

CHOICE-OF-COURT AGREEMENTS UNDER THE BRUSSELS I REGULATION (RECAST)

TENA RATKOVIĆ AND DORA ZGRABLIJĆ ROTAR*

A. INTRODUCTION

The importance of party autonomy in the jurisdictional sphere is undisputed when it comes to international business and commerce. Agreements on jurisdiction increase predictability, reduce the costs of litigation and for some parties provide the luxury of a domestic court. In the early 1960s, legal problems regarding the choice of forum were characterised as being of worldwide significance;¹ and judging by the debate evoked by some of the decisions of the Court of Justice of the European Union (CJEU) in cases involving choice-of-court clauses, they still are.² Although the European Union (EU) has, in recent decades, significantly broadened the sphere of party autonomy in matters with an international element, the Brussels I Regulation³ rules on choice-of-court agreements are regarded as overly restrictive and submissive to procedural certainty.⁴ The European legislator has acknowledged the problem, and pointed out the “enhancement of the effectiveness of choice of court agreements”⁵ as one of the aims of the Brussels I Regulation Recast.

In this article, some particularly important aspects of the newly introduced changes in the Brussels I Regulation regarding choice-of-court agreements are examined in more detail. In Section B, apart from providing a brief history of

* Tena Ratković and Dora Zgrabljic Rotar are both Assistants at the Private International Law Chair at the Faculty of Law, University of Zagreb. The authors are thankful to Prof Beaumont for his comments on an earlier draft of this article. The usual disclaimer applies.

¹ A Lenhoff, “The Parties’ Choice of a Forum: ‘Prorogation Agreements’” (1960–61) 15 *Rutgers Law Review* 414.

² Specifically, the widely discussed CJEU cases regarding the Brussels I Regulation *lis pendens* rules such as the *Gasser v MISAT* discussed *infra* in Section D.1.

³ Regulation 44/2001 EC on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1.

⁴ The Heidelberg Report confirms that national reports describe the Brussels I Regulation requirements for a valid choice-of-forum agreement as restrictive: “Report on the Application of Regulation Brussels I in the Member States” (“Heidelberg Report”) (Study JLS/C4/2005/03 Final Version September 2007), http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf (accessed 25 November 2012), para 374.

⁵ Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast) COM(2010) 748 final.

the Brussels regime, the authors discuss the issue of agreements in favour of third-state courts and the influence of the 2005 Hague Convention on Choice of Court Agreements on the Recast of the Brussels I Regulation. In Section C, the authors discuss the abandonment of the requirement that at least one of the parties has to be domiciled in an EU Member State for the application of the Brussels I rules to a choice-of-court agreement. In Section D.1, the new Regulation rule on substantive validity of choice-of-court agreements is discussed, concluding that legal certainty is enhanced (at least to some extent) by its inclusion since now every national court in the EU has to apply the law of the chosen court to substantive validity of the agreement. In Section D.2 the authors present the newly introduced rule on severability of choice-of-court agreements, paying special attention to the fact that the rule refers to the validity of the agreement without dealing with the existence of the agreement. In Section E, the issues connected to the newly introduced *lis pendens* rules of the Regulation are discussed, and some observations on the possible problems related to it are provided.

B. HISTORY, CONTEXT AND SOME OPENING REMARKS

The choice-of-court agreements rules were unified for the first time in Europe in the Brussels Convention concluded as an international treaty on 27 September 1968, which came into force on 1 February 1973. The Convention went through four revisions,⁶ after which it was decided to transform the Convention into a Regulation in accordance with the Treaty of Amsterdam and the newly created Community competence to make regulations in this field. The Brussels I Regulation rules on choice-of-forum agreements do not significantly differ from the rules set out in the Convention.⁷ The CJEU interpreted the

⁶ For more information on the four revisions, see U Magnus and P Mankowski (eds), *Brussels I Regulation* (Sellier, 2nd edn, 2012), 14.

⁷ Four changes were made to Art 17 of the Convention when it became Art 23 of the Regulation: (i) Art 23(2) “Any communication by electronic means which provides a durable record of the agreement shall be equivalent to ‘writing’” was added; (ii) Art 17(6) “In matters relating to individual contracts of employment an agreement conferring jurisdiction shall have legal force only if it is entered into after the dispute has arisen or if the employee invokes it to seise courts other than those for the defendant’s domicile or those specified in Article 5(1)” was deleted; (iii) Art 17(4) “If an agreement conferring jurisdiction was concluded for the benefit of only one of the parties, that party shall retain the right to bring proceedings in any other court which has jurisdiction by virtue of this Convention” was deleted; (iv) a provision providing that the jurisdiction will be exclusive, unless the parties have agreed otherwise, was added. The first amendment was introduced as a point of clarification regarding the new technologies; the second because the provision became redundant after the introduction of Art 21 that governs jurisdictional party autonomy explicitly for employment contracts. The most interesting change, especially in the light of the new case law, seems to be the deletion of Art 17(4). The Commission’s Proposal does not explicitly explain this amendment. It only refers to the introduction of the provision on non-exclusive jurisdiction clauses by calling it “additional flexibility” which is

Brussels Convention in a number of cases. The interpretation of the Convention equally applies to the Regulation, where its wording does not deviate from the wording of the Convention.⁸

In April 2009, the Commission adopted the Green Paper on the Review of the Brussels I Regulation.⁹ The Green Paper emphasised the importance of ensuring that choice-of-court agreements “are given the fullest effect”.¹⁰ After an extensive public debate on the proposed changes,¹¹ the Commission gave its Proposal for a Regulation of the European Parliament and of the Council on the jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (“the Proposal”). The Council and the European Parliament have adopted all of the proposed amendments referring to choice-of-court agreements, most importantly the ones regarding the *lis pendens* rules, albeit with some technical changes.

1. Choice-of-Court Agreements Conferring Jurisdiction on Third-State Courts

Although some important changes were included in the provisions on prorogation, the Brussels I Recast has not, however, resolved the problems involving choice-of-court agreements conferring jurisdiction on third-state courts. A general *lis pendens* rule in respect of proceedings already pending before a court of a third state has been introduced by Article 33. The rule allows the court to stay the proceeding in a case where an action involving the same cause of action and between the same parties is already pending before a third-state court and some additional conditions set forth in the same Article are fulfilled.¹² That *lis pendens* rule will be, under the same conditions, applicable in cases where the third court first seised is prorogated by the parties’ agreement. However, the rule does not resolve all the issues concerning the effect

“warranted by the need to respect the autonomous will of the parties” (see the Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters COM(1999) 348 final). This probably led to the conclusion that the parties’ possibility to modify the exclusive effects of the agreement includes the possibility to modify it only for the benefit of one of the parties. However, the French Cour de cassation recently struck down a jurisdiction clause providing for exclusivity only for the benefit of one of the parties, thus providing for a different view which is opposite to what was formerly set by the rules of the Convention. Judgment no 983 of 26 September 2012 of the Cour de cassation.

⁸ Case C-533/07 *Falco Privatstiftung and Thomas Rabitsch v Gisela Weller-Lindhors* [2009] ECR I-03327, paras 49, 50; J Kropholler and J von Hein, *Europäisches Zivilprozessrecht* (Verlag Recht und Wirtschaft GmbH, 2011), 53.

⁹ Commission, “Green Paper on the review of Council Regulation (EC) no 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters” COM(2009) 175 final, ch 3.

¹⁰ *Ibid.*, 5.

¹¹ The Commission received a total of 130 responses to its suggestions for the amendments.

