Consecutive Conflicting Jurisdiction Agreements under the Brussels I*bis* Regulation. Comment on the Austrian *Oberster Gerichtshof's* ruling of 23 September 2024 (case 7 Ob 116/24w)

Acuerdos jurisdiccionales consecutivos contradictorios en virtud del Reglamento Bruselas I-bis. Comentario a la sentencia del *Oberster Gerichtshof* austríaco de 23 de septiembre de 2024 (asunto 7 Ob 116/24w)

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Abstract: Surprisingly, the recently published report by the European Commission on the Brussels I*bis* Regulation does not take into consideration a reform of Art. 25(1). The application of the provision continues to pose challenges for the courts of the Member States. A recent decision by the Austrian *Oberster Gerichtshof* provides another example. The court was confronted with consecutive conflicting jurisdiction agreements. Instead of referring the resulting questions to the CJEU, the court concluded that the agreements cancelled each other out and that the competent court should be determined by applying the general rules on international jurisdiction (Arts. 4(1), 63(1) lit. a Brussels I*bis* Regulation). It is submitted that the court was correct to apply autonomous European standards when assessing the parties' agreements. However, such standards have yet to be established by the CJEU. The Austrian court's reasoning does not seem convincing.

Keywords: international jurisdiction, jurisdiction agreement, interpretation, invalidity, Brussels I*bis* Regulation

Resumen: Sorprendentemente, el informe publicado recientemente por la Comisión Europea sobre el Reglamento Bruselas I-bis no tiene en cuenta la reforma del artículo 25(1). La aplicación de dicha disposición sigue planteando desafíos para los tribunales de los Estados miembros. Una decisión reciente del Oberster Gerichtshof austriaco ofrece otro ejemplo. El tribunal se enfrentó a acuerdos jurisdiccionales sucesivos y contradictorios. En lugar de plantear las cuestiones resultantes al TJUE, el tribunal concluyó que los acuerdos se anulaban mutuamente y que el tribunal competente debía determinarse aplicando las normas generales sobre competencia internacional (arts. 4(1), 63(1) letra a del Reglamento Bruselas I-bis). Se sostiene que el tribunal actuó correctamente al aplicar normas europeas autónomas para evaluar los acuerdos entre las partes. Sin embargo, dichas normas aún no han sido establecidas por el TJUE. El razonamiento del tribunal austriaco no parece convincente.

Palabras clave: jurisdicción internacional, acuerdo de jurisdicción, interpretación, inefectividad, Reglamento Bruselas I-bis

I. Introduction

1. On 2 June 2025, the European Commission published its report to the European Parliament, the Council, and the European Economic and Social Committee on the application of 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 (recast) (Brussels I*bis* Regulation).[1] According to the Commission, "[t]he objective of the Report is to present an overall assessment of the application of the Regulation with a special focus on its most challenging aspects as well as those explicitly listed in Article 79. Moreover, it looks into a number of new and emerging issues such as digitalisation, collective redress and areas that could benefit from the simplification and modernisation of current rules." With a delay of almost three and a half years, the report carries out the task assigned by Art. 79 Brussels I*bis* Regulation. It is accompanied by a Commission staff working document of the same day which provides further analysis of the issues discussed in the report.[2] The preparation of the report benefited from a study conducted by a consulting firm of January 2023[3] and the JUDGTRUST project.[4]

2. The report praises the Brussels I*bis* Regulation as a "highly successful instrument" and commends "the enhancements that it provided, such as the abolition of exequatur, [which] have strengthened judicial cooperation in civil and commercial matters and as such have been welcomed by the Member States and the stakeholders".[5] The Regulation's provisions, so the report concludes, "as a whole, are considered to be clear and simple and, for this reason, are highly appreciated amongst practitioners."[6] Where there are still doubts, "[t]here is also a broad consensus that in principle the case-law of the CJEU provides sufficient guidance and assistance for the judiciary when applying the rules of the Regulation."[7] Notwithstanding, the report identifies "specific issues several Member States take the view that the interpretation of the Regulation raises complex issues, and they suggest clarifications by the legislator."[8] Apart from "horizontal issues" such as collective redress and the impact of digitalization,[9] the report unsurprisingly focusses on issues of jurisdiction.[10] Among the topics discussed are the possible extension of the jurisdiction rules to defendants domiciled in third countries, heads of special jurisdiction, protective jurisdiction rules over consumer contracts, and exclusive jurisdiction.

