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ÍNDICE

DAMAGES FOR THE VIOLATION OF A JURISDICTION AGREEMENT[1]

EXAMINED FROM AN AUSTRIAN PERSPECTIVE BASED ON THE GERMAN SUPREME COURT RULING BGH III ZR 42/19

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1. Introduction

In the decision mentioned above (III ZR 42/19[2]), the BGH[3] confirms that a party which agrees to sue the other party exclusively before a certain court or the courts of a certain state, but subsequently breaches this agreement by suing before a court other than the one (or the ones) having conferred jurisdiction on, is liable to pay compensation for the loss thereby caused to the other party.

This key message of the ruling might, at first sight, not actually sound surprising. For an Austrian or German procedural lawyer, however, this decision truly marks a "turning point"[4]. Namely, it is the first and, so far, the only supreme court ruling in the German-speaking area adopting a clear position in the much-debated issue of liability for compensation due to the breach of a *procedural contract*[5]. Therefore, the practical consequences for international disputes involving a jurisdiction agreement or an arbitration agreement[6] are almost "immense"[7].[8] Thus, this ruling can be named a "landmark decision"[9]. The German Professor *Mankowski* even called it a "sensation".[10]

2. Subject of the underlying litigation

As a starting point, allow us to briefly summarise the issue which the ruling III ZR 42/19 is based on:

The parties involved are both telecommunication companies in a contractual relationship. While the claiming party's registered office is in Washington D.C. (USA), the defending party is based in Bonn (Germany). The parties' contract contains the following clause:

"This Agreement shall be subject to the law of the Federal Republic of Germany. Bonn shall be the place of jurisdiction."

In consequence of disputes about contractual adjustments, the claiming party, however, sued the de-

[1] The following article is a slightly amended and extended version of *Trenker*, "Schadenersatz wegen Verletzung einer Gerichtsstandsvereinbarung nach BGH III ZR 42/19" in RdW ("Recht der Wirtschaft") 2020, p 431 et seqq.

[2] BGH October 17, 2019, III ZR 42/19; for example, see in BGHZ ("Entscheidungen des Bundesgerichtshofs in Zivilsachen") no 223, p 269.

[3] Federal Supreme Court of Germany, "Bundesgerichtshof" (BGH).

[4] *Pfeiffer* in LMK ("Kommentierte BGH-Rechtsprechung, Lindenmaier-Möhring") 2019, no 422740.

[5] See point 3.2., point 3.3. as well as point 4.1.

[6] As to the importance of the present reflections also for arbitration agreements, see point 7.

[7] *Mankowski* in RIW ("Recht der Internationalen Wirtschaft") 2020, p 64 (70 with further references).

[8] The importance of the ruling is also demonstrated by the number of comments written on it, eg *Pfeiffer* in LMK 2019, no 422740; *Unseld* in BB ("Betriebs-Berater") 2019, no 3023; *Korte* in GWR ("Gesellschafts- und Wirtschaftsrecht") 2020, p 48; *Schatz* in EWIR ("Entscheidungen zum Wirtschaftsrecht und Kurzkommentare") 2020, p 95; *F. Graf von Westphalen* in IWRZ ("Zeitschrift für Internationales Wirtschaftsrecht") 2020, p 39; *Mankowski* in RIW 2020, p 64; *Antomo* in EuZW ("Europäische Zeitschrift für Wirtschaftsrecht") 2020, p 143; *Wais* in NJW ("Neue Juristische Wochenzeitschrift") 2020, p 399.

[9] *F. Graf von Westphalen* in IWRZ 2020, p 39 (40); likewise, *Pfeiffer* in LMK 2019, no 422740.

[10] *Mankowski* in RIW 2020, p 64 (70).

fending party before a US district court which, on the basis of the parties' agreement, dismissed the suit due to lack of competence. Nevertheless, it refused the award of procedural costs in favour of the defending party according to the so-called "American rule"[11]. Given the failing in its action, the claiming party then brought proceedings in the competent German court.[12] Thus, the defending party directed a counterclaim against the claiming party, suing for compensation for the costs incurred before the US district court, namely attorney's fees amounting to USD 196.118,03.

In the context of the proceedings, the instances extensively examined the arising questions on the permissibility, the requirements, and the scope of a damage-sanctioned obligation in a jurisdiction agreement. As a result, the BGH drew two fundamental conclusions:

a) *An agreement on the domestic place of jurisdiction may include the obligation to sue the other party exclusively before the court or the courts competent due to this agreement*.

b) *A party that culpably violates this contractual obligation by suing the other party before a US court, which dismisses the suit due to lack of competence, but does not award any cost-reimbursement according to the "American Rule", is obliged to compensate the other party for the costs of necessary and appropriate legal defence*.

3. Specific problems arising due to the so-called "separation doctrine" of Austrian civil procedure law

3.1. Separation of substantive civil law and civil procedure law

In Austria (and, at least to some degree, also in Germany) research and dogmatic reflections on civil procedure law have been marked by the strongly upheld promotion of its strict separation from substantive civil law ("separation doctrine").[13] This point of view results from various considerations: First, civil procedure law constitutes an area of public law, since civil proceedings are governed by state courts as public authorities. Second, and probably of more importance, as the idea comes from the originator of the ZPO[14] *Franz Klein*[15], the function of civil procedure law can be seen not only in the enforcement of the parties' claims but also in the maintenance of a peaceful social and economic community life.[16] To put it briefly, according to the "formalistic approach"[17] developed from this "separation doctrine", procedural acts are to be viewed isolated from any substantive effects under civil law.

3.2. Denial of procedural obligations between the parties

As one important result drawn from this approach, in civil proceedings the parties could not dispose on their legal positions by concluding contractual agreements as they can in substantive civil law matters. In fact, the existence of procedural agreements as such is undeniable, since they are explicitly accepted by statutory provisions codified in the JN[18]. Still, according to the most stringent representatives of this doctrine, those agreements would not constitute "real agreements", but only a set of facts of co-existing declarations of intent establishing certain legal consequences.[19] Consequently, these co-existing declarations of intent could not create any obligations between the parties. By some scholars, the existence of procedural obligations was declined in general.[20]

Regarding the present issue, this "separation doctrine" and its implications are of particular interest: A choice of court agreement undoubtedly[21] is an *agreement* on the court (or the courts) competent to decide

[11] The "American Rule" provides that each party is responsible to pay its own attorney's fees, regardless of the outcome of the proceedings.