¹² Art 33 of the Brussels I Recast (Regulation 1215/2012 EU on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1.

of prorogation agreements in favour of third-state courts.¹³ This problem has been discussed in one of the first reports on the Brussels Convention, in which Professor Schlosser found that there is nothing in the Convention that would give guidance to the courts on how to deal with the validity of the agreements conferring jurisdiction on a third-state court.¹⁴ According to the CJEU, when a court is faced with a prorogation in favour of a third-state court, it should assess the validity of such a clause according to the applicable national law.¹⁵ Nevertheless, there is still no answer to the question of whether a valid agreement on a third-state court derogates from exclusive jurisdiction under the Brussels I Regulation.¹⁶

It is surprising that the Recast did not provide any guidance for this kind of situation, especially since the issue has been tackled in the Heidelberg Report, the Nuyts Report and the Green Paper. The last of these deals with the problem within the context of operation of the Regulation in the international legal order where it has been concluded that it might be appropriate to allow a derogative effect of the choice-of-court agreements in favour of third-state courts “for instance, when parties have concluded an exclusive choice of court agreement in favour of the courts of third States”.¹⁷ In the Heidelberg Report the reporters expressed their conviction that the issue can and will be resolved by CJEU case law.¹⁸ Notwithstanding the fact that it is possible that the issue can and will be resolved by the CJEU, it might have been more practical if it had been dealt with in a provision of the Recast of the Brussels I Regulation. Admittedly, the task of harmonising the rules to determine cases in which jurisdiction based on the uniform rules of the Regulation should or could be declined in favour of third-state courts is quite delicate.¹⁹ Some even suggested that an appropriate way would have been to introduce a type of *forum non conveniens* rule.²⁰

¹³ For more on the question of third-state choice-of-court agreements in the Brussels I Recast, see: C Kohler, “Agreements Conferring Jurisdiction on Courts of Third States” in F Pocar *et al* (eds), *Recasting Brussels I* (Cedam, 2012), 199; FC Villata, “Choice-of-Court Agreements in Favour of Third States in Light of the Suggestions by Members of the European Parliament” in Pocar *et al*, *ibid*, 219.

¹⁴ P Schlosser, “Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice (Signed at Luxembourg, 9 October 1978)” [1979] OJ C59/71, para 176.

¹⁵ Case C-387/98 *Coreck Maritime GmbH v Handelsveem BV and Others* [2000] ECR I-09337, para 19.

¹⁶ See Kohler, *supra* n 13, 200.

¹⁷ Green Paper, *supra* n 9, 4.

¹⁸ Heidelberg Report, *supra* n 4, para 388.

¹⁹ Study on Residual Jurisdiction (Review of the Member States’ Rules concerning the “Residual Jurisdiction” of their courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations), prepared by A Nuyts, http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf (accessed 4 July 2013), para 184.

²⁰ “Report on the implementation and review of council regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters”

The main reason for the silence on this question is the Commission's intention to fill this gap with the EU's accession to the Hague Convention on Choice of Court Agreements.²¹ However, it is questionable whether, even when the EU ratifies the Convention, this gap would indeed be closed²² – firstly, because the two instruments have different scopes, (the scope of the Hague Convention is narrower than the scope of the Brussels I Regulation);²³ and secondly, because the Hague Convention applies only between Contracting States²⁴ – meaning that the issue of the effect of an agreement on choice of a court of a state which is not an EU Member State or a party to the Hague Convention will still not be resolved. However, the latter leads to the reasonable conclusion that the Commission's intention when not including a provision on the choice of a third-state court was to give an incentive to non-Member States to ratify the Hague Convention when and if the EU ratifies it. The authors of this article have not examined the problem of the effect of the agreements conferring jurisdiction to third-state courts in more detail, since the Recast has not addressed it, but consider this to be an important topic for further discussion.

2. Relationship of the Recast with the Hague Choice of Court Agreements Convention

An important source of reference for the newly introduced changes in the rules on prorogation was the 2005 Hague Convention on Choice of Court Agreements.²⁵ Originally a part of an idea of a broad jurisdictional convention, the Convention on Choice of Court Agreements was adopted by the Hague Conference on Private International Law to ensure that choice-of-court agreements are enforced and that decisions of such chosen courts are recognised and enforced in the Contracting States.²⁶ Although only two ratifications are

(2009/2140(INI)), 29.6.2010, para 14. Discussion on English case law on this matter is available in J Goodwin, "Reflexive Effect and the Brussels I Regulation" (2013) 129 *Law Quarterly Review* 317.

²¹ Proposal, *supra* n 5, para 3.1.3, Kohler, *supra* n 13, 201.

²² Kohler, *supra* n 13, 202.

²³ *Ibid.* The Hague Convention is, as opposed to the Regulation, limited to exclusive choice-of-court agreements, and additionally, several matters that are within the scope of application of the Regulation are explicitly excluded from the scope of application of the Convention, eg carriage of passengers and goods.

²⁴ *Ibid.*

²⁵ The full text of the Hague Convention on Choice of Court Agreements is published in (2006) 2 *Journal of Private International Law* 270.

²⁶ For more information on the Convention, see A Schulz, "The Hague Convention of 30 June 2005 on Choice of Court Agreements" (2006) 2 *Journal of Private International Law* 243, 243–48; P Beaumont, "Hague Choice of Court Agreements Convention 2005: Background, Negotiations, Analysis and Current Status" (2009) 5 *Journal of Private International Law* 125, 127–34; P Bříza, "Choice-of-Court Agreements: Could the Hague Choice of Court Agreements Convention and the Reform of the Brussels I Regulation be the Way Out of the Gasser–Owusu Disillusion?" (2009) 5 *Journal of Private International Law* 554.

necessary for the entry into force,²⁷ the Convention is not yet in force, since to date only Mexico has ratified the Convention. The EU has signed²⁸ and is considering ratifying the Convention.²⁹ At this point, since both the EU and the US have signed the Choice of Court Convention it is safe to assume that the ratification of the Convention by any one of the two would induce a chain reaction in the accession of other states.³⁰

According to Article 26 of the Choice of Court Convention, the Convention will take precedence over the Brussels I Regulation if there is an actual incompatibility between them, ie if they lead to different results,³¹ but excluding the situations when the parties reside exclusively within EU Member States.³² The two cases of possible incompatibility identified by the Explanatory Report were the *lis pendens* rules and the insurance rules.³³ Since the “Hague Convention and the Brussels I Regulation have common aims: both strive for promoting international trade and investment by unifying the rules for jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters”,³⁴ it is not surprising that many have advocated alignment of the Regulation’s provisions with the solutions set by the Convention. The Heidelberg Report suggested that “regardless of whether the EC accedes to the Convention, its rules could be considered as a possible source for a comparison”³⁵ for the rules of the Brussels I Regulation on choice-of-court agreements. Finally, all of the solutions adopted by the Recast for choice-of-court agreements are compatible with the Hague Convention on Choice of Court Agreements, and according to the Commission’s Proposal thereby facilitate the ratification of the Convention by the EU.³⁶

3. Transitional Provisions in the Recast

The final version of the Brussels I Regulation Recast was published in the Official Journal on 20 December 2012 (OJ L351/1). According to Article 81, the Recast will apply from 10 January 2015. In the case of choice-of-court agree-

²⁷ The Hague Convention on Choice of Court Agreements, *supra* n 25, Art 31.

²⁸ Council Decision of 26 February 2009 on the signing on behalf of the European Community of the Convention on Choice of Court Agreements (2009/7397/EC), 29.5.2009.

²⁹ Study to Inform an Impact Assessment on the Ratification of the Hague Convention on Choice of Court Agreements by the European Community, http://ec.europa.eu/justice/civil/files/ia_choice_courts_agreement_en.pdf (accessed 29 March 2013), 95.

³⁰ Similarly Briza, *supra* n 26.

³¹ T Hartley and M Dogauchi, “Explanatory Report on the 2005 Hague Choice of Court Agreements Convention” (HCCH Publications 2007) (“Hartley/Dogauchi Report”), www.hcch.net/upload/expl37e.pdf (accessed 1 December 2012), para 267.

³² The Hague Convention on Choice of Court Agreements, *supra* n 25, Art 26.

³³ Hartley/Dogauchi Report, *supra* n 31, para 267.

³⁴ *Supra* n 29, 96.

³⁵ Heidelberg Report, *supra* n 4, para 390.

³⁶ Proposal, *supra* n 5, para 3.1.3.

ments, the rules of the Recast will, under certain circumstances, be applied even to those agreements that were concluded before the Recast enters into force. As established in *Sanicentral GmbH v René Collin*, a prorogation clause should be assessed according to the rules that are in force at the time of institution of the proceedings.³⁷ The Recast rules will, consequently, be applicable to a choice-of-court agreement concluded before the Recast entered into force and became applicable, if the judicial proceedings based on that agreement commence after the date when the Recast starts applying, ie after 10 January 2015.³⁸ The amended rules are, thus, at this point especially important when it comes to choice-of-court agreements, since it is possible that the Recast rules will apply to agreements made at this or at an earlier point in time.

