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CHOICE-OF-COURT AGREEMENTS IN COMMERCIAL, FAMILY AND  
SUCCESSION MATTERS

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## TABLE OF CONTENTS

<b>Introduction</b> .....	10
<b>CHAPTER ONE. CHOICE-OF-COURT AGREEMENT AS AN EXPRESSION OF THE PARTY AUTONOMY AND ITS LIMITATIONS</b> .....	16
<b>I. Party Autonomy: The Path to the Recognition of the Choice-of-Court Agreements</b>	16
<b>II. Effects and Nature of the Choice-of-Court Agreements</b> .....	30
1. Positive and Negative Effects in respect of the State's Court Jurisdiction.....	31
2. Nature of the Choice-of-court Agreements .....	32
2.1. Substantive Nature.....	32
2.2. Procedural Nature and Substantive Nature with Procedural Effects .....	34
3. Law Applicable to the Choice-of-Court Agreements .....	37
<b>III. Choice-of-Court Agreements in the International Disputes and its Limitations</b> ...	42
1. Functions of the Choice-of-Court Agreements.....	42
1.1. Practical Use of Choice-of-Court Agreements .....	45
2. Limitation to Party Autonomy in respect of Choice-of-Court Agreements .....	47
2.1. Public Policy and Overriding Mandatory Rules.....	48
2.1.1. Case law concerning the Interference of the Overriding Mandatory Rules with the Choice-of-Court Agreements.....	51
2.1.2. What Solution for Overriding Mandatory Rules and Public Policy in the context of the Jurisdiction Agreements?.....	58
a) Choice-of-Court Agreement according to the EU Regulations .....	58
b) Choice-of-Court Agreement in favour of a Third State's Court.....	66
2.2. <i>Forum Non Conveniens</i> .....	69
2.3. Protection of the Weaker Parties .....	72
2.3.1. Source of Vulnerability .....	73
2.3.2. Form of the Limitations concerning the Protection of the Weaker Parties.	74
<b>CHAPTER TWO. LEGAL INSTRUMENTS GOVERNING THE CHOICE-OF-COURT AGREEMENTS IN CIVIL AND COMMERCIAL MATTERS IN THE EU</b> ..	77
<b>I. The Brussels Regime and Lugano Regime</b> .....	77
1. Historical Background .....	77
2. Structure and Requirements for the Application of Article 25 of the Brussels <i>Ibis</i> Regulation .....	83
3. Scope of Application .....	83

3.1.	Territorial and Personal Scope of Application .....	84
3.2.	Temporal Scope of Application.....	85
3.2.1.	Relevant Point in Time for the Application of Article 25 of the Brussels <i>Ibis</i> Regulation .....	87
3.3.	Material Scope .....	89
3.4.	Internationality .....	90
4.	Domicile of the Parties .....	92
5.	Prorogation of the Court of a Member State.....	94
6.	Disputes in connection with a Particular Legal Relationship .....	96
7.	Formal Validity .....	96
7.1.	In Writing .....	99
7.2.	Evidenced in Writing.....	101
7.3.	Practices between the Parties.....	103
7.4.	International Trade Usage .....	103
7.5.	Communication by Electronic Means .....	105
8.	Substantive Validity.....	106
8.1.	The “Gap” in the Brussels Convention and the Brussels I Regulation as to the Substantive Validity .....	106
8.2.	Substantive Validity according to Article 25 of the Brussels <i>Ibis</i> Regulation .	110
9.	Effects of Choice-of-Court Agreements in respect of the Third Parties.....	119
9.1.	Company Statutes .....	120
9.2.	Bills of Lading .....	121
9.3.	Agreements Affecting a Third Party’s Right.....	122
9.4.	Chain of Contracts .....	123
9.5.	Bond Prospectus .....	125
9.6.	Assignment of Claims for Damages for an Infringement of Competition Law	126
9.7.	What is necessity for a Rule on Opposability of the Choice-of-Court Agreements against Third Parties? .....	127
10.	Severability of the Choice-of-Court Agreement .....	129
11.	Non-Exclusivity of the Choice-of-Court Agreement .....	130
11.1.	Exclusive and Non-Exclusive Choice-of-Court Agreement.....	131
11.2.	Asymmetric Choice-of-Court Agreement.....	133
12.	Relationship with other Rules in the Brussels <i>Ibis</i> Regulation .....	137

13.	Choice-of-Court Agreement in respect of the Weaker Parties.....	137
13.1.	Choice-of-Court Agreements in Insurance Contracts.....	139
13.2.	Choice-of-Court Agreements in Consumer Contracts.....	141
13.3.	Choice-of-Court Agreements in Employment Contracts.....	146
14.	<i>Lis Pendens</i> Rule among the Member States .....	148
14.1.	<i>Lis Pendens</i> Rule according to Article 31 of the Brussels <i>Ibis</i> Regulation ..	154
14.1.1.	Review of the Choice-of-Court Agreement .....	155
14.1.2.	Coordination between the Member State Courts .....	160
14.1.3.	Other Uncertainties arising out of the Application of the New <i>Lis Pendens</i> Rule	171
	a) Non-Exclusive and Asymmetric Choice-of-Court Agreements and <i>Lis</i> <i>Pendens</i> .....	171
	b) Temporal Application of <i>Lis Pendens</i> .....	172
15.	Derogation Effect in favour of the Third State courts.....	173
15.1.	Case law .....	174
15.2.	Theory of Reflexive Effect .....	178
15.3.	Non-Uniform Outcomes in the Member States .....	179
15.4.	Proposal of the Brussels <i>Ibis</i> Regulation as to the Choice-of-Court Agreements in favour of Third State Court .....	182
15.5.	Articles 33 and 34 of the Brussels <i>Ibis</i> Regulation.....	184
15.5.1.	Articles 33 and 34 of the Brussels <i>Ibis</i> Regulation as an Exclusive Regime for Allocating Disputes between the Member State Courts and the Third State Courts?.	191
<b>II.</b>	<b>Hague Convention on Choice of Court Agreements</b> .....	193
1.	The Historical Background .....	193
2.	Scope of Application .....	196
2.1.	Temporal and Territorial Scope.....	196
2.2.	Material Scope .....	199
2.3.	Personal Scope of Application .....	204
2.4.	Internationality .....	204
3.	Exclusivity of the Choice-of-Court Agreements .....	208
4.	Formal Validity .....	210
5.	Substantive Validity.....	211
6.	Severability .....	214

7.	Operative Rules of the Hague Convention on Choice of Court Agreements .....	215
7.1.	Jurisdiction of a Chosen Court .....	215
7.2.	Obligations of a Non-Chosen Court .....	215
7.3.	Recognition and Enforcement .....	219
<b>III.</b>	<b>Compatibility between the International Legal Instruments concerning Choice-of-Court Agreements .....</b>	<b>222</b>
1.	Compatibility between the Brussels <i>Ibis</i> Regulation and the 2007 Lugano Convention .....	222
2.	Compatibility between the Hague Convention on the Choice-of-Court Agreements and the Brussels <i>Ibis</i> Regulation .....	228
2.1.	Internationality .....	230
2.2.	Formal Validity .....	232
2.3.	Parallel Proceedings between the Member States .....	235
2.3.1.	Compatibility of the Regimes in the Presence of One of the Exceptions Provided in Article 6 of the Hague Convention on Choice of Court Agreements ..	236
2.4.	Parallel Proceedings between the Member State and Contracting State .....	246
2.4.1.	A Gap in the “Give Way” rule under the Hague Convention on Choice of Court Agreements? .....	249
2.4.2.	Compatibility of the Regimes in the Presence of One of the Exceptions Provided in Article 6 of the Hague Convention on Choice of Court Agreements ..	254
3.	Compatibility between the Hague Convention on the Choice of Court Agreements and the 2007 Lugano Convention .....	257
3.1.	Substantive Validity .....	260
3.2.	Parallel Proceedings .....	262
<b>CHAPTER THREE. LEGAL INSTRUMENTS GOVERNING THE CHOICE-OF-COURT AGREEMENTS IN FAMILY AND SUCCESSION MATTERS IN THE EU</b>		<b>264</b>
<b>I.</b>	<b>Choice-of-Court Agreements in Family Matters .....</b>	<b>266</b>
1.	Historical Background .....	266
2.	Agreements on Jurisdiction under the Brussels <i>IIa</i> Regulation .....	273
2.1.	Scope of Application .....	275
2.1.1.	Territorial and Personal Scope of Application .....	275
2.1.2.	Temporal Scope of Application .....	277
a)	Relevant Point of Time .....	277
2.1.3.	Material Scope of Application .....	280

2.2.	Article 12 par. 1 of the Brussels <i>Ila</i> Regulation .....	281
2.2.1.	Jurisdiction of the Court in Divorce, Legal Separation, or Marriage Annulment .....	282
2.2.2.	Parties to the Agreement .....	283
2.2.3.	Superior Interest of the Child .....	285
2.3.	Article 12 par. 3 of the Brussels <i>Ila</i> Regulation .....	287
2.3.1.	Substantial Connection.....	289
2.3.2.	Parties to the Agreement .....	290
2.3.3.	Best Interest of the Child.....	291
2.4.	Formal Validity .....	293
2.4.1.	Time of Acceptance of Jurisdiction .....	293
2.4.2.	Acceptance made “Otherwise in an Unequivocal manner” .....	295
2.5.	Substantive Validity .....	300
2.6.	Choice-of-court Agreements in Divorce, Legal Separation, and Marriage Annulment under the Brussels <i>Ila</i> Regulation .....	303
3.	Choice of Court agreements under the Maintenance Regulation .....	311
3.1.	Scope of Application .....	311
3.1.1.	Territorial and Personal Scope of Application.....	312
3.1.2.	Temporal Scope of Application .....	312
3.1.3.	Material Scope of Application .....	313
3.2.	Limitation on Free Choice of Jurisdiction according to Article 4 of the Maintenance Regulation .....	315
3.2.1.	Connecting Factors.....	316
a)	Relevant Point of Time .....	318
3.3.	Maintenance Obligations towards Minors.....	320
3.4.	Formal Validity .....	321
3.5.	Substantive Validity .....	324
3.6.	Severability.....	326
3.7.	Excusive, Non-Exclusive and Asymmetric Jurisdiction Agreements .....	328
3.8.	Relationship between the Maintenance Regulation and the 2007 Lugano Convention .....	329
4.	Choice of Court Agreement under the Regulations on Property Consequences of Marriage and Registered Partnership .....	332

4.1.	Scope of Application .....	332
4.1.1.	Territorial and Personal Scope of Application.....	332
4.1.2.	Temporal Scope of Application .....	334
4.1.3.	Material Scope of Application .....	335
4.2.	Types of the Choice-of-Court Agreements under the Matrimonial Property Regime Regulation and under the Regulation on Property Consequences of Registered Partnerships .....	336
4.2.1.	Choice-of-Court Agreements Providing for the Concentration of the Proceedings .....	342
a)	Moment of the Agreement .....	343
4.2.2.	Choice-of-Court Agreements in Other Cases.....	345
a)	Moment of the Agreement .....	349
4.3.	Formal Validity .....	351
4.4.	Substantive Validity .....	353
4.5.	Severability .....	354
5.	<i>Lis Pendens</i> between the Member States.....	355
5.1.	<i>Lis Pendens</i> under the Brussels IIa Regulation.....	355
5.2.	<i>Lis Pendens</i> under the Maintenance Regulation.....	357
5.3.	<i>Lis Pendens</i> under the Matrimonial Property Regime Regulation and under the Regulation on Property Consequences of Registered Partnerships.....	358
6.	Derogation from Jurisdiction in favour of Third States.....	361
6.1.	Derogation from Jurisdiction under the Brussels IIa Regulation .....	361
6.2.	Derogation from Jurisdiction under the Maintenance Regulation.....	370
6.3.	Derogation from Jurisdiction under the Matrimonial Property Regime Regulation and the Regulation on Property Consequences of Registered Partnership.....	373
<b>II.</b>	<b>Choice-of-Court Agreements in Succession Matters .....</b>	<b>376</b>
1.	Scope of Application .....	377
1.1.	Territorial Scope of Application.....	377
1.2.	Temporal Scope of Application.....	378
1.3.	Personal Scope of Application .....	379
1.4.	Material Scope of Application.....	379
2.	Choice-of-Court Agreements under the Succession Regulation .....	381
2.1.	Effects of the Choice-of-Court Agreement .....	382



2.2.	Conditions for Application of the Rule on Choice-of-Court Agreement .....	385
2.2.1.	Choice-of-Law under Article 22 of the Succession Regulation.....	385
2.2.2.	Formal Validity .....	387
2.2.3.	Substantive Validity .....	389
2.2.4.	Parties to the Agreement .....	392
3.	<i>Lis Pendens</i> under the Succession Regulation.....	395
4.	Declination from Jurisdiction in favour of Third States .....	396
	<b>Conclusion</b> .....	400
	<b>Bibliography</b> .....	410

## INTRODUCTION

Legal uncertainty arises regarding which State may hear a dispute and whether the judgement of the court will be upheld in other countries.<sup>1</sup> This risk can be reduced through a specific tool – choice-of-court agreements, which enable the parties to plan the venue for the dispute. However, the efficacy of this tool to provide legal certainty is dependent on the legal framework created by the States through which the parties may realize their rights and interests and on the functional system of the recognition of the judgments rendered by the designated courts.

A survey prepared for the Hague Conference on Private International Law noticed that business choice-of-court agreements are common in certain types of business-to-business (B2B) contracts.<sup>2</sup> The rule on choice-of-court agreements in civil and commercial matters was introduced in 1968 in the Brussels Convention<sup>3</sup> and later on, in the Brussels I Regulation.<sup>4</sup> However, the operators faced some difficulties in practice caused by the *lacunas* in the applying the rule on prorogation of jurisdiction under the Brussels regime and by the related interpretation provided by the Court of Justice of the European Union (“ECJ”). These difficulties lead to unfair commercial practices and sparked the call for reforming the Brussels Regulation’s rules. The Proposal for a Recast of the Brussels I Regulation<sup>5</sup> aimed at amending or introducing the rules: (i) which would create uniform solutions among the Member States of the European Union (“Member States”) concerning the rule on substantive validity; and (ii) which would not encourage abusive litigation tactics. Although the Brussels Regime determines the rule on choice-of-court agreements in the EU, it must be borne in mind that the recognition of choice-of-court agreements is also relevant beyond the EU. Growing

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<sup>1</sup> Study to Inform an Impact Assessment on the Ratification of the Hague Convention on Choice of Court Agreements by the European Community, Directorate-General Justice, Freedom and Security, Final Report submitted by GHK, 7 December 2007, p. 15.

<sup>2</sup> Commission Staff Working paper. Impact Assessment. Accompanying document to the Proposal for Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), SEC(2010) 1547 final, 14 December 2010, p. 29.

<sup>3</sup> 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, OJ L 299, 31 December 1972. For consolidated text see 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (consolidated version), OJ C 27, 26 January 1998, (“Brussels Convention”).

<sup>4</sup> 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 L 12, 16 January 2001, (“Brussels I Regulation”).

<sup>5</sup> 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, COM/2010/0748 final, 14 December 2010 (“Proposal for a Recast of the Brussels I Regulation”).

international trade and parallel proceedings in the Third States resulting in irreconcilable judgments necessitate solving this problem. Indeed, the Brussels *Ibis* Regulation<sup>6</sup> established new rules dealing with parallel proceedings in Third States. Moreover, the Hague Convention on Choice of Court Agreements,<sup>7</sup> which almost 10 years after its adoption entered into force on 1 October 2015, is currently applicable in 32 Contracting States, including the EU. The Hague Convention on Choice of Court Agreements is expected to promote international trade and investment through enhanced judicial co-operation by introducing uniform rules on jurisdiction agreements and recognition and enforcement of foreign judgments in civil or commercial matters.<sup>8</sup>

Jurisdiction agreements are recognized as a planning tool mainly in the private international law of contracts. The prevalence of mandatory rules in family law (predominantly concerning the *status* of the persons), where States do not mostly permit derogation from their content, has slowed down the progress of party autonomy in the field of family procedural international law. The increasing migration not only within the EU leads to a growing number of international couples and calls for greater legal certainty. Thus, the trend of recognizing choice-of-court agreements has gradually spread into all areas of international family law. It must be highlighted that choice-of-court agreements pursue another significant function of the EU family law: they enable the concentration of the jurisdiction in a single court of a Member State. This function may prevent the fragmentation of jurisdiction in different Member States which is caused by the multiplicity of the EU Regulations providing for different jurisdictional grounds.

This PhD project aims at verifying whether the current rules on choice-of-court agreements in the above-mentioned legal instruments provide for a clear and predictable legal framework in civil, family, and succession matters which contributes to desirable legal certainty within the EU. In particular, this PhD project aims at:

- i) Analysing the legal framework of choice-of-court agreements and *lis pendens* among both Member States courts and Third States courts in the presence of choice-of-court

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<sup>6</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20 December 2012 (“Brussels *Ibis* Regulation”).

<sup>7</sup> Convention of 30 June 2005 on Choice of Court Agreements (“Hague Convention on Choice of Court Agreement”).

<sup>8</sup> Preamble of the Hague Convention on Choice of Court Agreements.

agreements in the EU in civil, family, and succession matters under the Brussels *Ibis* Regulation, the Brussels I Regulation, the 2007 Lugano Convention,<sup>9</sup> the Hague Convention on Choice of Court Agreements, the Brussels *Ila* Regulation,<sup>10</sup> the Maintenance Regulation,<sup>11</sup> Matrimonial Property Regime Regulation,<sup>12</sup> Regulation on the Property Consequences of Registered Partnerships,<sup>13</sup> and the Succession Regulation;<sup>14</sup>

- ii) Determining the interactions between these legal instruments and where possible, examining their interplay through their simultaneous application;
- iii) Identifying the barriers, weaknesses, and gaps of the rules on choice-of-court agreements, *lis pendens*, and parallel proceedings and proposing solutions *de lege ferenda*.

Thus, the research will develop the effort to find answers on the following questions: Do the current rules on choice-of-court agreements in the all analysed legal instruments function in the correct manner? Can the effectiveness of the rules on choice-of-court agreements be further enhanced and strengthened? Are there any problems, loopholes, gaps, or weak points in the wording of the text of the rules on choice-of-court agreements or in the case law of the ECJ? What (if any) solutions should be adopted for the identified problems, loopholes, gaps, or weak points? What is the best approach for testing the current rules and their interplay? Can the approach ascertained in one subject matter be transferred to other one? Can be any common conclusions be assumed transversely through all subject matters?

The research will be conducted mainly on the basis of the qualitative method, where the author analyses: (i) the wording of the text of the target rules laid down in different legal

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<sup>9</sup> Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 339, 21 December 2007 (“2007 Lugano Convention”).

<sup>10</sup> Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338, 23 December 2003 (“Brussels *Ila* Regulation”).

<sup>11</sup> Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 7, 10 January 2009 (“Maintenance Regulation”).

<sup>12</sup> Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJ L 183, 8 July 2016 (“Matrimonial Property Regime Regulation”).

<sup>13</sup> Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, OJ L 183., 8 July 2016 (“Regulation on the Property Consequences of Registered Partnerships”).

<sup>14</sup> Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201, 27 July 2012 (“Succession Regulation”).

instruments, and take into consideration the *ratio* of the rules, historical backgrounds, legislative procedure, the amendments, and recasts; (ii) the interpretation provided by the ECJ and its impact on the case law of the Member States, which covers the acceptance of such interpretation by the Member States, the deviation from it with the further justifications, the adding of their own criteria, or tracking down the loopholes; (iii) the presentation of the doctrinal discussions, which present different approaches, assist in searching for answers, draw attention to the possible problems (or sometimes they even contradict themselves), and may be to the detriment of legal certainty; and (iv) the creation of examples; considerations and analysis of the examples; evaluation, verification, and presentation of their outcomes.

Although the topic may be seen as not very “new”, the purport of this PhD thesis offers new aspects, views, considerations, and conclusions and may benefit the current studies and publications due to the several reasons. First, this PhD thesis provides for an integrated analysis of choice-of-court agreements covering commercial, family, and succession matters in a single document. Although the subject matters are dealt with in separate chapters due to their specific characteristics, the PhD thesis examines their mutual interpenetration, influence, and the possibility of extending the approaches from one subject matter to another one. The current publications examining choice-of-court agreements focus mainly on one or two of the analysed legal instruments. However, no publication (at least which are known to the author) considers the commercial, family, and succession matters jointly. Second, it examines the interplay of the various legal instruments in practical examples. Moreover, the presentation, description, and examination of the problem may be sometimes difficult to follow due to its complexity. For this reason, the examples assist in imagining the outcomes arising out from the presented problems. Although most of the scientific, legal publications do not use practical examples, according to the author, it represents an efficient tool for revealing different legal problems and gaps following their (combined) application. Third, this topic is also a new one because it provides for a complete insight to the “whole package” of the rules on choice-of-court agreements concerning various aspects of the private life, which are laid down in different legal instruments dealing with family and succession matters. It is worth mentioning that a large part of the studies analyzes choice-of-court agreements in civil and commercial matters, but there is a minor number of the publications which pay particular attention to choice-of-court agreements in family matters. Furthermore, there is still no a cumulative assessment of choice-of-court agreements under different legal instruments in

family matters. Lastly, the PhD thesis analyses the new rules on choice-of-court agreements, *lis pendens*, and parallel proceedings under the Brussels *Ibis* Regulation under the Hague Convention on Choice of Court Agreements, which are applicable only from 2015. The analysis covers also a Proposal for a Recast for Brussels *Ia* Regulation<sup>15</sup> and Regulations of the Property Regimes in the context of choice-of-court agreements, which are applicable as from January 2019, and at the time of the choice of this topic, were not published.

Accordingly, this thesis is divided into three chapters. The first chapter introduces party autonomy on a general level, which significantly contributes to the correct comprehension of the statutory recognition of choice-of-court agreements in the next chapters. This includes the outline of different categorizations of party autonomy, their cross-over into the topic of choice-of-court agreements, and a brief historical development of the choice-of-court agreements. The nature and effect of the choice-of-court agreement are described in the subsequent subchapter, demonstrating the different approaches influencing the legislative or case law choices as to the law applicable to the choice-of-court agreements. This analysis becomes a building block in the subsequent chapters dealing with substantive validity. Furthermore, it introduces the importance of the rules on choice-of-court agreements, their functions, and practical use, as well as divergent limitations with respect to choice-of-court agreements. The analysis of limitations demonstrates currently unclear issues, such as the impact of overriding mandatory rules on choice-of-court agreements.

The second chapter represents a core of the PhD thesis tackling the civil and commercial matters. This chapter is divided into three subchapters: (i) choice-of-court agreements and issues related to it under the Brussels and Lugano Regimes; (ii) choice-of-court agreements and issues related to it under the Hague Convention on Choice of Court Agreement; and (iii) examination of the interplay between the Brussels and Lugano Regimes, between the Hague Convention on Choice of Court Agreement and the Brussels *Ibis* Regulation, and between the Hague Convention on Choice of Court Agreement and the 2007 Lugano Convention. The first two subchapters focus on the analysis of the rules on choice-of-court agreements, such as their scope, conditions for applications, formal and substantive validity, exclusivity, severability, rules on *lis pendens* or on parallel proceedings, and other related issues. The specificity of

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<sup>15</sup> Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), COM/2016/0411 final, 30 June 2016 (“Proposal for a Recast of the Brussels *Ia* Regulation”).

each legal instrument is considered (for example, the specific rules on choice-of-court agreements concluded with weaker parties in accordance with Articles 15, 19, and 23 of the Brussels *Ibis* Regulation). This analysis identifies problematic points and searches for reasonable solutions. The last subchapter shows the differences between the legal instruments and tests their interplay in the practical examples.

The third and last part is a core of the PhD thesis dealing with family and succession matters and is divided into two subchapters: choice-of-court agreements concerning family matters and choice-of-court agreements concerning succession matters. Moreover, family matters are further broken down by the single EU Regulations. In particular, the Regulations are: the Brussels *Iia* Regulation, which determines the rule on prorogation of jurisdiction in parental responsibility matters in Article 12 of the Brussels *Iia* Regulation, and where the rule on choice-of-court in divorce is lacking; the Maintenance Regulation, which determines the rule on choice-of-court agreements in Article 4; and the Regulation on Matrimonial Property Regimes and the Regulation on Property Consequences of Registered Partnerships, which determine the rules on choice-of-court agreements in Articles 5 and 7. The scope, conditions for applications, formal and substantive validity, exclusivity, and severability of the rules on choice-of-court agreements is examined in all sections. Also considered are the problem of jurisdiction clauses in favour of Third States and the rules on *lis alibi pendens*. The last subchapter describes the “mechanisms” contained in Articles 5, 6, 7, and 9 of the Succession Regulation allowing party autonomy to a limited extent, as well as the problem of jurisdiction clauses in favour of Third States and the *lis alibi pendens* rule.

## CHAPTER ONE. CHOICE-OF-COURT AGREEMENT AS AN EXPRESSION OF THE PARTY AUTONOMY AND ITS LIMITATIONS

### I. Party Autonomy: The Path to the Recognition of the Choice-of-Court Agreements

The origin of the term “autonomy” comes from the Greek word “nomos” which may be translated as “law” or “rule”, and word “auto” which may be translated as “self”.<sup>16</sup> Autonomy is often used in broad terms, as an equivalent to liberty, self-rule or self-sovereignty, and sometimes as freedom of a will.<sup>17</sup> According to Kant, people are subordinated to the laws which they lay down for themselves.<sup>18</sup> The autonomy of the will is correlated mainly with the private law – Kant’s views to all private law categories reflect a strictly relational character between two individuals.<sup>19</sup>

Nowadays, autonomy is perceived as “*self-arrangement of legal relations by individuals according to their respective will*”.<sup>20</sup> However, should the parties be permitted to design their own private rights and duties? And what is the relationship between the public power, *i.e.*, the power of the State to enact legal rules, and party autonomy, *i.e.*, the power of the individuals to make their arrangements? The concept of the sovereign State, which enacts a positive law, is superior to the individual.<sup>21</sup> Then, party autonomy derives from the authorisation or from the legal rule enacted in the legal system with the aim to be consequently recognised and it is bounded by the limitations.<sup>22</sup> It means that the legal instruments regulate *what* the act of party autonomy is, *how* it is constituted in the legal terms, and what limitations are imposed by

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<sup>16</sup> G. DWORKIN, *The Theory and Practice of Autonomy*, Cambridge University Press, 1988, p. 11.

<sup>17</sup> G. DWORKIN, *The Theory and Practice of Autonomy*, *op. cit.*, p. 3.

<sup>18</sup> E. KANT, *Groundwork of the Metaphysic of Morals*, translated by H. J. PORTON, Harper Torchbooks, 1964, p. 98-99: «*The will is therefore not merely subject to the law but is so subject that it must be considered as also making the law for itself and precisely on this account as the first subject to the law.*».

<sup>19</sup> E. KANT, *The Metaphysics of Morals* (1797), translated by M. GREGOR, Cambridge University Press, 1996, par. 6:2330.

<sup>20</sup> Study to Inform an Impact Assessment on the Ratification of the Hague Convention on Choice of Court Agreements by the European Community, Directorate-General Justice, Freedom and Security, Final Report submitted by GHK, 7 December 2007 (“Impact Assessment on the Ratification of the Hague Convention on Choice of Court Agreements”), p. 6.

<sup>21</sup> J. CARRUTHERS, *Party Autonomy in the Legal Regulation of Adult Relationships: What Place for Party Choice in Private International Law*, *International & Comparative Law Quarterly* 61:4 (2012), p. 884.

<sup>22</sup> A. M. BENEDETTI, *Autonomia privata procedimentale, La formazione del contratto fra legge e volontà delle parti*, Giappichelli, 2002, p. 2. On the tension between public order and party autonomy in choice of law, see H. E. YNTEMA, “*Autonomy*” in *Choice of Law*, *The American Journal of Comparative Law* (1952), p. 342-343, which makes reference to F. LAURENT, *Le Droit Civil International*, vol. 2, 1881, p. 378; *id.*; *Ibidem*, vol. 7, p. 512: «*...while the general laws established for the public welfare derive from the volonté generale, the parties are at liberty by their agreements to prescribe for themselves ‘private laws’ regulating the infinite variety of individual interests within the sphere of free enterprise.*».



law.<sup>23</sup> This applies in the area of substantive law, as well as in the area of procedural law. The States impose the external limitations, which are represented by: the mandatory rules or principles of public order in the context of substantive law;<sup>24</sup> other limitations aiming at the protection of the specific subjects (i.e., weaker parties);<sup>25</sup> whereby the internal limitations must be found in the specific provisions of the national legal orders.<sup>26</sup>

The autonomy of the parties is traditionally connected with the notion of freedom or liberty of contract, which must be distinguished from the party autonomy in international procedural law, which is subject of the analysis of this thesis.<sup>27</sup> Wachter and Savigny presumed that, except for the public ordering, contract law rests upon the autonomy of the parties.<sup>28</sup> This contractual autonomy also known as freedom or liberty of contract,<sup>29</sup> is defined as “*the rights to enter into binding private agreements with others*” and as “*a judicial concept that contracts are based on mutual agreement and free choice that should not be hampered by the undue external control such as governmental interference*”.<sup>30</sup>

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<sup>23</sup> Emphasis added. A. M. BENEDETTI, *Autonomia privata procedimentale, La formazione del contratto fra legge e volontà delle parti*, op. cit., p. 3.

<sup>24</sup> G. MORELLI, *Studi Di Diritto Processuale Civile di diritto processuale civile internazionale*, Giuffrè, 1961, p. 12.12, according to the author, the public order cannot operate as the limit of procedural provisions.

<sup>25</sup> On this type of limitation see *infra* Chapter One, Subchapter III, Section 2.3.

<sup>26</sup> On the differences between international overriding mandatory rules and simple internal mandatory rules see *infra* Chapter One, Subchapter III, Section 2.1.

<sup>27</sup> On the differences between party autonomy and freedom of contract: Z. MENG, *Party Autonomy, Private Autonomy, and Freedom of Contract*, Canadian Social Science 10: 6 (2014), p. 212 et seq.

<sup>28</sup> E. YNTEMA, “*Autonomy*” in *Choice of Law*, op. cit., p. 342.

<sup>29</sup> See for example, B. A. GARNER (ed), *Black’s Law Dictionary*, Thomson West, 2009, 9.ed., which does not provide for the definition of “autonomy of parties”, but directly refers to the notion of “freedom of the contract”.

<sup>30</sup> Impact Assessment on the Ratification of the Hague Convention on Choice of Court Agreements, p. 6. The meaning of contractual party autonomy may be characterised by more freedoms (*jus dispositivum*): the freedom to conclude a contract (the parties have a right to conclude a contract, which is contrary to the obligation of the party to conclude a contract, such as in the case of a preliminary contract, duty to conclude a contract in case of non-fulfilment, etc.); the freedom to determine the contents of the contract (the contracts can adopt the exact wording of the provision laid down by the national law, or, may deviate from the dispositive provisions); or the freedom to choose a contractor (the obligation to select a contractor is sometimes predefined by law, mainly by the family law). On this division see R. SCHULZE, *Common European Sales Law (CESL)*, Beck, Hart, 2012, p. 85. According to some authors, the freedom to conclude an innominate contract, the freedom to determine the form of the contract, or the freedom to make amendments to the contract form part of the contractual party autonomy. For example, in Poland, see M. LUBELSKA-SAZANOW, *The “Principle of No Freedom of Contract”: A Post Modern Version of the Freedom of Contract Principle*, in M. E. DE MAESTRI, S. DOMINELLI (eds), *Party Autonomy in European Private (and) International Law*, Aracne, 2015, p. 17-18. See also the judgment of *Ústavní soud České Republiky*, 7 December 2004, I. ÚS 670/02, which decided that another two factors of contractual freedom must be added: the freedom to agree on the modifications of the contract and the freedom to decide on the termination of the contract.

However, it must be pointed out that one party can also express its autonomy by making an unilateral legal act, such as a testament.<sup>31</sup> All these freedoms stand behind the restrictions (negative aspect): duty to respect mandatory provisions (*jus cogens*); duty not to disrupt public order; and duty not to contravene to *bono mores*, which are laid down by national rules aiming at counterbalancing positive rights of the parties.<sup>32</sup> The restrictions on freedoms play an important role, mainly in family law which require the higher level of mandatory regulations, and mostly the derogation from their content is not permitted.<sup>33</sup> In the succession law, the national law regulates the specific legal acts of party autonomy of the *de cuis*, as testaments, joint and mutual wills, or testamentary contracts.<sup>34</sup> Testamentary freedom also has significant limitations laid down by the national law, which protect the testator's closest relatives. For example, one limitation is the compulsory portion of the testator's inheritance, which must be passed on the most intimate relatives.<sup>35</sup>

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<sup>31</sup> G. A. BERMANN, *Party Autonomy: Constitutional and International Law Limits in Comparative Perspective*, Juris, 2005, p. 1, according to the author freedom of private parties applies in case of unilateral legal acts, such as gifts and testaments. The question is if the unilateral act is an expression of party autonomy or individual autonomy. See in this respect X. KRAMER, E. THEMELI, *The Party Autonomy Paradigm: European and Global Developments on Choice of Forum*, in S. STUIJ, V. LAZIĆ (eds), *Brussels Ibis Regulation: Changes and Challenges of the Renewed Procedural Scheme*, Springer, 2017, p. 30, which make a difference between party autonomy and individual autonomy.

<sup>32</sup> E.g., in Italy see Article 1343 of the Italian Codice civile (approvato con Regio Decreto del 16 marzo 1942, n. 262, e come modificato dalla Decreto 7 dicembre 2016, n. 291): «*La causa è illecita quando è contraria a norme imperative, all'ordine pubblico o al buon costume.*», or Article 588 of Czech Civil Code (Nový občanský zákoník č. 89/2012 Sb.), official translation available at: [obcanskyzakonik.justice.cz/images/pdf/Civil-Code.pdf](http://obcanskyzakonik.justice.cz/images/pdf/Civil-Code.pdf): «*A court shall, even of its own motion, take into account the invalidity of a juridical act which is manifestly against good morals or which is contrary to a statute and manifestly disrupting public order.*».

<sup>33</sup> In the Czech Republic, the rules on family matters are predominantly *ius cogens*, but the family law distinguishes personal rights and rules regulating property rights, when mandatory provisions are characterised only in respect of *status* rights. The national law usually expressly prescribes the possibility to conclude the certain legal acts (e.g. to enter into the marriage, conclude agreements on property regime and prenuptial agreements, a conclusion of agreements dealing with specific rights are excluded, innominate legal acts in family matters are not usually permitted), and their requirements, conditions and their form which must be fulfilled. Moreover, the recipients of the contract are usually already “chosen” by the circumstances, e.g. the future spouse, the father of the child, etc. See K. ELIÁŠ, M. ZUKLÍNOVÁ, *Principy a východiska nového kodexu soukromého práva*. Linde Praha, 2001, p. 134; Z. KRÁLÍČOVÁ, *Autonomie vůle v rodinném právu v česko-italském porovnání*, Masarykova univerzita, 2003, p. 38-39. On the comparison between legal systems concerning specific questions of family law, see: J. M. SCHERPE, *Marital Agreements and Private Autonomy in Comparative Perspective*, Hart Publishing, 2012.

<sup>34</sup> In Italy, France, and Germany, the arrangements as to succession, the joint wills are not permitted. See A. FUSARO, *Testamentary freedom in Italy*, in B. HEIDERHOFF, I. QUEIROLO (eds), *Party Autonomy in European Private (and) International Law*, Aracne, 2015, p. 211. For the comparative perspective, see M. ANDERSON, E. ARROYO I AMAYUELAS, *The Law of Succession: Testamentary Freedom: European Perspectives*, Europa Law Publishing, 2011.

<sup>35</sup> See A. FUSARO, *Testamentary freedom in Italy*, *op. cit.*, p. 212.

The recognition of the principle of freedom of contract may be attributed to the liberal conceptions of Smith, Rousseau, and Kant and was also extended into the area of conflicts-of-laws.<sup>36</sup> The disciplines of the freedom of contract and the choice-of-law were firstly assimilated when the reference to the foreign law was seen as the instrument to determine the contents of the contract; consequently the distinction between these two disciplines was drawn.<sup>37</sup> The principle of party autonomy in respect to the choice-of-law was, according to Giuliano and Lagarde Report, “*embodied in the private international law of all the Member States of the Community and most other countries*”.<sup>38</sup> This principle is recognised in most conflict-of-law codifications of the Twentieth Century in civil and commercial matters,<sup>39</sup> including: the EU Regulations;<sup>40</sup> international conventions;<sup>41</sup> conventions adopted by Hague Conference on Private International Law;<sup>42</sup> non-State law, such as *lex mercatoria*,<sup>43</sup> or

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<sup>36</sup> E. YNTEMA, “*Autonomy*” in *Choice of Law*, *op. cit.*, p. 342.

<sup>37</sup> I. VIARENGO, *Autonomia della volontà e rapporti patrimoniali tra coniugi nel diritto internazionale privato*, CEDAM, 1996, p. 112, 113; E. YNTEMA, “*Autonomy*” in *Choice of Law*, p. 342.

<sup>38</sup> see Report on the Convention on the law applicable to contractual obligations by Mario Giuliano, Professor, University of Milan, and Paul Lagarde, Professor, University of Paris I, 31 October 1980, OJ C 282 (“Giuliano and Lagarde Report”). ”), where Giuliano and Lagarde Report expressly refer to the legislation and case-law of France, Germany, Italy, Belgium, Luxembourg, the Netherlands, UK, and Denmark.

<sup>39</sup> S. SYMEONIDES, *Codifying Choice of Law around the World: An International Comparative Analysis*, Oxford University Press, 2014, p. 114.

<sup>40</sup> See for example, Article 3 par. 1 of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4 July 2008, (“Rome I Regulation”).

<sup>41</sup> See for example, Article 7 para 1 of Inter-American Convention on the Law Applicable to International Contracts adopted in 1994 in Mexico.

<sup>42</sup> See for example Article, Article 2 par. 1 and 2 of the Convention of 15 June 1955 on the law applicable to international sales of goods. The Hague Conference also drafted the Principles on Choice of Law in International Commercial Contracts, which seeks to harmonise approaches to international choice-of-law contracts by providing a universal model and best practice of recognition. The Hague Principles on Choice of Law in International Commercial Contracts were approved on 19 March 2015, and has been already implemented into Paraguayan Law 5393 of 2015 Regarding the Applicable Law to International Contracts, available at: <https://www.hcch.net/en/publications-and-studies/details4/?pid=6300&dtid=41>. On the Hague Principles on Choice of Law in International Commercial Contracts, see among other M. PERTEGÁS, B. A. MARSHAL, *Party Autonomy and its Limits: Convergence through the New Hague Principles on Choice of Law in International Commercial Contracts*, Brooklyn Journal of International Law 39:3 (2014), pp. 975-1003; L. G. RADICATI DI BROZOLO, *Non-national rules and conflicts of laws: Reflections in light of the UNIDROIT and Hague Principles*, Rivista di diritto internazionale privato e processuale 4 (2012), pp. 841–864; S. SYMEONIDES, *The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments*, American Journal of Comparative Law 61 (2013), pp. 873–899; J. BASEDOW, *The Hague Principles on Choice of Law: Their Addressees and Impact*, Uniform Law Review, 22 (2017), pp. 304-315; K. BOELE-WOELKI, *Party Autonomy in Litigation and Arbitration in View of the Hague Principles on Choice of Law in International Commercial Contracts*, Collected Courses of the Hague Academy of International Law, The Hague Academy of International Law 379 (2015), p. 51, 53.

<sup>43</sup> Parties entering into the contracts sometimes prefer that *lex mercatoria* governs the contract by exclusion of the national law and its limits. If the parties, choose to apply *lex mercatoria* and subject matter falls into the scope application of Rome Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980, OJ L 266, 9 October 1980 (“Rome Convention”) or Rome I Regulation the question

UNIDROIT Principles of International Commercial Contracts.<sup>44</sup> The parties are allowed, within specific parameters and limitations, to agree in advance on which State's law will govern the contract or legal relationship<sup>45</sup> “...and this choice includes in principle the mandatory law of the chosen legal system and excludes that of the ‘deselected’ legal system.”<sup>46</sup> According to Savigny, family and succession law are anomalous laws, which are immune from choice-of-law theory and are always governed by the *lex fori*.<sup>47</sup> Actually, there are significant current efforts to establish choice-of-law frameworks for family and succession matters,<sup>48</sup> but such efforts are determined in a limited manner.<sup>49</sup>

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arises whether *lex mercatoria* as a non-state law can be chosen by the parties independently on the national law. See J. BASEDOW, *The Law of Open Societies: Private Ordering and Public Regulation of International Relations*, Collected Courses of the Hague Academy of International Law, The Hague Academy of International Law 360 (2013), p. 171: «In the legislative proceedings leading to the adoption of the Rome I Regulation, the European Commission had in fact suggested to admit the parties’ agreement on “the principles and the rules of the substantive law of contract recognised internationally or in the Community” as an agreement on the applicable law. The proposal met with strong opposition in the European Council and was finally deleted; recital 13 of the definitive Regulation now only refers to the possible incorporation of a non-State body of law into the contract within the framework of the applicable law, i.e. not at the level of private international law. Put in other words, the parties are confined to the selection of one of the 200 or 250 State contract laws that exist in the jurisdictions of the world.» For this reason, the *lex mercatoria* may be perceived as a limitation on the power to choose the applicable law.

<sup>44</sup> The situation with UNIDROIT Principles of International Commercial Contracts is very similar as in case of *lex mercatoria* and «will bind the parties only to the extent that they do not affect the rules of the applicable law from which the parties may not derogate.» See Preamble, Comment to Article 4 lett. a) of UNIDROIT Principles of International Commercial Contracts 1994/1994

<sup>45</sup> S. SYMEONIDES, *Codifying Choice of Law around the World: An International Comparative Analysis*, *op. cit.*, p.110.

<sup>46</sup> A. FLESSNER, *Interessenjurisprudenz im internationalen Privatrecht*, J.C.B. Mohr, 1990, p. 97, where English translation in text provided by J. BASEDOW, *The Law of Open Societies: Private Ordering and Public Regulation of International Relations: General Course on Private International Law*, *op. cit.*, p. 165. On the *lex limitatis* see S. SYMEONIDES, *Party Autonomy in International Contracts and the Multiple Ways of Slicing the Apple*, *Brooklyn Journal of International Law* 39 (2014), p. 1123 *et seq.*; S. SYMEONIDES, *Codifying Choice of Law around the World: An International Comparative Analysis*, *op. cit.*, p. 149.

<sup>47</sup> F.C. SAVIGNY, *A Treatise on the Conflict of Laws, and the Limits of their Their Operation in respect of Place and Time*, translated by W. GUTHRIE, T & T Clark, 1880, p. 297. See also S. PEARI, *Choice-of-Law in Family Law: Kant, Savigny and the Parties’ Autonomy Principle*, *Nederlands Internationaal Privaatrecht* (2012), p. 597. See also J. CARRUTHERS, *Party Autonomy in the Legal Regulation of Adult Relationships: What Place for Party Choice in Private International Law*, *op. cit.*, p. 883: «...family law is concerned with matters of capacity, and it has not traditionally been deemed appropriate that parties, by their own agreement as to governing law, should be able to clothe themselves with, or deny themselves, capacity. Though it may be accepted that the parties to a transaction should enjoy the power to choose the law to govern that transaction, the position regarding capacity seemingly is different...marriage is to be regarded as more of a status than a contract, with the corollary that, its incidents are determined not by the will of the parties but by the prescriptions of the law». For example, the UK law applies *lex fori* in family cases.

<sup>48</sup> The enhanced cooperation in the area of applicable law in matrimonial matters among the specific participating Member States has been established in Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ L 343, 29 December 2010 (“Rome III Regulation”).

<sup>49</sup> See for example Article, Article 5 of the Rome III Regulation.

Already in the 19th Century, the German doctrine made a distinction between substantive, dispositive principle (“Dispositions Maxime”) and procedural, dispositive principle (c.d. “Verhandlungsmaxime”).<sup>50</sup> Since the disposal of the substantive rights is left to the free will of private individuals, the decision whether to quarrel, and on what basis, must be left to the intention of the parties as well.<sup>51</sup> In other words, the parties may decide which issues they wish to bring to court, when, and where they wish to litigate.<sup>52</sup> The principle of party autonomy in civil procedure law is known as the dispositive principle, which guarantees that a process is fully compliant with the contradictory principle, with the right of defence, and fully respecting the freedom of the parties.<sup>53</sup> This must be distinguished from the burdens constituting the negative side of the rights: the burdens represent the activities which are revealed by the parties in order to obtain a favourable result.<sup>54</sup> The dispositive principle does not mean only that the parties themselves determine the subject matter of proceedings,<sup>55</sup> but it also covers the right to dispose of the proceedings,<sup>56</sup> the rights given to the parties within the course of the proceedings,<sup>57</sup> or rights during the fact-finding phase.<sup>58</sup> In many legal systems,

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<sup>50</sup> G. MONTELONE, *Manuale di diritto processuale civile. Disposizioni generali. I processi di cognizione di primo grado. Le impugnazioni*, Vol. I, CEDAM, 2012, p. 275; T. CARNACINI, *Tutela giurisdizionale e tecnica del processo* vol., Vol. 2, Giuffrè, 1966, p. 724 *et seq.*

<sup>51</sup> A. CARRATA, *Il principio della non contestazione nel processo civile*, GiuffrèGiuffrè, 1995, p. 118; J. MACUR, *Občanské právo procesní v systému práva*, Universita J. E. Purkyně v Brně – právnická fakulta, 1975, p. 255.

<sup>52</sup> Impact Assessment on the Ratification of the Hague Convention on Choice of Court Agreements, p. 6.

<sup>53</sup> On the dispositive principle, see among others: E. MERLIN, *Elementi di diritto processuale civile, Parte generale*, Pacini Editore, 2017, p. 25 *ss.*; C. MANDRIOLI, A. CARRATA, *Diritto processuale civile, Nozioni introduttive e disposizioni generali*, Giappichelli, 2017, 26eds., p. 112 *et seq.*; A. P. PISANI, *Lezioni di diritto processuale civile*, Jovene, 2014, p. 412 *et seq.*; E. T. LIEBMAN, *Manuale di diritto processuale civile*, Giuffrè, 1955, p. 138. There are different views to the dispositive principle, sometimes it is considered as: (i) an absolute right belonging to the parties which cannot be restricted by the legal rules (the power to initiate the proceedings, to decide on the relevant facts for the proceedings are reserved only to the parties, and thus the judicial intervention on the determination of the material and probative facts is excluded); or (ii) the right of the parties to dispose with the substantive law which is reflected into the procedural law; or (iii) the direction of the legislator based on the opportunity principle represented by the guarantees of the State given to the individuals in order to defend their right and to recognize their interests. In this regard see G. CHIOVENDA, *Principii di diritto processuale civile: le azioni, il processo di cognizione*, Jovene, 1923, p. 728.

<sup>54</sup> E. T. LIEBMAN, *Manuale di diritto processuale civile*, p. 106.

<sup>55</sup> Case C-32/12, *Soledad Duarte Hueros v Autociba SA and Automóviles Citroën España SA.*, point 9. Opinion of Advocate General Kokott delivered on 28 February 2013, ECLI:EU:C:2013:128, par. 9.

<sup>56</sup> The initiative of the process represents the freedom of the party to provoke the exercise of jurisdiction with regards to a legal claim in which it is interested in order to obtain the protection of its interest, since the court does not have a duty either discretionarily to decide over the claim without a lodged application.

<sup>57</sup> For example, a withdrawal of a legal action, a default of appearance, a modification of the suit filed, an acknowledgement of the claim, etc. The party autonomy and the disposition principle are recognised even after the decision is delivered when the parties can appeal against the final judgments.

<sup>58</sup> The court has duty of the court to decide according to *Iuxta alligata et probate*. However, the modern legal systems modified the absolute dispositive principle into the “mitigated dispositive system” where some elements of inquisitor system are inserted.

the dispositive principle is limited, or sometimes even excluded, in matters concerning family and succession law; in these legal orders, the inquisitorial principle prevails.<sup>59</sup>

It is evident that the party autonomy in the substantive law, procedural law and conflict-of-laws was widely recognized, at least in civil and commercial matters. However, in the case of the choice of jurisdiction in the presence of the international elements, the situation was even more complicated. The way to the adoption and enactment of the express rule on party autonomy was much longer since the choice-of-court agreements may be seen as the privatization of a matter of procedure.<sup>60</sup> In the international procedural law, there is a plurality of the legal orders, which must co-exist together, and it creates a problem of interrelations of the jurisdiction of the States on the normative level.<sup>61</sup> The adjudicatory power depends on a number of factors, mainly on the sovereignty of the States.<sup>62</sup> The States have created the rules for the delimitation of their jurisdiction, prevalently based on the territorial factor.<sup>63</sup> Choice-

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<sup>59</sup> For example, in the Czech Republic, the inquisitorial principle prevails concerning status rights and rights concerning parental responsibility. See Act No., see *Zákon č. 292/2013 Sb., o zvláštních řízeních soudních*. The court in such proceedings may ascertain the evidence, may initiate proceedings *ex officio* etc.

<sup>60</sup> M.E. SOLIMINE, *Forum-Selection Clauses and the Privatization of Procedure*, Cornell International Law Journal, 25 (1992), p. 97.

<sup>61</sup> On the interaction between public and private law in respect of the choice-of-court agreements, see A. BRIGGS, *Agreements on Jurisdiction and Choice of Law*, Oxford University Press, 2008, par. 1.17 «... whether a court has jurisdiction is always - ultimately - a matter of public law which lies beyond the direct control or autonomy of the parties.... where legislators have established jurisdictional rules for a court, it is not for the parties as individuals to make private agreements which assert priority over that public law». See also I. QUEIROLO, *Evolutionary Trends in Choice-of-court Agreements: from the Lotus Case to the Brussels I-bis Regulation*, in B. HEIDERHOFF, I. QUEIROLO (eds), *Party Autonomy in European Private (and) International Law*, Aracne, 2015, p. 82 *et seq.*; I. QUEIROLO, *Gli accordi sulla competenza giurisdizionale: tra diritto comunitario e diritto interno*, CEDAM, 2000, p. 7 *et seq.*

<sup>62</sup> On the sovereignty of the States and exercise of its jurisdiction see case *S.S. Lotus* (France v. Turkey), Permanent Court of International Justice, Judgment No. 9, 7 September 1927: «*International law governs relations between independent States. The rules of law binding upon States therefor emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.*»

<sup>63</sup> Case *S.S. Lotus* (France v. Turkey), Permanent Court of International Justice, Judgment No. 9, 7 September 1927: «*It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law.... Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.*». On the jurisdiction in comparative law and private international law see, e.g. H. SMIT, *Proceedings of the 1961 Annual Meeting of the American Foreign Law Association*, American Journal of Comparative Law, 10:3 (1961), p. 164 *et seq.*, M. PRYLES, *The Basis of Adjudicatory Competence in Private International Law*, International and Comparative Law Quarterly, 21:1 (1972), pp. 61-80. The notion “jurisdiction” and “international competence” must be distinguished from “internal competence” which distributes the adjudicatory power to the courts of the specific State on the basis of the subject matter, territory,

of-court agreements were understood as the extension of the adjudicatory power, but the recognition of the instances where the national courts were limited in their adjudicative power was not always upheld.<sup>64</sup> The rise of international conventions aimed at preventing the positive and negative conflicts of jurisdiction and contrasting judgments and finally, party autonomy as a connecting factor was acknowledged on the international level. The Hague Convention of 15 April 1958 on the jurisdiction of the selected forum in the case of international sale of goods<sup>65</sup> and the Hague Convention of 25 November 1965 on the Choice of Court<sup>66</sup> were the first two essential efforts of the Hague Conference of Private International Law to regulate the choice-of-court agreements on an international level. The first one covered both jurisdiction and recognition and enforcement regarding the choice-of-court agreements; the latter one included only the rules of jurisdiction. Although both conventions have not ever entered into force, they served as the basis for the wording of Article 17 of the Brussels Convention.<sup>67</sup> However, there were still discussions whether the parties may exclude the jurisdiction of the courts of other States which would have otherwise jurisdiction since

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and value, see G. MORELLI, *Studi di diritto processuale civile internazionale*, p. 89. M. GIULIANO, *La giurisdizione civile italiana e lo straniero*, 1970, Giuffrè, 2ed., p. 1 *et seq.*

<sup>64</sup> Until the beginning of the Twentieth Century, it was disputed that parties should have right to “withdraw” from the jurisdiction of the States since jurisdiction was a matter of sovereignty of that State see E. BARTIN, *Etudes sur les effets internationaux des jugements*, LGDJ, 1907, p. 57-61. See also I. QUEIROLO, *Evolutionary Trends in Choice-of-court Agreements: from the Lotus Case to the Brussels I-bis Regulation*, *op. cit.*, p. 89. I. QUEIROLO, *Prorogation of Jurisdiction in the Proposal for a Recast of the Brussels I Regulation*, in F. POCAR, I. VIARENGO, F.C. VILLATA (eds), *Recasting Brussels I: Proceedings of the Conference Held at the University of Milan on 25-26 November 2011*, CEDAM, 2012, p. 183: «*In the past, the jurisdictional, connecting factors laid down by the State could generally not be derogated by the will of the parties because they are considered as a direct expression of the State’s sovereignty. Now, the jurisdictional function is, mainly, considered as a way through which individuals’ rights and interests can be realized and not principally as the realization of the State legal order*». See also, for example, the Lord Chief Justice in *Gienar v. Meyer* [1796] 2 H. Bl. 603: «*..no persons in this country can by agreement between themselves exclude themselves from the jurisdiction of the King’s Courts.*».

<sup>65</sup> Convention of 15 April 1958 on the jurisdiction of the selected forum in the case of international sales of goods was signed by Austria, Belgium, Germany, and France, but it has not entered into force, on the status table see: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=34>.

<sup>66</sup> Convention of 25 November 1965 on the Choice of Court was signed by Israel, but it has not entered into force, on the status table see: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=77>.

<sup>67</sup> Report by Mr P. Jenard on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, OJ C 59, 5 March 1979, p. 37, (“Jenard Report”). According to the Jenard Report, the wording determining formal requirements of rule on prorogation of jurisdiction was similar to the Convention between Germany and Belgium, which was based on the rules of the Hague Convention of 15 April 1958 on the jurisdiction of the selected forum in the case of international sale of goods, and the Hague Convention of 25 November 1965 on the choice-of-court.

*...some legal systems seem to consider such provision beyond the power of private parties, or they impose a test of reasonableness; others exclude this kind of agreement from specified areas of the law.*<sup>68</sup>

For example, the prorogation or derogation of jurisdiction based on the choice-of-court agreement, were not known to all national legal systems of six founding countries of European Community. In the Netherlands, the prorogation of jurisdiction was not introduced into the Dutch civil procedure, and until 1985 was not recognized. The parties could designate the Dutch court indirectly through the defendant's election of domicile.<sup>69</sup> However, the first judgment can be traced back to 1955 when the Dutch court refused jurisdiction in the presence of a choice of foreign court because of sanctity of the contract.<sup>70</sup> In Belgium, although there was no statutory provision defining the jurisdiction clause, the parties could elect the jurisdiction of a Belgian court or derogate from it.<sup>71</sup> In France, as well as in Luxembourg, the freedom of parties concerning the choice of court was upheld as one of the fundamental principles when the Napoleonic Code was promulgated in 1807.<sup>72</sup> The express

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<sup>68</sup> K. H. NADELMANN, *The Hague Conference on Private International Law and the Validity of Forum Selecting Clauses*, American Journal of Comparative Law, 13 (1964), p. 158.

<sup>69</sup> A. LENHOFF, *The Parties' Choice of a Forum: "Prorogation Agreements"*, Rutgers Law Review 15 (1961), p. 426, footnote no. 58.

<sup>70</sup> A. LENHOFF, *The Parties' Choice of a Forum: "Prorogation Agreements"*, *op. cit.*, p. 426. In 1985 *Hoge Raad, Piscator*, 1 February 1985, NJ 698 JCS, held that the parties are free to confer jurisdiction on a Dutch court. The derogation of the Dutch court in favour of other court was confirmed by the *Hoge Raad, Harvest Trader*, 28 October 1988, NJ 765, in 1988 referring to Article 17 of the Brussels Convention.

<sup>71</sup> M. FALLON, *Belgium*, in J. J. FAWCETT (ed), *Declining Jurisdiction in Private International Law: Reports to the XIVth Congress of the International Academy of Comparative Law*, Oxford University Press, 1995, p. 110-111.

<sup>72</sup> P. FRANCESCAKIS, *Compétence étrangère et jugement étranger*, *Revue critique de droit international privé* 42 (1953), p. 30: «*The idea of a jurisdiction (in the international sense) that is not subject to the will of the parties, is alien to the constant course taken by French courts.*». Article 1134 of the French Code Civil, 21 March 1804 provided: «*Agreements legally formed have the force of law over those who are the makers of them.*». See also the French case law cited in A. LENHOFF, *The Parties' Choice of a Forum: "Prorogation Agreements"*, *op. cit.*, p. 440, footnote 176. When the parties were foreigners in spite of their domicile or residence in France and selected French court, they did not have the right to bring an action before a French court. When one of the parties was a French citizen, Articles 14 and 15 of French Civil Code applied. If the plaintiff was a French citizen regardless of the domicile or residence he could sue a foreigner before the French courts, Article 15 has granted privilege of French jurisdiction to French citizen in the position of a defendant by a foreigner counterparty. See Article 14 and 15 of French Civil Code: «*A foreigner, although not resident in France, may be cited before the French courts, to enforce the execution of engagements contracted by him in France with a Frenchman; he may be summoned before the tribunals of France, on account of engagements entered into by him with Frenchmen in a foreign country. A Frenchman may be summoned before a French court, for engagements contracted by him in a foreign country, though with a foreigner.*». The opinion caused such exclusion of foreigners from the French jurisdiction that administration of jurisdiction is offered by the State and in case of two foreigners, there is no interest therein. However, the non-resident foreigners could be sued in front of French court by submission despite any other factor connecting the dispute with the French court. Subsequently, the prevailing case law disregarded the doctrine that French nationality is a requirement for the institution of proceedings in front of the French court. The provision did not prescribe the form of the forum



provision on territorial competence was amended by Decree on 5 December 1975,<sup>73</sup> which in 1986 was extended into the international order by *Cour de Cassation* in *Cie de Signaux et d'Enterprises Electriques v. Soc. Sorelec*.<sup>74</sup> In Germany, the jurisdiction of German courts was based on the provisions of *Zivilprozessordnung* on territorial competence; there was no special rule concerning disputes with an international element.<sup>75</sup> Already in 1877 Article 38 of *Zivilprozessordnung* expressly allowed the rule on the choice-of-court agreements on territorial competence.<sup>76</sup> In Italy, in contrast with France or Germany, international

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selection agreement, but, the oral evidence was excluded in the certain cases, see Article 7 of Code of Civil Procedure requiring signature (and as a consequence the written form): «*Thus, the judge will proceed although he is not the natural judge of the parties; for neither the defendant's domicile nor the situs of the object of the litigation is within his district. The parties' declaration demanding judgment must be signed by them, or, if they are unable to sign, this must be noted.*» and Article 1341 of the Civil Code: «*An act must be made before notaries or under private signature, respecting all things exceeding the sum or value of one hundred and fifty francs, even in the case of voluntary deposits; and no proof can be received by witnesses against or beyond what is contained in such acts, nor touching what shall be alleged to have been said before, at the time of or subsequently to such acts, although there may be question of a sum or value less than 150 francs; The whole without prejudice to what is prescribed in the laws relative to commerce.*». The case law of the French court was very progressive – the prorogation stipulations could form part of the bylaws of stock companies and general terms and conditions, the explicit acceptance was often required, but no waiver of French jurisdiction was permitted in case of immovable property situated in France, rectification of national Registers of Civil Status, or letters of patent or trademarks issued or registered by domestic authorities, see (also translation) A. LENHOFF, *The Parties' Choice of a Forum: "Prorogation Agreements"*, *op. cit.*, p. 421, 441, 443, 444, 445, 448, 477, 479; J. M. PERILLO, *Selected Forum Agreements in Western Europe*, *The American Journal of Comparative Law*, 13/1 (1964), p. 162-163; M. PRYLES, *Comparative Aspects of Prorogation and Arbitration Agreements*, *International & Comparative Law Quarterly*, 25:3 (1976), p. 550.

<sup>73</sup> «*Any clause that departs, directly or indirectly, from the rules of territorial jurisdiction will be deemed non-existent unless it has been agreed between parties to a contract entered into as merchants and the same has been provided for in an explicit manner in the undertakings of the party against whom it will be enforced.*», on the English translation see [https://www.legifrance.gouv.fr/content/download/1962/13735/version/3/.../Code\\_39.pdf](https://www.legifrance.gouv.fr/content/download/1962/13735/version/3/.../Code_39.pdf).

<sup>74</sup> *Cour de Cassation Chambre Civile 1, Cie de Signaux et d'Enterprises Electriques v. Soc. Sorelec*, 17 December 1985, N° de pourvoi: 84-16338, stating that: «*Clauses which extend the scope of international jurisdiction are legal when dealing with an international dispute, and when the clause does not deny application of the mandatory territorial competence of a French court*». See also H. GAUDEMET-TALLON, *France*, in J. J.J. FAWCETT (ed), *Declining Jurisdiction in Private International Law: Reports to the XIVth Congress of the International Academy of Comparative Law*, Oxford University Press, 1995, p.183.

<sup>75</sup> See A. ABT, M. MOLITORIS, *Comparative Study of "Residual Jurisdiction" in Civil and Commercial Disputes in the EU, National Report for Germany*, p. 2. available at: [http://ec.europa.eu/civiljustice/news/docs/study\\_resid\\_jurisd\\_germany\\_en.pdf](http://ec.europa.eu/civiljustice/news/docs/study_resid_jurisd_germany_en.pdf), p. 2.

<sup>76</sup> Code of Civil Procedure dated 30 January 1877, promulgated in *Reichsgesetzblatt*, RGBI, Law Gazette of the Reich, Article 38 provided «*Ein an dich unzuständiges gericht des ersten Rechtzuges wird durch ausdrückliche oder Stillschweigende Vereinbarung der parteien zuständig.*». In 1974, the provisions in Germany were modified, see *Bundesgesetzblatt Teil No 28 ausgedeben zu Bonn in 23 Mach 1974* and motivation for the reform in *Gesetzentwurf des Bundesrates Entwurf eines Gesetzes zur Änderung der Zivilprozessordnung*, Drucksache 7/268 from 27 February 1973. Article 38 par. 1 clarified that the parties which are subject to that provision must be merchants, legal persons under public law, or special assets under public law (*Sondervermögen*). Moreover, the provision in its paragraph 2 newly stated that the German court may be competent also if one of the parties does not have a general forum in Germany and in the case that one of the parties has a general forum in Germany and the German court was selected by the parties. In in such a case, the territorial competence is not possible to select - only the court of general venue is competent over the dispute. Article 40 of *Zivilprozessordnung* then regulated admissibility of choice-of-court agreements and provided that: (i) it must refer to the determinate legal dispute,

jurisdiction was explicitly distinguished from the territorial competence, and the rules on jurisdiction were directly determined by the Italian Code of Civil Procedure applicable from 21 April 1942.<sup>77</sup> The rule on prorogation of jurisdiction was embodied into Article 4 of the Italian Code of Civil Procedure from 1942,<sup>78</sup> whereby Article 2 of the Italian Code of Civil Procedure provided the conditions for derogation from Italian jurisdiction.<sup>79</sup> The choice-of-court agreements were at that time recognized also in other States. For example, in 1950 the Czech Republic (formal Czechoslovak Republic) adopted the new Act on Civil Procedure, where Article 623 determined both prorogation and derogation agreement with the international element.<sup>80</sup> After the new so-called “socialistic” Constitution was adopted in 1960, extensive codification works begun.<sup>81</sup> It may be surprising that despite a State reorganization and nationalization of the property, Czech Act on Private and Procedural

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thus it was not admissible if it covered all legal disputes which might arise in the future; and (ii) no contractual agreement on jurisdiction was permitted as to non-pecuniary claims and claims concerning exclusive competence. The written form was not required by *Zivilprozessordnung*, but some authors assumed that international choice-of-court agreement had to be written by the analogy to arbitration agreements when the prorogation was agreed as an exclusive. The derogation from German jurisdiction was denied, as in France, in cases of immovable property situated in Germany, or letters of patent or trademarks issued or registered by domestic authorities. See F. LENT, *Diritto processuale civile tedesco: parte prima: il procedimento di cognizione*, Morano, 1962, p. 50; A. LENHOFF, *The Parties’ Choice of a Forum: “Prorogation Agreements”*, *op. cit.*, p. 421. 458.

<sup>77</sup> Codice di Procedura Civile, Royal Decree from 28 October 1940, No. 1443, Official gazette n. 253 from 28 October 1940.

<sup>78</sup> This rule provided that the foreigner can be sued in front of the Italian court if he is there resident or domiciled (also if he elected domicile) or the representative is authorized to be cited in legal proceeding *ex* Article 77 of the Code of Civil Procedure, or if he accepted Italian jurisdiction unless the application is related to real estate located abroad. Article 37 of Italian Code of Civil Procedure determined the obligation for Italian court to detect the defect of Italian jurisdiction *ex officio* in cases of immovables. Otherwise, if the defendant was sued in front of an Italian court in contradiction of derogation agreement and he submitted by appearance to the Italian court without pleading the lack of jurisdiction in time, jurisdiction could lie in the Italian court. See G. MORELLI, *Diritto processuale civile internazionale*, *op. cit.*, p. 186.

<sup>79</sup> Article 2 of Codice di Procedura Civile from 1942 reads: *«Italian jurisdiction cannot be derogated by contract in favor of a foreign jurisdiction or of arbitrators who render their decision abroad, except in cases relating to obligations between aliens or between an alien and a citizen who neither resides in nor is domiciled in the State [Italy] and where the derogation results from a written act.»*, in other words the derogation was not permitted by contract except for cases concerning obligations between foreigners or between a foreigner and a citizen who was neither a resident nor a domiciliary in Italy and derogation resulted from a written act. On the translation see J. M. PERILLO, *Selected Forum Agreements in Western Europe*, *op. cit.*, p. 165. The validity of the derogation from Italian jurisdiction was subject to specific conditions – the object of the dispute had obligatory nature, the jurisdictional ground represented the character of internationality (parties), and the written form of agreement was required. G. MORELLI, *Diritto processuale civile internazionale*, *op. cit.*, p. 183 and 184. Articles 2 and 4 of Italian Code of Civil Procedure were replaced by Article 4 of the Legge 31 maggio 1995, n. 218 *Riforma del sistema italiano di diritto internazionale privato (“Italian Act on Private International Law”)* 1995.

<sup>80</sup> Zákon č. 142/1950 Sb. o konaní v občianskych právnych veciach (občiansky súdny poriadok), where Article 623 permitted to agree on a jurisdiction of a Czech court in the civil matters. However, derogation agreement could conclude only the (also private) legal entities. The jurisdiction agreement had to be concluded in written form.

<sup>81</sup> M. PAUKNEROVÁ, *Private International Law in the Czech Republic*, Kluwer Law International, 2011, p. 14-15.

International Law (which was in practice legally binding until 2012 with specific amendments) entered into force in 1964 and it was permitted to agree on jurisdiction of Czech court in property matters.<sup>82</sup>

Party autonomy in respect of a choice-of-court was recognised in the Brussels Convention and represented the first step to spread party autonomy at the European level.<sup>83</sup> The rule on the choice-of-court agreement was inspired by the two already mentioned Hague Conventions, as well as by the bilateral and multilateral conventions between the establishing States of the European Community before 1968.<sup>84</sup>

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<sup>82</sup> Zákon č. 97/1963 Sb. o mezinárodním právu soukromém a procesním, where Article 37 determined that the parties may agree on a jurisdiction of a Czech court. However, the derogation agreement could conclude only the Czechoslovak organizations.

<sup>83</sup> G. RÜHL, *Choice of Law and Choice of Forum in the European Union. Recent Developments*, in C. HODGES, S. VOGENAUER (eds), *Civil Justice Systems in Europe. Implications for Choice of Forum and Choice of Contract Law*, Hart Publishing, 2010, p. 8 available at SSRN: <https://ssrn.com/abstract=1604615> or <http://dx.doi.org/10.2139/ssrn.1604615>.

<sup>84</sup> In particular, in the following three conventions, the possibility to choose the jurisdiction was enabled only through the election of domicile: Convention concluded between France and Belgium on jurisdiction and the validity and enforcement of judgments, arbitration awards and authentic instruments, signed at Paris on 8 July 1899, where Article 3 provides: «*Lorsqu'un domicile attributif de juridiction a été élu dans l'un des pays pour l'exécutions d'un acte, les juges du lieu du domicile élu sont seuls compétentes pour connaître des contestations relatives a cet ate. Si cependant le domicile n'a été élu qu'en faveur de liune des parties contracteantes celle-ci conserve le droit de satir tout autre juge compétent.*»; between Belgium and the Netherlands jurisdiction, bankruptcy, and the validity and enforcement of judgments, arbitration awards and authentic instruments, signed at Brussels on 28 March 1925, where Article 5 provides: «*Lorsqu'un domicile attributif de juridiction a été élu dans l'un des pays pour l'exécutions d'un acte, les juges du lieu du domicile élu sont seuls compétentes pour connaître des contestations relatives a cet ate, sauf les exceptions at modifications établies ou à établir par l'une des deus législations nationales ainsi quo par les conventions internationales. Si le domicile n'a été élu qu'en faveur de l'une des parties contractactanes, celle-ci conserve le droit de satir tout autre juge compétent.*»; and between Belgium, the Netherlands, and Luxembourg on jurisdiction, bankruptcy, and the validity and enforcement of judgments, arbitration awards and authentic instruments, signed at Brussels on 24 November 1961. Other conventions concerned the recognition and enforcement of judgments. The “single” conventions did not determine the jurisdiction of the courts, but they were applied only for recognition and enforcement issued in another Convention State – the domestic legal orders regulated the jurisdictional grounds. The following single conventionsconvention were concluded before 1968 between founding States: Convention between France and Italy on the enforcement of judgments in civil and commercial matters, signed at Rome on 3 June 1930, where Article 12 provides: «*Dans les contestations entre français et italiens, lorsqu'un domicile attributif de juridiction a été élu dans celui des deux pays où un contrat a été conclu ou doit recevoir son exécutions, les juridictions du pays du domicile élu sont compétentes pour connaître des contestations relatives au contrat. L'élection de domicile doit avoir été acceptée expressément par les parties et spécialement pour chaque contrat. Si le domicile n'a été élu qu'en faveur d'une des parties, celle-ci conserve le droit de saisir tout juge compétent.*...», on the interpretation of this provision see: *Corte di Cassazione*, S.U., n. 2520, 10 July 1934, in *Rivista di diritto internazionale* (1934), p. 234; *Cour d'Appel de Colmar*, 26 February 1957, in *Revue critique de droit international privé*, (1957), p. 302 ; between Germany and Italy on the recognition and enforcement of judgments in civil and commercial matters, signed at Rome on 9 March 1936, where Article 2 par. 2 provides: «*Quando si tratta di contestazioni patrimoniali, le Autorità giudiziarie dello Stato in cui la decisione è stata pronunziata sono competenti ai sensi dell'art. 1, nelle ipotesi previste da convenzioni internazionali, quando, mediante una convenzione espressa in vista di contestazioni derivanti da rapporti giuridici determinati, il convenuto si era sottoposto alla competenza dell'Autorità giudiziaria che si è pronunciata, ovvero quando il convenuto senza*

Although the prominence on jurisdiction agreements was always attributed to the civil and commercial private international law, where Professor Briggs speaks of the “contractualisation” of private international law,<sup>85</sup> the general recognition of choice-of-court agreements is not so obvious in all areas of the family law. As stated, substantive family law, in particular, *status* law, is characterized by prevalence of the mandatory rules, unlike commercial relations where the dispositive rules prevail. Indeed, through the selection of the competent court (in the States where the conflict-of-laws rules are not harmonized or unified), the parties may derogate from the mandatory rules of the family law. At least, party autonomy in international family law was for the first time recognized in an international convention in 1978 and concerned the property law of the spouses, where the use of *ius cogens* is limited (Article 3 of the 1978 Hague Convention on the Law Applicable to Matrimonial Property

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*opporre alcuna riserva si è difeso nel merito della controversia salvo che le parti avessero la cittadinanza dello Stato richiesto e fossero domiciliate sul suo territorio.», on the interpretation of this Article see Corte di Appello Milano, 3 May 1940 in Rivista di diritto internazionale (1943), p. 118; Corte di Cassazione, S.U., n. 2528, 18 August 1941 in Rivista di diritto internazionale (1960), p. 538; Corte di Cassazione, n. 1061, 26 May 1965, in Rivista di diritto internazionale privato e processuale (1965), p. 711; between Italy and the Netherlands on the recognition and enforcement of judgments in civil and commercial matters, signed at Rome on 17 April 1959, where Article 2 par. 2 provides: «La compétence des juridictions de l'Etat où la décision a été rendue est fondée au sens de l'Article premier, n.1 si elle est prévue par une autre Convention entre les Hautes Parties Contractantes, ou dans les cas mentionnés ci-après: lorsque, par une convention écrite en vue de contestations déterminées, le défendeur s'était soumis à la compétence du tribunal qui a rendu la décision, sauf si toutes les parties avaient leur domicile dans l'Etat où la décision est invoquée ou s'il s'agit de contestations concernant la possession ou la propriété d'un immeuble dans un Etat autre que celui où la décision a été rendue, ou bien concernant les droits réel sur un tel immeuble.»», on the interpretation of this Article see: Corte di Appello di Genova, 10 May 1972 in Rivista di diritto internazionale privato e processuale (1972), p. 596; Arrondissementsrechtbank Leeuwarden, 11 January 1968, in F. POCAR, *Codice delle convenzioni sulla giurisdizione e l'esecuzione delle sentenze straniere nella C.E.E.: con la giurisprudenza sulla Convenzione di Bruxelles del 1968 e sulle convenzioni bilaterali concluse dall'Italia*, Giuffrè, 1980, p. 660; between Belgium and Italy on the recognition and enforcement of judgments and other enforceable instruments in civil and commercial matters, signed at Rome on 6 April 1962, where Article 2 paras. 1, 2 provide: «La compétence de l'autorité judiciaire de l'Etat dans lequel la décision a été rendue est fondée au sens de l'Article précédent si, au moment de l'introduction de la demande, l'une des conditions suivantes est réalisée lorsque, par une convention écrite en vue d'une contestation relative à un contrat déterminé, le défendeur s'est soumis à la juridiction de l'Etat dans lequel la décision a été rendue, sauf si les parties à ladite convention ont la nationalité de l'Etat dans lequel la décision est invoquée et y ont leur domicile ou leur résidence.»; between Germany and the Netherlands on the mutual recognition and enforcement of judgments and other enforceable instruments in civil and commercial matters, signed at The Hague on 30 August 1962, where Article 4 par. 1 lett. b) provides : «Die Zuständigkeit der Gerichte des Staates, in dem die Entscheidung ergangen ist, wird im Sinne dieses Vertrages anerkannt wenn der Beklagte sich durch eine Vereinbarung der Zuständigkeit der Gerichte des Staates, in dem die Entscheidung ergangen ist, unterworfen hat, es sei denn, daß eine solche Vereinbarung nach dem Recht des Staates, in dem die Entscheidung geltend gemacht wird, unzulässig ist; eine Vereinbarung im Sinne dieser Vorschrift liegt nur vor, wenn eine Partei ihre Erklärung schriftlich abgegeben und die Gegenpartei sie angenommen hat oder wenn eine mündlich getroffene Vereinbarung von einer Partei schriftlich bestätigt worden ist, ohne daß die Gegenpartei der Bestätigung widersprochen hat.»; and between Germany and Belgium on the mutual recognition and enforcement of judgments, arbitration awards and authentic instruments in civil and commercial matters, signed at Bonn on 30 June 1958.*

<sup>85</sup> A. BRIGGS, *Agreements on Jurisdiction and Choice of Law*, *op. cit.*, par. 1.05.

Regimes).<sup>86</sup> Almost 30 years after the adoption of the Brussels Convention, the 1996 Hague Convention on Parental Responsibility on Parental Responsibility<sup>87</sup> and the Brussels II Convention<sup>88</sup> established the new rule of prorogation of jurisdiction of the divorce court to the court with jurisdiction over parental responsibility. However, full party autonomy to choose a competent court was permitted already in 1965 for the maintenance matters in a surprisingly generous manner under the Brussels Convention.<sup>89</sup> In consequence, the exercise of *indirect* choice or *direct choice through presumed intention* is significant mainly in the area of family law, where the choice-of-court is not permitted, or is permitted in a very limited manner.<sup>90</sup> Article 3 of the Brussels IIa Regulation, is an example and contains seven alternative jurisdictional grounds for divorce, legal separation, and marriage annulment. First, *forum shopping*, gives a *direct* choice to the applicant to seize one of the *forums* offered in Article 3 of the Brussels IIa Regulation.<sup>91</sup> Second, parties can *indirectly* choose any of the Member

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<sup>86</sup> Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes, only France, Luxembourg and the Netherlands are Contracting States to this Convention., on the status table see: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=87>.

<sup>87</sup> Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (“1996 Hague Convention on Parental Responsibility”), on the status table see <https://www.hcch.net/en/instruments/conventions/status-table/?cid=70>.

<sup>88</sup> Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters - Declaration, annexed to the minutes of the Council, adopted during the Justice and Home Affairs Council on 28 and 29 May 1998 when drawing up the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters, OJ C 221, 16 July 1998, (“Brussels II Convention”).

<sup>89</sup> See Article 5 par. 2 of the Brussels Convention.

<sup>90</sup> Emphasis added. The direct choice of jurisdiction may be exercised in three different ways: through the express intention; through the intention inferred from the circumstances of the case (tacit intention); or through the presumed intention (choice is imputed from the circumstances). P. E. NYGH, *Autonomy in International Contracts*, Oxford University Press, 1999, p. 4-5; E. YNTEMA, “*Autonomy*” in *Choice of Law*, *op. cit.*, p. 342; J. CARRUTHERS, *Party Autonomy in the Legal Regulation of Adult Relationships: What Place for Party Choice in Private International Law*, *op. cit.*, p. 882.

<sup>91</sup> Emphasis added. *Forum shopping* is not only problem in the family cross-border matters, but it occurs also in the civil and commercial matters. See A. BELL, *Forum Shopping and Venue in Transnational Litigation*, Oxford University Press, 2003; F. FERRARI, *Forum Shopping: A Plea for a Broad and Value-Neutral Definition*, NYU Lectures on Transnational Litigation, Arbitration and Commercial Law, 2013. *Forum shopping* may occur also in the context of Article 7 of the Brussels Ibis Regulation which regulates “special jurisdiction”, conferring decisive power also to other courts other than to the courts of defendant’s domicile. Article 7 of the Brussels Ibis Regulation does not have to result in *forum shopping* but can be even perceived as “jurisdiction agreement *sui generis*”. The ECJ, the Case 56/79, *Siegfried Zelger v Sebastiano Salinitri*, 17 January 1980, ECLI:EU:C:1980:15, ruled that if the parties are permitted to specify the place of performance of an obligation without satisfying any special condition of form by the law of such agreement on the place of performance according to the law applicable to the contract, the agreement on the place of performance of the obligation is sufficient to found jurisdiction within the meaning of Article 5 par. 1 of the Brussels Convention. However, in case the agreed place does not represent a real place of performance aiming only at the establishing jurisdiction, such an agreement of the place of performance would circumvent of the functioning of Article 25 of the Brussels Ibis Regulation and therefore, it requires the form required by this provision, in this regard see ECJ, Case C-

States by the change of their residence.<sup>92</sup> However, a drawback may outweigh the advantage. Article 3 uses the “first seized” *lis pendens* rule, which opens the door to the phenomena of a “rush to court” and may be easily abused by the strategic move of habitual residence to other Member State in order to secure the most advantageous result of the dispute.<sup>93</sup> Another similar rule can be found in Article 15 of the Brussels IIa Regulation allowing a transfer of the case from a Member State court to a better placed Member State court on the request of one or both the parties.<sup>94</sup>

## II. Effects and Nature of the Choice-of-Court Agreements

The nature of the choice-of-court agreements and the relationship between the substantive law on one side and procedural law on the other side has not been clarified due to its “hybrid nature”.<sup>95</sup> The impossibility of drawing the distinction between procedural and substantive law is caused by the fact that it is a private contract and simultaneously falls under the law of procedure. The nature of the jurisdiction agreement represents a key for comprehension of consideration of its legal binding determination on the national, EU and international level.

There are several doctrinal discussions regarding the nature of the choice-of-court agreements and regarding the effects produced in respect to jurisdiction of the courts and in respect to the parties. In this Subchapter, the effect and nature are analysed on the general level. The considerations concerning the effects and the nature of jurisdiction clauses, which are subordinated to the national regime, come into play on the residual basis or when the EU

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106/95, *Mainschiffahrts-Genossenschaft eG (MSG) v Les Gravières Rhénanes SARL*, 20 February 1997, ECLI:EU:C:1997:70, par. 31-35

<sup>92</sup> Emphasis added. The reason is that six out of seven jurisdictional grounds are based on habitual residence.

<sup>93</sup> On the problem of “rush to court” see *infra* Chapter Three, Subchapter I, Section 2.6.

<sup>94</sup> Any agreement between the parties will be “in the shadow of the law”: E. M. MAGRONE, *La disciplina del diritto di visita nel regolamento(CE) n. 2201/2003*, *Rivista di diritto internazionale privato e processuale* (2005.), p. 339 at 360. On Article 15 see E. PATAUT, E. GALLANT, *Article 15*, in U. MAGNUS, P. MANKOWSKI (eds), *Brussels IIbis Regulation: 2017, European Commentaries on Private International Law*, Otto Schmidt, Sellier European Law Publishers, 2017, p. 173. It is uncommon to use the *forum non conveniens* within the Brussels system in the virtue of ECJ, Case C-281/02, *Andrew Owusu v N. B. Jackson, trading as “Villa Holidays Bal-Inn Villas” and Others*, 1 March 2005, ECLI:EU:C:2005:120, which represents a risk for the principle of legal certainty.

<sup>95</sup> T. HARTLEY, *Choice-of-Court Agreements under the European and International Instruments: The Revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*, Oxford University Press, 2013, p. 129, M. AHMED, *The Nature and Enforcement of Choice of Court Agreements: A Comparative Study. Studies in Private International Law*, Hart Publishing, 2017, p. 7.

regulations and the international conventions do not apply. The characterisation of choice-of-court agreements is then decisive mainly for determination of the law applicable to the jurisdiction clauses.

### **1. Positive and Negative Effects in respect to the State's Court Jurisdiction**

The choice-of-court clauses have impact on the jurisdiction of more one or more states – in case of exclusive jurisdiction agreements, they interfere with the jurisdiction of a State whose court is designated by the parties and with the jurisdiction of a State whose court should have jurisdiction in the absence of such jurisdiction agreement by virtue of the national law. In other words, the exclusive choice-of-court agreements have two effects: a prorogation effect which confers the jurisdiction to the designated court (positive effect) and derogation effect which excludes the jurisdiction of the court which would have otherwise jurisdiction (negative effect).<sup>96</sup> The prorogation effect does not directly interfere with the exercise of State authority - the State control is not affected. However, the derogation effect causes interference in the exercise of State authority.<sup>97</sup> The national legislators attribute to conduct and consent of the parties the existence or non-existence of the decisive power of the seized court. The obligation of the prorogued court to decide the case is constituted and *vice versa* the derogated court is refrained in exercising jurisdiction on the basis of the jurisdiction agreement. On the other hand, non-exclusive choice-of-court agreements have the same positive effect, but they do not impose on the parties to seize a designated court.<sup>98</sup> Sometimes, it is not possible to fit all jurisdiction agreements into the categories of exclusive and non-exclusive.<sup>99</sup>

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<sup>96</sup> M. KEYES, B. A. MARSHALL, *Jurisdiction agreements: exclusive, optional and asymmetrical*, *Journal of Private International Law*, 11.3 (2015), p. 349; J. J. FAWCETT, *Non-Exclusive Jurisdiction Clauses in Private International Law*, *Lloyd's Maritime and Commercial Law Quarterly*, 28 (2001), p. 240.

<sup>97</sup> As stated in Chapter One, Subchapter I *supra*, until the beginning of the Twentieth Century, it was disputed that parties should have right to "withdraw" from the jurisdiction of the States since jurisdiction was a matter of sovereignty of that State. However, now are perceived as a mean for realization of individuals' rights and interests can be realized. See I. QUEIROLO, *Prorogation of Jurisdiction in the Proposal for a Recast of the Brussels I Regulation*, *op. cit.*, p. 183.

<sup>98</sup> M. KEYES, B. A. MARSHALL, *Jurisdiction agreements: exclusive, optional and asymmetrical*, *op. cit.*, p. 349

<sup>99</sup> A. BRIGGS, *Agreements on Jurisdiction and Choice of Law*, *op. cit.*, par. 4.24-4.25, 5.20.

## 2. Nature of the Choice-of-court Agreements

Choice-of-court agreements are a frequent subject of the doctrinal discussion regarding their nature. These discussions question if they are substantive agreements, procedural agreements, or substantive agreements with the procedural effects.

Choice-of-court agreements affect the position of the parties and the doctrinal approaches in this respect are divided mainly into two significant approaches. The first approach perceives jurisdiction agreements as substantive agreements, which is based on the right and duties of the parties. The second approach assigns to jurisdictional agreements only a procedural nature. The divergences are significant mainly in the common law and civil law countries and are decisive for determining the applicable law and the obligation of the parties concerning the damages for the breach of the choice-of-court agreement.

### 2.1. Substantive Nature

Choice-of-court agreements may be regarded as contractual terms, which are part of the contract.<sup>100</sup> According to the common law perspective, a substantive nature is attributed to the choice-of-court agreements because they are analogous with the contract by which the parties are bound.<sup>101</sup> This theory considers the choice-of-court agreements as substantive agreements constituting rights and obligations for the parties. The conception of substantive effects of the choice-of-court agreements falls back to the Eighteen Century and has been gradually developed in the UK.<sup>102</sup> The common law system observes the jurisdictional rules in terms of

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<sup>100</sup> A. BRIGGS, *Agreements on Jurisdiction and Choice of Law*, *op. cit.*, par. 3.09, D. JOSEPH, *Jurisdiction and Arbitration Agreements and Their Enforcement*, Sweet & Maxwell, 2014, 3ed., par. 4.02, 4.07; A. BRIGGS, P. REES, *Civil Jurisdiction and Judgements*, Norton Rose, 2009, par. 2.113. This qualification can be also found in civil law countries.

<sup>101</sup> See M. AHMED, *The Nature and Enforcement of Choice-of-court Agreements: A Comparative Study*, *op. cit.*, p. 79.

<sup>102</sup> The first theory was developed in the context of the arbitration, the jurisdiction agreements were submitted within the meaning of the Common Law procedure Act 1854 and Arbitration Act 1889. L. GRAUPNER, *Contractual Stipulations Conferring Exclusive Jurisdiction upon Foreign Courts in the Law of England and Scotland*, *Law Quarterly Review*, 59 (1943), p. 238: «*Reviewing the English decisions we see that they started from the point that reference to a foreign Court came within the meaning of the C. L. P. Act of 1854 and now of section 4 of the Arbitration Act of 1889. And though the correctness of this starting point might be doubted, it turned out to be of great practical value, enabling the Courts by not having their jurisdiction ousted to exercise their discretion to stay proceedings or to refuse such a stay and if necessary to give relief and to dispose of any specific case according to its merits.*». See also *Law v. Garret* [1878] L. R. 8 Ch. D. 26; *Austrian Lloyd Steamship Company v Gresham Life Assurance Society Limited* [1903] 1 KB 249; *Racecourse Betting Control Board v Secretary for Air* [1943] Ch. 114



rights and duties of the parties.<sup>103</sup> According to this perception, the jurisdiction agreement grants a right to the plaintiff, who is entitled to decide whether to exercise his right to sue a defendant in front of a designated forum; the defendant then must assume the obligation resulting from the plaintiff's right to act according to the agreement.<sup>104</sup> The reasoning of the common law theory, which considers the choice-of-court agreements as substantive agreements composed by the rights and obligations of the parties, is based on two facts. First, the jurisdiction of a court in a common law system is based on the principle of territorial dominion and is established where the person is present within the territory of that State, at the time when the document instituting the proceedings is lodged with the court.<sup>105</sup> If the defendant cannot be served within the jurisdiction and does not enter into appearance, the claimant needs the permission of the court to serve outside its jurisdiction.<sup>106</sup> Thus, this territorial dominion gives rise to the effects of the jurisdiction agreements in another way than in the civil law countries. The second justification for the common law conception of the substantive rights and obligations focuses on the role of the choice-of-court agreements in international commercial trade; this conception was significant mainly in the USA.<sup>107</sup>

Although the theory of substantive nature is the most significant in the common law countries, the conception of the substantive nature of the jurisdiction agreements can also be found in the certain civil law countries. In Spain, *Tribunal Supremo* upheld that choice-of-forum clauses are of a contractual nature. Failure to comply with it implies that party may be sued for compensation for the legal costs in case of breach of the choice-of-court clause. The *Tribunal Supremo* also stated that the choice-of-court agreement is incorporated into the

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<sup>103</sup> A. BRIGGS, *Agreements on Jurisdiction and Choice of Law*, *op. cit.*, p. 57.

<sup>104</sup> A. BRIGGS, *Agreements on Jurisdiction and Choice of Law*, *op. cit.*, p. 57, L. PENASA, *Gli accordi sulla giurisdizione tra parti e terzi*, Vol. 1, CEDAM, 2012, p. 50; A. BRIGGS, *The Impact of Recent Judgments of the European Court on English Procedural Law and Practice*, Oxford Legal Studies Research Paper No. 11/2006, available at SSRN: <https://ssrn.com/abstract=899689>, p. 10; D. JOSEPH, *Jurisdiction and Arbitration Agreements and Their Enforcement*, *op. cit.*, p. 102.

<sup>105</sup> A. BRIGGS, P. REES, *Civil Jurisdiction and Judgements*, *op. cit.*, p. 408; A. BRIGGS, *The Impact of Recent Judgments of the European Court on English Procedural Law and Practice*, *op. cit.*, p. 137; T. HARTLEY, *The Modern Approach to Private International Law: International Litigation and Transactions from a Common-Law Perspective* in *Collected Courses of the Hague Academy of International Law*, The Hague Academy of International Law, 319 (2006), p.166.

<sup>106</sup> J. HILL, A. CHONG, *International Commercial Disputes: Commercial Conflict of Laws in English Courts*, Hart Publishing, 2010, 4eds, p. 216-217

<sup>107</sup> In UK, such a doctrine was connected with the importance of the negotiations of the jurisdiction clause with the main contract L. COLLINS, *Forum selection and an Anglo-American Conflict - The Sad Case of The Chaparral*, *International & Comparative Law Quarterly* 20:3 (1971), p. 557. See also *US Supreme Court, The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

contractual relationship as one of the rules of conduct to be observed by the parties and it creates a duty.<sup>108</sup>

## 2.2. Procedural Nature and Substantive Nature with Procedural Effects

In some States of the civil law and according to the Brussels regime, the jurisdiction clauses are perceived as a direction for the State to consider its jurisdiction. It can be assumed that the national, European, and international rules expressly recognize the admissibility of the choice-of-court agreements, and directly impact the State's jurisdiction.<sup>109</sup>

Choice-of-court agreements, as procedural acts, are inserted into the proceedings (even if they are accomplished outside of the proceedings) and produce direct and immediate procedural effects in respect to the rights of the parties to bring a legal action. The relationship between the parties and the court is created in the moment of the conclusion of the choice-of-court agreement.<sup>110</sup>

This conception denies any substantive effects which would produce obligations and rights of the parties. Thus, the compensation of damages, which is based on the breach of contractual obligations, should not be allowed. However, certain authors recognizing the procedural effects of the jurisdiction clauses do not deny the right to the compensation of the damages for breach of the jurisdiction clause in the specific circumstances: the parties' agreement may be interpreted (on the basis of applicable law) as a simultaneous obligation to seize a specific court, which also covers the compensation of damages.<sup>111</sup> Thus, the jurisdiction agreement may be understood as two unilateral contracts, each with its own criteria of the validity where each party is bound by the restriction of jurisdiction they formally accepted, and no contract is

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<sup>108</sup> *Tribunal Supremo*, 12 January 2009, which confirmed judgment of *Tribunal Supremo*, 23 February 2007. See translation and the further comments M. REQUEJO, *On the Value of Choice of Forum and Choice of Law Clauses in Spain* (2009), available at <http://conflictoflaws.net/2009/on-the-value-of-choice-of-forum-and-choice-of-law-clauses-in-spain/>; P. BŘÍZA, *Volba práva a volba soudu v mezinárodním obchodě*, Beck, 2012, p. 169.

<sup>109</sup> L. PENASA, *Gli accordi sulla giurisdizione tra parti e terzi*, *op. cit.*, Vol. 1, p. 90.

<sup>110</sup> *Ibidem*, p. 90.

<sup>111</sup> This concurrent agreement on the duties and rights of the parties to seize only prorogued court must be considered according to the national law. The applicable law cannot be determined according to the Rome Convention and Rome I Regulation, since the choice-of-court agreements (which may produce the substantive effects) are excluded from the scope of application (Article 1 par. 2 lett. c) of Rome Convention and Article 1 par. 2 lett. s) of the Rome I Regulation). See L. PENASA, *Gli accordi sulla giurisdizione tra parti e terzi*, *op. cit.*, Vol. 1, p. 61.

needed.<sup>112</sup> However, the parties may simultaneously conclude a mutual “promise” of the parties not to bring or to bring the legal proceedings in the designated court or State which must be interpreted by virtue of the applicable law which governs the contract.<sup>113</sup> Such a promise may be called, for our purpose, “separate agreements on rights and obligations”. In other words, according to this theory, the parties entering into the choice-of-court agreement may conclude two agreements, the first one has only procedural effects and directly affects the jurisdiction of the courts (i.e., the “true” choice-of-court agreements); the second one (“a separate agreement on rights and obligations”) may produce the substantive effect of the jurisdiction clauses, which gives rise to the rights and duties to the parties. The admissibility of “separate agreement on rights and obligations” according to the *lex contractus* would allow the right for compensation of damage caused by the breach of the choice-of-court agreements. In the case that the “true” choice-of-court agreement is not accompanied by another autonomous agreement which creates substantive effects, it can be concluded that such an agreement has only a procedural character.<sup>114</sup> These “true” choice-of-court agreements do not constitute obligations for the parties to compensate for damages if there is a breach of a jurisdiction clause.<sup>115</sup> However, according to other authors, the procedural nature of the jurisdiction clauses does not preclude the mandatory effects of the agreement between the parties, when a party has right to sue another party for a breach of jurisdiction agreements.<sup>116</sup>

In some other civil law countries, there is no uniform approach as to the nature of the jurisdictional agreements. However, the choice-of-court agreements are sometimes qualified as procedural<sup>117</sup> or substantive with procedural effects.<sup>118</sup>

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<sup>112</sup> A. BRIGGS, *Agreements on Jurisdiction and Choice of Law*, *op. cit.*, p. 258, 259. See opposite approach, where a choice-of-court agreement is perceived as bilateral (“negozi processuali bilaterali”): L. PENASA, *Gli accordi sulla giurisdizione tra parti e terzi*, *op. cit.*, Vol. 1, p. 92.

<sup>113</sup> A. BRIGGS, *Agreements on Jurisdiction and Choice of Law*, *op. cit.*, p. 278, L. PENASA, *Gli accordi sulla giurisdizione tra parti e terzi*, *op. cit.*, Vol. 1, p. 65.

<sup>114</sup> L. PENASA, *Gli accordi sulla giurisdizione tra parti e terzi*, *op. cit.*, Vol. 1, p. 75 et seq.

<sup>115</sup> J. STEINLE, E. VASILIADES, *The Enforcement of Jurisdiction Agreements under the Brussels I Regulation: Reconsidering the Principle of Party Autonomy*, *Journal of Private International Law*, 6:3 (2015), p. 576.

<sup>116</sup> For example, mainly in Germany, the jurisdiction clauses are effective only when it may be assumed that the jurisdiction clauses have mandatory effects and provide for the sanctions when one of the parties seizes the derogated court. See L. PENASA, *Gli accordi sulla giurisdizione tra parti e terzi*, *op. cit.*, Vol. 1, p. 59, footnote No 113, where the author makes reference to P. SCHLOSSER, *Materiell-rechtliche Wirkungen von (nationalen und internationalen) Gerichtsstandsvereinbarungen*, in W. HAU, H. SCHMIDT (eds), *Liber Amicorum Walter F. Lindacher zum 70. Geburtstag am 20. Februar 2007*, Heymann, 2007, p. 111; B. HESS, *Europäisches Zivilprozessrecht*, Müller, 2010, p. 318.

<sup>117</sup> For example, Italy is considered as “negozio giuridico processuale”, among the authors affirming the procedural nature of the jurisdictional clauses see L. PENASA, *Gli accordi sulla giurisdizione tra parti e terzi*, *op.*

The procedural character of the choice-of-court clauses is given credence mainly due to the fact that the Rome Convention (and the Rome I Regulation) excludes choice-of-court agreements from the scope of its application.<sup>119</sup> The Economic and Social Committee has been consulted during the negotiations of the Rome Convention and excluded jurisdiction agreements since “*these matters are covered by international civil procedural law, as they can be better dealt with in this context*”.<sup>120</sup> According to the Giuliano and Lagarde Report “*the matter lies within the sphere of procedure and forms part of the administration of justice (exercise of State authority)*”.<sup>121</sup>

This opinion can be supported by qualifying choice-of-court agreements as procedural agreements with procedural effects since it is difficult to imagine that the effect of the act, which is inserted into the proceedings, is autonomous and represents only the transition from another act with its own legal consequences.<sup>122</sup> In other words, the nature of the choice-of-court agreements is dependent on its effects.<sup>123</sup> The adverse characterisation of choice-of-court agreement as substantive would lead to the application of the substantive rules without the possibility to consider the specific, procedural legal act and such would not produce direct and immediate effects on procedural situations.<sup>124</sup>

On the contrary, according to another theory, which perceives the choice-of-court agreements as substantive agreements with the procedural effects, the qualification of the choice-of-court agreements as procedural acts would lead to the conclusion that they may produce legal

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*cit.*, Vol. 1, p. 86; E. RIGHETTI, *La Deroga Alla deroga alla giurisdizione*, Giuffrè, 2002, p. 213 e 376; G. GAJA, *La deroga alla giurisdizione italiana*, Giuffrè, 1971, p. 256; M. GIULIANO, *La giurisdizione civile italiana e lo straniero*, *op. cit.*, p. 185. In the context of the Brussels regime, see ECJ, Case C-269/95, *Francesco Benincasa v Dentalkit Srl.*, 3 July 1997, ECLI:EU:C:1997:337, par. 25: «...*jurisdiction clause, which serves a procedural purpose, is governed by the provisions of the Convention, whose aim is to establish uniform rules of international jurisdiction.*».

<sup>118</sup> Mainly in Germany so-called “*materiell-rechtliche verträge über prozessuale beziehungen*”, see BGH NJW 1968, 1233; BGH NJW, 1972, 1622; BGH NJW 1989, 1431; BGH NJW 1997, 2885. See also F. SPARKA, *Jurisdiction and Arbitration Clauses in Maritime Transport Documents: A Comparative Analysis. Hamburg Studies on Maritime Affairs*, Springer Science & Business Media, 2010, p. 30, 87.

<sup>119</sup> See Article 1 par. 2 lett. d) of the Rome Convention and Article 1 par. 2 lett. e) of the Rome I Regulation.

<sup>120</sup> Opinion of the European Economic and Social Committee on the Proposal for a Regulation of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I), CESE/2006/1153, 13 September 2006, point 3.1.4.

<sup>121</sup> Article 1 par. 5 of *Giuliano and Lagarde Report*.

<sup>122</sup> L. PENASA, *Gli accordi sulla giurisdizione tra parti e terzi*, *op. cit.*, Vol. 1, p. 88.

<sup>123</sup> *Ibidem*, p. 114.

<sup>124</sup> *Ibidem*, p. 89, 90.

effects only once they are plead in the proceedings.<sup>125</sup> This substantive nature must also be deduced *a priori* due to the fact that jurisdiction agreements are bilateral, as in case of contracts.<sup>126</sup>

### 3. Law Applicable to the Choice-of-Court Agreements

It can be summarised that the qualification of the nature and effects of the choice-of-court agreements has a significant impact on the legislative choices concerning the law applicable to the choice-of-court agreements. Thus, the following division should result:

- when choice-of-court agreements are qualified as substantive agreements, the law applicable to the choice-of-court agreements should be identified using provisions of private international law;<sup>127</sup>
- when choice-of-court agreements are qualified as procedural legal acts with procedural effects, the law applicable to the choice-of-court agreements should be governed by the procedural provisions of *lex fori*;<sup>128</sup>
- when choice-of-court agreements are qualified as substantive agreements with procedural effects, then admissibility and the efficacy should be governed by *lex fori*, but the substantive nature should permit the application of *lex causae* according to the provisions of private international law regarding substantive validity.<sup>129</sup>

However, the doctrine, the legislation, and the national case-law do not connect necessarily the nature and the effects of the choice-of-court agreements with the choices concerning

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<sup>125</sup> *Ibidem*, p. 84.

<sup>126</sup> On the critique see L. PENASA, *Gli accordi sulla giurisdizione tra parti e terzi*, *op. cit.*, Vol. 1, p. 85.

<sup>127</sup> See A. BRIGGS, P. REES, *Civil Jurisdiction and Judgments*, *op. cit.*, p. 172, 465, 474, the English law considers the validity and the scope as a contractual matter governed by the law of the contract in which it is contained. Therefore, the law governing the jurisdiction agreement will usually be specified by the Rome Convention. The parties may also provide for a separate law to govern the jurisdiction agreement and may make such an agreement distinct from a substantive contract. The principle of severability resolved the problem of the alleged invalidity of the main contract.

<sup>128</sup> Study JLS/C4/2005/03, Report on the Application of Regulation Brussels I in the Member States, presented by B. HESS, T. PFEIFFER, P. SCHLOSSER, ("Heidelberg Report"), par. 377; I. QUEIROLO, *Gli accordi sulla competenza giurisdizionale: tra diritto comunitario e diritto interno*, *op. cit.*, p. 203, L. Penasa, *Gli accordi sulla giurisdizione tra parti e terzi*, *op. cit.*, Vol. 1, p. 141.

<sup>129</sup> P. E. NYGH, *Autonomy in International Contracts*, *op. cit.*, p. 38, where the author divides the law governing the validity (and possibly the existence) of the choice of jurisdiction, and the question of whether the prorogued *forum* will accept the jurisdiction and whether the derogated forum will accept its exclusion (the permissibility of prorogation and derogation).

applicable law. For example, according to the German doctrine, although the procedural nature of the choice-of-court agreements has been upheld, it does not mean that *lex fori* is automatically applied to all situations.<sup>130</sup> Moreover, some of the doctrines consider jurisdiction agreements as a matter of procedural law and apply *lex causae* instead of *lex fori*.<sup>131</sup> This approach concerns the choice-of-court agreements as the legal acts accomplished outside the proceedings, which should be governed by conflict-of-law rules instead of *lex fori*, which concerns only legal acts performed within the proceedings.<sup>132</sup> This divergence demonstrates that the nature of choice-of-court agreements does not have necessarily a direct impact on the applicable law, but the nature of the choice-of-court agreements influences the legislation choices in respect of the applicable law. In particular, classification of the choice-of-court agreements may play a significant factor in respect of the determination of law applicable to the substantive validity to the choice-of-court agreements since the admissibility, and the formal validity is usually governed by *lex fori*.<sup>133</sup> Substantive validity covers the question whether the jurisdiction agreement was procured by misrepresentation, mistake, frustration, duress, etc. Although the Brussels *Ibis* Regulation<sup>134</sup> and the Hague Convention on Choice of Court Agreement<sup>135</sup> provides for express answers regarding the

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<sup>130</sup> When the prorogued court should apply *lex fori*, but derogated court would apply *lex causae* see L. PENASA, *Gli accordi sulla giurisdizione tra parti e terzi*, op. cit., Vol. 1, p. 118, 126, which makes reference to G. WAGNER, *Prozeßverträge*, Mohr Siebeck, 1998, p. 353.

<sup>131</sup> F. SPARKA, *Jurisdiction and Arbitration Clauses in Maritime Transport Documents: A Comparative Analysis. Hamburg Studies on Maritime Affairs*, op. cit., p. 87.

<sup>132</sup> This theory is rejected by L. PENASA, *Gli accordi sulla giurisdizione tra parti e terzi*, op. cit., Vol. 1, p. 117

<sup>133</sup> See also L. PENASA, *Gli accordi sulla giurisdizione tra parti e terzi*, op. cit., Vol. 1, p. 120, where the author refers to the theory of G. WAGNER, *Prozeßverträge*, Mohr Siebeck, 1998, p.358. According to this theory, the *lex fori* must be applied in respect of admissibility and effects. For example, in Italy, in case of prorogation and derogation, the jurisdiction agreement is admissible when the non-derogated (exclusive) jurisdiction is respected and when the agreement is written. Moreover, in case of derogation, other conditions are established: the claim concerns available rights (“diritti disponibili”); the designated courts do not decline jurisdiction, see in this respect F. C. VILLATA, *Sulla legge applicabile alla validità sostanziale degli accordi di scelta del foro: appunti per una revisione dell’art. 4 della legge n. 218/1995*, *Rivista di diritto internazionale privato e processuale*, (2015), p. 978. Article 4 of law 218/1995 takes into consideration the only admissibility of the derogation of the Italian court and not of other derogated courts through *renvoi* – see L. PENASA, *Gli accordi sulla giurisdizione tra parti e terzi*, op. cit., Vol. 1, p. 127.

<sup>134</sup> See Recital no 20 of the Brussels *Ibis* Regulation: «Where a question arises as to whether a choice-of-court agreement in favour of a court or the courts of a Member State is null and void as to its substantive validity, that question should be decided in accordance with the law of the Member State of the court or courts designated in the agreement, including the conflict-of-laws rules of that Member State». On the substantive validity under the Brussels Regime see *infra* Chapter Two, Subchapter I, Section 8.

<sup>135</sup> See Article 5 par. 1 of the Hague Convention on Choice of Court Agreement in case of the jurisdiction of the chosen court and Article 6 lett. a) and lett. b) of the Hague Convention on Choice of Court Agreements in case of the jurisdiction of a court not nonchosen. Whether the agreement is null and void will be determined according to the law of the chosen court, but an a unchosen court may consider the capacity of the parties according to its *lex fori*.

substantive validity of the jurisdiction agreements, the national rules on choice-of-court may come into play on several occasions. In practice, national rules governing substantive validity of the jurisdiction agreements apply: (i) when jurisdiction is conferred to Third State courts that are not party to the Hague Convention on Choice of Court Agreement and Lugano Conventions (“Third States”) on the basis of the jurisdiction agreement and the claim concerns civil and commercial matters;<sup>136</sup> (ii) when jurisdiction is conferred to Member States or to Third States on the basis of the jurisdiction agreement concerning family or succession matters, and such a jurisdiction agreement does not contravene to the EU law,<sup>137</sup> or a to the national law; or (iii) in respect of ongoing proceedings instituted before 10 January 2015, when jurisdiction was conferred to the Member State courts on the basis of the jurisdiction agreement, and the claim falls under the scope of application of the Brussels *Ibis* Regulation.<sup>138</sup>

In all these cases where the national rules on choice-of-court applies and there is a “gap” concerning the law applicable to the substantive validity, the options for the national courts are following: (i) to apply own *lex fori* by the seized, prorogued and derogated *forum*; (ii) to apply the national law of the designated court by both seized, prorogued and derogated *forum*; (iii) to apply own national conflict-of-laws rules by the seized, prorogued and derogated forum, such as *lex causae*; or (iv) to apply national conflict-of-laws rules of the designated court by both the seized, prorogued and derogated forum, such as *lex causae*.

All scenarios offer advantages and disadvantages at the same time. The need for simplicity and predictability, without any complications, is guaranteed by the application of *lex fori* excluding its conflict-of-laws rules. On the opposite side stands the application of conflict-of-laws rules, which may lead to unpredictable results *ex ante*. The application of *lex fori* mirrors

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<sup>136</sup> If we presume that there is no potential clash with ECJ, Case C-281/02, *Owusu*.

<sup>137</sup> The jurisdiction agreements are permitted in maintenance matters, see Article 4 of the Maintenance Regulation, in succession matters according to Article 5 of the Succession Regulation; according to Article 5 and 7 of the Regulations on the Property Regime; the jurisdiction agreements *sui generis* in parental responsibility matters according to Article 12 of the Brussels *Ia* Regulation. The question of substantive validity is not regulated in these EU regulations. On the substantive validity under the Maintenance Regulation see *infra* Chapter Three, Subchapter I, Section 3.5.; on the substantive validity under the Regulations on the Property Regime see *infra* Chapter Three, Subchapter I, Section 4.4.; on the substantive validity under the Brussels *Ia* Regulation see *infra* Chapter Three, Subchapter I, Section 2.5.; on the substantive validity under the Succession Regulation see *infra* Chapter Three, Subchapter II, Section 2.2.3.

<sup>138</sup> See Article 66 of the Brussels *Ibis* Regulation: «...*this Regulation shall apply only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 10 January 2015.*».

the perception of choice-of-court agreements as procedural agreements since they do not interfere with the substantive law, and thus *renvoi* to the foreign law is excluded.<sup>139</sup> Therefore, if we admit that jurisdiction agreements, which are considered to be procedural legal acts, should be governed by the national rules without referring to the conflict-of-laws rules, another question arises: whether the seized court should apply its own *lex fori* or the national rules of the prorogued court. The application of own *lex fori* by both, derogated and prorogued court, also offers to the seized derogated courts a clear and practical solution without the need to ascertain the foreign law of the prorogued forum. Moreover, both courts can very simply give effect to their own overriding mandatory rules which could not be otherwise applied, and which may prohibit the derogation from the domestic jurisdiction. However, the application of *lex fori* in two different States (i.e., by the derogated and prorogued court) could lead to positive or negative conflicts of jurisdictions.<sup>140</sup> Moreover, applying *lex fori* may lead to abusive, legal tactics in order to escape from the effects of the jurisdiction agreement, as such for example due to the mentioned overriding mandatory rules of the seized derogated *forum*. The application of the *lex fori* excluding conflict-of-laws rules only of the designated court by the seized court, which can be the prorogued court, as well as the derogated court, seems to be much more coherent in respect of the view of non-contrasting jurisdictions and unified solutions, when both courts evaluate the substantive validity according to a single law.<sup>141</sup> The possibility of applying the same law should be considered from another point of view - the designation of specific national courts reflects the will of the parties also in regard to the law applicable to the substantive validity of the choice-of-court agreement, although such an intention is not expressed.<sup>142</sup> The effect of the

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<sup>139</sup> L. PENASA, *Gli accordi sulla giurisdizione tra parti e terzi*, op. cit., Vol. 1, p. 125.

<sup>140</sup> F. C. VILLATA, *Sulla legge applicabile alla validità sostanziale degli accordi di scelta del foro: appunti per una revisione dell'art. 4 della legge n. 218/1995*, op. cit., p. 981; L. Penasa, *Gli accordi sulla giurisdizione tra parti e terzi*, op. cit., Vol. 1, p. 130.

<sup>141</sup> On this solution under the Brussels Ibis Regulation, see *infra* Chapter Two, Subchapter I, Section 8.2. See also ECJ, Case C-150/80, *Elefanten Schuh GmbH v Jacqmain*, The Opinion of Advocate General Sir Gordon Slynn, 20 May 1981, ECLI:EU:C:1981:112, p. 1699, the Advocate General stated: «A further question arises as to which court decides the validity of the agreement under the national law of the named forum. One possibility is that the court in which the question is raised should immediately refer the matter to the named forum for decision under its own national law. There are advantages in this but I do not consider that it is right. It seems to me that the court seised of the challenge of jurisdiction must itself decide the validity of the agreement (other than in relation to the provisions as to form specified in Article 17 itself) under the national law of the named forum.» See also authors in note 36, 37 and 28 quoted by L. PENASA, *Gli accordi sulla giurisdizione tra parti e terzi*, op. cit., Vol. 1, p. 130.

<sup>142</sup> L. PENASA, *Gli accordi sulla giurisdizione tra parti e terzi*, op. cit., Vol. 1, p. 130, note 38, according to the author such a conclusion is a legally unacceptable presumption.



overriding mandatory rules of the derogated court could come into play only in the case when they, by virtue of the national law, would fall into the category of “admissibility” which is governed by the *lex fori* of the seized, derogated court, but the substantive validity is determined according to *lex fori* of the designated court.<sup>143</sup>

However, it seems that both options concerning the application of the *lex fori*, and excluding the conflict-of-laws rules, would not allow *optio legis*, i.e., the parties’ independent choice of the law applicable to the choice-of-court agreements.<sup>144</sup> The parties’ choice could be gained by the operation of the conflict-of-laws rules.<sup>145</sup> The conflict-of-law rules solution reflects the perception of the choice-of-court agreement as a substantive matter. Also, in this case, the question arises whether the seized, derogated court should apply its own conflict-of-law rules or the conflict-of-law rules only of the designated court.<sup>146</sup> The application of its own conflict-of-law rules by the seized, derogated court opens the door to the straightforward application of its own overriding mandatory rules. However, the second scenario, when the seized, derogated court should apply the conflict-of-law rules of the designated court, would practically exclude the application of its own overriding mandatory rules, apart from the situation when *renvoi* refers back to the law of the derogated court.<sup>147</sup> Such a conclusion is strengthened when a State classifies the overriding mandatory rules as a matter of substantive validity instead of admissibility, which could allow the application of overriding mandatory rules of the seized, derogated court.<sup>148</sup>

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<sup>143</sup> See *infra* note 148.

<sup>144</sup> See L. PENASA, *Gli accordi sulla giurisdizione tra parti e terzi*, *op. cit.*, Vol. 1, p. 147; F. C. Villata, *Sulla legge applicabile alla validità sostanziale degli accordi di scelta del foro: appunti per una revisione dell’art. 4 della legge n. 218/1995*, *op. cit.*, p. 981; since they must be determined in virtue of procedural provisions see I. QUEIROLO, *Gli accordi sulla competenza giurisdizionale: tra diritto comunitario e diritto interno*, *op. cit.*, p. 203.

<sup>145</sup> See I. QUEIROLO, *Gli accordi sulla competenza giurisdizionale: tra diritto comunitario e diritto interno*, *op. cit.*, p. 204.

<sup>146</sup> The latter solution corresponds to the rule laid down in the Brussels *Ibis* Regulation.

<sup>147</sup> See this conclusion in respect of the Brussels *Ibis* Regulation in J. BASEDOW, *Exclusive choice-of-court agreements as a derogation from imperative norms*, in *Essays in Honour of Michael Bogdan*, Juristförlaget, 2013, p. 19.

<sup>148</sup> There are discussions in respect of the Brussels *Ibis* Regulation whether the overriding mandatory rules or public order can be classified as issues regarding admissibility which can be assigned to the national law or to substantive validity. See J. BASEDOW, *Exclusive Choice-of-court Court Agreements as a Derogation from Imperative Norms*, *op. cit.*, p. 20, which is oriented towards the substantive validity and see U. MAGNUS, *Article 23*, in U. MAGNUS, P. MANKOWSKI (eds), *Brussels I Regulation*, 2eds, Sellier European Law Publishers, 2012, par. 65 *et seq.*, 75 *et seq.*, which suggests to include the compatibility of the choice-of-court clause with public policy in “admissibility”. See also L. PENASA, *Gli accordi sulla giurisdizione tra parti e terzi*, *op. cit.*, Vol. 1, p. 121 which refers to the authors in footnote No 20, which affirm that the law chosen by the parties, or the *lex*

In conclusion, it can be stated that the identification of the law applicable to the jurisdiction agreements is subject to the legislative decisions in the specific States, i.e., whether the States apply *lex fori prorogati* by prorogued and derogated courts, or *lex fori* of respective courts, or *lex causae*. The non-unified approaches flowing up from the choices of the national legislators result in different outcomes. Even more, unpredictable consequences derive from the “silence” of national acts in this respect.<sup>149</sup> The impossibility to predict the outcome as to the law applicable to the choice-of-court agreements may discourage the parties from entering into the choice-of-court agreements. At least, the gap may be refilled by the constant national case law. Another acceptable solution might be closer to loopholes in the rule on substantive validity considering the Brussels *Ibis* Regulation or the Hague Convention on Choice of Court Agreement.

### **III. Choice-of-Court Agreements in the International Disputes and its Limitations**

#### **1. Functions of the Choice-of-Court Agreements**

The parties express their autonomy by designating a competent court. Parties are free to agree which court shall have jurisdiction over the dispute, which arises or may arise, between the parties and their freedom is counterbalanced by imposing reasonable limits. “Jurisdiction clauses”, or “forum selection clauses” or “choice-of-court clauses” are synonyms for the parties’ agreement on the *forum*. Due to the different characteristics which can be attributed to the choice-of-court agreements, a single definition is hard to provide. There are several types of jurisdiction clauses. Jurisdiction clauses may form part of the main contract, or may be drafted on the separate document, may be exclusive or non-exclusive, may designate specific court or courts of specific states, may be symmetric, asymmetric, alternative etc. Thus, the definition, the admissibility, the effects and the conditions must be found in the applicable legal instrument, either national or international. The Impact Assessment on the Ratification

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*contractus* should regulate the admissibility, but the certain limits (such as protection of the weaker parties) of *lex fori* can operate in case of the imperative norms or in case of positive public order. F. C. VILLATA, *Sulla legge applicabile alla validità sostanziale degli accordi di scelta del foro: appunti per una revisione dell’art. 4 della legge n. 218/1995, op. cit.*, p. 985, affirms that the derogated court could verify the conditions of admissibility of the Italian jurisdiction in order to protect interests of the legal order.

<sup>149</sup> For example, in Italy where Article 4 of 218/1995 do not provide for any expressed rule on the applicable law, see F. C. VILLATA, *Sulla legge applicabile alla validità sostanziale degli accordi di scelta del foro: appunti per una revisione dell’art. 4 della legge n. 218/1995, op. cit.*, p. 973-986.

of the Hague Convention on Choice of Court Agreements defines the choice-of-court agreement as

...an agreement through which parties to a contract agree that any future conflict arising out of that contract should be resolved by a court.<sup>150</sup>

Choice-of-court agreements provide for greater certainty and predictability for parties by enabling them to litigate in front of a designated court. In the international context, courts can recognise a judgment issued by the selected court in another state. They also allow the parties (with same bargaining powers) to select the venue of their shared interest, or at least avoid trying the case in an undesirable *forum* by designating a neutral one. The exclusive jurisdiction agreements may anticipate and minimize clashes over the venue, and thus they prevent self-interested jurisdictional battles caused by the *forum shopping*.<sup>151</sup> In this manner, the neutral *forum* guarantees the parties will have the same position in civil proceedings and the parties do not face risk of being sued in front of the other party's home court, or in front of the most advantage one.<sup>152</sup> Several factors should be taken into consideration by the parties entering into a forum-selection clause.

By designating a specific court, the parties can assess their rights and obligations according to the procedural rules of the chosen *forum*. The attractiveness of the *forum* is also represented by the procedural rules the *lex fori*.<sup>153</sup> The importance of procedural rules cannot be downgraded: the procedural rules determine the conduct of the hearing, the time limits, the requirements of written filings, the legal remedies, the legal costs and the cost recovery, the mode and the speed of litigation, and the quality and the ability of the courts. Last but not least, the *lex fori* also governs the mentioned dispositive principle and operation of party autonomy during the proceedings. In any case, good knowledge of procedural rules contributes to the successful result of the dispute. A specific experience or expertise, the

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<sup>150</sup> Impact Assessment on the Ratification of the Hague Convention on Choice of Court Agreements, p. 6.

<sup>151</sup> A. BELL, *Forum Shopping and Venue in Transnational Litigation*, *op. cit.*, p. 275.

<sup>152</sup> G. BORN, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*, Kluwer Law International, 2016, 4eds., p. 3.

<sup>153</sup> K. KERAMEUS, *Procedural harmonization in Europe*, *The American Journal of Comparative Law*, 43:3 (1995), p. 404; M. A. LUPOI, *Conflitti transnazionali di giurisdizione*, Giuffrè, 2002, 2eds, p. 26. The proceedings are regulated by *lex fori*, with certain exceptions. Sometimes the procedural rules follow *lex causae* or *lex diligentiae*, see: J. DOLINGER, C. TIBURCIO, *The Forum Law Rule in International Litigation—Which Procedural Law Governs Proceedings to Be Performed in Foreign Jurisdictions: Lex fori or Lex Diligentiae*. *Texas International Law Journal*, 33 (1998), p. 425; A. SURANA, *International Civil Procedure and Principle of 'Lex fori'*, 2006, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=915923](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=915923).

specific language skills, the distance of the parties in respect of the selected forum, or a good reputation of the courts help the parties to decide on the designation of such a court. The designation of the domestic court or a court which may favour only one of the parties may play an essential role during the negotiation of the contract and may be decisive for the result of the potential dispute.

In the absence of a choice-of-law agreement, the choice of a court has a significant impact on the law which is applied to the dispute. If the international or EU legal instruments do not unify or harmonize the applicable law, the designated court determines the applicable law according to its own national law. Although the importance of the selection of the competent court as to the impact to the applicable law is “weakened” when the choice-of-court agreement is coupled by a choice-of-law agreement, on the contrary, predictability and certainty of the parties are escalated.

The most important advantage is that parallel proceedings regarding the same dispute between the same parties may be avoided by exclusive choice-of-court agreements. When an exclusive forum-selection agreement lacks, the jurisdictions of courts in different states may overlap and may result in inconsistent judgments.<sup>154</sup> Moreover, as already stated, the forum-selection agreements may be perceived as an instrument for anticipating *forum shopping* since the parties have the freedom to minimise any potential clashes by the agreement.<sup>155</sup> The choice-of-forum clauses also assist in predicting whether the judgment will be recognized and enforced in the requested state. The conventions on judicial cooperation between the chosen and required court increase the possibility of successful recognition or enforcement of the judgment in the requested state. Therefore, the tendency of concluding international conventions in the field of jurisdiction (covering the *lis alibi pendens* rule and the rule on prevention of parallel proceedings) and recognition and enforcement of foreign judgment concerning the choice-of-court agreements is growing, and the efficiency of the rules on choice-of-court agreements is maximised.

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<sup>154</sup> C. MACLACHLAN, *Lis pendens in International Litigation*, in *Collected Courses of the Hague Academy of International Law*, The Hague Academy of International Law, 336 (2008), p. 199, 231.

<sup>155</sup> A. BELL, *Forum Shopping and Venue in Transnational Litigation*, *op. cit.*, p. 276.

## 1.1. Practical Use of Choice-of-Court Agreements

Several studies concerning the practical use of the choice-of-court agreements were published. The Oxford University paid attention to the choice-of-forum clauses in civil and commercial matters and revealed several interesting facts – England, Italy, Germany, and Switzerland were preferable choices as home *bias*.<sup>156</sup> However, when the party, which opted for home *bias*, should choose other forum, States like Switzerland, England, France, or Germany were among the top choices. Countries like Poland or Spain were not preferred by hometown parties, or by parties coming from other states. Thus, what are the factors which are reflected in the parties' choice? The parties in the business sector consider mainly the quality of judges and court (4,39%), the fairness of the outcome and corruption (4,38%), the predictability of outcomes (4,32%), or the speed of dispute resolution (4,15%). All these answers lead to the conclusion that business parties assume that the quality of judges is higher for example in Switzerland than in Poland, that the corruption is lower in England than in Spain, etc. However, according to professor Vogenauner, the parties, are influenced mainly by familiarity or image of the *forum*, and thus, the legal factors do not dominate a party's choice.<sup>157</sup> However, the crucial factors for selection of the specific courts represent undoubtedly the experience and the expertise of the courts and single judges. In Switzerland, England, France, or Germany specialised commercial courts were established.<sup>158</sup> Moreover, all preferred states are bound by the Brussels *Ibis* Regulation<sup>159</sup> and/or the 2007 Lugano Convention, which guarantee the successful recognition and enforcement of the judgment in other Member or Contracting States. Nowadays, other States try to attract parties and offer them higher standards, better procedures with more experiences, and proceedings in another language.<sup>160</sup> For example, a special state court in the Netherlands (Netherlands Commercial

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<sup>156</sup> See question n. 30 of final results of the study Civil Justice Systems in Europe: Implications for Choice of Forum and Choice of Contract Law, available at: [http://www.fondation-droitcontinental.org/fr/wp-content/uploads/2013/12/oxford\\_civil\\_justice\\_survey\\_-\\_summary\\_of\\_results\\_final.pdf](http://www.fondation-droitcontinental.org/fr/wp-content/uploads/2013/12/oxford_civil_justice_survey_-_summary_of_results_final.pdf).

<sup>157</sup> S. VOGENAUNER, *Regulatory Competition through the Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence*, in H. EIDENMÜLLER (ed), *Regulatory Competition in Contract Law and Dispute Resolution*, C.H. Beck and Hart Publishing, 2013, p. 256-263.

<sup>158</sup> M. ZIMMER, *Overview of Specialized Courts*, *International Journal for Court Administration*, 2:1 (2009), available at: <http://ijca.ubiquitypress.com/Articles/10.18352/ijca.111/galley/92/download/>;

<sup>159</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20 December 2012, ("Brussels *Ibis* Regulation").

<sup>160</sup> On competition between the national systems see: A. OGUS, *Competition between National Legal Systems: A Contribution of Economic Analysis to Comparative Law*, *International and Comparative Law Quarterly*, 48:2

Court) for large national and international commercial disputes should open their doors during the course of 2018 and should offer to the party's specialized judges, English or Dutch language proceedings, shorter proceedings, paperless litigation, recovery options, and no risk of high adversary party costs or awards if claims are dismissed, etc.<sup>161</sup>

Civil litigation gains popularity and can compete with arbitration proceedings in the civil and commercial matters. Two surveys analyzed the popularity and the use of arbitration and civil litigation in practice. The first questionnaire on international arbitration spread out among 101 corporate counsels by the Queen Mary University, and PWC in London in 2013 found out that most of the financial services sector organisations prefer litigation over arbitration;<sup>162</sup> when it is not possible to settle amicably, the same percentage of persons opted in for arbitration and litigation.<sup>163</sup> A more recent survey from 2015 conducted by White and Case and Queen Mary University on arbitration revealed a stronger preference for arbitration over civil litigation.<sup>164</sup> However, the survey conducted by PWC in 2005 in Germany shows the opposite tendency – the most of the companies primarily prefer to use negotiation and litigation for national and international disputes.<sup>165</sup> Also, the improvement of the national procedural law, competition among national legal systems, the creation of specialised courts, and the existence of useful international legal instruments on jurisdiction and recognition and enforcement of judgments should offer same advantages as arbitration proceedings.

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(1999), p. 405–418; G. WAGNER, *The Dispute Resolution Market*, Buffalo Law Review, 62 (2014), p. 1085 et seq. On the advantageous and disadvantageous of the specialised courts see R. C. DREYFUSS, *Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes*, Brooklyn Law Review, 61 (1995), p. 1 et seq.; R. C. DREYFUSS, *Specialized Adjudication*, Brigham Young University Law Review, 1 (1990), p. 377-441; M. J. KROEZE, *The Dutch Companies and Business Court as a Specialized Court*, Ondernemingsrecht 29 (2007), pp. 86-91.

<sup>161</sup> On the information see <https://netherlands-commercial-court.com/>. On 11 December 2018 the Dutch Senate voted to create the Netherlands Commercial Court (NCC District Court and NCC Court of Appeal) as part of the Amsterdam courts. The Minister of Justice and Security should now issue a decree for the NCC legislation to enter into force. In this regard see <https://www.rechtspraak.nl/English/NCC>.

<sup>162</sup> See Corporate Choices in International Arbitration, 2013 International Arbitration Survey, available at: [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwilqf3YopzdAhVwhaYKHYoYBq4QFjAAegQIABAC&url=https%3A%2F%2Fwww.pwc.com%2Fgx%2Fen%2Farbitration-dispute-resolution%2Fassets%2Fpwc-international-arbitration-study.pdf&usq=AOvVaw1\\_vHC8B91K8Wkw45j86wBM](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwilqf3YopzdAhVwhaYKHYoYBq4QFjAAegQIABAC&url=https%3A%2F%2Fwww.pwc.com%2Fgx%2Fen%2Farbitration-dispute-resolution%2Fassets%2Fpwc-international-arbitration-study.pdf&usq=AOvVaw1_vHC8B91K8Wkw45j86wBM), p. 7.

<sup>163</sup> 47 %, see 2013 International Arbitration Survey, p. 7.

<sup>164</sup> 90 % of respondents answered that over the past five years they used international arbitration for cross-border disputes and 43 % cross-border litigation. 763 respondents completed an online questionnaire. See 2015 International Arbitration, Survey Improvements and Innovations in International Arbitration, available at: <https://www.whitecase.com/publications/insight/2015-international-arbitration-survey-improvements-and-innovations>, p.53.

<sup>165</sup> See summary: [https://www.ikm.europa-uni.de/de/publikationen/IKM\\_PwC\\_Commercial-Dispute-Resolution\\_english-summary\\_2005.pdf](https://www.ikm.europa-uni.de/de/publikationen/IKM_PwC_Commercial-Dispute-Resolution_english-summary_2005.pdf)

## 2. Limitation to Party Autonomy in respect of Choice-of-Court Agreements

The core of party autonomy is an idea that parties have the liberty to use their independence within the boundaries.<sup>166</sup> However, as we could see *supra* in a Subchapter II, the situation with respect to the choice-of-court agreements is not so simple due to their hybrid nature. But in any case, the limits are necessary aspects in order to construct barriers for the freedom of the parties which should counterbalance their rights to protect their specific interests.

The purpose of this subchapter is not to describe limits to party autonomy on general level, but it restricts the analysis to choice-of-court agreements.<sup>167</sup> The limitations of party autonomy in respect of choice-of-court agreements with the cross-border element may be divided into two categories: (i) overriding mandatory rules and public policy control; and (ii) protection of the weaker parties. As we will see, the overriding mandatory rules and the protection of the weaker parties often overlap and are complementary to each other: overriding mandatory rules represent the interest of the State which also includes the protection of the weaker parties. Sometimes it is not possible to set boundaries between these two categories. Moreover, it is questionable whether the doctrine of *forum non conveniens* could be categorized as a third type of limitation to party autonomy. However, due to the discretionary power of the court often resulting in the dismissal of the valid choice-of-court agreement, the *forum non conveniens* will be considered as another type of limitation to the party autonomy. This may be supported by the fact that the overriding mandatory rules and public policy exception are factors when deciding whether the doctrine of *forum non conveniens* is upheld for the specific dispute.

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<sup>166</sup> L. ERVO, *Nordic Court Culture in Progress: Historical and Futuristic Perspectives*, in L. ERVO, A. NYLUND (eds), *The Future of Civil Litigation: Access to Courts and Court-Annexed Mediation in the Nordic Countries*, Springer, 2014, p. 389-396.

<sup>167</sup> On the restrictions regarding the choice of law, see: P. E. NYGH, *Autonomy in International Contracts*, *op. cit.*, p. 15. According to the author, the contract should have an international character; the chosen law should have connection with the transaction or parties; the chosen law should be of a contemporary municipal system; the choice should be *bona fide* and legal and not contrary to public policy and the choice should be made freely and voluntarily.

## 2.1. Public Policy and Overriding Mandatory Rules

Major part of civil law countries does not usually apply the doctrine of *forum non conveniens*.<sup>168</sup> In order to counterbalance unlimited party autonomy, specific “emergency breaks” has been introduced. Although certainty and predictability represent important values, the substantive law which protects the strong State policies and precludes abuse of unlimited party autonomy is primary. Party autonomy is not usually respected when it contravenes the overriding mandatory rules of the *forum* (positive effect) or when the restrictions are necessary for securing the public interest and the fundamental principles of the State (negative effect).<sup>169</sup> The international, overriding mandatory rules and the substantive public-policy exception have a common scope: they safeguard the public interests of the *forum*. However, each of these requires separate attention.<sup>170</sup> The overriding mandatory rules and rules on public policy are applied irrespectively of the law otherwise applicable to the dispute.<sup>171</sup> Such rules are usually regulated in the national, EU and international law.<sup>172</sup> A definition of the

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<sup>168</sup> However, for example in Sweden, the courts have a certain margin of appreciation which may be perceived as *forum non conveniens*, see M. BOGDAN, *Sweden*, in J. J. FAWCETT (ed), *Declining Jurisdiction in Private International Law: Reports to the XIVth Congress of the International Academy of Comparative Law*, Oxford University Press, 1995, p. 373-374.

<sup>169</sup> A. BĚLOHLÁVEK, *Public Policy and Public Interest in International Law and EU Law*, in A. BĚLOHLÁVEK, N. ROZEHNALOVÁ, *Czech Yearbook of International Law: Public Policy and Ordre Public*, p. 139.

<sup>170</sup> On the differences between public policy and overriding mandatory rules, see F. FERRARI, S. LEIBLE, *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe*, Sellier. European Law Pub, 2009, p. 297; R. FENTIMAN, *International Commercial Litigation*, Oxford University Press, 2010, p. 114-151. However, see for example that The Hague Principles address public policy and overriding mandatory provisions in a single Article, which differs from the Hague Conference’s traditional approach separating these two concepts.

<sup>171</sup> See A. BONOMI, *Le norme imperative nel diritto internazionale privato: considerazioni sulla Convenzione europea sulla legge applicabile alle obbligazioni contrattuali del 19 giugno 1980 nonché sulle leggi italiana e svizzera di diritto internazionale privato*, Schulthess, 1998.

<sup>172</sup> On the public policy in EU law see L. FUMAGALLI, *L’ordine pubblico nel sistema del diritto internazionale privato comunitario*, *Diritto del Commercio Internazionale* 3 (2004), pp. 635-652; L. FUMAGALLI, *EC Private International Law and the Public Policy Exception. Modern Features of a Traditional Concept*, *Yearbook of Private International Law* (2004), pp. 171-183. On the national rules, see for example, in Italy Article 16 of the Italian Act on Private International Law (rule on public policy): «No foreign law shall be applied whose effects are incompatible with public policy (*ordre public*). In that case, the applicable law shall be determined on the basis of other connecting factors possibly provided for with respect to the same matter. In the absence of other connecting factors, Italian law applies.»; and Article 17 (rule on overriding mandatory rules): «The following dispositions do not prejudice those provisions of Italian law which, because of their object and purpose, are applicable irrespectively of the reference made to the foreign law.», the non-official translation is available at: <http://www.unife.it/giurisprudenza/giurisprudenza/studiare/private-international-law/materiale-didattico/archivio/italian-statute-on-private-international-law-of-31-may-1995-no-218-as-originally-adopted-unofficial-english-translation/view>. In the Czech Republic, see Article 3 of Zákon č. 91/2012 Sb. o mezinárodním právu soukromém (“Czech Act on Private International Law”) governing overriding mandatory rules: «The provisions of this Act do not prevent the use of those provisions of Czech law which must always be used within the bounds of the regulation of their given subject areas regardless of which body of laws the legal relations, in which the effects of the use of any such provisions are manifest, are subject to.»; and Article 4 (rule



international overriding mandatory rules may also be found in the EU regulations, for example in Article 9 para 1 of the Rome I Regulation:

*Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.*<sup>173</sup>

The overriding mandatory rules are positive norms aiming at enforcing the public interest and protect the political, social, or economic order. They are applied irrespective of the chosen or otherwise applicable law. Thus, they are enforced irrespective of the law determined by the conflict-of-laws rules, and they even precede the application of the conflict-of-laws rules. The question arises what kind of the interests are triggers since the definition does not include an exhaustive list of such interests due to the phrase “such as”. The overriding mandatory provisions are internationally binding and must be distinguished from the “ordinary” or the “simple” mandatory provisions that might be avoided by the choice of law.<sup>174</sup> The notion of public policy includes a general category of values which cover the concepts of morality and justice that are subject to the protection of the overriding mandatory rules. However, the term public policy is a narrower term than then overriding mandatory rules when its function is to prevent the application of foreign rules which can seriously violate the system’s fundamental principles.<sup>175</sup> The exception of public policy then represents a negative law, it applies after the governing law has been determined through the conflict-of-laws rule and allows a final check

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on public policy): «*The provisions of any foreign body of laws which are supposed to be used in accordance with the provisions of this Act cannot be applied, if the effects of any such application would clearly contravene public order.*», the official translation is available at: <http://obcanskyzakonik.justice.cz/index.php/home/zakony-a-stanoviska/preklady/english>.

<sup>173</sup> See also Article 7 of the Rome Convention: «*When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application. 2. Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.*».

<sup>174</sup> On the difference between internal mandatory rules and overriding mandatory rules see M. PAUKNEROVÁ, *Mandatory Rules and Public Policy in International Contract Law*, ERA Forum, Springer-Verlag, 11:1 (2010), p. 30.

<sup>175</sup> A. CHONG, *The public policy and mandatory rules of third countries in international contracts*, *Journal of Private International Law*, 2:1 (2006), p. 325

on the contents.<sup>176</sup> The application of a law determined through the conflict-of-laws rules can be refused by the court if the application is manifestly incompatible with the public policy of the *forum*. The chosen law is only replaced to the extent of the incompatibility with the fundamental principles of the forum.<sup>177</sup> The substantive exception of public policy is defined in Article 21 of the Rome I Regulation:

*The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (order public) of the forum.*<sup>178</sup>

Although classic examples can be found in family and succession law,<sup>179</sup> the Rome III Regulation regulates only the rule on public policy control but does not make any statement concerning overriding mandatory rules.<sup>180</sup> In succession matters, Article 30 of the Succession Regulation has introduced special substantive rules imposing restrictions on economic, family, and social considerations and Article 35 contains the rule on public policy.