[12] Depending on the value of the claim, either the "Amtsgericht" (district court) or the "Landgericht" (regional court) is competent in first instance.

[13] As to the origin and the development of this "separation principle", see *Trenker*, "Einvernehmliche Parteidisposition im Zivilprozess" (2020), p 63 et seqq with further references, however, dissociating from it, p 71 et seqq (especially 99 et seqq).

[14] Austrian Civil Procedure Code, "Zivilprozessordnung" (ZPO).

[15] For example, see *Klein*, "Zeit- und Geistesströmungen im Prozesse" in *Friedländer Josef/Friedländer Ottilie*, "Franz Klein, Reden/Vorträge/Aufsätze/Briefe" I (1927), p 117.

[16] For further reference, see *Trenker*, "Parteidisposition", p 64 et seqq with the corresponding citations.

[17] As to this term, see *Trenker*, "Parteidisposition", p 67 et seqq.

[18] Austrian Jurisdiction Provisions, "Jurisdiktionsnorm" (JN); see § 104.

[19] For example, *Sperl*, "Vereinbarung der Zuständigkeit und Gerichtsstand des Erfüllungsortes nach dem neuesten österreichischen Civilprozessrecht" (1897), p 115; *Petschek* in *Petschek/Stagl*, "Der österreichische Zivilprozeß" (1963), p 127; *Matscher*, "Zuständigkeitsvereinbarungen im österreichischen und im internationalen Zivilprozeßrecht" (1967), p 23, 54.

[20] For example, *Goldschmidt*, "Der Prozess als Rechtslage" (1925), p 81 et seqq; *Niese*, "Doppelfunktionale Prozesshandlungen" (1950), p 64 et seqq; *Schrutka*, "Grundriß des Zivilprozeßrechts"[2] (1917), p 141.

[21] As pointed out, its existence is explicitly accepted by § 104 JN.

on the parties' dispute, hence, a procedural agreement. Consequently, as outlined above, the "separation doctrine" could be upheld only by conceiving a jurisdiction agreement as a set of facts of co-existing declarations of intent, which would establish the competence of a certain court, but could not constitute any obligations between the parties.[22]

From our point of view, the "separation doctrine" in its generality is indefensible. It has evolved from the attempt, which might have been understandable at its time of origin in the 19th century, to develop and preserve a certain autonomy and originality of civil procedure law. Nowadays, however, this essay cannot be upheld since it sticks to an undifferentiated and biased idea without any legal indication, ignoring the structural unity of the legal system.[23] Thus, in particular, although its legal nature is still disputed in detail,[24] a choice of court agreement is undoubtedly to be classified as a (procedural) contract[25] (for further reference, see point 4.1.). Similarly, the assumption that procedural law or, more concretely, a procedural contract could not create any obligations between the parties is an unproved contention without any evidence in the ZPO. Indeed, with respect to the variety of procedural acts, this assertion is unsustainable.[26]

3.3. Distinction between contracts creating obligations ("Verpflichtungsverträge") and contracts having direct formative effects ("Verfügungsverträge")

Another problem in regards to the assumption of a damage-sanctioned obligation in a choice of court agreement results from the distinction enshrined in Austrian and especially in German[27] substantive civil law between contracts creating obligations, so-called "Verpflichtungsverträge", and contracts entailing dispositions and consequently having direct formative effects, so-called "Verfügungsverträge". Providing a very simple example, the conclusion of a contract on buying goods only creates the seller's obligation to deliver the goods to the buyer and to transfer legal ownership ("Verpflichtungsvertrag"), however, legal ownership is not transferred, indeed; its transfer requires another "disposition" ("Verfügungsvertrag").

With questionable benefit[28], important scholars have transferred this distinction in substantive civil law to procedural acts and especially to procedural contracts.[29] Accordingly, with respect to legal consequences, procedural contracts in Germany[30] and Austria[31] are either classified as contracts which create the obligation to take a procedural action or to refrain from it ("Verpflichtungsvertrag"), or as contracts which have direct formative effects themselves ("Verfügungsvertrag"). On closer examination, the idea of this distinction also derives from the "separation doctrine" and can thus be considered as a further development from its most stringent version (point 3.2.): Although it is difficult to dogmatically draw this distinction in all its elements,[32] it can be stated that primarily contracts which were particularly accepted by statutory provisions were regarded as "Verfügungsverträge" with direct formative effects. To all other contracts concerning procedural matters only the creation of obligations was attributed; hence, they were automatically classified as "Verpflichtungsverträge". Furthermore, the legal nature of those contracts was – at least originally – assigned to substantive civil law even though they would refer to a procedural matter.[33]

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[22] Again, *Sperl*, "Vereinbarung", p 115; *Petschek* in *Petschek/Stagl*, "Zivilprozeß", p 127; *Matscher*, "Zuständigkeitsvereinbarungen", p 23, 54.

[23] *Trenker*, "Parteidisposition", p 99 et seqq.

[24] While the Austrian Supreme Court ("Oberster Gerichtshof" [OGH]) classifies choice of court agreements as "procedural law contracts" (8 Ob 571/86; 1 Ob 673/90; 1 Ob 25/05s; RIS-Justiz RS0046846 [www.ris.bka.gv.at]), the BGH describes them as "substantive law contracts about procedural law relations" (BGH VII ZR 102/65, NJW 1968, 1233; XI ZR 34/96, NJW 1997, 2885); as to the legal nature in detail, see *Trenker*, "Parteidisposition", p 809 et seqq (especially 819 et seq).

[25] Rejecting the conception of a jurisdiction agreement as a set of facts of co-existing declarations of intent, *Rummel*, "Schiedsvertrag und ABGB" in RZ ("Richterzeitung") 1986, p 146 et seq; *Schneider*, "Die Auslegung von Parteiprozesshandlungen" (2004), p 37 et seqq, 227; *Konecny* in *Fasching/Konecny,* "Kommentar zu den Zivilprozessgesetzen" II/1[3] (2014) preface, point 127; for further reference, see *Trenker*, "Parteidisposition", p 83, 635 et seqq.

