

# Handling Jurisdictional Problems in Civil Procedure – Based on Hungarian and EU Legislation

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## Abstract

In my study, I analyse jurisdiction, a fundamental concept in civil procedural law, primarily in relation to civil procedural law issues concerning jurisdiction. Thus, I shall examine in detail how jurisdiction appears as an absolute impediment to litigation and how the legal institution of intervention prevails. In my work, I also review the relationship between jurisdiction and sets of claims, as well as the transfer of jurisdiction as a new legal institution in Hungarian procedural law to the courts of another state. In my analysis, I consider not only Hungarian but also EU legislation, and I evaluate the jurisprudence of both the Hungarian courts and the Court of Justice of the European Union. As a result of my research, I consider it to be possible to conclude that the Hungarian procedural law system relies to a large extent on the norms of EU law and is in accordance with them (with the exception of the norms of the Brussels IIb Regulation on interference in proceedings and Section 106 (2) of the NMJTV).

**Keywords:** jurisdiction; domestic law, admission, counterclaim, pool of actions

## I Introduction – The Concept of Jurisdiction

Jurisdiction is one of the defining legal institutions of international civil procedure law and necessarily of national (internal and state) procedural law. Jurisdiction fundamentally determines which state's courts may hear a civil dispute. The existence or absence of jurisdiction essentially determines the *locus standi* of a court of a state. The absence or exclusion of jurisdiction renders it unnecessary to examine the jurisdiction of any court in that state.

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The aim of this study is to identify possible jurisdictional issues that arise and to find answers to them, focusing specifically on Hungarian civil procedure. In doing so, this article will rely primarily on the analysis of the provisions of the Hungarian Act on Private International Law (hereinafter: NMJTV)<sup>1</sup> and the Hungarian Code on Civil Procedure (hereinafter: CPC)<sup>2</sup> and, to the extent necessary, the main EU jurisdictional regulations (Brussels Ia,<sup>3</sup> Brussels Iib,<sup>4</sup> Succession Regulation<sup>5</sup> and Maintenance Regulation<sup>6</sup>).

With regard to the concept of jurisdiction, several approaches can be read in the legal literature. Thus, competence<sup>7</sup> and jurisdiction in international sense can be distinguished.<sup>8</sup>

István Szász considered competence to be a question of jurisdiction, ie, in his opinion, the court must have jurisdiction over the procedure in relation to several aspects.

First, under international law, the courts of the state should have jurisdiction to exercise judicial power, being one of the branches of state power – ie the courts of the state should have the power to apply the law and judge in the specific case (*Gerichtsbareit, facultas iurisdictionis*). In other words, judicial competence means the state's ability to apply

<sup>1</sup> 2017. évi XXVIII. törvény a nemzetközi magánjogról (Act XXVIII of 2017 on Private International Law).

<sup>2</sup> 2016. évi CXXX. törvény a polgári perrendtartásról (Act CXXX of 2016 on the Code of Civil Procedure).

<sup>3</sup> 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) [2012] OJ L351/1.

<sup>4</sup> Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) [2019] OJ L178/1.

<sup>5</sup> Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L201/1.

<sup>6</sup> Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L7/1.

<sup>7</sup> Miklós Kengyel, 'Keresetindítás' [*Filing for Action*] in Németh János, Kiss Daisy (eds), *A polgári perrendtartás magyarázata* [*Commentary on the Code of Civil Procedure*] (Complex Kiadó 2006, Budapest) 778; Ágnes Zsitva, 'Perindítás' [*Bringing Action*] in Zsuzsa Wopera (ed), *Kommentár a polgári perrendtartáshoz* [*Commentary on the Code of Civil Procedure*] (Wolters Kluwer 2019, Budapest) 440; Vilmos Ébner, 'Perindítás' [*Bringing Action*] in Varga István (ed), *A polgári perrendtartás és a kapcsolódó jogszabályok kommentárja* [*Commentary on the Code of Civil Procedure and Related Legislation*] (HVG-ORAC 2018, Budapest) 707, para 1829; László Névai, Jenő Szilbereky, *Polgári eljárásjog* [*Civil Procedural Law*] (Tankönyvkiadó 1974, Budapest) 169; Katalin Gombos, 'A Brüsszel Ia rendelet és a készülődő nemzetközi magánjogi törvény egymáshoz való viszonya' [*Relationship between the Brussels Ia and the Forthcoming Private International Law*] in Barna Berke, Zoltán Nemessányi (eds), *Az új nemzetközi magánjogi törvény alapjai – Kodifikációs előtanulmányok* [*Fundamentals of the New Private International Law – Codification Preliminary Studies*] (HVG-ORAC 2016, Budapest) 181.

<sup>8</sup> Imre Juhász, 'Gondolatok a Brüsszel Egyezményről' [*Reflections on the Brussels Agreement*] in Daisy Kiss, István Varga (eds), *Magister artis boni et aequi – Studia in honorem Németh János* (ELTE Eötvös Kiadó 2003, Budapest) 389; Miklós Világhy, *Bevezetés a nemzetközi magánjogba* [*Introduction to Private International Law*] (Tankönyvkiadó 1966, Budapest) 71–72; István Szász, *Nemzetközi polgári eljárásjog* [*International Civil Procedure Law*] (Közgazdasági és Jogi Könyvkiadó 1963, Budapest); Gombos (n 7) 181.

international law, the counterpart of which in private international law is the state's ability to legislate under international law; its legislative right. It is also necessary that the courts of the state have jurisdiction under international and domestic state law *vis-à-vis* foreign courts to decide the dispute in a specific case. So judicial jurisdiction under international law and domestic state law means judicial jurisdiction under international law and domestic state law in the narrower sense (*iurisdictio internationalis, staatliche, abstrakte Zuständigkeit*). It is also a prerequisite that the case must be subject to civil proceedings, ie that the civil courts of that state must have jurisdiction to decide the dispute. The fourth criterion to be examined is the classic question of jurisdiction in civil procedure (*sachliche Zuständigkeit*), ie, which level of the judicial system is competent to act in the dispute. Finally, territorial jurisdiction (*örtliche Zuständigkeit*), which is referred to in Hungarian civil procedure law as jurisdiction, should be included here.<sup>9</sup>

Miklós Világhy regards jurisdiction as the right of the state, flowing from its sovereignty, to act by state means (either administratively or judicially) in assessing legal relations containing foreign elements. Világhy also points out – in explaining the uncertainties regarding the conceptual definition – that the conceptual basis of jurisdiction is the distinction known in the domestic legal system of each state between competence on the one hand and jurisdiction on the other. It is important that while competence classically allocates cases within a single state, experience shows that the distribution of cases occurs not only within individual states but also between individual states, so some rules are required to distribute individual cases internationally among the various bodies of states. Világhy calls this international division of cases. In his view, this latter division of cases expresses 'the same kind of territorial distribution of cases as jurisdiction implies under domestic law'.<sup>10</sup>

Within the framework of the present article, it is not possible to process and present in detail the concept of jurisdiction, but it can be stated that states do not enter into a hierarchical relationship with each other in connection with jurisdiction, and the horizontal division of labour shall not be interpreted either. It is rather the area-based division of cases that can be interpreted.

To sum all this up, it can be stated that jurisdiction means the international division of cases and the subordination of the forum of one or another state to the decision-making power. Thus, 'jurisdiction feeds on the sovereignty of the state; it means the right of the state, flowing from sovereignty, to act in court with the help of state resources in disputes involving a foreign element'<sup>11, 12</sup> It is important to note that jurisdiction in this study refers

<sup>9</sup> In detail: Szászy (n 8) 315–316.

<sup>10</sup> Világhy (n 8) 71. Translation of the author.

<sup>11</sup> Translation of the author.