3. Prorogation of jurisdiction, however, is a topic that the report mentions only in passing and when it is linked to one of the before mentioned issues. In contrast, the Commission staff working document devotes more than two pages to Arts. 25 and 26 Brussels I*bis* Regulation.[11] Yet, only two revisions are taken into closer consideration, i.e. the effect of the choice of court agreements on third parties and the relevance of a violation of the court's obligation in Art. 26(2) Brussels I*bis* Regulation for recognition and enforcement under Art. 45(1)(e)(i) Brussels I*bis* Regulation.[12] However, the Commission staff working document also acknowledges that despite the CJEU's guidance on the matter, assessing the substantive (in)validity of choice of court agreements still is among the most challenging aspects of

[1] COM(2025) 268 final.
[2] SWD(2025) 135 final.
[3] 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 Ia Regulation) – Final Report, available online.
[4] The main findings of the project have been published in V. Lazić and P. Mankowski (eds.), *The Brussels I-bis Regulation*, Cheltenham, Elgar, 2023.
[5] COM(2025) 268 final, p. 2.
[6] COM(2025) 268 final, p. 2.
[7] COM(2025) 268 final, p. 2.
[8] COM(2025) 268 final, p. 2.
[9] COM(2025) 268 final, pp. 16–19.
[10] COM(2025) 268 final, pp. 4–14.
[11] SWD(2025) 135 final, pp. 6–8.
[12] SWD(2025) 135 final, p. 8.

applying Art. 25 Brussels I*bis* Regulation in legal practice and may give cause for reform.[13] This observation finds confirmation in the survey conducted within the study in preparation of the Commission's Report[14] as well as in academic writing.[15]

4. The Austrian Supreme Court of Justice's (*Oberster Gerichtshof* – in what follows: OGH) ruling of 23 September 2024 provides yet another example for the difficulties that the application of Art. 25 Brussels I*bis* Regulation may cause. The court had to assess the effects of two consecutive and contradicting jurisdiction agreements. Indeed, the pivotal issue was not the substantive invalidity of the agreements but whether an agreement was reached at all.

II. Factual Background and Procedural History

5. The claimant, an Austrian general contractor, entered into a contract for construction works in Germany with the defendant, a German construction company, for a total value of 734.000 €. The parties concluded their contract in June 2022, which included a jurisdiction clause in favour of German courts. The contract also referenced a protocol of the parties' negotiations from April 2022, which, in addition to the choice of German courts, designated the place of performance in Germany. In February and June 2023, the parties agreed on two additional orders with the combined value of 17.000 €. Both of these additional orders stipulated that the courts of Linz, Austria, have jurisdiction to settle any disputes between them. The parties are in agreement that the main contract of June 2022 and the two additional orders of February and June 2023 together constitute a single, unified construction contract.

6. At the end of 2023, the claimant brought proceedings against the defendant before the courts in Linz, Austria, seeking a declaration that the construction contract had not been validly terminated by the defendant's notice of September 2023 and that the defendant had breached the contract. In addition, the claimant demanded damages in the amount of 150.000 € for alleged defects of the defendant's construction works. The case passed through two instances before reaching the OGH. All three Austrian courts declined jurisdiction, holding instead that the German courts were competent to decide the matter. However, the court of first instance and the court of second instance reached this conclusion on grounds differing from those relied upon by the OGH.