[26] See also *Geroldinger*, "Der mutwillige Rechtsstreit" (2017), p19; *Trenker*, "Parteidisposition", p 111 et seq.

[27] See § 929 BGB ("Bürgerliches Gesetzbuch"); for further reference, for example, see *Oechsler* in „MüKoBGB (Münchener Kommentar zum Bürgerlichen Gesetzbuch)" [8] (2020) § 929, point 8 et seqq.

[28] Critically with respect to this terminology, *Wagner*, "Prozessverträge" (1998), p 223 et seqq; *Antomo*, "Schadensersatz wegen Verletzung einer internationalen Gerichtsstandsvereinbarung?" (2017), p 441 et seqq; also *Trenker*, "Parteidisposition", p 411.

[29] At least since *Schiedermair's* fundamental oevre "Vereinbarungen im Zivilprozess" (1935), p 95 et seq.

[30] For example, see *Rosenberg/Schwab/Gottwald*, "Zivilprozessrecht"[18] (2018) § 66, point 2 et seq; *Kern* in *Stein/Jonas*, "Kommentar zur Zivilprozessordnung"[23] (2016) Vor § 128, point 330 et seqq.

[31] For example, see *Fasching*, "Lehrbuch des österreichischen Zivilprozessrechts"[2] (1990), point 750; *Konecny* in *Fasching/Konecny* II/1[3] preface, point 116/2, 120.

[32] Extensively, *Trenker*, "Parteidisposition", p 406, 521 et seqq.

[33] For example, *Schiedermair*, „Vereinbarungen", p 95 et seq,

Since, as pointed out, in Austria[34] and Germany[35] a choice of court agreement is explicitly accepted by statutory rules which provide for its direct formative effects, its classification as "Verfügungsvertrag" is undisputed[36] (for further reference, see point 4.1.). Thus, the question important for the present issue is whether the classification of a jurisdiction agreement as "Verfügungsvertrag" is necessarily incompatible with the existence of additional obligations between the parties, or whether a jurisdiction agreement may also imply a (damage-sanctioned) obligation. As a matter of fact, original proponents of the distinction between the two types of procedural agreements used to hold the opinion that obligations were reserved to a "Verpflichtungsvertrag".

4. Permissibility of an obligation to pay damages in a choice of court agreement

4.1. Compatibility of a choice of court agreement with the creation of obligations in general

With regards to the present issue, the assumption that a choice of court agreement could not create any obligations between the parties leads to the following result: While the suit before the incompetent court is to be dismissed due to lack of competence, a claim for damages would fail due to missing unlawfulness towards the opposing party for, although the claimant has breached the choice of court agreement, he would not have breached any *obligation* with regard to the defendant.[37] Consequently, unlawfulness could only be affirmed in case of wilful damage caused by seising the incompetent court.[38]

As pointed out, this assumption of incompatibility probably results primarily from the insistence on the dogmatic independence of civil procedure law towards substantive civil law (point 3.1.). However, by overcoming this "separation doctrine" in its generality[39], the misleading conception of a jurisdiction agreement as a set of facts of co-existing declarations of intent[40], and the assertion of the general non-existence of procedural obligations[41], there is nothing left to argue against the admissibility of an obligation in a procedural contract. Accordingly, the compatibility of a "Verfügungsvertrag" with an obligation between the parties is now fully recognised in German doctrine.[42] In Austria a more liberal approach to this question is fortunately emerging, too.[43]

In the same vein, the BGH did not see any obstacle to the acceptance of an obligation to pay damages in a choice of court agreement. On the contrary, it clearly separated the question on the legal nature of a jurisdiction agreement from the question on the admissibility to establish a damage-sanctioned obligation.[44] Whereas the former is in the essence merely an academic question of definition,[45] the latter finally depends on the parties' intention (for further reference, see point 5.1.).

4.2. No comparison to the violation of statutory jurisdiction

Rightly, the BGH[46] also rejected the argument that an exclusive jurisdiction due to a *contractual agreement* could not be stronger in the effect than an exclusive jurisdiction due to *statutory provisions* and that, on this account, a choice of court agreement could not create a damage-sanctioned obligation.[47] While it is true that an indemnification obligation in principle cannot be created by "merely" infringing statutory jurisdiction provisions, the same cannot apply in

175; *Baumgärtel*, „Wesen und Begriff der Prozeßhandlung im Zivilprozeß"[2] (1972), p 272; also *Baumgärtel*, „Neue Tendenzen der Prozeßhandlungslehre" in ZZP („Zeitschrift für Zivilprozessrecht") no 87 (1974), p 121 (134).

[34] § 104 JN.

[35] § 38 of the German Civil Procedure Code, "Zivilprozessordnung" (ZPO).

[36] As one of many, see *Konecny* in *Fasching/Konecny* II/1[3] preface, point 120; *Kern* in *Stein/Jonas*[23] Vor § 128, point 348.

[37] *Korte* in GWR 2020, p 48.

[38] As to arbitration agreements, see *Fremuth-Wolf*, "Die Schiedsvereinbarung im Zessionsfall" (2004), p 192 et seq; *Koller*, "Die Schiedsvereinbarung" in *Liebscher/Oberhammer/Rechberger*, "Schiedsverfahrensrecht" I (2011), point 3/379.

[39] Particularly, *Trenker*, "Parteidisposition", p 71 et seqq (99 et seqq).

[40] See point 3.2. as well as footnote 19.

[41] See point 3.2. as well as footnote 20.

[42] As one of many, *H.-J. Hellwig*, "Zur Systematik des zivilprozessrechtlichen Vertrages" (1968), p 62 et seqq; *Konzen*, "Rechtsverhältnisse zwischen Prozessparteien" (1976), p 209 et seqq; *Rosenberg/Schwab/Gottwald,* "Zivilprozessrecht"[18] § 66, point 3; *Rieländer*, „Schadenersatz wegen Klage vor einem aufgrund Gerichtsstandsvereinbarung unzuständigen Gericht" in RabelsZ („Rabels Zeitschrift") 2020, no 84, p 549 (560).

