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THE REVISED ***LIS PENDENS***-RULE IN THE BRUSSELS JURISDICTION REGULATION**

1. Introduction

The Brussels Jurisdiction Regulation[1] is one of the most important private international law instruments of the EU legislator. It unifies the grounds of jurisdiction, ensures the efficient recognition and enforcement of judgments rendered in EU Member States and more generally facilitates judicial cooperation in civil and commercial matters. The Regulation applies to all EU Member States, including Denmark.[2] Although it may generally be said that it has not caused serious difficulties in its application and interpretation, the Commission in its

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[1] Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001, L 12/1) (hereinafter: Brussels Jurisdiction Regulation or Regulation Brussels I).

[2] Denmark has a special regime for judicial cooperation under the Treaty so that it was not initially bound by the Regulation. It became applicable in 2006 when the EU concluded an agreement with Denmark by means of the Council Decision 2006/325/EC of 27 April 2006.

Proposal of 14 December 2010[3] suggested rather substantial changes and alterations to the current regulatory scheme. They include a proposal to abolish the existing exequatur procedure, a suggestion to extend the formal scope of application of the jurisdictional rules to defendants outside the EU, a proposition to introduce some additional ***fora*** which would only apply to third country defendants, a set of amendments intended to improve access to justice concerning claims ***in rem*** with respect to movables and actions against multiple defendants in the employment area, the provision on ***forum necessitatis***, changes regarding provisional measures, as well as suggestions to enhance the efficiency of dispute settlement clauses – arbitration agreements and forum selection clauses.

The Proposal was subsequently subjected to a substantial review and amendment.[4] The final text of Regulation (EU) No. 1215/2012[5] was adopted on 12 December 2012. It introduces changes in a number of areas suggested by the Commission, but the alterations are not as substantial and extensive as was suggested in the Proposal. Thus, there are amendments concerning the provisional measures, the ***lis pendens*** rule and choice of court clauses. Further, the territorial (or formal) scope of application is somewhat extended and some provisions are inserted to ensure a further protection of weaker parties. With respect to the enforcement of judgments, the exequatur is no longer required, but the public policy exception has been retained among the grounds for refusing recognition and enforcement. Moreover, the final text significantly differs from

[3] Proposal of 14 December 2010 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, COM(2010)748 final 2010/0383 (COD) (Hereinafter: Proposal or Commission's Proposal).

[4] See, European Parliament Draft Report of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (COM[2010] 0748–C7-0433/2010-2010/0383(COD) of 28.06.2011 (hereinafter: European Parliament Draft Report) and the General Approach by the Council (Justice and Home Affairs), Proposal for a Regulation of the European Parliament and of the Council on the jurisdiction and enforcement of judgments in civil and commercial matters (Recast) – First reading, General Approach, JUSTCIV 209, CODEC 1495, 10609/12 ADD 1, Institutional file 2010/0383 (COD) (hereinafter: 'General Approach' or 'General Approach of the Council of 7 and 8 June 2012').

[5] Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351, 20 December 2012 (hereinafter: Regulation 1215/2012 or Recast Regulation).

the complicated regulatory scheme on the enforcement suggested in the Proposal.[6]

This contribution analyses the changes introduced with respect to the ***lis pendens*** rule in the Recast Brussels-I Regulation. The discussion will focus first on the amendments intended to enhance the effectiveness of forum-selection agreements (2). Thereafter other changes aimed at minimising the possibility of concurrent proceedings and of issuing irreconcilable judgments are briefly addressed, especially the provisions relating to proceedings pending before the courts of third States (3). Finally, the issue of interaction between arbitration and the Regulation will be touched upon. Although none of the suggestions in the Commission's Proposal to revise the ***lis pendens*** rule in that respect was accepted in the Recast Regulation, it is briefly presented how problems perceived by the Commission have been dealt with in the final text (4).

2. Amendments to the ***lis pendens*** rule aimed at enhancing the effectiveness of choice-of-court agreements

The Commission's Proposal has urged that there is a need to enhance the effectiveness of choice of court agreements which may be hindered by abusive litigation tactics.[7] The source of the problem was identified in the current rule contained in Article 27 of the Regulation, according to which the chosen court must stay proceedings if a court in another jurisdiction has been first seised. The technique known as the 'torpedo action' (or the 'Italian torpedo') may be used to delay litigation in the chosen court by filing a claim with a non-competent court. According to the Impact Assessment, it can take from several months to several years for the non-competent court to decline jurisdiction, depending on the efficiency of the judiciary in a particular EU Member State and the complexity of the matter. Allegedly it creates additional costs and delays and undermines the legal certainty and predictability of dispute resolution intended to be brought by choice of court agreements.[8]

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[6] According to Art. 81, the Recast Regulation shall apply from 10 January 2015, with the exception of Articles 75 and 76. The latter shall apply from 10 January 2014.

[7] The Impact Assessment – Accompanying the Proposal of 14 December 2010 for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters, COM(2010)748 final 2010/0383(COD) (Commission Staff Working Paper) 18101/10 ADD1 JUSTCIV 239 of 17 December 2010; Commission Stuff Working Paper Impact Assessment, Brussels 14.12.2010 SEC(2010)1547, (COM[2010] 748 final) (SEC[2010] 1548 final), p. 29, under 2.3. (hereinafter: Impact Assessment).

[8] However, it should be emphasised that there is no evidence or reliable information offered on

In order to deal with the problem identified in the Commission's Proposal and to enhance the effectiveness of forum-selection agreements[9] the revised Regulation introduces alterations to the ***lis pendens*** rule contained in Article 29 of the Recast Regulation (currently Art. 27 of Brussels I). In addition, a number of other provisions have been changed, in particular the provision concerning the choice of court agreements (Art. 25 of the Recast Regulation; Art. 23 of the Brussels I), as well as the territorial (formal) scope of application of the Recast Regulation (Art. 6 para. 1 of the Regulation 1215/2012). Although the latter provisions do not, strictly speaking, concern the ***lis pendens*** rule, for the sake of the completeness of the analysis concerning the choice of court agreements they are briefly presented.