<sup>12</sup> Ferenc Mádl, Lajos Vékás, *Nemzetközi magánjog és nemzetközi gazdasági kapcsolatok joga [Private International Law and International Economic Relations Law]* (ELTE Eötvös Kiadó 2012, Budapest) 457–458, para 598.

only to judicial jurisdiction in the form of the decision-making power of the courts of a given state in a given case;<sup>13</sup> ie we do not examine the issue of jurisdiction from an administrative or legislative point of view.<sup>14</sup>

## II Date of Determination of Jurisdiction

The key question is which date is relevant for determining whether the Hungarian court has jurisdiction. This also means that the principle of *perpetuatio fori* applies, ie while competence (*hatáskör/illetékesség*) is governed by the date of filing of the application [§ 23(1) CPC; § 30(1) CPC], it is questionable whether the same principle applies in the assessment of jurisdiction.

Closely related to this is the question of whether the facts necessary to determine jurisdiction change during the course of the litigation and, as a result, the jurisdiction existing at the time of the application is lost or, on the contrary, previously missing jurisdiction is created, thereby affecting the determination of jurisdiction in any way. According to István Szászy's argument, this is a condition that prompts the question whether, in accordance with the principle of *perpetuatio fori*, the principle of *perpetuatio iurisdictionis* must be admitted, ie whether jurisdiction must exist only at the time of lodging the application or also at the time of judgment.<sup>15</sup>

The CPC does not expressly provide for this issue, and nor does the NMJTV offer any further guidance in this regard. However, it may be a starting point if the date of the filing of the application is the relevant date for competence (*hatáskör/illetékesség*), then also when determining jurisdiction, and if the originally missing jurisdiction is deemed to exist due to a change in circumstances during the litigation, the jurisdiction of the Hungarian court may be established.

In essence, this principle is the basis of the legal institution of entering the proceedings since jurisdiction is absent when the application is lodged, and only a positive statement by the defendant (submission of a written defence) creates jurisdiction. Otherwise, the proceedings must be terminated *ex officio* [Section 240(1)(b) CPC]. However, if, during the litigation, the circumstances necessary to establish jurisdiction change and the jurisdiction existing until then ceases to exist, this does not constitute an obstacle to litigation in the absence of an express rule of litigation; it does not result in the termination

<sup>13</sup> In detail: Juhász (n 8) 389–390.

<sup>14</sup> To the definition of jurisdiction see also: Andreas Heldrich, *Internationales Zuständigkeit und anwendbares Recht – Beiträge zum ausländischen und internationalen Privatrecht* (J.C.B. Mohr, Paul Siebeck 1969, Tübingen); Bernd von Hoffmann, *Internationales Privatrecht* (Verlag C.H. Beck 2001, München); Haimo Schack, *Internationales Zivilverfahrensrecht* (Verlag C.H. Beck 2010, München); Peter Schlosser, 'Jurisdiction and International Judicial and Administrative Co-operation' (2000) 284 *Recueil des Cours de l'Académie de droit international* 284–307.

<sup>15</sup> Szászy (n 8) 408.

of the proceedings. In other words, the answer to the question posed by István Szászy is, in my view, that Hungarian law recognises the principle of *perpetuatio iurisdictionis*.

It is interesting to note that contrasting views have also appeared in previous Hungarian civil litigation literature, according to which if the defendant's domicile changes during the duration of the litigation, thereby reducing the jurisdiction of the Hungarian court, the lawsuit shall be terminated.<sup>16</sup>

It may seem clear, but in fact, it is questionable why questions concerning a lack of jurisdiction must be examined *ex officio* by the court. What has been written about the concept of jurisdiction shows that it is linked in its dogmatic nature to competence and/or jurisdiction. In view of the fact that the court also takes into account the lack of jurisdiction and jurisdiction of its own motion, it can be argued that the absence of international competence/jurisdiction must also be examined *ex officio* by the court [Section 24(1) CPC; Section 30(2) CPC]. This is also laid down at the normative level in Section 240(1) CPC when it declares that the lack of jurisdiction must always be detected *ex officio* by the court, which, if necessary, shall terminate the proceedings.

### **III Jurisdiction as an Absolute Obstacle to Litigation – Excluded Jurisdiction and the Exclusive Jurisdiction of a Court of Another State**

#### **1 General Overview**

Based on the above definition of jurisdiction, it can be concluded that the lack of the latter may result in an impediment to litigation, ie it may arise as a condition for litigation.<sup>17</sup>

According to István Szászy's approach, however, the term 'litigation condition' is not precise enough because the existence of jurisdiction is not an existential prerequisite for the establishment of the entire litigation relationship (ie, the litigation legal relationship), bearing in mind that a lawsuit may also be brought before a court without jurisdiction, and

<sup>16</sup> István Arató, *Joghatóság a külföldi állam magánjogi ügyletei felett [Jurisdiction over the Private Law Transactions of a Foreign State]* (Taizs József Könyvnyomda 1942, Pécs) 35.

<sup>17</sup> The conditions of litigation are the conditions in the absence of which the application must be rejected [Section 176 (1) to (2) of the CPC]. For their detailed, dogmatic analysis: Géza Magyary, *A magyar polgári peres eljárás alaptanai (A perbeli cselekmények tana) [The Foundations of Hungarian Civil Litigation (The Doctrine of the Procedural Acts)]* (Franklin Társulat 1898, Budapest); Géza Magyary, *Magyar polgári perjog [Hungarian Civil Litigation Law]* (Franklin Társulat 1913, Budapest); Jenő Bacsó, *A jogvédelem előfeltételei a polgári perben [Prerequisites for Legal Protection in Civil Proceedings]* (1910, Máramarossziget); Sándor Plósz, *A keresetjogról [About Right of Action]* (1927, Budapest); Névai, Szilbereky (n 7); Miklós Kengyel, *Magyar polgári eljárásjog [Hungarian Civil Procedure Law]* (Osiris Kiadó 1998, Budapest).

the court must decide on the question of jurisdiction. Therefore, Szászy argues that the existence of jurisdiction is a condition for the admissibility of litigation.<sup>18</sup>

At the same time, it is essential that the absence of jurisdiction is not the same as an obstacle to litigation because, in the system of Hungarian civil procedure, only excluded jurisdiction or the exclusive jurisdiction of a foreign court can result in the rejection of the application as an obstacle to litigation (absolute obstacle to litigation) [Section 176(1)(a) of the CPC]. In cases of excluded jurisdiction, the CPC refers to applicable laws, binding acts of the European Union, and international conventions. In other words, on the basis of these sources of law, the court must decide whether jurisdiction is excluded on the side of the Hungarian courts.

This is why I share Szászy's opinion that the absence of jurisdiction in itself is not an obstacle to litigation; it is not a condition for litigation, unlike excluded or exclusive jurisdiction; in all other cases, the admissibility of litigation depends on the defendant's conduct, ie in the absence of judicial jurisdiction, the legislator gives the defendant the right to choose whether to accept (at least implicitly) the jurisdiction of the state of the given court, that is, the law presumes such acceptance represents the 'implied agreement of jurisdiction' of the defendant.<sup>19</sup>

When defining cases subject to excluded (averted)<sup>20</sup> jurisdiction, the legislature takes into account only the nature of the case to be adjudicated, which is why it can be called unconditional. It is independent of the fact that there may be a domestic court competent to hear the case. By contrast, competing (parallel) jurisdiction already implies conditional, jurisdictional jurisdiction. As a general rule, jurisdiction is excluded in matters in which the domestic state has no judicial capacity to adjudicate under international law and when it lacks any territorial or personal connection whatsoever with the territory and citizens of the domestic state or with its substantive law.<sup>21</sup>

Hungarian judicial practice emphasises that, a lawsuit may only be terminated if the jurisdiction of the Hungarian court is excluded from the action pursuant to a provision of law or international convention. This does not apply in cases where a jurisdiction clause fails to clearly designate the courts of a foreign state or a specific foreign court.<sup>22</sup>

The judicature is clear: an application can only be rejected if Hungarian jurisdiction is excluded. However, upon the defendant's objection, the court is required to examine *ex officio* whether grounds exist to establish its jurisdiction.<sup>23</sup>

It is important that excluded or exclusive jurisdiction is an absolute obstacle to litigation, ie this must be taken into account at any stage of the proceedings, so if the court notices

<sup>18</sup> Szászy (n 8) 399.

