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A STEP FORWARD IN THE HARMONIZATION OF EUROPEAN JURISDICTION: REGULATION BRUSSELS I RECAST

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ABSTRACT

The Brussels regime is a legislative framework that regulates questions of transnational litigation in the European Union. Having been initially shaped upon negotiation of the 1968 Brussels Convention, it has been subsequently superseded and expanded in scope by the Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, alongside other instruments addressing specific areas of law. Recently, the Brussels regime has been amended by the Recast Brussels I Regulation, which entered into force on January 15, 2015, bringing about significant and

long-awaited change. Addressing the experience of application of its predecessors, the changes in the Recast Regulation have been introduced to the treatment of choice-of-court agreements and their relationship with the *lis pendens* doctrine, abolition of exequatur, reaffirmation and clarification of the arbitration exclusion, as well as further minor amendments.

KEYWORDS

Regulation 1215/2012 Brussels I Recast, Brussels regime, abolition of exequatur, choice-of-court agreements, *lis pendens*

INTRODUCTION

The present paper focuses on analyzing the stepping stones on the way to the adoption of the Recast Regulation.[1] To that end, the history of the recognition and enforcement of judgments and harmonization of questions of jurisdiction in the European countries is explored, tracking the changes from the early bilateral treaties to the powerful supranational instrument the EU has today. Despite the fact that the Regulation has entered into force rather recently, a fair amount of scholarly literature has accumulated since the early Commission proposal and the Regulation's adoption in 2012, which explores its novelties and potential, including, *inter alia*, a comprehensive treatise by Andrew Dickinson and Eva Lein called *The Brussels I Regulation Recast*[2]. The present paper contributes to the discussion through a detailed focus on one of the major changes introduced by the Recast Regulation – the treatment of choice-of-court agreements and their relationship with the *lis pendens* doctrine. This is done through a framework of an overall concise recollection of how the Brussels regime as we know it came about, which allows for tracking the development of the rationale on which the changes in the Recast Regulation rest.

The discussion is presented as follows: Part I gives an overview of the convenience of the free movement of judgments and the restrictions that state sovereignty places on it. Part II focuses on the major instruments in the process of harmonization of EU rules on jurisdiction and recognition and enforcement of judgments. In particular, it discusses the rationale and the process of creation of the 1968 Brussels Convention[3], which laid the foundation of the so-called Brussels regime, and the subsequent 2001 Regulation.[4] Part III concerns the major objectives of the revision of 2001 Regulation and the Commission proposal for the Recast. It makes a detailed summary of the key changes that were introduced with the adoption of the Recast Regulation. Part IV addresses in more detail the reform in the area of choice-of-court agreements and the rule of *lis pendens*. Finally, Part V draws on the body of the work and provides a forecast for the future application of the Recast Regulation.

[1] *Regulation 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)*, OJ L351, p. 1. Regulation 1215/2012 will be referred to in this paper as the "Recast Regulation".
[2] Andrew Dickinson and Eva Lein, *The Brussels I Regulation Recast* (Oxford University Press, 2015).
[3] *Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters 1968*, OJ L 299, 31/12/1972, p. 0032.
[4] *Council Regulation (EC) 44/2001 on jurisdiction and enforcement of judgements in civil and commercial matters*, OJ 2001 L 12, p. 1. Commonly referred to as the "Brussels I Regulation". To avoid confusion with its recently adopted Recast, the Brussels I Regulation will be referred to in this paper as "2001 Regulation".

1. MUTUAL RECOGNITION AND ENFORCEMENT OF JUDGMENTS BETWEEN SOVEREIGN STATES

The conflict of laws area of law is comprised of recognition and enforcement of foreign judgments, jurisdiction and the choice of law, the latter more commonly known as private international law. Recast Regulation is the youngest yet most far-reaching instrument in the area of jurisdiction and recognition and enforcement of judgments in the EU. In fact, indeed, it is one of a kind, superseding its predecessor, 2001 Regulation.

The Permanent Court of International Justice ruled in 1927 in the *Lotus* case that "the first and foremost restriction imposed by international law upon a state is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another state".[5] Whereas, in principle, a state may exercise its prescriptive jurisdiction, i.e. assume applicability of its national law, with regard to any person or event regardless of their location, enforcement jurisdiction is strictly limited to the state's frontiers. This means that, among others, the decisions of national courts carry weight only within the territory of the home state and can be enforced outside of its territory only subject to an agreement.[6]

Within the European Union sound cooperation of the Member States in carrying forward one another's judicial decisions is crucial to ensure the functioning of the internal market. With the increasing political and economic integration cross-border disputes skyrocket. Were there no harmonizing legislation in the area of recognition and enforcement of foreign judgments, a situation where a person from state A were involved in business with a person from state B would run into a lot of trouble should the business relationship collapse. Thus, court decisions rendered in state A would need to be recognized and enforced in state B so as to ensure effective performance of contractual obligations or collect debt. Unless the two states were parties to a bi- or multilateral agreement, the obligation to enforce a foreign court's decision would either follow a complicated procedure or be based solely on comity and reciprocity principles and give no legal certainly to the parties whatsoever.

Historically, with the rise of sovereignty the duty to enforce foreign judgments must be seen as an undue restraint. For example, in line with the similarly restrictive approaches in other European countries, Article 121 of the French Code Michaud 1629 denied foreign judgments all effects. It was then that other grounds

[5] *France v. Turkey*, Permanent Court of International Justice [PCIJ], 1927, PCIJ Series A no 10, ICGJ 248.
[6] Martin Dixon, *Textbook on International Law*, 7th ed. (Oxford University Press, 2013), 149.

were sought in order to legitimate judgments that originated in foreign courts. Two principals were developed – comity and reciprocity – which are relevant to date. However, both were too vague, too conditional and did not provide a solid foundation for states to assume obligations. As a result, states entered into treaties to ensure as among themselves free movement of judgments. At the time bilateral treaties were entered into for three purposes: substitute the vague nature of comity with precise legal rules, give a solid basis for reciprocity and expand the scope of recognizable judgments. The first of such treaties were concluded in 1715 between France and the Swiss communities, then later with Sardinia, Baden and Belgium as well as multiple treaties between the German States.

