District Court, The Hague) of 15 March 2023, ECLI:NL:RBDHA:2023:3409, paragraphs 2.6 and 2.7, which, in that context, cites the judgment of the Court of Justice of 1 March 2005, in *Owusu* (C-281/02, EU:C:2005:120, paragraph 26). However, in that case, the parties domiciled in the Netherlands chose the courts of a third country (the United States) as their courts of competent jurisdiction, so Dutch law applied to the agreement conferring jurisdiction.

[22] Unlike the previous judgments (see note 21), the Rechtbank Amsterdam (District Court, Amsterdam) held, in its judgment of 11 April 2019, ECLI:NL:RBAMS:2019:2588, paragraphs 9-11, that the requirement of a cross-border element was not satisfied despite the fact that both parties, domiciled in the Netherlands, had chosen a court of another Member State (at that time, the United Kingdom) as their court of competent jurisdiction. According to that court, the dispute involved a domestic situation exclusive to the Netherlands, specifically because the obligations under the contract, which served as the basis for the claim, were performed in the Netherlands and the invoice for payment had also been sent to a party domiciled in the Netherlands.

[23] See note to the aforementioned judgment of the Rechtbank Amsterdam (District Court, Amsterdam) by Bens, T., *Jurisprudentie Burgerlijk procesrecht*, 2019, p. 66, paragraphs 1-3.

11. In **Estonia**,[24] the Tallinna Ringkonnakohus (Court of Appeal, Tallinn) was required to rule in a case where two Swedish companies had entered into an agreement conferring jurisdiction on an Estonian court. The court examined and upheld the admissibility of the agreement under Article 25 of Brussels I bis, without considering the absence of any connection with Estonia a relevant issue.[25]

C. MEMBER STATES IN WHICH CASE-LAW HAS CONSIDERED A CHOICE OF FORUM NOT TO BE A SUFFICIENT CROSS-BORDER ELEMENT

12. In four Member States (**France**, **Germany**,[26] **Italy** and **Portugal**), higher and supreme court case-law does not consider the choice of a foreign court by the parties to the contract as giving a dispute, per se, the necessary international character to justify the application of Article 25 of Brussels I bis (or the corresponding provisions of previous legal instruments). Other aspects of the legal situation at issue were taken into account where the parties to a choice of forum clause were established in the same Member State. It is important to note that, in both **France** and **Portugal**, national law governing choice of forum expressly requires a cross-border element (see point 5).

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[24] A series of recent decisions refers, incidentally, to the issue of choice of forum agreements under Brussels I bis but raises questions of validity on consumer protection grounds.

[25] Tallinna Ringkonnakohus (Court of Appeal, Tallinn), order of 30 March 2022, 2-21-15389, EE:TLRK:2022:2.21.15389.3888, paragraphs 8-10.

[26] That is also the opinion of leading German legal writers and commentators in the field: Mankowski, P., in Rauscher, T. (ed.), *Europäisches Zivilprozess- und Kollisionsrecht*, 5th ed., 2021, Otto Schmidt, Cologne, 2021, notes 32 and 35 under Article 25 Brussels I bis; Hausmann, R., in Reithmann, C., and Martiny, D. (ed.), *Internationales Vertragsrecht*, 9e ed., Otto Schmidt, Cologne, 2022, notes 7.19 *et seq.* under § 7; Dörner, H., in Saenger, I. (ed.), *Zivilprozessordnung*, 9th ed., 2021, note 6, Article 25 Brussels I bis; Mankowski, P., 'Gerichtsstandsvereinbarungen in Tarifverträgen und Art. 23 EuGVVO' *Neue Zeitschrift für Arbeitsrecht* 2009, p. 584 and 586 *et seq.* For the opposite view, see Staudinger, H., *Internationale Zuständigkeit für Vertragsklagen; Gerichtsstands- und Schiedsvereinbarungen*, De Gruyter, Berlin, 2011, note 241 under Article 23 Brussels I bis; Zöller, G., *Zivilprozessordnung*, 33rd ed., Otto Schmidt, Cologne, 2020, note 3 under Article 25 Brussels I bis.

13. In **Belgium**,[27] **Slovenia** and **Spain**, cross-border elements with regard to agreements conferring jurisdiction do not appear to have elicited any significant discussions in previous judgments although the subject has been debated by academic commentators.[28] Nevertheless, ad hoc references have been identified in the case-law. Although the courts did not rule expressly, in that case-law, on the importance of choice of forum as a sufficient factor for the aforementioned EU rule to apply, where a choice of forum has been made, those judgments rely on other aspects of the legal situation to examine whether there was a cross-border link.

14. What therefore seems to differentiate the case-law of the aforementioned Member States, identified in the two sub-groups, is that, in the first group, the choice of a court outside the Member State where the parties are domiciled, has been expressly precluded as a cross-border element. In the second group, it is implied that the parties' choice of forum will be excluded where it is the only cross-border element because it will only be taken into account alongside other aspects of the legal situation in question.