<sup>19</sup> Juhász (n 8) 401.

<sup>20</sup> Szászy (n 8) 322.

<sup>21</sup> Szászy (n 8) 322–328.

<sup>22</sup> BH 2004. 153. I.

<sup>23</sup> Budapest-Capital Regional Court of Appeal 9.Pkf.25.572/2020/2.

the absence of this condition after the notification of the claim [Section 179(1) of the CPC], the proceedings shall be terminated *ex officio* [Section 240(1)(a) of the CPC]; this rule also applies in redress proceedings [in appeal proceedings: Section 379 of the CPC; in review proceedings: Section 379 CPC applicable under Section 405(1) CPC].

## 2 Excluded Jurisdiction in Domestic Law

Within the scope of excluded jurisdiction, the source of domestic law is Section 89 of the NMJTV, which exhaustively lists proceedings in which the jurisdiction of the Hungarian court is excluded, which simultaneously means the recognition of the jurisdiction of the foreign court.

The areas of regulated by Section 89 of the NMJTV overlap to a large extent with the rules of exclusive jurisdiction laid down in Section 88 of the NMJTV, so the interpretative framework valid in this area also applies in relation to excluded jurisdiction.

However, the situation is complicated by the fact that while the Brussels Ia Regulation establishes exclusive rules of jurisdiction but not expressly excluded rules of jurisdiction, the exclusive rules of jurisdiction of the regulation only constitute excluded jurisdiction in relation to other EU Member States. Consequently, rules of jurisdiction excluded in relation to a third state should be laid down in domestic law.<sup>24</sup> When interpreting of the NMJTV, it is advisable to take into account the case law related to the Brussels Ia Regulation, as referred to later.

Where there is no explicit need for different rules, the Act reproduces the rules under EU law in order to ensure that, despite the different sources of private international law, the Hungarian judge or authority must examine their jurisdiction on the basis of the most uniform set of rules possible to facilitate their task.<sup>25</sup>

In the present paper, however, we will analyse certain rules of excluded jurisdiction regulated by the NMJTV only to the extent necessary, and for reasons of content and scope, we will refrain from examining them in detail. As a matter of fact, it can be stated that the grounds of excluded jurisdiction are justified by the public interest linked to the legal relationship concerned or by the exclusive domestic aspects of the legal relationship. In view of the fact that Section 89 of the NMJTV and Section 176(1)(a) of the CPC deny the Hungarian court the right to act, the reasons listed in the NMJTV must therefore be interpreted restrictively.<sup>26</sup>

Pursuant to Section 89(a) of the NMJTV, the jurisdiction of a Hungarian court is excluded in proceedings concerning a right *in rem* on real estate situated abroad or the lease or sale of such real estate. The exclusion of rights *in rem* in relation to immovable property is also justified because the resolution of such disputes often requires checks or expert or other

<sup>24</sup> Bill T/14237 on Private International Law 87 ('the Proposal').

<sup>25</sup> Proposal 86.

<sup>26</sup> Proposal 86.

examinations that must be carried out on the spot, and the resolution of such disputes is often influenced by consumer habits which is best known to the courts of the Member State in which they are situated. It justifies the transfer of jurisdiction to a state that data, facts and rights relating to immovable property are recorded in the state in which it is located.<sup>27</sup> It is worth highlighting, based on case law, that the Hungarian court had no jurisdiction over an action aimed at replacing the legal declaration required for the registration of real estate ownership in Croatia by a court judgment. In the present action, the claim sought to be enforced is not a claim *in rem*; however, the jurisdiction of the Hungarian court is excluded, given that the proceedings concern the registration of rights, facts and data in a public register maintained in Hungary.<sup>28</sup>

It is relevant, however, that that ground of jurisdiction does not cover, for example, disputes relating to a contract resulting in succession in the person of the holder of a right *in rem*.<sup>29</sup> The Court of Justice of the European Union (CJEU) clarified the condition relating to ownership of immovable property in the *ČEZ* judgement, stating<sup>30</sup> that exclusive jurisdiction does not extend to all actions which have as their object a right *in rem* in immovable property, but only those actions which concern the territory of immovable property that are intended to establish the existence of its condition, property, possession or other right *in rem* and to secure the prerogatives of rightsholders by virtue of their title.<sup>31</sup>

The second phrase of Section 89(a) of the NMJTV applies to the lease and sale of real estate. An action falls under this clause only if its object is a right or obligation arising from the tenancy itself. The legal policy justification for this is that the rental of immovable property is generally governed by specific laws in the national legal canon, which are more appropriately heard by the courts of the state where they are in force. The excluded jurisdiction covers disputes between a landlord and tenant concerning the existence and interpretation of a lease agreement, as well as compensation for damage caused by a tenant to rental property, but it does not apply to issues related to the payment of rent.<sup>32</sup> In the CJEU's view,<sup>33</sup> a contract which does not exclusively provide for the partial rights of use of a holiday resort but also concerns the provision of other services with a value exceeding the value of that holiday use right cannot be regarded as a contract for the rental of immovable property and is therefore not subject to the rules of exclusive jurisdiction.<sup>34</sup>

<sup>27</sup> Adél Köblös, 'A kizárólagos joghatóság' [The Exclusive Jurisdiction] in Zsuzsa Wopera, Lajos Wallacher (eds), *Polgári eljárásjogi szabályok az Európai Unió jogában [Rules of Civil Procedure in European Union Law]* (Wolters Kluwer 2005, Budapest) 110.

<sup>28</sup> BH 2014. 47.

<sup>29</sup> Proposal 86.

<sup>30</sup> Case C-343/04 *Land Oberösterreich v ČEZ*, EU:C:2006:330.

<sup>31</sup> András Osztovits, 'Joghatóság' [Jurisdiction] in Zoltán Csehi (ed), *Magyarázat a nemzetközi magánjogról [Commentary on Private International Law]* (Wolters Kluwer 2020, Budapest) 871.

<sup>32</sup> Köblös (n 27) 113.

<sup>33</sup> Case C-73/04 – *Brigitte and Marcus Klein v Rhodos Manamegent Ltd*, EU:C:2005:607.

<sup>34</sup> C-73/04 *Klein* (n 33).

According to Section 89(b) of the NMJTV, the jurisdiction of a Hungarian court is excluded in probate proceedings concerning the foreign estate of a non-Hungarian citizen. The rule can be justified by the speciality of probate proceedings, but only in the case of purely foreign inheritance relationships not settled by the decree due to the temporal effect of the Succession Regulation.<sup>35</sup>

According to Section 89(c) of the NMJTV, the jurisdiction of a Hungarian court is excluded in proceedings for the destruction of documents or securities issued abroad. In this context, it should be borne in mind that the destruction of securities falls within the scope of the Brussels Ia Regulation if the subject matter of the proceedings falls within the material scope of the regulation, but this does not apply to the destruction of other documents.<sup>36</sup>

Section 89(d) of the NMJTV stipulates that the jurisdiction of a Hungarian court is excluded in proceedings relating to the grant, content and termination of foreign industrial property rights. When interpreting the rule, it should be noted that the granting of industrial property rights actually results from the exercise of state sovereignty, and these rights may be exercised in the territory of the state where they are registered.

Thus, according to the case law of the CJEU, this includes disputes concerning the existence, validity or extinction of a patent or a priority right based on a previous deposit. However, it does not include claims arising from patent infringement or disputes between an employer and an employee based on an employment contract concerning the right to patent protection over an invention developed by an employee during their employment.<sup>37</sup>

Pursuant to Section 89(e) of the NMJTV, the jurisdiction of the Hungarian court is excluded in proceedings relating to the establishment or dissolution of a legal person or legal entity without legal personality established abroad (hereinafter collectively referred to as 'legal person' for the purposes of the topic of discussion) in proceedings relating to the validity of the contract or articles of association on the basis of which the legal person was registered, or in proceedings for the review of decisions taken by the organs of the legal person.