C. DOMICILE OF THE PARTIES TO A CHOICE-OF-COURT AGREEMENT

According to the wording of the pre-recast Brussels I Regulation, at least one of the parties has to be domiciled in a Member State for the application of the rules in Article 23 on a choice-of-court agreement, apart from those in Article 23(3) discussed below. If none of the parties is domiciled in a Member State, the designated court will apply its own national rules to determine whether it has jurisdiction based on that choice-of-court agreement. It is irrelevant whether it is the plaintiff or the defendant who is domiciled in the Member State.³⁹ This follows from the nature of the situation in which it would be impossible to know at the time of the conclusion of the contract which procedural roles the parties will have in the future. That differs from the general rule on the scope of application *ratione personae* set out in Article 4 of the Regulation, under which the rules of the Regulation will only be applicable when the defendant is domiciled in a Member State.⁴⁰ For defendants domiciled in third states, the national rules of the court will be applied. Notwithstanding the fact that the general personal scope of application rule differs slightly from the rule for the scope of application of the choice-of-court rule, they are both consist-

³⁷ The court reasoned that “a choice has no legal effect for so long as no judicial proceedings have been commenced and only becomes of consequence at the date when judicial proceedings are set in motion”: Case 25/79 *Sanicentral GmbH v René Collin* [1979] ECR 03423, para 6.

³⁸ This solution might lead to frustrating results, for example, when the agreement was valid under the rules at the time it was concluded, but is not valid at the time of the proceedings because of the changed rules. D Babić, “Prorogacija međunarodne nadležnosti u europskom pravu” [June 2006] *Hrvatska pravna revija* 74, 75.

³⁹ H Gaudemet-Tallon, *Les Conventions de Bruxelles et de Lugano* (LGDJ, 1993), 72; J Kropholler, *Europaisches Zivilprozessrecht* (Recht und Wirtschaft, 2002), 273, I Queirolo, “Prorogation of Jurisdiction in the Proposal for a Recast of the Brussels I Regulation” in Pocar *et al*, *supra* n 13, 183, 187.

⁴⁰ With the exclusion of the provisions that refer to the choice-of-court agreements pursuant to Art 23 and exclusive jurisdiction pursuant to Art 22.

ent with the main idea that it is necessary to apply national rules over parties domiciled in third states under certain circumstances.

Under the pre-recast wording of the Regulation Article 23(3), a choice of an EU Member State court made by non-residents of the EU will derogate from the jurisdiction of all other Member States' courts. Such a choice-of-court agreement will have a derogative effect if it is formally valid under the rules of the Regulation.⁴¹ Thus, although the prorogative effect will be determined in accordance with the national rules of the designated court, the derogative effect is determined in accordance with the rules of the Regulation.

The rejection of the expansion of the scope of application of the entire Regulation over non-EU defendants did not influence the abandonment of the domicile requirement when it comes to choice-of-court agreements. Thus, under the Recast two non-EU residents can choose a Member State court and if that choice is valid under the rules set by the Regulation, the chosen court will have jurisdiction over their dispute. This change was never controversial as its main purpose is to respect the parties' will. This constitutes a small step forward in the application of the Regulation rules over non-EU defendants. However, even though the rules of the Regulation will apply when the choice-of-court agreement is valid under its rules, that might not be the case if the choice-of-court agreement does not comply with the rules of the recast, eg with its rules on formal validity. If an agreement is not valid under the Brussels I Regulation and is valid under the national law, national courts will still have jurisdiction based on their national rules.⁴²

D. VALIDITY AND SEVERABILITY OF CHOICE-OF-COURT AGREEMENTS

1. Substantive Validity of the Choice-of-Court Agreements

Formal validity of choice-of-court agreements is clearly governed exclusively by the Brussels I Regulation and before that the Convention. It was confirmed in 1981 in *Elefanten Schuh* that the Convention "intended to lay down itself the formal requirements which agreements conferring jurisdiction must meet",⁴³ which rendered any additional formal requirements stemming from national law inapplicable. Which rules govern the substantive validity of a choice-of-court agreement, on the other hand, was an issue that was never so clear. The problem in determining which law will govern the substantive validity has two

⁴¹ Schlosser, *supra* n 14, para 177.

⁴² T Hartley, "Choice-of-Court Agreements and the New Brussels I Regulation" (2013) 129 *Law Quarterly Review* 316.

⁴³ Case 150/80 *Elefanten Schuh GmbH v Pierre Jacqmain* [1981] ECR 01671, para 25.

sides: (i) the extent of application of national law; and (ii) which national law should be applied.⁴⁴

From the very early stage of application of the Brussels Convention, the CJEU's case law has favoured the autonomous application of Article 17 (later Article 23 of Brussels I) without reference to national law as to formation of consent, and consequently inferred that there was no scope for its application to the substantive validity of the choice-of-court clauses.⁴⁵ In *Estasis Salotti v Rüwa*, the CJEU states that "[t]he purpose of the formal requirements imposed by Article 17 is to ensure that the consensus between the parties is in fact established".⁴⁶ The prescription of formal requirements in the Regulation is therefore aimed both at establishing and proving the parties' consent. Later case law only confirmed that stance,⁴⁷ but the national courts still resort to application of national rules when the formation of consent is in question.⁴⁸ According to the Heidelberg Report,

"[t]his result is probably owed to the circumstance that the Regulation, on one hand, intends to harmonise the requirements for a valid choice of form agreement but, on the other hand, tries to respect the Member State law on the conclusion of contracts."⁴⁹

Basic concerns emphasised in doctrine are situations of duress, misrepresentation, fraud, mistake, etc, which certainly may influence the parties' agreement and the formation of consent and are not tackled within the formal require-

⁴⁴ Heidelberg Report, *supra* n 4, paras 375–78.

⁴⁵ Babić, *supra* n 38, 80; U Magnus, "Prorogation of Jurisdiction" in U Magnus and P Mankowski (eds), *Brussels I Regulation* (Sellier, 2007), para 78; L Merrett, "Article 23 of the Brussels I Regulation: A Comprehensive Code for Jurisdiction Agreements?" (2009) 58 *International and Comparative Law Quarterly* 545, 550, 557–59; A Dickinson, "Surveying the Proposed Brussels I bis Regulation: Solid Foundations but Renovation Needed" (2010) 12 *Yearbook of Private International Law* 247, 284, 300; PR Beaumont and PR McEleavy, *Anton's Private International Law* (W Green, 3rd edn, 2011), 8.106.

⁴⁶ Case 24-76 *Estasis Salotti di Colzani Aimo e Gianmario Colzani snc v Rüwa Polstereimaschinen GmbH* [1976] ECR 01831, para 7.

⁴⁷ Case 25-76 *Galeries Segoura SPRL v Société Rahim Bonakdarian* [1976] ECR 01851, para 6; *Elefanten Shuh*, *supra* n 43, para 25; Case 201/82 *Gerling Konzern Spezial Kreditversicherungs-AG and others v Amministrazione del Tesoro dello Stato* [1983] ECR 02503, para 13; Case 71/83 *Partenreederei ms Tilly Russ and Ernest Russ v NV Haven- & Vervoerbedrijf Nova and NV Goeminne Hout* [1984] ECR 02417, para 14; Case 221/84 *F Berghoefer GmbH & Co KG v ASA SA* [1985] ECR 02699, para 13; Case 313/85 *SpA Iveco Fiat v Van Hool NV* [1986] ECR 03337, para 5; *Coreck*, *supra* n 15, para 13; Case C-106/95 *Mainschiffahrts-GenossenschaftG (MSG) v Les GravièresRhénanes SARL* [1997] ECR I-00911, para 15; Case C-159/97 *Trasporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA* [1999] ECR I-01597, paras 34, 49, 51.