A question arises whether the overriding mandatory rules or the exception of public policy can be considered to be limits on party autonomy in the context of jurisdiction, and specifically in choice-of-court agreements. In other words, should a non-chosen court disregard the jurisdiction agreement on the grounds of violation of the public policy or the overriding mandatory rules of the *forum*? The invalidation of choice-of-court agreements based on the overriding mandatory rules and public policy is a more complicated problem and in the literature is sometimes criticised,<sup>181</sup> or on the contrary, is deemed to be an inevitable feature.<sup>182</sup> In this context it must be remembered that derogation from jurisdiction gives the

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<sup>176</sup> T. M. DE BOER, *Unwelcome Foreign Law: Public Policy and Other Means to Protect the Fundamental Values and Public Interests of the European Community*, in A. MALATESTA, S. BARIATTI, F. POCAR, (eds), *The External Dimension of EC Private International Law in Family and Succession Matters*, CEDAM, 2008, p. 296.

<sup>177</sup> M. PERTEGÁS, B. A. MARSHALL, *Harmonization Through the Draft Hague Principles on Choice of Law in International Contracts*, *Brooklyn Journal of International Law*, 39:3 (2014), p. 999.

<sup>178</sup> See also Article 16 of the Rome Convention: «*The application of a rule of the law of any country specified by this Convention may be refused only if such application is manifestly incompatible with the public policy ('ordre public') of the forum.*».

<sup>179</sup> See M. PAUKNEROVÁ, *Mandatory Rules and Public Policy in International Contract Law*, *op. cit.*, p. 31.

<sup>180</sup> On the potential problems regarding the lack of rules concerning overriding mandatory rules see S. MARINAI, *Matrimonial Matters and the Harmonization of Conflict of Laws: A Way to Reduce the Role of Public Policy as a Ground for Non-Recognition of Judgments*, in *Yearbook of Private International Law*, 13 (2012), p. 264, 265.

<sup>181</sup> H. SCHACK, *Internationales Zivilverfahrensrecht*, C.H. Beck, 2014, 6ed, par. 516.

<sup>182</sup> M. WELLER, *Choice of Forum Agreements Under the Brussels I Recast and Under the Hague Convention: Coherences and Clashes*, *Journal of Private International Law*, available at SSRN: <https://ssrn.com/abstract=2827711>, p. 12.

parties the possibility to escape from the overriding mandatory provisions and from the public policy control of the otherwise seized *forum* in the absence of choice-of-court agreements.

The answers are left to the national courts, whenever the EU regulations and international conventions are not applicable. In the EU, none of the regulations governing the jurisdiction contain any rule like Article 9 of the Rome I Regulation regarding the overriding mandatory rule or Article 21 concerning public policy exceptions in respect of choice-of-court agreements. However, Article 6 lett c) of the Hague Convention on Choice of Court Agreement introduced the “escape clause”. This clause provides for the possibility of the national court not to suspend or dismiss proceedings when the agreement “...*would lead to a manifest injustice or would be manifestly contrary to the public policy of the state of the court seized.*”. Such a public policy exception may be found in the Hague Convention on Choice of Court Agreement – a non-designated court is permitted to disregard a valid jurisdiction agreement and to proceed with the case if it finds that a jurisdiction agreement is contrary to the public policy of the *lex fori*. Hartley and Dogauchi explain this rule as “*situations where the chosen court would not apply some rule or principle that was regarded in the State of the court seized as being manifestly part of its fundamental public policy.*”<sup>183</sup>

### **2.1.1. Case law concerning the Interference of the Overriding Mandatory Rules with the Choice-of-Court Agreements**

In this chapter, the subsequent case-law demonstrates how the overriding mandatory rules or public policy exception intervene in party autonomy regarding the choice of jurisdiction. In order to step forward with the considerations regarding the overriding mandatory rules and public policy in the context of choice-of-court agreements, the cases *Trasporti Castelletti*,<sup>184</sup> *CDC*,<sup>185</sup> *Unamar*,<sup>186</sup> and *Ingmar*<sup>187</sup> rendered by the ECJ must be firstly mentioned (although the latter one concerns only choice-of-law clauses).

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<sup>183</sup> Prel. Doc. No 25 of March 2004 - Explanatory Report on the Preliminary Draft Convention on Choice of Court Agreements, drawn up by Trevor C. Hartley and Masato Dogauchi, par. 97.

<sup>184</sup> ECJ, Case C-159/97, *Trasporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA*, 16 March 1999, ECLI:EU:C:1999:142.

<sup>185</sup> ECJ, Case C-352/13, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Evonik Degussa GmbH and Others*, 21 May 2015, ECLI:EU:C:2015:335 and Case C-352/13, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Evonik Degussa GmbH and Others*, Opinion of Advocate General, 11 December 2014, ECLI:EU:C:2014:2443.

**i) *Trasporti Castelletti***

*Corte Suprema di Cassazione* referred to the ECJ a preliminary ruling in a dispute, between *Trasporti Castelletti Spedizioni Internazionali* (customer) and *Hugo Trumpy* (agent for the vessel) with their registered offices in Italy and *Lauritzen Reefers* with registered office in Copenhagen (carrier), concerning the compensation for damage caused during the unloading of goods carried under the bills of lading from Argentina to Italy. *Hugo Trumpy* contested international jurisdiction due to the jurisdictional clause contained in the bills of lading conferring jurisdiction on the High Court of Justice in London. *Corte Suprema di Cassazione* raised fourteen questions as to the consent, form, and validity of the jurisdiction clause according to Article 17 of the Brussels Convention. For the current considerations, it is decisive only for the question whether the substantive provisions applicable to the chosen court and reducing party's liability may affect the validity of the jurisdiction clause. According to the ECJ, in keeping with the spirit of certainty of the Brussels Convention, the court should decide on jurisdiction only based on the rules of the Brussels Convention without having to consider the substance of the case, in this specific case the substantive rules related to the liability of a carrier under a bill of lading. The ECJ justified its reasoning on legal certainty in order to foresee which court will have jurisdiction by virtue of Article 17 of the Brussels Convention as already interpreted in *Benincasa*.<sup>188</sup> From the decision it follows that only formal requirements specifically set out in Article 17 of the Brussels Convention must be assessed. Thus, any objective connection between the relationship in dispute and the designated court are excluded. In other words, the substantive rules applicable to the chosen court must not affect the validity of the jurisdiction clause.

**ii) *Cartel Damage Claims (CDC)***

The transnational disputes for damages against international cartels are frequently decided by the national courts and answer questions on applicable law and jurisdiction.<sup>189</sup> *Landgericht*

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<sup>186</sup> ECJ, C-184/12, *United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare*, 17 October 2013, ECLI:EU:C:2013:663.

<sup>187</sup> ECJ, Case C-381/98, *Ingmar GB Ltd v Eaton Leonard Technologies Inc.*, 9 November 2000, ECLI:EU:C:2000:605, par. 20.

<sup>188</sup> ECJ, Case, C-269/95, *Benincasa*, par. 28 and 29.

<sup>189</sup> On Article 23 in antitrust litigation see: M. WILDESPRIN, *Jurisdiction Issues: Brussels I Regulation Articles 6(1), 23, 27 and 28 in Antitrust Litigation*, in J. BASEDOW, S. FRANCO, L. IDOT, (eds) *International Antitrust Litigation: Conflict of Laws and Coordination. Studies in Private International Law*, Hart Publishing, 2012, p. 41-61.

*Dortmund* referred the CDC case to the ECJ. Before judicial proceedings in 2006, the European Commission fined the defendants for undertakings for a single and continuous infringement of Article 101 TFEU (Article 81 EC) and Article 53 EEA on the prohibition of cartel agreements regarding the chemicals hydrogen peroxide and sodium perborate which lasted several years.<sup>190</sup> Subsequently, in 2009, the Cartel Damages Claim group (CDC), a special enforcement entity, concluded agreements on the transfer of damage claims with companies in different Member States affected by a cartel and filed an action against six chemical undertakings addressed in the Commission’s infringement decision of 2006. Only Evonik Degussa GmbH had its seat in Germany; the other five defendants were domiciled in different Member States. CDC withdrew the action regarding Evonik Degussa due to an out-of-court settlement. The defendants contested the court’s jurisdiction. The dispute revolved around three issues on the court’s jurisdiction. In the context of choice-of-court agreement, only the last question of *Landgericht Dortmund* is relevant. In particular, whether in actions for damages for infringement of the prohibition of agreements, jurisdiction agreements in favour of a court other than the *Landgericht Dortmund* contained in the purchase agreements concluded with the customers were valid and were in line with the principle of effective enforcement of the European competition rules and of Article 101 TFEU.

Advocate General Jääskinen proposed two views on the jurisdiction agreements. First, the forum selection agreements covered by Article 23 of the Brussels I Regulation may not be frustrated by recourse to the principle of the full effectiveness of the prohibition of agreements, decisions, and concerted practices laid down in Article 101 TFEU.<sup>191</sup> By contrast, according to the Advocate General, the agreements not covered by Article 23 of the Brussels I Regulation, may not be applied in cases where the implementation of such clause would hamper the effectiveness of Article 101 TFEU which “may be regarded as a matter of public policy”.<sup>192</sup> However, with regard to both types of clauses, the Advocate General doubted if forum selection agreements relating to disputes arising out of a concrete contractual

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<sup>190</sup> Commission Decision of 3 May 2006 relating to a proceeding under Article 81 of the Treaty establishing the European Community and Article 53 of the EEA Agreement against Akzo Nobel NV, Akzo Nobel Chemicals Holding AB, EKA Chemicals AB, Degussa AG, Edison SpA, FMC Corporation, FMC Foret S.A., Kemira OYJ, L’Air Liquide SA, Chemoxal SA, Snia SpA, Caffaro Srl, Solvay SA/NV, Solvay Solexis SpA, Total SA, Elf Aquitaine SA and Arkema SA. (Case COMP/F/C.38.620 — Hydrogen Peroxide and perborate), 2006/903/EC, OJ L 353, 13 December 2006.

<sup>191</sup> ECJ, Case C-352/13, *Cartel Damage Claims (CDC)*, par. 114 and 116.

<sup>192</sup> ECJ, Case C-352/13, *Cartel Damage Claims (CDC)*, par. 123 and 124.

relationship can be interpreted as covering claims for damages brought against cartel members.<sup>193</sup> The ECJ did not provide any interpretation as to the derogation agreements not covered by Article 23 of the Brussels I Regulation due to insufficient information at its disposal in order to provide a useful answer to the referring court.<sup>194</sup>

In case of prorogation agreements according to Article 23 of the Brussels I Regulation, the ECJ stated that the principle of effective enforcement of the prohibition of cartel agreements could not restrict the possibility to be bound by a jurisdiction clause derogating from the jurisdiction of Member State courts according to Article 2, Article 5 par. 3 and 6 par. 1 of the Brussels I Regulation.<sup>195</sup> Moreover, according to the ECJ, the rules applicable to the substance of a case cannot affect the validity of a jurisdiction clause agreed to under Article 23 of the Brussels I Regulation - this judgment seems to follow the ECJ's interpretation given in *Trasporti Castelletti*.<sup>196</sup> The opposite approach would undermine the objective of jurisdiction agreements to provide legal certainty and predictability. The ECJ opted for mutual trust and predictability rather than for a break from the substantive law of the derogated *lex fori*. However, the ECJ concluded that those jurisdiction clauses which abstractly refer to disputes arising from the contractual relationship do not automatically extend the application of Article 23 of the Brussels I Regulation to disputes concerning liability incurred because of an infringement of competition law.

### iii) *Unamar*

The *Unamar* case concerned only choice-of-law agreements and did not tackle the question of jurisdiction. However, it is interesting to mention this judgment in the context of previous interpretation of the ECJ in *Trasporti Castelletti* and *CDC* on mutual trust. *Unamar*, a company incorporated in Belgium (as an agent) and Navigation Maritime Bulgare (“NMB”), a company incorporated in Bulgaria, concluded a commercial agency agreement. The agreement contained an arbitration clause in favour of the Chamber of Commerce and Industry in Sofia and a clause on the choice of Bulgarian law. *Unamar* brought proceedings in front of the Antwerp Commercial court, and NMB contested the international jurisdiction of the seized court. *Hof van Cassatie* requested an answer from ECJ on whether special

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<sup>193</sup> ECJ, Case C-352/13, *Cartel Damage Claims (CDC)*, par. 129 and 130.

<sup>194</sup> ECJ, Case C-352/13, *Cartel Damage Claims (CDC)*, par. 58.

<sup>195</sup> ECJ, Case C-352/13, *Cartel Damage Claims (CDC)*, par. 59.

<sup>196</sup> ECJ, Case C-352/13, *Cartel Damage Claims (CDC)*, par. 60.

mandatory rules of law of the *forum* exceeding the scope and the level of protection offered by Agency Directive 86/653 may be applied to the contract, even if the law applicable to the contract is the law of another Member State. The ECJ restricted the effect of overriding mandatory rules but also admitted that the Member States have the discretion to designate a mandatory rule as overriding if that rule is based on the directive and exceeds the minimum protection in it.<sup>197</sup> Therefore, the ECJ took the opposite approach as in the *Trasporti Castelletti* and *CDC* cases and went even further. Party autonomy concerning the choice of law can be restricted based on overriding mandatory rules also between the Member States which implemented the directive, although the mutual trust between the Member States should be guaranteed.

**iv) *Ingmar and National Case Law based on Ingmar***

*Ingmar*, a company, established in the United Kingdom, entered into an agency contract with Eaton, company established in California. The contract was governed by the law of the State of California. *Ingmar* seized the High Court of Justice of England and Wales for post-contractual compensation for damages. California law did not regulate the post-contractual compensation. The ECJ held that the chosen law did not ensure the adequate protection for the commercial agents. Articles 17 and 18 of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents guarantees certain rights to commercial agents after termination of agency contracts. As a consequence, parties cannot deviate from such non-derogable EU rules by opting for a choice-of-law clause.

Although the interpretation given in the *Ingmar* case regards the choice-of-law clause, the approach of *Ingmar* was extended by German courts also into choice-of-court clauses. The German courts, unlike common law courts, do not have any discretion to accept jurisdiction in the presence of a valid choice-of-court agreement specifying a foreign forum based on *forum non conveniens*. On the contrary, according to the German scholar's doctrine *forum non conveniens*, also called "appreciation of uncertainty" undermines predictable jurisdiction and

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<sup>197</sup> For more details, see L. M. VON BOCHOVE, *Overriding mandatory rules as a vehicle for weaker party protection in European private international law*, *Erasmus Law Review*, 7 (2014), p. 149.

might be manipulated.<sup>198</sup> Thus, the German courts' dismissal of the claim is inadmissible if the parties reached a valid agreement of exclusive competence. The mandatory derogation of the German courts is *ex officio*. Nonetheless, the subsequent judgments demonstrate the German courts continued German proceedings despite the valid jurisdiction clause. The national overriding mandatory rules caused the dismissal of valid jurisdiction clauses in favour of courts outside the EU by the German courts due to the choice of a *forum* with a choice-of-law clause in favour of a Third State whose national law did not provide the same level protection as German law.

The first judgment of *OLG München* on 17 May 2006<sup>199</sup> concerned a self-employed commercial agent who was residing and performing an activity in Germany. The contract was governed by California law and contained an exclusive choice-of-court clause in favour of Santa Clara courts.<sup>200</sup> The German protection of commercial agents and, the post-contractual compensation was unknown to the California law. According to the German court, Article 89b of German Commercial Code implementing Article 17 of Directive 86/653/EEC had a mandatory character. Coupling the choice-of-law with choice-of-court clause resulted in dismissal of the choice of law, as well as the forum-selection clause.<sup>201</sup> The *OLG München* recalled earlier judgments of German courts, involving jurisdiction agreements designating a foreign court in the area of carriage of goods by sea,<sup>202</sup> financial services,<sup>203</sup> and others, when the courts dismissed a forum-selection clause when the application of German law could not be otherwise upheld.

The more recent decision of the German Federal Court (*BGH*) also tackled the protection of commercial agents.<sup>204</sup> In November 2005, a US company headquartered in Virginia entered into an agency agreement with a German agent. The contract contained a choice-of-law clause

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<sup>198</sup> H. SCHACK, *Germany*, in J. J. FAWCETT (ed), *Declining Jurisdiction in Private International Law: Reports to the XIVth Congress of the International Academy of Comparative Law*, Oxford University Press, 1995, p. 194.

<sup>199</sup> *OLG München*, 17 May 2006, in: IPRax 2007, 322 = IHR 2006.

<sup>200</sup> The contract also included an arbitration clause the validity of forum-selection clause standing next to the arbitration clause will not be further analysed; on this type of optional clauses see D. DRAGUIEV, *Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability*, *Journal of International Arbitration* 31:1 (2014), pp. 19–46.

<sup>201</sup> On the analysis of the judgment, see P. MANKOWSKI, *Commercial Agents under European Jurisdiction Rules. The Brussels I Regulation plus the Procedural Consequences of Ingmar*, *Yearbook of Private International Law*, 10 (2009), p. 19-55.

<sup>202</sup> BGH, NJW 1961, 1061, 1062.

<sup>203</sup> BGH, NJW 1984, 2037; BGH NJW 1987, 3193.

<sup>204</sup> BGH, BB 2012, 3103, par. 35.



designating Virginia law as applicable law and a choice-of-court provision providing for exclusive jurisdiction in favour of the courts in Virginia. The German court was seized in order to decide on post-termination indemnity of the commercial agent (the contract expressly excluded the agent's German-law right to a post-termination, and according to the German law such an exclusion is not valid). According to the Court of Appeals of Stuttgart, such a case should be examined from the *Ingmar* perspective, and German provisions on the protection of commercial agents guaranteeing the right to post-termination indemnity and implementing Directive 86/653/EEC should be classified as an overriding mandatory rule. Hence, the overriding mandatory provision invalidated the choice-of-law clause, as well as the choice-of-court clause. The Court of Appeals of Stuttgart did not permit further appeal and BGH denied the complaint against this decision. The BGH stated that in light of *Ingmar*, Articles 17 and 18 contained in Directive 86/653/EEC are mandatory and parties cannot avoid its application through the choice of law of the non-EU state. Therefore, national substantive overriding mandatory rules implementing Directive 86/653/EEC invalidate the choice of law of the country that does not provide for post-contractual indemnity. Thus, there are no doubts that such an invalidation must be extended to the choice of forum. However, the German decision must be criticised mainly because the case was not referred to the ECJ and even in *supra* mentioned latter decision was assessed by BGH as *acte clair*.<sup>205</sup>

v) ***Océano Grupo Editorial SA***

Although the ECJ judgment in joined cases C-240/98 to C-244/98,<sup>206</sup> concerned only the domestic choice-of-court agreement, it is worth mentioning also because of international jurisdiction agreements. Defendants (not domiciled in Barcelona) entered into a contract for the purchase by instalments of an encyclopedia for personal use, which contained a jurisdiction clause in favour of the courts in Barcelona, in which the plaintiffs had their principal place of business. The sellers brought actions involving due sums in front of the

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<sup>205</sup> On the obligation to bring the matter before the ECJ, see Case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, 6 October 1982, ECLI:EU:C:1982:335. The theory of *acte claire* was a subject of a critique since it attributes the discretionary power to the court of last instance to decide whether the exemption of the duty to refer the question for a preliminary ruling to the ECJ is respected. On the Case *Cilfit* and the considerations in this regard see E. D'ALESSANDRO, *Il procedimento pregiudiziale interpretativo dinanzi alla Corte di Giustizia, Oggetto ed efficacia della pronuncia*, Giappichelli, 2012, p. 279-285. On the *acte clair* see E. D'ALESSANDRO, *Intorno alla théorie de l'acte clair*, *Giustizia civile* (1997), pp. 2882-2886.

<sup>206</sup> ECJ, Joined cases C-240/98 to C-244/98, *Océano Grupo Editorial SA v Roció Murciano Quintero and Salvat Editores SA v José M. Sánchez Alcón Prades (C-241/98)*, *José Luis Copano Badillo, Mohammed Berroane, and Emilio Viñas Feliú*, 27 June 2000, ECLI:EU:C:2000:346.

court in Barcelona. According to the ECJ, the jurisdiction clause, was not individually negotiated and included in a contract between a seller or supplier and a consumer within the meaning of the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.<sup>207</sup> Thus, conferring exclusive jurisdiction on a Member State court where the seller or supplier has their principal place of business, was unfair due to a significant imbalance in the parties' rights and obligations. Therefore, the jurisdiction agreement violating the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, may be considered as invalid.<sup>208</sup>

### **2.1.2. What Solution for Overriding Mandatory Rules and Public Policy in the context of the Jurisdiction Agreements?**

As demonstrated, the ECJ did not provide for the unique interpretation that applied the overriding mandatory rules and the public-policy exception of the seized derogated court in the presence of choice-of-court agreement in favour of another court. From the previous judgments, different approaches to the invalidation of choice-of-court agreement (i) in favour of a court other than a court of a Member State, and (ii) in favour of a court of Member State, may result.

#### ***a) Choice-of-Court Agreement according to the EU Regulations***

Before the ECJ in 1999 provided the *Trasporti Castelletti* interpretation, in 1984 the German court in a dispute relative to the protection of German investors (“*Rechtsumschwung*”) invalidated jurisdiction agreements designating courts in London for the violation of the public policy.<sup>209</sup> However, nowadays such decisions of a German court would be questionable. The ECJ tends to ensure party autonomy and excludes any effect of a loss of juridical advantage in substantive law on an otherwise valid jurisdiction agreement. The ECJ expressly stated in *Trasporti Castelletti*, which dealt with jurisdiction clause in favour of another Member State court, that:

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<sup>207</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21 April 1993.

<sup>208</sup> U. MAGNUS, *Article 23*, in Brussels I Regulation, 2012, *op. cit.*, p. 472.

<sup>209</sup> BGH, NJW 1984, 2037.

*Considerations about the links between the court designated and the relationship at issue, about the validity of the clause, or about the substantive rules of liability applicable before the chosen court are unconnected with those requirements.*<sup>210</sup>

This conclusion was then confirmed by the ECJ in *CDC* when the ECJ upheld party autonomy to designate another Member State court, even if such designation amounts to a public policy violation of the derogated Member State. In fact, the ECJ affirmed the separability of a choice-of-court clause from the substantive law, which might result in a violation of public policy of the derogated *forum*. Thus, it practically did not leave any space for other interpretations. The conclusion of the ECJ was built on the conviction that the legal certainty laid down in the Brussels Regime prevails over securing the public policy of the derogated *forum*. The mutual trust practically excludes the application of the overriding mandatory rules and public policy by which the derogation of the jurisdiction of a Member State court by a jurisdiction agreement would be invalidated.<sup>211</sup> Such a conclusion was reached in 2007 also by the *Sezione Unite* of Italian *Corte Suprema di Cassazione* stating that the court's jurisdiction prevails over the application of *norme di applicazione necessaria* since in the current case, the prorogued court was situated in another Member State.<sup>212</sup> On the other hand, it is interesting to observe a different conclusion in the purely domestic case (*Océano Grupo Editorial SA*), when the ECJ indirectly admitted the possibility of invalidation of a domestic jurisdiction clause when it contravenes the protection of the consumer, as a weaker party, provided by the EU directive.

The two ECJ interpretations regarding the application of overriding mandatory rules were provided in regard to Article 17 of the Brussels Convention (*Trasporti Castelletti*) and Article 23 of the Brussels I Regulation (*CDC*). But neither Article 17 of the Brussels Convention nor Article 23 of the Brussels I Regulation contained rules on the substantive validity of forum-selection agreements. According to Article 25 of the Brussels *Ibis* Regulation, a deselected Member State court should apply its national rules including conflict-of-laws norms for the substantive validity of the prorogued court, by both the prorogued and derogated court. According to Professor Basedow, the enforcement of overriding mandatory provisions or

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<sup>210</sup> ECJ, Case C-159/97, *Trasporti Castelletti*, par. 52.

<sup>211</sup> M. WELLER, *Choice of Forum Agreements Under the Brussels I Recast and Under the Hague Convention: Coherences and Clashes*, *op. cit.*, p. 17.

<sup>212</sup> *Corte di Cassazione S.U.*, n. 384120 February 2007.

international public policy of the non-selected *forum* under the Brussels regime should be classified as relating to the substantive validity of choice-of-court agreements. The *rationae* is that creation of the third category of “admissibility”, which is not covered by Article 25 of the Brussels *Ibis* Regulation and which should be left to the national law, is not convincing.<sup>213</sup> As a consequence of introducing new conflict-of-law rule on substantive validity of jurisdiction agreement to Article 25 of the Brussels *Ibis* Regulation, which refers to the conflict-of-laws rules of a chosen Member State, a seized derogated Member State court then must apply foreign law to the substantive validity of the prorogation clause, covering overriding mandatory rules of the selected *forum*. It practically means completely excluding the application of overriding mandatory rules of the *lex fori* of the derogated Member State, unless the conflict-of-laws rule refers back to the derogated *forum*.<sup>214</sup> It is also questionable whether the substantive validity really concerns the question of the overriding mandatory rules. Professor Magnus, in contrast with Professor Basedow, admits the possibility of the third category of “admissibility” concerning the public order question separated from the substantive validity, which would allow application of national rules of seized, non-designated court.<sup>215</sup> However, doctrinal consensus does not exist. The dispute is whether further control of Article 25 of the Brussels *Ibis* Regulation is permissible or whether this provision does not allow denial of the validity of choice-of-court agreement, even if such an approach constitutes misuse of the freedom granted in Article 25 of the Brussels *Ibis* Regulation. All questions about invalidating choice-of-court clauses to avoid giving effects to the overriding mandatory rules of the seized derogated Member State court may become even more significant in future. For example, directives protecting specific interests, either in context of protection of weaker parties (as consumer protection under Directive 2011/83/EU,<sup>216</sup> consumer credit protection under Directive 2008/48/EC<sup>217</sup> etc.), or in context

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<sup>213</sup> J. BASEDOW, *Exclusive choice-of-court agreements as a derogation from imperative norms*, *op. cit.*, p. 20.

<sup>214</sup> Recital 20 Brussels *Ibis* Regulation: «Where a question arises as to whether a choice-of-court agreement in favour of a court or the courts of a Member State is null and void as to its substantive validity, that question should be decided in accordance with the law of the Member State of the court or courts designated in the agreement, including the conflict-of-laws rules of that Member State». See in this respect J. BASEDOW, *Exclusive choice-of-court agreements as a derogation from imperative norms*, *op. cit.*, p. 20.

<sup>215</sup> U. MAGNUS, *Article 23*, in Brussels I Regulation, 2012, *op. cit.*, par. 65 *et seq.* and 75 *et seq.*, which suggests including the compatibility of the choice-of-court clause with public policy under “admissibility”.

<sup>216</sup> Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance, OJ L 304, 22 November 2011.

of other public interest regarding antitrust, or the environment, will be considered as mandatory and overriding. The more overriding mandatory rules that exist within the EU law, the more tensions will be created when limiting the effect of the choice-of-*forum* agreements. Moreover, it must be mentioned, that Article 9 para 3 of the Rome I Regulation does not provide for a rule protecting overriding mandatory rules of any other Third State with which the situation has a close connection, as the Rome Convention did.<sup>218</sup> As a consequence, there is much more probability that the overriding mandatory rules of the seized, derogated *forum* would not be applicable in the selected *forum*.

In this context, other aspects should be taken into consideration – i.e., the *ratio* concerning invalidation of the choice-of-court agreements. The invalidation of the choice-of-court agreements represents a tool for the protection of the overriding mandatory rules or public policy of the seized Member State court. If we admit that invalidation of the choice-of-court agreement is not permitted, such a conclusion will lead to a paradox. In *Unamar*, although the ECJ did not explicitly invalidate the choice-of-law agreement, it decided that the law of a Member State of the European Union, which has been chosen by the parties, may be rejected by the court of another Member State (before which the case has been brought) in favour of the law of the *forum*. From this ECJ judgment follows a clear intention to protect the mandatory nature of the norms of *lex fori*. Although the ECJ admitted the possibility of knocking out the law of a Member State in favour of *lex fori* in the presence of choice-of-law agreement, this conclusion may bear a significant relevance also in respect of the rules on jurisdiction. The opposite approach would lead to the conclusion that the principle of mutual

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<sup>217</sup> Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ L 133, 22 May 2008.

<sup>218</sup> See Article 9 par. 3 of the Rome I Regulation which provides: «Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.», see also Article 7 par. 1 of the Rome Convention: «When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.».

trust based on the substantive laws of the states using the same connecting factors,<sup>219</sup> is not treated equally when it comes to a choice-of-law agreement and choice-of-court agreement.

We can imagine a situation concerning the question of overriding mandatory rules in respect of a choice-of-law agreement:

*The defendant (agent) was domiciled in the Member State A, the claimant (agency) in the Member State B, and the law of Member State B was designated as the governing law. The action on liability for breach of contract was filed. Although Member State B implemented the directive, the Member State A offers wider protection. Member State A was seized.*

The seized Member State court A established its jurisdiction according to Article 4 of the Brussels Ibis Regulation. Then the Member State court A determined the law of Member State B was applicable. However, the application of the law of Member State B would result in a violation of overriding mandatory provisions of the *lex fori*. In this case, the Member State court A may reject the law of the Member State B (following the *Unamar* case).

However, we can imagine a different situation when the choice-of-law is coupled with a choice-of-court agreement.

*The defendant (agent) was domiciled in the Member State A, the claimant (agency) in the Member State B, and an exclusive choice-of-court agreement and a choice-of-law agreement was granted in favour of the Member State B. The action on liability for breach of contract was filed. Although the Member State B implemented the directive, the Member State A offers wider protection. The Member State A was seized.*

The seized Member State court A examines its jurisdiction and finds out that the prorogation agreement is valid. However, the court of a Member State A makes the following consideration. If the court of Member State B were seized, it would apply only its own overriding mandatory provisions in accordance with Articles 4 and 7 of the Rome I Regulation. Thus, the overriding mandatory rules of the Member State A would be disregarded. According to the ECJ case law and

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<sup>219</sup> M. WELLER, *Mutual trust: in search of the future of European Union private international law*, *Journal of Private International Law*, 11:1 (2015), p. 72.

the doctrinal theory mentioned above, Member State A must decline its jurisdiction, although the non-invalidity of the choice-of-court agreement would lead to the application of the law of the Member State B with its overriding mandatory rules. However, if the Member State court A would be entitled to invalidate the choice-of-court agreement, it could apply the law of the Member State B in accordance with Article 4 of the Rome I Regulation, but also its own overriding mandatory rules according to Article 7 para 2 of the Rome I Regulation, or could directly reject the law of the Member State B as in *Unamar* case.

These are two similar cases, with two different results. In the examples mentioned above, different approaches to the choice-of-court and choice of law were demonstrated. However, is it necessary to accept the unique approach in the coupled choice-of-law and choice-of-court agreement? The principle of party autonomy in private and procedural international law is often discussed in the context of choice-of-law and choice-of-*forum* together. Choice-of-law and choice-of-*forum* are connected legal concepts and their aim is the same - to provide certainty and predictability.<sup>220</sup> “Choice-of-*forum* is as much an expression of party autonomy as a choice-of-law clause, and equally specific”<sup>221</sup> and even in many cases determines whether a choice-of-law clause will be respected and enforced. However, there is one significant difference - the choice-of-*forum* is considered as a matter lying “within the sphere of procedure and forms part of the administration of justice”<sup>222</sup> and is formalised as an exception to the general jurisdiction rule.<sup>223</sup> On the other hand, choice-of-law creates the cornerstone of the system of conflict-of-law rules<sup>224</sup> and only if parties fail to choose the applicable law, the applicable law will be determined on the basis of connecting factors.<sup>225</sup> Different handling of choice-of-law and choice-of-court agreements is also evident due to their different nature and effects. It must be borne in mind that choice-of-law clauses and *forum*-selection clauses are not synonymous and that a choice-of-law clause does not necessarily determine the outcome of a jurisdiction motion. Although stated in other

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<sup>220</sup> P. E. NYGH, *Autonomy in International Contracts*, *op. cit.*, p. 2.

<sup>221</sup> S. SYMEONIDES, *The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments*, *op. cit.*, p. 898.

<sup>222</sup> Article 1 par. 5 of Giuliano and Lagarde Report.

<sup>223</sup> ECJ, Case 266/85 *Hassan Shenavai v Klaus Kreischer*, 15 January 1987 ECLI:EU:C:1987:11, par. 17;

<sup>224</sup> See Recital No 11 to the Rome I Regulation

<sup>225</sup> J. KUIPERS, *Party Autonomy in the Brussels I Regulation and Rome I Regulation and the European Court of Justice*, *German Law Journal*, 10 (2009), p. 1505.

circumstances, this decision was upheld in the recent judgment, *We Serve Health Care LP v. Onasanya*.<sup>226</sup> However, does it mean that substantive law cannot be backed by the procedural rules by extending the protective regime also into the area of jurisdiction?<sup>227</sup> What solutions can be proposed?

Since the jurisdiction clauses permit to “escape” from the application of overriding mandatory rules of the derogated court, it would be reasonable to offer a solution of application overriding mandatory rules already at the stage of jurisdiction and to allow to the Member State court to examine the potential result of the dispute in the presence of the choice-of-court clause. Such an examination should not only cover the situation when the choice-of-law is coupled with the choice-of-forum. This examination should also cover examination of applicable law determined according to the national or EU law of the deselected *forum* and the potentiality of exclusion of overriding mandatory rules of seized, non-designated Member State. However, this proposed solution concerning verification at the stage of jurisdiction does not seem to be acceptable by virtue of the interpretation provided by the ECJ, which is even more strengthened by the new conflict-of-laws rule of substantive validity in Article 25 of the Brussels *Ibis* Regulation.

The other solution might be to shift the public policy control into the stage of recognition. The examination of choice-of-court agreement would be provided *ex post*. This approach is in contrast with the previous scenario when the effect of choice-of-court agreement could be *ex ante* examined, i.e., at the stage of jurisdiction, and might result in invalidation of choice-of-court agreement. However, it must be borne in mind that only public policy control plays a role at the stage of recognition and enforcement of the foreign judgment. In particular, a judgment shall not be recognised if such recognition is *manifestly* contrary to public policy in the Member State in which recognition is sought.<sup>228</sup> The public policy control protects only fundamental principles of the legal order and cannot cover every issue which is evaluated as

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<sup>226</sup> Ontario Court, *We Serve Health Care LP v. Onasanya*, 2018 ONSC 1758. See also The Importance of Forum Selection Clauses in Contracts: A Comment on *We Serve Health Care LP v. Onasanya*, available at: <https://www.dentons.com/en/insights/Articles/2018/april/3/the-importance-of-forum-selection-clauses-in-contracts>.

<sup>227</sup> P. MANKOWSKI, *Commercial Agents under European Jurisdiction Rules. The Brussels I Regulation plus the Procedural Consequences of Ingmar*, *op. cit.*, p. 25.

<sup>228</sup> Article 45 par. 1 lett. a) of the Brussels *Ibis* Regulation; Article 22 lett. a) and 23 lett. a) of the Brussels *IIa* Regulation; Article 40 lett. a) of the Succession Regulation.



an overriding mandatory rule.<sup>229</sup> The review of the application as to the substance, including the overriding mandatory rules in the judgment, is prohibited.<sup>230</sup> The principle of *pacta sunt servanda* is not to be deprived. However, forcing parties to litigate in the designated state, even if the judgment will not be enforceable in the requested Member State due to public policy, may be a violation of the right of access to justice. Moreover, such a solution might be unsatisfactory since the judgment issued by the designated court would be enforced only in the territory of the designated state or even in a Third State. Thus, the overriding mandatory rules of the previously seized, non-designated state will remain unaffected.

The last solution might be a future proposal for an EU regulation and might combine the first and the second solution above, whereby inspiration may be found in Article 33 and 34 of the Brussels *Ibis* Regulation. The seized, non-designated court would forecast the possible recognition of the judgment issued by the chosen Member State court, which covers public policy control representing one of the grounds for non-recognition of the judgment. If the prognosis were positive, the court would stay proceedings in favour of the chosen court until the judgment of the chosen court is recognised. In case of an adverse prognosis, the court would be entitled to continue in proceedings. However, also this solution would open the door to public policy control, but the overriding mandatory rules of *lex fori* would not operate as well.

However, in my opinion, the mutual trust between the Member States as to the jurisdiction and predictability of the jurisdiction should prevail over the protection of specific State interests which may be classified as mandatory and overriding. It is true that overriding mandatory rules of the *forum* “escape” from the effects whenever derogated Member State court does not exercise its jurisdiction due to the jurisdiction agreement in favour of other Member State court and their mandatory, overriding character is then lost.<sup>231</sup> On the other hand, it is almost impossible to outline the borders of the overriding mandatory rules of specific Member State, and they have become more international and less bound to the

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<sup>229</sup> L. RADICATI DI BROZOLO, *Deroga alla giurisdizione e deroga alle norme imperative. Un conflitto fra conflitti di oleggi e conflitti di giurisdizione?*, Il diritto processuale civile nell'avvicinamento giuridico internazionale, Part 1, CLEUP, 2009, p. 290.

<sup>230</sup> Article 52 of the Brussels *Ibis* Regulation, Article 26 of the Brussels *Ila* Regulation, Article 41 of the Succession Regulation.

<sup>231</sup> L. RADICATI DI BROZOLO, *Deroga alla giurisdizione e deroga alle norme imperative. Un conflitto fra conflitti di oleggi e conflitti di giurisdizione?*, *op.cit.*, p. 301, the author calls such rules “semi-mandatory” or “almost mandatory.”

particular Member State.<sup>232</sup> And thus, the invalidation of the choice-of-court agreement every time that the derogated Member State deems that its overriding mandatory rules come into play would hamper the smooth functioning of European system on jurisdiction. In consequence, the opposite approach might be admitted – the overriding mandatory rules of the derogated court could be taken into consideration by the selected court by virtue of the regulations governing applicable law. For example, a new rule could be created for application of the overriding mandatory rules of the derogated court whenever there is a situation with a close connection between the dispute and derogated court.

***b) Choice-of-Court Agreement in favour of a Third State's Court***

The ECJ has not entirely clarified the relationship between the EU rules and jurisdiction agreements designating the court outside the EU. However, the considerations on possible mandatory application of Article 4 of the Brussels *Ibis* Regulation in virtue of *Owusu* case and on the potential application of Articles 33 and 34 concerning *lis pendens* between Member State and Third State will be left aside for a while.

The problematic issue arises in the situation when the choice-of-court in favour of a Third State would result in the application of the law of a Third State and which might circumvent the overriding mandatory rules either of the national law or the EU law. The possibility of invalidation of the abusive choice-of-court agreements depends on the national law when the jurisdiction is conferred to Third State courts that are not a party to the Hague Convention on Choice of Court Agreement based on the jurisdiction agreement.

In some civil law countries, which do not attribute directionality power to the courts, constitutional breaks have been introduced into the national legal orders which impose on the courts a requirement to verify their jurisdiction before hearing the case. This requirement prevents abusive choice-of-court agreements and enables the operation of overriding mandatory rules and public policy of the *forum*. For example, in Switzerland, choice-of-court agreements are not effective, if one of the parties is abusively deprived of the *forum* regulated by Swiss law.<sup>233</sup> In the Czech Republic, the possibility to hear the case in the presence of

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<sup>232</sup> L. RADICATI DI BROZOLO, *Deroga alla giurisdizione e deroga alle norme imperative. Un conflitto fra conflitti di oleggi e conflitti di giurisdizione?*, *op.cit.*, p. 300.

<sup>233</sup> See I. QUEIROLO, *Gli accordi sulla competenza giurisdizionale: tra diritto comunitario e diritto interno*, *op. cit.*, p. 215, 216 and footnotes No 37-38.

derogation agreement from Czech court is expressly regulated by the Czech Act on Private International Law in case that choice-of-court agreement contravenes to the public order. Article 86 par. 2 lett. d) provides:

*If the jurisdiction of a foreign court has been agreed in accordance with subsection 1, this rule oust the jurisdiction of the Czech courts. A Czech court may, however, hear the matter, if the agreement on the jurisdiction of the foreign court is at odds with public order.*<sup>234</sup>

Although the wording of this Article indicates a discretionary power of the court, some authors deduce the courts' duty to hear the case.<sup>235</sup> This rule should be possible to invoke only in very exceptional cases where the negotiation of the jurisdiction agreement circumvents overriding mandatory rules and other provisions protecting the values of the public order of the Czech Republic, i.e., provisions which the Czech court must apply regardless of the choice -of-law.<sup>236</sup> However, the Czech court must be sure that the foreign court would not provide the same protection of the values constituting the Czech public order. Additionally, only the strong connection between the case and the Czech Republic can justify the use of this extraordinary means of protection. The Czech rule thus moved the protection of public policy *ex post* during the recognition and enforcement into the phase of the determination of jurisdiction by rejecting derogatory effects of jurisdiction of the Czech courts.<sup>237</sup>

A different situation is when the national law does not expressly provide for invalidating the derogation from the State's jurisdiction when attributing the effect to the choice-of-court agreement would mean circumvention of the overriding mandatory rules of the seized (derogated) court. In these circumstances, the question of the nature and effects of the choice-of-court agreement may play a significant factor. If the national law categorises the overriding mandatory rules as a matter of admissibility (which is usually governed by *lex fori*), the national court could simply give effect to its own overriding mandatory rules of the *forum* in

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<sup>234</sup> The official translation of Czech Act on Private International Law is available at: <http://obcanskyzakonik.justice.cz/index.php/home/zakony-a-stanoviska/preklady/english>.

<sup>235</sup> P. BRÍZA, § 86 *Sjednání příslušnosti zahraničního soudu*, in *Zákon o mezinárodním právu soukromém: komentář*, C.H. Beck, 2014, p. 519.

<sup>236</sup> P. BRÍZA, § 86 *Sjednání příslušnosti zahraničního soudu*, *op. cit.*, p. 519, the commentary expressly states that this applies also in case of circumvention to overriding mandatory rules, not only in case of circumvention to public policy.

<sup>237</sup> N. ROZEHNALOVÁ, § 86 *Sjednání příslušnosti zahraničního soudu*, in *Zákon o mezinárodním právu soukromém – Komentář*, Wolters Kluwer, 2013.

order to invalidate the choice-of-court agreement.<sup>238</sup> However, when the overriding mandatory rules are part of substantive validity by virtue of the national law,<sup>239</sup> it depends on the law applicable to substantive validity, which as we could see, is usually legally affected by the classification of choice-of-court agreement's nature and effects.<sup>240</sup>

Sometimes this gap is refilled by continuous national case law. For examples, the French *Cour de Cassation*, which upheld a forum-selection agreement in favour of the court of California, even if French *loi de police* came into play. The French court affirmed that public policy control should be considered during the recognition and enforcement in France.<sup>241</sup> The national courts could also follow an interpretation provided by the ECJ in similar cases. Thus, we may assume two scenarios of possible decisions from the derogated Member States, when they refill the gap by the interpretation provided by the ECJ in case *Ingmar* and *CDC* or when they apply Article 25 of the Brussels *Ibis* Regulation in relation with the Third State courts by *effet réflexe* principle. In the first scenario, the national court's decision of a derogated Member State court may simply follow the *Ingmar* case extending the application of overriding mandatory rules of the derogated *lex fori* to the area of the validity of jurisdictional clauses (as is the case of German courts). Moreover, as already stated, according to the Advocate General in case *CDC*, the agreements not covered by Article 23 of the Brussels I Regulation (which may be qualified as jurisdiction agreements in favour of Third State courts), should be invalidated in cases where the implementation of such a clause would hamper the effectiveness of Article 101 TFEU.<sup>242</sup> From this opinion, it is not clear whether the invalidation of a jurisdiction clause in favour of Third State court should be automatic without forecasting the law applicable to the dispute in front of a court in a Third State. Or *vice versa*, should a derogated Member State court predict if the law that would be applicable by the designated Third State court might hamper the overriding mandatory rules of EU law. Unfortunately, the ECJ did not provide any interpretation in this context and the questions concerning the invalidation of choice-of-court agreements "not covered by Article 25 of the Brussels *Ibis* Regulation" in the presence of a violation of overriding mandatory rules or public policy of the EU remain unanswered. In the second scenario, when a Member State

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<sup>238</sup> See *supra* note 148.

<sup>239</sup> See J. BASEDOW, *Exclusive choice-of-court agreements as a derogation from imperative norms*, p. 19.

<sup>240</sup> See *supra* Chapter I, Subchapter II, Section 3.

<sup>241</sup> *Cour de Cassation Chambre Civile 1, Monster Cable v AMS*, 22 October 2008, N° de pourvoi: 07-15823.

<sup>242</sup> ECJ, Case C-352/13, *Cartel Damage Claims (CDC)*, par. 124.

court applies Article 25 of the Brussels *Ibis* Regulation regarding jurisdiction clauses in favour of Third State courts, for example, based on *effet réflexe*, the result might be same as in case of a choice-of-court agreement in favour of a Member State court. The derogated Member State court may follow *Trasporti Castelletti*. However, as already stated, the reasoning of the ECJ was based on considerations of predictability and certainty of the Brussels Regime and mutual trust among Member State, which does not apply to does not apply to Third States. Also, the theories mentioned above of Professor Basedow or opposite approach of other German scholars can be taken to the consideration when deciding on the validity of a choice-of-court agreement which violates overriding mandatory rules of the non-designated, seized court.

## 2.2. *Forum Non Conveniens*

The *forum non conveniens* is defined as a discretionary power of a court to decline jurisdiction on the basis that another court is more appropriate because the interest of justice is better secured if the trial takes place there.<sup>243</sup> In the civil-law countries, there is usually no discretionary power to continue in proceedings in the presence of a foreign choice-of-court agreement.<sup>244</sup> Civil-law states prefer certainty and predictability rather than flexibility, which the doctrine of *forum non conveniens* offers. It must be stressed that such flexibility is more time consuming and might require more expenses. Moreover, *forum non conveniens* may give rise to fears of an adverse conflict of jurisdiction or parallel litigation. Civil-law states tend to prefer a *lis alibi pendens* rule. Different positions on the doctrine of *forum non conveniens* may be found in Britain (and other states influenced by British law and the *Spiliada* case),<sup>245</sup>

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<sup>243</sup> On *forum non conveniens* see among others R.A. BRAND, S.R. JABLONSKI, *Forum Non Conveniens: History, Global Practice, and Future under the Hague Convention on Choice of Court Agreements*, Oxford University Press, 2007.

<sup>244</sup> In German law, *ex officio* dismissal of the local proceedings is inadmissible, similarly according to Swiss, Dutch, Greek, Finnish, and Japanese law. The French and Argentinian courts must dismiss the claim upon fulfilment of certain conditions. See J. J. FAWCETT, *General Report*, in J. J. FAWCETT (ed), *Declining Jurisdiction in Private International Law: Reports to the XIVth Congress of the International Academy of Comparative Law*, Oxford University Press, 1995, p. 48.

<sup>245</sup> *Spiliada Maritime Corp v Cansulex Ltd* [1986] AC 460. The court stated that there must be another available competent *forum* which satisfies the interests of the parties. Lord Goff set up two principles of the process. The first stage concerns the burden of the defendant to prove that there is another available and more appropriate forum. The second stage is concerned with considerations of justice – the burden shifts to the plaintiff to show the circumstances by reason of which justice requires that a stay should nevertheless not be granted.

USA,<sup>246</sup> Quebec,<sup>247</sup> Japan,<sup>248</sup> and also even in Sweden.<sup>249</sup> However, not all states where *forum non conveniens* forms part of the procedural system, is the doctrine applicable to choice-of-court agreements. For example, in Japan, although explicit provisions on the choice of the foreign *forum* are lacking, the subject is governed by a judgment from 28 November 1975, which stated that the exclusive international jurisdiction agreement in favour of a foreign court should be valid in principle, unless it would lead to unacceptable results violating public policy.<sup>250</sup>

On the contrary, in some common law countries, the courts have discretionary power to continue in the proceedings despite valid choice-of-court agreements designating a foreign court. For example, in England, in *the Eleftheria* case, the court held that it has the discretion to stay the English proceedings for a breach of a forum-selection clause.<sup>251</sup> The principles assumed in *the Eleftheria* were developed in the context of previous judgments and were confirmed by House of Lords.<sup>252</sup> The fundamental principle of the case is the adoption of

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<sup>246</sup> In the USA the doctrine of *forum non conveniens* was developed mainly through three decisions of Supreme Court: *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *Koster v. Lumbermens Mutual Casualty Co.*, 330 U.S. 518 (1947). According to the US doctrine of *forum non conveniens*, declining jurisdiction is possible when the US court is a “seriously inconvenient” *forum* and when the private and the public interest will be better placed in a more convenient *forum* that is available to the plaintiff. This approach is similar to the UK approach; however, there are some differences, such as more flexible consideration of the US court as well as the considerations of public interests. On other differences see J. J. FAWCETT, *General Report, op. cit.*, p. 14-16.

<sup>247</sup> Article 3135 of the Civil Code of Quebec provides for the provision of *forum non conveniens*. The previous case law of court in Quebec suggested consideration which must be taken into account: the domicile or the residence of the parties, the presence of the evidence in Quebec, the enforceability of the judgment, the assets in Quebec for the indemnification of victims, the abuse of procedure, the availability of another forum, etc. See J. J. FAWCETT, *General Report, op. cit.*, p. 16; G. GOLDSTEIN, *Quebec*, in J. J. FAWCETT (ed), *Declining Jurisdiction in Private International Law: Reports to the XIVth Congress of the International Academy of Comparative Law*, Oxford University Press, 1995, p. 146.

<sup>248</sup> In Japan, “special circumstances doctrine” applies. On the contrary to the “standard” doctrine, the “special circumstances doctrine” does not require the presence of other appropriate *forum* and the duty to dismiss a case without the right to stay. See FAWCETT, *General Report, op. cit.*, p. 17-18; M. DOGAUCHI, *Japan*, in J. J. FAWCETT (ed), *Declining Jurisdiction in Private International Law: Reports to the XIVth Congress of the International Academy of Comparative Law*, Oxford University Press, 1995, p. 309.

<sup>249</sup> It is uncertain whether Swedish law recognises the doctrine of *forum non conveniens* since the courts have a substantive margin of appreciation which can be used for the same aim as *forum non conveniens*. Among exceptions allowing continuation in proceedings are: exclusive competence of Swedish court (e.g. concerning right of property), weak-party relationship. See M. BOGDAN, *Sweden*, in *Declining Jurisdiction in Private International Law, op. cit.*, p. 373-374.

<sup>250</sup> *Koniglike Java China Paletvaat lijnen BV Amsterdam (Royal Interocean lines) v. Tokyo Marine and Fire Insurance Co* [1976]. See also M. DOGAUCHI, *Japan*, in *Declining Jurisdiction in Private International Law, op. cit.*, p. 305.

<sup>251</sup> *The Eleftheria* [1970] P 94.

<sup>252</sup> *The “El Amria”* [1981] 2 Lloyd’s Rep. 119; *The “Christos”* [1977] 1 Lloyd’s Rep. 109; *Carvallho v. Hull Blyth (Angola) Ltd* [1979] 3 All ER 280; *The “Panseptos”* [1981] 1 Lloyd’s Rep 139; *The “Indian Fortune”*

freedom, with the exception that English courts might stay the proceedings only in an “exceptional case” and in the presence of an exclusive jurisdiction clause. The *supra* mentioned principle was subsequently followed in New Zealand, Canada, and Israeli.<sup>253</sup>

The US Supreme Court in its decision *Bremen v. Zapata* from 1972 upheld the binding effect of forum-selection clauses. The court stated that a forum-selection clause is “*prima facie valid and should be enforced*” unless the party makes a “*strong showing that it should be set aside*”. However, the respect of party autonomy in freely negotiated private commercial contracts is subject of certain exceptions if enforcement would cause inconvenience, denial of an effective remedy, a violation of public policy, if the transaction is unfair, unjust or unreasonable, or in case of “fraud, overreaching or unconscionable conduct relations”.<sup>254</sup> It is interesting to highlight the question of public policy in this judgment. The court provided that:

*A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.*

The court did not invalidate the jurisdiction agreement but provided a reasonableness test to be conducted which includes a public policy control. In 1991, the US court went much further in *Carnival Cruise Lines Inc. v. Shuteby* upholding an exclusive forum-selection clause in favour of a court in Florida in small print on the back of a cruise passenger ticket for voyage.<sup>255</sup> Thus, the court did not provide a limitation on the enforcement of choice-of-court clauses for consumer contracts since the cruise had a legitimate interest in concentrating all litigation in Florida. However, nowadays forum-selection agreements are subject to public policy control and sometimes are invalidated, e.g. in the case of consumer rights in class action relief.<sup>256</sup>

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[1985] 1 Lloyd’s Rep. 344; *The “Rubenz Martinez Villena”* [1988] 1 Lloyd’s Rep 435; *The “Makefell”* [1975] 1 Lloyd’s Rep. 528; *The “Fehmarn”* [1958] 1 WLR 159; *YTC Universal Ltd. v. Trans Europe* [1973] 1 Lloyd’s Rep 480.

<sup>253</sup> J. J. FAWCETT, *General Report, op. cit.*, p. 10.

<sup>254</sup> On the details of *The Bremen v. Zapata Off-Shore Co.*, see Ronald A. Brand, *Forum Non Conveniens: History, Global Practice, and Future under the Hague Convention on Choice-of-Court Agreements*, p. 183-203. For consideration from today’s perspective see J. BOMHOFF, *Back to The Bremen (1972): Forum Selection and Worldmaking*, LSE Legal Studies Working Paper No. 6/2018, available at SSRN: <https://ssrn.com/abstract=3143982> or <http://dx.doi.org/10.2139/ssrn.3143982>, pp. 1-10.

<sup>255</sup> *Carnival Cruise Lines Inc. v. Shute*, 499 U.S. 585 (1991).

<sup>256</sup> *America Online Inc. v Superior Court*, 108 Cal. Rptr. 2d 699 (2001).

In Australia, other cases in invalidating jurisdiction clauses due to public policy are more much restrictive. In the case of *Akai*, the court decided that a jurisdiction agreement designating an English court could be enforced since the insured would suffer a loss of Australian statutory rights due to non-application of the Australian Insurance Contracts Act 1984.<sup>257</sup> It may be assumed that invalidating the choice-of-court agreement was presumed from domestic mandatory rules, not on the internationally overriding mandatory rules.<sup>258</sup> It is questionable whether such a far-reaching interpretation might undermine the effectiveness of choice-of-court agreements and circumvent exercises of party autonomy.

### 2.3. Protection of the Weaker Parties

It is still doubtful in the context of *Ingmar* case whether the overriding mandatory rules, defined as crucial provisions for safeguarding public interest, may preserve “individual interest” and protect weaker parties.<sup>259</sup> In some States, the overriding mandatory rules are considered as vehicles for the protection of weaker parties.<sup>260</sup> However, it was necessary to introduce the explicit rules on the protection of weaker parties and define groups of individuals which require special treatment. The rules on protection of weaker parties were entered into national, international, and EU instruments. Such rules are related to conflict-of-laws as well as to the international procedural rules. As already stated hereof, the choice-of-court agreement enables the parties to choose a neutral *forum* or that one they consider the most appropriate. The ideal situation is the case of perfect distribution of the powers, but in many cases, only one of the parties has more bargaining power. Because of non-balanced powers, the autonomy of the weaker party is limited during negotiation with the stronger party and during the process. Thus, the stronger party has more possibilities to reach a successful outcome. States should balance the power of stronger parties, and State’s civil

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<sup>257</sup> *Akai Pty Ltd v People’s Insurance Co Ltd* [1996] 188 CLR 418; see also *Commonwealth Bank of Australia v. White* [1999] 2 VR 681.

<sup>258</sup> M. WELLER, *Choice of Forum Agreements Under the Brussels I Recast and Under the Hague Convention: Coherences and Clashes*, *op. cit.*, p.15.

<sup>259</sup> See L. M. VON BOCHOVE, *Overriding mandatory rules as a vehicle for weaker party protection in European private international law*, *op. cit.*, p. 149; J. KUIPERS, *EU Law and Private International Law: The Interrelationship in Contractual Obligations*, Martinus Nijhoff Publishers, 2011, p. 145.

<sup>260</sup> For example, in the Netherlands, see J. KUIPERS, *EU Law and Private International Law: The Interrelationship in Contractual Obligations*, *op. cit.*, p. 154.



procedure should take in consideration position of the weaker parties and evaluate the consequences of court's decisions.<sup>261</sup>

The problem may arise mainly with determination and categorisation of a weaker party. It is undisputed that the consumers, employees, and insurance policy-holders require special protection.<sup>262</sup> The national law might protect other groups of individuals to guarantee them a better position. Therefore, the category of the person identified by the national law as weaker parties may vary from country to the country. In EU regulations, the situation is different - the EU regulations unify the protection of vulnerable parties in all Member States. The question arises whether certain parties in family or succession matters may be considered as weaker parties.<sup>263</sup> Also, the position of other "weaker" parties, as in the previously mentioned case of commercial agents, remains unclear.<sup>264</sup>

### **2.3.1. Source of Vulnerability**

In the first place, it is necessary to investigate the source of the vulnerability of specific groups of individuals.<sup>265</sup>

The information asymmetries prevail mainly in contract law. The protections rules presume that the specific individuals obtain partial or even no information. Such parties might be typical consumers who suffer information disadvantage while concluding the contract. On the opposite side stands the stronger party (in this case the strength represents only "informational strength") that conclude the contracts daily, such as insurers, etc., that utilize financial resources in order to be informed of legal consequences of applying a specific law or using specific court and might misuse these information for their benefit.

The economic or social reliance may be identified as the second reason for the vulnerability of weaker parties. This group may include employees or maintenance creditors. The dependence

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<sup>261</sup> L. ERVO, *Nordic Court Culture in Progress: Historical and Futuristic Perspectives*, *op. cit.*, p. 396-399.

<sup>262</sup> G. RÜHL, *The Protection of Weaker Parties in the Private International Law of the European Union: A Portrait of Inconsistency and Conceptual Truancy*, *Journal of Private International Law* 10: 3 (2014), p. 342.

<sup>263</sup> On the imbalances of the powers in family and succession matters: G. RÜHL, *The Protection of Weaker Parties in the Private International Law of the European Union: A Portrait of Inconsistency and Conceptual Truancy*, *op. cit.* p. 335-58; J. CARRUTHERS, *Party autonomy in the legal regulation of adult relationships: what place for party choice in Private International Law?*, *op. cit.*, pp. 881-913.

<sup>264</sup> See *supra* Chapter One, Subchapter III, Section 2.1.1.

<sup>265</sup> See division in G. RÜHL, *The Protection of Weaker Parties in the Private International Law of the European Union: A Portrait of Inconsistency and Conceptual Truancy*, *op. cit.*, p. 342-346.

of the employee on the income from the employers is evident.<sup>266</sup> The employer pays a salary to the employees and the employees benefit the business of employer by the performance of their duties according to the employment agreement. The maintenance creditors are dependent on the income from the maintenance debtor, but compared with the position of employees, the maintenance creditor does not provide for any performance for the maintenance debtor in order to benefit him. Therefore, the maintenance creditor must often rely on the voluntary fulfilment of the maintenance debtor.

In the last group may be recalled intellectual disadvantage. The legislators presume that certain individuals did not reach the sufficient mental ability to consider the legal consequences of their conducts. The typical examples of such groups are individuals that may suffer intellectual disadvantage as if they are less than 18 years of age. On the EU level, such protection might be found in Maintenance Regulation, the choice-of-court agreement is not allowed to conclude with underage maintenance creditors.<sup>267</sup>

### **2.3.2. Form of the Limitations concerning the Protection of the Weaker Parties**

The protection of the weaker parties is typically provided by introducing a general rule favouring the weaker party or by limiting or even excluding party autonomy. The different legislative techniques on the protection of weaker parties will be discussed.<sup>268</sup>

#### *i) Exclusion of Party Autonomy*

Party autonomy for specific groups is completely lacking. Such complete prohibition is justified by the vulnerability of the individuals which do not reach sufficient mental or intellectual maturity. For example, the possibility to agree on the choice-of-court agreement with a maintenance creditor less than 18-year-old is excluded in the Maintenance Regulation. This exclusion of party autonomy serves as an excellent example of a first technique which EU legislators opted to protect intellectually vulnerable individuals with regard to jurisdiction

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<sup>266</sup> Article 6 par. 1 of Giuliano and Lagarde Report.

<sup>267</sup> On the exclusion of party autonomy under the Maintenance Regulation see *infra* Chapter Three, Subchapter I, Section 3.3.

<sup>268</sup> On the division of form of limitation see F. MAULTZSCH, *Party Autonomy in European Private International Law: Uniform Principle or Context-Dependent Instrument?*, Journal of Private International Law 12: 3 (2016), p. 484-487; G. RÜHL, *The Protection of Weaker Parties in the Private International Law of the European Union: A Portrait of Inconsistency and Conceptual Truancy*, *op. cit.*, p. 346-356:

clauses. In other matters, that are considered as highly sensitive for the States (mainly family matters), the rule on the choice-of-court agreement is not even regulated and the relevant legal instruments remain silent. Such an approach is evident not only on the EU level,<sup>269</sup> but as well as in national legal systems.<sup>270</sup>

ii) *Partial Limitation of Party Autonomy*

The second legislative technique for protection of weaker parties provides for the more flexible instrument. Party autonomy is not excluded, but instead gives parties option to express their mutual will by imposing the *forums* which may be designated. Three possible sub-approaches are outlined below.

The first sub-approach pays attention to the free choice which is limited by a separate application of the *additional protective norms*.<sup>271</sup> The protection is provided by a general rule and simultaneously by introducing a new rule favouring the weaker party. As regards to the choice of *forum*, such an approach may be found in the Brussels *Ibis* Regulation in respect of consumer contracts, employment contracts, or insurance contracts. The Brussels *Ibis* Regulation allows for the parties to bring the proceedings to other Member State courts in the general provisions.<sup>272</sup>

The second sub-approach of primary limitation of party autonomy operates by *substantive limiting* the scope of the eligible *forum*.<sup>273</sup> The aim is the protection of certain individuals against the obtrusion of the alternative *forum* - the parties may designate courts provided by the legal instruments. Such a technique finds application mainly in family and succession law. For example, in maintenance matters, party autonomy in respect to a jurisdiction agreement is allowed only when the agreement contains a choice of forum in favour of Member State

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<sup>269</sup> On the lack of the rule on the choice-of-court agreement in respect of divorce in the Brussels *Iia* Regulation see *infra* Chapter Three, Subchapter I, Section 2.6.

<sup>270</sup> The choice-of-court agreements are usually permitted only for the property rights. See for example, article 85 of the Czech Act on Private International Law, which provides: «*The jurisdiction of a foreign court may be agreed by the parties in writing with regard to matters of the law of obligations and other property rights.*». On the official translation see: <http://obcanskyzakonik.justice.cz/index.php/home/zakony-a-stanoviska/preklady/english>.

<sup>271</sup> Emphasis added. F. MAULTZSCH, *Party Autonomy in European Private International Law: Uniform Principle or Context-Dependent Instrument?*, *op. cit.*, p. 484, the author indicates examples on the basis of Article 6 para 2, Article 8 para 1, and Article 9 of the Rome I Regulation only in respect to conflict-of-laws rules.

<sup>272</sup> For examples Article 15, 19 or 23 of the Brussels *Ibis* Regulation

<sup>273</sup> Emphasis added. F. MAULTZSCH, *Party Autonomy in European Private International Law: Uniform Principle or Context-Dependent Instrument?*, *op. cit.*, p. 485-486, where the author analyses this approach only in respect of conflict-of-laws, but not in respect of choice-of-court agreements.

courts prescribed in article 4 of the Maintenance Regulation. The limited choice of party autonomy is because the maintenance creditor would be otherwise entitled to sue a maintenance debtor in front of a vast range of other competent Member State courts that could favour the creditor's position in civil proceedings. Moreover, such limitation should enforce public and sovereign interests.

Lastly, the *time factor* limits the freedom of the parties.<sup>274</sup> The parties are allowed to agree on the choice-of-court agreement only in a specific moment. The Brussels *Ibis* Regulation contains such limitations in consumers, insurance, and employment disputes.

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<sup>274</sup> Emphasis added.

## CHAPTER TWO. LEGAL INSTRUMENTS GOVERNING THE CHOICE-OF-COURT AGREEMENTS IN CIVIL AND COMMERCIAL MATTERS IN THE EU

The rules on choice-of-court agreements in the civil and commercial matters in the EU are regulated by three significant legal instruments: by the Brussels I(-bis) Regulation, (2007) Lugano Convention and by the Hague Convention on Choice of Court Agreements. This chapter analyses all three legal instruments as to the rule on choice-of-court agreements, on the *lis pendens* rule in favour of the Member State courts and on the rule on parallel proceedings and the Third State courts in presence of the jurisdiction agreement. Lastly, the interrelationship between all three legal instruments is examined.

### I. The Brussels Regime and Lugano Regime

#### 1. Historical Background

The rules on jurisdiction (including the rule on the prorogation of jurisdiction) and the rules on recognition and enforcement of judgments in civil and commercial matters were codified in 1968 in the Brussels Convention and were applied initially in six Contracting States as from 1 February 1973. According to the Jenard Report, there was general consent to introduce the rule on the prorogation of jurisdiction into the Brussels Convention. The original version of the first paragraph of Article 17 provided:

*If the Parties, one or more of whom is domiciled in a Contracting State, have, by agreement in writing or by an oral agreement evidenced in writing, agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction.*

The Brussels Convention was several times modified by conventions on the accession to that Convention of new Member States.<sup>275</sup> As to the jurisdiction clauses, the reference to

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<sup>275</sup> Convention of Accession of 9 October 1978 of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and enforcement of judgements in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice, (78/884/EEC), OJ L 304, 30 October 1978; Convention on the accession of the Hellenic Republic to the Convention on jurisdiction and enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice with the adjustments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland, (82/972/EEC), OJ L 388, 31 December 1982; Convention on the accession of the Kingdom of Spain and the

international trade usages was added by the 1978 Accession Convention<sup>276</sup> and the reference to practices between the parties was incorporated by the 1989 Accession Convention, which followed the wording of the 1988 Lugano Convention.<sup>277</sup>

In 2000, after the Amsterdam Treaty entered into force,<sup>278</sup> the Brussels Convention has been replaced by a community act - the Brussels I Regulation. The Brussels I Regulation was adopted on 22 December 2000, and came into force on 1 March 2002. As to the rule on prorogation of jurisdiction, some amendments were adopted, for example the reference to clauses for the benefit of only one of the parties was deleted,<sup>279</sup> it was expressly provided that the Brussels I Regulation covers non-exclusive jurisdiction agreements,<sup>280</sup> and the definition of a writing, which includes electronic communications, based on Article 6 par. 1 of the UNCITRAL Model Law on Electronic Commerce 1996,<sup>281</sup> was included into the text.

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Portuguese Republic to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice with the adjustments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland and the adjustments made to them by the Convention on the accession of the Hellenic Republic, (89/535/EEC), OJ L 285, 3 October 1989; Convention on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice, with the adjustments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland, by the Convention on the accession of the Hellenic Republic and by the Convention on the accession of the Kingdom of Spain and the Portuguese Republic, OJ C 15, 15 January 1997.

<sup>276</sup> Report by Professor Dr Peter Schlosser on the Convention of 9 October 1978 on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice, OJ C 59, 5 March 1979, par. 179, (“Schlosser Report”).

<sup>277</sup> Report by Mr de Almeida Cruz, Mr Desantes Real, and Mr Jenard on the Convention on the accession of the Kingdom of Spain and the Portuguese Republic to the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, OJ C 189, 28 July 1990 (“Almeida Cruz-Desantes Real-Jenard Report”), par. 26; Report by Mr P. Jenard and Mr G. Möller on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters done at Lugano on 16 September 1988, OJ C 189, 28 July 1990, paras. 57-58, (“Jenard-Möller Report”).

<sup>278</sup> Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, OJ C 340, 10 November 1997, (“Treaty of Amsterdam”).

<sup>279</sup> This provision had legal basis in Conventions between France and Belgium, France and Italy, Belgium and Netherlands, and in the Benelux Treaty. It was not incorporated into the Brussels I Regulation due to uncertainty if the choice-of-court agreement was concluded for the benefit of one of the parties. See H. GAUDAMET-TALLON, *Compétence et exécution des jugements en Europe, Règlement no 44/2001, Conventions de Bruxelles et de Lugano*, 2002, 2ed., LGDJ, par. 157.

<sup>280</sup> Article 23 of the Brussels I Regulation provides that jurisdiction shall be exclusive *«unless the parties have agreed otherwise»*.

<sup>281</sup> UNCITRAL Model Law on Electronic Commerce (1996), adopted on 12 June 1996.

The Brussels I Regulation was repealed by the Brussels *Ibis* Regulation as from 12 December 2012, and came into effect on 10 January 2015.<sup>282</sup> The revised text has introduced three significant modifications as to the prorogation of jurisdiction, which is dealt in the details in Sections 4 and 8 of this Subchapter. The first modification has extended its scope of application to cases where none of the parties to the choice-of-court agreement is domiciled in a Member State. The second modification has added a new rule on the law applicable to the substantive validity. And the last modification has affirmed the severability of choice-of-court agreements from the main contract. Moreover, new Article 31 par. 2 of the Brussels *Ibis* Regulation has set out an exception to the “first seized *lis pendens*” rule aiming at strengthening the effectiveness of choice-of-court agreements, which is dealt separately in Section 14 of this Subchapter.

According to the Protocol on the interpretation by the Court of Justice of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters,<sup>283</sup> the ECJ had jurisdiction to rule on the interpretation of the Brussels Convention. A separate protocol granting the ECJ the jurisdiction to interpret is no longer necessary with regard to the regulations. The ECJ has jurisdiction to interpret the Union Treaties and the acts of the institutions by virtue of Article 267 TFEU<sup>284</sup> (*ex* Article 234 of EC Treaty<sup>285</sup>), which covers the Brussels Regulation and the Brussels *Ibis* Regulation.

It must be borne in mind that the continuity of the law between the Brussels Convention, the Brussels Regulation, and the Brussels *Ibis* Regulation has been ensured.<sup>286</sup> This continuity also covers interpretation provided by the ECJ in context of the Brussels Convention and the Brussels I Regulation, and in relation to the Brussels *Ibis* Regulation<sup>287</sup> Thus, even the

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<sup>282</sup> Subject to two exceptions of Articles 75 and 76, which are applied from 10 January 2014.

<sup>283</sup> Protocol concerning the interpretation by the Court of Justice of the convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters - signed in Luxembourg on 3 June 1971, OJ L 204, 2 August 1975.

<sup>284</sup> Consolidated version of the Treaty on the Functioning of the European Union, OJ C 202, 7 June 2016, (“TFEU”).

<sup>285</sup> Treaty establishing the European Community (consolidated version 2006), OJ C 321E, 29 December 2006 (“EC Treaty”).

<sup>286</sup> See Recital No 19 of the Brussels I Regulation and Recital No 34 of the Brussels *Ibis* Regulation.

<sup>287</sup> ECJ, Case C-533/08, *TNT Express Nederland BV v AXA Versicherung AG*, 4 May 2010, ECLI:EU:C:2010:243, par. 36; Case C-180/06, *Renate Ilsinger v Martin Dreschers*, 14 May 2009, ECLI:EU:C:2009:303, par. 41; Case C-189/08, *Zuid-Chemie BV v Filippo's Mineralenfabriek NV/SA*, 16 July 2009, ECLI:EU:C:2009:475, par. 18; Case C-292/08, *German Graphics Graphische Maschinen GmbH v Alice van der Schee*, 10 September 2009, ECLI:EU:C:2009:544, par. 27; Case C-406/09, *Realchemie Nederland BV v Bayer CropScience AG*, 8 October 2011, ECLI:EU:C:2011:668, par. 38.

explanatory reports to the Brussels Convention or the Brussels *Ibis* Regulation, such as the Jenard Report, Schlosser Report, Evrigenis-Kerameus Report,<sup>288</sup> or Almeida Cruz-Desantes Real-Jenard Report represent valuable tools to interpret the current Brussels *Ibis* Regulation, unless there is a change in the wording of the text.<sup>289</sup> Moreover, due to the similar or even same wording of the Brussels Convention with the 1988 Lugano Convention,<sup>290</sup> and of the Brussels I Regulation with the 2007 Lugano Convention, the Jenard-Möller Report and Pocar Report<sup>291</sup> may be perceived as another essential source for the Brussels *Ibis* Regulation. In any case, although the reports represent a valuable tool for interpretation, they are not binding on the courts.<sup>292</sup>

The 1988 Lugano Convention from 16 September 1987 applied in twelve Members of the European Union (European Communities)<sup>293</sup> and six members of the European Free Trade Association (“EFTA”)<sup>294</sup> as from 1 January 1992. Three of the Members of the European Free Trade Association (Austria, Finland, and Sweden) ceased to be Members when they joined the European Union. On 1 February 2000, the 1988 Lugano Convention became applicable in Poland. The EFTA countries were interested in the drafting of a parallel Convention to the Brussels Convention and in the creation of the contractual links between the Community Member States and the EFTA States with a view to facilitating the recognition and

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<sup>288</sup> Report on the accession of the Hellenic Republic to the Community Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, OJ C 298, 24 November 1986 (“Evrigenis-Kerameus Report”),

<sup>289</sup> A. BRIGGS, P. REES, *Civil Jurisdiction and Judgments*, Norton Rose, 2015, p. 11.

<sup>290</sup> Convention on jurisdiction and the enforcement of judgments in civil and commercial matters - Done at Lugano on 16 September 1988, (88/592/EEC), OJ L 319, 25 November 1988 (“1988 Lugano Convention”).

<sup>291</sup> Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 30 October 2007 - Explanatory report by Professor Fausto Pocar (Holder of the Chair of International Law at the University of Milan), OJ C 319, 23 December 2009 (“Pocar Report”). However, point 11 stated: «...but it should be borne in mind that the report is concerned only with the Lugano Convention, and does not in any way reflect the position of the States or of the Community with regard to the Brussels I Regulation. The absence of an explanatory report on the Brussels I Regulation does not mean that this report is intended to fill the supposed gap. In other words, the present report is not intended to offer clarification of the Regulation, or to give indications as to its interpretation or the application of the rules it lays down: its sole purpose is to explain the rules of the Lugano Convention as they stand after revision.»

<sup>292</sup> J. HILL, A. CHONG, *International Commercial Disputes: Commercial Conflict of Laws in English Courts*, Bloomsbury Publishing, 2010, *op. cit.*, p. 60, according to the authors, the importance of the reports must not be overstated. However, see Article 3 par. 3 of the English Civil Jurisdiction and Judgments Act 1982, which gives to the Jenard Report, Schlosser Report, Evrigenis-Kerameus Report or Almeida Cruz-Desantes Real-Jenard Report special status in relation to interpretation of the Brussels Convention, by providing that: «may be considered in ascertaining the meaning or effect of any provision of the Conventions and shall be given such weight as is appropriate in the circumstances.»

<sup>293</sup> Belgium, Germany, France, Italy, Luxembourg, the Netherlands, Denmark, Ireland, the United Kingdom, Greece, Spain, and Portugal.

<sup>294</sup> Iceland, Norway, Switzerland, Austria, Finland, and Sweden



enforcement of judgments in civil and commercial matters.<sup>295</sup> The 1988 Lugano Convention followed the Brussels Convention closely, and where rules were identical, the reader could refer to the explanatory reports to the Brussels Convention.<sup>296</sup> Since many rules of the 1988 Lugano Convention mirrored the text of the Brussels Convention, it was recognized that interpreting the 1988 Lugano Convention in the same way as the Brussels Convention would be desirable. Protocol 2 on the uniform interpretation of the Convention is an integral part of the 1988 Lugano Convention by virtue of Article 65. Article 1 of the Protocol 2 provides for the homogenous interpretations of both conventions<sup>297</sup> The courts of each Contracting State shall, when applying and interpreting the Convention “*pay due account to the principles laid down by any relevant decision delivered by courts of the other Contracting States concerning provisions of this Convention.*”<sup>298</sup> According to the Recital to the Protocol 2, the Contracting States are desire

*...to prevent, in full deference to the independence of the courts, divergent interpretations and to arrive at an interpretation as uniform as possible of the provisions of this Convention and of those of the Regulation (EC) No 44/2001 which are substantially reproduced in this Convention and of other instruments referred to in Article 64(1) of this Convention.*

The 2007 Lugano Convention replaced the 1988 Lugano Convention. The 2007 Lugano Convention was signed in Lugano on 30 October 2007, and is applied between the EU, (including Denmark), and the EFTA States - Iceland, Norway, and Switzerland.<sup>299</sup> The EU Member States are not parties to the 2007 Lugano Convention due to the ECJ interpretation

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<sup>295</sup> Jenard-Möller Report, p. 8.

<sup>296</sup> Jenard-Möller Report, p. 5, expressly refers to Jenard Report, Schlosser Report and Evrigenis-Kerameus Report.

<sup>297</sup> On the homogeneity, see C. KOHLER, *Homogeneity or Renationalisation in the European Judicial Area? Comments on a Recent Judgment of the Norwegian Supreme Court*, in C. BAUDENBACHER, P. SPEITLER, B. PÁLMARSDÓTTIR (eds), *EEA and the EFTA Court: Decentred Integration*, Hart Publishing, 2014, p. 239.

<sup>298</sup> On the Protocol 2, see the Pocar Report. The non-Member States, especially Switzerland, were unwilling to follow the interpretation of the Lugano Convention provided by the ECJ with regard to their courts, in consequence, Protocol No 2 represents a compromise. See B. HESS, *The Unsuitability of the Lugano Convention (2007) to Serve as a Bridge between the UK and the EU after Brexit*, MPILux Research Paper Series 2 (2018), available at SSRN: <https://ssrn.com/abstract=3118360> or <http://dx.doi.org/10.2139/ssrn.3118360>, p. 5.

<sup>299</sup> The 2007 Lugano Convention entered into force for the EU, Denmark and Norway on 1 January 2010, for Switzerland on 1 January 2011 and for Iceland on 1 May 2011.

provided in *Lugano opinion 1/03*.<sup>300</sup> In 2006, the ECJ was consulted by the Council in relation to the conclusion of the new Lugano Convention 2007. The ECJ was requested to take a position regarding exclusive or shared powers between the Community and the Member States. The ECJ verified its ability to affect Community rules on jurisdiction (*i.e.*, the Brussels I Regulation) by international agreements (*i.e.*, the 2007 Lugano Convention) and concluded that the new Lugano Convention falls within the Community's exclusive competence. In other words, the Member States cannot become the Contracting States of the 2007 Lugano Convention individually, but it must be concluded by EC (EU). Thus, the 2007 Lugano Convention constitutes EU law, and the ECJ has jurisdiction to interpret it "as regards the application by the courts of the EU Member States" as provided in Article 1 of Protocol 2 to the 2007 Lugano Convention.

Article 17 of the Brussels Convention on the prorogation of jurisdiction was a model for the same rule on the prorogation of jurisdiction according to Article 17 of the 1988 Lugano Convention. Moreover, Article 23 of the 2007 Lugano Convention contains a rule on the prorogation of jurisdiction in the same wording as Article 23 of the Brussels I Regulation. Since Article 17 of the 1988 Lugano Convention and Article 23 of the 2007 Lugano Convention adopted the same wording as the Brussels Convention and the Brussels I Regulation, the analysis of these Articles is not provided in the separate chapters. Where the following text makes reference to Article 17 of the Brussels Convention, it covers the considerations on Article 17 of the 1988 Lugano Convention. Where the following text makes reference to Article 23 of the Brussels I Regulation, it covers the considerations on Article 23 of the 2007 Lugano Convention. And where the following text makes reference to Article 25 of the Brussels *Ibis* Regulation without making a difference concerning Article 23 of the Brussels I Regulation, it also covers the considerations on Article 23 of the 2007 Lugano Convention. Finally, the interplay between the Brussels *Ibis* Regulation and the 2007 Lugano Convention is then analysed in Subchapter III, Section 3.

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<sup>300</sup> ECJ, Opinion of the Court (Full Court) of 7 February 2006, Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Opinion 1/03, ECLI:EU:C:2006:81. ("Lugano Opinion 1/03").

## **2. Structure and Requirements for the Application of Article 25 of the Brussels *Ibis* Regulation**

Article 25 of the Brussels *Ibis* Regulation is divided into five paragraphs. Paragraph 1 defines the scope of application of this rule, lays down the additional conditions, establishes the rule on substantive validity, prescribes formal requirements, and affirms the exclusivity of choice-of-court agreements (unless agreed otherwise). Paragraph 2 defines the additional definition of the form in “writing”. Paragraph 3 extends the application of this rule also to the trusts. Paragraph 4 rejects the legal force to the agreements if they are contrary to Articles 15, 19, or 23 (provisions giving the special protection to the weaker parties) or to Article 24 (exclusive jurisdiction). The last paragraph establishes the severability of the choice-of-court agreement from the main contract.

The choice-of-court agreements must satisfy certain conditions in order to give them effect under the Brussels *Ibis* Regulation. If the conditions are not met, the seized Member State court may nonetheless have jurisdiction according to other provisions of the Brussels *Ibis* Regulations. The conditions are the following: (i) the transaction must fall within the scope of application of the Brussels *Ibis* Regulation; (ii) the chosen court must be a court of a Member State, (iii) the choice-of-court agreement must be agreed upon in a form prescribed by this rule; (iv) the choice-of-court agreement must be connected with “a particular legal relationship”; (v) the choice-of-court agreement must be validly concluded (“substantive validity”); and (vi) the jurisdiction agreement cannot contradict Article 15, 19, 23, or 24 of the Brussels *Ibis* Regulation. All these conditions will be further analyzed.

## **3. Scope of Application**

On the first place, it is necessary to verify whether the legal relationship falls under the scope of application of the Brussels regime, *i.e.*, whether the prorogation agreement is regulated by the Brussels I(*bis*) Regulations. In consequence, attention must be paid to the territorial, material, temporal and personal scope of application of the Brussels *Ibis* Regulation in the context of Article 25 of the Brussels *Ibis* Regulation.

### 3.1. Territorial and Personal Scope of Application

The Brussels *Ibis* Regulation, as well as the Brussels I Regulation, is applicable in the territory of all 28 Member States.<sup>301</sup> Special status must be given to Ireland, the United Kingdom, and Denmark.

The United Kingdom and Ireland reserved their rights not to participate in the adoption of measures under Title V of Part III of the TFEU (*ex* Title IV of Part III of the EC Treaty) in accordance with Protocol No 21 (*ex* Protocol No 4) on the Position of the United Kingdom and Ireland.<sup>302</sup> In accordance with Article 3 of the Protocols above, the United Kingdom and Ireland notified their intention that they wished to accept that measure (*i.e.*, the Brussels I Regulation, as well as the Brussels *Ibis* Regulation).<sup>303</sup>

Denmark is in a different position than the United Kingdom and Ireland. In accordance with the Protocol No 22 on the Position of Denmark (*ex* Protocol No 5), the measures adopted under Title V of Part III of the TFEU (*ex* Title IV of Part III of the EC Treaty) would not apply to Denmark.<sup>304</sup> However, in 2005, after the Brussels I Regulation was adopted, Denmark concluded with the EU (Community) a separate Agreement on the application of the provisions of the Brussels I Regulation,<sup>305</sup> which entered into force on 1 July 2007. In accordance with Article 3 par. 2 of the Agreement, Denmark has, by letter dated 20 December 2012, notified the Commission of its decision to implement the contents of the amendments to the Brussels I Regulation. Danish Law No 518 of 28 May 2013, came into force on 1 June 2013, and implemented the Brussels *Ibis* Regulation.

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<sup>301</sup> See Article 355 TFEU (*ex* 299 EC Treaty)

<sup>302</sup> Treaty establishing the European Community (consolidated version), Protocols annexed to the Treaty on European Union and the Treaty establishing the European Community Protocol (No 4) on the position of the United Kingdom and Ireland (1997), OJ C 321E, 29 December 2006; Consolidated version of the Treaty on the Functioning of the European Union, Protocol (No 21) on the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice, OJ C 326, 26 October 2012.

<sup>303</sup> See Recital No 40 of the Brussels *Ibis* Regulation

<sup>304</sup> See Article 2 of the protocols: Treaty establishing the European Community (consolidated version), Protocols annexed to the Treaty on European Union and the Treaty establishing the European Community Protocol (No 5) on the position of Denmark (1997), OJ C 321E, 29 December 2006; Consolidated version of the Treaty on the Functioning of the European Union, Protocol (No 22) on the position of Denmark, OJ C 326, 26 October 2012.

<sup>305</sup> Council Decision of 20 September 2005 on the signing, on behalf of the Community, of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, (2005/790/EC), OJ L 299, 16 November 2005; Council Decision of 27 April 2006 concerning the conclusion of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, (2006/325/EC), OJ L 120, 5 May 2006.

The general rule requires the presence of the territorial element connecting the dispute with the *forum* (regularly the defendant's domicile). As it will be examined further, this is not the case of the rule regulating the jurisdiction agreement under Article 25 of the Brussels *Ibis* Regulation.

Although the Brussels Regime requires defendant to be domiciled within the territory of a Member State,<sup>306</sup> Article 25 of the Brussels *Ibis* Regulation does not limit the scope of its application in this respect. Neither the plaintiff nor the defendant has to be domiciled in the Member State. The condition for application of Article 23 of the Brussels I Regulation regarding domicile of one of the parties in the territory of EU has been abolished. However, the chosen court must be a court of a Member State.<sup>307</sup> This issue will be subject to the detailed analysis in the Section 4 of this Subchapter.

### **3.2. Temporal Scope of Application**

The Brussels *Ibis* Regulation is applied to legal proceedings instituted, with authentic instruments formally drawn up or registered, and to court settlements approved or concluded on or after 10 January 2015.<sup>308</sup> The Brussels I Regulation is applied to legal proceedings instituted, with authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 1 March 2002 in fourteen Member States,<sup>309</sup> on or after 1 May 2004 in ten Member States,<sup>310</sup> on or after 1 January 2007 in two Member States<sup>311</sup>, on or after 1 July 2007 in Denmark and on or after 1 July 2013 in Croatia.

It is not required that the choice-of-court agreement was concluded on or after those dates. It is sufficient that the Member State court is seized with the dispute concerning Article 25 of

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<sup>306</sup> Article 4 of the Brussels *Ibis* Regulation and Article 2 of the Brussels I Regulation.

<sup>307</sup> On the situation when the parties choose a court outside the EU, see *infra* Chapter Two, Subchapter I, Section 15.

<sup>308</sup> Article 66 of the Brussels *Ibis* Regulation.

<sup>309</sup> Belgium, France, Germany, Italy, Luxembourg, Netherlands, Ireland, United Kingdom, Greece, Portugal, Spain, Austria, Finland, and Sweden.

<sup>310</sup> Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia.

<sup>311</sup> Bulgaria, and Romania.

the Brussels *Ibis* Regulation (Article 23 of the Brussels Regulation) at the time the Brussels I(-*bis*) Regulation became applicable at that Member State.<sup>312</sup>

However, the ECJ in case 25/79, *Sanicentral GmbH*,<sup>313</sup> in the context of the intertemporal question related to the application of the Brussels Convention, stated that Article 17 requires judicial proceedings instituted after the coming into force of the Brussels Convention and clauses conferring jurisdiction concluded prior to that date must be considered valid, even in cases in which they would have been regarded as void under the national law in force at the time when the contract was entered into. Thus, the effects of the jurisdiction clause are fixed to the time of commencement of proceedings. This interpretation must be stressed in the context of the choice-of-court agreements concluded according to the national rules (for example in case of Croatia, where the Brussels I Regulation is applicable as from 1 July 2013), which governs the choice-of-court agreements differently than the Brussels *Ibis* Regulation. Moreover, such an interpretation can have a positive impact on the situation when the choice-of-court agreement, concluded before 1 January 2015, was considered invalid according to Article 23 Brussels I Regulation. (For example, when the question on the substantive validity of the choice-of-court agreement was left to the national law.) However, it can be considered valid under Article 25 of the Brussels *Ibis* Regulation, for example, in accordance with the new conflict-of-laws rules on the substantive validity. The opposite scenario is more problematic, where the previously valid choice-of-court agreement could become subsequently void according to the Brussels *Ibis* Regulation.<sup>314</sup> The extension of this interpretation to another case would practically enable undesirable false retroactivity, *i.e.*, the jurisdiction clause is concluded in virtue of the rules applicable at the time of its conclusion, but its validity is considered according to the future rules that at time of its conclusion did not even exist. Such interpretation would be in line neither with the comprehension of the choice-of-court clauses classifying their nature as substantial, nor with the perception of choice-of-

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<sup>312</sup> U. MAGNUS, *Article 25*, in U. MAGNUS, P. MANKOWSKI (eds), *Brussels I Bis Regulation: Commentary. European Commentaries on Private International Law*, volume I., Otto Schmidt, Sellier European Law Publishers, 2016, p. 601.

<sup>313</sup> ECJ, Case 25/79, *Sanicentral GmbH v René Collin*, 13 November 1979, ECLI:EU:C:1979:255.

<sup>314</sup> On the discussion regarding the parties' faithfulness to the originally valid jurisdiction clause, see: U. MAGNUS, *Article 25*, in *Brussels I Bis Regulation: Commentary*, 2016, p. 601; P. BŘÍZA, *Volba práva a volba soudu v mezinárodním obchodě, op. cit.*, p. 131.

court clauses classifying their nature as procedural due to the direct and immediate effects to the courts at the time of their conclusion.<sup>315</sup>

### **3.2.1. Relevant Point in Time for the Application of Article 25 of the Brussels *Ibis* Regulation**

The question also arises what point in time is decisive for the determination of application/non-application of Article 25 of the Brussels *Ibis* Regulation (Article 23 of the Brussels Regulation), *i.e.*, whether the decisive moment is the moment of the conclusion of the choice-of-court agreement or the moment when the Member State court is seized. This aspect seems to be more than significant when the circumstances relevant to the application of Article 25 of the Brussels *Ibis* Regulation (Article 23 of the Brussels Regulation) are changed. This change can concern the international element, which might be missed, or can concern the change of the domicile of both parties outside the EU in the case of Article 23 of the Brussels Regulation.

Due to the new rule on substantive validity introduced into Article 25 of the Brussels *Ibis* Regulation, the relevant point in time regarding substantive validity is determined in accordance with the national conflict-of-laws rules of the prorogued court.<sup>316</sup>

As to the formal validity, the ECJ in the above-mentioned case 25/79, *Sanicentral*, fixed the circumstances to the time of the commencement of proceedings.<sup>317</sup> For example, in the case where the parties' choice-of-court agreement concluded "in a form which accords with practices which the parties have established between themselves", such an interpretation would lead to the conclusion that the agreement may become invalid if the parties' practices change before the commencement of the proceedings. In consequence, due to the possibility of the change of circumstances between the conclusion of the contract and the beginning of the legal proceedings, it is recommended that the choice-of-court agreement should satisfy the formal requirements prescribed in Article 25 of the Brussels *Ibis* Regulation *at least* at the

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<sup>315</sup> On the nature and effects, see *supra* Chapter One, Subchapter II.

<sup>316</sup> U. MAGNUS, *Article 25*, in *Brussels I Bis Regulation: Commentary*, 2016, *op. cit.*, p. 601; P. BŘÍZA, *Volba práva a volba soudu v mezinárodním obchodě*, *op. cit.*, p. 617.

<sup>317</sup> For a restrictive interpretation see H. GAUDAMET-TALLON, *Compétence et exécution des jugements en Europe, Règlement no 44/2001, Conventions de Bruxelles et de Lugano*, *op. cit.*, par. 129.

time of the proceedings.<sup>318</sup> Such a conclusion would guarantee the full recognition of the principle of *pacta sunt servanda*.

As to the element of internationality, there is no consensus at what point in time the existence of an international factor should be considered, whether at the time the agreement is concluded or at the time the Member State court is seized.<sup>319</sup> However, the parties should rely on the fact that once the choice-of-court agreement has an international element, it should not be “lost” even although the dispute subsequently becomes purely internal.<sup>320</sup>

A similar conclusion may be upheld in the context of the change of the domicile to a Third State in the proceedings commenced before 1 January 2015, *i.e.*, when Article 23 of the Brussels I Regulation determines, as the condition for its application, the domicile of at least one of the parties is in the Member State. Also, in this case, it can be argued that one of the parties must have domicile in the Member State at the time the Member State court is seised by virtue of ECJ’s interpretation in case 25/79, *Sanicentral*. However, according to some opinions, it suffices that one of the parties is domiciled in the Member State at the time of conclusion of the choice-of-court agreement - considering that certainty and predictability are essential.<sup>321</sup> The support for the latter approach can be found in the context of the 2007 Lugano Convention in the Pocar Report where professor Pocar stated that the relevant time had to be the time of conclusion of the contract.<sup>322</sup> This conclusion may also be supported by the ECJ interpretation related to the assignment of the contract. The ECJ upheld that the

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<sup>318</sup> Emphasis added. See U. MAGNUS, *Article 25*, in *Brussels I Bis Regulation: Commentary*. European Commentaries on Private International Law, 2016, *op. cit.*, p. 601; P. BŘÍZA, *Volba práva a volba soudu v mezinárodním obchodě*, *op. cit.*, p. 619.

<sup>319</sup> U. MAGNUS, *Article 25*, in *Brussels I Bis Regulation: Commentary*, 2016, *op. cit.*, p. 601; P. BŘÍZA, *Volba práva a volba soudu v mezinárodním obchodě*, *op. cit.*, 619.

<sup>320</sup> U. MAGNUS, *Article 25*, in *Brussels I Bis Regulation: Commentary*, 2016, *op. cit.*, p. 619.

<sup>321</sup> G. A. L. DROZ, *Compétence judiciaire et effets des jugements dans le Marché commun*, *Daloz*, 8 (1972), par. 184; S. O’MALLEY, A. LAYTON, *European Civil Practice*, Sweet & Maxwell, 2004, p. 570.

<sup>322</sup> Pocar Report, par. 105: «*The ad hoc working party examined the question of the date on which one of the parties must be domiciled in a State bound by the Convention in order for Article 23(1) to apply, in the light of Articles 13(3) and 17(3), which specify that in the cases they refer to the relevant domicile is the parties’ domicile at the time of conclusion of the contract. It was agreed that that was the decisive date for purposes of Article 23 too, but it was not deemed necessary to add an explanation to that effect in the text. This was because the relevant time had to be the time of conclusion of the contract, for the sake of legal certainty and the confidence of the parties who agreed the clause. If the date of reference were to be the date on which the proceedings were brought, one party would be able to transfer his own domicile to a State bound by the Convention after signing the contract and before bringing the proceedings, thereby rendering Article 23(1) applicable, and changing the context in which the court designated in the clause was to verify its own jurisdiction.*».



validity of a jurisdiction clause must be assessed by reference to the relationship between the parties to the original contract.<sup>323</sup>

### 3.3. Material Scope

The choice-of-court agreement concluded under Article 25 of the Brussels *Ibis* Regulation must fall into the material scope of the Brussels *Ibis* Regulation, which concerns civil and commercial matters as provided in Article 1 par. 1. It must be borne in mind that the Brussels *Ibis* Regulation does not define the concept of civil and commercial matters, but it is an autonomous concept, which has been interpreted by the ECJ several times.<sup>324</sup> Article 1 par. 2 then expressly excludes specific issues from the term of the “civil and commercial matters”, such as: the status or legal capacity of natural persons; rights in property arising out of a matrimonial relationship or out of a relationship deemed by the law applicable to such relationship to have comparable effects to marriage; bankruptcy; proceedings relating to the winding-up of insolvent companies or other legal persons; judicial arrangements, compositions and analogous proceedings; social security; arbitration; maintenance obligations arising from a family relationship, parentage, marriage, or affinity; and wills and succession, including maintenance obligations arising by reason of death. The Jenard report explains such exclusions by the divergences in the national and private international law.<sup>325</sup> The other reason for the exclusion of the specific issues is that they are already subject to international

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<sup>323</sup> ECJ, Case C-71/83, *Partenreederei ms. Tilly Russ and Ernest Russ v NV Haven- & Vervoerbedrijf Nova and NV Goeminne Hout*, 19 June 1984, ECLI:EU:C:1984:217, par. 24; Case C-159/97, *Trasporti Castelletti* par. 41, 42; Case C-387/98, *Coreck Maritime GmbH v Handelsveem BV and Others*, 9 November 2000, ECLI:EU:C:2000:606, par. 20. See also J. HILL, A. CHONG, *International Commercial Disputes: Commercial Conflict of Laws in English Courts*, *op. cit.*, p. 112.

<sup>324</sup> See for example ECJ, Case C-29/76, *LTU Lufttransportunternehmen GmbH & Co. KG v Eurocontrol*, 14 October 1976, ECLI:EU:C:1976:137; Case C-814/79, *Netherlands State v Reinhold Rüffer*, 16 December 1980, ECLI:EU:C:1980:291; Case C-266/01, *Préservatrice foncière TIARD SA v Staat der Nederlanden*, 15 May 2003, ECLI:EU:C:2003:282; Case C-292/05, *Eirini Lechouritou and Others v Dimosio tis Omospondiakis Dimokratias tis Germanias*, 15 February 2007, ECLI:EU:C:2007:102; Case C-645/11, *Land Berlin v Ellen Mirjam Sapir and Others*, 11 April 2013, ECLI:EU:C:2013:228.

<sup>325</sup> Jenard Report, p. 10.

conventions or EU regulations.<sup>326</sup> The differences between the excluded issues listed in the Brussels *Ibis* Regulation and in the Brussels I Regulation are mostly technical.<sup>327</sup>

### 3.4. Internationality

From the ECJ case law, it is evident that the Brussels *Ibis* Regulation applies to international cases and a minimum degree of internationality is required.<sup>328</sup> The international element may also refer to the Third State.<sup>329</sup> No problem arises when the parties have a domicile in different States, and the agreement confers jurisdiction to the courts of a Member State.<sup>330</sup> However, some questions related to the choice-of-court agreements remain open - in what case is the situation considered only “domestic” (and thus national rules will be applied) and in what case is the situation “sufficiently international”.

What happens if the two parties domiciled in the same Member State confer jurisdiction by agreement to another Member State court?<sup>331</sup> This situation should be considered as sufficiently international, when the case had links also to other States, for example when the subject matter has an international character (*e.g.*, delivery).<sup>332</sup> However, such an answer is not so unequivocal where an objective link between the legal relationship and the chosen

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<sup>326</sup> See for example Maintenance Regulation, Succession Regulation, Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L 141, 5 June 2015 (“Insolvency Regulation”).

<sup>327</sup> It was specified that the term matrimonial relationship covers also “*relationship deemed by the law applicable to such relationship to have comparable effects to marriage*”; the words “*including maintenance obligations arising by reason of death*” were added.

<sup>328</sup> ECJ, Case C-327/10, *Hypoteční banka a.s. proti Udo Mike Lindner*, 17 November 2011, ECLI:EU:C:2011:745; Case C-9/12, *Corman-Collins SA v La Maison du Whisky SA*, 19 December 2013, ECLI:EU:C:2013:860.

<sup>329</sup> ECJ, Case C-281/02, *Owusu*, par. 26.

<sup>330</sup> Jenard Report, p. 38.

<sup>331</sup> This question was posed to the ECJ in Case C-136/16, *Sociedade Metropolitana de Desenvolvimento SA v Banco Santander Totta SA*, 10 March 2017, ECLI:EU:C:2017:237. Request for a preliminary ruling from the *Supremo Tribunal de Justiça* (Portugal) lodged on 7 March 2016 — *Sociedade Metropolitana de Desenvolvimento SA v Banco Santander Totta SA*, OJ C 165, 10 May 2016: «*In a dispute between two national undertakings of a Member State concerning agreements, does the fact that such agreements contain clauses conferring jurisdiction to another Member State constitute a sufficient international element to give rise to the application of Regulation (EC) No 44/2001 (1) and Regulation No 1215/2012 (2) to determine international jurisdiction, or must there be other international elements?*». However, the Order of the President of the Second Chamber of the Court of 10 March 2017 has been removed.

<sup>332</sup> Jenard Report, p. 38; U. MAGNUS, *Article 25*, in Brussels I *Bis* Regulation: Commentary, 2016, *op. cit.*, p. 602; S. O'MALLEY, A. LAYTON, *European Civil Practice*, Sweet & Maxwell, 1989, p. 553; F. GARCIMARTIN, *Chapter 9 - Article 25*, in A. DICKINSON, A. JAMES, E. LEIN (eds), *The Brussels I Regulation Recast*, Oxford University Press, 2015, p. 285.

court is missing. Although genuine autonomy is sometimes considered as a situation when a chosen court accepts jurisdiction, when there is no connection to the *forum*,<sup>333</sup> the opinions differ in the context of the Brussels Regime regarding the dispute deriving from a case where all relevant elements are located in one Member State, but only the choice-of-court agreement designates a court of other Member State.<sup>334</sup> However, according to Professor Droz every agreement which designates a Member State court, but excludes another Member State court which would have otherwise jurisdiction according to the Brussels Convention, is to be considered as having an international element.<sup>335</sup> Such an assumption cannot cover all the cases, for example when both parties are domiciled in Third States.<sup>336</sup> In my opinion, with the rising importance of the specialised business courts, the parties domiciled in the same Member States will be even more motivated to confer jurisdiction in favour of such courts, with a view of automatic recognition of the judgment in the other Member States<sup>337</sup> and the limitations might seem to be counterproductive for the international trade. Article 25 of the Brussels *Ibis* Regulation, which has repealed the requirement of the domicile of one of the parties in a Member State, supports this view.<sup>338</sup> On the other hand, this view seems to be

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<sup>333</sup> Some legal systems require a connection with the territory of the State, other legal systems respect party autonomy as far as possible. For examples, in Germany no connection between the dispute and forum is necessary. In Switzerland, the court may decline jurisdiction if neither party has residence, domicile, or place of business in the canton of the designated court. The law of New York requires that an agreement giving rise to the litigation is governed by the New York law. See P. NYGH, *Autonomy in International Contracts*, *op. cit.*, p. 15, 16; A. BĚLOHLÁVEK, *Rome Convention-Rome I Regulation: Commentary: New EU Conflict-of-Laws Rules for Contractual Obligations*, Juris, 2010, p. 670.

<sup>334</sup> On the negative approach see Schlosser Report, par. 174; in context of the 2007 Lugano Convention see Pocar Report, par. 104; A. BRIGGS, *Agreements on Jurisdiction and Choice of Law*, *op. cit.*, p. 245 and footnote No 25.

<sup>335</sup> G. A. L. DROZ, *Compétence judiciaire et effets des jugements dans le Marché commun*, *op. cit.*, par. 191. On the assumption that no connection is required see also M. WELLER, *Choice of Forum Agreements Under the Brussels I Recast and Under the Hague Convention: Coherences and Clashes*, *op. cit.*, p. 5. On the other hand, Article 3 par. 3 of the Rome I Regulation provides: «Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement». In consequence, it may be argued that this provision limits of a choice-of-law clause stands in respect of internationality of the case, whereby the mere choice of law or a foreign court in otherwise entirely domestic cases cannot suffice.

<sup>336</sup> See opposite approach in U. MAGNUS, *Article 25*, in *Brussels I Bis Regulation: Commentary*, 2016, *op. cit.*, p. 604, where the author considers the potential future change of the domicile from the Third State into the Member State until the commencement of the proceedings as “potential derogation”.

<sup>337</sup> F. GARCIMARTIN, *Chapter 9 - Article 25*, in *The Brussels I Regulation Recast*, *op. cit.*, p. 286, where the author provides: «given the possibility that a judgment from one Member State may ultimately be enforced in another, the objectives of the Recast Regulation, in promoting party autonomy and facilitating the cross-border recognition and enforcement of judgments, would be better served by the harmonious application of Art 25 in this case.».

<sup>338</sup> U. MAGNUS, *Article 25*, in *Brussels I Bis Regulation: Commentary*, 2016, *op. cit.*, p. 603.

inconsistent with Article 1 par. 2 of the Hague Convention on Choice of Court Agreements, which expressly provides: “...*a case is international unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State.*”.

At least, the opinions on the purely domestic situation do not differ. According to the Jenard Report, Article 17 of the Brussels Convention (Article 25 of the Brussels Ibis Regulation) does not apply “...*where two parties who are domiciled in the same Contracting State have agreed that a court that State shall have jurisdiction...*”<sup>339</sup>

#### **4. Domicile of the Parties**

Article 23 of the Brussels I Regulation, like Article 17 of the Brussels Convention,<sup>340</sup> applied only when at least one of the parties had a domicile in the Member States. The procedural rule of the parties was not relevant. This party domiciled in the Member State could be in the position of the plaintiff.<sup>341</sup> Although the party possessed more domiciles according to Article 63 of the Brussels Ibis Regulation (Article 60 of the Brussels I Regulation), it was sufficient that one of the domiciles was situated in a Member State.<sup>342</sup> Article 23 of the Brussels I Regulation was in generally inapplicable where both parties were domiciled in Third States. However, Article 23 par. 3 of the Brussels I Regulation gave priority to the Member State court designated by the parties domiciled outside the EU over the courts of other Member States - the derogated Member State court had to stay the proceedings and had to decline its jurisdiction if the chosen Member State court established its jurisdiction. Although this paragraph should have secured the dealings with the derogative effect of other Member States

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<sup>339</sup> Jenard Report, p. 38.

<sup>340</sup> Article 17 of the Brussels Convention in contrast with Article 1 of the 1958 Hague Convention and Article 2 of the 1965 Hague Convention, where only *forum* located in a Contracting State represent a condition for the application, requires the domicile of one of the parties in the Contracting State.

<sup>341</sup> ECJ, Case C-412/98, *Group Josi Reinsurance Company SA v Universal General Insurance Company (UGIC)*, 13 July 2000, ECLI:EU:C:2000:399. See also U. MAGNUS, *Article 25*, in *Brussels I Bis Regulation: Commentary*, 2016, *op. cit.*, p. 614.

<sup>342</sup> U. MAGNUS, *Article 23*, in *Brussels I Regulation*, 2012, *op. cit.*, p. 463. On the different interpretation of the “domicile” determined in different Member States according to their national law see Heidelberg Report, par. 180-186.

in a uniform way within the EU,<sup>343</sup> on the contrary, specific uncertainties arose. The wording of this paragraph (“such an agreement”) may have supported the view that the jurisdiction agreement had to be upheld only if the formal requirements laid down in paragraph 1 were met.<sup>344</sup> However, only the national rules (including the conflict-of-laws rules) can regulate the substantive and the formal validity, since the Brussels I Regulation did not cover the choice-of-court agreements “from outside”.<sup>345</sup>

In the Green Paper was stressed that:

*...the good functioning of an internal market and the Community's commercial policy both on the internal and on the international level require that equal access to justice on the basis of clear and precise rules on international jurisdiction is ensured not only for defendants but also for claimants domiciled in the Community.*<sup>346</sup>

The original Proposal for a Recast of the Brussels I Regulation, which intended, in general, to extend the scope to the Third State’s defendant, was not adopted.<sup>347</sup> According to the Impact Assessment, the negative economic impact on companies was “*difficult to quantify*” and

*...there is little quantitative evidence that the existing divergences between the national laws lead to distortions of competition and that the absence of access to EU courts entails significant losses for consumers and other weaker parties.*<sup>348</sup>

In consequence, the Draft Report on the Proposal for the Brussels *Ibis* Regulation took the view that the general extension of the scope to the Third State’s defendant did not improve the position of non-EU defendants.<sup>349</sup>

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<sup>343</sup> Schlosser Report, par. 177.

<sup>344</sup> *Ibidem*.

<sup>345</sup> U. MAGNUS, *Article 23*, in Brussels I Regulation, 2012, *op. cit.*, p. 464.

<sup>346</sup> See answer to question 1 in the Green Paper on the review of Council Regulation (EC) no 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM/2009/0175 final, 21 April 2009.

<sup>347</sup> 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, COM/2010/0748 final, 14 December 2010 (“Proposal for a Recast of the Brussels I Regulation”). The scope of the Third State’s defendant was adopted only in the context of consumers and employees, see Article 18 par. 1 and Article 21 par. 2 of the Brussels *Ibis* Regulation.

<sup>348</sup> Commission staff working paper. Impact assessment. Accompanying document to the Proposal for Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), SEC (2010) 1547 final, 14 December 2010, p. 25.

<sup>349</sup> Committee on Legal Affairs, Draft Report on the proposal for a regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), PE467.046, 28 June 2011.

However, the Brussels *Ibis* Regulation has extended the scope to Third State defendants in relation to the choice-of-court agreement.<sup>350</sup> Thus, Article 25 of the Brussels *Ibis* Regulation applies irrespective of the domicile of the parties. The subsequent change of the domicile of one of the parties of the Third States does not represent a problem anymore.<sup>351</sup>

However, under the 2007 Lugano Convention, the domicile of one of the parties in the Member State is still decisive. In consequence, all considerations related to the application of Article 23 of the Brussels I Regulation remain relevant for the 2007 Lugano Convention.

## 5. Prorogation of the Court of a Member State

Article 25 of the Brussels *Ibis* Regulation determines that *a court or the courts of a Member State* are to have jurisdiction. In practice, it means that the parties may designate a specific court (*Tribunale di Milano*) or a specific Member State (Italian courts). The designation of the court in a specific city meets the requirements of Article 25 of the Brussels *Ibis* Regulation. Such a conclusion was confirmed by the ECJ judgment, case C222/15, *Hőszig*,<sup>352</sup> when the parties agreed that “*the Paris Courts have exclusive and final jurisdiction to settle disputes which may arise between the parties*”. The interesting thing about this judgment is that the ECJ has supported its conclusion on the basis that the parties simultaneously agreed that the law of the designated Member State court was applicable to the contract. According to the ECJ, for this reason, there was “*no doubt that that clause seeks to confer exclusive jurisdiction on the courts belonging to the judicial system of that Member State.*”<sup>353</sup>

When the courts of the Member State are designated, the national law decides which local court has jurisdiction.<sup>354</sup> The plaintiff must comply with the national rules on local jurisdiction

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<sup>350</sup> The Proposal for a Recast of the Brussels I Regulation did not explain such an extension, but it can be presumed that this proposal made a part of the general option of the extension of the scope of the Brussels I Regulation to the Third State’s defendant. This extension was already proposed in 2008 by European Group for Private International Law (“GEDIP.”). See Proposition de modification du chapitre II du règlement 44/2001 en vue de son application aux situations externes, Bergen 21 September 2008, available at : <https://www.gedip-egpil.eu/documents/gedip-documents-18pf.htm>.

<sup>351</sup> On the relevant point of time in case of transfer of a domicile according to Article 23 of the Brussels I Regulation, see *supra* Section 3.2.1. of this Subchapter

<sup>352</sup> ECJ, Case C222/15, *Hőszig Kft. V Alstom Power Thermal Services*, 7 July 2016, ECLI:EU:C:2016:525.

<sup>353</sup> ECJ, Case C222/15, *Hőszig*, para 46.

<sup>354</sup> See Jenard Report, p. 37; Case 23/78, *Nikolaus Meeth v Glacetal*, Opinion of Advocate General Capotorti, 12 October 1978, ECLI:EU:C:1978:183, par. 2; U. MAGNUS, *Article 25*, in Brussels I *Bis* Regulation, 2016, *op. cit.*, p. 622.

and identify the competent national court.<sup>355</sup> Certain problem may arise when such a rule is lacking in the designated Member State, for example when the parties designate a “neutral” Member State or where the facts of the case do not have any connection with the chosen Member State. Professor Jenard in the Jenard Report, referring to professor Batiffol’s statement, pointed out that the jurisdiction clause “*may have no legal effect if, in the absence of any connecting factor between the contractual situation and the State whose courts have been agreed on as having jurisdiction, the law of that State provides no way of determining which court can or should be seized of the matter*”.<sup>356</sup> However, it has been suggested, that in such a case, the plaintiff may choose a specific court in that Member State; in the absence of a choice, the domicile one of the parties or the seat of government should be decisive.<sup>357</sup>

The parties can also designate courts in more than one Member State. In particular, the ECJ in the case 23/78, *Meeth*, stated that the wording could not exclude the right of the parties to agree on *two or more courts*.<sup>358</sup> The ECJ justified its interpretation on the fact that Article 17 of the Brussels Convention (Article 25 of the Brussels *Ibis* Regulation) is based on the independent will of the parties and on widespread business practice.<sup>359</sup> The principle of the independent will of the parties was subsequently confirmed in the judgment C-387/98, *Coreck Maritime*<sup>360</sup> and in C222/15, *Hőszig*.<sup>361</sup>

The designated court does not have to be indicated in the choice-of-court agreement. It suffices that the objective criterion, according to which it is possible to identify the designated court, is established; these criteria may be established on the basis of the circumstances of a specific case.<sup>362</sup> The most crucial aspect is that the designation is “sufficiently precise”. The ECJ suggested that such a designation is specific enough when the parties designate a Member State court situated in the domicile of the defendant or the claimant,<sup>363</sup> or in the place of business.<sup>364</sup>

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<sup>355</sup> Jenard Report, p. 37.

<sup>356</sup> Jenard Report, p. 37.

<sup>357</sup> U. MAGNUS, *Article 25*, in Brussels I *Bis* Regulation, 2016, *op. cit.*, p. 622.

<sup>358</sup> ECJ, Case 23/78, *Nikolaus Meeth v Glacetal*, 9 November 1978, ECLI:EU:C:1978:198, para 5. On the asymmetric clauses under the Brussels Regime, see *infra* Section 11.2. of this Subchapter.

<sup>359</sup> ECJ, Case 23/78, *Meeth*, par. 5.

<sup>360</sup> ECJ, Case C-387/98, *Coreck*, par. 14.

<sup>361</sup> ECJ, Case C222/15, *Hőszig*, par. 44.

<sup>362</sup> ECJ, Case C-387/98, *Coreck*, par. 15.

<sup>363</sup> ECJ, Case 23/78, *Meeth*, par.6.

<sup>364</sup> ECJ, Case C-387/98, *Coreck*, par. 15.

## 6. Disputes in connection with a Particular Legal Relationship

Article 25 of the Brussels *Ibis* Regulation provides that the parties may agree on a court or the courts of a Member State to have jurisdiction “to settle any dispute any disputes which have arisen or which may arise in connection with a particular legal relationship”. The ECJ has interpreted this wording in judgment C-214/89, *Powell Duffryn*,<sup>365</sup> concerning a jurisdiction clause inserted in the company statute. According to the ECJ, such wording limits the scope of a jurisdiction agreement solely to disputes which arise from the legal relationship in connection with which the jurisdiction agreement was concluded.<sup>366</sup> It cannot be deduced that the jurisdiction clause covers all disputes which may arise out of parties’ legal relationship or relationship other than that in connection with which the jurisdiction clause was entered into.<sup>367</sup> Unless agreed otherwise between the parties, the part of the claim also represents set-off claims.<sup>368</sup>

It depends on the formulation of the jurisdiction clause to which extent it applies. However, “catch-all-clauses” covering every present and future dispute between the parties cannot be admitted under the Brussels *Ibis* Regulation.<sup>369</sup>

## 7. Formal Validity

According to the Brussels Convention, the prorogation agreement must be in “writing or by an oral agreement evidenced in writing”.<sup>370</sup> The purpose of such wording of Article 17 on

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<sup>365</sup> ECJ, Case C-214/89, *Powell Duffryn plc v Wolfgang Petereit*, 10 March 1992, ECLI:EU:C:1992:115.

<sup>366</sup> ECJ, Case C-214/89, *Powell Duffryn*, par. 31.

<sup>367</sup> ECJ, Case C-214/89, *Powell Duffryn*, par. 31.

<sup>368</sup> ECJ, Case 23/78, *Meeth*, par. 8, 9.

<sup>369</sup> U. MAGNUS, *Article 25*, in Brussels *I Bis* Regulation, 2016, *op. cit.*, p. 620.

<sup>370</sup> According to the Jenard Report, the wording determining formal requirements of rule on prorogation of jurisdiction was similar to the Convention between Germany and Belgium, which was based on the rules of the Hague Convention of 15 April 1958 on the jurisdiction of the selected forum in the case of international sale of goods, and the Hague Convention of 25 November 1965 on the choice-of-court. The German-Belgian Convention specifies that an agreement within the meaning of that Article 3 para 2 shall exist only if a party has made its declaration in writing and the opponent has accepted it or if the agreement has been confirmed in writing: «.eine Vereinbarung im Sinne dieser Vorschrift liegt nur vor, wenn eine Partei ihre Erklärung schriftlich abgegeben und die Gegenpartei sie angenommen hat oder wenn die Vereinbarung für den Fall, daß sie mündlich getroffen ist, von einer Partei schriftlich bestätigt worden ist, ohne daß die Gegenpartei der Bestätigung widersprochen hat.» The Hague Convention of 15 April 1958 in Article 2 provides that when the parties designate the forum in oral form, such designation is valid only if it has been expressly confirmed by a



formal requirements was “not to impede commercial practice” and avoid “excessive formality” which is “incompatible with commercial practice”. At the same time, it should not recognize the effect of the agreements on jurisdiction, unless they were the subject of an agreement which implied the consent of all the parties.<sup>371</sup> Indeed, the jurisdiction clauses in the printed forms for business correspondence or in the invoices do not have legal force if they are not agreed to by the party against whom they would operate.<sup>372</sup> The valid consent of the parties must be granted. The weight given to the written document, which evidences a previous oral agreement, is assessed by the Member State court (*i.e.*, whether a written document serves as evidence of the existence of the agreement).<sup>373</sup> The reference to international trade usages was added by the 1978 Accession Convention<sup>374</sup> and the reference to practices between the parties was incorporated by the 1989 Accession Convention, which followed the wording of the 1988 Lugano Convention.<sup>375</sup> The definition of writing, which includes electronic communications, was included in Article 23 of the Brussels Regulation.

Article 25 of the Brussels *Ibis* Regulation has not been amended as to the formal validity of choice-of-court agreements. Article 25 of the Brussels *Ibis* Regulation requires that the parties “agree” on the jurisdiction. According to the ECJ, the concept must be interpreted independently, and no reference to the national law is permitted.<sup>376</sup> Article 25 of the Brussels *Ibis* Regulation represents an exhaustive and a uniform regime and must be interpreted autonomously.<sup>377</sup> No conditions on the form can be added or reduced by the national law.<sup>378</sup>

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declaration one of the party without having been contested.: «*Lorsque la vente, conclue oralement, comporte la désignation du for, cette désignation n'est valable que si elle a été exprimée ou confirmée par une déclaration écrite émanant de l'une des parties ou d'un courtier, sans avoir été contestée.*». Article 4 of the Hague Convention of 25 November 1965 provides as well for the formal requirements of the choice-of-court agreement in order to be considered validly made – the forum-selection agreement must be a result of the acceptance by one party of a written proposal by the other party expressly designating the chosen court or courts.

<sup>371</sup> Jenard Report, p. 37.

<sup>372</sup> Jenard Report, p. 37. This conclusion corresponds to the case law determined between the founding Member States, *e.g.*, on Article 12 of the bilateral convention between Italy and France see *Corte di Appello di Firenze*, 5 May 1967, in *Rivista di diritto internazionale privato e processuale*, (1968), p. 394.

<sup>373</sup> Jenard Report, p. 37.

<sup>374</sup> Schlosser Report, par. 179. It was a reaction to the ECJ, Case 25/76, *Galerias Segoura SPRL v Société Rahim Bonakdarian*, 14 December 1976, ECLI:EU:C:1976:178.

<sup>375</sup> Almeida Cruz-Desantes Real-Jenard Report, par. 26; Jenard-Möller Report, par. 57, 58. It was a reaction to the ECJ, Case 25/76, *Galerias Segoura*.

<sup>376</sup> ECJ, Case C-214/89, *Powell Duffryn*, par. 11.

<sup>377</sup> U. MAGNUS, *Article 25*, in *Brussels I Bis Regulation*, 2016, *op. cit.*, p. 635; F. GARCIMARTIN, *Chapter 9 - Article 25*, in *The Brussels I Regulation Recast*, *op. cit.*, p. 286.

<sup>378</sup> ECJ, Case C-150/80, *Elefanten Schuh GmbH v Jacqmain*, 24 June 1981, ECLI:EU:C:1981:148, par. 25; Case C-159/97, *Trasporti Castelletti*, par. 37.

The formal requirements guarantee to protect the parties by: (i) ensuring a real consent between them; and (ii) providing proof of such consent.<sup>379</sup> Therefore, the formal requirements, which assure that there was actual consent on the part of the persons concerned, prevent the jurisdiction clause from being unnoticed.<sup>380</sup> On the other hand, meeting the formal requirements offers proof of such consent – Article 25 of the Brussels *Ibis* Regulation constitutes a presumption or at least an indication of the consent.<sup>381</sup>

It might be disputed whether the wording “agree” covers “agreement” of both parties. According to Professor Briggs, the plural form of “agree” was necessary to use since at the time of the conclusion of the choice-of-court clause, it is unknown who will be suing whom, and therefore, it does not mean that the agreement is bilateral in its nature.<sup>382</sup> In consequence, unilateral acceptance by the party or both parties must be sufficiently demonstrated and formalised.<sup>383</sup> This conclusion corresponds to the ECJ case *Estasis Salotti*, Case 24/76, where the ECJ stated that: “*since no guarantee is thereby given that the other party has really consented to the clause waiving the normal rules of jurisdiction*”.<sup>384</sup> It practically means that it suffices that the defendant has accepted the jurisdiction of otherwise competent court according to the Brussels *Ibis* Regulation.<sup>385</sup> The acceptance of the plaintiff is evident when he files the legal action in front of the designated Member State court.<sup>386</sup> The more complicated situation takes place when the plaintiff seizes a Member State court other than the designated one. In such a case, it must be demonstrated that the plaintiff agreed to the jurisdiction of the designated Member State court. Therefore, it is crucial to demonstrate the existence of the consent, which is based on the fulfilment of the requirements imposed by Article 25 of the Brussels *Ibis* Regulation. Diversely, in the same judgment, the ECJ stated that the purpose of the formal requirements is “*to ensure that the consensus between the parties is in fact*

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<sup>379</sup> ECJ, Case C-150/80, *Elefanten Schuh*, par. 26; Case C-159/97, Case C-159/97, *Trasporti Castelletti*, par. 34, 48.

<sup>380</sup> ECJ, Case C-106/95, *MSG v Les Gravières Rhénanes*, par. 17; Case C-159/97, *Trasporti Castelletti*, par. 19; Case 71/83, *Tilly Russ*, par. 24.

<sup>381</sup> F. GARCIMARTIN, *Chapter 9 - Article 25*, in *The Brussels I Regulation Recast*, *op. cit.*, p. 287.

<sup>382</sup> A. BRIGGS, *Agreements on Jurisdiction and Choice of Law*, *op. cit.*, p. 259.

<sup>383</sup> *Ibidem*.

<sup>384</sup> ECJ, Case 24/76, *Estasis Salotti di Colzani Aimò e Gianmario Colzani s.n.c. v Rüwa Polstereimaschinen GmbH*, 14 December 1976, ECLI:EU:C:1976:177, par. 9.

<sup>385</sup> P. BŘÍZA, *Volba práva a volba soudu v mezinárodním obchodě*, *op. cit.*, p. 139.

<sup>386</sup> P. BŘÍZA, *Volba práva a volba soudu v mezinárodním obchodě*, *op. cit.*, p. 139.

*established*” and that “*the consensus must be clearly and precisely demonstrated*”.<sup>387</sup> This conclusion favours more the interpretation of the concept of bilateral agreement.

Article 25 of the Brussels *Ibis* Regulation allows four alternative forms of the jurisdiction agreement: (i) in writing; (ii) evidenced in writing; (iii) shown by practices among the parties; or (iv) shown by international trade or commerce.

### **7.1. In Writing**

The real consent of the parties is the aim of this provision.<sup>388</sup> There are no doubts that the written jurisdiction clause signed by both parties satisfies the formal requirements according to Article 25 par. 1 lett. a) of the Brussels *Ibis* Regulation.<sup>389</sup>

The national case law assumed another criterion as to the signature. The clause may be inserted into the contract with another clause, or may be separately signed, or may be in various documents referring to the jurisdiction clause if every document is individually signed. In case that the kind of writing (telefax, telegram, etc.) does not allow a handwritten signature, then it suffices that the clause is identifiable. Also, the jurisdiction clause inserted in an unreasonable place (bottom part of the page) into the contract, the confirmation of the reception of the offer containing jurisdiction clause, or the reference to the jurisdiction clause inserted into the other contract between the same parties, is not enough for application of Article 25 of the Brussels *Ibis* Regulation.<sup>390</sup> On the other hand, the supply order, containing jurisdiction clause, which is accepted and signed by other party satisfies formal requirements within the meaning of Article 25 par. 1 lett. a) of the Brussels-*bis* Regulation.<sup>391</sup>

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<sup>387</sup> ECJ, Case 24-76, *Estasis Salotti*, par. 7.

<sup>388</sup> ECJ, Case C543/10, *Refcomp SpA v Axa Corporate Solutions Assurance SA and Others*, 7 February 2013, ECLI:EU:C:2013:62, par. 28.

<sup>389</sup> F. GARCIMARTIN, *Chapter 9 - Article 25*, in *The Brussels I Regulation Recast*, *op. cit.*, p. 288; U. MAGNUS, *Article 25*, in *Brussels I Bis Regulation*, 2016, *op. cit.*, p. 636.

<sup>390</sup> See reference to the case-law cited in the footnotes by F. GARCIMARTIN, *Chapter 9 - Article 25*, in *The Brussels I Regulation Recast*, *op. cit.*, p. 288; U. MAGNUS, *Article 25*, in *Brussels I Bis Regulation*, 2016, *op. cit.*, p. 636. See also *Corte di Cassazione*, S.U., n. 3693, 9 March 2012, in *Rivista di diritto internazionale privato e processuale* (2013), p. 144.

<sup>391</sup> *Corte di Cassazione*, S.U., n. 19447, 10 September 2009, in *Rivista di diritto internazionale privato e processuale*, (2010), p. 147.

The most problematic issue concerns the validity of the jurisdiction clause incorporated into the standard contract terms which is part of the main contract. The ECJ has developed autonomous criteria for the interpretation of such jurisdiction clauses.

In the judgment C222/15, *Hőszig*, the ECJ held that the jurisdiction clause is lawful where the text of the contract signed by both parties contains an express reference to the general conditions which contain a jurisdiction clause.<sup>392</sup>

In the judgment, 24/76, *Estasis Salotti*, the ECJ stressed that in a situation where a jurisdiction clause is incorporated into the general terms on the back of a contract signed by both parties, an express reference to those general conditions must be included in the contract in order to meet the formal requirements prescribed in the Brussels Convention.<sup>393</sup> It is not sufficient that a jurisdiction clause is printed among the general conditions of one of the parties on the reverse of a contract drawn up by that party. Moreover, in the same judgment, the ECJ addressed the situation when the parties referred in the contract to a prior written offer, which made a reference to general conditions (including a jurisdiction clause). Such a reference satisfies the formal requirements only if the reference is express and can be checked by a party exercising reasonable care.

The ECJ in the most recent case C64/17, *Saey Home & Garden*,<sup>394</sup> dealt with the jurisdiction agreement, which was concluded verbally, was not evidenced in writing, and the general terms (including the jurisdiction clause) were included only in the invoices. The ECJ held that a jurisdiction clause contained in the invoices does not satisfy the formal requirements. Such a conclusion is in line with the previous national case law.<sup>395</sup>

The national case law also developed another criterion as to the general terms and conditions containing jurisdiction clauses. For example, the case when the contract did not make any express reference to the general terms (including the jurisdiction clause) was considered

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<sup>392</sup> ECJ, Case C222/15, *Hőszig*, par. 39.

<sup>393</sup> For the same conclusion regarding printing of a jurisdiction clause on the reverse of the bill of lading, see also ECJ, Case 71/83, *Tilly Russ*, par. 16.

<sup>394</sup> ECJ, Case C-64/17, *Saey Home & Garden NV/SA v. Lusavouga-Máquinas e Acessórios Industriais SA*, 8 March 2018, ECLI:EU:C:2018:173.

<sup>395</sup> *Corte di Cassazione*, S.U., n. 20887, 27 September 2006, *Rivista di diritto internazionale privato e processuale*, (2007), p. 759; *Tribunale di Lecco*, 15 April 2010, *Rivista di diritto internazionale privato e procedssuale*, 2012, p. 221.

insufficient by the German and Italian courts.<sup>396</sup> On the contrary, the formal requirements within the meaning of Article 25 of the Brussels *Ibis* Regulations are met where one of the parties signs the general terms and conditions separately and explicitly,<sup>397</sup> or where an apparent reference to the general terms is mentioned in the contract, or in the front page below the signature,<sup>398</sup> without the necessity to make an explicit reference to the jurisdiction clause.<sup>399</sup>

## 7.2. Evidenced in Writing

Although Article 25 of the Brussels *Ibis* Regulation does not permit the oral agreement for the valid conclusion of the jurisdiction clause, it allows a “half writing” method, which requires two elements – a verbal agreement and a subsequent written confirmation.<sup>400</sup>

The ECJ dealt with the situation in two judgements when the oral agreement was confirmed in writing, and such written confirmation referred to general terms containing the jurisdiction clause. In the ECJ case 71/83, *Tilly Russ*, concerned a dispute where a jurisdiction clause appeared in the conditions printed on a bill of lading signed by the carrier, which was subject to a prior oral agreement on the jurisdiction clause. The ECJ held that the formal requirements of “evidenced in writing” were fulfilled, even if conditions printed on a bill of lading was not signed by the shipper and bore only the signature of the carrier. According to the ECJ, the function of this form is to ensure that the agreement of the parties is clearly established.

In the case 25/76, *Segoura*, the parties concluded an oral contract, and a partial payment was provided. The vendor delivered to the purchaser a confirmation of the order and an invoice, which referred to the conditions on the reverse containing a jurisdiction clause. The purchaser did not confirm delivery. The ECJ stated that even if the purchaser agreed to abide by the general conditions, it could not be considered as acceptance of a jurisdiction clause which might appear in the general conditions unless the purchaser agrees to it in writing.<sup>401</sup> Not raising any objections against a written confirmation does not constitute the acceptance of the

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<sup>396</sup> *OLG Hamm*, IPRspr 1977, 118; *Corte di Cassazione*, S.U., n. 13891, 14 June 2007, *Rivista di diritto internazionale privato e processuale*, (2008), p. 505.

<sup>397</sup> *OLG München*, RIW, 1989, 901.

<sup>398</sup> *LG Hamburg*, RIW, 1977, 424.

<sup>399</sup> *OLG Düsseldorf*, RIW, 2001, 63, 64.

<sup>400</sup> U. MAGNUS, *Article 25*, in *Brussels I Bis Regulation*, 2016, *op. cit.*, p. 641.

<sup>401</sup> ECJ, Case 25/76, *Galeries Segoura*, par. 8.

jurisdiction clause.<sup>402</sup> The situation would be different when an oral agreement, which forms part of a continuing trading relationship, is based on the general conditions containing a jurisdiction clause.<sup>403</sup>

In other two judgments, the ECJ concerned the reverse situation - the oral modification of the already concluded written contract containing a jurisdiction clause. In the first case 221/84, *Berghoef*,<sup>404</sup> the ECJ has dealt with the validity of a jurisdiction clause initially agreed in writing and subsequently amended orally. The parties had agreed in the agency contract that the Tribunal de Commerce in Roanne (France) would have jurisdiction, but the plaintiff claimed that he had agreed orally with the defendant to modify the initial jurisdiction agreement and to confer jurisdiction on the German courts. The ECJ decided that the formal requirements are satisfied concerning the jurisdiction established by express oral agreement, if the written confirmation of that agreement by one of the parties was received by the other and that the latter raised no objection. According to the ECJ, it would be a breach of good faith to raise any objection if the subsequent oral agreement was not contested previously.<sup>405</sup> Thus, it can be stated that this case covers only the specific case, *i.e.*, an oral modification of the original jurisdiction agreement, which was subsequently confirmed in writing by one party without objecting it by another party. However, this interpretation cannot find an application for the mere oral modification of the jurisdiction clause.

In the second judgment, Case 313/85, *Iveco Fiat*,<sup>406</sup> the ECJ concerned a dispute, where the contract, containing a jurisdiction clause, continued to serve as the legal basis for the contractual relations between the parties after its expiry date, although the agreement could be renewed only in writing. The ECJ took two views on this issue: when the law applicable to the jurisdiction agreement allows the renewal of the original written agreement, all the terms of the agreement (including the jurisdiction clause) continue to be binding on the parties.

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<sup>402</sup> ECJ, Case 25/76, *Galleries Segoura*, par. 12.

<sup>403</sup> ECJ, Case 25/76, *Galleries Segoura*, par. 11. In this sense see *Corte di Cassazione*, S.U., n. 4634, 28 February 2007, *Rivista di diritto internazionale privato e processuale*, (2008), p. 168, where the court affirmed that Article 17 of the Brussels Convention, as well as Article 23 of the Brussels I Regulation do not require the written acceptance according to Article 1341 of the Italian Code on Civil Procedure. The form within the meaning of Article 23 par. 1 lett. a) is satisfied where the agreement is implied through execution of Article 1327 of the Italian Code on Civil Procedure.

<sup>404</sup> ECJ, Case 221/84, *F. Berghoef GmbH & Co. KG v ASA SA*, 11 July 1985, ECLI:EU:C:1985:337.

<sup>405</sup> ECJ, Case 221/84, *F. Berghoef*, par. 15.

<sup>406</sup> ECJ, Case 313/85, *SpA Iveco Fiat v Van Hool NV*, 11 November 1986, ECLI:EU:C:1986:423.

However, when the law applicable to jurisdiction agreements does not allow such renewal, the court must analogically apply the interpretation provided in ECJ Case 221/84, *Berghoef*.

### **7.3. Practices between the Parties**

According to Article 25 par. 1 lett. b) of the Brussels Regulation, the agreement conferring jurisdiction shall be “*in a form which accords with practices which the parties have established between themselves*”. The rule on this form of the jurisdiction clause was inserted in the Brussels Convention in 1989 and was a reaction to the ECJ judgment *Segoura*. The wording was taken from the CISG. Continuing trading relationship between the parties, relying on the principle of good faith, justifies the formal validity of the jurisdiction clause. However, the practice between the parties must be established on a regular basis, and it must last a particular time and take place several times.<sup>407</sup> Apparently, from the previous business practice, it must be evident that the parties concluded the jurisdiction clause; it cannot be assumed from the repeated practice that the jurisdiction clause mirrors the common will of the parties.<sup>408</sup>

### **7.4. International Trade Usage**

This form of the jurisdiction agreement made

*...in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned...*

is admitted by Article 25 par. 1 lett. c) of the Brussels *Ibis* Regulation. Also, the rule on this form was inserted in the Brussels Convention in 1989 as a reaction to the ECJ judgment *Segoura*. The wording of this provision was inspired by the model of Article 9 par. 2 of the CISG. This provision represents “the relaxation” of the requirements as to form laid down by Article 25 par. 1 lett. a) of the Brussels *Ibis* Regulation by eliminating the need for a written

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<sup>407</sup> U. MAGNUS, *Article 25*, in Brussels I *Bis* Regulation, 2016, *op. cit.*, p. 644.

<sup>408</sup> *BGH*, IHR 2004, 221, 222; U. MAGNUS, *Article 25*, in Brussels I *Bis* Regulation, 2016, *op. cit.*, p. 644.

form of consent for the purpose of non-formalism, simplicity and speed in international trade.<sup>409</sup>

According to the ECJ, the real consent of the parties must also be established with regard to lett. c) of the Brussels *Ibis* Regulation “*since it is still one of the aims of that provision to ensure that there is real consent on the part of the persons concerned*”.<sup>410</sup> However, consent may be presumed when commercial usages in a specific branch of international trade or commerce exist.<sup>411</sup> Consent is not identified in relation to commercial trade or commerce in general, but the relevant branch must be taken into consideration, in particular, when conduct is “generally and regularly” followed by operators in that specific branch.<sup>412</sup> It means that such conduct becomes usage after a regular and a general time during which it was observed. The usage, in contrast with the practice between the parties (lett. b) of par. 1 of Article 25 of the Brussels *Ibis* Regulation), does not exist *inter partes*. Although the usage must be constituted worldwide, it does not have to be established in specific countries. However, the general and regular observation by operators in the states playing a prominent role in a given branch can help to prove the existence of such usage.<sup>413</sup>

How can the national courts ascertain whether the parties were aware of this usage? According to the ECJ, such “awareness” is presumed when the parties established commercial or trade relations between themselves or between other parties operating in the sector, or such usage is sufficiently well known since it was followed on the general and regular basis.<sup>414</sup> The publicity of the usage provided by the specific associations does not play any role, but can make it easier to prove awareness.<sup>415</sup>

Therefore, the national courts must determine whether the contract is a part of international trade or commerce and, whether the usage operates in the relevant branch.<sup>416</sup> There may be borderline cases when deciding whether the conduct is “general and regular” and may be subsumed under the term “international usage” since the term represents indefinite and vague term. In consequence, it might be recommended not to rely on this form and to opt for an

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<sup>409</sup> ECJ, Case C-106/95, *MSG*, par. 18.

<sup>410</sup> ECJ, Case C-106/95, *MSG*, par. 17.

<sup>411</sup> ECJ, Case C-106/95, *MSG*, paras. 19 and 20.

<sup>412</sup> ECJ, Case C-106/95, *MSG*, par. 23.

<sup>413</sup> ECJ, Case C-159/97, *Trasporti Castelletti*, par. 27.

<sup>414</sup> ECJ, Case C-159/97, *Trasporti Castelletti*, par. 43.

<sup>415</sup> ECJ, Case C-159/97, *Trasporti Castelletti*, par. 44.

<sup>416</sup> ECJ, Case C-106/95, *MSG*, par. 21.



“easier” alternative – *i.e.*, to conclude a written choice-of-court agreement. In any case, this provision may be helpful in case that the jurisdiction clause was not concluded and one of the parties makes an effort to reconstruct the jurisdiction agreement *ex post*.