The purpose of the rule is clear: to avoid conflicting and incompatible decisions and to ensure that data, facts, rights and changes thereto relating to individual legal persons are recorded and published in the home state that is best placed to adjudicate on these disputes.<sup>38</sup>

Pursuant to Section 89(f) of the NMJTV, the jurisdiction of the Hungarian court is excluded in proceedings concerning the registration of rights, facts and data in a public register kept abroad. It is important that this provision applies only in relation to the registration of rights, facts and data directly in connection with the proceedings of the court or authority keeping the public register (such as an action for annulment of the order of registration order). If, on the other hand, the subject matter of the proceedings is not the

<sup>35</sup> Proposal 87.

<sup>36</sup> Osztovits (n 31) 877.

<sup>37</sup> Case C-288/82. *Ferdinand M.J.J. Duijnste v Lodewijk Goderbauer*, EU:C:1983:326.

<sup>38</sup> Köblös (n 27) 116.

registration itself but the right, fact or data on which the registration is based, that ground of jurisdiction shall not apply.<sup>39</sup>

Pursuant to Section 89(g) of the NMJTV, the jurisdiction of the Hungarian court is excluded in proceedings concerning foreign enforcement. The exclusion of jurisdiction in proceedings concerning foreign enforcement also follows from international law since the enforcement of judgments is a very close consequence of state sovereignty and public authority. The excluded Hungarian jurisdiction is also supported by the relationship between the forum acting and the applicable foreign substantive law.<sup>40</sup>

In addition to the excluded jurisdiction rules presented so far, the relationship between immunity and the exclusive jurisdiction rule should be examined. Should Section 86(2) of the NMJTV, according to which no Hungarian court may act in proceedings against a foreign national acting as diplomatic representative in Hungary or otherwise exempt from jurisdiction, be interpreted as a rule of jurisdiction unless the foreign state or the employing international organisation has expressly waived immunity?

Although formally, this rule appears to be a jurisdictional norm, in my view, it is more correct to interpret it as an immunity issue. The problem of immunity is related to the ability to judge (*facultas iurisdictionis*). In Hungarian jurisprudence, István Szászy called judicial capacity an independent litigation condition distinct from jurisdiction. In his view, judicial capacity ‘means the judicial power vested in the state, ... which shall not be vested in the state unless the legal relationship to be adjudicated involves a foreign sovereign state or any of its organs or institutions acting in the exercise of legal authority’<sup>41, 42</sup>

Tibor Szócs points out that judicial capacity essentially concerns the immunity from Hungarian judicial power of foreign states, state bodies or persons enjoying diplomatic or other international legal immunity, which, however, has not been specifically regulated procedurally but has merged into the system of rules of jurisdiction.<sup>43</sup> That is, the question of immunity arises as a lack of jurisdiction – excluded jurisdiction – and thus results in the rejection of the application. Kinga Timár also emphasises in her study that ‘the absence of state immunity is a prerequisite for the applicability of European jurisdictional regulation’<sup>44, 45</sup> That

<sup>39</sup> Proposal 87.

<sup>40</sup> Detailed explanatory memorandum relating to Section 1 of Act CX of 2000 on the amendment of certain laws on jurisdiction and the recognition and enforcement of foreign judgments.

<sup>41</sup> Translation of the author.

<sup>42</sup> Szászy (n 8) 328.

<sup>43</sup> Tibor Szócs, ‘A magyar nemzetközi polgári eljárásjogi reformja – szabályozást igénylő kérdések’ [Reform of Hungarian Civil Procedure Law – Issues Requiring Regulation] in János Németh, István Varga (eds), *Egy új polgári perrendtartás alapjai [The Foundations of a New Civil Procedure]* (HVG-ORAC 2014, Budapest) 678.

<sup>44</sup> Translation of the author.

<sup>45</sup> Kinga Timár, ‘Immunitás és joghatóság az Európai Bíróság aktuális gyakorlatában’ [*Immunity and Jurisdiction in Current Practice of the European Court of Justice*] 58. <[https://edit.elte.hu/xmlui/static/pdf-viewer-master/external/pdfjs-2.1.266-dist/web/viewer.html?file=https://edit.elte.hu/xmlui/bitstream/handle/10831/35148/Jogi\\_tan\\_2010\\_3\\_Timar\\_Kinga\\_p\\_45-60.pdf?sequence=1&isAllowed=y](https://edit.elte.hu/xmlui/static/pdf-viewer-master/external/pdfjs-2.1.266-dist/web/viewer.html?file=https://edit.elte.hu/xmlui/bitstream/handle/10831/35148/Jogi_tan_2010_3_Timar_Kinga_p_45-60.pdf?sequence=1&isAllowed=y)> accessed 1 April 2025.

is, the assessment of immunity must necessarily precede the jurisdictional examination.<sup>46</sup> In line with this, during the codification of the NMJTV, Katalin Gombos stated that it is justified to separate issues related to public international law elements related to diplomatic law and state sovereignty from the scope of exclusive and excluded jurisdiction rules.<sup>47</sup>

Accordingly, we do not interpret Section 86(2) of the NMJTV as a rule of jurisdiction but as a provision relating to immunity. This is based on the fact that the NMJTV clearly distinguishes between jurisdiction in the sense of public international law and jurisdiction in the sense of private international law since these are different legal institutions built on each other.<sup>48</sup>

A jurisdiction agreement within the meaning of Section 99 of the NMJTV results in excluding the jurisdiction of the Hungarian courts once the parties prorogate the jurisdiction of a foreign court. Section 99(7) of the NMJTV states that the jurisdiction stipulated by the jurisdiction agreement is exclusive unless otherwise agreed by the parties. That is, if the statement of claim is filed in a property action affected by the jurisdiction agreement, the court must reject the application on the basis of Section 176(1)(a) CPC since the jurisdiction clause of the courts of a state or one or more specific courts simultaneously means the excluded jurisdiction of the Hungarian court.

It should be noted that, under the NMJTV, having regard also to the material scope of the Act [Section 1 of the NMJTV], the parties may not stipulate the jurisdiction of a foreign court in a purely domestic case.<sup>49</sup> *Nota bene*: the opposite position is also known in legal literature, so: 'To permit the prorogation of jurisdiction, it suffices that the prorogated and derogated courts are different even if the parties are domiciled in the same country. The international element is created through the choice of a foreign forum.'<sup>50</sup> According to the latest practice of CJEU, this might change with the *Inkreal* judgment<sup>51</sup> at least under the scope of Brussels Ia.<sup>52</sup>

<sup>46</sup> Zoltán Nemessányi, 'A nemzetközi szervezetek immunitása és a joghatóság polgári kereskedelmi ügyekben' [Immunity of International Organisations and Jurisdiction in Civil Trade] in Lajos Vékás, András Osztovits, Zoltán Nemessányi (eds), *Nemzetközi magánjogi rendeletek az Európai Unió Bírósága gyakorlatában* [Private International Law Regulations in the Practice of the Court of Justice of the European Union] (HVG-ORAC 2021, Budapest) 107.

<sup>47</sup> Gombos (n 7) 188.

<sup>48</sup> In detail: Szabolcs Boreczki, 'Eljárásjogi rendelkezések' [Procedural Provisions] in Lajos Vékás, András Osztovits, Zoltán Nemessányi (eds), *A nemzetközi magánjogról szóló törvény kommentárja* [Commentary of the Law on Private International Law] (HVG-ORAC 2020, Budapest) 384–388.

<sup>49</sup> Proposal 91.

<sup>50</sup> Tamás Szabados, 'The New Hungarian Private International Law Act: New Rules, New Questions' (2018) 4 The Rabel Journal of Comparative and International Private Law 999.

<sup>51</sup> Case C-566/22 *Inkreal s.r.o. v Dúha reality s.r.o.*, EU:C:2024:123.

<sup>52</sup> Article 25(1) of Brussels Ia must be interpreted as meaning that an agreement conferring jurisdiction by which the parties to a contract who are established in the same Member State agree on the jurisdiction of the courts of another Member State to settle disputes arising out of that contract is covered under that provision, even if that contract has no other connection with that other Member State.