2.1 Priority for the chosen court to decide on its jurisdiction (Articles 29(1) and 31(2)-(4) of the Recast Regulation)

In order to enhance the effectiveness of exclusive forum-selection agreements and to avoid abusive litigation tactics, the Recast Regulation provides for an exception to the general rule on ***lis pendens***. A deviation from the rule has been introduced for the situation when proceedings have been initiated in the court designated in an exclusive choice of court agreement after a non-chosen court

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how often this problem occurs in practice so as to reflect the urgency and the appropriateness of an action by the EU legislator. See the Impact Assessment, p. 30 under 2.3.1.3., stating, ***inter alia***, that '[i]t is difficult to obtain reliable figures which would quantify the risk of abuse'. See also, Impact Assessment, p. 33 under 2.3.6.3 and C. Heinze, "Choice of Court Agreements, Coordination of Proceedings and Provisional Measures in the Reform of the Brussels I Regulation", ***Max Planck Private Law Research Paper No. 11/5***, pp. 8, electronic copy available at: ***http://ssrn.com/abstract=1804111***. In a similar vein, with respect to other issues which it was suggested should be changed the Commission's Proposal and the accompanying documents failed to provide concrete examples of the problems in practice (such as interface between arbitration and the Regulation) or the information provided appeared to be based on unreliable reports (e.g., the need to abolish the ***exequatur***). With respect to the latter and the 'inaccurate estimates' of the CSES Report, see L. J. E. Timmer, "Abolition of ***Exequatur*** under the Brussels I Regulation: Ill Conceived and Premature?", ***Journal of Private International Law***, Vol. 9 No. 1 (April 2013) pp. 142-145. With respect to the lack of concrete examples which would illustrate the need to introduce the changes suggested in the Proposal with the purpose of allegedly enhancing the effectiveness of arbitration agreements, see, V. Lazić, "The Commission's Proposal to Amend the Arbitration Exception in the EC Jurisdiction Regulation: How 'Much Ado About Nothing' can end up in a 'Comedy of Errors' and in Anti-suit Injunctions Brussels-style", ***Journal International Arbitration*** 29, no. 1, February (2012) pp. 20-26.

[9] For more particulars, see V. Lazić, "Enhancing the Efficiency of Dispute Settlement Clauses in the European Union", in: N. Bodiroga-Vukobrat/G.G. Sander/S. Rodin (eds.), ***Legal Culture in Transition - Supranational and International Law Before National Courts***, Europäisches und internationales Wirtschaftsrecht, Band 4, Logos Verlag, Berlin (2013) pp. 188-198.

had been seised of the same cause of action and between the same parties.[10] Differently from the general rule on ***lis pendens***, the revised provisions require that the court first seised is to stay its proceedings so that the chosen court may be the first to rule on its jurisdiction. Thus, the court or courts designated in the choice of court agreement has/have priority in ruling on its/their jurisdiction over the court first seised of the matter with respect to which a choice of court agreement has been concluded.[11] To this end, the amendments have been introduced in Articles 29(1) and 31(2) of Regulation 1215/2012.

2.1.1 Lis pendens rule in Article 29 of the Recast

Aside from the newly introduced exception for choice of court agreements the general rule on ***lis pendens*** regarding the same causes of action and between the same parties in Article 29(1) (the current Art. 27 of Brussels I) has remained unchanged. Thus, any court other than the court first seised is under an obligation to stay its proceedings on its own motion where proceedings involving the same causes of action are brought in the courts of different Member States. As soon as the court first seised has declared that it has jurisdiction any other court must decline its own jurisdiction.[12]

With respect to the ***lis pendens*** rule regarding related actions in Article 30 (the current Art. 28 of Brussels I), none of the suggestions contained in the Commission's Proposal has been introduced in the final text of the Recast.[13] Consequently this provision has remained unchanged.

As to the main rule in Article 29, the Commission's Proposal contained rather substantial additions to the existing text. Especially the suggestion to revise the arbitration exception within the framework of this provision and the time-limit for a court first seised to render a decision on jurisdiction were extensively discussed in the literature. An attempt to revise the arbitration exception is explained in more detail in part (4) of the present contribution.

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[10] See Recital (22) of the Recast Regulation.

[11] A similar rule is already contained in Article 23 paragraph 3 of the Regulation which relates to choice of court agreements between parties domiciled in non-Member States. It provides that the courts in EU Member States may only have jurisdiction if the court or the courts designated in the forum-selection agreement have declined jurisdiction.

[12] Art. 29(3) of the Recast Regulation (currently Art. 27(2) of the Brussels I).

[13] The Proposal only suggested deleting in paragraph two the reference to consolidation in national laws.

Regarding the time-limit, the Proposal suggested that "the court first seised shall establish its jurisdiction within 6 months except where exceptional circumstances make this impossible".[14] The court first seised may be requested by any other court seised of the dispute to provide the information on the date on which it was seised and whether it has decided on its jurisdiction over the dispute and if not, when the decision is expected to be rendered (Art. 29 par. 2 Commission's Proposal).

Presumably, the idea behind such an adaptation of the rule was to enhance efficiency in the administration of justice in civil and commercial matters within the Member States and accordingly to improve access to justice in the EU. However, the provision of Article 29 paragraph 2 of the Proposal was not sufficiently precise and the time-limit appears to be unrealistically short. In particular, it is not clear what would have been the consequences of a failure of the court first seised to decide on its jurisdiction within 6 months. Would it imply that another court seised could continue the proceedings and decide on its jurisdiction? If so, such a short time-limit is likely to result in a rather wide "use" of the "exceptional circumstances" exemption. Thereby, it is likely that difficulties would have been encountered in the interpretation of which circumstances "qualify" as "exceptional" and consequently in applying the ***lis pendens*** rule.

The reference to a time-limit has been omitted from the final text of Article 29(2) of the Recast Regulation. The only addition to the current text is that "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 in accordance with Article 32".

With a view to enhancing the effectiveness of forum-selection agreements, the important change in Article 29(1) is the express reference to Article 31(2) as an exception to the general rule that "[w]here 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".[15] The latter provision determines the particulars of the exception to the main "priority rule" in favour of the chosen court.

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[14] Art. 29 (2) Commission's Proposal.

[15] Art. 29(1) of the Recast Regulation (currently Art. 27(1) of the Brussels I).