## 7.5. Communication by Electronic Means

The second paragraph of Article 25 of the Brussels *Ibis* Regulation provides that:

*Any communication by electronic means which provides a durable record of the agreement shall be equivalent to ‘writing’.*

This provision aims at treating certain forms of electronic communications in the same way as written communications,<sup>417</sup> since: “...*the need for an agreement ‘in writing or evidenced in writing’ should not invalidate a choice-of-forum clause concluded in a form that is not written on paper but accessible on screen.*”<sup>418</sup>

The national case law has suggested assuming other criteria. For example, the durable record of electronic communication may be understood as printing, saving, a backup tape, disk, storing it in some other way, or a record which is accessible to be usable for subsequent reference.<sup>419</sup> In other words, the formal requirements are satisfied if the electronic communication provides a durable record, although if such durable record has not been made. The durable record is necessary to provide only for the scope of evidence of the existence of such a clause.<sup>420</sup>

Certain difficulties may arise in the context of the e-mail correspondence and the use of active websites. The ECJ in case C322/14, *Jaouad El Majdoub* ruled on “click-wrapping” which represents a method of accepting the general terms and conditions of a contract for sale (including jurisdiction agreement).<sup>421</sup> The ECJ stated that such acceptance constitutes a communication by electronic means, which provides a durable record of the agreement, “*where that method makes it possible to print and save the text of those terms and conditions*

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<sup>417</sup> ECJ, Case C322/14, *Jaouad El Majdoub v CarsOnTheWeb.Deutschland GmbH*, 21 May 2015, ECLI:EU:C:2015:334, par. 36.

<sup>418</sup> Explanatory Memorandum on the Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, (COM(1999) 348 final, 14 July 1999.

<sup>419</sup> In context of the 2007 Lugano Convention, see Pocar Report, par. 109.

<sup>420</sup> In context of the 2007 Lugano Convention, see Pocar Report, par. 109.

<sup>421</sup> On the similar conclusion see *High Court of Ireland, Ryanair Ltd v Billigfluege.De GmbH [2010] IEHC 47*.

*before the conclusion of the contract.*” Quite a different case was dealt with in the Italian court in 2013 when the sale contract referred to the general terms and conditions (including the jurisdiction clause), which were accessible on the website.<sup>422</sup> The court decided that the formal requirements by virtue of Article 23 of the Brussels I Regulation were met.

It must be born in mind that e-mail messages are stored in the recipient's mailbox; they can be downloaded or printed. It is usual that the jurisdiction clause is incorporated into the general condition and sent by e-mail. In these circumstances, the interpretation in ECJ case 24/76, *Estasis Salotti* in connection with the ECJ case C322/14, *Jaouad El Majdoub*, might be used analogously for e-mail correspondence. In case that an e-mail contains an express reference to the general terms, and the general terms may be printed and saved, such a reference could satisfy the formal conditions of Article 25 par. 2 of the Brussels *Ibis* Regulation. A certified electronic signature is not required.<sup>423</sup>

## **8. Substantive Validity**

Article 25 of the Brussel I Regulation has established a new rule on the substantive validity of the jurisdiction clause. First, the different theories on the substantive validity of the jurisdiction agreement under the Brussels Convention and the Brussels I Regulation are further introduced. Subsequently, the various proposals on this rule and the current rule on the substantive validity according to the Brussel I Regulation will be analysed.

### **8.1. The “Gap” in the Brussels Convention and the Brussels I Regulation as to the Substantive Validity**

Substantive validity means the consensus of the parties which have agreed on jurisdiction.<sup>424</sup> However, the absence of an explicit rule on the substantive validity in the Brussels Convention and the Brussels *Ibis* Regulation and the silence of the ECJ as to fraud, mistake, or duress and other related questions, as well as the capacity of the parties, has left room for

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<sup>422</sup> *Tribunale di Torino*, 13 May 2013, *Rivista di diritto internazionale privato e processuale*, (2015), p. 567.

<sup>423</sup> In contrast with, for example, Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, OJ L 399, 30 December 2006, when Article 7 par. 6 refers to Article 2(2) of Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures, OJ L 13, 19 January 2000.

<sup>424</sup> U. MAGNUS, *Article 25*, in *Brussels I Bis Regulation*, 2016, *op. cit.*, p. 626.

different doctrines and discussions. There are two central doctrinal theses concerning the substantive validity of the jurisdiction clauses in the light of Article 17 of the Brussels Convention and Article 23 of the Brussels I Regulation.

The first doctrine is based on the interpretation of the ECJ regarding the formal validity of the jurisdiction clauses, which is extended into the questions on substantive validity.<sup>425</sup> The ECJ in took the view in several occasions that “*the consensus must be clearly and precisely demonstrated*”<sup>426</sup>, which is presumed when “*the formal requirements of the agreements conferring jurisdiction are met*” and no reference to the national law is permitted.<sup>427</sup> The ECJ confirmed this conclusion in the case, C-159/97, *Trasporti Castelletti*, stating that

*...the choice-of-court in a jurisdiction clause may be assessed only in the light of considerations connected with the requirements laid down by Article 17.*<sup>428</sup>

In the case C-116/02, *Gasser*, the ECJ went even further when the ECJ stated that the jurisdiction clause is an independent concept to be appraised solely in relation to the requirements of Article 17 of the Brussels Convention.<sup>429</sup> Advocate General Leger in *Gasser* was even more specific when he held that

*...the formal and substantive conditions governing validity to which agreements conferring jurisdiction are subject must be assessed in the light of the requirements of Article 17 alone.*<sup>430</sup>

In other words, these judgments may lead to the conclusion that Article 23 of the Brussels Regulation provides a self-sufficient test for the validity of the jurisdiction clauses. Moreover, according to some authors, consent had to be interpreted autonomously: the existence of consent requires an inquiry which involves only the application of the rule of formal

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<sup>425</sup> A. DICKINSON, *The Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast) ('Brussels I bis' Regulation)*, Sydney Law School Research Paper No. 11/58, available at SSRN: <https://ssrn.com/abstract=1930712>, p. 21.

<sup>426</sup> ECJ, Case 24-76, *Estasis Salotti*, par. 7.

<sup>427</sup> ECJ, Case C-150/80, *Elefanten Schuh*, par. 25. The concept of agreement conferring jurisdiction must be interpreted independently and no reference to the national law is allowed.

<sup>428</sup> ECJ, Case C-159/97, *Trasporti Castelletti*, par. 49.

<sup>429</sup> ECJ, Case C-116/02, *Erich Gasser GmbH v MISAT Srl*, 9 December 2003, ECLI:EU:C:2003:657, para 51

<sup>430</sup> ECJ, Case C-116/02, *Erich Gasser GmbH v MISAT Srl*, 9 December 2003, ECLI:EU:C:2003:657, Opinion of Advocate General Leger, 9 September 2003, ECLI:EU:C:2003:436, par. 78.

requirements.<sup>431</sup> It means that there is little space left (if any) for the use of the national law. This begged the question: Does any other kind of consensus exist which could be assessed in addition to formal validity, according to Article 23 of the Brussel I Regulation? Is it possible to invalidate the formally valid jurisdiction agreement? Is there any space left for the invalidation due to fraud or duress?<sup>432</sup> For example, according to Professor Briggs, preclusion of any reference to any other rule of law, when the written agreement was obtained by extreme duress or fraud, would be absurd.<sup>433</sup> On the other hand, according to Professor Merrett, questions of fraud, mistake, duress etc., may be subordinated to the concept of good faith.<sup>434</sup> The ECJ has already recognised a concept of good faith concerning the jurisdiction clause in Case 221/84, *Berghoefer*, where ECJ stated that it would be a breach of good faith to raise any objection as to the validity of a jurisdiction clause initially agreed in writing and subsequently amended orally if the subsequent oral agreement was not contested previously.<sup>435</sup> Such an interpretation may be extended to another area of contracts.<sup>436</sup> Also, Professors Beaumont and McEleavy suggest that “*Union law could, in theory, be a better solution to the question of validity than a reference to national law.*”<sup>437</sup>

A different interpretation is also possible to develop in lights of the case law of ECJ, where the ECJ referred in a number of cases to the national law. In the case of C-214/89, *Powell Duffryn*, the ECJ stated that the concept of a jurisdiction agreement “*should not be interpreted simply as referring to the national law of one or other of the States concerned*”.<sup>438</sup>

Although it may seem that the ECJ excluded the reference to the national law, the analysis of its wording does not lead to a clear result. On the contrary, such an interpretation may be understood to mean that the reference to the national law is possible in certain cases.

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<sup>431</sup> Heidelberg Report, par. 376; L. MERRETT, *Article 23 of the Brussels I Regulation: A Comprehensive Code for Jurisdiction Agreements?*, *International & Comparative Law Quarterly* 58.3 (2009), p. 545-564.

<sup>432</sup> R. FENTIMAN, *International Commercial Litigation*, *op. cit.*, par. 2.36.

<sup>433</sup> A. BRIGGS, P. REES, *Civil Jurisdiction and Judgements*, Norton Rose, 2005, par. 2.105; L. COLLINS, C. G. J. MORSE, D. MCCLEAN, A. BRIGGS, J. HARRIS, C. MCLACHLAN, J. HILL (eds), *Dicey, Morris, and Collins on the Conflict of Laws*, Sweet & Maxwell, 2006, 14ed. par. 12.108.

<sup>434</sup> L. MERRETT, *Article 23 of the Brussels I Regulation: A Comprehensive Code for Jurisdiction Agreements?*, *op. cit.*, p. 559.

<sup>435</sup> ECJ, Case 221/84, *F. Berghoefer*, par. 15.

<sup>436</sup> L. MERRETT, *Article 23 of the Brussels I Regulation: A Comprehensive Code for Jurisdiction Agreements?*, *op. cit.*, p. 560.

<sup>437</sup> A. E. ANTON, P. R. BEAUMONT, P. E. MCELEAVY, *Private International Law*, W. Green/Thomson Reuters, 2011, 3ed., par. 8.108. On the same opinion see Z. TANG, *The Interrelationship of European Jurisdiction and Choice of Law in Contract*, *Journal of Private International Law* 4.:1 (2008), p. 46.

<sup>438</sup> ECJ, Case C-214/89, *Powell Duffryn*, par. 13.

Moreover, Advocate General Sir Gordon Slynn in the case *Elefanten Schuh* stated that the court seized when challenging jurisdiction must itself decide the validity of the agreement (other than in relation to the provisions as to form specified in Article 17 of the Brussels Convention) under the national law of the designated *forum*.<sup>439</sup> From this opinion, it is evident that Advocate General Slynn did not exclude the existence of a “different” validity. Also, in other judgements, the ECJ expressly referred to the national law, in particular in case of: the adoption of a choice-of-court clause in the statute of a company;<sup>440</sup> the renewal of a jurisdiction clause;<sup>441</sup> the interpretation of the choice-of-court agreement;<sup>442</sup> and the succession of a third party to the jurisdiction clause.<sup>443</sup> It means that if the ECJ judgments are analyzed as a whole “package”, it may be deduced that material rules for jurisdiction clauses exist.<sup>444</sup> Also, the doctrinal approaches concerning the necessity to give space to evaluate formally valid jurisdiction agreements obtained by extreme the fraud or duress suggested that the questions on substantive law are better left to the national law.<sup>445</sup>

The ambiguity based on the doctrinal discussions resulted from the different judgments of ECJ mentioned above. In consequence, it was not clear whether Article 23 of the Brussels I Regulation represented the independent regulation of the formation of the choice-of-court agreement, and thus the reference to the national law was excluded; or if the referral to the domestic was admitted, even more, if it was necessary.<sup>446</sup> In case that the second approach

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<sup>439</sup> Case C-150/80, *Elefanten Schuh*, The Opinion of Advocate General Sir Gordon Slynn, 20 May 1981, ECLI:EU:C:1981:112, p. 1699.

<sup>440</sup> ECJ, Case C-214/89, *Powell Duffryn*, par. 21.

<sup>441</sup> ECJ, Case 313/85, *SpA Iveco Fiat*, par. 7-8.

<sup>442</sup> ECJ, Case, C-269/95, *Benincasa*, par. 31.

<sup>443</sup> ECJ, C-387/98, *Coreck Maritime*, par. 24.

<sup>444</sup> U. MAGNUS, *Choice-of-court Agreements in the Review Proposal for the Brussels I Regulation*, in E. LEIN, (ed), *The Brussels I Review Proposal Uncovered*, British Institute of International and Comparative Law, 2012., p. 86; R. FENTIMAN, *International Commercial Litigation*, par. 2.32.

<sup>445</sup> U. MAGNUS, *Choice-of-court Agreements in the Review Proposal for the Brussels I Regulation*, *op. cit.*, p. 86; S. O'MALLEY, A. LAYTON, *European Civil Practice*, 2004, *op. cit.*, par. 20.029; U. MAGNUS, *Article 23, Brussels I Regulation*, 2012, *op. cit.*, p. 475; I. QUEIROLO, *Choice-of-court Agreements in the new Brussels I-bis Regulation: A critical Appraisal*, in *Yearbook of Private International Law*, 15 (2013/2014), p. 118, 124; F. C. VILLATA, *L'attuazione degli accordi di scelta del foro nel regolamento Bruxelles I*, CEDAM, 2012, p. 94; I. QUEIROLO, *Prorogation of Jurisdiction in the proposal for a Recast of the Brussels I Regulation*, in *Recasting Brussels I*, *op. cit.*, p. 183, 189; T. RATKOVIĆ, D. ZGRABLIĆ ROTAR, *Choice-of-court agreements under the Brussels I Regulation (Recast)*, *Journal of Private International Law* 9.2 (2013), p. 254-5.

<sup>446</sup> See A. MALATESTA, *Gli accordi di scelta del foro*, in A. MALATESTA (ed), *La riforma del regolamento di Bruxelles I: il regolamento (UE) n. 1215/2012 sulla giurisdizione e l'efficacia delle decisioni in materia civile e commerciale*, Giuffrè Editore, 2016., p. 69, where the author uses a word “necessity”.

prevails, what law should be applied to the jurisdiction agreements: the *lex fori* or the *lex causae*?

In case of the absence of a uniform rule to the substantive validity to jurisdiction clause, the solutions in the Member States may differ on the basis of various hypotheses, such as their nature.<sup>447</sup> The qualification of jurisdiction clauses as procedural in the specific Member States probably should lead to the application of *lex fori*.<sup>448</sup> On the other hand, their classification as substantive or procedural with substantive effects should indicate the use of *lex causae*.<sup>449</sup> As stressed in the Heidelberg Report,<sup>450</sup> the law of some Member States refers to the *lex fori*,<sup>451</sup> whereas others refer to the *lex causae*,<sup>452</sup> and in some Member States there is no clear answer.<sup>453</sup> It seems that a significant number of the Member States apply the conflict-of-laws rules of the seized Member State court.<sup>454</sup> The divergences between the Member States might be held materially valid in one Member State and invalid in other Member State.<sup>455</sup>

## 8.2. Substantive Validity according to Article 25 of the Brussels Ibis Regulation

Article 25 of the Brussels Ibis Regulation provides that the Member State court designated in the jurisdiction agreement shall have jurisdiction “...unless the agreement is null and void as to its substantive validity under the law of that Member State...”

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<sup>447</sup> A. MALATESTA, *Gli accordi di scelta del foro*, in *La riforma del regolamento di Bruxelles I*, *op. cit.*, p. 69

<sup>448</sup> F. C. VILLATA, *L’attuazione degli accordi di scelta del foro nel regolamento Bruxelles I*, *op. cit.*, p. 94. See also Heidelberg Report, par. 377.

<sup>449</sup> F. C. VILLATA, *L’attuazione degli accordi di scelta del foro nel regolamento Bruxelles I*, *op. cit.*, p. 94. See also Heidelberg Report, par. 377.

<sup>450</sup> Heidelberg Report, par. 377

<sup>451</sup> Cyprus, Greece, and Ireland apply *lex fori*. See Study JLS/C4/2005/03 “Compilation of All National Reports, Questionnaire No 3: Legal Problem Analysis”, [http://ec.europa.eu/civiljustice/news/docs/study\\_bx11\\_compilation\\_quest\\_3\\_en.pdf](http://ec.europa.eu/civiljustice/news/docs/study_bx11_compilation_quest_3_en.pdf), pp. 388–95.

<sup>452</sup> Austria, Estonia, Germany, Hungary, Latvia, Luxemburg, Malta, the Netherlands, Poland, Slovakia, and Spain, see Study JLS/C4/2005/03 “Compilation of All National Reports, Questionnaire No 3: Legal Problem Analysis”, [http://ec.europa.eu/civiljustice/news/docs/study\\_bx11\\_compilation\\_quest\\_3\\_en.pdf](http://ec.europa.eu/civiljustice/news/docs/study_bx11_compilation_quest_3_en.pdf), pp. 388–95.

<sup>453</sup> Italy, Slovenia see Study JLS/C4/2005/03 “Compilation of All National Reports, Questionnaire No 3: Legal Problem Analysis”, [http://ec.europa.eu/civiljustice/news/docs/study\\_bx11\\_compilation\\_quest\\_3\\_en.pdf](http://ec.europa.eu/civiljustice/news/docs/study_bx11_compilation_quest_3_en.pdf), pp. 388–95.

<sup>454</sup> U. MAGNUS, *Choice-of-court Agreements in the Review Proposal for the Brussels I Regulation*, in *The Brussels I Review Proposal Uncovered*, *op. cit.*, p. 86.

<sup>455</sup> Heidelberg Report, par. 377.

The legal recognition of severability of the formal and substantive validity was welcomed by certain scholars,<sup>456</sup> but the legal introduction of substantive validity to Article 25 of the Brussels *Ibis* Regulation was not the necessary solution, according to other scholars. For example, according to Professor Dickinson, the ECJ has reached a high level of legal certainty which assumes that only the requirements provided in Article 23 of the Brussels I Regulation are decisive for establishing consent.<sup>457</sup>

The current wording of Article 25 of the Brussels *Ibis* Regulation corresponds to the wording of the first Commission Proposal with the one exception, providing that “..*unless the agreement is null and void as to its substance*”<sup>458</sup> under the law of the designated Member State. The interesting point is the fact that the proposal did not consider the possibility of the application of the law of the seized (also non-designated) Member State, as it was applied prevalently in the Member States.<sup>459</sup> Moreover, the possibility of the application of the conflict-of-laws rules was not addressed. A major portion of the scholars deemed this rule to refer to the substantive law of the designated Member State.<sup>460</sup> However, the explanatory memorandum to the Commission Proposal provided that this solution should reflect the solution adopted in the Hague Convention on Choice of Court Agreements.<sup>461</sup>

The application of the substantive law, with the exclusion of conflict-of-laws rules, has an advantage in its simplicity, but it does not represent the best solution in a certain situation. The simultaneous application of the conflict-of-laws rules to the main contract and the application of the substantive law excluding conflict-of-laws rules to substantive validity of choice-of-court agreements would practically lead to their complete division. This approach

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<sup>456</sup> U. MAGNUS, *Choice-of-court Agreements in the Review Proposal for the Brussels I Regulation*, in *The Brussels I Review Proposal Uncovered*, *op. cit.*, p. 84; A. BRIGGS, *The Brussels Ibis Regulation Appears on the Horizon*, *Lloyd's Maritime and Commercial Law Quarterly*, 2013, p. 161.

<sup>457</sup> A. DICKINSON, *The Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)*, *op. cit.*, p. 21.

<sup>458</sup> Proposal for a Recast of the Brussels I Regulation, p. 32.

<sup>459</sup> U. MAGNUS, *Choice-of-court Agreements in the Review Proposal for the Brussels I Regulation*, in *The Brussels I Review Proposal Uncovered*, *op. cit.*, p. 86.

<sup>460</sup> The doctrine tended to interpret this wording as mere application of the substantive law, see B. HESS, *The Proposed Recast of the Brussels I Regulation: Rules on Jurisdiction*, in F. POCAR, I. VIARENGO, F. C. VILLATA (eds.), *Recasting Brussels I: Proceedings of the Conference Held at the University of Milan on 25-26 November 2011*, CEDAM, 2012, p. 105; I. QUEIROLO, *Prorogation of Jurisdiction in the Proposal for a Recast of the Brussels I Regulation In Recasting Brussels I*, in *Recasting Brussels I*, p. 190-191. On the opposite approach see C. HEINZE, *Choice-of-court agreements, coordination of proceedings and provisional measures in the reform of the Brussels I regulation*, *Rabels Zeitschrift fuer auslaendisches und internationales Privatrecht*, 75.3 (2011), p. 585.

<sup>461</sup> Proposal for a Recast of the Brussels I Regulation, p. 9.

might result in the validity of the main contract and invalidity of the jurisdiction clause and *vice versa*. Although such result would not contradict the principle of severability laid down by the Brussels regime, problems of separation would be even more evident in more complex contracts, such as in the Articles of Association.<sup>462</sup>

The opinion on the introduction of the explicit rule on substantive validity was also shared by the Committee for Legal Affairs of the European Parliament. However, the Committee for Legal Affairs of the European Parliament favoured the solution of *favour validitatis* in the proposal of 28 June 2011.<sup>463</sup> The proposed law to address substantive validity meant the rules of substantive law, with the exception of its rules of private international law. In particular, the law governing substantive validity was proposed as follows: (a) the law of the Member State of the court or courts designated by the agreement; (b) the law chosen by the parties to govern the agreement; (c) in the absence of such a choice, the law applicable to the contract of which the agreement forms a part; or (d) in all other cases, the law applicable to the particular legal relationship from which the dispute between the parties arose.<sup>464</sup> It means that the

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<sup>462</sup> On the similar approach, see C. HEINZE, *Choice-of-court agreements, coordination of proceedings and provisional measures in the reform of the Brussels I regulation*, *op. cit.*, p. 586.

<sup>463</sup> Committee on Legal Affairs, Draft Report on the proposal for a regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), PE467.046, 28 June 2011. See proposed Article 23a: «1. An agreement conferring jurisdiction shall be valid as to its substance if it is regarded as being such by: (a) the law of the Member State of the court or courts designated by the agreement, or (b) the law chosen by the parties to govern the agreement, or (c) in the absence of such choice, the law applicable to the contract of which the agreement forms a part, or (d) in all other cases, the law applicable to the particular legal relationship from which the dispute between the parties arose. 2. The law designated by points (b) to (d) of paragraph 1 shall apply even if that law is not the law of a Member State. 3. The law of any State designated by paragraph 1 means the rules of substantive law in force in that State with the exception of its rules of private international law. 4. The law designated by paragraph 1 shall not govern legal capacity. The reality of the consent of the parties to the agreement shall be governed by Article 23(1). 5. Where a State consists of several territorial units each with its own rules as to the substantive validity of agreements conferring jurisdiction, each territorial unit shall be regarded as a State for the purposes of this Article. 6. A Member State in which various territorial units have their own rules as to the substantive validity of agreements conferring jurisdiction shall not be bound to apply this Article to conflicts concerning solely the laws of those units.».

<sup>464</sup> This wording partially coincides with the proposal of A. DICKINSON, *The Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)*, *op. cit.*, p. 38: «Without prejudice to paragraph 1, an agreement conferring jurisdiction is materially valid if it is regarded as being such by either: (a) the law of any country in which any Member State court or courts designated by the agreement are located, or (b) the law chosen by the parties to govern the choice-of-court agreement or, in the absence of such choice, the law governing the contract or other relationship between the parties to which the choice-of-court agreement relates. The application of the law of any country designated by point (b) above means the rules of law in force in that State other than its rules of private international law, and that law shall apply even if it is not the law of a Member State. 1b. The law designated by paragraph 1 shall not govern questions of legal capacity.» This wording also partially coincides with the proposal of C. HEINZE, *Choice-of-court agreements, coordination of proceedings and provisional measures in the reform of the Brussels I regulation*, *op. cit.*, p. 587, where he proposed: «1. If the parties have



jurisdiction clause would be valid if one of the listed laws would regard the jurisdiction clause valid. This solution would ensure that the jurisdiction clause in most cases would be valid rather than invalid. The exclusion of the conflict-of-laws rule assumes the same solution as the Rome I Regulation, where *renvoi* is excluded. Letter b) regulates the choice-of-law (as Article 3 of the Rome I Regulation). Furthermore, this solution would resolve the problem of the “gap” in several Member States concerning substantive validity of the jurisdiction clause, which does not guarantee the respect of choice of law in relation to the validity of the jurisdiction clause. Letter c) does not separate the jurisdiction clause from the main contract whereby the law applicable to substantive validity may also be the law applicable to the main contract (where the parties fail to choose the law to govern the jurisdiction agreement). This would mirror the solution adopted in Article 10 of the Rome I Regulation where the law governing the contract determines the existence and substantive validity of a contract. Letter d) then would resolve other problems, such as the jurisdiction clause inserted into the Articles of Association. Therefore, letter a) providing for *lex fori* of the designated Member State court would lead, in theory, to the same law as in sopra listed letter b) and c).<sup>465</sup> This solution was not adopted.

On 29 June 2011, the Working Party was invited to discuss whether the reference to the law of the Member State should be construed as including the rules of private international law and whether any clarification is needed in the text or a recital.<sup>466</sup> On 24 February 2012, the Presidency of the Council of the European Union addressed the Working Party on Civil Law Matters proposal on substantive validity of the jurisdiction clause. It was directly specified in Article 23 that the law includes the conflict-of-law rules of the designated Member State.<sup>467</sup>

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*agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substance under the law of that Member State under the law designated by paragraph 5. 5. Subject to the provisions of this Regulation, an agreement referred to in paragraph 1 shall be governed by the law chosen by the parties, in the absence of such choice by the same law which governs the issue in dispute in the main contract in which the agreement is incorporated, and in the absence of a main contract by the substantive law of the Member State whose court or courts have been chosen in the agreement.»*

<sup>465</sup> U. MAGNUS, *Article 25*, in Brussels I Bis Regulation, 2016, *op. cit.*, p. 629.

<sup>466</sup> The Presidency and the incoming Polish Presidency of the Council of the European Union, 11867/11, 2010/0383 (COD), 29 June 2011, p. 21.

<sup>467</sup> The Presidency of the Council of the European Union, 6795/12, 2010/0383 (COD), 24 February 2012, p. 19. The specification was in the brackets: «...unless the agreement is null and void as to its substantive validity under the law [designated by the conflict-of-law rules] of that Member State...».

Finally, on 1 June 2012, the Presidency of the Council of the European Union proposed to the Council to add a new text as to the new rule on substantive validity of jurisdiction clause:

*The question as to whether a choice-of-court agreement in favour of a court or the courts of a Member State is null and void as to its substantive validity should be decided in accordance with the law of that Member State. The reference to the law of the Member State of the chosen court should include the conflict of laws rules of that State.*<sup>468</sup>

However, this rule was inserted into the Recital and not into the text concerning the choice-of-court agreement. The European Parliament kept the structure with regard to the clarification of the application of the conflict-of-laws rules in the Recital.<sup>469</sup> Such text was adopted by the European Parliament on 20 November 2012, and by the Council of the European Union on 6 December 2012.<sup>470</sup>

The current rule on substantive validity brings specific problems, such as the statutory weight of the Recital, law applicable to the non-exclusive clauses or exclusive clauses designating more Member State courts and the scope of substantive validity. These problems are individually dealt with in more details.

Recital 20 of the Brussels *Ibis* Regulation was probably inspired by the Explanatory Report to the Hague Convention on Choice of Court Agreements which also suggests application of conflict-of-laws rules of the *forum prorogatum* according to Article 5 par. 1 of the Hague Convention on Choice of Court Agreements.<sup>471</sup> Both of them do not have statutory weight, but they actively favour of inclusion of conflict-of-law rules.<sup>472</sup>

The law of the chosen Member State, including its conflict-of-laws rules, should ensure that all courts would consider the substantive validity of a choice-of-court agreement under the

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<sup>468</sup> The Presidency of the Council of the European Union, 10609/12 ADD 1, 2010/0383 (COD), 1 June 2012, p. 22.

<sup>469</sup> Committee on Legal Affairs, Amendments 121 Draft report - Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), PE496.504, 2010/0383 (COD), 25 September 2012, p. 13.

<sup>470</sup> European Parliament legislative resolution of 20 November 2012 on the proposal for a regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), T7-0412/2012, 2010/0383 (COD).

<sup>471</sup> T. Hartley, M. Dogauchi, Explanatory Report on the 2005 Hague Choice-of-court Agreements Convention, HCCH Publications, 2013, par. 125 (“Hartley-Dogauchi Report”). Some doubts on the interpretation provided in the Hartley-Dogauchi Report, see F. POCAR, *Brevi riflessioni in tema di revisione del regolamento Bruxelles I e clausole di scelta di foro*, *Diritto del Commercio Internazionale*, (2) 2012, p. 332.

<sup>472</sup> U. MAGNUS, *Article 25*, in Brussels I *Bis* Regulation, 2016, *op. cit.*, p. 629.

same substantive national law.<sup>473</sup> Therefore, it offers uniform solutions - it avoids the non-uniformity between the designated court and seized non-designated court<sup>474</sup> and inconsistent judgments on the validity of the jurisdiction agreement.<sup>475</sup> The potential problem may represent the ambiguous approaches concerning application of the Rome I Regulation. Although jurisdiction clauses were excluded from the Rome I Regulation (Article 1 par. 2 lett. e), as well as from the Rome Convention (Article 1 par. 2 lett. d). there is no uniformity between the Member States. Some Member States apply the national law, and some Member States abolished their conflict-of-laws rules due to the application of the Rome I Regulation, or they analogously apply the Rome I Regulation.<sup>476</sup> There is also doctrinal support for the method that conflict-of-laws rules of the Rome I Regulation should be applied in all Member State courts.<sup>477</sup> The application of the Rome I Regulation would ensure the possibility of application of the choice-of-law rule,<sup>478</sup> whereby according to some of the national law of the Member States, the choice of law may be excluded.

Also, the problem of *renvoi* to the law of the other States including its conflict-of-laws rules permitted by the domestic acts may complicate the testing of the substantive validity of the

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<sup>473</sup> A. SCHULZ, *The Hague convention of 30 June 2005 on choice- of- court agreements*, *Journal of Private International Law* 2:2 (2006), p. 253.

<sup>474</sup> On the context of the Hague Convention see R. A. BRAND, P. HERRUP, *The 2005 Hague Convention on Choice- of-court Court Agreements: Commentary and Documents*, Cambridge University Press, 2008, p. 90.

<sup>475</sup> On the context of the Hague Convention see Hartley-Dogauchi Report, par. 149.

<sup>476</sup> For example, in Germany, the conflict-of-laws rule was abolished when the Rome I Regulation became applicable. In Belgium, the scope of application of the Rome I Regulation is extended, see H. BOULARBAH, *Le nouveau droit international privé belge*, *March Journal des Tribunaux*, (2005), p. 190. In Italy, in the absence of the conflict-of-laws rules to the substantive validity of the jurisdiction clause in Italian legal order, probably the Rome Convention would find the application by its extension through Article 57 of the Italian Act on Private International Law. On this approach see S. CARBONE, *Il Nuovo Spazio Giudiziario Europeo in Materia Civile E Commerciale: Il Regolamento UE N. 1215/2012*, Giappichelli, 2016, p. 928. On the possibilities of the law applicable to the substantive validity in Italy see F. C. VILLATA, *L'attuazione degli accordi di scelta del foro nel regolamento Bruxelles I*, *op. cit.*, p. 105-106; F. C. VILLATA, *Sulla legge applicabile alla validità sostanziale degli accordi di scelta del foro: appunti per una revisione dell'art. 4 della legge n. 218/1995*, pp. 973-986. In Spain, the Spanish court would probably apply Article 10 par. 5 of the Spanish Civil Code where the law of common nationality applies. see Article 10 par. 5 of the Spanish Civil Code, approved by Royal Decree of July 24, 1889, ("Spanish Civil Code") provides: «*The law to which the parties have expressly submitted shall apply to contractual obligations, provided that it has some connection with the transaction in question; in the absence thereof, the law of the common nationality of the parties shall apply; and in the absence of such law, then that of their common habitual residence and, lastly, the law of the place where the contract has been entered into.*». Article 12 par. 2 of the Civil Code (approved by Royal Decree of July 24, 1889) says: «*Referral to foreign law shall be deemed made to its material law, without taking into account any renvoi made by its conflict of laws rules to another law other than Spanish law*». On the possibility of the application of the Spanish Civil Code and on translation see M. HERRANZ BALLESTEROS, *The Regime of Party Autonomy in the Brussels I Recast: the Solutions Adopted for Agreements on Jurisdiction*, *Journal of Private International Law*, 10:2 (2014), p. 300.

<sup>477</sup> U. MAGNUS, *Article 25*, in *Brussels I Bis Regulation*, 2016, *op. cit.*, p. 629.

<sup>478</sup> Article 3 of the Rome I Regulation, as well as Article 3 of the Rome Convention.

jurisdiction clause, contrary to the Rome I Regulation, where *renvoi* is excluded.<sup>479</sup> The simplest solution would be not to apply *renvoi*, but the different Member States adopt different solutions to this problem.<sup>480</sup>

Another problematic issue represents the situation when the parties select two or more Member State courts to decide their dispute, *i.e.*, the problem of the non-unique exclusive or even non-exclusive jurisdiction clauses in the context of the substantive validity.<sup>481</sup> Which law would govern the substantive validity of the jurisdiction clause as provided in the cases *Meeth* or even *Rotschild*? One of the options is testing the substantive validity under the law of all designated Member States. This solution is advocated by Professor Magnus when both courts would apply the provisions of the Rome I Regulation which would lead to the same substantive law.<sup>482</sup> Another option is checking the substantive validity only under the law of the seized designated Member State. However, what will happen if the seized Member State court would not be one of the chosen Member State courts? In case the jurisdiction clause will be non-exclusive, the new *lis pendens* rule according to Article 31 par. 2 of the Brussels Ibis Regulation is not applicable, and the seized non-designated Member State would be obliged to proceed according to the “first seized” *lis pendens* rule; thus, it would be obliged to test the substantive validity.<sup>483</sup> Probably, in such a case, the seized non-designated Member State court should apply conflict-of-laws rules of all designated Member State courts, but it would be unreasonable if the seized non-designated Member State would “choose” randomly one of the conflict-of-laws rules of the designated Member States in order to test substantive validity. The other uncertainty as to the substantive validity of the jurisdiction clause concerns its scope. Some academics divide the validity of jurisdiction clause into three types: formal validity in its usual sense; validity as to *prima facie* consent; and substantive validity

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<sup>479</sup> Article 20 of the Rome I Regulation, as well as Article 15 of the Rome Convention.

<sup>480</sup> For example, in France there is “simple renvoi”, in England “double renvoi”. On the problem of the renvoi according to the Brussels I -bis Regulation see T. HARTLEY, *Choice-of-Court Agreements under the European and International Instruments: The Revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*, *op. cit.*, p. 166.

<sup>481</sup> Recital 20 of the Brussels Ibis Regulation is drafted on the assumption that only one Member State court can be designated.

<sup>482</sup> U. MAGNUS, *Article 25*, in Brussels I Bis Regulation, 2016, *op. cit.*, p. 631.

<sup>483</sup> See different opinion, M. HERRANZ BALLESTEROS, *The Regime of Party Autonomy in the Brussels I Recast: the Solutions Adopted for Agreements on Jurisdiction*, *op. cit.*, p. 296.

excluding formal consent, but including, the creation of consent and capacity.<sup>484</sup> Hence, which issues relate to substantive validity, according to Article 25 of the Brussels *Ibis* Regulation? In the first place, Article 25 of the Brussels *Ibis* Regulation uses the term “null and void as to its substantive validity”. According to Professor Magnus, validity covers all issues which may invalidate the formally valid jurisdiction clause, such as incapacity or violation of good morals.<sup>485</sup> However, due to the silence of the EU legislator in respect to the capacity of the parties to enter into jurisdiction agreements, the opinion leaves certain doubts. Such a solution would be only partially supported by the alignment with the rules on the capacity contained in the Hague Convention on Choice of Court Agreements.<sup>486</sup> In consequence, it may be considered to apply conflict-of-laws rules of the seized Member State court.<sup>487</sup> The question also arises whether the other circumstances which may render the jurisdiction clause “voidable” are included in the new rule on substantive validity. The voidable circumstances invalidate the jurisdiction clause only if the party invokes the invalidation and may cover error, mistake, fraud, duress, and threats.<sup>488</sup> Such problems may be even more evident when an error, mistake, fraud, duress, or threats are considered to be voidable circumstances according to the certain national laws.<sup>489</sup> During the approval process of the Brussels *Ibis* Regulation, it was suggested by professor Magnus to make this rule clearer as it follows: “*The substantive validity (concerning capacity, mistake, fraud, duress) of the choice-of-court agreement is governed by the law of the Member State where the chosen court or courts are*

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<sup>484</sup> T. RATKOVIĆ, D. ZGRABLJIĆ ROTAR, *Choice-of-court agreements under the Brussels I Regulation (Recast)*, *op. cit.*, p. 12.

<sup>485</sup> U. MAGNUS, *Choice-of-court Agreements in the Review Proposal for the Brussels I Regulation*, in *The Brussels I Review Proposal Uncovered*, *op. cit.*, p. 93.

<sup>486</sup> On the substantive validity under the of the Hague Convention on Choice of Court Agreements see *infra* Chapter Two, Subchapter II, Section 5. Tquestion of capacity of the parties is included in the question of “null and void” jurisdiction agreement in case that the designated court is seized according to Article 5 of the Hague Convention on Choice of Court Agreements. However, the question of capacity is separated by the phrase “null and void” whenever the non-designated court is seized and is governed by the *lex fori* including conflict-of-law rules according to Article 6 lett. b) and simultaneously by the law of the chosen court according to Article 6 lett. a) of the Hague Convention on Choice- of Court Agreements.

<sup>487</sup> See Article 1 par. 2 lett. a) of the Rome I Regulation where the question of capacity is excluded from the scope of its application. On the similar conclusion see F. C. VILLATA, *L’attuazione degli accordi di scelta del foro nel regolamento Bruxelles I*, *op. cit.*, p. 109; M. WELLER, *Choice of Forum Agreements Under the Brussels I Recast and Under the Hague Convention: Coherences and Clashes*, *op. cit.*, p. 10.

<sup>488</sup> U. MAGNUS, *Choice-of-court Agreements in the Review Proposal for the Brussels I Regulation*, in *The Brussels I Review Proposal Uncovered*, *op. cit.*, p. 93.

<sup>489</sup> On similar considerations, see A. MALATESTA, *Gli accordi di scelta del foro*, in *La riforma del regolamento di Bruxelles I: il regolamento (UE) n. 1215/2012 sulla giurisdizione e l’efficacia delle decisioni in materia civile e commerciale*, *op. cit.*, p. 71.

located”.<sup>490</sup> Unfortunately, the wording of Article 25 of the Brussels *Ibis* Regulation did not clarify this issue. However, according to some scholars, voidable circumstances should be subsumed under Article 25 of the Brussels *Ibis* Regulation.<sup>491</sup> This opinion can be supported by the original intention of the Commission to harmonize the rule with the Hague Convention on Choice of Court Agreements which also use the term “null and void”, but the Explanatory Report recognised the grounds as fraud, mistake, misrepresentation, duress, and lack of capacity.<sup>492</sup>

Moreover, it remains unclear whether Article 25 of the Brussels *Ibis* Regulation still contains the autonomous elements on the formation of the agreement not referring to the national law,<sup>493</sup> or if the concept such as “considerations” is newly relevant in the context of the substantive validity.<sup>494</sup> However, the word “unless” would indicate that the interpretation of the validity of a choice-of-court agreement is presumed by virtue of the current ECJ judgments on the formation of the consent; “null and void” points in the direction of restrictions on the grounds which might invalidate the jurisdiction clause.<sup>495</sup> In consequence, it might be stated the internal considerations on the formation of the jurisdiction clause should not interfere with the formal validity according to Article 25 of the Brussels *Ibis* Regulation.<sup>496</sup>

If we conclude that formal validity by virtue of Article 25 of the Brussels *Ibis* Regulation and as interpreted by the ECJ will be untouched by this new rule on substantive validity, and if the concept “null and void” refers only to the substantive grounds, the question arises whether specific matters such as agency, assignment, interpretation, subrogation, etc. are separate

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<sup>490</sup> U. MAGNUS, *Choice-of-court Agreements in the Review Proposal for the Brussels I Regulation*, in *The Brussels I Review Proposal Uncovered*, *op. cit.*, p. 93.

<sup>491</sup> M. HERRANZ BALLESTEROS, *The Regime of Party Autonomy in the Brussels I Recast: the Solutions Adopted for Agreements on Jurisdiction*, *op. cit.*, p. 296; C. HEINZE, *Choice-of-court agreements, coordination of proceedings and provisional measures in the reform of the Brussels I regulation*, *op. cit.*, p. 585; U. MAGNUS, *Article 25*, in *Brussels I Bis Regulation*, 2016, *op. cit.*, p. 630.

<sup>492</sup> Hartley-Dogauchi Report, par. 126.

<sup>493</sup> ECJ, Case C-150/80, *Elefanten Schuh*, par. 25.

<sup>494</sup> U. MAGNUS, *Choice-of-court Agreements in the Review Proposal for the Brussels I Regulation*, in *The Brussels I Review Proposal Uncovered*, *op. cit.*, p. 93.

<sup>495</sup> U. MAGNUS, *Article 25*, in *Brussels I Bis Regulation*, 2016, *op. cit.*, p. 627.

<sup>496</sup> A. BRIGGS, *Agreements on Jurisdiction and Choice of Law*, *op. cit.*, p. 138-143; M. HERRANZ BALLESTEROS, *The Regime of Party Autonomy in the Brussels I Recast: the Solutions Adopted for Agreements on Jurisdiction*, *op. cit.*, p. 302.

aspects of substantive validity.<sup>497</sup> The ECJ has already stated that specific matters are governed by national law, in particular when adopting a choice-of-court clause in the statute of a company,<sup>498</sup> the renewal of a jurisdiction clause,<sup>499</sup> the interpretation of the choice-of-court agreement,<sup>500</sup> and the succession of a third party to the jurisdiction clause.<sup>501</sup> Is the new rule on substantive validity applied to these issues? One may suggest that due to the wording “as to the substantive validity” the meaning must be restricted and thus, the other grounds which could invalidate the jurisdiction clause must remain excluded from the application of the new rule on substantive validity.<sup>502</sup> Professor Magnus admits the non-application of the new rule on substantive validity to these remaining issues, but he suggests application of the conflict-of-laws rules of the prorogued court in this regard.<sup>503</sup> During the preparatory works, he proposed to cover other separate questions such as agency or assignment under this rule, by providing:

*The substantive validity (concerning capacity, mistake, fraud, duress) of the choice-of-court agreement as well as matters such as agency and assignment connected with the formation of such agreement are governed by the law designated by the rules of private international law of the Member state where the chosen court or courts are located.*<sup>504</sup>

## **9. Effects of Choice-of-Court Agreements in respect of the Third Parties**

A jurisdiction agreement, usually included in the contracts, limits its effect only to the contractual parties *ultra partes*. The rights and duties incorporated in the contract may be

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<sup>497</sup> U. MAGNUS, *Choice-of-court Agreements in the Review Proposal for the Brussels I Regulation*, in *The Brussels I Review Proposal Uncovered*, *op. cit.*, p. 93.

<sup>498</sup> ECJ, Case C-214/89, *Powell Duffryn*, par. 21.

<sup>499</sup> ECJ, Case 313/85, *SpA Iveco Fiat*, par. 7-8.

<sup>500</sup> ECJ, Case, C-269/95, *Benincasa*, par. 31.

<sup>501</sup> ECJ, C-387/98, *Coreck Maritime*, par. 24.

<sup>502</sup> F. C. VILLATA, *L'attuazione degli accordi di scelta del foro nel regolamento Bruxelles I*, *op. cit.*, p. 103; T. Hartley, *Choice-of-Court Agreements under the European and International Instruments: The Revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*, *op. cit.*, p. 131; M. HERRANZ BALLESTEROS, *The Regime of Party Autonomy in the Brussels I Recast: the Solutions Adopted for Agreements on Jurisdiction*, *op. cit.*, p. 303; A. MALATESTA, *Gli accordi di scelta del foro*, in *La riforma del regolamento di Bruxelles I: il regolamento (UE) n. 1215/2012 sulla giurisdizione e l'efficacia delle decisioni in materia civile e commerciale*, *op. cit.*, p. 72.

<sup>503</sup> U. MAGNUS, *Article 25*, in *Brussels I Bis Regulation, 2016*, *op. cit.*, p. 631.

<sup>504</sup> U. MAGNUS, *Choice-of-court Agreements in the Review Proposal for the Brussels I Regulation*, in *The Brussels I Review Proposal Uncovered*, *op. cit.*, p. 93-95.

transferred partially or as a whole to the third parties. Can the third parties be bound by the choice-of-court agreements when there is no consent?

The Brussels *Ibis* Regulation does not directly regulate this issue, but two provisions of the Brussels *Ibis* Regulation implicitly extend the effects of the jurisdiction agreements to the third parties: (i) to trustees and beneficiaries in the “unilateral”<sup>505</sup> trust instruments according to Article 25 par. 3 of the Brussels *Ibis* Regulation; and (ii) to the insured and the beneficiaries in insurance contracts according to Article 15 par. 2 of the Brussels *Ibis* Regulation. The ECJ has also admitted the extension of the effects to the third parties on several occasions – regarding company statutes, bills of lading, and chain of contracts.

### 9.1. Company Statutes

As stated in Section 4 of this Subchapter, the ECJ in the judgment C-214/89, *Powell Duffryn*, considered the choice-of-court agreement incorporated into the statute of the company. The ECJ decided that such a clause constitutes an agreement conferring jurisdiction within the meaning of Article 17 of the Brussels Convention.

According to the ECJ, the company’s statutes must be regarded as a contract covering relations between the shareholders respectively and between the shareholders and the company. The relationship between the shareholders is comparable to the relationship of the parties to a contract, whereby their rights and obligations are set out in the company’s statutes.<sup>506</sup> This part of the interpretation seems to be in line with the principle of the effects of the clause *inter partes* since the shareholders constituting the company express their consent with the statute and the jurisdiction clause. Therefore, such clauses must be regarded as an agreement within the meaning of Article 17 of the Brussels Convention. However, the ECJ went even further. According to the ECJ, the adoption of the jurisdiction clause which was opposed by the shareholder is irrelevant and the statute binds the shareholder, even if he entered into the company after the clause was adopted<sup>507</sup> since the shareholder:

*...agrees to be subject to all the provisions appearing in the statutes of the company and to the decisions adopted by the organs of the company, in accordance with the*

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<sup>505</sup> Schlosser Report, p. 320; S. O’MALLEY, A. LAYTON, *European Civil Practice*, 1989, *op. cit.*, p. 736.

<sup>506</sup> ECJ, Case C-214/89, *Powell Duffryn*, par. 16.

<sup>507</sup> ECJ, Case C-214/89, *Powell Duffryn*, par. 18.



*provisions of the applicable national law and the statutes, even if he does not agree with some of those provisions or decisions.*<sup>508</sup>

In other words, the new shareholder of the company that accedes to the statute is bound by the jurisdiction clause without the necessity to give express consent. However, the national applicable law regulates the modality of the introduction of the jurisdiction clause into the statutes. The ECJ did not specify if a national law is the *lex fori* of the seized Member State court or *lex fori prorogati*. Because it is presumed this issue is not governed by the new rule on substantive validity according to Article 25 of the Brussels *Ibis* Regulation,<sup>509</sup> it will depend on the seized Member State court what “applicable national law” will be applied. It might be suggested to apply the *lex fori prorogati*,<sup>510</sup> but on the other hand, the ECJ in the judgment *CDC* (which is analysed further) by referring to the *Coreck* case explicitly specified that the application of the national law is the rules of private international law of the court *seized*.<sup>511</sup>

As to the formal requirements prescribed in the Brussels *Ibis* Regulation, according to the ECJ, they are deemed to be satisfied if the statutes are lodged in a place to which the shareholder may have access, such as the seat of the company, or are contained in a public register.

## **9.2. Bills of Lading**

In three judgments, the ECJ addressed the opposability of the jurisdiction clause incorporated in a bill of lading between a carrier and a shipper in respect of a bearer.

In the judgments 71/83, *Tilly Russ* and *Trasporti Castelletti*, the ECJ upheld that, a valid and formally consented to jurisdiction agreement incorporated in a bill of lading is binding for a third party, which has succeeded to the shipper’s rights and obligations by acquiring the bill of lading under the *relevant national law*.<sup>512</sup> The third party becomes subject to all the rights

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<sup>508</sup> ECJ, Case C-214/89, *Powell Duffryn*, par. 19.

<sup>509</sup> See *supra* Section 8.2. of this Subchapter. On the opposite approach see L. PENASA, *Gli accordi sulla giurisdizione tra parti e terzi. Vol. 2: Profili soggettivi*, CEDAM, 2017, p. 162.

<sup>510</sup> U. MAGNUS, *Article 25*, in Brussels *I Bis* Regulation, 2016, *op. cit.*, p. 631.

<sup>511</sup> ECJ, Case C-352/13, *CDC*, par. 65.

<sup>512</sup> Emphasis added.

and to all the obligations under the bill of lading.<sup>513</sup> In other words, the question of the opposability against the third party is governed by the applicable national law (applying its conflict-of-laws rules). In *Coreck* case, the ECJ confirmed the interpretation provided in the 71/83, *Tilly Russ* and *Trasporti Castelletti* case, and decided that in cases that the rights and obligations do not succeed to the third party under the applicable national law, the seized Member State court must ascertain, whether the third party actually accepted the jurisdiction clause by virtue of formal requirements laid down in Article 17 of the Brussels Convention. The question arises whether the law of the seized Member State court or the law of the chosen Member State court will govern this succession. It might be suggested to apply the *lex fori prorogati*,<sup>514</sup> but it must also be remembered in this context that the ECJ in *CDC*, when it referred to the *Coreck* case, specified that the application of the national law is the rules of private international law of the court *seized*.<sup>515</sup>

### 9.3. Agreements Affecting a Third Party's Right

The ECJ has addressed the question concerning the choice-of-court agreement included in a contract for the benefit of a third party. As stated above, one provision of the Brussels *Ibis* Regulation contemplates the effects of the choice-of-court clause in favour of third parties: Article 15 par. 2 of the Brussels *Ibis* Regulation permits the insured and the beneficiary of the insurance contract, concluded between the policyholder and the insurer, to bring proceedings in courts other than those indicated in the Section 3 of the Brussels *Ibis* Regulation.

The ECJ *Gerling Konzern* case,<sup>516</sup> regarded a question if a person, in whose favour the contract of insurance was made and who was not a party to the contract between the insurer and the policyholder, was entitled to rely on a jurisdiction clause which he had not signed. The ECJ upheld that such a jurisdiction clause according to Article 17 of the Brussels Convention must be considered valid when Article 12 of the Brussels Convention (Article 15 of the Brussels *Ibis* Regulation) provided for the possibility of stipulating the jurisdiction clauses in favour of the insured and the beneficiary, even though they were not parties to the

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<sup>513</sup> ECJ, Case 71/83, *Tilly Russ*, par. 25; Case C-159/97, *Trasporti Castelletti*, par. 41.

<sup>514</sup> U. MAGNUS, *Article 25*, in Brussels *I Bis* Regulation, 2016, *op. cit.*, p. 631.

<sup>515</sup> ECJ, Case C-352/13, *CDC*, par. 65.

<sup>516</sup> ECJ, Case 201/82, *Gerling Konzern Speziale Kreditversicherungs-AG and others v Amministrazione del Tesoro dello Stato*, 14 July 1983, ECLI:EU:C:1983:217.

contract.<sup>517</sup> Consequently, the ECJ relied on the principle of good faith: if Article 17 was to be regarded as requiring the insured or the beneficiary expressly to sign the jurisdiction clause, the effect of such an interpretation would result in:

*...a pointless restriction amounting even, it may be, to a formality with which it would be difficult to comply if, before any proceedings, the insured has not been informed by the policy-holder of the existence of a clause conferring jurisdiction which has been made for his benefit.*<sup>518</sup>

Due to the recognition of the insured or the beneficiary as weaker parties, which justifies the application of the jurisdiction clause, for their benefit in order to protect them against a predetermined non-negotiable contract,<sup>519</sup> it seems that this interpretation can be extended with difficulty to the “different” third parties, which benefit from the jurisdiction clause.<sup>520</sup> The ECJ in the case *Société financière et industrielle du Peloux*<sup>521</sup> confirmed the protective approach when it stated that a jurisdiction clause<sup>a</sup> according to Article 12 par. 3 of the Brussels Convention cannot be relied on *against* a beneficiary who has not expressly subscribed to the jurisdiction clause.<sup>522</sup>

#### **9.4. Chain of Contracts**

The *Refcomp*, C543/10 case concerned the question whether a jurisdiction clause, concluded between a manufacturer of goods and a buyer, is effective also against a sub-buyer. The claimant, the French insurance company, to which the rights of property were subrogated, sued the manufacturer, the fitter and the seller of goods before the French court seeking for the remedy of damage suffered. The manufacturer Refcomp challenged the jurisdiction of the French court relying on a jurisdiction clause in favour of the Italian courts included in the contract concluded between the fitter and itself, in order to escape French jurisdiction. The ECJ decided against the opposability of the jurisdiction clause against the sub-buyer “*unless*

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<sup>517</sup> ECJ, Case 201/82, *Gerling Konzern*, par. 18.

<sup>518</sup> ECJ, Case 201/82, *Gerling Konzern*, par. 19.

<sup>519</sup> ECJ, Case 201/82, *Gerling Konzern*, par. 17.

<sup>520</sup> See opposite approach L. PENASA, *Gli accordi sulla giurisdizione tra parti e terzi. Vol. 2: Profili soggettivi, op. cit.*, p. 153.

<sup>521</sup> ECJ, Case C-112/03, *Société financière et industrielle du Peloux v Axa Belgium and Others*, 12 May 2005, ECLI:EU:C:2005:280.

<sup>522</sup> Emphasis added, See ECJ, Case C-112/*Société financière et industrielle du Peloux*, par. 43.

*it is established that that third party has actually consented to that clause under the conditions laid down in that Article.*<sup>523</sup>

The ECJ reasoning was based on the several arguments. First, the choice-of-court clause included in a contract may produce effects only in the relations between the parties who have given their consent.<sup>524</sup> On the other hand, Article 23 of the Brussels I Regulation does not indicate whether a jurisdiction clause may be transmitted to a third party.<sup>525</sup> Second, the conditions and the forms of the consent to a jurisdiction clause may vary taking into consideration the nature of the initial contract.<sup>526</sup> In particular, the chain of contracts cannot be assimilated to:

- (a) The statutes of a company (C-214/89, *Powel Duffryn* case) when in the context of an action for damages there is no contractual relationship between the sub-buyer and the manufacturer. Thus, due to the lack of a contractual link, the parties did not agree within the meaning of Article 23 of the Brussels *Ibis* Regulation;<sup>527</sup>
- (b) Bill of lading (71/83, *Tilly Russ and Coreck*) due to its specific nature: it is an instrument of international commerce intended to govern a relationship involving at least three persons and in most legal systems it is a negotiable instrument which allows transferring the goods to a purchaser, who becomes as the bearer of the bill of lading;<sup>528</sup>
- (c) Transfer to of a single contract or the transfer of all the rights and obligations since in a chain of contracts “*the contractual obligations of the parties may vary from contract to contract, so that the contractual rights which the sub-buyer can enforce against his immediate seller will not necessarily be the same as those which the manufacturer will have accepted in his relationship with the first buyer.*”<sup>529</sup> Moreover, the relationships between manufacturer and sub-buyer are perceived differently in the Member States, and there is no single approach to it.<sup>530</sup>

Although the ECJ has admitted the application of the national law in several cases, it seems that the ECJ was, in this case, afraid of the different outcomes. The reference to the national

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<sup>523</sup> ECJ, Case C543/10, *Refcomp*, par. 41.

<sup>524</sup> ECJ, Case C543/10, *Refcomp*, par. 29.

<sup>525</sup> ECJ, Case C543/10, *Refcomp*, par. 25.

<sup>526</sup> ECJ, Case C543/10, *Refcomp*, par. 30.

<sup>527</sup> ECJ, Case C543/10, *Refcomp*, par. 33.

<sup>528</sup> ECJ, Case C543/10, *Refcomp*, par. 35.

<sup>529</sup> ECJ, Case C543/10, *Refcomp*, par. 37.

<sup>530</sup> ECJ, Case C543/10, *Refcomp*, par. 38.

law would be according to the ECJ an “*element of uncertainty incompatible with the concern to ensure the predictability of jurisdiction*”.<sup>531</sup> The interpretation of C543/10 in the *Refcomp* case has been already applied by the Member State courts, emphasising the role of an effective agreement.<sup>532</sup>

## 9.5. Bond Prospectus

In April 2014, the ECJ handed down the judgment C-366/13, *Profit Investment*,<sup>533</sup> concerning the question on the opposability of the jurisdiction clause against a third party who acquired the bonds from a financial intermediary. The referring national court asked the ECJ whether the choice-of-court clause inserted into a bond prospectus binds not only the original transactional parties, but also the buyers of the bonds on the secondary markets. The parties in the dispute were: Commerzbank, the bond issuer of a programme for the issue of bonds, whereby the general rules of the programme were set out in the issuing prospectus containing a jurisdiction clause in favour of the English courts and previously approved by the Irish Stock Exchange; Redi, financial intermediary, which subscribed to the bonds issued by Commerzbank on the ‘primary’ market; and Profit, an Italian company who bought part of the bonds of Redi on the secondary market. The credit event in relation to the bonds in question brought the compulsory liquidation of Profit, which brought an action before the Italian court, seeking a declaration of nullity of the purchase agreements of the bonds between itself and Redi and the restitution of the sum paid. The ECJ upheld that a jurisdiction agreement contained in a prospectus produced by the bond issuer concerning the issue of bonds may be relied on against a third party who acquired those bonds from a financial intermediary if it is established, and the referring party must verify, that:

*...(i) that clause is valid in the relationship between the issuer and the financial intermediary, (ii) the third party, by acquiring those bonds on the secondary market, succeeded to the financial intermediary’s rights and obligations attached to those bonds*

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<sup>531</sup> ECJ, Case C543/10, *Refcomp*, par. 39.

<sup>532</sup> E.g., in France see: *Cour de Cassation, X v Platinum Controls Ltd*, 25 March 2015, No 13-24.796; in the UK see: *Antonio Gramsci Shipping Corporation v Alvars Lemberg* [2013] EWCA Civ 730, par. 52.

<sup>533</sup> ECJ, Case C-366/13, *Profit Investment SIM SpA v Stefano Ossi and Others*, 20 April 2016, ECLI:EU:C:2016:282.

*under the applicable national law, and (iii) the third party had the opportunity to acquaint himself with the prospectus containing that clause.*<sup>534</sup>

The ECJ referred to *Refcomp* case, C-543/10, and distinguished on one hand the chain of contracts where a contractual link was absent and which cannot be regarded as “agreed”, and on the other hand the bills of lading and company’s statutes, in which the ECJ had accepted transferability of choice-of-court clause to third parties.<sup>535</sup> In view of the case law regarding *Tilly Russ*, 71/83; *Trasporti Castelletti*, C-159/97; *Coreck*, C-387/98 and *Powell Duffryn*, C-214/89, the ECJ answered in an affirmative way.

It might be surprising that after the *Refcomp*, C543/10, a case in which the ECJ refused the reference to the national law due to the uncertainty incompatible with the predictability of the jurisdictional rules laid down in the Brussels regime, the ECJ has turned back to the reference of the applicable national law to resolve the question of the succession of the financial intermediary’s rights and obligations attached to the bonds to the third party, which acquired the bonds on the secondary market. The ECJ judgment has been criticised due to the reference to the national law and for not providing the autonomous interpretation as in *Refcomp* case, C543/10, when there is a contractual relationship between the issuer and investor notwithstanding the number of intermediaries interposed between them.<sup>536</sup>

## **9.6. Assignment of Claims for Damages for an Infringement of Competition Law**

The facts of the most recent case *CDC*, C-352/13, have already been analysed in Chapter I, Subchapter III, Section 2.1., regarding the application of the overriding mandatory rules. However, it must be mentioned that the ECJ *inter alia* stated that:

*...where a party not privy to the original contract had succeeded to an original contracting party’s rights and obligations in accordance with national substantive law as established by the application of the rules of private international law of the court seized*

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<sup>534</sup> ECJ, Case C-366/13, *Profit Investment*, par. 37.

<sup>535</sup> ECJ, Case C-366/13, *Profit Investment*, par. 32 and 33.

<sup>536</sup> M. HAENTJENS, D. VERHEIJ, *Finding Nemo: Locating Financial Losses after Kolassa/Barclays Bank and Profit*, Leiden Law School Research Paper; Hazellhoff Research Paper Series No. 8. p. 346-358, available at SSRN: <https://ssrn.com/abstract=2793727>, p. 26, 27.

*of the matter could that third party nevertheless be bound by a jurisdiction clause to which it had not agreed.*<sup>537</sup>

The ECJ also, in this case, did not refuse to refer to the national law which could cause “uncertainty and non-predictability of the jurisdictional rules”, and did not provide the autonomous interpretation as in *Refcomp* case, C543/10. Moreover, as stated above, the ECJ made reference to the *Coreck* case. However, the ECJ affirmations seem to be new in two regards:

- (i) The “applicable national law” mentioned in the *Coreck* case must be newly comprehended as “the rules of private international law of *the court seized*”.<sup>538</sup> Since the effects of the jurisdiction clause to the third parties are not governed by Article 25 of the Brussels *Ibis* Regulation, it was discussed whether the law of the chosen court or law of the seized Member State court should be applied. This ECJ judgment explicitly confirmed the approach of application *lex fori proporgati*;
- (ii) Where a successor acquired an original contracting party’s rights and obligations, such a successor is bound by a jurisdiction clause to which it had not agreed, also concerning the disputes as to the liability incurred as a result of an infringement of competition law. However, contrary to the *Coreck* case, the CDC entered into the agreement on the transfer of claims for damages with the different undertakings, some of which undertakings had previously concluded similar transfer agreements with other undertakings and the original contracts of sale concluded between the defendants and the undertakings contained agreements on jurisdiction. The application of the *Coreck* case regarded a bill of lading, which the ECJ classified as a special instrument of international commerce intended to govern a relationship involving at least three persons.

### **9.7. What is necessity for a Rule on Opposability of the Choice-of-Court Agreements against Third Parties?**

Due to the ambiguity of the adopted solutions in different cases, the Committee on Legal Affairs considered in the course of preparatory works for the recast of the Brussels I

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<sup>537</sup> ECJ, Case C-352/13, *CDC*, par. 65.

<sup>538</sup> Emphasis added.

Regulation introducing a new provision dealing with the opposability of choice-of-court agreements against third parties. In particular it was proposed that:

*...a person who is not a party to the contract will be bound by an exclusive choice-of-court agreement concluded in accordance with the Regulation only if: (a) that agreement is contained in a written document or electronic record; (b) that person is given timely and adequate notice of the court where the action is to be brought; (c) in contracts for carriage of goods, the chosen court is (i) the domicile of the carrier; (ii) the place of receipt agreed in the contract of carriage; (iii) the place of delivery agreed in the contract of carriage, or (iv) the port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship; considers that it should further be provided that, in all other cases, the third party may bring an action before the court otherwise competent under the Regulation if it appears that holding that party to the chosen forum would be blatantly unfair.<sup>539</sup>*

This proposal aimed at ascertaining whether a third party has knowledge about the existence of the jurisdiction agreement and at giving a possibility to a third party to escape from the jurisdiction clause whenever *the chosen forum would be blatantly unfair*. However, the subsequent proposals were silent in this respect, and the rule has not been adopted. Consequently, the ECJ interpretation should give guideline and can be divided into three groups:<sup>540</sup>

- 1) Restrictive approach: a jurisdiction clause included in the contract cannot be relied on against a third party unless a third party has actually consented to that clause (*Refcomp*, C543/10);
- 2) Substantive approach: a jurisdiction clause included in the contract for the benefit of a third party, is binding for such a third party even if he has not agreed (*Gerling Konzern*), but cannot be relied on against a beneficiary who has not expressly subscribed to the jurisdiction clause (*Société financière et industrielle du Peloux*); and
- 3) Accessorial approach: a jurisdiction agreement incorporated in the original contract can be relied on against a third party, which has succeeded to the rights and obligations under

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<sup>539</sup> Committee on Legal Affairs, Report on the implementation and review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, PE 439.997v02-00997, A7-0219/2010, 29 June 2010, par. 13.

<sup>540</sup> On similar divisions, see B. MUSSEVA, *Opposability of Choice-of-Court Agreements against Third Parties under the Hague Choice-of-Court Convention and Brussels Ibis Regulation*, Anali Pravnog Fakulteta Univerziteta u Zenici, 18 (2016), p. 86.



the applicable national law, even if he does not agree with a jurisdiction clause (C-214/89, *Powell Duffryn*; 71/83, *Tilly Russ, Trasporti Castelletti, Coreck, Profit Investment, CDC*).

Unfortunately, such different solutions offered by the ECJ, which depend on the specific dispute, may compromise the legal certainty and predictability in respect to the effects of the choice-of-court agreement on third parties and the national courts can interpret it in a different manner.<sup>541</sup>

## 10. Severability of the Choice-of-Court Agreement

Severability is a technique which protects the validity of the jurisdiction agreement from attacks of the invalidity of the contract to which it belongs.<sup>542</sup> The new paragraph 5 of Article 25 of the Brussels *Ibis* Regulation expressly provides for the severability of the jurisdiction agreement from the contract or another instrument in which it was included. In other words, although the jurisdiction clause forms part of the main contract, the provision in the contract governing the jurisdiction clause must be treated as an independent agreement. The invalidity of the main contract does not cause invalidity of the jurisdiction clause.

This new provision was not originally in the Commission Proposal,<sup>543</sup> but the principle of the separability has already operated according to the Brussels Convention and the Brussels Regulation. Such a principle has been already recognized by the ECJ in the case *Benincasa*, C-269/95, stating a jurisdiction clause and the substantive provisions of the contract in which a jurisdiction clause is incorporated must be distinguished. The Brussels regime does not determine the substantial law,<sup>544</sup> but the provisions aim at establishing uniform rules of

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<sup>541</sup> See, for example, the UK developing case law on the circumstances in which an anti-suit injunction based on a contractual exclusive choice-of-court clause will be granted against a litigant that is not a party to the forum clause, in particular: *The Yusuf Cepnioglu* [2016] 1 Lloyd's Rep 641 (CA), [20]-[21], [35], [49]-[50], [55]-[56]; *Dell v IB Maroc.com* [2017] EWHC 2397 (Comm), [22]-[23], [27]-[28], [32]-[34]; *The MD Gemini* [2012] 2 Lloyd's Rep 672, [15]; *Fair Wind Navigation v ACE Seguradora* [2017] EWHC 352 (Comm), [5]-[8]. In relation of the arbitration clause, see *Qingdao Huiquan Shipping Company v Shanghai Dong He Xin Industry Group Co Ltd* [2018] EWHC 3009 (Comm).

<sup>542</sup> A. BRIGGS, *Agreements on Jurisdiction and Choice of Law*, *op. cit.*, par. 1.21.

<sup>543</sup> It has the origin in the Committee on Legal Affairs, Draft Report on the proposal for a regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), PE467.046, 28 June 2011, p. 19 with similar wording.

<sup>544</sup> ECJ, Case 25/79, *Sanicentral*, par. 5.

international jurisdiction.<sup>545</sup> On the one hand, the jurisdictional clause serves a procedural purpose and is governed by Brussels Convention.<sup>546</sup> On the other hand, the substantive provisions and validity of the main contract are governed by the *lex causae* determined by private international law rules. It means that these two distinct legal terms operate autonomously. The formal validity of the jurisdiction clause must be determined according to Article 25 of the Brussels *Ibis* Regulation, and the formal validity of the main contract is governed by the law in accordance with Article 11 of the Rome I Regulation. The substantive validity of the jurisdiction clause is determined according to the conflict-of-laws rules of the designated Member State court, whereas the substantive validity of the main contract is governed by *lex contractus* according to Article 10 of the Rome I Regulation. Therefore, if the choice-of-court agreement is valid even when the main contract is invalid (*e.g.*, the law applicable to the formal validity of the main contract requires additional formalities such as notarization), the designated Member State court will have jurisdiction to decide on the invalidity of the main contract and the consequences resulting from invalidity.

## 11. Non-Exclusivity of the Choice-of-Court Agreement

The characterisation of a choice-of-court agreement as exclusive or non-exclusive is crucial for the identification of the effects that they produce. Article 25 of the Brussels *Ibis* Regulation allows both exclusive and non-exclusive jurisdiction clauses compared to the Hague Convention on Choice of Court Agreements, which applies only exclusive jurisdiction agreements.<sup>547</sup> Thus, the accurate differentiation of jurisdiction clauses as exclusive and non-exclusive is also essential for the determination of the regime applied.<sup>548</sup> It must be borne in mind that categorization is a matter for national law.<sup>549</sup> The character of the jurisdiction agreement might be perceived as a matter of interpretation,<sup>550</sup> which is left to the national

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<sup>545</sup> ECJ, Case, C-269/95, *Benincasa*, par. 25.

<sup>546</sup> ECJ, Case, C-269/95, *Benincasa*, par. 25.

<sup>547</sup> See Article 1 and 3 of the Hague Convention on Choice of Court Agreements.

<sup>548</sup> On the Hague Convention on Choice of Court Agreements see *infra* Chapter Two, Subchapter II, Section 3.

<sup>549</sup> A. BRIGGS, P. REES, *Civil Jurisdiction and Judgements*, *op. cit.*, 2009, par. 2.126.

<sup>550</sup> R. FENTIMAN, *Article 31*, in U. MAGNUS, P. MANKOWSKI (eds), *Brussels I Bis Regulation: Commentary. European Commentaries on Private International Law*, volume I., Otto Schmidt, Sellier European Law Publishers, 2016, p. 753.

law;<sup>551</sup> or a matter of admissibility;<sup>552</sup> or a matter of the substantive validity,<sup>553</sup> which would be newly governed by the conflict-of-laws of the designated Member State court.

Article 25 of the Brussels *Ibis* Regulation, like Article 23 of the Brussels I Regulation, provides for the exclusivity of the chosen court “unless agreed otherwise”. This rule was inserted into the Brussels I Regulation in 2001. Previously, Article 17 par. 1 of the Brussels Convention has provided for the exclusivity of choice-of-court agreements by stating that “that court or those courts shall have exclusive jurisdiction”.<sup>554</sup> However, it was discussed whether the parties could agree otherwise.<sup>555</sup> The only exception was the choice-of-court agreements for the benefit of one party, leaving non-exclusivity of the choice-of-court agreements.<sup>556</sup> It is indisputable that the specific court or courts of a specific Member State shall have exclusive jurisdiction if the parties expressly provide so. Article 25 of the Brussels *Ibis* Regulation can be interpreted that the provision raises a presumption that the parties intended to grant exclusive effect to their choice-of-court agreement; in case of doubts in the text of a jurisdiction clause, exclusive jurisdiction is presumed.<sup>557</sup>

### 11.1. Exclusive and Non-Exclusive Choice-of-Court Agreement

Exclusive jurisdiction agreements mean that the parties agree on the jurisdiction of specific courts and exclude the jurisdiction of other courts which would have jurisdiction.<sup>558</sup> Exclusive choice-of-court agreements have both positive and negative effects. The positive effect

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<sup>551</sup> ECJ, Case C-214/89, *Powell Duffryn*, par. 33.

<sup>552</sup> Q. FORNER-DELAYGUA, *Changes to jurisdiction based on exclusive jurisdiction agreements under the Brussels I Regulation Recast*, *Journal of Private International Law*, 11:3 (2015), p. 396, according to the author’s opinion, the non-exclusive jurisdiction clauses are matter of admissibility in Article 25 of the Brussels *Ibis* Regulation. However, on the non-existence of third category “admissibility” according to the Brussels *Ibis* Regulation see J. BASEDOW, *Exclusive choice-of-court agreements as a derogation from imperative norms*, *op. cit.*, p. 20.

<sup>553</sup> Q. FORNER-DELAYGUA, *Changes to jurisdiction based on exclusive jurisdiction agreements under the Brussels I Regulation Recast*, *op. cit.*, p. 396, according to the author’s opinion, the asymmetric jurisdiction clauses are matter of substantive validity, but would be better placed under the admissibility.

<sup>554</sup> The rule providing for an exclusive nature of agreement could be found in Article 2 of the Hague Convention of 15 April 1958 or in bilateral conventions between France and the Netherlands, and between Belgium and France. The national legislations did not provide for an explicit rule on exclusive jurisdiction, the intention of the parties had to be ascertained by the court. See in this regard already cited judgments concerning national legislation, e.g. in France - *Cour de Cassation Chambre Civile, Banque d’Italie v. Ferrand*, 2 May 1928.

<sup>555</sup> U. MAGNUS, *Article 23*, in Brussels I Regulation, 2012, *op. cit.*, p. 502.

<sup>556</sup> See Article 17 par. 5 of the Brussels Convention.

<sup>557</sup> S. O’MALLEY, A. LAYTON, *European Civil Practice*, 2004, *op. cit.*, par. 20.060; U. MAGNUS, *Article 23*, in Brussels I Regulation, 2012, *op. cit.*, p. 503.

<sup>558</sup> U. MAGNUS, *Article 23*, in Brussels I Regulation, 2012, *op. cit.*, p. 503.

concerns the obligation of the designated court to accept jurisdiction. Under Article 25 of the Brussels Ibis Regulation, a designated Member State court does not have the discretion to decline jurisdiction based on the exclusive choice-of-court agreement.<sup>559</sup> In addition to the positive effect of the exclusive prorogation, the exclusive choice-of-court agreement has a negative effect, which excludes all otherwise competent courts.

It is generally accepted that exclusive jurisdiction agreements provide for unique (single) jurisdiction.<sup>560</sup> Indeed, unique jurisdiction clauses create a high level of predictability and certainty about jurisdiction. However, does exclusive choice-of-court agreement mean really “unique”?<sup>561</sup> According to the ECJ, the parties may designate more than one exclusive jurisdiction. In case 23/78, *Meeth v Glacetal*, the parties concluded a contract containing the following jurisdiction clause: “*If Meeth sues Glacetal the French courts alone shall have jurisdiction. If Glacetal sues Meeth the German courts alone shall have jurisdiction.*” The ECJ, (in the context of application of Article 17 of the Brussels Convention), decided that:

*That wording, which is based on the most widespread business practice, cannot, however, be interpreted as intending to exclude the right of the parties to agree on two or more courts for the purpose of settling any disputes which may arise.... Although such an agreement coincides with the scope of Article 2 it is nevertheless effective in that it excludes, in relations between the parties, other optional attributions of jurisdiction, such as those detailed in Articles 5 and 6 of the Convention.*<sup>562</sup>

Since Article 17 of the Brussels Convention was applicable only to the exclusive jurisdiction clauses, this judgment should be interpreted to allow exclusive non-unique jurisdiction agreements within the Brussels Regime. In other words, when the parties designate one exclusive jurisdiction for each party and exclude all otherwise competent courts for each party, such jurisdiction must be classified as an exclusive choice-of-court agreement.<sup>563</sup> The *Meeth v Glacetal* case practically relates exclusive jurisdiction to the perspective of each

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<sup>559</sup> A. BRIGGS, *Private International Law in English Courts*, Oxford University Press, 2014, para 4.40. See also ECJ, Case C-281/02, *Owusu*, where ECJ expressly stated though in relation to Article 2 of the Brussels I Regulation, that the rules of the Brussels I Regulation are compulsory and do not allow any discretion. The discretion of the courts permitted according to the English law on the basis of doctrine of forum non conveniens has no space under the Brussels regime.

<sup>560</sup> M. KEYES, B. A. MARSHALL, *Jurisdiction agreements: exclusive, optional and asymmetrical*, *op. cit.*, p. 355.

<sup>561</sup> J. FAWCETT, *Non-Exclusive Jurisdiction Agreements in Private International Law*, *op. cit.*, p. 239-240.

<sup>562</sup> ECJ, Case 23/78, *Meeth*, p. 2141, 2142.

<sup>563</sup> On this conclusion, see M. KEYES, B. A. MARSHALL, *Jurisdiction agreements: exclusive, optional and asymmetrical*, *op. cit.*, p. 351, 352

party. Doubts arise with the classification of the non-unique exclusive jurisdiction agreements when the parties nominate two or more jurisdictions for both parties excluding the jurisdiction of any other court for both parties.<sup>564</sup> However, such jurisdiction agreements do not provide one-sided exclusivity. In any case, both types of non-unique exclusive jurisdiction clauses create a potential for a “rush to court”. Moreover, a gap caused by the new *lis pendens* rule according to Article 31 par. 2 of the Brussels *Ibis* Regulation and Recital 22 n 2 of the Brussels *Ibis* Regulation<sup>565</sup> may result in parallel proceedings and even in inconsistent judgments.<sup>566</sup>

The non-exclusive choice-of-court clauses are agreements that are not exclusive.<sup>567</sup> Non-exclusive choice-of-court agreements have the same positive effect as exclusive jurisdiction clauses since they oblige the seized, designated court to decide. However, the adverse effect differs. The non-exclusive jurisdiction agreements do not require the parties to seize a designated court. Article 25 of the Brussels *Ibis* Regulation does not exclude possibility to conclude non-exclusive jurisdiction agreements. It is worth mentioning that the general “first seized” *lis pendens* rule according to Article 29 of the Brussels *Ibis* Regulation applies to the non-exclusive choice-of-court clauses.<sup>568</sup>

## 11.2. Asymmetric Choice-of-Court Agreement

Finally, some jurisdiction clauses do not fall under exclusive jurisdiction clauses, nor are they under non-exclusive jurisdiction clauses.<sup>569</sup> For example, the clause inserted into the main contract in the French case *Rotschild*<sup>570</sup> provided:

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<sup>564</sup> On the criticism see R. FENTIMAN, *Jurisdiction – When Non-Exclusive Means Exclusive*, *The Cambridge Law Journal*, 51:2 (1992), p. 234.

<sup>565</sup> Recital 22 n. 2 of the Brussels *Ibis* Regulation provides: «*This exception should not cover situations where the parties have entered into conflicting exclusive choice-of-court agreements or where a court designated in an exclusive choice-of-court agreement has been seized first. In such cases, the general lis pendens rule of this Regulation should apply.*».

<sup>566</sup> On this problem see *infra* Section 14.1.3. of this Subchapter.

<sup>567</sup> A. BRIGGS, *Agreements on Jurisdiction and Choice of Law*, *op. cit.*, par. 4.19.

<sup>568</sup> See Recital 22 of the Brussels *Ibis* Regulation. On details see *infra* Section 14.1.3. of this Subchapter.

<sup>569</sup> A. BRIGGS, *Agreements on Jurisdiction and Choice of Law*, *op. cit.*, par. 4.24-4.25.

<sup>570</sup> *Mme X v Société Banque Privé Edmond de Rothschild 13*, Case No. 11-26022. On the more details of the judgment see M. E. ANCEL, L. MARION, L. WYNAENDTS, *Reflections on One-Sided Jurisdiction Clauses in International Litigation (About the Rothschild Decision, French Cour de Cassation, 26 September 2012)* available at SSRN: <https://ssrn.com/abstract=2258419>, (2013), pp. 3-9; R. FENTIMAN, *Unilateral jurisdiction agreements in Europe*, *The Cambridge Law Journal* 72:1 (2013), p. 24-27.

*Any dispute which arises between the client and the Bank will be submitted to the exclusive jurisdiction of the courts of Luxembourg. The Bank nonetheless reserves the right to proceed against the client in the courts of the client's domicile or before any other court with jurisdiction in default of an election of the preceding jurisdiction.*<sup>571</sup>

This jurisdiction clause can often be founded in international financial agreements often favouring the financial institutions. There is a degree of certainty since such clauses indicate *ex ante* the designated jurisdiction for both parties, but at the same time, they allow parties to seize *ex post* any other jurisdiction favourable only to one party to the dispute. In other words, the jurisdiction clause is exclusive from the perspective of one party, but non-exclusive from the perspective of another party. In consequence, they are called optional or asymmetric jurisdiction clauses. This clause is reminiscent of Article 17 par. 5 of the Brussels Convention providing that if a choice-of-court agreement was concluded for the benefit of only one of the parties, that party should retain the right to bring proceedings in any other court which has jurisdiction by virtue of the Brussels Convention. Nevertheless, Article 17 par. 5 of the Brussels Convention has been removed; it is disputed whether such clauses are admissible according to the Brussels Regulations<sup>572</sup> and if they continue to have non-exclusive effect as according to Article 17 par. 5 of the Brussels Convention.<sup>573</sup> Concerning Article 17 par. 5 of the Brussels Convention the ECJ in case *Anterist v Credit Lyonnais*, C-22/85,<sup>574</sup> stated that the common intention to confer an advantage on one of the parties must be clear from the terms of the choice-of-court clause or from all the evidence to be found therein or from the circumstances in which the contract was concluded.<sup>575</sup>

In the above-mentioned French case *Rothschild*, the *Cour de Cassation* decided that the clause was “potestative”, for the sole benefit of one party, and was contrary to the objectives

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<sup>571</sup> On the translation, see M. KEYES, B. A. MARSHALL, *Jurisdiction agreements: exclusive, optional and asymmetrical*, *op. cit.*, p. 364.

<sup>572</sup> In the positive way, see U. MAGNUS, *Article 25*, in *Brussels I Bis Regulation*, 2016, *op. cit.*, p. 659; F. GARCIMARTIN, *Chapter 9 - Article 25*, in *The Brussels I Regulation Recast*, *op. cit.*, p. 302; R. FENTIMAN, *International Commercial Litigation*, Oxford University Press, 2015, par. 2.130 and 2.135.

<sup>573</sup> *Cour d'Appel, Paris*, 18 October 2011, No 11/03572. See also ECJ, Case C-189/08, *Zuid-Chemie*, par. 18, which provided that: «*Second, in so far as Regulation No 44/2001 now replaces, in the relations between Member States, the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the successive conventions relating to the accession of new Member States to that convention, the interpretation provided by the Court in respect of the provisions of the Brussels Convention is also valid for those of Regulation No 44/2001 whenever the provisions of those Community instruments may be regarded as equivalent.*».

<sup>574</sup> ECJ, Case C-22/85, *Anterist v Credit Lyonnais*, 24 June 1986, ECLI:EU:C:1986:255.

<sup>575</sup> ECJ, Case C-22/85, *Anterist*, par. 14.

of the prorogation of jurisdiction laid down in Article 23 of the Brussels I Regulation. It is interesting to note that the French court applied the French concept of “potestativité”, and implicitly ruled on the substantive validity under the French law. As stated in Section 8.2. of this Subchapter, the new rule on substantive validity refers to the law of the designated Member State court. Thus, the application of French law, including French concept of “potestativité” would be excluded under the Brussels I Regulation. This conclusion of the *Cour de Cassation* in the *Rothschild* case, followed the opinions of the courts of lower instance, where, according to the courts, the jurisdictional clause gave to one party vast discretionary choice, and such is contrary to the Brussels I Regulation, which is based on the predictability and certainty of the jurisdictional rules.<sup>576</sup> The *Cour de Cassation* confirmed this approach in another judgment *ICH v. Crédit Suisse*, this time concerning the 2007 Lugano Convention, and invalidated the clause since the “objective factors” were not defined.<sup>577</sup> However, in the subsequent case of *Apple v eBizcuss*<sup>578</sup>, the *Cour de Cassation* retained the clause as valid since it satisfied the “predictability requirement” when the competent courts were clearly identified. Afterwards, the *Cour de Cassation* in the case of *Diemme Enologia v Chambon* validated an optional unilateral clause which gave an unlimited option to only one party.<sup>579</sup> In the most recent judgment (3 October 2018), the *Cour de Cassation* decided that the following clause was invalid: “Whenever the French laws permit, the disputes about the present are subject to the District Court of and Luxembourg. However, the bank reserves the right to waive this attribution of jurisdiction if it considers it appropriate.”. The *Cour de Cassation* refused to give effect to this clause, since it did not contain any objective element sufficiently precise to identify the jurisdiction of the court which might be seised and it did not meet a high degree of predictability in virtue of Recital 11 and Article 23 of the Brussels I Regulation.<sup>580</sup>

The national case law is not unified in the other Member States. In Bulgaria, the same approach as in French case *Rothschild* was upheld by the Bulgarian Supreme Court in

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<sup>576</sup> *Tribunal de Grande Instance de Paris, Madame X v Banque Privée Edmond de Rothschild*, 18 January 2011, No 09/16659; *Cour d’Appel de Paris, Madame X v Banque Privée Edmond de Rothschild*, 18 October 2011, No 11/03572.

<sup>577</sup> *Cour de Cassation Chambre Civile 1, ICH v Crédit Suisse*, 25 March 2015, No. 13-27264

<sup>578</sup> *Cour de Cassation Chambre Civile 1, Apple v eBizcuss*, 7 October 2015, No 14-16.898

<sup>579</sup> *Cour de Cassation Chambre Commerciale, Case Diemme Enologia v Chambon*, 11 May 2017, No 15-18758.

<sup>580</sup> *Cour de Cassation, Chambre civile 1, Saint Joseph v Dexia banque internationale*, 3 October 2018, No 17-21.309.

September 2011. The Bulgarian court stated that unilateral asymmetric clauses might have a “potestative right” and therefore, are not permitted according to the Bulgarian law.<sup>581</sup> In Italy, *Corte Suprema* admitted a unilateral asymmetric clause in 2012 and declined jurisdiction in the case concerning the choice-of-court agreement when one of the parties could seize the English courts, whereby the other party could seize the Italian court or any other court having jurisdiction according to the international conventions.<sup>582</sup> The court stated that the fact that, with respect to the jurisdiction, the position of the parties to the contract is asymmetric, since Cuna is bound by the jurisdiction of the English courts and the other has the option of opting eventually also for different forums, falls within the scope of possible different agreements by means of which the aforementioned art. 23 which makes possible to reconcile the exclusivity of the criterion of conventional jurisdiction, but it does not legitimise the derogation from this criterion even in favour of the party to whom that option has not been recognized in the contract.<sup>583</sup>

According to the English case law, unilateral asymmetric clauses have been considered as enforceable and legitimate according to the Brussels Convention,<sup>584</sup> Lugano Convention,<sup>585</sup> and English national law.<sup>586</sup> The High Court in *Commerzbank Aktiengesellschaft v Liquimar Tankers Management Inc* upheld the validity of an asymmetric jurisdiction clause also under the Brussels Ibis Regulation.<sup>587</sup>

It can be summarized from the national case law that unilateral asymmetric clauses are in the most cases upheld if the parties identify clearly the competent courts having jurisdiction on the basis of the jurisdiction clause. Moreover, although Article 17 par. 5 of the Brussels

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<sup>581</sup> *Bulgarian Supreme Court of Cassation, Commercial Chamber*, 2 September 2011, judgment No. 71, in commercial case No. 1193/2010.

<sup>582</sup> *Corte di Cassazione*, 8 March 2012, no 3624, *Rivista di diritto internazionale privato e processuale* (2013), p. 142. On the same conclusion see also Tribunale di Milano, 22 September 2011, in *Rivista di diritto internazionale privato e processuale* (2012), p. 918. See also F. C. VILLATA, *Rapporto sull'applicazione in Italia del Regolamento (CE) n. 44/2001, del 22 dicembre 2000 («Bruxelles I»), e del Regolamento (UE) n. 1215/2012, del 12 dicembre 2012, («Bruxelles I-bis») concernenti la competenza giurisdizionale, il riconoscimento e l'esecuzione delle decisioni in materia civile e commerciale*, in S. BARIATTI, I. VIARENGO, F. C. VILLATA (eds), *La giurisprudenza italiana sull'applicazione dei regolamenti europei in materia civile e commerciale e di famiglia*, Kluwer/Cedam, 2016, p. 62; M. A. LUPOLI, *Optional choice of court agreements in Italy*, *Annuario di diritto comparato e studi legislativi*, special edition (2018), p. 165-166;

<sup>583</sup> Translation provided by the author.

<sup>584</sup> *Continental Bank NA v Aeakos Compania Naviera*, [1994], 1 WLR 588, 594.

<sup>585</sup> *Lornamead Acquisitions Ltd v Kaupthing Bank HF*, [2011], EWHC, 2611 (Comm).

<sup>586</sup> *NB Three Shipping v Harebell Shipping*, [2004], EWHC 509 (QB).

<sup>587</sup> *Commerzbank Aktiengesellschaft v Liquimar Tankers Management Inc*, [2017] EWHC 161 (Comm).



Convention was repealed, unilateral asymmetric clauses represent a specific type of the clauses which benefit only one party. Therefore, it might be recommended that the parties entering into the unilateral asymmetric clauses could follow the ECJ case *Anterist v Credit Lyonnais* and could expressly indicate their intention to favour one party in the jurisdiction clause.<sup>588</sup>

## **12. Relationship with other Rules in the Brussels Ibis Regulation**

Article 25 of the Brussels *Ibis* Regulation takes precedence over the other jurisdictional rules of the Brussels *Ibis* Regulation with few exceptions. One of the exceptions is Article 24 of the Brussels *Ibis* Regulation governing exclusive jurisdiction (for example, proceedings concerning rights in *rem* in immovable property or tenancies; validity of the constitution, nullity, or the dissolution of companies; validity of entries in public registers; registration or validity of patents, trademarks, designs). The reason for providing for exclusive jurisdiction which cannot be overridden by other rules of the Brussels *Ibis* Regulation is given by the close connection between the dispute and the Member State<sup>589</sup> and the nature of the listed matters, which are in most of the Member States considered as mandatory rules.<sup>590</sup> Moreover, Article 25 of the Brussels *Ibis* Regulation is overturned if the choice-of-court agreement contradicts the protective provisions set out in Articles 15, 19, and 23 of the Brussels *Ibis* Regulation, which is analysed further.

## **13. Choice-of-Court Agreement in respect of the Weaker Parties**

Adequate protection in procedural law is offered to the parties which are regarded as weaker from the socio-economic point of view in a contractual relationship.<sup>591</sup> As stated in Chapter I, Subchapter III, Section 2.3., the protective jurisdictional rules aim at counterbalancing the information or economic or social dependence asymmetries between the parties. The

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<sup>588</sup> U. MAGNUS, *Article 25*, in Brussels I *Bis* Regulation, 2016, *op. cit.*, p. 659.

<sup>589</sup> ECJ, Case C-412/98, *Group Josi*, par. 46.

<sup>590</sup> H. GAUDAMET-TALLON, *Compétence et exécution des jugements en Europe, Règlement no 44/2001, Conventions de Bruxelles et de Lugano*, *op. cit.*, par. 98; L. DE LIMA PINHEIRO, *Article 24* in U. MAGNUS, P. MANKOWSKI (eds.), *Brussels I Bis Regulation: Commentary*. European Commentaries on Private International Law, volume I., Otto Schmidt, Sellier European Law Publishers, 2016, p. 561.

<sup>591</sup> V. LAZIC, *Procedural justice for weaker parties in cross-border litigation under the EU regulatory scheme*, *Utrecht Law Review*, 10 (2014).

counterbalancing of the powers of the parties in the context of the party autonomy is represented by virtue of the Brussels *Ibis* Regulation in two ways: (i) by establishing additional protective norms, whereby the protection is provided by the possibility of applying the general rule offered to the weak parties and simultaneously introducing an additional rule favouring the weaker party in the jurisdiction agreement; and (ii) by establishing a time factor limiting the freedom of the parties, which fixes possibility of the conclusion of the jurisdiction agreement to a specific time moment.

The Brussels *Ibis* Regulation has established a protective jurisdictional regime which is included in the Sections 3, 4, and 5. Paragraph 4 of Article 25 of the Brussels *Ibis* Regulation provides a protective regime for the policyholder, the insured, a beneficiary, the consumer, and the employee since Recital 18 of the Brussels *Ibis* Regulation provides:

*In relation to insurance, consumer and employment contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules.*

The Brussels Convention has already regulated this protective regime, where the jurisdiction clause could not contrast with Article 12 (insurance) or with Article 15 (instalment sales). It is interesting to remark that some of the national legislation or national case law provided for the protection of employees in the context of the choice-of-court agreements in 1968, but the Brussels Convention included employees under the special protection only in 1989.<sup>592</sup>

The jurisdiction agreement, which is contrary to Articles 15, 19 or 23 of the Brussels *Ibis* Regulation, is without any legal force. In insurance, consumer, and employment contracts the jurisdiction clause has common aspects: (i) the requirements of formal and substantive validity of the agreement must comply with Article 25 of the Brussels *Ibis* Regulation: and (ii) the designated jurisdiction must benefit the weaker party.

It must be borne in mind that in the case of infringement of Articles 15, 19, or 23 of the Brussels *Ibis* Regulation (in contrast with Article 25 of the Brussels *Ibis* Regulation) constitutes a ground for denial of the recognition according to Article 45 par. 1 lett. e) point ii)

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<sup>592</sup> The Convention, signed in San Sebastian on 26 May 1989, upon the accession of the Kingdom of Spain and the Portuguese Republic to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters. See Jenard-Möller Report, par. 60-61, which gave rise to Article 17 para 5 of the Brussels Convention.

of the Brussels *Ibis* Regulation, but only when the policyholder, the insured, a beneficiary, the consumer, and the employee are in a position of the defendant.

### **13.1. Choice-of-Court Agreements in Insurance Contracts**

As recorded in the Jenard Report, the purpose of Article 15 of the Brussels *Ibis* Regulation is to prevent the parties from limiting the choice offered by the Brussels regime to the policyholder.<sup>593</sup> Like other provisions in Section 3, this Article was designed to protect the weaker parties to insurance transactions, *i.e.*, the policy-holder, the insured, or the beneficiary. Article 15 of the Brussels *Ibis* Regulation regulates the situation when the agreement between the parties overrides the special jurisdictional rules laid down in Articles 10 to 14 of the Brussels *Ibis* Regulation.

The parties to this jurisdiction agreement are the insurer and the policy-holder. This rule aims at benefiting the policy-holder and the third-party beneficiary by permitting a specific jurisdiction agreement and by allowing them to bring an action to the Member State court other than indicated in Section 3 of the Brussels *Ibis* Regulation. As stated in Section 9.3. of this Subchapter, the effect of the jurisdiction agreement is extended to the insured or the beneficiary if it was concluded for their benefit nevertheless he has not agreed (*Gerling Konzern*), but not against a beneficiary who has not expressly subscribed to the jurisdiction clause (*Société financière et industrielle du Peloux*).

Article 15 of the Brussels *Ibis* Regulation does not regulate any requirement of form for the insurance jurisdiction agreement. It seems clear that the form prescribed in Article 25 of the Brussels *Ibis* Regulation must be satisfied.<sup>594</sup> As a consequence, all considerations in this text as to the validity (including substantive validity) may be used in the context of Article 15 of the Brussels *Ibis* Regulation.

The jurisdiction agreements in insurance contracts are permitted only in a limited number of cases.<sup>595</sup>

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<sup>593</sup> Jenard Report, p. 33.

<sup>594</sup> S. O'MALLEY, A. LAYTON, *European Civil Practice*, 1989, *op. cit.*, p. 483.

<sup>595</sup> On the general considerations see S. DOMINELLI, *Party autonomy and insurance contracts in private international law: a European Gordian knot*, Aracne, 2016.

According to this provision, the jurisdiction agreements are effective only if they are entered into after the dispute has arisen (point 1 of Article 15 of the Brussels *Ibis* Regulation). The weaker party, which is aware of the risk of the jurisdiction agreement, may freely choose to enter into the agreement conferring jurisdiction to any Member State court.<sup>596</sup> According to some scholars, the use of this provision is rare.<sup>597</sup> The Jenard Report states that the point at which the dispute has arisen should be comprehended “*as soon as the parties disagree on a specific point and legal proceedings are imminent or contemplated*”.<sup>598</sup> However, due to no indications in this regard, it might be difficult to determine the moment when the dispute has arisen. At least, it can be affirmed that the jurisdiction agreement is permitted to be concluded before or after the proceedings are brought in front of the Member State court.<sup>599</sup>

Point 2 of Article 15 of the Brussels *Ibis* Regulation states that the parties may agree on the jurisdiction of additional Member States, other than listed in Section 3 in order to benefit the policyholder, the insured, or a beneficiary. The jurisdiction clause must widen the choice available to the weaker party, and in consequence, this provision cannot be understood as limiting the choice.<sup>600</sup> In this case, the jurisdiction agreement may be entered into at any time, also when the dispute has not arisen.

The parties may derogate from Articles 12 and 13 by a jurisdiction agreement concluded according to point 3 of Article 15 of the Brussels *Ibis* Regulation if three conditions are met: (i) a policyholder and an insurer are domiciled or habitually resident in the same Member State at the time of conclusion of the contract; (ii) the jurisdiction agreement is in favour of such Member State courts, even if the harmful event were to occur abroad; and (iii) an agreement is not contrary to the law of that Member State.

If a Third State policyholder is in the position of a claimant, he apparently cannot sue the insurer in a Third State where the policyholder is domiciled. Nevertheless, it would be possible to sue where the insurer domiciled (or has a branch, agency, or another

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<sup>596</sup> H. HEISS, *Introduction to Articles 10-16*, in U. MAGNUS, P. MANKOWSKI (eds), *Brussels I Bis Regulation: Commentary. European Commentaries on Private International Law*, volume I, Otto Schmidt, Sellier European Law Publishers, 2016, p. 431.

<sup>597</sup> L. COLLINS, *The Civil Jurisdiction and Judgments Act*, Butterworth, 1982, p. 73.

<sup>598</sup> Jenard Report, p. 33. On the disagreement with this approach see: G. A. L. DROZ, *Pratique de la Convention de Bruxelles du 27 Septembre 1968*, Dalloz, 1973, par. 128; L. MAXWELL, *Report of the Scottish Committee on Jurisdiction and Enforcement*, H.M. Stationery Off., 1980, par. 5.120.

<sup>599</sup> F. GARCIMARTIN, *Chapter 9 - Article 25*, in *The Brussels I Regulation Recast*, *op. cit.*, p. 208.

<sup>600</sup> S. O'MALLEY, A. LAYTON, *European Civil Practice*, 1989, *op. cit.*, p. 485.

establishment) in a Member State on the basis of other jurisdictional grounds in the Brussels *Ibis* Regulation (e.g., in the Member State court of insurer's domicile according to Article 11, or place where the harmful event occurred according to Article 12 of the Brussels *Ibis* Regulation). However, these jurisdictional grounds can be excluded by a jurisdiction agreement unless one of the exceptions according to Article 15 point 4 of the Brussels *Ibis* Regulation applies (i.e., where the insurance is compulsory and when it relates to immovable property in a Member State).<sup>601</sup> Section 3 is not applicable to the Third State defendants. If a Third State policy-holder or insurer is in the position of a defendant, Section 3 is not applicable, and the Member State courts will be able to decide according to the national law and Article 6 of the Brussels *Ibis* Regulation.<sup>602</sup> In such a case a Third State policy-holder may conclude the jurisdiction agreement with the insurer<sup>603</sup> according to Article 25 of the Brussels *Ibis* Regulation and to sue in the designated Member State court.

Article 15 point 5 of the Brussels *Ibis* Regulation then allows to the parties to the insurance contract, which covers specific risk listed in Article 16 of the Brussels *Ibis* Regulation, to agree freely on the jurisdiction of the Member State court. There is no need to protect the policy-holder since such types of the insurance contracts are concluded typically by the policy-holders not requiring special protection.<sup>604</sup>

### **13.2. Choice-of-Court Agreements in Consumer Contracts**

Article 19 of the Brussels *Ibis* Regulation is similar to Article 15 of the Brussels *Ibis* Regulation. The origin may be found in Article 13 of the Brussels Convention when this section was named "jurisdiction in matters relating to instalment sales and loans". The word "consumer" did not appear in the text. The ECJ in the case *Bertrand*<sup>605</sup> specified that the persons who are subject to the protection in this Section are "private final consumers" who are "not engaged...in a trade or professional activities."<sup>606</sup> In 1978 the Brussels Convention was amended by virtue of the ECJ interpretation in the *Bertrand* case, and gave rise to the use of

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<sup>601</sup> T. HARTLEY, *Choice-of-Court Agreements under the European and International Instruments: The Revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*, *op. cit.*, p. 245.

<sup>602</sup> S. O'MALLEY, A. LAYTON, *European Civil Practice*, 1989, *op. cit.*, p. 488.

<sup>603</sup> H. HEISS, *Introduction to Articles 10-16*, in *Brussels I Bis Regulation*, *op. cit.*, p.431,

<sup>604</sup> Schlosser Report, par. 140.

<sup>605</sup> ECJ, Case 150/77, *Bertrand v Paul Ott KG*, 21 June 1978, ECLI:EU:C:1978:137.

<sup>606</sup> ECJ, Case 150/77, *Bertrand*, par. 21.

the word “consumer”. It must be borne in mind that in case that the consumer assigns his right to a professional, who brings the proceedings, the special protection under Section 4 is not provided.<sup>607</sup> The EU has adopted the Directive on consumer rights,<sup>608</sup> which clearly indicates that e-consumers are served with the same protection as “traditional” consumers.

On the other side of the contractual relationship stand suppliers who act in their trade or professional activities. In consequence, such persons must be non-consumers for the special provision to apply.<sup>609</sup> In addition, the contract must fall into the three categories listed in Article 17: (i) it is a contract for the sale of goods on instalment credit terms;<sup>610</sup> (ii) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods;<sup>611</sup> or (iii) in all other cases the contract has been concluded with the supplier who pursues his commercial or professional activities in the Member State of the consumer’s domicile or directs such activities to that Member State or to several States including that Member State and the contract falls within the scope of such activities.<sup>612</sup>

Article 19 of the Brussels *Ibis* Regulation regulates the condition when the agreement between the parties overrides the special jurisdictional rules laid down in Section 4 of the Brussels *Ibis* Regulation. Moreover, the Directive on unfair terms in consumer contracts<sup>613</sup> has priority over the Brussels *Ibis* Regulation according to Article 67 of the Brussels *Ibis* Regulation. In the case *Océano Grupo Editorial*, (Joined cases C-240/98 to C-244/98) the ECJ upheld that where a jurisdiction clause without being individually negotiated and included in a contract between a consumer and a seller within the meaning of the Directive confers exclusive jurisdiction on a court of a seller’s principal place of business, it must be

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<sup>607</sup> ECJ, Case C-89/91, *Shearson Lehmann Hutton Inc. v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH*, 19 January 1993, ECLI:EU:C:1993:15.

<sup>608</sup> Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance, OJ L 304, 22 November 2011.

<sup>609</sup> T. HARTLEY, *Choice-of-Court Agreements under the European and International Instruments: The Revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*, *op. cit.*, p. 253.

<sup>610</sup> On the interpretation of this term, see ECJ, Case 150/77, *Bertrand*, where the ECJ stated that it is “sale of goods on instalment credit terms is to be understood as a transaction in which the price is discharged by way of several payments”.

<sup>611</sup> On the interpretation of this term, see ECJ, Case 150/77, *Bertrand*, where the ECJ simply stated it is applied to a financing contracts linked to a contract of sale.

<sup>612</sup> On the latter case see the interpretation provided by the ECJ, Joined cases C-585/08 and C-144/09, *Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG and Hotel Alpenhof GesmbH v Oliver Heller*, 7 December 2010, ECLI:EU:C:2010:740, par. 75-84.

<sup>613</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21 April 1993.

regarded as unfair within the meaning of Article 3 of the Directive because it causes, contrary to the requirement of good faith, a significant imbalance in the parties' rights.<sup>614</sup>

The choice-of-court agreements in consumer contracts under Section 4 of the Brussels *Ibis* Regulation are valid if the requirements prescribed in Article 19, and to a certain extent in Article 25, of the Brussels *Ibis* Regulation are satisfied. Article 19 of the Brussels *Ibis* Regulation does not regulate any requirement of form for the jurisdiction agreement in consumer contracts as in case of the insurance contracts. The form prescribed in Article 25 of the Brussels *Ibis* Regulation must also be satisfied in the context of Article 19 of the Brussels *Ibis* Regulation.<sup>615</sup> The substantive validity of the jurisdiction agreement is governed by the conflict-of-laws rules of the chosen Member State.<sup>616</sup> As a consequence, all considerations in this text as to the formal and substantive validity may be used in the context of Article 15 of the Brussels *Ibis* Regulation.

Article 19 of the Brussels *Ibis* Regulation permits the jurisdiction clauses in three exhaustively listed situations.<sup>617</sup>

The provisions of Section 4 may be departed from by an agreement which is entered into after the dispute has arisen. This provision was designed to protect consumers. In consumer contracts, the clauses are often written in the small print of the seller's general terms and conditions, and for this reason, they must be treated with special protection.<sup>618</sup> In consequence, point 1 of Article 19 of the Brussels *Ibis* Regulation guarantees that such clause will not be valid in principle, unless the consumer concludes such a clause after the dispute has arisen.<sup>619</sup>

A jurisdiction agreement is also available for the consumers in order to broaden the range of jurisdiction of the Member State courts other than available according to Article 18 of the

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<sup>614</sup> ECJ, Joined cases C-240/98 to C-244/98, *Océano Grupo Editorial*, par. 24.

<sup>615</sup> S. O'MALLEY, A. LAYTON, *European Civil Practice*, 1989, *op. cit.*, p. 483.

<sup>616</sup> P. MANKOWSKI, P. NIELSEN, *Article 19*, in U. MAGNUS, P. MANKOWSKI (eds), *Brussels I Bis Regulation: Commentary. European Commentaries on Private International Law*, volume I., Otto Schmidt, Sellier European Law Publishers, 2016, p. 516.

<sup>617</sup> By stating "only", see U. Magnus, *Article 19*, in *Brussels I Bis Regulation*, 2016, *op. cit.*, p. 516.

<sup>618</sup> P. MANKOWSKI, P. NIELSEN, *Article 19*, in *Brussels I Bis Regulation*, 2016, *op. cit.*, p. 519.

<sup>619</sup> P. MANKOWSKI, P. NIELSEN, *Article 19*, in *Brussels I Bis Regulation*, 2016, *op. cit.*, p. 519.

Brussels *Ibis* Regulation.<sup>620</sup> Point 2 of Article 19 of the Brussels *Ibis* Regulation envisages asymmetric, optional jurisdiction agreements which can be only unilaterally applied by the consumer for his benefit.<sup>621</sup> There is no derogatory effect of jurisdiction clauses to the detriment of consumers. On the contrary, it regulates the prorogatory effects in the consumer's favour. In other words, the jurisdiction agreement does not exclude the jurisdiction of the courts according to Article 18, but it extends the consumer's possibility of choosing between several courts with jurisdiction.<sup>622</sup> Although if the clause does not contain the precise wording "for the benefit of" the consumer, it does not make any difference.<sup>623</sup> This clause can be freely inserted in the original contract and does not require the dispute have arisen.<sup>624</sup>

The third situation, where the jurisdiction clause in the consumer contracts is permitted, it allows a consumer and a supplier to agree on the jurisdiction of the Member State court of their own State if an agreement is not contrary to the law of such Member State. It means that at the time of the conclusion of the jurisdiction agreement, the agreement is merely domestic, and the element of internationality arises subsequently. This provision enhances the legal certainty that when one of the parties change domicile to another Member State, the jurisdiction of a court of a Member State of the previous domicile of the parties will be maintained.<sup>625</sup> On the contrary to the previous point, this provision concerns the derogation from the jurisdiction of the Member State courts which would have otherwise jurisdiction according to Article 18 of the Brussels *Ibis* Regulation.<sup>626</sup>

Is it relevant if the supplier or consumer is domiciled outside the EU?

When the supplier sues the consumer, which is not domiciled in the Member State, the special jurisdictional rules are not applicable, and national law applies instead.<sup>627</sup> However, the parties

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<sup>620</sup> On the same conclusions regarding choice-of-court agreements in employment contracts see ECJ; Case C-154/11, *Ahmed Mahamdia v People's Democratic Republic of Algeria*, 19 July 2012, ECLI:EU:C:2012:491, par. 63.

<sup>621</sup> P. MANKOWSKI, P. NIELSEN, *Article 19*, in Brussels I *Bis* Regulation, 2016, *op. cit.*, p. 522.

<sup>622</sup> On the same conclusions regarding choice-of-court agreements in employment contracts see, ECJ Case C-154/11, *Ahmed Mahamdia*, par. 63.

<sup>623</sup> S. O'MALLEY, A. LAYTON, *European Civil Practice*, 1989, *op. cit.*, p. 515.

<sup>624</sup> S. O'MALLEY, A. LAYTON, *European Civil Practice*, 1989, *op. cit.*, p. 514.

<sup>625</sup> P. MANKOWSKI, P. NIELSEN, *Article 19*, in Brussels I *Bis* Regulation, 2016, *op. cit.*, p. 527, 528.

<sup>626</sup> S. O'MALLEY, A. LAYTON, *European Civil Practice*, 1989, *op. cit.*, p. 515.

<sup>627</sup> T. HARTLEY, *Choice-of-Court Agreements under the European and International Instruments: The Revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*, *op. cit.*, p. 267.



may conclude a jurisdiction agreement according to Article 25 of the Brussels *Ibis* Regulation. When the consumer sues the supplier, the position must be distinguished under the Brussels *Ibis* Regulation and the Brussels I Regulation. In cases that the Brussels *Ibis* Regulation applies, the supplier without a domicile, a branch, agency, or another establishment in the EU may be still sued on the basis of the special jurisdictional rules if the consumer is domiciled in the Member State. Such amendment was inserted into Article 6 of the Brussels *Ibis* Regulation by stating that:

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

Article 18 par. 1 of the Brussels *Ibis* Regulation then provides:

*A consumer may bring proceedings against the other party ... regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled.*

It means that if, for example, a Russian supplier concludes a jurisdiction agreement with the consumer habitually resident in France in favour of the Dutch court, the consumer should not be deprived from its protection to sue the supplier in a French court according to Article 18 par. 1 of the Brussels *Ibis* Regulation or to sue the supplier in a Dutch court according to Article 19 par. 2 of the Brussels *Ibis* Regulation.<sup>628</sup>

This protection is not provided to the consumers under the Brussels I Regulation. In case, that the supplier without a domicile, a branch, agency, or another establishment in the EU is sued by the consumer habitually resident in the EU, the Brussels I Regulation does not apply. The defendant must be domiciled in the Member State to activate the special rules according to the Brussels Regulation. If a Russian supplier concludes the jurisdiction agreement with the consumer domiciled in France in favour of the Dutch court and the consumer would be

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<sup>628</sup> On the opposite result, see T. HARTLEY, *Choice-of-Court Agreements under the European and International Instruments: The Revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*, *op. cit.*, p. 267 and 268, which does not distinguish between the regime under the Brussels I Regulation and the Brussels *Ibis* Regulation. Thus, according to the author, the question on the jurisdiction and effectiveness of the choice-of-court agreement is subject to national law.

interested in seizing a French court, the choice-of-court agreement should be governed by Article 23 of the Brussels I Regulation<sup>629</sup>

### 13.3. Choice-of-Court Agreements in Employment Contracts

Section 5 of the Brussels *Ibis* Regulation lays down rules whose objective is to protect the employee by means of jurisdiction rules that are more favourable to his interests.<sup>630</sup> As stated by ECJ in the several occasions, the jurisdiction rules over employment contracts should ensure the proper protection for the employee as the weaker of the contracting parties.<sup>631</sup>

The position regarding the agreement on jurisdiction in individual contracts of employment is similar to that concerning consumer contracts. Article 23 of the Brussels *Ibis* Regulation restricts the possibility to conclude an agreement on jurisdiction in a contract of employment and regulates the conditions when the agreement between the parties overrides the special jurisdictional rules laid down in Section 5 of the Brussels *Ibis* Regulation. Also as with insurance and consumer contracts, the choice-of-court agreements under Section 5 of the Brussels *Ibis* Regulation are valid if the requirements prescribed in Article 23, and to a certain extent in Article 25, of the Brussels *Ibis* Regulation are satisfied. It means that the formal requirements of Article 25 of the Brussels *Ibis* Regulation must also be satisfied in the context of Article 23 of the Brussels *Ibis* Regulation,<sup>632</sup> as well as the substantive validity of the jurisdiction agreement is governed by the conflict-of-laws rules of the designated Member State according to Article 25 of the Brussels *Ibis* Regulation.<sup>633</sup>

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<sup>629</sup> On the opposite result see T. HARTLEY, *Choice-of-Court Agreements under the European and International Instruments: The Revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*, *op. cit.*, p. 267, 268. According to the author, the national law should govern the jurisdiction and the effectiveness of the choice of court agreement.

<sup>630</sup> ECJ, Case C-462/06, *Glaxosmithkline and Laboratoires Glaxosmithkline v Jean-Pierre Rouard*, 22 May 2008, ECLI:EU:C:2008:299, par. 17.

<sup>631</sup> ECJ, Case 133/81, *Roger Ivenel v Helmut Schwab*, 26 May 1982, ECLI:EU:C:1982:199, par. 14; Case C-125/92, *Mulox IBC Ltd v Hendrick Geels*, 13 July 1993, ECLI:EU:C:1993:306, par. 18; Case C-383/95, *Petrus Wilhelmus Rutten v Cross Medical Ltd*, 9 January 1997, ECLI:EU:C:1997:7, par. 22; Case C-437/00 *Giulia Pugliese contro Finmeccanica SpA, Betriebsteil Alenia Aerospazio*, 10 aprile 2003, ECLI:EU:C:2003:219, par. 18.

<sup>632</sup> S. O'MALLEY, A. LAYTON, *European Civil Practice*, 1989, *op. cit.*, p. 483.

<sup>633</sup> P. MANKOWSKI, P. NIELSEN, *Article 19*, in *Brussels I Bis Regulation*, 2016, *op. cit.*, p. 516.

Moreover, Article 23 of the Brussels *Ibis* Regulation permits jurisdiction clauses in two exhaustively listed situations which coincide with the list in points 1 and 2 of Article 19 of the Brussels *Ibis* Regulation governing consumer contracts.

Such an agreement must be concluded: (i) after the dispute has arisen; or (ii) must allow the employee to bring proceedings before courts other than those on which those rules confer jurisdiction. In both cases, it may be referred to the previous two Sections. It is worth mentioning that Article 23 of the Brussels *Ibis* Regulation does not allow an employer and an employee to agree on the jurisdiction of the Member State court of their own State if an agreement is not contrary to the law of such Member State as Article 19 par. 3 of the Brussels *Ibis* Regulation does for the consumer contracts.

Is it relevant if the employer or employee is domiciled in a Third State? When the employer sues the employee, which is not domiciled in the Member State, the special jurisdictional rules are not applicable, and the national law applies instead.<sup>634</sup> However, the parties may conclude a jurisdiction agreement according to Article 25 of the Brussels *Ibis* Regulation. When the employee sues the employer, the position must be distinguished under the Brussels *Ibis* Regulation and the Brussels I Regulation. In cases that the Brussels *Ibis* Regulation applies, the employer without a domicile, a branch, agency, or another establishment in the EU may be still sued on the basis of the special jurisdictional rules under Section of the Brussels *Ibis* Regulation. Such an amendment was inserted into the Brussels *Ibis* Regulation.<sup>635</sup> It means that if for example, a Russian employer concludes a jurisdiction agreement with the employee carrying out his work in France in favour of the Dutch court, the employee may sue the employer in a French court according to Article 21 par. 2 in conjunction with Article 21 par. 1 lett. b) of the Brussels *Ibis* Regulation or in the Dutch court according to Article 23 point 2 of the Brussels *Ibis* Regulation.<sup>636</sup>

This protection is not provided to the employee under the Brussels I Regulation. In case, that the employer without a domicile, a branch, agency, or another establishment in the EU is sued by the employee habitually carrying out his work in the EU, the Brussels I Regulation does

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<sup>634</sup> T. HARTLEY, *Choice-of-Court Agreements under the European and International Instruments: The Revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*, *op. cit.*, p. 280.

<sup>635</sup> See Article 6 par 1 and Article 21 par. 2 of the Brussels *Ibis* Regulation.

<sup>636</sup> On the similar example see T. HARTLEY, *Choice-of-Court Agreements under the European and International Instruments: The Revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*, *op. cit.*, p. 279.

not apply since the defendant must be domiciled in the Member State to activate the special rules according to the Brussels Regulation. If a Russian supplier concludes a jurisdiction agreement with the consumer domiciled in France in favour of the Dutch court and the employee would be interested in seizing a French court, the choice-of-court agreement should be governed by Article 23 of the Brussels I Regulation.<sup>637</sup>

#### 14. *Lis Pendens* Rule among the Member States

The purpose of the rule on *lis pendens* according to the Brussels regime was to facilitate the proper administration of justice in the EU and to avoid the risk of conflicting judgments,<sup>638</sup> by preventing parallel proceedings which have the potentiality to give rise to such judgments.<sup>639</sup> Article 21 of the Brussels Convention and Article 27 of the Brussels I Regulation required any Member State court other than the one first seized to stay its proceedings involving the same cause of action<sup>640</sup> and between the same parties<sup>641</sup> of its motion in favour of the first seized Member State court. This *lis pendens* rule was subject of the criticism due to its applicability to the jurisdiction agreements. It means that a second seized Member State court whose jurisdiction was claimed under a jurisdiction agreement nevertheless had to stay the proceedings until the Member State court first seized had declared lack of its jurisdiction. Although one exception as to the operation of *lis pendens* in relation to the exclusive

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<sup>637</sup> On the opposite result see T. HARTLEY, *Choice-of-Court Agreements under the European and International Instruments: The Revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*, *op. cit.*, p. 279 and 268. According to the author, the national law should govern the jurisdiction and the effectiveness of the choice of court agreement.

<sup>638</sup> Jenard Report, p. 41.

<sup>639</sup> A. BRIGGS, P. REES, *Civil Jurisdiction and Judgements*, 2009, *op. cit.*, p. 311-343; R. FENTIMAN, *International Commercial Litigation*, *op. cit.*, p. 421-452; S. O'MALLEY, A. LAYTON, *European Civil Practice*, 2004, *op. cit.*, 770-785; R. FENTIMAN, *Introduction to Arts. 27-30*, in U. MAGNUS, P. MANKOWSKI (eds), *Brussels I Regulation*, 2 eds, Sellier European Law Publishers, 2012, p. 558-560.

<sup>640</sup> ECJ, Case 144/86, *Gubisch Maschinenfabrik KG v Giulio Palumbo*, 8 December 1987, ECLI:EU:C:1987:528; Case C-406/92, *The owners of the cargo lately laden on board the ship "Tatry" v the owners of the ship "Maciej Rataj"*, 6 December 1994, ECLI:EU:C:1994:400; Case C-39/02, *Mærsk Olie & Gas A/S v Firma M. de Haan en W. de Boer*, 14 October 2004, ECLI:EU:C:2004:615.

<sup>641</sup> ECJ, Case C-351/96, *Drouot assurances SA v Consolidated metallurgical industries (CMI industrial sites), Protea assurance and Groupement d'intérêt économique (GIE) Réunion européenne*, 19 May 1998, ECLI:EU:C:1998:242.

jurisdiction was admitted by the ECJ,<sup>642</sup> the proper application of “first seized *lis pendens*” rule was confirmed by the ECJ in C-116/02, *Gasser* in the context of jurisdiction agreements.

MISAT, an Italian company, brought proceedings against Gasser, Austrian company before the Italian court, whereby six months after Gasser brought an action against MISAT before the Austrian court. According to Gasser, a jurisdiction clause in favour of the Austrian court was inserted into all invoices sent by Gasser to MISAT, without the latter having raised any objection. Such a jurisdiction agreement was constituted within the meaning of Article 17 of the Brussels Convention due to the usage prevailing in trade between Austria and Italy. The Austrian court asked the ECJ whether the existence of the jurisdiction clause allows non-application of Article 21 of the Brussels Convention and whether it may render a judgment without waiting for a declaration from the court first seized stating that it has no jurisdiction.<sup>643</sup>

The Government of the UK suggested answering in an affirmative way, supporting its argument with the interpretation provided by the ECJ in case C-351/89, *Overseas Union Insurance*, where the ECJ accepted that exclusive jurisdiction based on Article 16 of the Brussels Convention prevails over Article 21 of the Brussels Convention. Thus, the Member State court having exclusive jurisdiction could entertain the proceedings notwithstanding other first seized Member State court. It is worth mentioning that in this judgment the exclusive jurisdiction was not expressly distinguished between Article 16 and 17 of the Brussels Convention.<sup>644</sup> In order to avoid the risk of irreconcilable judgments, the Government of the UK proposed to reverse the *lis pendens* rule in a way that a first seized Member State court whose jurisdiction is contested due to the jurisdiction agreement should stay proceedings until the designated second seized Member State court gives a decision on its own jurisdiction.<sup>645</sup> Advocate General Léger suggested that a designated second seized Member State court may, by way of derogation from Article 21 of the Brussels Convention, give the judgment without waiting for a declaration from the (non-competent) first seized

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<sup>642</sup> ECJ, Case C-351/89, *Overseas Union Insurance Ltd and Deutsche Ruck Uk Reinsurance Ltd and Pine Top Insurance Company Ltd v New Hampshire Insurance Company*, 27 June 1991, ECLI:EU:C:1991:279.

<sup>643</sup> ECJ, Case C-116/02, *Gasser*, par. 26.

<sup>644</sup> For this possible assimilation with Article 17 of the Brussels Convention, see also ECJ, Case C-351/89, *Overseas Union Insurance*, Opinion of Advocate General Van Gerven, 7 March 1991, ECLI:EU:C:1991:105, par. 13.

<sup>645</sup> ECJ, Case C-116/02, *Gasser*, par. 33.

Member State court where there are no doubts as to the jurisdiction of the designated Member State court.<sup>646</sup> His solution tolerated the risk of parallel proceedings, whereby the risk of inconsistent judgments as regards the validity of a jurisdiction agreement would be reduced due to the strict formal conditions required by Article 17 of the Brussels Convention.<sup>647</sup>

However, the ECJ did not accept the proposed solution and held that the parties always have the option to invoke the jurisdiction clause and the defendant has the option of entering an appearance before the Member State court first seized.<sup>648</sup> The first seized Member State court must verify the existence of the agreement and decline jurisdiction if it is established according to Article 17 of the Brussels Convention.<sup>649</sup> Legal certainty as to the jurisdiction clauses sought by the Brussels Convention and clear and precise rules in cases of *lis pendens* prevails.<sup>650</sup> In consequence, a second seized Member State court whose jurisdiction has been claimed under a jurisdiction agreement must nevertheless stay proceedings until the Member State court first seized has declared that it has no jurisdiction.<sup>651</sup>

The ECJ did not accept the suggestions of the Government of the UK to recognise an exception to Article 21 of the Brussels Convention also in relation to the proceedings brought in bad faith before a non-competent Member State court for the purpose of blocking proceedings.<sup>652</sup> On the contrary, according to the ECJ, it would not be compatible with the Brussels Convention to respect rules on *lis pendens* only to assume that the Member State court first seized will give judgment within a reasonable period: the delays cannot be settled in the context of the Brussels Convention.<sup>653</sup>

This judgment was called a shocking case<sup>654</sup> and was highly criticised.<sup>655</sup> This interpretation gives a recalcitrant party the opportunity to seize a Member State court in breach of

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<sup>646</sup> ECJ, Case C-116/02, *Gasser*, Opinion of Advocate General Léger, 9 September 2003, par. 83.

<sup>647</sup> ECJ, Case C-116/02, *Gasser*, Opinion of Advocate General Léger, par. 80.

<sup>648</sup> ECJ, Case C-116/02, *Gasser*, par. 49.

<sup>649</sup> ECJ, Case C-116/02, *Gasser*, par. 49.

<sup>650</sup> ECJ, Case C-116/02, *Gasser*, par. 51.

<sup>651</sup> ECJ, Case C-116/02, *Gasser*, par. 54.

<sup>652</sup> ECJ, Case C-116/02, *Gasser*, par. 63.

<sup>653</sup> ECJ, Case C-116/02, *Gasser*, par. 68, 69.

<sup>654</sup> A. BRIGGS, *Agreements on Jurisdiction and Choice of Law*, *op. cit.*, p. 276.

<sup>655</sup> See e.g., U. MAGNUS, P. MANKOWSKI, *Brussels I on the Verge of Reform, A Response to the Green Paper on the Review of the Brussels I Regulation*, *ZVglRWissZeitschrift für Vergleichende Rechtswissenschaft* 109 (2010), p. 11; R. FENTIMAN, *Case note on Case C-116/02 (Erich Gasser GmbH v. MISAT Srl)*, *Common Market Law Review*, 42 (2005), p. 255; P. BRÍZA, *Choice-of-court Agreements: Could the Hague Choice-of-court Agreements Convention and the Reform of the Brussels I Regulation be the way out of the Gasser-Owusu*

jurisdiction agreement and prevent thus the institution of the proceedings before the designated Member State court. Therefore, the institution of the proceedings in front of the “slow” Member State court blocks the proceedings, which gives one party the tactical advantage. In consequence, this interpretation was often perceived as a legitimization of “Torpedo” actions,<sup>656</sup> *i.e.*, a mechanism to undermine a choice-of-court agreement.<sup>657</sup> The other party, which suffered from the blocking of the proceedings, is often forced to settle.<sup>658</sup> Moreover, the institution of the proceedings in front of the non-designated Member State court could also result in the Member State court declining jurisdiction due to the prescriptive period laid down by the substantial law, which is identified by the rules of private international law of the designated Member State,<sup>659</sup> or due to the evaluation of the jurisdiction agreement of the first seized Member State court as ineffective.<sup>660</sup> In the latter case, the first seized Member State court may reach a solution on the merits, rather than the designated Member State court.<sup>661</sup>

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*Disillusion*, Journal of Private International Law, 5 (2009), p. 537; R. FENTIMAN, *Parallel Proceedings and Jurisdiction Agreements in Europe*, in P. DE VAREILLES-SOMMIÈRES (ed), *Forum Shopping in the European Judicial Area*, Hart Publishing, 2007, p. 27-54; R. FENTIMAN, *Access to Justice and Parallel proceedings in Europe*, Cambridge Law Journal, 63:2 (2004); A. NEIL, *Abuse of process and obstructive tactics under the Brussels jurisdictional system: Unresolved problems for the European authorities Erich Gasser GmbH v MISAT Srl Case C-116/02 (9 December 2003) and Turner v Grovit Case C-159/02 (27 April 2004)*, Zeitschrift für Gemeinschaftsprivatrecht, 2005, p. 8-15; L. G. RADICATI DI BROZOLO, *Choice-of-court and arbitration agreements and the review of the Brussels I regulation*, in IPRax, 30:2 (2010), p. 121 *et seq.* See also Questionnaire of the Heidelberg Report, the national report of the U.K. (questions III 3.1, 3.2, 3.3., 3.7); German national report (questions III 3.2 and 3.7); Greek report (Klamaris - 3<sup>rd</sup> questionnaire, 3.7); national report of the Netherlands (3<sup>rd</sup> questionnaire, 3.2); Austrian national report (3<sup>rd</sup> questionnaire, 3.7). See Heidelberg Report, para 438. See also House of Lords, European Union Committee, 21st Report of Session 2008–09, 27 July 2009, p. 18

<sup>656</sup> J. VLEK, *Lis Pendens, Choice-of-court Agreements and Abuse of Law Under Brussels Ibis*, Netherlands International Law Review 63: 297 (2016), p. 301. On the principle of abuse of right in context of Gasser case, see also A. NUYTS, *The Enforcement of jurisdiction Agreements Further to Gasser and the Community Principle of Abuse of Right*, in P. DE VAREILLES-SOMMIÈRES (ed.), *Forum Shopping in the European Judicial Area*, Hart Publishing, 2007, pp. 55 *et seq.*

<sup>657</sup> See M. FRANZOSI, *Worldwide Patent Litigation and the Italian Torpedo*, European Intellectual Property Review, 7:19 (1997), p. 384, where the author stressed the possibility that the enforcement of intellectual property rights could be paralysed by seizing the Member States with “slow-moving” jurisdictions.

<sup>658</sup> P. BŘÍZA, *Volba práva a volba soudu v mezinárodním obchodě*, *op. cit.*, p. 541.

<sup>659</sup> P. FRANZINA, *Successive Proceedings over the Same Cause of Action: A Plea for a New Rule on Dismissals for Lack of Jurisdiction*, in F. POCAR, I. VIARENGO, F. C. VILLATA (eds.), *Recasting Brussels I: Proceedings of the Conference Held at the University of Milan on 25-26 November 2011*, CEDAM, 2012, p. 253-271; F. C. VILLATA, *L’attuazione degli accordi di scelta del foro nel regolamento Bruxelles I*, *op. cit.*, p. 130.

<sup>660</sup> R. FENTIMAN, *Parallel proceedings and Jurisdiction Agreements*, in *Forum shopping in European Judicial Area*, *op. cit.*, p. 41.

<sup>661</sup> R. FENTIMAN, *Parallel proceedings and Jurisdiction Agreements*, in *Forum shopping in European Judicial Area*, *op. cit.*, p. 42.

The *Gasser* judgment, subsequent national judgments following the *Gasser* case,<sup>662</sup> and the discussions on the possible solutions gave rise to the common purpose of improving the effectiveness of the choice-of-court agreements. In the Green Paper, main solutions were proposed. The first one corresponded to the solution proposed by the Advocate General Léger in the *Gasser* case when the designated Member State court would not be prevented from its obligation to stay proceedings under the *lis pendens* rule.<sup>663</sup> However, in this case, parallel proceedings leading to irreconcilable judgments would be possible. The second proposed option corresponded to the solution proposed by the Government of the United Kingdom in the *Gasser* case, in particular, the priority rule would be reversed insofar as the designated Member State court would have priority to determine its jurisdiction, and any other Member State court seized would stay proceedings until the jurisdiction of the designated Member State court is established. Alternatively, the Commission proposed<sup>664</sup> to: (i) maintain *status quo*, but to establish direct communication and cooperation between the seized Member State courts combined with deadlines and reports on the progress of the proceedings;<sup>665</sup> (ii) grant damages for breach of jurisdiction agreements;<sup>666</sup> (iii) exclude the application of the *lis*

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<sup>662</sup> *JP Morgan Europe Ltd./ v. Primacom AG and Others*, [2005] 2 Lloyd's Rep. 665. Comm. It was a very disputable judgment of the English court that stayed proceedings, in the light of the *Gasser* case, since the German court was first seized in breach of a choice-of-court clause designating the English courts.

<sup>663</sup> Green Paper on the review of Council Regulation (EC) no 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM/2009/0175 final, 21 April 2009, p. 7. On support of this solution see House of Lords, European Union Committee, 21st Report of Session 2008–09, 27 July 2009, p. 21.

<sup>664</sup> Green Paper on the review of Council Regulation (EC) no 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM/2009/0175 final, 21 April 2009, p. 7. See also other solutions proposed in R. FENTIMAN, *Parallel proceedings and Jurisdiction Agreements*, in *Forum shopping in European Judicial Area*, *op. cit.*, p. 49-51. See also Commission staff working paper. Impact Assessment, Accompanying document to the Proposal for Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, (Recast), SEC(2010) 1547 final, 14 December 2010, p. 31, where according to the Commission, «*Setting a deadline would be helpful to speed up proceedings in some countries where the judicial system is very slow but would not as such discourage abusive litigation in a non-competent court.*».

<sup>665</sup> House of Lords, European Union Committee, 21st Report of Session 2008–09, 27 July 2009, p. 21, this solution was supported only to the certain extent – it might improve the situation, but it will still be essential to provide clear rules. See discussion against this solution: Opinion of the European Economic and Social Committee on the 'Green Paper on the review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters' COM (2009) 175 final, 22 September 2010, point 4.7.

<sup>666</sup> House of Lords, European Union Committee, 21st Report of Session 2008–09, 27 July 2009, p. 21, such a solution was not supported due to «*the Regulation's general philosophy of non-interference by the courts of one State in the affairs of the courts of another State.*». This option was not subsequently considered in the Commission staff working paper. Impact Assessment. Accompanying document to the Proposal for Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, (Recast), SEC(2010) 1547 final, 14 December 2010, p. 31.



*pendens* rule in a situation where the parallel proceedings are proceedings on the merits, on the one hand and proceedings for declaratory relief, on the other hand,<sup>667</sup> or at least to ensure a suspension of the running of limitation periods; and (iv) prescribe the standard choice-of-court clause.<sup>668</sup>

According to the Commission in the Impact Assessment, the last options have been discarded because they did not receive sufficient support from stakeholders.<sup>669</sup> The option concerning the exemption of the chosen court from the obligation to stay proceedings would, according to the Commission, limit the risk of abusive litigation. However, as stated above, it would create the risk of time and cost in parallel litigation and result in conflicting judgments “*which the rules of the Regulation generally seek to avoid*”.<sup>670</sup> According to this Impact Assessment, 7.7% of companies have faced a situation where their contractual counterpart did not respect the jurisdiction agreement and brought proceedings in a different Member State court. The risk of parallel proceedings resulting in conflicting outcomes would affect 1.5% of companies per year. In consequence, the option concerning the reverse priority rule was evaluated as the better solution since it “*would eliminate the costs and delays which businesses incur today due to their partners’ bad faith attempts to circumvent choice-of-court agreements*”.<sup>671</sup>

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<sup>667</sup> However, some procedural laws do not allow an action for negative declaratory relief, e.g. in Ireland, see Irish National Report (3rd questionnaire, 3.7), Heidelberg Report. This proposal was discarded by the Commission since: «*Stakeholders also pointed out that this option would not be in line with the solution adopted by the Hague Choice-of-court Convention. It was therefore decided not to pursue it further.*», see Commission staff working paper. Impact Assessment. Accompanying document to the Proposal for Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, (Recast), SEC (2010) 1547 final, 14 December 2010, p. 31.

<sup>668</sup> See e.g. Heidelberg Report, para 451: «*[Party 1] and [Party 2] agree that the courts of [Member State] have exclusive jurisdiction to hear and determine any suit, action or proceeding, and to settle any dispute or disputes which may arise out of or in connection with the [Agreement], including, without limitation, a dispute or disputes regarding existence, validity, termination, authority to conclude the agreement, or the consequences of nullity.*». See also House of Lords, European Union Committee, 21st Report of Session 2008–09, 27 July 2009, p. 21, it was opposed to such proposal since: «*Parties are likely to prefer to draft their own agreements, suitable to their particular circumstances...*». Against this solution see: Opinion of the European Economic and Social Committee on the ‘Green Paper on the review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters’ COM (2009) 175 final, 22 September 2010, point 4.8.1. This option was not subsequently considered in the Commission staff working paper. Impact Assessment, Accompanying document to the Proposal for Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, (Recast), SEC(2010) 1547 final, 14 December 2010, p. 31.

<sup>669</sup> Commission staff working paper. Impact Assessment. Accompanying document to the Proposal for Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, (Recast), SEC(2010) 1547 final, 14 December 2010, p. 31.

<sup>670</sup> *Ibidem*, p. 33.

<sup>671</sup> *Ibidem*, p. 33.

Subsequently, the Commission proposed the new *lis pendens* rule concerning exclusive jurisdiction agreements, which provided:

*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 or the courts of a Member State, the courts of other Member States shall have no jurisdiction over the dispute until such time as the court or courts designated in the agreement decline their jurisdiction.*<sup>672</sup>

This wording was very doubtful: new Article 32 par. 2 of the Proposal did not require the non-chosen Member State court to stay its proceedings, but this wording provided “shall have no jurisdiction”. This wording seemed to require the non-designated Member State court to be obliged to declare that it has no jurisdiction, and to dismiss the claim whatever the designated Member State court would have decided.<sup>673</sup>

#### **14.1. *Lis Pendens* Rule according to Article 31 of the Brussels *Ibis* Regulation**

The wording of the current *lis pendens* rule in relation to the jurisdiction agreement according to the Brussels *Ibis* Regulation has clarified some of the criticised aspects. Article 31 par. 2, 3, and 4 of the Brussels *Ibis* Regulation must be read in conjunction with new Recital 22 of the Brussels *Ibis* Regulation.<sup>674</sup> Article 31 par. 2 of the Brussels *Ibis* Regulation gives priority to the Member State court designated in an exclusive agreement, as referred to in Article 25, to decide on the validity of the exclusive jurisdiction agreement and to determine its jurisdiction in proceedings involving the same cause of action and between the same parties. The first seized non-designated Member State court must stay its proceedings until such time as the subsequently seized chosen Member State court declares that it has no jurisdiction under the jurisdiction agreement. Article 31 par. 3 of the Brussels *Ibis* Regulation then specifies that once the designated Member State court has established jurisdiction in accordance with the

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<sup>672</sup> See new Article 32 of the Proposal for a Recast of the Brussels I Regulation.

<sup>673</sup> C. HEINZE, *Choice-of-court agreements, coordination of proceedings and provisional measures in the reform of the Brussels I regulation*, *op. cit.*, p. 585; U. Magnus, *Choice-of-court Agreements in the Review Proposal for the Brussels I Regulation*, in *The Brussels I Review Proposal Uncovered*, p. 96; A. DICKINSON, *The Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)*, *op. cit.*, p. 19-20.

<sup>674</sup> Although as stated by ECJ, the Articles prevail over recitals, see ECJ, Case C-346/88, *Schweizerische Lactina Panchaud AG v Bundesamt für Ernährung und Forstwirtschaft*, 14 December 1989, ECLI:EU:C:1989:653; C-308/97, *Giuseppe Manfredi v Regione Puglia*, 25 November 1998, ECLI:EU:C:1998:566.

jurisdiction agreement, any Member State court shall decline jurisdiction in favour of that Member State court. Recital 22 of the Brussels *Ibis* Regulation then clarifies that the designated Member State court can proceed without waiting for the decision of the non-designated Member State court to stay its proceedings.

The wording of the Brussels *Ibis* Regulation leaves several questions regarding the operation of this new *lis pendens* rule, regarding the fulfilment of the conditions of the non-chosen Member State court before staying its proceedings and regarding the effects of this determination on the designated Member State court.

#### **14.1.1. Review of the Choice-of-Court Agreement**

The wording of Article 31 par. 2 of the Brussels *Ibis* Regulation provides for two prerequisites in respect of the non-chosen Member State court's obligation to stay its proceedings: (i) the other Member State court is seized; and (ii) such a Member State court is the chosen under an exclusive jurisdiction clause according to Article 25 of the Brussels *Ibis* Regulation.