7. According to both the court of first instance and the court of second instance, the parties had initially agreed on the jurisdiction of German courts. The subsequent jurisdiction agreements in the additional orders were considered insufficient to alter the previous prorogation. Pursuant to Art. 25(1) sent. 2 Brussels I*bis* Regulation, the burden of proof lies with the party invoking the international jurisdiction of a particular Member State's courts to establish the conclusion of such an agreement. Both lower courts found that the claimant had failed to prove the existence of a prorogation agreement in favour of Austrian courts that would override the initial agreement conferring jurisdiction on the German courts. The decisions of the first and second instance courts have not been published. Accordingly, their exact reasoning remains unknown. However, the OGH reported that the court of first instance was unable to ascertain a clear intention on the part of the parties to replace the original jurisdiction agreement through the terms of the additional orders.[16] The court of second instance, as reported by the OGH, even expressed doubts as to whether the defendant had taken notice of the jurisdiction stipulation contained in

[13] SWD(2025) 135 final, p. 7.

[14] 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 Ia Regulation) – Final Report, available online, pp. 381, 390, 438, 491.

[15] See, e.g., P. Franzina, "The substantive validity of forum selection agreements under the Brussels Ibis Regulation", in: P. Mankowski (ed.), *Research Handbook on the Brussels Ibis Regulation*, Cheltenham, Elgar, 2020, pp. 95-117.

[16] OGH 23 September 2024, 7 Ob 116/24w, para. 7.

the additional orders.[17] As a result, both lower courts upheld the original jurisdiction agreement in favour of German courts, declined their own jurisdiction, and dismissed the action.

8. The claimant lodged an appeal with the OGH. Austria's highest civil court held, however, that the consecutive agreements between the parties cancelled each other out, with the result that no jurisdiction agreement existed.[18] This conclusion was based on an interpretation of the parties' contractual arrangements according to autonomous standards.[19] In the absence of an *electio fori*, the OGH concludes that international jurisdiction had to be determined in accordance with the general rules.[20] As both the defendant's seat (Arts. 4(1), 63(1) lit. a Brussels I*bis* Regulation) and the place of performance for the defendant's services (Art. 7 no. 1 lit. b indent 2 Brussels I*bis* Regulation) were located in Germany, the OGH declined the jurisdiction of the Austrian courts and dismissed the action.

III. The Law Applicable to a Forum Selection Agreement

9. When determining the law applicable to a forum selection agreement, Art. 25(1) Brussels I*bis* Regulation draws a distinction between two categories: First, the consensus as such and the form of the agreement are autonomously and substantively governed by Art. 25(1) sent. 1 and 3 Brussels I*bis* Regulation itself. Recourse to conflict-of-laws rules is excluded in this regard. Second, issues falling under the concept of 'substantive invalidity' ("null and void as to its substantive validity") are subject to the conflict-of-laws rule at the end of Art. 25(1) sent. 1 Brussels I*bis* Regulation. This rule activates the *lex fori prorogati*. As clarified by Recital 20 Brussels I*bis* Regulation, this reference encompasses the conflict-of-laws rules of the chosen forum. The substantive law thus determined governs in particular defects in consent (mistake, misrepresentation, duress) as well as legal incapacity, potentially rendering the agreed void or voidable.[21]

10. In the OGH's case, the decisive question was whether the parties had reached an agreement in favour of Austrian courts. Issues such as mistake, misrepresentation, duress, or incapacity were clearly not relevant and thus not to be taken into account. Accordingly, the OGH was correct in concluding that the conflict-of-laws rule set out at the end of Art. 25(1) sent. 1 Brussels I*bis* Regulation did not apply and that the *lex fori prorogati* played no role in determining the formation of the agreement.[22] Instead, the term 'agreed' in Art. 25(1) sent. 1 Brussels I*bis* Regulation constitutes an autonomous concept of EU law.[23] While the provision does not define the conditions under which agreement is deemed to have been concluded, Art. 25(5) Brussels I*bis* Regulation makes clear that such an agreement is to be assessed independently of the main contract. Furthermore, Art. 25(1) sent. 3 Brussels I*bis* Regulation lays down the formal requirements for the conclusion of jurisdiction agreements. According to the CJEU's interpretation, compliance with these formal requirements is indicative of a valid material consensus between the parties.[24] In the OGH's case, all relevant contracts were concluded in writing (Art. 25(1)

[17] OGH 23 September 2024, 7 Ob 116/24w, para. 8.

