

## European Civil Procedure

### Handout 2

#### Alternative fora (Articles 5–7 LC) – introduction

- Alternative fora (Articles 5–7 LC): general characteristics
  - alternative to the general forum at the defendant’s domicile; i.e., the plaintiff can choose between the general forum and an available alternative forum
  - the rules on alternative fora determine both international and local jurisdiction (with some exceptions)
- Not available for
  - Matters falling in the scope of Article 22 LC (exclusive jurisdiction)
  - Cases where a valid exclusive jurisdiction agreement has been concluded
  - Insurance matters (Articles 8 ff. LC; exception: Article 5.5 LC)
  - Consumer contracts (Articles 15 ff. LC; exception: Article 5.5 LC)
  - Individual contracts of employment (Articles 18 ff. LC; exception: Article 5.5 LC)
- Alternative fora with jurisdiction based on a connection between the claim and the forum (Article 5 LC)
  - purpose/rationale
    - connection to the subject matter in dispute
    - proximity of evidence
    - “stable” forum (remains available even if the defendant has moved to a different Contracting State)
      - Example:** A (domiciled in Germany) and B (domiciled in Switzerland) concluded a sales contract. The goods were duly delivered in Switzerland. Subsequently, B moves to Norway. A wants to sue for payment of the sales price.
      - But note:* Article 5.1 no longer applies (and national law determines the court that has jurisdiction) if the defendant moves to a third state.
  - Territorial/personal scope of application
    - defendant domiciled in a Contracting State
    - action in *another* Contracting State (see chapeau of Article 5.1 LC); whether similar fora are also available against defendants domiciled in the forum state is a matter of that state’s national law

**Jurisdiction at the place of performance for contractual obligations  
(Article 5.1 LC/Article 7.1 Brussels I bis Regulation)**

- “matters relating to a contract”
  - autonomous interpretation
  - “obligation freely assumed by one party towards another”
  
- place of performance: two approaches
  - Article 5.1(b) LC: autonomous approach
    - for contracts on the sale of goods or on the provision of services
    - relevant obligation: delivery of goods/provision of services
    - relevant place of performance: place of delivery/place of provision of those services (determined based on autonomous criteria)
  - Article 5.1(a) LC: “*lex causae*” approach
    - for contracts that fall within the scope of Article 5.1, but not Article 5.1(b) LC, or cases where there is no place of performance under Article 5.1(b) LC in a Contracting State (see Article 5.1(c) LC)
    - determination of the *lex causae* according to the applicable conflict-of laws rules
    - place of performance of the contractual obligation in question according to those rules
  
- Agreed place of performance
  - Article 5.1(a) LC
    - agreement possible if permitted by the *lex causae*
    - “abstract” agreements (agreements not meant to designate the actual place of performance but only to determine the courts having jurisdiction) must comply with the requirements for jurisdiction agreements (Article 23 LC)
  - Article 5.1(b) LC
    - determination of the place of performance of the characteristic obligation by reference to the contract, including clauses such as Incoterms, where these are capable of clearly identifying the place of delivery or performance of the obligation
    - unclear whether other agreements are possible (e.g., designating the place of performance of a payment obligation or referring to the *lex causae*) (according to the case law of the Swiss Federal Court [BGE 140 III 170], only agreements designating the actual place of performance of the characteristic obligation are possible under Article 5.1(b) LC; other agreements must comply with Article 23 LC)

### **Case 1**

S (domiciled in Zurich) sells goods to B (domiciled in Konstanz, Germany). According to the contract, S has to deliver the goods to various resellers in Austria and Slovenia.

1. *As B does not pay, S wants to know where B could be sued.*
2. *The goods were delivered to B's Singapore branch. How does this change the solution?*

### **Case 2**

A (domiciled in Aarau, Switzerland) was a commercial agent for M (domiciled in Milan, Italy). A was responsible for clients in Switzerland, Germany, France, and Poland. A's work mainly consisted in visiting clients at their domiciles, where she demonstrated and sold products to them. In 2023, M terminated the commercial agency contract. A considers the termination to be unjustified and wants to sue for damages.

*Which courts have jurisdiction for A's claim?*

### **Case 3**

A and B were partners. While living together, they bought a house in Berne (Switzerland) for 1.5 million CHF. To fund the purchase, they took out a loan for 1 million CHF from a Zurich bank as joint borrowers. Subsequently, the couple split, and B moved to Estonia, while A remained domiciled in Berne. Since moving to Estonia, B has no longer paid her share of the repayments for the loan.

*Where can A sue B for reimbursement of the loan repayments which he made on her behalf?*

### **Case 4**

P booked a flight from Zurich (Switzerland) to Newark (US) with stops in Frankfurt (Germany) and Amsterdam (Netherlands) under a confirmed single booking with a German airline (G). The first leg was operated by a Latvian airline, the second by G, and the third by a Dutch airline (N). The third flight arrived in Newark with a delay of several hours. P wants to obtain compensation from N under the EU Air Passenger Rights Regulation. She has assigned that claim for collection purposes to X (domiciled in Zurich), a start-up company specialising in the enforcement of passenger rights.

*Where can X sue N for payment?*