In case that the proceedings are pending in front of both Member State courts, as required in Article 31 par. 2 of the Brussels *Ibis* Regulation, difficulty arises in the context of its imprecise wording regarding to what extent (if at all) the exclusive jurisdiction clause may be reviewed by the non-designated Member State court, according to Article 25 of the Brussels *Ibis* Regulation. The question of the review was one of the most controversial points during the preparatory works on the Recast.<sup>675</sup> Three possible approaches to this issue may be available:<sup>676</sup>

##### ***i) No review***

It is debatable if the non-chosen Member State court does not need to make any determination that an exclusive jurisdiction agreement has been concluded. In such a case, it would suffice

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<sup>675</sup> C. HEINZE, B. STEINROTTER, *The Revised Lis Pendens Rules in the Brussels Ibis Regulation*, in S. STUIJ, V. LAZIĆ (eds), *Brussels Ibis Regulation: Changes and Challenges of the Renewed Procedural Scheme*, Springer, 2017, p. 14.

<sup>676</sup> On the division see J. VLEK, *Lis Pendens, Choice-of-court Agreements and Abuse of Law Under Brussels Ibis*, *op. cit.*, p. 308; I. BERGSON, *The death of the torpedo action? The practical operation of the Recast's reforms to enhance the protection for exclusive jurisdiction agreements within the European Union*, *Journal of Private International Law*, 11:1 (2015), p. 7.

to assert the existence of the jurisdiction clause.<sup>677</sup> However, at least the non-chosen Member State court should examine whether there is an exclusive jurisdiction agreement, as suggested in Recital 22 of the Brussels *Ibis* Regulation, which provides that the new *lis pendens* rule does not apply where the parties have concluded conflicting exclusive choice-of-court agreements, where the general *lis pendens* rules of the Brussels *Ibis* Regulation applies. Moreover, paragraph 4 of Article 31 of the Brussels *Ibis* Regulation provides that this new *lis pendens* rule according to Article 31 par. 2 and 3 of the Brussels *Ibis* Regulation is not applicable in respect of the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer, or the employee as the claimant when the jurisdiction agreement is not valid under a provision contained within Sections 3, 4, or 5 of the Brussels *Ibis* Regulation. This exception from the “reverse *lis pendens* rule” is justified by the fact that those sections include the provisions aimed at protecting the weaker party by providing an exhaustive list of the Member States to have jurisdiction. This exception should be applicable also for any ground of the exclusive jurisdiction according to Article 24 of the Brussels *Ibis* Regulation, although it is not expressed in Article 31 par. 4 of the Brussels *Ibis* Regulation.<sup>678</sup> It means that the seized non-chosen Member State court must, at least, ascertain whether the jurisdiction agreement is exclusive and should examine the validity of the choice-of-court agreements in respect to sections 3 to 6 of Chapter 2 of the Brussels *Ibis* Regulation.

This approach could result in a “reverse torpedo” since it would open the door to the abusive litigation tactics when the defendant seeking to avoid a dispute being litigated in a seized *forum*, would assert that there is a choice-of-court agreement in favour of other Member State court, and the defendant would bring proceedings in the putatively chosen Member State

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<sup>677</sup> Such an approach was suggested by A. DICKINSON, *The Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)*, *op. cit.*, p. 34, providing that: «*The courts of Member State whose jurisdiction is contested on the ground that the parties have agreed that the court or courts of another Member State have exclusive jurisdiction under Article 23(1) shall ... stay proceedings once the Member State court or courts which are claimed to have been chosen are seized of proceedings to determine, as their main object or as an incidental question, the existence, validity or effects of the choice-of-court agreement with respect to the dispute between the parties.*».

<sup>678</sup> M. WELLER, *Choice of Forum Agreements under the Brussels I Recast and under the Hague Convention: Coherences and Clashes*, *op. cit.*, p. 27.

court.<sup>679</sup> The reverse *lis pendens* rule based on the no review from the non-chosen Member State court would drawback the advantage of this new mechanism.

*ii) Entire Review*

In this case, the opposite approach is concerned for the non-chosen Member State court. Such a Member State court would thoroughly review the existence and the validity of the jurisdiction agreement in the same way as the designated Member State court by virtue of Article 25 of the Brussels *Ibis* Regulation. On the basis of this evaluation, the non-chosen Member State court would decide on its stay. Although the wording of Article 31 par. 2 of the Brussels *Ibis* Regulation states “conferring” exclusive jurisdiction agreement, it might indicate a full review approach by the first seized non-chosen Member State court.<sup>680</sup> On the contrary, this approach seems to contravene to the wording of Recital 22 of the Brussels *Ibis* Regulation providing that “...the designated court has priority to decide on the validity of the agreement and on the extent to which the agreement applies to the dispute pending before it.”. In other words, the non-designated Member State is not entitled to decide as to the validity of the jurisdiction clause. Moreover, the purpose of Article 31 par. 2 of the Brussels *Ibis* Regulation is to grant priority to the chosen Member State court to determinate whether it has jurisdiction. It is difficult to find the *rationae* to grant to the second seized designated Member State court the priority to decide when the first seized Member State court could conduct such a complete investigation.

The disadvantage of the full review approach is represented by more financial resources and more time than a limited review. In order to prevent the time-consuming blocking of the proceedings, Article 31 par. 2 preferred to tolerate parallel proceedings for a limited period. However, under a full review, there is a much more significant probability that the parallel proceedings would take place, and the non-designated Member State court could determine more easily the invalidity of the jurisdiction agreements.<sup>681</sup> Suppose that the non-chosen

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<sup>679</sup> T. HARTLEY, *The “Italian torpedo” and choice-of-court agreements: sunk at last?*, in P. LINDSKOUG (ed), *Essays in Honour of Michael Bogdan*, Juristförlaget, 2013, p. 95, 100; J. VLEK, *Lis Pendens, Choice-of-court Agreements and Abuse of Law Under Brussels Ibis*, *op. cit.*, p. 308; I. BERGSON, *The death of the torpedo action? The practical operation of the Recast’s reforms to enhance the protection for exclusive jurisdiction agreements within the European Union*, *op. cit.*, p. 8.

<sup>680</sup> M. WELLER, *Choice of Forum Agreements under the Brussels I Recast and under the Hague Convention: Coherences and Clashes*, *op. cit.*, p. 27.

<sup>681</sup> M. WELLER, *Choice of Forum Agreements under the Brussels I Recast and under the Hague Convention: Coherences and Clashes*, *op. cit.*, p. 29.

Member State court would make a full review of the existence and validity of the jurisdiction agreement, and the designated Member State court would be able to proceed irrespective of whether the non-designated court has already decided on the stay of proceedings by virtue of Recital 22 of the Brussels *Ibis* Regulation.<sup>682</sup> Such a situation would quickly lead to parallel proceedings and might result in a race to judgment<sup>683</sup> or even in the irreconcilable judgments. Or, if the non-chosen Member State court would decide as the first on the invalidity of the choice-of-court agreement, the judgment as to the merits would be recognisable and enforceable throughout Chapter III of the Brussels *Ibis* Regulation, as well as the interim judgment as to the validity of the jurisdiction agreement in light of the *Gothaer*<sup>684</sup> case.

### iii) *Prima facie* review

If the previous two options cannot be accepted due to the reasons specified above, logically a compromise should be considered. In this case, it would be required by the non-chosen Member State court to stay its proceedings once it is satisfied that there is some evidence that a jurisdiction agreement exists. This solution was already proposed in 2008 by Professor Fentiman. According to his opinion, the mere allegation that the jurisdiction agreement exists would be insufficient.<sup>685</sup> In consequence, a stay would be granted on the basis of *prima facie* evidence as to the existence of the jurisdiction agreement. However, does it mean the review *prima facie* concerning the existence of the jurisdiction agreement, or also concerning “manifestly” invalid jurisdiction agreement?<sup>686</sup> The ECJ has recognised that the Brussels Convention does not govern the standard of proof. Thus, the evidence must be adduced by a claimant before a national court in order to enable to decide on the merits of the case.<sup>687</sup> It means that this approach could bring a problem of inconsistent application in the Member States, introducing a new category of jurisdiction agreement as the “evidently valid” or

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<sup>682</sup> This was the *ratio* of the original proposal which involved tolerating parallel proceedings, see Heidelberg Report, par. 388 *et seq.*

<sup>683</sup> C. HEINZE, *Choice-of-court agreements, coordination of proceedings and provisional measures in the reform of the Brussels I regulation*, *op. cit.*, p. 593.

<sup>684</sup> ECJ, Case C-456/11, *Gothaer Allgemeine Versicherung AG et al v Sampskip*, 15 November 2012, EU:C:2012:719.

<sup>685</sup> R. FENTIMAN, *Parallel proceedings and Jurisdiction Agreements*, in *Forum shopping in European Judicial Area*, *op. cit.*, p. 51.

<sup>686</sup> M. WELLER, *Choice of Forum Agreements under the Brussels I Recast and under the Hague Convention: Coherences and Clashes*, *op. cit.*, p. 29.

<sup>687</sup> ECJ, C-68/93, *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA*, 7 March 1995, ECLI:EU:C:1995:61, par. 37-39, in the context of determining jurisdiction under Article 7 par. 2 of the Brussels *Ibis* Regulation.

“*prima facie* existent” jurisdiction agreements, which can lead to uncertainty and divergent opinions between the Member States courts.<sup>688</sup> It is difficult to predict whether the ECJ will develop any standard to be applied by all Member States for ensuring a uniform approach to the interpretation of Article 31 par. 2 of the Brussels *Ibis* Regulation and for minimising the potential for inconsistent decisions between the non-designated and designated Member State court.

The question also arises whether there is any distinction between the existence and validity of the jurisdiction clause according to Article 25 of the Brussels *Ibis* Regulation.<sup>689</sup> Since Recital 22 of the Brussels *Ibis* Regulation provides that the designated Member State court has priority to decide on the *validity* of the jurisdiction clause and on the extent to which the jurisdiction agreement applies to the dispute, such wording indicates that the first seized non-designated court should ascertain only the existence of the jurisdiction clause. Such existence would be proven by the submission of the evidence as to the existence of jurisdiction clauses, such as presenting copies of the agreement or direct communication between the courts would be possible.<sup>690</sup> In consequence, the first seized Member State could examine the jurisdiction clause only as to its existence, exclusivity, and validity in respect to sections 3 to 6 of Chapter 2 of the Brussels *Ibis* Regulation.

The second sub-approach could also concern *prima facie* review as to the “manifestly invalid” choice-of-court agreement. It was suggested by some scholars to find an answer in formal requirements of the jurisdiction agreement according to Article 25 of the Brussels *Ibis* Regulation.<sup>691</sup> This standard of review could use as a model by virtue of Article 23 par. 3 of the Brussels I Regulation, which was abolished, once the domicile of the parties to the

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<sup>688</sup> On this critique see C. HEINZE, *Choice-of-court agreements, coordination of proceedings and provisional measures in the reform of the Brussels I regulation*, *op. cit.*, p. 593.

<sup>689</sup> I. BERGSON, *The death of the torpedo action? The practical operation of the Recast's reforms to enhance the protection for exclusive jurisdiction agreements within the European Union*, *op. cit.*, p. 12, 13.

<sup>690</sup> C. HEINZE, B. STEINROTTER, *The Revised Lis Pendens Rules in the Brussels Ibis Regulation*, in *Brussels Ibis Regulation: Changes and Challenges of the Renewed Procedural Scheme*, *op. cit.*, p. 20. Professor Garcimartin considers the information from the parties as sufficient, see F. GARCIMARTIN, *Chapter 9 - Article 25*, in *The Brussels I Regulation Recast*, *op. cit.*, par. 11.52.

<sup>691</sup> C. HEINZE, B. STEINROTTER, *The Revised Lis Pendens Rules in the Brussels Ibis Regulation*, in *Brussels Ibis Regulation: Changes and Challenges of the Renewed Procedural Scheme*, *op. cit.*, p. 20; M. WELLER, *Choice of Forum Agreements under the Brussels I Recast and under the Hague Convention: Coherences and Clashes*, *op. cit.*, p. 29.

jurisdiction agreement outside the EU was no longer relevant.<sup>692</sup> This provision stating “such an agreement“ had supported the view that the jurisdiction agreement had to be upheld if the formal requirements were met.<sup>693</sup> However, also, in this case, a risk of abuse may appear if the jurisdiction agreements were concluded in a form which accords with the practices which have parties have established according to Article 25 par. 1 lett. b) or in a form according to international trade usage as specifies in Article 25 par. 1 lett. c) of the Brussels Ibis Regulation. According to this sub-approach, the second seized designated Member State would verify all issues governed by its law.<sup>694</sup>

#### 14.1.2. Coordination between the Member State Courts

Before to move out with the considerations on the possible scenarios, the ECJ case C-456/11 *Gothaer* must be briefly introduced. The dispute concerned a German claimant and four German insurance companies who engaged another German subsidiary of the company to deliver brewing installation to a Mexican purchaser. The action for compensation was brought in the Belgian courts. The Belgian courts had dismissed a claim as inadmissible since the bill of lading contained a jurisdiction clause stating that any dispute arising thereunder was to be decided by Icelandic courts. Consequently, the insurers brought an action for compensation against in front of the German courts. The German court observed that the actions were inadmissible due to the judgment of Belgian court which produces legal effects not only in relation to the Belgian courts’ lack of jurisdiction but also in relation to the jurisdiction of the Icelandic courts. According to the ECJ, Article 32 of the Brussels I Regulation covers a judgment by which the Member State court declines jurisdiction on the basis of a jurisdiction clause, irrespective of categorisation of the judgment according to the national law, extending its effect also to *ratio decidendi* (i.e., validity of the jurisdiction agreement).<sup>695</sup> Therefore,

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<sup>692</sup> M. WELLER, *Choice of Forum Agreements under the Brussels I Recast and under the Hague Convention: Coherences and Clashes*, op. cit., p. 29

<sup>693</sup> However, only the national rules including the conflict-of-laws rules had regulated the formal validity, since the Brussels I Regulation did not cover the choice-of-court agreements “from outside“, see U. MAGNUS, *Article 23*, in Brussels I Regulation, 2012, op. cit., p. 464.

<sup>694</sup> M. WELLER, *Choice of Forum Agreements under the Brussels I Recast and under the Hague Convention: Coherences and Clashes*, op. cit., p. 30.

<sup>695</sup> In this regards, see E. D’ALESSANDRO, *L’influenza esercitata dal diritto nazionale nell’elaborazione di concetti ‘europei’ ad opera della Corte di giustizia. Il caso Gothaer*, Scritti dedicati a Maurizio Converso, Roma tre Press, 2016, pp. 142-146, where the author analyzes three alternatives of the objective limits of the efficacy of the declinatory decisions, when the Gothaer case inspired by the French concept.



other Member State courts are bound by the finding of such a final judgment regarding the validity of the jurisdiction clause. The ECJ did not make any distinction drawn according to the content of the judgment according to Article 32 of the Brussels I Regulation.<sup>696</sup> It justified its interpretation on mutual trust, which would be undermined if a Member State court refuses to recognise a judgment by which a court of another Member State declined jurisdiction on the basis of a jurisdiction clause and such a refusal would be liable to compromise the effective operation of the rules on the distribution of jurisdiction. The ECJ refused to create a category of judicial decisions which are not among the exhaustively listed exceptions set out in Articles 34 and 35 of the Brussels I Regulation which are not entitled to recognition.

*i) Single Proceedings in front of the Non-Chosen Member State Court*

In order to activate the mechanism of *lis pendens* according to Article 31 of the Brussels Ibis Regulation, the proceedings must be pending in both the designated and the non-designated Member State court. And, as Recital 22 of the Brussels Ibis Regulation specifies, the designated Member State court must be second seized. The seized non-designated Member State court may rule on its jurisdiction and on the validity of the jurisdiction agreements as long as the designated Member State court is not seized.<sup>697</sup> There is no time limit for the institution of the proceedings in the designated Member State court, which might create specific room for abuse. It is questionable whether the non-designated Member State court should set a time limit according to its national procedural rules.<sup>698</sup> For example, the time limit could be set by the non-designated Member State court when the defendant enters an appearance to contest the jurisdiction of such a Member State court.<sup>699</sup>

Such a decision is then capable of recognition and enforcement. The ECJ did not distinguish the issue on merits and the issue of jurisdiction in the case C-456/11, *Gothaer*. As a consequence, once the Member State court had decided on the validity of the jurisdiction clause, the other Member State courts are bound by the outcome.<sup>700</sup> This has the practical

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<sup>696</sup> Case C-456/11, *Gothaer*, par. 23.

<sup>697</sup> A. NUYTS, *La refonte du règlement Bruxelles I*, Revue Critique de Droit International Privé, (2013), p. 56; Garcimartín, *Chapter 9 - Article 25*, in The Brussels I Regulation Recast, p. 339; J. VLEK, *Lis Pendens, Choice-of-court Agreements and Abuse of Law Under Brussels Ibis*, *op. cit.*, p. 305.

<sup>698</sup> On the positive response see M. WELLER, *Choice of Forum Agreements under the Brussels I Recast and under the Hague Convention: Coherences and Clashes*, *op. cit.*, p. 25 and footnote No 109.

<sup>699</sup> M. WELLER, *Choice of Forum Agreements under the Brussels I Recast and under the Hague Convention: Coherences and Clashes*, *op. cit.*, p. 25

<sup>700</sup> Case C-456/11, *Gothaer*, par. 23 and 33

consequence to the other party - he is forced to litigate in front of the designated Member State court in order to trigger a stay in the first seized Member State court and in order to prevent *res iudicata* as to the merits,<sup>701</sup> as well as to the validity of the jurisdiction clause.<sup>702</sup>

**ii) Parallel Proceedings**

As stated above, the *lis pendens* rule according to Article 31 par. 2 of the Brussels *Ibis* Regulation applies when the non-chosen Member State court is first seized, and the designated Member State is second seized under an exclusive jurisdiction clause according to Article 25 of the Brussels *Ibis* Regulation. It is helpful to imagine one practical scenario:

*Party X and party Y concluded an exclusive jurisdiction agreement in favour of the Czech courts. Party X brought an action in front of the Italian courts. Eight months after, party Y brought an action in front of the Czech courts.*

A) The designated Member State issues a judgment prior to any decision by the non-designated Member State court

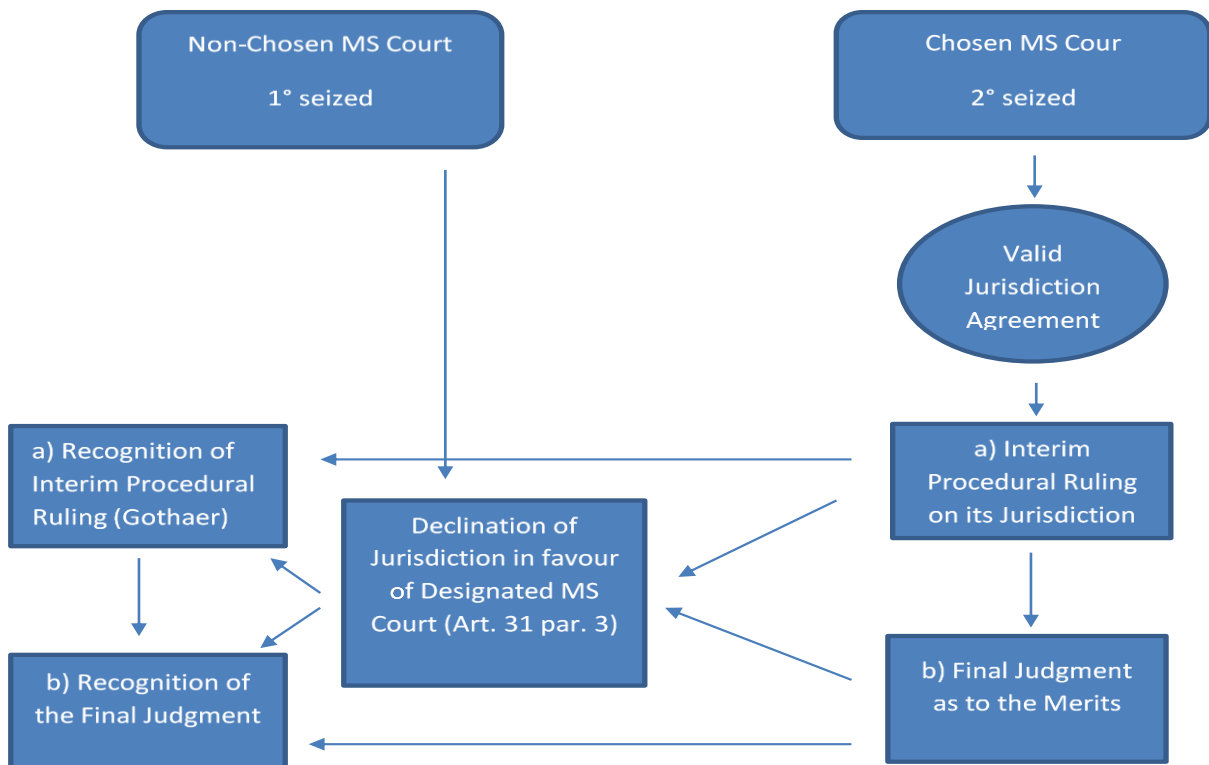
A1) Valid Choice-of-Court Agreement

Pursuant to Article 31 par. 2 of the Brussels *Ibis* Regulation, the Czech court is no longer obliged to stay its proceedings and will determine the existence and validity of the jurisdiction clause. It may happen that the Czech court will be quicker in issuing a preliminary ruling on its jurisdiction or even as to merits, than the Italian court when deciding to stay its proceedings. The decision of the Czech court is capable of recognition, as to the merits according to Chapter III of Brussels *Ibis* Regulation, as well as to its jurisdiction by virtue of the *Gothaer* judgment. The Italian court shall decline jurisdiction in favour of the Czech court according to Article 31 par. 3 of the Brussels *Ibis* Regulation. In such a case, the risk of a *torpedo action* is significantly reduced since the Czech courts did not have to wait for the decision of the Italian court.

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<sup>701</sup> There were also proposals to make unenforceable any judgment obtained in breach of the jurisdiction agreements. However, such proposal was not adopted. See R. FENTIMAN, *Parallel proceedings and Jurisdiction Agreements*, in *Forum shopping in European Judicial Area*, *op. cit.*, p. 49.

<sup>702</sup> R. FENTIMAN, *Article 31*, in *Brussels I Bis Regulation, 2016*, *op. cit.*, p. 752.



## A2) Invalid Choice-of-Court Agreement

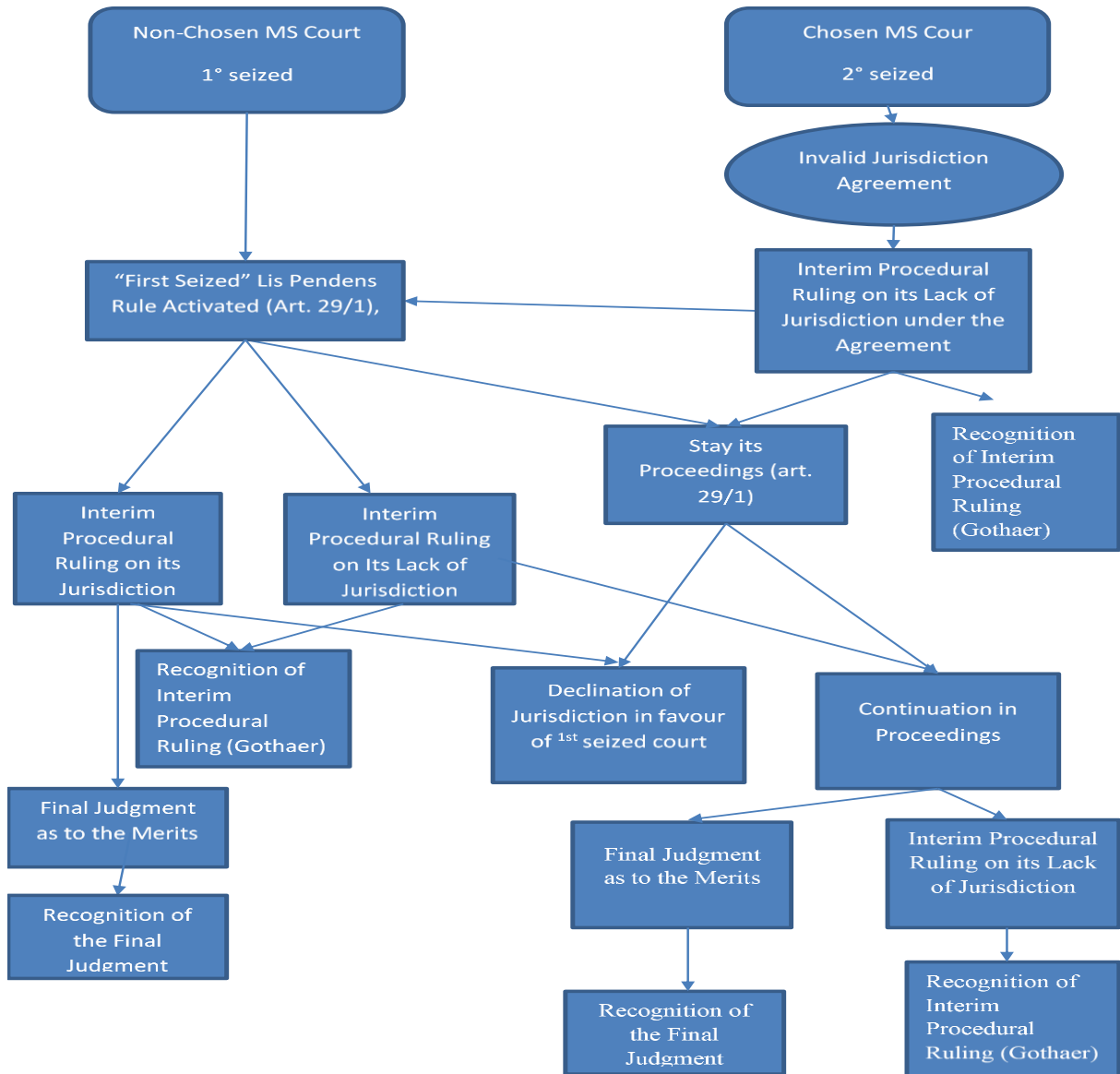
However, what will happen if the Czech court finds the jurisdiction agreement invalid?

We may presume that although the Czech court finds the jurisdiction agreement invalid, it has jurisdiction pursuant to other grounds of jurisdiction according to the Brussels *Ibis* Regulation. This situation is not expressly dealt with in the Brussels *Ibis* Regulation, but the wording of Article 31 par. 2 of the Brussels *Ibis* Regulation providing “...it has no jurisdiction under the agreement” suggests that the Czech court has priority only to establish its jurisdiction according to the jurisdiction agreement.<sup>703</sup> In such a case, the “first seized *lis pendens*” should apply and the Italian court will be entitled to decide first. In consequence, a Czech decision on its invalidity will bound the Italian court by virtue of the *Gothaer* judgment. Moreover, the “first seized *lis pendens*” rule according to Article 29 of the Brussels *Ibis* Regulation will be activated.<sup>704</sup> Thus, the Italian court will be entitled to decide on its jurisdiction, and the Czech court will stay its proceeding. The role of the courts is, in this case, reversed. If the Italian court establishes its jurisdiction, the Czech court

<sup>703</sup> M. WELLER, *Choice of Forum Agreements under the Brussels I Recast and under the Hague Convention: Coherences and Clashes*, op. cit., p. 26; I. BERGSON, *The death of the torpedo action? The practical operation of the Recast's reforms to enhance the protection for exclusive jurisdiction agreements within the European Union*, op. cit., p. 27.

<sup>704</sup> M. WELLER, *Choice of Forum Agreements under the Brussels I Recast and under the Hague Convention: Coherences and Clashes*, op. cit., p. 26.

shall decline jurisdiction in favour of the Italian court according to Article 29 par. 3 of the Brussels Ibis Regulation. In case the Italian court determines it lacks jurisdiction, the Czech court will be entitled to decide its jurisdiction according to other grounds laid down in the Brussels Ibis Regulation.

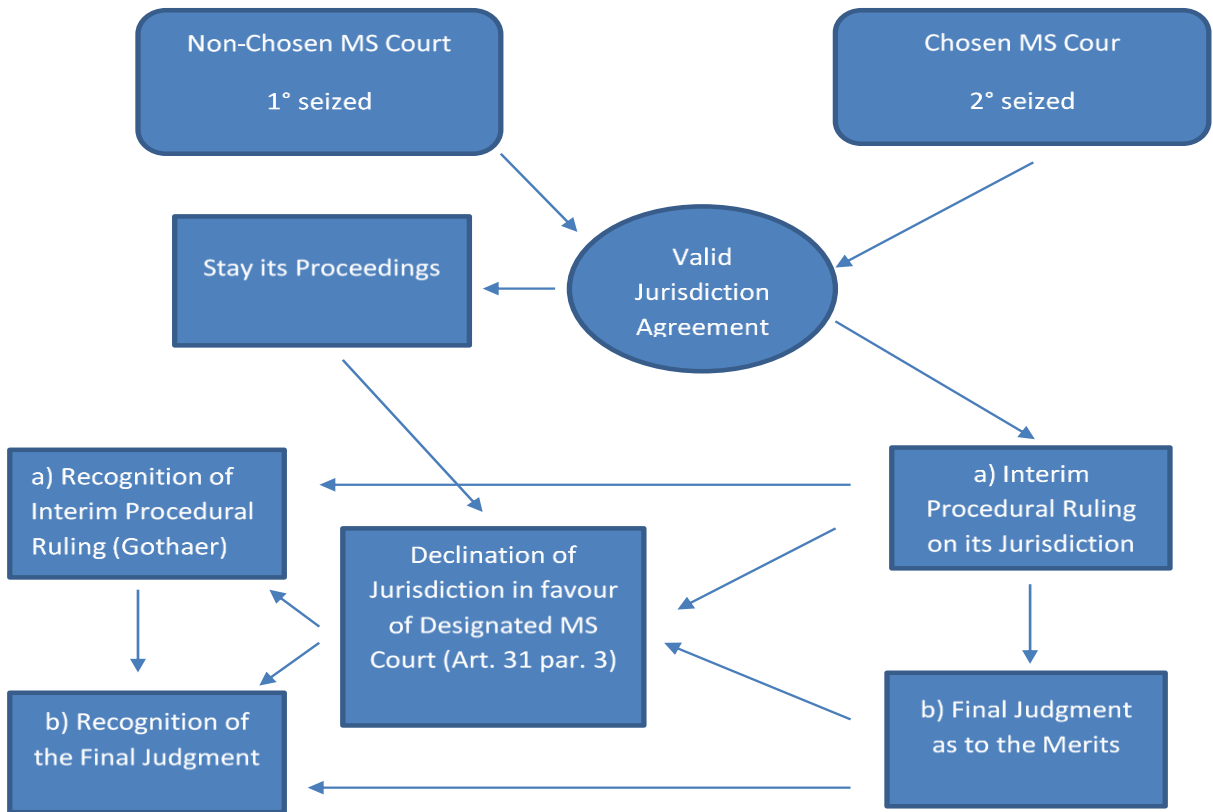


B) The non-designated Member State court stays its proceedings

B1) Valid Choice-of-Court Agreement

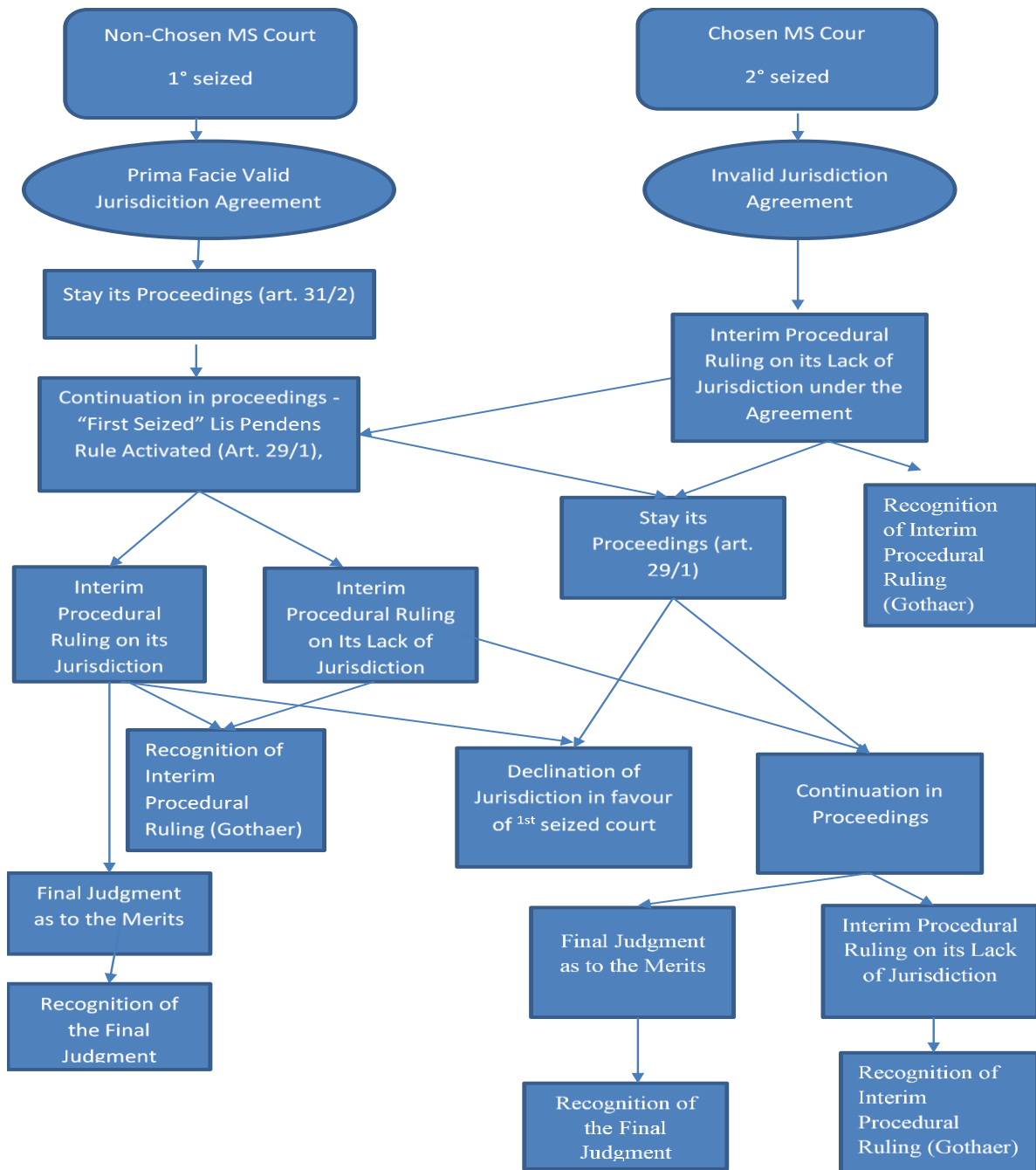
This scenario concerns another situation: when the Italian court stays its proceedings after making a *prima facie* evaluation of the existence (and maybe the *prima facie* validity) of the jurisdiction

clause before the Czech court considers its jurisdiction. The preliminary evaluation on the existence (and maybe the *prima facie* validity) of the Italian court will not bind the Czech court in its determination of the jurisdiction clause. If the Czech court establishes its jurisdiction in accordance with the jurisdiction agreement, the Italian court shall decline jurisdiction in favour of Czech court



B2) Invalid Choice-of-Court Agreement

In case of a ruling of the Czech court on the invalidity of the jurisdiction agreement, the scenario will be almost the same as in point A2) above.

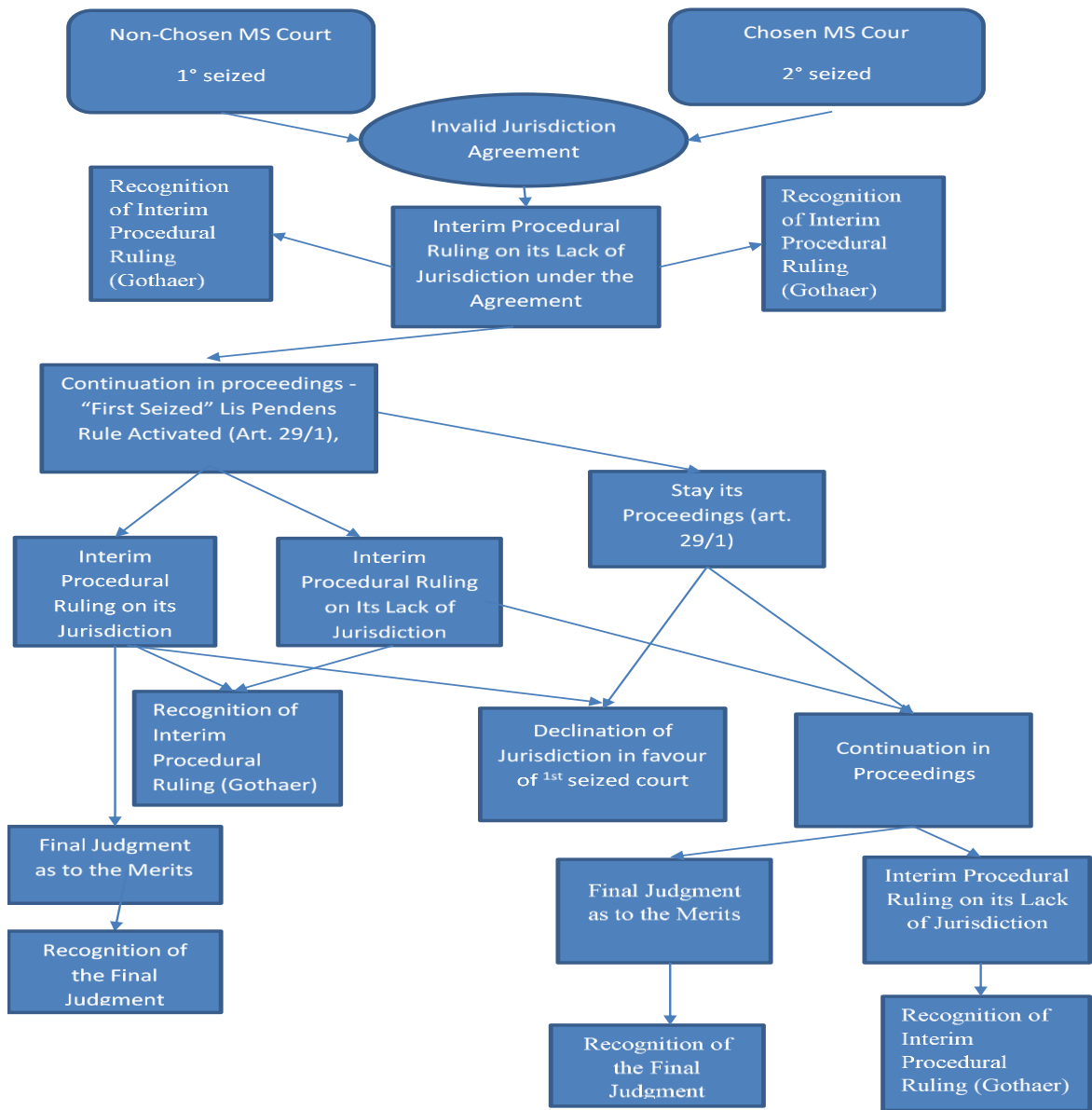


C) Non-Chosen Member State Court Does Not Stay

This last scenario case seems to be more problematic. It concerns a case when the Italian court *prima facie* finds that the jurisdiction agreement does not exist or is “manifestly invalid”. What effect does this have on the designated Member State court?

C1) No Disagreement on the Invalidity of the Choice-of-Court Agreements between the designated and the non-designated Member State Court

It is unlikely that the Czech court and the Italian court give conflicting results. In case that Czech and Italian court find the jurisdiction agreement as invalid, the Czech court will decide on its lack of jurisdiction concerning the jurisdiction agreement which will bind the Italian court by virtue of *Gothaer* case. Even although the Italian court would decide first on the invalidity of the jurisdiction agreement, such a decision will bind the Czech court by virtue of *Gothaer* case. In any case, there is no discrepancy in relation to this issue between the Member State courts. Subsequently, the Italian court may conduct its proceedings according to “first seized” *lis pendens* rule in Article 29 par. 1 of the Brussels *Ibis* Regulation. Subsequently, the scenario may continue as described under point A2).



## C2) Disagreement on the Invalidity of the Choice-of-Court Agreements between the designated and the non-designated Member State Court

However, what would happen if the Italian court finds the jurisdiction agreement invalid and the Czech court valid? Such a situation cannot be excluded and is even more probable if the Italian court decides to apply the “full review” approach. It is likely that the “full review” of the jurisdiction clause may be provided by the non-designated Member State court when the designated Member State court is seized a long time after its institution.<sup>705</sup> Until then, the first non-designated Member State court was the only seized court (*e.g.*, for 1 year) and might examine the validity of the jurisdiction clause.

The Brussels *Ibis* Regulation does not tackle the possibility of disagreement between two seized Member State courts, which may be perceived as a *lacuna*. The problem arises when both seized Member State courts decide their jurisdiction when the Recital 22 of the Brussels *Ibis* Regulation states that the designated Member State court should be able to proceed, irrespective of whether the non-designated Member State court has already decided whether to stay its proceedings.

When we go back to our example:

Both Member State courts will proceed according to Article 31 par. 2 in conjunction with Recital 22 of the Brussels *Ibis* Regulation. The Italian court reaches its decision first on the inexistence or invalidity of the jurisdiction clause.<sup>706</sup> In such a case, the decision of the Italian court will bind the Czech court<sup>707</sup> by virtue of the *Gothaer* judgment. Subsequently, the Italian court would have the door open to proceed according to Article 29 par. 1 of the Brussels *Ibis* Regulation, since in case of invalidity of the jurisdiction agreement, it is the first seized court. Such a situation results in a

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<sup>705</sup> See M. WELLER, *Choice of Forum Agreements under the Brussels I Recast and under the Hague Convention: Coherences and Clashes*, *op. cit.*, p. 26, where the author suggests that once the designated Member State court is seized, the non-designated Member State court should reduce the standard of review from a full review of the jurisdiction agreement to the reduced standard.

<sup>706</sup> See M. WELLER, *Choice of Forum Agreements under the Brussels I Recast and under the Hague Convention: Coherences and Clashes*, *op. cit.*, p. 26. According to the author’s opinion, preliminary ruling on the invalidity of the jurisdiction agreements issued before the designated Member State court is violation of Article 31 par. 2 of the Brussels *Ibis* Regulation. However, there is no support in the wording in Article 31 par. 2 of the Brussels *Ibis* Regulation providing for the obligation of the non-designated Member State court to wait for the decision of the designated Member State court.

<sup>707</sup> On the opinion that the chosen Member State court should recognise the decision of the non-chosen court, see C. HEINZE, B. STEINROTTER, *The Revised Lis Pendens Rules in the Brussels Ibis Regulation*, in *Brussels Ibis Regulation: Changes and Challenges of the Renewed Procedural Scheme*, *op. cit.*, p. 22.



nondesirable race to a decision. Professor Dickinson has already noted the loophole during the preparatory works of the Commission when the objectives could be frustrated if the non-designated Member State court makes a preliminary ruling on the invalidity of the jurisdiction clause.<sup>708</sup> It might seem to be ironic to introduce the new rule giving the designated Member State court the priority to decide, but at the end of the day, the designated Member State court is bound by the decision of the non-designated Member State court. For example, the opposite conclusion may be defended by the fact that the preliminary ruling of the non-designated Member State concerns the non-existence, not the invalidity of the jurisdiction agreement, as was held in *Gothaer* case.<sup>709</sup> However, such a conclusion cannot succeed, when there is no consensus on the extent of the review on the jurisdiction agreement provided by the non-designated Member State court. Other arguments for non-recognition of the preliminary ruling on invalidity (or non-existence) of the jurisdiction agreement may be deduced from the textual wording of Recital 22 of the Brussels *Ibis* Regulation when it states that the designated Member State court “should be able to proceed *irrespective* of whether the non-designated court *has already decided* on the stay of proceedings.” (emphasis added). A broad interpretation may cover any decision of the non-designated Member State court, which does not bind the designated Member State court and the designated Member State court can direct to its own judgment.<sup>710</sup> However, the *Gothaer* judgment confirmed that any category of the decisions, which are not susceptible to enforcement that is not provided in the exhaustively-listed exceptions in Article 45 of the Brussels *Ibis* Regulation, cannot be created.<sup>711</sup>

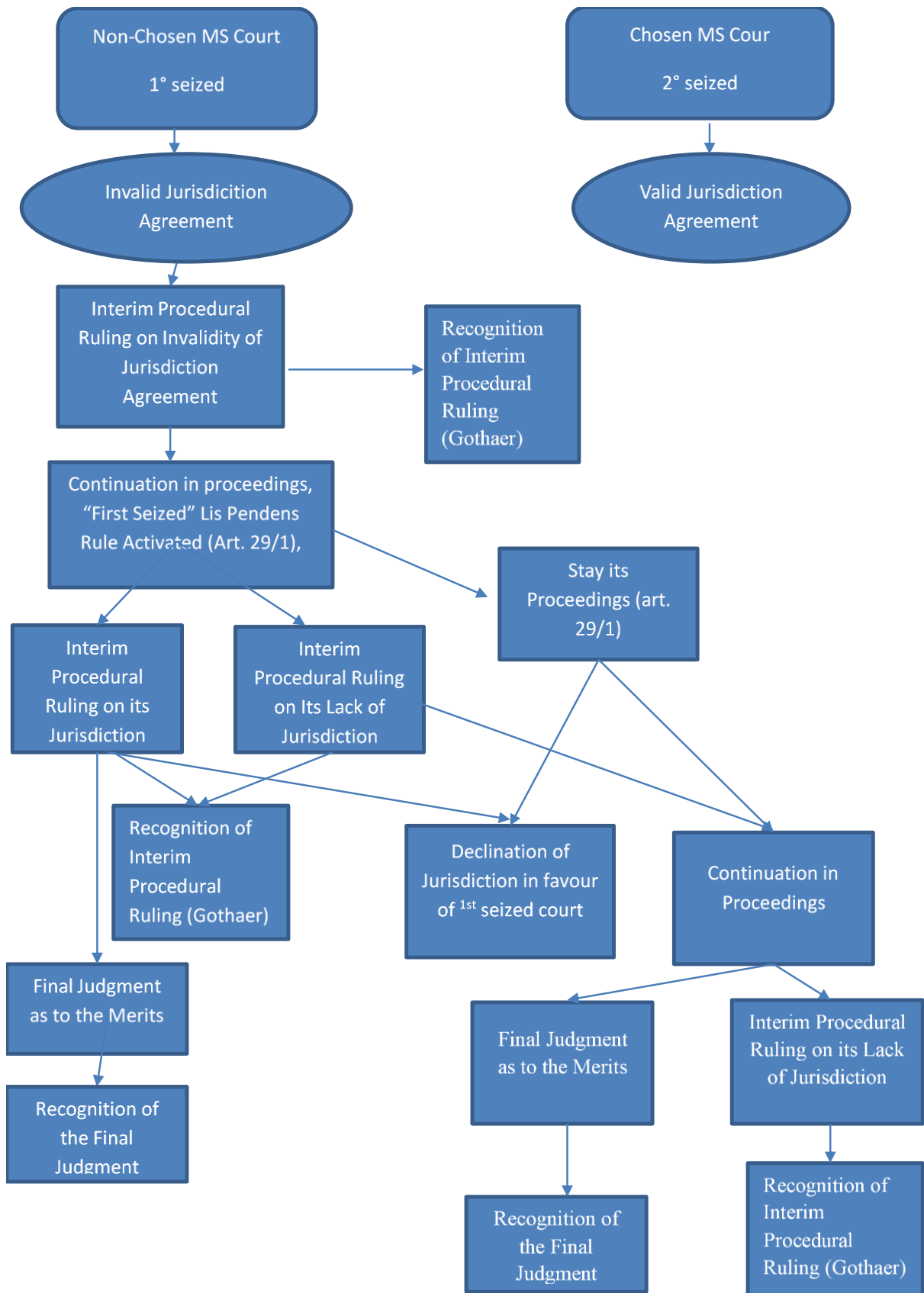
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<sup>708</sup> A. DICKINSON, *The Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)*, *op. cit.*, p. 20.

<sup>709</sup> I. BERGSON, *The death of the torpedo action? The practical operation of the Recast's reforms to enhance the protection for exclusive jurisdiction agreements within the European Union*, *op. cit.*, p. 19.

<sup>710</sup> On this consideration see: I. BERGSON, *The death of the torpedo action? The practical operation of the Recast's reforms to enhance the protection for exclusive jurisdiction agreements within the European Union*, *op. cit.*, p. 19.

<sup>711</sup> Case C-456/11, *Gothaer*, par. 31.



### 14.1.3. Other Uncertainties arising out of the Application of the New *Lis Pendens* Rule

#### a) *Non-Exclusive and Asymmetric Choice-of-Court Agreements and Lis Pendens*

The new *lis pendens* rule represents an exception to the general *lis pendens* rule and is applicable only with respect to the exclusive jurisdiction clauses.<sup>712</sup> The general *lis pendens* rule on the non-exclusive jurisdiction clauses and conflicting exclusive choice-of-court clauses shall apply. The first problem concerns the interpretation of the “conflicting exclusive choice-of-court agreements”. Maybe it is the jurisdiction clause of *Meeth v. Glacetal* case, when the parties designate one exclusive jurisdiction for each party with the exclusion of all otherwise competent courts for each party, subsumed under the term of “conflicting exclusive choice-of-court agreements”? It was already stated that such jurisdiction must be classified as exclusive choice-of-court agreements.<sup>713</sup> Professor Nuyts suggested that Recital 22 addresses the problem of the battle of forms when each party invokes its own standard terms including different jurisdiction clauses.<sup>714</sup> The Council of the European Union inserted this Recital without further explanation.<sup>715</sup> It might be perceived that *Meeth v. Glacetal* does not enter into the categorisation of the “conflicting exclusive choice-of-court agreements” when once a court is seized under *Meeth v. Glacetal* clause, this clause becomes uniquely exclusive.<sup>716</sup> This interpretation can be upheld when the first seized Member State court is none of the designated Member State courts and the second seized court is one of the designated Member State courts. On the other hand, when both “exclusively designated” Member State courts are seized, it logically follows that the “first seized” *lis pendens* should be applied instead.

Moreover, whether the jurisdiction agreement is evaluated as exclusive or non-exclusive, is a question of the construction of the jurisdiction clause and is left to the national law.<sup>717</sup> If we

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<sup>712</sup> See Recital 22 of the Brussels Ibis Regulation and Article 29 of the Brussels Ibis Regulation providing that: «Without prejudice to Article 31(2)...».

<sup>713</sup> On this conclusion see M. KEYES, B. A. MARSHALL, *Jurisdiction agreements: exclusive, optional and asymmetrical*, *op. cit.*, p. 351, 352.

<sup>714</sup> A. NUYTS, *La refonte du règlement Bruxelles I*, *op. cit.*, p. 16, 53. On the same approach see Q. FORNER-DELAYGUA, *Changes to jurisdiction based on exclusive jurisdiction agreements under the Brussels I Regulation Recast*, *op. cit.*, p. 386.

<sup>715</sup> The Presidency of the Council of the European Union, 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, Draft Recitals, 10711/12, 2010/0383 (COD), 6 June 2012, p. 8.

<sup>716</sup> M. KEYES, B. A. MARSHALL, *Jurisdiction agreements: exclusive, optional and asymmetrical*, *op. cit.*, p. 359.

<sup>717</sup> A. BRIGGS, P. REES, *Civil Jurisdiction and Judgments*, 2009, *op. cit.*, par. 2.126.

presume that the national law considers the *Rothschild* jurisdiction agreement as valid, the problem of evaluating asymmetric jurisdiction clauses as to the “exclusivity” or the “conflicting exclusivity” of the *Rothschild* jurisdiction clause comes into play in the context of the application of *lis pendens* rule according to Article 31 par. 2 by virtue of Recital 22 of the Brussels *Ibis* Regulation. As said in Section 10.2. of this Subchapter, the jurisdiction clause is exclusive from the perspective of one party but non-exclusive from the perspective of another party. We may imagine a scenario where the parties conclude an agreement conferring jurisdiction to the French court, but the other party (*e.g.*, a bank) has right to sue in front of any other Member State court having jurisdiction according to the Brussels *Ibis* Regulation.

For instance, the borrower could sue the bank in Spanish court and the bank then seizes the French court, or any other Member State court having jurisdiction according to the Brussels *Ibis* Regulation. In such a case Article 31 par. 2 of the Brussels *Ibis* Regulation would provide a protection for the “exclusive jurisdiction agreement for one party”, that might be affected by application of the *Gasser* case.<sup>718</sup> Article 31 par. 2 of the Brussels *Ibis* Regulation could be therefore engaged in the situation when the counterparty (often borrower) sues the beneficiary in front of the Member State court other than designated on the basis of its “exclusive jurisdiction agreement”.<sup>719</sup> Such a conclusion may occur only in the Member States which considered such jurisdiction agreements as valid and exclusive from the perspective of one side. However, if the first seized Member State court considers the jurisdiction agreement to be invalid or non-exclusive, and the second seized designated Member State court considers it to be valid and exclusive, both courts could simultaneously assume their jurisdiction according to Article 29 par. 1 of the Brussels *Ibis* Regulation and according to Article 31 par. 2 of the Brussels *Ibis* Regulation.

#### ***b) Temporal Application of Lis Pendens***

A second unresolved situation concerns the temporal application. As stated in Section 3.2. of this Subchapter, the Brussels *Ibis* Regulation applies to the legal proceedings instituted on or

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<sup>718</sup> On similar considerations see R. FENTIMAN, *Article 31*, in Brussels I *Bis* Regulation, 2016, *op. cit.*, p. 753.

<sup>719</sup> On a similar conclusion see R. FENTIMAN, *Article 31*, in Brussels I *Bis* Regulation, 2016, *op. cit.*, p. 753.

after 10 January 2015.<sup>720</sup> Moreover, the saving provision states that the Brussels I Regulation continues to apply to the proceedings instituted before 10 January 2015.<sup>721</sup> However, the transitional provisions of the Brussels *Ibis* Regulation do not tackle the struggle of applying Brussels I Regulation and the Brussels *Ibis* Regulation, in particular, when the non-designated Member State was seized before 10 January 2015 and the designated Member State court after 10 January 2015. In this case, does the “old” “first seized *lis pendens*” rule according to Article 27 of the Brussels I Regulation apply, or does the “new” reversed *lis pendens* rule according to Article 31 par. 2 of the Brussels *Ibis* Regulation prevail? Should the Czech court stay its proceedings by virtue of *Gasser* case or should the Italian court stay its proceedings according to Article 31 par. 2 of the Brussels *Ibis* Regulation? Unfortunately, the answer to this question remains open.

## 15. Derogation Effect in favour of the Third State courts

As stated in Chapter I, Subchapter II, Section 1, the exclusive jurisdiction agreements have two effects – they confer jurisdiction to a specific court, and they oust jurisdiction to a court which would have jurisdiction otherwise. Article 25 of the Brussels *Ibis* Regulation expressly addresses only the prorogation effect but leaves open the considerations on which basis the derogation effect is determined.<sup>722</sup> It is doubtful whether Article 25 of the Brussels *Ibis* Regulation applies when the parties agree to exclude the jurisdiction of certain Member State courts without prorogating any competent Member State court (“mere derogation”). The uniform treatment of the different kinds of the choice-of-court agreements and the prevention of the misuse of such a derogation agreement favours the application of Article 25 of the Brussels *Ibis* Regulation.<sup>723</sup> However, such a conclusion cannot be accepted when all competent Member State courts are excluded according to the Brussels *Ibis* Regulation, which would lead to the denial of the access of justice.<sup>724</sup>

The prorogation effect is fully covered by Article 25 of the Brussels *Ibis* Regulation. It does not matter if the parties domiciled in the Third States derogates from the jurisdiction of a

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<sup>720</sup> See Article 66 and 81 of the Brussels *Ibis* Regulation.

<sup>721</sup> See Article 66 par. 2 of the Brussels *Ibis* Regulation.

<sup>722</sup> U. MAGNUS, *Article 25*, in Brussels I *Bis* Regulation, 2016, *op. cit.*, p. 605.

<sup>723</sup> U. MAGNUS, *Article 23*, in Brussels I Regulation, 2012, *op. cit.*, p. 458.

<sup>724</sup> *Ibidem*, p. 459.

Third State court.<sup>725</sup> However, what happens when the parties confer jurisdiction to a Third State court? The Brussels *Ibis* Regulation does not provide for an explicit rule enabling prorogue exclusive choice-of-court agreements in favour of a Third State court. The Brussels *Ibis* Regulation also does not provide a rule expressly banning the derogation of the jurisdiction of the Member State courts in favour of a Third State court. As a starting point, it is necessary to stress that Article 25 of the Brussels *Ibis* Regulation cannot regulate the prorogation effect in respect of the courts outside the EU.<sup>726</sup> Thus, the question arises if derogation of jurisdiction of a Member State court that could establish jurisdiction in accordance with Article 4 of the Brussels *Ibis* Regulation (when the defendant is domiciled in the Member State) is possible in favour of a designated Third State court.

It was disputed if Article 17 of the Brussels Convention and Article 23 of the Brussels I Regulation were applicable in the context of the derogation effect of the jurisdiction agreement in favour of Third State courts. The specific rule on the exclusive choice-of-court agreements in favour of a Third State court has not been introduced into the Brussels *Ibis* Regulation in order to motivate Third States into ratifying the Hague Convention of 30 June 2005 on the Choice-of-court Agreements.<sup>727</sup> Only the new rule on *lis pendens* and on related actions was established by Article 33 and 34 of the Brussels *Ibis* Regulation, which as we see further, they might resolve some of the demonstrated problems. Also, the ECJ case law (*Coreck*, C-387/98; *Owusu*, C-281/02; *Lugano Opinion 1/03*; *Mahamdia*, C-154/11) regarding choice-of-court agreements in favour of Third States courts have not provided insight into this issue.

### 15.1. Case law

The ECJ has defined specific guidelines connected with problematic points and the gap in the Brussels I Regulation regarding the possibility of designating a Third State court. However, a unique and clear solution has not been provided.

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<sup>725</sup> U. MAGNUS, *Article 25*, in Brussels I *Bis* Regulation, 2016, *op. cit.*, p. 605.

<sup>726</sup> Schlosser Report, par. 176; S. O'MALLEY, A. LAYTON, *European Civil Practice*, 2004, *op. cit.*, par. 20.014; U. MAGNUS, *Article 25*, in Brussels I *Bis* Regulation, 2016, *op. cit.*, p. 608.

<sup>727</sup> Committee on Legal Affairs, 20 September 2011, available at: <http://www.europarl.europa.eu/ep-live/en/committees/video?event=20110920-0900-COMMITTEE-JURI>.

In the *Coreck* case, the ECJ for the first time addressed the question on the validity of choice-of-court agreements in favour of a Third State court. *Coreck*, a company incorporated in accordance with German law, issued the bills of lading for consignments of groundnut kernels from China to the Netherlands aboard a ship belonging to a company incorporated under Russian law. The bills of lading contained a choice-of-court agreement in favour of a court in the State where the carrier had his principal place of business, *i.e.*, a Russian court. The ECJ held that the court of the Member State should consider the validity of choice-of-court agreements in favour of a Third State in accordance with its national conflict-of-laws rules:

*...Article 17 of the Convention does not apply to clauses designating a court in a third country. A court situated in a Contracting State must, if it is seized notwithstanding such a jurisdiction clause, assess the validity of the clause according to the applicable law, including conflict-of-laws rules, where it sits...*<sup>728</sup>

The ECJ has not given any precise answer regarding the possibility of a derogation from jurisdiction under the Brussels I Regulation in favour of Third State courts on the basis of the choice-court-agreement. However, it may be deduced from the judgment that the Dutch court was entitled to decline jurisdiction in favour of the Russian court. Such a conclusion corresponds to the opinion expressed by some authors<sup>729</sup> and can be found as well in the Schlosser Report. The Schlosser Report stated that:

*In cases where parties agree to bring their disputes before the courts of a State which is not a party to the 1968 Convention there is obviously nothing in the 1968 Convention to prevent such courts from declaring themselves competent, if their law recognizes the validity of such an agreement...*<sup>730</sup>

*If, when these tests are applied, the agreement is found to be invalid, then the jurisdictional provisions of the 1968 Convention become applicable.*<sup>731</sup>

In other words, the Brussels regime is not applicable when the jurisdiction agreement is valid according to the national conflict-of-laws rules and the non-designated Member State court

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<sup>728</sup> Case C-387/98, *Coreck*, par. 19.

<sup>729</sup> See F. GARCIMARTIN, *Chapter 9 - Article 25*, in *The Brussels I Regulation Recast*, *op. cit.*, p. 280: «*The derogation effect is, in principle (and subject to the future effect of the Hague Convention on choice-of-court agreements), determined by the national law of the corresponding Member State. This is so even when the choice-of-court agreement purports to exclude the jurisdiction granted by the Recast Regulation, for example because the defendant is domiciled in that Member State.*».

<sup>730</sup> Schlosser Report, par. 176.

<sup>731</sup> Schlosser Report, par. 176.

having jurisdiction according to the other jurisdictional grounds set in the Brussels *Ibis* Regulation might decline its jurisdiction.<sup>732</sup> On the contrary when the jurisdiction agreement is invalid, the Brussels regime applies. However, this impacts the question posed in *Owusu*.

The well-known and the most controversial approach was taken by the ECJ in the *Owusu* judgment. Mr Owusu, domiciled in the United Kingdom, suffered a serious accident during a holiday in Jamaica. He subsequently brought an action in the United Kingdom for breach of contract against Mr Jackson, also domiciled in the United Kingdom and for tort against certain Jamaican companies. The English Court of Appeal stayed its proceedings and referred the question to the ECJ for a preliminary ruling. The English Court of Appeal asked the ECJ if in the case when the court's jurisdiction is founded on Article 2 of the Brussels Convention (Article 4 of the Brussels *Ibis* Regulation), jurisdiction in favour of the courts of a non-Contracting State based on *forum non conveniens* might be declined. The ECJ confirmed the compulsory system of jurisdiction set out by the Brussels Convention and held that Article 2 is mandatory in nature and therefore cannot be derogated from, unless expressly provided for by the Brussels Convention. Although the *Owusu* case did not deal directly with the choice-of-court agreement in favour of a Third State court, such a decision must lead to the conclusion that the court of the Member State establishing jurisdiction on the defendant's domicile, pursuant to Article 4 of the Brussels *Ibis* Regulation, is not permitted to decline its jurisdiction when the parties concluded a jurisdiction agreement in favour of the court of a non-Member State.<sup>733</sup> Such a conclusion seems to be even more apparent in English law which does not mandate dismissal of proceedings in the presence of a foreign choice-of-court agreement because the grant of a stay is discretionary.<sup>734</sup>

In *Lugano opinion 1/03*, the ECJ practically confirmed the conclusion contained in the *Owusu* case. In 2006, the ECJ was consulted by the Council regarding the conclusion of the 2007 Lugano Convention. The ECJ was requested to take a position regarding exclusive or shared

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<sup>732</sup> R. FENTIMAN, *Civil Jurisdiction and Third States: Owusu and After*, in *Common Law Market Review*, 43, (2006), p. 708.

<sup>733</sup> See the opposite approach of F. GARCIMARTIN, *Chapter 9 - Article 25*, in *The Brussels I Regulation Recast*, *op. cit.*, p. 280: «Neither the *Owusu* case nor the introduction of a new provision on *lis pendens vis-a-vis non-Member States* should undermine that conclusion. Unlike the *forum non conveniens* doctrine, the protection of party autonomy is one of the main goals of the Regulation and, in principle, there are no grounds to restrict such autonomy to choice-of-court agreements in favour of the courts of a Member State.»

<sup>734</sup> R. FENTIMAN, *Civil Jurisdiction and Third States: Owusu and After*, *op. cit.*, p. 723. See the difficulties arising out of the *Owusu* case in *Konkola Copper Mines v Coromin* [2005] EWHC 898 (Comm.).



powers between the Community and the Member States. The ECJ verified its ability to affect Community rules on jurisdiction (the Brussels I Regulation) by international agreements (the 2007 Lugano Convention) and concluded that the new 2007 Lugano Convention falls within the Community's exclusive competence. As one of the examples leading to this conclusion, the ECJ revealed two possible scenarios regarding the derogation effect in favour of a court in the Third States:

*Thus, where the new Lugano Convention contains Articles identical to Articles 22 and 23 of Regulation No 44/2001 and leads on that basis to selection as the appropriate forum of a court of a non-member country which is a party to that Convention, where the defendant is domiciled in a Member State, in the absence of the Convention, that latter State would be the appropriate forum, whereas under the Convention it is the non-member country.*<sup>735</sup>

In other words, the first scenario refers to the situation when the 2007 Lugano Convention was concluded. For example, a Swiss court was designated by the parties, and the defendant was domiciled in Germany. In this case, the 2007 Lugano Convention prevails. A Swiss court will have jurisdiction pursuant to Lugano Convention 2007. A German court, that could establish jurisdiction on the basis of Article 2 of the Brussels I Regulation, must decline its jurisdiction in favour of a Swiss court. The second scenario refers to the opposite situation when the 2007 Lugano Convention is absent. The German court is obliged to establish its jurisdiction in accordance with Article 2 of the Brussels I Regulation in breach of the choice-of-court agreement conferring jurisdiction to a Swiss court. The ECJ mentioned the *Owusu* case in the Lugano interpretation but failed to mention its diverse approach expressed in the *Coreck* case.

In the last case, the *Mahamdia* case, the ECJ had a similar approach as in the *Coreck* case. However, the *Mahamdia* case refers only to individual employment contracts containing an exclusive jurisdiction clause in favour of a Third State court. Mr Mahamdia, a German and Algerian citizen, domiciled in Germany, concluded a contract of employment with the Ministry of Foreign Affairs of the People's Democratic Republic of Algeria. The contract

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<sup>735</sup> See *Lugano opinion 1/03*, par. 153. For further details on the opinion, see P. FRANZINA, *Le condizioni di applicabilità del regolamento (CE) n. 44/2001 alla luce del parere 1/03 della Corte di giustizia*, *Rivista diritto internazionale*, (2006), p. 948 *et seq.*; N. LAVRANOS, *Opinion 1/03, Lugano Convention*, *Common Market Law Review*, (2006), p. 1087 *et seq.*; F. POCAR (ed), *The External Competence of the European Union and Private International Law: The EC Court's Opinion on the Lugano Convention*, CEDAM, 2007.

contained a prorogation clause in favour of the Algerian court. Mr Mahamdia filed an action against the People's Democratic Republic of Algeria in the *Arbeitsgericht Berlin* and he claimed overtime pay and subsequently for a declaration of the unlawfulness of the employment contract termination. Article 21 of the Brussels I Regulation (Article 23 of the Brussels *Ibis* Regulation) gives the possibility of designating the courts other than those indicated in Article 18 and 19 of the Brussels I Regulation in accordance with prorogation agreement. Moreover, this provision does not specify the presumption that the designated court must be the court of a Member State (unlike Article 23 of the Brussels I Regulation). As a consequence, the ECJ concluded that the employee could also take proceedings to the courts outside the EU in compliance with the jurisdiction clause. Such an interpretation might be extended to matters relating to insurance, consumer contracts, and individual contracts of employment determined by the Brussels regime. This ECJ position seems to be peculiar – a prorogation of the court of the third State by two equal parties (*e.g.*, business-to-business transactions) is not allowed. However, choice-of-court agreements in favour of the court of a Third State concluded with a weaker party are permitted.

## **15.2. Theory of Reflexive Effect**

The term reflexive effect seems to be first used by Professor Droz referring to the problem of immovable property in a Third State.<sup>736</sup> The theory of reflexive effect has been extended and consists in an analogous application of the jurisdiction rules set out in the Brussels *Ibis* Regulation in relation to Third States. Three areas are affected: (i) parallel proceedings in a Member State and in a Third State; (ii) a strong connection between the subject matter and the Third State court, such as in case of exclusive jurisdiction; and (iii) exclusive choice-of-court agreement in favour of Third State courts. In order to resolve the problem of the mandatory nature of the Brussels regime, the theory of reflexive effect suggests the reflexive application of Articles 29, 25, and 24 of the Brussels *Ibis* Regulation. As we see further, the Brussels *Ibis* Regulation grapples only with parallel proceedings.

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<sup>736</sup> See G. A. L. DROZ, *Compétence judiciaire et effets des jugements dans le Marché commun*, *op. cit.*, p. 109, where the author defined the doctrine of 'a mirror effect' of the Brussels Convention rules on the exclusive jurisdictions, in particular 'a mirror effect' refers to cases when connecting factors of the exclusive jurisdictions are located outside the EU (*e.g.*, an. action in rem concerning a property located in a Third State).

The theory of reflexive reflect was admitted by the English court in the famous case *Ferrexpo*,<sup>737</sup> concerning the validity of the company resolution. Andrew Smith J. justified the stay in favour of the Ukrainian court by giving reflexive effect to Article 22 of the Brussels I Regulation, although the defendants were domiciled in England.<sup>738</sup>

### 15.3. Non-Uniform Outcomes in the Member States

From the interpretation provided by the ECJ, it is evident that there is no unique and clear solution in this respect yet. Therefore, EU economic individuals and legal entities entering into choice-of-court agreements in favour of Third State courts face legal uncertainty because: (i) choice-of-court agreements in favour of a Third State court are respected in the EU; (ii) choice-of-court agreements in favour of a court in the EU are respected in the Third States; (iii) a judgement given by the chosen Third State court has the capacity to be recognised and enforced in the EU; and (iv) a judgement given by the chosen Member State court has the capacity to be recognised and enforced outside the EU.

The practical consequences of uncertainty are serious – if Member State courts cannot decline jurisdiction in favour of the designated Member State court, parallel litigation may ensue, resulting in the conflicting judgments. Thus, the proceedings can be pointless, and party autonomy associated with the certainty of the jurisdiction agreement in favour of the Third State courts is lost.<sup>739</sup>

Therefore, if the parties designate a court in a Third State and jurisdiction of a Member State court is based on the Brussels system, four different scenarios are possible:<sup>740</sup>

1. The Member-State court verifies the validity of the choice-of-court agreements according to the national conflict-of-laws rules and declines jurisdiction in favour of the Third State court (*Coreck* case);

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<sup>737</sup> *Ferrexpo AG v Gilson Investments Ltd & Ors* [2012] EWHC 721.

<sup>738</sup> On other cases referring to theory of reflexive reflect, see among others, for example, *Plaza BV v Law Debenture Trust Corp plc* [2015] EWHC 43 (Ch); *contra Catalyst Investments Group Ltd v Lewinsohn* [2009] EWHC 1964 (Ch).

<sup>739</sup> R. FENTIMAN, *Civil Jurisdiction and Third States: Owusu and After*, *op. cit.*, p. 708.

<sup>740</sup> See similar results demonstrated by R. FENTIMAN, *Introduction to Arts. 27-30*, in U. MAGNUS, P. MANKOWSKI (eds), *Brussels I Regulation*, Sellier European Law Publishers, 2007, 2eds, p. 498.

2. The Member State court establishes its jurisdiction without taking into consideration the choice-of-court agreement in favour of a Third State court (*Owusu* case, *Lugano opinion I/03*);<sup>741</sup>
3. The Member State court declines jurisdiction in favour of a Third State court in the event of a choice-of-court agreement concluded with an employee, consumer, policyholder, insured party, or a beneficiary (*Mahamdia* case);
4. The Member State court declines its jurisdiction in favour of a Third State court in accordance with Article 25 of the Brussels *Ibis* Regulation, *i.e.*, on the grounds of the *effet réflexe* doctrine.

The legal practice of courts in all 28 Member States proves the non-uniformity, some Member State courts apply Article 25 of the Brussels *Ibis* Regulation, other Member State court applies the national rules.<sup>742</sup> The jurisdiction agreements in favour of Third States court are in fact respected, notwithstanding *Owusu*. A study of Professor Nuyts shows that a vast majority of interviewed Member States declined jurisdiction pursuant to national law without

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<sup>741</sup> T. HARTLEY, *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention and the Hague Convention*, *op. cit.*, p. 95, that admits possibility that declination in favour of Third State court is not possible on the basis of choice-of-court agreements.

<sup>742</sup> See Heidelberg Report, p. 164, 165. See questionnaire n 3 to the Heidelberg Report. Austria applies national law according to the *Coreck* case; in Belgium it was not yet the subject of any judgment, but the new Belgian Code of Private International Law provides a framework for choice-of-court clauses and requires a Belgian court to decline jurisdiction when parties have chosen to submit their disputes to the Third State court; in England and Wales the *Owusu* problem seems to be more problematic due to *forum non conveniens* - *Konkola Copper Mines v Coromin* [2005] EWHC 898 (Comm.) where Colman J. has distinguished the *Owusu* case (*forum non conveniens*) and the exclusive jurisdiction in favour of a Third State court and held that a stay was permitted. In France, the Brussels regime is not applicable for the jurisdiction clause designating a third State court, in such a case, the French courts apply the rules of the common law of conflicts of jurisdiction which have been established by the case law. It has thus been held that the clause designating a foreign jurisdiction is, in principle, lawful when the dispute is of an international order and provided that it does not defeat the imperative territorial jurisdiction of a French *Cour de Cassation Chambre Civile 1, Cie de Signaux et d'Enterprises Electriques v. Soc. Sorelec*, 17 December 1985, No 84-16338 (see Annex 2.2.25.5); in Germany, the Oberlandesgericht Nürnberg holds Brussels Regulation inapplicable in case of the prorogation of jurisdiction in favour of a third State court, the derogation of the jurisdiction of the Member State courts has been judged according to the national law; In Greece the prevailing practice is that jurisdiction clauses designating a third State court are to be examined according to the Brussels regime thus excluding the application of domestic law; in Spain the judgment of court of appeal of Valencia 27th of January 2003 declared without any problem that choice-of-*forum* agreements in Third States must be respected. See also more recent case law. In England: *Winnetka Trading Corp v Julius Baer International Ltd* [2008] EWHC 3146 (Ch), Norris J. held that *Owusu* did not prevent a stay, and in a similar vein, in *Masri v Consolidated Contractors International UK Ltd*, [2008] EWCA (Civ) 303 at [125], Lawrence Collins L.J. opined that it would be “odd” if there was no possibility of a stay in such a situation; English Court of Appeal in case *Jong v HSBC Private Bank (Monaco) SA* [2015] EWCA Civ 1057 where the court upheld an order declining English jurisdiction over a claim in the presence of an exclusive jurisdiction clause in favour of the Monaco courts.

distinction between the situation where the defendant is domiciled in a Third State and in a Member State.<sup>743</sup>

In the Czech Republic, there is not yet any judgment in this respect, but the opinions of the authors of the commentaries differ. One of the commentaries states that the Czech court must proceed by virtue of *Coreck* case.<sup>744</sup> The opposite approach is taken by Bříza which provided an example that the Czech courts cannot respect the choice-of-court agreement in favour of a New York court when the jurisdiction of Czech court is given on the basis of Article 2 of the Brussels I Regulation (*i.e.*, *Owusu* case).<sup>745</sup>

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<sup>743</sup> A. NUYTS, Study on Residual Jurisdiction (Review of the Member States' Rules Concerning the 'Residual Jurisdiction' of Their Courts in Civil and Commercial Matters Pursuant to the Brussels I and II Regulations), (JLS/C4/2005/07-30-CE)0040309/00-37, p. 83. In this respect see opposite approach taken in the L. COLLINS, C. G. J. MORSE, D. MCCLEAN, A. BRIGGS, J. HARRIS, C. MCLACHAN, J. HILL (eds), *Dicey, Morris, and Collins on the Conflict of Laws*, Sweet & Maxwell, 2018, 15ed., par. 12-033: «113. At paragraph 12-033, the editors of *Dicey* note the classic exposition of Lord Goff's *forum non conveniens* test in the *Spiliada* case, but add: Lord Goff could not have foreseen, however, the subsequent distortion which would be brought about by the decision of the European Court in *Owusu v Jackson*. The direct effect of that case is that where proceedings in a civil or commercial matter are brought against a defendant who is domiciled in the United Kingdom, the court has no power to stay those proceedings on the ground of *forum non conveniens*. Its indirect effect is felt in a case in which there are multiple defendants, some of whom are not domiciled in a Member State and to whom the plea of *forum non conveniens* remains open: it is inevitable that the ability of those co-defendants to obtain a stay (or to resist service out of the jurisdiction) by pointing to the courts of a non-Member State which would otherwise represent the *forum conveniens*, will be reduced, for to grant jurisdictional relief to some but not to others will fragment what ought to be conducted as a single trial ... There is no doubt, however, that the *Owusu* factor will have made things worse for a defendant who wishes to rely on the principle of *forum non conveniens* when a co-defendant cannot.» This approach was confirmed in the recent English case, *Angola v Perfectbit*, [2018] EWHC 965 (Comm), where the court drew a distinction between a case where proceedings are commenced in England, in breach of an exclusive foreign jurisdiction clause, against a single defendant, and a case where there are multiple defendants. The court affirmed that against non-EU defendants whose case is anchored with an EU defendant in a dispute where there are multiple co-defendants, some of whom are English, *forum non conveniens* may be applied but has become more unlikely.

<sup>744</sup> P. SIMON, in L. DRÁPAL, J. BUREŠ, (eds), *Občanský soudní řád I, II*, C. H. Beck, 2009, p. 2959.

<sup>745</sup> P. BRÍZA, *Nový český zákon o mezinárodním právu soukromém v kontextu práva EU a mezinárodních smluv*, *Právní rozhledy* (2013), p. 584; BRÍZA P., § 86 *Sjednání příslušnosti zahraničního soudu*, in *Zákon o mezinárodním právu soukromém: komentář*, op. cit., p. 521.

#### **15.4. Proposal of the Brussels Ibis Regulation as to the Choice-of-Court Agreements in favour of Third State Court**

In 2010, the European Parliament advocated amending the Brussels I Regulation and to allow reflexive effect in relation to the exclusive choice-of-court clauses in favour of Third States courts, stressing the necessity for the wide-ranging consultations and political debate.<sup>746</sup>

During the legislative process, the Commission did not address the problem regarding the jurisdiction agreements in favour of the Third State courts in the context of the *Owusu* judgment. The Committee on Legal Affairs stated in September 2011, “...nobody has any interest in concluding 2005 Convention with us, so that was the reason why the Proposal does not contain a rule on the extension of the respect of choice-of-court agreements.”<sup>747</sup> The non-introduction of the explicit rule governing the choice-of-court agreements in favour of the Third State court was the subject of the critique.<sup>748</sup>

At least, the Green Paper highlighted the necessity of the equal access to justice on the basis of clear and precise rules on international jurisdiction, not only for defendants, but also for claimants domiciled in the EU.<sup>749</sup> The Proposal introduced a discretionary *lis pendens* rule for disputes on the same subject matter and between the same parties which are pending before the Member State courts and Third State courts, whereby:

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<sup>746</sup> European Parliament Resolution of 7 September 2010 on the implementation and review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, P7 TA(2010) 0304, 7 September 2010, point 15, 17.

<sup>747</sup> Committee on Legal Affairs, 20 September 2011, available at: <http://www.europarl.europa.eu/ep-live/en/committees/video?event=20110920-0900-COMMITTEE-JURI>.

<sup>748</sup> F. C. VILLATA, *Choice-of-Court Agreements in Favour of Third States' Jurisdiction in Light of the Suggestions by Members of the European Parliament*, in F. POCAR, I. VIARENGO, F. C. VILLATA (eds), *Recasting Brussels I: Proceedings of the Conference Held at the University of Milan on 25-26 November 2011*, CEDAM, 2012, p. 224; C. KOHLER, *Agreements Conferring Jurisdiction on Courts of Third States*, in F. POCAR, I. VIARENGO, F. C. VILLATA (eds), *Recasting Brussels I: Proceedings of the Conference Held at the University of Milan on 25-26 November 2011*, CEDAM, 2012, p. 217; A. DICKINSON, *The Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)*, *op. cit.*, p. 16; J. WEBER, *Universal jurisdiction and third states in the reform of the Brussels I Regulation*, *The Rabel Journal of Comparative and International Private Law*, 3 (2011), p. 630.

<sup>749</sup> Green Paper on the review of Council Regulation (EC) no 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM/2009/0175 final, 21 April 2009, point 2. On the relevance of the domicile of the defendant as a ground triggering the application of the jurisdiction rules in the Brussels regime see among others, T. KRUGER, *Civil Jurisdiction Rules of the EU and Their Impact on Third States*, Oxford University Press, 2008, p. 59 et seq.

*A court of a Member State can exceptionally stay proceedings if a non-EU court was seized first and it is expected to decide within a reasonable time and the decision will be capable of recognition and enforcement in that Member State.*<sup>750</sup>

Although the general extension of the scope of the Brussels I Regulation to the EU claimant has not been achieved, Article 33 Brussels *Ibis* Regulation has been maintained with small modifications. Moreover, it was supplemented with Article 34 of the Brussels *Ibis* Regulation governing the related proceedings in a Third State court.<sup>751</sup> It seems that Article 33 of the Brussels *Ibis* Regulation was inspired by the European Group for Private International Law Proposal drafted in Bergen in 2008, which has proposed the introduction of a new mechanism of *lis pendens*.<sup>752</sup> It is regrettable that the new rule on the choice-of-court in favour of a Third State court proposed by the European Group for Private International Law,<sup>753</sup> which has been sent to the EU institutions,<sup>754</sup> did not appear in the Proposal. As a result, the only rules which

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<sup>750</sup> Proposal for a Recast of the Brussels I Regulation, p. 8.

<sup>751</sup> Article 34 of the Brussels *Ibis* Regulation appeared for the first time in a draft circulated by the Danish Presidency in 2012, The Presidency of the Council of the European Union, 8855/12, 2010/0383 (COD), 17 April 2012; see also The delegation of the United Kingdom, 8000/12, 2010/0383 (COD), 22 March 2012. On the comments of this proposal see: L. FUMAGALLI, *Lis alibi pendens. The rules on Parallel Proceedings in the Reform of the Brussels I Regulation*, in F. POCAR, I. VIARENGO, F. C. VILLATA (eds), *Recasting Brussels I: Proceedings of the Conference Held at the University of Milan on 25-26 November 2011*, CEDAM, 2012, p. 237-252; F. MARONGIU BONAIUTI, *La disciplina della litispendenza nei rapporti tra giudici di paesi membri e giudici di paesi terzi nella proposta di revisione del regolamento n. 44/2001*, *Rivista diritto internazionale*, (2011), p. 496; P. ROGERSON, *Lis Pendens and Third States: The Commission's Proposed Changes to the Brussels I Regulation*, in E. LEIN (ed), *The Brussels I Review Proposal Uncovered*, British Institute of International and Comparative Law, 2012, pp. 103-124.

<sup>752</sup> The European Group for Private International Law in its meeting in Bergen on 19-21 September 2008 proposed the amendment of chapter II of Brussels I Regulation in order to apply external situations, available at: <https://www.gedip-egpil.eu/documents/gedip-documents-18pe.htm>. See text of proposed Article 30bis: «*In the case of lis pendens or related actions as understood in Articles 27 and 28, when the claim is pending before the courts of a non-Member State, the court of a Member State seized second may stay the proceedings before it until the court seized first gives judgment, if it appears that judgment will be given within a reasonable time and that it will be subject to recognition under the law of the Member State in question. It shall decline jurisdiction once the court seized first has given a judgment entitled to recognition under the law of that Member State.*».

<sup>753</sup> The European Group for Private International Law in its meeting in Bergen on 19-21 September 2008, available at: <https://www.gedip-egpil.eu/documents/gedip-documents-18pe.htm>. See Article 23bis of the Proposal: «*1. A court of a Member State seized of proceedings over which it has jurisdiction under this Regulation, and with regard to which the parties have given exclusive jurisdiction to a court or the courts of a non-Member State under an agreement complying with the conditions laid down by Article 23, shall not hear the proceedings unless and until the chosen court has declined jurisdiction. It shall stay the proceedings as long as the chosen court has not been seized or, if it has been seized, has not declined jurisdiction. It shall decline jurisdiction once the chosen court has given a judgment entitled to recognition under the law of the State of the court seized. Nevertheless, it may hear the proceedings if it appears that: (a) the chosen court will not give judgment within a reasonable time; (b) the chosen court will give a judgment which will not be entitled to recognition under the law of the State of the court seized.*».

<sup>754</sup> A. BORRÁS, *The Application of the Brussels I Regulation to Defendants Domiciled in Third States: From the EGPIIL Proposal to the Commission Proposal*, in E. LEIN, (ed), *The Brussels I Review Proposal Uncovered*, British Institute of International and Comparative Law, 2012, p. 62.

give indirectly to the Third State's jurisdiction in the presence of the choice-of-court agreement are Articles 33 and 34 of the Brussels *Ibis* Regulation dealing the parallel proceedings.

### **15.5. Articles 33 and 34 of the Brussels *Ibis* Regulation**

Due to the lack of an express rule giving effect to the jurisdiction clauses in favour of the Third State court, specific problems could be solved at least by the new rules on *lis pendens* and related actions established in Articles 33 and 34 of the Brussels *Ibis* Regulation.<sup>755</sup> The aim of the *lis pendens* rule is to handle parallel litigation and irreconcilable judgments, whereby Articles 33 and 34 of the Brussels *Ibis* Regulation should eliminate the risk of parallel proceedings and the irreconcilable judgments outside the EU. This must be highlighted in the context of the fact that the legal activity in the Third State court is not irrelevant to the Brussels regime. Article 45 par. 1 lett. d) of the Brussels *Ibis* Regulation establishes as one of the grounds for non-recognition irreconcilability of the judgment with an earlier judgment given in a Third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.

These provisions aim at providing “*for a flexible mechanism allowing the courts of the Member States to take into account proceedings pending before the courts of third States...*”<sup>756</sup> The extra-EU rules on *lis pendens* and related actions operate unilaterally without the obligation of reciprocity.

While Article 33 of the Brussels *Ibis* Regulation refers to the “same cause of action”, Article 34 refers to “an action which is related to the action in the court of the Third State”. Both Articles are similar to the structure. However, due to the failure to provide for a definition of “same cause of action” in Article 33 of the Brussels *Ibis* Regulation and “irreconcilability” in Article 34 of the Brussels *Ibis* Regulation, according to some scholars the rules are regarded

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<sup>755</sup> For a more detailed analysis, see also F. SALERNO, *Giurisdizione ed efficacia delle decisioni straniere nel regolamento (UE) n.1215/2012 (rifusione)*, Wolters Kluwer, 2015, p. 284-288; P. FRANZINA, *Lis pendens involving a Third Country under the Brussels I-bis Regulation: an overview*, *Rivista di diritto internazionale privato e processuale*, (2014), p. 32.

<sup>756</sup> Recital No 23 of the Brussels *Ibis* Regulation



as incomplete.<sup>757</sup> It is disputed whether the “same cause of action” and “irreconcilability” should be interpreted autonomously by virtue of Article 29 of the Brussels *Ibis* Regulation in order to prevent a clash between a Third State and Member State’s judgment. Or should these terms be assessed with reference to the national law of the Member State court seized.<sup>758</sup>

Articles 33 and 34 of the Brussels *Ibis* Regulation may be applied only upon the fulfilment of certain conditions. It is necessary to point out that the effectiveness of new rules on *lis pendens* and related actions is weakened by the fact that a seized Member-State court is granted discretionary power. In other words, the Brussels *Ibis* Regulation does not oblige a Member State court to suspend or dismiss proceedings even if conditions for its application are met. Thus, the decision to stay the proceedings falls entirely within the competence of a specific Member State court. Some of the rigid conditions are described further in this text. Moreover, the Member State court may change its mind and may continue the proceedings at any time. According to paragraph 2 of Article 33 of the Brussels *Ibis* Regulation, it may happen, if the proceedings in the Third State court is stayed or discontinued; or if the proceedings in the Third State court are unlikely to be concluded within a reasonable time; or if the continuation of the proceedings is required for the proper administration of justice. Paragraph 3 of Article 33 of the Brussels *Ibis* Regulation then provides that the Member State court shall dismiss the proceedings if the proceedings in the Third State court has resulted in a judgment capable of recognition and enforcement in that Member State. Paragraph 4 of Article 33 of the Brussels *Ibis* Regulation specifies that all the mentioned procedures relating to the stay of proceedings, its continuation and its dismissal, are subject to the application of one of the parties or of its own motion where possible and under the national law.<sup>759</sup>

The new rules on *lis pendens* and related actions refer only to Articles 4, 7, 8, and 9 of the Brussels *Ibis* Regulation. The new rules on *lis pendens* and the related actions rule cannot operate in proceedings in matters relating to insurance, consumer agreements, and individual contracts of employment, *i.e.*, in proceedings with a weaker party either in the position of

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<sup>757</sup> S. M. CARBONE, C.E. TUO, *Non-EU States and Brussels I: New Rules and some Solutions for Old Problems*, *Rivista di diritto internazionale privato e processuale*, (2015), p. 12.

<sup>758</sup> On the later interpretation, see J. WEBER, *Universal jurisdiction and third states in the reform of the Brussels I Regulation*, *op. cit.*, p. 619.

<sup>759</sup> *e.g.*, in Italy, see P. FRANZINA, *Litispendenza e connessione tra Stati membri e Stati terzi nel regolamento Bruxelles I bis*, *Diritto di commercio internazionale*, 2014, p. 625 referring to Article 7 of the Italian Act on Private International Law and to *Corte Suprema di Cassazione*, 28 November 2012, n. 21108.

defendant or plaintiff (in accordance with Article 18 and 21 par. 1 lett. b) of the Brussels *Ibis* Regulation). Moreover, as a consequence of jurisdiction based on Article 4, 7, 8, and 9 of the Brussels *Ibis* Regulation, Articles 33 and 34 cannot be applied as well when the jurisdiction of a Member State court is based on an exclusive jurisdiction agreement according to Article 25, or when the Member State court has exclusive jurisdiction according to Article 24 of the Brussels *Ibis* Regulation. This means that the EU proceedings based on the above-mentioned jurisdiction grounds cannot be stayed or dismissed in favour of parallel Third State proceedings. However, the recognition of the judgments stemming from such proceedings may be denied in another Member State if the earlier judgment fulfils the conditions necessary for its recognition in the Member State, irrespective of when the court was seized.<sup>760</sup>

However, the new rules on *lis pendens* and related actions might be applied when the jurisdiction agreement is in favour of a Third State court, even if the new provisions do not expressly state so. In relation to the assessment of proper administration of justice, Recital No 24 of the Brussels *Ibis* Regulation only provides:

*That assessment may also include consideration of the question whether the court of the third State has exclusive jurisdiction in the particular case in circumstances where a court of a Member State would have exclusive jurisdiction.*

But as a consequence of the Brussels *Ibis* Regulation, silence regarding the validity of the choice-of-court agreements in favour of Third State courts, it may create an additional problem in practice. The GEDIP proposed in this regard that the seized Member State court should exercise the formal and substantial validity of the extra-EU choice-of-court agreements under the conditions laid down by Article 23 of the Brussels Regulation.<sup>761</sup> Although, as already stated, the express rule of the choice-of-court agreements in favour of the Third States

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<sup>760</sup> On the similar considerations see S. M. CARBONE, C. E. TUO, *Non-EU States and Brussels I: New Rules and some Solutions for Old Problems*, *op. cit.*, p. 12; G. VITELLINO, *La nuova disciplina in tema di litispendenza e connessione "extra-europee"*, in A. Malatesta (ed), *La riforma del regolamento di Bruxelles I: il regolamento (UE) n. 1215/2012 sulla giurisdizione e l'efficacia delle decisioni in materia civile e commerciale*, Giuffrè Editore, 2016, p. 110; F. MARONGIU BONAIUTI, *Lis alibi pendens and Related Actions in the Relationships with the Courts of Third Countries in the Recast of the Brussels I Regulation*, *Yearbook of Private International Law*, 15 (2014), p. 94. However, the recognition of judgments issued by Third State courts is left to the national law of the Member States or to international conventions.

<sup>761</sup> The European Group for Private International Law in its meeting in Bergen on 19-21 September 2008, available at: <https://www.gedip-egpil.eu/documents/gedip-documents-18pe.htm> See Article 23bis of the Proposal: «...with regard to which the parties have given exclusive jurisdiction to a court or the courts of a non-Member State under an agreement complying with the conditions laid down by Article 23...»

has not been adopted, this clear solution gives a uniform answer in all Member States in for extra-EU parallel proceedings seems to be in line with the wording of Recital No 24 “...in circumstances where a court of a Member State would have exclusive jurisdiction.” According to Professor Fentiman, a seized Member State court must apply Article 25 of the Brussels *Ibis* Regulation reflexively to the extent that it must ascertain whether the Third State court has exclusive jurisdiction *mutatis mutandis* according to this provision. For example, it must decide on the exclusivity of the jurisdiction agreement according to Article 25 of the Brussels *Ibis* Regulation.<sup>762</sup>

The second condition (that is not subject to the discretionary power of a Member-State judge) is already pending proceedings before the Third State court at the time when the Member State court is seized.<sup>763</sup> The necessity of the court to be first seized was doubted due to the unclear English version which provides “when a court in a Member State *is seized*”<sup>764</sup>, and thus it opened the door to the opposite interpretation.<sup>765</sup> Nevertheless, the Proposal for a Recast of the Brussels I Regulation providing that the Third State court must have been “seized first in time”<sup>766</sup> and the other linguistic versions of Article 33 and 34 of the Brussels *Ibis* Regulation,<sup>767</sup> support the view that the Member State court must be second seized.

In consequence, we might imagine two specific situations: the parties concluded a valid and effective court agreement in favour of a Russian court, where the Russian court was seized first and the Belgian court second. In this case, the Belgian court may consider declining jurisdiction in favour of the Russian court (if all conditions set out in Articles 33 and 34 were satisfied). However, the Brussels *Ibis* Regulation in practice excludes the opposite situation from the application of Articles 33 and 34 when the Member State court is seized first. It was observed that in such a case, the national law should be applied.<sup>768</sup> However, when *Owusu* situation appears, *i.e.*, when the defendant is domiciled in a Member State, such affirmation does not seem to be very unambiguous.

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<sup>762</sup> R. FENTIMAN, *Article 31*, in Brussels I *Ibis* Regulation, 2016, *op. cit.*, p. 766.

<sup>763</sup> Article 32 of the Brussels *Ibis* Regulation lays down the rule in order to determine when the court was seized.

<sup>764</sup> Emphasis added.

<sup>765</sup> P. ROGERSON, *Lis Pendens and Related Actions*, in A. DICKINSON, A. JAMES, E. LEIN (eds), *The Brussels I Regulation Recast*, Oxford University Press, 2015, para 11.79; C. HEINZE, B. STEINROTTER, *The Revised Lis Pendens Rules in the Brussels Ibis Regulation*, *op. cit.*, p. 10.

<sup>766</sup> Proposal for a Recast of the Brussels I Regulation, p. 38.

<sup>767</sup> See e.g., French version: « ...au moment où une juridiction d'un État membre est saisie d'une demande entre les mêmes parties ayant le même objet et la même cause que la demande... ».

<sup>768</sup> C. HEINZE, B. STEINROTTER, *The Revised Lis Pendens Rules in the Brussels Ibis Regulation*, *op. cit.*, p. 10.

If the party intentionally and abusively first seized the court in Belgium in breach of the choice-of-court agreement and subsequently the proceedings were brought to a Russian court, the Belgian court cannot decline jurisdiction in favour of the Russian court. Thus, the new rules on *lis pendens* and related actions leave a broad space for procedural tactics – the party may bring the proceedings to a Third State court in conformity with the choice-of-court agreement or may just “ignore” the choice-of-court agreement. In the latter case, it suffices to first seize a court in a Member State in breach of the choice-of-court agreement. This must lead to the assumption that in case that the defendant is domiciled in the Member State and the exclusive jurisdiction clause confers the jurisdiction to the Third State court, which was second seized, the Brussels *Ibis* Regulation must be applied, and a different interpretation can be difficultly assumed.<sup>769</sup> Such situation might result in a *rush-to-court* tactic in order to seize the most advantageous forum and rush to judgment,<sup>770</sup> and would limit the efficacy of choice-of-court agreements in favour of Third State court whenever the Member State court is first seized.

As to the third condition, unfortunately, Articles 33 and 34 of the Brussels *Ibis* Regulation do not require a stay of the proceedings in a Member State court if the prorogation agreement was not respected. The court must simply verify whether a stay is necessary for the proper administration of justice. Recital No 24 indicates factors that must be taken into account in order to evaluate the proper administration of justice, such as: (i) connections between the facts of the case and the parties and the Third State concerned; (ii) the stage to which the proceedings in the Third State have progressed by the time of proceedings in the Member State court; and (iii) whether or not the Third State court can be expected to give a judgment within a reasonable time. It can be summarised that the Brussels *Ibis* Regulation is concerned with three matters: the allocation of the proceedings to the court with the closest factual connection to the dispute; the avoidance of delay; and the prevention of the irreconcilable judgments. However, it is uncertain, in what way these terms should be understood and the term “proper administration of justice” may be difficult to prove.<sup>771</sup>

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<sup>769</sup> J. P. COOK, *Pragmatism in the European Union: recasting the Brussels I Regulation to Ensure the Effectiveness of Exclusive Choice-of-Court Agreements*, Aberdeen Student Law Review, (2013), available at [https://www.abdn.ac.uk/law/documents/Pragmatism\\_in\\_the\\_European\\_Union](https://www.abdn.ac.uk/law/documents/Pragmatism_in_the_European_Union).

<sup>770</sup> F. C. VILLATA, *L'attuazione degli accordi di scelta del foro nel regolamento Bruxelles I*, *op. cit.*, p. 214.

<sup>771</sup> On the similar considerations, see R. FENTIMAN, *Article 31*, in Brussels *I Bis* Regulation, 2016, *op. cit.*, p. 763. On the preoccupation regarding the introduction of these flexible rules belonging to the common law in the

The meaning of proper administration of justice laid down by Article 33 and 34 and Recital No 24 gives a sensation that is a kind of “hybrid” between *lis pendens* and *forum non conveniens*.<sup>772</sup> As already stated, according to ECJ opinion in *Owusu* judgment, *forum non conveniens* undermines the predictability of the Brussels Convention rules on jurisdiction and the principle of legal certainty of the Brussels Convention. It is regrettable that the principle of *forum non conveniens* was admitted into the Brussels *Ibis* Regulation, but other problems connected with the *Owusu* case have remained unresolved.

As to the fourth condition laid down in Articles 33 and 34 of the Brussels *Ibis* Regulation, a judgment that will be delivered by a Third State court must be recognisable and, where applicable, enforceable in that Member State. Thus, the specific court of the Member State must examine the likelihood of the judgment being recognised and enforced in the future and in accordance with its national rules or international conventions.<sup>773</sup> There is no harmonisation of national rules in this respect.

For example, in the Czech Republic, the court would verify the fulfilment of conditions determined by Article 14 of the Czech on Private International Law (the legal effect of the foreign judgment and the recognition of the judgment by the Czech court). At the same time, if the recognition cannot be refused on the grounds established by Article 15 of the Czech Act on Private International Law (*i.e.*, *res judicata*, *lis pendens*, public policy, reciprocity, breach of right of defence, or indirect jurisdiction). As to indirect jurisdiction, the Czech court must determine whether it has the right to establish its exclusive jurisdiction or if the jurisdiction of the Third State court was established on the basis of the rules on territorial jurisdiction set out in Czech Act No. 99/1963 Coll. on Civil Procedure.<sup>774</sup> Thus, the provisions on territorial jurisdiction set out by the Act on Civil Procedure are reflected in the rules of the Third State

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other Member States courts which are acquainted with *forum non conveniens* see F. MARONGIU BONAIUTI, *Lis alibi pendens and Related Actions in the Relationships with the Courts of Third Countries in the Recast of the Brussels I Regulation*, *op. cit.*, p. 110.

<sup>772</sup> It is the same requirements for the granting of a stay on the basis of *forum non conveniens* grounds under English law, by the well-known case of *Spiliada Maritime Corp v Cansulex Ltd* [1986] AC 460.

<sup>773</sup> See S. M. CARBONE, *What about the Recognition of Third States' Foreign Judgments?*, in F. POCAR, I. VIARENGO, F. C. VILLATA (eds), *Recasting Brussels I: Proceedings of the Conference Held at the University of Milan on 25-26 November 2011*, CEDAM, 2012, p. 299- 302.

<sup>774</sup> See Article 6 of the Czech Act on Private International Law. The direct international jurisdiction of Czech courts is determined in accordance with the procedural regulations governing territorial jurisdiction in the Czech Republic, unless the provisions of the Act on Private International Law stipulates otherwise.

court.<sup>775</sup> Moreover, in matters of contractual rights, the parties may agree in writing on the jurisdiction of a foreign court in accordance with Article 86 of the Czech on Private International Law, thereby excluding the jurisdiction of Czech courts.

In Slovakia, the Slovak on Private International Law is based on the same principle – a judgment is recognized unless grounds of non-recognition exist (the breach of the right of defence, public policy, indirect jurisdiction, *res judicata*, judgment is without legal effect or is not as to the substance).<sup>776</sup> As to the indirect jurisdiction, the Slovak court refuses recognition of a foreign judgment, if the foreign court assumed its jurisdiction on a criterion of jurisdiction that does not apply in Slovakia.<sup>777</sup>

Also, in Italy, Article 64 par. 1 lett. a)<sup>778</sup> of the Italian Act on Private International Law provides for indirect jurisdiction, conditions, and criterion for the jurisdiction of choice-of-court agreements, are regulated by Article 4 of the same Act,<sup>779</sup> where the conditions for derogation should be required by the Italian Act on Private International Law as well.<sup>780</sup>

As a result, problems connected with the possibility of derogating from jurisdiction might also arise in front of Czech and Slovak courts as in Italy. Since the subject matter enters into the scope of application of the Brussels *Ibis* Regulation, should derogation conditions be verified in light of the rules laid down by the Brussels *Ibis* Regulation, and by virtue of *Owusu* case?

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<sup>775</sup> See commentary to Article 15: P. BŘÍZA, IN P. BŘÍZA, T. BŘICHÁČEK, Z. FIŠEROVÁ, *Zákon o mezinárodním právu soukromém*, p. ; M. Pauknerová, N. Rozehnalová, M. Zavadilová, *Zákon o mezinárodním právu soukromém. Komentář*, Wolters Kluwer ČR, Praha, 2013; V. VAŠKE, *Uznání a výkon cizích rozhodnutí v České republice*, C. H. Beck, Praha, 2007, p. 434.

<sup>776</sup> Provision Articles 63 and 64 of Act No 97/1963 Coll. on Private International Law. (“Slovak Act on Private International Law”).

<sup>777</sup> M. HAŤAPKA, *Priznávanie účinkov cudzím rozhodnutiam v občianskych veciach v Slovenskej republike (uznávanie a výkon)*, *Justičná revue*, (3) (2015.), p. 282. As to the jurisdiction regarding a choice-of-jurisdiction clause, Article 37( lett. e) of the Slovak Act on Private International Law determines jurisdiction rule in this respect.

<sup>778</sup> Article 64 par. 1 lett. a) of the Italian Act on Private International Law provides: «A judgement rendered by a foreign authority shall be recognized in Italy without requiring any further proceedings if: a) the authority rendering the judgement had jurisdiction pursuant to the criteria of jurisdiction in force under Italian law...». On Article 64 of the Italian Act on Private International Law see E. D’ALESSANDRO, *Commento agli artt.64-71 l. 31 maggio 1995, n.218, in Codice di procedura civile commentato*, Vol 1, UTET, 2010, pp. 3466-3485.

<sup>779</sup> Article 4 of the Italian Act on Private International Law provides: «Where jurisdiction cannot be determined pursuant to Article 3, Italian courts shall nonetheless have jurisdiction if the parties have agreed to it and such acceptance is evidenced in writing, or if the defendant enters an appearance without pleading the lack of jurisdiction in his statement of defence. 2. The jurisdiction of any Italian court may be derogated from by an agreement in favour of a foreign court or arbitration if such derogation is evidenced in writing and the action concerns alienable rights. 3. Derogation shall have no effect if the court or the arbitrators decline jurisdiction or cannot hear the action.».

<sup>780</sup> F. C. VILLATA, *L’attuazione degli accordi di scelta del Foro nel regolamento Bruxelles I*, op. cit., p. 220.

Such a scenario would lead to undesirable results, *i.e.*, to the impossibility of the proper application of Articles 33 and 34 of the Brussels *Ibis* Regulation and the impossibility of recognition of the judgments based on the choice-of-court agreement conferring jurisdiction to Third State court when a defendant is domiciled in the requested Member State.<sup>781</sup> In other words, the Member States determining indirect jurisdiction in their PIL Acts as a condition for recognition and enforcement of foreign judgments might face the previously mentioned problem.

#### **15.5.1. Articles 33 and 34 of the Brussels *Ibis* Regulation as an Exclusive Regime for Allocating Disputes between the Member State Courts and the Third State Courts?**

The introduction of Articles 33 and 34 into the Brussels *Ibis* Regulation emphasises the conclusion that the new rules on *lis pendens* and related actions are the only two exceptions allowing jurisdiction to be declined in favour of a Third State court.<sup>782</sup> In consequence, the Member State courts might be faced with more difficulties in being able to decline jurisdiction in favour of a Third State court in presence of the choice-of-court agreement designating such a Third State court in two situations: (i) when the Member State court is first seized; and (ii) when there are no parallel proceedings. However, some authors have tried to justify the declination on favour of the Third State court in the absence of parallel proceedings on the ground of the Third State's exclusive jurisdiction by reference to the national law, which would be an independent evaluation of the application of Articles 33 and 34 of the Brussels *Ibis* Regulation.<sup>783</sup> In this regard, Recital No 24 may support the view that a Third State court may exercise its exclusive jurisdiction, which represents an independent ground for declining jurisdiction distinct from Articles 33 and 34 of the Brussels *Ibis* Regulation.<sup>784</sup> In such a case, Recital 24 might be engaged and the Member State “*may also include consideration of the question whether the court of the third State has exclusive jurisdiction*”. However, due to the allocation of this wording into the Recital 24 which addresses the

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<sup>781</sup> F. C. VILLATA, *L'attuazione degli accordi di scelta del Foro nel regolamento Bruxelles I*, *op. cit.*, p. 220

<sup>782</sup> S. CARBONE, *Il Nuovo Spazio Giudiziario Europeo in Materia Civile E Commerciale: Il Regolamento UE N. 1215/2012*, *op. cit.*, p. 306.

<sup>783</sup> R. FENTIMAN, *Article 31*, in *Brussels I Bis Regulation, 2016*, *op. cit.*, p. 767.

<sup>784</sup> R. FENTIMAN, *Article 31*, in *Brussels I Bis Regulation, 2016*, *op. cit.*, p. 766.

complexity of the extra-EU *lis pendens* and the interpretation of the proper administration of justice, the practical effect remains uncertain.

As we could see, Articles 33 and 34 of the Brussels *Ibis* Regulation address only a problem related to the extra-EU parallel proceedings and may be perceived as the result of a partial solution. On the contrary, the practical consequences of this partial solution embodied in Articles 33 and 34 of the Brussels *Ibis* Regulation may be even counterproductive. First, in cases of parallel proceedings in the Member State and Third State in the presence of a jurisdiction agreement in favour of such a Third State, whereby the Member State court is first seized, it is difficult to defend the position of declining jurisdiction in such a case. Second, as stated above, in the absence of *lis pendens* it is arguable whether Articles 33 and 34 of the Brussels *Ibis* Regulation do not forbid any remission to the national law for Third State derogation agreements. If we admit that the national law could still have a role, does the interpretation given in *Owusu* case prevail?

The lack of any express rule in the Brussels *Ibis* Regulation providing for a uniform guideline in order to resolve the *Owusu* problem is regrettable. As mentioned above, such a partial solution was intended to motivate other States in ratifying the Hague Convention on the Choice of Court Agreements. Although it would be a desirable objective, it does not sufficiently cover the current problem arising out of the absence of a rule on the jurisdiction agreements in favour of a Third State court.



## II. Hague Convention on Choice of Court Agreements

### 1. The Historical Background

In 1992, the US Department of State proposed to the Hague Conference of Private International Law a judgment convention in civil and commercial matters.<sup>785</sup> The letter of the US Department proposed to take up the negotiations of the convention “on the recognition and enforcement of judgments” even if the failure of the single Hague Convention on recognition and enforcement of judgments from 1971 in terms of ratifications was admitted.<sup>786</sup> This letter was accompanied by report of Professor von Mehren containing an idea of a “classical mixed convention”.<sup>787</sup> The classical mixed convention is a convention which contains a: (i) whitelist, a list of grounds under which the court is required to assume the jurisdiction; (ii) blacklist, a list of grounds under which the courts are not required to assume jurisdiction; and (iii) grey area, when the courts may assume jurisdiction on grounds neither in the whitelist nor the blacklist.<sup>788</sup> The Permanent Bureau of the Hague Conference on Private International Law foresaw the risk that such a classical mixed convention would press the Brussels and Lugano States to “stick as closely as possible to the existing Brussels and Lugano texts”.<sup>789</sup> In consequence, the Permanent Bureau proposed more than a classical “single” convention, which determines the indirect rules of jurisdiction that could form the basis for recognition and enforcement. They suggested a “mixed convention”.<sup>790</sup> A “flexible mixed convention” does not contain any positive direct rules of jurisdiction, but it operates

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<sup>785</sup> Letter of 5 May 1992 sent by Edwin Williamson, Legal Advisor, U.S. Department of State to the Hague Conference.

<sup>786</sup> Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, which has been ratified only by Cyprus, Kuwait, the Netherlands, and Portugal.

<sup>787</sup> See A. T. VON MEHREN, *Recognition Convention Study: Final Report*.

<sup>788</sup> A. T. VON MEHREN, *The Case for a Convention-mixte Approach to Jurisdiction to Adjudicate and Recognition and Enforcement of Foreign Judgments*, *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 61 (1997), p. 86; A. T. VON MEHREN, *Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?*, *Law and Contemporary Problems* 57 (1994), p. 271. See also in this regard: P. NYGH, *Arthur's Baby: The Hague Negotiations for a World-Wide Judgments Convention*, in J. NAFZIGER AND S. SYMEONIDES (eds), *Law and Justice in a Multistate World: Essays in Honor of Arthur T. von Mehren*, Brill- Nijhoff, 2002, p. 151.

<sup>789</sup> Prel. Doc. No 17 of May 1992 in *Proceedings of the Seventeenth Session (1993)*, Vol I – Some reflections of the Permanent Bureau on a general convention on enforcement of judgments, p. 237.

<sup>790</sup> A. T. VON MEHREN, *Enforcing Judgments Abroad: Reflections on the Design of Recognition Conventions*, *Brooklyn Journal of International Law* (1998), p.19.

only with the “blacklist” of direct jurisdiction grounds and list of positive indirect jurisdiction grounds, under which the judgment can be recognized or enforced.<sup>791</sup>

In 1992, the Working Group supported the view of the classical mixed convention,<sup>792</sup> but the Hague Conference on Private International Law decided to study further the matter within the Special Commission. The study lasted from 1994 to 1996, and the formal negotiations based on the study started in 1997, resulting in the Draft Preliminary Text.<sup>793</sup> Due to the large support for the convention to be a “double” convention,<sup>794</sup> which was caused by the presence of the delegations coming from more than 25 “Brussels Regime Member States”, the draft text often reflected the double conventions, in particular, the Brussels Convention. It became apparent that it was too ambitious of a project and it was not possible to draw up the convention within a reasonable time.<sup>795</sup> Moreover, the agreement was not possible to reach in particular as regards to the black and white lists. Special attention was given to e-commerce, intellectual property, consumer, and employment contracts and to the relationship with other international instruments.<sup>796</sup>

In February 2002, the Permanent Bureau identified the issues on which the consensus was achieved, as “*the provisions on scope, defendant's forum, choice-of-court in the business to business context, lis pendens and exceptional circumstances for declining jurisdiction along*

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<sup>791</sup> The flexible mixed rules can be found for example in the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance.

<sup>792</sup> Prel. Doc. No 19 of November 1992 - Proceedings of the Seventeenth Session (1993), Vol I – Conclusions of the Working Group meeting on enforcement of judgments, p. 257.

<sup>793</sup> Prel. Doc. No. 11 of August 2000 - Report on the preliminary draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, drawn up by Peter Nygh and Fausto Pocar.

<sup>794</sup> A. T. VON MEHREN, *Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable World-Wide: Can the Hague Conference Project Succeed?*, American Journal of Comparative Law (2001), p. 199; R. A. BRAND, S. R. JABLONSKI, *Forum Non Conveniens: History, Global Practice, and Future under the Hague Convention on Choice-of-court Agreements*, *op. cit.*, p. 145; A. ZANOBETTI, *EU Cooperation in Civil Matters and Multilevel Unification of Private International Law: Some Remarks*, in P. FRANZINA (ed), *The External Dimension of EU Private International Law After Opinion 1/13*, Intersentia, 2017, p. 129.

<sup>795</sup> Prel. Doc. No 11 of August 2000 - Report on the preliminary draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, drawn up by Peter Nygh and Fausto Pocar, p. 27; Interim Text - Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference (6-22 June 2001), prepared by the Permanent Bureau and the Co-reporters Interim Text - Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference (6-22 June 2001), prepared by the Permanent Bureau and the Co-reporters. On the details of the history backgrounds of this project see R. A. BRAND, *The 1999 Hague Preliminary Draft Convention Text on Jurisdiction and Judgments: A View from the United States*, in F. POCAR, C. HONORATI (eds), *The Hague Preliminary Draft Convention on Jurisdiction and Judgments*, CEDAM, 2005, pp. 31-62.

<sup>796</sup> Prel. Doc. No 12 of August 1996 - Proceedings of the Nineteenth Session (1996), Vol 1 – Miscellaneous matters, p. 81-83.

with most of the chapter on recognition and enforcement.”<sup>797</sup> stating that the starting point should be choice-of-court agreements.<sup>798</sup> The Informal Working Group met three times aiming at preparing a text to be submitted to the Special Commission.<sup>799</sup> The three meetings of the Special Commission took place between 2003 and 2005. The definitive text was prepared at the Twentieth Session of the Hague Conference in June 2005, and was approved by the Plenary Session on 30 June 2005. The Hague Convention on Choice of Court Agreements was opened to the signature on that date.

The Hague Convention on Choice of Court Agreements aims at promoting international trade and investment through enhanced judicial co-operation by the introduction of the uniform rules on jurisdiction and recognition and enforcement of foreign judgments in civil or commercial matters.<sup>800</sup> The Hague Convention on Choice of Court Agreement should provide certainty and should ensure the effectiveness of exclusive choice-of-court agreements in business to business transactions.<sup>801</sup> As explained in Section 15 of the Subchapter II, there is a risk that that: (i) choice-of-court agreements in favour of a Third State court will not be respected in the EU; (ii) choice-of-court agreements in favour of a court in the EU will not be respected in Third States; (iii) a judgement given by the chosen Third State court will not have the capacity to be recognised and enforced in the EU; and (iv) a judgement given by the chosen Member State court will not have the capacity to be recognised and enforced outside the EU. The survey carried out by the ABA revealed that almost 40 % of respondents stated that enforcing a Third State choice-of-court agreement had been difficult or extremely difficult.<sup>802</sup> According to the ICC survey, almost 40% stated that obtaining recognition or enforcement of judgments had been difficult and 7,4% stated that this had been extremely difficult or practically insurmountable.<sup>803</sup>

Furthermore, small and the medium enterprises faced with difficulty in accessing information on risks stemming from the trade with the Third States. Barriers were identified, especially for

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<sup>797</sup> Prel. Doc. No 16 of February 2002 - Some reflections on the present state of negotiations on the judgments project in the context of the future work programme of the Conference, p. 431.

<sup>798</sup> Prel. Doc. No 16 of February 2002 - Some reflections on the present state of negotiations on the judgments project in the context of the future work programme of the Conference, p. 433.

<sup>799</sup> Prel. Doc. No 22 of June 2003 - Report on the work of the Informal Working Group on the Judgments Project, in particular a text achieved at its third meeting of March 2003.

<sup>800</sup> Preamble of the Hague Convention on Choice- of-court Court Agreements.

<sup>801</sup> Preamble of the Hague Convention on Choice- of-court Court Agreements.

<sup>802</sup> Impact Assessment on the Ratification of the Hague Convention on Choice-of-Court Agreements, p. 25.

<sup>803</sup> *Ibidem*.

small businesses or individuals, as difficulties: enforcing rights; costs of proceedings; lack of easily accessible and readily understood specialist knowledge; and high level of uncertainty of success in pursuing a case.<sup>804</sup>

Although Articles 33 and 34 of the Brussels *Ibis* Regulation may be perceived as a partial solution on the EU level in case of *lis pendens* in a Third State court in the presence of choice-of-court agreement in favour of a Third State court (if the conditions are fulfilled), in other cases the *Owusu* problem seems to be unresolved. Since the non-introduction of the explicit rule on choice-of-court agreements in favour of Third State courts which would fill this “gap” was caused by the intention on motivating other States in ratifying the Hague Convention on Choice of Court Agreements,<sup>805</sup> it is necessary to analyse the rules on the Hague Convention on Choice of Court Agreements and their compatibility with the Brussels *Ibis* Regulation. In 2008, several impact assessments on the conclusion of the Hague Convention on Choice of Court Agreements by the EU were published.<sup>806</sup> It concluded that the Hague Convention on Choice of Court Agreements would be beneficial in terms of promoting legal certainty and predictability for European businesses in respect of Third States.<sup>807</sup>

## 2. Scope of Application

### 2.1. Temporal and Territorial Scope

On 5 September 2008, the European Commission issued a proposal for a Council Decision on signing by the European Community of the Hague Convention on Choice of Court Agreements. According to the European Commission, the European Community had exclusive competence to conclude the Hague Convention on Choice of Court Agreements and

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<sup>804</sup> Commission Staff Working Document. Accompanying the Proposal for a Council Decision on the signing by the European Community of the Convention on Choice-of-Court Agreements, SEC (2008) 2390, 5 September 2009, p. 11.

<sup>805</sup> Committee on Legal Affairs, 20 September 2011, available at: <http://www.europarl.europa.eu/ep-live/en/committees/video?event=20110920-0900-COMMITTEE-JURI>.

<sup>806</sup> Impact Assessment on the Ratification of the Hague Convention on Choice-of-Court Agreements; Commission Staff Working Document. Accompanying the Proposal for a Council Decision on the signing by the European Community of the Convention on Choice-of-Court Agreements, SEC (2008) 2390, 5 September 2009.

<sup>807</sup> Commission Staff Working Document. Accompanying the Proposal for a Council Decision on the signing by the European Community of the Convention on Choice-of-Court Agreements, SEC (2008) 2390, 5 September 2009, p. 46.

referred to the ECJ's jurisprudence, in particular to *Lugano opinion 1/03*.<sup>808</sup> The European Commission proposal on the exclusive competence of the European Community was approved by the Council on 26 February 2009.<sup>809</sup> The EU deposited the instrument of approval on 11 June 2015, on the basis of the decision to approve the Hague Convention on Choice of Court Agreements on behalf of the Member States adopted by the Council of the European Union on 4 and 5 December 2014.<sup>810</sup>

Almost after ten years after its adoption, the Hague Convention on Choice of Court Agreements entered into force on 1 October 2015 under Article 31 par. 1 of the Hague Convention on Choice of Court Agreement in 32 Contracting State – the EU, all Member States,<sup>811</sup> Mexico,<sup>812</sup> Singapore,<sup>813</sup> and Montenegro.<sup>814</sup> Moreover, the People's Republic of China,<sup>815</sup> Ukraine,<sup>816</sup> and the United States of America<sup>817</sup> have signed the Hague Convention

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<sup>808</sup> Proposal for a Council Decision on the signing by the European Community of the Convention on Choice-of-Court Agreements, 5 September 2008, COM (2008) 538 final, point 11.

<sup>809</sup> Council Decision of 26 February 2009 on the signing on behalf of the European Community of the Convention on Choice of Court Agreements, (2009/397/EC), OJ L 133, 29 May 2009. The existence of an exclusive external competence of the EU concerning judicial cooperation in civil matters was affirmed by the ECJ in the already analysed the *Lugano Opinion 1/03*, 7 February 2006. Opinions of the Court, Avis 1/13, Adhésion d'États tiers à la convention de La Haye, 14 October 2014, ECLI:EU:C:2014:2303, strengthen the idea of the EU's exclusive external competence, when the ECJ upheld that the acceptance of the accession of third States to the Hague Convention of 1980 on international child abduction fell within the exclusive external competence of the EU.

<sup>810</sup> Council Decision of 4 December 2014, on the approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice-of-Court Agreements, (2014/887/EU), OJ L 353, 10 December 2014.

<sup>811</sup> The Member States are bound by the approval according to Article 30 of the Hague Convention on Choice of Court Agreements, except of Denmark, as specified in the Recital 8 and 9 of the Council Decision of 4 December 2014, on the approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice-of-Court Agreements, (2014/887/EU) OJ L 353, 10 December 2014. Article 30 of the Hague Convention on Choice of Court Agreements authorizes a Regional Economic Integration Organisation to be the only Contracting Party, whereby the Member States are bound by the Convention, when the Regional Economic Integration Organisation exercises the external competence over the whole matter. On 30 May 2018, Denmark had deposited its instrument of accession to the Hague Convention on Choice of Court Agreements and entered into force for Denmark on 1 September 2018. In accordance with article 21 of the Hague Convention on Choice of Court Agreements, Denmark made a declaration to exclude certain types of insurance contracts from the Convention's scope.

<sup>812</sup> Mexico acceded to the Hague Convention on Choice of Court Agreements on 26 September 2007 and entered into force for Mexico on 1 October 2015.

<sup>813</sup> Singapore signed the Hague Convention on Choice of Court Agreements on 25 March 2015, ratified it on 2 June 2016 and entered into force on 1 October 2016. On the Hague Convention on Choice of Court Agreements from the perspective of Singapore see: T. M. YEO, *Hague Convention on Choice of Court Agreements 2005: A Singapore Perspective*, Journal of International Law and Diplomacy, (2015), p. 50 *et seq.*

<sup>814</sup> Montenegro signed the Hague Convention on Choice of Court Agreements on 5 October 2017, ratified it on 18 April 2018, and the Hague Convention on Choice of Court Agreements entered into force for Montenegro on 1 August 2018.

<sup>815</sup> The People's Republic of China signed the Hague Convention on Choice of Court Agreements on 12 September 2017. On the Chinese perspective see G. TU, *The Hague Choice-of-court Convention - A Chinese Perspective*, American Journal of Comparative Law, (2007), p. 347 *et seq.*

on Choice of Court Agreements.<sup>818</sup> Although until now, the Hague Convention on Choice of Court Agreements does not seem to be as successful as its arbitration counterpart (the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, that is applied within over 130 Contracting States<sup>819</sup>) the US ratification could motivate other States to begin the ratification process.<sup>820</sup> According to the Council on General Affairs and Policy of the Hague Conference, countries such as Australia, Canada, Tunisia, and Brazil are considering joining the Hague Convention on Choice of Court Agreements and countries such as Argentina, Costa Rica, New Zealand, and Serbia participate in the Permanent Bureau's Implementation Dialogue.<sup>821</sup> Lastly, in the context of the territorial scope, it must be highlighted that the chosen court must be a court or courts of a Contracting State.<sup>822</sup>

Two other situations must be distinguished: first when the Hague Convention on Choice of Court Agreements comes into force for a particular State; second, when the Hague Convention on Choice of Court Agreements applies to a particular legal contract or proceedings. As to the first issue, Article 31 of the Hague Convention on Choice of Court

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<sup>816</sup> Ukraine signed the Hague Convention on Choice of Court Agreements on 21 March 2016

<sup>817</sup> The United States of America has signed the Hague Convention on Choice of Court Agreements on 19 January 2009. There is a support for ratification of the Hague Convention on Choice-of-court Court Agreements. However, the reason of the non-ratification is due to the complicated state and federal issues in context of the implementation of the Convention in the legal system. See P. H. PFUND, *Federalism and U.S. Implementation of PIL Conventions - Implementing the Hague Convention on Choice-of-court Agreements*, in A Commitment to Private International Law: Essays in honour of Hans van Loon, Intersentia, 2013, p. 477 et seq.; R. A. BRAND, *Implementing the 2005 Hague Convention: The EU Magnet and the US Centrifuge*, in J. FORNER DELAYGUA (ed), *Entre Bruselas y La Haya. Estudios Sobre La Unificación Internacional Y Regional Del Derecho Internacional Privado: Liber Amicorum Alegría Borrás*, Marcial Pons, 2013, p. 267 et seq. See also: G. P. HENDRIX, *Memorandum of the American Bar Association - Section of International Law Working Group on the implementation of the Hague Convention on Choice-of-court Agreements*, *The International Lawyer International Lawyer*, 49:3 (2016), p 255-272: «*the Convention enjoys universal support in the United States, but its transmittal to the Senate for advice and consent to ratification has been held up by disagreements over whether it should be implemented by federal law or by a combination of federal and state law.*».

<sup>818</sup> Such commitment of the States which have signed the convention is not irrelevant from an international law perspective. See Article 18 lett. a) of the 1969 Vienna Convention on the Law of Treaties: «*(a) State is obliged to refrain from acts which would defeat the object and purpose of a treaty when ... it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty.*».

<sup>819</sup> See List of Contracting States available at: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html).

<sup>820</sup> P. D. TROBOFF, *Proposed Principles for United States Implementation of the New Hague Convention on Choice-of-court Agreements*, *New York University Journal of International Law and Politics* 42 (2009), p. 237, 244; M. B. BERLIN, *Hague Convention on Choice-of-court Agreements: Creating an International Framework for Recognizing Foreign Judgments*, *International Law & Management Review* 3:1 (2007), p. 76.

<sup>821</sup> Prel. Doc. No 5 of January 2017 - Suggested Further Work in Support of Forum and Law Selection in International Commercial Contracts.

<sup>822</sup> Hartley-Dogauchi Report, par. 100.

Agreements specifies that the rules take effect in the Contracting States on the first day of the month following the expiration of three months after the deposit of the instrument of the ratification, acceptance, approval, or accession.<sup>823</sup> As to the second case, Article 16 of the Hague Convention on Choice of Court Agreements differs from the situation when the seized court is the chosen one and when the non-designated court is seized. Article 16 par. 1 of the Hague Convention on Choice of Court Agreements provides that it applies to the choice-of-court agreements concluded after the entry into the force at the chosen State. On the other hand, the seized non-chosen court may rely upon the Hague Convention on Choice of Court Agreements only when: (i) the choice-of-court agreement was concluded after the entry into the force at the chosen State; or (ii) the proceedings were instituted after the Hague Convention on Choice of Court Agreements' entry into force in the seized State. In other words, the time of the institution of the proceedings is irrelevant for the chosen court. Only the non-designated court will be required to ascertain whether the proceedings are instituted after the entry into force of the Hague Convention on Choice of Court Agreements, *i.e.*, it must identify the point of time of the institution of the proceedings. However, the Hague Convention on Choice of Court Agreements is silent in this respect. Since the Hague Convention on Choice of Court Agreements should not affect the procedural law of the Contracting States, unless otherwise provided, the procedural law of the Contracting States determines the proceedings (for example, the time limits) within the Hague Convention regime.<sup>824</sup> In consequence, it can be assumed that the point of time determining the institution of the proceedings should be governed by *lex fori*.

## 2.2. Material Scope

The Hague Convention on Choice of Court Agreements limits its scope to the civil and commercial matters, as provided in Article 1. The notion of civil and commercial matters has an autonomous meaning and it does not refer to the national law.<sup>825</sup> However, this notion is

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<sup>823</sup> According to Article 27 of the Hague Convention on Choice of Court Agreement, every State may become a Party to the Hague Convention on Choice-of-court Agreement either by signature followed by ratification, acceptance, approval, or accession, it depends on the State which of the methods is most convenient.

<sup>824</sup> Hartley-Dogauchi Report, par. 88-92.

<sup>825</sup> Hartley-Dogauchi Report, par. 49.

not defined in the Convention.<sup>826</sup> As explained in the Hartley-Dogauchi Report, this notion primarily intends to exclude public law and criminal law, whereby the use of the words “civil”, as well as “commercial” is because of the strict division of this category in the legal systems of some States. In case that a State acts as a private person, such an act should fall under the term of “civil and commercial matters”.<sup>827</sup>

Article 2 excludes from the scope of the Hague Convention on Choice of Court Agreement the specific matters expressly listed in two paragraphs. The long list of the excluded matters is a consequence of the existence of: international conventions; the categorisation of the matter as exclusive with the special ground of jurisdiction; or because consensus was not reached.<sup>828</sup> First, paragraph 1 of Article 2 excludes from the scope of the Hague Convention on Choice of Court Agreement the choice-of-court agreements: (i) where a natural person acts primarily for personal, family, or household purposes; or (ii) employment contracts. Such exclusions serve the purpose protecting vulnerable persons which often are subject to national protective rules.<sup>829</sup> These two categories of vulnerable persons suggest the difference between them – the consumer’s exclusion depends on the primary scope of “acting”, but the employment’s exclusion is based on the subject matter – employment contracts. In comparison with the Brussels regime, as we could see in Section 12 of Subchapter I, the Brussels *Ibis* Regulation does not exclude from its scope consumers and employees, but it offers the protective *fora* to the weaker parties in accordance with Article 19 and 23 of the Brussels *Ibis* Regulation. It means that consumers and employees will not be deprived of the protective regime of the Brussels *Ibis* Regulation. However, the Hague Convention on Choice of Court Agreements excludes only consumers-natural persons, which obviously do not cover legal persons not acting in the course of business, such as charity, government, department, or another organisation. Due to the restriction of “consumer” to “private final consumers”<sup>830</sup> and the

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<sup>826</sup> On the uncertainties relating to the lack of the definition see: M. B. BERLIN, *Hague Convention on Choice-of-court Agreements: Creating an International Framework for Recognizing Foreign Judgments*, *op. cit.*, p. 66.

<sup>827</sup> R. A. BRAND, P. HERRUP, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents*, *op. cit.*, p. 47.

<sup>828</sup> M. PERTEGÁS, *The Brussels I Regulation and the Hague Convention on Choice of Court Agreements*, ERA Forum. 11:1 (2010), p. 24.

<sup>829</sup> R. A. BRAND, P. HERRUP, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents*, *op. cit.*, p. 55

<sup>830</sup> ECJ, Case 150/77, *Bertrand*, par. 21.



exclusion of a corporation<sup>831</sup> as interpreted by the ECJ,<sup>832</sup> and also due to the notion of “consumer” defined in the various directives as “natural persons”,<sup>833</sup> it can be concluded that the notion of “consumer” provided in the Brussels *Ibis* Regulation is in line with the Hague Convention on Choice of Court Agreements.

Paragraph 2 of Article 2 in the Hague Convention on Choice of Court Agreements exhaustively listed matters within its scope of application.<sup>834</sup> At first, it can seem that the list is much longer than the list of the matters excluded from the scope of the Brussels *Ibis* Regulation. However, the difference is less significant than it might appear. Both the Hague Convention on Choice of Court Agreements and the Brussels *Ibis* Regulation exclude the status or legal capacity of natural persons,<sup>835</sup> matrimonial property rights,<sup>836</sup> maintenance,<sup>837</sup> wills and successions,<sup>838</sup> insolvency proceedings,<sup>839</sup> social security,<sup>840</sup> and arbitration.<sup>841</sup>

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<sup>831</sup> ECJ, Joined cases C-541/99 and C-542/99, *Cape Snc v Idealservice Srl and Idealservice MN RE Sas v OMAI Srl*, 22 November 2001, ECLI:EU:C:2001:625, in context of interpretation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21 April 1993.

<sup>832</sup> In certain Member States, the notion of consumer covers also legal persons, e.g. Belgium, Denmark, Germany etc., see H. SCHULTE-NÖLKE, C. TWIGG-FLESNER, M. EBERS, *EC Consumer Law Compendium – Comparative Analysis- Annotated Compendium including a comparative analysis of the Community consumer acquis*, Universität Bielefeld 52 (2007), pp. 341-366.

<sup>833</sup> For examples see Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ L 133, 22 May 2008; Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21 April 1993; Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171, 7 July 1999; Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, OJ L 271, 9 October 2002.

<sup>834</sup> Article 2 par. 2 excludes these matters from its scope: a) the status and legal capacity of natural persons; b) maintenance obligations; c) other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships; d) wills and succession; e) insolvency, composition, and analogous matters; f) the carriage of passengers and goods; g) marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage; h) anti-trust (competition) matters; i) liability for nuclear damage; j) claims for personal injury brought by or on behalf of natural persons; k) tort or delict claims for damage to tangible property that do not arise from a contractual relationship; l) rights *in rem* in immovable property, and tenancies of immovable property; m) the validity, nullity, or dissolution of legal persons, and the validity of decisions of their organs; n) the validity of intellectual property rights other than copyright and related rights; o) infringement of intellectual property rights other than copyright and related rights, except where infringement proceedings are brought for breach of a contract between the parties relating to such rights, or could have been brought for breach of that contract; p) the validity of entries in public registers.

<sup>835</sup> Article 2 par. 2 lett. a) of the Hague Convention on Choice of Court Agreements and Article 1 par. 2 lett. a) of the Brussels *I-bis* Regulation.

<sup>836</sup> Article 2 par. 2 lett. c) of the Hague Convention on Choice of Court Agreements and Article 1 par. 2 lett. a) of the Brussels *I-bis* Regulation.

<sup>837</sup> Article 2 par. 2 lett. b) of the Hague Convention on Choice of Court Agreements and Article 1 par. 2 lett. e) of the Brussels *I-bis* Regulation. However, maintenance matters are still covered in the 2007 Lugano Convention.

<sup>838</sup> Article 2 par. 2 lett. d) of the Hague Convention on Choice of Court Agreements and Article 1 par. 2 lett. f) of the Brussels *I-bis* Regulation.

Moreover, certain matters which are governed by the rules on exclusive jurisdiction according to the Brussels *Ibis* Regulation, and thus, exclude party autonomy, are excluded as well from the scope of the Hague Convention on Choice of Court Agreements, such as immovable property,<sup>842</sup> validity, nullity or dissolution of legal persons and their decisions,<sup>843</sup> validity and infringement of intellectual property rights other than copyrights issues,<sup>844</sup> and validity of entries in public registers.<sup>845</sup> There are also matters which are excluded from the Hague Convention on Choice of Court Agreement, but not from the Brussels *Ibis* Regulation, such as carriage of persons and goods,<sup>846</sup> maritime matters,<sup>847</sup> antitrust and competition,<sup>848</sup> nuclear liability,<sup>849</sup> personal injury,<sup>850</sup> and damage to tangible property.<sup>851</sup>

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<sup>839</sup> Article 2 par. 2 lett. e) of the Hague Convention on Choice of Court Agreements and Article 1 par. 2 lett. b) of the Brussels *Ibis* Regulation. However, the winding-up of the non-insolvent companies is covered by the exclusive jurisdiction according to Article 24 of the Brussels *Ibis* Regulation, but they are excluded from the scope of application of the Hague Convention on Choice of Court Agreements pursuant to Article 2 par. 2 lett. m).

<sup>840</sup> This can be found in Article 1 par. 2 lett. c) of the Brussels *Ibis* Regulation, but there is no equivalent in the Hague Convention on Choice-of-court Agreements. However, it is regarded as a public-law matter which does not fit with the term of civil and commercial matters. See Hartley, book, p. 80.

<sup>841</sup> Article 2 par. 4 of the Hague Convention on Choice of Court Agreements and Article 1 par. 2 lett. d) of the Brussels *Ibis* Regulation.

<sup>842</sup> Article 2 par. 2 lett. l) of the Hague Convention on Choice of Court Agreements excludes rights *in rem* in immovable property, and tenancies of immovable property. It means that the rights *in rem* must be regarded as proceedings concerning ownership and not other proceedings where the subject/object of the proceedings do not have rights *in rem* (e.g. damage to an immovable, damage for breach of contract for the sale of immovable). The tenancies were excluded for two reasons: first, the tenants are subject of the protection in the certain legal systems; second, the tenancies are in some jurisdictions considered as rights *in rem*.

<sup>843</sup> Article 2 par. 2 lett. m) of the Hague Convention on Choice of Court Agreements.

<sup>844</sup> Article 2 par. 2 lett. n) and o) of the Hague Convention on Choice of Court Agreements.

<sup>845</sup> Article 2 par. 2 lett. p) of the Hague Convention on Choice of Court Agreements.

<sup>846</sup> Article 2 par. 2 lett. f) of the Hague Convention on Choice of Court Agreements. Two reasons led to the exclusion: (i) the States were afraid of the unfavourable standard-form contracts, (ii) there are a number of other international conventions, which could lead to the conflicts of the conventions. See T. HARTLEY, *Choice-of-Court Agreements under the European and International Instruments: The Revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*, *op. cit.*, p. 84.

<sup>847</sup> Article 2 par. 2 lett. g) of the Hague Convention on Choice of Court Agreements, which means marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage. However, the Hague Convention on Choice of Court Agreements applies to marine insurance, non-emergency towage and salvage, shipbuilding, ship mortgages and liens. See Hartley-Dogauchi Report, par. 59.

<sup>848</sup> Article 2 par. 2 lett. h) of the Hague Convention on Choice of Court Agreements. The different terms are caused by the US denomination “anti-trust” and Europe denomination “competition law”. The exclusion covers also private-law proceedings arisen from the contractual relationship (e.g., tort damages for breach of antitrust/competition law), unless they arise as preliminary question. See Hartley-Dogauchi Report, par. 62 and 63.

<sup>849</sup> Article 2 par. 2 lett. i) of the Hague Convention on Choice of Court Agreements, this matter is also covered by various international conventions. See Hartley-Dogauchi Report, par. 64.