15. What all of those Member States have in common is that their case-law has failed to assemble a comprehensive list of cross-border elements where the parties are established in the same country. Various factors can be taken into consideration to decide whether there was a cross-border element, either overall or on a case by case basis. The case-law has identified the following objective factors concerning the subject matter, nature, and details of the parties' contractual relationship:

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[27] The only decisions identified on that issue were by courts of first instance.

[28] Recent **Belgian** academic writings have lobbied more in favour of applying Article 25 of Brussels I bis in cases where parties established in the same Member State choose foreign jurisdiction. According to Boularbah, H., Francq, S., Nuyts, A., Van Boxstael, J.-L, van Drooghenbroeck, J.-F. and Wautelet, P., 'From Brussels I to Brussels I bis', *J.T.*, 2015, p. 95-96, the Belgian prorogation provision 'will become *de facto* obsolete' as soon as that regulation comes into force. Samyn, L. and Van Overbeeke, F., in Europees procesrecht, Brussels, Larcier, 2016, in particular, No 36, point to the existence of an 'internationality' requirement specifically adapted to agreements conferring jurisdiction. Establishing a link between Brussels I bis and Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (OJ 2008 L 177, p. 6) ('Rome I'), according to Francq, S., 'Recasting the Brussels I Regulation – Scope and Jurisdiction', *T.B.H.* 2013, p. 307, in particular, p. 319 and footnote 70, if the Court of Justice were to decide in favour of applying the regulation to domestic situations involving a jurisdiction clause, such an interpretation would extend the reasoning provided for in Rome I. However, according to the view of the majority of academic commentators in **Spain**, the Brussels I Regulation should not follow the 'contrived' approach expressed in Article 3(3) of Rome I, which takes into consideration the choice of the law applicable to contracts in domestic situations. Accordingly, the mere election for the jurisdiction of the courts of another Member State cannot be deemed a relevant cross-border element; see Calvo Caravaca, A-L. and Carrascosa González, J., *Tratado de Derecho internacional privado*, vol. II, Tirant lo Blanch, Valencia, 2020, p. 2538; Rodríguez Benot, A., 'Artículo 25 del Reglamento 1215/2012' under Pilar Blanco-Morales Limones, P., *et al.* (ed.), *Comentario al Reglamento 1215/2012 relativo a la competencia judicial, el reconocimiento de resoluciones judiciales en materia civil y mercantil: Reglamento de Bruselas I refundido*, Aranzadi, Cizur MeNor, 2016, point 2.1.

– the place where the contractual obligation arises, [29] where it is performed, or must or can be performed; [30]

– the invoicing address; [31]

– the language of the contract or other documents submitted at trial; [32] or

[29] For **Slovenia**, see Višje sodišče v. Mariboru (Court of Appeal, Maribor), order of 25 April 2019, Sklep I Cpg 103/2019, ECLI:SI:VSMB:2019:I.CPG.103.2019, in a dispute between contracting parties established in Slovenia, in which the defendant relied on an agreement conferring jurisdiction on an Austrian court. The court of first instance ruled that the regulation did not apply, holding that the place of performance was also located in Slovenia. However, the Court of Appeal held that Article 25 of Brussels I bis did apply on the basis, *inter alia*, that the origin of all the debt claims was Austria and that those claims were the result of a contractual relationship between the applicant and the subsidiary of the defendant located in Austria.

[30] In **Germany**, under Article 17 of the Lugano Convention, the Oberlandesgericht Hamm (Higher Regional Court, Hamm), in its judgment of 18 September 1997, 5 U 89/97, IPRax 1999, p. 244 and 245, ruled that an international relationship does exist where there is a connecting factor to the countries referred to in the parties' contract which equates to the connecting factors used by the convention, including place of performance. The cross-border element does not derive from the contract as such (the dispute involved an election for Swiss court jurisdiction in a relationship between parties established in Germany). The decision was upheld by the Bundesgerichtshof (Federal Court of Justice) but on different grounds, holding that the clause conferring jurisdiction was not exclusive; see BGH, judgment of 23 July 1998, II ZR 286/97. The Bundesarbeitsgericht (Federal Labour Court) also upheld that a cross-border element existed without expressly ruling on either party's view, in a dispute between parties established in Germany on whether jurisdiction fell to the German or Swiss courts. The dispute also involved a clause conferring jurisdiction on the Swiss courts, where there were links supporting the application of the Lugano Convention, in particular, a substantial part of the work was carried out in Switzerland. Therefore, the Court ruled that it did not have to decide whether application of the convention was excluded because the dispute was entirely domestic; see Bundesarbeitsgericht (Federal Labour Court), judgment of 8 December 2010, 10 AZR 562/08, points 18 and 19. In **France**, in its judgment in the leading case, the Court of Cassation, 1st Civ. Div., judgment of 4 October 2005, Keller, No 02-12.959, Bull. Civ. I, No 352, p. 292, ruled that the dispute concerning a subcontract signed by a company domiciled in Germany, the sole cross-border element, but performed by its French office, located in France, for the benefit of a French client, was not a situation of an international nature. In **Portugal**, place of performance is one factor taken into consideration by the Supremo Tribunal de Justiça (Supreme Court); see the judgments of 26 January 2016, Case 540/14.4TVLSB.S1 and 4 February 2016, Case 536/14.6TVLSB.L1.S1. For **Spain**, see Audiencia Provincial de Barcelona (Barcelona Provincial Court) judgment of 23 July 2019, No 1463/2019, ECLI:ES:APB:2019:9715 (choice of the English courts between parties domiciled in Spain; lack of cross-border element because the case involved domestic shipping between two Spanish ports).