2.1.2 Exception to the general "Priority rule" in Article 31(2)-(4) of the Recast Regulation

The priority for the chosen court to rule first on its jurisdiction, as an exception to the general ***lis pendens*** rule, is determined in Article 31(2)-(4) of the Recast Regulation.[16] Thus, any court seised other than the court designated in an exclusive choice of court agreement shall stay the proceedings until the court seised on the basis of the agreement declares its lack of jurisdiction.[17] This is to ensure the priority to the designated court "to decide on the validity of the agreement and on the extent to which the agreement applies to the dispute pending before it".[18] The court chosen in the agreement can proceed regardless of whether or not the non-designated court has decided to stay proceedings. Recital (22) of the Recast Regulation clarifies that the exception does not apply to conflicting exclusive forum selection agreements or where a court chosen has been first seised. In these cases, the general rule on ***lis pendens*** applies.

The reference to Article 26 in paragraph 2 of Article 31[19] implies that the choice of court agreement must be invoked by a party in order to trigger a stay of proceedings before the court first seised. Article 26 deals with the situation where a defendant enters an appearance without contesting jurisdiction (tacit prorogation). Accordingly, an agreement on the prorogation of jurisdiction must be invoked by a party before the court seised. A court seised may not raise the issue of a forum selection clause ***ex officio***, as it would be contrary to the principle of party autonomy.

In this context it should be mentioned that the provision on the tacit prorogation of jurisdiction has been amended so as to better accommodate the interests of "weak" parties. Under the current regime of Brussels I, if a defendant enters an appearance, a court in an EU Member State in principle does not examine ex ***officio*** whether or not it has jurisdiction under the Regulation. The exception is an obligation to examine whether a court in another state has exclusive jurisdiction according to Article 22.[20] This follows from the current text of Article 24 of

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[16] Paragraph 1 of Article 31 merely reiterates the current rule concerning actions within the exclusive jurisdiction of several courts, according to which "any court other than the court first seised shall decline jurisdiction in favour of that court".

[17] Art. 31(2) of the Recast Regulation.

[18] Recital (22) of the Recast Regulation.

[19] Art. 31 (2) of the Regulation 1215/2012, uses the wording in paragraph 2: "[w]ithout prejudice to Article 26".

[20] Jurisdictional rules in disputes arising out of insurance contracts and consumer disputes may be mentioned as further examples when a court could examine the jurisdictional grounds ***ex***

Brussels I which relates to so-called tacit prorogation. The newly introduced paragraph 2 in Article 26 of the Recast Regulation provides that the court seised is under an obligation to inform ***ex officio*** a "weak" party defendant of the consequences of entering an appearance (i.e., a policy holder / an insured / injured party / a beneficiary of the insurance contract, a consumer or an employee).[21] Thereby a weaker party receives additional protection.[22]

The exception to the "priority rule" in paragraphs 2 and 3 of Article 31 of the Recast Regulation does not apply to choice of court agreements contained in contracts involving a weaker party when the "weaker" party is a claimant and the forum-selection clauses is considered invalid according to Sections 3, 4, or 5.

When compared to the Commission's Proposal,[23] the final text of Article 31 of the Recast Regulation[24] presents a significant improvement.

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officio. Namely, a violation of these jurisdictional rules as well as the rules on exclusive jurisdiction represent a valid ground to refuse the enforcement of the judgment under Article 35(1) of the Brussels I. This is now clearly reflected in a new provision in paragraph 2 of Article 26 of the Recast Regulation (currently Art. 24 Regulation Brussels I relating to tacit prorogation).

[21] Art. 26(2) of the Recast Regulation reads: "In matters referred to in Sections 3, 4 and 5 (…) where the policyholder, the insured, the injured party of a beneficiary of the insurance contract, the consumer or the employee is the defendant, the court, before assuming jurisdiction under paragraph 1, shall ensure that the defendant is informed of his right to contest the jurisdiction and of the consequences of entering or not entering an appearance".

[22] See also, P. Hays, "Notes on the European Union's Brussels-I 'Recast' Regulation – An American Perspective", ***The European Legal Forum*** 1-2013, Jan. / Feb. 2013, p. 4.

[23] Art. 32(2) of the Commission's Proposal reads as follows:

2. With the exception of agreements governed by Sections 3, 4 and 5 of this Chapter, where an agreement referred to in Article 23 confers exclusive jurisdiction to a court of a Member State, the courts of other Member States shall have no jurisdiction over the dispute until such time as the court of the courts designated in the agreement decline their jurisdiction.

[24] Art. 31 of the Recast Regulation reads as follows:

"1.Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.

2. Without prejudice to Article 26, where a court of a Member State on which an agreement referred to in Article 25 confers exclusive jurisdiction is seised, 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.

3. Where the court designated in the agreement has established jurisdiction in accordance with the agreement, any court of another Member State shall decline jurisdiction in favour of that court.

4. Paragraphs 2 and 3 shall not apply to matters governed by Sections 3, 4 and 5 where the policyholder, the insured, the injured party or a beneficiary of the insurance contract, the consumer or the employee is the claimant and the agreement is not valid under those Sections."

First of all, the wording of the Proposal: "the courts of other Member States shall have no jurisdiction", is imprecise and unclear. In particular, it is not clear what action the court first seised has to take (e.g., to declare a lack of jurisdiction or to stay the proceedings) and when (at the moment the agreement is invoked by a party or when the court chosen has actually been seised). The wording in paragraphs 2 and 3 of Article 31 of the Recast Regulation more precisely defines the obligations of the court seised of a matter with respect to which a forum-selection agreement has been concluded. Thus, it distinguishes the obligation of the courts seised to stay the proceedings (para. 2) from the obligation to decline jurisdiction (para. 3). For the purposes of, ***inter alia***, applying the provisions on ***lis pendens***, the moment when a court is seised is defined in Article 32. The relevance of this provision and the changes in the Recast Regulation will be addressed ***infra***, under 3.1.

As far as the moment from which a court seised must stay the proceedings is concerned, the provision of Article 31 of the Recast Regulation is not explicit. However, it follows from Recital (22) that "the court first seised should be required to stay its proceedings as soon as the designated court has been seised and until such time as the latter court declares that it has no jurisdiction under the choice-of-court agreement". Thus, the fact that the obligation of the court seised to stay proceedings depends on the actual commencement of the lawsuit before the court chosen may be perceived as an improvement to the Commission's Proposal.