[43] As to arbitration agreements, see *Koller* in *Liebscher/Oberhammer/Rechberger*, "Schiedsverfahrensrecht" I, point 3/375, 3/378 et seqq; in general, see *Trenker*, "Parteidisposition", p 492 et seq; tending to this view, also *Geroldinger*, "Rechtsstreit", p 591.

[44] BGH III ZR 42/19, point 26 et seq.

[45] In detail, see *Trenker*, "Parteidisposition", p 25 et seqq, 809 et seq.

[46] BGH III ZR 42/19, point 27.

[47] As argued, for example, in the monographs *Pfeiffer*, "Internationale Zuständigkeit und prozessuale Gerechtigkeit" (1995), p 770; or *Wagner*, "Prozessverträge" (1998), p 258.

the case of breach of a contractual choice of court agreement. This follows from the understanding that a contractual obligation not to sue before a court other than the one (or the ones) having conferred jurisdiction on in the agreement is suitable to *establish* the unlawfulness of suing the opposing party before an incompetent court.[48]

4.3. No impediments by European Law

Independently from other connecting factors, *cross-border jurisdiction agreements* fall within the scope of the Brussels Ia Regulation[49] as long as they provide for an agreement on the jurisdiction of a member state of the European Union (except for Denmark) (Article 25).[50] Therefore, in the context of the objective issue, European aspects cannot be disregarded.

In particular, it is to be considered that within the scope of the Brussels Ia Regulation the European Court of Justice (ECJ) has declared so-called *anti-suit injunctions*[51] on the basis of an arbitration agreement to be contrary to European Union Law.[52] Primarily, this was based on the reasoning that otherwise the principle of mutual trust between the member states would be infringed, since the injunction would restrict the power of a member state's court to verify its jurisdiction according to the Brussels I(a)[53] Regulation on its own.

The impermissibility of *anti-suit injunctions* according to European Law stated by this argumentation, however, does at least not generally contradict the permissibility of a contractual agreement on the obligation to pay compensation for damages.[54] Of course, the fear of subsequently being ordered to pay damages might prevent the parties from suing before the courts of another member state in a similar way as an injunction.[55] Nonetheless, because liability can only apply as a consequence of the *dismissal* of a suit due to lack of competence by the court first seised (*forum derogatum)*,[56] the assumption of the permissibility of a claim for damages does not *undermine* but even *reinforce* the authority of taking this decision.[57] Thus, the principle of mutual trust is not violated at all.

Furthermore, the Brussels Ia Regulation aims to state a primary competence of the court which an agreement confers exclusive jurisdiction on (*forum prorogatum*). Consequently, at least[58] the admissibility of the award of subsequent compensation for damages *by this court* should be beyond any doubt.[59] Eventually, it must be taken into consideration, especially with regard to the underlying case, that, based on the reasoning of the ECJ, damages resulting from taking recourse to the courts of a *non-member state* will be unobjectionable in any case.

Confidently, but in our view rightly so, the BGH therefore classified the specific question on the admissibility of an indemnity claim due to the invocation

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[48] The exact legal classification of this obligation (for example, see *Mankowski* in RIW 2020, p 64 [70 et seq]; or *Gebauer* in Festschrift Kaissis, p 267 [276]) is not significant for this result.

[49] Regulation (EU) No 1215/2012.

[50] This already results from the wording of Article 25 (1); for further reference, see eg *Nunner-Krautgasser*, "Ausschließliche Gerichtsstandsvereinbarungen in der EuGVVO" in ZZP 127 (2014), p 461 (467 et seqq).

[51] An anti-suit injunction is a judicial order preventing a party from suing before another court or the courts of another state or, in the context of arbitral proceedings, before any state court.

[52] ECJ, February 10, 2009, C-185/07, Allianz and Generali v West Tankers; still based on the Brussels Convention, already ECJ, April 27, 2004 C-159/02, Turner v Grovit.

[53] Before 2015, of course, this understanding was based on the Brussels I Regulation (Regulation [EC] No 44/2001).

[54] See also *Rieländer* in RabelsZ 2020/84, p 549 (562 et seq); however, holding a different opinion, *Mankowski*, "Ist eine vertragliche Absicherung von Gerichtsstandsvereinbarungen möglich?" in IPRAX ("Praxis des Internationalen Privat-Wirtschafts-, und Verfahrensrechts") 2009, p 23 (29 et seq); *Schack*, "IZVR (Internationales Zivilverfahrensrecht)"[7] (2017), point 863, though differentiating with regard to the event that the suit is dismissed due to lack of competence by the *forum derogatum* in the reiusse, "IZVR"[8] (2021), point 920.

[55] In that sense, for example, *Hess*, "Schiedsgerichtsbarkeit und europäisches Zivilprozessrecht" in JZ ("Juristenzeitung") 2014, p 538 (542); *Wais* in NJW 2020, p 399 (405 et seq).

[56] It is unclear whether a claim for damages is also considerable in the event that the incompetent court does not dismiss the suit due to lack competence but decides in the matter. Within the scope of the Brussels Ia Regulation this probably has to be denied (*Peiffer*, "Schutz gegen Klagen im *forum derogatum*" [2013], p 484 et seqq; *Gebauer* in Festschrift Kaissis, p 267 [279 et seq]; both on the basis of the Brussels I Regulation but equally valid according to the Brussels Ia Regulation despite its Article 31 [disagreeing in that point, *Antomo*, "Schadensersatz", p 627 et seqq] because, according to the principle of mutual trust, the decision on jurisdiction taken in the *forum derogatum* is still to be respected in the *forum prorogatum*; see *Domej*, "Die neue Brüssel Ia-Verordnung: Änderungen im Zuständigkeitsbereich" in *König/Mayr*, "Europäisches Zivilverfahrensrecht in Österreich" IV [2015], p 17 [26]; also *Rieländer* in RabelsZ 2020/84, p 549 [565 et seqq]).

[57] In that sense, *Peiffer*, "Schutz", p 484 et seqq; *Antomo*, "Schadensersatz", p 623 et seqq.

[58] This primary competence constitutes a legislative amendmend towards the Brussels I Regulation. According to this amendmend, in our opinion, it is no longer that clear if in case of an agreement on the conferment of exclusive jurisdiction the order of an anti-suit injunction shall indeed still be impermissible (see also *Mankowski* in RIW 2020, p 64 [71]).