⁴⁸ Heidelberg Report, *supra* n 4, para 376. See *infra* nn 61–65 and accompanying text. In Study JLS/C4/2005/03 "Compilation of All National Reports, Questionnaire No 3: Legal Problem Analysis", http://ec.europa.eu/civiljustice/news/docs/study_bxl1_compilation_quest_3_en.pdf (accessed 12 March 2012), 388–95 it is seen that some states only referred to the CJEU's case law (Belgium, Czech Republic, the United Kingdom to some extent, and Portugal in which the question never arose so the CJEU's case law and Art 23 were sufficient).

⁴⁹ Heidelberg Report, *supra* n 4, para 376.

ments of Article 23. The CJEU's interpretation of consent is driven by facilitation of the judicial task to estimate the prorogation clause's validity as well as by respect for the autonomy of the parties, which still cannot solve the mentioned issues since they are not regulated on the EU level – either in the Brussels I Regulation or in any other piece of legislation. The notion of consent, as interpreted by the CJEU, has an autonomous meaning which includes only the prima facie evidence of consensus that will suffice if none of the parties alleges any of the above-mentioned concerns. Therefore, a number of authors have suggested that one should resort to national law to solve such issues if they are invoked during the proceedings.⁵⁰

Some authors reject the idea of application of national law and suggest that the solution lies in the principle of good faith relying on the vice versa application of the principle as established in *Berghofer*⁵¹ in which, as Merrett states, it was concluded that “it was bad faith to rely on the formality requirements to deny the agreement”.⁵² According to Merrett, the principle should be developed autonomously in the EU, although this is only implied, through the CJEU's case law which would resemble the effect of the English notion of mistake in contracts.⁵³ The principle would then govern the validity of prorogation clauses through invoking bad faith when a jurisdiction agreement concluded in troubled circumstances is relied upon which would lead to its invalidity.⁵⁴ This would avoid the application of national law and would be dealt with by a commonly accepted principle of good faith in the EU. Keeping everything on the EU level seems like a good path to take, but it is unlikely that agreement on such a principle could be reached by all the Member States.⁵⁵ Even Merrett admits that *bona fides* is differently construed and applied in common law and continental law jurisdictions.⁵⁶ A solution based on general principles can also be found in German writings that advocate application of the abuse-of-rights doctrine as employed in the operation of general terms of trade.⁵⁷ Beaumont and McEleavy suggest that “Union law could in theory be a better solution to the question of validity than reference to national law.”⁵⁸ However, the authors

⁵⁰ Eg Z Tang, “The Interrelationship of European Jurisdiction and Choice of Law in Contract” (2008) 4 *Journal of Private International Law* 35, 46; JJ Kuipers, “Party Autonomy in the Brussels I Regulation and Rome I Regulation and the European Court of Justice” (2009) 10 *German Law Journal* 1505, 1512.

⁵¹ Case 221/84 *Berghofer GmbH & Co v ASA SA* [1985] ECR 2699.

⁵² Merret, *supra* n 45, 560, Lord Collins of Mapesbury, A Briggs, A Dickinson, J Harris *et al*, *Dicey, Morris & Collins on the Conflict of Laws* (Sweet & Maxwell, 15th edn, 2012), para 12-130.

⁵³ Merret, *supra* n 45, 558.

⁵⁴ *Ibid*, 558–60.

⁵⁵ Beaumont and McEleavy, *supra* n 45, 8.108. See also Tang, *supra* n 50, 46.

⁵⁶ Merrett, *supra* n 45, 559.

⁵⁷ J Kropholler, *Europäisches Zivilprozessrecht* (Mohr Siebeck, 7th edn, 2002), 311; P Schlosser, *EU-Zivilprozessrecht* (CH Beck, 2nd edn, 2003), 167; S Kröll, “Gerichtsstandsvereinbarungen aufgrund Handelsbrauchs im Rahmen des GvU” [2000] *Zeitschrift für Zivilprozess* 149 *et seq* referred to by Babić, *supra* n 38, 80.

⁵⁸ Beaumont and McEleavy, *supra* n 45, 8.108.

correctly point out that the CJEU has not developed an autonomous meaning of substantive validity in 30 years of case law and that there is no political will in the Council to harmonise European contract law.⁵⁹

The Heidelberg Report mentions three solutions regarding the issue of substantive validity: inclusion of a conflict-of-laws rule mirroring the one from the Hague Choice of Court Convention; harmonisation of the question of validity of choice-of-court agreements in the future Common Frame of Reference of EU law; or a combination of both.⁶⁰ The EU legislator opted for the first version, which, unfortunately, does not straightforwardly solve the issue of formation of consent between the parties and the scope of application of national law in that area.⁶¹

The introduction of the conflict-of-laws rule confirms the standpoint of those authors who claimed that the requirements of Article 23 of Brussels I are not self-sufficient with respect to substantive validity. With the new choice-of-law rule, the logical interpretation of the new provision on choice-of-court agreements (Article 25 of the recast) divides validity of choice-of-court agreements into three parts: formal validity in its usual sense; validity as to *prima facie* consent (referred to as formal consent⁶²); and substantive validity which excludes formal consent, but includes, for example, flaws in the creation of consent and capacity to enter into the contract. Formal validity and the formal part of the consent are dealt with on the EU level, ie by formal requirements solely under the new Article 25. Other issues involving consensus, as well as the residue of substantive validity, would be governed by application of national law to which the conflict-of-laws rule refers. Therefore, the pro-unification and pro-choice-of-court standpoint of the EU is preserved since formal requirements will most probably reflect the real consensus of the parties.

Besides determining the extent of application of national law under the pre-recast text of the Brussels I Regulation, the problem lies in determining which national law is applicable to the substantive validity of choice-of-court

⁵⁹ *Ibid.* For a similar discussion on benefits of choice-of-law rule versus a substantive one on validity with regard to the Hague Convention on Choice of Court Agreements, see L Usunier, “La Convention de La Haye du 30 juin 2005 sur les accords d’élection de for, Beaucoup de bruit pour rien?” (2010) 99 *Revue critique de droit international privé* 37, 61–62.

⁶⁰ Heidelberg Report, *supra* n 4, para 378. For a further discussion on the options presented in the Heidelberg Report, see Beaumont and McEleavy, *supra* n 45, 8.103–8.111.

⁶¹ Dickinson strongly opposes the introduction of the new conflict-of-laws rule stating that it is unnecessary and will endanger legal certainty since it contravenes established CJEU case law. See A Dickinson, “The Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)”, [www.europarl.europa.eu/RegData/etudes/note/juri/2011/453200/IPOL-JURI_NT\(2011\)453200\(PAR00\)_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/juri/2011/453200/IPOL-JURI_NT(2011)453200(PAR00)_EN.pdf) (accessed 12 March 2013), 21.

⁶² SP Camilleri, “Article 23: Formal Validity, Material Validity or Both?” (2011) 7 *Journal of Private International Law* 297, 301–02. The author makes a differentiation between the formal and material consent, where the formal one deals only with the question of awareness of the incorporation of the clause into the main agreement.

agreements. Namely, there are some inconsistencies in the national case law⁶³ since some Member States apply the *lex fori*,⁶⁴ whereas others apply the *lex causae*⁶⁵ to validity of prorogation agreements in addition to the requirements set out in Article 23.⁶⁶ In some Member States there is no practice and no clear answer in the literature on that question.⁶⁷ This could lead to a choice-of-court agreement being valid in one Member State but not in another due to the applicability of either of the two approaches according to the forum's private international law.⁶⁸ A choice-of-court agreement's validity being dependent on the seised forum's conflict of laws is therefore avoided by the inclusion of the uniform conflict-of-laws rule.

The EU legislator decided to apply the law of *forum prorogatum* to the issue of substantive validity, including its private international law rules.⁶⁹ Under the new Article 25 the chosen court "shall have jurisdiction, unless the agreement is null and void⁷⁰ as to its substantive validity under the law of that Member State".⁷¹ The policy reason behind choosing the law of the chosen court is alignment with the Hague Choice of Court Agreements Convention of 2005.⁷² The wording in the two instruments is almost⁷³ the same and this solution

⁶³ Heidelberg Report, *supra* n 4, 377.

⁶⁴ Cyprus, Greece, Ireland as well as Finland which applies either *lex fori* or *lex causae*. See Compilation of All National Reports, *supra* n 48.