[31] For **Belgium**, ondernemingsrechtbank Leuven (Business Court, Leuven), decision of 19 November 2018, *RABG* 2021, p. 831. The dispute involved two parties established in Belgium, which had chosen Dutch court jurisdiction. The court 'noted' that the purchase order showed an invoicing address in the Netherlands which, together with the agreement conferring jurisdiction on the Dutch courts, 'confirmed' the international character of the legal relationship, and declined jurisdiction. According to Cnudde, S., 'De geldigheid van een forumkeuzebeding in algemene voorwaarden bij geschillen met een grensoverschrijdend karakter onder de Brussel I bis-verordening', *RABG* 2021, p. 841, the court appears to indicate that the choice of forum clause is not, per se, sufficient to grant a cross-border dimension to the dispute.

[32] For **Spain**, see Audiencia Provincial de Barcelona (Provincial Court, Barcelona), note 30 (all the evidentiary exhibits were in Spanish). For **Portugal**, the Supremo Tribunal de Justiça (Supreme Court), see note 30. In **Belgium**, in a dispute between parties established in Belgium, which had elected for German court jurisdiction, the choice of forum clause was held insufficient to meet the cross-border requirement. However, there were other cross-border elements which gave the dispute an international dimension, such as documentary evidence submitted in German; see arbeidsrechtbank Antwerpen (Labour Court, Antwerp), decision of 16 January 1996, *Soc. Kron.* 1996, page 604. That decision cites Laenens, J., 'Internationaal privaatrechtelijk procesrecht en de bevoegdheidsovereenkomst,' *T.P.R.* 1982, in particular, p. 231-232, according to which choosing a court of another Member State as the court of competent jurisdiction, as the sole factor, is not enough to meet the cross-border requirement. In that regard, academic writings have supported the view that, in that decision, the international nature of the legal relationship is deduced less from there being a choice of forum clause than and more from the other factors linking it to Germany; see Wautelet, P., 'Art. 1 Europees executieverdrag', *Comm. Ger*. 1999, p. 38.

– the choice of the law applicable to the contract, in particular, if it is the law of chosen forum. [33]

16. From a broader perspective, the circumstances of the specific contractual relationship have also been taken into account in that case, [34] for example, the requirement of a security interest in real property located abroad [35] or the fact that the interests protected by the contract are not entirely confined to the territory of the Member State in which the parties have their main place of businesses. [36] Moreover, in **Portugal**, in a series of judgments, the Supremo Tribunal de Justiça (Supreme Court) looked at the cross-border element as a whole in the specific context of financial derivative swap agreements between parties established in Portugal. [37] In particular, in concluding that there was a cross-border element, the judgments identified, from among a number of factors, at least a functional and economic link between the swap agreements and the underlying financial agreements, which had a 'clearly international' context. [38]

17. As opposed to the objective elements referred to above, there were fewer cases where personal factors were taken into account when examining cross-border elements. That was the case, for example, where the international element is of the place where a subsidiary of a party involved in a contractual relationship has its seat [39] or where the administrative services of a party established in a national forum are concentrated in the *forum prorogatum*. [40]

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[33] For **Belgium**, arbeidsrechtbank Antwerpen (Labour Court, Antwerp), see note 32. For **Portugal**, Supremo Tribunal de Justiça (Supreme Court), see note 30.

[34] In **France**, in a case where the parties to a contract, both French and domiciled in France, had agreed on a Belgian court as their court of competent jurisdiction, the Cour de Cassation (Court of Cassation) held the mere fact that the source of the dispute was an international carriage of goods 'an improper ground for characterising the situation as international'; see Cour de Cassation (Court of Cassation), 1st Civ. Div., judgment of 30 September 2020, No 19-15.626, Mainfreight, unreported, ECLI:FR:CCASS:2020:C100583. However, in **Spain**, the Audiencia Provincial de Bilbao (Provisional Court, Bilbao), order No 1359/2010 of 28 December 2010, ECLI:ES:APBI:2010:1359A, and order No 992/2011 of 2 February 2011, ECLI:ES:APBI:2011:992A, ruled a choice of foreign court jurisdiction valid in the case of a contract concluded in Spain between parties domiciled in that same Member State. However, as the contract involved an international carriage of goods, a cross-border element may conceivably derive from circumstances associated with that shipment.