[59] In that sense, for example, *Antomo*, "Schadensersatz", p 617 et seq.

of a US court in breach of a jurisdiction agreement as *acte clair* and consequently denied an obligation to refer the matter to the ECJ.[60]

5. Generation of damage-sanctioned obligations depending on the parties' will

5.1. Current opinion and problem definition

As outlined above, a choice of court agreement *can* in principle create indemnity obligations. However, this does not imply that this *necessarily must* be the case. Rather, the answer has to be found in the interpretation of the parties' will in every individual case. For example, an express agreement on an indemnification obligation or even the establishment of a contractual penalty for non-performance in case of seising a court other than the one (or the ones) having conferred exclusive jurisdiction on should be fairly unproblematic. More or less the same will apply in the event that the parties have agreed on the *obligation* to take action exclusively before a specific court even if there is no reference to liability provisions or consequences. It is (or at least it has been before the BGH's ruling, see point 5.2.) no longer clear, though, how to proceed in the *absence* of such an agreement or any other indications on the parties' will, which might frequently be lacking.[61] Thus, the corresponding question whether an indemnification obligation *in case of doubt* shall constantly be *affirmed*[62] or *denied*[63] is (or at least has been) particularly controversial in German literature. In Austria this question is all too seldom discussed.[64]

In order to ensure a consistent solution to the present question it is required to, at first, screen out the cases indeed being problematic: In purely national constellations without any foreign connection, the question will arise in exceptional cases only.[65] In the example of Austria, this results from the fact that Austrian civil procedure law[66] provides for a sufficient and, in principle, also conclusive[67] set of tools in order to grant compensation for the other contracting party's expenses.[68] Also in cross-border cases, however, the constellations of interest are those in which the procedural law of the *forum derogatum* does not provide for adequate rules on cost-reimbursement, as clearly illustrated by the "American Rule". In accordance with the BGH's ruling, the present problem mainly occurs when proceedings are brought in US courts although the parties have chosen exclusive jurisdiction in favour of the courts of another state.

5.2. The BGH's solution

The controversy of the question whether to affirm or deny the obligation for damages in case of doubt is proven by the difference of opinion between the two instances in the present case, namely the OLG Cologne[69] as court of appeal, and the BGH as highest court. On the one hand, the OLG Cologne[70] still assumes the general non-existence of corresponding substantive obligations and cannot identify sufficient evidence for an (implied) additional agreement on an indemnification obligation. The BGH[71], on the other hand, states that in international disputes an agreement on the exclusive jurisdiction of a certain court or the courts of a certain state in principle (!) creates the

[60] BGH III ZR 42/19, point 30 et seqq; dissenting in this point, *Mankowski* in RIW 2020, p 64 (71), though leaving the lack of reference to another member state out of consideration.

[61] *Korte* in GWR 2020, p 48.

[62] Approving, already *H.-J. Hellwig*, "Systematik", p 60 et seqq; *Schlosser* in Festschrift Lindacher, p 111 (115 et seqq); *Schlosser* in *Stein/Jonas*[23] (2014) § 1029, point 59; *Gebauer* in Festschrift Kaissis, p 267 (275); *Peiffer*, "Schutz", p 330 et seqq, 435 et seqq; *Antomo*, "Schadensersatz", p 440 et seqq; also *Hau*, "Positive Kompetenzkonflikte im Internationalen Zivilprozessrecht" (1996), p 202 et seq.

[63] Denying, *Wagner*, "Prozessverträge", p 257 et seq; *Wagner* in *Stein/Jonas*[22] (2011) Article 23, point 149 et seq; *Mankowski* in IPRAX 2009, p 23 (26 et seqq); *Nagel/Gottwald*, "IZPR (Internationales Zivilprozessrecht)"[7] (2013) § 3, point 230, though respecting the BGH's ruling in the reissue, "IZPR"[8] (2020) § 3, point 3.276; *Schack*, "IZVR"[7], point 862 et seq, still restrained despite the consideration of the BGH's ruling in the reissue; "IZVR"[8], point 920 et seq; *Gottwald* in *Rauscher/Krüger*, "MüKoZPO (Münchener Kommentar zur Zivilprozessordnung)"[5] (2017) Article 25 of the Brussels Ia Regulation, point 100; however, respecting the BGH's ruling in the reissue, "MüKoZPO"[6] (2022) Article 25, point 102.

[64] In connection with arbitration agreements, *Koller* (in *Liebscher/Oberhammer/Rechberger*, "Schiedsverfahrensrecht" I, point 3/375), however, *affirms* a corresponding obligation to refrain from seising a state court.

[65] It might be conceivable in the context of a possible compensation for "collateral damages". As to this term, see point 6.1.

[66] §§ 40 et seqq ZPO.

[67] § 40 (2) ZPO.

[68] As to this exclusion effect of the procedural cost-reimbursement rules, see *M. Bydlinski*, "Kostenersatz im Zivilprozess" (1992), p 128; *Chvosta*, "Prozesskostenrecht" (2001), p 115; *Geroldinger*, "Rechtsstreit", p 214 et seqq; *Vonkilch*, "Der Vorrang des prozessualen Kostenrechts", wbl ("Wirtschaftsrechtliche Blätter") 2020, p 8 et seqq; in the present context, *Trenker*, "Parteidisposition", p 502 et seq.

[69] Cologne Higher Regional Court; "Oberlandesgericht" (OLG) Cologne.

[70] 3 U 159/17 in IWRZ 2019, p 234.

[71] III ZR 42/19, point 31, 34 et seq.

obligation towards the other party not to sue before a court other than the one (or the ones) having conferred jurisdiction on.

Thereby, the BGH refers to the parties' objectives pursued by concluding a choice of court agreement in an international contract,[72] which is to be seen in the avoidance of uncertainties and disputes about jurisdiction that could possibly bring about unnecessary costs. Typically, according to the BGH, the parties would want to provide for legal certainty and predictable litigation risks. Since these goals would be frustrated by seising a court other than the one exclusive jurisdiction is conferred on by the parties' agreement, at least an effective compensation for the resulting cost burden would have to be ensured.[73] Additionally, by agreeing on the jurisdiction of German courts and the application of German law, for the US contracting party this consequence would have been predictable.[74] This is, pursuant to the BGH, not altered by the fact that the wording of the jurisdiction clause, namely "*Bonn shall be the place of jurisdiction*", does not even explicitly indicate whether the parties had agreed on an *exclusive* jurisdiction or not[75] because, due to the outlined objective of international choice of court agreements, the parties' intention on the exclusivity of the jurisdiction agreement could be assumed.