⁶⁵ Austria, Estonia, Germany, Hungary, Latvia, Luxemburg, Malta, the Netherlands, Poland, Slovakia and Spain. *Ibid.*

⁶⁶ Heidelberg Report, *supra* n 4, para 377.

⁶⁷ Germany to some extent, Italy, Slovenia. Compilation of All National Reports, *supra* n 48.

⁶⁸ Heidelberg Report, *supra* n 4, para 377; Commission, "Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters" COM(2009) 174 final, ch 3.3.

⁶⁹ Already when discussing the possible sufficiency of Art 17 of the Brussels Convention requirements in *Elefanten Schuh*, AG Sir Gordon Slynn argued for application of the chosen courts' law on residual issues. Slynn rightly submits that applying *lex fori* of whichever court is seised leads to non-uniformity as well as, in some instances, application of law that is not connected to the dispute: see Case 150/80 *Elefanten Schuh GmbH v Pierre Jacqmain*, Opinion of AG Sir Gordon Slynn [1981] ECR- 01671, 1697–99. Beaumont and McEleavy, *supra* n 45, 8.110 state that application of *lex fori* could lead to forum shopping.

⁷⁰ Dickinson, *supra* n 45, 301 states that declaring the formulation "null and void" is very "unsatisfactory for common law lawyers to whom vitiating factors such as fraud or duress may render a contract voidable not void". It seems that a better formulation would be simply "invalid".

⁷¹ There is no difference in the effects of the Commission's Proposal ("unless the agreement is null and void as to its substance under the law of that Member State") and the Parliament's amendment ("unless the agreement is null and void as to its substantive validity under the law of that Member State").

⁷² Art 5(1) states that: "The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State."

⁷³ The Recast Regulation refers specifically to substantive validity ("null and void as to its substantive validity under the law of that Member State").

works toward the aim of facilitating the “possible conclusion of this Convention by the European Union”.⁷⁴

Another possible solution was to opt for the *lex causae* as the law applicable to substantive validity. Some argue that in that case the consistency of the whole transaction would be upheld since it would not “divorce the validity of the choice of court agreement from the overall validity of the contract”⁷⁵ as the chosen approach does. Application of two different laws to two different contracts that are closely connected could hinder the operation of the economic transaction they serve by making one contract valid and the other invalid. Nevertheless, one has to keep in mind that the two contracts are severable which makes the existence of one contract independent from the other.⁷⁶

According to Recital 20 of the Preamble to the Recast Regulation the reference to the chosen court’s law includes its choice-of-law rules as well. In addition, the Explanatory Memorandum of the Proposal⁷⁷ states that this change accords to the Hague Choice of Court Agreements Convention of 2005, which also refers to the private international law of the chosen court’s state and not only its substantive rules.⁷⁸ Therefore, it is clear that inclusion of *renvoi* within the new Article 25 is intended and the question whether the jurisdiction agreement is null and void is therefore to be ascertained under the substantive law to which the conflict-of-laws rules of the Member State of the chosen court refer. Therefore, before some chosen courts the internal law will be applied to the validity of the prorogation agreements, while others will apply the *lex causae* to the same issue.

Some authors are not keen to accept *renvoi* in the determination of the validity of jurisdiction agreements,⁷⁹ arguing that it is in accordance with the principles of contractual relations, especially when governed by party autonomy, to exclude *renvoi* from the operation of private international law rules,⁸⁰

⁷⁴ Proposal, *supra* n 5, ch 3.1.3.

⁷⁵ A Layton, “The Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)”, www.europarl.europa.eu/committees/de/JURI/studiesdownload.html?languageDocument=EN&file=49443 (accessed 12 March 2013), 15.

⁷⁶ If *lex causae* is applied, it could lead to a prorogation agreement’s invalidity based on grounds stemming from the main contract, contrary to the principle of severability. See Beaumont and McEleavy, *supra* n 45, 8.110.

⁷⁷ Proposal, *supra* n 5, ch 3.1.3: “Both modifications [*lis pendens* rule and substantive validity rule] reflect the solutions established in the 2005 Hague Convention on Choice of Court Agreements, thereby facilitating a possible conclusion of this Convention by the European Union.”

⁷⁸ Hartley/Dogauchi Report, *supra* n 31, para 125.

⁷⁹ B Hess, “The Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)”, [www.europarl.europa.eu/RegData/etudes/note/juri/2011/453201/IPOL-JURI_NT\(2011\)453201\(PAR00\)_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/juri/2011/453201/IPOL-JURI_NT(2011)453201(PAR00)_EN.pdf) (accessed 12 March 2013), 14.

⁸⁰ P Nygh, *Autonomy in International Contracts* (Clarendon Press, 1999), 83–84; Queirolo, *supra* n 39, 190–91.

as was done by the Rome I⁸¹ and Rome II⁸² Regulations. However, in some cases it would not be reasonable to apply the chosen court's substantive law on, for example, capacity to enter a prorogation agreement since often the main reason for the choice is neutrality of the forum, meaning that the parties have no or only tenuous connections with the forum state. Similarly, when the only reason for the choice is the experience and promptness of the court and the connections between the parties and the chosen forum are weak, it is also advisable to apply the private international law of the chosen forum to determine the capacity to enter into a prorogation agreement. For those limited cases application of *renvoi* is justifiable since it will lead to the application of a closely connected law to the issue. The same can be said for the situation where the parties have made a choice of law that differs from the law usually applied before the chosen court – *renvoi* to the chosen law should be applied in order to respect party autonomy.⁸³ Therefore, it was submitted by Beaumont and McEleavy that *renvoi* is to be applied in case of choice of law, ie when there is a subjective connecting factor, and should not extend to the objectively applicable law of another country.⁸⁴ In addition, in cases of duress or fraud, it is not clear how *renvoi* can help in solving the issue of the substantive validity of the prorogation clause. It can surely complicate the judicial task,⁸⁵ especially in common law countries where the parties will probably have to submit evidence on the foreign law's standpoint on *renvoi* and not only on its private international law rules as in civil law countries.

Notwithstanding that there is no doubt that legal certainty is enhanced to some extent by the new choice-of-law rule requiring every national court in the EU to apply the same applicable law to substantive validity of the same agreement, legal certainty and uniformity will still not be absolutely ensured since the private international law rule for substantive validity varies from Member State to Member State.⁸⁶ The capacity of a natural person to enter into a contract and choice-of-court agreements are left out of the scope of the Rome I Regulation,⁸⁷ which means that each Member State is allowed to apply its own rules for that issue.⁸⁸

⁸¹ Regulation 593/2008 EC on the law applicable to contractual obligations [2008] OJ L177/6, Art 20.

⁸² Regulation 864/2007 EC on the law applicable to non-contractual obligations [2007] OJ L199/40, Art 24.

⁸³ Beaumont and McEleavy, *supra* n 45, 8.111.

⁸⁴ *Ibid.*

⁸⁵ Uisnier, *supra* n 59, 64–65 discusses the same difficulty with respect to the Hague Convention.

⁸⁶ Queirolo, *supra* n 39, 191.

⁸⁷ Art 1(2)(a) and (e).

⁸⁸ Therefore, it was suggested that such a rule is included into the Rome I Regulation. See Camilleri, *supra* n 62, 317–18. However, even the Report on the Rome Convention that preceded the Rome I Regulation stated that “each court is obliged to determine the validity of the agreement on the choice of court in relation to its own law, not in relation to the law chosen. Given the nature of these provisions and their fundamental diversity, no rule of conflict can lead to a

Inclusion of *renvoi* allowed Member States to retain their policy in determining the capacity of persons to enter into the agreement as well as other concerns of substantive validity. It remains to be seen how *renvoi* will be applied and whether it will slow the judicial process and thereby endanger the effectiveness of choice-of-court agreements.

2. Severability of Choice-of-Court Agreements

The Brussels I Regulation Recast includes a new provision referring to the severability of choice-of-court agreements.⁸⁹ Neither the Brussels Convention nor the Brussels I Regulation contains a similar provision. Nonetheless, severability of choice-of-court agreements was, even before the explicit wording in the Recast, established by the CJEU case law.⁹⁰ In *Benincasa v Dentalkit*⁹¹ the Court found that a void provision of the contract does not render the choice-of-court clause void as well.