[18] OGH 23 September 2024, 7 Ob 116/24w, paras. 27 et seq.

[19] OGH 23 September 2024, 7 Ob 116/24w, paras. 17 et seq.

[20] OGH 23 September 2024, 7 Ob 116/24w, para. 29.

[21] U. Magnus, in: U. Magnus and P. Mankowski (eds.), *European Commentaries on Private International Law – ECPIL – Commentary*, Volume I, Brussels Ibis Regulation, Cologne, Otto Schmidt, 2nd ed., 2023, Art. 25 Brussels Ibis, paras. 79a, 81c.

[22] But see B. Hess, "Die Auslegung kollidierender Gerichtsstandsklauseln im europäischen Zivilprozessrecht", in: M. Brinkmann, D. Effer-Uhe, B. Völzmann-Stickelbrock, S. Wesser, and S. Weth (eds.), *Dogmatik im Dienst von Gerechtigkeit, Rechtssicherheit und Rechtsentwicklung. Festschrift für Hanns Prütting*, Cologne, Carl Heymanns Verlag, 2018, pp. 337-345, according to whom the resolution of consecutive conflicting jurisdiction agreements is a matter of the *lex fori prorogati* (pp. 341 et seq.).

[23] CJEU 7 July 2016, *Hőszig kft/Alstom Power Thermal Services*, C-222/15, para. 29. For an in-depth analysis, see U. Magnus, in: U. Magnus and P. Mankowski (eds.), *European Commentaries on Private International Law – ECPIL – Commentary*, Volume I, Brussels Ibis Regulation, Cologne, Otto Schmidt, 2nd ed., 2023, Art. 25 Brussels Ibis, paras. 77-79a.

[24] CJEU 18 November 2020, *Ryanair DAC/DelayFix*, C-519/19, paras. 38, 41.

sent. 3 lit. a Brussels I*bis* Regulation), thereby satisfying the formal requirement and thus indicating valid material consensus. However, this indication alone could not resolve the conflict arising from the existence of consecutive contradicting jurisdiction agreements, as each agreement in itself carried the same indication of consensus.

IV. Consecutive Conflicting Jurisdiction Agreements

11. The challenges arising from the adoption of an autonomous European concept of 'agreement' are evident. On what legal basis are national courts to determine whether an agreement has been reached? A uniform European law on the formation of contracts has not yet emerged within the *acquis communautaire*, i.e. within the body of EU directives and regulations.[25] Also, the substantive law of the Member States reflect divergent approaches to contract formation.[26] Likewise, the CJEU's case law on Art. 25(1) Brussels I*bis* Regulation, its predecessors (Art. 23(1) Brussels I Regulation, Art. 17(1) Brussels Convention), and parallel provisions (Art. 23(1) Lugano Conventions) remains limited and offers little concrete guidance on how to ascertain the existence of consensus between the parties. In substance, the current framework amounts to nothing more than instructing national courts to examine whether there was a genuine concurrence of wills.[27] Moreover, the determination of a potential agreement requires interpretation of the relevant contractual provision. In this respect, the CJEU has based its decisions on the interpretation of jurisdiction agreements again on an autonomous concept, one that remains imprecisely defined and without recourse to national laws.[28] As a result, the courts of the Member States are effectively left on their own in construing and applying this autonomous concept.

12. In its ruling of 23 September 2024, the OGH was required to determine whether there (still) was agreement in the case of consecutive conflicting jurisdiction agreements. The court answered this question in the negative, relying on arguments advanced in literature. Notably, the central passage of the court's reasoning[29] is an almost verbatim reproduction of a paragraph from a commentary authored by the late great Peter Mankowski.[30] However, the OGH appears to have misunderstood the scenario addressed by Mankowski. In the relevant paragraph, Mankowski examined the classic 'battle of forms', a situation in which both parties seek to apply their own standard terms, including jurisdiction clauses, while otherwise reaching agreement on the substance of the contract. In such cases, Mankowski persuasively argues that no consensus on international jurisdiction has been reached, as neither party has accepted the jurisdiction clause proposed by the other.