5.3. Transferability on agreements in favour of Austrian jurisdiction

Although some restraint is called for the *general* assumption of the parties' will to create a certain obligation within a procedural contract,[76] the reflections of the BGH seem very reasonable. As a result, extortionate pressure to compromise[77] created by suing in the *forum derogatum* is effectively prevented, which is particularly welcome. From this point of view, in our opinion, it can be assumed that this decision of principle will point out the way for Austrian law too. This applies all the more since the transfer of this jurisprudence to the violation of the prorogation of Austrian jurisdiction would induce a strengthening of the domestic business location as well as the domestic judicial location.[78]

Though, along with the already disproved "separation doctrine" of civil law and civil procedure law and its undifferentiated implications (point 3.), there are two peculiarities according to Austrian jurisprudence which might constitute obstacles to such a "reception":

The BGH's reference to the typically pursued objectives of an international choice of court agreement illustrates the same procedure as it is defined in the interpretation provisions of the Austrian ABGB[79] in order to acquire the "intention of the parties" according to the "transaction of good faith".[80] Due to the classification of a choice of court agreement as a *procedural contract* (point 3.2.; point 3.3.), however, the OGH[81] persists on underlining the inapplicability of the relevant provisions of the ABGB[82] to the interpretation of jurisdiction agreements.[83] This results from another relic of the strict "formalistic approach" in civil procedure law (point 3.) upholding the so called "declaration theory" for *procedural acts* of the parties in a very pure and rigid way. According to this strict "declaration theory", only the objective content of a declaration is to be taken into account, while the true will of the parties is left out of consideration. Correctly, of course, this strict "formal approach" is to be abandoned.[84] In our opinion, the true "core" of this view is to be seen merely in the fact that the parties' intention relevant to the interpretation of a jurisdiction agreement has to be at least *indicated* in it in order to be considered.[85] Nevertheless, this requirement does not prohibit to revert to the "transaction of good faith"[86] in order to interpret the agreement.[87] Besides, the application of

[72] According to the underlining of the international context in the objective issue, the conclusion drawn by *Mankowski* (in RIW 2020, p 64 [71]), saying that the agreement on exclusive local (national) jurisdiction does create an equal obligation, is to be opposed.

[73] BGH III ZR 42/19, point 42 with regard to point 37.

[74] BGH III ZR 42/19, point 42 with regard to point 49.

[75] Sceptical to a certain point but still approving, *Unseld* in BB 2019, no 3023 (3028).

[76] In this regard, the idea is to be upheld that a typical situation of interest cannot easily be identified; see *Trenker*, "Parteidisposition", p 494.

[77] Already *Mankowski* in IPRAX 2009, p 23 (24 et seq); *Gebauer* in Festschrift Kaissis, p 267 (274).

[78] As to the German context of this issue, see *Pfeiffer* in LMK 2019, no 422740; *Korte* in GWR 2020, p 48; *Antomo* in EuZW 2020, p 143 (150); *Wais* in NJW 2020, p 399 (405).

[79] Austrian Civil Code, "Allgemeines Bürgerliches Gesetzbuch" (ABGB).

[80] § 914 ABGB.

[81] Austrian Supreme Court, "Oberster Gerichtshof" (OGH).

[82] §§ 914 et seq ABGB.

[83] OGH 6 Ob 284/63; 7 Ob 575/95; 1 Ob 25/05s; 4 Ob 144/13z; RIS-Justiz RS0119823 (www.ris.bka.gv.at).

[84] Extensively, *Trenker*, "Parteidisposition", p 656 et seqq with the corresponding citations also on the counterview.

[85] In that sense, already *Schneider*, "Auslegung", p 244 et seqq; *Schauer* in *Czernich/Deixler-Hübner/Schauer*, "Schiedsrecht", point 5.34; in detail, see *Trenker*, "Parteidisposition", p 658 et seqq with further references.

[86] In the sense of §§ 914 et seq ABGB.

[87] *Oberhammer* ("Internationale Gerichtsstandsvereinbarungen: Konkurrierende oder ausschließliche Zuständigkeit?" in JBl ["Juristische Blätter"] 1997, p 434 [436 et seq]) has already proved this with reference to older OGH-decisions: 1 Ob 21/29 ZBl 1929/2120, 307; 3 Ob 5/53 SZ 26/13; see also RIS-Justiz RS0046791 [T1] (www.ris.bka.gv.at); or examples in *Rummel*, RZ 1986, p 146 (149).

these interpretation rules of the ABGB to an arbitration agreement is no longer disputed.[88] Since an arbitration agreement and a jurisdiction agreement are both to be classified as procedural contracts having direct formative effects (point 3.3.), this inconsistency reveals the need to abandon the "declaration theory" also for jurisdiction agreements.

As the second Austrian peculiarity in the present context, the OGH insists on interpreting that in case of doubt a purely domestic choice of court agreement does not entail an *exclusive* but only an *elective* jurisdiction.[89] Besides the fact that this assumption is, in our opinion, utterly counterintuitive, this jurisprudence contradicts the Brussels Ia Regulation which codifies that the chosen jurisdiction shall be exclusive unless the parties have agreed otherwise (Article 25 [1]). At least in international disputes, this also corresponds to the typical interests of the parties.[90] Ultimately, it is convincing to derive from this typical situation of interests a damage-sanctioned obligation to comply with a jurisdiction agreement according to Austrian law and therefore to adopt the BGH's statements.

5.4. Applicable law

Not least, it has to be clarified which law can be applied to disputes resulting from the breach of a jurisdiction agreement. In that context, at first, it has to be distinguished between the question on the international jurisdiction and the question on the applicable law.

As the BGH states with unmistakable clarity, the *international jurisdiction* for corresponding claims is based in the state which is competent due to the agreement, since a jurisdiction agreement shall presumably apply also to disputes resulting from its breach.[91] This seems strongly compelling.