The second sentence of Article 25(5) of the Brussels I Regulation Recast follows what has been established by the case law and is exactly the same as provision on severability found in Article 3(d) of the Hague Convention on Choice of Court Agreements. The Recast provides that “the validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid”.⁹² The wording might raise some questions on the intended scope of severability of the prorogation agreements: by mentioning only the validity of the agreement, an issue on whether the problems in determining the existence of the main contract influences the existence of the choice-of-court agreement might be raised in the application of the provision.

This question is inevitably tied to the issue tackled in the previous subsection; however, it does differ from the above discussion in some respects. To answer the question of whether the existence of the choice-of-court agreement falls within the definition of validity according to the Regulation, and consequently provides that the existence of the main contract and the existence of the choice-of-court agreement should be examined separately, two points have to be addressed. Firstly, one has to define formal validity and substantive validity within the meaning of the Brussels I Regulation. As already discussed above in Section D.1, the validity of choice-of-court agreements can be understood

uniform solution.” M Giuliano and P Lagarde, “Report on the Convention on the Law Applicable to Contractual Obligations” [1980] OJ C282/1, 11.

⁸⁹ Art 25(5) states that an agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.

⁹⁰ Case C-214/89, *Powell Duffryn plc v Wolfgang Petereit* [1992] ECR I-01745; Case C-269/95, *Francesco Benincasa v Dentalkit Srl* [1997] ECR I-03767; Case C-159/97 *Trasporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA* [1999] ECR I-01597.

⁹¹ *Francesco Benincasa v Dentalkit Srl*, *supra* n 90, paras 24–29. See also *Trasporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA*, *supra* n 90, paras 34, 49, 51.

⁹² Art 35(3) of the Brussels I Regulation, *supra* n 3.

as a three part test: formal validity, formal consent and substantive validity. The first two are dealt with by the Brussels I Regulation autonomously; while substantive validity is, according to the conflict-of-laws rule, provided by the Regulation, governed by the law of the chosen forum.

The second question that follows from the above conclusion is whether existence of the contract falls within the scope of formal validity, substantive validity, or neither of these. If existence is a part of formal or substantive validity, the wording of the severability clause provides a basis to decide the existence of the main contract and the prorogation clause separately, since it mentions explicitly only the validity of the contract. If the existence, on the other hand, does not fall within the definition of either formal or substantive validity, an issue of whether there is a ground to decide on the existence of the two otherwise separate contracts together might occur in practice.

As has already been pointed out by other authors “the existence of the parties’ choice is far more complicated than it appears”.⁹³ It has been argued that existence of the choice-of-forum clause should not be equated with the validity of the choice or its formal validity.⁹⁴ In the comments and discussion on the same issue regarding the Hague Convention on Choice of Court Agreements, which, as already mentioned, has the same wording on severability as the Regulation, scholars have taken three different approaches. The first approach considers the existence of choice-of-court agreements as an issue that does not fall within the scope of either formal or substantive validity.⁹⁵ A different view is, however, expressed by the explanatory report, which seems to equate the existence of the contract with the consent of the parties, ie the substantive validity which is governed by the law of the chosen court.⁹⁶ Under the third approach, the existence of the choice-of-court agreement is covered by the formal validity of the contract, precisely because the idea of the drafters of the Convention was to have strict rules provided by the Convention that would not allow flexibility in the courts’ decisions on the existence of choice-of-court agreements that fall within the scope of the Convention.⁹⁷

Without further exploring the issue in general or in the context of the Hague Convention on Choice of Court Agreements, the latter view on the question of existence and formal validity is the most appropriate one when applying the Brussels I Regulation. Finally, a similar understanding was provided by the CJEU in *Gasser v MISAT*, although not in the context of severability of the choice-of-court agreement, and not as explicitly as might be wished. In *Gasser*

⁹³ Tang, *supra* n 50, 41.

⁹⁴ *Ibid*, 41, 42.

⁹⁵ RA Brand and PM Herrup, *The 2005 Hague Convention on the Choice of Court Agreements: Commentary and Documents* (Cambridge University Press, 2008), 79.

⁹⁶ Hartley/Dougauchi Report, *supra* n 31, para 94.

⁹⁷ Beaumont, *supra* n 26, 138.

the Court found that the existence of the choice-of-court agreement should be determined in accordance with the rules set by the Regulation.⁹⁸

Thus the newly introduced provision on the severability of choice-of-court agreements under the Brussels I Regulation Recast should be understood to mean that the courts should examine the existence, formal validity and substantive validity of the choice-of-court agreements independently from the existence, formal validity and substantive validity of the main contract.

E. THE CHOSEN COURT AND THE *LIS PENDENS* RULE

The *lis pendens* rule contained in Article 27 of the pre-recast Brussels I Regulation⁹⁹ is a successful mechanism for reducing parallel litigation in the EU.¹⁰⁰ It basically functions as a first-come, first-served rule, meaning that the court second seised must stay proceedings until the court first seised decides on its jurisdiction.

In a well-known and widely criticised CJEU judgment, *Gasser v MISAT*,¹⁰¹ the Court applied the *lis pendens* rule very strictly. The case concerned a choice-of-court agreement in favour of Austrian courts, but MISAT started the proceedings before an Italian court in disregard of the parties' agreement. What was so surprising about *Gasser* is that the CJEU gave no preference to the chosen court, but applied Article 27 literally,¹⁰² demanding the Austrian court stay its proceedings. The CJEU did not accept Attorney General Léger's suggestion to treat choice-of-court agreements as an exception to the rule contained in it.¹⁰³ Apart from creating legal uncertainty about the place of litigation, as well as additional costs for the parties,¹⁰⁴ this ruling led to even bigger problems (subsequently called the "Italian torpedo"¹⁰⁵) since it often takes an unacceptably long time for an Italian court to decide on its jurisdiction. This

⁹⁸ Case C-116/02 *Erich Gasser GmbH v MISAT Srl* [2003] ECR I-14693, paras 51, 53.

⁹⁹ Article 27: "1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established. 2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court."

¹⁰⁰ TC Hartley, *International Commercial Litigation* (Cambridge University Press, 2009), ch 10, para 1.4.

¹⁰¹ *Gasser*, *supra* n 96.

¹⁰² *Ibid*, para 54.

¹⁰³ Case C-116/02 *Erich Gasser GmbH v MISAT Srl* [2003] ECR I-14693, Opinion of AG Léger, para 83.

¹⁰⁴ J Mance, "Exclusive Jurisdiction Agreements and European Ideals" (2004) 120 *Law Quarterly Review* 357, 362; A Dodd, "European Court Ruling Promotes Delaying Tactics" (2004) 39 *European Lawyer* 16, 16.

¹⁰⁵ For development of the notion, see A Nuyts, "Enforcement of Jurisdiction Agreements Further to *Gasser*" in P de Vareilles-Sommières (ed), *Forum Shopping in the European Judicial Area* (Hart Publishing, 2007), 56.

problem was also addressed by the national court that sent the preliminary questions but only resulted in the CJEU's reminder on the importance of mutual trust between Member States.¹⁰⁶ The result of the decision, according to some authors, was a future preference for arbitration over litigation in the European Judicial Area.¹⁰⁷

The *Gasser* judgment raised many concerns since it is thought to support bad faith litigation and delaying tactics.¹⁰⁸ According to some authors, the existing regime weakens the exclusivity of a prorogation agreement as a jurisdictional basis since no preference is given to it in the case of parallel adjudication.¹⁰⁹ The changes to the Brussels I Regulation are driven by all these objections.¹¹⁰ The Commission's Proposal introduced two major changes: derogative effect of the exclusive choice-of-court agreements¹¹¹ and a time frame of six months in which the court first seised should decide on its jurisdiction.¹¹² The Commission's Proposal had the same *lis pendens* rule – a derogative one – for exclusive jurisdiction under Article 22 of the Brussels I Regulation and for exclusive choice-of-court agreements. The adopted regime differs both from the exclusive jurisdiction *lis pendens* rule, which still derogates jurisdiction of all courts apart from those in Article 22 (new Article 24), and from the non-exclusive jurisdictional bases for which the traditional first-come, first-served rule still applies. According to the final version contained in the Recast, “any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement”.¹¹³ This solution softens the derogative effect of the jurisdiction agreement and circumvents the need to seek a declaration of invalidity before seising a non-chosen court.