[35] In **France**, the Cour de Cassation (Court of Cassation), 1st Civ. Div., judgment of 25 May 2016, No 15-10.163, unreported, ECLI:FR:CCASS:2016:C100566, accepted the international character of a clause agreed by two Luxembourgish parties granting jurisdiction to a Luxembourg court. It was considered international because it offered a financial instruments account with a French bank as security for a loan.

[36] According to P**ortuguese** case-law, such circumstances are sufficient to conclude that there is a cross-border element; see Supremo Tribunal de Justiça (Supreme Court), judgment of 21 April 2016, Case No 538/14.2TVLSB.L1.S1.

[37] Supremo Tribunal de Justiça (Supreme Court), see note 30. For academic commentary on that dispute, see Castelo, H., 'Swap de taxa de juro – os casos Nos tribunais', *JULGAR* No 33, September-December 2017, p. 349.

[38] In addition to performing contractual obligations abroad and choosing to apply a foreign substantive law; Supremo Tribunal de Justiça (Supreme Court), see note 30.

[39] For **Slovenia**, Višje sodišče v. Mariboru (Court of Appeal, Maribor), see note 29. The origin of the disputed claims was Austria and they derived from a contractual relationship between the claimant, established in Slovenia and the defendant's Austrian subsidiary, also established in Slovenia.

[40] For **Belgium**, ondernemingsrechtbank Leuven (Business Court, Leuven), see note 31: that element, the invoicing address and choice of forum in favour of the Dutch courts 'confirm' the international character of the legal relationship.

The nationality of the parties is generally referred to alongside other elements. [41] More generally, aside from the specific case referred to in the present note, the domicile of parties located in different countries is regularly cited as a cross-border element supporting the application of Article 25 of Brussels I bis (or a corresponding rule in a prior regulation or convention) in cases where one of those parties is domiciled in the *forum prorogatum*. [42]

18. In addition, most of the decisions identified specify the need for a cross-border element to support the application of Article 25 of Brussels I bis (previous regulations or the Lugano Convention), without generally referring to the scope of the regulation per se. There are only a handful of rulings where it is held that, by ruling out the applicability of that specific provision, the situation is purely internal and governed by national law. [43]

D. MEMBER STATES IN WHICH NO CASE-LAW HAS BEEN IDENTIFIED

19. In **Poland**, we have not identified any decisions which take into account cross-border elements for the application of Article 25 of Brussels I bis. Disputes concerning that provision mainly concern the formal validity of agreements conferring jurisdiction. Furthermore, the analysis of case-law in the Polish legal system is affected by the anonymisation of data concerning the domicile of the parties.

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[41] For **Spain**, the Audiencia Provincial de Barcelona (Provincial Court, Barcelona), see note 30, and Juzgado de lo mercantil de Madrid (Commercial Court, Madrid) judgment of 11 September 2017, ECLI:ES:JMM:2017:94A, To exclude a cross-border element in a case where a foreign court was chosen in a jurisdiction agreement between parties domiciled in Spain, the court relied on the 'national' subject matter of the contract (domestic shipping between two Spanish ports or across Spanish territory), in addition to the Spanish nationality of the parties and production of case file exhibits in Spanish, as the basis for its ruling. In **Belgium**, the arbeidsrechtbank Antwerpen (Labour Court, Antwerp), see note 32, decided to rely on other elements associated with German jurisdiction, such as the production of case file exhibits in German or the alleged choice of German law, in addition to the German nationality of the claimant, as the basis for its ruling. In **Portugal**, the Supremo Tribunal de Justiça (Supreme Court) judgment of 26 January 2016, see note 30, ruled that the mere existence of an agreement conferring jurisdiction on the courts of a Member State other than those of the nationality and domicile of the parties, did not, per se, establish that the Brussels I Regulation was applicable, without other cross-border elements.

[42] For **Spain**, see the Audiencia Provincial de Barcelona (Provincial Court, Barcelona) judgment No 3425/1999 of 19 April 1999, ECLI:ES:APB:1999:3425 (existence of a cross-border element meeting the requirements of the Brussels Convention where the parties agreeing to German court jurisdiction were domiciled in Germany and Spain). For **Portugal**, see Supremo Tribunal de Justiça (Supreme Court) judgment of 7 October 2021, Case No 448/18.4T8FAR.E1.S1 (contract placed under Dutch court jurisdiction where one party had its seat in the Netherlands) and judgment of 10 December 2020, No 1608/19.6T8GMR.G1.S1 (parties with seats in different Member States). For **France**, see Cour de Cassation (Court of Cassation), 1st Civ. Div., judgment of 2 September 2020, 19-15.377, ECLI:FR:CCASS:2020:C100468, unreported (choice of the courts of London where the defendant had its seat).