<sup>850</sup> Article 2 par. 2 lett. j) of the Hague Convention on Choice of Court Agreements specifies that from its scope are excluded claims for personal injury brought by or on behalf of natural persons.

Furthermore, the Contracting States are entitled to make a declaration that a particular matter falls outside the scope of the Hague Convention on Choice of Court Agreements under Article 21. The Contracting State must pay attention so that it is “no broader than necessary” and that the exclusion is “clearly and precisely defined”. The basic principles are applied in this regard: transparency and non-retroactivity, reciprocity, and review of the declaration.<sup>852</sup> The transparency and non-retroactivity principle basically means that the declaration must be notified according to Article 32 of the Hague Convention on Choice of Court Agreements to the depositary and is posted on the websites of the Hague Conference (*i.e.*, transparency). Non-retroactivity is secured by the fact that such a declaration takes effect on the first day of the month following the expiration of three months after the date on which the notification is received by the depositary, in accordance with Article 32 par. 4 of the Hague Convention on Choice of Court Agreements. The reciprocity principle means that the Convention is not applicable in the other Contracting States for the excluded subject matter, where an exclusive choice-of-court agreement designates the courts of the Contracting State that made the declaration. Lastly, the review of declaration principle is based on the fact that the Secretary General of the Hague Conference makes arrangements at regular intervals for review of the operation of such declarations, in accordance with article 24 of the Hague Convention on Choice of Court Agreements. Although this provision aims at enabling adherence to the Convention,<sup>853</sup> it might be perceived negatively, in so far as it might undermine predictability and reduce utility.<sup>854</sup> It can be argued that the strong interest in not applying this Convention to a specific matter can often be replaced by the public policy exception according to Article 6 lett. c) and Article 9 lett. e),<sup>855</sup> or by the nullity and voidability of the jurisdiction agreement according to Articles 5, 6 lett. a), and 9 lett. a) of the Hague Convention on Choice of Court Agreements.<sup>856</sup> The EU made the declaration excluding the insurance matters from the scope

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<sup>851</sup> Article 2 par. 2 lett. k) of the Hague Convention on Choice of Court Agreements specifies that from its scope are excluded tort or delict claims for damage to tangible property that do not arise from a contractual relationship.

<sup>852</sup> Hartley-Dogauchi Report, par. 236.

<sup>853</sup> A. SCHULZ, *The Hague Convention of 30 June 2005 on Choice of Court Agreements*, *op. cit.*, p. 260.

<sup>854</sup> R. GARNETT, *The Hague Choice of Court Convention: Magnum Opus or Much Ado About Nothing?*, *Journal of Private International Law* 5:1 (2009), p. 167.

<sup>855</sup> For the sufficiency of the application of public policy according to Article 6 of the Hague Convention on Choice of Court Agreements without necessity to make a declaration see F. RAGNO, *Forum Selection under the Hague Convention on Choice of Court Agreements – A European Perspective*, NYU Lectures, 2018, p. 88.

<sup>856</sup> L. E. TEITZ, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration*, *The American Journal of Comparative Law* 53:3 (2005), p. 553.

of the Hague Convention on Choice of Court Agreements in order to maintain consistency with the Brussels *Ibis* Regulation, which protects policyholders, insured parties, and beneficiaries.<sup>857</sup>

Lastly, paragraph 3 of Article 2 of the Hague Convention on Choice of Court Agreements provides that the matter is excluded from the scope where a matter arises merely as a preliminary question.

### **2.3. Personal Scope of Application**

For the Hague Convention on Choice of Court Agreements, it is not relevant whether the persons are resident in the Contracting States. The only condition is that the seized courts (designated, as well as non-designated) are situated in the Contracting States. The Hague Convention applies when the parties are parties to the choice-of-court agreement, are bound by it, or are entitled to invoke it.<sup>858</sup> However, as it will be demonstrated further, the residence of the parties is relevant for the consideration of the international element and of the application of the “give-way” rules in case of conflicting treaties, according to Article 26 of the Hague Convention on Choice of Court Agreements.<sup>859</sup>

### **2.4. Internationality**

Article 1 provides that the Hague Convention on Choice of Court Agreement applies in international cases to exclusive choice-of-court agreements. Paragraphs 2 and 3 then provide that a case is international “*unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute...are connected only with that State.*” In other words, the rules on the Hague Convention on Choice of Court Agreements do not apply to entirely domestic cases. On the contrary, the rules apply if the

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<sup>857</sup> See Annex 1 of Council Decision of 4 December 2014 on the approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements, (2014/887/EU), OJ L 353, 10 December 2014. The text corresponds largely to the wording of Article 15 of the Brussels *Ibis* Regulation.

<sup>858</sup> Hartley-Dogauchi Report, par. 97 and 294. According to this Report: «*the agreement may bind third parties who did not expressly consent to it, if their standing to bring the proceedings depends on their taking over the rights and obligations of one of the original parties. Whether this is the case will depend on national law.*». In this regard see also Minutes No 2 of the Twentieth Session, Commission II, par. 2 to 10. However, see par. 142 of the Hartley-Dogauchi Report.

<sup>859</sup> On the “give way” rule, see *infra* Sections 2 and 3, Subchapter III of this Chapter.

parties are not resident in the same State, even when all other elements are connected only with the State of residence of one of the parties, or if the parties reside in the same State, but another element is located in other State. In case all facts are wholly domestic, but the parties choose a court in another Contracting State, Article 1 par. 2 of the Hague Convention on Choice of Court Agreements specifies that such cases cannot be considered as international.<sup>860</sup>

In the first place, Article 1 par. 2 of the Hague Convention refers to the residence of the parties - if the parties are resident in different States, the case is international. Such ascertainment requires the application of national law in respect of the natural persons since the residence of natural persons remained undefined.<sup>861</sup> The residence of an entity or person other than a natural person is governed by Article 4 par. 2 of the Hague Convention on Choice of Court Agreements which may result in more residences.<sup>862</sup>

The wording referring to the residence of the parties in the same Contracting State is important. This wording means that the Hague Convention on Choice of Court Agreement distinguishes between the parties, that are resident in the Contracting States, and the parties, that are resident in the non-Contracting States, for the purpose of identification of the internationality. We may imagine two (domestic) situations. The first situation concerns the parties, that are resident in Mexico, with all other elements of the case situated in Mexico, and they designate the Italian court. The second situation concerns the parties, that are resident in California, with all elements of the case situated in California, and they designate the Italian court. In the first case, the Hague Convention on Choice of Court Agreements is not applicable due to the lack of an international element. In the second case, it can be assumed that Article 1 par. 2 of the Hague Convention does not impede its application. Thus, it may be recommended to disregard the reference to the Contracting State,<sup>863</sup> which would otherwise lead to the different treatment of Third State parties and the Contracting State parties for the determination of the international element.

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<sup>860</sup> On the doubts in this regard under the Brussels regime, see *supra* Section 3.4., Subchapter I of this Chapter.

<sup>861</sup> R. A. BRAND, P. HERRUP, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents*, *op. cit.*, p. 50.

<sup>862</sup> The four different definitions of residence of entities other than natural persons were assumed on the basis of the conceptions provided in the civil and common law countries. See Hartley-Dogauchi Report, par. 120-123.

<sup>863</sup> On the similar recommendation see M. WELLER, *Choice of Forum Agreements Under the Brussels I Brussels I-bis Regulation and Under the Hague Convention: Coherences and Clashes*, *op. cit.*, p. 4.

When the parties are resident in the same Contracting State, what kind of “international” elements should be regarded? There is no guideline in this regard, but it can be deduced that the factors as the conclusion of the contract, the place of performance or parties’ nationality may establish “internationality”, but not, for example, if the goods are manufactured abroad.<sup>864</sup> Such elements should be determined by national law.<sup>865</sup> It is disputable whether the choice-of-law agreement coupled with the choice-of-court agreement may establish the international element within the meaning of article 1 par. 2 of the Hague Convention on Choice of Court Agreement. Also, in this case, the Hartley-Dogauchi Report is silent in this respect. Its counterpart, the Explanatory Report on Principles on Choice of Law in International Commercial Contracts specifies that the parties cannot establish internationally of the contract solely by selecting a foreign law accompanied by a foreign choice-of-court.<sup>866</sup> The silence in the Hartley-Dogauchi Report favours the conclusion that a combination of the two choices is not deemed to be sufficient for the establishment of the international case.<sup>867</sup> On the contrary, the parties’ choice-of-law may be considered as the subjective connection based entirely on party autonomy just like the parties’ choice of the forum.<sup>868</sup>

Moreover, article 19 of the Hague Convention on Choice of Court Agreement enables the Contracting States to make a declaration “*that its courts may refuse to determine disputes to which an exclusive choice-of-court agreement applies if, except for the location of the chosen court, there is no connection between that State and the parties or the dispute.*” By making this declaration, the Contracting State would prevent the parties from designating a foreign

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<sup>864</sup> On these considerations see Commentary on the Principles on Choice of Law in International Commercial Contracts, HCCH Publications, 2015, par. 1.18, whereby Article 1 par. 2 of the Principles on Choice of Law in International Commercial Contracts provides for the similar rule as Article 1 of the Hague Convention on Choice-of-court Agreements.

<sup>865</sup> R. A. BRAND, P. HERRUP, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents*, *op. cit.*, p. 51.

<sup>866</sup> Commentary on the Principles on Choice of Law in International Commercial Contracts, HCCH Publications, 2015, par. 1.22. This can be found as well in the Recital 15 of the Rome I Regulation which relates to Article 3 par. 3 and provides: «*This rule should apply whether or not the choice of law was accompanied by a choice-of-court or tribunal.*».

<sup>867</sup> P. BEAUMONT, *Hague Choice of Court Agreements Convention 2005: Background, Negotiations, Analysis and Current Status*, *Journal of Private International Law* 5:1 (2009), p. 150. On the conclusion that choice of law represents a sufficient international factor, since the choice-of-law coupled with choice-of-court clause evades to the mandatory provisions, see F. RAGNO, *Forum Selection under the Hague Convention on Choice of Court Agreements – A European Perspective*, *op. cit.*, p. 92.

<sup>868</sup> M. WELLER, *Choice of Forum Agreements Under the Brussels I Brussels I-bis Regulation and Under the Hague Convention: Coherences and Clashes*, *op. cit.*, p. 4.

neutral forum<sup>869</sup> or a foreign specialised commercial court. It means that although the case would be international within the meaning of Article 1 of the Hague Convention on Choice of Court Agreement, the court would also be obliged to identify the connection between the designated court and the parties or the dispute.

As in the case of the Brussels *Ibis* Regulation, it is necessary to analyse at what point of time the case must be considered as international. Due to the silence in the Hague Convention on Choice of Court Agreements, such an answer must be searched for in national law.<sup>870</sup> In consequence, the courts may come out with different results, depending on whether the internationality of the case is determined at the time of making an agreement; at the time the proceedings are instituted; at both times; or at either time.<sup>871</sup> The identification of the relevant point of time is a significant aspect mainly when the residence or other international element has changed. The fixation of the time to the conclusion of the agreement guarantees the predictability for the parties, but the wording of “case” not “agreement” in Article 1 of the Hague Convention on Choice of Court Agreements might support the opinion that it refers to the time of institution of the proceedings.<sup>872</sup> This restrictive approach can be assumed when the international element of the case is ascertained at the time of the conclusion of the agreement, as well as at the time of institution of the proceedings. The broadest scope guarantees the use of reference to either the time of the conclusion of the agreement or the time of institution of the proceedings.<sup>873</sup>

Moreover, for the purpose of the rules on recognition and enforcement of the judgments, paragraph 3 of Article 1 of the Hague Convention on Choice of Court Agreements provides that a case is international where recognition or enforcement of a foreign judgment is sought. In other words, it suffices to request recognition and enforcement in the Contracting State different from the Contracting State that issued such judgment. As Article 19 limits jurisdiction, Article 20 of the Hague Convention on Choice of Court Agreements restricts the meaning of the “international case” to the recognition and the enforcement of the foreign

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<sup>869</sup> See Hartley-Dogauchi Report, par. 230. Some States welcome this solution, such as England or USA.

<sup>870</sup> R. A. BRAND, P. HERRUP, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents*, *op. cit.*, p. 51.

<sup>871</sup> *Ibidem*.

<sup>872</sup> *Ibidem*.

<sup>873</sup> On the advantageous and disadvantageous see R. A. BRAND, P. HERRUP, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents*, *op. cit.*, p. 52.

judgment. In particular, Article 20 of the Hague Convention on Choice of Court Agreements gives the possibility to a Contracting State to declare that its courts may refuse to recognise or enforce a judgment when the parties were resident in the requested State, all other elements relevant to the dispute were connected only with the requested State, and only the designated court was located in other Contracting State.

Lastly, it is worth mentioning the consequences of a purely domestic case. The designated court is not required to hear the case according to Article 5 of the Hague Convention on Choice of Court Agreements, but is not precluded from hearing a case through the exercise of jurisdiction based on its national law. On the other hand, the non-designated court is not obliged to suspend or dismiss proceedings according to Article 6 of the Hague Convention on Choice of Court Agreements, but the exercise of its jurisdiction is subject to national law.<sup>874</sup>

### **3. Exclusivity of the Choice-of-Court Agreements**

The Hague Convention on Choice of Court Agreements applies only to exclusive jurisdiction agreements.<sup>875</sup> As in the case of the Brussels *Ibis* Regulation, the Hague Convention on Choice of Court Agreements provides as well for the “deeming rule”.<sup>876</sup> Choice-of-court agreements are presumed to be exclusive unless the parties expressly agreed otherwise by virtue of Article 3 lett. b) of the Hague Convention on Choice of Court Agreements.<sup>877</sup> The exclusivity of the jurisdiction agreement represents a condition for application of the Hague Convention on Choice of Court Agreements.

Moreover, Article 3 lett. a) of the Hague Convention on Choice of Court Agreements defines the “exclusive choice-of-court agreement” as an agreement which:

*...designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or*

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<sup>874</sup> R. A. BRAND, P. HERRUP, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents*, *op. cit.*, p. 52.

<sup>875</sup> See Article 1 par. 1 of the Hague Convention on Choice-of-court Agreements.

<sup>876</sup> A. SCHULZ, *The 2005 Hague Convention on Choice of Court Clauses*, *ILSA Journal of International & Comparative Law*, 12:2 (2006), p. 436.

<sup>877</sup> In contrast with the US system where jurisdiction agreements are presumed to be non-exclusive, see R. A. BRAND, P. HERRUP, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents*, *op. cit.*, p. 42.



*one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts.*

In other words, the parties may designate the Italian court without the necessity to specify which Italian court will hear a case. Or, the parties are entitled to designate a specific court such as a Milanese Court or specific courts of the same Contracting State such as either a Milanese court or Bolognese Court.

Although the Hartley-Dogauchi Report acknowledges the importance of the asymmetric jurisdiction clauses in international loan agreements, it continues, that the Diplomatic Session had agreed that they “*are not exclusive choice-of-court agreements for the purposes of the Convention*”.<sup>878</sup> The position is not so clear when an earlier report suggested clarifying the position of the asymmetric jurisdiction clauses in order to be excluded from the definition of Article 3 lett. a) of the Hague Convention on Choice of Court Agreements.<sup>879</sup> Moreover, Cranston J in the English judgment *Commerzbank v Liquimar* admitted that asymmetric jurisdiction clauses are covered by the Hague Convention on Choice of Court Agreements.<sup>880</sup>

It must be noted that Article 22 of the Hague Convention on Choice of Court Agreement permits to the Contracting State to make declarations allowing reciprocal declarations on non-exclusive agreements concerning the recognition and enforcement of judgments (Articles 8-15). Article 22 of the Hague Convention on Choice of Court Agreements poses the strict requirements which must be met for its operation.<sup>881</sup> Such declarations also cover the

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<sup>878</sup> Minutes No. 3 of the Second Commission Meeting of Wednesday 15 June 2005, Proceedings of the Twentieth Session, par. 2-11; Hartley-Dogauchi Report, par. 105 and 106. On the non-applicability of the Hague Convention on Choice of Court Agreements to asymmetric jurisdiction clauses see also A. SCHULZ, *The Hague Convention of 30 June 2005 on Choice of Court Agreements*, *op. cit.*, p. 243, 263; M. KEYES, B. A. MARSHALL, *Jurisdiction Agreements: Exclusive, Optional and Asymmetrical*, *op. cit.*, p. 345, 366, stating that Switzerland proposed that unilateral agreements should be covered within the scope of the Hague Convention on Choice of Court Agreements, but that such a proposal was rejected.

<sup>879</sup> L. MERRETT, *The Future Enforcement of Asymmetric Jurisdiction Agreements*, *International & Comparative Law Quarterly*, 67:1 (2018), p. 58, where the author suggests to add the words «*such an agreement must be exclusive irrespective of the party bringing the proceedings.*».

<sup>880</sup> See *Commerzbank Aktiengesellschaft v Liquimar Tankers Management Inc*, [2017] EWHC 161 (Comm), [39]. See also R. A. BRAND, P. HERRUP, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents*, *op. cit.*, p. 44, which does not classify the asymmetric agreements as non-exclusive jurisdiction agreements, but he deems that such clauses may represent “a potential problem”.

<sup>881</sup> The conditions are: (i) the State of origin and the State requested for the recognition and enforcement must be in the Contracting States; (ii) both Contracting States made a declaration; (iii) the court of origin was chosen in the non-exclusive jurisdiction agreement; (iv) such the court of origin was the court first seized; (v) there exists neither a judgment given by any other court before which proceedings could be brought in accordance with the non-exclusive choice-of-court agreement, nor a proceeding pending between the same parties in any other such court on the same cause of action; and (vi) the choice-of-court agreement meets the formal requirements of

recognition and enforcement of non-exclusive choice-of-court agreements without limitation,<sup>882</sup> non-exclusive choice-of-court agreements with limitation,<sup>883</sup> and asymmetric agreements.

#### 4. Formal Validity

Article 3 lett. c) of the Hague Convention on Choice of Court Agreements provides that an exclusive choice-of-court agreement must be concluded or documented in writing. Or the agreement must be concluded by any other means of communication which renders information accessible and usable for subsequent reference. The text regarding the electronic communication was modelled from the UNCITRAL Model Law on Electronic Commerce 1996.<sup>884</sup>

Exclusive jurisdiction clauses fall into the Hague Convention on Choice of Court Agreements if they comply with the exhaustive formal requirements: the national law cannot add any further formal requirements.<sup>885</sup> The national law cannot prescribe invalidity of the jurisdiction clause where it is not notarized,<sup>886</sup> it is written in a foreign language, written in special bold or small types, or where it is not signed separately from the main contract.<sup>887</sup> On the contrary, if the national law or other treaties or regulations<sup>888</sup> impose no formal requirements or less rigid formal requirements than Article 3 lett. c) of the Hague Convention on Choice of Court Agreements, a court may give effect to such a jurisdiction clause according to its national law and hear a case. However, a seized non-designated court would not be prohibited from

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Article 3lett. c) and designates a court or courts of one or more Contracting States in disputes which have arisen or may arise in connection with a particular legal relationship.

<sup>882</sup> According to Hartley-Dogauchi Report, par. 246, the non-exclusive choice-of-court agreements without limitation do not impose restrictions as to the designated courts, such as e.g. «*Proceedings may be brought in Milan court or any other court which may exercise jurisdiction under its own law.*».

<sup>883</sup> According to Hartley-Dogauchi Report, par. 247, non-exclusive choice-of-court agreements with limitations impose the restrictions as to the designated courts, such as «*Proceedings may be brought in Milan court or any in Paris court*». The authors of this report categorise exclusive non-unique jurisdiction agreements such as in ECJ, Case 23/78, *Meeth* in the non-exclusive choice-of-court agreements with limitation.

<sup>884</sup> A. SCHULZ, *The Hague Convention of 30 June 2005 on Choice of Court Agreements*, *op. cit.*, p. 250.

<sup>885</sup> Hartley-Dogauchi Report, par. 110.

<sup>886</sup> R. A. BRAND, P. HERRUP, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents*, *op. cit.*, p. 45.

<sup>887</sup> Hartley-Dogauchi Report, par. 110, provides for these non-exhaustive examples.

<sup>888</sup> Except where the Brussels *Ibis* Regulation, the 2007 Lugano Convention and other international conventions are not affected by the Convention pursuant to Article 26 of the Hague Convention on Choice-of-court Agreements. See A. SCHULZ, *The Hague Convention of 30 June 2005 on Choice of Court Agreements*, *op. cit.*, p. 250.

hearing a case according to Article 6 of the Hague Convention on Choice of Court Agreement or from non-recognition or non-enforcement of a judgment rendered by a designated court, according to Article 8 of the Hague Convention on Choice of Court Agreements.<sup>889</sup> In general, such a jurisdiction clause would not fall within the scope of the Hague Convention on Choice of Court Agreements.<sup>890</sup> The text distinguishes between the agreement “concluded” and “documented”. The Hague Conference has rejected the phrase “evidenced in writing”<sup>891</sup> due to the impression to constitute a rule of evidence.<sup>892</sup> The agreement concluded or documented in writing does not require a signature. Nevertheless, it might be more difficult to prove its existence.<sup>893</sup> The same level of the difficulty may arise in the context of the proof of existence of the oral agreement – it is recommended to put into writing also only by one of the party, but the writing must mirror the consent of the parties to the original oral agreement.<sup>894</sup> In the absence of the agreement in writing, the parties may rely on the other form of the jurisdiction agreement. This includes electronic means of data transmission or storage where the data are retrievable.

## 5. Substantive Validity

The validity of the jurisdiction agreement covers all issues that may invalidate the agreement, such as grounds for the nullity, lack of formal requirements and the sufficient consent of the parties.<sup>895</sup> As to the consent, as we could see in Section 8.1., Subchapter I of this Chapter, the ECJ upheld on several occasion that consensus is presumed where the formal requirements of the jurisdiction agreement are met.<sup>896</sup> However, the severability of the formal and substantive validity was recognized by the introduction of the new rule on substantive validity in Article 25 of the Brussels *Ibis* Regulation and has removed the doubts in this context.

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<sup>889</sup> Hartley-Dogauchi Report, see note no 141.

<sup>890</sup> A. SCHULZ, *The Hague Convention of 30 June 2005 on Choice of Court Agreements*, *op. cit.*, p. 250.

<sup>891</sup> See article 25 par. 1 lett. c) of the Brussels *Ibis* Regulation, which provides for the wording «*evidenced in writing*».

<sup>892</sup> Hartley-Dogauchi Report, par. 113.

<sup>893</sup> Hartley-Dogauchi Report, par. 112.

<sup>894</sup> Hartley-Dogauchi Report, par. 114.

<sup>895</sup> M. WELLER, *Choice of Forum Agreements Under the Brussels I Brussels I-bis Regulation and Under the Hague Convention: Coherences and Clashes*, *op. cit.*, p. 7.

<sup>896</sup> ECJ, Case C-159/97, *Trasporti Castelletti*; Case C-116/02, *Gasser*, par. 51.

In the regime of the Hague Convention on Choice of Court Agreement the existence of the consent is attributed to the substantive validity, whereby the formal requirements “*merely requires the objective existence of a written text and does not contain any element of knowledge or consent.*”<sup>897</sup> Hartley and Dogauchi Report provides:

*Whether there is consent is normally decided by the law of the State of the chosen court, including its rules of choice of law ... However, the Convention as a whole comes into operation only if there is a choice-of-court agreement, and this assumes that the basic factual requirements of consent exist. If, by any normal standard, these do not exist, a court would be entitled to assume that the Convention is not applicable, without having to consider foreign law...*<sup>898</sup>

Probably on the basis of this affirmation, Professors Brand and Herrup presumed that the existence of consent is a distinct term from the legal concept “null and void” and thus, it would generate a gap which should be refilled by the law of *forum* including its conflict-of-law rules.<sup>899</sup> Once the dispute falls within the scope of the Hague Convention on Choice of Court Agreements, the court would be obliged to ascertain validity according to *lex fori* and the whether the agreement is null and void according to the law of the chosen court by virtue of Articles 5 and 6 of the Hague Convention on Choice of Court Agreement. Assuming this interpretation, a double test with two different standards would be necessary.<sup>900</sup> On the other hand, according to Professor Beamont, consent was always treated as an aspect of the substantive validity (like restrictions and limitations), and such conclusions were never contested by the Special Commissions and Diplomatic Session.<sup>901</sup> The Hartley-Dogauchi Report must be read as that the questions on “consent” are governed by the conflict-of-laws rules for substantive validity and capacity and only “*in some extreme cases where the applicable law has very silly rules on consent we can treat some of the basic questions of consent as questions of fact.*”<sup>902</sup> Professor Beamont even urged courts to reject both approaches as not being consistent with the text of the Hague Convention on Choice of Court

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<sup>897</sup> A. SCHULZ, *The Hague Convention of 30 June 2005 on Choice of Court Agreements*, *op. cit.*, p. 253.

<sup>898</sup> Hartley-Dogauchi Report, par. 94 and 95.

<sup>899</sup> R. A. BRAND, P. HERRUP, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents*, *op. cit.*, p. 79.

<sup>900</sup> Similarly, see M. WELLER, *Choice of Forum Agreements Under the Brussels I Brussels I-bis Regulation and Under the Hague Convention: Coherences and Clashes*, *op. cit.*, p. 7.

<sup>901</sup> P. BEAUMONT, *Hague Choice of Court Agreements Convention 2005: Background, Negotiations, Analysis and Current Status*, *op. cit.*, p. 138, note no 44.

<sup>902</sup> *Ibidem*, p. 139.

Agreements.<sup>903</sup> However, this assumption may also be opposed by the fact that the original consent of the parties to the jurisdiction agreement may have a binding effect on third parties, and such question should be resolved by the national law according to the Hartley and Dogauchi Report.<sup>904</sup> Due to the ambiguous wording, it cannot be stated with certainty that the Hartley-Dogauchi Report refers to the application of *lex fori* of the seized court including conflict-of-laws rules,<sup>905</sup> as suggested by Professors Brand and Herrup concerning the existence of consent. Consent is a condition of the existence of the jurisdiction agreement, which the seized derogated court would need to verify *prima facie* and that the allegation on the existence of the jurisdiction agreement is not only purpose-built.<sup>906</sup> Moreover, interpretation supporting the application of the *lex fori* of the seized court would be in line with the law of seized derogated court governing capacity of the parties pursuant to Article 6 lett. b) of the Hague Convention on Choice of Court Agreements.

The substantive validity operates according to Article 5, 6, and 9 of the Hague Convention on Choice of Court Agreements. In particular, the law of the chosen State determines whether the jurisdiction agreement is null and void. According to the Hartley-Dogauchi Report, the phrase “law of the State” covers conflict-of-laws rules, since otherwise, the text would have used the phrase “internal law of the State”,<sup>907</sup> although such a reading may not be convincing.<sup>908</sup> There might be different interpretations of this rule,<sup>909</sup> but the rule should be understood mainly as applying only to substantive (not formal) grounds of invalidity,<sup>910</sup> which under the law of the chosen court is sufficient to lead to the jurisdiction agreement being “null and void”.<sup>911</sup> It

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<sup>903</sup> *Ibidem*.

<sup>904</sup> Hartley-Dogauchi Report, par. 97

<sup>905</sup> F. C. VILLATA, *L'attuazione degli accordi di scelta del foro nel regolamento Bruxelles I*, *op. cit.*, p. 84.

<sup>906</sup> F. C. VILLATA, *L'attuazione degli accordi di scelta del foro nel regolamento Bruxelles I*, *op. cit.*, p. 86.

<sup>907</sup> Hartley-Dogauchi Report, par. 125 and note no 158

<sup>908</sup> Similarly, see M. WELLER, *Choice of Forum Agreements Under the Brussels I Brussels I-bis Regulation and Under the Hague Convention: Coherences and Clashes*, *op. cit.*, p. 9, footnote no 37; Some doubts on the interpretation provided in the Hartley-Dogauchi Report, see F. POCAR, *Brevi riflessioni in tema di revisione del regolamento Bruxelles I e clausole di scelta di foro*, *op. cit.*, p. 332.

<sup>909</sup> See R. A. BRAND, P. HERRUP, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents*, *op. cit.*, p. 80, where the authors offer three different interpretations. First interpretation concerns “any grounds for declining to give legal effect to a meeting of the minds that has occurred”, second interpretation concerns “coextensive with 'lack of substantive validity' or (depending on the concept of 'substantive') to refer to any ground of invalidity which is not purely formal” and the last interpretation concerns “some subset of grounds under national law for declining to give effect to a meeting of the minds which has occurred”.

<sup>910</sup> Hartley-Dogauchi Report, par. 126

<sup>911</sup> P. BEAUMONT, *Hague Choice of Court Agreements Convention 2005: Background, Negotiations, Analysis and Current Status*, *op. cit.*, p. 145.

intends to cover the grounds such as misrepresentation, duress, and lack of capacity.<sup>912</sup> The law of the chosen State including its conflict-of-laws rules should ensure that all courts would consider the substantive validity of a choice-of-court agreement under the same substantive national law.<sup>913</sup>

Lastly, it must be stressed that the question on incapacity to conclude the jurisdiction agreement is governed by *lex fori* of the chosen court and is included in the “null and void” jurisdiction agreement in virtue of Article 5 of the Hague Convention on Choice of Court Agreement. However, the Hague Convention on Choice of Court Agreements does not opt for the same solution for the seized non-designated court. It distinguishes the jurisdiction agreement as “null and void” on one hand and capacity to enter into jurisdiction agreements, on the other hand. Thus, the seized non-designated court must apply two different laws in order to verify capacity: the law of the State of the chosen court according to Article 6 lett. a) and the law of the State of the seized non-designated court according to Article 6 lett. b) of the Hague Convention on Choice of Court Agreements.<sup>914</sup>

## 6. Severability

Article 3 lett. d) of the Hague Convention on Choice of Court Agreements provides for a severability rule between the jurisdiction clause and main contract. In particular, this provision provides that where a jurisdiction agreement forms part of a contract, the jurisdiction agreement shall be treated independently from other terms of the contract. It aims at maintaining the validity of the jurisdiction agreement even if the main contract is in whole or in part invalid.<sup>915</sup> Conversely, the main contract remains valid although the jurisdiction clause is invalid, and such an issue will be a matter of national law.<sup>916</sup>

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<sup>912</sup> Lack of capacity is dealt separately in Article 6 lett. b) and Article 9 lett. b) of the Hague Convention on Choice of Court Agreements.

<sup>913</sup> A. SCHULZ, *The Hague Convention of 30 June 2005 on Choice of Court Agreements*, *op. cit.*, p. 253.

<sup>914</sup> Hartley-Dogauchi Report, par. 150. Similarly, see R. A. BRAND, P. HERRUP, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents*, *op. cit.*, p. 91.

<sup>915</sup> The presence of the rule may be attributed to the experience of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which resulted in diverging case law. See A. SCHULZ, *The Hague Convention of 30 June 2005 on Choice of Court Agreements*, *op. cit.*, p. 251.

<sup>916</sup> R. A. BRAND, P. HERRUP, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents*, *op. cit.*, p. 47.

## **7. Operative Rules of the Hague Convention on Choice of Court Agreements**

The Hague Convention on Choice of Court Agreements is based on three “key” rules, which are addressed to the different courts. All rules are subject to the further analysis.

- 1) The seized chosen court must hear the case if the jurisdiction agreement is valid according to Article 5 of the Hague Convention on Choice of Court Agreements;
- 2) The non-designated seized court must suspend or dismiss the case unless one of the exceptions established in Article 6 of the Hague Convention on Choice of Court Agreements applies; and
- 3) Any judgment given by the designated court must be recognised and enforced in the other Contracting States unless one of the exceptions established in the Hague Convention on Choice of Court Agreements applies.

### **7.1. Jurisdiction of a Chosen Court**

According to Article 5 of the Hague Convention on Choice of Court Agreements, the chosen court must hear a case when it is seized with the dispute unless the jurisdiction agreement is null and void according to its own law, including its own conflict-of-law rules. The wording “null and void under the law of that State” represents the only exception when the seized designated court of the Contracting State is not obliged to hear the case.

Moreover, the obligation of the chosen court is highlighted by virtue of paragraph 2. The chosen court cannot refuse to exercise its jurisdiction claiming the dispute should be decided in a court of another State, in particular on the basis of *forum non conveniens* or *lis pendens* rule.<sup>917</sup>

### **7.2. Obligations of a Non-Chosen Court**

The second key rule is laid down in Article 6 of the Hague Convention on Choice of Court Agreements, and it is addressed to a court of the Contracting State other than a court of a Contracting State designated in an exclusive choice-of-court agreement. Such non-designated

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<sup>917</sup> Hartley-Dogauchi Report, par. 3, 132-133. On the interplay of the rules on *lis pendens* according to the Brussels *Ibis* Regulation and Lugano Convention see *infra* Section 1, Subchapter III of this Chapter.

court is obliged to suspend or dismiss proceedings unless one of five exceptions applies. The wording “suspend or dismiss” suggests the possibility to be entitled to choose the most appropriate approach in the circumstances.<sup>918</sup> This rule constitutes an obligation which overrides inconsistent provisions of national law.<sup>919</sup> It must be remembered that in the first place the non-designated court must interpret whether the jurisdiction agreement covers the dispute “which have arisen or may arise in connection with a particular legal relationship” by virtue of Article 3 of the Hague Convention on Choice of Court Agreements. In case of an affirmative answer, the non-designated court may avoid its obligation to suspend or dismiss only due to: (i) a null and void jurisdiction agreement pursuant to the law of the State of the chosen court; (ii) incapacity (of one) of the parties to conclude the jurisdiction agreement under its own law; (iii) a manifest injustice or contrariety to the public policy; (iv) failure of performance on the basis of the exceptional reasons beyond the control of the parties; or (v) not hearing the case by the chosen court.<sup>920</sup>

It must be stressed that Article 6 of the Hague Convention on Choice of Court Agreements does not constitute a ground of jurisdiction and it does not require the court to exercise its jurisdiction according to its national law, “*the law of the court seized determines whether or not it has jurisdiction and whether or not it can exercise that jurisdiction*”.<sup>921</sup> The Hartley-Dogauchi Report also states in the footnotes two important facts: in case that the non-designated court does not have jurisdiction under its own law, it is not obliged to consider whether any of the exceptions apply, pursuant to Article 6. Although according to the national law it may be prevented from exercising jurisdiction due to a *lis pendens* rule, according to the Hague Convention on Choice of Court Agreements the designated court is not obliged to suspend or dismiss proceedings when the non-designated court continues with its

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<sup>918</sup> R. A. BRAND, P. HERRUP, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents*, *op. cit.*, p. 89.

<sup>919</sup> R. A. BRAND, P. HERRUP, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents*, *op. cit.*, p. 87.

<sup>920</sup> Hartley-Dogauchi Report in par. 147 provides that null and void and incapacity correspond to the provision in Article II(3) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and paragraphs d) and e) which deals with grounds such as “inoperative or incapable of being performed” which may be found in the same provision of the New York Convention, when letter c) was necessary to add. On the different approach, where the author affirms that only letter e) adds a new ground in respect of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, see A. SCHULZ, *The Hague Convention of 30 June 2005 on Choice of Court Agreements*, *op. cit.*, p. 255.

<sup>921</sup> Hartley-Dogauchi Report, par. 146.



proceedings.<sup>922</sup> Thus, the legal risk of pre-emptive proceedings in breach of an exclusive choice-of-court agreement is reduced, but it is not completely removed.<sup>923</sup> Parallel proceedings are possible according to the Hague Convention on Choice of Court Agreements.<sup>924</sup> However, only the judgment rendered by the chosen court will be eligible for recognition and enforcement in the requested Contracting State under the Hague Convention on Choice of Court Agreements.<sup>925</sup>

The discussion on null and void jurisdiction agreements was examined in the previous discussion on substantive validity. Both Article 5 of the Hague Convention on Choice of Court Agreements and Article 6 lett. a) of the Hague Convention on Choice of Court Agreements refers to the law of the chosen court in order to determine whether the jurisdiction agreement is null and void.<sup>926</sup> Thus, it avoids the non-uniformity between the designated court and seized non-designated court<sup>927</sup> and inconsistent judgments on the validity of the jurisdiction agreement.<sup>928</sup> Although there might be a risk that the non-designated seized court might make a mistake in applying foreign law, its benefits outweigh the difficulties: the rule minimises parallel proceedings and denial of justice.<sup>929</sup>

The second exception concerns the lack of capacity to enter into jurisdiction agreement according to the law of the State of the seized non-designated court including its conflict-of-law rules.<sup>930</sup> However, since Article 6 lett. a) provides for a conflict-of-laws rule on substantive validity and also covers the issue of capacity, the seized non-designated court is obliged to perform a double test: both the law of the State of the chosen court and the law of

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<sup>922</sup> R. A. BRAND, P. HERRUP, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents*, *op. cit.*, p. 88.

<sup>923</sup> M. AHMED, P. BEAUMONT, *Exclusive choice-of-court agreements: some issues on the Hague Convention on Choice of Court Agreements and its relationship with the Brussels I Brussels I-bis Regulation especially anti-suit injunctions, concurrent proceedings and the implications of BREXIT*, *Journal of Private International Law*, 13:2 (2017), p. 395; R. FENTIMAN, *International Commercial Litigation*, *op. cit.*, p. 97.

<sup>924</sup> T. HARTLEY, *Choice-of-court Agreements under the European and International Instruments*, *op. cit.*, p. 231; Hartley-Dogauchi Report par. 132-134.

<sup>925</sup> R. A. BRAND, P. HERRUP, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents*, *op. cit.*, p. 88.

<sup>926</sup> This is different from the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards which does not specify which law should be applied.

<sup>927</sup> R. A. BRAND, P. HERRUP, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents*, *op. cit.*, p. 90.

<sup>928</sup> Hartley-Dogauchi Report, par. 149.

<sup>929</sup> A. SCHULZ, *The Hague Convention of 30 June 2005 on Choice of Court Agreements*, *op. cit.*, p. 256.

<sup>930</sup> The text does not specify conflict of law rules. However according to the Hartley-Dogauchi Report, par. 125 and footnote no 158, the phrase “law of the State” covers conflict-of-laws rules, since otherwise the text would have used the phrase “internal law of the State”.

the State of the seized non-designated court determines the capacity of the parties to enter into jurisdiction agreement.<sup>931</sup> However, it is likewise that the double test does not have to be applied by all Contracting States since some national laws do not categorise the question of capacity as substantive validity.<sup>932</sup>

The third exception represents a situation where the jurisdiction agreement would lead to manifest injustice or would be manifestly contrary to the public policy of the State of the court seized. The Hague Convention on Choice of Court Agreements distinguishes between these two terms due to the fact that in certain legal systems they are considered as synonyms, but in other legal systems, they have different meanings. The public policy exception refers to the general public interest (*i.e.*, basic norms and principles of the State) rather the interest of the party,<sup>933</sup> and it does not permit the seized court to disregard the jurisdiction agreement only because it would violate its mandatory rules.<sup>934</sup> In contrast, manifest injustice is understood to be more than an infringement of the right to fair trial, covering reasons as bias, corruption, or fraud.<sup>935</sup> However, the term injustice and public policy may often overlap<sup>936</sup> and the word “manifest or manifestly”, used in the context of both terms, has two common aspects: it must be clear and extremely serious<sup>937</sup> and it suggests its use only as a last resort.<sup>938</sup> The designated court is obliged to make a double check. First, the court must ascertain that “giving effect to the agreement” in the specific case would lead to the mentioned consequence, *i.e.*, it would lead to manifest injustice or would be manifestly contrary to the

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<sup>931</sup> Hartley-Dogauchi Report, par. 150. Similarly, see R. A. BRAND, P. HERRUP, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents*, *op. cit.*, p. 91.

<sup>932</sup> This problem of categorisation was a *ratio* for differentiation between these two rules, see R. A. BRAND, P. HERRUP, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents*, *op. cit.*, p. 90.

<sup>933</sup> Hartley-Dogauchi Report, par. 151, R. A. BRAND, P. HERRUP, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents*, *op. cit.*, p. 92.

<sup>934</sup> Hartley-Dogauchi Report, par. 153.

<sup>935</sup> Hartley-Dogauchi Report, par. 152.

<sup>936</sup> R. A. BRAND, P. HERRUP, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents*, *op. cit.*, p. 92.

<sup>937</sup> R. A. BRAND, P. HERRUP, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents*, *op. cit.*, p. 92. The word of manifest or manifestly is used already in a number of the conventions. See e.g. the most recent convention: Principles on Choice of Law in International Commercial Contracts, article 11.

<sup>938</sup> Prel. Doc. No 11 of August 2000 - Report on the preliminary draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, drawn up by Peter Nygh and Fausto Pocar, p. 1114.

public policy. Second, the threat of violation of these two legal institutions is not only hypothetical but is highly probable.<sup>939</sup>

The fourth exception refers to the incapability of the parties to performance for exceptional reasons beyond the control of the parties. In practice, the parties are not able to bring the proceedings in the designated court, which do not have to be necessary impossible, but exceptional, as in case of war or inexistence of the designated court.<sup>940</sup> This rule can be qualified as a doctrine of frustration: the contract cannot be performed where an unanticipated and fundamental change of circumstances after its conclusion occurs.<sup>941</sup> *Lex fori* governs this exception.<sup>942</sup>

Where the designated court cannot hear the case is the last exception of Article 6 of the Hague Convention on Choice of Court Agreements. Such an exception is crucial for avoiding a denial of justice.<sup>943</sup>

### **7.3. Recognition and Enforcement**

The last “key rule” provides that the judgment rendered by a designated court shall be recognised and enforced in the other Contracting State unless one of seven grounds of non-recognition or non-enforcement according to Article 9 of the Hague Convention on Choice of Court Agreement occurs. There are three conditions to be satisfied. Both courts, *i.e.*, the court requested for recognition or enforcement and a court which rendered judgment, must be located in the Contracting States. Moreover, there must be an international element, and thus, a court which rendered a judgment must be in a different Contracting State than a requested court.<sup>944</sup> Lastly, a court must be designated in an exclusive choice-of-court agreement.

No review on the merits is permitted: the requested court is bound by the findings of the court of origin concerning its jurisdiction unless the judgment was given by default (Article 8 par. 2

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<sup>939</sup> R. A. BRAND, P. HERRUP, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents, op. cit.*, p. 91.

<sup>940</sup> Hartley-Dogauchi Report, par. 154, R. A. BRAND, P. HERRUP, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents, op. cit.*, p. 94.

<sup>941</sup> Hartley-Dogauchi Report, par. 154.

<sup>942</sup> R. A. BRAND, P. HERRUP, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents, op. cit.*, p. 94.

<sup>943</sup> Hartley-Dogauchi Report, par. 155.

<sup>944</sup> R. A. BRAND, P. HERRUP, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents, op. cit.*, p. 100.

of the Hague Convention on Choice of Court Agreements). The judgment is recognised and enforced only if it has an effect or if it is enforceable in the State of origin (Article 8 par. 3 of the Hague Convention on Choice of Court Agreements). Moreover, even if it is already enforceable, the requested court may postpone or refuse recognition or enforcement where the judgment is reviewed in the State of origin within the time limit for seeking regular review (Article 8 par. 4 of the Hague Convention on Choice of Court Agreements).

When one of the exceptions applies, the requested court is not obligated to recognise or enforce the judgments. However, it is not precluded from doing so.<sup>945</sup> The list of grounds of non-recognition or non-enforcement is exhaustive.<sup>946</sup> Two grounds mentioned in Article 6 lett. a) and b) are repeated in letter a) and b) of Article 9 of the Hague Convention on Choice of Court Agreement. The grounds are: (i) the invalidity of the choice-of-court agreement under the law of the chosen court, including its conflict-of-law rules; and (ii) the lack of capacity to conclude such a jurisdiction agreement under the law of the requested State. Letter a) of Article 9 of the Hague Convention on Choice of Court Agreement aims at avoiding conflicting judgments by applying the same law to substantive validity, *i.e.*, the designated court according to its *lex fori* pursuant to Article 5; the seized non-designated court according to the law of chosen court pursuant to Article 6 lett. a); and the requested court according to the law of chosen court pursuant to Article 9 lett. a) of the Hague Convention on Choice of Court Agreements. Although letter b) assumes the same solution as Article 6 lett. b), the consequence is different than in letter a) – all courts, the designated court, the seized non-designated court, and the requested court, apply their own conflict of laws rules to capacity. It means that three different results as to the incapacity may be obtained due to the application of the different laws. In addition, there are other “traditional Brussels Regime grounds”, such as public policy, incompatible judgments, and a defective service of process may be found in letters c), e), f). and g) of Article 9 of the Hague Convention on Choice of Court Agreements.

In *Ermgassen & Co Ltd v Sixcap Financials Pte Ltd* [2018] SGHCR, the High Court of Singapore granted the enforcement application under Article 8 of the Hague Convention on Choice of Court Agreements of the judgment rendered by the English High court. This

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<sup>945</sup> Hartley-Dogauchi Report, par 182.

<sup>946</sup> R. A. BRAND, P. HERRUP, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents, op. cit.*, p. 101.

appears to be the first application brought under the Hague Convention on Choice of Court Agreements since its enactment.

### **III. Compatibility between the International Legal Instruments concerning Choice-of-Court Agreements**

#### **1. Compatibility between the Brussels *Ibis* Regulation and the 2007 Lugano Convention**

The relationship between the Brussels I Regime and the 2007 Lugano Convention is determined by Article 64 of the 2007 Lugano Convention. In particular, the Brussels Regime takes priority over the Lugano Convention according to Article 64 par. 1 of the 2007 Lugano Convention in the Member States, unless one of the exceptions applies. For the purpose of jurisdiction and jurisdiction agreements, paragraph 2 lett. a) and b) of Article 64 of the 2007 Lugano Convention is relevant. The 2007 Lugano Convention shall be applied where the defendant is domiciled in a State bound by the 2007 Lugano Convention but not by the Brussels regime, or where Article 23 of the 2007 Lugano Convention confers jurisdiction on the courts of a State where the 2007 Lugano Convention but not Brussels Regime applies. In relation to *lis pendens*, the 2007 Lugano Convention prevails when proceedings are instituted in a State where the 2007 Lugano Convention but not the Brussels Regime applies, and in a State where either the 2007 Lugano Convention or the Brussels Regime applies. The compatibility of the rules laid down in the Brussels I Regulation and the 2007 Lugano Convention do not have to be analysed since the rules on the prorogation of jurisdiction and on *lis pendens* are almost identical, and thus, no clashes are expected. However, as we could see in Subchapter I of this Chapter, the Brussels *Ibis* Regulation has been significantly amended. The 2007 Lugano Convention practically mirrors the application of the Brussels I Regulation before its recast, and thus, three fundamental problems remain unresolved: (i) the problem concerning the lack of a rule on the substantive validity of the jurisdiction agreement; (ii) the possibility of “torpedo actions” caused by *Gasser* case; moreover, and (iii) the problematic requirement that at least one of the parties is domiciled in a State bound by the 2007 Lugano Convention.<sup>947</sup> Article 73 of the Brussels *Ibis* Regulation provides that the Brussels *Ibis* Regulation shall not affect the application of the 2007 Lugano Convention.

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<sup>947</sup> On the problems concerning the *status quo* of the 2007 Lugano Convention in presence of the amendments effective under the Brussels *Ibis* Regulation see A. BRIGGS, P. REES, *Civil Jurisdiction and Judgments*, 2015, *op. cit.*, p. 375.

The proper interplay of the rules will play a significant role Post-Brexit, since the United Kingdom will leave the European Union on 29 March 2019. According to the White Paper published in July 2018, the government seeks to participate in the Lugano Convention,<sup>948</sup> provided that “*However, while the UK values the Lugano Convention, some of its provisions have been overtaken...*”.<sup>949</sup> In this context, the discussions suggest reflecting on “*the subsequent developments at EU level in civil judicial cooperation between the UK and the Member States*”,<sup>950</sup> in which might be implied the necessity to resolve the problem of the Italian torpedo<sup>951</sup> (beyond the ratification of the Hague Convention on Choice of Court Agreements).<sup>952</sup> Unfortunately, the renegotiation of the 2007 Lugano Convention as to the

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<sup>948</sup> On the scenario favouring the 2007 Lugano Convention as to the jurisdiction see HM Government, Providing a Cross-Border Civil Judicial Cooperation Framework – A Future Partnership Paper, published 22 August 2017, available at <<https://www.gov.uk/government/publications/providing-a-cross-border-civil-judicial-cooperation-framework-a-future-partnership-paper>>, par. 50; R. AIKENS, A. DINSMORE, *Jurisdiction, Enforcement and the Conflict of Laws in Cross-Border Commercial Disputes: What Are the Legal Consequences of Brexit?* European Business Law Review, 7 (2016), p. 915, 917, 920; A. DICKINSON, *Close the Door on Your Way Out*, Zeitschrift für Europäisches Privatrecht, (2017), p. 558.

<sup>949</sup> See the future relationship between the United Kingdom and the European Union, Presented to Parliament by the Prime Minister by Command of Her Majesty, July 2018, par. 147, <https://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union>. See also Herbert Smith Freehills – Litigation notes at <https://hsfnotes.com/litigation/2018/07/12/brexit-white-paper-reiterates-aims-for-civil-judicial-cooperation/> which deduces that the provision which must be overtaken regards the stronger protections for exclusive jurisdiction clauses under the Brussels *Ibis* Regulation.

<sup>950</sup> The future relationship between the United Kingdom and the European Union, Presented to Parliament by the Prime Minister by Command of Her Majesty, July 2018, <https://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union>, par. 148. On the scenario favouring the continuation of application of the Brussels *Ibis* Regulation see: Report of the European Union Committee of the House of Lords, Brexit: Justice for Families, Individuals and Businesses? (17th Report of Session 2016–17, HL Paper 134, 20 March 2017), 11, par. 23 and 42 par. 1, available at <<https://www.publications.parliament.uk/pa/ld201617/ldselect/lddeucom/134/134.pdf>>.

<sup>951</sup> G. RÜHL, *Judicial cooperation in civil and commercial matters after Brexit: Which way forward?*, International & Comparative Law Quarterly, 67:1 (2018), p. 127; A. DICKINSON, *Back to the Future: The UK's EU Exit and the Conflict of Laws*, Journal of Private International Law, 12 (2016), p. 202.

<sup>952</sup> On the intention to participate in Hague Conventions to which the UK is already a party also in by virtue of our membership of the EU listing the Hague Convention on Choice of Court Agreements see: HM Government, Providing a Cross-Border Civil Judicial Cooperation Framework – A Future Partnership Paper, available at <<https://www.gov.uk/government/publications/providing-a-cross-border-civil-judicial-cooperation-framework-a-future-partnership-paper>>, p. 8; see N. NEWING, L. WEBSTER, *Could the Hague Convention Bring Greater Certainty for Cross-Border Disputes Post-Brexit: And What Would This Mean for International Arbitration*, Dispute Resolution International, (2016) p. 105, 115. On the discussion that the UK will not be longer a party to the 2007 Lugano Convention and the Hague Convention, see: A. DICKINSON, *Back to the Future: The UK's EU Exit and the Conflict of Laws*, *op. cit.*, p. 195; P. J. ROGERSON, *After BREXIT: Is international commercial litigation in London doomed?*, New Law Journal, (2017), p. 4; Final Report of the House of Lords European Union Justice Sub-Committee, Implications of Brexit for the justice system, (14 March 2017). The UK has on 28 December 2018 signed and ratified the 2005 Hague Convention on Choice of Court Agreements, which applies to the UK by virtue of its membership of the EU but may cease to be applied for UK, when it leaves the EU on 29 March 2019. By ratifying the Hague Convention on Choice of Court Agreements on 28 December 2018, it seems that UK have reduced a transition period gap to two days it will enter into force for the UK on 1 April

Gasser problem does not seem to be on the agenda in the near future;<sup>953</sup> at least the discussions of the Experts' Meeting pursuant to Article 5 Protocol 2 of the 2007 Lugano Convention may accelerate the potential renegotiation.<sup>954</sup>

Firstly, the interplay between the rules will be examined.<sup>955</sup> Second, the national case law is briefly presented.

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2019: «In accordance with Article 29 of the 2005 Hague Convention, the United Kingdom is bound by the Convention by virtue of its membership of the European Union, which approved the Convention on behalf of its Member States. The United Kingdom intends to continue to participate in the 2005 Hague Convention after it withdraws from the European Union. The Government of the United Kingdom and the European Council have reached political agreement on the text of a treaty (the "Withdrawal Agreement") on the withdrawal of the United Kingdom from the European Union and the European Atomic Energy Community. Subject to signature, ratification and approval by the parties, the Withdrawal Agreement will enter into force on 30 March 2019. The Withdrawal Agreement includes provisions for a transition period to start on 30 March 2019 and end on 31 December 2020 or such later date as is agreed by the United Kingdom and the European Union (the "transition period"). In accordance with the Withdrawal Agreement, during the transition period, European Union law, including the 2005 Hague Convention, would continue to be applicable to and in the United Kingdom. The European Union and the United Kingdom have agreed that the European Union will notify other parties to international agreements that during the transition period the United Kingdom is treated as a Member State for the purposes of international agreements concluded by the European Union, including the 2005 Hague Convention. In the event that the Withdrawal Agreement is not ratified and approved by the United Kingdom and the European Union, however, the United Kingdom wishes to ensure continuity of application of the 2005 Hague Convention from the point at which it ceases to be a Member State of the European Union. The United Kingdom has therefore submitted the Instrument of Accession in accordance with Article 27(4) of the 2005 Hague Convention only in preparation for this situation. The Instrument of Accession declares that the United Kingdom accedes to the 2005 Hague Convention in its own right with effect from 1 April 2019. In the event that the Withdrawal Agreement is signed, ratified and approved by the United Kingdom and the European Union and enters into force on 30 March 2019, the United Kingdom will withdraw the Instrument of Accession which it has today deposited. In that case, for the duration of the transition period as provided for in the Withdrawal Agreement as stated above, the United Kingdom will be treated as a Member State of the European Union and the 2005 Hague Convention will continue to have effect accordingly. The Embassy of the United Kingdom of Great Britain and Northern Ireland to the Kingdom of the Netherlands avails itself of the opportunity to renew to the Ministry of Foreign Affairs of the Kingdom of the Netherlands the assurances of its highest consideration.» See the notification by the Dutch Ministry of Foreign Affairs [https://verdragenbank.overheid.nl/nl/Verdrag/Details/011343/011343\\_Notificaties\\_13.pdf](https://verdragenbank.overheid.nl/nl/Verdrag/Details/011343/011343_Notificaties_13.pdf).

<sup>953</sup> On the 2007 Lugano Convention in context of the revision of the Brussels I Regulation see F. POCAR, *A Partial Recast: Has the Lugano Convention been forgotten?* in F. POCAR, I. VIARENGO, F. C. VILLATA (eds), *Recasting Brussels I: Proceedings of the Conference Held at the University of Milan on 25-26 November 2011*, CEDAM, 2012, pp. 117 *et seq.*; A. R. MARKUS, *Harmonisation of the EU rules of jurisdiction regarding defendants outside the EU: What about the Lugano countries?*, in F. POCAR, I. VIARENGO, F. C. VILLATA (eds.), *Recasting Brussels I: Proceedings of the Conference Held at the University of Milan on 25-26 November 2011*, CEDAM, 2012, p. 123 *et seq.*; A. FURRER, *The Brussels I Review Proposal: Challenge for the Lugano Convention?*, in E. LEIN, (eds), *The Brussels I Review Proposal Uncovered*, British Institute of International and Comparative Law, 2012, p. 165 *et seq.*

<sup>954</sup> The last Experts' Meeting pursuant to Article 5 Protocol 2 of the 2007 Lugano Convention took place on 16 and 17 October 2017 in Basel. See M. AHMED, *I thought we were exclusive? Some issues with the Hague Convention on Choice-of-court, Brussels Ia and Brexit*, published on 24 September 2017 on [conflictoflaws.net](http://conflictoflaws.net)

<sup>955</sup> On the different examples, see also T. HARTLEY, *Choice-of-Court Agreements under the European and International Instruments: The Revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*, *op. cit.*, p. 107 and 108.



1) *Parties concluded jurisdiction agreement designating a Swiss court. The Swiss, as well as the Italian court was seized.*

According to Article 64 par. 2 lett. a) of the 2007 Lugano Convention, Article 23 of the 2007 Lugano Convention applies since Switzerland is the only party to the 2007 Lugano Convention, even though the defendant would be domiciled in the Member State.<sup>956</sup> In consequence, both the Swiss and the Italian courts determine conditions for the application and validity of the jurisdiction agreement according to Article 23 of the 2007 Lugano Convention. Article 27 of the 2007 Lugano Convention governs the *lis pendens* by virtue of Article 64 par. 2 lett. b) of the 2007 Lugano Convention, since the proceedings were instituted in Switzerland (a State where the 2007 Lugano Convention but not Brussels *Ibis* Regulation applies) and in Italy (a State where both the 2007 Lugano Convention and the Brussels *Ibis* Regulation applies). It practically mirrors the application of the Brussels I Regulation before its recast, and thus, the problems concerning lack of the rule on the substantive validity of the jurisdiction agreement and the possibility of the “torpedo actions” caused by *Gasser* case remains unresolved. Moreover, it must be borne in mind that the domicile of one of the parties in a State bound by the 2007 Lugano Convention is required.

2) *Defendant domiciled in Switzerland and plaintiff domiciled in Italy concluded a jurisdiction agreement designating an Italian court. The Italian court, as well as the Swiss court, were seized.*

According to Article 64 par. 2 lett. a) of the 2007 Lugano Convention, the Italian court applies the 2007 Lugano Convention since the defendant is domiciled only in the Contracting State. In consequence, the Italian court determines conditions for application and validity of the jurisdiction agreement according to Article 23 of the 2007 Lugano Convention. Also, the Swiss court determines the conditions for application and validity of the jurisdiction agreement according to Article 23 of the of the 2007 Lugano Convention.

Moreover, Article 27 of the 2007 Lugano Convention governs the *lis pendens* by virtue of Article 64 par. 2 lett. b) of the 2007 Lugano Convention, since the proceedings were instituted in Switzerland (a State where the 2007 Lugano Convention but not Brussels *Ibis* Regulation applies)

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<sup>956</sup> See *Lugano opinion 1/03*, where the ECJ upheld that where Article 23 of the 2007 Lugano Convention leads to a court of a non-Member State, party to the 2007 Lugano Convention, such a non-Member State would be the appropriate *forum*, although where the defendant is domiciled in a Member State.

and in Italy (a State where both the 2007 Lugano Convention the Brussels *Ibis* Regulation applies). Also, in this case, it practically mirrors the application of the Brussels I Regulation before its recast, and thus, the problems concerning lack of the rule on substantive validity of the jurisdiction agreement and the possibility of the “torpedo actions” caused by *Gasser* case remains unresolved.

3) *Defendant domiciled in Italy and plaintiff domiciled in Switzerland concluded a jurisdiction agreement designating an Italian court. The Italian court, as well as the Swiss court, were seized.*

According to Article 64 par. 2 lett. a) of the 2007 Lugano Convention, Italian court applies the Brussels *Ibis* Regulation since the defendant is domiciled in the EU and the Swiss court is not the designated court and is a State where the 2007 Lugano Convention but not the Brussels Regime applies. In consequence, the Italian court determines conditions for application and validity of the jurisdiction agreement according to Article 25 of the Brussels *Ibis* Regulation. The Swiss court is bound only by the 2007 Lugano Convention; this means that it determines the conditions for application and validity of the jurisdiction agreement according to Article 23 of the Brussels *Ibis* Regulation. It must be stressed that the new rule on the substantive validity of the jurisdiction agreement is not applicable by the Swiss court, but the Italian court determines the substantive validity of the jurisdiction agreement according to Article 25 of the Brussels *Ibis* Regulation.

Moreover, Article 27 of the 2007 Lugano Convention governs the *lis pendens* by virtue of Article 64 par. 2 lett. b) of the 2007 Lugano Convention, since the proceedings were instituted in Switzerland (a State where the 2007 Lugano Convention but not Brussels *Ibis* Regulation applies) and in Italy (a State where both the 2007 Lugano Convention and the Brussels *Ibis* Regulation applies).

This case practically mirrors the application of the Brussels I Regulation before its recast concerning the rule on *lis pendens* and the possibility of “torpedo actions”. However, the new rule on the substantive validity will be applicable only by the designated Member State, but not by the non-designated Contracting State which is bound only by the 2007 Lugano Convention.

4) *The defendant is domiciled in the USA and the plaintiff is domiciled in Russia, they concluded a sale contract whereby the place of delivery was in Switzerland. The sale contract contained the jurisdiction agreement designating an Italian court. The Italian court, as well as the Swiss*

*court, were seized.*

The Italian court determines the conditions for application and validity of the jurisdiction agreement according to Article 25 of the Brussels *Ibis* Regulation. The 2007 Lugano Convention is not applicable since Article 23 of the 2007 Lugano Convention requires domicile of one of the parties in the Contracting State bound by the 2007 Lugano Convention. In consequence, Article 27 of the 2007 Lugano Convention governing the *lis pendens* rule is not applicable. The question of the validity of the jurisdiction agreement and *lis pendens* must be resolved by the Swiss court pursuant to its own national law.

In the first place, it must be remembered that the Contracting States must “pay due account” to the case law of the courts of other Contracting States, including the case law of the ECJ within the meaning of the Protocol No 2. However, the Contracting States are not obliged to follow the ECJ’s case law as closely as possible, but they may give reasons for the deviation.<sup>957</sup> There are no penalties for the national courts of the Contracting States when deviating from the case law of the ECJ. The Swiss Federal Tribunal has deviated from the ECJ’s interpretation on several occasions since it has not paid regard to the relationship with other EU instruments due to the fact that it is not bound by other EU instruments.<sup>958</sup> Additionally, it has deviated from the ECJ’s interpretation without giving an explanation and has interpreted the Lugano Conventions in a way not fully in line with the interpretation provided by the ECJ.<sup>959</sup> According to Professor Hess, as a consequence of the absence of any sanctions for the deviations, there is no uniform interpretation of the 2007 Lugano Convention in the light of the Brussels Regime.<sup>960</sup> On the basis of this assumption, it can also be deduced

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<sup>957</sup> B. HESS, *The Unsuitability of the Lugano Convention (2007) to Serve as a Bridge between the UK and the EU after Brexit*, *op. cit.*, p. 5.

<sup>958</sup> BGE 131 III 227, where Switzerland, not bound by the Insolvency Regulation, departed from the ECJ case law.

<sup>959</sup> B. HESS, *The Unsuitability of the Lugano Convention (2007) to Serve as a Bridge between the UK and the EU after Brexit*, *op. cit.*, p. 6, where the author maintains that in 2016, the Swiss Federal Tribunal issued judgments concerning the Lugano Convention and in 4 cases it deviated from the interpretation provided by the ECJ (e.g. BGE 142 III 170).

<sup>960</sup> B. HESS, *The Unsuitability of the Lugano Convention (2007) to Serve as a Bridge between the UK and the EU after Brexit*, *op. cit.*, p. 6.

that the deviation from the ECJ interpretation provided in the *Gasser* case is possible, where the national courts of the Contracting State “give reasons for the deviation”.<sup>961</sup>

Moreover, the Swiss Federal Supreme Court has gone even further. In its decision from March 2018, it reduced the requirement for the legal interest in a negative declaratory judgment in an international context and thereby allowed *forum running*, securing an advantageous place of jurisdiction in Switzerland.<sup>962</sup> This leading case may *in extremis* lead to the “Swiss torpedo”. The party may seek to seize the most favorable courts by filing a negative declaratory action. Such a negative declaratory action establishes an obstacle of *lis pendens* for other seized court that is to the detriment of the party that has filed the adverse declaratory action. Furthermore, it is of vital importance that according to the ECJ in the case *Schlömp*,<sup>963</sup> the Swiss conciliation proceedings constitute the *lis pendens* of the action under the 2007 Lugano Convention.<sup>964</sup> This may even allow a party that is threatened with a court action to act very quickly in the Swiss court.

## **2. Compatibility between the Hague Convention on the Choice-of-Court Agreements and the Brussels *Ibis* Regulation**

In Subchapters I and II of this Chapter, the general aspects of the rules of the Brussels *Ibis* Regulation and the Hague Convention on Choice of Court Agreements were analysed separately. Since the ratification of the Hague Convention on Choice of Court Agreements has a direct impact on the Brussels Regime,<sup>965</sup> the focus must be on their simultaneous application, the compatibility of their rules, and the “give way” rules giving precedence to one or other legal instruments in case of a clash of their rules. However, it is true that clashes

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<sup>961</sup> On the opinion that the courts should reject the *Gasser* doctrine, see T. HARTLEY, *Choice-of-Court Agreements under the European and International Instruments: The Revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*, *op. cit.*, p. 231.

<sup>962</sup> 4A\_417/2017. The previous judgment of the Federal Supreme Court, ATF 136 III 523 was rejected since the legitimate interest to file an action for a negative declaratory judgment exists.

<sup>963</sup> ECJ, Case C-467/16, *Brigitte Schlömp v Landratsamt Schwäbisch Hall*, 20 December 2017, ECLI:EU:C:2017:993.

<sup>964</sup> It was already upheld by the English Court in *Lehman Brothers Finance AG v. Klaus Tschira Stiftung GmbH* [2014] EWHC 2782 (Ch).

<sup>965</sup> Council Decision of 26 February 2009 on the signing on behalf of the European Community of the Convention on Choice of Court Agreements, (2009/397/EC), OJ L 133, 29 May 2009 and referred to the already analysed ECJ, *Lugano Opinion 1/03*, 7 February 2006, where the ECJ upheld the existence of an exclusive external competence of the EU concerning judicial cooperation in civil matters and interference to the Brussels regime.

should be restricted since the European legislator while working on the Proposal of the Brussels I Regulation underlined the necessity to strengthen choice-of-court agreements and to reach the coherence of the Brussels Regime with the Hague Convention on Choice of Court Agreements.<sup>966</sup> In consequence, the specific rules of these two instruments are compared in this chapter, in particular: the internationality of the case, substantive validity of the choice-of-court agreement, the public policy control, the mechanisms for coordinating parallel proceedings between the Member States and between the Member State and Contracting State. On the other hand, where the Hague Convention on Choice of Court Agreement is more restricted than the Brussels *Ibis* Regulation, *e.g.*, the scope of application or non-exclusive jurisdiction agreements, there is no contradiction between these two legal regimes and the dispute only falls into the scope of application of the Brussels *Ibis* Regulation.

Before moving to the comparison of the specific rules, it is necessary to understand the interplay of the Hague Convention on Choice of Court Agreements and the Brussels *Ibis* Regulation. These two legal regimes may overlap when: (i) the chosen court and the seized court are situated in the Contracting State and in the Member State; (ii) the jurisdiction agreement is exclusive; and (iii) the dispute is not excluded from the scope of application of the Hague Convention on Choice of Court Agreements and of the Brussels *Ibis* Regulation.<sup>967</sup>

When both legal instruments are in line, they are applied simultaneously by the Member State courts (the courts of the Contracting State are not bound by the Brussels *Ibis* Regulation; therefore, they simply apply the Hague Convention on Choice of Court Agreements). Only in the event of conflicting rules does Article 26 par. 6 of the Hague Convention on Choice of Court Agreements come into play.<sup>968</sup> The relationship between the conflicting rules determined by the Hague Convention on Choice of Court Agreements and the Brussels *Ibis* Regulation is resolved by two “give way” rules of Article 26 par. 6 of the Hague Convention

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<sup>966</sup> Commission staff working paper. Impact assessment. Accompanying document to the Proposal for Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), SEC(2010) 1548 final, 14 December 2010, p. 7.

<sup>967</sup> F. RAGNO, *Forum Selection under the Hague Convention on Choice of Court Agreements – A European Perspective*, *op. cit.*, p. 109

<sup>968</sup> Hartley-Dogauchi Report, par. 292 that refers to the first “give-way” rule on conflicting treaties, see par. 267: «*The first is that there must be an actual incompatibility between the two treaties. In other words, the application of the two treaties must lead to different results in a concrete situation. Where this is not the case, both treaties can be applied.*».

on Choice of Court Agreements. Article 26 par. 6 lett. a) provides for a “give way” rule regarding jurisdiction:

*This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention, whether adopted before or after this Convention a) where none of the parties is resident in a Contracting State that is not a Member State of the Regional Economic Integration Organisation.*

Also, Article 26 par. 6 lett. b) provides for a “give way” rule regarding recognition and enforcement of judgments: “...b) *as concerns the recognition or enforcement of judgments as between Member States of the Regional Economic Integration Organisation.*” In other words, Article 26 par. 6 lett. a) gives preference to the Brussels Regime if:

- (i) All parties involved reside exclusively within the Member States;
- (ii) All parties involved reside exclusively in the Third States that are not Contracting States;
- (iii) Parties involved reside exclusively within the Member States and in the Third States that are not Contracting States.

In contrast, the Hague Convention on Choice of Court Agreements prevails if at least one party resides in the Contracting State of the Hague Convention on Choice of Court Agreements that is not a Member State. It must be remembered that the designated or seized derogated court must be situated in the Member State, and only such a court uses a give way rule.

As to the recognition and enforcement of judgments, Article 26 par. 6 lett. b) of the Hague Convention on Choice of Court Agreements provides for the second “give way” rule and does not affect rules on recognition and enforcement between Member States courts.<sup>969</sup>

## **2.1. Internationality**

The Brussels *Ibis* Regulation considers a case to be international as soon as the parties designate a foreign court.<sup>970</sup> But in contrast to this assumption the Hague Convention on

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<sup>969</sup> Hartley-Dogauchi Report, par. 305 refers to the par. 286 that provides: «Where a judgment granted by a State that is a Party to such a treaty is sought to be recognised or enforced in another such State, the Convention will not affect the application of that treaty, provided that the judgment is not recognised or enforced to a lesser extent than under the Convention.».

Choice of Court Agreements requires the parties to be resident in different States or requires other factual international elements beyond the choice-of-court.<sup>971</sup> On the first view, the evaluation of the “international case” within these two regimes may seem to be governed differently. The conclusions within the regime of the Hague Convention on Choice of Court Agreements concerning the question on the internationality of the case and the necessity of the link may be perceived as much more restrictive than according to the Brussels *Ibis* Regulation. It means that only one situation does not fit within both regimes: when the parties are resident in the same State, all other elements are situated in that State, and they designated a court in different State. This specific example demonstrates that there is no clash between these two regimes.<sup>972</sup>

*The parties are resident in Mexico and they designate a court in Italy in an exclusive jurisdiction agreement. An Italian court, as well as a Mexican court, are seized.*

According to Article 1 par. 2 of the Hague Convention on Choice of Court Agreements the case is not considered as international and therefore, the Hague Convention on Choice of Court Agreements is not applicable. Thus, the Italian court exercises its jurisdiction only according to Article 25 of the Brussels *Ibis* Regulation and the Mexican court according to its own national law.<sup>973</sup>

<sup>970</sup> If the two parties domiciled in the same Member State confer jurisdiction by agreement to other Member State court, this situation should be considered as sufficiently international, when the case had links also to other States, for example when the subject-matter has an international character (*e.g.*, delivery). However, such an answer is not so unequivocal where an objective link between the legal relationship and the chosen court is missing. Although a genuine autonomy is sometimes considered as a situation when a chosen court accepts its jurisdiction although there is no connection to the *forum*, the opinions differ in the context of the Brussels regime. On the negative approach see Schlosser Report, par. 174; in context of the 2007 Lugano Convention see Pocar Report, par. 104; A. BRIGGS, *Agreements on Jurisdiction and Choice of Law*, *op. cit.*, p. 245 and footnote No 25; *contra* G. A. L. Droz, *Compétence judiciaire et effets des jugements dans le Marché commun*, *op. cit.*, par. 191; M. WELLER, *Choice of Forum Agreements Under the Brussels I Brussels I-bis Regulation and Under the Hague Convention: Coherences and Clashes*, *op. cit.*, p. 5. On more details see *supra* Section 3.4., Subchapter I of this Chapter.

<sup>971</sup> The Hague Convention on Choice of Court Agreements applies if the parties are not resident in the same State even when all other elements are connected only with the State of the residence of one of the parties or if the parties reside in the same State, but another element is located in other State. In case that all facts are wholly domestic, but the parties choose a court in other Contracting State, Article 1 par. 2 of the Hague Convention on Choice of Court Agreements specifies that such case cannot be considered as international. On more details see *supra* Section 2.4., Subchapter II of this Chapter.

<sup>972</sup> On the opposite approach where the author argues that there is a clash between these two instruments see: M. WELLER, *Choice of Forum Agreements Under the Brussels I Brussels I-bis Regulation and Under the Hague Convention: Coherences and Clashes*, *op. cit.*, p. 6.

<sup>973</sup> *Ibidem*.

It is evident, that in such a case, examination of jurisdiction is subject to the national law, which in case of the designated court in a Member State, is the Brussels *Ibis* Regulation. In consequence of the exclusion of the Hague Convention on Choice of Court Agreements, there is no certainty that the jurisdiction agreement will be respected in the designated Contracting State as well as in the other seized derogated court of the Contracting States. However, such a consequence does not result in the clash between the two analysed legal instruments.

## 2.2. Formal Validity

As stated in Section 4, Subchapter II of this Chapter, Article 3 lett. c) of the Hague Convention on Choice of Court Agreements provides that an exclusive choice-of-court agreement must be concluded or documented in writing; or it must be concluded or documented by any other means of communication which renders information accessible so as to be usable for subsequent reference; the national law cannot add any further formal requirements.<sup>974</sup> The Brussels *Ibis* Regulation lays down the formal requirements more generously than Article 3 lett. c) of the Hague Convention on Choice of Court Agreements. Article 25 par. 1 lett. c) of the Brussels *Ibis* Regulation allows the jurisdiction agreement also in a form, which accords with practices which the parties have established between themselves. Article 25 par. 1 lett. d) of the Brussels *Ibis* Regulation allows the jurisdiction agreement “*in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned*”. In case that the jurisdiction agreement concluded by virtue of article 25 par. 1 lett. c) or d) of the Brussels *Ibis* Regulation does not fulfil the conditions laid down in article 3 lett. c) of the Hague Convention on Choice of Court Agreements, a Member State court may give effect to such a jurisdiction clause only under the Brussels *Ibis* Regulation since such a jurisdiction clause would not fall within the scope of the Hague Convention on Choice of Court Agreement.<sup>975</sup> Therefore, a clash cannot arise between the two regimes.

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<sup>974</sup> Hartley-Dogauchi Report, par. 110.

<sup>975</sup> A. SCHULZ, *The Hague Convention of 30 June 2005 on Choice of Court Agreements*, *op. cit.*, p. 250.



*The party A is resident in Mexico, and the party B is resident in Italy. The contract was concluded orally in international trade and the parties agreed on conferring jurisdiction to the Italian court. Subsequently, the Mexican party did not react to a commercial letter of confirmation sent by the Italian party. However, the Mexican party repeatedly paid the invoices where the conditions on the reverse contained a jurisdiction clause designating the Italian court. A continuing trading relationship between the parties was based on the general conditions of the Italian party. The Italian court, as well as the Mexican court, are seized.*

Both courts, the Italian and the Mexican court, deem that the formal requirements according to Article 3 lett. c) of the Hague Convention on Choice of Court Agreements are not met since there is no proof that party A consented to the oral jurisdiction agreement, and thus, the Hague Convention on Choice of Court Agreements is not applicable. However, the Italian court establishes its jurisdiction according to Article 25 of the Brussels *Ibis* Regulation since the formal requirements are met within the meaning of Article 25 lett. d) of the Brussels *Ibis* Regulation.<sup>976</sup> The examination of jurisdiction of the Mexican court is subject to the national law.

Conversely, the formal requirements of the Hague Convention on Choice of Court Agreement may be more generous in respect of the Brussels *Ibis* Regulation. For example, this may concern the standard terms on the back of an invoice, since the Contracting States do not obviously follow the interpretation of the ECJ concerning the formal requirements of Article 25 of the Brussels *Ibis* Regulation and may interpret Article 3 lett. c) of the Hague Convention on Choice of Court Agreement differently.<sup>977</sup> In this context, it must be borne in mind that the Member State courts cannot interpret the formal requirements of the Hague Convention on Choice of Court Agreements in the same manner as interpreted by the ECJ in regards of the Brussels regime. It means that the seized designated Member State court must interpret the formal requirements laid down in both regimes independently. However, clashes between the two regimes should not arise in most cases. The problem of simultaneous application of Article 25 of the Brussels *Ibis* Regulation and Article 3 lett. c) of the Hague Convention on Choice of Court Agreement may occur only in front of the seized designated Member State court, since Article 25 of the Brussels *Ibis* Regulation is applicable only in respect of the agreement conferring the jurisdiction to the Member States. In such a case,

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<sup>976</sup> ECJ, Case 25/76, *Galerias Segoura*, par. 11.

<sup>977</sup> A. SCHULZ, *The Hague Convention of 30 June 2005 on Choice of Court Agreements*, *op. cit.*, p. 250.

where the defendant is resident in the designated Member State, such a designated Member State court may establish the jurisdiction according to Article 4 of the Brussels *Ibis* Regulation in conjunction with Article 5 of the Hague Convention on Choice of Court Agreement. On the contrary, where the defendant is not resident in a Member State, the designated Member State cannot establish jurisdiction under the Brussels regime. The only problem which can occur is where the other Member State court could have jurisdiction according to Article 4 of the Brussels *Ibis* Regulation. The first example describes a proper application of both regimes. The second example demonstrates a difficulty if the Member States interpret the formal requirements laid down in both regimes independently.

*1) The invoice issued by party A contained an agreement conferring jurisdiction to the Italian court. The Italian court, as well as the Mexican court, are seized.*

Both courts, the Italian and the Mexican courts, deem that the formal requirements according to Article 3 lett. c) of the Hague Convention on Choice of Court Agreements are met, and thus, the Hague Convention on Choice of Court Agreements is applicable. However, the Italian court cannot establish its jurisdiction according to Article 25 of the Brussels *Ibis* Regulation, since the formal requirements within the meaning of Article 25 lett. a) of the Brussels *Ibis* Regulation are not met.<sup>978</sup> In consequence, the Italian court hears the case according to Article 5 of the Hague Convention on Choice of Court Agreements (in conjunction with Article 4 of the Brussels *Ibis* Regulation where applicable) and the Mexican court suspends or dismisses proceedings according to Article 6 of the Hague Convention on Choice of Court Agreements.

*2) Party A is resident in the Czech Republic (the residence of party B is dealt with in the text and is a part of a solution). The invoice issued by party B contained an agreement conferring jurisdiction to the Italian court. The Italian court is seized by Czech party and the Czech court is seized by party B as well.*

Both courts, the Italian and the Czech court, deem that the formal requirements according to Article 3 lett. c) of the Hague Convention on Choice of Court Agreements are met, and thus, the Hague Convention on Choice of Court Agreements should be applicable. However, both Member State courts cannot establish jurisdiction according to Article 25 of the Brussels *Ibis* Regulation, since the

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<sup>978</sup> ECJ, Case C-64/17, *Saey Home & Garden*.

formal requirements within the meaning of Article 25 lett. a) of the Brussels *Ibis* Regulation are not met.<sup>979</sup> Moreover, the Italian court does not have jurisdiction according to Article 4 of the Brussels *Ibis* Regulation. Article 5 of the Hague Convention on Choice of Court Agreements requires the Italian court to hear the case, but according to Articles 4 and 25 of the Brussels *Ibis* Regulation it cannot establish jurisdiction. Instead, the Czech court should suspend or dismiss the proceedings according to Article 6 of the Hague Convention on Choice of Court Agreements, but it is obliged to establish its jurisdiction according to Article 4 of the Brussels *Ibis* Regulation. Article 26 par. 2 of the Hague Convention on Choice of Court Agreements must resolve the incompatibility:

- a) the Brussels *Ibis* Regulation prevails if for example, (i) the party B is resident in Italy; or (ii) if the party B is resident in Russia;
- b) the Hague Convention on Choice of Court Agreements prevails if, for example, the party B is resident in Mexico.

If the Hague Convention on Choice of Court Agreements prevails, it practically prevails over the interpretation of the ECJ concerning the formal requirements prescribed by Article 25 of the Brussels *Ibis* Regulation.

### **2.3. Parallel Proceedings between the Member States**

The Hague Convention on Choice of Court Agreements does not establish the rule on *lis pendens* as in the Brussels *Ibis* Regulation. Therefore, the chosen court cannot refuse to exercise its jurisdiction on the ground that the dispute should be decided in a court of another State, in particular on the basis of *lis pendens* rule.<sup>980</sup> The non-designated court is obliged to suspend or dismiss proceedings unless one of five exceptions applies according to Article 6 of the Hague Convention on Choice of Court Agreements. However, it does not constitute the ground of jurisdiction when one of the exceptions applies – such assumption whether to exercise its jurisdiction is subject of the national law.<sup>981</sup> If the non-designated court continues with its proceedings, the designated court is not obliged to suspend or dismiss proceedings and *vice versa*.<sup>982</sup> Thus, parallel proceedings are not excluded according to the Hague

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<sup>979</sup> ECJ, Case C-64/17, *Saey Home & Garden*.

<sup>980</sup> Hartley-Dogauchi Report, par. 3, 132 and 133. On the interplay of the rules on *lis pendens* according to the Brussels *Ibis* Regulation and the 2007 Lugano Convention, see *supra* Section 1, Subchapter III of this Chapter.

<sup>981</sup> Hartley-Dogauchi Report, par. 146.

<sup>982</sup> R. A. BRAND, P. HERRUP, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents, op. cit.*, p. 88.

Convention on Choice of Court Agreements,<sup>983</sup> but the independent evaluation of the validity by both courts should reduce the risk of irreconcilable judgments.<sup>984</sup>

The whole Section 14, Subchapter I of this Chapter, was dedicated to the new rule on *lis pendens* according to Article 31 par. 2 of the Brussels *Ibis* Regulation giving precedence to the chosen Member State court to decide on its validity. Thus, the “court first seized rule” rule which gave rise to the “torpedo actions” was abolished in respect of the jurisdiction agreements.

The new *lis pendens* rule laid down in Article 31 par. 2 of the Brussels *Ibis* Regulation gives precedence to the chosen court which does not contrast with the operation of Articles 5 and 6 of the Hague Convention on Choice of Court Agreements. However, Article 6 of the Hague Convention on Choice of Court Agreements provides for the exceptions from the obligation to suspend the proceedings and may be problematic under the Brussels regime. Thus, two of the exceptions are analysed in this part: the substantive validity and the public policy exception.

### **2.3.1. Compatibility of the Regimes in the Presence of One of the Exceptions Provided in Article 6 of the Hague Convention on Choice of Court Agreements**

#### **a) Substantive Validity**

It must be remembered that solutions concerning substantive validity are in the Hague Convention on Choice of Court Agreements and in the Brussels *Ibis* Regulation.

The substantive validity according to Article 5, 6, and 9 of the Hague Convention on Choice of Court Agreements is governed by the law of the chosen State including its conflict-of-laws rules.<sup>985</sup> As stated in Section 5, Subchapter II of this Chapter, the rule should be understood mainly to address misrepresentation, duress, and lack of capacity.<sup>986</sup> It is questionable whether the question of the existence of “consent” should be treated separately by *lex fori*, or as an aspect of substantive validity. However, it seems that the latter solution corresponds to the

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<sup>983</sup> T. HARTLEY, *Choice-of-Court Agreements under the European and International Instruments: The Revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*, *op. cit.*, p. 231; Hartley-Dogauchi Report, par. 132-134.

<sup>984</sup> A. SCHULZ, *The 2005 Hague Convention on Choice of Court Clauses*, *op. cit.*, p. 438.

<sup>985</sup> Hartley-Dogauchi Report, par. 125 and note no 158

<sup>986</sup> Lack of capacity is dealt separately in Article 6 lett. b) and article 9 lett. b) of the Hague Convention on Choice of Court Agreements.

intention of the Special Commissions and Diplomatic Session.<sup>987</sup> The law of the chosen State including its conflict-of-laws rules should ensure that all courts would consider the substantive validity of a choice-of-court agreement under the same substantive national law. However, the question of the capacity of the parties is partially separated from the substantive validity whenever the non-designated court is seized. Then the question of capacity and is governed by the *lex fori* including its conflict-of-laws rules according to Article 6 lett. b) and simultaneously by the law of the chosen court according to Article 6 lett. a) of the Hague Convention on Choice of Court Agreements.<sup>988</sup>

Almost same solution on the substantive validity was introduced into the Brussels *Ibis* Regulation. The explanatory memorandum to the Commission Proposal provided that new rule on substantive validity should reflect the solution adopted in the Hague Convention on Choice of Court Agreements.<sup>989</sup> Also, Recital 20 of the Brussels *Ibis* Regulation was probably inspired by the Hartley-Dogauchi Report, which also suggests application of the conflict-of-laws rules of the chosen Member State court. The most problematic issue concerns the capacity of the parties. According to Professor Magnus, substantive validity covers all issues which may invalidate the formally valid jurisdiction clause, which covers incapacity.<sup>990</sup> However, because of the silence of the EU legislator in respect of the capacity of the parties, it is ambiguous whether the *lex fori*<sup>991</sup> should govern the capacity or if it should be subordinated to the new rule on substantive validity.

However, neither of the solutions entirely corresponds to the wording of the Hague Convention on Choice of Court Agreements, since Article 25 of the Brussels *Ibis* Regulation

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<sup>987</sup> See P. BEAUMONT, *Hague Choice of Court Agreements Convention 2005: Background, Negotiations, Analysis and Current Status*, *op. cit.*, p. 138, footnote no 44, where the author affirms that the consent making part of the substantive validity was never contested by the Special Commissions and Diplomatic Session. Against R. A. BRAND, P. HERRUP, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents*, *op. cit.*, p. 79, which presumed that the existence of the consent is a distinct term from a legal concept “null and void” and thus, it creates a gap which should be probably refilled by the law of forum including its choice of law rules.

<sup>988</sup> Hartley-Dogauchi Report, par. 150. Similarly, see R. A. BRAND, P. HERRUP, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents*, *op. cit.*, p. 91.

<sup>989</sup> 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, COM/2010/0748 final, 14 December 2010, p. 9.

<sup>990</sup> U. MAGNUS, *Choice-of-court Agreements in the Review Proposal for the Brussels I Regulation*, in *The Brussels I Review Proposal Uncovered*, *op. cit.*, p. 93.

<sup>991</sup> See Article 1 par. 2 lett. a) of the Rome I Regulation where the question of capacity is excluded from the scope of its application. On the similar conclusion see F. C. VILLATA, *L'attuazione degli accordi di scelta del foro nel regolamento Bruxelles I*, *op. cit.*, p. 109; M. WELLER, *Choice of Forum Agreements Under the Brussels I Brussels I-bis Regulation and Under the Hague Convention: Coherences and Clashes*, *op. cit.*, p. 10.

does not provide for the “double test” as to capacity made by the non-designated Member State court, as prescribed in Article 6 lett. a) and b) of the Hague Convention on Choice of Court Agreements.

First, the proper simultaneous operation of the rules of both regimes in the presence of an invalid jurisdiction agreement is demonstrated.

1) *Party A and party B concluded an exclusive jurisdiction agreement in favour of the Czech courts. Party A brought an action in front of the Italian court and subsequently, party B brought an action in front of the Czech courts.*

Perspective from the point of view of the Czech court: The Czech court applies simultaneously the rules on substantive validity according to Article 5 of the Hague Convention on Choice of Court Agreements and according to Article 25 of the Brussels *Ibis* Regulation, which lead to the application of its own conflict-of-laws rule. As to the capacity to conclude the jurisdiction agreement, this question is also covered by the conflict-of-laws rule on the substantive validity according to Article 5 of the Hague Convention on Choice of Court Agreements. The same result would be gained by the application of the new conflict-of-laws rule on substantive validity under Article 25 of the Brussels *Ibis* Regulation qualifying capacity as a part of substantive validity. If capacity were qualified as a separate aspect from the substantive validity, the *lex fori* including conflict-of-laws would lead to the same result: application of the conflict-of-laws rules of the Czech court. Consequently, the Czech court presumes that the jurisdiction agreement is invalid according to its own Czech conflict-of-laws rules. As to the *lis pendens* rule, this situation is not expressly dealt in the Brussels *Ibis* Regulation, but the wording of Article 31 par. 2 of the Brussels *Ibis* Regulation providing “...it has no jurisdiction under the agreement” suggests that the Czech court has priority only to establish its jurisdiction according to the jurisdiction agreement.<sup>992</sup> In such a case, the “first seized *lis pendens*” according to Article 29 of the Brussels *Ibis* Regulation should apply and the Italian court is entitled to decide first. A Czech decision on its invalidity binds the Italian court by virtue of the *Gothaer* judgment. In consequence, the Czech court of its own motion stays its proceedings until such time the jurisdiction of the Italian court is established. If the jurisdiction of the Italian court is established, the Czech court declines jurisdiction in favour of the Italian court.

<sup>992</sup> M. WELLER, *Choice of Forum Agreements Under the Brussels I Brussels I-bis Regulation and Under the Hague Convention: Coherences and Clashes*, *op. cit.*, p. 26; I. BERGSON, *The death of the torpedo action? The practical operation of the Recast's reforms to enhance the protection for exclusive jurisdiction agreements within the European Union*, *op. cit.*, p. 27.

Perspective from the point of view of the Italian court: The Italian court applies Article 6 of the Hague Convention on Choice of Court Agreements and Article 31 par. 2 of the Brussels Ibis Regulation concerning parallel proceedings and should suspend the proceedings. The question arises whether the Italian court should independently ascertain if the jurisdiction agreement is null and void even although the Italian court is directly bound by the decision of the Czech court concerning the lack of jurisdiction of the Czech court under the agreement by virtue of the *Gothaer* case. In any case, if the jurisdiction agreement is null and void, “*the law of the court seized determines whether or not it has jurisdiction and whether or not it can exercise that jurisdiction*”,<sup>993</sup> whereby the law of the seized Italian court is the *Gothaer* judgment and the reversed “first seized *lis pendens*” rule based on Article 29 par. 1 of the Brussels Ibis Regulation. Thus, the Italian court may establish its jurisdiction or decline its jurisdiction in favour of the Czech court according to the Brussels Ibis Regulation.

The second example concerns a more problematic situation which was described in Section 14.1., Subchapter I of this Chapter concerning the new *lis pendens* rule when both the designated and the derogated Member State courts disagree whether the jurisdiction agreement is valid. Such a situation cannot be excluded and is even more probable if the non-designated Member State court decides to apply a “full review” approach or when the designated Member State court is seized a long time after the institution of the non-designated Member State court.<sup>994</sup> Until then, the first non-designated Member State court is the only seized court (*e.g.*, for 1 year) and might examine the validity of the jurisdiction clause. The Brussels Ibis Regulation does not tackle the possibility of a disagreement between two seized Member State courts, which may be perceived as a *lacuna*. Moreover, this situation is complicated by the simultaneous application of the Hague Convention on Choice of Court Agreements.<sup>995</sup> It is evident from this example, that when the Hague Convention on Choice of Court Agreements prevails over the Brussels Regime pursuant to Article 26 par. 6 of the

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<sup>993</sup> Hartley-Dogauchi Report, par. 146.

<sup>994</sup> See M. WELLER, *Choice of Forum Agreements Under the Brussels I Brussels I-bis Regulation and Under the Hague Convention: Coherences and Clashes*, *op. cit.*, p. 26, where the author suggests that once the designated Member State court is seized, the non-designated Member State court should reduce the standard of review from a full review of the jurisdiction agreement to the reduced standard.

<sup>995</sup> On the disagreement concerning validity of the jurisdiction agreement between the Member States under the Brussels regime see *supra* Section 14.1., Subchapter I of this Chapter.

Hague Convention on Choice of Court Agreements, such a situation may even lead to parallel proceedings and irreconcilable judgments rendered by two Member State courts.

2) *Party A and party B concluded an exclusive jurisdiction agreement in favour of the Czech courts. Party A brought an action in front of the Italian courts. Eight months after, party B brought an action in front of the Czech courts.*

Perspective from the point of view of the Italian court: The Italian court should suspend or dismiss proceedings according to Article 6 of the Hague Convention on Choice of Court Agreements (Article 31 par. 2 of the Brussels *Ibis* Regulation is not applicable since there is no *lis pendens*). However, the Italian court, which is seized eight months before the Czech court, assumes that the jurisdiction agreement is invalid. The Italian court applies simultaneously conflict-of-laws rules on substantive validity according to Article 6 lett. a) of the Hague Convention on Choice of Court Agreements and according to Article 25 of the Brussels *Ibis* Regulation, which lead to the application of the conflict-of-laws rules of the Czech court. As to the capacity to conclude the jurisdiction agreement, this question is governed by the conflict-of-laws rules of the Italian court by virtue of Article 6 lett. b) and simultaneously by conflict-of-laws rules of the Czech court according to Article 6 lett. a) of the Hague Convention on Choice of Court Agreements. The question arises whether the capacity should be qualified as a part of the substantive validity under Article 25 of the Brussels *Ibis* Regulation, that is governed by the law of the chosen court; or should be qualified as a separate aspect from the substantive validity, that is governed by the *lex fori*. Thus, two different results may occur if we presume that capacity is governed under the Brussels regime. The situations are governed”: (i) by the *lex fori*: the Italian court applies its own conflict-of-laws rules; such a solution is in line with Article 6 lett. b), but not with Article 6 lett. a) of the Hague Convention on Choice of Court Agreements; or (ii) by the law of the chosen court (conflict-of-laws rules of the Czech court) according to Article 25 of the Brussels *Ibis* Regulation. Such a solution is in line with Article 6 lett. a) but not with Article 6 lett. b) of the Hague Convention on Choice of Court Agreements. Moreover, other question arises whether this partial conformity and partial conflict should be resolved through the application of Article 26 par. 6 of the Hague Convention on Choice of Court Agreements.<sup>996</sup> If so, the law applicable to capacity will be dependent on which legal instrument prevails. In any case, the “double test” under the Hague Convention on Choice of Court

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<sup>996</sup> See Hartley-Dogauchi Report, par. 273: «*The problem of conflicting treaties arises only if two conditions are fulfilled. The first is that there must be an actual incompatibility between the two treaties. In other words, the application of the two treaties must lead to different results in a concrete situation. Where this is not the case, both treaties can be applied.*».



Agreements on capacity may constitute the invalidity of the jurisdiction clause. If the Italian court reaches the decision as to invalidity of the jurisdiction clause before the Czech court, which was seized eight months after,<sup>997</sup> such a decision is binding for the Czech court by virtue of the *Gothaer* judgment.<sup>998</sup> This may happen if Article 31 par. 2 of the Brussels *Ibis* Regulation is applied a certain period after the institution of the proceedings (there is no *lis pendens*) or when the Italian court decides to apply “full review” approach.<sup>999</sup> Where one of the exceptions in Article 6 of the Hague Convention on Choice of Court arises (invalidity or no consent), “*the law of the court seized determines whether or not it has jurisdiction and whether or not it can exercise that jurisdiction*”.

The law of the seized Italian court is represented by Article 29 par. 1 of the Brussels *Ibis* Regulation,<sup>1000</sup> since in case of invalidity of the jurisdiction agreement, it is the first seized court.<sup>1001</sup> Thus, the Italian court may establish its jurisdiction or decline its jurisdiction in favour of the Czech court according to the Brussels *Ibis* Regulation.

Perspective from the point of view of the Czech court: The Czech court applies Article 5 of the Hague Convention on Choice of Court Agreements and simultaneously Article 31 par. 2 of the Brussels *Ibis* Regulation concerning parallel proceedings and may hear the case. According to the Czech court, the jurisdiction agreement is valid pursuant to its own conflict-of-laws rules: the Czech court applies simultaneously the rule on substantive validity according to Article 5 of the Hague Convention on Choice of Court Agreements and according to Article 25 of the Brussels *Ibis* Regulation, which lead to the application of its own conflict-of-laws rule. As to the capacity to conclude the jurisdiction agreement, this question is also covered by the conflict-of-laws rule on

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<sup>997</sup> See M. WELLER, *Choice of Forum Agreements Under the Brussels I Brussels I-bis Regulation and Under the Hague Convention: Coherences and Clashes*, *op. cit.*, p. 26. According to his opinion, preliminary ruling on the invalidity of the jurisdiction agreements issued before the designated Member State court is violation of Article 31 par. 2 of the Brussels *Ibis* Regulation. However, there is no support in the wording in Article 31 par. 2 of the Brussels *Ibis* Regulation providing for the obligation of the non-designated Member State court to wait for the decision of the designated Member State court.

<sup>998</sup> On the opinion that the chosen Member State court should recognise the decision of the non-chosen court, see C. HEINZE, B. STEINROTTER, *The Revised Lis Pendens Rules in the Brussels Ibis Regulation*, *op. cit.*, p. 22.

<sup>999</sup> On details see see *supra* Section 14.1., Subchapter I of this Chapter. It is likely that the “full review” of the jurisdiction clause may be provided by the non-designated Member state court when the designated Member State court is seized after a long time after its institution. See M. WELLER, *Choice of Forum Agreements Under the Brussels I Brussels I-bis Regulation and Under the Hague Convention: Coherences and Clashes*, *op. cit.*, p. 26, where he suggests that once the designated Member State court is seized, the non-designated Member State court should reduce the standard of review from a full review of the jurisdiction agreement to the reduced standard.

<sup>1000</sup> Hartley-Dogauchi Report, par. 146., where it is stated that «*For example, according to the law applied by the court, it may be prevented from exercising jurisdiction due to a lis pendens rule.*».

<sup>1001</sup> M. WELLER, *Choice of Forum Agreements Under the Brussels I Brussels I-bis Regulation and Under the Hague Convention: Coherences and Clashes*, *op. cit.*, p. 26 ; I. BERGSON, *The death of the torpedo action? The practical operation of the Recast’s reforms to enhance the protection for exclusive jurisdiction agreements within the European Union*, *op.cit.*, p. 27.

substantive validity according to Article 5 of the Hague Convention on Choice of Court Agreements. The same result would be gained by the application of the new conflict-of-laws rule on substantive validity under Article 25 of the Brussels *Ibis* Regulation defining capacity as a part of substantive validity. Although capacity would be qualified as a separate aspect from substantive validity, the *lex fori* including conflict-of-laws would lead to the same result: application of conflict-of-laws rules of the Czech law. However, the decision of the Italian court on the invalidity of the jurisdiction clause is binding for the Czech court by virtue of the *Gothaer* judgment.<sup>1002</sup> Contrary to the Brussels regime, according to Article 5 par. 2 of the Hague Convention on Choice of Court Agreement provides the Czech court “*shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State*”. In consequence, two regimes seem to be in conflict – the result is dependent on which legal instrument prevails

- a) If the Brussels *Ibis* Regulation prevails by virtue of Article 26 par. 6 of the Hague Convention on Choice of Court Agreements (*i.e.*, party A resides in Italy, party B in the Czech Republic), the *Gothaer* judgment is binding for the Czech courts. Although such a situation results in a nondesirable race to a decision, it is perfectly in line with the Brussels *Ibis* Regulation.<sup>1003</sup> This result will not lead to irreconcilable judgments which do not undermine the Brussels regime.
- b) If the Hague Convention on Choice of Court Agreements prevails by virtue of Article 26 par. 6 (*i.e.*, party A resides in Italy, party B in Mexico), in such a case, the *Gothaer* judgment is not binding for the Czech courts, and the Czech court may proceed independently according to Article 5 of the Hague Convention on Choice of Court Agreements. The Czech court may hear the case. This result may lead to irreconcilable judgments rendered by two Member State courts.

### ***b) Public Policy Exception***

According to the Hague Convention on Choice of Court Agreements, the seized non-designated court is relieved from its duty to suspend or dismiss proceedings according to Article 6 lett. c) of the Hague Convention on Choice of Court Agreements, where giving the effect to the jurisdiction agreement would lead to manifest injustice or would be manifestly contrary to its own public policy. In such a case, the seized non-designated court is not prevented from continuing proceedings and may even render a judgment. However, only the

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<sup>1002</sup> On the opinion that the chosen Member State court should recognise the decision of the non-chosen court, see C. HEINZE, B. STEINROTTER, *The Revised Lis Pendens Rules in the Brussels Ibis Regulation*, *op. cit.*, p. 22

<sup>1003</sup> On the flowchart and details see *supra* Section 14.1., Subchapter I of this Chapter.

judgment rendered by the chosen court is eligible for recognition and enforcement in the requested Contracting State.<sup>1004</sup>

The situation concerning the interference of public policy and the overriding mandatory rules with the validity of jurisdiction agreements under the Brussels Regime was analysed in detail in Section 2.1., Subchapter III, Chapter One. The ECJ expressly stated in *Trasporti Castelletti* that: “*Considerations about the links between the court designated and the relationship at issue, about the validity of the clause, or about the substantive rules of liability applicable before the chosen court are unconnected with those requirements.*”<sup>1005</sup> This conclusion was then confirmed by ECJ in *CDC* and it was built on the conviction that mutual trust between the Member States for the predictability of jurisdictional rules should prevail over the public policy of the derogated *forum* and the protection of specific State interests. Furthermore, according to Professor Basedow the enforcement of overriding mandatory provisions or international public policy of the non-selected *forum* under the Brussels Regime should be classified as relating to the substantive validity of choice-of-court agreements.<sup>1006</sup> Therefore, the introduction of the new conflict-of-law rule on substantive validity of jurisdiction agreements according to Article 25 of the Brussels *Ibis* Regulation practically results in the complete exclusion of the overriding mandatory rules of the *lex fori* of the derogated Member State, unless the conflict-of-laws rule refers back to the derogated forum.<sup>1007</sup> Therefore, such an interpretation would seemingly lead to the conclusion that the rules laid down in the Hague Convention on Choice of Court and the rules laid down in the Brussels *Ibis* Regulation are not compatible. A seized non-designated court is entitled to proceed under the Hague Convention on Choice of Court if the choice-of-court agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of its *lex fori*. However, according to Article 25 of the Brussels *Ibis* Regulation, a seized non-designated Member State court is not entitled to consider public policy. The example below demonstrates that the interference of public

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<sup>1004</sup> R. A. BRAND, P. HERRUP, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents*, *op. cit.*, p. 88

<sup>1005</sup> ECJ, Case C-159/97, *Trasporti Castelletti*, par. 52.

<sup>1006</sup> J. BASEDOW, *Exclusive choice-of-court agreements as a derogation from imperative norms*, *op. cit.*, p. 20.

<sup>1007</sup> Recital 20 Brussels *Ibis* Regulation: «*Where a question arises as to whether a choice-of-court agreement in favour of a court or the courts of a Member State is null and void as to its substantive validity, that question should be decided in accordance with the law of the Member State of the court or courts designated in the agreement, including the conflict-of-laws rules of that Member State.*». J. BASEDOW, *Exclusive choice-of-court agreements as a derogation from imperative norms*, *op. cit.*, p. 20.

policy under the Hague Convention on Choice of Court Agreements with the Brussels Regime is excluded between the Member States.

1) *Party A and party B concluded an exclusive jurisdiction agreement in favour of the Czech courts. Then party A brought an action in front of the Italian court and party B brought an action in front of the Czech courts.*

Perspective from the point of view of the Czech court: The Czech court applies Article 5 of the Hague Convention on Choice of Court Agreements and simultaneously Article 31 par. 2 of the Brussels *Ibis* Regulation. If the jurisdiction agreement is not “null and void”, the Czech court may hear the case.

Perspective from the point of view of the Italian court: The Italian court applies Article 6 of the Hague Convention on Choice of Court Agreements and simultaneously Article 25 and 31 par. 2 of the Brussels *Ibis* Regulation. According to the Italian court, giving effect to the jurisdiction agreement in favour of the Czech court would be manifestly contrary to its public policy because of Article 6 lett. c) of the Hague Convention on Choice of Court Agreements. Where one of the exceptions in Article 6 of the Hague Convention on Choice of Court arises, “*the law of the court seized determines whether or not it has jurisdiction and whether or not it can exercise that jurisdiction*”:<sup>1008</sup> the law of the seized Italian court is represented by Article 25 (which does not allow the court to disregard the jurisdiction agreement due to the public policy of the seized Member State court) and by Article 31 par. 2 of the Brussels *Ibis* Regulation as to *lis pendens*. Since the Czech court established its jurisdiction in accordance with the agreement, the Italian court declines jurisdiction in favour of Czech court.

2) *Party A and party B concluded an exclusive jurisdiction agreement in favour of the Czech courts. Then, party A brought an action in front of the Italian courts. Eight months after, party B brought an action in front of the Czech courts.*

Perspective from the point of view of the Italian court: The Italian court applies Article 6 of the Hague Convention on Choice of Court Agreements and Article 25 of the Brussels *Ibis* Regulation (Article 31 par. 2 of the Brussels *Ibis* Regulation is not applicable since there is no *lis pendens*). The Italian court, which is seized eight months before the Czech court, assumes that the jurisdiction

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<sup>1008</sup> Hartley-Dogauchi Report, par. 146.

agreement is valid, but giving effect to the jurisdiction agreement in favour of the Czech court would be manifestly contrary to its public policy because of Article 6 lett. c) of the Hague Convention on Choice of Court Agreements. Where one of the exceptions in Article 6 of the Hague Convention on Choice of Court arises, “*the law of the court seized determines whether or not it has jurisdiction and whether or not it can exercise that jurisdiction*”.<sup>1009</sup> Article 25 does not allow the court to disregard the jurisdiction agreement due to the public policy of the seized Member State court and Article 31 par. 2 of the Brussels *Ibis* Regulation addresses *lis pendens*. Thus, the Italian court must stay its proceedings in favour of the Czech court according to the Brussels *Ibis* Regulation.

Perspective from the point of view of the Czech court: The Czech court applies Article 5 of the Hague Convention on Choice of Court Agreements and simultaneously Article 31 par. 2 of the Brussels *Ibis* Regulation concerning parallel proceedings and might hear a case (the jurisdiction agreement is not null and void).

The rules are not in conflict and thus, Article 26 par. 6 of the Hague Convention on Choice of Court Agreement is not applicable.<sup>1010</sup> In consequence, the residence of the parties is irrelevant. The Hague Convention on Choice of Court Agreements does not interfere with the conclusions of the ECJ in judgment *Trasporti Castelletti*, which excludes any effect of violation of public policy on a valid jurisdiction agreement. Thus, the legal certainty laid down in the Brussels Regime and mutual trust between the Member States prevails over securing the public policy of the derogated Member State also under the Hague Convention on Choice of Court Agreement.

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<sup>1009</sup> Hartley-Dogauchi Report, par. 146.

<sup>1010</sup> On the opposite approach see F. RAGNO, *Forum Selection under the Hague Convention on Choice of Court Agreements – A European Perspective*, *op. cit.*, p. 149, where the author provides the similar example, but stating that «*This theoretically falls into the scope of both the Brussels and Hague regimes. One must rely on Article 26(6)(a) of the Hague Convention to determine the applicable instrument.*». The author refuses the approach that the *lis pendens* mechanism provided by the Brussels *I-bis* Regulation is not affected by Article 6 of the Hague Convention on Choice of Court Agreements; *contra* Hartley-Dogauchi Report, par. 301; M. AHMED, P. BEAUMONT, *Exclusive choice-of-court agreements: some issues on the Hague Convention on Choice of Court Agreements and its relationship with the Brussels I Brussels I-bis Regulation especially anti-suit injunctions, concurrent proceedings and the implications of BREXIT*, *op. cit.*, p. 405; F. C. VILLATA, *L'attuazione degli accordi di scelta del foro nel regolamento Bruxelles I*, *op. cit.*, p. 165–66.

#### 2.4. Parallel Proceedings between the Member State and Contracting State

As to the regime on parallel proceedings, the Hague Convention on Choice of Court Agreements obviously does not differ between the Member States and the Contracting States.

As to the Brussels regime, in Section 15, Subchapter I of this Chapter, it was pointed out that the ECJ case law (*Coreck* C-387/98; *Lugano Opinion* 1/03; and *Mahamdia*, C-154/11) regarding derogation from the jurisdiction of the Member States on the basis of choice-of-court agreements in favour of Third States courts have not provided insight into this issue. On the contrary, the *Owusu* judgment, C-281/02, where the ECJ upheld that the general ground of the jurisdiction based on the domicile of the defendant cannot be derogated from,<sup>1011</sup> brought even more doubts. The specific rule on exclusive choice-of-court agreements in favour of a Third State court has not been introduced into the Brussels *Ibis* Regulation in order to motivate the Third States into ratifying the Hague Convention on Choice of Court Agreements.<sup>1012</sup> Only new rules on *lis pendens* and related actions were established by Article 33 and 34 of the Brussels *Ibis* Regulation: Section 15.5., Subchapter I of this Chapter, was partially dedicated to these two provisions, and the basic conditions for their application are only briefly mentioned: there must be already pending proceedings before the Third State court at the time the Member State court is seized; the new rules on *lis pendens* and on related actions refer only to Articles 4, 7, 8, and 9 of the Brussels *Ibis* Regulation; a judgment that will be issued by a Third State court must be recognisable and, where applicable, enforceable in that Member State (a prognosis rule); and a stay must be necessary for the proper administration of justice. Moreover, the effectiveness of these new provisions is weakened by the fact that a seized Member State court is granted with the discretionary power. These rules must be applied in the context of the parallel proceedings with the Contracting State where Article 6 of the Hague Convention on Choice of Court Agreements is simultaneously applied. It is difficult to justify the operation of Article 25 and Article 31 par. 2 of the Brussels *Ibis* Regulation when this rule governs only intra-EU proceedings. The application of Article 25 and Article 31 par. 2 of the Brussels *Ibis* Regulation in respect of Third States could be admissible only because of the *effet réflexe* doctrine. This doctrine is not considered a strong

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<sup>1011</sup> ECJ, C-281/02, *Owusu*, par. 40.

<sup>1012</sup> Committee on Legal Affairs, 20 September 2011, available at: <http://www.europarl.europa.eu/ep-live/en/committees/video?event=20110920-0900-COMMITTEE-JURI>.

argument for declination of jurisdiction where Articles 33 and 34 of the Brussels *Ibis* Regulation deal specifically with the extra-EU proceedings.

In consequence, it is necessary to analyse whether the new rules coordinating the parallel proceedings with Contracting States by virtue of Articles 33 and 34 of the Brussels *Ibis* Regulation in the presence of choice-of-court agreement operate properly with the rules laid down in the Hague Convention on Choice of Court Agreements.

The following two examples demonstrate the proper mixed application of both regimes. The first example concerns the application of Articles 33 and 34 of the Brussels *Ibis* Regulation and the second example concerns a situation where Articles 33 and 34 of the Brussels *Ibis* Regulation cannot operate. However, no difficulties were identified.

*1) Party A is resident in Italy, party B is resident in Singapore, and they designate a court in Mexico. The Italian court is second seized by the Singaporean party, with a court in Mexico being seized first by the Italian party.*

Perspective from the point of view of the Mexican court: The Mexican court applies Article 5 of the Hague Convention on Choice of Court Agreements and may hear a case unless the agreement is null and void according to its own conflict-of-laws rules.

Perspective from the point of view of the Italian court: The Italian court applies Article 33 of the Brussels *Ibis* Regulation (if the conditions are fulfilled) in conjunction with Article 6 of the Hague Convention on Choice of Court Agreements (where no exception of Article 6 of the Hague Convention on Choice of Court Agreements occurs). It is likely that all conditions of Article 33 of the Brussels *Ibis* Regulation are fulfilled when: (i) the Italian court is second seized; (ii) the jurisdiction of the Italian court is based on Article 4 of the Brussels *Ibis* Regulation; (iii) judgment that will be issued by a Mexican court might be recognisable and enforceable in Slovakia where Articles 8 and 9 of the Hague Convention on Choice of Court Agreements governs the recognition and enforcement of the judgments rendered by the chosen court of the Contracting State; (iv) Recital No 24 of the Brussels *Ibis* Regulation provides that the assessment of proper administration of justice may also include consideration of the question whether the court of the Third State has exclusive jurisdiction in the particular case. According to Article 33 of the Brussels *Ibis* Regulation, the Italian court may stay the proceedings, and according to Article 6 of the Hague Convention on Choice of Court Agreements the Italian court should suspend or dismiss the proceedings. If the Italian court stays the proceedings, Article 26 par. 6 of the Hague Convention on Choice of Court

Agreements is not applicable, and the rules of both regimes are properly in line.

2) *Party A is resident in Italy, party B is resident in Singapore, and they designate a court in Mexico. The Italian court is first seized by the Singaporean party, with a court in Mexico being seized second by the Italian party.*

Perspective from the point of view of the Mexican court: The Mexican court applies Article 5 of the Hague Convention on Choice of Court Agreements and may hear a case unless the agreement is null and void according to its own conflict-of-laws rules.

Perspective from the point of view of the Italian court: The Italian court applies Article 6 of the Hague Convention on Choice of Court Agreements (no exception of Article 6 of the Hague Convention on Choice of Court Agreements occurs). However, Article 33 of the Brussels *Ibis* Regulation cannot operate since the Italian court is first seized. In such a case, two different interpretations may be provided:

- i) *Owusu* judgment. The Italian court could establish jurisdiction according to Article 4 of the Brussels *Ibis* Regulation by virtue of *Owusu* case. Article 4 of the Brussels *Ibis* Regulation contradicts Article 6 of the Hague Convention on Choice of Court Agreements. Therefore, the Hague Convention on Choice of Court Agreements prevails according to Article 26 par. 6 of the Hague Convention on Choice of Court Agreements. The Italian court suspends or dismisses the proceedings according to Article 6 of the Hague Convention on Choice of Court Agreements.
- ii) *Lugano Opinion 1/03*. It must be reminded of the ECJ interpretation: “*Thus, where the new Lugano Convention contains articles identical to Articles 22 and 23 of Regulation No 44/2001 and leads on that basis to selection as the appropriate forum of a court of a non-member country which is a party to that Convention, where the defendant is domiciled in a Member State, in the absence of the Convention, that latter State would be the appropriate forum, whereas under the Convention it is the non-member country.*”<sup>1013</sup> It is true that Article 5 of the Hague Convention on Choice of Court Agreements is not identical to Article 25 of the Brussels *Ibis* Regulation, but the extension of this interpretation into jurisdiction clauses

<sup>1013</sup> See *Lugano opinion 1/03*, par. 153. For further details on the opinion, see P. FRANZINA, *Le condizioni di applicabilità del regolamento (CE) n. 44/2001 alla luce del parere 1/03 della Corte di giustizia*, op. cit., pp. 948-977; N. LAVRANOS, *Opinion 1/03, Lugano Convention*, op. cit., pp. 1087-1100; F. POCAR (ed.), *The External Competence of the European Union and Private International Law: The EC Court's Opinion on the Lugano Convention*, op. cit.



falling into the scope of the Hague Convention on Choice of Court Agreements seems to represent a reasonable expectations for the parties that their jurisdiction agreement will be respected. This interpretation does not contradict the Hague Convention on Choice of Court Agreements, and the Italian court suspends or dismisses the proceedings according to Article 6 of the Hague Convention on Choice of Court Agreements.

#### **2.4.1. A Gap in the “Give Way” rule under the Hague Convention on Choice of Court Agreements?**

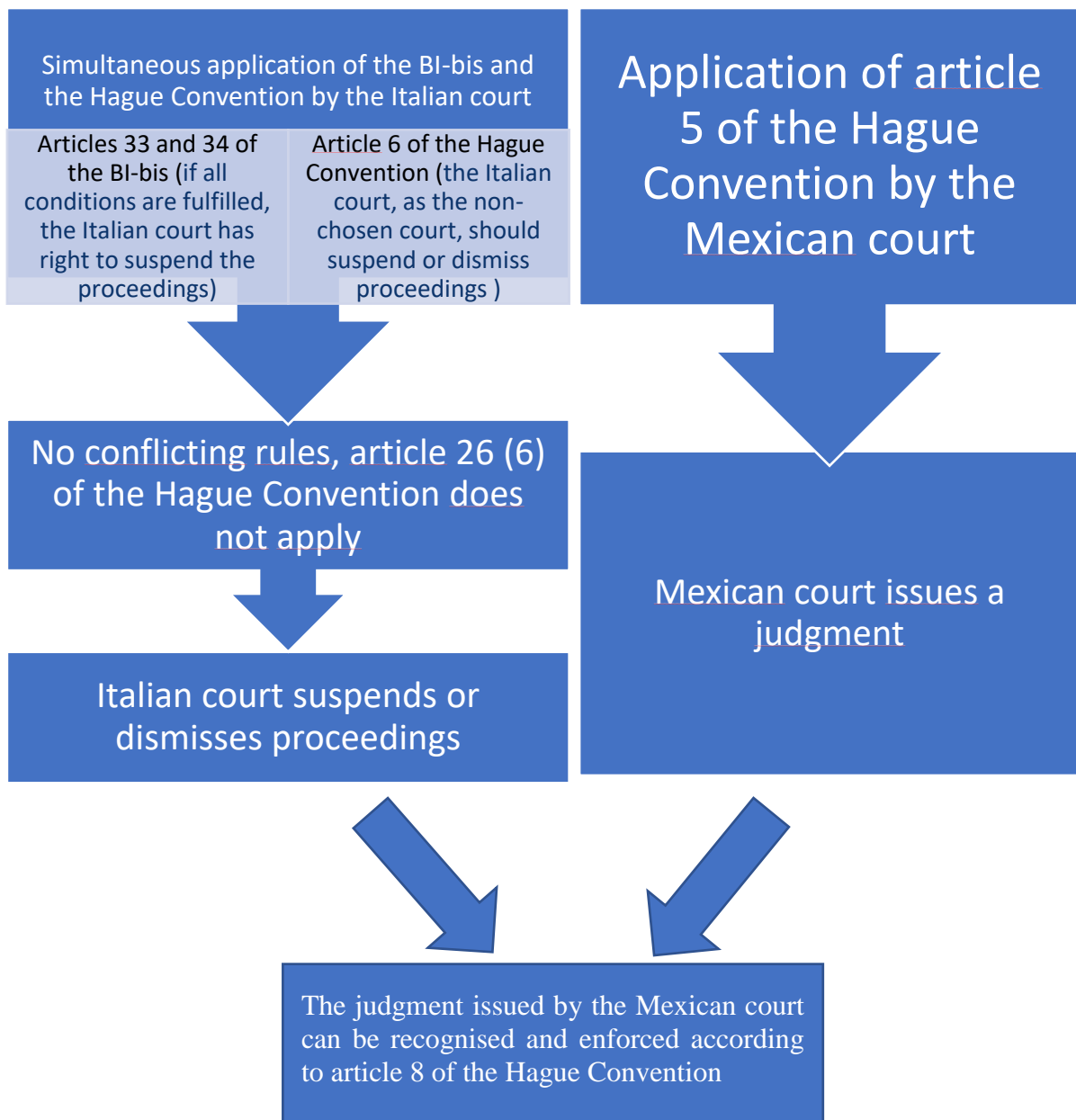
However, the following scenario demonstrates that the problem may arise where all parties involved reside exclusively within the Member States and agree on a court in a Contracting State. According to the first “give way” rule provided in Article 26 par. 6 of the Hague Convention on Choice of Court Agreements, the Brussels *Ibis* Regulation should prevail in case of conflicting rules. For better understanding, the first example demonstrates a proper combined application of Articles 33 and 34 of the Brussels *Ibis* Regulation and Article 6 of the Hague Convention on Choice of Court Agreements and compatibility of their rules (similar example as example No 1):

*1) Party A is resident in Italy, party B is resident in the Czech Republic, and they designate a court in Mexico. The Italian court is second seized by the Czech party in accordance with Article 4 of the Brussels Ibis Regulation, with a court in Mexico being seized first by the Italian party.*

Perspective from the point of view of the Mexican court: The Mexican court applies Article 5 of the Hague Convention on Choice of Court Agreements and may hear a case unless the agreement is null and void according to its own conflict-of-laws rules.

Perspective from the point of view of the Italian court: The Italian court applies Article 33 of the Brussels *Ibis* Regulation (if the conditions are fulfilled) in conjunction with Article 6 of the Hague Convention on Choice of Court Agreements (where no exception of Article 6 of the Hague Convention on Choice of Court Agreements occurs). It is likely that all conditions of Article 33 of the Brussels *Ibis* Regulation are fulfilled when: (i) the Italian court is second seized; (ii) the jurisdiction of the Italian court is based on Article 4 of the Brussels *Ibis* Regulation; (iii) the judgment that will be issued by a Mexican court might be recognisable and enforceable in Slovakia where Articles 8 and 9 of the Hague Convention on Choice of Court Agreements governs the recognition and enforcement of the judgments rendered by the chosen court of the Contracting

State; (iv) Recital No 24 of the Brussels *Ibis* Regulation provides that the assessment of proper administration of justice may also consider whether the court of the Third State has exclusive jurisdiction in the particular case. According to Article 33 of the Brussels *Ibis* Regulation the Italian court may stay the proceedings, and according to Article 6 of the Hague Convention on Choice of Court Agreements the Italian court should suspend or dismiss the proceedings. If the Italian court stays the proceedings, Article 26 par. 6 of the Hague Convention on Choice of Court Agreements is not applicable, and the rules of both regimes are properly in line. As to the recognition or enforcement of the judgment, the judgment issued by the Mexican court may be recognised and enforced in Italy or the other Contracting States according to Article 8 of the Hague Convention on Choice of Court Agreements, and there is no conflicting judgment rendered by the Italian court.



The following example is very similar to the previous one, with the exception that the Italian court is seized first and as a consequence, Articles 33 and 34 of the Brussels *Ibis* Regulation cannot be applied. This example demonstrates the difficulties.

2) *Party A resident in Italy and the party B resident in Czech Republic, they designate a court in Mexico. The Italian court is seized first by the Czech party in accordance with Article 4 of the Brussels Ibis Regulation, with a court in Mexico being seized second by the Italian party.*

Perspective from the point of view of the Mexican court: The Mexican court applies Article 5 of the Hague Convention on Choice of Court Agreements and may hear a case unless the agreement is null and void according to its own conflict-of-laws rules.

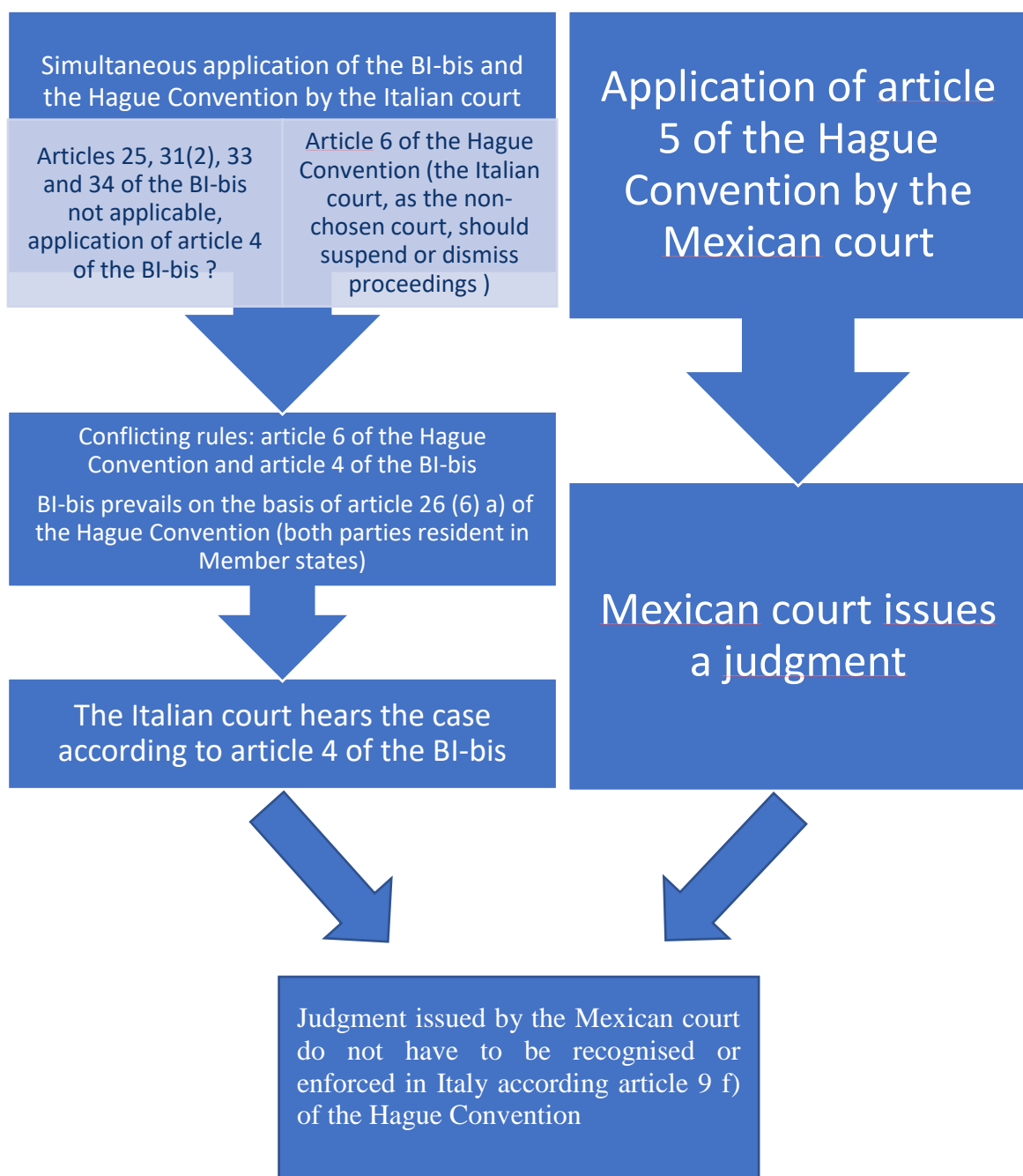
Perspective from the point of view of the Italian court: The Italian court applies Article 6 of the Hague Convention on Choice of Court Agreements (no exception of Article 6 of the Hague Convention on Choice of Court Agreements occurs). However, Article 33 of the Brussels *Ibis* Regulation cannot operate since the Italian court is first seized. In such a case, two different interpretations may be provided:

- i) *Lugano Opinion 1/03*. It must be reminded of the ECJ interpretation: “*Thus, where the new Lugano Convention contains articles identical to Articles 22 and 23 of Regulation No 44/2001 and leads on that basis to selection as the appropriate forum of a court of a non-member country which is a party to that Convention, where the defendant is domiciled in a Member State, in the absence of the Convention, that latter State would be the appropriate forum, whereas under the Convention it is the non-member country.*”<sup>1014</sup> It is true that Article 5 of the Hague Convention on Choice of Court Agreements is not identical to Article 25 of the Brussels *Ibis* Regulation, but the extension of this interpretation into the jurisdiction clauses falling into the scope of the Hague Convention on Choice of Court Agreements seems to represent a reasonable expectations for the parties that their jurisdiction agreement will be respected. This interpretation does not contradict the Hague Convention on Choice of Court Agreements, and the Italian court suspends or dismisses the proceedings according to Article 6 of the Hague Convention on Choice of Court Agreements.
- ii) *Owusu* judgment. The Italian court could establish jurisdiction according to Article 4 of the

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<sup>1014</sup> See *Lugano opinion 1/03*, par. 153.

Brussels *Ibis* Regulation by virtue of the *Owusu* case. Article 4 of the Brussels *Ibis* Regulation contradicts Article 6 of the Hague Convention on Choice of Court Agreements. Therefore, the Brussels *Ibis* Regulation prevails according to Article 26 par. 6 of the Hague Convention on Choice of Court Agreements (both parties are resident in the Member States). The Italian court hears a case according to Article 4 of the Brussels *Ibis* Regulation. As a result, there are two judgments issued by the Contracting States. The enforcement or recognition of the judgment issued by the Mexican court can be denied in Italy according to Article 9 lett. f) of the Hague Convention on Choice of Court Agreements. This problematic scenario is demonstrated in the flowchart.



However, according to the authors of the Impact Assessment, the Hague Convention on Choice of Court Agreements prevails also in case when all the parties involved reside exclusively within the Member States and agree on a court in the Hague Convention on Choice of Court Agreements Contracting State as well:

*Finally, a situation may arise under which all parties to a choice-of-court agreement are resident in EU Member States but they have agreed to a court in a non-EU Member State which is a Contracting Party to the Hague Convention. In this case, Art. 26 para 6 of the Hague Convention which refers to residence of the parties only, gives priority to Brussels I. However, if in such a case there is no exclusive jurisdiction of any court in a EU Member State under Brussels I, the Hague Convention could still apply even if, this situation is not exactly covered by any provision of the Hague Convention.<sup>1015</sup>*

Despite this statement, does it mean that when the Member State court may establish jurisdiction according to Article 4 of the Brussels Ibis Regulation (i.e., *Owusu* case), the court may simply apply the Hague Convention on Choice of Court Agreements? If the intention was also to cover this situation, why does the Hague Convention on Choice of Court Agreements not expressly provide for a specific rule?<sup>1016</sup> Unfortunately, Article 26 par. 6 lett. a) of the Hague Convention on Choice of Court Agreements is silent in this respect, and it is likely that the Member State courts will give way to the Brussels Ibis Regulation in case of conflicting rules. However, if we assume that the Hague Convention on Choice of Court Agreements prevails instead of the Brussels Ibis Regulation in light of the Impact Assessment, then the Italian court in example No 4 might be allowed to suspend or dismiss proceedings in accordance with Article 6 of the Hague Convention on Choice of Court Agreements.

The same result, as identified in example No 4 above, may occur when the plaintiff is domiciled in a Third State that is not a Contracting State (Russia), the defendant is domiciled in a Member State (Italy), court of the Contracting State is designated and is seized second (Mexico) with the Member State court of the defendant's domicile seized first (Italy). Also, in

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<sup>1015</sup> A Study to Inform an Impact Assessment on the Ratification of the Hague Convention on Choice of Court Agreements by the European Community, 105.

<sup>1016</sup> Hartley-Dogauchi Report, par. 291-301. The authors only tackle an issue regarding choice-of-court agreements in favour of a Member State court.

this case, Articles 33 and 34 of the Brussels *Ibis* Regulation cannot operate if the proceedings in a Third State court are not pending when a Member State court is seized. However, Article 4 of the Brussels *Ibis* Regulation may find the application on the basis of *Owusu* case, which would be in contrast with Article 6 of the Hague Convention. Consequently, the Brussels *Ibis* Regulation should prevail in accordance with Article 26 par. 6 lett. a) of the Hague Convention (one party is domiciled in a Member State and another party in a third State that is not Contracting State).

In any case, a precise rule for these two problematic situations should be adopted, such as an amendment to Articles 33 and 34 of the Brussels *Ibis* Regulation or an exception specified in Article 26 par. 6 of the Hague Convention on Choice of Court Agreements. Otherwise, the practice of Member State courts may differ – some Member States court may: (i) suspend proceedings according to Article 6 of the Hague Convention on Choice of Court Agreements by virtue of the Impact Assessment (the Hague Convention on Choice of Court Agreements prevails); (ii) suspend proceedings according to Article 6 of the Hague Convention on Choice of Court Agreements by virtue of Lugano Opinion 1/03 (the Brussels I-bis Regulation prevails); or (iii) establish jurisdiction in accordance with Article 4 of the Brussels *Ibis* Regulation by virtue of the *Owusu* judgment (the Brussels *Ibis* Regulation prevails). Moreover, if the latter situation occurs, there exists the possibility of two inconsistent judgments. This situation is a gap that can create legal uncertainty and unpredictability for the parties in the future.

#### **2.4.2. Compatibility of the Regimes in the Presence of One of the Exceptions**

##### **Provided in Article 6 of the Hague Convention on Choice of Court Agreements**

Lastly, it is necessary to analyse the mixed operation of the rules when one of the exceptions in Article 6 of the Hague Convention on Choice of Court Agreements occurs. For instance: (i) the jurisdiction agreement is null and void pursuant to the law of the State of the chosen court; (ii) one of the parties lack capacity to conclude the jurisdiction agreement under its own law; (iii) the jurisdiction agreement is manifestly unjust or contrary to the public policy; (iv) the agreement cannot reasonably be performed on the basis of the exceptional reasons beyond the control of the parties; or (v) the chosen court has decided not to hear the case. The following examples tackle one of the most problematic situations described in Section 2.1.2,

Suhchapter III, Chapter One – the possibility to disregard the jurisdiction agreement in favour of the court of the Contracting State when giving effect to the agreement would be contrary to the public policy of the State of the court seized. However, the same result would be gained also when other exceptions in Article 6 of the Hague Convention on Choice of Court Agreements occur.

First, for better understanding we examine a specific situation demonstrating the proper application of Articles 33 and 34 of the Brussels *Ibis* Regulation.

*1) Party A is resident in Italy party B is resident in Singapore, and they designate a court in Mexico. An Italian court is seized second by the Singaporean party, with a court in Mexico being seized first by the Italian party.*

The Italian court simultaneously applies Article 33 of the Brussels *Ibis* Regulation and Article 6 of the Hague Convention on Choice of Court Agreements. The Italian court presumes that giving effect to the jurisdiction agreement in favour of the Mexican court would be manifestly contrary to its public policy by virtue of Article 6 lett. c). The Brussels *Ibis* Regulation does not seem to conflict with the Hague Convention on Choice of Court Agreements, since Article 33 of the Brussels *Ibis* Regulation does not prescribe suspending the proceedings and Article 6 of the Hague Convention on Choice of Court Agreements does not require hearing the case. Therefore, Article 26 par. 6 lett. a) of the Hague Convention on Choice of Court Agreements is not applicable. According to Article 6 of the Hague Convention on Choice of Court Agreements, “*the law of the court seized determines whether or not it has jurisdiction and whether or not it can exercise that jurisdiction*”.<sup>1017</sup> The national law embodies the Brussels *Ibis* Regulation. In consequence, the Italian court re-verifies Article 33 of the Brussels *Ibis* Regulation in order to determine whether to stay the proceedings or not. It is likely that all conditions of Article 33 of the Brussels *Ibis* Regulation are not fulfilled. A judgment rendered by a Mexican court would not be probably recognisable and enforceable in Italy, since Articles 8 and 9 of the Hague Convention on Choice of Court Agreements should be applied for the recognition and enforcement of the judgments rendered by the chosen court of the Contracting State. According to Article 9 lett. c) of the Hague Convention on Choice of Court Agreements, recognition or enforcement may be refused if such recognition or enforcement would be manifestly incompatible with the public policy of the requested State. In consequence, the Italian court cannot stay the proceedings.

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<sup>1017</sup> Hartley-Dogauchi Report, par. 146.

The second specific situation is the same as the previous one, but the Member State court is seized first. In consequence, Articles 33 and 34 of the Brussels *Ibis* Regulation cannot operate.

2) *Party A is resident in Italy, party B is resident in Singapore, and they designate a court in Mexico. An Italian court is seized first by the Singaporean party, with a court in Mexico being seized second by the Italian party.*

The Italian court applies Article 6 of the Hague Convention on Choice of Court Agreements. Since Articles 33 and 34 of the Brussels *Ibis* Regulation are not applicable, the Italian court applies Article 4 of the Brussels *Ibis* Regulation on the basis of the *Owusu* case due to the defendant's domicile in Italy. The Italian court presumes that giving effect to the jurisdiction agreement in favour of the Mexican court would be contrary to its public policy by virtue of Article 6 lett. c) of the Hague Convention on Choice of Court Agreements. Also, in this case, Article 4 of the Brussels *Ibis* Regulation does not conflict with Article 6 of the Hague Convention on Choice of Court Agreements since Article 6 of the Hague Convention on Choice of Court Agreements does not require a court to suspend proceedings or on the contrary, to hear a case when one of the exceptions apply, stating, "*the law of the court seized determines whether or not it has jurisdiction and whether or not it can exercise that jurisdiction*".<sup>1018</sup> The law of the Italian court seized is bound by Article 4 of the Brussels *Ibis* Regulation, which necessarily prescribes establishing its jurisdiction. Thus, the Italian court cannot suspend or dismiss the proceedings.

As we can see, the Hague Convention on Choice of Court Agreements gives an answer to the question of disregarding the jurisdiction agreement in favour of the Contracting States in order to protect the public policy of the seized Member State court or even of EU legislation. Such a result is opposite to the result which was reached in Section 2.3.1. of this Subchapter regarding parallel proceeding between the Member States. It is obvious that the level of protection of the fundamental principles of the derogated States is different between the Member States, where mutual trust should be guaranteed, and between the Member State and the Third State. This "permission" to disregard the jurisdiction agreement in the presence of

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<sup>1018</sup> Hartley-Dogauchi Report, par. 146.



public policy given by the regime based on the Hague Convention on Choice of Court Agreements also corresponds to the ECJ's interpretation in the *Ingmar* case.<sup>1019</sup>

### **3. Compatibility between the Hague Convention on the Choice of Court Agreements and the 2007 Lugano Convention**

The rules on the 2007 Lugano Convention were analysed simultaneously with the rules of the Brussels *Ibis* Regulation, whereby the “old” Brussels I Regulation contains almost identical wording as the 2007 Lugano Convention concerning the rules on the prorogation of jurisdiction and on *lis pendens*. The compatibility between the Brussels *Ibis* Regulation and the 2007 Lugano Convention was exercised in the Section 1 of this Subchapter. Furthermore, it is necessary to examine the interplay of the rules on choice-of-court between the 2007 Lugano Convention and the Hague Convention on Choice of Court Agreements. This scenario may become relevant if the UK becomes a Contracting State to the 2007 Lugano Convention<sup>1020</sup> and the Hague Convention on Choice of Court Agreements.<sup>1021</sup>

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<sup>1019</sup> See *supra* Section 2.1.2., Subchapter III, Chapter One.

<sup>1020</sup> On the scenario favouring the 2007 Lugano Convention see HM Government, Providing a Cross-Border Civil Judicial Cooperation Framework – A Future Partnership Paper, Published 22 August 2017 available at <https://www.gov.uk/government/publications/providing-a-cross-border-civil-judicial-cooperation-framework-a-future-partnership-paper>, 9 par. 50; The future relationship between the United Kingdom and the European Union, Presented to Parliament by the Prime Minister by Command of Her Majesty, July 2018, par. 147, <https://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union>.