13. In the case before the OGH, however, the circumstances were different. The parties had agreed to three consecutive jurisdictions clauses, with the later jurisdiction clauses contradicting the first. In such a scenario, it cannot be maintained that no consensus was ever reached. Rather, the question is whether – and if so, how – the later agreements affected the initial prorogation. The neutralization approach adopted by the OGH does not appear convincing. Where, at a later stage in their transaction, the parties agree on the international jurisdiction of the courts of a different state than that originally designated, it is generally more plausible to regard the later agreement as having replaced the earlier

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[25] G. Christandl, in: N. Jansen and R. Zimmermann (eds.), *Commentaries on European Contract Laws*, Oxford, Oxford University Press, 2018, Introduction before Art 2:101, para. 6.

[26] G. Christandl, in: N. Jansen and R. Zimmermann (eds.), *Commentaries on European Contract Laws*, Oxford, Oxford University Press, 2018, Introduction before Art 2:101, paras. 2-4.

[27] CJEU 18 November 2020, *Ryanair DAC/DelayFix*, C-519/19, para. 41; CJEU 21 May 2015, *CDC Hydrogen Peroxide/ Akzo Nobel NV*, C-352/13, para. 67.

[28] U. Magnus, in: U. Magnus and P. Mankowski (eds.), *European Commentaries on Private International Law – ECPIL – Commentary*, Volume I, Brussels Ibis Regulation, Cologne, Otto Schmidt, 2nd ed., 2023, Art. 25 Brussels Ibis, paras. 80, 141-143 with references to the case law.

[29] OGH 23 September 2024, 7 Ob 116/24w, para. 27.

[30] P. Mankowski, in: T. Rauscher (ed.), *Europäisches Zivilprozess- und Kollisionsrecht*, Volume I, Brüssel Ia-VO, Cologne, Otto Schmidt, 5th ed., 2021, Art. 25 Brüssel Ia-VO, para. 273.

one.[31] In the present case, however, the later agreements concerned only "additional orders" amounting to less than 3 % of the value of the original contract. These additions could therefore not be considered sufficiently significant to override the earlier jurisdiction agreement. Moreover, the parties concurred that both the original contract and the additional orders were to be regarded as forming a single, unified contract concerning the performance to be rendered by the defendant. Accordingly, it was not possible to construe the later jurisdiction agreements as applying solely to disputes relating to the additional orders.[32] As a result, the later jurisdiction agreements must be regarded as devoid of legal significance, and the parties' initial *electio fori* in favour of German courts should have prevailed.

V. Conclusions

14. Admittedly, the OGH arrived at the correct result by applying the general rules on international jurisdiction. Nevertheless, the court should have referred the matter to the CJEU. The application of Art. 25(1) Brussels I*bis* regulation continues to pose significant challenges for the courts of the Member States. The autonomous European standards for assessing and interpreting jurisdiction agreements remain in need of further clarification and delineation. The recently published report by European Commission indicates that no reform in this area is to be expected in the foreseeable future. It is therefore all the more important that the CJEU be afforded the opportunity to enhance legal clarity and uniformity wherever possible.

[31] Similarly, T. Reich, "Anmerkung", *Österreichische Jurist:innenzeitung* 2025, pp. 68-69, 69.

[32] But see T. Reich, "Anmerkung", *Österreichische Jurist:innenzeitung* 2025, p. 68-69, 69. More general, B. Hess, "Die Auslegung kollidierender Gerichtsstandsklauseln im europäischen Zivilprozessrecht", in: M. Brinkmann, D. Effer-Uhe, B. Völzmann-Stickelbrock, S. Wesser, and S. Weth (eds.), *Dogmatik im Dienst von Gerechtigkeit, Rechtssicherheit und Rechtsentwicklung. Festschrift für Hanns Prütting*, Cologne, Carl Heymanns Verlag, 2018, pp. 337-345, 343.