Multilateral conventions pursue largely the same aims as bilateral treaties, while also unifying the law of foreign judgments and jurisdiction (in case of 'double' instruments).[7] They are a more recent trend and can be classified as belonging to three groups: global enforcement conventions, regional conventions and recognition rules incorporated in conventions on various subjects.[8] Regional conventions is the topic of the current paper, precisely – the so-called EU Brussels regime governing the jurisdiction, recognition and enforcement of foreign judgments. The Brussels regime is complemented in the EEA countries by the Lugano Conventions, which will be also addressed in this paper as part of the historical development of the Brussels regime.

2. THE PREDECESSORS OF THE RECAST REGULATION

2.1. THE 1968 BRUSSELS CONVENTION

Article 26 of the Treaty on the Functioning of the European Union provides for adopting measures to establish the internal market, where the free movement of goods, persons, services and capital will be ensured. In 1959 the negotiations commenced between the then six Member States to create a multilateral instrument for the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards. In its note to the Member States the Commission of the European Economic Community observed that the true internal market is only achievable if adequate legal protection is secured. Therefore, recognition and enforcement of various rights arising out of the numerous legal relationships shall be ensured. This is especially

[7] Ralf Michaels, "Recognition and Enforcement of Foreign Judgments"; in: *Max Planck Encyclopaedia of Public International Law (MPEPIL)* (Max Planck Institute for Comparative Public Law and International Law, Heidelberg and Oxford University Press, 2009) // http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2699&context=faculty_scholarship.
[8] *Ibid*.: 4.

so because jurisdiction in civil and commercial matters stems from the sovereignty of the Member States and the effects of judicial acts and judgments are confined to each Member State's territory. It is only by negotiating a mutually satisfactory solution in the matter that legal certainty and legal protection within the common market can be achieved.[9]

The work started under the authority of Article 220 of the Treaty of Rome (Article 293 EC Treaty). Despite the fact that the Article only secured the Community's competence in legislating in the area of recognition and enforcement of judgments, the resulting Convention also prescribed matters of jurisdiction, resulting in a so-called 'double treaty'. The rationale for this was explained in the 1968 Jenard Report on the Convention. Inspiration had been drawn from the previously concluded bilateral treaties among the Member States, which were based either on direct or indirect rules of jurisdiction.[10] It was decided that within the EEC by way of adopting common rules of jurisdiction a 'double treaty' will allow for an increased harmonization of laws, greater legal certainty, free movement of judgments and will avoid discrimination.[11] It is this decision that secured the influence and success of the Brussels regime. Moreover, the drafters of the Convention took another innovative step by agreeing on certain issues that at the time provided for different solutions in the Member States. Additionally, the interpretation and clarification of the open ends in the Convention were entrusted with the European Court of Justice, which would suggest comparative as well as autonomous interpretations of the Convention's provisions. Finally, the influence of the Brussels regime is illustrated by the fact that some of the provisions of the Convention as well as its interpretations by the ECJ found its way into the laws on transnational litigation of some of the Member States.[12]

The Brussels Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters was adopted on September 27, 1968, and entered into force on February, 1 1973. In order to catch up with the subsequent enlargements of the EEC, the Convention was amended to accommodate the accessions of Denmark, Ireland and the United Kingdom in 1978, Greece in 1982, Spain and Portugal in 1989, Austria, Finland and Sweden in 1998.[13]

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[9] *Jenard Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters*, OJ 5.3.79 No. 59/1 (Brussels, September 27, 1968): 3.
[10] *Ibid*.: 7. In conventions based on rules of direct jurisdiction ('double treaties') the rules of jurisdiction apply in the state of origin of proceedings and independently of any proceedings for recognition and enforcement; they lay down common rules of jurisdiction, which results in harmonisation of laws. Conventions based on indirect jurisdiction mean that the rules incorporated therein are considered only in relation to recognition and enforcement and do not affect the courts of the state of origin; they trigger application of national rules in order to determine international jurisdiction in a state.
[11] *Ibid*.
[12] Samuel P. Baumgartner, *The proposed Hague Convention on Jurisdiction and Foreign Judgments* (Tübingen: Gulde-Druck, 2003) // http://ssrn.com/abstract=719542.
[13] Andrew Dickinson and Eva Lein, *supra* note 2, 5.

In 1988 the geographic reach of the Convention was further extended by the adoption of the Lugano Convention, signed as between the EEC Member States and the states of the European Free Trade Area (EFTA; Austria, Finland, Iceland, Norway, Sweden and Switzerland)[14]. The text of the Lugano Convention is virtually identical to that of the Brussels Convention. States that are not members of either EC or EFTA may accede to the Lugano Convention subject to the unanimous agreement of the EC and EFTA Member States.