<sup>1021</sup> On the intention to participate in Hague Conventions to which the UK is already a party also in by virtue of our membership of the EU listing the Hague Convention on Choice of Court Agreements see: HM Government, Providing a Cross-Border Civil Judicial Cooperation Framework – A Future Partnership Paper, available at <<https://www.gov.uk/government/publications/providing-a-cross-border-civil-judicial-cooperation-framework-a-future-partnership-paper>>, p. 8. The UK has on 28 December 2018 signed and ratified the 2005 Hague Convention on Choice of Court Agreements, which applies to the UK by virtue of its membership of the EU but may cease to be applied for UK, when it leaves the EU on 29 March 2019. By ratifying the Hague Convention on Choice of Court Agreements on 28 December 2018, it seems that UK have reduced a transition period gap to two days it will enter into force for the UK on 1 April 2019: «*In accordance with Article 29 of the 2005 Hague Convention, the United Kingdom is bound by the Convention by virtue of its membership of the European Union, which approved the Convention on behalf of its Member States. The United Kingdom intends to continue to participate in the 2005 Hague Convention after it withdraws from the European Union. The Government of the United Kingdom and the European Council have reached political agreement on the text of a treaty (the “Withdrawal Agreement”) on the withdrawal of the United Kingdom from the European Union and the European Atomic Energy Community. Subject to signature, ratification and approval by the parties, the Withdrawal Agreement will enter into force on 30 March 2019 and end on 31 December 2020 or such later date as is agreed by the United Kingdom and the European Union (the “transition period”). In accordance with the Withdrawal Agreement, during the transition period, European Union law, including the 2005 Hague Convention, would continue to be applicable to and in the United Kingdom. The European Union and the United Kingdom have*

Article 26 of the Hague Convention on Choice of Court Agreements determines the relationship between the treaties through different “give way rules”. It must be borne in mind that all treaties are to be applied simultaneously; the give way rule should only resolve a real incompatibility between the conventions which lead to different results in a concrete situation.<sup>1022</sup> The give way rule is addressed only to the States which are party to all applicable treaties.<sup>1023</sup> For the purpose of this Section, the give way rules are analysed only in respect to the 2007 Lugano Convention, although such give way rules are in generally applicable to the all applicable conflicting treaties.

Paragraph 2 of Article 26 of the Hague Convention on Choice of Court Agreements contains the first give way rule and is applicable irrespective of the fact whether the conflicting convention was concluded before or after the Hague Convention on Choice of Court Agreements. Under this give way rule, the 2007 Lugano Convention prevails if:<sup>1024</sup>

- (i) All parties involved reside exclusively within the Contracting States to the Lugano Convention (*e.g.*, party A is a resident in Switzerland and party B is a resident in Norway, in case Switzerland and Norway would become a party to the Hague Convention on Choice of Court Agreements);
- (ii) Parties involved reside exclusively within the Contracting States to the Lugano Convention and in the Third States that are not Contracting States of the Hague

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*agreed that the European Union will notify other parties to international agreements that during the transition period the United Kingdom is treated as a Member State for the purposes of international agreements concluded by the European Union, including the 2005 Hague Convention. In the event that the Withdrawal Agreement is not ratified and approved by the United Kingdom and the European Union, however, the United Kingdom wishes to ensure continuity of application of the 2005 Hague Convention from the point at which it ceases to be a Member State of the European Union. The United Kingdom has therefore submitted the Instrument of Accession in accordance with Article 27(4) of the 2005 Hague Convention only in preparation for this situation. The Instrument of Accession declares that the United Kingdom accedes to the 2005 Hague Convention in its own right with effect from 1 April 2019. In the event that the Withdrawal Agreement is signed, ratified and approved by the United Kingdom and the European Union and enters into force on 30 March 2019, the United Kingdom will withdraw the Instrument of Accession which it has today deposited. In that case, for the duration of the transition period as provided for in the Withdrawal Agreement as stated above, the United Kingdom will be treated as a Member State of the European Union and the 2005 Hague Convention will continue to have effect accordingly. The Embassy of the United Kingdom of Great Britain and Northern Ireland to the Kingdom of the Netherlands avails itself of the opportunity to renew to the Ministry of Foreign Affairs of the Kingdom of the Netherlands the assurances of its highest consideration.»* See the notification by the Dutch Ministry of Foreign Affairs [https://verdragenbank.overheid.nl/nl/Verdrag/Details//011343/011343\\_Notificaties\\_13.pdf](https://verdragenbank.overheid.nl/nl/Verdrag/Details//011343/011343_Notificaties_13.pdf).

<sup>1022</sup> Hartley-Dogauchi Report, par. 267.

<sup>1023</sup> Hartley-Dogauchi Report, par. 268.

<sup>1024</sup> The Brussels Ibis Regulation prevails also where all parties involved reside exclusively in the Third States, this rule cannot cover also the 2007 Lugano Convention, since Article 23 of the 2007 Convention requires one of the parties to be domiciled in the State which is party to the Lugano Convention.

Convention on Choice of Court Agreements (e.g. party A is a resident in Switzerland and party B is a resident in Russia, in case Switzerland would become party to the Hague Convention on Choice of Court Agreements).

In contrast, the Hague Convention on Choice of Court Agreements prevails if at least one party resides in a Contracting State of the Hague Convention on Choice of Court Agreements that is not a Contracting State to the 2007 Lugano Convention (e.g., party A resides in Mexico). The *ratio* behind this rule is that only the States which are parties to the Hague Convention on Choice of Court Agreements, but not to the conflicting treaty, has an interest and the Hague Convention on Choice of Court Agreements prevails.<sup>1025</sup>

The “second rule giving way” to the 2007 Lugano Convention is determined in paragraph 3 of Article 26 of the Hague Convention on Choice of Court Agreements. It is addressed to the States of the 2007 Lugano Convention which would become parties to the Hague Convention on Choice of Court Agreements and towards a State of the 2007 Lugano Convention which would not be party to the Hague Convention on Choice of Court Agreements in order not to violate the obligation towards the latter State imposed by the 2007 Lugano Convention.<sup>1026</sup> This second give way rule applies only to the prior treaties, *i.e.*, it applies in respect to the States which are parties to the 2007 Lugano Convention and which will ratify the Hague Convention on Choice of Court Agreements in the future. However, Article 26 par. 3 of the Hague Convention on Choice of Court Agreements would not apply to the possible future amendments to the 2007 Lugano Convention, for example, amendments which would bring the contents of the 2007 Lugano Convention in line with the Brussels *Ibis* Regulation, “*with regard to any new inconsistencies introduced by it*”.<sup>1027</sup>

The “third give way” rule concerns only question on the recognition and the enforcement of judgments given by a court of a Contracting State to the 2007 Lugano Convention in other Contracting State to the 2007 Lugano Convention.<sup>1028</sup> However, the judgment cannot be recognised or enforced to a lesser extent than under the Hague Convention on Choice of Court Agreements.

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<sup>1025</sup> Hartley-Dogauchi Report, par. 273.

<sup>1026</sup> Hartley-Dogauchi Report, par. 280.

<sup>1027</sup> Hartley-Dogauchi Report, par. 285 and footnote n. 317.

<sup>1028</sup> If both Contracting States to the 2007 Lugano Convention will become parties to the Hague Convention on Choice of Court Agreements.

Since the interplay between the rules on jurisdiction agreements and on *lis pendens* contained in the Brussels *Ibis* Regulation and in the Hague Convention on Choice of Court Agreements were analysed in Section 2 of this Subchapter, it is only necessary to focus now on the interplay of the “old” non-amended rules of the Brussels I-2007 Lugano regime and the Hague Convention on Choice of Court Agreements, *i.e.*, the rule on substantive validity, the “first seized” *lis pendens*, and the restrictive approach as to the domicile of one of the parties in a Contracting State. All examples demonstrated further are built on the hypothesis that the 2007 Lugano States ratify the Hague Convention on Choice of Court Agreements.

### 3.1. Substantive Validity

The *status quo* of the question on substantive validity as provided in the 2007 Lugano Convention must be remembered.<sup>1029</sup>

An explicit rule on the substantive validity of the jurisdiction agreement in the 2007 Lugano Convention is absent. There are two central doctrinal theses in the context of the Brussels I Regulation which may be extended to the 2007 Lugano Convention. The first doctrine is based on the interpretation of the ECJ regarding the formal validity of the jurisdiction clauses which extends this interpretation also to the questions of the substantive validity.<sup>1030</sup> The second doctrine is based on the reference to the national law which determines the substantive validity of the jurisdiction clauses.<sup>1031</sup> It is not clear whether Article 23 of the 2007 Lugano represents the independent regulation of the formation of the choice-of-court agreement, or if the referral to the domestic is allowed. Therefore, the solutions in the Contracting States may differ on the basis of various hypotheses leading to the application of *lex fori* or *lex*

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<sup>1029</sup> On details see *supra* Section 8.1., Subchapter I of this Chapter, concerning the substantive validity according to the Brussels Regulation

<sup>1030</sup> ECJ, Case 24-76, *Estasis Salotti*, par. 7; C-150/80, *Elefanten Schuh*, par. 25; C-159/97, *Trasporti Castelletti*, par. 49; C-116/02, *Gasser*, par. 51; Case C-116/02, *Gasser*, Opinion of Advocate General Leger, 9 September 2003, par. 78.

<sup>1031</sup> The ECJ referred in a number of cases to the national law, see ECJ, Case C-214/89, *Powell Duffryn*, par. 13, 21; Case 313/85, *SpA Iveco Fiat*, par. 7-8; Case, C-269/95, *Benincasa*, par. 31; C-387/98, *Coreck Maritime*, par. 24. See also Case C-150/80, *Elefanten Schuh*, The Opinion of Advocate General Sir Gordon Slynn, 20 May 1981, p. 1699, where the Advocate General did not exclude the existence of “different” validity.

*causae*.<sup>1032</sup> The divergences between the Contracting States might result in materially valid jurisdiction agreement in one Contracting State and invalid in other Contracting State.<sup>1033</sup>

The substantive validity according to Article 5 and 6 of the Hague Convention on Choice of Court Agreements is governed by the law of the court of the chosen State including conflict of laws rules.<sup>1034</sup> However, the seized non-designated State must consider the question of the capacity of the parties under the *lex fori*, including conflict-of-laws rules according to Article 6 lett. b) of the Hague Convention on Choice of Court Agreements, and simultaneously under the law of the chosen court according to Article 6 lett. a) of the Hague Convention on Choice of Court Agreements.<sup>1035</sup>

1) *The parties designate a court in Mexico in an exclusive jurisdiction agreement. Both, the Mexican court and the Swiss court are seized.*

The Mexican court applies a rule on substantive validity according to Article 5 of the Hague Convention on Choice of Court Agreements and applies conflict-of-laws rule of the Mexican court (the law of the chosen court).

The Swiss court applies the conflict-of-laws rule on substantive validity according to Article 6 lett. a) of the Hague Convention on Choice of Court Agreements which leads to the conflict-of-laws rules of the Mexican court. However, in the absence of the explicit rule in Article 23 of the 2007 Lugano Convention, the Swiss court may apply *lex fori* or *lex causae*. In case the application of such a law would lead to different results in a concrete situation,<sup>1036</sup> Article 26 par. 2 of the Hague Convention on Choice of Court Agreements must resolve the incompatibility:

a) The 2007 Lugano Convention prevails if for examples, (i) party A is resident in Norway and party B in is resident Switzerland; or (ii) if party A is resident in Norway and party B in Russia;

<sup>1032</sup> On the solutions adopted by the Member States see Heidelberg Report: Cyprus, Greece, and Ireland apply *lex fori*. See Study JLS/C4/2005/03 “Compilation of All National Reports, Questionnaire No 3: Legal Problem Analysis”, [http://ec.europa.eu/civiljustice/news/docs/study\\_bxl1\\_compilation\\_quest\\_3\\_en.pdf](http://ec.europa.eu/civiljustice/news/docs/study_bxl1_compilation_quest_3_en.pdf), Austria, Estonia, Germany, Hungary, Latvia, Luxemburg, Malta, the Netherlands, Poland, Slovakia, and Spain, see Study JLS/C4/2005/03 “Compilation of All National Reports, Questionnaire No 3: Legal Problem Analysis”, [http://ec.europa.eu/civiljustice/news/docs/study\\_bxl1\\_compilation\\_quest\\_3\\_en.pdf](http://ec.europa.eu/civiljustice/news/docs/study_bxl1_compilation_quest_3_en.pdf), pp. 388–95 Italy, Slovenia see Study JLS/C4/2005/03 “Compilation of All National Reports, Questionnaire No 3: Legal Problem Analysis”, [http://ec.europa.eu/civiljustice/news/docs/study\\_bxl1\\_compilation\\_quest\\_3\\_en.pdf](http://ec.europa.eu/civiljustice/news/docs/study_bxl1_compilation_quest_3_en.pdf), pp. 388–95.

<sup>1033</sup> Heidelberg Report, par. 377.

<sup>1034</sup> Hartley-Dogauchi Report, par. 125 and note no 158.

<sup>1035</sup> Hartley-Dogauchi Report, par. 150. Similarly, see R. A. BRAND, P. HERRUP, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents*, op. cit., p. 91.

<sup>1036</sup> Hartley-Dogauchi Report, par. 267

b) The Hague Convention on Choice of Court Agreements prevails if, for example, party A is resident in Norway and party B in Mexico.

### 3.2. Parallel Proceedings

As stated in Section 7, Subchapter II of this Chapter, the Hague Convention on Choice of Court Agreements does not establish the rule on *lis pendens* as does the Brussels-Lugano Regime. According to Article 6 of the Hague Convention on Choice of Court Agreements the non-designated court is obliged to suspend or dismiss proceedings unless one of six exceptions applies. This rule does not constitute a ground for jurisdiction when one of the exceptions applies – the decision whether to exercise its jurisdiction or not is subject to the national law.<sup>1037</sup>

Article 27 of the 2007 Lugano Convention requires any Member State court other than the one first seized to stay its proceedings on its own motion in favour of the first seized court of the Contracting State. This *lis pendens* rule in the context of the Brussels I Regulation was criticized because it applied to jurisdiction agreements as confirmed by the ECJ in C-116/02, *Gasser* and was often perceived as a legitimization of “Torpedo” actions.<sup>1038</sup> Although the Brussels *Ibis* Regulation was modified and a new *lis pendens* rule was laid down in Article 31 par. 2 of the Brussels *Ibis* Regulation gives precedence to the chosen court, the 2007 Lugano Convention remains unchanged. However, the following case No 1 b) demonstrates that the Torpedo Action would be limited if the Contracting States to the 2007 Lugano Convention would accede to the Hague Convention on Choice of Court Agreements.

1) *The parties concluded an exclusive jurisdiction agreement in favour of the Swiss courts. Party A brought an action in front of the Norwegian courts as the first, and party B brought an action in front Swiss of the courts as second.*

The Swiss court is obliged to hear the case according to Article 5 of the Hague Convention on Choice of Court Agreements, but according to Article 27 of the 2007 Lugano Convention, it must stay its proceedings as a second seized court. The Norwegian court should suspend or dismisses the

<sup>1037</sup> Hartley-Dogauchi Report, par. 146

<sup>1038</sup> J. VLEK, *Lis Pendens, Choice-of-court Agreements and Abuse of Law Under Brussels Ibis*, *op. cit.*, p. 301.

proceedings according to Article 6 of the Hague Convention on Choice of Court Agreements, but according to Article 27 of the 2007 Lugano Convention, it should decide on its jurisdiction as the first. In consequence, the rule is conflicting for both courts. Article 26 par. 2 of the Hague Convention on Choice of Court Agreements should resolve the incompatibility:

- i) The 2007 Lugano Convention prevails if for example, (i) party A is resident in Norway and party B in is resident Switzerland; or (ii) if party A is resident in Norway and party B in Russia. In consequence, the Swiss court must stay its proceedings, and the Norwegian court should decide on its jurisdiction as the first seized in accordance with Article 27 of the 2007 Lugano Convention.
- ii) The Hague Convention on Choice of Court Agreements prevails if, for example, party A is resident in Norway and party B in Mexico. In consequence, the Swiss court must hear the case according to Article 5 of the Hague Convention on Choice of Court Agreements and the Norwegian court must suspend the proceedings according to Article 6 of the Hague Convention on Choice of Court Agreements.

As to the parallel proceedings between the Contracting States to the Hague Convention on Choice of Court Agreements and the 2007 Lugano Convention, it can be referred to the Section 2.4. of this Subchapter and to the practical examples therein where Articles 33 and 34 of the Brussels *Ibis* Regulation are not applicable. The Hague Convention on Choice of Court Agreements does not distinguish between the parallel proceedings among the Contracting States to other treaties and the Contracting States to the Hague Convention on Choice of Court Agreements. The 2007 Lugano Convention which should “pay due account”<sup>1039</sup> to the different interpretation of the ECJ concerning derogation from the jurisdiction of the Member States on the basis of choice-of-court agreements in favour of Third States courts (*Coreck*, case C–387/98; *Lugano Opinion 1/03*, *Mahamdia*, case C–154/11; and *Owusu*), leaves the questions without any answers.

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<sup>1039</sup> Protocol 2 on the uniform interpretation of the 1988 Lugano Convention.

### CHAPTER THREE. LEGAL INSTRUMENTS GOVERNING THE CHOICE-OF-COURT AGREEMENTS IN FAMILY AND SUCCESSION MATTERS IN THE EU

Almost five million persons immigrated to the European Union (“EU”) during 2015, more than two million of them are Third States citizens, and more than one million of EU citizens immigrated to a different EU Member State.<sup>1040</sup> Increased immigration results in a growing number of international couples. A study from 2012<sup>1041</sup> demonstrates that the countries in which the immigration rate is lower results in a lower value of the “mixed marriages”.<sup>1042</sup> According to this study, on average one in twelve married persons was in a mixed marriage and persons born from the foreign marriage tend to enter into “mixed marriages” much more than the native-born persons.<sup>1043</sup> In general, two million marriages and one hundred thousand divorces took place in the EU in 2011.<sup>1044</sup> In consequence, the EU law should facilitate the personal life of cross-border families by providing for a transparent and predictable framework of family law for the international couples. Increased immigration also impacts cross-border succession proceedings. Therefore, the uniform jurisdiction rules, which should remove any obstacles for the cross-border family and succession disputes, should regulate the status of persons, parental responsibility matters, maintenance, property matters, and succession matters.

As stated in Chapter One, Subchapter I, family law is prevalently characterized by substantive mandatory rules. Succession law also has significant limitations laid down by the national law, which, for example, protect the testator’s closest relatives. Indeed, through the selection of the court (where conflict-of-laws rules are not harmonized or unified), the parties derogate from the mandatory rules of the family and succession law of the otherwise competent court.

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<sup>1040</sup> On the data see Eurostat regarding migration and migrant population statistics: [http://ec.europa.eu/eurostat/statistics-explained/index.php/Migration\\_and\\_migrant\\_population\\_statistics](http://ec.europa.eu/eurostat/statistics-explained/index.php/Migration_and_migrant_population_statistics).

<sup>1041</sup> G. LANZIERI, *Merging populations. A look at marriages with foreign-born persons in European countries*, Eurostat, Statistics in Focus, 26 June 2012, available at: <https://emnbelgium.be/news/eurostat-statistics-marriages-foreign-born-persons-european-countries>.

<sup>1042</sup> “Mixed marriage” is defined as «... *mixed marriages are defined as those in which one partner is native-born and the other was born abroad.*».

<sup>1043</sup> 43% of married foreign-born men and 46.9% of married foreign-born woman in 30 European States (27 EU countries and 3 EFTA States) concluded “mixed marriages”. G. Lanzieri, *Merging populations. A look at marriages with foreign-born persons in European countries*, Eurostat, Statistics in Focus, 26 June 2012, available at: <https://emnbelgium.be/news/eurostat-statistics-marriages-foreign-born-persons-european-countries>, p. 1 and 2.

<sup>1044</sup> On the data see Eurostat regarding marriages and divorces: [http://ec.europa.eu/eurostat/statistics-explained/index.php/Marriage\\_and\\_divorce\\_statistics](http://ec.europa.eu/eurostat/statistics-explained/index.php/Marriage_and_divorce_statistics).



Therefore, it may be deduced that the jurisdiction agreements in cross-border family and succession disputes are permitted only to a precise extent, since the potential scale of the derogation from the mandatory rules of the otherwise competent courts are restricted, and sometimes party autonomy is excluded. Moreover, the effort to protect the weaker parties in the family law disputes requires an even higher level of mandatory regulations which play an essential role in the legal process of EU family law.

In the first place, it must be borne in mind that family matters are fragmented in the different EU regulations covering the different scope of their application. In consequence, the parties entering into a jurisdiction agreement should know that two or more agreements, which prescribe different conditions, must be concluded at the same time. However, choice-of-court agreements are not permitted in all family matters, or, are not binding on the court. The rule on the choice-of-court agreements, which is subject to the discretionary power of the designated court, is permitted for parental responsibility matters under the Brussels IIa Regulation. It was expected that the new rule on jurisdiction agreements for divorce, legal separation, or marriage would be proposed in the 2016 Proposal for a Recast of the Brussels IIa Regulation. Unfortunately, the Brussels IIa Regulation maintains the *status quo* in this matter. At least, the “true” rule on the choice-of-court agreements is provided only in the Maintenance Regulation, but it is rejected for the maintenance of a child under 18. Also, both new Regulations on the Property Regime gives priority to the concentration of the proceedings in divorce, legal separation, or marriage with the proceedings regarding property, when the agreement is required under the specific circumstances. Lastly, in succession law, choice-of-court agreements represent only a “mechanism” designed to ensure that the Member State court applies their own law.<sup>1045</sup> All these rules are examined in this chapter.

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<sup>1045</sup> See Recital No 27 and 28 of the Succession Regulation.

## I. Choice-of-Court Agreements in Family Matters

### 1. Historical Background

The Brussels IIa Regulation is the cornerstone of the EU judicial cooperation in matrimonial matters and parental responsibility matters.<sup>1046</sup> The Brussels IIa Regulation has the same basic framework as the Brussels Convention and its successor - the Brussels I Regulation, and the Brussels Ibis Regulation.<sup>1047</sup> The rationale was that the European integration “*can no longer be purely economic, rather it must now inevitably address issues specifically affecting the life of the European citizen*”.<sup>1048</sup> Before the Brussels II Convention was drafted, the ECJ case law demonstrated some problems caused by judgments on divorces rendered by one Member State court and subsequently not recognized in another Member State.<sup>1049</sup> Also, at that time, the Convention on the Recognition of Divorces and Legal Separations concerning recognition of the decisions on cross-border divorces and legal separations was drafted by the Hague Conference as a single convention, but it was ratified or adhered to by only eight of the Member States.<sup>1050</sup> The extension of the scope of the Brussels Convention was for the first

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<sup>1046</sup> Commission Staff Working Document. Impact Assessment. Accompanying the document Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), 30 June 2016, SWD/2016/0207 final -, 30 June 2016/0190 (CNS), p. 6.

<sup>1047</sup> See Explanatory Report on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (approved by the Council on 28 May 1998) prepared by Dr Alegria Borrás Professor of Private International Law University of Barcelona, OJ C 221, 16 July 1998, (“Borrás Report”), which in point 6 is provided: *«The initial purpose of the Convention was to extend the 1968 Brussels Convention to cover matrimonial matters. Hence the starting-point for the preparation of this Convention lies in the text of the 1968 Convention which is cited in the preamble. It would have been impossible to disregard such an important background text which has been demonstrably successful and is accompanied by extensive case-law from the Court of Justice of the European Communities, making it possible to pinpoint its most controversial features in the section applicable to this text. Nevertheless, the differing matters covered in both texts result in significant differences on a number of points (e. g. the fact that there is no general forum and the absence of any hierarchy in the grounds of jurisdiction) whereas in other areas the rules are more convergent (as for lis pendens and automatic recognition). The outcome is therefore a separate convention although the objectives pursued are the same: to unify the rules on international jurisdiction and to facilitate international recognition and enforcement of judgments.»*

<sup>1048</sup> P. MCELEAVY, *The Brussels II Regulation: How the European community has moved into family law*, *The International and Comparative Law Quarterly*, 51:4 (2002), p. 890.

<sup>1049</sup> ECJ, Case 145/86, *Horst Ludwig Martin Hoffmann v Adelheid Krieg*, 4 February 1988, ECLI:EU:C:1988:61. See also Jenard Report, p. 10-11. On further comments see S. L. UBERMAN, *The Brussels II Convention: A Tool Necessary to Enforce Individual Rights Relating to Matrimonial Matters within the European Union*, *Suffolk Transnational Law Review*, (1999), p. 169.

<sup>1050</sup> Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations entered into force on 24 August 1975. In 1992, only Denmark, Finland, Italy, Luxembourg, Netherlands, Portugal, Sweden, and UK have ratified or adhered to the Convention. Also, the Czech Republic, Poland and Slovakia ratified or adhered to Convention before they entered into the EU and Estonia adhered to the Convention in 2002. On more details concerning the Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations

time suggested by the German delegation to the European Community Judicial Cooperation Working Group in 1992.<sup>1051</sup> A questionnaire, which was circulated by the United Kingdom Presidency, enabled an exchange of views on jurisdiction in divorce and legal separation.<sup>1052</sup> At the same time, the European Group on Private International Law drafted a proposal for a convention on jurisdiction and recognition and enforcement of judgments in respect of marriage, matrimonial regimes, divorce, filiation, and succession.<sup>1053</sup> This proposal was taken into account for the next draft of the Brussels II Convention with the exception of succession and filiation, which were dropped due to many technical difficulties.<sup>1054</sup> In 1994, a first draft covered only divorce, legal separation, and marriage annulment, but in 1995, the French and Spanish delegations proposed to extend the scope of the draft of the Brussels II Convention to custody and related orders since the divorce court would normally have the competence to deal with such litigation.<sup>1055</sup> For the first time, the new rule on jurisdiction respecting the party autonomy in family law was introduced to a certain extent. Article 3 par. 2 of the Brussels II Convention provided that where the child was not habitually resident in the Member State, which exercised jurisdiction on an application for divorce, legal separation, or marriage annulment by virtue of Article 2, the courts of that State had jurisdiction in such a matter. Such prorogation of jurisdiction was possible only when all the following requirements were met: (i) the child was habitually resident in one of the Member States; (ii) at least one of the spouses had parental responsibility in relation to the child; (iii) the jurisdiction of the court had been accepted by the spouses; and (iv) such jurisdiction was in the best interests of the child. The text of this provision, which provided for concurrent jurisdiction of the court of divorce, legal separation, or annulment of the marriage, was

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Convention see P. Bellet, B. Goldman. Explanatory Report on the 1970 Hague Divorce Convention, HCCH Publications, 1970; A. E. ANTON, *The Recognition of Divorces and Legal Separations*, International and Comparative Law Quarterly, (1969), pp. 620-643; P. BEAUMONT, G. MOIR, *Brussels Convention II: A New Private International Law Instrument in Family Matters for the European Union or the European Community*, European law review, 20:3 (1995), p. 272-73.

<sup>1051</sup> P. MCELEAVY, *The Brussels II Regulation: How the European community has moved into family law*, *op. cit.*, p. 891.

<sup>1052</sup> Borrás Report, par. 7.

<sup>1053</sup> See European Group on Private International Law, Proposal for a Convention concerning jurisdiction and the enforcement of judgments in family and succession matters, 1993, Heidelberg, available at: <https://www.gedip-egpil.eu/documents/gedip-documents-3pe.html>.

<sup>1054</sup> P. MCELEAVY, *The Brussels II Regulation: How the European community has moved into family law*, *op. cit.*, p. 892.

<sup>1055</sup> There has been a strong opposition to the inclusion of custody matters, in particular from the United Kingdom, see P. MCELEAVY, *The Brussels II Regulation: How the European community has moved into family law*, *op. cit.*, p. 893.

inspired by Article 10 par. 1 of the 1996 Hague Convention on parental responsibility and protection of children and aimed at guaranteeing the compatibility between these two legal rules.<sup>1056</sup> Article 10 par. 1 of the 1996 Hague Convention on parental responsibility and protection of children compared to Article 3 par. 2 of the Brussels II Convention, required also that one of the parents habitually reside in that State at the time of the commencement of the proceedings and the law of the seized court had to provide so.<sup>1057</sup> Despite the conflicts on the inclusion of custody matters into the Brussels II Convention,<sup>1058</sup> the Brussels II Convention was adopted in May 1998,<sup>1059</sup> but it was never ratified by the Member States. The reason was that in the meantime, the Treaty of Amsterdam was signed in 1997 and was due to come into force on 1 May 1999. The text of the Brussels II Convention provided that the legal basis is Article K.1(6), judicial cooperation in civil matters, and it was transferred from the third pillar to the Title IV of the first pillar (European Community). Thus, the Treaty of Amsterdam opened the door to increased Community competence and facilitated the adoption of the regulations.<sup>1060</sup>

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<sup>1056</sup> Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children of 19 October 1996 (“1996 Hague Convention on parental responsibility and protection of children”). According to Article 15 of the Hague Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants (1961 Hague Convention on protection of infants) enabled to the Contracting States to make a reservation where «*Each Contracting State may reserve the jurisdiction of its authorities empowered to decide on a petition for annulment, dissolution or modification of the marital relationship of the parents of an infant, to take measures for the protection of his person or property.*». Due to the fact that the majority of the States had reserved their competence, the divorce court did not have the jurisdiction to take measures of protection for the child, unless it coincides with one of the *fora* provided in the 1961 Hague Convention on protection of infants. In consequence, Article 8 and 9 of the 1996 Hague Convention on parental responsibility and protection of children enables the divorce court to take measures of protection for the child only on a subsidiary basis. See P. Lagarde, Explanatory Report on the 1996 Hague Child Protection Convention, HCCH Publications, 1998, p. 563, Borrás Report, par. 38.

<sup>1057</sup> On the practical examples concerning Article 10 of the 1996 Hague Convention on parental responsibility and protection of children see: Practical Handbook on the Operation of the 1996 Child Protection Convention, HCCH Publications, 2014.

<sup>1058</sup> House of Lords Select Committee on the European Communities rejected extension of the Brussels II Convention to child matters in the House of Lord Report (1997), par. 56 and 57.

<sup>1059</sup> The EU negotiations were compatible with parallel developments within the 1996 Hague Convention on parental responsibility and protection of children. See P. McELEVAY, *The Brussels II Regulation: How the European community has moved into family law*, *op. cit.*, p. 893. Nowadays, the 1996 Hague Convention on parental responsibility and protection of children has 48 Contracting States, all EU Member States are party to that convention), on the status table see: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=70>.

<sup>1060</sup> W. KENNETT, *The Treaty of Amsterdam*, *The International and Comparative Law Quarterly*, 48:2 (1999), p. 465-466; W. KENNETT, *Enforcement of Judgments in Europe*, Oxford University Press, 2000, p. 12; J. BASEDOW, *The Communitarisation of Private International Law – Introduction*, *Rabels Zeitschrift fuer auslaendisches und internationales Privatrecht*, 73:3 (2009), p. 455-460; J. ISRAËL, *Conflicts of Law and the EC after Amsterdam a Change for the Worse?*, *Maastricht Journal of European and Comparative Law*, 81(2000), p. 93 et seq.

A few days after the Treaty of Amsterdam came into force, the Commission issued a Proposal on the Brussels II Regulation, which practically incorporated a text of the Brussels II Convention.<sup>1061</sup> The Brussels II Regulation was adopted on 29 May 2000, and became applicable in fifteen Member States on 1 March 2001.<sup>1062</sup> Article 3 par. 2 of the Brussels II Regulation determined the rule for the “prorogation of jurisdiction” of the divorce *forum* to the *forum* with jurisdiction over parental responsibility matters for marital children. This approach mirrored the same wording as Article 3 par. 2 of the Brussels II Convention.

The Brussels II Regulation was criticized due to its unfair treatment of the non-marital children.<sup>1063</sup> Firstly, the Commission proposed a separate proposal concerning parental responsibility<sup>1064</sup> and thus, extending the scope of the Brussels II Regulation to non-marital children, regardless of the nature of the relationship between the parents, which was to protect the children’s best interests.<sup>1065</sup> However, it was assumed that it would be better to replace the Brussels II Regulation with a single regulation.<sup>1066</sup> In consequence, the Commission submitted a proposal covering matrimonial matters and matters of parental responsibility which resulted in the adoption of the Brussels IIa Regulation.<sup>1067</sup> By virtue of Article 72 of the Brussels IIa Regulation, the Brussels IIa Regulation entered into force on 1 August 2004, and is applicable from 1 March 2005. Article 12 par. 3 of the Brussels IIa Regulation should

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<sup>1061</sup> Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for joint children, COM/99/0220 final, 31 August 1999.

<sup>1062</sup> Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, OJ L 160, 30 June 2000. The UK communicated the intention to opt-in, but Denmark did not participate according to the Protocol No 22 on the Position of Denmark (at that time, Protocol No 5). On the temporal scope of application see Article 46 of the Brussels II Regulation.

<sup>1063</sup> On the implications see: M. JÄNTERÄ-JAREBORG, *A European Family Law for Cross-Border Situations—Some Reflections Concerning the Brussels II Regulation and its Planned Amendments*, Yearbook of Private International Law, 4 (2002), p. 67, 72.

<sup>1064</sup> Proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in matters of parental responsibility, COM(2001) 505 final, 27 November 2001.

<sup>1065</sup> Publications Office, Summaries of EU legislation, date of last review – 23 July 2002, available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=LEGISSUM:133166>.

<sup>1066</sup> M. NÍ SHÚILLEABHÁIN, *Ten Years of European Family Law: Retrospective Reflections from a Common Law Perspective*, International & Comparative Law Quarterly, 59:4 (2010), p. 1024, footnote 21.

<sup>1067</sup> Proposal for a Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility repealing Regulation (EC) No 1347/2000 and amending Regulation (EC) No 44/2001 in matters relating to maintenance, COM(2002)0222 final, 27 August 2002.

guarantee the non-discriminatory treatment of both marital children and children born out of the marriage.<sup>1068</sup>

Article 3 of the Brussels IIa Regulation was criticised since it opened the door for the phenomena of *forum shopping*. The combination of the “court first seized” *lis pendens* rule and rule on the alternative grounds of jurisdiction,<sup>1069</sup> may lead to abusive procedural tactics,<sup>1070</sup> which is caused mainly by the differences between the national procedural and substantive rules.<sup>1071</sup> In consequence, in 2006 it was proposed that the Brussels IIa Regulation should contain rules on the law applicable to divorce.<sup>1072</sup> This proposal on “Rome III Regulation”, which should simultaneously cover the applicable law and the rules on jurisdiction laid down in the Brussels IIa Regulation, has not been accepted due to the significant opposition from specific Member States.<sup>1073</sup> It is worth mentioning that this

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<sup>1068</sup> ECJ, Case C-656/13, *L v. M*, 12 November 2014, ECLI:EU:C:2014:2364, par. 50.

<sup>1069</sup> On the explanation of the lack of hierarchy, see: Borrás Report, par. 28, or Case C-168/08, *Laszlo Hadadi (Hadady) v Csilla Marta Mesko, épouse Hadadi (Hadady)*, 16 July 2009, ECLI:EU:C:2009:474, the Opinion of Advocate General Kokott, 12 March 2009, ECLI:EU:C:2009:152, par. 58, 59, confirming the flexible choice of jurisdiction. For the need of establishment of a hierarchy between jurisdictional grounds, see Responses to the Questionnaire of the project EUFam’s available at: <http://www.eufams.unimi.it/2017/06/01/report-outcomes-online-questionnaire/>, almost 62% of respondents answered that the efficacy of Article 3 of the Brussels IIa Regulation should be improved by establishing a hierarchy among the existing grounds.

<sup>1070</sup> See *Agata Rapisarda v Ivan Colladon* [2014] EWFC 35. This English case concerned 180 cases of fraudulent forum shopping. A party in each case utilised the same address in the UK owned by an Italian company in order to obtain jurisdiction for divorce in England. All the divorces were declared void. See also *CC v NC* [2014] EWHC 703 (Fam); *Wai FoonTan v Weng Kean Choy* [2014] EWCA Civ 251; *W Husband v W Wife* [2010] EWHC 1843 (Fam); *E v E* [2015] EWHC 3742 (Fam); *EA v AP* [2013] EWHC 2344 (Fam). On the forum shopping in family matters see: ECJ, Case C-168/08, *Laszlo Hadadi (Hadady) v Csilla Marta Mesko, épouse Hadadi (Hadady)*, 16 July 2009, ECLI:EU:C:2009:474, par. 57; M. NÍ SHÚILLEABHÁIN, *Cross-border divorce law. Brussels II bis*, Oxford University Press, 2010, pp. 149; J. MEEUSEN, *System shopping in European private international law in family matters*, in J. MEEUSEN, M. PERTEGAS, G. STRAETMANS, F. SWENNEN (eds), *International Family Law for the European Union*, Intersentia, 2007, pp. 239; N. DENTHLOFF, *Arguments for the Unification and Harmonisation of Family Law in Europe*, in K. BOELE-WOELKI, *Perspectives for the Unification and Harmonisation of Family Law in Europe*, Intersentia, 2003, p. 51. On the possibility of *forum shopping* which should be resolved by the new regulation see: See A. BORRÁS, *From Brussels II to Brussels II bis and Further*, in K. BOELE-WOELKI, C. GONZÁLEZ BEILFUSS (eds), *Brussels II bis: Its Impact and Application in the Member States European Family Law Series No 14*, Intersentia, 2007, p 8.

<sup>1071</sup> On the differences in divorce law among the Member States see K. BOELE-WOELKI, *To be, or not to be: enhanced cooperation in international divorce law within the European Union*, *Victoria University of Wellington Law Review*, 39 (2008), p. 781.

<sup>1072</sup> Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, COM/(2006/0399 final, 17 July 2006. See F. POCAR, *Osservazioni a margine della proposta di regolamento sulla giurisdizione e la legge applicabile al divorzio*, in STEFANIA BARIATTI (ed), *La Famiglia nel diritto internazionale privato comunitario*, Giuffrè, 2007, p. 267-278.

<sup>1073</sup> For example, UK or Sweden, see A. FIORINI, *Rome III – Choice of Law in Divorce: Is the Europeanization of Family Law Going Too Far?*, *International Journal of Law, Policy and the Family*, 22 (2000), p. 181; M. JÄNTERÄ-JAREBORG, *Jurisdiction and Applicable Law in Cross-Border Divorce Cases in Europe*, in J.

proposal also addressed the question of choice-of-court clauses in matters concerning divorce.<sup>1074</sup> Consequently, the “true” Rome III Regulation, which covers the law applicable to divorce and legal separation,<sup>1075</sup> has been adopted and may be perceived as a partial solution to abusive procedural tactics.<sup>1076</sup> Unfortunately, the Brussels IIa Regulation remained untouched concerning the proposed rule on the choice of forum.<sup>1077</sup>

In 2005, a draft of the Maintenance Regulation was issued<sup>1078</sup> and resulted in the adoption of the Maintenance Regulation, which covers jurisdiction, applicable law, recognition and enforcement of decisions, and cooperation in matters relating to maintenance obligations. The Maintenance Regulation, which replaced the Brussels I Regulation concerning jurisdiction in maintenance matters is applicable from 18 June 2011. The first model for the draft of the rule on choice-of-court agreements was Article 23 of the Brussels Regulation. Article 3 of the Proposal of the Maintenance Regulation proposed to enable agreement on jurisdiction of any

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BASEDOW, H. BAUM, Y. NISHITANI (eds), *Japanese and European Private International Law in Comparative Perspective* Mohr Siebeck, Tübingen, 2008, p. 338 and 340; M. NÍ SHÚILLEABHÁIN, *Cross-Border Divorce Law: Brussels II Bis, op. cit.*, par. 1.11. On the discussions concerning the proposal see T. DE BOER, *The Second Revision of the Brussels II Regulation: Jurisdiction and Applicable Law*, in K. BOELE-WOELKI, T. SVERDRUP (eds), *European Challenges in Contemporary Family Law* European Family Law Series No 19, Intersentia, 2008, p. 321-341.

<sup>1074</sup> See Article 3a of the Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, COM(2006)0399 final, 17 July 2006.

<sup>1075</sup> On the general comments to the Rome III Regulation see: I. VIARENGO, *Il Regolamento UE sulla legge applicabile alla separazione e al divorzio e il ruolo della volontà delle parti*, *Rivista di diritto internazionale privato e processuale*, (2011), p. 601 *et seq.*; I. VIARENGO, *The Rome III Regulation in legal practice: case law and comments*, *ERA Forum* (2014), p. 547 *et seq.*; P. FRANZINA, *The law applicable to divorce and legal separation under Regulation (EU) no. 1259/2010 of 20 December 2010*, *Cuadernos de Derecho Transnacional* (2011), p. 85 *et seq.*; P. FRANZINA, *L'autonomia della volontà nel regolamento sui conflitti di leggi in materia di separazione e divorzio*, *Rivista di diritto internazionale*, (2011), p. 489 *et seq.*; J. BASEDOW, *European Divorce law. Comments on the Rome III Regulation*, in *Confronting the Frontiers of Family and Succession Law*, Liber Amicorum Walter Pintens, Intersentia (2012), p. 135–150; K. BOELE-WOELKI, *For Better or for Worse: The Europeanization of International Divorce Law*, *Yearbook of Private International Law*, 12 (2010), p. 1–26.

<sup>1076</sup> However, the Rome III Regulation is applicable only in 16 Member States. On the opposite approach where the Rome III Regulation may increase abusive tactics see A. BONOMI, *Litigation in family matters: is it possible to reconcile uniformity and application of lex fori?*, in *International Family Law*, Special Issue in Honour of William Duncan, 2012, p. 11, according to the author the jurisdictional grounds contained in Article 3 of the Brussels IIa Regulation are same as in the Rome III Regulation; as a consequence, the court may apply *lex fori* that will encourage even more forum shopping. See also M. JÄNTERÄ-JAREBORG, *Unification of international family law in Europe*, in BOELE-WOELKI, *Perspectives for the Unification and Harmonisation of Family Law in Europe*, Intersentia, 2003, p. 207.

<sup>1077</sup> The choice of *forum* was welcomed and one of the scenarios presumed was that the Brussels IIa Regulation would be revised in respect of choice-of-court clauses, see K. BOELE-WOELKI, *To be, or not to be: enhanced cooperation in international divorce law within the European Union*, *op. cit.*, p. 784, 788. For further details see *infra* Section 2.6. of this Subchapter.

<sup>1078</sup> Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, COM(2005)0649 final, 15 December 2005 (“Proposal of the Maintenance Regulation”).

court of a Member State if one or more parties were habitually resident in any Member State. However, the modified text of Article 3 of the Proposal of the Maintenance Regulation, which limited the choice of the parties, was embodied in Article 4 of the Maintenance Regulation.<sup>1079</sup>

At the same time, the Commission adopted Green Paper on Conflicts of Laws in Matters Concerning Matrimonial Property Regimes.<sup>1080</sup> In 2011, a Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and a Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships were issued.<sup>1081</sup> Due to the impossibility of reaching unanimity for the adoption of the two compromise texts of the Proposals,<sup>1082</sup> a group of the Member States addressed requests to the Commission to establish enhanced cooperation in the area of the property regimes of international couples.<sup>1083</sup> After the Council authorised such enhanced cooperation,<sup>1084</sup> both regulations were promulgated using the original proposals<sup>1085</sup> (and do not mirror the political compromises)<sup>1086</sup> and shall apply in 18 Member States from 29 January 2019.

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<sup>1079</sup> The major amendments to Article 4 of the Proposal of the Maintenance Regulation was proposed by the Presidency on 21 October 2008 and such text was adopted to the Maintenance Regulation. The Presidency of the Council of the European Union, Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations – Political agreement, 14066/08 ADD1, 2005/0259 (CNS), 21 October 2008.

<sup>1080</sup> Green Paper on Conflicts of Laws in Matters Concerning Matrimonial Property Regimes, Including the Question of Jurisdiction and Mutual recognition of 17 July 2006, COM (2006) 400 final, 17 July 2006. On the Green Paper see S. BARIATTI, I. VIARENGO, *I rapporti patrimoniali tra coniugi nel diritto internazionale privato comunitario*, Rivista di diritto internazionale privato e processuale, (2007), p. 603 *et seq.*

<sup>1081</sup> Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM(2011)0126 final, 16 March 2011; Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships, COM(2011)0127 final, 16 March 2011. On the Proposal on Matrimonial Property Regime see I. VIARENGO, *The EU Proposal on Matrimonial Property Regimes, Some General Remarks*, Yearbook of Private International Law, 13 (2011), pp. 199-215.

<sup>1082</sup> Hungary and Poland vetoed the proposals in 2015. Video coverage available at <https://video.consilium.europa.eu/en/webcast/ac1f65b6-b9b9-490d-8564-562692bd2539>.

<sup>1083</sup> Austria, Belgium, Bulgaria, Croatia, the Czech Republic, Finland, Germany, Greece, France, Italy, Luxembourg, Malta, the Netherlands, Portugal, Slovenia, Spain, and Sweden. Cyprus reiterated this wish during the work of the Council. Estonia announced its intention to take part in the cooperation after its adoption.

<sup>1084</sup> Council Decision (EU) of 9 June 2016 authorising enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships, (2016/954), OJ L 159, 16 June 2016, OJ L 159.

<sup>1085</sup> Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM(2016)0106 final, 2 March 2016; Proposal for a



## 2. Agreements on Jurisdiction under the Brussels IIa Regulation

Article 12 of the Brussels IIa Regulation provides for a rule on “prorogation of jurisdiction” concerning parental responsibility. According to Recital No 12, the grounds of jurisdiction in matters of parental responsibility “*are shaped in the light of the best interests of the child, in particular on the criterion of proximity.*” It means that the Member State of the child’s habitual residence has jurisdiction (Article 8 of the Brussels IIa Regulation) except for certain cases, including the case of “*an agreement between the holders of parental responsibility.*”

The aim of the provision is not only to ensure legal certainty and predictability, but also to allow consolidation of proceedings and to reduce the costs, which may be caused by simultaneous proceedings in different Member States.<sup>1087</sup> The condition of the best interest of the child allows crucial judicial discretion. In consequence, although the parties conclude an agreement conferring jurisdiction to a Member State court, there is no certainty that their agreement will produce a legal effect since the Member State court has the discretion to disregard the agreement if it is not in best interest of the child. It means that the agreement does not have a binding effect on the chosen court.<sup>1088</sup> The prorogation of jurisdiction, understood as “an independent alternative forum,”<sup>1089</sup> does not represent an exclusive ground of jurisdiction, which would produce the negative effect of depriving the jurisdiction of all other Member States court under the Brussels IIa Regulation.<sup>1090</sup> Since the agreement on jurisdiction does not have a binding effect on the chosen court, it does not have a binding effect on the seized non-designated Member State court. Due to the non-exclusive nature of this provision, the parties are still free to seize a Member State court according to Article 8 of

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Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, COM(2016)0107 final, 2 March 2016.

<sup>1086</sup> See the last version: The Presidency of the Council of the European Union, 14655/15 INIT, 2011/0059 (CNS) 2011/0060 (CNS), 26 November 2015.

<sup>1087</sup> E. PATAUT, E. GALLANT, *Article 12*, in U. MAGNUS, P. MANKOWSKI, (eds), *Brussels IIbis Regulation: 2017, European Commentaries on Private International Law*, Otto Schmidt, Sellier European Law Publishers, 2017, p. 151; C. GONZÁLES BEILFUSS, *Prorogation of Jurisdiction*, in C. HONORATI (ed), *Jurisdiction in Matrimonial Matters, Parental Responsibility and International Abduction: A Handbook on the Application of Brussels II-a Regulation in National Courts*, Giappichelli, 2017, p. 186.

<sup>1088</sup> C. GONZÁLES BEILFUSS, *Prorogation of Jurisdiction*, in *Jurisdiction in Matrimonial Matters, Parental Responsibility and International Abduction*, *op. cit.*, p. 194.

<sup>1089</sup> E. PATAUT, E. GALLANT, *Article 12*, in *Brussels IIbis Regulation: 2017, op. cit.*, p. 151.

<sup>1090</sup> C. GONZÁLES BEILFUSS, *Prorogation of Jurisdiction*, in *Jurisdiction in Matrimonial Matters, Parental Responsibility and International Abduction*, *op. cit.*, p. 187, 195. On the opposite approach which defines the prorogation of jurisdiction as “a derogation of the general rule on jurisdiction” see S. MARINO, *La portata della proroga del foro nelle controversie sulla responsabilità genitoriale*, *Rivista di diritto internazionale privato e processuale*, (2015), p. 349.

the Brussels IIa Regulation. However, it was proposed by the Presidency of the Council in the General Approach to the Proposal of a Recast of the Brussels IIa Regulation issued on 30 November 2018, that the jurisdiction shall be exclusive when the parties, as well as any other holder of parental responsibility, have accepted the jurisdiction expressly in the course of the proceedings and the court has ensured that all the parties are informed of their right not to accept the jurisdiction.<sup>1091</sup>

Although the Proposal for a Recast of the Brussels IIa Regulation endeavours to rename the title “Prorogation of jurisdiction” to “Choice of Court”,<sup>1092</sup> the agreement on the prorogation of jurisdiction laid down in Article 12 of the Brussels IIa Regulation should not be confused with a “typical” agreement on jurisdiction, which is binding upon the parties and upon the Member State courts.<sup>1093</sup> Comparing it to Article 25 of the Brussels Ibis Regulation, the wording of Article 12 of the Brussels IIa Regulation is very different. First, it is generally recognized that the Brussels Ibis Regulation is based on rules which are certain and highly predictable.<sup>1094</sup> The Brussels IIa Regulation has established objective, alternative, mandatory rules on jurisdiction in divorce matters.<sup>1095</sup> However, in parental responsibility matters, aside from the general rule of the jurisdiction of the court of the place of habitual residence of the child, no other rule makes reference to the “exclusive” or “non-exclusive” nature of the provisions.<sup>1096</sup> The best interest of the child, which serves as a “watchdog”,<sup>1097</sup> allows specific

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<sup>1091</sup> The Presidency of the Council of the European Union, 14784/18, 2016/0190(CNS), 30 November 2018, p. 26.

<sup>1092</sup> See Article 10 of the Proposal for a Recast of the Brussels IIa Regulation.

<sup>1093</sup> U. MAGNUS, P. MANKOWSKI, *Introduction*, in U. MAGNUS, P. MANKOWSKI (eds), *Brussels Ibis Regulation: 2017, European Commentaries on Private International Law*, Otto Schmidt, Sellier European Law Publishers, 2017, p. 45.

<sup>1094</sup> See Recital No 15 of the Brussels I-bis Regulation. See for example ECJ, Case C-281/02, *Owusu*, par. 41: «Application of the *forum non conveniens* doctrine, which allows the court seized a wide discretion as regards the question whether a foreign court would be a more appropriate forum for the trial of an action, is liable to undermine the predictability of the rules of jurisdiction laid down by the Brussels Convention, in particular that of Article 2, and consequently to undermine the principle of legal certainty, which is the basis of the Convention»; or ECJ, Case C-533/07, *Falco Privatstiftung and Thomas Rabitsch v Gisela Weller-Lindhorst*, 23 April 2009, ECLI:EU:C:2009:257, par. 21 and 22: «...Regulation No 44/2001 pursues an objective of legal certainty which consists in strengthening the legal protection of persons established in the European Union, by enabling the applicant to identify easily the court in which he may sue and the defendant reasonably to foresee before which court he may be sued.».

<sup>1095</sup> Borrás Report, par. 28. This was confirmed by the ECJ, Case C-68/07, *Kerstin Sundelind Lopez v Miguel Enrique Lopez Lizazo*, 29 November 2007, ECLI:EU:C:2007:740.

<sup>1096</sup> A. BORRÁS, *Lights and Shadows of Communitarisation of Private International Law: Jurisdiction and Enforcement in Family Matters with regard to Relations with Third States*, in A. MALATESTA, S. BARIATTI, F. POCAR (eds), *The External Dimension of EC Private International Law in Family and Succession Matters*, CEDAM, 2008, p. 117.

control by the Member State court. Such discretionary power of the Member State court when evaluating the best interest of the child suggests non-exclusivity,<sup>1098</sup> flexibility, and non-binding effect<sup>1099</sup> on the prorogued Member State court. Second, the Brussels *Ila* Regulation uses a term “acceptance” and is more akin to the tacit prorogation according to Article 26 of the Brussels *Ibis* Regulation, but with considerable differences.<sup>1100</sup>

## 2.1. Scope of Application

It must be borne in mind that, as analysed in the case of the application of the rule on choice-of-court under the Brussels *Ibis* Regulation, the legal relationship must fall under the scope of application of the Brussels *Ila* Regulation in order to give effect to the rule on the prorogation of jurisdiction. Indeed, the territorial, material, temporal, and personal scope of application of the Brussels *Ila* Regulation in the context of Article 12 must be briefly analyzed.

### 2.1.1. Territorial and Personal Scope of Application

The Brussels *Ila* Regulation is applicable in 27 Member States,<sup>1101</sup> except for Denmark where the special status applies. In accordance with the Protocol No 22 on the Position of Denmark (*ex* Protocol No 5), the measures adopted under Title V of Part III of the TFEU (*ex* Title IV of Part III of the EC Treaty) would not apply to Denmark, thus Denmark is not bound by the Brussels *Ila* Regulation.<sup>1102</sup>

With respect to the jurisdiction laid down in Article 12 of the Brussels *Ila* Regulation, the child is not required to be habitually resident in the agreed *forum*. On the contrary, Article 12 accepts the assumption that a child is habitually resident in another Member State. However,

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<sup>1097</sup> U. MAGNUS, P. MANKOWSKI, *Introduction*, in Brussels *Ibis* Regulation: 2017, *op. cit.*, p. 46.

<sup>1098</sup> E. PATAUT, E. GALLANT, *Article 12*, in Brussels *Ibis* Regulation: 2017, *op. cit.*, p. 153.

<sup>1099</sup> C. GONZÁLES BEILFUSS, *Prorogation of Jurisdiction*, in *Jurisdiction in Matrimonial Matters, Parental Responsibility and International Abduction*, *op. cit.*, p. 194.

<sup>1100</sup> U. MAGNUS, P. MANKOWSKI, *Introduction*, in Brussels *Ibis* Regulation: 2017, *op. cit.*, p. 46.

<sup>1101</sup> Article 52 TEU (*ex* Article 299 par. 1 EC Treaty) and Article 355 TFEU (*ex* 299 EC Treaty). Although the United Kingdom and Ireland reserved their rights not to participate in the adoption of measures under Title V of Part III of the TFEU (*ex* Title IV of Part III of the EC Treaty) in accordance with Protocol No 21 (*ex* Protocol No 34) on the Position of the United Kingdom and Ireland The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, notified their wish to take part in the adoption and application of the Brussels *Ila* Regulation.

<sup>1102</sup> See Article 2 of the Protocols.

one of the spouses must be habitually resident in a Member State or both spouses must be nationals of that Member State by virtue of Article 3 of the Brussels IIa Regulation for the concentration of the proceedings according to Article 12 par. 1 of the Brussels IIa Regulation. Or there must be another substantial connection of the child with an agreed *forum* (Article 12 par. 3 of the Brussels IIa Regulation).

It is not also relevant whether the child is habitually resident in the Third State.<sup>1103</sup> However, attention must be paid to Article 60 lett. a) and Article 61 of the Brussels IIa Regulation. When the child is habitually resident in a Contracting State of the 1996 Hague Convention on parental responsibility and protection of children or 1961 Hague Convention on protection of infants, the Conventions prevail, and Article 12 of the Brussels IIa Regulation cannot enable the Member State courts to assert jurisdiction. It must be remembered that the 1961 Hague Convention on protection of infants does not allow the prorogation of jurisdiction and party autonomy is admitted only according to Article 10 of the 1996 Hague Convention on parental responsibility and protection of children. Moreover, Article 12 par 4 of the Brussels IIa Regulation aims at resolving an “artificial problem”<sup>1104</sup> - when the child has habitual residence in a Third State which is not a contracting party to the 1996 Hague Convention on parental responsibility and protection of children, the Brussels IIa Regulation assumes that a child’s interest is in the agreed upon Member State court, particularly if it is impossible to

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<sup>1103</sup> On the critique see T. M. DE BOER, *What we should not expect from a recast of the Brussels IIbis Regulation*, in *Nederlands Internationaal Privaatrecht* (2015), p. 14: «My main objection to the extension of jurisdiction to cases in which the child is not habitually resident in one of the member States is the likelihood that the court’s decision will not be recognized outside the EU. Absent a convention on recognition and enforcement, there is no guarantee that protective measures rendered in one of the member States will be recognized and enforced in the non-member State of the child’s habitual residence.».

<sup>1104</sup> A. BORRÁS, *From Brussels II to Brussels II bis and Further*, in *Brussels II Bis: Its Impact and Application in the Member States*, *op. cit.*, p. 14-15.

hold proceedings in the Third State.<sup>1105</sup> According to Professor Borrás, such a rule is qualified as an “excessive exercise of communitarisation of judicial jurisdiction”.<sup>1106</sup>

### 2.1.2. Temporal Scope of Application

The Brussels *Ia* Regulation applies to: legal proceedings instituted; documents formally drawn up or registered as authentic instruments; and agreements concluded between the parties after 1 March 2005, in 24 Member States, on or after 1 January 2007, in Bulgaria and Romania, and on or after 1 July 2013 in Croatia.

As to the rule on the prorogation of jurisdiction, Article 64 of the Brussels *Ia* Regulation specifies that it applies to *agreements concluded between the parties* after 1 March 2005.<sup>1107</sup> This rule differs from the Brussels *Ibis* Regulation, which requires only the Member State court to be seized with the dispute concerning Article 25 of the Brussels *Ibis* Regulation (Article 23 of the Brussels Regulation) at the time the Brussels *Ibis* Regulation has become applicable in that Member State.<sup>1108</sup> It means that the parties, which agree on a Member State court after 1 March 2005, may rely on Article 12 of the Brussels *Ia* Regulation irrespective of the date of the institution of the proceedings.

#### a) *Relevant Point of Time*

Two questions arise in the context of Article 12 of the Brussels *Ia* Regulation. First, what point of time is relevant for determining the applicability of Article 12 of the Brussels *Ia*

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<sup>1105</sup> The extended approach of this rule may be found in judgment of English Supreme court, *I (A Child)* [2009] UKSC 10, [37]: «*If the child is habitually resident in a country outside the EU which, like Pakistan, is not a party to the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children, then even if the EU country in question is a party to that Convention, there would be no provision for recognition and enforcement of one another's orders. If, therefore, the parties have accepted the jurisdiction of an EU State, it makes sense for that State to determine the issue. The difficulty or otherwise of holding the proceedings in the third State in question are obviously relevant. It is not suggested that it would be impossible to hold these proceedings in Pakistan, but while neither party has had difficulty with the proceedings here, the mother would certainly face difficulties litigating in Pakistan.*».

<sup>1106</sup> A. BORRÁS, *From Brussels II to Brussels II bis and Further*, in *Brussels II Bis: Its Impact and Application in the Member States*, *op. cit.*, p. 15. See *Općinski sud u Dubrovniku*, GŽ.1366/14, 15 October 2014, where this rule was used as “a false ground of jurisdiction” in order to justify the jurisdiction of the Croatian court over the child habitually resident in Bosna and Hercegovina.

<sup>1107</sup> Emphasis added. P. MANKOWSKI, *Article 64*, in U. MAGNUS, P. MANKOWSKI (eds), *Brussels Ibis Regulation: 2017, European Commentaries on Private International Law*, Otto Schmidt, Sellier European Law Publishers, 2017, p. 477.

<sup>1108</sup> U. MAGNUS, *Article 25*, in *Brussels I Bis Regulation: Commentary*, 2016, *op. cit.*, p. 601.

Regulation? In other words, is the decisive moment the moment of the conclusion of the agreement, or the moment when the Member State court is seized? Second, is an agreement conferring jurisdiction to a Member State court limited in time?

As to the relevant point of time for determining the applicability of Article 12 of the Brussels IIa Regulation, the determination is significant when circumstances relevant for the application of Article 12 of the Brussels IIa Regulation have changed, *e.g.*, the holders of parental responsibility changed their habitual residence or the child changed nationality. Due to the wording of Article 12 par. 3 of the Brussels IIa Regulation, which requires a substantial connection with the agreed upon Member State court, it can be presumed that the agreed upon Member State court is obliged to examine the conditions for application of Article 12 par. 3 of the Brussels IIa Regulation when it is seized. Otherwise, the designated Member State court would be obliged to declare on its own motion that it has no jurisdiction according to Article 17 of the Brussels IIa Regulation since the substantial connection is lacking. (For example, if the child is not a national of that Member State, a substantial connection is lacking.) However, Article 12 par. 1 of the Brussels IIa Regulation aims mainly at consolidating the proceedings on divorce, legal separation, or marriage with the proceedings concerning parental responsibility and does not require a substantial connection. Jurisdiction is then based on Article 3 of the Brussels IIa Regulation, and the examination is fixed to the time the Member State court is seized (Article 16 and 17 of the Brussels IIa Regulation). In both cases, the subsequent change of the habitual residence or nationality of the child should be taken into consideration for the purpose of identification of the best interest of the child.

The second question concerns the limitation of time concerning the effects of the agreement, which is resolved by Article 12 par. 2 of the Brussels IIa Regulation. This provision refers only to Article 12 par. 1 of the Brussels IIa Regulation. The agreement is temporary in nature and ceases once: (i) the judgment allowing or refusing the application for divorce, legal separation, or marriage annulment has become final; (ii) a judgment in relation to parental responsibility has become final; or (iii) the proceedings above have come to an end for another reason, for example withdrawal or death of a party.<sup>1109</sup> Whether a judgment is final, is

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<sup>1109</sup> Borrás Report, par. 39; E. PATAUT, E. GALLANT, *Article 12*, in Brussels IIbis Regulation: 2017, *op. cit.*, p. 160. The same provision contains the 1996 Hague Convention. on parental responsibility and protection of children. See P. Lagarde, Explanatory Report on the 1996 Hague Child Protection Convention, p.565.

subject to the national procedural law,<sup>1110</sup> but no further appeal is permitted.<sup>1111</sup> The proceedings in parental responsibility matters cannot be considered as post-divorce litigation, which in some Member States is concentrated with the proceedings on patrimonial matters.<sup>1112</sup> The post-divorce litigation on the basis of the agreement of the parents is permitted only for independent proceedings within the limits of Article 12 par. 3 of the Brussels IIa Regulation. As to the limitation of time concerning the effects of the agreement based on of Article 12 par. 3 of the Brussels IIa Regulation, the ECJ in case C-436/13, *E. v. B.*, held that the agreement on the prorogation of jurisdiction under Article 12 par. 3 of the Brussels IIa Regulation “*ceases following a final judgment in those proceedings*”.<sup>1113</sup> The agreement does not continue “*after those proceedings have been brought to a close or in relation to other matters which may come to light subsequently*”.<sup>1114</sup> Article 10 par. 4 of the Proposal for a Recast of the Brussels IIa Regulation reacts to this ECJ judgment and confirms the ECJ approach by providing that “*The jurisdiction conferred in paragraph 3 shall cease as soon as the proceedings have led to a final decision.*”. On the other hand, according to the General Approach taken by the Presidency of the Council on 30 November 2018, the jurisdiction shall cease as soon as the decision given in those proceedings is no longer subject to ordinary appeal; or the proceedings have come to an end for another reason, unless otherwise agreed by the parties.<sup>1115</sup> It must be noted that this Council’s General Approach does not differ between the prorogation of jurisdiction within the meaning of the current Article 12 par. 1 of the Brussels IIa Regulation and the jurisdiction based on the current Article 12 par. 3 of the Brussels IIa Regulation.

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<sup>1110</sup> E. PATAUT, E. GALLANT, *Article 12*, in Brussels IIbis Regulation: 2017, *op. cit.*, p. 160. The same opinion in the context of Article 10 ar. 2 of the 1996 Hague Convention on parental responsibility and protection of children, see P. Lagarde, Explanatory Report on the 1996 Hague Child Protection Convention, HCCH Publications, 1998, p.565.

<sup>1111</sup> Borrás Report, par. 39.

<sup>1112</sup> E. PATAUT, E. GALLANT, *Article 12*, in Brussels IIbis Regulation: 2017, *op. cit.*, p. 159.

<sup>1113</sup> ECJ, Case C-436/13, *E. v. B.*, 1 October 2014, ECLI:EU:C:2014:2246, par. 50.

<sup>1114</sup> ECJ, Case C-436/13, *E. v. B.*, par. 48.

<sup>1115</sup> The Presidency of the Council of the European Union, 14784/18, 2016/0190(CNS), 30 November 2018, p. 26.

### 2.1.3. Material Scope of Application

Article 1 of the Brussels IIa Regulation specifies that it applies to: (a) divorce, legal separation, or marriage annulment;<sup>1116</sup> and (b) attribution, exercise, delegation, restriction or termination of parental responsibility. For the purpose of the analysis of Article 12 par. 1 of the Brussels IIa Regulation, which concerns the consolidation of the proceedings in parental responsibility with the proceedings in divorce, legal separation or marriage annulment, both matters must be considered. Article 1 par. 1 lett. b) is limited only to the “civil matters”.<sup>1117</sup> The attribution, the exercise, the delegation, the restriction or the termination of parental responsibility must be interpreted within the meaning of paragraph 2. This paragraph specifies that it covers: (a) right of custody and right of access;<sup>1118</sup> (b) guardianship, curatorship, and similar institutions; (c) designation and functions of any person or body having charge of the child’s person or property, representing or assisting the child; (d) placement of the child in a foster family or in institutional care; and (e) measures for the protection of the child relating to the administration, conservation, or disposal of the child’s property. As provided by the ECJ, the list contained in paragraph 2 must be used as a guide.<sup>1119</sup>

On the other hand, paragraph 3 excludes specific matters from the scope of application. The Brussels IIa Regulation does not apply to: (i) the establishment or contesting of a parent-child relationship; (ii) decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption; (iii) the name and forenames of the child; (iv) emancipation; or (v) measures taken as a result of criminal offences committed by children. Moreover, the maintenance obligations in relation to the spouses’ maintenance as well as to the child’s maintenance are excluded from the scope of application of the Brussels IIa Regulation and are subject to the Maintenance Regulation. Although trusts or successions do not fall into the

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<sup>1116</sup> ECJ, Case C-294/15, *Edyta Mikołajczyk v Marie Louise Czarnecka and Stefan Czarnecki*, 13 October 2016, ECLI:EU:C:2016:772, where the ECJ decided that an action for annulment of marriage brought by a third party following the death of one of the spouses falls within the scope of the Brussels IIa Regulation.

<sup>1117</sup> ECJ, Case C-435/06, *C.*, 27 November 2007, ECLI:EU:C:2007:714, where the ECJ upheld that «a single decision ordering that a child be taken into care and placed outside his original home in a foster family is covered by the term ‘civil matters’, for the purposes of that provision, where that decision was adopted in the context of public law rules relating to child protection.». On the same conclusion see ECJ, Case C-523/07, *A.*, 2 April 2009, ECLI:EU:C:2009:225.

<sup>1118</sup> ECJ, Case C-335/17, *Neli Valcheva v Georgios Babanarakis*, 31 May 2018, ECLI:EU:C:2018:359, where the ECJ upheld that the concept of “rights of access” must be interpreted as including rights of access of grandparents to their grandchildren.

<sup>1119</sup> Case C-435/06, *C.*, par. 30. See also Case C-92/12 PPU, *Health Service Executive v S.C. and A.C.*, 26 April 2012, ECLI:EU:C:2012:255; Case C-215/15, *Vasilka Ivanova Gogova v Ilia Dimitrov Iliev*, 21 October 2015, ECLI:EU:C:2015:710.



scope of the Brussels IIa Regulation, the ECJ decided that approval of an agreement for the sharing-out of an estate of a guardian *ad litem* on behalf of minor children constitutes a measure relating to the exercise of parental responsibility and not a measure relating to succession.<sup>1120</sup> Although the property regime is not expressly excluded, Recital No 8 of the Brussels IIa Regulation suggests that it does not deal with the grounds for divorce, property consequences of the marriage, or any other ancillary measures.<sup>1121</sup>

## **2.2. Article 12 par. 1 of the Brussels IIa Regulation**

Article 12 par. 1 extends the jurisdiction of the court having jurisdiction in divorce, legal separation, or marriage annulment to parental responsibility matters. As stated in Section 1 of this Subchapter in the context of Article 3 of the previous Brussels II Regulation, the text of Article 12 par. 1 is inspired by Article 10 par. 1 of the 1996 Hague Convention on parental responsibility and protection of children aiming at guaranteeing their compatibility. The conditions for application of Article 12 par. 1 of the Brussels IIa Regulation, which must be fulfilled cumulatively, are the following: (i) the court must have jurisdiction for divorce, legal separation, or marriage annulment according to Article 3 of the Brussels IIa Regulation; (ii) at least one of the spouses have parental responsibility; (iii) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by the spouses and by the holders of parental responsibility, at the time the court is seized; and (iv) prorogation of jurisdiction is in the superior interests of the child. Since the formal requirements (point iii) are examined together with Article 12 par. 3 of the Brussels IIa Regulation in the context of formal and substantive validity of the agreement, the focus will be on: (i) jurisdiction of the court in divorce, legal separation or marriage; ii) concerning the parties to the agreement; and (iii) the notion of superior interest of the child.

The Presidency of the Council in the General Approach to the Proposal for a Recast of the Brussels IIa Regulation from 30 November 2018 proposed to modify Article 12 of the Brussels IIa Regulation in order to unify prorogation of jurisdiction in the single paragraph

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<sup>1120</sup> ECJ, Case C-404/14, *Marie Matoušková*, 6 October 2015, ECLI:EU:C:2015:653. See also Case C-565/16, *Alessandro Saponaro and Kalliopi-Chloi Xylina*, 19 April 2018, ECLI:EU:C:2018:265, par. 18, where according to ECJ application of the parents on behalf of the child for authorisation to renounce an inheritance as being concerned with the status and capacity of the person and does not fall within the law on succession.

<sup>1121</sup> ECJ, Case C-67/17, *Todor Iliev v Blagovesta Ilieva*, 14 June 2017, ECLI:EU:C:2017:459, par. 31.

and practically deletes paragraph 1 of Article 12 of the Brussels IIa Regulation. Only new Recital should specify that such prorogation within the meaning of Article 12 par. 1 of the Brussels IIa Regulation is still possible

*...Under specific conditions laid down by this Regulation, jurisdiction in matters of parental responsibility might also be established in a Member State where proceedings for divorce, legal separation or marriage annulment are pending between the parents, or in another Member State with which the child has a substantial connection and which the parties have either agreed upon in advance, at the latest at the time the court is seised, or accepted expressly in the course of those proceedings, where the law of that Member State so provides, even if the child is not habitually resident in that Member State, provided that the exercise of such jurisdiction is in the best interests of the child. According to the case law of the Court of Justice, anyone other than the parents who, according to the national law, has the capacity of a party to the proceedings commenced by the parents, should be considered a party to the proceedings for the purposes of this Regulation and therefore, opposition by that party to the choice of jurisdiction made by the parents of the child in question, after the date on which the court was seised, should preclude the acceptance of prorogation of jurisdiction by all the parties to the proceedings at that date from being established.<sup>1122</sup>*

### **2.2.1. Jurisdiction of the Court in Divorce, Legal Separation, or Marriage Annulment**

In some national systems of the Member States, it is common that the court deciding over divorce, legal separation, or marriage annulment of the spouses has jurisdiction to decide over the parental responsibility too.<sup>1123</sup> This rule aims at concentrating the proceedings. However,

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<sup>1122</sup> The Presidency of the Council of the European Union, 14784/18, 2016/0190(CNS), 30 November 2018, p. 26.

<sup>1123</sup> For example, in Slovakia. According to the Slovak law, matters relating to divorce, maintenance, and parental responsibility must be decided in unique proceedings. In particular, Article 24, par. 1 of the Act No 36/2005 Coll. on Family law provides: «The court determines parental rights and responsibilities over the child for a time after the divorce in the judgment of divorce, in particular the court determines which parent has custody rights over a child and who represents and administers child assets. The court simultaneously orders maintenance obligations to a parent whom a child was not entrusted into the personal care or approves the parents' agreement on the child maintenance obligations». Article 100 of Act No 161/2015 on Civil Procedure, expressly provides that proceedings for determination of parental responsibility for time after the divorce is connected with the divorce proceedings. By virtue of EU legal instruments in family matters prevailing over the national law rules, the Slovak courts are often obliged to exclude certain matters (parental responsibility,

the concentration of jurisdiction is possible *only* when the prorogued Member State has jurisdiction on divorce, legal separation, or marriage annulment according to Article 3 of the Brussels *Ia* Regulation. This implies that where a Member State court is seized by virtue of other jurisdictional grounds for divorce, legal separation, or marriage under the Brussels *Ia* Regulation, its jurisdiction cannot be extended to parental responsibility matters according to Article 12 par. 1 of the Brussels *Ia* Regulation.<sup>1124</sup> In particular, Article 7 of the Brussels *Ia* Regulation, which permits the application of the national rules, cannot be used for the connection of the proceedings.

Thus, what is the justification for such concentration of the proceeding, *only* when the prorogued Member State has jurisdiction in divorce, legal separation, or marriage annulment according to Article 3 of the Brussels *Ia* Regulation? Each of the jurisdictional grounds listed in Article 3 of the Brussels *Ia* Regulation may be perceived as a substitution for the condition of the “substantial connection” required by Article 12 par. 3 of the Brussels *Ia* Regulation.<sup>1125</sup> However, due to a sharp critique of Article 3 of the Brussels *Ia* Regulation, which opens the door for abusive procedural tactics, the “substantial connection” for the purpose of the proceedings concerning parental responsibility according to Article 12 par. 1 of the Brussels *Ia* Regulation, may leave an inevitable question on the adequacy of the adopted solution.

### **2.2.2. Parties to the Agreement**

Article 12 par. 1 of the Brussels *Ia* Regulation requires an agreement between the spouses, which are subject to the proceedings, according to Article 3 of the Brussels *Ia* Regulation. Simultaneously, at least one of the spouses must have parental responsibility in relation to the child. Furthermore, where one of the holders of the parental responsibility is not subject to the proceedings for divorce, legal separation, or marriage according to Article 3 of the Brussels *Ia* Regulation, the provision requires an additional agreement also with such a holder. This

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maintenance etc.) from a single hearing although separation of proceedings from unique family proceedings is in not known to Slovak law. The case law demonstrates that the national courts still face with the problems regarding the “division” of the proceedings in divorce and parental responsibility. See for example *Krajský súd Bratislava*, 30 September 2011, 5 Co 414/2011.

<sup>1124</sup> E. PATAUT, E. GALLANT, *Article 12*, in *Brussels Ibis Regulation: 2017, op. cit.*, p. 155.

<sup>1125</sup> On the similar conclusion see E. PATAUT, E. GALLANT, *Article 12*, in *Brussels Ibis Regulation: 2017, op. cit.*, p. 155.

should guarantee that the parental responsibility proceedings over all siblings is before one Member State court.<sup>1126</sup> However, certain linguistic versions suggest that is necessary either the agreement between the spouses or the agreement between the holders of parental responsibility.<sup>1127</sup> On the other hand, other linguistic versions provide for the wording “and”, where both agreements are required.<sup>1128</sup> Although the predecessor of Article 12 par. 1 of the Brussels IIa Regulation (*i.e.*, Article 3 of the Brussels II Regulation) required only one agreement of the spouses, 1996 Hague Convention on parental responsibility and protection of children provides for the opposite answer – both agreements (the agreement of the spouses and the agreement of the holders of parental responsibility) are required. The Proposal for a Recast of the Brussels IIa Regulation, as well as other subsequent proposals of the European Parliament, do not offer any answer - the linguistic versions are still different.<sup>1129</sup> Only Council’s General Approach issued on 30 November 2018 unifies the linguistic versions and provides that both the parties and holders of the parental responsibility must accept jurisdiction.<sup>1130</sup> Also, the majority of the doctrine suggests that both the spouses and holder of the parental responsibility must accept jurisdiction.<sup>1131</sup>

The term “holder of parental responsibility” is defined in Article 2 par. 8 of the Brussels IIa Regulation as a person having parental responsibility for a child. The term “parental responsibility” should be understood by virtue of Article 2 par. 7 of the Brussels IIa Regulation as all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, *by operation of law* or by an agreement having legal effect – this shall include the right of custody and right of access.<sup>1132</sup> The question on the “holder of parental responsibility” represents a preliminary question<sup>1133</sup> which should be

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<sup>1126</sup> E. PATAUT, E. GALLANT, *Article 12*, in Brussels IIbis Regulation: 2017, *op. cit.*, p. 155.

<sup>1127</sup> Spanish and German versions.

<sup>1128</sup> English, French, and Italian version.

<sup>1129</sup> Compare English, French, and Italian version with German and Spanish version.

<sup>1130</sup> The Presidency of the Council of the European Union, 14784/18, 2016/0190(CNS), 30 November 2018, p. 26.

<sup>1131</sup> E. PATAUT, E. GALLANT, *Article 12*, in Brussels IIbis Regulation: 2017, *op. cit.*, p. 156. C. GONZÁLES BEILFUSS, *Prorogation of Jurisdiction*, in Jurisdiction in Matrimonial Matters, Parental Responsibility and International Abduction, *op. cit.*, p. 190.

<sup>1132</sup> Emphasis added.

<sup>1133</sup> ECJ, Case C-404/14, *Marie Matoušková*, par. 30, where the ECJ referred to the Case C-404/14, *Marie Matoušková*, Opinion of Advocate General Kokott delivered on 25 June 2015, ECLI:EU:C:2015:428, par. 41 and expressed its view to the preliminary issues, in particular that «...*legal capacity and the associated representation issues must be assessed in accordance with their own criteria and are not to be regarded as preliminary issues dependent on the legal acts in question. Therefore, it must be held that the appointment of a*

resolved by *operation of law*, i.e., by the law applicable to the parental responsibility according to the 1996 Hague Convention on parental responsibility and protection of children.<sup>1134</sup> The national courts do not always examine this question. The Spanish court *Audiencia Provincial de Barcelona*,<sup>1135</sup> decided that the agreement of the grandparents, which took care of the child on the basis of the agreement with legal effect and according to the law of the child's habitual residence, was not necessary, whereby the acceptance by the parents was satisfactory. The Spanish court failed to examine the notion of the holder of parental responsibility according to the 1996 Hague Convention on parental responsibility and protection of children. Contrary to Article 12 par. 3 of the Brussels IIa Regulation, it can be presumed that another party to the proceedings within the meaning of national procedural law, such as a legal representative of the child or the prosecutor, is not a party to the prorogation agreement according to Article 12 par. 1 of the Brussels IIa Regulation. This emerges from the Opinion of Advocate General Tanchev which stated that:

*This is confirmed by a juxtaposition of Articles 12(3) and 12(1) of Brussels IIbis. Article 12(1) of Brussels IIbis, which allows prorogation of the jurisdiction of the courts of a Member State where divorce proceedings are brought, contains a precise description of those who have to accept the jurisdiction for prorogation to become effective, namely 'the spouses and ... holders of parental responsibility'. Article 12(3) of Brussels IIbis, in contrast, refers to 'all the parties to the proceedings', thereby using a reference to the particular procedure...<sup>1136</sup>*

### **2.2.3. Superior Interest of the Child**

The last condition is the superior interest of the child. The wording providing for “superior condition of the child” differs from the English wording of Article 12 par. 3 of the Brussels

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*guardian for the minor children and the review of the exercise of her activity are so closely connected that it would not be appropriate to apply different jurisdictional rules, which would vary according to the subject-matter of the relevant legal act.»*

<sup>1134</sup> Emphasis added. C. GONZÁLES BEILFUSS, *Prorogation of Jurisdiction*, in *Jurisdiction in Matrimonial Matters, Parental Responsibility and International Abduction*, *op. cit.*, p. 191.

<sup>1135</sup> *Audencia Provincial de Barcelona*, section 12, 30 October 2014.

<sup>1136</sup> ECJ, Case C-565/16, *Alessandro Saponaro*, Opinion of Advocate General Tanchev delivered on 6 December 2017, ECLI:EU:C:2017:942, par. 46.

Ila Regulation which provides for “best interest of the child”.<sup>1137</sup> Although the wordings are different, no distinction was intended by the drafters of the legislation.<sup>1138</sup>

This condition leaves room for judicial discretion. The superior interest of the child is also a basis of the other jurisdictional rules, or their exceptions, but is not defined in the Brussels Ila Regulation. At least, Recital 12 provides that the grounds of jurisdiction established by the Brussels Ila Regulation are shaped in the light of the best interests of the child, in particular of *the criterion of proximity*. The same recital in the Proposal for a Recast of the Brussels Ila Regulation specifies in more details the best interest of the child, providing that the best interest of the child should be interpreted in light of Article 24 of the Charter of Fundamental Rights of the European Union<sup>1139</sup> and the United Nations Convention on the Rights of the Child of 20 November 1989.<sup>1140</sup>

In the context of Article 12 par. 3 of the Brussels Ila Regulation, the ECJ stated that the best interest of the child should be examined in each individual case.<sup>1141</sup> Moreover, the ECJ has already provided examples which should be taken into account when considering the best interest of the child, such as nationality of the child, which is the Member State of the chosen courts; the residence of the deceased at the date of his death; or the assets that are the subject matter of the inheritance, which are situated in that Member State.<sup>1142</sup> The ECJ concluded that

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<sup>1137</sup> According to Practice Guide for the application of the new Brussels II Regulation, European Commission, p. 32, in other languages the wording does not differ.

<sup>1138</sup> Practice Guide for the application of the new Brussels II Regulation, European Commission, p. 32.

<sup>1139</sup> Article 24 of the Charter of Fundamental Rights of the European Union, OJ C 326, 26 October 2012, provides: «1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity. 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration. 3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.»

<sup>1140</sup> According to Article 3 the best interests of the child shall be a primary consideration. See also UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC /C/GC/14, available at: <http://www.refworld.org/docid/51a84b5e4.html>, par. 32-35. See for example par. 32 which provides: «The concept of the child's best interests is complex and its content must be determined on a case-by-case basis. It is through the interpretation and implementation of Article 3, paragraph 1, in line with the other provisions of the Convention, that the legislator, judge, administrative, social or educational authority will be able to clarify the concept and make concrete use thereof. Accordingly, the concept of the child's best interests is flexible and adaptable. It should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs. For individual decisions, the child's best interests must be assessed and determined in light of the specific circumstances of the particular child.»

<sup>1141</sup> ECJ, Case C-656/13, *L v. M*, par. 58; ECJ, Case C-436/13, *E. v. B*, par. 49.

<sup>1142</sup> ECJ, Case C-565/16, *Alessandro Saponaro*, par. 36.

“the connection between the child and the Member State of those courts, lead to the conclusion that the condition of taking the best interests of the child into account is satisfied.”.<sup>1143</sup> In consequence, one may remark that the evaluation of “best interest of the child” which requires only “connection between the child and the Member State” is fulfilled due to the connection laid down in Article 3 of the Brussels IIa Regulation, *i.e.*, habitual residence of one or both spouses in the seized Member State or common nationality of the spouses of the seized Member State. However, some jurisdictional grounds of Article 3 of the Brussels IIa Regulation are perceived as they do not represent a real connection with matrimonial life,<sup>1144</sup> thus, the evaluation on the best interest of the child is still a significant criterion.

The discretionary power attributed to the prorogued seized Member State court has a consequence that such a Member State court is not obliged to establish its jurisdiction if all other conditions are met.<sup>1145</sup> It may be demonstrated in the following example:

*Lucia (Italian-Czech national) was born in 2011 to spouses Michele and Beatrice (Italian nationals), who had been living in Prague for 10 years. Michele seizes a court in Italy for divorce according to Article 3 of the Brussels IIa Regulation. Beatrice agrees with the custody proceedings in Italy through the application of Article 12 par. 1 of the Brussels IIa Regulation. However, the Italian court disregards the parties' agreement, since it considers that the commencement of the custody proceedings in Italy would not be in the best interest of the child.*

### **2.3. Article 12 par. 3 of the Brussels IIa Regulation**

Article 12 of the Brussels IIa Regulation is structured in a slightly different way. The equivalent cannot be found in the 1996 Hague Convention on parental responsibility and protection of children. Party autonomy is recognized in a much broader extent than Article 12 par. 1 of the Brussels IIa Regulation and should promote a peaceful agreement between the

<sup>1143</sup> ECJ, Case C-565/16, *Alessandro Saponaro*, par. 39.

<sup>1144</sup> On the criticism of two last indents of Article 3 lett. a) of the Brussels IIa Regulation see R. BARATTA, *Lo scioglimento del vincolo coniugale nel diritto comunitario*, in S. M. CARBONE, I. QUEIROLO, *Diritto di famiglia e Unione europea*, Giappichelli, 2008, p. 182, according to the author it would not be unreasonable to eliminate these two connecting factors since they do not represent a real connection with matrimonial life.

<sup>1145</sup> See for example, *B v B* [2012] EWHC 1924 (fam), [23]; where the court decided that it is not in the best interest of the children to allow proceedings to be brought in England under Article 12 par. 3 since neither the children nor their parents were habitually resident in the jurisdiction.

parties. However, sufficient breaks have been introduced since as remembered several times in this thesis, the family law is characterized by the mandatory rules.<sup>1146</sup> Indeed, the party autonomy is accepted only under the strict conditions.

The conditions for application of Article 12 par. 3 of the Brussels IIa Regulation, which must be fulfilled cumulatively, are the following: (i) the child has a substantial connection with that Member State (in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State); (ii) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings, at the time the court is seized; and (iii) the prorogation of jurisdiction is in the best interests of the child. Since the formal requirements (point iii) are examined together with Article 12 par. 1 of the Brussels IIa Regulation in the context of formal and substantive validity of the agreement, the focus will be paid to point (i) concerning the substantial connection; point (ii) concerning all the parties to the agreement and the point (iii) concerning the notion of best interest of the child.

In the first place, the contextual wording of Article 12 par. 3 of the Brussels IIa Regulation provides that the courts of a Member State shall also have jurisdiction in relation to parental responsibility in proceedings *other than those referred to in paragraph 1*.<sup>1147</sup> It was discussed for a long time whether this provision should enable concentration of the proceedings other than the proceedings concerning divorce, legal separation, or marriage annulment,<sup>1148</sup> or, if this provision permits seizing a Member State court in the autonomous proceedings.<sup>1149</sup> This question was referred to the ECJ by Czech Supreme Court in case C-656/13, *L v. M*. In particular, the Czech court asked whether Article 12 par. 3 of the Brussels IIa Regulation must be interpreted as establishing jurisdiction over proceedings concerning parental responsibility even where no other related proceedings are pending.<sup>1150</sup> The ECJ answered affirmatively to this question and justified its decision by two facts. First, Article 12 par. 3 of

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<sup>1146</sup> See E. PATAUT, E. GALLANT, *Article 12*, in Brussels IIbis Regulation: 2017, *op. cit.*, p. 162.

<sup>1147</sup> Emphasis added.

<sup>1148</sup> On this strict interpretation see B. ANCEL, H. MUIR WATT, *L'intérêt supérieur de l'enfant dans le concert des juridictions: Le Règlement de Bruxelles II Bis*, *Revue critique de droit international privé*, (2005), p. 588, where this provision should serve as an extension of other proceedings which based jurisdiction on Article 7 of the Brussels IIa Regulation (residual basis). Other interpretations would lead to the threat of operation of Article 15 of the Brussels IIa Regulation.

<sup>1149</sup> On the interpretation supporting extensive interpretation see E. GALLANT, *Responsabilité parentale et protection des enfants en droit international*, Defrenois, 2004, p. 132.

<sup>1150</sup> ECJ, Case C-656/13, *L v. M*, par. 31.



the Brussels IIa Regulation does not specify among the conditions, which must be met, whether it is necessary that the seized prorogued Member State court is already seized in other proceedings.<sup>1151</sup> Second, Article 12 par. 2 of the Brussels IIa Regulation, which determines the time when the agreement ceases, refers only to Article 12 par. 1 of the Brussels IIa Regulation. Article 12 par. 3 of the Brussels IIa Regulation does not contain any equivalent provision. Furthermore, in the case C-436/13, *E v. B*, the ECJ upheld that an agreement under Article 12 par. 3 of the Brussels IIa Regulation ceases following a final judgment in those proceedings.<sup>1152</sup> In consequence, only the interpretation, allowing the application of Article 12 par. 3 of the Brussels IIa Regulation even where no other proceedings are pending before the court chosen, guarantees that the objectives pursued by the Brussels IIa Regulation are respected and secure the non-discriminatory treatment of the marital children and children born out of the marriage.<sup>1153</sup> Article 10 par. 3 of the Proposal for a Recast of the Brussels IIa Regulation has reacted to this ECJ judgment and eliminates any doubts in this regards by removing the wording in the text “*proceedings other than those referred to in paragraph 1*”. As stated in Section 2.2. above, the Presidency of the Council proposed in the General Approach to the Proposal for a Recast of the Brussels IIa Regulation from 30 November 2018 to modify Article 12 of the Brussels IIa Regulation in order to unify prorogation of jurisdiction in the single paragraph and it practically deletes paragraph 1 of Article 12 of the Brussels IIa Regulation.<sup>1154</sup> In consequence, no specification regarding the doubts on the autonomous proceedings of Article 12 par. 3 of the Brussels IIa Regulation was not necessary to add.

### **2.3.1. Substantial Connection**

As clarified by the ECJ, Article 12 par. 3 of the Brussels IIa Regulation finds application also in autonomous proceedings. In consequence, the “substantial connection” between the child and the prorogued seized Member State court based on the jurisdictional ground in divorce, legal separation, or marriage as provided by Article 12 par. 1 of the Brussels IIa Regulation, is

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<sup>1151</sup> ECJ, Case C-656/13, *L v. M*, par. 40.

<sup>1152</sup> ECJ, Case C-436/13, *E. v. B.*, par. 48, 50.

<sup>1153</sup> ECJ, Case C-656/13, *L v. M*, par. 45, 47, 50.

<sup>1154</sup> The Presidency of the Council of the European Union, 14784/18, 2016/0190(CNS), 30 November 2018, p. 26.

substituted by the necessity to ascertain the substantial connection. In particular, “...by virtue of the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State.”<sup>1155</sup> However, this list is not exhaustive, and the Member State courts may take into consideration other factors, for example, factors listed in Article 15 of the Brussels IIa Regulation (such as the Member State where the prorogued court is situated; has become the habitual residence of the child after the Member State court was seized; is the former habitual residence of the child; or is the place where property of the child is located, and the case concerns measures for the protection of the child relating to the administration, conservation, or disposal of this property). Obviously, other factors may be considered by the Member State court as “substantially connected”. The Proposal for a Recast of the Brussels IIa Regulation adds another substantial factor – the habitual residence of close relatives of the child, with whom the child is in continuous contact<sup>1156</sup> and the Council’s General Approach to the Proposal for a Recast of the Brussels IIa Regulation from 30 November 2018 also adds different substantial factor - the former habitual residence of the child.<sup>1157</sup>

### **2.3.2. Parties to the Agreement**

In contrast to Article 12 par. 1 of the Brussels IIa Regulation which determines who are the parties to the agreement, Article 12 par. 3 of the Brussels IIa Regulation provides that the jurisdiction of the Member State courts must be accepted expressly or otherwise *by all the*

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<sup>1155</sup> On the critique see T. M. DE BOER, *What we should not expect from a recast of the Brussels IIbis Regulation*, *op. cit.*, p. 13, footnote No 34: «The phrase ‘substantial connection’ is rather (too) flexible. The connections to which Art. 12(3) expressly refers may not be ‘substantial’ at all, for instance if the child of an American father and a Dutch mother lives with his parents in the United States: the child is a Dutch/American national, but not in any other way connected with the Netherlands. Similarly: is there a substantial connection with the Netherlands if an American child is living with her American mother in the United States, while her American father is habitually resident in the Netherlands? Conversely, there may be a strong connection with the Netherlands even if the child is not a Dutch national and neither parent is a resident of the Netherlands. What if refugee parents have returned from the Netherlands to their home country and decide to send their child back to the Netherlands to be raised by a Dutch foster family?».

<sup>1156</sup> See Amendment No 119 proposed by E. Radev without any further explanation, Committee on Legal Affairs, Amendments 25-190, on the proposal for a Council regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), PE 606.308v01, 26 June 2017.

<sup>1157</sup> The Presidency of the Council of the European Union, 14784/18, 2016/0190(CNS), 30 November 2018, p. 26.

*parties to the proceedings*.<sup>1158</sup> Who is party to the proceedings should be determined by the national law.<sup>1159</sup> In ECJ case C-565/16, *Saponaro* regards the case of the parents acting on behalf of their child (all habitually resident in Italy) which have made an application to the Greek court for authorisation to renounce the inheritance from the deceased grandfather. The child, as the heir, would be liable in a civil action for damages brought by the victim due to the attempted fraud by the deceased. According to the Greek law, the prosecutor as one of the parties is legally a party to the relevant proceedings. In the first place, the ECJ had to examine whether the prosecutor being a party under the national law “is also a “party” within the meaning of Article 12 par. 3 lett. b) of the Brussels IIa Regulation.<sup>1160</sup> The Advocate General Tanchev stated that the answer to the question, who is a party to the proceedings is, must be found in the particular procedure organised according to the national law of the court seized since Brussels IIa Regulation does not regulate preliminary issues and “*refrains from interfering with the Member State’s procedural law in general*”.<sup>1161</sup> The ECJ, referring to the Opinion of Advocate General Tanchev, decided that a prosecutor who, according to the national law, has the capacity of a party to the proceedings commenced by the parents, is a party to the proceedings within the meaning of Article 12 par. 3 lett. b) of the Brussels IIa Regulation,<sup>1162</sup> since the “*EU legislature thus took care to use a term that encompassed all the parties to the proceedings, within the meaning of national law*”.<sup>1163</sup> According to the Council’s General Approach to the Proposal for a Recast of the Brussels IIa Regulation from 30 November 2018, the parties, as well as any other holder of parental responsibility should accept jurisdiction.<sup>1164</sup>

### 2.3.3. Best Interest of the Child

As stated in Section 2.2.3. of this Subchapter, although Article 12 par. 1 of the Brussels IIa Regulation lays down the condition of “superior interest of the child”, no distinction between

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<sup>1158</sup> Emphasis added.

<sup>1159</sup> C. GONZÁLES BEILFUSS, *Prorogation of Jurisdiction*, in *Jurisdiction in Matrimonial Matters, Parental Responsibility and International Abduction*, *op. cit.*, p. 191.

<sup>1160</sup> ECJ, Case C-565/16, *Alessandro Saponaro*, par 26.

<sup>1161</sup> ECJ, Case C-565/16, *Alessandro Saponaro*, Opinion of Advocate General Tanchev, par. 45-47.

<sup>1162</sup> ECJ, Case C-565/16, *Alessandro Saponaro*, par. 40.

<sup>1163</sup> ECJ, Case C-565/16, *Alessandro Saponaro*, par. 28.

<sup>1164</sup> The Presidency of the Council of the European Union, 14784/18, 2016/0190(CNS), 30 November 2018, p. 26.

these two terms was intended by the drafters of the legislation.<sup>1165</sup> Indeed, it can be partially referred to the text in Section 2.2.3. of this Subchapter concerning the superior interest of the child. However, the test concerning the best of interest of the child plays a more important role than in paragraph 1 and allows the Member State court discretion such as *forum non conveniens*.<sup>1166</sup> However, as stated by the ECJ when the matter contains the connection between the child and the Member State, this should lead to the conclusion that the condition of taking the best interests of the child into account is satisfied. Indeed, the boundaries between the condition on “substantial connection” and “best interest of the child” may sometimes be hard to determine.

Thus, a sizeable discretionary power attributed to the prorogued seized Member State court has a consequence that such a Member State court is not obliged to establish its jurisdiction if all other conditions are met, otherwise the principle of best interest of the child would be jeopardized.<sup>1167</sup> It may be demonstrated in the following example:

*Lucia (Italian-German national) was born in 2011 to Michele (German national) and Beatrice (Italian national), who has been living in Prague for 10 years. Michele and Beatrice wish to know which courts might be seized of action of parental responsibility if they reach an agreement on the competent court.*

Michele and Beatrice might agree according to Article 12 par. 3 of the Brussels IIa Regulation on an Italian court (e.g. the substantial connection – Lucia is Italian national); or a German court (e.g. the substantial connection - Lucia is German national); or a Czech court (e.g. the substantial connection – Lucia and her parents are habitually resident in the Czech Republic, probably a Czech court could also establish jurisdiction according to Article 8 of the Brussels IIa Regulation, if Lucia is habitually resident in the Czech Republic at the time the court is seized and no other court has jurisdiction according to Articles 9, 10, 12, or 15 of the Brussels IIa Regulation). However, as stated above, if Michele and Beatrice agree that one of the aforementioned courts has jurisdiction, such a court can disregard the parties’ agreement, e.g. the German court can decide that the commencement of the custody proceedings in Germany would not be in the best interest of the child

<sup>1165</sup> Practice Guide for the application of the new Brussels II Regulation, European Commission, p. 32.

<sup>1166</sup> E. PATAUT, E. GALLANT, *Article 12*, in Brussels IIbis Regulation: 2017, *op. cit.*, p.164.

<sup>1167</sup> See for example, *B v B* [2012] EWHC 1924 (fam), [23]; where the court decided that it is not in the best interest of the children to allow proceedings to be brought in England under Article 12 par. 3 since neither the children nor their parents were habitually resident in the jurisdiction.

## 2.4. Formal Validity

Article 12 par. 1 and par. 3 of the Brussels IIa Regulation provides that the jurisdiction of the Member State courts must be accepted expressly or otherwise in an unequivocal manner. The Brussels IIa Regulation does not define the notion of the acceptance made “expressly or otherwise in an unequivocal manner”. The wording on the formal validity of the agreement on jurisdiction differs significantly from Article 25 of the Brussels IIa Regulation. In consequence, any guidance by the Brussels IIa Regulation is not possible in this sense.

### 2.4.1. Time of Acceptance of Jurisdiction

The most significant doubts concern the question of time of seising a Member State court, *i.e.*, whether the parties are able to agree on a Member State court prior the institution of proceedings or after the commencement of the proceedings. Article 12 of the Brussels IIa Regulation provides that the parties need to agree on a Member State court at the time the court is seized.<sup>1168</sup> According to Article 16 of the Brussels IIa Regulation, a Member State court shall be deemed to be seized at the time when the document instituting the proceedings is lodged with the court. The English case *I (A Child)* has demonstrated the difficulties with the interpretation of the English version (as well as with the Italian, Spanish and French versions) of the wording “at the time is seized”, in particular if it can be interpreted as that the jurisdiction of the courts has been accepted at any time after the proceedings had begun. It was concluded that:

*...the diversity of views expressed by this court indicates that the interpretation is not acte clair and may have to be the subject of a reference to the European Court of Justice in another case. But I would favour an interpretation which catered both for a binding acceptance before the proceedings began and for an unequivocal acceptance once they had begun.*<sup>1169</sup>

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<sup>1168</sup> See Article 10 of the Proposal for a Recast of the Brussels IIa Regulation which substitute the wording “at the time the court is seized” with the wording “at the latest the court is seized, or, where the law of that Member State so provides, during those proceedings”.

<sup>1169</sup> *I (A Child)*, [2009] UKSC 10, [35].

Article 10 of the Proposal for a Recast of the Brussels IIa Regulation clarifies this doubt by providing that the jurisdiction of Member State court must be accepted “*at the latest the court is seized, or, where the law of that Member State so provides, during those proceedings*”. According to the Council’s General Approach to the Proposal for a Recast of the Brussels IIa Regulation from 30 November 2018, the parties, as well as any other holder of parental responsibility should accept jurisdiction at the latest at the time the court is seised; or in the course of the proceedings and the court has ensured that all the parties are informed of their right not to accept the jurisdiction.<sup>1170</sup>

It is generally accepted that any prior agreement is permitted,<sup>1171</sup> and that the agreement may be ineffective if it has been withdrawn at the time the court is seized.<sup>1172</sup> The parties are entitled to make different arrangements.<sup>1173</sup> Moreover, although Article 12 par. 1 of the Brussels IIa Regulation enables *ex ante* agreement, *i.e.*, before the court is seized with the divorce, separation, or marriage annulment proceedings, the parties do not have a possibility to foresee which Member State court will actually exercise jurisdiction on divorce, separation, or marriage annulment proceedings. Thus, due to the absence of a rule on choice-of-court relative to divorce, separation, or marriage annulment under the Brussels IIa Regulation, this agreement may benefit the parties who wish to concentrate the proceedings relating to divorce, separation, or annulment with the proceedings relating parental responsibility, notwithstanding the impossibility of predicting which court will assume jurisdiction. However, it may even encourage a “rush to court”, as either spouse may rush to file the claim before the Member State court that will apply the most beneficial substantive rules concerning divorce and parental responsibility.<sup>1174</sup> It may be demonstrated in the following example:

*Lucia was born in 2011 to the spouses Michele and Beatrice (Italian nationals), who had been living in Prague for 10 years. Michele and Beatrice wish that a Member State court, which would*

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<sup>1170</sup> The Presidency of the Council of the European Union, 14784/18, 2016/0190(CNS), 30 November 2018, p. 26.

<sup>1171</sup> On the opposite opinion see M. HELIN, *The Impact and application of the Brussels IIbis Regulation in Finland* in K. BOELE-WOELKI (ed), *Brussels II Bis: Its Impact and Application in the Member States*. European Family Law Series 14, Intersentia, 2007, p. 97.

<sup>1172</sup> C. GONZÁLES BEILFUSS, *Prorogation of Jurisdiction*, in *Jurisdiction in Matrimonial Matters, Parental Responsibility and International Abduction*, *op. cit.*, p. 191.

<sup>1173</sup> *I (A Child)*, [2009] UKSC 10, [25], [26].

<sup>1174</sup> On the same considerations see F. C. Villata, L. Válková, *EU Fam’s Model Choice-of-Court and Choice-of-Law Clauses*, available at: <http://www.eufams.unimi.it/2017/12/27/model-clauses/>, p. 42-45.

*have jurisdiction for their potential future divorce according to Article 3 of the Brussels IIa Regulation, will have jurisdiction to rule on a potential dispute for parental responsibility for Lucia according to Article 12 par. 1 of the Brussels IIa Regulation.*

Although Michele and Beatrice may informally agree which a Member State court will have jurisdiction for their potential future divorce (for example, an Italian court), and extend jurisdiction on parental responsibility according to Article 12 par. 1 of the Brussels IIa Regulation, there is a risk that:

- (i) An agreement by virtue of Article 12 par. 1 of the Brussels IIa Regulation will not be effective if the parties nominate a specific Member State court, for example, an Italian court, when the “informal agreement on divorce” will be disregarded by one of the parties and other Member State court will be seized for divorce according to Article 3 of the Brussels IIa Regulation;
- (ii) An agreement by virtue of Article 12 par. 1 of the Brussels IIa Regulation will be effective if the parties accept the jurisdiction of any Member State court exercising jurisdiction by virtue of Article 3 of the Brussels IIa Regulation on an application for divorce, legal separation, or marriage annulment, in relation to parental responsibility over Lucia. But in this case, Beatrice or Michele can disregard their “informal agreement on divorce” and may institute the proceedings in front of any Member State court having jurisdiction according to Article 3 of the Brussels IIa Regulation. This agreement may encourage a “rush to court”.

#### **2.4.2. Acceptance made “Otherwise in an Unequivocal manner”**

Express acceptance may be in a written or oral agreement.<sup>1175</sup> However, the question arises whether the conduct of the defendant, which enters into proceedings and does not object to the jurisdiction of the seized Member State court may be subsumed under the term of acceptance made “otherwise in an unequivocal manner” within the meaning of Article 12 of the Brussels IIa Regulation. The ECJ has tackled the issue in several judgments.

In case C-656/13, *L v. M*, the ECJ stated that where the defendant brings a second proceedings before the same court, as the plaintiff did, and pleads the lack of jurisdiction of that court, it cannot be considered that the jurisdiction of the Member State court seized by one party of proceedings in matters of parental responsibility has been “accepted expressly or otherwise in

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<sup>1175</sup> C. GONZÁLES BEILFUSS, *Prorogation of Jurisdiction*, in *Jurisdiction in Matrimonial Matters, Parental Responsibility and International Abduction*, *op. cit.*, p. 192.

an unequivocal manner by all the parties to the proceedings” according to Article 12 par. 3 lett. b) of the Brussels IIa Regulation.<sup>1176</sup> The ECJ stated this provision must be read with Article 16 of the Brussels IIa Regulation, which requires the existence of the agreement to be shown *at the latest* at the time when the document instituting the proceedings or an equivalent document is lodged with the court chosen.<sup>1177</sup> On the other hand, by argument *a contrario*, the ECJ held that Article 12 par. 3 lett. b) of Brussels IIa Regulation must be interpreted as meaning that jurisdiction has not been accepted where the defendant, on taking the first step required of him in the proceedings concerned, pleads the lack of jurisdiction of the court prorogation of whose jurisdiction is at issue.<sup>1178</sup> In other words, the ECJ did not limit its assessment to the “*time when the document instituting the proceedings ... [was] lodged with the court*” by virtue of Article 16 of Brussels IIa, but it refers to the other party’s conduct that took place later (in that case three and five days later).<sup>1179</sup>

The second ECJ case C-215/15, *Vasilka Ivanova Gogova*, concerned the action for obtaining the authorisation for the child, habitually resident in Italy, to travel abroad and for obtaining a new child’s passport, which was pending in front of the Bulgarian court. As it was not possible to serve the document instituting the proceedings on the child’s father, the Bulgarian court appointed a legal representative to represent him on the basis of the Bulgarian Code of Civil Procedure. The legal representative did not contest the jurisdiction of the Bulgarian courts. The ECJ decided that the will of the defendant cannot be deduced from the conduct of a legal representative appointed by the Member State courts when the document instituting proceedings could not be served on the defendant. Thus, it cannot be regarded as having been “accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings” within the meaning of Article 12 par. 3 of the Brussels IIa Regulation.<sup>1180</sup> It was justified by the fact that the legal representative has no contact with the defendant and thus, he cannot obtain the information necessary to accept or contest the jurisdiction of those

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<sup>1176</sup> ECJ, Case C-656/13, *L v. M*, par. 57 and 59.

<sup>1177</sup> ECJ, Case C-656/13, *L v. M*, par. 56.

<sup>1178</sup> ECJ, Case C-656/13, *L v. M*, par. 57.

<sup>1179</sup> The application was filed by the father of the children on 26 October 2012, the mother filed an application with the same court on 29 October 2012, and on 31 October 2012, the mother stated that she did not accept the international jurisdiction in the proceedings instituted by the father, ECJ, Case C-656/13, *L v. M*, par. 19, 21, 28. On the support of this view see ECJ, Case C-565/16, *Alessandro Saponaro*, Opinion of Advocate General Tanchev, 6 December 2017, ECLI:EU:C:2017:942, par. 60.

<sup>1180</sup> ECJ, Case C-215/15, *Vasilka Ivanova Gogova v Ilia Dimitrov Iliev*, par. 42.



courts.<sup>1181</sup> It should be pointed out that the ECJ referred to the case A, C-112/13, which concerned the conditions for application of the rule on submission of appearance laid down by Article 24 of the Brussels I Regulation.<sup>1182</sup>

In the most recent case C-565/16, *Alessandro Saponaro*, the ECJ stated two important things. First, where both parents make a joint application to the same court, such agreement must be regarded as “unequivocal” within the meaning of Article 12 par. 3 lett. b) of the Brussels IIa Regulation.<sup>1183</sup> The second statement concerned mainly the question of the prosecutor being a party the proceedings. The ECJ stated:

*Opposition by that party to the choice of jurisdiction made by the parents of the child in question, after the date on which the court was seized, precludes the acceptance of prorogation of jurisdiction by all the parties to the proceedings at that date from being established. In the absence of such opposition, the agreement of that party may be regarded as implicit and the condition of the unequivocal acceptance of prorogation of jurisdiction by all the parties to the proceedings at the date on which that court was seized may be held to be satisfied.*<sup>1184</sup>

According to the Advocate General Tanchev, Article 12 par. 3 of the Brussels IIa Regulation, which requires the acceptance of all parties to the proceedings (e.g., legal representatives) is not compatible with the wording of Article 16 of the Brussels IIa Regulation, which would practically exclude the prorogation, which would be dependent only on the applicants, not to all parties to the proceedings.<sup>1185</sup> In consequence, the acceptance must be attributed “as soon as the parties on whom a copy of the document instituting the proceedings is served have

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<sup>1181</sup> ECJ, Case C-215/15, *Vasilka Ivanova Gogova v Ilia Dimitrov Iliev*, par. 42.

<sup>1182</sup> ECJ, Case C--112/13, *A v B and Others*, 11 September 2014, ECLI:EU:C:2014:2195, par. 54 and 55.

<sup>1183</sup> ECJ, Case C-565/16, *Alessandro Saponaro*, par. 25. See also *Krajský soud v Hradci Králové*, 21 Co 611/2013, 19 December 2013, where the Court of Appeal (*Krajský soud v Hradci Králové*) annulled the judgment and remitted the case to the First Instance Court for further consideration. According to the Court of Appeal, the First Instance Court had to re-evaluate conditions for application of Article 12 par. 1 of the Brussels II-a Regulation since the action was filed by both parents, and therefore the parents probably expressed the acceptance of seized court. In Italy see *Tribunale di Padova, Giudice tutelare*, decree, 14 September 2017, according the court, all the conditions required by Article 12 par. 3 of the Brussels IIa Regulation were met in the case since the jurisdiction of the court was expressly accepted by all the parties to the proceedings since the parents had lodged a joint application.

<sup>1184</sup> ECJ, Case C-565/16, *Alessandro Saponaro*, par. 32.

<sup>1185</sup> ECJ, Case C-565/16, *Alessandro Saponaro*, Opinion of Advocate General Tanchev, par. 57 and 58.

*either taken the first steps open to them or can be considered to have failed to do so on the expiry of the period within which they are required to take such steps.”*<sup>1186</sup>

It can be deduced from the above-mentioned interpretations of ECJ that:

- The acceptance cannot be limited to the “time when the document instituting the proceedings is lodged with the court” by virtue of Article 16 of Brussels IIa Regulation, but it covers party’s conduct that took place later;<sup>1187</sup>
- By analogy it is possible to make a reference to Article 24 of the Brussels I Regulation (Article 26 of the Brussels Ibis Regulation) determining the tacit prorogation;<sup>1188</sup>
- The agreement of the party may be regarded as implicit in the absence of opposition after the date on which the court was seized, whereby opposition precludes the acceptance of the prorogation of jurisdiction.<sup>1189</sup>

However, it is still questionable whether the acceptance within the meaning of Article 12 of the Brussels IIa Regulation also covers the typical rule on submission by appearance. The certain national case law has already permitted submission by an appearance in their case law.<sup>1190</sup> However, the clear conclusion on the rule on submission by appearance would be

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<sup>1186</sup> ECJ, Case C-565/16, *Alessandro Saponaro*, Opinion of Advocate General Tanchev, par. 59.

<sup>1187</sup> ECJ, Case C-656/13, *L v. M*, par. 19, 21, 28; Case C-565/16, *Alessandro Saponaro*, Opinion of Advocate General Tanchev, par. 60.

<sup>1188</sup> ECJ, Case C-215/15, *Vasilka Ivanova Gogova v Ilia Dimitrov Iliev*, par. 42.

<sup>1189</sup> ECJ, Case C-565/16, *Alessandro Saponaro*, par. 32.

<sup>1190</sup> National case law of the certain States admitted the submission by appearance as an unequivocal acceptance. For example, in Spain see *Audencia Provincial de Barcelona*, section 12, 30 October 2014, where the Spanish Court allowed to concentrate family proceedings in the court having jurisdiction for divorce according to Article 12 par. 1 of the Brussels IIa Regulation since the defendant appeared and did not contest the jurisdiction. In France see *Cour d’Appel Bordeaux*, 28 May 2013, where French court established its jurisdiction where the mother assisted by a lawyer appeared in proceedings and did not contest the jurisdiction. In Italy see *Tribunale di Arrezzo*, decreto 15 March 2011, in *Rivista di diritto internazionale privato e processuale*, (2012), p. 161, where the Italian court established its jurisdiction according to Article 12 of the Brussels IIa Regulation since defendant submitted legal conclusion of the claim as to the substance. In UK see *Re Family Division, G (Children)*, [2017] EWHC 2111 (Fam), where the court affirmed that although the father raised the issue of jurisdiction in his first Statement and at the hearing, it does not change the fact that he had already unequivocally accepted jurisdiction through his previous letter as to the substance. On the opposite approach where the submission by appearance is rejected see S. MARINO, *La portata della proroga del foro nelle controversie sulla responsabilità genitoriale*, *op. cit.*, p. 355. See also M. C. Baruffi, C. Fratea, C. Peraro, Report on the Italian Good Practices, p. 6, available at: <http://www.eufams.unimi.it/2017/01/10/italian-report-on-good-practices/>: «*The academics generally agreed that in such cases Art. 12 cannot be applied and that the acceptance of the jurisdiction must be, if not necessarily written, at least explicit, which implies the appearance of the parties before the court. The provision itself does not require a written agreement, but the jurisdiction must be accepted expressly or otherwise in an unequivocal manner by the spouses and by the holders of parental responsibility, even because matrimonial and parental responsibility matters, even when dealt with jointly, must be treated separately.*».

The national courts seem to accept a unified approach as to the question concerning non-admissibility of the extension of the acceptance of the jurisdiction in divorce proceedings to the parental responsibility matter. See

helpful also to the Member States where the national rule on submission by appearance is lacking.<sup>1191</sup> The absence of the rule on submission by appearance on a national level and in the Brussels IIa Regulation then creates an additional problem, for example, problems connected with non-specification of the level of instance in Article 12 of the Brussels IIa Regulation.<sup>1192</sup> The model could be taken from Article 26 par. 2 of the Brussels Ibis Regulation,<sup>1193</sup> which protects the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer, or the employee by ensuring that these weaker parties which are in the position of the defendants are informed of their right to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance. However, it seems that the Proposal for a Recast of the Brussels IIa Regulation took an opposite approach since new paragraph 5 provides that:

*Where all the parties to the proceedings in relation to parental responsibility accept the jurisdiction referred to in paragraph 1 or 3 during those proceedings, the agreement of the parties shall be recorded in court in accordance with the law of the Member State of the court.*

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*Corte di Cassazione*, S.U., 30 December 2011, n. 30646, where the court specified that the acceptance of the jurisdiction of the Italian court as to parental responsibility could not be inferred from the failure of the party to contest its jurisdiction on the personal separation petition, since the two applications have different objects. In France see *Cour de Cassation*, 13 May 2015, No 13-21.827 and in Spain *Tribunal Supremo - Sala Primera*, de lo Civil, 16 December 2015, 710/2015; in UK see *Mark Ian Bush v Neena Bush*, [2008] EWCA Civ 865.

<sup>1191</sup> For examples in the Czech Republic. See *Krajský soud v Brně*, 20 Co 464/2014, 17 September 2014, where the father requested for approval of the agreement on custody and visitation right on 31 December 2013. The mother supported the father's motion on approval of the agreement on custody and visitation right and filed an action on divorce. The first instance court (*Okresní soud Brno – venkov*) declared lack of jurisdiction since it could not establish jurisdiction according to Article 8 of the Brussels IIa Regulation. The father appealed against the judgment and he pointed out to the fact that all conditions for application of Article 12 of the Brussels IIa Regulation are fulfilled. The Court of Appeal annulled the judgment and returned the case to the First Instance Court for further considerations. According to the Court of Appeal, the first instance court must examine all conditions laid down in Article 12 par. 1 of the Brussels IIa Regulation, whereby the conditions of the acceptance must be examined from the first defence (e.g. response to the petition).

<sup>1192</sup> See *Krajský soud v Českých Budějovicích*, 5 Co 526/2007, 12 March 2007. The Czech judgment of *Krajský soud v Českých Budějovicích* regards the father's claim on modification of custody and visitation order in respect of the child habitually resident in Austria. The first instance court established its jurisdiction, despite the child's habitual residence in Austria. The mother of the child appealed against this judgment as to the substance where, for the first time, contested the jurisdiction of Czech courts (both parties were silent in this respect in front of first instance court). According to *Krajský soud v Českých Budějovicích*, the jurisdiction of the Member State court according to Article 12 par. 3 of the Brussels II-a Regulation, which must be accepted expressly or otherwise in an unequivocal manner "at the time the court is seized", includes acceptance in front of court of appeal within the meaning of Considerations No 7, referring to civil matters "whatever the nature of the court or tribunal". *Krajský soud v Českých Budějovicích* did not taken into consideration Article 16 of the Brussels IIa Regulation and the acceptance made in an unequivocal manner by the mother (*i.e.*, submission of appearance which is not known to the Czech procedural law) in front of the first instance court and declined its jurisdiction.

<sup>1193</sup> On the suggestion to cover explicitly the submission by appearance see also: T. M. de Boer, *What we should not expect from a recast of the Brussels Ibis Regulation*, *op. cit.*, p. 18.

The question is whether the wording “to be recorded” implies tacit prorogation where entering into proceedings without contesting jurisdiction may be registered merely as protocol, or a legal filing in accordance with the law of the seized Member State court, or if a specific agreement by the parties registered in front of the Member State court will be necessary.<sup>1194</sup> However, the Council’s General Approach from 30 November 2018 provides:

*...The parties, as well as any other holder of parental responsibility ... have accepted the jurisdiction expressly in the course of those proceedings and the court has ensured that all the parties are informed of their right not to accept the jurisdiction....A choice-of-court agreement ... shall be expressed in writing, dated and signed by the parties concerned or included in the court record in accordance with national law and procedure. Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing. Persons who become parties to the proceedings after the court was seized may express their agreement after the court was seized. In the absence of their opposition, their agreement shall be regarded as implicit.*<sup>1195</sup>

It means that according to the Council’s General Approach, that the tacit prorogation is not possible, since the parties and holders of parental responsibility must accept jurisdiction *expressly* in the course of the proceedings and the court must also firstly ensure that all the parties are informed of their right not to accept the jurisdiction.

## **2.5. Substantive Validity**

The Brussels IIa Regulation does not provide for a rule on the substantive validity of the prorogation of jurisdiction, which concerns the consent of the parties and may include also mistake, fraud, duress, or even capacity. As stated in Chapter One, Subchapter II, Section 2.3., one of the parties may be considered as vulnerable person due to: (i) information asymmetry caused by limited financial resources to be informed about the legal consequences; (ii) economic or the social dependence on another party; or (iii) intellectual disadvantage (individuals that did not reach the sufficient mental ability to consider the legal consequences of their conduct, for example persons under age of 18 years). Such asymmetries between the holders of parental responsibility may result in mistake, fraud, or duress more easily. This problem may become significant in case of the prior written agreements on jurisdiction where no control operates. Although the written agreement on the jurisdiction filed with the document instituting proceedings is not binding on the court, other proofs submitted by the

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<sup>1194</sup> See C. HONORATI, *La proposta di revisione del regolamento Bruxelles II Bis: Più tutela per i minori e più efficacia nell’esecuzione delle decisioni*, *Rivista di diritto internazionale privato e processuale*, (2017), p. 8, where according to the author the procedural conduct of the party, which neither explicitly accepts the jurisdiction or contests the jurisdiction, but requests parental responsibility, will not be longer understood as implicit acceptance.

<sup>1195</sup> The Presidency of the Council of the European Union, 14784/18, 2016/0190(CNS), 30 November 2018, p. 26.

applicant may persuade the court on its jurisdiction according to Article 12 of the Brussels IIa Regulation. At least, the discretionary power of the court represents a significant break to reveal any mistake, fraud, or duress. At least, new Recital proposed by the Council on 30 November 2018 should provide:

*...Before exercising its jurisdiction based on a choice of court agreement or acceptance the court should examine whether this agreement or acceptance was based on an informed and free choice of the parties concerned and not a result of one party taking advantage of the predicament or weak position of the other party...*<sup>1196</sup>

Moreover, it must be borne in mind that Article 12 of the Brussels IIa Regulation does not represent an exclusive ground of jurisdiction, it is an alternative forum which does not produce the negative effect of depriving the jurisdiction of other Member States courts.<sup>1197</sup> This has two consequences. First, the previous agreement which would be concluded in mistake, fraud, or duress does not preclude the “damaged” weaker party from seizing a Member State of the place of habitual residence of the child. Second, such a seized Member State court does not examine the (substantive) validity of the jurisdiction, since the agreement is not effective for any other Member State court other than the designated one. Indeed, the seized non-designated Member State court may establish its jurisdiction according to Article 8 of the Brussels IIa Regulation. It means that only the seized designated Member State must exercise the substantive validity of the agreement. Thus, it may use three methods for the evaluation of the substantive validity of the agreement:

- a) The validity should be assessed only in the light of the considerations connected with the requirements laid down in Article 12 of the Brussels IIa Regulation. In consequence, there is no space for the national law regarding substantive validity.<sup>1198</sup> However, such a conclusion would lead to the impossibility of examining substantive validity which seems even more essential element in family matters with a weaker party.
- b) Substantive validity should be governed by the *lex fori*. The *lex fori* in this case always means the law of the designated Member State court – there is no other Member State

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<sup>1196</sup> The Presidency of the Council of the European Union, 14784/18, 2016/0190(CNS), 30 November 2018, p. 26.

<sup>1197</sup> C. GONZÁLES BEILFUSS, *Prorogation of Jurisdiction*, in *Jurisdiction in Matrimonial Matters, Parental Responsibility and International Abduction*, *op. cit.*, p. 187, 194, 195.

<sup>1198</sup> As stated by the ECJ in the context of the Brussels Convention. See ECJ, Case C-159/97, *Trasporti Castelletti* par. 49.

court which should examine the substantive validity of the jurisdiction agreement according to Article 12 of the Brussels IIa Regulation. This approach corresponds to the reasonable expectation of the parties which designate such a Member State court.

- c) The answer concerning substantive validity could be searched for in Article 25 of the Brussels I-bis Regulation which determines the rule on substantive validity and refers to the conflict-of-laws rules of the designated Member State court. It is questionable whether, in cases of parental responsibility, the 1996 Hague Convention is applicable. In such a case, Article 15 par. 1 of the 1996 Hague Convention on parental responsibility and protection of the children would refer back to the *lex fori*.<sup>1199</sup> The application of the 1996 Hague Convention on parental responsibility and protection of children may be supported by Article 10, which covers agreements on the prorogation of jurisdiction in a similar way as Article 12 par. 1 of the Brussels IIa Regulation, and by Article 4 which does not exclude the question on validity *a priori* from its scope of application. However, according to Article 4 lett. a) of the 1996 Hague Convention on parental responsibility and protection of children, the establishment or contesting of a parent-child relationship is excluded from its scope. Thus, it is for the private international law to decide whether the underage mother of a child must be represented in connection with any declarations of recognition or consent or any lawsuits concerning her child's status.<sup>1200</sup> Moreover, the question of the legal capacity of the parties should be left to private international law.<sup>1201</sup>

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<sup>1199</sup> Conflict of law rules are excluded according to Article 21 of the 1996 Hague Convention on parental responsibility and protection of children. By virtue of paragraph 2 of Article 15, if the protection of the person or the property of the child requires, the law of another State with which the situation has a substantial connection may be exceptionally applied or taken into consideration. Such law might be the law of the State of habitual residence of the child.

<sup>1200</sup> P. Lagarde, Explanatory Report on the 1996 Hague Child Protection Convention, HCCH Publications, 1998, par. 27.

<sup>1201</sup> P. Lagarde, Explanatory Report on the 1996 Hague Child Protection Convention, HCCH Publications, 1998, par. 30, refers only to the question of the capacity of the children, in consequence it may be presumed that the capacity of the parents is excluded from the scope of application as well: «*The Commission declined on the other hand a proposal which would have excluded capacity expressly from the scope of the Convention. It did not wish in that way to submit to the Convention's rules the determination of the capacity of a person under the age of 18 years. If, for example, the court of a Contracting State is called upon to decide, in ruling on the validity of a contract entered into without authorisation by a person under 18 years of age, on the capacity of this minor, it will decide this question of capacity without reference to the Convention. But capacity may enter indirectly into the scope of the Convention in that it may be posed as a question preliminary to a principal question which enters within the scope of the Convention as a question of legal representation or of the taking of a measure of protection. This preliminary question of capacity will be decided upon under the rules of private international law of the State of the authority which has taken jurisdiction, but the decision taken by this authority on the principal question, which enters by hypothesis into the scope of the Convention, will benefit from the Convention's rules, in particular from the set of rules which it provides on recognition and enforcement.*».

## 2.6. Choice-of-court Agreements in Divorce, Legal Separation, and Marriage Annulment under the Brussels IIa Regulation

There is no rule on the choice-of-court agreements in divorce, legal separation, or marriage annulment under the Brussels IIa Regulation. There was a large number of discussions concerning the introduction of the rule on the choice-of-court agreement in divorce, legal separation, and marriage annulment into the Brussels IIa Regulation; a number of studies, reports, impact assessments and projects concerned this issue.<sup>1202</sup> The introduction of the new rule was suggested in order to limit a “rush to court” caused by alternative grounds of jurisdiction provided in Article 3 of the Brussels IIa Regulation in conjunction with *lis pendens* rule and the absence of harmonised conflict-of-law rules in the entire European Union.<sup>1203</sup> Jurisdiction agreements in divorce, legal separation, or marriage would reduce uncertainty and could protect the economically weaker spouse from such a “rush to court”.<sup>1204</sup> It would also ensure access to a Member State court for the spouses of different nationalities

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<sup>1202</sup> See for example: Study to inform a subsequent Impact Assessment on the Commission proposal on jurisdiction and applicable law in divorce matters, Draft Final Report to the European Commission DG Justice, Freedom and Security, European Policy Evaluation Consortium, 2006; Commission Staff Working Document. Annex to the proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters. Impact Assessment, SEC(2006) 949, 17 July 2006; EU Commission, Study on the assessment of Regulation (EC) No 2201/2003 and the policy options for its amendment, Final report: evaluation – Study. Study conducted by Deloitte, 2015, available at: <https://publications.europa.eu/en/publication-detail/-/publication/463a5c10-9149-11e8-8bc1-01aa75ed71a1/language-en/format-PDF/source-73782761> (“Deloitte, Study on the assessment of Regulation (EC) No 2201/2003 and the policy options for its amendment”); Commission Staff Working Document. Impact Assessment. Accompanying the document Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), SWD/2016/0207 final, 30 June 2016; Project ‘Planning the future of cross-border families: a path through coordination’ (EUFam’s), co-funded by the Directorate-General for Justice and Consumers of the European Commission (JUST/2014/JCOO/AG/CIVI/7729) available at: <http://www.eufams.unimi.it/project/>; Project ‘Cross-Border Proceedings in Family Law Matters before National Courts and CJEU’, funded by the European Commission’s Justice Programme (GA - JUST/2014/JCOO/AG/CIVI/7722) available at: <http://www.asser.nl/projects-legal-advice/cross-border-proceedings-in-family-law-matters-before-national-courts-and-cjeu/>.

<sup>1203</sup> Commission Staff Working Document. Impact Assessment. Accompanying the document Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), SWD/2016/0207 final, 30 June 2016, p. 16 and 17.

<sup>1204</sup> Deloitte, Study on the assessment of Regulation (EC) No 2201/2003 and the policy options for its amendment, p. 38, p. 63.

who live in a Third State.<sup>1205</sup> Moreover, the new rule would also take into account the trend of encouraging the parties to reach a mutual agreement and party autonomy<sup>1206</sup> - and it would provide consistency with other EU instruments.<sup>1207</sup> Finally, from a practical view, it would also allow the concentration of the proceedings.<sup>1208</sup> From the different questionnaire results, the most part of the respondents would welcome including the possibility for spouses to choose a Member State court.<sup>1209</sup> However, if we look into the national laws of the Member States, most of them do not allow choice-of-court agreements in divorce.<sup>1210</sup> There are also negative aspects and legitimate concerns regarding the use of choice-of-court agreements in family matters since the contractual method does not operate fairly, especially in respect to

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<sup>1205</sup> Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, COM(2006)0399 final, 17 July 2006. p. 4 and 8.

<sup>1206</sup> Deloitte, Study on the assessment of Regulation (EC) No 2201/2003 and the policy options for its amendment, p. 5, 29; Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, COM(2014)0225 final, 15 April 2014, p. 5.

<sup>1207</sup> Deloitte, Study on the assessment of Regulation (EC) No 2201/2003 and the policy options for its amendment, p. 12.

<sup>1208</sup> Council of Bars and Law Societies of Europe, CCBE Position on the proposal for a recast of the Brussels II-*a* Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, 2 December 2016, p. 3; Commission Staff Working Document. Impact Assessment. Accompanying the document Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), SWD/2016/0207 final, 30 June 2016, p. 14.

<sup>1209</sup> 85% (139 of 163) of the respondents in the questionnaire prepared by Deloitte, Study on the assessment of Regulation (EC) No 2201/2003 and the policy options for its amendment, p. 12. See also responses to question no 13, The Project 'Cross-Border Proceedings in Family Law Matters before National Courts and CJEU', funded by the European Commission's Justice Programme (GA - JUST/2014/JCOO/AG/CIVI/7722) available at: <http://www.asser.nl/projects-legal-advice/cross-border-proceedings-in-family-law-matters-before-national-courts-and-cjeu/>, where only Estonia, Finland, Lithuania, and Poland stated that a recast should not include a choice of forum.

<sup>1210</sup> See question No 8 of The Project 'Cross-Border Proceedings in Family Law Matters before National Courts and CJEU', funded by the European Commission's Justice Programme (GA - JUST/2014/JCOO/AG/CIVI/7722) available at: <http://www.asser.nl/projects-legal-advice/cross-border-proceedings-in-family-law-matters-before-national-courts-and-cjeu/>. Only Slovenia and Spain admitted that possibility. See Slovenian answer: «*In Slovenian jurisdiction is a possibility for a choice of forum for spouses. Despite the general territorial jurisdiction (actor sequitur forum rei – art. 46(1) Civil Procedure Act 187 (hereinafter: CPA), the jurisdiction in matrimonial disputes may also be at the court on the territory of which the spouses had their last common permanent residence (art. 54(1) CPA). The possibility of choice is therefore limited and the plaintiff may choose just between general jurisdiction and last common permanent residence.*»; see Spanish answer: «*According to Article 22bis Organic Law on Judiciary Power, Spanish Courts will have jurisdiction as long as the parties, regardless of its domicile, would have agreed in that sense. However, it is important to note that implicit and explicit submission would only take place in those instances where “A rule specifically allows it”. This expression can be controversial and would lead to problems of interpretation in order to accept that a choice of forum in regards to matrimonial matters would be possible in Spain.*».



the vulnerable parties.<sup>1211</sup> The Proposal for a Recast of the Brussels IIa Regulation from 2006<sup>1212</sup> proposed a new rule on the choice-of-court agreement in divorce or legal separation.<sup>1213</sup> The party autonomy was limited to the extent that a “criterion proximity” between the spouses and agreed Member State was required. In particular, the spouses could choose: a Member State court having jurisdiction for divorce, legal separation, or marriage annulment according to Article 3 of the Brussels IIa Regulation;<sup>1214</sup> a Member State court of the place of the spouses’ last common habitual residence for a minimum period of three years;<sup>1215</sup> or a Member State court of one of the spouses’ nationality.<sup>1216</sup> However, the first draft did not specify the moment when the criteria had to be met, which was subject to further

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<sup>1211</sup> P. MCELEAVY, *The communitarization of divorce rules: what impact for English and Scottish law?*, International & Comparative Law Quarterly 53:3 (2004), p. 621; M. NÍ SHÚILLEABHÁIN, *Cross-Border Divorce Law: Brussels II Bis*, *op. cit.*, p. 78; Deloitte, Study on the assessment of Regulation (EC) No 2201/2003 and the policy options for its amendment, p. 38.

<sup>1212</sup> Article 3a of the Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, COM(2006)0399 final, 17 July 2006, provided: «1. The spouses may agree that a court or the courts of a Member State are to have jurisdiction in a proceeding between them relating to divorce or legal separation provided they have a substantial connection with that Member State by virtue of the fact that: any of the grounds of jurisdiction listed in Article 3 applies, or it is the place of the spouses’ last common habitual residence for a minimum period of three years, or one of the spouses is a national of that Member State or, in the case of the United Kingdom and Ireland, has his or her “domicile” in the territory of one of the latter Member States. 2. An agreement conferring jurisdiction shall be expressed in writing and signed by both spouses at the latest at the time the court is seized.»

<sup>1213</sup> See Recital No 6 of Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, COM(2006)0399 final, 17 July 2006. The possibility to conclude a choice-of-court agreement for a marriage annulment was excluded because «Such possibility should not extend to marriage annulment, which is closely linked to the conditions for the validity of the marriage, and for which parties’ autonomy is inappropriate.»

<sup>1214</sup> On the critique of this jurisdictional ground see T. M. DE BOER, *The second revision of the Brussels II Regulation: Jurisdiction and applicable law*, *op. cit.*, p. 6; A. BORRÁS, *Lights and Shadows of Communitarisation of Private International Law: Jurisdiction and Enforcement in Family Matters with regard to Relations with Third States*, in *The External Dimension of EC Private International Law in Family and Succession Matters*, *op. cit.*, p. 120, which retains the possibility of the persistency of *forum shopping*, where the grounds of jurisdiction set out in Article 3 of the Brussels IIa Regulation were not reduced.

<sup>1215</sup> On the critique concerning the doubts on substantial connection in the context of the last habitual residence. See A. BORRÁS, *Lights and Shadows of Communitarisation of Private International Law: Jurisdiction and Enforcement in Family Matters with regard to Relations with Third States*, in *The External Dimension of EC Private International Law in Family and Succession Matters*, *op. cit.*, p. 120. This criterion was for the first time amended in European Parliament, Report on the proposal for a Council regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, A6-0361/2008, 2006/0135(CNS), 19 September 2008, as follows: «it is the Member State in which the spouses have had their habitual residence for a minimum period of three years, provided that this situation did not come to an end more than three years before the jurisdiction was seized.»

<sup>1216</sup> In the European Parliament, Report on the proposal for a Council regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, A6-0361/2008, 2006/0135(CNS), 19 September 2008, was proposed another jurisdictional ground – place of the marriage, since «The choice by the parties of a country to celebrate their marriage should be reasonably presumed as implying possible acceptance of the jurisdiction of that country as well.»

discussions.<sup>1217</sup> The never-accepted, proposed rule on the choice-of-court agreements in divorce or legal separation did not meet with unconditional approval.<sup>1218</sup>

In 2016, the Commission processed the various options in order to improve the current rules laid down in the Brussels IIa Regulation. The Commission took into account the introduction of the rule on the choice-of-court agreements in divorce, legal separation, or marriage annulment. The Commission proposed four options:

- a) Baseline scenario. This option proposed to leave the *status quo*. The consolidation of the proceedings is possible under the existing rules by bringing parental responsibility and maintenance issues before one of the Member State courts having jurisdiction for the divorce under the Brussels IIa Regulation. A problem of the “rush to court” would continue to persist in the Member States which have not joined the Rome III Regulation.
- b) Introduction of a choice-of-court in a Member State. This option would add the possibility for the spouses to determine in advance and upon agreement which court shall deal with the consolidated proceedings. However “*the assessment of the effectiveness to achieve this objective is however hampered by the lack of data and the fact that the actual scale of the problem is currently unknown.*”<sup>1219</sup> 85% of the stakeholders (including the Member States) were in favour of this option. It was proposed that the choice should be limited to the Member State courts to which the spouses had a substantial connection and that the formal requirements should be in line with other EU instruments.<sup>1220</sup>
- c) Introduction of a choice-of-court in a Member State combined with a possibility of the transfer of jurisdiction. In addition to a new rule on the choice-of-court, the Member State court seized with the divorce could consider whether a court of another Member State is

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<sup>1217</sup> European Parliament, Committee Draft Report on the proposal for a Council regulation amending regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, PE 400.282v01 2006/0135(CNS), 9 January 2008, proposed “the time the agreement was concluded” since “The precise moment at which the criteria apply must be specified”.

<sup>1218</sup> T. M. DE BOER, *What we should not expect from a recast of the Brussels IIbis Regulation*, *op. cit.*, p. 11. See also C. HONORATI, *La proposta di revisione del regolamento Bruxelles II bis: Più tutela per i minori e più efficacia nell'esecuzione delle decisioni*, *op. cit.*, p. 4, where, according to the author, the formulation was difficult and full of complications which would not facilitate application of the Brussels IIa Regulation, even it could open the Pandora's box.

<sup>1219</sup> Commission Staff Working Document. Impact Assessment. Accompanying the document Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), SWD/2016/0207 final, 30 June 2016, p. 18.

<sup>1220</sup> *Ibidem*, p. 20.

better placed to hear the case.<sup>1221</sup> The UK argued in favour of introducing the possibility to transfer jurisdiction for matrimonial matters.

- d) Introduction of a choice-of-court in a Member State combined with a hierarchy of grounds of jurisdiction. In addition to a new rule on the choice-of-court, this option would completely eliminate the “rush to court” by providing the hierarchical list of *fora*.<sup>1222</sup>

The Commission compared the options and found out that option 1 is the preferred policy since “*the existing rules have proven to work to a large extent satisfactorily, and the drawbacks of the other options make them currently not feasible or desirable.*”<sup>1223</sup> In consequence, the Proposal for a Recast of the Brussels IIa Regulation does not contain a rule on the choice-of-court agreements in divorce, legal separation, and marriage annulment.

However, the doctrine still highlights the necessity to introduce a new rule on the choice-of-court agreements in divorce, legal separation, and marriage annulment. In a number of publications, a specific rule on the choice-of-court agreement has been proposed.<sup>1224</sup> There are some points which reveal the common approaches as to the choice-of-forum for divorce, legal separation, and marriage annulment. The choice of available *fora* should be limited since the authors or respondents deem that a weaker party is protected by limiting the number of choices available,<sup>1225</sup> and the limitation would be based on “proximity” between the spouses

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<sup>1221</sup> *Ibidem*, p. 19.