Finally, the wording of paragraph 4 of Article 31 providing for the exception to the "priority rule" in case of "weaker" party disputes is more precise and appropriate than the wording in the Proposal. The latter refers to "Sections 3, 4, and 5", which is insufficiently precise.[25] Namely, there is no reason to deviate from the suggested "priority rule" in favour of the chosen court in all cases involving a weaker party as it follows from the text of the Proposal. In particular, no exception is needed or is appropriate when a choice of court agreement is invoked by a weaker party. Therefore, the wording of paragraph 4 of Article 31 of the Recast Regulation is an improvement as it clearly provides that the exception applies only when a forum-selection clause is invoked against a "weaker" party. In other words, it specifies that the rule on the priority of the chosen court does not apply when a prorogation clause is invoked by an insurer, employer or a professional.

[25] The drawbacks of the suggested rule have already been explained in Lazić, ***Legal Culture in Transition***, pp. 190 and 191.

It can be said that the newly introduced ***lis pendens*** rule is likely to successfully combat abusive litigation tactics and "torpedo actions". Although the text in Article 31 of the Recast Regulation is an improvement compared to the Commission's Proposal it does not eliminate a number of serious drawbacks of the suggested rule. Thus, from the wording of Article 31 and of Recital (22) the court seised should completely refrain from any examination of the jurisdiction agreement. This is likely to result in duplicate proceedings and consequently an increase in costs for a party contesting the validity of the agreement on jurisdiction.[26]

In particular, the possibility for the court seised to carry out at least a ***prima facie*** examination as to the existence of the agreement and possibly its compliance with the written form requirement would have enhanced efficiency in dispute resolution. Such a solution would also have been more in line with the approach taken in the 2005 Hague Choice of Court Agreements Convention.[27] Namely, the latter provides for a list of exceptions to the obligation of the court seised.[28] Moreover, the Explanatory Memorandum indicates that one of the incentives for reform is the idea of creating "a mechanism [which] would largely accord with the system established in the 2005 Hague […] Convention".[29] This is not to suggest that the same grounds provided in the 2005 Convention should have been adopted in the Recast Regulation, but it was more appropriate to clearly define the conditions for the applicability of the exception to the "priority rule".

Although the formal scope of application has been extended in a case of the prorogation of jurisdiction under the Recast,[30] the priority in favour of a chosen court under the revised ***lis pendens*** rule does not extend to the prorogation of jurisdiction of a third country court. Even though it may generally be desirable to regulate this issue on the EU level, it is better for the time being to leave it outside the Regulation with a view to the possible adherence of the EU Member States to the 2005 Hague Convention.[31] In any case, it is appropriate that any possible

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[26] See also, Heinze, ***op. cit***., p. 8-9.

[27] Generally on the similarities and differences between the 2005 Hague Convention and the Regulation Brussels I, see: M. Pertegás, "The Brussels I Regulation and the Hague Convention on Choice of Court Agreements", ***ERA Forum*** (2010) 11, Springer, pp. 19-27.

[28] Art. 6 of the 2005 Hague Choice of Court Convention.

[29] Explanatory Memorandum, p. 4, under 2.

[30] See ***infra***, under 2.2.

[31] Some authors have expressed the view that the Recast Regulation should have addressed this issue as well. See, e.g., Hay, ***op. cit.,*** p. 4.

future regulation of this issue does not run counter to the provisions of the Convention.

Some have questioned whether the Recast Regulation effectively deals with an alleged "torpedo" action in the context of arbitration agreements.[32] However, it should be emphasised that there is a substantial difference between the effectiveness of the "torpedo" actions with respect to the forum selection clauses and arbitration clauses as the general ***lis pendens*** rule does not apply to arbitral proceedings.[33] The interface with arbitration is addressed in somewhat greater detail ***infra***, under 4.

2.2. Other changes affecting choice of court agreements (Article 25 of the Recast Regulation)

Although the changes in Articles 25 and 6(1) of the Recast Regulation do not directly concern the ***lis pendens*** rule, it is appropriate to briefly present them as well, in the interest of a better understanding of the content and reach of the changes addressed in this contribution.

The most important changes of the provision on the prorogation of jurisdiction now contained in Article 25 of the Recast Regulation (the current Art. 23 of Brussels I) are the expansion of the applicability of this provision regardless of the domicile of the parties and the introduction of a conflict of law rule for the substantive validity of prorogation agreements (paragraph 1 of Art. 25). As a consequence of expanding the formal scope of application, the provision relating to forum-selection agreements under Brussels I between third country parties has become redundant.

The Recast Regulation in paragraph 1 of Article 25 provides that the substantive validity of choice of court agreements will be governed by the law of the Member State of the chosen court.[34] Accordingly, that law will be applicable to issues such as the interpretation of the choice of court agreement, its renewal or succession into a forum-selection agreement.[35]

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[32] See e.g., Freshfields Bruckhaus Deringer, Briefing: Arbitrations in the EU Following the revised Brussels I Regulation, January 2013, referred to in Hay, ***op. cit.***, p. 4, n. 28.

[33] For more particulars on this issue, see Lazić, ***Journal International Arbitration***, pp. 29-31.

[34] Thus, Article 25(1) of the Recast provides that a court or the courts of a Member State designated by an agreement between the parties shall have jurisdiction "unless the agreement is null and void as to its substantive validity under the law of that Member State".

[35] Under the current Article 23 of Brussels I these issues are to be dealt with in accordance with the national substantive law determined by national conflict of law rules. See e.g., ECJ decision of 3 July 1997, C-269/95, E.C.R. 1997, I-3767, para. 31 (***Benincasa***); ECJ 11 November 1986, C-313/85,

It clearly follows from the wording of Recital (20) of the Recast Regulation that the reference to the law of the Member State of the chosen court includes the conflict of law rules of that state. Such a solution has been taken over from the wording in the General Approach which explicitly provided that the reference to the "law" of the Member State of the chosen court should include the conflict of law rules.[36] The Commission's Proposal was not explicit in that respect, but the Explanatory Memorandum stated that the amendments "reflect the solutions established in the 2005 Hague Convention on the Choice of Court Agreements, thereby facilitating a possible conclusion of this Convention by the European Union".[37] Indeed, the reference to the applicable law under the 2005 Hague Convention does include the private international law rules of that State, as well as its substantive law.[38]

Such a solution under the Recast Regulation is to be regretted and is a major shortcoming of the newly introduced rule on the choice of law for the substantive validity of prorogation agreements. By referring to the conflict of law rules this provision does not introduce a true uniform private international law rule, but merely refers to the national conflict of law rules of the Member State whose court has been chosen. Thereby the application of the same law on the substantive validity of jurisdiction agreements is not ensured within the EU.[39] It

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E.C.R. 1986, 3337, paras. 7-8 (***Iveco Fiat***); ECJ 9 November 2000, C-387/98, E.C.R. 2000, I-9337, para. 24 (***Coreck Maritime***).