[43] Such a conclusion results explicitly from **Italian** case-law, see Cass., Sez. U. (Court of Cassation, full court sitting) of 14 February 2011, No 3568 and Cass., Sez. U. (Court of Cassation, full court sitting) of 30 December 1998, No 12907, which cites the report of Schlosser P. on the Convention of Accession of 9 October 1978 of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and enforcement of judgements in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice (OJ 1978 L 304, p. 1), point 174: 'the condition [requiring the relevant transaction to bring international relationships into play] is not satisfied by merely choosing the jurisdiction of a given State.' For Brussels I bis, see Cass., Sez. U. (Court of Cassation, full court sitting), 10 May 2019, No 12585 (also available here). For **Slovenia**, see Višje sodišče v. Mariboru (Court of Appeal, Maribor), see note 29: the court of first instance held, notwithstanding the choice of an Austrian court, that Brussels I bis did not apply because the parties were domiciled in the Republic of Slovenia and the claim had to be enforced in Slovenia.

20. Nor has any relevant case-law been identified in **Ireland**. However, we can cite two decisions of courts in the **United Kingdom** as illustrations and for their persuasive value to the Irish courts. Those decisions appear to support the view that the question of whether there is a cross-border element should be assessed on the basis of whether there is an agreement conferring jurisdiction.. In a **Scottish** case, [44] Scottish parties domiciled in Scotland concluded an entirely Scottish contract, to be performed in full in Scotland, but which contained an agreement granting jurisdiction to the English courts. [45] The Court of Session, the highest civil law court in Scotland, held that the agreement was valid. In an **English** case, the English parties to an entirely English contract excluded all jurisdiction of the courts in Swansea (Wales [46]) in favour of exclusive jurisdiction of the courts in London.[47] They lodged legal applications in Swansea but one party then contested the Swansea court jurisdiction. The High Court of Justice (England & Wales), Queen's Bench Division, expressly considered whether a cross-border element was necessary for the case to fall under Article 23 of the Brussels I Regulation. Although the judge's observations on that point were obiter dicta, the position he adopted erred in favour of applying Article 23 where there was no cross-border element.[48]

21. Reference works on the subject, both in **Ireland** and non-EU common law countries, are now demonstrating their recognition that a cross-border element is necessary for the exercise of international jurisdiction. [49] Accepting a choice of foreign jurisdiction as a relevant cross-border element has already been discussed, from a comparative perspective, in the past. [50]

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[44] *Scotmotors (Plant Hire) Ltd v. Dundee Petrosea Ltd* [1980] SC 351.

[45] The English and Scottish legal systems are, for private international law purposes, to be considered different countries.

[46] Wales (unlike Scotland) is considered an integral part of the legal system of England and Wales, including for private international law purposes.

[47] *Anthony Snookes v. Jani-King (GB) Limited* [2006] EWHC 289 (especially paragraph 54).

[48] Dicey, Morris & Collins, *The Conflict of Laws*, 15th Ed., Sweet & Maxwell, London, 2012, p. 616, footnote, page 566. Despite challenging the authority of that decision because it was handed down in a case involving a conflict of domestic territorial jurisdiction between two national courts, those academic writers do take the view that no cross-border element is required to satisfy the rules of the Brussels I Regulation.

[49] Binchy, W., *Irish Conflicts of Law*, Butterworths, London, 1988, p. 123 ('The first question which a court faced with a case involving a foreign element may have to address is whether it has jurisdiction in a particular case at all'); under English law, Cheshire, North & Fawcett, *Private International Law*, 15th Ed., OUP, Oxford, 2017, p. 3 ('Private international law […] comes into operation whenever the court is faced with a claim that contains a foreign element. It is only when this element is present that private international law has a function to perform').

[50] Nygh, P., *Autonomy in International Contracts*, Clarendon, Oxford, 1999, p. 52, which expresses 'the most radical position, namely that the very choice of a foreign forum transforms an otherwise completely domestic contract into an international contract.'

More recent academic opinion seems to prefer affording the parties as much autonomy as possible.[51] In particular, citing the Court's judgment in *Castelletti*, [52] some commentators consider that there is no requirement for any objective link between the parties and chosen jurisdiction because compliance with the formal requirements laid down by Article 25 of Brussels I bis is sufficient. [53]

II. THE DECISIVE MOMENT TO EXAMINE CROSS-BORDER ELEMENTS FOR THE PURPOSES OF ARTICLE 25 OF BRUSSELS I BIS

A. GENERAL OVERVIEW

22. The issue referred to in the first chapter above, namely how cross-border the 'cross-border element' has to be, is closely influenced by time considerations. It may be that, when the parties conclude their agreement conferring jurisdiction, their situation is entirely domestic but by the time the dispute arises it becomes cross-border. The opposite may also be true: a situation that was cross-border to begin with unfolds as entirely domestic at the time a dispute arises. The choice of one or other of the dates to gauge whether there is a cross-border element can therefore affect whether or not Article 25 of Brussels I bis applies.

23. In essence, our research shows that case-law considers two moments as significant: the date the parties concluded their agreement conferring jurisdiction (B.) and the date the legal action was brought (C.). However, for a final group of Member States, we have not been able to find any discussion on the subject (D.).

B. MEMBER STATES IN WHICH CASE-LAW OPTS FOR THE AGREEMENT CONCLUSION DATE

24. According to a first approach, the decisive moment to examine whether there is a cross-border element is the date on which the agreement conferring jurisdiction was concluded. If a situation is characterised as 'international' at that moment, Article 25 of Brussels I bis will apply even if the situation loses its 'international' dimension later on. Legal certainty is often used as an argument to support that outcome.