¹⁰⁶ *Gasser*, *supra* n 98, para 72; Opinion of AG Léger, *supra* n 103, para 89.

¹⁰⁷ Mance, *supra* n 104, 358; Dodd, *supra* n 104, 17; I Nurmela, “Sanctity of Dispute Resolution Clauses: Strategic Coherence of the Brussels System” (2005) 1 *Journal of Private International Law* 115, 146; R Fentiman, “Jurisdiction Agreements and Forum Shopping in Europe” (2006) 7 *Butterworths Journal of International Banking and Financial Law* 304.

¹⁰⁸ See R Fentiman, “Access to Justice and Parallel Proceedings in Europe” (2004) 63 *Cambridge Law Journal* 312; Bříza, *supra* n 26.

¹⁰⁹ Nurmela, *supra* n 107, 134; JJ Forner Delaygua, “Choice of Court Clauses: Two Recent Developments” (2004) 15 *International Company and Commercial Law Review* 288, 292.

¹¹⁰ Commission Report, *supra* n 68, ch 3.3; Green Paper, *supra* n 9, ch 3; Heidelberg Report, *supra* n 4, paras 441–57.

¹¹¹ Proposal, *supra* n 5, Art 32(2). Due to the derogative effect of the proposed Article, even in the case of an invalid jurisdiction agreement the party would first have to resort to the chosen court to seek a declaration of invalidity because the courts of other Member States would have no jurisdiction until the court designated in the agreement declined its jurisdiction. See: Green Paper, *supra* n 9, ch 3. This effect could also be interpreted as a mere reversion of the *lis pendens* rule, see Queirolo, *supra* n 39, 194.

¹¹² Proposal, *supra* n 5, Art 29(1).

¹¹³ European Parliament, “Report on the Proposal for a regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)” COM(2010) 748–C7-0433/2010–COD (2010) 383, Art 32(2).

It should be remarked that the change only refers to exclusive choice-of-court agreements; non-exclusive ones will still be subject to the old regime. The difficult task of evaluating the exclusivity of prorogation agreements is alleviated by the Brussels I Regulation itself which prescribes a presumption in favour of exclusivity.¹¹⁴ The courts will still sometimes have to engage in the task of deciding whether the intended prorogation was exclusive or not, which could prolong the proceedings. However, making the *lis pendens* rule differ depending on the nature of the prorogation agreements is reasonable since when the parties agree on a non-exclusive prorogation it is not necessary to give absolute priority to the chosen court since the agreement does not oust other courts' jurisdiction.

The new Article infers that if the opposing party only objects to the non-chosen court's jurisdiction, without seising the chosen court, the first may decide on its jurisdiction without staying the procedure. Unfortunately, the other party is compelled to seise the chosen court in order to trigger the application of the new rule. If the opposing party fails to seise the chosen court, the non-chosen court's decision on its jurisdiction is *res judicata* and is susceptible to recognition and enforcement.¹¹⁵ Therefore, there is a risk that the non-chosen court's incorrect positive decision on its own jurisdiction will be binding for the parties and other courts, but the number of such situations will hopefully be small.

Once the chosen court is seised, the non-chosen one has to stay the proceedings and wait for the chosen court's decision. Under Article 31(3), if the chosen court establishes its jurisdiction, every other court that was seised of the same dispute must decline its jurisdiction. In this way, there is no danger of parallel adjudication, the abolition of which is one of the Regulation's main goals.¹¹⁶ Therefore, the parties always have the right to seise the chosen court so that it can decide on its own jurisdiction, but they can waive that right by not seising it and leave the decision to the non-chosen court.

However, the objection of the respondent is crucial since its repercussion is not merely making the non-chosen court aware that there is a prorogation agreement between the parties but also avoiding submission to the non-chosen court. Since the submission to the non-chosen court's jurisdiction under Article 24 (new Article 26) overrides the prorogation agreement,¹¹⁷ the party has to object to the non-chosen court's jurisdiction when entering an appearance before or at the same time as, but not later than, submitting the first defence.¹¹⁸

What is still unresolved is the situation of seising the "chosen" court under

¹¹⁴ Brussels I Regulation, *supra* n 3, Art 23(1).

¹¹⁵ Case C-456/11 *Gothaer Allgemeine Versicherung AG and Others v Samskip GmbH* [2012] ECR 00000, judgment of 15 November 2012, para 32.

¹¹⁶ Recital 15 of the Preamble to the Brussels I Regulation Recast, *supra* n 12.

¹¹⁷ Case 150/80 *Elefanten Schuh GmbH v Pierre Jacqmain* [1981] ECR 01671, paras 10–11; Case 48/84 *Hannelore Spitzley v Sommer Exploitation SA* [1985] ECR 00787, para 27. Even the new *lis pendens* rule confirms it by allowing its application only "without prejudice to Article 26".

¹¹⁸ *Elefanten Schuh*, *supra* n 43, para 16.

sham agreements or invalid ones.¹¹⁹ Since the Recast Brussels I Regulation did not adopt the six-month rule,¹²⁰ the problem known as the Italian torpedo could easily occur again. It is true that the evaluation of the existence of the choice-of-court agreement is “a process which may necessitate delicate and costly investigations”,¹²¹ especially if estimating the formal validity which accords to international usages or practice which is established between the parties.¹²² Some authors even claim that the deadline rule is not an appropriate solution, since not all cases demand the same time frame¹²³ and national procedures vary.¹²⁴ Nevertheless, including the six-month rule for situations of parallel procedures when a choice-of-court agreement exists seems reasonable,¹²⁵ since only its existence would have to be decided in that deadline and Member States have already successfully complied with deadlines in some other procedural aspects imposed by EU law.¹²⁶ Some might say that the timeframe rule is anyway ineffective since there is no sanction for its breach in the Brussels I Regulation. However, the CJEU has already said that even Member State courts can breach EU law,¹²⁷ so the sanction could be provided in infringement proceedings¹²⁸ or in state liability for the breach.¹²⁹ Although not the best solu-

¹¹⁹ Opinion of AG Léger, *supra* n 103, para 74; Bříza, *supra* n 26, 557; D Sancho Villa, “Jurisdiction over Jurisdiction and Choice of Court Agreements: Views on the Hague Convention of 2005 and Implications for the European Regime” (2010) 12 *Yearbook of Private International Law* 399, 404. For the submission that sham agreements should not amount to the stay of the proceedings before the non-chosen court, see Queirolo, *supra* n 39, 195.

¹²⁰ The new Art 29(2) in the Recast Regulation, *supra* n 12, reads: “In cases referred to in paragraph 1, upon request by a court seised of the dispute, any other court seised shall without delay inform the former court of the date when it was seised according to Article 33.”

¹²¹ Gasser, *supra* n 98, para 26.

¹²² Brussels I Regulation, *supra* n 3, Art 23(1)(b) and (c).

¹²³ Bříza, *supra* n 26, 560.

¹²⁴ S Orton, “Jurisdiction Clauses: Why Might You Find Yourself In a Forum Different to That Which You Have Contractually Agreed?” (2007) 10 *Journal of International Banking and Finance Law* 578.

¹²⁵ It was unclear whether the time frame was also supposed to apply to the decision on jurisdiction when there is a prorogation agreement. The wording itself would say that the answer is “no” (the first-come, first-served rule is applied “without prejudice to article 32(2)” excluding choice-of-court agreements from its scope. Art 29(2) providing for the time frame only refers to the courts first seised under Art 29(1)), but looking at the problems that could arise, the answer should be “yes”. If the court seised under invalid or sham agreements was not bound by the six-month rule, the “Italian torpedo” could once again sink parties’ expectations of predictable and appropriate length proceedings.

¹²⁶ E Ivanova, “Choice of Court Clauses and *Lis Pendens* under Brussels I Regulation” (2010) 27 *Merkourios Utrecht Journal for International and European Law* 12, 16 on cross-border exchange of evidence as stated in “Report from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the application of the Council Regulation (EC) 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters”, COM(2007) 0769 final, ch 2.1.

¹²⁷ Case C-224/01 *Gerhard Köbler v Republik Österreich* [2003] ECR I-10239, paras 30–50.