[36] General Approach, p. 22, n. 1, Art. 23.

[37] Commission's Proposal, Explanatory Memorandum, p. 8, under 3.1.3.

[38] Hartley/Dogauchi, "Explanatory Report on the preliminary draft Convention on exclusive choice of court agreements, Draft Convention on Exclusive Choice of Court Agreements – Draft Report", Preliminary Document No. 26 of December 2004 drawn up for the attention of the Twentieth Diplomatic Session on Jurisdiction, Recognition and Enforcement of Foreign Judgment in Civil and Commercial Matters, p. 6, available at: ***http://www.hcch.net/upload/wop/jdgm_pd26e.pdf***.; see also V. Lazić, "The Hague Convention on Choice of Court Agreements of 2005: Scope of Application and Main Rules", in: Knežević/Pavić (eds.), ***Državljanstvo i međunarodno privatno pravo/Haške konvencije (Nationality and International Private Law/Hague Conventions),*** Zbornik radova III konferencije o međunarodnom privatnom pravu/ Yearbook III PIL Conference, JP Službeni glasnik, Belgrade (2007) pp. 214-237. For a comment on the Commission's Proposal in that respect see M. Koppenol-Laforce, "Herschikking Brusslel I: litispendentie en forumkeuze, een positieve stap voorwaarts?", ***Nederlands internationaalprivaatrecht (NIPR)*** 29/3 (2011), p. 458.

[39] See also, Hay, ***op. cit***., p. 3; Heinze, ***op. cit***., p. 5; S. P. Camilleri, "Article 23: Formal Validity, Material Validity or both?", ***Journal of Private International Law***, Vol. 7 No. 2 (2011) p. 298. But see, P. Beaumont/B. Yüksel, "The Validity of Choice of Court Agreements under the Brussels I Regulation and the Hague Choice of Court Agreements Convention", in: K. Boele-Woelki/T. Einhorn/D. Girsberger/S. Symeonides (eds.), ***Convergence and Divergence in Private International***

is surprising that the EU legislator has opted for such a rule considering that ***renvoi*** is expressly excluded in most international legal instruments that harmonise conflict of law rules, including those of the EU legislator,[40] in particular in the field of contract law.[41] The suggestions in the European Parliament Draft Proposal of 28 June 2011 would have provided a more appropriate solution. It proposed, ***inter alia***, an alternative application of the law of the Member State of the court designated in the agreement, the law chosen by the parties, or the law applicable to the substance of the dispute[42] and suggested an express exclusion of the conflict of law rules of the designated state.[43]

Article 25 of the Recast Regulation introduces in its paragraph 5 an express provision on the separability or autonomy of prorogation agreements. Taking into consideration a rather wide acceptance of this rule would not imply substantial changes in practice.[44]

Another modification in Article 25 of Regulation 1215/2012 is that it is no longer required that one of the parties to the agreement on jurisdiction is domiciled in an EU Member State. Under the current regime of Article 23 of Brussels I, for its applicability it is required that a court of an EU Member State is agreed upon and that one of the parties is domiciled in a Member State. Under the revised Article 25 it applies to prorogation clauses providing for the jurisdiction of a court in a Member State regardless of the domicile of the parties. Forum-selection agreements providing for the jurisdiction of a court of a third state are accordingly governed by national rules. Consequently, the revised ***lis pendens*** rule of the Recast Regulation does not extend to these choice of court agreements.

Law (2010), Eleven International Publishing, The Hague, pp. 563-577, at p. 575-577 - the authors approve of the approach in both the 2005 Hague Convention and the proposed changes to Article 23, including ***renvoi***.

[40] See e.g., Art. 20 of the Regulation 593/2009, OJ 2008 L 177/6 (Regulation Rome I); Art. 10 of the 1980 Rome Convention on the Law Applicable to Contractual Obligations; Art. 24 of the Regulation 864/2007 OJ 2007 L 199/40 (Regulation Rome II). Similarly, a reference to the applicable law in Art. V(1)(a) of the 1980 New York Arbitration Convention is usually interpreted as excluding the choice of law rules of the particular state.

[41] See also, Hay, ***op. cit.,*** p. 3.

[42] European Parliament Draft Report, p. 18, Amendment 20, Article 23 at para. 1.

[43] European Parliament Draft Report, p. 18, Amendment 20, Article 23 at para. 3. For more particulars on the solution suggested in the European Parliament Draft Report, see Lazić, ***Legal Culture in Transition***, p. 196.

[44] Statutory laws on arbitration usually contain express provisions on the autonomy or separability or independence of arbitration clauses of the other terms of the contract. See e.g., Sect. 7 of the 1996 English Arbitration Act, Art. 1040 of the German Code of Civil Procedure, Art. 1053 of the 1986 Netherlands Arbitration Act.

The Recast Regulation has not accepted the idea of the universal application of jurisdictional rules and their extension to disputes involving third party defendants advocated in the Proposal.[45] The acceptance of the so-called "universal scope" of application would result in the abolition of the dual regime of jurisdictional rules in cross-border cases in EU Member States. Consequently, no exorbitant jurisdictional grounds would be applicable in cases involving defendants from outside the EU. Yet the Recast Regulation does somewhat expand its formal (or territorial) scope of application. In principle it only remains applicable if the defendant is domiciled in an EU Member State. However, in addition to the already existing exceptions of choice of court agreements and exclusive jurisdiction, the territorial scope is further expanded in the Recast Regulation so as to include certain "weaker" party disputes, notably consumer and labour law disputes.[46] Thus, a court in a Member State may establish its jurisdiction on the basis of the jurisdictional rules of Regulation 1215/2012 in all disputes involving a consumer or an employee regardless of the domicile of the other party. The provision of Article 6(1) refers only to consumer (Art. 18 para. 1) and labour disputes (Art. 21 para. 2), but there is no reference to insurance contracts. Consequently, the jurisdictional rules contained in Section 3 relating to insurance contracts only apply if a defendant is domiciled in an EU Member State. [47]