2.2. THE 2001 REGULATION

In 1997 a parallel revision of the 1968 Brussels Convention and 1988 Lugano Convention was started by *ad hoc* working parties composed of representatives of the EC and EFTA members. The main objectives for the revision of the Brussels Convention were to provide for greater harmonization of the rules of the Member States relating to jurisdiction and simplify the formalities for the recognition and enforcement of judgments in civil and commercial matters. Besides, account had to be taken of the new forms of commerce that did not exist at the time when the Brussels Convention was negotiated.[15] The Commission presented a proposal for an updated Brussels Convention under the authority of the Treaty of Maastricht. However, in the meanwhile the Amsterdam Treaty entered into force in May 1999, which granted competence to the EC to legislate in the area of civil justice. Quickly afterwards, in July the Commission presented a proposal for a Regulation on the matter.[16] The Commission opted for a Regulation instead of a Convention in order to position the rules governing jurisdiction and recognition and enforcement of judgments in the Community in a legal instrument that is binding and directly applicable.[17] Many articles were transferred from the Brussels Convention to the proposal for a Regulation unchanged. Because of this the Explanatory Reports on the Convention as well as the case law of the ECJ remain relevant as regards the

[14] In 1991 the EFTA States signed an agreement with the EC to create the European Economic Area (EEA), according to which the states will not be represented in the Community institutions and will not participate in the decision-making. The Swiss electorate rejected the EEA membership; until now Switzerland remains outside both EEA and EU. The other EFTA states - Austria, Finland, Iceland, Liechtenstein, Norway and Sweden - went on to join the EEA in 1993. Soon afterwards the Austria, Finland, Sweden and Norway applied for the full membership of the European Communities. The Norwegian electorate rejected the membership, while the other 3 states joined the EC in 1995 (Nigel Foster, *Foster on EU Law*, 4th ed. (Oxford University Press, 2013), 16-17).

[15] *Comments on the Brussels I Regulation on jurisdiction and recognition and enforcement of judgments in civil and commercial matters* // http://dutchcivillaw.com/content/brusselsone000.htm.

[16] Andrew Dickinson and Eva Lein, *supra* note 2, 6.

[17] *Commission Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, COM (1999) 348 final: 4.

Regulation too.[18] The most significant changes in the Brussels Regulation compared to its predecessor concerned the following:

- Article 60 laid down the uniform definition of domicile for corporate and incorporated bodies;
- Article 5(1) introduced autonomous rules of special jurisdiction relating to goods and services contracts;
- Article 15 amended the scope of consumer contract provisions;
- Article 30 introduced a uniform definition of the moment when a Member State court is seized of proceedings for the purposed of *lis pendens*;
- Chapter III removes the consideration of the grounds for non-enforcement from the declaration of enforceability stage.[19]

The Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters was adopted on December 22, 2000, and entered into force on March 1, 2002. Following the waves of EC enlargement in 2004, 2007 and 2013, the number of states applying the Regulation's provisions increased to 27 out of 28 (except Denmark until 2007).

To correspond to the updated provisions in the 2001 Regulation, the new Lugano Convention was concluded in 2007 between the EC and the remaining members of EFTA – Iceland, Norway and Switzerland. The delay in its adoption occurred because a request for the ECJ opinion was submitted by the Commission in order to clarify whether the conclusion of a new Lugano Convention was within the ambit of the Community's exclusive competence or one shared with the Member States. After the Court ruled that it is a matter of Community's exclusive external competence, the Lugano Convention was adopted and entered into force on January, 1 2010. Even though the text of the Convention is largely identical to that of the 2001 Regulation, the important difference concerns the role of the ECJ in giving preliminary rulings on its interpretation. Whereas the ECJ may interpret the provisions of the 2001 Regulation according to Article 234 of the EC Treaty, it has no power to interpret the Lugano Convention. However, as the negotiations leading to the conclusion of the original Lugano Convention were largely based on the Brussels Convention, attention shall be paid to the non-binding relevant interpretations of the ECJ by analogy.[20]

The 2001 Regulation applied in relations between the EU Member States. Despite the fact that Denmark alone did not participate in the adoption of the

[18] *See* the explanatory reports on the Brussels Convention, among others: Jenard Report 1968, Schlosser Report 1979, Jenard-Möller Report 1988 and Pocar Report (Lugano Convention), Almeida-Desantes Report 1990.
[19] Andrew Dickinson and Eva Lein, *supra* note 2, 7.
[20] Peter Stone, *EU Private International Law: Harmonisation of Laws* (Edward Elgar Publishing, 2006), 15-16.

Regulation, it later negotiated an accession treaty with the EC for the application of the Brussels Regulation in relations between the EC and Denmark. The treaty entered into force in 2007. Besides only slight modifications in the Regulation's application, the treaty also included a mechanism to incorporate subsequent amendments to the 2001 Regulation. Furthermore, the 2001 Regulation's geographic scope extended to the French overseas departments (but not territories) and to Gibraltar.[21]

3. THE ADOPTION OF THE RECAST REGULATION AND ITS KEY FEATURES

3.1. THE REVIEW PROCESS AND THE COMMISSION PROPOSAL FOR A RECAST

Article 73 of the 2001 Regulation provides that no later than five years after its entry into force the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of the Regulation. If necessary, the report shall be complemented by proposals for adaptations of the Regulation. In 2005 a study on its application was started, whose results in 2007 gave the Commission the required data to continue work in the area.