¹²⁸ Treaty on Functioning of the European Union (Lisbon Treaty), Art 258.

¹²⁹ Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Federal Republic of Germany and The Queen v Secretary of State for Transport, ex parte Factortame Ltd and Others* [1996] ECR I-01029, para 32.

tion, primarily due to the Commission's reluctance to start such proceedings, it could be an efficient one since the pressure on Member States and their courts is higher if the infringement procedure or state liability is possible.

What could create a problem with the time frame rule is that the evaluation of the validity should not remain only a *prima facie* one, since the decision on jurisdiction of one Member State court could not contradict the decision of the other, unless some new evidence is produced before the latter. If the chosen court decides that the prorogation agreement is invalid and declines jurisdiction, the court that will have jurisdiction on an objective jurisdictional basis cannot conclude differently. Another problem could occur in some procedural systems of Member States which demand jurisdictional and substantive questions to be evaluated simultaneously,¹³⁰ which could hardly be achieved in only six months. However, it would not be the first time that Member States need to implement additional procedures or alter the existing ones to comply with EU law. The change would only apply to a decision on jurisdiction in choice-of-court agreements when two courts are seised, whereas the existing system could remain in all the other cases.¹³¹ The problem could be solved by giving primacy in the national system to this type of case and using existing procedures that are more expeditious. Prescribing a deadline for a decision on jurisdiction allows for respect of party autonomy, the importance of which is emphasised in the Preamble to the Recast Regulation.¹³² Therefore, the solution as given by the Recast with the addition of the time frame rule seems the best one that could be given.

In addition, there is a limit in the new *lis pendens* rule in Article 31(4) regarding consumer, employment and insurance contracts. Namely, the special *lis pendens* rule for the prorogation agreements will not be applied if (a) the weaker party (the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee) is the claimant in the proceedings, and if (b) the agreement is invalid, ie if the conditions set out in Articles 15, 19 and 23¹³³ of the Recast are not fulfilled.¹³⁴ The purpose is to protect the weaker party that seises the non-chosen court from "torpedo actions" before the invalidly chosen court. If the weaker party is the claimant and he/she relies on the objective jurisdiction basis, the invalidly chosen court should have no primacy in determining its jurisdiction, and the regular first-come, first-served

¹³⁰ Heidelberg Report, *supra* n 4, para 178.

¹³¹ Cf Fentiman, *supra* n 107.

¹³² Recitals 15 and 19 of the Preamble to the Brussels I Regulation Recast, *supra* n 12.

¹³³ The conditions set out in those provisions remained the same and protect the weaker party to the contract, ie allowing an agreement only after the dispute has arisen, where the agreement gives more choice to the weaker party and so on.

¹³⁴ The provision as it stands was inserted by the Parliament and the Council. The Commission's Proposal completely excluded choice-of-court agreements in employment, consumer and insurance contracts from the application of the special *lis pendens* rule.

rule from Article 29 will hence be applied. Therefore, the first-seised court will be the one to check the conditions from Articles 15, 19 and 23, and if these are not fulfilled it can proceed in accordance with Article 29. If the first-seised court is the invalidly chosen one, it should dismiss the claim. If it is the non-chosen one, it should proceed with the litigation before it after concluding that the choice does not fulfil the special conditions set out in Articles 15, 19 and 23. In both cases, the stronger party cannot avail itself of the special *lis pendens* rule which could cause significant delays due to the primacy of the invalidly chosen court.

However, if the choice is valid under the special conditions of Articles 15, 19 and 23, there is still a chance that it is invalid under the general requirements of Article 25, which will be checked by the chosen court since the special *lis pendens* rule will be applied and that court will proceed with the litigation. The effect of the rule in other cases, when the weaker party seises the invalidly chosen court, is a little unclear and it is not certain whether the rule aims to apply in those situations as well.¹³⁵ It would be more reasonable if it was clearly stated that the regular *lis pendens* rule is applicable if the weaker party is the claimant before the non-chosen court since the purpose is the protection of the weaker party from those prorogation agreements that do not comply with special conditions aiming at protection of that party.

To conclude, in the hierarchy under the Recast, the chosen court will prevail over a non-chosen court and will be able to decide on its own jurisdiction unless the defendant submits to the jurisdiction of the non-chosen court. The choice of court cannot in any case prevail over exclusive jurisdictional bases.¹³⁶ Therefore, the exclusivity of the choice-of-court agreements is still “just a description of its capacity to wholly displace other jurisdictional grounds, on a party autonomy basis”.¹³⁷ The effect is similar to exclusive jurisdiction when compared to the general and special jurisdictional bases, but it is still overridden by submission and excluded in cases of disputes for which the exclusive jurisdiction is prescribed.

¹³⁵ If the weaker party seises the invalidly chosen court first, the court second seised would have to stay the proceedings according both to Art 29 (being the second seised) and Art 31(2) (being the non-chosen one). Therefore, Art 31(4) clearly has no purpose here. If the weaker party seises the invalidly chosen court second, it would have to stay the proceedings under Art 29 and could proceed under the rules on *lis pendens* for choice-of-court agreements. In these cases, Art 31(4) makes a difference. It means that in such a case, the chosen court would have to assess the validity (compliance with special conditions for the weaker parties) if there is an objection of the other party and if it concludes that the choice is invalid, the regular *lis pendens* rule will be applied. However, there will be no need to apply that rule since the court will most probably dismiss the claim since it will have no jurisdiction to proceed.

¹³⁶ Art 23(4) of the Brussels I Regulation, *supra* n 3.

¹³⁷ Delaygua, *supra* n 109, 292.

F. CONCLUSION

Several important changes within the rules dealing with choice-of-court agreements have been introduced by the Recast, not only changes in the Article on choice-of-court agreements per se, but also the widely discussed rules on *lis pendens*.

The most important novelty is found in Article 31(2), providing that any other court shall stay the proceedings until the court seised on the basis of the agreement declares that it has no jurisdiction under the prorogation agreement. At first glance, the provision successfully resolves the problem known as the “Italian torpedo”, connected to the CJEU’s decision in *Gasser v MISAT*. However, a couple of obstacles can occur in the application of the provision that may not lead to the best possible solutions. Firstly, in order to trigger its application the opposing party has actually to seise the chosen court. Thus, if the opposing party only objects to the non-chosen court’s jurisdiction, the first-seised court can decide on its jurisdiction without staying the procedure. Secondly, since the proposed introduction of the time frame of six months for a decision of the seised court on its jurisdiction was not accepted, the problem of the Italian torpedo might again occur in cases of invalid or sham agreements. Notwithstanding these two possible problems, the newly introduced rules on *lis pendens* will preserve the parties’ agreement much better than the application of the old general rule on *lis pendens* did.

Three changes have been introduced into the text of the old Article 23 to create the new Article 25. The first one is the abandonment of the requirement that at least one of the parties must be domiciled in the EU for the provisions to apply fully. Since under the current wording of the Regulation, a choice of court made by non-residents of the EU, although without a prorogative effect, will derogate jurisdiction of all other Member States’ courts, this is not a revolutionary change. It does, however, render the national rules in those situations inapplicable, and is thus a step towards the application of the Regulation rules over non-EU defendants. On the other hand, the Recast did not resolve an important issue, namely situations where the parties have agreed on the jurisdiction of the third-state court and the effect of such agreements on jurisdiction under the Brussels I Regulation. The probable aim was to create an incentive for third states to ratify the Hague Convention on Choice of Courts Agreements when the EU ratifies it. Further, a conflict-of-laws rule has been introduced according to which the law of the chosen court is applicable to the substantive validity of the agreement. However, even though the inclusion of this provision did resolve an old problem encountered by the national courts, the inclusion of *renvoi* resulted in a situation where each Member State is still allowed to apply its own rules for that issue. Finally, the inclusion of an express clause on severability of choice-of-court agreements confirmed what has already been established by the CJEU’s case law.

The newly introduced changes are all in line with one of the proclaimed aims of the Recast, ie to ensure that choice-of-court agreements are given the fullest effect. Nevertheless, this was an opportunity to regulate choice-of-court agreements and their effect thoroughly, which has not been taken full advantage of since there are still some open issues left for the CJEU or a new reform to resolve.