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[51] Cheshire, North & Fawcett, see note 49, p. 202: 'It is, perhaps, unclear if a foreign element is established merely because the parties have chosen a foreign court in a jurisdiction agreement or because the dispute could otherwise be litigated before a foreign court, although the better view is probably that this is sufficient.' In the footnote, page 95, those writers cite a number of English judgments ruling that the parties' choice is sufficient. See also Mills, A., *Party Autonomy in Private International Law*, CUP, Cambridge, 2018, p. 224: 'An alternative way of expressing this understanding might be to say that the choice bythe parties itself internationalises the dispute, implicating rules of private international law.'

[52] Judgment of 16 March 1999, in Castelletti (C-159/97, EU:C:1999:142).

[53] North, P. (ed.), *Halsbury's Laws of England*, *Conflict of Laws*, 5th ed. vol. 19, 2011, p. 392, footnote, page 4.

25. That approach is followed, first of all, by **French** case-law. In its judgment in *Keller* [54] regarding the Brussels Convention, the Cour de Cassation (Court of Cassation) laid down the rule that the international nature of the dispute 'is judged, for reasons of legal certainty, when the parties conclude their agreement conferring jurisdiction.' The Cour de Cassation (Court of Cassation) restated that outcome in a judgment of 2008 [55] and, more recently, in 2020, [56] again emphasising 'reasons of legal certainty', in the latter case, to support its decision.

26. In the case-law of other Member States, although no definitive response can be inferred from the case-law, anecdotal evidence has been identified to confirm that the decisive moment is when the parties conclude their agreement conferring jurisdiction.

27. In the **Netherlands**, a judgment of the gerechtshof Arnhem-Leeuwarden (Court of Appeal, Arnhem-Leeuwarden) stipulates that the decisive moment to examine whether there is a cross-border element is when the parties conclude their agreement conferring jurisdiction. It does so by analogy with the 'case-law of the Court of Justice' on the assessment of whether a contractual choice of forum clause is valid, without reference to a specific judgment. [57] Academic literature in the Netherlands has stated that the Court's judgment in *Sanicentral* [58] seems, on the contrary, to prefer the moment when the dispute arises to assess the scope of such clauses.[59] In that context, that judgment of the Court of Appeal provides no means to infer with any clarity whether the viability of the cross-border element should be examined when the agreement conferring jurisdiction is concluded or the moment the dispute arises.

28. In **Poland**, a clue as to the moment when there must be a cross-border element and when it must be assessed, is given in an order of the Court of Appeal, Katowice.[60] That court held that 'at the moment the agreement was concluded', both parties were domiciled in Poland and, accordingly, the Polish courts, designated by the parties as the courts of competent jurisdiction, undoubtedly had domestic jurisdiction. Accordingly, it would have been impossible to enter into any agreement granting international jurisdiction.

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[54] Court of Cassation, 1st Civ. Div., judgment of 4 October 2005, Keller, No 02-12.959, Bull. Civ. I, No 352, p. 292.

[55] Court of Cassation, 1st Civ. Div., judgment of 23 January 2008, No 06-21.898, Bull. Civ. I, No 17, p. 14, which adopted the wording 'at the date of the agreement.'

[56] The Court of Cassation, see note 34, agrees with the appellant's proposition: 'the mere fact that performance of the agreement later allows one of the contracting parties to enter into a contract which is international in character, does not in itself imbue the situation with international character at the moment the contract is concluded.'

[57] Gerechtshof Arnhem-Leeuwarden (Court of Appeal, Arnhem-Leeuwarden), judgment of 27 October 2015, ECLI:NL:GHARL:2015:8119, paragraph 3.11.

[58] Judgment of 13 November 1979 in *Sanicentral* (25/79, EU:C:1979:255, paragraph 6).

[59] See point 5 of the note of Vlas P., to the judgment of the Hoge Raad (Supreme Court) of 24 September 1999, Van Maanen v. Caorle, ECLI:NL:HR:1999:ZC2968, NJ 2000, 552 (concerning Article 17 of the Brussels Convention) and Vlas P., Comments on Article 23 of the Brussels I Regulation, *GS Burgerlijke Rechtsvordering*, point 5.

[60] Postanowienie Sądu Apelacyjnego w Katowicach V Wydział Cywilny, z dnia 21 stycznia 2016 r., synatura akt. V ACz 52/16 (Court of Appeal, Katowice, order of 21 January 2016, V ACz 52/16).