Despite the Regulation's success and following the study conducted about the effects of its application, in 2009 the Commission proposed a number of amendments. The study, carried out by Professors Hess, Pfeiffer and Schlosser, revealed drawbacks in the application of the Regulation's provisions that had to be addressed. Among the identified concerns were the exequatur procedure for the enforcement of judgements rendered in another Member State; the limitation of the material scope of the Regulation to defendants domiciled in the EU; the regulation of choice-of-court agreements, the *lis pendens* rule and the notorious 'torpedo' actions; as well as the exclusion of arbitration from the scope of the 2001 Regulation.[22]

First, the exequatur procedure, despite its technical nature, proved to be costly and time-consuming for the parties and created an obstacle to the true free movement of judgments in the EU. Second, whenever a case concerns a defendant domiciled in a non-EU country, provisions of a Member State's national law apply, with some exceptions. Among other things, such differential treatment granting

[21] *Ibid*., 13-14.
[22] *Commission 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 (Brussels, December 17, 2010): 3-4.

unequal access to justice is perceived as disadvantageous by EU companies that conduct business with non-EU partners. Besides, it creates uncertainty whether the mandatory provisions, which apply to protect consumers and employees in the Member States, are enforced vis-a-vis foreign defendants. Furthermore, the treatment of the *lis pendens* rule in the context of choice-of-court agreements under the Regulation's provisions makes 'torpedo' proceedings possible, which negates the purposes and effectiveness of party autonomy and exclusive jurisdiction. Under the 2001 Regulation, any court, even the one expressly designated by the parties in a valid choice-of-court agreement, shall stay the proceedings until such time as the court first seized establishes whether or not it has jurisdiction. Finally, the exclusion of arbitration from the scope of the Regulation created a lot of controversy. It is argued that such an approach compromises the predictability of dispute resolution and creates a risk of parallel proceedings and irreconcilable judgments. The arbitration exclusion is criticized largely because there are no clear boundaries of what is and is not covered by the Regulation, complementary to arbitration issues being subject to interpretation and not treated uniformly in the member States Courts.

The identified flaws in the Regulation's application were consolidated in the Commission's Impact Assessment. The suggested amendments included the following: abolition of the exequatur; extending jurisdiction rules to disputes involving defendants from outside the EU; improving the efficiency of choice-of-court agreements; addressing the relationship between the 2001 Regulation and arbitration. In addition, the revision process was meant to tackle a number of other issues, including (among others): facilitate coordination of proceedings before the Member States courts; access to justice in certain specific disputes[23], and clarify the conditions for the circulation of provisional and protective measures in the EU.

The legal basis for the updated legal instrument resulting from the proposed amendments lay with Articles 67(4) and 81(2)(a) and (c) TFEU. The Legal Affairs Committee with rapporteur Mr. Tadeusz Zwiefka and the Working Party on Civil Law Matters working jointly finalized the Regulation Brussels I Recast on December 6th, 2012, which was published in the Official Journal on December 12th and entered into force on January, 10th 2015.[24] The 2001 Regulation continued to apply to judgments given in proceedings instituted before that date. It is noteworthy that the Recast Regulation underwent amendment already before entering into force to

[23] *Ibid*.: 5-6., Section 2, Article 5(3), Article 18(1), Article 22(1)(b), Article 24(2). So, the primary changes with regard to access to justice include the creation of a special jurisdiction rule regarding rights in rem in immovable property; provision for the possibility of proceedings brought against joint employers in different Member States; provision for the possibility of choice-of-court agreements in tenancy of premises for professional use; introduction of a rule to inform defendants of their right to contest jurisdiction and the consequences of not doing so, respectively.
[24] Andrew Dickinson and Eva Lein, *supra* note 2, 12-13.

accommodate the two courts – the Unified Patent Court (UPC)[25] and the Benelux Court of Justice[26] – within its scope. The courts are common to several Member States and can apply the Regulation's provisions when they deal with matters that fall within its scope.[27]

Like its predecessor, the Recast Regulation in its continuity is not merely a review of the existing rules. Both the 2001 Regulation and Recast Regulation are elements of the "matrix of [transnational litigation]"[28] in the European Union. Thus, the 2001 Regulation was preceded and complemented by a number of legal instruments that have already altered the original scope of its application.[29] These include, *inter alia*: the Small Claims Regulation, [30] the Order of Payment Regulation,[31] and the Uncontested Claims Regulation,[32] which allow the judgments rendered under their scopes to be enforced in other Member States. This means that matter have been excluded from the Regulation's provisions and transferred to separate more specific instruments, which both shrank the Regulation's scope per se and expanded it. For example, the Insolvency Regulation[33] refers to the relevant provisions of the 2001 Regulation regarding enforcement of certain judgments rendered during transnational insolvency proceedings. [34] Additionally, besides referring back to the 2001 Regulation's rules, many instruments borrow terms from it, some of which have acquired a particular meaning in the EU legal vocabulary. One of these is the reference to "civil and commercial matters".[35] The new Recast Regulation, therefore, introduces new rules only as opposed to the outdated 2001 Regulation, which are to coexist with other related legal instruments in the web of transnational litigation.

[25] The UPC was established on February, 19 2013 to ensure uniform applicability of patent law among the signatory states. The UPC Agreement provides that its international jurisdiction is to be established according to the Brussels I Recast Regulation or the 2007 Lugano Convention, where applicable (*see* Agreement of February, 19 2013 between 25 Member States (excl. Spain, Poland and Croatia) on a Unified Patent Court (OJ C175/1, 2013)).
[26] Benelux Court of Justice was established under the Treaty of March, 31 1965 between Belgium, Luxembourg and the Netherlands. In October 2012 the Treaty was amended so as to make it possible to transfer jurisdiction over certain matters falling under the scope of Brussels I Recast Regulation to the Benelux Court of Justice (*see* Protocol of October, 15 2012 between Belgium, Luxembourg and the Netherlands amending the treaty of 31 March 1965 on the establishment and statute of a Benelux Court of Justice).
[27] *Press Release of the Council of the European Union regarding the amendments to the Recast 'Brussels I' Regulation*, 9356/14 (OR. en) (May 6, 2014).
[28] Samuel P. Baumgartner, "Recent Reforms in EU Law. Recognition and Enforcement of Foreign Judgments," *Judicature* 97 (2014): 193.
[29] *Ibid*.
[30] *Regulation 861/2007 of the European Parliament and the Council of 11 July 2007 establishing a European Small Claims Procedure*, OJ L 199, p. 1.
[31] *Regulation 1896/2006 of the European Parliament and the Council of December 12, 2006, creating a European order for payment procedure*, OJ L 399, p. 1.
[32] *Regulation 805/2004 of the European Parliament and of the Council of April 2004 creating a European Enforcement Order for uncontested claims*, OJ L 143, p. 15.
[33] *Council Regulation (EC) 1346/2000 of May 29, 2000, on insolvency proceedings*, OJ L 160, p. 1.
[34] Samuel P. Baumgartner, *supra* note 28: 193.
[35] *Ibid*.