<sup>1222</sup> *Ibidem*, p. 20, 21.

<sup>1223</sup> *Ibidem*, p. 23.

<sup>1224</sup> On the proposed wording of the new choice-of-court agreements see: P. TORREMANS, J. J. FAWCETT, U. GRUŠIĆ, (eds), *Cheshire, North & Fawcett: Private International Law*, Oxford University Press, 2017, p. 964: «*Spouses should have been allowed to enter into a choice-of-court agreement opting for either the courts of the Member State of their habitual residence, at the time the agreement is concluded; the court of the member State of their last habitual residence, provided that one of them still resides there at the time the agreement is concluded; the courts of the Member State of the nationality of either spouse at the time of the agreement.*»; T. KRUGER, L. SAMYN, *Brussels II bis: successes and suggested improvements*, in *Journal of Private International Law* 12:1 (2016), p. 144: «*...the spouses should be able to at least opt for: the courts of the Member State of their habitual residence, at the time the agreement is concluded; the courts of the Member State of their last habitual residence, provided that one of them still resides there at the time of the agreement; the courts of the Member State of the nationality of either spouse at the time of the agreement.*».

<sup>1225</sup> During the public consultation, 97% (i.e. 140 out of 145 responses to this question) stated that the choice should be limited through a “substantial connection”, see Commission Staff Working Document. Impact Assessment. Accompanying the document Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), SWD/2016/0207 final, 30 June 2016, p. 18, footnote no 51; *contra* T. KRUGER, L. SAMYN, *Brussels II bis: successes and suggested improvements*, *op. cit.*, p. 145, where the authors deem a weaker party is not protected by limiting the number of choices available. See also T. M. DE BOER, *The second revision of the Brussels II Regulation: Jurisdiction and applicable law*, *op. cit.*, p. 5 : «*Now that we have actually reached the stage of choice-of-law harmonization – or rather unification – I still cannot think of any reason why*

and the chosen *forum*.<sup>1226</sup> If the choice would refer to Article 3 of the Brussels IIa Regulation, this could create additional problems when the court is seized. For example, at the time of the conclusion of the jurisdiction agreement it would not be clear who will be the respondent and the applicant. In consequence, it seems to be more practical to list the specific jurisdictional grounds.<sup>1227</sup> The possibilities given to the spouses should mirror possibilities given in the Rome III Regulation in order to reach the coincidence between *ius* and *forum* in the Member States where the Rome III Regulation is applicable. Moreover, although Article 4 of the Maintenance Regulation allows the parties to agree on a court which has jurisdiction to settle their matrimonial dispute and the maintenance between the spouses, the reversed scenario would enable concentration of the proceedings also for maintenance obligations towards a child under the age of 18. In consequence, it may be proposed that the parties could opt for the Member State court of the habitual residence of either spouse,<sup>1228</sup> the former habitual residence of both spouses,<sup>1229</sup> or nationality of either spouse.<sup>1230</sup> Following the solutions

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*the spouses should not be allowed to choose any forum within the European Union, and why their freedom of choice should be limited to a number of options under the general motto that they have 'a substantial connection' with the forum State. If the harmonization of conflict-of-law rules is thought to be an effective means to prevent forum-shopping, there cannot possibly be any objection to allowing the spouses to choose any court within EU territory as long as either of them has some connection with one of the member States, not necessarily the forum State.».*

<sup>1226</sup> 65% (85 out of 140 responses) think that the spouses' habitual residence provides a valid connecting factor, 33% (47 out of 140 responses) think that the nationality of at least one of the spouses provides a valid connecting factor and 36% (48 out of 140 responses) consider any court having jurisdiction to hear the case under the main jurisdiction provisions of the Regulation as being sufficiently closely connected with the case and therefore eligible to be chosen by the parties, see Commission Staff Working Document. Impact Assessment. Accompanying the document Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), SWD/2016/0207 final, 30 June 2016, p. 18, footnote no 51.

<sup>1227</sup> On the critique concerning the reference to Article 3 of the Brussels IIa Regulation see: T. M. DE BOER, *The second revision of the Brussels II Regulation: Jurisdiction and applicable law*, op. cit., p. 6: «*If the spouses choose a forum before they actually contemplate a divorce, they have no way of knowing who is going to be the petitioner and who is going to be the respondent, both crucial data for the application of Article 3. If the conditions of Article 3 should be measured against the time of the agreement, the only fool proof criterion listed in that provision is the common residence of the spouses at that time. All other factors that determine jurisdiction under Article 3 are unknown at the time the agreement is made. If, on the other hand, those factors should be measured against the time the court is actually seized, chances are that, since the date of the agreement, the circumstances have changed in such a way that the conditions of Article 3 are no longer satisfied.*».

<sup>1228</sup> Although Article 5 per. 1 lett. a) of the Rome III Regulation provides for the possibility to designate the law common to the spouses' habitual residence, the jurisdictional ground referring to habitual residence of only one of the spouses is aligned with Article 4 par. 1 lett. a) of the Maintenance Regulation and indirectly also with Article 3 par. 1 lett. a) of the Brussels IIa Regulation which is in fact based on the habitual residence of one of the spouses.

<sup>1229</sup> The spouses' last common habitual residence is in line with Article 4 par. 1 lett. c) ii) indent of the Maintenance Regulation (the Maintenance Regulation requires two years duration of the spouses' habitual residence). However, the duration may be irrelevant if part of the spouses' life was spent in that Member State

provided in the Property Regimes Regulations and Succession Regulation, the parties may also be allowed to agree on the courts of the Member State, whose law is applicable, or the law applied to their divorce or legal separation, or marriage annulment.<sup>1231</sup> Lastly, the parties should also be entitled to designate a Member State court which has jurisdiction to entertain proceedings concerning parental responsibility for spouses' or future spouses' children, ensuring that such jurisdiction gives primary consideration to the child's best interests.<sup>1232</sup>

As to the relevant point of time when the agreement should be concluded, two things must be mentioned. The choice-of-court agreement *ex post* is practically already permitted through the application of Article 3 of the Brussels IIa Regulation when the spouses may file a joint application in Member State court of the habitual residence of one the spouses or of the nationality of both spouses. On the other hand, the spouses cannot agree on jurisdiction based on the nationality of only one of the spouses and thus, the spouses habitually resident in a Third State or with different nationalities within Member States are excluded.<sup>1233</sup> The choice-of-court agreement *ex ante* would be beneficial not only in the presence of prenuptial agreements. However, it must be borne in mind that the marriage lasts approximately 10-20 years after the marriage.<sup>1234</sup> In consequence, it may be recommended that: (i) an agreement

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and it represents a close connection. On this opinion see T. KRUGER, L. SAMYN, *Brussels II bis: successes and suggested improvements*, *op. cit.*, p. 145.

<sup>1230</sup> Such a connecting factor is in line with Article 5 par. 1 lett. c) of the Rome III Regulation and Article 4 par. 1 lett. b) of the Maintenance Regulation.

<sup>1231</sup> I. Viarengo, L. Válková, Party Autonomy, in I. Viarengo, F. Marchetti (eds), *EUfam's Policy Guidelines*, available at: <http://www.eufams.unimi.it/2017/12/27/policy-guidelines/>, p. 30.

<sup>1232</sup> L. CARPANETO, *On the Recast of the Brussels II-bis Regulation's Regime on Parental Responsibility: few proposals de jure condendo*, in I. QUEIROLO, B. HEIDERHOFF (eds), *Party Autonomy in European Private (and) International Law*, Aracne, p. 265. See also T. M. DE BOER, *Jurisdiction and Enforcement in International Family Law: A Labyrinth of European and International Legislation*, *Netherlands International Law Review* (2002), p. 342, 343: «If Article 12(1) Brussels II-bis allows the spouses to ask the forum divortii for a decision on parental responsibility for a child habitually resident in another member State, why could it not be the other way round? Why are they not allowed, then, to choose a forum divortii in the member State where their child is habitually resident?».

<sup>1233</sup> On this problem see for example, A. Gandia Sellens, C. Camara, A. Facucon Alonso P. Siaplaouras, *Report on Internationally Shared Good Practices*, available at: <http://www.eufams.unimi.it/2017/06/16/report-on-internationally-shared-good-practices/>; T. M. DE BOER, *What we should not expect from a recast of the Brussels IIbis Regulation*, *op. cit.*, p. 13; T. KRUGER, L. SAMYN, *Brussels II bis: successes and suggested improvements*, *op. cit.*, p. 140.

<sup>1234</sup> C. E. Copen, K. Daniels, J. Vespa. W. D. Mosher, *Division of Vital Statistics First Marriages in the United States: Data From the 2006–2010 National Survey of Family Growth*, *National health statistics reports*, 2012; K. K. Payne, *Median Duration of First Marriage at Divorce and the Great Recession*, *National Centre for Family & Marriage Research*, 2014, available at: <http://www.bgsu.edu/content/dam/BGSU/college-ofarts-and-sciences/NCFMR/documents/FP/FP-14-20-median-durationfirst-marriage.pdf>.

may be modified at any time;<sup>1235</sup> (ii) the rule should enable the consideration of unforeseen circumstances which may fundamentally alter the equilibrium of the spouses resulting in an excessive burden being placed on one of the spouses or would be manifestly unfair<sup>1236</sup> (e.g., “family hardship clause”). This may be reached through the certain discretion posted to the designated Member State court,<sup>1237</sup> which, on the other hand, would limit the predictability and certainty to the parties. Or, it may be suggested to adopt the similar rule as Article 8 par. 5 of the 2007 Hague Maintenance Protocol as to the choice-of law:

*Unless at the time of the designation the parties were fully informed and aware of the consequences of their designation, the law designated by the parties shall not apply where the application of that law would lead to manifestly unfair or unreasonable consequences for any of the parties.*

The formal requirements should be in line with other Regulations, mainly with the Rome III Regulation, the Maintenance Regulation, and the Regulations on Property Consequences,<sup>1238</sup> i.e., the agreement shall be expressed in writing, dated, and signed by both spouses.<sup>1239</sup>

It is difficult to identify *ex ante* the “weaker party” and to provide to that party protection, when the position of the weaker spouse may be converted. In consequence, the weakness must be examined on a case-by-case basis, rather than qualify the party as a “weak party”, as provided for example in the Brussels *Ibis* Regulation for consumers etc.<sup>1240</sup> In consequence, two provisions may be recommended. First, the parties would be obliged to be informed of

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<sup>1235</sup> Although it may be presumed that the parties may modify the agreement, it may be suggested to provide it expressly as Article 5 par. 2 of the Rome III Regulation: «Without prejudice to paragraph 3, an agreement designating the applicable law may be concluded and modified at any time, but at the latest at the time the court is seized.»

<sup>1236</sup> On the similar approach see M. NÍ SHÚILLEABHÁIN, *Cross-border divorce law. Brussels II bis, op. cit.*, p. 79.

<sup>1237</sup> *Ibidem*.

<sup>1238</sup> Commission Staff Working Document. Impact Assessment. Accompanying the document, Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility and on international child abduction (recast), SWD/2016/0207 final, 30 June 2016, p. 18. See also the answer to question no 10 and 11, Council of Bars and Law Societies of Europe, CCBE Position on the proposal for a recast of the Brussels II-a Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, 2 December 2016, p. 4, the CCBE considers that formal requirements should be based on Article 4 par. 2 of the Maintenance Regulation. Moreover, it should be in conformity with the Rome III Regulation.

<sup>1239</sup> Article 7 par. 1 of the Rome III Regulation; Article 7 par. 1 of the Regulation on Matrimonial Property Regime and on Regulation of Property Consequences of Registered partnerships. However, Article 4 par. 2 of the Maintenance Regulation requires the agreement to be only in writing.

<sup>1240</sup> J. CARRUTHERS, *Party autonomy in the legal regulation of adult relationships: what place for party choice in Private International Law?*, *op. cit.*, p. 909.

the consequences of the choice of Member State court by an independent legal authority,<sup>1241</sup> for example by the notary. Moreover, the spouses should be informed not only about the consequences of the selection, but also about the consequences of deselection of the otherwise competent court. This seems to be particularly important also due to the fact that jurisdiction for property consequences follows the *forum* of divorce, legal separation, or marriage (with certain exceptions) according to Article 5 of the new Regulations. Second, the express harmonized rule on substantive validity would guarantee that the Member State court examines an existence of consent and if the agreement was not concluded under duress, mistake, misrepresentation, etc.<sup>1242</sup> Such a law may be the *lex fori* or the law of the designated Member State court, as provided in the Brussels *Ibis* Regulation.<sup>1243</sup>

### 3. Choice of Court agreements under the Maintenance Regulation

The Maintenance Regulation contains a “proper” rule on the choice-of-court agreements in maintenance matters in Article 4; there is no place for discretion as according to Article 12 of the Brussels *Ia* Regulation.

#### 3.1. Scope of Application

First, the territorial, material, temporal, and personal scope of the scope of application of the Maintenance Regulation must be analysed. This analysis must take into consideration Article 4 of the Maintenance Regulation, since the rule on the choice-of-court agreements is applicable only when the legal relationship falls under its scope.

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<sup>1241</sup> See for example Proposal in the context of legislative procedure of Article 4 of the Maintenance Regulation, Opinion of the Committee on Legal Affairs for the Committee on Civil Liberties, Justice and Home Affairs on the proposal for a Council regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, PE386.692, 2005/0259(CNS), 5 October 2007, p. 13: «2a. *The court seized must be satisfied that any prorogation of jurisdiction has been freely agreed after obtaining independent legal advice and that it takes account of the situation of the parties at the time of the proceedings.*». However, this proposal was subsequently rejected.

<sup>1242</sup> On the similar approach see: J. CARRUTHERS, *Party autonomy in the legal regulation of adult relationships: what place for party choice in Private International Law?*, *op. cit.*, p. 909.

<sup>1243</sup> The model may be taken from Article 25 of the Brussels *Ibis* Regulation, as suggested by U. MAGNUS, *Choice of Court Agreements in the Review Proposal for the Brussels I Regulation*, in *The Brussels I Review Proposal Uncovered*, *op. cit.*, p. 93: «*The material validity (concerning capacity, mistake, fraud, duress) of the choice-of-court agreement is governed by the law of the Member State where the chosen court or courts are located*».

### 3.1.1. Territorial and Personal Scope of Application

The rules on the jurisdiction of the Maintenance Regulation are applicable in all Member States, including Denmark,<sup>1244</sup> the United Kingdom,<sup>1245</sup> and Ireland.<sup>1246</sup>

The Maintenance Regulation is based on its universal application; it is not relevant whether the defendant is domiciled in the Member State. It means that where the parties choose one of the Member States according to Article 4 of the Maintenance Regulation under the conditions laid down therein, it is not relevant whether the creditor or debtor is not habitually resident in the Member State. There is no room for national law. Moreover, in accordance with Article 6 of the Maintenance Regulation, where no Member State courts have jurisdiction according to Article 3, 4, and 5 of the Maintenance Regulation, the courts of the Member State of the common nationality of the parties shall have jurisdiction.<sup>1247</sup>

### 3.1.2. Temporal Scope of Application

The Maintenance Regulation applies to proceedings instituted, to court settlements approved or concluded, and to authentic instruments established after 18 June 2011,<sup>1248</sup> except for

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<sup>1244</sup> Denmark has by letter of 14 January 2009 confirmed its intention to implement the content of the Maintenance Regulation to the extent that the Maintenance Regulation amends the Brussels I Regulation with the exception of the provisions in Chapters III and VII. Article 2 and Chapter IX of Maintenance Regulation are applicable only to the extent that they relate to jurisdiction, recognition, enforceability and enforcement of judgments, and access to justice. Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 149, 12 June 2009, p. 80.

<sup>1245</sup> The United Kingdom notified by letter of 15 January 2009 its intention to accept the Maintenance Regulation. Commission Decision of 8 June 2009 on the intention of the United Kingdom to accept Council Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, 2009/451/EC of 8 June 2009, OJ L 149, 12. June 2009, p. 73.

<sup>1246</sup> See Recital no 46.

<sup>1247</sup> B. HESS, S. SPANCKEN, *Setting the Scene – The EU Maintenance Regulation*, in P. BEAUMONT, B. HESS, L. WALKER, S. SPANCKEN (eds), *The Recovery of Maintenance in the EU and Worldwide. Studies in Private International Law*, Hart Publishing, 2014, p. 333. See Recital No 15 of the Maintenance Regulation: «*In order to preserve the interests of maintenance creditors and to promote the proper administration of justice within the European Union, the rules on jurisdiction as they result from Regulation (EC) No 44/2001 should be adapted. The circumstance that the defendant is habitually resident in a third State should no longer entail the non-application of Community rules on jurisdiction, and there should no longer be any referral to national law. This Regulation should therefore determine the cases in which a court in a Member State may exercise subsidiary jurisdiction.*».

<sup>1248</sup> See Article 76 of the Maintenance Regulation.



Croatia where it applies on or after 1 July 2013. Contrary to the Brussels IIa Regulation, which specifies that it applies to agreements concluded between the parties after 1 March 2005, the Maintenance Regulation fixes the moment of application to the time when the proceedings are instituted. It means that it is not required that the choice-of-court agreement was concluded on or after that 18 June 2011, it is sufficient that the Member State court is seized with the dispute concerning Article 4 of the Maintenance Regulation at the time the Maintenance Regulation has become applicable at that Member State. This construction mirrors the Brussels Ibis Regulation solution. In consequence, the interpretation provided by the ECJ in case 25/79, *Sanicentral GmbH* in the context of intertemporal question related to the application of Article 17 of the Brussels Convention may also be extended into the Maintenance Regulation. Thus, jurisdiction clauses concluded prior to that date must be considered valid even in cases in which they would have been regarded as void under the national law (or Brussels I Regulation) in force at the time when the agreement was entered into.<sup>1249</sup> The problematic point which must be highlighted in the context of this interpretation is: prior to the date the Maintenance Regulation entered into force, the Brussels I Regulation applied, which has a less strict formal requirements. The inside-out interpretation of *Sanicentral GmbH* case would lead to false retroactivity causing undesirable results. The transnational provisions do not address a situation when the choice-of-court agreement was concluded under the Brussels I Regulation, but the proceedings are instituted after 18 June 2011. Indeed, the “stricter” conditions of Article 4 of the Maintenance Regulation do not have to be newly met, and such a jurisdiction agreement would not be valid.

### **3.1.3. Material Scope of Application**

Article 1 of the Maintenance Regulation provides that it shall apply to maintenance obligations arising from a family relationship, parentage, marriage, or affinity. The term “maintenance” must be interpreted autonomously.<sup>1250</sup> However, there are some problems regarding characterization and delimitation of the maintenance and the matrimonial property, mainly due to the fact that the certain Member States, such as England or Ireland, do not distinguish both concepts which are used to satisfy the goals of fairness and proper

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<sup>1249</sup> *Brack v Brack* [2018] EWCA Civ 2862, [47], [48].

<sup>1250</sup> Recital No 11.

provision.<sup>1251</sup> The ECJ has rendered several judgments, which provided guidance on this issue. It is worth mentioning that the first two judgments have dealt with the national rules in Germany and in France, where the characterization of the two concepts is much clearer than in England and Wales.<sup>1252</sup> In the first case 143/78, *Cavel v de Cavel* (No 1),<sup>1253</sup> the ECJ did not develop any precise criteria for distinguishing between maintenance and matrimonial property, but gave an autonomous meaning to the term “*rights in property arising out of a matrimonial relationship*”.<sup>1254</sup> In the second case 120/79, *Cavel v de Cavel* (No 2), the ECJ held that the ancillary claim of maintenance falls under the scope of the Brussels Convention even if the primary dispute concerns the status of persons, which is excluded under Article 1 par. 1 of the Brussels Convention.<sup>1255</sup> The more important thing is that the ECJ provided the definition of maintenance, such as payments “*...concerned with any financial obligations between former spouses after divorce which are fixed on the basis of their respective needs and resources and are equally in the nature of maintenance.*”<sup>1256</sup> In the third case, C-220/95, *Van den Boogaard*, the ECJ finally dealt with English law and held that the case falls: (i) under the term of “maintenance” if the needs and resources of each of the spouses are taken into consideration in the determination of its amount; and (ii) under the term of “rights in property arising out of a matrimonial relationship” if the award is concerned with division of the property between the spouses.<sup>1257</sup> The ECJ decided that a decision rendered in divorce,

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<sup>1251</sup> M. HARDING, *The Harmonisation of Private International Law in Europe: Taking the Character Out of Family Law?*, *Journal of Private International Law*, 1 (2011), p. 203, 208

<sup>1252</sup> M. TORGA, *Drawing a Demarcating Line between Spousal Maintenance Obligations and Matrimonial Property in the Context of the New Instruments of European Union Private International Law*, in P. BEAUMONT, B. HESS, L. WALKER, S. SPANCKEN (eds), *The Recovery of Maintenance in the EU and Worldwide. Studies in Private International Law*, Hart Publishing, 2014, p. 428; C. ISTVÁN NAGY, *Love and Money: Problems of Characterisation in Matrimonial Property and Maintenance Matters in the European Union*, in P. BEAUMONT, B. HESS, L. WALKER, S. SPANCKEN (ed), *The Recovery of Maintenance in the EU and Worldwide. Studies in Private International Law*, Hart Publishing, 2014, p. 411; L. WALKER, *Maintenance and Child Support in Private International Law*, Hart Publishing, 2015, p. 37 – 46; M. NÍ SHÚILLEABHÁIN, *Cross-border divorce law. Brussels II bis, op. cit.*, p. 173; T. SVERDRUP, *Maintenance as a Separate Issue - The Relationship between Maintenance and Matrimonial Property*, in K. BOELE-WOELKI (ed), *Common Core and Better Law in European Family Law*, Intersentia, 2005, p. 119 – 134.

<sup>1253</sup> ECJ, Case 143/78, *Jacques de Cavel v Louise de Cavel*, 27 March 1979, ECLI:EU:C:1979:83.

<sup>1254</sup> ECJ, Case 143/78, *Cavel de Cavel*, 27 March 1979, par. 7, the term “rights in property arising out of a matrimonial relationship” «*...includes not only property arrangements specifically and exclusively envisaged by certain national legal systems in the case of marriage but also any proprietary relationships resulting directly from the matrimonial relationship or the dissolution thereof.*».

<sup>1255</sup> ECJ, Case 120/79, *Louise de Cavel v Jacques de Cavel*, 6 March 1980, ECLI:EU:C:1980:70, par. 9 and 12.

<sup>1256</sup> ECJ, Case 120/79, *Cavel de Cavel*, 6 March 1980, par. 5.

<sup>1257</sup> ECJ, Case C-220/95, *Antonius van den Boogaard v Paula Laumen*, 27 February 1997, ECLI:EU:C:1997:91, par. 22.

which orders payment of a lump sum and transfer of ownership in property by one spouse to another spouse, must be regarded as relating to maintenance.<sup>1258</sup>

### **3.2. Limitation on Free Choice of Jurisdiction according to Article 4 of the Maintenance Regulation**

Contrary to its predecessor (Article 23 of the Brussels I Regulation), Article 4 of the Maintenance Regulation limits party autonomy. In particular, the Maintenance Regulation provides a list of the Member State courts which may be designated in a choice-of-court agreement. The following Member State courts may be chosen: (i) a court or the courts of a Member State in which one of the parties is habitually resident; (ii) a court or the courts of a Member State of which one of the parties has the nationality, without taking into consideration who is a creditor and who is debtor. Furthermore, the spouses or the former spouses may choose in the case of maintenance obligations: (i) the court which has jurisdiction to settle their dispute in matrimonial matters; and (ii) a court or the courts of the Member State which was the Member State of the spouses' last common habitual residence for a period of at least one year.

The European legislator has not explained the justification for the restriction of the jurisdictional grounds offered to the parties. In consequence, several theories have been developed. The application of the proximity principle between the designated Member State and the dispute is often discussed.<sup>1259</sup> The principle of the Borrás Report concerning jurisdictional grounds according to Article 3 of the Brussels II Convention, which “are based on the principle of genuine connection between the person and a Member State”,<sup>1260</sup> is also extended to other regulations. It is affirmed that the proximity principle should help to avoid any abuse to the detriment of the vulnerable person.<sup>1261</sup> This theory may be supported by the

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<sup>1258</sup> ECJ, Case C-220/95, *van den Boogaard*, par. 27. See also other Scottish and English judgments, *B v D* (also known as *AB v CD*) [2006] CSOH 200; *C v C*, [2007] ScotCS CSOH 191; *Kremen v Agrest*, [2012] EWHC 45 (Fam).

<sup>1259</sup> M. ABENDROTH, *Choice of Court in Matters Relating to Maintenance Obligations*, in *The Recovery of Maintenance in the EU and Worldwide*, in P. BEAUMONT, B. HESS, L. WALKER, S. SPANCKEN (eds), *The Recovery of Maintenance in the EU and Worldwide. Studies in Private International Law*, Hart Publishing, 2014, p. 465.

<sup>1260</sup> Borrás Report, par. 30.

<sup>1261</sup> M. ABENDROTH, *Choice of Court in Matters Relating to Maintenance Obligations*, in *The Recovery of Maintenance in the EU and Worldwide*, *op. cit.*, p. 466.

legislative choice of the connecting factor “habitual residence” which considers the factual circumstances. On the other hand, the connecting factor “nationality” does not guarantee a current factual connectedness<sup>1262</sup> and proximity. Moreover, the time factor allowing the choice-of-court agreement *ex ante* may result very often in the absence of any connection between the designated Member State and the parties.

The other theory concerns the fact that when the Maintenance Regulation became an autonomous legal instrument governing one part of family law, the legislator chose to make a compromise between the unlimited approach concerning the choice-of-court clauses in commercial matters under the Brussels I Regulation and the non-existence of choice-of-court agreements in national family law.<sup>1263</sup> It must be borne in mind that parties entering into choice-of-court agreements deselect the public policy of the derogated court, which could be otherwise taken into consideration.<sup>1264</sup> In consequence, the limited choice given to the parties limits the number of the potentially derogated courts – connecting factors laid down in Article 4 often overlap with connecting factors laid down in Article 3 of the Maintenance Regulation.

### 3.2.1. Connecting Factors

A connecting factor based on the habitual residence is a restriction on party autonomy laid down in Article 4 of the Maintenance Regulation. The term “habitual residence” is the most important connecting factor for establishing the jurisdiction in international family matters within the various EU regulations and international conventions, such as the Brussels IIa Regulation, 1996 Hague Convention on parental responsibility and protection of children, 2007 Hague Maintenance Protocol, Matrimonial Property and Registered Partnerships Regulations, etc. However, the term is not defined in any of these legal instruments. Recital 32 of the Maintenance Regulation provides that the “habitual residence” should be stricter

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<sup>1262</sup> M. NÍ SHÚILLEABHÁIN, *Cross-border divorce law. Brussels II bis, op. cit.*, p. 73.

<sup>1263</sup> F. PESCE, *Le obbligazioni alimentari tra diritto internazionale e diritto dell'Unione europea*, Aracne, 2013, p. 133.

<sup>1264</sup> The 2007 Hague Maintenance Protocol does not provide for the protection of the overriding mandatory rules of the forum, but Article 13 of the 2007 Hague Maintenance Protocol provides that «*The application of the law determined under the Protocol may be refused only to the extent that its effects would be manifestly contrary to the public policy of the forum.*».

than the “residence”, which excludes mere presence.<sup>1265</sup> The ECJ has provided interpretation concerning “habitual residence” of the child under the Brussels IIa Regulation in the several judgments, which takes into account the factual circumstances such as “the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family’s move to that State, the child’s nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State.”<sup>1266</sup> The ECJ has not provided an autonomous interpretation of “habitual residence” of adults in the international family law, but it may draw inspiration from the case law on the habitual residence of children.

Another restriction of party autonomy under Article 4 of the Maintenance Regulation is based on the connecting factor of “nationality”.<sup>1267</sup> The practicality of this connecting factor lies in the easy determination without judicial deliberation,<sup>1268</sup> and is tied up in the primary law surrounding Article 18 TFEU.

Lastly, in case of the spouses’ maintenance, the spouses may choose a Member State court which has jurisdiction to settle their dispute in matrimonial matters or which was the Member State of the spouses’ last common habitual residence for a period of at least one year. There are some uncertainties whether these two connecting factors for the spouses’ maintenance represents the only choice for the spouses or if they extend the scope of choice of Article 4 of

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<sup>1265</sup> M. ABENDROTH, *Choice of Court in Matters Relating to Maintenance Obligations*, in *The Recovery of Maintenance in the EU and Worldwide*, *op. cit.*, p. 466. On the “presence” of the child see ECJ, Case C-393/18 PPU, *UD v XB*, Opinion of Advocate General Saugmandsgaard Øe delivered on 20 September 2018, ECLI:EU:C:2018:749, where the Advocate General proposed that the ECJ reply to the questions for a preliminary ruling that the habitual residence of a child, within the meaning of Article 8 par. 1 of the Brussels IIa Regulation corresponds to the place where that child has its *de facto* centre of interests, which in certain exceptional situations, *de facto* the centre of its interests may be in a place in which a child has never been physically present. Therefore, «*the physical presence of the child is therefore not a prerequisite for the purpose of establishing the child’s habitual residence there.*».

<sup>1266</sup> Regarding the habitual residence of child see ECJ, Case C-523/07, A; Case C-497/10, *Barbara Mercredi v Richard Chaffe*, 22 December 2010, ECLI:EU:C:2010:829; Case C-376/14, *C v M*, 9 October 2014, ECLI:EU:C:2014:2268; Case C-111/17, *OL v PQ*, 8 June 2017, ECLI:EU:C:2017:436; Case C-512/17, *HR*, 28 June 2018, ECLI:EU:C:2018:513. On the habitual residence see also: T. Kruger, *Chapter 2: Finding Habitual Residence*, in I. Viarengo, F. C. Villata (eds), *EUFam’s Final Study*, p. 77 and 78, available at: <http://www.eufams.unimi.it/2017/12/30/final-study/>; T. KRUGER, *Habitual Residence: The Factors that Courts Consider*, in P. BEAUMONT, PAUL, M. DANOV, K. TRIMMINGS, B. YÜKSEL (eds), *Cross-Border Litigation in Europe, Studies in Private International Law*, Hart Publishing, 2017, p. 741-754; M. NÍ SHÚILLEABHÁIN, *Cross-border divorce law. Brussels II bis*, *op. cit.*, p. 36-73.

<sup>1267</sup> The problem of multiple nationalities in this field was solved by the ECJ, Case C-168/08, *Hadadi*.

<sup>1268</sup> M. NÍ SHÚILLEABHÁIN, *Cross-border divorce law. Brussels II bis*, *op. cit.*, p. 73.

the Maintenance Regulation. However, a restrictive interpretation should be rejected.<sup>1269</sup> It must be remembered that due to the absence of a rule on choice-of-court agreements for divorce, legal separation, or marriage, the parties may designate a Member State court which will have jurisdiction to settle their dispute in matrimonial matters without having knowledge in advance and that Member State court will exercise its jurisdiction for divorce, legal separation, or marriage.<sup>1270</sup> Although such an agreement may benefit the parties from the concentration of the proceedings in both subject matters, the parties should be aware that it may encourage a “double rush to court”.<sup>1271</sup>

**a) Relevant Point of Time**

In contrast with Article 25 of the Brussels *Ibis* Regulation, the Maintenance Regulation specifies the moment relevant for the determination of the conditions laid down in Article 4 of the Maintenance Regulation. Article 4 par. 1 provides that the conditions have to be met at the time the choice-of-court agreement is concluded, or at the time the court is seized. It means that although certain aspects are meanwhile changed (for example habitual residence of the parties), it does not have an impact on the validity of the choice-of-court agreement. In other words, this legislative choice offers *favor validitatis* for the parties – when the parties designate a Member State court not listed in Article 4 of the Maintenance Regulation, the validity of the jurisdiction clause may be “cured”, if such Member State court would be listed in Article 4 during the time.<sup>1272</sup> On the other hand, when the parties conclude a choice-of-court agreement in an early moment in the relationship (for example at the time of the marriage), the connecting factor listed in Article 4 of the Maintenance Regulation may lose any link with a Member State court at the time the court is seized. Such a jurisdiction clause will be valid, but it does not have to necessarily correspond anymore to the needs of (one of) the parties.

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<sup>1269</sup> M. ABENDROTH, *Choice of Court in Matters Relating to Maintenance Obligations*, in *The Recovery of Maintenance in the EU and Worldwide*, *op. cit.*, p. 466-467; F. POCAR, I. VIARENGO, *Il Regolamento (CE) n. 4/2009 in materia di obbligazioni alimentari*, in *Rivista di diritto internazionale privato e processuale*, (2009), p. 814

<sup>1270</sup> On the opposite approach see M. ABENDROTH, *Choice of Court in Matters Relating to Maintenance Obligations*, in *The Recovery of Maintenance in the EU and Worldwide*, *op. cit.*, p. 466-467.

<sup>1271</sup> F. C. Villata, L. Válková, *EUFam’s Model Choice-of-Court and Choice-of-Law Clauses*, *op. cit.*, p. 47.

<sup>1272</sup> On the similar conclusion see F. PESCE, *Le obbligazioni alimentari tra diritto internazionale e diritto dell’Unione europea*, *op. cit.*, p. 135.

Nothing in Article 4 of the Maintenance Regulation impedes the parties from designating a Member State of “habitual residence” or “nationality” of “creditor” or “debtor”, without specifying the Member State or specific Member State court.<sup>1273</sup> For this reason, it seems necessary to specify the moment to which the jurisdiction clause makes reference, *i.e.*, the moment of the conclusion of the jurisdiction agreement or the moment of the institution of the proceedings. It is questionable whether the agreement conferring jurisdiction to a court, for example, of the habitual residence of the debtor without determination of the relevant point of time, would be considered valid taking into consideration the fact that the debtor meanwhile changed its habitual residence. Fixing the moment to the institution of the proceedings brings the flexibility and meets the need of the maintaining the “criterion of proximity” between the dispute and the designated Member State court. However, it also reduces legal certainty and predictability when habitual residence or nationality of one of the parties has meanwhile changed and may even result in abuse by manoeuvring these variable jurisdictional grounds.

The same also applies to the condition according to Article 4 par. 1 lett. c) of the Maintenance Regulation concerning the maintenance obligations of the spouses, which may choose a Member State court which has jurisdiction to settle their dispute in matrimonial matters or which was the Member State of the spouses’ *last* common habitual residence for a period of at least one year. These two connecting factors refer to future circumstances which are not known to the spouses at the time of the conclusion of the jurisdiction agreement. However, according to Professor Abendroth, when the parties choose a Member State court which has jurisdiction to settle their dispute in matrimonial matters “...the parties must clearly express the link between the chosen court and the court in matrimonial matters”.<sup>1274</sup> This would mean that this connecting factor can be used only in pending or concluded disputes relating to the matrimonial matters.<sup>1275</sup>

In my opinion, nothing in Article 4 of the Maintenance Regulation prevents the parties from agreeing that any Member State court, which will be seized for divorce, legal separation, or marriage, will have jurisdiction also for the maintenance between the spouses. This may be

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<sup>1273</sup> On the similar conclusion see F. PESCE, *Le obbligazioni alimentari tra diritto internazionale e diritto dell’Unione europea*, *op. cit.*, p. 135; M. ABENDROTH, *Choice of Court in Matters Relating to Maintenance Obligations*, in *The Recovery of Maintenance in the EU and Worldwide*, *op. cit.*, p. 467.

<sup>1274</sup> On the opposite approach see M. ABENDROTH, *Choice of Court in Matters Relating to Maintenance Obligations*, in *The Recovery of Maintenance in the EU and Worldwide*, *op. cit.*, p. 467.

<sup>1275</sup> *Ibidem*, p. 476.

supported by the wording of Article 4 of the Maintenance Regulation providing that “*The conditions referred to in points (a), (b) or (c) have to be met at the time the choice-of-court agreement is concluded or at the time the court is seized.*” Point (c) refers to the dispute in matrimonial matters. It is true that the choice-of-court agreement is not available for divorce, legal separation, or marriage and any of the Member State courts listed in Article 3 of the Brussels IIa Regulation may exercise jurisdiction for divorce, legal separation, or marriage in the future, but the parties may be merely interested in the concentration of the jurisdiction in both subject matters, which is to the detriment of legal certainty and predictability.

### **3.3. Maintenance Obligations towards Minors**

Article 4 par. 3 of the Maintenance Regulation does not give effect to choice-of-court agreements in relation to maintenance obligations towards a minor under the age of 18. It seems surprising that there is no general requirement in Article 4 of the Maintenance Regulation protecting all weaker parties by providing that the parties should obtain independent legal advice before making their choice.<sup>1276</sup> However, the rule on choice-of-court agreement does not apply to any dispute relating to a maintenance obligation towards a child under the age of 18, since this rule aims at protecting the weaker party.<sup>1277</sup> It results that a maintenance creditor may choose only between the Member State courts listed in Article 3 of the Maintenance Regulation. The choice of applicable law is also excluded for maintenance obligations towards minors under Article 8 of the 2007 Hague Maintenance Protocol since:

*...minor is usually represented by either of his or her parents, who are also bound to provide for him or her; ...admitting the choice of applicable law involves an excessive risk of conflicts of interest in such cases.*<sup>1278</sup>

However, this protection of the child under the age of 18 may be doubtful since the parents usually seek to provide the best solution for their child and the child is usually represented by the impartial legal prosecutor. It is worth mentioning that adults who are not in the position to protect their interest by reason of an impairment or insufficiency of personal faculties, are also

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<sup>1276</sup> J. CARRUTHERS, *Party autonomy in the legal regulation of adult relationships: what place for party choice in Private International Law?*, *op. cit.*, p. 909, footnote no 164.

<sup>1277</sup> Recital No 19 of the Maintenance Regulation.

<sup>1278</sup> A. Bonomi, *Explanatory Report on the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations*, HCCH Publications, 2013, par. 128.



excluded from the choice of applicable law according to Article 8 of the 2007 Hague Protocol. However, they are not “protected” from the choice-of-court according to Article 4 of the Maintenance Regulation.<sup>1279</sup>

This rule is criticised due to two reasons. First, the minors are not protected from the tacit prorogation according to Article 5 of the Maintenance Regulation.<sup>1280</sup> Second, the prorogation of jurisdiction may be in favour of the child.<sup>1281</sup> The protection of the child would be better guaranteed if the designated Member State court would be non-exclusively and unilaterally allowed to the child.<sup>1282</sup> Another possibility could be assumed by virtue of the solution laid down in Article 12 of the Brussels IIa Regulation, giving to the prorogued Member State court the discretionary power on the determination of its jurisdiction based on the best interest of the child.<sup>1283</sup> Or, the designated Member State court could dispose with the “escape clause”, and thus, it could transfer the proceedings to the Member State of the habitual residence of the child if it is in the best interest of the child.<sup>1284</sup>

### 3.4. Formal Validity

Paragraph 2 of Article 4 of the Maintenance Regulation provides that a choice-of-court agreement shall be in writing. It means that the formal requirements regarding the Brussels I Regulation are limited at first sight. However, it is hard to imagine the parties concluding the choice-of-court agreements for their maintenance obligations in a form which accords with

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<sup>1279</sup> See Opinion of the Committee on Legal Affairs for the Committee on Civil Liberties, Justice and Home Affairs on the proposal for a Council regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, PE386.692, 2005/0259(CNS), 5 October 2007, p. 13 and 14: «*This Article shall not apply if the debtor is a child below the age of 18 or an adult lacking legal capacity.*». However, this proposal was subsequently rejected.

<sup>1280</sup> M. ABENDROTH, *Choice of Court in Matters Relating to Maintenance Obligations*, in *The Recovery of Maintenance in the EU and Worldwide*, *op. cit.*, p. 469.

<sup>1281</sup> M. HELLNER, *The Maintenance Regulation: A Critical Assessment of the Commission's Proposal*, in K. BOELE-WOELKI, T. SVERDRUP (eds), *European Challenges in Contemporary Family Law* European Family Law Series No 19, Intersentia, 2008, p. 349.

<sup>1282</sup> F. POCAR, I. VIARENGO, *Il Regolamento (CE) n. 4/2009 in materia di obbligazioni alimentari*, *op. cit.*, p. 814.

<sup>1283</sup> On this proposal see I. Viarengo, L. Válková, *Party Autonomy*, in I. Viarengo, F. Marchetti (eds), *EUFam's Policy Guidelines*, available at: <http://www.eufams.unimi.it/2017/12/27/policy-guidelines/>, p. 55.

<sup>1284</sup> L. WALKER, *New (and Old) Problems for Maintenance Creditors Under the EU Maintenance Regulation*, in P. BEAUMONT, PAUL, M. DANOV, K. TRIMMINGS, B. YÜKSEL (eds), *Cross-Border Litigation in Europe*, *Studies in Private International Law*, Hart Publishing, 2017, p. 775.

practices which the parties have established between themselves.<sup>1285</sup> Although Article 4 of the Maintenance Regulation specifies that any communication by electronic means which provides a durable record of the agreement shall be equivalent to “writing”, the practical consequences of this provision in maintenance matters leaves certain doubts.<sup>1286</sup>

In the light of the Recital No 15 and No 44 of the Maintenance Regulation, the rules on jurisdiction as they result from the Brussels I(*bis*) Regulation have been incorporated into the Maintenance Regulation. Since the Maintenance Regulation does not require the agreement to be “in writing”, an autonomous interpretation can be is in the Brussels *Ibis* Regulation.<sup>1287</sup> There are no doubts that the written jurisdiction clause signed by both parties satisfies the formal requirements within the meaning of Article 4 of the Maintenance Regulation. However, the real consensus of the parties must be ascertained, and the jurisdiction agreement cannot be incorporated unilaterally by one party and unnoticed by the other party. This may be the case with the prenuptial agreements covering maintenance obligations between the spouses. The question also arises whether the choice-of-court agreement may be inferred.<sup>1288</sup>

Moreover, Recital No 8 of the Maintenance Regulation provides that the 2007 Hague Convention and the 2007 Hague Protocol should be taken into account. Article 3 of the 2007 Hague Convention defines an agreement in writing as an agreement recorded in any medium. Articles 7 and 8 of the 2007 Hague Protocol concerning the choice-of-law agreement provide that the designation of the applicable law in an agreement shall be in writing or recorded in any medium. Bonomi Report as regards to Article 7 of the 2007 Hague Protocol States that the:

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<sup>1285</sup> The formal requirement laid down in Article 25 par. 1 lett. c) of the Brussels *Ibis* Regulation refers to international trade or commerce, in consequence for the Maintenance Regulation not applicable.

<sup>1286</sup> However, see *Baldwin v Baldwin* [2014] EWHC 4857 (Fam), par. 45: «*The clear inference from the petition is that the husband accepts and proposes that the English court should have maintenance jurisdiction... There was no dissent from the wife's Statement that if the maintenance was not paid she would apply for an order. The husband says that silence is not to be treated as acceptance. However, in this case there was not silence, but an engagement, from which the only inference which can be drawn is that the husband was agreeing to the English court's jurisdiction. The correspondence, in my view, shows a clear joint, several, and mutual decision that these parties both agreed that the English court should determine their maintenance claims. I do not think it is necessary for me to use the word "unequivocal" but if "unequivocal" is part of the test, I record also my view that this was an unequivocal agreement. There is no explanation, other than that the husband agreed to the English court's jurisdiction, for the failure to record the husband's present case, looking at this correspondence as a whole. The fact that the choice-of-court agreement may not have been explicitly Stated in those terms does not inhibit my power to draw an explicit inference.*».

<sup>1287</sup> M. ABENDROTH, *Choice of Court in Matters Relating to Maintenance Obligations*, in *The Recovery of Maintenance in the EU and Worldwide*, *op. cit.*, p. 462.

<sup>1288</sup> ECJ, Case 24/76, *Estasis Salotti*, par. 9 ad 10.

*...the parties' attention should be drawn to the important consequences that the choice of applicable law can have in relation to the existence and extent of the maintenance obligation.... this provision contains only minimal formal requirements with respect to the agreement; States may provide other requirements, for instance to ensure that the parties' consent is freely given and sufficiently informed (e.g., recourse to legal advice before signature of the agreement).*<sup>1289</sup>

It is questionable, whether the Member State courts should draw the attention to the fact that the parties have not been informed of the consequences on the choice-of-court agreement and whether the further formal requirements may be required by the national law. For example, the German *Bundesrat* criticised the formal requirements due to the lack of legal assistance and recommended notarial certifications.<sup>1290</sup> However, by virtue of the ECJ interpretation as to the choice-of-court agreements under the Brussels *Ibis* Regulation, where the ECJ upheld that the formal requirements exclude any reference to the national law (*i.e.*, no conditions on the form can be added or subtracted),<sup>1291</sup> the formal requirements of Article 4 Maintenance Regulation suggest autonomous interpretation without considering the approach taken under the 2007 Hague Convention and the 2007 Hague Protocol.

It should be briefly remembered that the submission by appearance is permitted according to Article 5 of the Maintenance Regulation. Therefore, no uncertainties arise as in the case of Article 12 of the Brussels *IIa* Regulation. However, it seems regrettable that the Member State courts are not obligated to inform (vulnerable) persons about the consequences of tacit prorogation without contesting the jurisdiction as provided in Article 25 of the Brussels *Ibis* Regulation.<sup>1292</sup> However, the Member State courts are not prohibited from doing so.<sup>1293</sup>

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<sup>1289</sup> A. Bonomi, Explanatory Report on the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, HCCH Publications, 2013, par. 119.

<sup>1290</sup> M. ABENDROTH, *Choice of Court in Matters Relating to Maintenance Obligations*, *op. cit.*, p. 468 referring to Bundesrat, 19 May 2006, BR-Drucks 30/06, p.7.

<sup>1291</sup> ECJ, Case C-150/80, *Elefanten Schuh*, par. 25; Case C-159/97, *Trasporti Castelletti*, par. 37.

<sup>1292</sup> On the same proposal see L. WALKER, *New (and Old) Problems for Maintenance Creditors Under the EU Maintenance Regulation*, in *Cross-Border Litigation in Europe*, *op. cit.*, p. 776; L. Walker, *Maintenance and Child Support in Private International Law*, *op. cit.*, p. 67.

<sup>1293</sup> See F. C. VILLATA, *Obblighi alimentari e rapporti di famiglia secondo il regolamento n. 4/2009*, *Rivista di diritto internazionale* (2011), p. 751, which recalls the case law of ECJ regarding submission by appearance concerning the disputes with the consumers, employees, and the insured. In particular see ECJ, Case C-111/09, *Česká podnikatelská pojišťovna as, Vienna Insurance Group v Michal Bilas*, 20 May 2010, ECLI:EU:C:2010:290, par. 32: «However, it is always open to the court seized to ensure, having regard to the objective of the rules on jurisdiction resulting from Sections 3 to 5 of Chapter II of that regulation, which is to

### 3.5. Substantive Validity

Article 4 of the Maintenance Regulation is silent in respect of substantive validity of choice-of-court agreements as is Article 23 of the Brussels I Regulation. As in the case of formal validity, the interpretation provided in respect of substantive validity under the Brussels I Regulation may be recalled.<sup>1294</sup> It must be remembered that two interpretations were developed in the context of Article 17 of the Brussels Convention and Article 23 of the Brussels Regulation. The first doctrine is based on the interpretation of the ECJ, where Article 23 of the Brussels Regulation provides a self-sufficient test for the validity of the jurisdiction clauses. The inquiry on existence of consent involves only the application of the rule of formal requirements<sup>1295</sup> and little space is left (if any) for the use of national law.<sup>1296</sup> In the case of C-159/97, *Trasporti Castelletti*, the ECJ stated that “*the choice-of-court in a jurisdiction clause may be assessed only in the light of considerations connected with the requirements laid down by Article 17*”.<sup>1297</sup> The second interpretation was developed in the light of other case law of the ECJ, where the ECJ referred in a number of cases to the national law.<sup>1298</sup> It may be deduced that material rules of jurisdiction clauses exist.<sup>1299</sup> In consequence, it was not clear whether Article 23 of the Brussels I Regulation represented the independent regulation of the formation of the choice-of-court agreement, and thus the reference to the

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*offer stronger protection of the party considered to be the weaker party, that the defendant being sued before it in those circumstances is fully aware of the consequences of his agreement to enter an appearance.*».

<sup>1294</sup> M. ABENDROTH, *Choice of Court in Matters Relating to Maintenance Obligations*, in *The Recovery of Maintenance in the EU and Worldwide*, *op. cit.*, p. 463; F. PESCE, *Le obbligazioni alimentari tra diritto internazionale e diritto dell'Unione europea*, *op. cit.*, p. 141.

<sup>1295</sup> Heidelberg Report, par. 376; L. MERRETT, *Article 23 of the Brussels I Regulation: A Comprehensive Code for Jurisdiction Agreements?*, *op. cit.*, p. 545-564.

<sup>1296</sup> A. DICKINSON, *The Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)*, *op. cit.*, p. 21.

<sup>1297</sup> ECJ, Case C-159/97, *Trasporti Castelletti*, par. 49. This interpretation was strengthened in the ECJ, Case C-116/02, *Gasser*, par. 51, where the ECJ stated that jurisdiction clause is an independent concept to be appraised solely in relation to the requirements of Article 17 of the Brussels Convention. See also ECJ, Case C-116/02, *Gasser*, Opinion of Advocate General Leger, par. 78., where the Advocate General Leger held that «*...the formal and substantive conditions governing validity to which agreements conferring jurisdiction are subject must be assessed in the light of the requirements of Article 17 alone.*».

<sup>1298</sup> ECJ, Case C-214/89, *Powell Duffryn*, par. 13, 21; Case C-150/80, *Elefanten Schuh*, The Opinion of Advocate General Sir Gordon Slynn, p. 1699; Case 313/85, *Iveco Fiat*, par. 7-8; Case, C-269/95, *Benincasa*, par. 31.

<sup>1299</sup> U. MAGNUS, *Choice of Court Agreements in the Review Proposal for the Brussels I Regulation*, in *The Brussels I Review Proposal Uncovered*, *op. cit.*, p. 86; R. FENTIMAN, *International Commercial Litigation*, 2015, *op. cit.*, par. 2.32.

national law is excluded; or if the referral to the domestic is admitted, or, even more, if it is necessary.<sup>1300</sup> In the Member States where the latter approach prevailed, the Heidelberg Report pointed out<sup>1301</sup> that the law of some Member States refers to the *lex fori*,<sup>1302</sup> whereas others refer to the *lex causae*,<sup>1303</sup> and in some Member States there is no clear answer.<sup>1304</sup> However, Article 25 of the Brussels Ibis Regulation introduced the new rule on substantive validity providing that the Member State court shall have jurisdiction “...unless the agreement is null and void as to its substantive validity under the law of that Member State...”.

Thus, it is questionable whether substantive validity on the choice-of-court agreement under Article 4 of the Maintenance Regulation should adopt the solution laid down in the Brussels Ibis Regulation, where “*the rules on jurisdiction as they result from Regulation (EC) No 44/2001 should be adapted.*”<sup>1305</sup> In consequence, it seems more probable that two approaches assumed by Article 23 of the Brussels I Regulation in respect of choice-of-court agreements according to Article 4 of the Maintenance Regulation will continue, as long as the Maintenance Regulation is not reformed.<sup>1306</sup> It may be recommended to adopt a new rule on substantive validity<sup>1307</sup> since such a rule may reinforce the position of the “weaker party”,

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<sup>1300</sup> See A. MALATESTA, *Gli accordi di scelta del foro*, in A. MALATESTA (ed), *La riforma del regolamento di Bruxelles I: il regolamento (UE) n. 1215/2012 sulla giurisdizione e l’efficacia delle decisioni in materia civile e commerciale*, *op. cit.*, p. 69, where the author uses a word “necessity”.

<sup>1301</sup> Heidelberg Report, par. 377.

<sup>1302</sup> Cyprus, Greece, and Ireland apply *lex fori*. See Study JLS/C4/2005/03 “Compilation of All National Reports, Questionnaire No 3: Legal Problem Analysis”, [http://ec.europa.eu/civiljustice/news/docs/study\\_bx11\\_compilation\\_quest\\_3\\_en.pdf](http://ec.europa.eu/civiljustice/news/docs/study_bx11_compilation_quest_3_en.pdf), p. 388–95.

<sup>1303</sup> Austria, Estonia, Germany, Hungary, Latvia, Luxemburg, Malta, the Netherlands, Poland, Slovakia, and Spain, see Study JLS/C4/2005/03 “Compilation of All National Reports, Questionnaire No 3: Legal Problem Analysis”, [http://ec.europa.eu/civiljustice/news/docs/study\\_bx11\\_compilation\\_quest\\_3\\_en.pdf](http://ec.europa.eu/civiljustice/news/docs/study_bx11_compilation_quest_3_en.pdf), p. 388–95.

<sup>1304</sup> Italy and Slovenia see Study JLS/C4/2005/03 “Compilation of All National Reports, Questionnaire No 3: Legal Problem Analysis”, [http://ec.europa.eu/civiljustice/news/docs/study\\_bx11\\_compilation\\_quest\\_3\\_en.pdf](http://ec.europa.eu/civiljustice/news/docs/study_bx11_compilation_quest_3_en.pdf), p. 388–95.

<sup>1305</sup> Recital No 15 of the Maintenance Regulation

<sup>1306</sup> On the similar conclusion see M. ABENDROTH, *Choice of Court in Matters Relating to Maintenance Obligations*, in *The Recovery of Maintenance in the EU and Worldwide*, *op. cit.*, p. 464.

<sup>1307</sup> The model may be taken from Article 25 of the Brussels Ibis Regulation, as suggested by U. MAGNUS, *Choice of Court Agreements in the Review Proposal for the Brussels I Regulation*, in *The Brussels I Review Proposal Uncovered*, *op. cit.*, p. 93: «*The material validity (concerning capacity, mistake, fraud, duress) of the choice-of-court agreement is governed by the law of the Member State where the chosen court or courts are located*».

which is hard to identify *ex ante*,<sup>1308</sup> and protect such a party against fraud, the duress, or the mistake.

### 3.6. Severability

Moreover, it must be noted that jurisdiction clauses may form part of prenuptial agreements. The uniform approach on the severability of the jurisdiction clause is recommended. In this case, it may be referred to the case *Benincasa*, C-269/95, stating that a jurisdiction clause and the substantive provisions of the contract in which a jurisdiction clause is incorporated must be distinguished.<sup>1309</sup> Moreover, a problem concerning severability of the validity of the jurisdiction agreement concerning matrimonial property regime and the jurisdiction agreement concerning maintenance in the prenuptial agreement may arise. In the recent English case of the Court of Appeal, *Brack v Brack*, issued on 20 December 2012, three prenuptial agreements were concluded between the spouses (“Niagara agreement”, the “Gothenburg agreement”, and “Ohio agreement”, being the locations where each were signed), which contained prorogation clauses granting exclusive jurisdiction to the court in Stockholm. The Niagara and Gothenburg agreement contained a Prenuptial and Prorogation agreements relating to the property regime between the spouses as follows:

*The undersigned... who intend to contract a marriage with one another, by this conclude the following prenuptial agreement. Furthermore we enter into a prorogation agreement in which we determine what law and court shall apply and as to the distribution of property with ourselves... All property acquired by each of us independently before entering into marriage or which will be acquired during the marriage as well as any property which will replace that property together with all revenue generated by all property shall make up the private property of each of us independently, in which the other spouse shall have no right by marriage to community property or other joint property rights... Moreover, we agree that in the case of separation between the two of us Swedish law shall apply at the distribution of our property and that any dispute as to that*

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<sup>1308</sup> J. CARRUTHERS, *Party autonomy in the legal regulation of adult relationships: what place for party choice in Private International Law?*, *op. cit.*, p. 909.

<sup>1309</sup> ECJ, Case, C-269/95, *Benincasa*, par. 25.

*property shall be settled in accordance with Swedish law before the City Court of Stockholm, Sweden.”*<sup>1310</sup>

The Ohio Agreement was a more length and detailed document than either the Niagara or Gothenburg agreements, covering maintenance (at Clause 12 whereby the wife waived any rights to maintenance for herself) as well as the prorogation clause (Clause 19, identifying Sweden as having jurisdiction).

The High Court of Justice distinguished between spousal maintenance on the one hand, and the matrimonial property on the other hand because of the ECJ case, *Van den Boogaard* (C-220/95). Although, the court found the agreements to be unfair as to the rights in property arising out of a matrimonial relationship, the court and declared its stay of jurisdiction as to the spouses’ maintenance in favour of the Swedish court since the prorogation agreement was valid according to Article 4 of the Maintenance Regulation. The court stated:

*...the prorogation clause, albeit properly entered into, and not negated by one of the traditional vitiating factors, is not caught by the Maintenance Regulation insofar as it deals with any sharing or real property claims, unless those claims are negated by the terms of the prenuptial agreement itself.*<sup>1311</sup>

Although the Court of Appeal confirmed approach of the High Court of Justice as to the severability of the validity of the prorogation clause as to the matrimonial property and maintenance, since “*under EU law only maintenance can be prorogated, all other aspects of matrimonial finance being excluded from the regulation and subject therefore to domestic law, pursuant to Article 1*”.<sup>1312</sup> Thus, if there is a valid maintenance prorogation agreement, it can be found only in the Ohio agreement.<sup>1313</sup> According to the Court of Appeal, in Clause 12 the spouses “irrevocably waived” their rights to maintenance in whatever form and Clause 19 relates solely to jurisdiction in order to make good the deficit, there is no specific choice of jurisdiction clause in respect of maintenance.<sup>1314</sup> The Court of Appeal concluded that maintenance prorogation clause is invalid, referring to ECJ case *Estasis*.

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<sup>1310</sup> *DB v PB*, 22 December 2016, [2016] EWHC 3431 (Fam), [40]; *Brack v Brack* [2018] EWCA Civ 2862, [15].

<sup>1311</sup> *DB v PB*, 22 December 2016, [2016] EWHC 3431 (Fam), [52].

<sup>1312</sup> *Brack v Brack* [2018] EWCA Civ 2862, [66].

<sup>1313</sup> *Brack v Brack* [2018] EWCA Civ 2862, [44].

<sup>1314</sup> *Ibidem*, [62], [64].

...In *Estasis*, a prorogation clause found within the Terms and Conditions on the back of the agreement was not adequate to satisfy the requirements of Article 4 without specific reference to the clause within the agreement itself. Having considered the submissions of both parties, I have concluded that the same must be equally true where the meaning of the clause relied upon is itself unclear, particularly where, as here, the critical wording must be read across from a part of the document, dealing specifically with rights and not jurisdiction. In my judgment, the requirements in Article 4 are not satisfied, notwithstanding that the agreement is in writing.<sup>1315</sup>

### 3.7. Exclusive, Non-Exclusive and Asymmetric Jurisdiction Agreements

Contrary to Article 12 of the Brussels IIa Regulation, the choice-of-court agreement has a binding effect on the selected Member States court, as well as the derogated Member State court. Article 4 of the Maintenance Regulation provides for the same assumption as Article 25 of the Brussels IIa Regulation - the jurisdiction agreement shall be deemed exclusive unless the parties have agreed otherwise. In consequence, it may be generally referred to as to Chapter Two, Subchapter I, Section 11 concerning the jurisdiction clauses under the Brussels IIa Regulation.<sup>1316</sup> However, significant doubts under the Brussels IIa Regulation may arise regarding the use of optional asymmetrical jurisdiction clauses in maintenance matters. It may be suggested that optional asymmetric jurisdiction clauses could have a binding effect when the party forced into a particular jurisdiction is a debtor and the counterpart is creditor, which has an option to commence proceedings either before the designated jurisdiction or before any other competent court.<sup>1317</sup> The opposite approach could lead to the contravention of the *rationae* of the Maintenance Regulation by giving an advantage to the maintenance debtor.<sup>1318</sup> This may be demonstrated in the following example:

*Michele (German national) and Beatrice (Italian national), got married in 2008 and they have been*

<sup>1315</sup> *Ibidem*, [67].

<sup>1316</sup> J. CARRUTHERS, *Party autonomy in the legal regulation of adult relationships: what place for party choice in Private International Law?*, *op. cit.*, p. 909.

<sup>1317</sup> On the same approach see F. C. Villata, L. Válková, *EUFam's Model Choice-of-Court and Choice-of-Law Clauses*, *op. cit.*, p. 20.

<sup>1318</sup> According to a German decision BGH, NJW 2014,1101 an asymmetrical agreement on the *substantive regime* of the matrimonial relationship (including maintenance) is null and void, if it creates an excessive imbalance between the spouses harming the weaker party. Such findings may also have an impact on the substantive validity of an asymmetrical choice-of-court agreement concerning maintenance obligations.



*living in Prague for 10 years. When they married, Michele used to live in Prague, whereas Beatrice moved to Prague in order to stay with Michele. As a consequence of the change of her residence, Beatrice lost her job in Italy and she became unable to support her own living costs. Michele wished for her to feel comfortable, i.e. that she can rely on a jurisdiction with which she is familiar.*

They concluded an asymmetrical exclusive choice-of-court agreement providing for the exclusiveness of Italian courts' jurisdiction in case that Michele claims maintenance against Beatrice (through a negative declaratory action) according to Article 4 par. 1 lett. b) of the Maintenance Regulation, whilst Beatrice has the right to bring proceedings in Italian courts according to Article 4 par. 1 lett. b) or in any other court according to Article 3 of Maintenance Regulation.

### **3.8. Relationship between the Maintenance Regulation and the 2007 Lugano Convention**

There is no explicit rule dealing with the relationship between the Maintenance Regulation and the 2007 Lugano Convention. In consequence, several theories have been developed.

Article 69 par. 1 of the Maintenance Regulation, which provides that the Maintenance Regulation shall not affect the application of multilateral conventions, refers to the relationship with already existing international conventions. Although the 2007 Lugano Convention entered into force on 1 December 2010, the 2007 Lugano Convention may be perceived as a pre-existing instrument which replaced the 1988 Lugano Convention.<sup>1319</sup> Article 69 of the Maintenance Regulation specifies that it covers only conventions concluded by the Member States, but the contracting party of the 2007 Lugano Convention is the EU. For these two reasons, it is doubtful whether the 2007 Lugano Convention should prevail. In support of this theory is the fact that the Maintenance Regulation should take into account the

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<sup>1319</sup>Cross-border divorce and maintenance, Thematic Unit 3, Cross-border recovery of maintenance in Europe, Workshop for judges implementing the training module on European Family Law, 2012, available at: [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwix7crA\\_ezcAhVHbFAKHdeOCSIQFjAAegQIAxAC&url=https%3A%2F%2Fwww.era-comm.eu%2FEU\\_Civil\\_Justice\\_Training\\_Modules%2Fkiosk%2Fcourses%2FFamily\\_Law\\_Module\\_1\\_EN%2FModule%25203%2Fkiosk%2Fdokuments%2FThematical\\_unit\\_3.pdf&usg=AOvVaw0TkPXhib4QvU8hXwB55iG9](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwix7crA_ezcAhVHbFAKHdeOCSIQFjAAegQIAxAC&url=https%3A%2F%2Fwww.era-comm.eu%2FEU_Civil_Justice_Training_Modules%2Fkiosk%2Fcourses%2FFamily_Law_Module_1_EN%2FModule%25203%2Fkiosk%2Fdokuments%2FThematical_unit_3.pdf&usg=AOvVaw0TkPXhib4QvU8hXwB55iG9).

EU's jurisdictional obligations under the 2007 Lugano Conventions to which the EU is a party.<sup>1320</sup>

On the other hand, Article 64 par. 1 of the 2007 Lugano Convention provides that the 2007 Lugano Convention shall not prejudice the application of the Brussels I Regulation, as well as any amendments thereof. However, is the Maintenance Regulation a successor to the Brussels I Regulation? Moreover, Article 67 par. 2 of the 2007 Lugano Convention states that the 2007 Lugano Convention shall not prevent a court from assuming jurisdiction in accordance with the convention on a particular matter. Indeed, it is doubtful whether the Maintenance Regulation is *lex specialis* and should prevail.<sup>1321</sup>

The most problematic point is Article 4 par. 4 of the Maintenance Regulation, which determines the relationship between the Maintenance Regulation and the 2007 Lugano Convention as to jurisdiction clauses. If the parties agree to attribute jurisdiction to a non-Member State, which is party to the 2007 Lugano Convention, the 2007 Lugano Convention applies except in the case of disputes relating to a maintenance obligation towards a child under the age of 18. However, it must be borne in mind that Article 23 of the 2007 Lugano Convention applies only when one of the parties is domiciled in the Contracting State. In my opinion, it leaves room for doubts. The 2007 Lugano Convention does not restrict the scope of application to minors under the age of 18. The non-Member State, which is party to the 2007 Lugano Convention, is not bound by the Maintenance Regulation, *i.e.*, by Article 4 par. 4 of the Maintenance Regulation. Indeed, in what way may Article 4 par. 4 of the Maintenance Regulation impose an obligation on the non-Member State, which is party to the 2007 Lugano Convention? This provision deals only with the derogation effect<sup>1322</sup> and

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<sup>1320</sup> P. BEAUMONT, *Interaction of the Brussels II-a and Maintenance Regulations with [possible] litigation in non-EU States: Including Brexit Implications*, Working Paper No. 2018/1, available at: <https://www.abdn.ac.uk/law/research/working-papers-455.php>, p. 3.

<sup>1321</sup> For this approach see: K. KOSTKIEWICZ, M. EICHENBERGER, *International Maintenance Law in Legal Relations between Switzerland and the EU*, *Comparative Law Review*, 20 (2015), available at: <http://dx.doi.org/10.12775/CLR.2015.009>, p. 21.

<sup>1322</sup> P. BEAUMONT, *Interaction of the Brussels IIa and Maintenance Regulations with [possible] litigation in non-EU States: Including Brexit Implications*, *op. cit.*, p. 3: «It is very unfortunate that the EU unilaterally derogated from this provision of the Lugano Convention rather than abiding by the Lugano Convention in full until an opportunity arose for the Lugano Convention to be revised based on the consensus of all the Contracting Parties to the Convention. It does not augur well for the EU's willingness to abide by its treaty obligations with its near neighbours. A future revision of the Lugano Convention should discuss the pros and cons of jurisdiction agreements in relation to maintenance obligations towards a child under the age of 18.» See also F. Pesce, *Le obbligazioni alimentari tra diritto internazionale e diritto dell'Unione europea*, *op. cit.*, p. 140.

imposes the obligation not to recognize any effect of such jurisdiction agreements in the Member State courts. However, in the case of parallel proceedings, the clash between these two legal instruments is evident and may result in positive and negative conflicts of jurisdiction.

We can imagine two scenarios with opposite results.<sup>1323</sup>

1) *The defendant is domiciled in Switzerland, the plaintiff is domiciled in the USA. A non-designated Swiss court is first seized to decide on child maintenance (under the age of 18) according to Article 2 of the 2007 Lugano Convention. However, there is an agreement conferring jurisdiction to the Italian court which is valid by virtue of Article 23 of the 2007 Lugano Convention.*

The Swiss court declares a lack of jurisdiction due to the valid jurisdiction agreement. The second seized Italian court declares lack of its jurisdiction since the jurisdiction agreement is invalid by virtue of Article 4 par. 4 of the Maintenance Regulation and since it cannot assume its jurisdiction according to Article 3 of the Maintenance Regulation. A negative conflict of jurisdiction occurs.

2) *A Swiss court is seized to decide on child maintenance (under the age of 18) on the basis of the jurisdiction agreement according to Article 23 of the 2007 Lugano Convention. The Italian court is seized according to Article 3 of the Maintenance Regulation.*

The Swiss court examines the validity of the jurisdiction clauses and assumes its jurisdiction. However, the Italian court is seized as well and might establish jurisdiction according to Article 3 of the Maintenance Regulation, since by virtue of Article 4 par. 4 of the Maintenance Regulation, the jurisdiction agreement is invalid. A positive conflict of jurisdiction occurs. However, the second seized court must suspend its jurisdiction according to Article 27 of the 2007 Lugano Convention (also if we presume that the Maintenance Regulation prevails, Article 12 of the Maintenance Regulation is applicable only between the Member States). On the other hand, according to Professor Beaumont “... a possible construction of Article 4 par. 4 of the Maintenance Regulation is that for courts in EU Member States it overrides Article 27 of the 2007 Lugano Convention in a

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<sup>1323</sup> On similar examples and problems connected with positive and negative conflicts of jurisdiction see K. KOSTKIEWICZ, M. EICHENBERGER, *International Maintenance Law in Legal Relations between Switzerland and the EU*, *op. cit.*, p. 25, 26.

case where the non-EU Lugano court is first seized on the basis of a non-exclusive jurisdiction agreement".<sup>1324</sup> Such a situation could lead to two conflicting judgments.

#### **4. Choice-of-Court Agreements under the Regulations on Property Consequences of Marriage and Registered Partnership**

As described in the introduction of Section 1 of this Subchapter, a group of 17 Member States declared their interest in enhanced cooperation in the area of the property regimes of international couples including matrimonial property regimes and the property consequences of registered partnerships. Beginning 1 January 2019 the both Property Regimes Regulations will become applicable in their jurisdictions. The common goal of the Regulations is to establish a European legal framework for determining jurisdiction and the law applicable to matrimonial property and registered partnership regimes and to facilitate the movement of decisions and among the Member States.

Both regulations contain the rule on choice-of-court agreements, which is dealt in the slightly different manner. In consequence, the rules on choice-of-court agreements will be analysed separately. On the other hand, the examined aspects which are common for the rules on choice-of-court agreements in the regulations, the formal and substantive validity of jurisdiction agreements, the *lis pendens* rule, and the scope of application will be dealt simultaneously.

##### **4.1. Scope of Application**

###### **4.1.1. Territorial and Personal Scope of Application**

The Regulation on Matrimonial Property Regime and the Regulation on the Property Consequences of Registered Partnership will be applicable only in the Member States that have established enhanced cooperation among themselves.<sup>1325</sup> Until now, the Member States

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<sup>1324</sup> P. BEAUMONT, *Interaction of the Brussels Iia and Maintenance Regulations with [possible] litigation in non-EU States: Including Brexit Implications*, *op. cit.*, p. 4.

<sup>1325</sup> Article 20 of the Treaty on European Union; and Article 326 and ff. TFEU.

taking part in the enhanced cooperation are: Austria, Belgium, Bulgaria, Croatia, the Czech Republic, Finland, Germany, Greece, France, Italy, Luxembourg, Malta, the Netherlands, Portugal, Slovenia, Spain, and Sweden. Cyprus reiterated this wish during the work of the Council.<sup>1326</sup> Estonia announced its intention to take part in the cooperation after its adoption.<sup>1327</sup>

The UK and Ireland decided not to opt-in into the Property Regime Regulations, since the common law system is not familiar with the concept of matrimonial property regimes. Also:

*...the Government considers that these proposals would create problems for all UK jurisdictions given that the proposals do not cover all aspects of financial provision on divorce or dissolution. When considering ancillary relief or equivalent financial provision courts in the UK only consider domestic law and take account of a wider range of issues than matrimonial property regimes in other Member States usually cover – e.g. maintenance (needs and resources), the division of capital, including gifts and jointly owned companies (both of which are excluded from the scope of the Commission’s proposals), and matters such as pension sharing and discretionary trusts (where the scope of these proposals is unclear).*<sup>1328</sup>

In accordance with Protocol No 22 on the Position of Denmark (*ex* Protocol No 5), the measures adopted under Title V of Part III of the TFEU (*ex* Title IV of Part III of the EC Treaty) would not apply to Denmark,<sup>1329</sup> thus Denmark is not bound by both regulations.

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<sup>1326</sup> Recital No 11 of the Property Regime Regulations

<sup>1327</sup> See [www.consilium.europa.eu/en/press/press-releases/2016/06/09/property-regimes-for-international-couples](http://www.consilium.europa.eu/en/press/press-releases/2016/06/09/property-regimes-for-international-couples).

<sup>1328</sup> Joint consultation by the Ministry of Justice, Scottish Government, and the Northern Ireland Department of Finance and Personnel, “Matrimonial Property Regimes and the property consequences of registered partnerships -How should the UK approach the Commission’s proposals in these areas?”, (Consultation Paper CP 8/2011,2011), par. 28. See also Impact Assessment on proposed European Community Regulations on Matrimonial Property Regimes and the property consequences of registered partnerships, Ministry of Justice, 15 April 2011, par. 2.7. and 2.8.; S. CRETNEY, *Community of property imposed by judicial decision*, *Law Quarterly review*, 119 (2003), p. 349; E. COOKE, T. AKOTO, A. BALLOU, T. CALLUS, *A community of property-a regime for England and Wales: interim report*, *International family law*, (2005), p. 133-137; B. BRAAT, *Matrimonial property law: diversity of forms, equivalence in substance?*, in M. ANTOKOLSKAIA (ed), *Convergence and divergence of family law in Europe Intersentia*, 2008, p. 243; J. SCHERPE, *Towards a matrimonial property regime for England and Wales*, in R. PROBERT, C. BARTON (eds), *Fifty years in family law. Essays for Stephen Cretney*, Intersentia, 2012, p. 133-146; M. THORPE, *Financial consequences of divorce: England versus the rest of Europe*, in K. BOELE-WOELKI (ed), *The Future of family property in Europe*, Intersentia, 2011, p. 4 *et seq.*

<sup>1329</sup> See Article 2 of the protocols: Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts - Protocol annexed to the Treaty on European Union and to the Treaty establishing the European Community - Protocol on the position of Denmark, OJ C 340,

The six Member States where the Regulations will not be applicable are Poland, Hungary, Slovakia, Latvia, Lithuania, and Romania. It seems that the reasons are more socio-political such as the non-recognition of same-sex marriages and registered partnerships.<sup>1330</sup> Although Article 9 of both Regulations allow the Member State courts to decline its jurisdiction for property disputes where such marriages or registered partnerships are not recognised, it seems that this provision did not offer enough of a guarantee.<sup>1331</sup>

Both Property Regime Regulations do not contain any specific provisions concerning its personal scope. The rules are based on universal application, as well as the Maintenance Regulation and do not foresee any reference to the national law of the Member States.<sup>1332</sup>

#### **4.1.2. Temporal Scope of Application**

Both Property Regime Regulations shall apply to: legal proceedings instituted, authentic instruments formally drawn up or registered, and court settlements approved or concluded on or after 29 January 2019 in the Member States participating in enhanced cooperation.<sup>1333</sup> Contrary to the Brussels IIa Regulation, which specifies that it applies to *agreements concluded between the parties* after 1 March 2005, the two Property Regime Regulations fix the moment of application to the time when the proceedings are instituted (as well as the Maintenance Regulation and the Brussels Ibis Regulation). It will not be required that the choice-of-court agreement be concluded on or after 29 January 2019. It will be sufficient that the Member State court will be seized with the dispute concerning the choice-of-court agreement at the time the two Property Regime Regulations will be applicable in that Member State.

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10 November 1997 and Consolidated version of the Treaty on the Functioning of the European Union, Protocol (No 22) on the position of Denmark, OJ C 326, 26 October 2012

<sup>1330</sup> However, in Hungary registered partnerships are permitted from 2010. In Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, the Netherlands, Norway, Portugal, Spain, Sweden, and United Kingdom (excluding Northern Ireland) same-sex marriages are permitted.

<sup>1331</sup> However, see the recent case of the ECJ, Case C-673/16, *Relu Adrian Coman and Others v Inspectoratul General Pentru Imigrări and Ministerul Afacerilor Interne*, 5 June 2018, ECLI:EU:C:2018:385, par. 34 and 46, where the ECJ defined the term “spouse” as gender-neutral, which may cover the same-sex spouse of the Union citizen concerned and an obligation to recognise such marriages for the sole purpose of granting a derived right of residence to a third-country national does not undermine the national identity or pose a threat to the public policy of the Member State concerned.

<sup>1332</sup> The Regulations make an express reference to the national law for the determination of the certain questions, see for example Recital No 17 of the Matrimonial Property Regime Regulation regarding the term “marriage”.

<sup>1333</sup> See Article 69 of the Matrimonial Regime Regulation.

### 4.1.3. Material Scope of Application

Article 1 of both Property Regime Regulations establishes the material scope of application in a positive and a negative way.

The Matrimonial Property Regime Regulation defines the concept of matrimonial property regimes autonomously<sup>1334</sup> in Article 3 par. 1 lett. a) as “*a set of rules concerning the property relationships between the spouses and in their relations with third parties, as a result of marriage or its dissolution*”. The Regulation on Property Consequences of Registered Partnership defines the concept of registered partnership as well in Article 3 par. 1 lett. a) as “*the regime governing the shared life of two people which is provided for in law, the registration of which is mandatory under that law and which fulfils the legal formalities required by that law for its creation.*”.

Recital No 18 of both Regulations state clearly that the scope of the Regulations should include all civil-law aspects of the matrimonial property regimes and property consequences of registered partnerships which cover the daily management of matrimonial property, a partner's property, and the liquidation of the regime, in particular as a result of the couple's separation or the death of one of the spouses or partners. In contrast with the Regulation on Property Consequences of Registered Partnership, Recital No 18 of the Matrimonial Regime Regulation then specifies that it also encompasses: (i) the rules from which the spouses may not derogate; (ii) any optional rules to which the spouses may agree in accordance with the applicable law; and (iii) any default rules of the applicable law.<sup>1335</sup>

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<sup>1334</sup> Recital No 18 of the Matrimonial Regime Regulation.

<sup>1335</sup> “...*the rules from which the spouses may not derogate*” may be understood as the general law on marriage (*régime primaire*), for example rules governing family home and household goods, which are applied irrespective of the matrimonial property regime and must be distinguished from the secondary regime which focuses on the property rights of the spouses and exercise of party autonomy. The secondary regime then concerns the default regime (“...*any default rules of the applicable law*”, e.g. community or separation of assets) and optional regime (“...*any optional rules to which the spouses may agree in accordance with the applicable law*”, e.g. marital agreements). See W. PINTENS, *Matrimonial property law in Europe*, in K. BOELE-WOELKI, K. MILES, J. SCHERPE (eds), *The future of family property in Europe*, Intersentia, 2011, p. 20 (*régime primaire*), p. 21-37 (default regime), p. 37-39 (optional regime); K. BOELE-WOELKI, F. FERRAND, C. GONZÁLEZ BEILFUSS, M. JÄNTERA-JAREBORG, N. LOWE, D. MARTINY, W. PINTENS, *Principles of European family law regarding property relations between spouses*, Intersentia, 2013, p. 35-97 (*régime primaire*), p. 99-135 (optional regime), p. 139—340 (default regime); K. BOELE-WOELKI, *European Family Law in Action. Vol. 4: Property Relations between Spouses*, European Family Law Series 24, Intersentia, 2009, p. 175-207 (*régime primaire*), p. 237-245 (optional regime), p. 245-249 (default regime).

The negative scope of application is provided in Article 1 par. 1 and par. 2 of both Regulations. In particular, they do not cover the following subject matters: revenue, customs or administrative matters, the legal capacity of spouses or partners;<sup>1336</sup> the existence, the validity, or the recognition of a marriage or registered partnership;<sup>1337</sup> maintenance obligations;<sup>1338</sup> the succession to the estate of a deceased spouse or partner;<sup>1339</sup> social security; the entitlement to transfer or adjustment between spouses or partners, in the case of divorce, legal separation, or marriage annulment or dissolution or annulment of the registered partnership; the rights to retirement or disability pension accrued during marriage and which have not generated pension income during the marriage or registered partnership;<sup>1340</sup> the nature of rights *in rem* relating to a property;<sup>1341</sup> and any recording in a register of rights in immovable or movable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register.<sup>1342</sup>

#### **4.2. Types of the Choice-of-Court Agreements under the Matrimonial Property Regime Regulation and under the Regulation on Property Consequences of Registered Partnerships**

Articles 4 and 5 of the Matrimonial Regime Regulation establish an innovative rule providing for typical connections.<sup>1343</sup> In other words, the rules automatically allocate the jurisdiction of the property regime disputes to the Member State courts having jurisdiction over succession

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<sup>1336</sup> However, according to Recital 20 of the Property Regime Regulations, this exclusion should not cover the specific powers and rights of either or both spouses with regard to property, either as between themselves or as regards third parties, as these powers and rights should fall under the scope of the Regulations.

<sup>1337</sup> The Matrimonial Property Regime Regulation clearly states that the concept of marriage should be determined according to the national law of each Member State, see Recital No 17. Concerning registered partnership – the term should be defined here solely for the purpose of this Matrimonial Property Regime Regulation, where the substance of the concept should remain defined in the national laws of the Member States.

<sup>1338</sup> Issue covered by the Maintenance Regulation.

<sup>1339</sup> Issue covered by the Succession Regulation.

<sup>1340</sup> However, according to Recital No 23, the Property Regime Regulations should govern in particular the issue of classification of pensions assets, the amounts that have already been paid to one spouse during the marriage/registered partnership, and the possible compensation that would be granted in case of a pension subscribed to with common assets.

<sup>1341</sup> See Recitals No 24 to 26 of the Property Regime Regulations.

<sup>1342</sup> See Recitals No 27 and 28 of the Property Regime Regulations.

<sup>1343</sup> S. MARINO, *Strengthening the European Civil Judicial Cooperation: the patrimonial effects of family relationships*, Cuadernos de Derecho Transnacional, (2017), p. 270.



(Article 4) and divorce, legal separation, or marriage annulment (Article 5).<sup>1344</sup> The connection is exclusive; the choice-of-court agreement providing for the concentration of the proceedings is admissible only under the specific circumstances laid down in paragraph 2 of Article 5 of the Matrimonial Property Regime Regulation. Although Article 4 of the Regulation on Property Consequences of Registered Partnership automatically allocates the jurisdiction of the property regime disputes to the Member State courts having jurisdiction over succession, in case of the dissolution or annulment of a registered partnership the agreement of the spouses is necessary.

Moreover, both Regulations allow two types of choice-of-court agreements. One type of choice-of-court agreements is covered by the already mentioned Article 5 par. 2 and 3 of the Matrimonial Property Regime Regulation and by Article 5 of the Regulation on Property Consequences of Registered Partnership. These Articles allow the concentration of the proceedings concerning divorce, legal separation, or marriage annulment or dissolution or annulment of a registered partnership with the proceedings concerning the property regime (under the specific circumstances in the matrimonial property regime). The second type of choice-of-court agreements is determined by Article 7 of the Matrimonial Property Regime Regulation and Regulation on Property Consequences of Registered Partnership and provides for the limited choice, which is activated only in two cases:

- (i) When the Member State court is seized to rule on an application for divorce, legal separation, or marriage annulment in accordance with the fifth or the sixth indent of Article 3 par. 1 lett. a), Article 5 or Article 7 of the Brussels IIa Regulation and the parties fail to agree to such a Member State court; or when the Member State court is

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<sup>1344</sup> The connecting rules can be found already in Article 3 par. 1 lett. c) and d) of the Maintenance Regulation. However, the connection rules are not automatic. See in this context ECJ, Case C-184/14, *A v B*, 16 July 2015, ECLI:EU:C:2015:479, where the ECJ upheld that Article 3 lett. referred by the Italian Corte di Cassazione, n. 8049, order 7 April 2014, in this regard see E. D'ALESSANDRO, *Giudizio di separazione e domanda concernente la responsabilità genitoriale ed il mantenimento dei figli stabilmente residenti in altro Stato membro, nota a Cass. ord. 7 aprile 2014, n. 8049*, *La nuova giurisprudenza civile commentata* (2014), pp. 957-960. The ECJ upheld that Article 3 lett. c) and lett. d) of the Maintenance Regulation must be interpreted that, in the event that a court of a Member State is seized of proceedings involving the separation or dissolution of a marital link between the parents of a minor child and a court of another Member State is seized of proceedings in matters of parental responsibility involving that same child, an application relating to maintenance concerning that child is ancillary only to the proceedings concerning parental responsibility, within the meaning of Article 3 lett. d). However, it must be borne in mind that the connection is not automatic as in the case of the Matrimonial Property Regime Regulation.

seized to rule on an application for the dissolution or annulment of a registered partnership and the parties fail to agree to such a Member State court; or

- (ii) When matters of the property regime are not linked to proceedings on succession or divorce, legal separation, or marriage annulment or dissolution, or annulment of the registered partnership (for example, when the spouses or partners want to change the property regime of their marriage or registered partnership)”<sup>1345</sup>.

In the first place, in order to understand this division, it is necessary to make a brief introduction of the legislative history of these rules. The 2011 Matrimonial Property Regime Proposal proposed the first type of choice-of-court agreement in a manner that the agreement was required every time the spouses intended to connect the proceedings in divorce and matrimonial property regime; the allocation of jurisdiction was not automatic.<sup>1346</sup> The same

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<sup>1345</sup> Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM(2016)0106 final, 2 March 2016, p. 8; Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, COM(2016)0107 final, 2 March 2016, p. 8; The scope and the use of this “second” jurisdictional clause is not explained sufficiently in the Recitals. See for example Recital No 35 and 36 of the Matrimonial Property Regime Regulation, where it seems that the rule on the choice of court under Article 7 and the rule on alternative grounds of jurisdiction under Article 6 are not connected. Recital No 35 provides «Where matters of matrimonial property regime are not linked to proceedings pending before the court of a Member State on the succession of a spouse or on divorce, legal separation or marriage annulment, this Regulation should provide for a scale of connecting factors for the purposes of determining jurisdiction, starting with the habitual residence of the spouses at the time the court is seized. These connecting factors are set in view of the increasing mobility of citizens and in order to ensure that a genuine connecting factor exists between the spouses and the Member State in which jurisdiction is exercised.» Recital No 36 provides: «In order to increase legal certainty, predictability and the autonomy of the parties, this Regulation should, under certain circumstances, enable the parties to conclude a choice-of-court agreement in favour of the courts of the Member State of the applicable law or of the courts of the Member State of the conclusion of the marriage.» However, the “certain circumstances» provided in Recital No 36 should be understood as the “cases which are covered by Article 6” as specified in Article 7. In consequence, Recital No 36 should be read in conjunction with Recital No 35, i.e. «Where matters of matrimonial property regime are not linked to proceedings pending before the court of a Member State on the succession of a spouse or on divorce, legal separation or marriage annulment... this Regulation should ..., enable the parties to conclude a choice-of-court agreement in favour of the courts of the Member State of the applicable law or of the courts of the Member State of the conclusion of the marriage.» This may be supported by the wording of Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM(2011)0126 final, 16 March 2011, Recital No 16: «Where matters of matrimonial property regimes are not linked to a divorce, separation or marriage annulment or to the death of a spouse, the spouses may decide to submit questions related to their matrimonial regime to the courts of the Member State of the law they chose as the law applicable to their matrimonial property regime. Such a decision is expressed by an agreement between the spouses which may be concluded at any moment, even during the proceedings.» The same considerations apply to the Regulation on Property Consequences of Registered Partnership, where the connection between Articles 6 and 7 are not clarified, which is neither evident from Recitals No 34 and 36.

<sup>1346</sup> Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM(2011)0126 final, 16 March 2011, Article 4: «The courts of a Member State called upon to rule on an application for divorce, judicial separation or marriage annulment under Regulation (EC) No 2201/2003, shall also have jurisdiction, where the spouses so agree, to

rule was also proposed in the 2011 Proposal on the Property Consequences of the Registered Partnership,<sup>1347</sup> which has maintained this structure until now. Although in 2011, the delegations of the certain Member States proposed the automatic concentration of the proceedings,<sup>1348</sup> other Member States did not support such an idea of the automatic extension of the jurisdiction.<sup>1349</sup> In July 2012, the Committee on Legal Affairs rejected the first idea of

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*rule on matters of the matrimonial property regime arising in connection with the application.». See B. CAMPUZANO DÍAZ, *The Coordination of the EU Regulations on Divorce and Matrimonial Property*, Yearbook of Private International Law, 13 (2011), p. 238: «..we consider that by requiring an agreement between the spouses, the Proposal seeks to avoid an automatic extension to the matrimonial property regime issues of the large number of alternative grounds of jurisdiction offered in Regulation 2201 /2003. The list of seven alternative fora, which is criticized even with respect to divorce," seems inadequate in a Proposal aimed at fixing the specific competent court.».*

<sup>1347</sup> Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM(2011)0127 final, 16 March 2011.

<sup>1348</sup> Comments by the German delegation on Chapters I, II, III, IV, V, and VI, 17792/11 ADD 9, 2011/0059 (CNS) 2011/0060 (CNS), 16 January 2011, p. 7, 8: «*That the court competent in divorce matters should also have jurisdiction to rule on the division of property should not be made dependent on an agreement between the spouses. Where spouses are in conflict, divided, such an agreement can be difficult to reach and provides one or other of the spouses with an opportunity to delay the process of dividing the property. It would be preferable to ensure that an application from only one spouse is sufficient.*»... «*Germany takes the view that, because divorce and division of property are closely connected, the court with (international) jurisdiction over the divorce should also attend to the division of property. To deal with cases in which, contrary to Article 4, the spouses cannot agree that jurisdiction should lie with the court conducting the divorce proceedings, there should be maximum concordance between international jurisdiction over the divorce under the Brussels II-a Regulation and jurisdiction over the division of property under this Regulation. This can be achieved by further aligning Article 5(1) of the Regulation with Article 3(1) of the Brussels II-a Regulation, i.e. by supplementing the former with the last two indents of the latter.*». For the automatic concentration see also Comments from the United Kingdom delegation on Chapters I-II, 13698/11 ADD 1, 2011/0059 (CNS) 2011/0060 (CNS), 6 September 2011; Comments from the Spanish delegation on Chapters I-II, 13698/11 ADD 7 REV 1, 2011/0059 (CNS) 2011/0060 (CNS), 13 September 2011, p. 8, 9; Comments from the Swedish delegation on Chapters I-II, 13698/11 ADD 10, 2011/0059 (CNS) 2011/0060 (CNS), 15 September 2011, p. 3; Comments from the Portuguese delegation on Chapters I-II, 13698/11 ADD 11, 2011/0059 (CNS) 2011/0060 (CNS), 19 September 2011, p. 4; Comments from the Danish delegation on Chapters I-II, 13698/11 ADD 1, 2011/0059 (CNS) 2011/0060 (CNS), 20 September 2011, p. 2; Comments from the Czech delegation on Chapters I-II, 13698/11 ADD 13, 2011/0059 (CNS) 2011/0060 (CNS), 20 September 2011, p. 6; Comments from the Belgian delegation on Chapters I-II, 13698/11 ADD 16, 2011/0059 (CNS) 2011/0060 (CNS), 30 September 2011, p. 4; Comments from the Slovenian delegation on Chapters I and II, 13698/11 ADD 18, 2011/0059 (CNS) 2011/0060 (CNS), 3 October 2011, p. 3.

<sup>1349</sup> Comments from the Hungarian delegation on Chapters I-II 13698/11 INIT, 2011/0059 (CNS) 2011/0060 (CNS), 6 September 2011: «*We support Article 4 of the MPR draft regulation whereby the courts of a MS called upon to rule on divorce, judicial separation or marriage annulment, may have jurisdiction by this fact only if the spouses so agree. Article 3 of EC Regulation 2201/2003 provides for several possible fora for divorce, judicial separation and marriage annulment from which the spouses may choose including – under certain circumstances -the plaintiff's habitual residence. Though such fora may be suitable for divorce proceedings, would not have sufficient connection to an MPR matter unless the defendant agrees. Providing jurisdiction in MPR matters to the courts of a MS where the plaintiff has his/her habitual residence (in most common cases to a MS where the plaintiff leaves after the marriage broke down) without the defendant's consent would be unfair to the defendant.*». Against the automatic concentration see also Austrian delegation, Comments from the Austrian delegation on Chapters I-II, 13698/11 ADD 4, 2011/0059 (CNS) 2011/0060 (CNS), 09 September 2011, p. 5; Comments from the Slovak delegation on Chapters I-II, 13698/11 ADD 6, 2011/0059 (CNS) 2011/0060 (CNS),

automatic concentration and amended the rule to be inspired more by Article 12 par. 1 lett. b) of the Brussels IIa Regulation for the spouses, as well as for the registered partners.<sup>1350</sup> In the Council's seventh revised text of the Proposal in 2013, it was the first time the rule was proposed with the current wording where the concentration of the proceedings is automatic.<sup>1351</sup> As stated in the Section 1 of this Subchapter, these proposals were not successful since it was not possible to gain the unanimity.

The second type of the choice-of-court agreement was situated in 2011 Matrimonial Property Regime Proposal in the second paragraph under Article called "Jurisdiction in other cases" concerning the cases when the parties failed to agree on the extension of the proceedings in divorce, legal separation, or marriage into the matrimonial property regime<sup>1352</sup> or "*where matters of matrimonial property regimes are not linked to a divorce, separation or marriage annulment or to the death of a spouse*"<sup>1353</sup>. In such cases, the 2011 Matrimonial Property Regime Proposal provided for the objective rule on jurisdiction based on the alternative grounds or the parties could also agree that the Member State courts whose law they have

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12 September 2011, p. 2; Comments from the Finnish delegation on Chapters I-II, 13698/11 ADD 13, 2011/0059 (CNS) 2011/0060 (CNS), 19 September 2011.

<sup>1350</sup> Committee on Legal Affairs, Draft Report on the proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, PE494.578, 2011/0059(CNS), 25 July 2012, p. 27 and Committee on Legal Affairs, Draft Report on the proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions on the property consequences of registered partnerships, PE494.575, 2011/0060(CNS), 25 July 2012, p. 27. See for example this amendment in matters of matrimonial property regimes: «*The courts of a Member State called upon to rule on an application for divorce, judicial separation or marriage annulment under Regulation (EC) No 2201/2003 shall also have jurisdiction to rule on matters of the matrimonial property regime arising in connection with the application, if the jurisdiction of the courts concerned has been recognised, expressly or otherwise in an unequivocal manner by the spouses. Failing recognition of the jurisdiction of the court referred to in paragraph 1, jurisdiction shall be governed by Article 5 et seq.*». The justification for this amendment was: «*In divorce cases, it seems sensible not to provide for an automatic concentration of jurisdiction, including for associated issues of property rights, in order to preserve the interests of the parties concerned more effectively and to ensure that they accept the jurisdiction of the divorce court. The proposed provision corresponds to Article 12(1)(b) of the Brussels IIa Regulation.*». However, the justification for registered partners the justification is different: «*It would be advisable to avoid automatically imposing a concentration of jurisdictions, even in connected property regime cases, to better safeguard the interests of the parties concerned and ensure that they accept the jurisdiction of the court dealing with the separation. The proposed provision corresponds to Article 12(1)(b) of the 'Brussels IIa' Regulation.*».

<sup>1351</sup> The Irish Presidency and the incoming Lithuanian Presidency, 11699/13 INIT, 2011/0059 (CNS), 28 June 2013.

<sup>1352</sup> See Article 4 of the Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM(2011)0126 final, 16 March 2011: «*Failing agreement between the spouses, jurisdiction is governed by Articles 5 et seq.*».

<sup>1353</sup> See Recital No 16 of the Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM(2011)0126 final, 16 March 2011.

chosen as the law applicable to their matrimonial property regime would have jurisdiction to rule on matters of their matrimonial property regime.<sup>1354</sup> However, in the case of the annulment of a registered partnership, the second type of the choice-of-court agreement was not taken into consideration, since the 2011 Proposal on the Property Consequences of the Registered Partnership did not allow the partners to choose the applicable law.<sup>1355</sup> Subsequently, it was proposed to determine this rule in a more detailed way, which was approved by the European Parliament.<sup>1356</sup> However, according to the Commission “*The Article as proposed by the European Parliament in the opinion of the Commission is conceived in too large terms and would undermine the overall objective of consolidation of jurisdiction. Therefore the Commission cannot accept it.*”<sup>1357</sup>

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<sup>1354</sup> Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM(2011)0126 final, 16 March 2011, Article 5 par 2: «Both parties may also agree that the courts of the Member State whose law they have chosen as the law applicable to their matrimonial property regime in accordance with Articles 16 and 18 shall also have jurisdiction to rule on matters of their matrimonial property regime. Such an agreement may be concluded at any time, even during the proceedings. If it is concluded before the proceedings, it must be drawn up in writing and dated and signed by both parties.»

<sup>1355</sup> On the critique see C. GONZÁLEZ BEILFUSS, *The Proposal for a Council Regulation on the Property consequences of registered partnerships*, Yearbook of Private International Law, 13 (2011), p. 193: «Apparently there is no need for such a rule in the context of the Registered Partnership Proposal since this Proposal does not allow the partners to choose the applicable law, as will be analysed below. It would however, in my opinion, make sense to allow the partners to agree that the courts at the place of registration should have jurisdiction in view of two factors. From a strictly jurisdictional perspective such an agreement would counteract the fact that courts other than those of the place of registration have the possibility of declining to hear the case if the situation is unknown under their law. Whether such a rule will be interpreted narrowly or broadly, allowing courts to decline to hear the case also if the particular type of registered partnership is not known under their law is unclear. Such a rule, therefore, creates a certain amount of uncertainty, which the partners would be able to remove if they were allowed to agree that the courts of the place of registration should be the ones with jurisdiction.»

<sup>1356</sup> See Amendment 45 of the European Parliament legislative resolution of 10 September 2013 on the proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, P7\_TA(2013)0338, 2011/0059(CNS), 10 September 2013: «1. The spouses may agree that the courts of the Member State whose law they have chosen as the law applicable to their matrimonial property regime in accordance with Article 16 are to have jurisdiction to rule on matters of their matrimonial property regime. Such jurisdiction shall be exclusive. ... 2. The spouses may also agree that, if no court has been chosen, the courts of the Member State whose law is applicable pursuant to Article 17 are to have jurisdiction.» See also the same rule for the registered partners, Amendment 42 of the European Parliament legislative resolution of 10 September 2013 on the proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships, P7\_TA(2013)0337, 2011/0060(CNS), 10 September 2013.

<sup>1357</sup> For the matrimonial property regimes see Commission response to text adopted in plenary, SP(2013)774, 6 December 2013. See different reasoning for the property consequences of registered partnership, Commission response to text adopted in plenary, SP(2013)774, 6 December 2013: «If a choice of law is introduced as set out below (see Amendment 63), Amendments 12 and 50 can be accepted by the Commission in principle. However, technical changes should be made to both of them. In particular, the Article proposed is conceived in too large terms and would undermine the overall objective of consolidation of jurisdiction.»

In consequence, it does not seem surprising that the automatic connection was introduced in the 2016 Proposal Matrimonial Property Regime Proposal only under the certain conditions, as well an autonomous rule on choice-of-court agreement was proposed in Article 7 of the 2016 Matrimonial Property Regime Proposal /2016 Proposal on the Property Consequences of the Registered Partnership in the wording more similar to the 2011 Matrimonial Property Regime Proposal.

#### **4.2.1. Choice-of-Court Agreements Providing for the Concentration of the Proceedings**

As stated before, the rules automatically allocate the jurisdiction of the matrimonial property regime disputes to the Member State courts having jurisdiction over succession, divorce, legal separation, or marriage annulment. A choice-of-court agreement *sui generis* is possible to conclude according to Article 5 of the Matrimonial Property Regime Regulation when the Member State is seized to rule on an application for divorce, legal separation, or marriage annulment:

- a) In accordance with the fifth indent of Article 3 par. 1 lett. a) of the Brussels IIa Regulation (*i.e.*, the court of a Member State in which the applicant is habitually resident, and the applicant had resided there for at least a year immediately before the application was made);
- b) In accordance with the sixth indent of Article 3 par. 1 lett. a) of the Brussels IIa Regulation (*i.e.*, the court of a Member State of which the applicant is a national and the applicant is habitually resident there and had resided there for at least six months immediately before the application was made);
- c) In accordance with Article 5 of the Brussels IIa Regulation (in cases of conversion of legal separation into divorce);
- d) In accordance with Article 7 of the Brussels IIa Regulation and the parties fail to agree upon such a Member State court (in cases of residual jurisdiction).

The justification of the legislative decision regarding the automatic concentration of the proceedings in certain cases and the exclusion of the automatic concentration of the proceedings in other cases, which are then subject to the party autonomy, has not been

clarified. However, it may be presumed that due to the criticism of the potential abuse of the two last indents of Article 3 of the Brussels IIa Regulation based on the simulation of the habitual residence of the applicant in the Member States where “advantageous” substantial rules are applicable, the Commission intended to avoid such abuse by requiring agreement of the parties. Such a step does not seem to be very reasonable taking into consideration the fact that Matrimonial Property Regime Regulation unifies the law applicable to the matrimonial property regime. It means that the Member State court A having jurisdiction according to Article 5 of the Matrimonial Property Regime Regulation, as well as the Member State court B having jurisdiction according to Article 6 of the Matrimonial Property Regime Regulation, would apply the same law. On the other hand, the place of the venue remains a significant factor for the application of the overriding mandatory rules and public policy of forum according to Articles 30 and 31 of the Matrimonial Property Regime Regulation.

The connection is not automatic under the Regulation on Property Consequences of Registered Partnerships. Thus, the agreement of the partners is required every time the partners intend to concentrate the proceedings in accordance with Article 5. The justification for the requirement of the agreement of the partners is cannot foresee the outcome of the application of the national law for the dissolution or annulment of registered partnerships.<sup>1358</sup>

**a) *Moment of the Agreement***

As to the relevant point of time when the parties are entitled to conclude such a choice-of-court agreement, nothing impedes the parties from concluding the choice-of-court agreement *ex ante*. Or they can extend the jurisdiction for the property regime when the Member State court is already seized with divorce, legal separation, or marriage annulment/dissolution or annulment of the registered partnership. This extension does not seem to create any problems because it is already known from Article 12 par. 1 of the Brussels IIa Regulation. The choice-of-court agreement *ex ante* makes different complications.

The possibility to conclude an *ex ante* choice-of-court agreement is supported by the wording of Article 5 par. 3 of the Matrimonial Property Regime Regulation and of Article 5 par. 2 of the Regulation on the Property Consequences of the Registered Partnership. These provisions provide that if the agreement is concluded *before* the court is seized to rule on the matters of

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<sup>1358</sup> For this interpretation see S. MARINO, *Strengthening the European Civil Judicial Cooperation: the patrimonial effects of family relationships*, *op. cit.*, p. 271.

matrimonial property regimes/property consequences of the registered partnership, the agreement shall comply with the formal requirements laid down in Article 7 of both regulations. The same assumption can be deduced from the point of view of the historical developments of this rule.<sup>1359</sup>

What are the consequences of such an agreement *ex ante*? Due to the absence of a rule on choice-of-court agreements relating to divorce, legal separation, or marriage annulment in the Brussels IIa Regulation and due to the absence of EU rules on choice-of-court agreements relating to the dissolution or annulment of registered partnerships, the parties at the pre-dispute stage cannot foresee which Member State court will actually exercise jurisdiction.<sup>1360</sup> Thus, *ex ante* choice-of-court agreements according to Article 5 of both regulations may benefit the parties who wish to concentrate the proceedings relating to divorce, legal separation, or marriage annulment or dissolution or annulment of a registered partnership with the proceedings relating to property regime (according to Article 5 of the Regulation on Property Consequences of Registered Partnerships or in the listed cases covered in paragraph 2 of Article 5 of the Matrimonial Property Regime Regulation). They will not have the possibility to foresee which court will actually exercise jurisdiction. The jurisdiction agreement in a matrimonial property regime should be drafted in a way that if the Member State court will be seized with divorce, legal separation, or marriage annulment according to fifth or sixth indent of Article 3 of the Brussels IIa Regulation, it will have jurisdiction to decide over the property regime according to Article 5 par. 2 of the Matrimonial Property Regime Regulation. Such an agreement, however, may even encourage abusive litigation tactics such as a “rush to court”, as either spouse may rush to file the claim before the court that will apply the most beneficial substantive rules concerning divorce, legal separation, or

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<sup>1359</sup> See Article 4 of the Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM(2011)0126 final, 16 March 2011 and Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships, COM(2011)0127 final, 16 March 2011: “*Such an agreement may be concluded at any time, even during the proceedings. If it is concluded before the proceedings, it must be drawn up in writing and dated and signed by both parties.*”.

<sup>1360</sup> On this problem see also: J. GRAY, P. QUINZÁ REDONDO, *Stress-Testing the EU Proposal on Matrimonial Property Regimes: Co-operation between EU private international law instruments on family matters and succession*, 2013, p. 17, available at: <http://www.familyandlaw.eu/tijdschrift/fenr/2013/11/FENR-D-13-00008>: «*Should the EU legislator wish to enhance the autonomy of couples by allowing them to choose the particular Member State court which will decide on matters relating to their matrimonial property regime in cases of divorce, they would first have to revise Brussels II bis in order to allow for choice-of-court agreements in divorce proceedings instituted under this Regulation.*».



marriage annulment and the property regime in accordance with Article 3 of the Brussels IIa Regulation. The parties should be aware of the consequences of such an agreement, but unfortunately, there is no provision requiring legal advice.<sup>1361</sup> However, the scenario might be very different in case of property consequences of the registered partnership if the relevant national law grants the possibility to choose the competent forum in relation to the dissolution or annulment of registered partnerships.<sup>1362</sup>

Moreover, due to the wording of Article 5 par. 2 of the Matrimonial Property Regime Regulation, which refers to the parties' agreement where the court is seized, it can be deduced that choice-of-court agreements become effective when the court is seized to rule on the application for divorce, legal separation, or marriage annulment.<sup>1363</sup> It means, that if the Member State court is seized according to the first indents of par. 1 lett. a) of Article 3 or Article 3 par. 1 lett. b) of the Brussels IIa Regulation, the choice-of-court agreement would be redundant. However, when the Member State court is seized according to the fifth or the sixth indent of par. 1 lett. a) of Article 3, or according to Articles 5 or 7 of the Brussels IIa Regulation, the choice-of-court agreement will become effective.

#### **4.2.2. Choice-of-Court Agreements in Other Cases**

In case that the parties fail to conclude the jurisdiction agreement according to Article 5 of the Matrimonial Property Regime Regulation/Regulation on Property Consequences of Registered Partnerships in order to concentrate these two proceedings, two various scenarios are possible: (i) the Member State courts listed in Article 6 of the Matrimonial Property Regime Regulation/Regulation on Property Consequences of Registered Partnerships will

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<sup>1361</sup> See Amendment 12 of the Opinion of the Committee on Women's Rights and Gender Equality for the Committee on Legal Affairs on the proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, PE478.403, 2011/0059(CNS), 7 May 2012, where the rule providing for the necessity to inform of the spouses was drafted: «Such an agreement may be concluded at any time, even during the proceedings. If it is concluded before the proceedings, it must be drawn up in writing, dated and signed by both parties and authenticated. Before the agreement is concluded each spouse should be individually informed by a legal practitioner of the legal consequences of this choice.» It was justified by the fact that the spouses should get access to independent legal advice from a legal practitioner should allow an autonomous and informed choice to be made that protects a spouse who may be in a situation of vulnerability.

<sup>1362</sup> On this conclusion see F. C. Villata, L. Válková, EUFam's Model Choice-of-Court and Choice-of-Law Clauses, *op. cit.*, p. 49 and 50.

<sup>1363</sup> On this conclusion see F. C. Villata, L. Válková, EUFam's Model Choice-of-Court and Choice-of-Law Clauses, *op. cit.*, p. 49 and 50.

have jurisdiction; or, (ii) the parties may conclude a choice-of-court agreement according to Article 7 of the Matrimonial Property Regime Regulation/Regulation on Property Consequences of Registered Partnerships. Article 7 of the Matrimonial Property Regime Regulation/Regulation on Property Consequences of Registered Partnerships may operate also “*where no court of a Member State has jurisdiction pursuant to Article 4 or 5 or in cases other than those provided for in those Articles*”. In other words, the choice-of-court agreement according to Article 7 of the Matrimonial Property Regime Regulation/ Regulation on Property Consequences of Registered Partnerships operates in two cases: (i) where the parties fail to conclude the jurisdiction agreement according to Article 5 of the Matrimonial Property Regime Regulation/ Regulation on Property Consequences of Registered Partnerships; or (ii) the dispute on the property regime is not linked to proceedings on succession or divorce, legal separation, or marriage annulment or dissolution or annulment of a registered partnership (for example, when the spouses/partners want to change their property regime).

In other words, this “second type” of the choice-of-court agreement will be directly effective when the property regime represents the principal issue of the proceedings (*e.g.*, when the parties would like to modify their property regime, etc.). However, in case that the property regime deals simultaneously with divorce, legal separation, or marriage annulment, it is doubtful whether the parties may derogate from a Member State court seized with the divorce, legal separation, or marriage annulment proceedings and designate a different competent court according to Article 7 of the Matrimonial Property Regime Regulation if application for divorce, legal separation, or marriage is filed according to first four indents of Article 3 par. 1 lett. a) or according to Article 3 par. 1 lett. b) of the Brussels IIa Regulation.<sup>1364</sup> It seems from the wording of Article 7 of the Matrimonial Property Regime Regulation (“in cases which fall under Article 6”) that choice-of-court agreements according to Article 7 of the Matrimonial Property Regime Regulation should be considered invalid by the court seized with the divorce, legal separation, or marriage annulment proceedings according to first four indents of Article 3 par. 1 lett. a) or according to Article 3 par. 1 lett. b) of the Brussels IIa

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<sup>1364</sup> On the doubts see also Swedish delegation, Comments from the Swedish delegation on Chapters I-II, 13698/11 ADD 10, 2011/0059 (CNS) 2011/0060 (CNS), 15 September 2011, p. 4: «*An agreement on jurisdiction according to paragraph 2 would of course be valid also in the case of a divorce between the spouses or in case of the death of one of them. However, recital 16 gives the impression that such agreements would not be valid in such cases. Neither does this correspond with the text nor does it make sense as it would render such agreements meaningless in most cases. Recital 16 should, therefore, be deleted or amended.*».

Regulation.<sup>1365</sup> In the case of registered partnerships, the situation is different, and nothing impedes the parties from concluding choice-of-court agreements according to Article 7 of the Regulation on Property Consequences of Registered Partnerships, which would be binding on the Member State court without taking into the consideration which Member State court will be seized to rule on the dissolution or annulment of a registered partnership.

Moreover, the derogation of jurisdiction of the Member State court is possible on the basis of the rule on the submission by appearance (Article 8). This Article provides that a court of a Member State whose law is applicable pursuant to Article 22 or Article 26 and before which a defendant enters an appearance in cases covered by Article 5 par. 2 of the Matrimonial Property Regime Regulation, shall have jurisdiction. This double solution for the matrimonial property regime does not provide for legal certainty.

Article 7 of the Matrimonial Property Regime Regulation and the Regulation on Property Consequences of Registered Partnerships additionally restrict party autonomy by offering three options to the parties:

- The parties may choose the law applicable to their property regime pursuant to Article 22 of the Matrimonial Property Regime Regulation/Regulation on Property Consequences of Registered Partnerships and may designate such a Member State court, whose law was chosen. The parties may agree on the law and the Member State court of the place where the spouses or partners or future spouses or partners, or one of them, is habitually resident at the time the agreement is concluded; or the law and the court of a Member State of the nationality of either spouse/partner or future spouse/partner at the time the agreement is concluded.
- The parties designate the Member State court, whose law is applicable pursuant to Article 26 par. 1 lett. a) or b) of the Matrimonial Property Regime Regulation (the law of the State of the spouses' first common habitual residence after the conclusion of the marriage; or, failing that of the spouses' common nationality at the time of the conclusion of the marriage); or according to Article 26 of the Regulation on Property Consequences of Registered Partnerships (the law of the State under whose law the registered partnership was created. By way of exception and upon application by either partner, the law of the

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<sup>1365</sup> On the similar conclusion see S. MARINO, *La portata della proroga del foro nelle controversie sulla responsabilità genitoriale*, op. cit., p. 272.

State where the partners had their last common habitual residence for a significantly long period of time and where both partners had relied on the law of that other State in arranging or planning their property relations);

- The parties may designate the court of a Member State where the marriage was concluded or the courts of the Member State under whose law the registered partnership was created; this jurisdictional ground is not dependent on the law applicable to the matrimonial property regime.

Thus, Article 7 offers the parties only one choice without considering the applicable law. Such a choice represents a Member State court of the celebration of marriage or of the registered partnership. Although this jurisdictional ground may be criticised due to the non-sufficient connection with such a Member State,<sup>1366</sup> such designation may be advantageous for same-sex couples. The designation of the Member State under which law the marriage or the registered partnership of same-sex couples was celebrated or registered, may “safeguard” a situation where another Member State having jurisdiction pursuant to the Matrimonial Property Regime Regulation/Regulation on Property Consequences of Registered Partnerships, does not recognize the marriage or institution of registered partnerships under its private international law.<sup>1367</sup>

Otherwise, the legislative effort to guarantee the coincidence between *ius* and *forum* in all other cases seems evident. Although the idea behind this rule has not been explained in the proposals, it may be presumed that it aims at facilitating the proof of foreign law.<sup>1368</sup> This

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<sup>1366</sup> For this interpretation see S. MARINO, *La portata della proroga del foro nelle controversie sulla responsabilità genitoriale*, op. cit., p. 272.

<sup>1367</sup> See Article 9 par. 2 of Matrimonial Property Regime Regulation: «Where a court having jurisdiction pursuant to Article 4 or 6 declines jurisdiction and where the parties agree to confer jurisdiction to the courts of any other Member State in accordance with Article 7, jurisdiction to rule on the matrimonial property regime shall lie with the courts of that Member State. In other cases, jurisdiction to rule on the matrimonial property regime shall lie with the courts of any other Member State pursuant to Article 6 or 8, or the courts of the Member State of the conclusion of the marriage.» And Article 9 par. 2 of the Regulation on Property Consequences of Registered Partnerships: “«Where a court referred to in paragraph 1 of this Article declines jurisdiction and where the parties agree to confer jurisdiction to the courts of any other Member State in accordance with Article 7, jurisdiction to rule on the property consequences of the registered partnership shall lie with the courts of that Member State. In other cases, jurisdiction to rule on the property consequences of a registered partnership shall lie with the courts of any other Member State pursuant to Article 6 or 8.»».

<sup>1368</sup> On the proof of foreign law and taking evidence abroad see L. FUMAGALLI, *Conflitti tra giurisdizioni nell'assunzione di prove civili all'estero*, CEDAM, 1990; L. FUMAGALLI, *Assunzione di prove all'estero*, in R. BARATTA (ed), *Diritto internazionale privato*, Giuffrè, 2010, pp. 18-22; L. FUMAGALLI, *La nuova disciplina comunitaria dell'assunzione delle prove all'estero in materia civile*, *Rivista di diritto internazionale privato e processuale* (2002), pp. 327-348; E. D'ALESSANDRO, *Onere della prova e legge applicabile*, in M. BOVE (ed),

problem was highlighted mainly by the UK at the time of the ongoing legislative process. The UK law does not normally apply foreign law in family cases, whereby “*the need to use experts to prove foreign law will drive up the costs to parties and complicate the resolution of such disputes.*”<sup>1369</sup>. In consequence, the effort to provide for the coincidence between *ius* and *forum* could be developed in order to facilitate the acceptance of the proposals from the Member States which normally apply *lex fori* to the property regime.<sup>1370</sup> The solution that the *forum* follows the applicable law and not the opposite classical method of private international of the application of *lex fori*,<sup>1371</sup> mirrors the solution provided in the Succession Regulation even to a greater extent.<sup>1372</sup>

#### **a) Moment of the Agreement**

Both Regulations are silent about when the agreement designating the Member State court can be concluded. In consequence, it can be presumed that the parties may conclude the choice-of-court agreement *ex ante* or they may designate the Member State court when it is seized.

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Scritti offerti dagli allievi a Francesco Paolo Luiso per il suo settantesimo compleanno, 2017, pp. 181-203; P. IVALDI, *In tema di applicazione giudiziale del diritto straniero*, Rivista di diritto internazionale privato e processuale (2010), p. 585-602; I. QUEIROLO, *Conoscenza del diritto straniero e contraddizioni della giurisprudenza italiana*, Rivista di diritto internazionale privato e processuale (2010), p. 603-634. See for example *Moore v Moore* [2007] EWCA Civ 361, where the court spent five days hearing expert evidence on Spanish law.

<sup>1369</sup> Joint consultation by the Ministry of Justice, Scottish Government, and the Northern Ireland Department of Finance and Personnel, ‘Matrimonial Property Regimes and the property consequences of registered partnerships -How should the UK approach the Commission’s proposals in these areas?’ (Consultation Paper CP 8/2011,2011), para 37. The UK Government also pointed to two problems. First, where the parties change the applicable law without retrospective effect, this would lead to the possible application of more than one applicable law to a number of different assets. Second, such designation of the applicable law may lead to the application of the law of the Third State (Article 20 provides for the universal application), which may be often in sensitive family matters.

<sup>1370</sup> See Commission Staff Working Document, Impact Assessment, Accompanying document to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Bringing legal clarity to property rights for international couples, Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and the Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships, SEC(2011) 327 final, 16 March 2011, p. 51, which seems that only Latvia applies *lex fori*.

<sup>1371</sup> As provided for in the example in the Rome III Regulation or in the 1996 Hague Convention on parental responsibility and protection of children.

<sup>1372</sup> Article 5 of the Succession Regulation allows to the “concerned parties” to agree a Member State law, which law was chosen by the deceased to govern his succession pursuant to Article 22. On the details see *infra* Section 2.2.4., Subchapter II of this Chapter.

The possibility to conclude *ex ante*, as well as *ex post* choice-of-court agreements, may be supported by the historical developments of this rule.<sup>1373</sup>

The *ex ante* choice-of-court agreement may operate also when the parties designate: (i) the courts of the Member State whose law is applicable pursuant to Article 22; (ii) the courts of the Member State whose law is applicable pursuant to Article 26; or (iii) the courts of the Member State of the conclusion of the marriage or the courts of the Member State under whose law the registered partnership was created.

The first option concerning the choice-of-law agreement coupled with the choice-of-court agreement enables planning the venue and the law applicable to the property regime at the pre-dispute stage, which guarantees the coincidence between the *ius* and *forum*. The second option for choice-of-court agreements concerning the coincidence between the *ius* and *forum* in the absence of the choice of law agreement does not seem to be a simple planning tool. The utility of this choice-of-court agreement concluded *ex ante* might find the parties who wish that any Member State court with jurisdiction over the property regime will apply its own substantive law to the merits of the case, notwithstanding the impossibility of foreseeing such a competent court and applicable law. In such a case, the parties may agree that the Member State court, whose law is applicable pursuant to Article 26 of Matrimonial Property Regime Regulation/Regulation on the Property Consequences, is to have jurisdiction to rule on their matrimonial property regime in accordance with Article 7 of Matrimonial Property Regime Regulation/Regulation on the Property Consequences. However, the examination of the law applicable to the property regime could be difficult for private parties not experts in private international law. The last option enables straightforward *ex ante* planning by designating the

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<sup>1373</sup> Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM(2011)0126 final, 16 March 2011, Article 5 par 2: «... *Such an agreement may be concluded at any time, even during the proceedings. If it is concluded before the proceedings, it must be drawn up in writing and dated and signed by both parties.*». See also Amendment 45 of the European Parliament legislative resolution of 10 September 2013 on the proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, P7\_TA(2013)0338, 2011/0059(CNS), 10 September 2013: «... *Without prejudice to the third subparagraph, a choice-of-court agreement may be concluded or amended at any time, but no later than when the case is brought before the court. If the law of the forum so provides, the spouses may also choose the court after the case has been brought before the court. In that event, such choice shall be recorded in court in accordance with the law of the forum. If the agreement is concluded before the proceedings, it must be drawn up in writing and dated and signed by the spouses. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'.*».

court of the Member State of the conclusion of the marriage or the law that created the registered partnership without the necessity to consider the applicable law.

One may also wonder whether the spouses can choose the court during the course of the proceedings. The wording of Article 7 does not limit the moment of the agreement to the time the Member State court is seized. On the other hand, it does not provide for the rule similar to the Rome III Regulation which allows parties to reach a choice-of-law agreement during the proceedings if the law of the forum so provides.<sup>1374</sup> It may be deduced that although the law of the *forum* does not permit reaching the choice-of-court agreement during the course of the proceedings, the parties should not be prevented from doing so.

### 4.3. Formal Validity

Article 7 par. 2 of the Matrimonial Property Regime Regulation/Regulation on the Property Consequences determines the formal requirements of the “first type” of the *ex ante* choice-of-court agreements according to Article 5 of the Matrimonial Property Regime Regulation/Regulation on the Property Consequences. This Article also determines the requirements for the “second type” of the *ex ante* as well as *ex post* choice-of-court agreements according to Article 7 par. 1 of the Matrimonial Property Regime Regulation/Regulation on the Property Consequences. The choice-of-court agreement shall be expressed in writing and dated and signed by the parties.<sup>1375</sup> Since there is no interpretation provided by the ECJ as to Article 5 par. 2 of the Succession Regulation<sup>1376</sup> and the Matrimonial Property Regime Regulation/Regulation on the Property Consequences do not define an agreement that is considered to be “in writing”, autonomous interpretation could be searched for in the Brussels I(*bis*) Regulation. The real consensus of the parties must be ascertained, as well as the fact that the jurisdiction agreement has not been incorporated unilaterally by one party and has been noticed by the other party.<sup>1377</sup> This may be the case with the matrimonial property agreement, or partnership property agreement concluded

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<sup>1374</sup> Article 5 par. 3 of the Rome III Regulation.

<sup>1375</sup> Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to a writing.

<sup>1376</sup> The wording of Article 7 par. 2 of both Regulations corresponds to Article 5 par. 2 of the Succession Regulation.

<sup>1377</sup> ECJ, Case 24/76, *Estasis Salotti*, par. 9 ad 10.

according to Article 25 of the Matrimonial Property Regime Regulation/Regulation on the Property Consequences.

It does not seem opportune to provide for a different treatment of the choice-of-court agreement when it is concluded *during the proceedings*.<sup>1378</sup> When the choice-of-court agreement is concluded during the proceedings according to Article 5 par. 2 of the Matrimonial Property Regime Regulation or according to Article 5 par. 1 of Regulation on the Property Consequences, the regulations do not prescribe any formal requirements.<sup>1379</sup> However, when the choice-of-court agreement confers jurisdiction to the Member State court according to Article 7 of the Matrimonial Property Regime Regulation/Regulation on the Property Consequences during the proceedings, the written, dated, and signed choice-of-court agreement is required. Thus, it may be presumed that such a jurisdiction agreement according to Article 5 par. 2 of the Matrimonial Property Regime Regulation or Article 5 par. 1 of Regulation on the Property Consequences does not have to be in writing, dated, and signed, it can be simply recorded or concluded in any other form in court and in accordance with the law of the *forum*.

Moreover, it must be remembered that when the parties choose the applicable law according to Article 22 of the Matrimonial Property Regime Regulation/Regulation on the Property Consequences and choose the courts of the Member State, whose law is applicable pursuant to Article 22, the validity of the choice-of-court agreement will be dependent on the validity of the choice of law agreement. Article 23 determines the additional formal requirements of the law of the habitual residence of the one or both spouses or partners.<sup>1380</sup> In such a case, the

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<sup>1378</sup> Emphasis added.

<sup>1379</sup> This was pointed during the legislative process by the Spanish delegation. See, see Comments from the Spanish delegation on Chapters I-II, 13698/11 ADD 7 REV 1, 2011/0059 (CNS) 2011/0060 (CNS), 13 September 2011, p. 8: «Moreover, we fail to understand why the requirements apply only if an agreement is concluded before the proceedings but do not apply if it is concluded during the proceedings. Where an agreement is concluded during proceedings, there is no indication of the formal requirements which must be met in order for that agreement to be valid.»

<sup>1380</sup> See Article 23 par. 2, 3, 4 of both Regulations: «If the law of the Member State in which both spouses/partners have their habitual residence at the time the agreement is concluded lays down additional formal requirements for partnership property agreements/ matrimonial property agreements, those requirements shall apply. 3. If the spouses/partners are habitually resident in different Member States at the time the agreement is concluded and the laws of those States provide for different formal requirements for matrimonial property agreements/partnership property agreements, the agreement shall be formally valid if it satisfies the requirements of either of those laws. 4. If only one of the spouses/partners is habitually resident in a Member State at the time the agreement is concluded and that State lays down additional formal requirements for matrimonial property agreements/partnership property agreements, those requirements shall apply.»



parties should be aware that the choice-of-law agreement must be accompanied by guarantees of authenticity, such as a notarial act if this is required by the legal system of the habitual residence of the one or both of the spouses or partners.<sup>1381</sup>

Article 8 of the Matrimonial Property Regime Regulation/Regulation on the Property Consequences determines the rule on tacit prorogation. A court of a Member State whose law is applicable pursuant to Article 22 or Article 26, and before which a defendant enters an appearance, shall have jurisdiction.<sup>1382</sup> However, this rule does not apply in cases covered by Article 4 of the Matrimonial Property Regime Regulation/Regulation on the Property Consequences or 5 par. 1 of the Matrimonial Property Regime Regulation. This rule practically removes any formal requirements laid down in Article 7 of the Matrimonial Property Regime Regulation/Regulation on the Property Consequences when the parties want the court of a Member State, whose law is applicable pursuant to Article 22 or Article 26, to have jurisdiction. On the other hand, the tacit prorogation in front of the courts of the Member State of the conclusion of the marriage or the courts of the Member State under whose law the registered partnership was created is not allowed. However, the parties should not be impeded from concluding a choice-of-court agreement in front of the seized Member State court under the formal requirements laid down in Article 7 of the Matrimonial Property Regime Regulation/Regulation on the Property Consequences.

#### **4.4. Substantive Validity**

Article 7 of the Matrimonial Property Regime Regulation/Regulation on the Property Consequences is silent in respect of the substantive validity of the choice-of-court agreement as in with Article 23 of the Brussels I Regulation or Article 4 of the Maintenance Regulation. Since this significant “gap” was analyzed several times and the specific solutions were

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<sup>1381</sup> See for example German EGBGB, where Articles 46b-46d provide for special rules in order to implement the Rome III Regulation. Article 46d specifies that an agreement on choice of law according to Article 5 of the Rome III must be notarized. It is not excluded that such a rule will be extended in the future also to the choice of law agreement according to the Matrimonial Property Regime Regulation/Regulation on the Property Consequences. On the English translation see: [https://www.gesetze-im-internet.de/englisch\\_bgbeg](https://www.gesetze-im-internet.de/englisch_bgbeg). On the additional formal requirements in the Rome III Regulation see I. VIARENGO, *The Rome III Regulation in legal practice: case law and comments*, op. cit., p. 554.

<sup>1382</sup> The positive must be evaluated; par. 2 of Article 8 which provides «*Before assuming jurisdiction pursuant to paragraph 1, the court 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.*».

proposed; thus, it may be referred to as Chapter Two, Subchapter I, Section 8.1. and Section 3.5. of this Subchapter. Although it was questionable whether Article 4 of the Maintenance Regulation should adopt the solution laid down in the Brussels *Ibis* Regulation, where “*the rules on jurisdiction as they result from Regulation (EC) No 44/2001 should be adapted*”<sup>1383</sup> such an assumption cannot be supported in the area of the property regime due to the lack of any historical and language such as “direct connection”. It seems regrettable that a rule on substantive validity has not been adopted<sup>1384</sup> since such a rule may protect the “weaker party” (e.g., from the fraud, duress, or mistake), which is hard to identify *ex ante*.<sup>1385</sup>

#### 4.5. Severability

As stated in Chapter Two, Subchapter I, Section 10, severability is a technique which protects the validity of the jurisdiction agreement from attacks on the invalidity of the contract to which it belongs.<sup>1386</sup> The paragraph 5 of Article 25 of the Brussels *Ibis* Regulation expressly provides for the rule on severability. However, neither Article 5 nor Article 7 of the Matrimonial Property Regime Regulation/Regulation on the Property Consequences determines the severability of the choice-of-court agreement inserted into the matrimonial property agreement or partnership property agreement within the meaning of Article 25 of the Matrimonial Property Regime Regulation/Regulation on the Property Consequences. Article 25 determines the additional formal requirements of the law of the habitual residence of one or both spouses or partners.<sup>1387</sup> In consequence, it may happen that a matrimonial property

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<sup>1383</sup> Recital No 15 of the Maintenance Regulation.

<sup>1384</sup> The model may be taken from Article 25 of the Brussels *Ibis* Regulation, as suggested by U. MAGNUS, *Choice of Court Agreements in the Review Proposal for the Brussels I Regulation*, in *The Brussels I Review Proposal Uncovered*, *op. cit.*, p. 93: «*The material validity (concerning capacity, mistake, fraud, duress) of the choice-of-court agreement is governed by the law of the Member State where the chosen court or courts are located*».

<sup>1385</sup> J. CARRUTHERS, *Party autonomy in the legal regulation of adult relationships: what place for party choice in Private International Law*, p. 909.

<sup>1386</sup> A. BRIGGS, *Agreements on Jurisdiction and Choice of Law*, *op. cit.*, par. 1.21.

<sup>1387</sup> See Article 25 par. 2, 3, 4 of both Regulations: «*If the law of the Member State in which both spouses/partners have their habitual residence at the time the agreement is concluded lays down additional formal requirements for partnership property agreements/ matrimonial property agreements, those requirements shall apply. 3. If the spouses/partners are habitually resident in different Member States at the time the agreement is concluded and the laws of those States provide for different formal requirements for matrimonial property agreements/partnership property agreements, the agreement shall be formally valid if it satisfies the requirements of either of those laws. 4. If only one of the spouses/partners is habitually resident in a Member State at the time the agreement is concluded and that State lays down additional formal requirements for matrimonial property agreements/partnership property agreements, those requirements shall apply.*».

agreement or partnership property agreement must be accompanied by guarantees of authenticity, such as a notarial act. The substantive validity of the matrimonial property agreement or partnership property agreement is then governed by the law applicable to the property regime pursuant to Matrimonial Property Regime Regulation/Regulation on the Property Consequences.<sup>1388</sup>

It is questionable whether the choice-of-court agreement included in the invalid matrimonial property agreement or partnership property agreement (for example, since it does not meet the additional formal requirements such as notarization), should be considered as valid. In this case, the case *Benincasa*, C-269/95 held that a jurisdiction clause and the substantive provisions of the contract in which a jurisdiction clause was incorporated were to be distinguished. The ECJ decided that the jurisdictional clause served a procedural purpose and was governed by Brussels Convention,<sup>1389</sup> but the substantive provisions and validity of the main contract were governed by the *lex causae* determined by the private international law rules.

This case means that these two distinct terms legal terms operate autonomously. If this interpretation is extended to the property regime, it would lead to the conclusion that if the choice-of-court agreement is valid, even when the matrimonial property agreement or partnership property agreement is invalid, the designated Member State court will have jurisdiction to decide on the invalidity of the matrimonial property agreement or partnership property agreement.

## **5. *Lis Pendens* between the Member States**

### **5.1. *Lis Pendens* under the Brussels IIa Regulation**

Article 19 of the Brussels IIa Regulation determines the rule on *lis pendens* in a very similar way as Article 29 of the Brussels Ibis Regulation, where the first seized Member State court

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<sup>1388</sup> See Article 27 of the Matrimonial Property Regime Regulation/Regulation on the Property Consequences which determines the scope of the applicable law. Under the letter g), the material validity of a matrimonial property agreement or partnership property agreement falls under the scope of the applicable law.

<sup>1389</sup> ECJ, Case, C-269/95, *Benincasa*, par. 25.

has precedence to decide its own jurisdiction.<sup>1390</sup> On first sight, it may seem that the abusive procedural tactics highlighted in the *Gasser* judgment may take place also in the context of the agreements on parental responsibility matters according to Article 12 of the Brussels IIa Regulation. However, the abuse of “first seized *lis pendens*” is not probable, where Article 12 of the Brussels IIa Regulation is “an independent alternative forum,”<sup>1391</sup> and does not represent exclusive grounds of jurisdiction producing the negative effect of depriving jurisdiction of other Member States courts.<sup>1392</sup> In cases of the parallel proceedings in different Member State courts, two different scenarios are possible:

- i) Where the prorogued Member State court is first seized, it will assess all conditions of Article 12 of the Brussels IIa Regulation, and it will decide over its own jurisdiction as first seized within the meaning of Article 19 par. 2 of the Brussels IIa Regulation. The second seized Member State court shall decline jurisdiction in favour of that court where the jurisdiction of the prorogued Member State first seized is established. However, it is probable, that where one of the parties seizes another Member State court, the acceptance of both parties will not be given.

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<sup>1390</sup> However, Article 19 par. 2 of the Brussels IIa Regulation strictly requires the same cause of action and the proceedings involving the same child, where the rule lays down a number of substantive conditions for the determination of an autonomous definition. ECJ, Case C-256/09, *Bianca Purrucker v Guillermo Vallés Pérez*, 15 July 2010, ECLI:EU:C:2010:437 and mainly Case C-296/10, *Bianca Purrucker v Guillermo Vallés Pérez*, 9 November 2010, ECLI:EU:C:2010:665, where the ECJ stated there is no requirement that the parties to the proceedings are the same and that a determination whether a situation of *lis pendens* arises must be regarded as autonomous as decided in ECJ Case 144/86, *Gubisch Maschinenfabrik KG*. Moreover, the ECJ confirmed its approach concerning *lis pendens* as in the context of the Brussels Convention, in specific the “object of the action”, where account must be taken of the applicants’ claims in each of the sets of proceedings and “cause of the action”, where account must be taken of the facts and the rule of law relied on as the basis of the action. The ECJ referred to Case C-406/92, *Tatry*, par. 39, 41; Case C-111/01, *Gantner Electronic GmbH v Basch Exploitatie Maatschappij BV.*, 8 May 2003, ECLI:EU:C:2003:257, par. 26. See also ECJ, Case C-376/14 PPU, *C v M*, par. 40, concerning *lis pendens* and child abduction proceedings «Such an action, whose object is the return, to the Member State of origin, of a child who has been wrongfully removed or retained in another Member State, does not concern the substance of parental responsibility and therefore has neither the same object nor the same cause of action as an action seeking a ruling on parental responsibility.». On the *lis pendens* in family matters see M. ŽUPAN, M. DRVENTIĆ, *Chapter 5. Parallel Proceedings*, in I. VIARENGO, F. C. VILLATA (eds), *EU Fam’s Final Study*, available at: <http://www.eufams.unimi.it/2017/12/30/final-study/>, p. 152-169; F. C. VILLATA, *Lis pendens*, in I. VIARENGO, F. C. VILLATA (eds), *First Assessment Report on the case-law collected by the Research Consortium*, available at: <http://www.eufams.unimi.it/2017/01/09/firstassessmentreport/>, p. 55-58; I. KUNDA, D. VRBLJANAC, *Lis Pendens*, in C. HONORATI (ed), *Jurisdiction in Matrimonial Matters, Parental Responsibility and International Abduction: A Handbook on the Application of Brussels II-a Regulation in National Courts*, Giappichelli, 2017, p. 221-245.

<sup>1391</sup> E. PATAUT, E. GALLANT, *Article 12*, in *Brussels IIbis Regulation: 2017, op. cit.*, p. 151.

<sup>1392</sup> C. GONZALES BEILFUSS, *Prorogation of Jurisdiction*, in *Jurisdiction in Matrimonial Matters, Parental Responsibility and International Abduction op. cit.*, p. 187, 195. On the opposite approach which defines the prorogation of jurisdiction as “a derogation of the general rule on jurisdiction” see S. MARINO, *La portata della proroga del foro nele controversie sulla responsabilità genitoriale, op. cit.*, p. 349.

ii) Where the prorogued Member State court is second seized, the first seized Member State court would not take into consideration any written proof of the previous agreement on jurisdiction, since it suggests there is no longer any valid jurisdiction agreement according to Article 12 of the Brussels *Ia* Regulation. Article 12 of the Brussels *Ia* Regulation would represent only an alternative forum. The prorogued Member State court is regularly the second seized Member State court and Article 19 par. 2 and 3 of the Brussels *Ia* Regulation operates correctly. In consequence, a situation where a party seizes a Member State court in breach of the agreement would not occur, as in the *Gasser* case.

## 5.2. *Lis Pendens* under the Maintenance Regulation

Contrary to Article 12 of the Brussels *Ia* Regulation, the choice-of-court agreement in maintenance matters concluded according to Article 4 of the Maintenance Regulation has a binding effect on all Member State courts. The rule on *lis pendens* between the Member States is determined in Article 12 of the Maintenance Regulation and is also based on the *prior temporis* principle.<sup>1393</sup> It is interesting to note that the model for the *lis pendens* rule under the Maintenance Regulation was Article 27 of the Brussels I Regulation, instead of Article 19 of the Brussels *Ia* Regulation. In Chapter Two, Subchapter I, Section 14, the new rule on *lis pendens* of the Brussels *Ibis* Regulation, which was designed as a reaction to the *Gasser* case and gave precedence to the jurisdiction of the Member State court in the exclusive jurisdiction agreement, was described in the details. It is doubtful whether the *Gasser* case may be considered as outdated under the Maintenance Regulation by virtue of the new Article 31 par. 2 of the Brussels *Ibis* Regulation.<sup>1394</sup>

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<sup>1393</sup> See also ECJ Case C-467/16, *Brigitte Schlömp*, concerning the *lis pendens* rule and the 2007 Lugano Convention which covers also the maintenance matters, where the ECJ stated that the term court includes any authorities designated by a State bound by that convention as having jurisdiction in the matters falling within its scope, such includes a conciliation proceedings. As to the subject matter of the *lis pendens* see also ECJ, Case, C-467/16, *Brigitte Schlömp v Landratsamt Schwäbisch Hall*, Opinion of Advocate General Szpunar delivered on 18 October 2017, ECLI:EU:C:2017:768, par. 31: « *it is sufficient that the actions have, in essence, the same subject matter: the claims are not required to be entirely identical. The converse situation of an action for a declaration of non-liability being followed by an action for damages has also been the subject of a ruling. In that respect, the latter action has the same object as the former, since the question of the existence or nonexistence of liability is the focus of the proceedings. The different heads of claim do not mean that the two legal actions have different objects.*».

<sup>1394</sup> M. ABENDROTH, *Choice of Court in Matters Relating to Maintenance Obligations*, in *The Recovery of Maintenance in the EU and Worldwide*, *op. cit.*, p. 470.