3. Other changes related to the ***lis-pendens*** rule aimed at preventing parallel proceedings and conflicting decisions

Besides the alterations with respect to forum-selection agreements, the Commission suggested a number of other changes relating to the ***lis pendens*** rule. They include determining the time-limit of the court first seised to rule on its jurisdiction, a decision on jurisdiction in related matters, the ***lis pendens*** rule with respect to third countries, determining the moment when a court shall be deemed to be seised and the interface between litigation and arbitration. Some of the

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[45] For detailed comments on the proposal for universal jurisdiction, see J. Weber, "Universal Jurisdiction in Third States in the Reform of the Brussels I Regulation", ***Rabels Zeitschrift*** 75 (2001) pp. 620 ***et seq***.

[46] The provision of Article 6 paragraph 1 of the Recast Regulation (the current Art. 4 of the Brussels I Regulation) reads as follows:

"1. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 18(1), 21(2) and Articles 24 and 25, be determined by the law of that Member State."

[47] For more particulars on the territorial scope of application of the Recast Regulation, see V. Lazić, ***Legal Culture in Transition***, pp. 184-188.

suggested changes have been accepted in the Recast Regulation with or without adaptations and adjustments to the proposed text, in particular the provision on the moment as of which a court is deemed seised and a new provision on ***lis pendens*** in a third State.

3.1 When the court is deemed to be seised

The provision of Article 32 of the Recast Regulation (the current Art. 30 of Brussels I) is relevant for the applicability of the rule on ***lis pendens*** as it provides for an autonomous determination of the moment as from which a court is deemed to be seseid. It is thereby ensured that differences that exist in national laws on the moment of the commencement of court proceeding do not hinder the effectiveness of a mechanism for resolving cases of ***lis pendens*** and related actions. The wording in Recital (21) of the Recast is illustrative:

"In the interest of the harmonious administration of justice it is necessary minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in different Member States. There should be a clear and effective mechanism for resolving cases of ***lis pendens*** and related actions, and for obviating problems flowing form national differences as to the determination of the time when a case is regarded as pending For the purposes of this Regulation, that time should be defined autonomously."

There are no changes in the Recast on defining the moment when a court shall be deemed to be seised. In that sense the wording of the first paragraph of Articles 32 of the Recast and Article 30 of the current law has remained identical. There is a minor addition in paragraph 1, which provides that the authority responsible for service shall be the first authority which receives the documents to be served. Besides, there is a newly introduced paragraph 2 providing for the obligation of the courts and authorities responsible for service to note the date and time of the lodging of the document instituting proceedings or of the receipt of the documents to be served.

The Commission's Proposal to introduce a new paragraph defining the moment when an arbitral tribunal is deemed to be seised and the whole idea of a partial deletion of the arbitration exception have been rejected.[48]

3.2 Lis pendens rule regarding court proceedings in a third State

The existing regulatory regime of Brussels I deals with parallel litigation in different EU Member States in Articles 27 and 28. Thus, a stay is mandatory in

[48] For more particulars see ***infra***, under 4.

cases involving the same cause of action (Art. 27) and is permitted in cases of related claims (Ar. 28). Third state parallel litigation is not addressed in Brussels I and the Recast Regulation introduces changes in that respect in Articles 33 and 34. According to these provisions a court in a Member State, which is seised second, may stay the proceedings pending in a third State concerning the same (Art. 33) or related causes of action (Art. 34) if the conditions provided therein are fulfilled. Both provisions concern cases where the jurisdiction of the court in a Member State is based on the general rule on jurisdiction (Art. 4 – domicile of the defendant) or special jurisdictional rules in Arts. 7, 8 or 9 (such as contracts, torts, civil claims for damages based on an act giving rise to criminal proceedings and other cases referred to in Art. 7).[49]

Two conditions are identical in both provisions: firstly, it is expected that the judgment rendered in a third state is capable of recognition and/or being enforced in that Member State[50] and, secondly, the court of a Member State is satisfied that a stay is necessary for the proper administration of justice.[51] With respect to related actions under Article 34(1)(a) there is an addition requirement that "it is expedient to hear and determine the related actions together to avoid the risk of irreconcilable judgments resulting from separate proceedings". Considering that recognition and/or enforcement will depend on the national rules of the Member States it has rightly been observed that the rules of third country parallel litigation are incomplete without a common set of rules on the recognition of judgments rendered in third countries.[52] If a court in a third country has based its jurisdiction on a ground that has been considered exorbitant, it is likely that a judgment subsequently rendered would not satisfy the criterion of being "capable of enforcement" in a Member State for the purpose of applying the ***lis pendens*** rule in the case of third country litigation.

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[49] The provisions of Articles 8 and 9 of the Recast are identical to provisions 6 and 7 of the current Brussels I. In Art. 7 a new rule has been introduced in paragraph 4 regarding a civil claim for the recovery of a cultural object. The person claiming to have the right of recovery may file the claim in the courts where the object is situated at the moment the action is filed. Considering that Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, L 7/1 applicable from 18 June 2011, the provision on jurisdiction in Art. 5(2) of the current law in Brussels I is irrelevant and consequently has been deleted from Article 7 of the Recast.

[50] Art. 33(1)(a) concerning the same causes of action and Art. 34(1)(b) concerning related actions.

[51] Arts. 33(1)(a)-(b) and 34(1) (b)-(c) of the Recast.

[52] Weber, ***op. cit.***, p. 643.

The discretionary stay is further conditioned under both provisions by a Member State's court finding that the stay is "necessary for the proper administration of justice". It is indeed a rather vague notion, but Recital (24) of the Recast offers some guidelines for the assessment of compliance with this criterion. Thus, a court of a Member State will take into consideration all the circumstances of the case, such as connections between the parties and the facts and the third State, the stage at which the proceedings are at the moment a court of a Member State is seised and whether the court in the third state can be expected to render a judgment within a reasonable time. The fact that a court in the third state has exclusive jurisdiction according to the criteria for exclusive jurisdiction in that Member State is also a circumstance that can be considered when assessing whether a stay is necessary for the proper administration of justice.