3.2. THE MAJOR CHANGES IN THE RECAST REGULATION

The Recast Regulation turned out to be less ambitious than the initial Commission Proposal. The key amendments that differentiate the Recast Regulation from the 2001 Regulation are the following:

1. The exequatur was abolished but the conditions for contesting recognition and enforcement of judgements remained unchanged. Addressing the objective of facilitating the free movement of judgments within the EU and ensuring their direct enforcement, the Recast Regulation eliminated the need to obtain an exequatur in order to enforce judgments rendered in another Member State. The same rule concerns authentic instruments and court settlements, which also fall within the scope of the Recast Regulation. According to Article 37(1), the party seeking to enforce a judgment must only produce its authentic copy and a certificate issued by the court of origin. A translation of the judgment may also be required if the court or the competent authority is unable to proceed without it.[36] Abolition of exequatur, however, was not a straightforward decision devoid of concerns. In particular, it has been pointed out that the exequatur procedure is a safeguard against importing human rights violations from the jurisdiction where they originate because in order to be recognized foreign judgments must meet the standards of the European human rights law. This is to be considered, however, in the framework of the existing human rights mechanisms such as the ECHR and the EU Charter of Fundamental Rights.[37]

2. The exclusion of arbitration from the scope of the Regulation was reinforced. The United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards and the 1961 European Convention on International Commercial Arbitration were believed to cover the questions of arbitration it their entirety. Therefore, both the original Brussels Convention and 2001 Regulation excluded arbitration from their scopes. The exclusion was justified by the need of prevention of parallel proceedings and irreconcilable judgments, which may result if one party to an arbitration agreement brings a court action. It has been identified during the review process of 2001 Regulation that the extent of arbitration exclusion was ambiguous, providing no answers about whether the arbitration agreement, arbitral award and its consequences are altogether not covered. In the

[36] *Regulation 1215/2012*, *supra* note 1: Article 37(2); Laurens J. Timmer, "Abolition of Exequatur under the Brussels I Regulation: ILL Conceived and Premature?" *Journal of Private International Law* 9 (2013): 133.
[37] Gilles Cuniberti and Isabelle Rueda, "Abolition of Exequatur. Addressing the Commission's Concerns," *University of Luxembourg Law Working Paper* No. 2010-03 (2010) // http://ssrn.com/abstract=1691001.

Marc Rich[38] case it was ruled that Brussels Convention did not cover cases where arbitration was the principal subject matter of the case. Following this reasoning, in the *West Tankers*[39] case the ECJ decided that the validity of the arbitration agreement was not the main claim in the case. Instead, the subject matter was a claim for tort damages. Therefore, the question incidental to it about the validity of the arbitration agreement was also covered by the scope of 2001 Regulation. Such loose treatment of arbitration and supplementary questions was considered inconsistent with the overall exclusion of arbitration and caused negative reactions from the arbitration community.[40]

Recital 12 of the Recast Regulation reinforces the exclusion of arbitration from its scope. It reads that when a court is seized of a matter in respect of which the parties have entered into an arbitration agreement, the court may refer the parties to arbitration, stay or dismiss the proceedings, or examine the validity of the arbitration agreement. Furthermore, when a court rules on the validity of an arbitration agreement, the decision is outside the scope of Recast Regulation's recognition and enforcement rules regardless of whether it is a principal issue or an incidental question. Paragraph 3 of the recital specifies that when a court rules on the validity of an arbitration agreement and finds it null and void, it can still rule on the substance of the dispute. Read in conjunction with Article 73, this means that arbitration awards that deal with the same subject matter and are inconsistent can be enforced under the New York Convention, which takes precedence. Finally, the Recital explains that the Recast Regulation does not apply to any action or ancillary proceedings, which relate to the establishment of an arbitral tribunal, powers of arbitrators, etc. Altogether, despite the fact that the clarification of the extent of arbitration exclusion is not in the body of the Recast Regulation but in the Preamble, it is a welcome development that reduces the voiced ambiguity.

3. The proposed extension of the scope of the 2001 Regulation to third-country defendants has retained references to national law in most cases. Thus, a defendant not domiciled in a Member State is subject to the national rules on jurisdiction in the Member State where a court is seized. In contrast, as regards protection of consumers and employees, certain rules in the regulation shall be applied regardless of the defendant's domicile.[41] By the same token, certain rules

[38] *Marc Rich & Co. AG v. Societa Italiana Impianti PA*, Court of Justice of the European Communities (1991, C-190/89).
[39] *Allianz SpA v. West Tankers, Inc.*, Court of Justice of the European Union (2009, C-185/07).
[40] Margaret L. Moses, "Arbitration/Litigation Interface: The European Debate," *Northwestern Journal of International Law & Business* 35 (2014): 12.
[41] *Regulation 1215/2012*, *supra* note 1: Recital 14 and Article 18(1), Article 21(1); in matters relating to insurance, where an insurer is not domiciled in a Member State but has a branch, agency or other establishment within the EU, Article 11(2); similarly, in matters relating to consumer and employment contracts, the weaker party could sue the defendant regardless of the latter's domicile, provided that they have a branch, agency or other establishment within the EU, Article 17(2) and 20(2).

concerning exclusive jurisdiction and prorogation of jurisdiction shall disregard the defendant's domicile.[42] The detailed account of the minor changes that were introduced in this area is beyond the scope of this paper.