29. In **Portugal**, we have not identified any case-law expressly relating to that issue. The so-called 'swap' judgments of the Supremo Tribunal de Justiça (Supreme Court) (see point 16) provide no indication that any clear position has been adopted.[61] However, academic commentators take the unanimous view that the viability of the cross-border element must, for reasons of legal certainty, be judged when the agreement conferring jurisdiction is concluded. Accordingly, if there is international character at the outset, Article 25 of Brussels I bis will apply, whether or not the situation later loses its internationality.[62]

C. MEMBER STATES IN WHICH CASE-LAW OPTS FOR THE DATE ON WHICH THE LEGAL ACTION WAS BROUGHT

30. According to a second approach, adopted by the case-law of three Member States (**Austria, Germany** and **Italy**), the decisive moment to judge whether there is a cross-border element is the moment the legal action is brought. The judgment of the Court of in *Sanicentral* [63] (see note 27) is often cited in that context.

31. Examples that illustrate that approach particularly well have been identified in **Austria**, in precedents of the Oberster Gerichtshof (Supreme Court) on Article 23 of the Brussels I Regulation. In cases referred to the Oberster Gerichtshof (Supreme Court), the contracting companies had their seat in Austria at the moment they concluded their agreements conferring jurisdiction. That means that their jurisdiction agreements lacked internationality at that time and were governed by national law. However, before any legal action were brought, the companies had transferred their respective seats to Germany. Based on the Court's judgment in *Sanicentral*, the Supreme Court held that the requirement for a relevant international element was met because that element only took effect at the moment when the legal action was brought. [64]

32. **German** academic commentators also cite the judgment in *Sanicentral* in that regard, in concluding, supported by an order of a **German** Court of Appeal, that the moment to examine the cross-border link is, as a general rule,

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[61] That case-law appears to prioritise the contract conclusion phase for identifying relevant cross-border elements which, however, are 'indirect' in nature; see Moreira, P., 'A internacionalização de situações internas no direito internacional privado unificado da União Europeia Tendências jurisprudenciais recentes', *@pública* 2018, No 1, p. 328. For example, the foreign language in which a contract is drafted was raised as a relevant factor by the Supremo Tribunal de Justiça (Supreme Court) in its request for a preliminary ruling in the case of *Sociedade Metropolitana de Desenvolvimento* (C-136/23), later removed from the court register.

[62] Henriques, S., *Os Pactos de Jurisdição No Regulamento (EC) No 44 de 2001*, Coimbra Editora, Coimbra, 2006, p. 60-61; Lobo Moutinho, J., Vicente, S., Garcia Marques, P., and Vaz de Sequeira, E., *Homenagem ao Professor Doutor GermaNo Marques da Silva*, vol. I, Universidade Católica Editora, Lisbonne, p. 805.

[63] Judgment of 13 November 1979 in *Sanicentral* (25/79, EU:C:1979:255, paragraph 6).

[64] See Oberster Gerichtshof (Supreme Court), order of 5 June 2007, 10 Ob 40/07s ECLI:AT:OGH0002:2007:0100OB00040.07S. 0605.000 and the legal rule (*Rechtssatz*) RS0122185, ECLI:AT:OGH0002:2007:RS0122185, established following that order. In concurrence, for courts of second instance, see Oberlandesgericht Wien (Higher Regional Court, Vienna), order of 26 February 2007, 13R 24/07f, ECLI:AT:OLG0009:2007:01300R00024.07F.0226.000.

the moment the legal action is set in motion. [65] Taking the view that the relevant moment for examining jurisdiction and, accordingly, the validity of the contract containing the parties' jurisdiction agreement, the decisive moment may also be the moment the judgment is handed down.[66]

33. The same is true in **Italy** where the international element is judged at the moment the case is lodged with the court. It is generally held, that that moment, and not the moment when the contract is concluded, is the decisive moment for assessing jurisdiction in contractual relationships pursuant to Brussels I bis, [67] which equates to the rule of *perpetuatio jurisdictionis* under national law.[68]

34. It can also be deduced from **Spanish** academic writings[69] that there must be a cross-border element when the legal action is brought. Accordingly, it should be borne in mind that the international element may disappear once the agreement conferring jurisdiction has been concluded.

35. Finally, the view may also be taken that it is sufficient for there to be a cross-border element at either of those two moments. We have found expressions of that view in the commentary of **Dutch** academics, who specifically quote a **French** writer on that issue.[70]

[65] See Reithmann, C., and Martiny, D., note 26, note 7.23 (7); Oberlandesgericht München (Higher Regional Court, Munich), order of 31 March 1987, 6 W 788/87, Neue Juristische Wochenschrift 1987, p. 2166.

[66] See, concurring, Oberlandesgericht Hamm (Higher Regional Court, Hamm), judgment of 22 February 1999, 8 U 255/97, ECLI:DE:OLGHAM:1999:0222.8U255.97.00, and Oberlandesgericht Köln (Higher Regional Court, Cologne), judgment of 2 December 2003, 24 U 40/03, ECLI:DE:OLGK:2003:1202.24U40.03.0A, Juris – paragraph 13.

[67] Cass., Sez. U. (Court of Cassation, full court sitting), 4 March 2019, No 6280 (also available here). See also Billi, S., 'Corte Suprema di Cassazione Ufficio del Massimario', in *Principi di diritto processuale civile – Gli orientamenti delle Sezioni Civili*, vol. III, 2021, p. 907.