Both provisions provide for the continuation of proceedings. The following conditions are identical under the two provisions:[53] if the proceedings in the third state are discontinued or stayed, if it appears to the court of a Member State that it is not likely that a judgment will be rendered within a reasonable time or that a continuation is required for the proper administration of justice. In cases of parallel related actions Article 34(2)(a) proceedings in a court in a Member States may be continued if there is no longer a risk of irreconcilable judgments.

Both provisions provide for the dismissal of proceedings by a court in a Member State if the proceedings in the third state have been completed and have resulted in a judgment that is capable of recognition and/or enforcement in that Member State. The dismissal is mandatory in cases of parallel proceedings involving the same causes of action and the same parties under Article 33(3) and discretionary in cases of related actions under Article 34(3).

These provisions applying to the court in Member States shall apply upon the request of a party or on its own motion where this is possible under national law.[54]

Amendments under the Recast Regulation are more substantial than the Commission's Proposal, considering that the latter dealt only with the same causes of action.

As already indicated, the newly introduced exception to the general "priority rule" in Article 31(2)-(4) does not apply to a forum-selection clause providing for the jurisdiction of a court in a third state.[55]

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[53] Arts. 33(2)(a)-(c) and 34(2)(b)-(d) of the Recast.

[54] Arts 33(3) and 34(4) of the Recast.

4. Improving the interaction between arbitration and litigation

In its Proposal the Commission suggested a number of additions to the text of the Regulation so as to revise the so-called arbitration exception under Article 1(2)(d) of Brussels I. The Explanatory Memorandum and the Impact Assessment generally refer to the need to prevent parallel proceedings and abusive actions undermining the effectiveness of arbitration agreements and emphasise the need to improve the interface between arbitration and litigation.[56] However, the Commission has failed to put forward any concrete problems that have been encountered in practice and that would demand, justify and urge the action of the EU legislator. No evidence has been offered that arbitration agreements are improperly denied effect or that there is excessive court intervention in any of the EU Member States. Instead, the Impact Assessment relies almost exclusively on the factual and legal circumstances of the widely discussed judgment of the European Court of Justice in ***West Tankers*** case.[57] Considering serious shortcomings in the substance and wording of the suggested changes, their rejection by the EU legislator is to be met with approval.[58] It is outside the scope of this contribution to analyse all the details of the Proposal,[59] but they will be

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[55] Hay, ***op. cit***., p. 4.

[56] In particular, the possibility to challenge an arbitration agreement before the court seised of a matter falling within the scope of the Regulation has been perceived as a major problem. In the Explanatory Memorandum it is stated that "by challenging an arbitration agreement before the court, a party may effectively undermine the arbitration agreement and create a situation of inefficient parallel court proceedings which may lead to irreconcilable resolutions of the dispute". Explanatory Memorandum, p. 3.

[57] Case C-185/07, ***Allianz SpA et al. v. WestTankers, Inc***. [2009] NIPR 2009, http://curia.europa.eu (West Tankers).

[58] For more particulars on the major shortcomings of the Proposal, see, Lazić, ***Journal of International Arbitration,*** pp. 19-48; V. Lazić, "The Amendment to the Arbitration Exception Suggested in the Commission's Proposal: The Reasons as to Why It Should Be Rejected", ***Nederlands Internationaal Privaatrecht (NIPR),*** pp. 289-298 (No. 2, 2011). Lazić, ***Legal Culture in Transition***, pp. 198-206. See also an early publication relating to the ECJ decision in ***West Tankers***, V. Lazić, "The Arbitration Exception in the Brussels Jurisdiction Regulation in the Light of the Judgment of the European Court of Justice, in ***Allianz SpA et al. v. West Tankers, Inc***", ***Nederlands Internationaal Privaatrecht (NIPR),*** pp. 130 ***et seq***. (No. 2, 2009).

[59] The Proposal has been extensively discussed in the legal literature. See, ***supra***, n. 58. See also, M. Illmer, "Brussels I and Arbitration Revised – The European Commission's Proposal COM(2010) 748 final", in: ***Max Planck Private Research Paper No. 11/6***, available at: ***http://ssm.com/abstract=1804079***. L. Radicati di Brozolo, "Arbitration and the Drafts Revised Brussels I Regulation: Seeds of Home Country Control and of Harmonization?", available at: ***http://ssrn.com.abstract=1895303***; J. J. Van Haersolte-van Hoff, The "Commission's Proposal to Amend the Arbitration Exception should be embraced", 29/2 ***Nederlands Internationaalprivaatrecht (NIPR)*** (2011) pp. 280 ***et seq***.

briefly outlined. Also the clarifications provided in the Recast Regulation on the interface between litigation and arbitration are summarised.

4.1 Solutions suggested in the Proposal with respect to the interface between the Regulation and arbitration

In its Proposal the Commission opted for a "partial deletion" of the arbitration exception in Article 1(2)(d). In other words, the suggested amendments were not meant to deal with all aspects of the interactions between the Regulation and arbitration. Instead they were only intended to allegedly enhance the effectiveness of arbitration agreements.[60] The suggested amendments were drafted within the framework of the provisions on ***lis pendens***, in particular Articles 29(4) and 33(3) of the Proposal (the current Arts. 27 and 30 of Brussels I).

The most important change which was proposed was to introduce a new provision in the main rule on ***lis pendens*** in Article 29(4) of the Proposal. According to this provision the courts in the Member States seised of a matter with respect to which an arbitration agreement has been concluded would have been required to stay their proceedings and refer the parties to arbitration as soon as the court at the seat of arbitration or the arbitral tribunal has been requested to rule on the validity of an arbitration agreement.[61] When an arbitral tribunal is deemed to be seised was to be defined in Art. 33(3) of the Proposal.[62]

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[60] To this end, the changes to the text of Article 1(2)(d) regarding the arbitration exception that were suggested were the following: "2. This Regulation shall not apply to arbitration, save as provided for in Articles 29, paragraph 4 and 33, paragraph 3."

[61] Article 29(4) of the Commission's Proposal provided as follows:

"4. Where the agreed or designated seat of an arbitration is in a Member State, the courts of another Member State whose jurisdiction is contested on the basis of an arbitration agreement shall stay proceedings once the courts of the Member State where the seat of arbitration is located or the arbitral tribunal have been seised of proceedings to determine, as their main object or as an incidental question, the existence, validity or effects of that arbitration agreement.