4. Significant change concerns the choice-of-court agreements and the *lis pendens* rule, which is designed to do away with 'Italian torpedo' actions. This is discussed in more detail in Part IV.

4. CHOICE-OF-COURT AGREEMENTS AND THE *LIS PENDENS* RULE

The instrument that was the cornerstone of the Brussels regime – the 1968 Brussels Convention – was adopted with the primary purpose of ensuring the free movement of judgments within the common market. The harmonized rules on jurisdiction and the recognition and enforcement of judgments are crucial for ensuring the integrity of the Brussels regime and avoiding conflicting judgments originating in different Member States. The other objectives of the 2001 Regulation – providing legal certainty to parties through uniformity and finality of court decisions, encouraging judicial cooperation and facilitating administration of justice – also aim at doing away with parallel proceedings and irreconcilable judgments.[43] With this in mind the *lis pendens* doctrine was incorporated in the provisions of the 2001 Regulation (Article 27). According to the *lis pendens* rule, the court seized second will be obliged to stay the proceedings until the first court establishes whether it has jurisdiction. This concerned also those proceedings that were wrongfully initiated in a non-designated court regardless of the existence of a choice-of-court agreement between the parties to a dispute. In such a case, should a designated court be seized second, it had to wait until the court first seized established or declines jurisdiction. This undermined the effectiveness of choice-of-court agreements, which could be disregarded by a party acting in bad faith by taking advantage of the so-called 'Italian torpedo' action.

In particular, the 'Italian torpedo' refers to a situation when a party to a dispute brings an action before a court in a notoriously slow jurisdiction with the intention to bar unwanted court action. Such action, usually brought in Italian courts, creates delay and undermines the effectiveness and purpose of choice-of court agreements, which are meant to authorize a designated court to have exclusive jurisdiction over a dispute. Article 23 of 2001 Regulation provided for choice-of-court agreements as an expression of the principle of party autonomy. According to it, parties could agree on their own rules, including the choice of a competent court or court system, provided that such rules did not contradict the

[42] *Ibid.*: Article 24 and Article 25.
[43] Andrew Dickinson and Eva Lein, *supra* note 2, 321.

mandatory laws in force in the Member States.[44] Choice-of-court agreements grant exclusive jurisdiction over the substance of the dispute and over the validity of the choice-of-court agreement to the designated therein forum. This is designed to allow for a considerable degree of certainty as regards the place where potential disputes are to be adjudicated. The convenience and certainty offered by prorogation of jurisdiction encouraged forum shopping – agreeing to adjudicate potential disputes arising out of the relationship between the parties in any favorable forum. And whereas choosing a Member State with the most lenient laws could be negotiated for the benefit of both parties, it took only one *male fide* party to undermine the agreement by taking advantage of the *lis pendens* rule.[45]

The *lis pendens* doctrine, which appears in Article 27 of the 2001 Regulation, is an internationally recognized means of ensuring effective legal protection by preventing parallel proceedings and irreconcilable judgments, according to which later instituted proceedings are barred by prior action. The rule was confirmed by the ECJ case law, particularly in *Erich Gasser GmbH v. MISAT Srl,* which was decided under 1968 Brussels Convention.[46] It provides that 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 seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established. The article is mandatory, shall be applied *ex officio* and cannot be derogated from by the agreement of the parties. It is the *lis pendens* doctrine that makes 'Italian torpedo' possible. The court seized second shall wait until jurisdiction is established by the court seized first. In *Gasser v. MISAT* the ECJ explained that the court seized first relies on the rules of the Brussels Convention to determine whether it has jurisdiction just as the court seized second would, and so has the same amount of authority as any other court in the Member States.[47] This means that in case the parties concluded a choice-of-court agreement and the first court was wrongfully seized, it is incumbent on that court to verify the existence of

[44] Jan-Jaap Kuipers, "Party Autonomy in the Brussels I Regulation and Rome I Regulation and the European Court of Justice," *German Law Journal* 10 (2009).
[45] Ekaterina Ivanova, "Choice of Court Clauses and Lis Pendens under Brussels I regulation," *Merkourios-Utrecht Journal of International and European Law* 26 (2009-2010): 15.
[46] *Erich Gasser GmbH v. MISAT Srl*, European Court of Justice (2003, C-116/02). In the case, MISAT brought proceedings against Gasser before the Tribunale Civile e Penale in Rome. Seven months later, Gasser brought an action against MISAT before the Landsgericht Feldkirch in Austria regarding the same business relationship. Gasser indicated that the Austrian court was not only the one for the place of performance of the contract between the parties, but also the one designated in the choice-of-court cases, to which MISAT has never objected. MISAT relied on Article 2 of Regulation Brussels I, which conferred jurisdiction on the Italian court according to the place of establishment, and on the fact that proceedings were already started before the Austrian court was seized. The ECJ ruled that the lis pendens rule shall be interpreted broadly so as to mean that any court subsequently seized, even if it happens to be the one indicated in the valid choice-of-court agreement, shall stay the proceedings until the court first seized establishes whether or to it has jurisdiction. The ECJ also expressly stated that this rule cannot be derogated from for the sole reason that the court system of the court first seized is excessively slow.
[47] *Ibid.*: § 48.