It was also questioned whether the same *lis pendens* rule as adopted in Article 31 par. 2 of the Brussels IIa Regulation is the right solution for family matters. Hence, it was suggested to adopt a transfer mechanism akin to Article 15 of Brussels IIa Regulation, where a non-designated Member State court seized in breach of a choice-of-court agreement would be empowered to exercise discretion to decline jurisdiction in favour of the Member State court designated. Or, a designated seized Member State court would be permitted to exercise its discretion to decline jurisdiction, to take into account the changed circumstances (*e.g.*, unfair bargaining powers of the parties), and to transfer the case to a court of another Member State if it is better placed to hear the case.<sup>1395</sup> This type of discretionary power as a legitimate check on unequal bargaining power could also be employed in the case where there is no other pending procedure.<sup>1396</sup>

### **5.3. *Lis Pendens* under the Matrimonial Property Regime Regulation and under the Regulation on Property Consequences of Registered Partnerships**

The rule on *lis pendens* between the Member States is determined in Article 17 of both Regulations and is based on the *prior temporis* principle. The model was the *lis pendens* rule under the Brussels I Regulation with one exception - upon request by a seized Member State court, any other Member State court seized shall without delay inform the former Member State court of the date when it was seized. However, the new rule on *lis pendens* of the Brussels Ibis Regulation giving precedence to the Member State court having jurisdiction on the basis of the jurisdiction agreement was not inserted into the Matrimonial Property Regime Regulation/the Regulation on Property Consequences of Registered Partnership. Is it possible that the *Gasser* case could have an impact on Article 5 or 7 of the Matrimonial Property Regime Regulation/ Regulation on Property Consequences of Registered Partnership? Two situations must be distinguished under the Matrimonial Property Regime Regulation and under the Regulation on Property Consequences of Registered Partnership depending on: (a) whether the dispute on the property regime is not linked to proceedings on succession or divorce, legal separation, or marriage annulment or dissolution or annulment of a registered

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<sup>1395</sup> J. CARRUTHERS, *Party autonomy in the legal regulation of adult relationships: what place for party choice in Private International Law?*, *op. cit.*, p. 911.

<sup>1396</sup> For this solution concerning choice-of-court agreements in divorce see M. NÍ SHÚILLEABHÁIN, *Cross-border divorce law. Brussels II bis*, *op. cit.*, p. 78, 140-141.

partnership (for example, when the spouses or partners want to change their property regime); or (b) whether the dispute on the property regime is not linked to proceedings on succession or divorce, legal separation, or marriage annulment or dissolution or annulment of a registered partnership.

In the first case, when the property regime represents the principal issue of the proceedings, the choice-of-court agreement according to Article 7 of the Matrimonial Property Regime Regulation/the Regulation on Property Consequences of Registered Partnership is directly effective on all other Member State courts. In such a case, the *Gasser* problem may arise.

In the second case, the situation is more complicated, and another five situations may arise:

- i) The first seized court is Member State A court having jurisdiction for divorce, legal separation, and marriage annulment according to one of the first four indents of Article 3 par. 1 lett. a) or lett. b) of the Brussels IIa Regulation. The second seized court is Member State B court having jurisdiction for divorce, legal separation, and marriage annulment according to one of the last two indents of Article 3 par. 1 lett. of the Brussels IIa Regulation. The parties concluded an *ex ante* jurisdiction agreement according to Article 5 par. 2 of the Matrimonial Property Regime Regulation conferring jurisdiction to the whatever Member State court which will rule on divorce, legal separation, or marriage annulment according to one of the last two indents of Article 3 par. 1 lett. a) of the Brussels IIa Regulation in order to enable the concentration of the proceedings. There is practically no contradiction concerning the jurisdiction agreement. As stated in Section 4.2.1. of this Subchapter, there is no certainty which Member State will exercise the jurisdiction; both Member State courts would be competent to decide the case, and there is no precedence that should be given to the jurisdiction agreement. The *Gasser* problem does not arise.
- ii) Member State A is first seized according to Article 6 of the Matrimonial Property Regime Regulation (which cannot establish jurisdiction for divorce, legal separation, or marriage annulment according to the Brussels IIa Regulation). The second seized court is Member State court B having jurisdiction for divorce, legal separation, and marriage annulment according to one of the last two indents of Article 3 par. 1 lett. a) of the Brussels IIa Regulation. The parties concluded an *ex ante* jurisdiction agreement according to Article 5 par. 2 of the Matrimonial Property Regime Regulation conferring the jurisdiction to the whatever Member State court which will rule on divorce, legal separation, or marriage

annulment according to the last two indents of Article 3 par. 1 lett. a) of the Brussels IIa Regulation in order to enable the concentration of the proceedings. The *Gasser* problem arises only partially. In the case of divorce, legal separation, or marriage annulment, no jurisdiction agreement is possible, and the binding effect of the jurisdiction agreement concluded according to Article 5 par. 2 of the Matrimonial Property Regime Regulation is dependent on the institution of the proceedings in divorce, legal separation, or marriage annulment according to the last two indents of Article 3 par. 1 lett. a) of the Brussels IIa Regulation. Once Member State court B is seized, Article 6 is inapplicable,<sup>1397</sup> there is no jurisdiction of the Member State court A. Article 17 gives precedence to the first seized Member State court A. However, Member State court A, which is seized to rule on application of the property regime according to Article 6 of the Matrimonial Property Regime (which is linked to the divorce, legal separation, or marriage annulment), will not be able to establish its jurisdiction under its national rules where there is no already pending application on divorce. Indeed, there will be time for the institution of the divorce proceedings and activating the jurisdiction agreement according to Article 5 par. 2 of the Matrimonial Property Regime Regulation. Member State B will be entitled to conduct the proceedings concerning the application on divorce, legal separation, or marriage annulment under the Brussels IIa Regulation (if there are no other pending proceedings concerning divorce). However, the Member State B shall of its own motion stay its proceedings until such time as the jurisdiction of the Member State court A is established under Article 17 of the Matrimonial Property Regime. The same applies to the jurisdiction agreements according to Article 5 of the Regulation on Property Consequences of Registered Partnership.

iii) The first seized court is Member State A court having jurisdiction for divorce, legal separation, and marriage annulment according to one of the first four indents of Article 3 par. 1 lett. a) or lett. b) of the Brussels IIa Regulation. The second seized court is Member State B and does not have jurisdiction for divorce, legal separation, and marriage annulment according to the Brussels IIa Regulation. The parties concluded an *ex ante* jurisdiction agreement according to Article 7 par of the Matrimonial Property Regime

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<sup>1397</sup> Article 6 of the Matrimonial Property regime is applicable “where no court of a Member State has jurisdiction pursuant to Article 4 or 5”,



Regulation conferring jurisdiction to the Member State B. The concentration of the proceedings for divorce, legal separation, and marriage annulment with the proceedings for property regime is automatic, and the jurisdiction agreement is disregarded. The *Gasser* problem cannot arise.

- iv) The first seized court is Member State A court having jurisdiction for the dissolution or annulment of a registered partnership. The second seized is a Member State B does not have jurisdiction for the dissolution or annulment of a registered partnership. The parties concluded an *ex ante* jurisdiction agreement according to Article 7 par of the Matrimonial Property Regime Regulation conferring jurisdiction to the Member State B. The concentration of the proceedings for the dissolution or annulment of a registered partnership with the proceedings for property regime is not automatic, and the jurisdiction agreement is valid. The *Gasser* problem can arise.
- v) Member State court A is first seized according to Article 6 of the Matrimonial Property Regime Regulation, and the Member State court B is second seized on the basis of an *ex ante* jurisdiction agreement according to Article 7 of the Matrimonial Property Regime Regulation/ Regulation on Property Consequences of Registered Partnership conferring the jurisdiction Member State court B. Both Member State courts cannot establish jurisdiction for divorce, legal separation, or marriage annulment according to the Brussels IIa Regulation on the dissolution or annulment of a registered partnership according to the national law. The Member State court C exercises jurisdiction for divorce, legal separation, or marriage annulment pursuant to one of the first four indents of Article 3 par. 1 lett. a) or lett. b) of the Brussels IIa Regulation for the dissolution or annulment of a registered partnership according to the national law. The *Gasser* problem may arise.

## **6. Derogation from Jurisdiction in favour of Third States**

### **6.1. Derogation from Jurisdiction under the Brussels IIa Regulation**

It would be inconsistent to separate cases concerning divorce, legal separation, or marriage annulment and parental responsibility. The rules on divorce, legal separation, or marriage annulment and parental responsibility must be distinguished so far that Articles 3, 4, and 5 of the Brussels IIa Regulation provide for objective, alternative, and mandatory rules in matters

concerning divorce, legal separation, or marriage annulment.<sup>1398</sup> When Articles 3, 4, and 5 do not give jurisdiction to a Member State court, the national laws are applicable, but only if no other Member State can be seized in accordance with the Brussels IIa Regulation, as stated by the ECJ in case C-68/07, *Sundelind Lopez*.<sup>1399</sup> However, in parental responsibility matters, the Brussels IIa Regulation does not make reference to the “exclusive” or “non-exclusive” nature the provisions.<sup>1400</sup> Article 14 of the Brussels IIa Regulation (*i.e.*, the “residual” jurisdiction) merely provides that where no Member State court has jurisdiction pursuant to Articles 8 to 13 of the Brussels IIa Regulation, jurisdiction shall be determined, in each Member State, by the laws of that Member State. As to the *lis pendens* rule, Article 19 of the Brussels IIa Regulation is applicable only between the Member States; the Brussels IIa Regulation does not contain any rule concerning *lis pendens* in relation to Third States.<sup>1401</sup>

Two situations must be distinguished. The first concerns a case, which does not fall under the scope of the Brussels IIa Regulation, or the national law is residually applicable under the Brussels IIa Regulation. In such a case, where a choice-of-court agreement confers jurisdiction in favour of the Third State courts, and it is not possible to establish jurisdiction in divorce, legal separation, or marriage annulment according to Article 3 to 5 and in parental responsibility according to Article 8 to 13 of the Brussels IIa Regulation. The jurisdiction of the seized Member State court will be established by its own law by virtue of Article 6, 7, and 14 of the Brussels IIa Regulation. It is apparently a question of the national law whether the choice-of-court agreement in favour of the Third State court will produce a legal effect, the

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<sup>1398</sup> Borrás Report, par. 13B and 28

<sup>1399</sup> ECJ, Case C-68/07, *Sundelind Lopez*. However, there are some practical uncertainties, such as a position of a defendant who is EU national not resident in a Member State, for whom no Member State court has jurisdiction according to the Articles 3, 4, and 5 and one of the spouses has the nationality of a Member State and both spouses have the habitual residence in a third country. See for example A. GANDIA SELLENS, C. CAMARA, A. FACUCON ALONSO P. SIAPLAOURAS, *Report on Internationally Shared Good Practices*, available at: <http://www.eufams.unimi.it/2017/06/16/report-on-internationally-shared-good-practices/>. On this problem see also T. M. DE BOER, *What we should not expect from a recast of the Brussels IIbis Regulation*, *op. cit.*, p. 13; T. KRUGER, L. SAMYN, *Brussels II bis: successes and suggested improvements*, *op. cit.*, p. 140.

<sup>1400</sup> A. BORRÁS, *Lights and Shadows of Communitarisation of Private International Law: Jurisdiction and Enforcement in Family Matters with regard to Relations with Third States*, in *The External Dimension of EC Private International Law in Family and Succession Matters*, *op. cit.*, p. 117.

<sup>1401</sup> On the critique of this provision, which does not take account of situations where there may be competing matrimonial proceedings in a Third State see P. MCELEAVY, *The communitarization of divorce rules: what impact for English and Scottish law?*, *op. cit.*, p. 624.

jurisdiction is extra-EU, and it is untouched by *Owusu* principles.<sup>1402</sup> The national rules giving space to the parallel proceedings in the Third States are applicable to the extent that they do not impede the effectiveness of the EU law.<sup>1403</sup> This applies either when the Third State court is seized, or where there are no pending proceedings in the Third States. However, if the parents conclude a choice-of-court agreement in favour of a Third State court concerning divorce, legal separation, marriage or parental responsibility where the Member State court may establish jurisdiction according to the Brussels IIA Regulation (e.g., a respondent is habitually resident in the seized Member State according to Article 3 of the Brussels IIA Regulation; a child is habitually resident in the seized Member State according to Article 8 of the Brussels IIA Regulation), the situation is different.

For the purpose of the latter case *Owusu* must be remembered. ECJ held that Article 2 is mandatory in nature and therefore cannot be derogated from unless expressly provided for by the Convention. Article 2 cannot be derogated from the basis of *forum non conveniens*, which “is liable to undermine the predictability of the rules of jurisdiction laid down by the Brussels Convention”.<sup>1404</sup> The refusal of the extension of the *Owusu* case into the Brussels IIA Regulation must be supported mainly by the ECJ case, where the ECJ stated that

*...it should be pointed out that, according to settled case law, a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation.*<sup>1405</sup>

The Advocate General Kokott also stressed that the principle of supremacy of Community law obliges the Member State courts to disapply domestic law which conflicts with Community law unless the relevant provisions of Community law expressly permit derogations by the Member States.<sup>1406</sup> The national case law of the Member States has tackled

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<sup>1402</sup> On this opinion see High Court of Justice Family Division, *JKN v JCN*, [2010] EWHC 843 (Fam). In matrimonial proceedings in England see Domicile and Matrimonial Proceedings Act 1973 c. 45, Schedule 1 Staying of Matrimonial proceedings (England And Wales)

<sup>1403</sup> G. VITELLINO, *European Private International Law and Parallel Proceedings in Third States in Family Matters*, in A. MALATESTA, S. BARIATTI, F. POCAR (eds), *The External Dimension of EC Private International Law in Family and Succession Matters*, CEDAM, 2008, p. 222.

<sup>1404</sup> ECJ, Case C-281/02, *Owusu*, par. 41. On the details of the case and impact of this judgments on the the Brussels Regime, see *supra* Chapter Two, Subchapter I, Section 15.

<sup>1405</sup> ECJ, Case C-435/06, *C.*, par. 57.

<sup>1406</sup> ECJ, Case C-435/06, *C.*, Opinion of Advocate Kokott, 20 September 2007, ECLI:EU:C:2007:543, par. 56, 57.

this problem, but not concerning the choice-of-court agreement in respect of the Third State court.<sup>1407</sup> Although the following three English cases did not concern the problem of choice-of-court agreements in family matters in favour of Third State courts, the interpretation provided by the English courts is an important guide to comprehend the interference of the *Owusu* effect with the Brussels IIa Regulation.

In the first case, *Ella v Ella*<sup>1408</sup> the Court of Appeal granted a stay in English divorce proceedings in favour of proceedings in Israel. However, the *Owusu* case was not cited.<sup>1409</sup>

The second case *JKN v JCN*<sup>1410</sup> concerned the question, whether the English court is prevented from exercising discretionary jurisdiction to stay English divorce proceedings where Article 3 of the Brussels IIa Regulation is applicable. The husband and wife had dual US and English citizenship. They were born, brought up and married in New York, but they lived in London for most of their marriage. They returned to New York by the date of their separation, but the residency requirements were not met in order to seize a court for divorce proceeding in New York. The wife initiated divorce proceedings in the UK and the husband in New York a month later. According to the husband, New York was the appropriate forum, and *Owusu* doctrine could be applicable under the Brussels I Regulation but not under the Brussels IIa Regulation. The wife argued that *Owusu* case confirmed the mandatory exercise of jurisdiction and must also be applied where the jurisdiction of a Member State was founded

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<sup>1407</sup> See for example, in the Czech Republic, *Krajský soud v Českých Budějovicích*, 5 Co 1611/2008, 14 August 2008. The Court of Appeal decided that Article 19 of the Brussels IIa Regulation only addresses *lis pendens* between Member States. Thus, the first instance court must take into account a specific judgement of the Supreme Court (*Nejvyšší soud České republiky*, R 26/1987) dealing with the possibility to suspend divorce proceeding in cases of parallel proceedings with other foreign States according to Article 109 par. 2 lett. c) of Act 99/1963 Coll. on Civil Procedure (*Občanský soudní řád č. 99/1963 Sb.*) and Article 68 par. 1 of 1963 PIL Act. the Act No 97/1963 Coll., on Private International Law (*Zákon č. 97/1963 Sb. o mezinárodním právu soukromém a procesním*).

<sup>1408</sup> *Ella v Ella*, [2007] EWCA Civ 99.

<sup>1409</sup> See also case of the Italian *Corte di Cassazione*, S.U., n. 30877, 22 December 2017, where problem regarding *Owusu* case was not tackled. *Corte di Cassazione* was called upon to rule on whether jurisdiction grounded on Article 3 of Brussels IIa Regulation should be understood as exclusive, and thus prevailing over the domestic rule on *lis pendens*, or whether Article 7 of the Italian Act on Private International Law should be deemed applicable in cases of parallel proceedings between Italian and third States' courts (Switzerland). *Corte di Cassazione* hold that the order to stay the proceedings issued by the second seized court does not entail any decision on its jurisdiction, which depends on the first seized court. Thus, the second seized court is limited to determine whether the *lis pendens* situation actually exists on the basis of the first seized *lis pendens* rule and not to a ruling on jurisdiction. On the analysis of this judgment see E. D'ALESSANDRO, *Le Sezioni Unite ribadiscono che è il regolamento necessario di competenza lo strumento utilizzabile avverso il provvedimento di sospensione del processo per litispendenza internazionale (nota a Cass., 22 dicembre 2017, n. 30877)*, *Il Foro italiano*, pp. 521-526.

<sup>1410</sup> *JKN v JCN*, [2010] EWHC 843 (Fam).

according to Article 3 to the Brussels IIa Regulation; there is no power to grant a stay of proceedings under the Domicile and Matrimonial Proceedings Act 1973.<sup>1411</sup> The court decided that it is “*neither necessary nor desirable*” to extend *Owusu* principle to the parallel proceedings in a non-Member State,<sup>1412</sup> and it stayed the proceedings due to the fact that New York was clearly the more appropriate forum. The court stated that:

*The risk of irreconcilable judgments which undermine two important objectives of the Brussels scheme namely: avoiding irreconcilable judgments between Member States and ensuring recognition of judgments between Member States. It would lead to an undesirable lacuna, as there will be no mechanism in place for resolving this situation with the consequence of both proceedings continuing with the consequent increased uncertainty and cost.*

The court’s decision is grounded on the further arguments: (i) there is no “direct connection” between the Brussels I Regulation and Brussels IIa Regulation; (ii) the interpretation of the Brussels I Regulation may be used for the Brussels IIa Regulation where the language is identical, but the respective provisions are different; Article 2 of Brussels I Regulation is mandatory and requires the exercise of that jurisdiction once the court is seized; Article 3 of Brussels IIa Regulation facilitates jurisdiction with no obligation on a Member State court to exercise that jurisdiction or on the applicant as to where he or she must bring proceedings; (iii) the court’s discretion to stay under the national law remains in place where the competing proceedings are in a non-Member State (it would be ousted in cases where the mandatory provisions of Article 19 of the Brussels IIa Regulation were engaged), (iv) Brussels IIa Regulation provides a mechanism in place to deal with competing non-Member State proceedings and reduces the risk of irreconcilable judgments; and (v) *Owusu* is not applicable in the case of parallel proceedings.<sup>1413</sup>

Another decision was approved by the Court of Appeal in *Mittal v Mittal*.<sup>1414</sup> The spouses, Indian nationals and married in India, moved to the UK in 2006 because of the husband’s

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<sup>1411</sup> Section 5 par. 2 of schedule 1 of the Domicile and Matrimonial Proceedings Act 1973 provides that the high court or divorce county court shall have jurisdiction to entertain proceedings if and only if the court has jurisdiction under the Brussels IIa Regulation; or if no Member State court has jurisdiction under the Brussels IIa Regulation and either of the parties to the marriage is domiciled in England and Wales on the date when the proceedings are begun.

<sup>1412</sup> *JKN v JCN*, [2010] EWHC 843 (Fam), [149].

<sup>1413</sup> *JKN v JCN*, [2010] EWHC 843 (Fam), [149].

<sup>1414</sup> *AB v CB* (Divorce: Jurisdiction), [2013] EWCA Civ 1255.

employment. They separated and returned to India in 2010. The husband initiated divorce proceedings in India in 2009, and the wife filed in England one year later. The court in India had jurisdiction to determine the proceedings. The court confirmed the first instance decision on the English stay of divorce proceedings on the basis of *forum non conveniens* in favour of the first seized Indian court. The court held that *Owusu* “has little to do with our case”. According to the court the reasons why the *Owusu* effect cannot be extended to the Brussels IIa Regulation are the following: (i) it was concerned with a different convention regulating jurisdiction in a very different field of activity; (ii) Article 2 of the Brussels Regulation is mandatory, transitive, and prescriptive, but Article 3 par. 1 of Brussels IIa Regulation is intransitive and facilitative; (iii) *Owusu* did not deal with stay of proceedings in favour of competing for prior proceedings in a non-Member State, but the policy of the Brussels I Regulation, as well as the Brussels IIa Regulation, is to avoid conflicting judgments in different jurisdictions; (iv) the policy of both Regulations are similar; (v) Brussels IIa Regulation recognises diversity in different legal systems; and (vi) the policy under the Brussels Ibis Regulation recognises a discretionary power to stay proceedings (Article 33 and 34 of the Brussels Ibis Regulation).<sup>1415</sup>

There are significant doctrinal discussions regarding the extension of *Owusu* case into the Brussels IIa Regulation. The argument supporting such an extension, at least concerning divorce, is that the ECJ held that Article 2 of the Brussels Convention based on the defendant’s domicile in mandatory. It must be stressed that although the jurisdictional grounds in divorce laid down in Article 3, 4, and 5 of the Brussels IIa Convention are simply alternative (as stated in *JKN v JCN*), they are also objective and mandatory as stressed in Borrás Report.<sup>1416</sup> Moreover, the Borrás Report provides that “..it is compulsory to apply all

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<sup>1415</sup> *AB v CB*, [2013] EWCA Civ 1255 [37].

<sup>1416</sup> Borrás report, par. 28. See also P. TORREMANS, J. J. FAWCETT, U. GRUŠIĆ (eds), *Cheshire, North & Fawcett: Private International Law*, op. cit., p. 975. Although the authors have doubts regarding Article 3 of the Brussels IIa Regulation, whether it is mandatory in nature, the authors support the view that *Owusu* affects the Brussels IIa Regulation: «The likelihood is that the ECJ, if asked by means of a preliminary reference to give an interpretative ruling on the point, would deny the possibility of any derogation from the principle enshrined in Article 3, except such as is expressly provided for by Article 7 (residual jurisdiction). The Regulation provides no exception in relation to *forum non conveniens*, at least in relation to matrimonial proceedings. It is highly probable that application, in a case such as has been conjectured, of the doctrine of *forum non conveniens* by means of the operation of a discretionary stay, would be deemed to undermine the desired objectives of certainty and predictability, which are inherent in the Regulation, as well as to jeopardise the legal protection of persons established in the European Community»; contra P. MANKOWSKI, Article 19, in U. MAGNUS, P. MANKOWSKI, (eds), *Brussels Ibis Regulation: 2017, European Commentaries on Private International Law*, Otto

*the rules in Convention... and replace all other national or contractual provisions, subject to the limitations resulting from the Convention itself...".*<sup>1417</sup> As to parental responsibility, nothing in the Brussels IIa Regulation suggests that the rules on parental responsibility are mandatory in nature; they are only shaped in the light of the best interests of the child, in particular on the criterion of proximity.<sup>1418</sup> Moreover, Article 15 of the Brussels IIa Regulation provides for intra-EU *forum non conveniens* where another Member State court is “better placed to hear the case, or a specific part thereof, and where this is in the best interest of the child”. Although Article 15 of the Brussels IIa Regulation deals only with intra-EU proceedings, some doubts may arise in the context of *Owusu* interpretation neglecting *forum non conveniens*, which is liable “to undermine the predictability” of the rules of jurisdiction of the Brussels Convention.<sup>1419</sup> However, discretionary power is not unlimited, rather the mechanism of transfer of jurisdiction provides strict and specific conditions laid down in Article 15 of the Brussels IIa Regulation aiming to guarantee the best interest of the child.<sup>1420</sup> At first, Article 15 of the Brussels IIa Regulation may be perceived as an option to give effect to the Third State proceedings, where a Third State is better placed, thus, opening the door to the jurisdiction clauses in parental responsibility matters in favour of the Third State court. The English Supreme Court, although it has dealt with the case concerning child abduction and determination of the habitual residence of the child, held:

*We have not heard detailed argument on whether the courts of a Member State which has jurisdiction in respect of parental responsibility for a child under the Brussels II revised Regulation is obliged to exercise that jurisdiction even though there is a third country which would be better placed to hear the case. The wording of Articles 3 and 8 of the Regulation is not the same as that in Article 2 of the Brussels Convention. Furthermore, Article 19 of the Regulation deals with the position where there are pending proceedings in two Member States and Article 15 allows the courts of the Member State having jurisdiction to transfer the case to another Member State in*

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Schmidt, Sellier European Law Publishers, 2017, p. 244: «*There is nothing in Owusu that would directly demand to press jurisdiction forward and through even against the exceptional settings of third State proceedings which would take precedence under the national law of the forum.*».

<sup>1417</sup> Borrás Report, par. 13B and 28. This was confirmed by the ECJ, Case C-68/07, *Sundelind Lopez*.

<sup>1418</sup> Recital No 12 of the Brussels IIa Regulation.

<sup>1419</sup> See A. BORRÁS, *Lights and Shadows of Communitarisation of Private International Law: Jurisdiction and Enforcement in Family Matters with regard to Relations with Third States*, in *The External Dimension of EC Private International Law in Family and Succession Matters*, *op. cit.*, p. 107.

<sup>1420</sup> Recital No 13 of the Brussels IIa Regulation.

*appropriate circumstances (see para 24 above). It might therefore be thought anomalous for this to be precluded in a case where the courts of a non-Member State were better placed to hear the case.*<sup>1421</sup>

The Supreme Court made a reference to the cases *JKN v JCN* and *Mittal v Mittal* and concluded, “*The relevance of Owusu v Jackson is merely to reinforce the conclusion that the jurisdiction provisions of the Regulation do indeed apply regardless of whether there is an alternative jurisdiction in a non-Member State.*”<sup>1422</sup> On the other hand, one of the arguments of the ECJ in *Owusu* when rejecting *forum non conveniens* was that this doctrine is recognised only in a limited number of Contracting States.<sup>1423</sup> It means that the use of judicial discretion would be available only to the seized English courts, but not to German or French courts.<sup>1424</sup> The use of *effet reflexe* concerns only the material scope of the rule, but not the rule to be applied under the Brussels IIa Regulation by virtue of the ECJ case law.<sup>1425</sup> The proper mirrored application of the *forum non conveniens* rule according to Article 15 of the Brussels IIa Regulation in non-EU court is a matter of domestic law.<sup>1426</sup> Thus, the use of the *forum non conveniens* would be not available to most of the Member States.

The doctrine of *effect reflexe* allowing the mirror application of the rule on the choice-of-court agreements *vis-à-vis* the Third States cannot get by the fact that a choice-of-court agreement in divorce and a “true” choice-of-court agreement in parental responsibility matters according to the Brussels IIa Regulation does not exist.<sup>1427</sup> In parental responsibility matters, the rule on the prorogation of jurisdiction is a non-exclusive alternative ground permitted only under several conditions, which are subject to the discretionary power of the seized prorogued Member State court. In consequence, it is hard to imagine using the theory of reflexive effect in these cases. However, the theory of *effet reflexe* under the Brussels IIa Regulation in the

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<sup>1421</sup> A (Children), [2013] UKSC 60, par. [32].

<sup>1422</sup> A (Children), [2013] UKSC 60, [33].

<sup>1423</sup> A (Children), [2013] UKSC 60, [43].

<sup>1424</sup> E. PATAUT, E. GALLANT, *Article 15*, in *Brussels IIbis Regulation: 2017*, *op. cit.*, p. 175.

<sup>1425</sup> G. VITELLINO, *European Private International Law and Parallel Proceedings in Third States in Family Matters*, in *The External Dimension of EC Private International Law in Family and Succession Matters*, *op. cit.*, p. 233.

<sup>1426</sup> G. A. L. DROZ, *Compétence judiciaire et effets des jugements dans le Marché commun*, Daloz, 1972, par. 199.

<sup>1427</sup> On this conclusion regarding choice-of-court agreements in divorce in favour of Third State court see M. NÍ SHÚILLEABHÁIN, *Cross-border divorce law. Brussels II bis*, *op. cit.*, p. 206.



context of *lis pendens* laid down in Article 19 of the Brussels IIa Regulation may be invoked.<sup>1428</sup>

According to some authors, which welcome the stay of proceedings in favour of Third States, the lack of clarification leads to parallel proceedings, whereby the decision does not produce an effect.<sup>1429</sup> In consequence, it was suggested that the similar mechanism as provided in Articles 33 and 34 of the Brussels Ibis Regulation allowing a stay of proceedings in case of pending proceedings in a Third State should be introduced into the Brussels IIa Regulation.<sup>1430</sup> However, the Impact Assessment to the Proposal for a Recast of the Brussels IIa Regulation takes an opposite approach. The Impact Assessment clarifies that although Article 19 of the Brussels IIa Regulation will not follow the changes made in the Brussels Ibis Regulation, the interpretation of *Owusu* should be extended to the Brussels IIa Regulation:

*This judgment concerned the Brussels I Convention, but the overwhelming majority of courts and academics applies this Statement also to other EU instruments such as the Brussels I Regulation and the Brussels IIa Regulation, at far as matrimonial matters are concerned.*<sup>1431</sup>

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<sup>1428</sup> See G. VITELLINO, *European Private International Law and Parallel Proceedings in Third States in Family Matters*, in *The External Dimension of EC Private International Law in Family and Succession Matters*, *op. cit.*, p. 237, 239; P. MANKOWSKI, *Article 19*, in *Brussels IIbis Regulation: 2017*, *op. cit.*, p. 243. On the certain doubts regarding application of theory of reflexive effect of Article 19 of the Brussels IIa Regulation see: J. HILL, M. NÍ SHÚILLEABHÁIN, *Clarkson & Hill's Conflict of Laws*, Oxford University Press, 4ed, p. 420, «*With regard to divorce etc cases, when there are proceedings pending in a non-Member State, a case can be made for the English court having discretion under paragraph 9 to decline jurisdiction on the basis that paragraph 9 is the domestic analogue of Article 19 (1) of Brussels II Revised. Without mentioning the reflexive theory as such, this was the approach adopted in the above cases. It remains to be seen whether or not the "reflexive effect" theory (in any of its possible permutations) will be endorsed by the Court of Justice.*».

<sup>1429</sup> M. ŽUPAN, M. DRVENTIĆ, *Chapter 5: Parallel Proceedings*, in EUFam's Final Study, available at: <http://www.eufams.unimi.it/2017/12/30/final-study/>, *op. cit.*, p. 168; G. VITELLINO, *European Private International Law and Parallel Proceedings in Third States in Family Matters*, in *The External Dimension of EC Private International Law in Family and Succession Matters*, *op. cit.*, p. 235. See also P. TORREMANS, J. J. FAWCETT, U. GRUŠIĆ (eds), *Cheshire, North & Fawcett: Private International Law*, *op. cit.*, p. 977; K. TRIMMINGS, *Brussels IIa: Matrimonial Matters*, in P. BEAUMONT, M. DANOV, K. TRIMMINGS, B. YÜKSEL (eds.), *Cross-Border Litigation in Europe*, *Studies in Private International Law*, Hart Publishing, 2017, p. 815, where according to the authors, the English case law "seems to be at odds with the latest European developments". On the critique of English case law see J. MILES, *England and Wales*, in M. J. SCHERPE (ed), *Marital Agreements and Private Autonomy in Comparative Perspective*, *op. cit.*, p. 115, 116.

<sup>1430</sup> NÍ SHÚILLEABHÁIN, *Cross-border divorce law. Brussels II bis*, *op. cit.*, p. 207; U. MAGNUS, P. MANKOWSKI, *Introduction*, in *Brussels IIbis Regulation: 2017*, *op. cit.*, p. 8. See also the answer to question no 5, Council of Bars and Law Societies of Europe, CCBE Position on the proposal for a recast of the Brussels IIa Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, 2 December 2016, p. 2.

<sup>1431</sup> Commission Staff Working Document, Impact Assessment, Accompanying the document, Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the

Moreover, the Impact Assessment adds that the discretion under national law to transfer jurisdiction is not allowed:

*As the Court of Justice has ruled that Member States are not allowed to use any discretion which may exist under their national law to transfer jurisdiction established by EU Regulations, the transfer mechanism could only be created by including it into the Regulation.*<sup>1432</sup>

## **6.2. Derogation from Jurisdiction under the Maintenance Regulation**

Recital No 15 specifies that:

*The circumstance that the defendant is habitually resident in a third State should no longer entail the nonapplication of Community rules on jurisdiction, and there should no longer be any referral to national law.*

The Maintenance Regulation is based on universal jurisdiction; the habitual residence of the defendant is no longer required.<sup>1433</sup> It means that there is no room for the residual jurisdiction as in the Brussels *Ibis* Regulation. Thus, the problem of giving effect to the proceedings in the Third States in the presence of *Owusu* case seems to be even more significant. The *erga omnes* approach of the system of allocation of jurisdiction is reinforced by autonomous subsidiary jurisdiction and the rule on *forum necessitatis*.<sup>1434</sup> Otherwise, there is no jurisdictional rule which directly deals with the jurisdiction of the Third State court, which might be better situated, for example, if there is a choice-of-court agreement in favour of the Third State court.

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matters of parental responsibility, and on international child abduction (recast), SWD(2016) 207/0207 final, 30 June 2016, p. 16.

<sup>1432</sup> Commission Staff Working Document, Impact Assessment, Accompanying the document, Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), SWD(2016) 207/0207 final, 30 June 2016, p. 16 footnote no 49.

<sup>1433</sup> See T. M. DE BOER, *What we should not expect from a recast of the Brussels Ibis Regulation*, *op. cit.*, p. 13, footnote 28 providing an example: «Thus, a French citizen living in New York could not start proceedings in France against her Swiss husband living in Switzerland, even if French national law would allow her to do so. Except for prorogation (Art. 4) or tacit submission (Art. 5), the Maintenance regulation does not offer her an opportunity to bring suit in France.».

<sup>1434</sup> P. FRANZINA, *Sul forum necessitatis nello spazio giudiziario europeo*, *Rivista di diritto internazionale* (2009), p. 1121; G. ROSSOLILLO, *Forum necessitatis e flessibilità dei criteri di giurisdizione nel diritto internazionale privato nazionale e dell'Unione europea*, *Cuadernos de derecho transnacional*, (2010), p. 413–15.

Could the rejection of *Owusu* in *Mittal v Mittal* case and *JKN v JCN* case under the Brussels IIa Regulation be extended into the Maintenance Regulation? These English cases were built on different arguments, some of them might also survive in the context of the Maintenance Regulation. The most significant general argument against the threat of the extension of *Owusu* into the Maintenance Regulation is the risk of irreconcilable judgments, which may undermine the objectives of the Maintenance Regulation.<sup>1435</sup>

On the other hand, the extension of *Owusu* case into the Maintenance Regulation could be argued because of several reasons. There is a historic “direct connection” between the Maintenance Regulation and Brussels I Regulation - before the enactment of the Maintenance Regulation, the questions of maintenance were dealt with under the Brussels I Regulation, and therefore, *Owusu* would be applicable. The interpretation of the Brussels I Regulation may be used for the Brussels IIa Regulation where the language is identical. Although it is questionable whether the language of the Maintenance Regulation is more akin to the Brussels I Regulation or the Brussels IIa Regulation, the wording of the rules on choice-of-court agreements and *lis pendens* under the Maintenance Regulation mirrors the solutions adopted in the Brussels I Regulation. Thus, it may be argued, that there is a transfer of questions of maintenance from the Brussels I Regulation to the Maintenance Regulation, with the consequence that *Owusu* case continues to apply. Moreover, the Maintenance Regulation does not contain any *forum non conveniens* mechanism as does Article 15 of the Brussels IIa Regulation.

However, according to the English court in the case *Mittal v Mittal*, there “...is a division between commercial cases on the one hand and family cases on the other, putting maintenance into the latter category.”<sup>1436</sup> The nature of the maintenance claim as a family claim may also be supported by the fact that the maintenance claim is considered under the Brussels IIa Regulation as ancillary to the proceedings concerning the status of a person or concerning parental responsibility.<sup>1437</sup>

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<sup>1435</sup> *JKN v JCN*, [2010] EWHC 843 (Fam), [149].

<sup>1436</sup> See *AB v CB*, [2013] EWCA Civ 1255, [29], [30]. The argument of the extension of the Brussels I Regulation (and *Owusu* case) into the Maintenance Regulation was rejected due to the Recital No 15 of the Maintenance Regulation and similar language with the Brussels IIa Regulation.

<sup>1437</sup> In the case *JKN v JCN*, [2010] EWHC 843 (Fam), [149]: «*The wife’s claims for maintenance are not free-standing. If her petition is stayed, the maintenance claim automatically falls away. (c) Following the rationale in Lucasfilm, personal jurisdiction over the husband and subject-matter jurisdiction in respect of the divorce suit*

As to choice-of-court agreements in favour of Third State courts, it is doubtful whether all the theories developed in the commercial matters under the Brussels *Ibis* Regulation may be transferred to the Maintenance Regulation. First, as stated above, the Maintenance Regulation refuses any reference to the residual application of the national law. In consequence, to give effect to choice-of-court agreements in favour of the Third State court under the national law would have difficulty succeeding.<sup>1438</sup> Moreover, although Article 23 of the Brussels I Regulation was a model for Article 4 of the Maintenance Regulation, the limitation of party autonomy was justified by the necessity to protect weaker parties and mirrors to a great extent the connecting factors of Article 3 of the Maintenance Regulation. However, it does not mean that the Member State court, which assumed jurisdiction according to Article 3 of the Maintenance Regulation always represents a more favourable forum for the maintenance creditor compared to a Third State court, which may have jurisdiction in accordance with the choice-of-court agreement. We may demonstrate it in the following scenario:

*The child over the age 18 is a child of divorced parents, nationals of the US and Finland. The child lives in Finland with parent A. The child concluded a choice-of-court agreement with parent B according to Article 4 of the Maintenance Regulation designating a court of the place of the habitual residence of the child without any other specification. Parent A went back to the US with the child and acquired habitual residence. There is a choice-of-court agreement in favour of a US court, but the Swedish court has jurisdiction according to Article 3 lett. a) of the Maintenance Regulation.*

From this example, it is evident that the maintenance debtor habitually resident in Finland could sue the maintenance creditor (habitually resident in the US) for negative declaratory relief in Finland for breach of a choice-of-court agreement providing protection for the weaker party. It may be presumed that the jurisdiction of the US court on the basis of the jurisdiction agreement represents a more favourable *forum* for the maintenance creditor.

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*are conferred on this court by virtue of Article 3 of BIIR. Jurisdiction for ancillary relief is not conferred by Brussels I since personal jurisdiction is conferred over the husband by Article 3 of BIIR and not by Brussels I and it is expressly excluded from the ambit of BIIR (recital 8). Jurisdiction over ancillary relief is therefore conferred not by either of the Regulations but by national legislation (Matrimonial Causes Act 1973 (as amended)).».*

<sup>1438</sup> In support of this conclusion see D. RANTON, *A sad death in the family: Owusu, the Maintenance Regulation and the demise of forum conveniens*, International Family Law (2012), p. 437.

### **6.3. Derogation from Jurisdiction under the Matrimonial Property Regime Regulation and the Regulation on Property Consequences of Registered Partnership**

In the first place, it must be noted that there is no space for national law in the Matrimonial Property Regime Regulation and Regulation on Property Consequences of Registered Partnership. These Regulations follow the model provided in the Maintenance Regulation rather than the one provided in the Brussels *Ibis* Regulation, where the grounds of jurisdiction apply even where none of the parties presents a personal connection to one or more Member States.<sup>1439</sup> This excludes a rule on the residual application of national law of the Member States in respect of the disputes falling into the scope of these two Regulations. The exhaustive allocation of jurisdiction which does not leave any space for national law does not contribute to the justification of giving effect to the proceedings in the Third States in the presence of the *Owusu* case.<sup>1440</sup> Except for the rule on *forum necessitatis*,<sup>1441</sup> and rule on the *limitation of proceedings*,<sup>1442</sup> there is no jurisdictional rule which directly deals with the jurisdiction of the Third State court.

The Matrimonial Property Regime Regulation and the Regulation on Property Consequences of Registered Partnership distinguish two types of jurisdiction clauses. These clauses depend on: (a) whether the dispute on the property regime is not linked to proceedings on succession or divorce, legal separation, or marriage annulment or dissolution or annulment of a registered partnership (for example, when the spouses or partners want to change their property regime); or (b) whether the dispute on the property regime is linked to proceedings on succession or

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<sup>1439</sup> On the similar considerations in respect of the Succession Regulation see F. MARONGIU BUONAIUTI, *The EU Succession Regulation and third country courts*, Journal of Private International Law, 12:3 (2016), p. 547; L. FUMAGALLI, *Il sistema italiano di diritto internazionale privato e processuale e il regolamento (UE) n. 650/2012 sulle successioni: spazi residui per la legge interna?*, Rivista di diritto internazionale privato e processuale (2015), pp. 779-792.

<sup>1440</sup> In respect of the Succession Regulation see F. MARONGIU BUONAIUTI, *The EU Succession Regulation and third country courts*, *op. cit.*, p. 552; In respect of the Maintenance Regulation see D. RANTON, *A sad death in the family: Owusu the Maintenance Regulation and the demise of forum conveniens*, *op. cit.*, p. 437.

<sup>1441</sup> Article 11 of the Matrimonial Property Regime Regulation and Regulation on Property Consequences of Registered Partnership.

<sup>1442</sup> Article 13 of the Matrimonial Property Regime Regulation and Regulation on Property Consequences of Registered Partnership.

divorce, legal separation, or marriage annulment or dissolution or annulment of a registered partnership, this section must also take into the account this division.

In the first case, when the property regime is not linked to proceedings on divorce, legal separation, or marriage annulment or dissolution or annulment of a registered partnership since the spouses or partners intend to change their property regime, the seized Member State court does not consider the question regarding derogation from jurisdiction of another court which might have jurisdiction for divorce, legal separation, or marriage annulment or dissolution or annulment of a registered partner according to the Brussels *Ia* Regulation or national law. In case that the parties conferred jurisdiction to a Third State court on the basis of the jurisdiction agreement, in what way should the Member State court, having jurisdiction according to Article 6 of the Matrimonial Property Regime Regulation/the Regulation on Property Consequences of Registered Partnership, proceed? Article 7 of the Matrimonial Property Regime Regulation/Regulation on Property Consequences of Registered Partnership provides that: “the parties may agree that the courts of the *Member State*...shall have exclusive jurisdiction” This Article appears manifestly to exclude an option of jurisdiction agreement in favour of Third State court. The only argument for upholding such a jurisdiction agreement might be a theory of *effect reflexe*. This theory may come into play when: (i) the parties designate, as the law applicable to the property regime, the law of a Third State according to Article 22 of the Matrimonial Property Regime Regulation/the Regulation on Property Consequences of Registered Partnership; (ii) when the law applicable to the property regime according to Article 26 of the Matrimonial Property Regime Regulation/the Regulation on Property Consequences of Registered Partnership leads to the law of a Third State;<sup>1443</sup> or (iii) when the marriage was concluded or the registered partnership was created in the Third State. Unfortunately, the *lis pendens* rule laid down in Article 17 is applicable only between the Member States and there is no rule similar to Articles 33 and 34 of the Brussels *Ibis* Regulation which would allow the proceedings in the Third States.

In the second case, where the dispute on the property regime is linked to proceedings on succession or divorce, legal separation, or marriage annulment or dissolution or annulment of a registered partnership, the situation is even more complicated. When there is an automatic

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<sup>1443</sup> The rules on the applicable law have universal application within the meaning of Article 20 of the Matrimonial Property Regime Regulation and Regulation on Property Consequences of Registered Partnership.

concentration of the proceedings in divorce, legal separation, or marriage annulment with the proceedings in matrimonial property regime, it may be referred to in Section 6.1. of this Subchapter concerning derogation from the jurisdiction for divorce, legal separation, or marriage annulment under the Brussels IIa Regulation, since the property regime in practice represents ancillary proceedings as to status.

However, what happens where the concentration of the proceedings is not automatic, and there is no agreement which would permit the concentration, and on the contrary, the parties designated the Third State court? In case that Member State A is seized for divorce, legal separation, or marriage annulment according to one of the last two indents of Article 3 lett. a) of the Brussels IIa Regulation, basically, there is no Member State court that may establish jurisdiction to rule on the matrimonial property regime, since Article 6 of the Matrimonial Property Regime Regulation mirrors only first three indents of Article 3 lett. a) and Article 3 lett. b) of the Brussels IIa Regulation.<sup>1444</sup>

In the case of the registered partnership, the situation differs. In case that Member State A is seized to rule on the dissolution or annulment of a registered partnership according to the national law, there might be another Member State court, which may establish jurisdiction to rule on the property consequences of their registered partnership according to Article 6 Property Consequences of Registered Partnership. First, it may be actually Member State A, since, for example, the partners are habitually resident there at the time the court is seized; or it may be any other Member State competent according to Article 6 of the Property Consequences of Registered Partnership. This case practically brings back the considerations made in respect of the application of Article 7 of the Matrimonial Property Regime Regulation/Regulation on Property Consequences of Registered Partnership.

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<sup>1444</sup> If the Member State court would not have jurisdiction according to Article 10 (subsidiary jurisdiction), or Article 11 (*forum necessitatis*).

## II. Choice-of-Court Agreements in Succession Matters

The Proposal on a Succession Regulation was presented by the Commission in 2009,<sup>1445</sup> and was already one of the priorities of the Vienna Action Plan in 1998.<sup>1446</sup> The Hague Programme called on the Commission to present a Green Paper on succession covering applicable law, jurisdiction, and recognition and administrative measures.<sup>1447</sup> As to jurisdiction, significant problems caused by a positive and negative conflicts of jurisdiction and difficulties with the identification of the competent authorities were revealed, and the Impact Assessment proposed and evaluated Policy Options which reacted to such difficulties.<sup>1448</sup> Although it was admitted that the Member States should allow a choice of jurisdiction by the parties in case of a dispute between heirs, the Impact Assessment and the Proposal on a Succession Regulation did not take into the consideration a rule on choice-of-court agreements. However, the choice-of-law rule represented a cornerstone of the Proposal

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<sup>1445</sup> Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, COM(2009)0154 final, 14 October 2009. On the Proposal see A. BONOMI, *Prime considerazioni sulla proposta di regolamento sulle successioni*, *Rivista di diritto internazionale privato e processuale* (2010), p. 877; A. BONOMI, *Il regolamento europeo sulle successioni*, *Rivista di diritto internazionale privato e processuale* (2013), p. 293; A. DAVI, *Riflessioni sul futuro diritto internazionale privato europeo delle successioni*, *Rivista di diritto internazionale privato e processuale*, (2005), p. 297; P. KINDLER, *La legge regolatrice delle successioni nella proposta di regolamento dell'Unione europea: qualche riflessione in tema di carattere universale, rinvio e professio iuris*, *Rivista di diritto internazionale*, (2011), p. 422; E. LEIN, *A Further Step Towards a European Code of Private International Law: The Commission Proposal for a Regulation on Succession*, *Yearbook of Private International Law* (2009), pp. 107-142; J. HARRIS, *The Proposed EU Regulation on Succession and Wills: Prospects and Challenges*, *Trust Law International* (2008), pp. 181-235. See also the study of the Max Planck Institute for Comparative and International Private Law, *Comments on the European Commission's Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession*, *Rabels Zeitschrift* 74:3 (2010).

<sup>1446</sup> Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice - Text adopted by the Justice and Home Affairs Council of 3 December 1998, OJ C 19, 23 January 1999.

<sup>1447</sup> The Hague Programme: strengthening freedom, security and justice in the European Union, OJ C 53, 3 March 2005.

<sup>1448</sup> Commission Staff Working Document Accompanying the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of successions and on the introduction of a European Certificate of Inheritance, Impact Assessment, SEC(2009) 410 final, 14 October 2009, p. 10. It was pointed out that many Member States take the last habitual residence of the deceased as connecting factor, such as Austria, Germany, Spain, Greece, Hungary, Italy, Poland, Portugal, Romania (for movable property), Slovenia, Sweden, and the Czech Republic; other Member States take the nationality of the testator as connecting factor, such as Belgium (movables), Bulgaria (movables), Cyprus (movables), Denmark, Estonia, Finland, France (movables), Luxembourg (movables), Ireland, Lithuania, the Netherlands, and the UK (England and Wales; Scotland: for movables only).



on a Succession Regulation. The rule on choice-of-court agreements was for the first time proposed by the Committee on Legal Affairs in 2011,<sup>1449</sup> and in 2012 was drafted using almost the current wording.<sup>1450</sup> The Succession Regulation was adopted on 4 July 2012, and has become applicable since 17 August 2015. The rule on choice-of-court agreements is provided in Article 5 of the Succession Regulation and must be read in conjunction with Articles 6, 7, and 9 of the Succession Regulation.

## 1. Scope of Application

First, territorial, material, temporal, and personal scopes of application of the Succession Regulation must be briefly analysed. These scopes must be considered in the context of Article 5 of the Succession Regulation, since the rule on choice-of-court agreements is applicable only when the legal relationship falls under its scope.

### 1.1. Territorial Scope of Application

The Succession Regulation is applicable in 24 Member States as from 17 August 2015 except for UK, Ireland,<sup>1451</sup> and Denmark.<sup>1452</sup> According to the opinion of the majority of the authors, the reasons behind the United Kingdom's decision to not opt into the Succession Regulation is because of the use of a "weak" connecting factor, habitual residence, in the Succession Regulation, and the characteristic of civil law successions, where a clawback is used to make a claim against *inter vivos* gifts and which does not fall within the UK's succession law.<sup>1453</sup> It

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<sup>1449</sup> See Amendments No 173 and 174 of the Draft Report on the proposal for a regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, Committee on Legal Affairs, PE464.765, 23 February 2011.

<sup>1450</sup> Amendments 246, Committee on Legal Affairs, Draft report - on the proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, Committee on Legal Affairs, PE483.680, 2009/0157(COD), 27 February 2012, p. 23.

<sup>1451</sup> See Recital No 82 of the Succession Regulation.

<sup>1452</sup> See Recital No 83 of the Succession Regulation.

<sup>1453</sup> P. BEAUMONT, J. HOLLIDAY, *Some Aspects of Scots Private International Law of Succession Taking Account of the Impact of the EU Succession Regulation*, Working Paper No. 2015/6, available at: <https://www.abdn.ac.uk/law/research/working-papers-455.php>, p. 2, 3: «The use of habitual residence at the time of death to determine the applicable law was considered to be a weak connecting factor, in that it lacked the certainty required to determine the applicable law to a succession and to aspects of the succession...Clawback, a device used to make a claim against *inter vivos* gifts when the estate does not make sufficient provision for

is a subject of the doctrinal discussions whether these three Member States should be considered as the “Third States” for the purpose of the Succession Regulation.<sup>1454</sup>

## 1.2. Temporal Scope of Application

According to Article 83 of the Succession Regulation, the decisive moment is the death of the person whose succession is at issue. The *de cuius* must have died on or after 17 August 2015, since the Succession Regulation is not meant to have retroactive effect.<sup>1455</sup> The successions of persons who died prior to 17 August 2015 continue to be governed by the domestic rules of private international law of the *forum*. Thus, the choice-of-court agreements concluded before 17 August 2015 are governed by the Succession Regulation if the *de cuius* dies or died on or after 17 August 2015. Moreover, as it will be analysed further in Section 2.2.1. of this Subchapter, the choice-of-court agreement is considered valid only if there is a valid choice-of-law agreement. Indeed, it must be stressed that the deceased may have chosen the law applicable to his/her succession prior to 17 August 2015, and the choice may not conform to the provisions in the Succession Regulation. Nevertheless, the choice will be upheld if it is valid under the rules of private international law which were in force at the time the choice was made, in the Member State in which the deceased had his habitual residence, or in any of

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*forced heirship beneficiaries does not fall within the UK's succession law... The third issue concerned the administration of estates. The UK separates the settling of the debts and tax and ingathering of the estate from the distribution of the estate». See also P. BEAUMONT, P. MCELEAVY, *Anton's Private International Law*, W Green, 2011, 3edn, p. 1000, 1063; A. DAVÌ, A. ZANOBETTI, *Il nuovo diritto internazionale privato europeo delle successioni*, Giappichelli, 2014, p. 18-22; Parliament of the UK, available at <https://publications.parliament.uk/pa/ld200910/ldselect/lducom/75/7504.htm>: «The red lines were: the EU measure should not in any way call into question the validity of otherwise valid inter vivos gifts, and it should not deal with the administration of estates, the validity and operation of testamentary trusts, matrimonial property law and interests terminating on death such as joint tenancies.»*

<sup>1454</sup> See for example Article 1 par. 2 of the German International Succession Law Procedure Act (Internationales Erbrechtsverfahrensgesetz – IntErbRVG vom 29. Juni 2015 ([2015] BGBI I 1042), which states that UK, Denmark, and Ireland must be considered as Third States. On the assumption that “non-compliant Member States” cannot be categorised as Member States see: E. B. CRAWFORD, J. M. CARRUTHERS, *Speculation on the Operation of Succession Regulation 650/2012: Tales of Unexpected*, European Review of Private Law 22 (2014), p. 847; A. Davì, *Introduction*, in A. L. CALVO CARAVACA, A. DAVÌ (eds), *The EU Succession Regulation: A Commentary*, Cambridge University Press, 2016, p. 17; P. Lagarde, *Introduction*, in U. BERGQUIST, D. DAMASCELLI, R. FRIMSTON, P. LAGARDE, F. ODERSKY, B. REINHARTZ, (eds), *EU Regulation on Succession and Wills: Commentary*, Otto Schmidt, 2015, p. 37; I. QUEIROLO, *General Rules on Jurisdiction*, in S. BARIATTI, I. VIARENGO, F. C. VILLATA (eds), *Final Study: Towards the entry into force of the succession regulation: building future uniformity upon past divergences*, 2016, available at: <https://eventi.nservizi.it/evento.asp?evID=85&IDm=1688>, p. 341

<sup>1455</sup> P. FRANZINA, *Article 83. Transnational Provisions*, in A. L. CALVO CARAVACA, A. DAVÌ (eds), *The EU Succession Regulation: A Commentary*, Cambridge University Press, 2016, p. 853.

the States whose nationality he possessed. However, this grandfather clause<sup>1456</sup> does not apply to the choice-of-court agreements. Thus, it can be deduced that if the concerned persons have chosen the Member State court prior to 17 August 2015, which does not conform to the provisions in the Succession Regulation, the choice shall be valid only if it meets the conditions laid down in the Succession Regulation. It means that the validity of a jurisdiction agreement made before 17 August 2015 must be assessed according to the conditions set out in Article 5 of the Succession Regulation, which does not seem to be at odds with the principle of non-retroactivity.<sup>1457</sup>

### **1.3. Personal Scope of Application**

The scope of the Succession Regulation *ratione personae* is unlimited since it also covers the successions of persons who are not related to any Member State at the time of death. However, for the application of the rule on choice-of-court agreements it is necessary that the deceased is a national of the Member State. On the other hand, the parties to the choice-of-court agreement, i.e., the parties concerned, do not have to be related to any Member State.

### **1.4. Material Scope of Application**

Article 1 of the Succession Regulation provides for both a positive list of the matters, which fall within the scope of application of the Succession Regulation and a negative list of the matters that are excluded from its scope. Hence, the Succession Regulation covers the succession of the estates of deceased persons. The term “succession” must be interpreted in an autonomous manner, and it includes all civil law aspects of a succession.<sup>1458</sup> Succession is defined in Article 3 of the Succession Regulation as

*...succession to the estate of a deceased person and covers all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession.*

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<sup>1456</sup> A. DAVÌ, A. ZANOBETTI, *Il nuovo diritto internazionale privato europeo delle successioni*, op. cit., p. 39.

<sup>1457</sup> On the similar conclusion concerning the agreements as to succession see P. FRANZINA, *Article 83. Transnational Provisions*, in *The EU Succession Regulation: A Commentary*, op. cit., p. 853, 854.

<sup>1458</sup> See Recital No 9 of the Succession Regulation.

Conversely, the Succession Regulation does not apply to: revenue, customs, or administrative matters; the status of natural persons, as well as family relationships and relationships; the legal capacity of natural persons; questions relating to the disappearance, absence, or presumed death of a natural person; questions relating to matrimonial property regimes<sup>1459</sup> and property regimes of relationships; maintenance obligations other than those arising by reason of death; the formal validity of dispositions of property upon death made orally; property rights, interests, and assets created or transferred otherwise than by succession; questions governed by the law of companies and other bodies, corporate or unincorporated; the nature of rights in rem; and any recording in a register of rights in immovable or movable property.<sup>1460</sup>

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<sup>1459</sup> ECJ, Case C-558/16, *Doris Margret Lisette Mahnkopf*, 1 March 2018, ECLI:EU:C:2018:138: «Article 1(1) ... must be interpreted as meaning that a national provision, such as that at issue in the main proceedings, which prescribes, on the death of one of the spouses, a fixed allocation of the accrued gains by increasing the surviving spouse's share of the estate falls within the scope of that regulation.».

<sup>1460</sup> On the interpretation of Article 1 par. 2 lett. k) and l) of the Succession Regulation see ECJ, Case C-218/16, *Aleksandra Kubicka*, 12 October 2017, ECLI:EU:C:2017:755: «Article 1(2)(k) and (l) and Article 31... must be interpreted as precluding refusal, by an authority of a Member State, to recognise the material effects of a legacy 'by vindication', provided for by the law governing succession chosen by the testator in accordance with Article 22(1) of that regulation, where that refusal is based on the ground that the legacy concerns the right of ownership of immovable property located in that Member State, whose law does not provide for legacies with direct material effect when succession takes place.» On the material scope of application see: A. BONOMI, P. WAUTELET, *Ambito di Applicazione*, in A. BONOMI, P. WAUTELET (eds), *Il Regolamento europeo sulle successioni: Commentario al Reg. UE 650/2012 in vigore dal 17 agosto 2015*, Giuffrè, 2015, p. 23-79; A. DAVI, A. ZANOBETTI, *Il nuovo diritto internazionale privato europeo delle successioni*, op. cit., p. 23-32; D. DAMASCELLI, *Diritto internazionale privato delle successioni a causa di morte: dalla l. n. 218/1995 al reg. UE n. 650/2012*, Giuffrè, 2013, p. 39-44; M. WELLER, *Article 1, Scope and Definitions*, in A. L. CALVO CARAVACA, A. DAVI (eds), *The EU Succession Regulation: A Commentary*, Cambridge University Press, 2016, p. 73-111; R. FRIMSTON, *Chapter I: Scope and Definitions*, in U. BERGQUIST, D. DAMASCELLI, R. FRIMSTON, P. LAGARDE, F. ODESKY, B. REINHARTZ, (eds), *EU Regulation on Succession and Wills: Commentary*, Otto Schmidt, 2015, p. 38-50; P. KINDLER, *Definition of succession*, in S. BARIATTI, I. VIARENGO, F. C. VILLATA (eds), *Final Study: Towards the entry into force of the succession regulation: building future uniformity upon past divergences*, 2016, available at: [eventi.nservizi.it/evento.asp?evID=85&IDm=1688](http://eventi.nservizi.it/evento.asp?evID=85&IDm=1688), p. 9 *et seq.*; A. REIS, *Succession and family law*, in S. BARIATTI, I. VIARENGO, F. C. VILLATA (eds), *Final Study: Towards the entry into force of the succession regulation: building future uniformity upon past divergences*, 2016, available at: [eventi.nservizi.it/evento.asp?evID=85&IDm=1688](http://eventi.nservizi.it/evento.asp?evID=85&IDm=1688), p. 13 *et seq.*; D. MURITANO, *Succession and trust*, in S. BARIATTI, I. VIARENGO, F. C. VILLATA (eds), *Final Study: Towards the entry into force of the succession regulation: building future uniformity upon past divergences*, 2016, available at: [eventi.nservizi.it/evento.asp?evID=85&IDm=1688](http://eventi.nservizi.it/evento.asp?evID=85&IDm=1688), p. 59 *et seq.*; Z. CRESPI REGHIZZI, *Succession and property rights*, in S. BARIATTI, I. VIARENGO, F. C. VILLATA (eds), *Final Study: Towards the entry into force of the succession regulation: building future uniformity upon past divergences*, 2016, available at: [eventi.nservizi.it/evento.asp?evID=85&IDm=1688](http://eventi.nservizi.it/evento.asp?evID=85&IDm=1688), p. 87 *et seq.*; D. PAULUS, *Succession and company law*, in S. BARIATTI, I. VIARENGO, F. C. VILLATA (eds), *Final Study: Towards the entry into force of the succession regulation: building future uniformity upon past divergences*, 2016, available at: [eventi.nservizi.it/evento.asp?evID=85&IDm=1688](http://eventi.nservizi.it/evento.asp?evID=85&IDm=1688), p. 126 *et seq.*; D. MURITANO, *Tax aspects of international successions: notarial problems*, in S. BARIATTI, I. VIARENGO, F. C. VILLATA (eds), *Final Study: Towards the entry into force of the succession regulation: building future uniformity upon past divergences*, 2016, available at: <https://eventi.nservizi.it/evento.asp?evID=85&IDm=1688>, p. 152 *et seq.*

## 2. Choice-of-Court Agreements under the Succession Regulation

Under the Succession Regulation the choice-of-court agreement is conceived as strictly complementary in respect of the choice of law.<sup>1461</sup> In fact, the admissibility of the choice-of-court agreement is subject to the condition that the deceased has previously made a choice of law in accordance with Article 22 of the Succession Regulation and the parties concerned made a choice in respect of the courts of the Member State of the law chosen by the deceased. The function of the jurisdiction agreement is the establishment of the so-called *Gleichlauf*, in other words parallelism between the jurisdiction and applicable law, which would be gained also in absence of choice-of-law and choice-of-court agreements, through the habitual residence, which represents a general rule for jurisdiction (Article 4 of the Succession Regulation) and a general rule for applicable law (Article 21 of the Succession Regulation).<sup>1462</sup> As it is analysed further, the deceased is entitled to choose the law of his/her nationality, and the rule on a choice of court serves as a tool to reach the coincidence between *ius* and *forum*. The advantage of this approach is realized by the courts on the application of their own domestic law: the proceedings are easier to manage, less expensive, and less time-consuming.<sup>1463</sup> This emerges from Recitals No 27 and 28, which refer to the choice-of-court agreements' "mechanism" designed to ensure that the Member State court applies their own law.<sup>1464</sup> Thus, it is evident that party autonomy in the Succession Regulation is somewhat limited and aims mainly at establishing the coincidence between *ius* and *forum*.

Article 5 of the Succession Regulation determines a proper rule on choice-of-court agreements, although the choice of the potential *fora* is limited only to the Member State of

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<sup>1461</sup> F. MARONGIU BUONAIUTI, *Article 5. Choice-of-Court Agreement*, in A. L. CALVO CARAVACA, A. DAVÌ (eds), *The EU Succession Regulation: A Commentary*, Cambridge University Press, 2016, p. 149.

<sup>1462</sup> F. MARONGIU BUONAIUTI, *Article 5. Choice-of-Court Agreement*, in *The EU Succession Regulation: A Commentary*, *op. cit.*, p. 150.

<sup>1463</sup> I. QUEIROLO, *General Rules on Jurisdiction*, in *Final Study: Towards the entry into force of the succession regulation: building future uniformity upon past divergences*, *op. cit.*, p. 342.

<sup>1464</sup> See Recital No 27 and 28 of the Succession Regulation which provides: «*The rules of this Regulation are devised so as to ensure that the authority dealing with the succession will, in most situations, be applying its own law. This Regulation therefore provides for a series of mechanisms which would come into play where the deceased had chosen as the law to govern his succession the law of a Member State of which he was a national...One such mechanism should be to allow the parties concerned to conclude a choice-of-court agreement in favour of the courts of the Member State of the chosen law. It would have to be determined on a case-by-case basis, depending in particular on the issue covered by the choice-of-court agreement, whether the agreement would have to be concluded between all parties concerned by the succession or whether some of them could agree to bring a specific issue before the chosen court in a situation where the decision by that court on that issue would not affect the rights of the other parties to the succession.*».

the nationality of the deceased. There are several conditions that must be satisfied, which are analysed further. Moreover, the jurisdiction may also be conferred to the Member State court after the institution of the proceedings according to Article 7 lett. c) of the Succession Regulation. This rule is not based on the choice-of-court agreement within the meaning of Article 5 of the Succession Regulation, but on the fact that a Member State court, whose law was chosen by the deceased according to Article 22 of the Succession Regulation shall have jurisdiction if the parties to the proceedings have expressly accepted the jurisdiction of the court seized. This acceptance must be also distinguished from the jurisdictional rule under Article 9 of the Succession Regulation, where acceptance is implied. Article 9 of the Succession Regulation aims mainly at complementing Article 5 of the Succession Regulation by providing that where in the course of proceedings it appears that not all the parties to those proceedings were party to the choice-of-court agreement, the court shall continue to exercise jurisdiction if the parties to the proceedings which were not party to the agreement enter an appearance without contesting the jurisdiction of the court.

Thus, the “mechanism” allowing the parties concerned to conclude a choice-of-court agreement in favour of the courts of the Member State of the chosen law according to Article 5 of the Succession Regulation must be read in conjunction with Article 6, 7, and 9 of the Succession Regulation. Therefore, the choice of law, as well as the formal and substantive validity of Article 5 of the Succession Regulation, are analysed together with Article 6, 7, and 9 of the Succession Regulation.

### **2.1. Effects of the Choice-of-Court Agreement**

By virtue of Article 5 of the Succession Regulation, only exclusive jurisdiction agreements are admitted in the Succession Regulation. It means, that non-exclusive jurisdiction clauses are not valid for the purposes of the Succession Regulation. For example, the Succession Regulation does not permit the parties to widen the choice of jurisdictional grounds by adding jurisdictions (of the Member State court of the nationality of *de cujus*) to the general jurisdiction laid down in Article 4 of the Succession Regulation. This option is explained by the aim of the Succession Regulation to make the *ius* and *forum* coincide and by the effort to

prevent the multiplicity of competent Member States.<sup>1465</sup> The question arises how should choice-of-court agreements be treated where the parties did not specify the exclusivity of the jurisdiction. The Brussels Ibis Regulation and the Maintenance Regulation provide for an assumption, under which agreements are considered to be exclusive if the parties do not express otherwise. Thus, from the lack of this assumption in the Succession Regulation it may be deduced that the Succession Regulation requires ascertaining the mutual will of the parties by the seized Member State court, which, should favour the validity of the agreement over material errors of the parties.<sup>1466</sup>

Article 6 lett. b) of the Succession Regulation provides that if the deceased chose the law to govern his/her succession pursuant to Article 22 of the Succession Regulation, the court seized pursuant to Article 4 or Article 10 of the Succession Regulation shall decline jurisdiction if the parties to the proceedings have a choice-of-court agreement in favour of the Member State court whose law was chosen in accordance with Article 5 of the Succession Regulation.<sup>1467</sup> In other words, the negative effect of the jurisdiction agreement according to Article 5 of the Succession Regulation is confirmed by the mandatory declining of the jurisdiction of the non-designated seized Member State court.<sup>1468</sup> Also, in this case, the prerequisite is a valid *professio juris* and the valid choice-of-court agreement.

A problem arises with identifying which Member State court should ascertain the existence and validity of the jurisdiction agreement. In case that only the non-designated Member State court is seized (i.e., there is *no lis pendens*) or is seized first, such a Member State court must provide a “full review” on the existence and the validity of the jurisdiction agreement and must decline (not only suspend) its jurisdiction in case of a valid jurisdiction agreement.<sup>1469</sup> After this moment, it is not possible to question the existence and validity of the jurisdiction

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<sup>1465</sup> A. BONOMI, R. DI IORIO, *Accordi di scelta del foro*, in A. BONOMI, P. WAUTELET (eds), *Il Regolamento europeo sulle successioni: Commentario al Reg. UE 650/2012 in vigore dal 17 agosto 2015*, Giuffrè, 2015, p. 139.

<sup>1466</sup> I. QUEIROLO, *General Rules on Jurisdiction*, in *Final Study: Towards the entry into force of the succession regulation: building future uniformity upon past divergences*, *op. cit.*, p. 359.

<sup>1467</sup> Article 6 lett. a) of the Succession Regulation is not subject of the current analysis since it deals with the declination of jurisdiction at the request of one of the parties when the court of a Member State of the chosen law is better placed to rule on the succession.

<sup>1468</sup> A. BONOMI, R. DI IORIO, *Dichiarazione di incompetenza in caso di scelta di legge*, in A. BONOMI, P. WAUTELET (eds.), *Il Regolamento europeo sulle successioni: Commentario al Reg. UE 650/2012 in vigore dal 17 agosto 2015*, Giuffrè Editore, 2015, p. 146; H. PAMBOUKIS, *EU Succession Regulation No 650/2012: A Commentary*, Hart Publishing, 2017, p. 129.

<sup>1469</sup> A. BONOMI, R. DI IORIO, *Dichiarazione di incompetenza in caso di scelta di legge*, in *Il Regolamento europeo sulle successioni: Commentario al Reg. UE 650/2012 in vigore dal 17 agosto 2015*, *op. cit.*, p. 147.

agreement by the designated Member State court.<sup>1470</sup> This negative effect is connected with the positive effect laid down in Article 7 lett. a) of the Succession Regulation, which leads to the establishment of jurisdiction of the designated Member State court where a Member State court previously seized has declined jurisdiction in the same case pursuant to Article 6 lett. b) of the Succession Regulation. The establishment of jurisdiction is automatic and the designated Member State court is not entitled to re-examine the existence or validity of the *professio juris* and the jurisdiction agreement,<sup>1471</sup> although the examination of the non-designated court was not correct.<sup>1472</sup> This solution aims at preventing the negative conflict of the jurisdiction and *denegatio iustitiae*.<sup>1473</sup> Although this rule seems to be a new solution in the EU regulations, it practically adopts same approached endorsed by the ECJ in the *Gothaer* case where other Member State courts are bound by the final judgment regarding the validity of the jurisdiction clause.

On the contrary, where the designated Member State court is the only court seized or is first seized in accordance with Article 5 of the Succession Regulation, Article 7 lett. b) of the Succession Regulation provides that such Member State courts shall have jurisdiction to rule on the succession. It practically confirms the jurisdiction of the Member State court designated according to Article 5 of the Succession Regulation. In such a case, it is a designated Member State court which must examine the existence and the validity of the *professio juris* and the choice-of-court agreement pursuant to the conditions laid down in Article 5 of the Succession Regulation.

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<sup>1470</sup> A. BONOMI, R. DI IORIO, *Dichiarazione di incompetenza in caso di scelta di legge*, in Il Regolamento europeo sulle successioni: Commentario al Reg. UE 650/2012 in vigore dal 17 agosto 2015, *op. cit.*, p. 147.

<sup>1471</sup> A. BONOMI, R. DI IORIO, *Competenza in Caso di Scelta di Legge*, in A. BONOMI, P. WAUTELET (eds), Il Regolamento europeo sulle successioni: Commentario al Reg. UE 650/2012 in vigore dal 17 agosto 2015, Giuffrè, 2015, p. 151

<sup>1472</sup> F. ODESKY, *Article 6: Declining of jurisdiction in the event of a choice of law*, in U. BERGQUIST, D. DAMASCELLI, R. FRIMSTON, P. LAGARDE, F. ODESKY, B. REINHARTZ (eds), EU Regulation on Succession and Wills: Commentary, Otto Schmidt, 2015, p. 80.

<sup>1473</sup> A. BONOMI, R. DI IORIO, *Dichiarazione di incompetenza in caso di scelta di legge*, in Il Regolamento europeo sulle successioni: Commentario al Reg. UE 650/2012 in vigore dal 17 agosto 2015, *op. cit.*, p. 147; A. BONOMI, R. DI IORIO, *Competenza in Caso di Scelta di Legge*, in Il Regolamento europeo sulle successioni: Commentario al Reg. UE 650/2012 in vigore dal 17 agosto 2015, *op. cit.*, p. 152.



## 2.2. Conditions for Application of the Rule on Choice-of-Court Agreement

Several conditions must be satisfied in order to give effect to the valid jurisdiction agreement according to Article 5 of the Succession Regulation: (i) there must be a previous *professio juris* made by the deceased according to Article 22 of the Succession Regulation; (ii) the choice-of-court agreement must fulfil certain formal requirements; (iii) it must be substantively valid; and (iv) the choice-of-court agreement must be concluded by the concerned parties.

### 2.2.1. Choice-of-Law under Article 22 of the Succession Regulation

The first mandatory prerequisite of the choice of *forum* is a previous *professio juris*. The choice of law must be effectuated by the *de cuius*, whereas the choice-of-court agreement must be concluded by the “parties concerned”. Moreover, while the choice of law in accordance with Article 22 of the Succession Regulation may result in the designation of the law of a Third State, the choice-of-court provision finds no application if the *de cuius* chose the law of a Third State. It means that where the deceased is a national of the Third State, the choice-of-court agreement is not governed by the Succession Regulation.<sup>1474</sup> This clearly follows from the wording of Article 22 par. 1 in conjunction with Article 20 of the Succession Regulation, which supports the universalistic approach of the conflict-of-laws rules already admitted in other regulations. Converse to this approach, Article 5 of the Succession Regulation provides that the parties concerned may agree on a court, whose law was chosen by the deceased pursuant to Article 22, only if such law is the law of a Member State. It must be borne in mind that the *renvoi* in case of choice of law is excluded. Therefore, it is not possible to conclude the choice-of-court agreement in favour of the Member State court, where *renvoi* refers to such a Member State through the law of a Third State, which was chosen.<sup>1475</sup>

The choice-of-court agreement may not precede the *professio juris*<sup>1476</sup> and other forms of the intention of the deceased to designate a law (such as dispositions of property upon death or agreements as to succession) may not be admitted as an effective condition for applying the

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<sup>1474</sup> On the derogation from jurisdiction under the Succession Regulation, see *infra* Section 4 of this Subchapter.

<sup>1475</sup> See Article 34 par. 2 of the Succession Regulation.

<sup>1476</sup> F. MARONGIU BUONAIUTI, *Article 5. Choice-of-Court Agreement*, in *The EU Succession Regulation: A Commentary, op. cit.*, p. 154.

rule on choice-of-court agreements according to Article 5 of the Succession Regulation.<sup>1477</sup> Articles 24 and 25 of the Succession Regulation, which govern dispositions of property upon death and agreements as to succession, refers to *profession juris* under Article 22 of the Succession Regulation as to admissibility, substantial validity, and effects. However, Article 5 of the Succession Regulation clearly provides that the choice-of-court agreement is permitted only “where the law chosen by the deceased to govern his succession pursuant to Article 22 is the law of a Member State”. This establishes the coincidence between *ius* and *forum* for the succession as a whole. A different approach would lead to the introduction of the co-existence among concurrent jurisdictions.<sup>1478</sup>

The choice of law must satisfy the requirements of Article 22 of the Succession Regulation. It is likely that the consequence of an invalid *professio iuris* is the invalidation of the choice-of-court agreement. The valid *professio iuris* seems to be a precondition for a valid choice of court. Otherwise, the choice-of-court agreement itself would not meet the conditions prescribed in Article 5 of the Succession Regulation.<sup>1479</sup> However, if the concerned parties conclude a valid choice-of-court agreement, who could challenge the validity of the choice of law made by deceased? In this regard, the question arises whether the designated Member State court is obliged to assess the validity *ex officio*. The assessment of the jurisdiction *ex officio* according to Article 15 of the Succession Regulation in conjunction with the contextual wording of Articles 5, 6 lett. b) and 7 of the Succession Regulation suggest that the Member State court must review whether the deceased chose the law to govern his succession pursuant to Article 22 of the Succession Regulation. Due to the fact that Article 22 of the Succession Regulation determines the formal and substantive validity of the *professio iuris*, it may be deduced that the Member State court is obliged to assess the validity of the choice of

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<sup>1477</sup> On the same conclusion see A. BONOMI, R. DI IORIO, *Accordi di scelta del foro*, in *Il Regolamento europeo sulle successioni: Commentario al Reg. UE 650/2012 in vigore dal 17 agosto 2015*, *op. cit.*, p. 136; F. MARONGIU BUONAIUTI, *Article 5. Choice-of-Court Agreement*, in *The EU Succession Regulation: A Commentary*, *op. cit.*, p. 154; A. DAVÌ, A. ZANOBETTI, *Il nuovo diritto internazionale privato europeo delle successioni*, *op. cit.*, p. 206.

<sup>1478</sup> F. MARONGIU BUONAIUTI, *Article 5. Choice-of-Court Agreement*, in *The EU Succession Regulation: A Commentary*, *op. cit.*, p. 155.

<sup>1479</sup> I. QUEIROLO, *General Rules on Jurisdiction*, in *Final Study: Towards the entry into force of the succession regulation: building future uniformity upon past divergences*, *op. cit.*, p. 361.

law *ex officio*. Such examination of validity should be fully reviewed also by the seized non-designated Member State court, and the *prima facie* approach does not suffice.<sup>1480</sup>

### 2.2.2. Formal Validity

The formal requirements are laid down in Article 5 par. 2 of the Succession Regulation and provide that a choice-of-court agreement shall be expressed in writing, dated, and signed by the parties concerned. The formal requirements seem to be inspired by paragraph 2 of Article 4 of the Maintenance Regulation, which provides only that a choice-of-court agreement shall be in writing. In addition, the Succession Regulation requires the jurisdiction agreement to be in writing and dated. Moreover, Article 5 par 2, as well as Article 4 of the Maintenance Regulation specifies that any communication by electronic means which provides a durable record of the agreement shall be equivalent to a “writing”. Thus, the formal requirements in respect of the Brussels *Ibis* Regulation are limited, since jurisdiction agreements in succession matters in a form which accords with practices or usage would be meaningless. Also, the Succession Regulation does not define the agreement to be “in writing”, and thus, an autonomous interpretation can be searched for in the Brussels *Ibis* Regulation, when the real consensus of the parties must be ascertained.<sup>1481</sup>

It is questionable whether the manifestation of the agreement in writing requires the mutual agreement of the parties concerned, or whether the declaration of the intent of each party on a separate document, which is dated and signed, satisfies the formal requirements prescribed in Article 5 par. 2 of the Succession Regulation.<sup>1482</sup> The signature of the parties is typically considered as being part of a written agreement, at least for evidential purposes. The same also applies to the communication by electronic means which provides a durable record, that is, for the purpose of Article 5 of the Succession Regulation, assimilated into an agreement in

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<sup>1480</sup> A. BONOMI, R. DI IORIO, *Dichiarazione di incompetenza in caso di scelta di legge*, in *Il Regolamento europeo sulle successioni: Commentario al Reg. UE 650/2012 in vigore dal 17 agosto 2015*, *op. cit.*, p. 148; H. PAMBOUKIS, *EU Succession Regulation No 650/2012: A Commentary*, *op. cit.*, p. 130.

<sup>1481</sup> ECJ, Case C-150/80, *Elefanten Schuh*, par. 26; Case C-159/97, *Trasporti Castelletti*, par. 34, 48.

<sup>1482</sup> On the approach excluding unilateral declaration see A. BONOMI, R. DI IORIO, *Accordi di scelta del foro*, in *Il Regolamento europeo sulle successioni: Commentario al Reg. UE 650/2012 in vigore dal 17 agosto 2015*, *op. cit.*, p. 137; on the opposite approach affirming that the unilateral declaration meets the requirements as to form see F. ODERSKY, *Article 5: Choice-of-Court agreement*, in U. BERGQUIST, D. DAMASCELLI, R. FRIMSTON, P. LAGARDE, F. ODERSKY, B. REINHARTZ (eds), *EU Regulation on Succession and Wills: Commentary*, Otto Schmidt, 2015, p. 75.

writing. Thus, a digital signature should be part of the jurisdiction agreement concluded through means of electronic communication.<sup>1483</sup> The requirement of the date is then a significant factor for the determination of the moment of the conclusion of the choice-of-court agreement.<sup>1484</sup>

The Succession Regulation does not specify the moment when the choice-of-court agreement should be concluded. There are no doubts that the choice-of-court agreement is admitted after the opening of the succession and before the institution of the proceedings in the designated Member State court.<sup>1485</sup> On the other hand, it would be a too restrictive approach to prevent the concerned parties from designating the Member State court before the opening of the succession under the condition that the deceased had already chosen the law applicable to his/her succession as a whole.<sup>1486</sup> In case that the *professio juris* is withdrawn by the deceased, the choice-of-court agreement would not produce any effect.<sup>1487</sup> If the interpretation admits the possibility of designating a Member State court before the death of the deceased, it should be admitted as well the possibility to include the choice-of-court agreement in the agreement as to succession concluded between the *de cuius* and his/her heirs. In such a case, the principle of severability prescribed by the Brussels Ibis Regulation should be upheld. The validity of the agreement as to succession should not have an impact on the validity of the choice-of-court agreement.<sup>1488</sup> However, it must be borne in mind, that that the validity of the choice-of-court agreement is dependent on the valid *professio juris*.

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<sup>1483</sup> In support of this conclusion see: A. BONOMI, R. DI IORIO, *Accordi di scelta del foro*, in *Il Regolamento europeo sulle successioni: Commentario al Reg. UE 650/2012 in vigore dal 17 agosto 2015*, *op. cit.*, p. 137; H. PAMBOUKIS, *EU Succession Regulation No 650/2012: A Commentary*, *op. cit.*, p. 123. On the doubts whether it is not sufficient the document signed, scanned and transmitted see F. ODESKY, *Article 5: Choice-of-Court agreements*, *op. cit.*, p. 75.

<sup>1484</sup> F. MARONGIU BUONAIUTI, *Article 5. Choice-of-Court Agreement*, in *The EU Succession Regulation: A Commentary*, *op. cit.*, p. 157.

<sup>1485</sup> A. BONOMI, R. DI IORIO, *Accordi di scelta del foro*, in *Il Regolamento europeo sulle successioni: Commentario al Reg. UE 650/2012 in vigore dal 17 agosto 2015*, *op. cit.*, p. 138.

<sup>1486</sup> A. BONOMI, R. DI IORIO, *Accordi di scelta del foro*, in *Il Regolamento europeo sulle successioni: Commentario al Reg. UE 650/2012 in vigore dal 17 agosto 2015*, *op. cit.*, p. 138; F. MARONGIU BUONAIUTI, *Article 5. Choice-of-Court Agreement*, in *The EU Succession Regulation: A Commentary*, *op. cit.*, p. 152; *contro* O. FERACI, *La nuova disciplina europea della competenza giurisdizionale in materia di successioni mortis causa*, in *Cuadernos de Derecho Transnacional*, 5:2 (2013), p. 306.

<sup>1487</sup> A. BONOMI, R. DI IORIO, *Accordi di scelta del foro*, in *Il Regolamento europeo sulle successioni: Commentario al Reg. UE 650/2012 in vigore dal 17 agosto 2015*, *op. cit.*, p. 138; F. MARONGIU BUONAIUTI, *Article 5. Choice-of-Court Agreement*, in *The EU Succession Regulation: A Commentary*, *op. cit.*, p. 152.

<sup>1488</sup> ECJ, Case, C-269/95, *Benincasa*, par. 25. On support of this conclusion see: A. BONOMI, R. DI IORIO, *Accordi di scelta del foro*, in *Il Regolamento europeo sulle successioni: Commentario al Reg. UE 650/2012 in vigore dal 17 agosto 2015*, *op. cit.*, p. 138.

Jurisdiction may also be attributed to the court also after the institution of the proceedings according to Article 7 lett. c) of the Succession Regulation. This rule is not based on the choice-of-court agreement within the meaning of Article 5 of the Succession Regulation, but on the fact that a Member State court, whose law was chosen by the deceased according to Article 22 of the Succession Regulation shall have jurisdiction if the parties to the proceedings have expressly accepted the jurisdiction of the court seized. Therefore, the last moment when it is possible to accept jurisdiction during the proceedings depends on the procedural law of the seized Member State court.<sup>1489</sup> On the other hand, this rule may be considered as obsolete since Article 5 of the Succession Regulation does not pose a limit regarding the moment of conclusion of the agreement. It is questionable whether such an agreement should respect the formal requirements in Article 5 par. 2 of the Succession Regulation, or, whether may also be concluded orally at a hearing of the proceedings, or in other manners according to the procedural requirements of the seized Member State court, such as recorded in the minutes of the proceedings.<sup>1490</sup> This acceptance must be distinguished from jurisdiction under Article 9 of the Succession Regulation, where the acceptance is implied. Where, in the course of proceedings it appears that not all the parties to those proceedings were party to the choice-of-court agreement, the court shall continue to exercise jurisdiction if the parties to the proceedings, which were not party to the agreement, enter an appearance without contesting the jurisdiction of the court.

### 2.2.3. Substantive Validity

Article 5 of the Succession Regulation does not determine the rule on substantive validity like the Brussels I Regulation and all the Regulations in the family matters. Also, in this case, it seems regrettable that the rule was not inspired by the new rule on substantive validity

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<sup>1489</sup> A. BONOMI, R. DI IORIO, *Accordi di scelta del foro*, in *Il Regolamento europeo sulle successioni: Commentario al Reg. UE 650/2012 in vigore dal 17 agosto 2015*, *op. cit.*, p. 139; A. BONOMI, R. DI IORIO, *Competenza in caso di scelta di legge*, in *Il Regolamento europeo sulle successioni: Commentario al Reg. UE 650/2012 in vigore dal 17 agosto 2015*, *op. cit.*, p. 152.

<sup>1490</sup> On the approach that the formal validity of acceptance should be based on the same conditions set out by Article 5 of the Succession Regulation see I. QUEIROLO, *General Rules on Jurisdiction*, in *Final Study: Towards the entry into force of the succession regulation: building future uniformity upon past divergences*, *op. cit.*, p. 369; *contra* F. MARONGIU BUONAIUTI, *Article 7. Jurisdiction in the Event of a Choice of Law*, in A. L. CALVO CARAVACA, A. DAVÌ (eds), *The EU Succession Regulation: A Commentary*, Cambridge University Press, 2016, p. 176.

included in Article 25 of the Brussels Ibis Regulation. Should substantive validity of the choice-of-court agreement under Article 5 of the Succession Regulation adopt the solution laid down in the Brussels Ibis Regulation? According to some authors, the gap in the Succession Regulation should be filled by the solution adopted in the Brussels Ibis Regulation. Thus, the answers concerning the substantive validity of the jurisdiction agreement are to be searched for in the conflict-of-laws rules of the designated Member State court.<sup>1491</sup> The application of the law of the chosen Member State court may be supported by the reasonable expectations of the parties and by the strict interrelationship between *ius* and *forum*. The parties expressed their intention to consider the legal order of the nationality of the deceased, whose law was chosen and such a legal order would be competent to regulate the succession in terms of the applicable law and jurisdiction.<sup>1492</sup> Moreover, this solution circumvents the non-uniformity between the designated court and seized non-designated court,<sup>1493</sup> which seems to be relevant mainly in the context of Article 6 lett. b) and Article 7 lett. a) of the Succession Regulation. As analyzed above, according to Article 6 lett. b) of the Succession Regulation the non-designated Member State court has a duty to decline its jurisdiction whenever the parties opted for the jurisdiction agreement according to Article 5 of the Succession Regulation. The examination of the jurisdiction agreement by the seized non-designated Member State court must precede the declaration of its lack of jurisdiction. It should be admitted that the examination of the jurisdiction agreement must be based on the full review approach since the existence and validity of the jurisdiction agreement are not subject to the further examination by the designated Member State court within the meaning of Article 7 lett. a) of the Succession Regulation, which is bound by the examination of the

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<sup>1491</sup> In this regard see A. Bonomi, R. Di Iorio, *Accordi di scelta del foro*, in Il Regolamento europeo sulle successioni: Commentario al Reg. UE 650/2012 in vigore dal 17 agosto 2015, *op. cit.*, p. 136. See also H. PAMBOUKIS, *EU Succession Regulation No 650/2012: A Commentary*, *op. cit.*, p. 123, where the author retains that «the Succession regulation does not contain any provisions with respect to the applicable law, however Regulation 1215/2012 may very well be applied without any difficulty», but on the other hand the author continues «Consequently, the applicable law shall be determined by the conflict-of-laws rule of the court seized». On the doubts regarding the future interpretation of the ECJ affirming the extension of the Brussels Ibis Regulation's approach into the Succession Regulation due to the differences between the Regulations see I. QUEIROLO, *General Rules on Jurisdiction*, in Final Study: Towards the entry into force of the succession regulation: building future uniformity upon past divergences, *op. cit.*, p. 363.

<sup>1492</sup> On similar conclusions see F. MARONGIU BUONAIUTI, *Article 5. Choice-of-Court Agreement*, in The EU Succession Regulation: A Commentary, *op. cit.*, p. 159.

<sup>1493</sup> R. A. BRAND, P. HERRUP, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents*, *op. cit.*, p. 90.

non-chosen Member State court.<sup>1494</sup> Therefore, the application of the law of the chosen Member State court by the non-chosen Member State court would ensure the same result on the substantive validity of the jurisdiction agreement, which would be gained by the chosen Member State court.

Or, as the other solution to the demonstrated *lacuna* concerning the substantive validity of the choice-of-court agreement, the case of C-159/97, *Trasporti Castelletti* may be useful. According to this interpretation, an inquiry on the existence of consent involves only the application of the rule of formal requirements and provides a self-sufficient test for the validity of jurisdiction clauses.<sup>1495</sup> The last possibility encompasses the application of *lex fori*.<sup>1496</sup>

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<sup>1494</sup> A. BONOMI, R. DI IORIO, *Dichiarazione di incompetenza in caso di scelta di legge*, in Il Regolamento europeo sulle successioni: Commentario al Reg. UE 650/2012 in vigore dal 17 agosto 2015, *op. cit.*, p. 147.

<sup>1495</sup> ECJ, Case C-159/97, *Trasporti Castelletti*, par. 49. See also ECJ, Case C-116/02, *Gasser*, par. 51 and ECJ, Case C-116/02, *Gasser*, Opinion of Advocate General Leger, par. 78. In support of the approach concerning the interference of the ECJ interpretation on consensus between the parties, which must be clearly and precisely demonstrated see I. QUEIROLO, *General Rules on Jurisdiction*, in Final Study: Towards the entry into force of the succession regulation: building future uniformity upon past divergences, *op. cit.*, p. 362.

<sup>1496</sup> A. DAVÌ, A. ZANOBETTI, *Il nuovo diritto internazionale privato europeo delle successioni*, *op. cit.*, p. 205, where according to the author, the choice-of-court agreement is a procedural agreement which should be governed by *lex fori*, which is the law of the last habitual residence, since the courts of the habitual residence with jurisdiction according to Article 4. Or, the designated law should be examined by virtue of Article 7 lett. b). Thus, the agreement should respect both laws. On the other hand, it was suggested to apply the law which governs the successions. See original text: «*il regolamento non precisa in base a quale legge debba essere valutata la validità sostanziale dell'accordo. Trattandosi di accordo processuale, si dovrebbe, a rigore, ritenere applicabile la lex fori, vale a dire la legge del paese di ultima residenza abituale, i cui tribunali sono competenti ai sensi dell'art. 4, oppure la legge designata, in applicazione dell'art. 7, lett. b), a seconda del giudice dal quale la validità dell' accordo debba venire valutata. L'accordo dovrebbe quindi in pratica rispettare i requisiti stabiliti da entrambe le leggi. È stato però suggerito che la validità sostanziale dell' accordo di scelta del foro sia invece da considerare sottoposta alla stessa legge che regola la successione.*». See also A. LEANDRO, *La giurisdizione nel regolamento dell'Unione europea sulle successioni mortis causa*, in P. FRANZINA, A. LEANDRO (eds), *Il diritto internazionale privato europeo delle successioni mortis causa*, Giuffrè, 2013, p. 69, where according to the author, substantive validity depends on the legal system of the private international law of the *forum* seized (that do not have to be necessarily the prorogued one) and is governed by the *lex fori* which governs the procedural effects of the prorogation agreement. See original text: «*mentre quella sostanziale, nel silenzio del regolamento, va risolta alla luce del sistema di diritto internazionale privato del foro adito (prorogato o no che sia) ed è immaginabile che essa sia regolata dalla lex fori in qualità di legge notoriamente richiamata per disciplinare gli effetti processuali della proroga.*».

#### 2.2.4. Parties to the Agreement

Article 5 of the Succession Regulation provides that the parties concerned may agree on a jurisdiction agreement.<sup>1497</sup> The concept of “the parties concerned” is not defined. The heirs and the legatees can be included under the term, which is evident from the numerous references in the Succession Regulation.<sup>1498</sup> However, the main problem lies in the difficulty of identifying all parties concerned. In case the agreement is concluded before opening the succession, all parties concerned do not have to be known at this stage. The difficulties with the identification of the parties may be evident mainly in the non-contentious proceedings, such a proceeding directed to determine the heirs.<sup>1499</sup> Moreover, the positions of the specific group of subjects in the succession proceedings, such as the creditors, remains controversial. Thus, the notion of the parties concerned should be limited in a manner that “*there must be a direct and objective connection between the succession and the parties.*”<sup>1500</sup> In consequence, the persons with a mere claim against the estate,<sup>1501</sup> should not be considered as sufficiently concerned and the creditor’s claim should be governed by the jurisdictional rules applicable to the debt collection.<sup>1502</sup>

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<sup>1497</sup> See the proposal on a choice of court of the Max Planck Institute for Comparative and International Private Law, Comments on the European Commission’s Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, p. 50-51, where the Institute suggested to grant freedom of choice of jurisdiction to the person whose succession is concerned on the basis of a testamentary disposition and to the parties to the dispute with regard to contentious proceedings in succession matters: «1. A person may by way of a testamentary disposition provide that a court or the courts of a Member State whose law they may choose to govern the succession pursuant to Articles 17, 18(3) or 18a(3) shall have jurisdiction to rule on their succession as a whole or in part... 2. The parties to a dispute may agree that a court or the courts of a Member State shall have jurisdiction to settle any contentious litigation proceedings which have arisen or which may arise among them in connection with the succession...».

<sup>1498</sup> See for example Recital No 32 of the Succession Regulation. On this conclusion see F. ODERSKY, *Article 5: Choice-of-Court Agreement*, in EU Regulation on Succession and Wills: Commentary, *op. cit.*, p. 72-73; H. PAMBOUKIS, *EU Succession Regulation No 650/2012: A Commentary*, *op. cit.*, p. 124, I. QUEIROLO, *General Rules on Jurisdiction*, in Final Study: Towards the entry into force of the succession regulation: building future uniformity upon past divergences, *op. cit.*, p. 359.

<sup>1499</sup> These proceedings are covered by the Succession Regulation according to Article 64 of the Succession Regulation. see F. ODERSKY, *Article 5: Choice-of-Court agreement*, in EU Regulation on Succession and Wills: Commentary, *op. cit.*, p. 73.

<sup>1500</sup> I. QUEIROLO, *General Rules on Jurisdiction*, in Final Study: Towards the entry into force of the succession regulation: building future uniformity upon past divergences, *op. cit.*, p. 359.

<sup>1501</sup> On this conclusion see F. ODERSKY, *Article 5: Choice-of-Court Agreement*, in EU Regulation on Succession and Wills: Commentary, *op. cit.*, p. 73.

<sup>1502</sup> A. BONOMI, R. DI IORIO, *Accordi di scelta del foro*, in Il Regolamento europeo sulle successioni: Commentario al Reg. UE 650/2012 in vigore dal 17 agosto 2015, *op. cit.*, p. 137. On the opposite approach where the creditors should be covered by the term “concerned parties” see H. PAMBOUKIS, *EU Succession Regulation No 650/2012*, *op. cit.*, p. 124, where according to the author: «*there is no reason why to exclude the*



In the proceedings where the compulsory participation of the specific parties is required (i.e., compulsory joinders), the choice-of-court agreement is valid only when all compulsory joinders are parties to the jurisdiction agreement.<sup>1503</sup> If during the proceedings it appears that not all the compulsory joinders concluded the choice-of-court agreement, the designated Member State court cannot rule on the succession,<sup>1504</sup> unless the parties have expressly accepted the jurisdiction of the court seized according to Article 7 lett. c) of the Succession Regulation, or compulsory joinders who were not a party to the agreement enter an appearance without contesting the jurisdiction of the court pursuant to Article 9 of the Succession Regulation. In other words, Article 7 lett. c) and Article 9 of the Succession Regulation gives to the court a possibility to “heal” the invalid jurisdiction agreement where the jurisdiction agreement was not concluded with all compulsory concerned parties. However, the identification of all concerned parties and the validity of the jurisdiction agreement may be even more complicated when the non-designated Member State court was seized previously according to Article 4 of the Succession Regulation. When the non-designated Member State court declines its jurisdiction according to Article 6 lett. b) of the Succession Regulation after having assessed positively the validity of the jurisdiction agreement (which covers the question of the participation of all parties concerned), the designated Member State court is bound by this decision by virtue of Article 7 lett. a) of the Succession Regulation and cannot review the validity of the jurisdiction agreement. However, where the compulsory participation of the specific parties in the proceedings is required, and it appears that all compulsory joinders were not parties to the jurisdiction agreement and did not agree on the jurisdiction according to Article 7 of the Succession Regulation, or did not enter an appearance according to Article 9 par. 1 of the Succession Regulation, the choice-of-court agreement should be invalid, and the designated Member State court should not rule on

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*creditors since “the prorogation of jurisdiction aims exactly to achieve legal unity with respect to all issues related to the inheritance».* On support of this latter opinion see P. LAGARDE, *Les principes de bases du nouveau règlement européen sur les successions*, *Revue critique de droit international privé* 4 (2012), p. 691.

<sup>1503</sup> On relationship between jurisdiction based on the choice-of-court agreement and compulsory joinders under the Succession Regulation see A. BONOMI, R. DI IORIO, *Accordi di scelta del foro*, in *Il Regolamento europeo sulle successioni: Commentario al Reg. UE 650/2012 in vigore dal 17 agosto 2015*, *op. cit.*, p. 136; H. PAMBOUKIS, *EU Succession Regulation No 650/2012: A Commentary*, *op. cit.*, p. 124.

<sup>1504</sup> A. BONOMI, R. DI IORIO, *Accordi di scelta del foro*, in *Il Regolamento europeo sulle successioni: Commentario al Reg. UE 650/2012 in vigore dal 17 agosto 2015*, *op. cit.*, p. 136. In such a case where the measures have been already taken, they will produce the effects until the time they will be changed.

the succession.<sup>1505</sup> In such a case, as provided in Article 9 par. 2 and 3 of the Succession Regulation, if jurisdiction is contested by parties to the proceedings which were not a party to the agreement, the court shall decline jurisdiction and the jurisdiction over the succession shall lie with the courts having jurisdiction pursuant to Article 4 or Article 10. However, the non-designated Member State, which is competent according to Article 4 of the Succession Regulation, already declined its jurisdiction according to Article 6 lett. b) of the Succession Regulation. Therefore, there are two possible results: either the designated Member State court declines its jurisdiction as provided in Article 9 par. 2 and 3 of the Succession Regulation, which could result in the *denegatio iustitiae*. Or the designated Member State court assumes its jurisdiction, but the jurisdiction agreement should not produce any effects for the compulsory joinders which were not a party to the agreement.<sup>1506</sup>

In some cases, the Succession Regulation acknowledges that a choice-of-court agreement might be concluded only by some of the concerned parties *in relation to a specific issue*.<sup>1507</sup> In such a case, this possibility must be determined on a case-by-case basis, depending on the issue covered by the choice-of-court agreement where the decision by that court on that issue would not affect the rights of the other parties to the succession.<sup>1508</sup> It seems that such a situation is foreseen in Article 7 lett. c) of the Succession Regulation, which makes reference simply to the “parties to the proceedings” where only the acceptance is required only by the parties involved in the specific proceedings.<sup>1509</sup> On the other hand, it can be argued that Article 7 lett. b) of the Succession Regulation also makes reference to the “parties to the

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<sup>1505</sup> A. BONOMI, R. DI IORIO, *Accordi di scelta del foro*, in *Il Regolamento europeo sulle successioni: Commentario al Reg. UE 650/2012 in vigore dal 17 agosto 2015*, *op. cit.*, p. 136. In such a case where measures have been already taken, they will produce effects until the time they are changed.

<sup>1506</sup> On the conclusion that the jurisdiction agreement cannot produce any effects for the parties which were not a party to the agreement A. BONOMI, R. DI IORIO, *Accordi di scelta del foro*, in *Il Regolamento europeo sulle successioni: Commentario al Reg. UE 650/2012 in vigore dal 17 agosto 2015*, *op. cit.*, p. 137.

<sup>1507</sup> Emphasis added.

<sup>1508</sup> See Recital No 28 of the Succession Regulation.

<sup>1509</sup> In this regard see I. QUEIROLO, *General Rules on Jurisdiction*, in *Final Study: Towards the entry into force of the succession regulation: building future uniformity upon past divergences*, *op. cit.*, p. 369-370, where according to the author «*on the other hand, the express acceptance of jurisdiction in the proceedings can constitute a way through which a subject, who is not bound by a choice of court agreement previously concluded by other parties, can subsequently adhere to the agreement.*». See also F. MARONGIU BUONAIUTI, *Article 7. Jurisdiction in the Event of a Choice of Law*, in *The EU Succession Regulation: A Commentary*, *op. cit.*, p. 175, where according to the author, the acceptance only produces effects regarding the specific proceedings commenced before the court seized.

proceedings” in the context of Article 5 of the Succession Regulation, and thus, it must have the same meaning as the parties concerned.<sup>1510</sup>

### 3. *Lis Pendens* under the Succession Regulation

The “first seized *lis pendens*” rule was inspired by the Brussels I Regulation. 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. However, the rule giving precedence to the Member State court designated in the jurisdiction agreement to decide on its jurisdiction in case of *lis pendens* (Article 31 par. 2 of the Brussels Ibis Regulation) was not introduced into the Succession Regulation. On the contrary, Article 6 lett. b) which must be read in conjunction with Article 7 lett. a) of the Succession Regulation indirectly confirms the approach of the ECJ taken in the *Gasser* case. These provisions impose a general duty upon any other Member State court seized pursuant to Articles 4 or 10 of the Succession Regulation to decline jurisdiction, based on a choice-of-court agreement under Article 5 of the Succession Regulation, irrespective of the designated Member State court having been seized or not.<sup>1511</sup>

In practice, the decision on the existence and validity of the jurisdiction agreement lies with the seized non-designated Member State court according to Article 6 lett. a) and Article 17 of the Succession Regulation, once the non-designated Member State court is first seized. The designated Member State court shall of its own motion stay its proceedings until such time as the jurisdiction of the Member State court first seized is declined. Subsequently, the designated Member State court cannot bring into question the existence and the validity of the jurisdiction agreement and must establish its jurisdiction according to Article 7 lett. a) of the Succession Regulation.<sup>1512</sup> Also, even if the first seized non-chosen Member State court finds the jurisdiction agreement non-existent or invalid, “the first seized *lis pendens*” rule laid down

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<sup>1510</sup> In this regard see F. ODERSKY, *Article 7: Jurisdiction in the event of choice of law*, in U. BERGQUIST, D. DAMASCELLI, R. FRIMSTON, P. LAGARDE, F. ODERSKY, B. REINHARTZ (eds), *EU Regulation on Succession and Wills: Commentary*, Otto Schmidt, 2015, p. 82.

<sup>1511</sup> A. BONOMI, R. DI IORIO, *Dichiarazione di incompetenza in caso di scelta di legge*, in *Il Regolamento europeo sulle successioni: Commentario al Reg. UE 650/2012 in vigore dal 17 agosto 2015*, *op. cit.*, p. 147; F. MARONGIU BUONAIUTI, *Article 17. Lis pendens*, in A. L. CALVO CARAVACA, A. DAVÌ (eds), *The EU Succession Regulation: A Commentary*, Cambridge University Press, 2016, p. 265.

<sup>1512</sup> A. BONOMI, R. DI IORIO, *Dichiarazione di incompetenza in caso di scelta di legge*, in *Il Regolamento europeo sulle successioni: Commentario al Reg. UE 650/2012 in vigore dal 17 agosto 2015*, *op. cit.*, p. 147.

in Article 17 of the Succession Regulation applies and the designated Member State court shall of its own motion stay its proceedings until such time as the jurisdiction of the Member State court first seized is established and consequently, it declines jurisdiction in favour of the first seized Member State court.<sup>1513</sup> In this latter case, the *Gasser* problem regarding the “first seized *lis pendens*” rule may be even more significant. The Succession Regulation does not unify the solution on the substantive validity of the jurisdiction agreement. Thus, the non-designated Member State court may evaluate the matter of substantive validity according to its own *lex fori*,<sup>1514</sup> whereas the designated Member State court would apply the law of the chosen court, i.e., its own *lex fori*.

#### 4. Declination from Jurisdiction in favour of Third States

It must be borne in mind that the jurisdictional rules in the Succession Regulation are unlimited and exclusive in a sense that they delineate the jurisdiction of the Member State courts as well as Third State courts; indeed, there is no space for the national law.<sup>1515</sup> It means that the jurisdiction rules of the Succession Regulation apply to successions with international elements which are situated both within the EU and outside the EU. This model follows from the Maintenance Regulation concerning universal jurisdiction, rather than the Brussels Ibis Regulation, and the habitual residence of the defendant is no longer required.<sup>1516</sup> This excludes residual jurisdiction as provided in the Brussels Ibis Regulation.

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<sup>1513</sup> F. MARONGIU BUONAIUTI, *Article 7. Jurisdiction in the Event of a Choice of Law*, in *The EU Succession Regulation: A Commentary*, *op. cit.*, p. 179.

<sup>1514</sup> On the *lex fori* approach: A. DAVÌ, A. ZANOBETTI, *Il nuovo diritto internazionale privato europeo delle successioni*, *op. cit.*, p. 205, A. LEANDRO, *La giurisdizione nel regolamento dell’Unione europea sulle successioni mortis causa*, in *Il diritto internazionale privato europeo delle successioni mortis causa*, *op. cit.*, p. 69.

<sup>1515</sup> L. FUMAGALLI, *Il sistema italiano di diritto internazionale privato e processuale e il regolamento (UE) n. 650/2012 sulle successioni: spazi residui per la legge interna?*, *op. cit.*, pp. 779-792; A. DAVÌ, *Introduction*, in *The EU Succession Regulation: A Commentary*, *op. cit.*, p. 30; A. BONOMI, *Le Introduzione*, in A. BONOMI, P. WAUTELET (eds), *Il Regolamento Europeo sulle successioni: Commentario al reg. UE 650/2012 in vigore dal 17 agosto 2015*, Giuffrè Editore, 2015, p. 11.

<sup>1516</sup> See T. M. DE BOER, *What we should not expect from a recast of the Brussels Ibis Regulation*, *op. cit.*, p. 13, footnote 28 providing an example: «Thus, a French citizen living in New York could not start proceedings in France against her Swiss husband living in Switzerland, even if French national law would allow her to do so. Except for prorogation (Art. 4) or tacit submission (Art. 5), the Maintenance regulation does not offer her an opportunity to bring suit in France.». On the Succession Regulation see I. QUEIROLO, *General Rules on Jurisdiction*, in *Final Study: Towards the entry into force of the succession regulation: building future uniformity upon past divergences*, *op. cit.*, p. 350: «...under the Succession Regulation the jurisdiction of Italian courts is now subject to relevant limitations since the succession of an Italian national habitually resident abroad will fall

Also, the problem of giving effect to the jurisdiction of Third States courts in the presence of *Owusu* case seems to be even more significant. The *erga omnes* approach of the system of allocation of jurisdiction is reinforced by Article 10 on subsidiary jurisdiction and by Article 11 on *forum necessitatis*.<sup>1517</sup> It means that the Succession Regulation provides only for the reverse scenario. The Member State courts may establish jurisdiction over the succession although the deceased at the time of death is not located in a Member State. Or, Member States have jurisdiction if proceedings cannot reasonably be brought or conducted or would be impossible in a Third State with which the case is closely connected. Otherwise, there is no jurisdictional rule which directly deals with the jurisdiction of Third State courts, which might be better situated (for example, where there is a choice-of-court agreement in favour of the Third State court).

On the contrary, Article 5 of the Succession Regulation provides that where the law chosen by the deceased to govern his succession pursuant to Article 22 is the law of a Member State, the parties concerned may confer the jurisdiction to such a Member State court. Therefore, the *de cuius* may choose the law of his/her nationality even if it is a law of a Third State, but the concerned parties subsequently cannot designate such a Third State court. Since the objective of the Succession Regulation is the establishment of the coincidence between the *ius* and the *forum*, it seems regrettable that the Succession Regulation did not take the position that where the deceased chose a law of the Third State and the parties would be interested in seizing such a Third State court. Although the EU regulations cannot determine the allocation of the jurisdiction in respect of Third States,<sup>1518</sup> the Succession Regulation could provide for a rule to stay the proceedings in favour of the Third State court on the basis of the jurisdiction agreement.<sup>1519</sup> Unfortunately, due to the exhaustive system of the allocation of jurisdiction,

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*outside the jurisdiction of Italian courts, unless special heads of jurisdiction provided by the Regulation are to be applied.».*

<sup>1517</sup> L. FUMAGALLI, *Il sistema italiano di diritto internazionale privato e processuale e il regolamento (UE) n. 650/2012 sulle successioni: spazi residui per la legge interna?*, *op. cit.*, p. 790; P. FRANZINA, *Sul forum necessitatis nello spazio giudiziario europeo*, *op. cit.*, p. 1121; G. ROSSOLILLO, *Forum necessitatis e flessibilità dei criteri di giurisdizione nel diritto internazionale privato nazionale e dell'Unione europea*, in *op. cit.*, p. 413–15.

<sup>1518</sup> M. FALLON, T. KRUGER, *The spatial scope of the EU's rules on jurisdiction and enforcement of judgments: from bilateral modus to unilateral universality?*, *Yearbook of Private International Law* (2013), p. 1-36.

<sup>1519</sup> See for example, the European Group for Private International Law in its meeting in Bergen on 19-21 September 2008, available at: <https://www.gedip-egpil.eu/documents/gedip-documents-18pe.htm>, Article 23bis: «1. A court of a Member State seized of proceedings over which it has jurisdiction under this Regulation, and with regard to which the parties have given exclusive jurisdiction to a court or the courts of a non-Member State

which does not leave room for national law, it seems hardly arguable that the choice-of-court agreements in favour of a Third State court may be permitted under the national law.<sup>1520</sup> The only argument for upholding such a jurisdiction agreement might be the theory of *effet reflexe*, which might come into play when the *de cuius* designate, as the law applicable to the succession as a whole, the law of a Third State according to Article 22 of the Succession Regulation. On the other hand, nothing in the regulations impede the parties from bringing the dispute in front of the Third State court on the basis of the jurisdiction agreement. However, if the relevant parties enter into an agreement and file a petition before non-Member State court and later on, one of them files a claim in Member State court where the deceased had habitual residence, the problem of parallel proceedings occurs and the Member State court should assume its jurisdiction in accordance with Article 4 of the Succession Regulation.

The Succession Regulation does not address the case of *lis pendens* concerning the pending proceedings in the Third States, contrary to the Brussels Ibis Regulation, which would ensure desirable coordination. The *lis pendens* rule is designated only for the scope of determining the parallel proceedings between the Member State. The use of the theory of *effet reflexe* is rejected by some authors.<sup>1521</sup> Although Professor Bonomi points out the interpretation of the ECJ in *Owusu* case, he suggests application of the national rules for *lis pendens* even when the jurisdiction of the Member State court is based on Articles 4, 7, and 10 of the Succession Regulation since the application of national rules “is the mean for the coordination between the Member State courts and the Third States”.<sup>1522</sup> The specific consideration of the English

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*under an agreement complying with the conditions laid down by Article 23, shall not hear the proceedings unless and until the chosen court has declined jurisdiction. It shall stay the proceedings as long as the chosen court has not been seized or, if it has been seized, has not declined jurisdiction. It shall decline jurisdiction once the chosen court has given a judgment entitled to recognition under the law of the State of the court seized. Nevertheless, it may hear the proceedings if it appears that: (a) the chosen court will not give judgment within a reasonable time; (b) the chosen court will give a judgment which will not be entitled to recognition under the law of the State of the court seized.»* On the similar solution in the Succession Regulation see F. MARONGIU BUONAIUTI, *The EU Succession Regulation and third country courts*, *op. cit.*, p. 563.

<sup>1520</sup> On this conclusion see F. MARONGIU BUONAIUTI, *The EU Succession Regulation and third country courts*, *op. cit.*, p. 552.

<sup>1521</sup> A. BONOMI, R. DI IORIO, *Litispendenza*, in A. BONOMI, P. WAUTELET (eds), *Il Regolamento europeo sulle successioni: Commentario al Reg. UE 650/2012 in vigore dal 17 agosto 2015*, Giuffrè Editore, 2015, *op. cit.*, p. 201.

<sup>1522</sup> A. BONOMI, R. DI IORIO, *Litispendenza*, in *Il Regolamento europeo sulle successioni: Commentario al Reg. UE 650/2012 in vigore dal 17 agosto 2015*, *op. cit.*, p. 201. On the opposite approach see L. FUMAGALLI, *Il sistema italiano di diritto internazionale privato e processuale e il regolamento (UE) n. 650/2012 sulle successioni: spazi residui per la legge interna?*, *op. cit.*, pp. 790-791. See also for example L. MARI, *Il Diritto processuale civile della Convenzione di Bruxelles*, CEDAM, 1999, p. 779, where the author excludes the

courts concerning the interference of the *Owusu* case with the other regulations (in this case with the Brussels IIa Regulation) in the case *JKN v JCN*<sup>1523</sup> and in *Mittal v Mittal*<sup>1524</sup> may confirm Bonomi's opinion. The English court decided that the Member State court's discretion to stay under the national law remains in place where the competing proceedings are in a non-Member State and that the *Owusu* case is not applicable in the case of parallel proceedings.<sup>1525</sup> Moreover, it must be borne in mind that the policy of the Succession Regulation is also to avoid conflicting judgments in different jurisdictions.<sup>1526</sup> Some other doubts on the extension of the *Owusu* interpretation into the Succession Regulation may arise in the context of *forum non conveniens*, which is according to the ECJ liable "to undermine the predictability" of the rules of jurisdiction of the Brussels Convention. Contrary to this rejection, Article 6 lett. a) of the Succession Regulation is inspired by the *forum non conveniens*.<sup>1527</sup> In any case, it is regrettable that the Succession Regulation did not opt for the rule similar to the current Articles 33 and 34 of the Brussels Ibis Regulation. For example, the Member State court seized could take into the consideration the ability of a Third State court to exercise its jurisdiction pursuant to the national law of the seized Member State court, and where the dispute would be closely connected with the jurisdiction of a Third State court, such as when the coincidence of the *ius* and the *forum* occurs.<sup>1528</sup>

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application of the national law in the case of the *lis pendens* in case that the Member States courts have jurisdiction according to the Brussels regime.

<sup>1523</sup> *JKN v JCN*, [2010] EWHC 843 (Fam).

<sup>1524</sup> *AB v CB*, [2013] EWCA Civ 1255.

<sup>1525</sup> *JKN v JCN*, [2010] EWHC 843 (Fam), [149].

<sup>1526</sup> *AB v CB*, [2013] EWCA Civ 1255, [37].

<sup>1527</sup> A. BONOMI, R. DI IORIO, *Dichiarazione di incompetenza in caso di scelta di legge*, in *Il Regolamento europeo sulle successioni: Commentario al Reg. UE 650/2012 in vigore dal 17 agosto 2015*, *op. cit.*, p. 143.

<sup>1528</sup> F. MARONGIU BUONAIUTI, *The EU Succession Regulation and third country courts*, *op. cit.*, p. 551. However, there is a danger that the choice-of-court agreement is inadmissible according to national law. The author points out that according to the specific domestic law, the deceased is only entitled to make a choice of court, instead of the concerned parties, as the Succession Regulation provides.

## CONCLUSION

At the beginning of the conclusion of this PhD thesis, it is necessary to remember some facts. The importance and the main task of choice-of-court agreements are legal certainty and predictability by enabling the parties to plan the venue of the dispute with cross-border elements. Although the importance of the choice-of-court agreement was recognized in civil and commercial matters, this tool, which gives legal certainty to cross-border couples and individuals, proved to be necessary for international family and succession law as well.

It must be borne in mind that the efficacy of this tool is reliant on the statutory recognition of choice-of-court agreements and providing for the functional legal framework. Indeed, this PhD thesis examined the legal framework of choice-of-court agreements within the EU. In particular, this PhD thesis examined the rules on choice-of-court agreements (*e.g.*, the scope, conditions for application, formal and substantive validity, exclusivity, and severability) and related rules, such as rules on *lis pendens* among both Member States courts and parallel proceedings in Third States, under the Brussels Ibis Regulation, the 2007 Lugano Convention, the Hague Convention on Choice of Court Agreements, the Brussels IIa Regulation, the Maintenance Regulation, Matrimonial Property Regime Regulation, Regulation on the Property Consequences of Registered Partnerships, and the Succession Regulation.

The task of the first chapter was to create a foundation for comprehension of the examined argument. This served as a point for departure for the second chapter dealing with the “origin” rule on choice-of-court agreement in civil and commercial matters under the Brussels Convention which paved the way and influenced, to a certain extent, the “younger” rules on choice-of-court agreements in family and succession matters. This PhD thesis directed the readers to comprehend the gradual evolution of the argument, the push for the enhancement of the rules, the expansion of the rule to other subject-matters, and the actual trends.

In this conclusion, the questions raised in the Introduction must be addressed even though the answers can be found through the reading of the whole PhD thesis. The content of these questions is briefly summarized. The questions concern: (i) the identification of the problems, loopholes, gaps, or weak points and the solutions adopted in this regard, which may contribute to the enhancement and strengthening of the effectiveness of the rules on choice-of-court agreements; (ii) the approach for testing the rules and their interplay; (iii) the verification of the transferability of the approach assumed in one subject matter to another and



the possibility of assuming the conclusions transversely through all subject matters; and lastly (iv) the general conclusion of the functionality of the rules on choice-of-court agreements in the all analysed legal instruments. It is not possible to define the boundaries between individual questions because the approach to two or more questions often overlaps.

The first questions concern the identification of the problems, loopholes, gaps, or weak points and the solutions *de lege ferenda*. This PhD thesis detected both significant and less essential loopholes and weak points resulting from the wording of the texts of the rules on choice-of-court agreements, *lis pendens* laid down in the different legal instruments, as well as from the ECJ interpretation. Some of the loopholes, gaps, or weak points are free-standing since they create problems only in respect of a single legal instrument and the considerations cannot be extended into another legal instrument. Therefore, the solutions for the single problems must be assessed on the case-by-case basis, taking into consideration the specificity of the analysed legal problem and the nature of the subject matter. It is not surprising that the free-standing problems were practically detected in all target legal instruments. This conclusion only presents the most significant problems and the brief tailor-made recommendations for their solutions.

The analysis of the Brussels *Ibis* Regulation revealed several free-standing substantial problems in this PhD thesis when most of them relate to the new rules of the Brussels *Ibis* Regulation. It must be remembered that the new rules were established in the Brussels *Ibis* Regulation either due to the gaps in the wording of the rules of the Brussels I Regulation or due the ECJ interpretation based on the often criticized principle of the legal certainty, which may often contrast with limited effectivity and has turned out to be deceptive in practice.<sup>1529</sup> This PhD thesis recognized that the gap of substantive validity was positively refilled by the new rule of the Brussels *Ibis* Regulation, which clarified past doctrinal mismatches by providing the uniform solutions for the designated and non-designated Member State court. This thesis also affirms also that there is space for further enhancement. The effectiveness of choice-of-court agreements might be further strengthened by the delineation of its scope of application, such as answering questions of capacity, voidable circumstances, agency, and assignment. For this specific problem the thesis suggested using a proposal of Professor

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<sup>1529</sup> On the general consideration as to the principle of legal certainty see J. VAN MEERBEECK, *The principle of legal certainty in the case-law of the European Court of justice: from certainty to trust*, *European Law Review* 41:2 (2016), pp. 275-288.

Magnus as a springboard for reasoning for the next amendments, because the proposal recommended subsuming capacity, mistake, fraud, duress, as well as matters such as agency and assignment under the new rule of substantive validity.<sup>1530</sup>

Moreover, the ECJ interpretations, which are built on the principle of legal certainty, have led to the over-rigid application of the rules and even to the injustice.<sup>1531</sup> Therefore, different and new rules established in the Brussels *Ibis* Regulation aimed at correcting the ECJ interpretations undermining the effectiveness of the rule on choice-of-court agreements. The new rule on *lis pendens* giving precedence to the designated Member State court to decide on validity was a reaction to the ECJ interpretation provided in the *Gasser* case. It was demonstrated that even though the new *lis pendens* rule may limit the “torpedo actions”, a negative side of this rule was detected: the Brussels *Ibis* Regulation does not tackle the possibility of a disagreement between two seized Member State courts (although it will be limited due to the new rule on substantive validity). This *lacuna* may lead to a special type of parallel proceedings often resulting in a race to judgments.<sup>1532</sup> This result is caused by the combination of the imprecise wording regarding the extent of the review of the existence and validity of the jurisdiction agreement by the non-designated Member State (resulting in application of the “full review” approach), and by the *Gothaer* case, where the designated Member State courts are bound by the decision rendered by the non-designated Member State court regarding the validity of the jurisdiction clause. For this specific problem, it was suggested to perform a “*prima facie*” review.<sup>1533</sup> Another ECJ interpretation, which had a side-effect on choice-of-court agreements in favour of the Third States was the *Owusu* case. The criticised *Owusu* case exerted pressure on the adoption, at least of the partial solution - of Articles 33 and 34 dealing with the parallel proceedings in the Third States. Although the new Articles 33 and 34 of the Brussels *Ibis* Regulation enhance parallel proceedings in the Third States, the application only to pending proceedings in the Third States was evaluated as a

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<sup>1530</sup> U. MAGNUS, *Choice-of-court Agreements in the Review Proposal for the Brussels I Regulation*, in *The Brussels I Review Proposal Uncovered*, *op. cit.*, p. 93-95. On the general considerations on the substantive validity, related problems and the solutions under the Brussels Regime see *supra* Section 8.2., Subchapter I, Chapter Two.

<sup>1531</sup> A. DICKINSON, *Legal Certainty and the Brussels Convention - Too Much of a Good Thing?*, in P. DE VAREILLES-SOMMIERES (ed), *Forum Shopping in the European Judicial Area*, Hart Publishing, 2007, p. 136.

<sup>1532</sup> See Recital No 22 of the Brussels *Ibis* Regulation: «*The designated court should be able to proceed irrespective of whether the non-designated court has already decided on the stay of proceedings.*».

<sup>1533</sup> On the general considerations on the new rule on *lis pendens* under the Brussels Regime, and on the examples and solutions see *supra* Section 14, Subchapter I, Chapter Two.

weak point. Thus, it was recommended to extend the application of Articles 33 and 34 of the Brussels *Ibis* Regulation to cases when the Member State court is first seized.<sup>1534</sup>

The free-standing loopholes and weak points were identified in the wording of the rules under the EU Regulations in family and succession matters as well. Although several problems may be found under the Brussels *Iia* Regulation, it is presumed that the Proposal for a Recast of the Brussels *Iia* Regulation may resolve some of the problems. Such solutions include: determining the duration of the effect of the jurisdiction agreement under Article 12 par. 3 of the Brussels *Iia* Regulation;<sup>1535</sup> a more precise specification of the best interest of the child;<sup>1536</sup> application of Article 12 par. 3 of the Brussels *Iia* Regulation to the autonomous proceedings (C-656/13, *L v. M*);<sup>1537</sup> or the possibility of accepting jurisdiction during the proceedings, etc. However, as to the latter issue, it was noted that the new paragraph 5 of Article 10 of the Proposal does not shed light on the problem concerning the possibility to accept jurisdiction through the “submission of appearance” under Article 12 of the Brussels *Iia* Regulation.<sup>1538</sup> In respect of the Maintenance Regulation, it was noted that the exclusion of party autonomy in relation to the maintenance obligations towards a minor under the age of 18 might be seen as another weak point. In this case, various solutions were proposed which have taken into consideration the nature of the subject matter and the position of the minor as a weaker party. In consequence, it was proposed to give the option to the minor to choose a court through non-exclusive unilateral jurisdiction agreements; and to enable a discretionary power of the courts’ jurisdiction, when the best interest of the child should be considered, or to provide for a “escape clause” where the transfer of the proceedings to the better place court may be requested.<sup>1539</sup>

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<sup>1534</sup> On the general considerations on problem of *Owusu* case, the new rules on parallel proceeding with the Third States under the Brussels Regime, and on solutions see *supra* Section 15, Subchapter I, Chapter Two.

<sup>1535</sup> On the time limit of the effects of the agreement under the Brussels *Iia* Regulation see *supra* Section 2.1.2, Subchapter I, Chapter Three.

<sup>1536</sup> On the best interest of the child and new Proposal for a Recast of the Brussels *Iia* Regulation see *supra* Sections 2.2.3. and 2.3.3., Subchapter I, Chapter Three.

<sup>1537</sup> On the problem regarding wording of Article 12 par. 3 of the Brussels *Iia* Regulation providing that the courts of a Member State shall also have jurisdiction in relation to parental responsibility “*in proceedings other than those referred to in paragraph 1*”, and for the new Proposal for a Recast of the Brussels *Iia* Regulation, see *supra* Section 2.3., Subchapter I, Chapter Three.

<sup>1538</sup> On the problem of the submission by appearance under the Brussels *Iia* Regulation see *supra* Section 2.4., Subchapter I, Chapter Three.

<sup>1539</sup> On the general considerations on exclusion of choice-of-court agreements in relation to maintenance obligations towards a minor under the age of 18, and on solutions see *supra* Section 3.3., Subchapter I, Chapter Three.

Not only gaps and weaknesses were identified in the PhD thesis, but also uncertainties regarding the wording of the rules. These uncertainties were mainly due to the lack of doctrinal approaches and ECJ interpretation in respect of the young EU Regulations. The significant uncertainty, which may undermine the effectiveness of the rules on choice-of-court agreements, was identified under the Matrimonial Property Regime Regulation. In case that property regime is dealt simultaneously with divorce, legal separation, or marriage annulment, it is doubtful whether the parties may derogate from the jurisdiction of a Member State court seized with the divorce, legal separation, or marriage annulment proceeding according to first four indents of Article 3 par. 1 lett. a) or according to Article 3 par. 1 lett. b) of the Brussels *Ia* Regulation and may designate a different competent court according to Article 7 of the Matrimonial Property Regime Regulation.<sup>1540</sup>

Other loopholes can be called transversal since they affect more legal instruments cumulatively. The most serious loophole, which was revealed in chapter III, is the lack of a rule on a choice-of-court agreement for divorce. The lack of a rule on choice-of-court agreements for divorce, legal separation, or marriage annulment under the Brussels *Ia* Regulation prevents the spouses from planning the potential dispute in other connected family matters (maintenance, parental responsibility, property regime) and the effective concentration of the jurisdiction in the hand of a single Member State court for one package including all family matters. It was demonstrated that the concentration would be possible through: (i) Article 12 par. 1 of the Brussels *Ia* Regulation, which provides for the possibility to agree on jurisdiction of the Member State court having jurisdiction according to Article 3 of the Brussels *Ia* Regulation to matters of parental responsibility upon fulfilment of strict conditions (which is discretionary); (ii) according to Article 4 par. 1 lett. c) of the Maintenance Regulation, which confers jurisdiction upon agreement to the Member State court which has jurisdiction to settle disputes in matrimonial matters and maintenance obligations between spouses or former spouses; and (iii) according to Article 5 of the Matrimonial Property Regime Regulation, which provides for the automatic extension of jurisdiction of the Member State court competent to decide on the divorce, legal separation, or marriage annulment under the Brussels *Ia* Regulation.

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<sup>1540</sup> On this uncertainty under the Matrimonial Property Regime Regulation see *supra* Section 4.2.2., Subchapter I, Chapter Three.

Although it was expected that this loophole would be filled by the Proposal for a Recast of the Brussels IIa Regulation, no rule on choice-of-court agreements for divorce was proposed. Thus, it was affirmed that due to the absence of a rule on choice of court relative to divorce, separation, or marriage annulment, jurisdiction agreements in parental responsibility matters, maintenance, and property regime designating a court having jurisdiction in divorce, separation, or marriage annulment under the Brussels IIa Regulation, may benefit the parties who wish to “blindly” concentrate all proceedings, notwithstanding the impossibility to predict which court will assume jurisdiction. Such jurisdiction agreements may encourage “rush to court” tactics. The PhD thesis highlights the need to adopt a rule on choice-of-court relative to divorce, otherwise choice-of-court agreements would lose fundamental functions and would not be able to guarantee the legal certainty and predictability.<sup>1541</sup>

The other question, which must be addressed regards the approach for testing the rules and their interplay. As stated in the Introduction, the testing was pursued through the analysis of: the target legal instruments; the ECJ interpretation; the presentation of the different doctrinal approaches; and through the creation of the examples, considerations, and analysis of the examples; and evaluation, verification, and presentation of their outcomes. It is necessary to pause for the latter approach. According to the author, this approach represents an efficient tool for revealing different legal problems and gaps following their combined application. This approach allows imagining a concrete situation, to ratiocinate the examples, and to offer solutions. Sometimes, it was necessary to turn the example inside out which revealed the potential weaknesses and gaps. This approach also illustrated the outcomes arising out from the presented problems when the presentation of a specific problem would be difficult to follow only through the reading of the legal instruments and doctrinal studies.

By this means, two significant problems concerning the simultaneous application of the Brussels Ibis Regulation and the Hague Convention on Choice of Court Agreements were identified. The first problem concerns the interplay of the rules on *lis pendens* between the Member States under Articles 25 and 31 par. 2 of the Brussels Ibis Regulation and Articles 5 and 6 of the Hague Convention on Choice of Court Agreement and in the presence of one of the exceptions for a stay of proceedings (substantive validity) laid down in Article 6 of the

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<sup>1541</sup> On considerations regarding the lack of a rule on choice-of-court for divorce, legal separation, or marriage annulment under the Brussels IIa Regulation and the proposals see *supra* Section 2.6., Subchapter I, Chapter Three.

Hague Convention on Choice of Court Agreement. It was shown that the problem resulting in the parallel proceedings and irreconcilable judgments might arise due to the combination of: the applying a “full review” approach by the non-designated Member State court under the Brussels *Ibis* Regulation; the double test of capacity under both *lex fori* and law of the designated Member State court by a seized non-designated Member State court under the Hague Convention on Choice of Court Agreements; and by prevalence of the Hague Convention on Choice of Court Agreements over the Brussels *Ibis* Regulation pursuant to Article 26 par. 6 of the Hague Convention on Choice of Court Agreements.<sup>1542</sup>

The second problem concerned the interplay of the rules on parallel proceedings between the Member State and Third State under Articles 33 and 34 of the Brussels *Ibis* Regulation and Articles 5 and 6 of the Hague Convention on Choice of Court Agreement. One gap was detected: when all parties involved reside exclusively within the Member States, or when the plaintiff is domiciled in a Third State that is not a Contracting State and the defendant is domiciled in a Member State, and they agree on a court in the Contracting State. In such a case, the Brussels *Ibis* Regulation should prevail over the Hague Convention on Choice of Court Agreements. The problem of parallel proceedings and irreconcilable judgments may arise when the Member State court should establish jurisdiction according to Article 4 of the Brussels *Ibis* Regulation by virtue of the *Owusu* case and Articles 33 and 34 of the Brussels *Ibis* Regulation cannot operate. In such a case, it was recommended to follow the Impact Assessment, the Hague Convention on Choice of Court Agreements.<sup>1543</sup>

Another question concerns the transferability of the approach assumed in one subject matter to another and the possibility of the transversal conclusions through all subject matters. It was demonstrated that the extension of the approach assumed under the Brussels Regime into the

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<sup>1542</sup> On the problem concerning the simultaneous application of the Brussels *Ibis* Regulation and the Hague Convention on Choice of Court Agreements as to *lis pendens* between the Member States see *supra* Section 2.3., Subchapter III, Chapter Two.

<sup>1543</sup> A study to inform an impact assessment on the ratification of the Hague Convention on Choice of Court Agreements by the European Community, p. 105: «*Finally, a situation may arise under which all parties to a choice-of-court agreement are resident in EU Member States but they have agreed to a court in a non-EU Member State which is a Contracting Party to the Hague Convention. In this case, Art. 26 para 6 of the Hague Convention which refers to residence of the parties only, gives priority to Brussels I. However, if in such a case there is no exclusive jurisdiction of any court in a EU Member State under Brussels I, the Hague Convention could still apply even if, this situation is not exactly covered by any provision of the Hague Convention.*». On the problem concerning the simultaneous application of the Brussels *Ibis* Regulation and the Hague Convention on Choice of Court Agreements as to parallel proceedings in the Member State and Third State see *supra* Section 2.4., Subchapter III, Chapter Two.

family and succession matters might be possible through: (i) the ECJ interpretation as to the Brussels Regime; (ii) the doctrinal studies regarding the Brussels Regime; or (iii) by virtue of the new rules of the Brussels *Ibis* Regulation. This may be proved on the basis of the following demonstrations.

The gap regarding substantive validity was identified pursuant to all EU Regulations in family and succession matters,<sup>1544</sup> which represented a highly discussed problem under the Brussels Convention and Brussels I Regulation. The ECJ interpretation and the different doctrinal approaches were developed as to substantive validity of the jurisdiction agreement under the Brussels Regime,<sup>1545</sup> which have led to the adoption of a new rule under the Brussels *Ibis* Regulation. In consequence, the solution of the gap concerning substantive validity of jurisdiction agreements pursuant to all EU Regulations in family and succession matters may be, for example, found in the following: the ECJ interpretation in *Trasporti Castelletti* regarding the formal requirements under the Brussels Convention; in *lex fori* which reflects the comprehension of jurisdiction agreements as procedural agreements (which is mainly based on the doctrinal studies as to the Brussels Regime); or may be inspired by the new rule on substantive validity laid down in the Brussels *Ibis* Regulation.

The other demonstration concerns the gap on severability of the jurisdiction agreement in the EU Regulations in family and succession matters. This may have an impact on the validity of jurisdiction agreements forming part of the prenuptial agreement or the agreement as to the succession. In such a case, the scholars often refer to a solution in the ECJ's interpretation in the *Benincasa* case.<sup>1546</sup>

In this PhD thesis, it was also pointed out that some rules under the Brussels I(*bis*) Regulation were practically transposed into other EU Regulations in family and succession matters (for example, regarding the electronic communication, which is considered a written formal

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<sup>1544</sup> On the of the rule on substantive validity under the Brussels IIa Regulation see *supra* Section 2.5., Subchapter I, Chapter Three; under the Maintenance Regulation see *supra* Section 3.5., Subchapter I, Chapter Three; under the Regulations on the Property Regime see *supra* Section 4.4., Subchapter I, Chapter Three; under the Succession Regulation see *supra* Section 2.2.3., Subchapter II, Chapter Three.

<sup>1545</sup> On the gap in the rule on substantive validity under the Brussels I Regulation see see *supra* Section 8.1., Subchapter I, Chapter Two.

<sup>1546</sup> On the gap regarding severability of the jurisdiction agreement under the Maintenance Regulation see *supra* Section 3.6., Subchapter I, Chapter Three; under the Regulations on the Property Regime see *supra* Section 4.5., Subchapter I, Chapter Three, under the Succession Regulation see *supra* Section 2.2.2. Subchapter II, Chapter Three.

requirement under the Maintenance Regulation or Regulations of the Property Regimes; rules on *lis pendens* etc.). This raised the question whether such transposition of the rules from the Brussels Regime into the EU Regulations in family and succession matters was intentional and all conclusions assumed under the Brussels Regime may be automatically extended into another EU Regulations. This is a case of *lis pendens* rule. If such automatic extension should be accepted, the ECJ interpretation in *Gasser* case under the Brussels Regime may represent a threat for choice-of-court agreements in family and succession matters as well. In consequence, this PhD thesis also examined in what cases the *Gasser* case might come into a play in family and succession matters.<sup>1547</sup>

Lastly, it may be stated that one specific point is transversal for all subject matters. This connecting point, unfortunately, concerns the loophole on choice-of-court agreements in favour of the Third States and the extension of the *Owusu* case into the family and succession matters. Although the national case law of the specific Member States admitted derogation of jurisdiction in favour of the Third States in the context of the Brussels IIa Regulation (*JKN v JCN* case or *Mittal v Mittal* case),<sup>1548</sup> it was demonstrated that the *Owusu* case is often considered in cross-border family and succession matters. The justification for the derogation from *Owusu* case may be even more difficult due to the exclusive jurisdictional rules laid down in certain EU Regulations in family and succession matters excluding national law.

Despite all different weaknesses, gaps, and problems which were pointed out in this PhD thesis, it may be stated that the current legal framework of the rules on choice-of-court agreements laid down in the analysed legal instruments operate satisfactorily and contribute to legal certainty and predictability. However, there is wide room for the further enhancement and strengthening of the effectiveness of the rules on choice-of-court agreements. This PhD thesis analysed many aspects, included many considerations, and offered new conclusions and proposals. This analysis may be helpful for further improvement of the current wording of the target legal instruments. For example, this analysis may assist the ongoing proposals on the

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<sup>1547</sup> On *lis pendens* between the Member under the Brussels IIa Regulation, Maintenance Regulation; Regulations on the Property Regime see *supra* Section 5, Subchapter I, Chapter Three; under the Succession Regulation see *supra* Section 3, Subchapter II, Chapter Three.

<sup>1548</sup> On the considerations regarding the extension of the *Owusu* case under the Brussels IIa Regulation, Maintenance Regulation; Regulations on the Property Regime see *supra* Section 6, Subchapter I, Chapter Three; under the Succession Regulation see *supra* Section 4, Subchapter II, Chapter Three.



recast of the Brussels IIa Regulation or, the future proposals on the recast of the Maintenance Regulation.

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