[68] See Article 5 of the Italian Civil Procedure Code. According to that same article, subsequent factors such as changes of domicile or other amendments to the law, will not adversely affect the existing jurisdiction of a court to hear a case at the moment that case is lodged with the court.

[69] Calvo Caravaca, A-L., and Carrascosa González, J., *Tratado de Derecho internacional privado*, vol. I, Tirant lo Blanch, Valencia, 2020, p. 122 et seq.

[70] Kuypers, P., 'Forumkeuze in het Nederlandse IPR', *R&P* 2008, No 159, points 5.3 and 7.2.3, referring to Droz, G.A.L., *Court Jurisdiction and Effects of Judgments in the Common Market*, Dalloz, Paris, 1972, p. 118.

D. MEMBER STATES IN WHICH NO CASE-LAW HAS BEEN IDENTIFIED

36. We have not identified any specific factor influencing the decisive moment to examine whether there is a cross-border element for the purposes of Brussels I bis in **Belgian**, **Estonian,**[71] **Irish**[72] or **Slovenian** case-law.

CONCLUSION

37. First, with regard to what makes a dispute cross-border for the purposes of the applicability of Article 25 of Brussels I bis, our research in the twelve selected Member States has shown that only the case-law of three Member States (**Austria**, **Estonia** and the **Netherlands**) has held that the choice by parties established in the same Member State of the jurisdiction of another Member State is a sufficient international element to justify applying Article 25 (or the corresponding provision of a previous regulation or the Lugano Convention).

38. The case-law of four Member States (**France**, **Germany**, **Italy** and **Portugal**) has adopted a more restrictive approach and does not consider designating a foreign court, per se, as sufficient to give a dispute its international nature. According to that approach, the cross-border element in question needs to be found in exogenous aspects of the choice of forum. However, in **Belgium**, **Slovenia** and **Spain**, the courts also relied on other aspects in assessing the applicability of Article 25 of Brussels I bis (or corresponding provisions in the other legal instruments referred to above), without ruling expressly on the viability of the choice of forum alone. It therefore appears that in those Member States, if the parties' choice of forum is taken into consideration, it is only alongside other aspects of the legal situation in question.

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[71] Nonetheless, national law may, *inter alia*, allow a choice of forum agreement in favour of the Estonian courts where the parties agreed jurisdiction in the case where the defendant, after entering into the agreement, establishes domicile in a foreign country or transfers its business or residence there. In that instance, a cross-border element only arises after the jurisdiction agreement was concluded; see Article 104(3)(2) of the Tsiviilkohtumenetluse seadustik (Civil Procedure Code; see also the non-official English translation).

[72] It may be useful to mention that a change in circumstances occurring after agreeing a choice of forum clause will be taken into account by the courts in the exercise of their discretion under the rules of *forum conveniens* and *forum non conveniens*, which imply a global appraisal. That appraisal will be made at the stage when the dispute is brought before the court; as an illustration from the recent case-law of the **United Kingdom** in *Donohue v. Armco Inc.* [2001] UKHL 64 [an anti-suit injunction was denied 'in the interests of justice', in the case of a choice of exclusive jurisdiction agreement in favour of the English courts, against part of a lawsuit brought in New York involving other parties and contracts that did not provide for such exclusive jurisdiction]; *ACE Insurance SA-NV* v. *Zurich Insurance Company* [2001] EWCA Civ 173 (regarding the Lugano Convention); *The Nile Rhapsody* [1994] 1 Lloyd's Rep 382. Thus, where an agreement confers exclusive jurisdiction on the Irish courts in a completely foreign situation, but a cross-border element emerges at a later date –in particular, because a defendant is later domiciled in Ireland– that change will support the court in its finding that the forum conveniens should be Ireland; see Binchy, W., see note 49, p. 163.Conversely, the change in domicile of a defendant moving abroad would support a finding that Ireland, as the chosen forum, would be a *forum non conveniens.*

39. What the Member States listed in the previous paragraph have in common is that their case-law has not assembled a comprehensive list of cross-border elements. Instead, various objective or personal factors are taken into account to make an appraisal on a case-by-case basis where the parties are domiciled in the same Member State. Those objective factors predominantly involve the contractual relationship between the parties (such as the place of performance or law chosen to apply to the contract).

40. In **Ireland** and **Poland**, we have not been able to identify any case-law dealing with cross-border elements in the context of agreements conferring jurisdiction.

41. Secondly, we have identified two primary approaches regarding the decisive moment to determine whether there is a cross-border element and how it should be assessed: they are the date the agreement was concluded and the date on which the legal action was brought. However, in the majority of the legal systems that we analysed, that issue has aroused no significant debate in the case-law.

42. Lastly, there is a degree of continuity in the case-law in that the decisions identified in the various Member States often relate to the Brussels Convention or Brussels I Regulation but have been revived for Brussels I bis. One exception is **Austria**, which has seen an about-turn in its case-law on the Brussels I Regulation in favour of applying European rules.

[…]