said agreement and decline jurisdiction should it establish that the parties designated a different court to have exclusive jurisdiction.[48] Another question addressed by the ECJ in Gasser concerned the possibility of derogation from Article 21 of the Brussels Convention where a court first seized is established in a Member State whose court system is notoriously slow. After all, a party wishing to create excessive delay and sabotage swift hearing of a claim may exploit Article 21 for personal advantage. In this regard the Court was adamant, upholding the fundamental principles and values of the Convention. It is stated that the very system of jurisdiction and the recognition and enforcement of judgments in the EC was created on the basis of trust towards each other's legal systems and judicial institutions.[49]

A similar reasoning resurfaced in the case *Websense v. ITWAY*[50], which was decided in February 2014 in Ireland. The choice-of-court agreement between the parties designated Irish courts as having exclusive jurisdiction to decide the dispute. However, an Italian court was seized first and the Irish Supreme Court decided to stay proceedings until such time as the court first seized establishes whether it has jurisdiction. An opinion has been expressed with this regard that, failing to uphold the effectiveness of choice-of-court agreements, expediency is being sacrificed to certainty (MacMenamin J).[51]

Similar to the 'Italian torpedo' issue is the notion of 'race of plaintiffs'. The race occurs when a *male fide* party, well aware of the effects of *lis pendens*, submits a case to a court not recognized in the choice-of-court agreement with the intention to create parallel proceedings and render the case stagnant. This often takes place when an unwanted performance or debt is at stake, which may be only resolved in court. The debtor then benefits from the years it takes Italian courts to reach a resolution or the time taken to establish whether or not jurisdiction persists. The decision pending, the court rightfully designated in the agreement between the parties if seized second, will need to stay proceedings unable to proceed. The possibility to compromise the application of the choice-of-court agreements has been criticized strongly and the amendments introduced in the Recast regulation are meant to do away with such a maneuver altogether.[52]

The Recast Regulation introduces a new rule with regard to treatment of choice-of-court agreements and the *lis pendens* doctrine in Article 31(2). Whereas the general *lis pendens* rule remains in force, Article 31(2) introduces an exception

[48] *Ibid*.: § 49.
[49] *Ibid*.: § 72.
[50] *Websense International Technology Limited v. ITWAY SpA*, Irish Supreme Court (2014, IESC 5).
[51] David Kenny and Rosemary Hennigan, "Choice-of-Court Agreements, the Italian Torpedo, and the Recast of the Brussels I Regulation," *International and Comparative Law Quarterly* 64 (2015): 198.
[52] Peter A. Nielsen, "The State of Play of the Recast of the Brussels I Regulation," *Nordic Journal of International Law* 81 (2012): 593.

to it by providing that as soon as the *designated* court is seized, all other courts previously or subsequently seized shall stay proceedings. It is further reaffirmed in Recital 22, which reads that the designated court shall proceed regardless of whether the non-designated court has stayed the proceedings. This effectively eliminates the opportunity to delay proceedings by seizing a non-designated court as the designated court has authority to act immediately and independently of any potential parallel proceedings. Specifically, Article 31(2) states that when a designated court is seized with exclusive jurisdiction any court of another Member State shall stay the proceedings until it declares – in case the agreement is invalid – lack of jurisdiction. If the designated court establishes jurisdiction, all other courts shall decline it in favor of the court under the agreement (Article 31(3)). The introduced exception makes void any attempt to file an action with a court other than the one designated by the choice-of-court agreement.

When read in conjunction with Article 29, which contains the Regulation's rule of *lis pendens*, it becomes apparent that Article 31(2) is merely an exception to the general *lis pendens* rule. Article 29 reads: "Without prejudice to Article 31(2) […], any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established". This means that in any case other than designating a court on the basis of a choice-of-court agreement and conferring upon it exclusive jurisdiction to proceed with hearing the claim, the general rule of *lis pendens* applies.

As opposed to the other provisions in Article 31, Article 31(4) follows the chronological *lis pendens* priority of the courts seized with regard to certain kinds of claimants. It provides that when a claimant in the instituted proceedings is a party protected under Sections 3, 4, and 5 of the Regulation (policyholder, the insured, a beneficiary of the insurance contract, the injured party, a consumer or an employee),[53] and the agreement is not valid under the provisions contained in those sections,[54] the exception to the *lis pendens* general rule does not apply. This is designed to protect the weaker party from reverse 'torpedo actions' before the invalidly designated court, while allowing the non-designated court first seized to establish the validity of the agreement.[55]

Additionally, Article 26 requires attention. It provides that the court, before the respondent enters an appearance without contesting its jurisdiction, shall have

[53] *Regulation 1215/2012*, *supra* note 1: Chapter II: Section 3 'Jurisdiction in matters relating to insurance'; Section 4 'Jurisdiction over consumer contracts'; Section 5 'Jurisdiction over individual contracts of employment'. These concern the week-party contracts, where it is thought that additional safeguards shall apply in these cases because consumers, employees and insured persons are in a weaker bargaining position.
[54] Articles 15, 19 and 23 provide that the jurisdiction rules in the following sections can be derogated from only by agreement, which shall meet the conditions laid down in the respective articles.
[55] Andrew Dickinson and Eva Lein, *supra* note 2, 342.

jurisdiction irrespective of the agreement between the parties. Article 31(2) applies without prejudice to Article 26. This means that if the respondent does not appear before the court seized first or appears in order to contest its jurisdiction, Article 26 does not apply in favor of Article 31(2). It is also possible that the respondent communicated to the court first seized their intention to submit the claim with another court designated in the parties' agreement. In such a case the court shall allow a reasonable period of time for another court to be seized, failing which it can proceed with hearing the claim.[56]

Although introduced amendments to the old Brussels regime are welcome and significant, there are several issues that are to be tested in court now that the new Recast Regulation has come into force. On the face of it, the new rules deal (with exclusive jurisdiction under the choice-of-court agreements) leaves non-exclusive clauses unaddressed. This retains the *status quo* regarding the general rule of *lis pendens* and with it the 'Italian torpedo'.