Not quite as clear, however, are the BGH's remarks on the *applicable law*.[92] Nevertheless, it undoubtedly follows from Article 25 (1) of the Brussels Ia Regulation that the question on the substantive validity of a jurisdiction agreement shall be decided in accordance with the law of the member state of the *forum prorogatum*, including its conflict-of-laws rules (Recital 20 Brussels Ia regulation).[93] In our opinion, this can be generalised[94] in the sense that the existence of a possible obligation is in principle not governed by the law applicable to the main contract[95] but by the law of the *forum prorogatum*[96]. This also corresponds to the widespread *separability doctrine*[97].

With regards to Austria, this leads to the very reasonable result that in case of conferring jurisdiction exclusively to Austrian courts by the agreement, a possible obligation to pay damages due to its violation shall be decided according to Austrian substantive law. However, in our view, the parties can choose the applicable substantive law, for this matter does not fall within the scope of the *lex-fori*-principle.[98]

6. The claim for damages in detail

6.1. Compensable damages

When considering the damages possibly compensated, as shown above, mainly the incurred procedural costs are to be borne in mind. First of all, the BGH has

[88] OGH 1 Ob 545/86; 7 Ob 123/99k; 6 Ob 122/04s; 5 Ob 63/18b and more; RIS-Justiz RS0018093 (www.ris.bka.gv.at); *Rummel* in RZ 1986, p 146 (148); *Koller* in *Liebscher/Oberhammer/Rechberger*, "Schiedsverfahrensrecht I", point 3/239; *Hausmaninger* in *Fasching/Konecny* IV/2[3] (2016) § 581 ZPO, point 183; *Schauer* in *Czernich/Deixler-Hübner/Schauer*, "Schiedsrecht", point 5.36.

[89] RIS-Justiz RS0046791 (www.ris.bka.gv.at); OGH 2 Ob 630/37 SZ 19/228; 2 Ob 180/07w; 1 Ob 121/00g; 10 Ob 24/13x.

[90] See *Oberhammer* in JBl 1997, p 434 et seqq; also *Schneider*, "Auslegung", p 269; *Simotta* in *Fasching/Konecny* I[3] (2013) § 104 JN, point 97; *Mayr* in *Rechberger/Klicka*, "ZPO"[5] § 104 JN, point 12; furthermore, OGH 6 Ob 275/01m (www.ris.bka.gv.at).

[91] BGH III ZR 42/19, point 17; also *Gebauer* in Festschrift Kaissis, p 267 (283 with footnote 104), rightly stating that, in this regard, an exclusive jurisdiction cannot be assumed since the *forum derogatum* can be seised in the context of a countersuit.

[92] BGH III ZR 42/19, point 27; critically, *Antomo* in EuZW 2020, p 143 (150).

[93] As one of many, *Czernich* in *Czernich/Mayr/Kodek*, "Europäisches Gerichtsstands- und Vollstreckungsrecht" (2015) Article 25 Brussels Ia Regulation, point 21; also *Mankowski* in *Rauscher*, "EuZPR, EuIPR (Europäisches Zivilprozess- und Kollisionsrecht)" I[5] (2020) Article 25 Brussels Ia regulation, point 36 et seqq.

[94] More cautious, *Nunner-Krautgasser* in ZZP 127, p 461 (477).

[95] *Gebauer* in Festschrift Kaissis, p 267 (282 et seq); *Antomo*, "Schadensersatz", p 382 et seqq; *Antomo* in EuZW 2020, p 143 (150).

[96] *Rieländer* in RabelsZ 2020/84, p 549 (580 et seqq).

[97] The *separability doctrine* as a term is usually used to express that the invalidity of the main contract does not necessarily lead to the invalidity of the procedural agreement based on the main contract (see *Trenker,* "Parteidisposition", p 788 et seqq).

[98] However, the OGH (7 Ob 712/83; RS0046893 [T3] [www.ris.bka.gv.at]) has, even though quite some years ago, denied the admissibility of a choice-of-law according to the principle of *lex fori*. In our opinion, *lex fori* is only *necessarily applicable* when deciding about the direct procedural effects of the choice of court agreement, while in order to assess its substantive legal effects a choice-of-law is permissible (see also *Mankowski* in RIW 2020, p 64 [71]).

limited the compensable damages to the costs of *necessary and appropriate* legal defence.[99] This is correct also according to Austrian law: There is no reimbursement of procedural costs exceeding those of adequate legal defence either, since such costs are beyond the context of unlawfulness.[100]

However, in order to determine the *necessary and appropriate* expenses, it cannot be referred to the standards applying in the *forum prorogatum*[101] but to those applying in the *forum derogatum*. Accordingly, as it is clarified by the BGH,[102] not only *usual* attorneys' fees are decisive. Rather, it must be determined in addition whether legal defence, going further than simply claiming the lack of jurisdiction in the *forum derogatum,* concretely has been *necessary and appropriate* as well as *state of the art*. The rather complex reply to this question could possibly be instructed to a court-appointed expert or be resolved by the application of judicial discretion.[103] Ideally, the remaining difficulties of damage calculation could be avoided in advance by agreeing on a contractual penalty or any other kind of lump-sum compensation.[104]

Even though the extent of the compensable damages is based on the *standards* in the *forum derogatum*,[105] this does not mean that the *law* of the *forum derogatum* would limit the compensable damages. It does not make any difference whether the law of the *forum derogatum* does not provide for any cost-reimbursement at all, or the awarded compensation according to the existing procedural rules cannot cover all the expenses. The remaining costs are eligible for compensation as long as they were necessary. In addition, "collateral damages", such as damages caused by not taking advantage of a business opportunity due to the delay of the litigation proceedings or by the necessity of external financing, can be considered eligible for compensation.[106]

6.2. Standard of fault

The BGH considers slight negligence to be sufficient for the award of damages resulting from the breach of the jurisdiction agreement.[107] This, however, is not self-evident.[108] First, it shall not be forgotten that *in the absence of any indications* on the parties' will on the exclusion of liability for breach of a contractual obligation caused by slight negligence can *in principle* not be assumed. However, such a liability-exclusion might be argued according to the hypothetical will of the parties.[109] As a matter of fact, according to some German authors, reasonable parties would typically not want to be held responsible for the breach of a procedural agreement in consequence of slight negligence. In particular, they argue that the assumption of liability for seising the "wrong court" in consequence of slight negligence would unduly restrict the parties' rights to seek access to courts, which is why a corresponding will of the parties could not be assumed.[110]