### 3 Excluded Jurisdiction in Sources of EU Law

Article 24 of the Brussels Ia Regulation governs exclusive jurisdiction. This includes proceedings relating to the rental or lease of rights *in rem* or immovable property (point 1), disputes concerning the organisation and decisions of legal persons (point 2), the validity of entries in a public register (point 3), proceedings relating to the registration or validity of patents, trademarks, designs or similar rights requiring deposit or registration (point 4), proceedings relating to the enforcement of judgments (point 5).<sup>53</sup> I will not analyse the individual points in detail, but I will refer back to what was explained in point 3.2.

The fact that the Brussels Ia Regulation regulates only exclusive jurisdiction is a necessary consequence of EU legislation since the latter can only regulate exclusive jurisdiction, not excluded jurisdiction, so Hungarian courts can also establish the exclusion of jurisdiction by applying Article 24 of the Brussels Ia Regulation accordingly. Similarly to Section 99 of the NMJTV, the exclusion of jurisdiction by the courts of a Member State to which the agreement does not apply results from Article 25 of the Brussels Ia Regulation.

The Brussels IIB Regulation also recognises exclusive jurisdiction so that a court of a Member State has exclusive jurisdiction if the parties, as well as any other holder of parental responsibility, have expressly declared acceptance of that jurisdiction during the proceedings and the court has ensured that each party is informed of their right to object to that jurisdiction and that the exercise of jurisdiction is in the best interests of the child [Brussels IIB Regulation, Article 10(4); Article 10(1)(b)(ii)].<sup>54</sup>

This includes exclusive jurisdiction introduced by Article 5 of the Succession Regulation so that where the testator has chosen the law of a Member State pursuant to Article 22 as the law applicable to succession to them, the parties concerned may agree that the court or courts of that Member State shall have exclusive jurisdiction to decide on successions.<sup>55</sup> The rule allows the forum to follow the law of its choice. Exclusive jurisdiction is based on a jurisdictional agreement concluded between the parties, which has a dual effect: it establishes the jurisdiction of the Member State of the law chosen by the testator

<sup>53</sup> A detailed analysis of the rules of exclusive jurisdiction of the Brussels Ia Regulation: Peter Mankowski, 'Art. 24. Brüssel Ia-VO' in Thomas Rauscher (ed), *Europäisches Zivilprozess- und Kollisionsrecht EuZPR / EuIPR – Kommentar* (Otto Schmidt 2021, Köln); Thomas Pfeiffer, 'Art. 24. Brüssel Ia-Vo.' in Hanns Prütting, Markus Gehrlein (eds), *ZPO – Kommentar* (Luchterhand 2023, München); Peter Schlosser, Burkhard Hess, *EuZPR – EU-Zivilprozessrecht* (C.H.Beck 2021, München); Jan Kropholler, Jan von Hein, *Europäisches Zivilprozessrecht* (Fachmedien Recht und Wirtschaft, Deutscher Fachverlag GmbH 2023, Frankfurt am Main); Hans-Joachim Musielak, Wolfgang Voit, *ZPO – Zivilprozessordnung* (Verlag Franz Vahlen 2023, München).

<sup>54</sup> A detailed analysis of the rules of exclusive jurisdiction of the Brussels IIB Regulation: Zsuzsa Wopera (ed), *A Brüsszel IIB rendelet kommentárja [Commentary on Brussels IIB]* (ORAC 2023, Budapest); Thomas Garber, Katharina Lugani (eds), *Die Brüssel IIB Verordnung* (Verlag Österreich 2022, Wien).

<sup>55</sup> A detailed analysis of the rule of exclusive jurisdiction of the Succession Regulation: Astrid Deixler-Hübner, Martin Schauer (eds), *EuErbVO-Kommentar* (2nd edn, Manz Verlag 2020, Wien); Tibor Szócs, *A nemzetközi öröklési jog szabályainak kommentárja [Commentary on the Rules of International Succession Law]* (HVG-ORAC 2021, Budapest).

(prorogation), and it terminates the jurisdiction of the courts that would otherwise have jurisdiction under the Succession Regulation (derogation). Those effects are binding on the tribunal, which would otherwise have jurisdiction.<sup>56</sup>

The stipulated jurisdiction, ie the agreement of the parties, may also give rise to exclusive jurisdiction in relation to the Maintenance Regulation [Article 4(1)]. It is important that the parties' right of choice in maintenance disputes is severely restricted, as the Maintenance Regulation limits the connecting principle of jurisdiction in disputes relating to maintenance obligations. As a general rule, the jurisdictional connecting factor may be the Member State of habitual residence or nationality of one of the parties [Article 4(1)(a) and (b)]. However, a dispute between spouses or former spouses concerning maintenance obligations may relate to a court having jurisdiction over the matrimonial dispute (stipulated adhesive jurisdiction), or the dispute may be subject to the jurisdiction of the last Member State of habitual residence common to at least one year.<sup>57</sup>

#### 4 Exclusive Jurisdiction of a Foreign Court

Furthermore, it is an absolute obstacle to litigation if a foreign court has exclusive jurisdiction. In this context, a question of interpretation emerges: while the CPC clarifies that excluded jurisdiction serves as an obstacle to litigation – based on law, a binding act of the European Union, or a source of law recognised as part of Hungarian law through an international agreement – it does not link the obstructive nature of a foreign court's judgment to any source of law considered to be part of Hungarian law.

The judgment of the foreign court as an obstacle to the proceedings is provided for in Section 176(1)(a) of the CPC. However, in my opinion, Section 176(1)(a) has not been properly codified. Based on a grammatical interpretation of the law, a question may arise: can a judgment issued by any state and any of its courts result in the dismissal of an application on the grounds of exclusive jurisdiction? If the answer is yes, then any judgment issued by any court of any state would have legal effect in Hungary, as the judgment would constitute a negative precondition for bringing proceedings. In my view, the correct interpretation is that an explicit provision in a statute, a binding legal act of the European Union, or an international treaty is required for any judgment of a foreign court to constitute a bar to litigation under Hungarian procedural law.

<sup>56</sup> Tibor Szócs, 'Az Európai Öröklési rendelet' [The European Succession Regulation] in Varga (n 7) 2678.

<sup>57</sup> Károly László Simon, 'Az Európai Tartási rendelet' [The European Maintenance Regulation] in Varga (n 7) 2753; For details on the jurisdiction rules of the Maintenance Regulation, see: Philip Reuß, 'Kommentar zu EuUntVo' in Reinhold Geimer, Rolf A. Schütze (eds), *Internationaler Rechtsverkehr in Zivil- und Handelssachen* (C.H.Beck 2014, München); Burkhard Hess, *Europäisches Zivilprozessrecht* (C.F. Müller 2010, Heidelberg); Wolfgang Hau, 'Die Zuständigkeitsgründe der Europäischen Unterhaltsverordnung' (2010) (3) *Zeitschrift für das gesamte Familienrecht*; Matthias Abendroth, 'Choice of Court in Matters Relating to Maintenance Obligations' in Paul Beaumont, Burkhard Hess, Lara Walker, Stefanie Spancken (eds), *The Recovery of Maintenance in the EU and Worldwide* (Hart Publishing 2014, Oxford).

## 5 Lack of Jurisdiction as a Relative Obstacle to Litigation – Entry into Litigation

In addition to Section 176(1)(a) CPC, the lack of jurisdiction arises as a relative impediment to litigation of a special nature. The special nature of the relative obstacle to litigation is that its actual effectiveness depends on the conduct of the defendant. In other words, the court must already realise, when examining the application, that although excluded or exclusive jurisdiction cannot be established, the Hungarian court nevertheless does not have jurisdiction to decide on the given lawsuit (case). In other words, the entry into litigation ‘may be significant in cases where, although Hungarian jurisdiction is not excluded, there is not a single ground of jurisdiction in the law that would provide a Hungarian judicial forum for the given case.’<sup>58</sup>

Although the court notices this *ex officio*, its legal consequence, ie the termination of proceedings *ex officio*, can only result from the defendant’s passivity [Section 240(1)(ba) CPC] or a well-founded objection to jurisdiction [Section 240(1)(bb) of the CPC]. The rule is also special because the application can only be notified if it is deemed suitable for initiating a lawsuit [Section 179(1) of the CPC]. In other words, by notifying the claim to the defendant, the court determines that the application is appropriate for taking legal action. Nevertheless, subsequent conduct by the defendant may result in the termination of the proceedings, thereby declaring, with retroactive effect, that it was not suitable for litigation even at the time when the application was lodged.