Another controversy that remains to be clarified is whether the new exception is designed to address both identical[57] and related[58] proceedings, or merely the former.[59] This is significant because the 2001 Regulation deals with identical and related proceedings differently under Articles 27 and 28, respectively. Article 27 provides that any court is obliged to stay the proceedings until the court first seized decides whether it has jurisdiction, whereas Article 28 gives courts discretion as to whether to stay or not stay the proceedings. Article 31 of the Recast Regulation, which incorporates the introduced exception to the general *lis pendens*, is silent as to its scope. When read in conjunction with Article 29(1) and Recital 22 of the Recast Regulation, Article 31 could be interpreted as not covering related actions. Should this be true, the exclusion of related actions from the scope of the exception leaves much unwanted leeway for 'torpedo' actions, rendering the newly introduced mechanism in the Recast largely redundant. This means that, whereas under the 2001 Regulation it was sufficient to bring a case regarding the same cause of action and between the same parties before Italian courts to create delay, today the party wishing to circumvent the choice-of-court agreement would only need to make slight changes to either the cause of action or the parties involved to jeopardize the effects of Article 31 of the Recast Regulation.

Dickinson and Lein also mention that the practical application of the newly introduced rule is likely to raise problems. First, the application of Article 31(2)

[56] *Ibid*., 342.
[57] Proceedings between the same parties and regarding the same cause of action.
[58] Proceedings "so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings" (*The Tatry v. Maciej Rataj*, European Court of Justice (1994, C-406/92)).
[59] David Kenny and Rosemary Hennigan, *supra* note 51: 198.

depends on the existence of a choice-of-court agreement between the parties. This means that the provision can only be triggered if the court first seized (non-designated court) is made duly aware of it. To this end, the respondent will have to present proof of the existence of a choice-of-court agreement, on the basis of which a court of another Member State has been seized between the same parties and regarding the same cause of action. It is argued that a mere assertion of the existence of such agreement is not sufficient. Notably, the non-designated court presented with an agreement cannot verify its validity because it is the designated court that has priority to decide on the validity of the agreement and the extent to which it applies to the dispute pending before it (Recital 22). Should the designated court establish that the agreement is not in compliance with Article 25 or that it does not extend to the dispute pending before it, the general rule of *lis pendens* applies and the non-designated court first-seized will proceed to hear the case.[60]

Further, no consequence is prescribed for the court which does not comply with its obligation to stay proceedings or decline jurisdiction. In case a final decision is made by a non-designated court, there are no grounds in Article 45 for non-recognition of the decision in other Member States.[61]

Finally, it is unclear from the wording of Article 31(2) if it is sufficient for the party who seeks to invoke the choice-of-court agreement to seize a designated court solely for the purpose of establishing the validity of the agreement or if it is obliged to seize the designated court on the merits of the case. Arguably, in light of the purpose of Article 31(2) to enhance the effectiveness of choice-of court agreements, proceedings before the designated court with the sole purpose to validate the agreement will suffice. This will be, at least in part, deemed to come within the meaning of "the same cause of action and the same parties".[62]

IN LIEU OF CONCLUSIONS: THE FORECAST FOR THE RECAST

The Brussels regime has changed over the years both in substance and in form. Despite the insignificant number of innovations introduced with the 2001 Regulation, the nature of the instrument solidified the direct application and binding nature of the rules on jurisdiction and the recognition and enforcement of judgment within the EU. The Recast Regulation took a step further with the most significant substantive amendments since the 1960s.

[60] Andrew Dickinson and Eva Lein, *supra* note 2, 341.
[61] *Ibid*.
[62] *Ibid*., 342.

In the future the need may arise to consider further extension of the rules on jurisdiction to defendants not domiciled in the EU.[63] Additionally, some ambiguity persists with regard to the proceedings involving courts from outside the EU. It is not until the Brussels regime expressly incorporates a provision that allocates the jurisdiction, based on the choice-of-court agreements among the EU and non-EU courts, that the situation will be solved.[64] The adopted Regulation's significantly more modest text proposal (than the Commission's) suggests that further amendments may be proposed yet again after the 2022 revision is carried out. Their acceptance will depend greatly on the success of the recently introduced provisions and identification through practice of any loopholes in application.

The amendments introduced to the Brussels regime are welcome and will undoubtedly help address some of the problems encountered during the course of application of the 2001 Regulation. Among these, the new *lis pendens* rule and the treatment of choice-of-court agreements will help counteract 'torpedo' actions and reaffirm the effectiveness and security of the exercise of party autonomy. Another important aspect of the Recast Regulation is the clarification of the relationship with arbitration. The Preamble specifies the limits and reach of arbitration exception from the regulation's scope to a much greater extent than its predecessor. Abolition of exequatur is a technicality, which will facilitate swift enforcement of foreign judgments without extra movements. The extension of the Regulation's scope in some cases to third-country defendants is a step forward, even though not nearly as ambitious as the initial proposal intended it to be. All of the reforms mentioned in the paper fall largely in the prescribed course of the Brussels regime and should not encounter any complications or difficulties in their application by the interested parties.

As the discussion above illustrated, many of the amendments have flaws and potentially are not free of controversy. A year after the Recast Regulation became applicable in its entirety in the Member States, it is perhaps too soon to construct a pattern of its defects. But the new interpretations by the ECJ of its provisions and their practical application will follow and the significance of the Brussels regime reform will be revealed.

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