From our point of view, it will be necessary to pursue a differentiated approach as suggested by the BGH's ruling:[111] If the parties have agreed on the jurisdiction of Austrian (or German) courts, it cannot easily be presumed (according to the parties' hypothetical will) that they have intended to establish liability for cost-related damages only in the case of gross negligence because the obligation of cost-reimbursement according to Austrian (and German) procedural law applies irrespective of fault. To that extent, it cannot be presumed that the parties' hypothetical will was directed to suspend liability in consequence of slight negligence. With respect to "collateral damages", however, the parties' intention to restrict liability in cases of slight

[99] BGH III ZR 42/19, point 60.

[100] In this regard, the legal provisions on the reimbursement of costs according to the ZPO pursue the objective that the defending party should not be burdened by costs incurred by the claiming party's unsuccessful suit. However, it is no longer the purpose of the procedural cost-reimbursement rules to "enrich" the defending party by awarding more costs than those really needed for legal defence. Thus, for those exceeding costs, there is no connecting factor of a possible unlawfulness.

[101] In Austria attorney's fees are in principle to be compensated according to the "Rechtsanwaltstarifgesetz" (RATG).

[102] BGH III ZR 42/19, point 60.

[103] § 273 ZPO provides for the possibility to determine the amount of a claim on compensation by the means of "independent conviction" without formally taking any evidence. This provision focuses exactly on cases (such as the present one) in which the amount of the claim can hardly be determined by the party itself (in detail, see for example *Rechberger* in *Fasching/Konecny* III/1[3] [2017] § 273 ZPO). To the German equivalent, see § 287 (German) ZPO and, in the present context, *Antomo* in EuZW 2020, p 143 (150).

[104] *Wagner* in *Stein/Jonas*[22] Article 23, point 150.

[105] In that sense also *Mankowski* in "EuZPR, EuIPR" I[5] Article 25 Brussels Ia Regulation, point 414.

[106] *Mankowski* in RIW 2020, p 64 (71). As to collateral damages due to the violation of procedural contracts in general, see *Trenker*, "Parteidisposition", p 496, 505 et seq.

[107] BGH III ZR 42/19, point 55.

[108] Critically, for example *Wais* in NJW 2020, p 399 (406).

[109] As to the basis of this issue, see *Trenker*, "Parteidisposition", p 492 et seqq.

[110] *Wagner*, "Prozessverträge", p 258; *Häsemeyer*, "Beteiligtenverhalten im Zivilrechtsstreit" in ZZP 118 (2005), p 265 (304 et seq); see also *Schlosser* in *Stein/Jonas*[23] § 1029, point 59.

[111] BGH III ZR 42/19, point 44 et seq; not yet sufficiently differentiated in this regard, see also *Trenker*, "Parteidisposition", p 495.

negligence seems to be appropriate. This matches with the general considerations of "compensation for damages caused by litigation".[112] Consequently, in case of doubt regarding the parties' will (!), damages other than the costs incurred for adequate legal defence cannot be awarded when the claiming party sues before the *forum derogatum*, falsely, but still in a responsible manner, assuming the invalidity or lack of applicability of the choice of court agreement.[113]

Furthermore, the BGH states that a disclaimer of liability clause in the main contract which clearly refers to the main obligation cannot have any effect on the possible obligation to pay damages due to the violation of the jurisdiction agreement. This can easily be agreed with.[114]

7. Impacts on arbitration agreements

The BGH's ruling is suitable to have impacts not only on jurisdiction agreements but also on arbitration agreements in international contracts which affirm a corresponding substantive obligation.[115] Since international arbitration agreements equally pursue the objective to establish a certain planning security, the parties' wish can be stressed to effectively compensate the incurring costs due to the violation of an arbitration agreement.[116] Moreover, many factors militate in favour of the jurisdiction of the arbitration court for claims on damages resulting from the breach of the arbitration agreement,[117] following the same reasoning as for the violation of a jurisdiction agreement (point 5.4.).

8. Conclusion

Summarising, neither dogmatic considerations on the "legal nature" of civil procedural contracts (point 3.; point 4.1.), a comparison with the statutory order of jurisdiction (point 4.2.), nor European law (point 4.3.) contradict the deduction of a binding damage--sanctioned obligation to sue before the (arbitration) court or the courts having conferred exclusive jurisdiction on by the parties' choice of court agreement (or arbitration agreement [point 7.]). According to the reasonable opinion of the BGH, in case of doubt, this is even to be assumed in international litigations (point 5.2.).

There are no justified reasons not to transfer these principles to jurisdiction agreements assessed by Austrian law, which in principle applies when jurisdiction is conferred to Austrian courts by the choice of court agreement (point 5.3.). Eligible for compensation are the costs necessary for adequate legal defence before the court seised in breach of the jurisdiction agreement, as well as other collateral damages (point 6.1.); the latter, however, in principle only consequent to gross negligence (point 6.2.).

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[112] Instructively to this matter, *Fidler*, "Schadenersatz und Prozessführung" (2014), p 18 et seqq; *Geroldinger*, "Rechtsstreit", p 44 et seqq, p 672 et seqq with further references.

[113] *Trenker*, "Parteidisposition", p 495.

[114] BGH III ZR 42/19, point 57 et seq; approving, also *Unseld* in BB 2019, no 3023 (3028).

[115] See also *Antomo* in EuZW 2020, p 143 (150); *Mankowski* in RIW 2020, p 64 (72); *Schatz* in EWiR 2020, p 95 (96).

[116] See already *Koller* in *Liebscher/Oberhammer/Rechberger*, "Schiedsverfahrensrecht" I, point 3/375.

[117] *Koller* in *Liebscher/Oberhammer/Rechberger*, "Schiedsverfahrensrecht" I, point 3/378; unclear, however, *Antomo* in EuZW 2020, 143 (150), stating that the jurisdiction of state courts would be "problematic".

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