Section 240(1)(b) CPC contains a rule that is easy to apply at first reading, but it is actually a complex norm consisting of several elements. Namely, the proceedings may be terminated if:

- there is no excluded jurisdiction over Hungarian courts, nor does any other state have exclusive jurisdiction (because in that case, Section 176(1)(a) CPC would apply);
- the jurisdiction of Hungarian courts cannot be established under any ground of jurisdiction;
- however, the establishment of jurisdiction by the defendant’s entry into litigation is not precluded (positive condition);
- the defendant does not wish to enter into a lawsuit
  - or by expressly raising a challenge to jurisdiction [Section 240(1)(bb) CPC – active provision];
  - or by remaining completely passive and not submitting a written defence [Section 240(1)(ba) of the CPC – passive provision].<sup>59</sup>

<sup>58</sup> Detailed explanatory memorandum relating to Section 1 of Act CX of 2000 on the amendment of certain laws on jurisdiction and the recognition and enforcement of foreign judgments.

<sup>59</sup> Vilmos Ébner, ‘A perfelvételi szak és az érdemi tárgyalási szakban alkalmazandó közös rendelkezések’ [Common Provisions Applicable to Case Stage and Hearings as to Merits] in Varga (n 7) 1012, para 2585.

An important interpretative rule for Section 240(1)(b) CPC is that for the purposes of subsection (ba), an opposition to the order for payment shall not be considered as a written defence. According to judicial practice, in proceedings following the European order for payment procedure conducted before a Hungarian notary, which has turned into a lawsuit due to an objection, the defendant may also lodge a challenge to jurisdiction in their written defence. The court may also examine the existence or absence of jurisdiction of its own motion in the cases provided for in the Brussels Ia Regulation (BH 2019. 3.80.). It is essential that the defendant may lodge their objection to jurisdiction under subsection (1)(b)(bb) at the latest in their written defence at the same time as the substantive defence [Section 240(2) CPC]. Section 240 of the CPC does not expressly stipulate that the court, if the defendant has no legal representative, must inform him of the possibility of objection under subsection (1)(b)(bb); however, this provision was clearly laid down in Section 157/A(2) of the earlier Code of Civil Procedure [Act III of 1952 on the Code of Civil Procedure]. It is questionable whether this is still the duty of the court. It can be argued that given that there is no express provision in this regard in the CPC and, moreover, that it did not expressly maintain the previous regulation, it is not necessary to inform the party acting with legal counsel of the possibility of a challenge to jurisdiction. At the same time, however, it is not excluded that according to Section 111 of the CPC, the court must inform the party who does not have legal representation of their procedural rights, ie the right to object, since the lack of jurisdiction is a fundamental procedural obstacle, ie the party must be aware that the Hungarian court has jurisdiction only in the case that they make a statement on the merits of the suit. In the case of jurisdiction, this issue cannot arise because the court is always required to take procedural action regarding the lack of jurisdiction *ex officio*, even at the initiation stage. As a general rule, this results in a referral (Section 174 of the CPC), but, in exceptional cases, it may lead to the rejection of the application [Section 176(1)(b) of the CPC]. On the other hand, the absence of jurisdiction, unless it is excluded or exclusive, does not in itself result in the rejection of the application (cf. Section 176(1)(a) CPC). In my view, the more correct solution is to inform the defendant of the right to object under Section 111 CPC since the lack of jurisdiction deprives the state and thus all its courts with potential jurisdiction and jurisdiction to act, and therefore, it is justified from a guarantee point of view that the defendant should be properly informed.

According to Hungarian case law, only pleas of jurisdiction which are manifestly late and, therefore, likely to be abusive should be rejected on the grounds of entry into litigation. This includes objections to jurisdiction raised at second instance<sup>60</sup> or at first instance after several hearings and numerous substantive statements.<sup>61</sup> It may be pointed out from recent practice that in a lawsuit brought by the Hungarian buyer against a Belgian seller in Hungary, the court established its jurisdiction on the basis of the seller's entry into the

<sup>60</sup> Debrecen Regional Court of Appeal 3.Gf.30.259/2014/3.

<sup>61</sup> Supreme Court Gf.VI.31.805/2001/2.

lawsuit because it raised its objection to jurisdiction only after the defendant entered the substantive proceedings.<sup>62</sup> It is not considered to be an entry into court if the party objects to the order for payment but does not yet raise a challenge to jurisdiction,<sup>63</sup> nor if the defendant first raises a plea of pends and only then lodges a plea of jurisdiction.<sup>64</sup> In particular, the case-by-case decision that the entry of proceedings must be examined individually for each defendant is irrelevant, while the party's objection to jurisdiction on behalf of the other parties is irrelevant.<sup>65</sup>

### a) The relationship between admission and set-off

It raises a question of interpretation how to deal with the defendant when they do not submit a written defence but a document containing a set-off or a counterclaim. The answer is also not simple because these pleadings are documents [Section 7(1)(16) CPC], ie each pleading has an independent function and role as a document of admission. However, Section 240(1) (b) CPC only mentions the written defence.

A written defence is a classic means of defence against the claim, where the right sought to be enforced by the defendant is a substantive objection [Section 7 (1) (1) of the CPC], in which the latter only presents a defence against the claim. In the document containing the set-off, the defendant asserts a counterclaim by means of set-off as a right since 'the substantive effect of the defendant's declaration of set-off is the termination of the claim, ie the exclusion of the possibility of performance being claimed. It is against this background that it constitutes a substantive objection from a substantive point of view, that is to say, a plea leading to the unfoundedness of the claim'<sup>66, 67</sup>

In assessing the set-off, consideration should be given to the rule of Section 91 of the NMJTV, which settles the entry into proceedings in such a way that the jurisdiction of the Hungarian court is also established by the fact that the defendant, without objecting to the lack of jurisdiction, submits a counter-application without objecting to the lack of jurisdiction. According to the related legislative objective, Section 91 of the NMJTV inserts the phrase 'lodges a counterclaim' in order to achieve greater consistency with the CPC (according to Section 199(2) of the CPC, a written defence may include a formal defence or substantive defence, and under paragraph (6), even an acknowledgement of the action). The provision thus clarifies that the jurisdiction of the Hungarian court is established by entering the action even if the defendant contests the action only on formal grounds other than lack of jurisdiction (eg *res iudicata*, failure to comply with the time limit for bringing an action),

<sup>62</sup> Győr District court P.21.711/2015.

<sup>63</sup> Debrecen Regional Court of Appeal 4.Gf.30.317/2008/4.

<sup>64</sup> Budapest-Capital Regional Court of Appeal 14.Gf.40.317/2013/2.

<sup>65</sup> Budapest-Capital Regional Court of Appeal 8.Pf.22.390/2013/8.

<sup>66</sup> Translation of the author.

<sup>67</sup> Bill T/11900 on the Code of Civil Procedure 345. (CPC Proposal).

but not on the merits and even if the action is admitted. In essence, therefore, a defence means a statement made in relation to the case outside the objection to jurisdiction.<sup>68</sup>

It is possible that the legislature was guided by the intention in drafting the NMJTV that the entry into proceedings establishes the jurisdiction of the Hungarian court if the defendant makes any statement on the merits of the action. That is, following the terminology of the CPC, the defendant enters the litigation not only by submitting a written defence but also by submitting a document containing a set-off. All this is confirmed by the fact that by setting off, the defendant waives the right of formal defence since only a written defence could be used to submit an application for termination of proceedings [cf. Section 199(2)(a)(aa) CPC].