This paragraph does not prevent the court whose jurisdiction is contested from declining jurisdiction in the situation referred to above if its national law so prescribes.

Where the existence, validity of effects of the arbitration agreement are established, the court seised shall decline jurisdiction.

This paragraph does not apply in disputes concerning matters referred to in Sections 3, 4 and 5 of Chapter II."

[62] An arbitral tribunal would be deemed to be seised when a party has nominated an arbitrator or when a party has requested the support of an institution or authority of a court for the tribunal's constitution.

Uncertainties about the nature of a decision of the court at the seat of arbitration on the validity of the arbitration agreement, i.e., whether or not it would be of a binding nature, can be seen as a major shortcoming of the suggested rule.[63] If the decision is indeed meant to be covered by the Regulation and consequently to be binding in all EU Member States, that would seriously affect the 1958 New York Arbitration Convention, especially Articles II(3) and V(1)(a). Additionally, the idea of staying proceedings by a court in one Member State (the courts seised of a matter) in order to enable the court in another state (at the seat of arbitration) to decide on the validity of an arbitration agreement undermines the ***competence-competence*** principle. Namely, it would be reasonable that a court seised would be required to stay its proceedings so that the arbitral tribunal may rule on its own jurisdiction, as is provided for example under Article VI(3) of the 1962 European (Geneva) Convention. However, the reasons justifying a stay in one jurisdiction in order to permit the court in another jurisdiction to decide on the validity of the arbitration agreement are not easily discernible. Besides, there are grave deficiencies in the wording which would have caused serious difficulties in the application and interpretation by national courts in the Member States.[64] Therefore, it is not surprising that none of the suggested changes have been adopted in the final text of the Recast Regulation.

Yet the Recast does introduce some helpful clarifications on the interface between arbitration and the Regulation.

4.2 Amendments clarifying the interaction between arbitration and the Regulation 1215/2012

The Recast Regulation in Article 73(2) expressly provides that "[t]his Regulation shall not affect the application of the 1958 New York Convention". It thereby rejects the idea that a decision on the validity of an arbitration is covered by the Regulation and is accordingly binding in other EU Member States, as it would indeed affect the 1958 New York Convention. Additionally, the wording in Recital (12) leaves no doubts in that respect. It provides, ***inter alia***, that "[a] ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be

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[63] Even the members of the "Expert Group" that has drafted the Proposal have expressed a controversial view on the purpose and the intention of the suggested rules concerning the binding nature of the decision on the validity of arbitration agreement. Some argue that such a decision would not be covered by the Regulation and accordingly would not be binding in other Member States (see, e.g,, Radicati di Brozolo, ***op. cit***., p. 29), whereas others suggest that the decision would indeed be covered by the Regulation (see, Illmer, ***op. cit***., p 21).

[64] For a detailed discussion on the drawbacks of the Proposal, see, Lazić, ***supra,*** n. 58.

subject to the rules of recognition and enforcement of this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question". Such a clear and unambiguous wording renders moot any further discussion on the uncertainties about the reach and scope of the arbitration exception under the Regulation, as well as on the allegedly binding nature of a decision on the validity of the agreement of the court seised of a matter. Namely, the ***West Tankers*** judgment was often criticised and interpreted in the literature so as imply the binding nature of such a decision.[65]

Recital (12) further provides that nothing in the Regulation shall prevent national courts from ruling on the validity of an arbitration agreement. A ruling of a court of a Member State on the invalidity of an arbitration agreement shall not preclude the recognition and/or enforcement of that court's judgment rendered on the substance in another Member State. Moreover, it reiterates that the New York Convention takes precedence over the Regulation and that the Regulation does not apply to any action or ancillary proceedings related to arbitration, such as, "the establishment of the arbitral tribunal, the powers of the arbitrators, the conduct of the arbitration procedure or any other aspects of such a procedure, nor to any action or judgment concerning the annulment, review, appeal, recognition and enforcement of an arbitral award".

Thus, the added wording in Recital (12) answers all queries that may arise in the context of the arbitration exception in Article 1(2)(d) of the Regulation especially those triggered by the ***West Tankers*** judgment. As such it presents a valuable clarification and a useful tool in the interpretation of this provision.

5. Conclusions

Regarding the amendments to the Brussels I in general, it is appropriate that the Regulation has not been the subject of such an extensive and substantial revision as the Commission suggested. Namely, it is one of the most important instruments of EU private international law which has generally not resulted in significant difficulties in the application and interpretation by the national courts. Therefore, a decision to substantially revise such an important and rather successful legal instrument should not be taken without careful consideration.

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[65] See e.g., Van Haersolte-van Hoff, ***op. cit.***, p. 281; A. Markus/S. Giroud, "A Swiss Perspective on West Tankers and its Aftermath", ***ASA Bulletin*** 28/2 (2010) p. 237; Radicati di Brozolo, ***op. cit***., p. 29; see also, the decision of the English Court of Appeal in ***National Navigation Co. v. Intesa Generacion SA***, [2009] EWCA Civ. 1396, ***http://www.bailii.org/ew/cases/EWCA/Civ/2009/1397.html***.

As to the exception to the priority rule under the general ***lis pendens*** rule in the case of choice of court agreements, it is likely that it will be effective in combating "torpedo actions". Yet it is questionable whether the revised rule will generally enhance efficiency in dispute resolution. In particular, it would have been more appropriate to provide for a list of grounds on the basis of which a court seised would not be under the obligation to refer the parties to the chosen court. This is especially so when a choice of court agreement is obviously invalid or inoperable. The obligation of the court seised to refer the parties to the chosen court in such cases will unnecessarily delay dispute resolution.

The reference to the conflict of law rules of the state whose court is designated in the forum-selection agreement is not appropriate as it does not provide for the true uniformity of the rule to determine the law applicable to the substantive validity of the choice of court agreement.

Rules on parallel actions in third countries provide for a useful addition within the regulatory framework of the revised Brussels I Regulation. The same holds true with respect to the clarification as to the extent of the arbitration exception and the interface between the Regulation and arbitration. Rejecting the Commission's Proposal in that respect is to be met with approval, considering its substantial drawbacks and the deficiencies in its wording.