### b) Relationship between admission and counterclaim

By means of a letter containing a counterclaim, the defendant initiates a ‘counter-suit’, which is why the CPC treats the counterclaim as an independent procedural legal institution.<sup>69</sup> That is, through the counterclaim, the defendant asserts an independent claim against the plaintiff, which involves a right to be enforced that is distinct from the right sought to be enforced in the original claim [Section 7(1)(11) of the CPC].

Therefore, if the defendant only makes a counterclaim this is to be interpreted as not wishing to enter into litigation, ie the passive provision of Section 240(1)(b)(ba) CPC applies, and the proceedings are terminated *ex officio* due to the failure to submit a written defence.

## 6 No Access to Litigation

According to Section 240(1)(c) of the CPC, the court terminates the proceedings *ex officio* at any stage if the jurisdiction of a Hungarian court cannot be established on any ground of jurisdiction and the jurisdiction of the court cannot be established by the defendant’s entry into the litigation.

That is, Section 240(1)(c) CPC regulates cases where no excluded or excluded jurisdiction can be established, and thus the application cannot be rejected, while the legislature does not provide the defendant with the establishment of jurisdiction by entering into litigation in view of the subject matter of the dispute. The legislature expressly excludes the possibility of bringing proceedings in certain types of cases where this is expressly justified by ‘the nature of the proceedings and/or legal relationships concerned’<sup>70,71</sup> Thus, concerning participation in litigation in insolvency proceedings [Section 100(3) of the NMJTV], cases concerning the establishment of origin [Section 104(2) of the NMJTV] are excluded; additionally, adoption

<sup>68</sup> Proposal 88.

<sup>69</sup> CPC Proposal 344.

<sup>70</sup> Translation of the author.

<sup>71</sup> Proposal 88.

cases [Section 105(2) of the NMJTV], cases concerning parental authority, contact and guardianship [Section 106(2) of the NMJTV], cases concerning guardianship and other protection measures [Section 107(3) of the NMJTV] and cases concerning the declaration of death or the establishment of death [Section 108(2) of the NMJTV].

This rule is all the more remarkable because, although the Hungarian court does not have jurisdiction, and at the same time, excluded or exclusive jurisdiction cannot be established, the legislature nevertheless – *de facto* – regards the absence of jurisdiction as an absolute obstacle to litigation, even if it cannot be established even by entering litigation. In other words, in this case, the court must not reject the application without notifying the application but must terminate the proceedings *ex officio*.

In connection with Section 240(1)(c) CPC, the relationship between the Brussels IIa Regulation<sup>72</sup> and the entry into litigation should be analysed separately. Pursuant to Article 12(1)(b) of the Brussels IIa Regulation, the courts of a Member State having jurisdiction pursuant to Article 3 in an application for divorce, legal separation or marriage annulment shall also have jurisdiction in matters of parental responsibility relating to that application where: at least one of the spouses has parental responsibility for the child; and the spouses and holders of parental responsibility have expressly or otherwise unambiguously accepted the jurisdiction of the courts at the time the court is seised, and this is in the best interests of the child.

According to the related Hungarian legal practice, there is no place in a child responsibility (custody) action for termination of proceedings due to lack of jurisdiction if, although there are no other grounds for jurisdiction, the defendant has clearly expressed through their statements in court that they accept the jurisdiction of the Hungarian court and that this is also in the best interests of the child.<sup>73</sup> In this case-by-case decision, the Supreme Court stated that by implicitly but unequivocally acknowledging the jurisdiction of the Hungarian court with regard to child custody, as well as in relation to the defence and counterclaim, the defendant had implicitly but unequivocally recognised the jurisdiction of the Hungarian court. This conclusion was reached with the understanding that the question of jurisdiction could only arise once a Hungarian court had been determined to have jurisdiction to hear the case. The court's reasoning thus clearly accepted the jurisdiction of the Hungarian court, which also serves the interests of the integrated child who has lived in Hungary for a long time, ie the jurisdiction of the Hungarian court exists under Article 12(1)(b) of the Brussels IIa Regulation.

It is questionable how this relates to the legal concept of litigation, especially in view of the fact that Section 91 of the NMJTV merely requires a defence to be made in order to establish jurisdiction on that basis, while Section 106(2) of the NMJTV clearly excludes the

<sup>72</sup> Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [2003] OJ L338/1.

<sup>73</sup> BH 2010. 2141.

application of Section 91 of the NMJTV in the context of parental authority. In other words, while *de facto* litigation may prevail in the case of the application of the Brussels IIa and Brussels IIb Regulations, if the NMJTV applies, it does not, pursuant to Section 106(2), and the proceedings must be terminated *ex officio* [Section 240(1)(c) of the CPC].

Next, the relationship between the Brussels IIb Regulation and the litigation procedure must also be examined. Article 10(1)(b)(ii) of the Brussels IIb Regulation essentially maintains the rules of the Brussels IIa Regulation by making specific provision for the obligation of the court to inform the court of the right to object to jurisdiction. In my view, the Brussels IIb Regulation provides for the possibility of entering litigation. At the same time, however, there is also the anomaly that while Section 106(2) of the NMJTV clearly excludes entry into litigation, the defendant already has this right in cases concerning the EU. The divergent regulation is difficult to justify, so the position of the legislator would be justified in this regard.

#### **IV Relationship between Jurisdiction and the Pool of Actions**

Paragraph (2a) was added to Section 242 of the CPC from 1 September 2022, according to which, if, in the case of a set of actions, the jurisdiction of the Hungarian court can only be established in respect of individual actions, the court may partially terminate the proceedings in respect of the actions concerned by the grounds for termination.

The reason for the regulation can be traced back to the fact that cases involving divorce, parental responsibility and maintenance have been characterised by divergent judicial practices. The key issue is whether, in such cases, where Hungarian jurisdiction is partially established, the entire procedure should be terminated or only the part where the Hungarian court does not have jurisdiction (partial termination of proceedings). Based on the examination of the jurisprudence analysis group, judicial practice<sup>74</sup> has adopted three positions regarding the assessment of the set of claims: on the one hand termination of proceedings or rejection of the application if jurisdiction exists only for divorce but not for parental responsibility and maintenance of the child, on the other hand extending existing jurisdiction and adjudicating on pools of actions in a single procedure, finally partial termination of proceedings pursuant to Section 242 (1) CPC.

In the opinion of the jurisprudence analysis group studying the judicial practice of Act XXVIII of 2017 on Private International Law, the correct procedural solution is to partially

<sup>74</sup> Győr District Court P.21.531/2020/21; Győr Regional Court 2.Pkf.50.746/2020/2; Szolnok District Court 2.P.21.608/2020/7; Gödöllő District Court 4.P.21.433/2020/5; Bonyhád District Court 5.P.20.016/2019; Tapolca District Court 4.P.20.399/2018/22; Veszprém Regional Court 1.Pkf.20.527/2019/3; Budapest-Capital Regional Court 50.Pkf.640.257/2018/5; Veszprém Regional Court 1.Pkf.20.527/2019/3; Kecskemét District Court P.20.593/2018; Kecskemét District Court 7.P.21.701/2018/39; Kecskemét Regional Court 1.Pkf.20.487/2020/4.

terminate the procedure on the basis of Section 240(1)(b) and (c) of the CPC.<sup>75</sup> However, it may be justified to amend the CPC to harmonise domestic law with EU regulations by means of a special rule for international situations.

The legislature adopted the opinion of the jurisprudence analysis group and inserted Section 242(2a) CPC. This breaks with the principle of treating the application as a whole for the purpose of terminating proceedings, even in the case of a set of actions, as regards disputes with a foreign element. In civil and family law cases with a foreign element, it may occur that, under the legislation determining the jurisdiction of Hungarian courts, the court's jurisdiction applies only to certain individual claims within a set of claims, and jurisdiction cannot be established simply by the defendant entering into litigation. In such cases, it is appropriate to provide for the possibility of the partial dismissal of proceedings because, under the legislation in force, the entire proceedings are terminated on the basis of the principle of unity of action, even in cases where the court has jurisdiction to hear certain actions.<sup>76</sup>

In my view, too, the only correct solution is the partial termination of the proceedings, which, however, clearly followed from the CPC even without the amendment of the CPC. Section 242(1) CPC stipulates that if the reason for terminating proceedings *ex officio* or on application exists only in respect of the claim or counterclaim or only in respect of one of the parties, the court shall partially terminate the proceedings in respect of the claim or counterclaim or the party affected by the cause of termination.

That is, according to Section 242(1) CPC, if, in the case of a pool of actions, the termination of proceedings *ex officio* or on application exists only in respect of individual actions in the pool, the proceedings shall be partially terminated. This standard also applies without further ado to a set of claims concerning divorce, parental responsibility and maintenance. It should be noted that since the legal basis for partial termination of proceedings in this case is Section 240(1)(b) or (c) CPC, there is no obstacle to partial termination. This emphasis is justified because if the legal basis for termination of proceedings for lack of jurisdiction is Section 240(1)(a) CPC, then only the termination of the whole proceeding is possible since Section 240(1) CPC refers back to Section 176 CPC, where Section 176(3) CPC excludes partial dismissal of the application and thus partial termination of proceedings *ex officio*. For this reason, I do not consider correct the statement of reasons that 'under the legislation in force, on the basis of the principle of unity of action, the entire proceedings are terminated even in cases where the court has jurisdiction to hear certain actions'<sup>77,78</sup> It is precisely Section 242(1) CPC and Section 240(1)(b) and (c)

<sup>75</sup> Jurisprudence analysis group studying the judicial practice of Act XXVIII of 2017 on Private International Law 23–24, paras [60]–[61] and [63].

<sup>76</sup> Detailed justification for Sections 176–185 of Act XXIV of 2022 on the establishment of Hungary 2023 central budget.

<sup>77</sup> Translation of the author.

<sup>78</sup> Detailed justification for Sections 176–185 of Act XXIV of 2022 on the establishment of Hungary 2023 central budget.

CPC that refute this assertion since they expressly authorise the courts to partially dismiss proceedings even in the absence of jurisdiction.

Against this background, I consider that the amendment is functional, and in contrast to the related explanatory memorandum, it does not in any way suggest that it applies only to disputes with a foreign element or that it is a special standard applicable in those litigations. If this had been the aim of the legislature, this standard should have been placed in Part Nine of the CPC, among the rules of international civil procedure, since this Part lays down certain provisions governing certain aspects of civil proceedings with an international dimension.<sup>79</sup>

## V Transfer of Jurisdiction to a Court of Another State

Section 473/A CPC settles the transfer of jurisdiction to a court of another state. Accordingly, if there is a foreign element in the case and a binding act of the European Union or an international convention provides for the possibility of transferring jurisdiction to a court of another state before taking the measures prescribed in this connection, the trial court shall issue an order on the admissibility of the transfer, against which a separate appeal may be lodged. Measures relating to the transfer of jurisdiction may be taken after this order has become final. Once jurisdiction has been transferred to a court of another state, the court shall terminate the proceedings *ex officio*.

Section 473/A CPC was codified in connection with Article 12 of the Brussels IIB Regulation, but with the proviso that it may apply not only in relation to the EU Regulation but also in relation to Articles 8 to 9 of the Hague Convention on the Protection of Children.<sup>80</sup> If the Hungarian court decides to transfer jurisdiction, it shall issue an order on its admissibility, and only after it has become final may the provisions of Article 12(1) (a) or (b) of the Brussels IIB Regulation be carried out, to make arrangements for transfer.

If the court of another Member State takes over jurisdiction, the proceedings may be terminated *ex officio*, taking into account the lack of jurisdiction [Section 473/A(2) CPC, Article 12(2) of the Brussels IIB Regulation]. The right of appeal against the order of the Hungarian court is guaranteed under Section 240 (6) CPC.

The published case law on the rule is not yet available concerning either Article 12 of the Brussels IIB Regulation or Article 473/A CPC. However, it is worth reviewing the case law relating to the Brussels IIA Regulation, among which the *Child and Family Agency v J.D.* decision should be highlighted.<sup>81</sup> The CJEU stated in principle that Article 15(1) of the

<sup>79</sup> CPC Proposal 477.

<sup>80</sup> Adrienn Várai-Jeges, 'Joghatóság más tagállam bíróságának való átadása' [Transfer of Jurisdiction to a Court of another Member State] in Wopera (n 54) 119–120.

<sup>81</sup> Case C-428/15 *Child and Family Agency v J. D.*, EU:C:2016:819.

Brussels Iia Regulation (identical in substance to Article 12 of the Brussels Iib Regulation) must be interpreted as follows:

On the one hand, in order to assess whether a court of another Member State with which the child has a special connection is better placed to hear the case, the court having jurisdiction should ascertain whether the transfer of the case to such a court may have actual and concrete added value for the examination of the case, having regard, *inter alia*, to the procedural rules applicable in that other Member State;<sup>82</sup>

On the other hand, in order to assess whether such referral is in the best interests of the child, the court having jurisdiction should ensure, *inter alia*, that there is no risk of adverse effects on the child's situation in the event of such referral;<sup>83</sup>

Finally, when implementing Article 15 in a particular case relating to parental responsibility, the court having jurisdiction in a Member State shall not take into account either the effect of a possible transfer of that case to a court in another Member State on the right to the free movement of the persons concerned other than the child in question or the reason why the mother of that child exercised that right before bringing the matter before going to court unless those considerations adversely affect the situation of that child.<sup>84</sup>

Although not included in the operative part of the judgment, the declaration of the CJEU ruling states that the court with jurisdiction must assess whether transferring the case to another court could offer real and tangible added value to the decision concerning the child, compared to keeping the case within its own jurisdiction.<sup>85</sup>

In this context, it may take into account, among other factors, procedural rules of another Member State similar to those applicable to the taking of evidence necessary for the adjudication of the case. On the other hand, the court having jurisdiction is not required, in the context of that assessment, to take into account the substantive law of that other Member State, which the court of that Member State may have to apply if the case is referred to it. Taking that into account would be contrary to the principles of mutual trust between Member States and the mutual recognition of judicial decisions underlying Regulation No 2201/2003.<sup>86</sup>

The CJEU has also laid down the principle governing Article 473/A CPC, according to which Article 15 of the Brussels Iia Regulation must be interpreted as not applicable in a situation where pursuant to Articles 12 and 8 of that Regulation, both courts seized have jurisdiction over the substance of the case (*IQ v JP*).<sup>87</sup>

<sup>82</sup> *Child and Family Agency* (n 81) Para 61.

<sup>83</sup> *Child and Family Agency* (n 81) Para 61.

<sup>84</sup> *Child and Family Agency* (n 81) Para 61.

<sup>85</sup> *Child and Family Agency* (n 81) Para 57.

<sup>86</sup> Case C-403/09 *Jasna Detiček v Maurizio Sgueglia*, EU:C:2009:810 para 45; Case C-256/09 *Bianca Purucker v Guillermo Vallés Pérez*, EU:C:2010:437, para 70 and 71.

<sup>87</sup> Case C-478/17 *IQ v JP*, EU:C:2018:812.

## VI Summary

After reviewing the Hungarian procedural issues related to jurisdiction, it may be concluded that the Hungarian procedural system relies heavily on and is in line with the norms of EU law (with the exception of the standards of the Brussels IIb Regulation on entering litigation and Section 106(2) of the NMJTV). This necessarily means that, in addition to Hungarian case law, the CJEU's legislation must also be taken into account.

It is also relevant that the domestic (internal) sources of law address questions arising with jurisdiction – with one exception – either through an explicit and unambiguous rule or they can be resolved dogmatically based on the rules of jurisdiction in Hungarian civil procedure. In my opinion, the exception is the second phrase of Section 176(1)(a) CPC, where clear legislative intervention would be required, which would resolve questions of legal interpretation beyond doubt.

Furthermore, it can be stated as a fact that procedural questions relating to jurisdiction are also constantly changing, and this must be addressed primarily by the legislator in each case [cf. Section 242 (2a) of the CPC; Section 473/A of the CPC]. Due to the prominent role of jurisdiction, it is appropriate that disputes be clarified by clear legal provisions.