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Jurisdiction over Consumer, Employment, and Insurance Contracts under the Brussels I Regulation Recast

Enhancing the Protection of the Weaker Party

Aleš Galič*, University of Ljubljana

Abstract: *This article aims to present and critically assess the changes which the Recast Brussels I Regulation brought to the protective regime for the weaker parties. Although these changes are not as far-reaching as in other fields, they are nevertheless important. The most significant changes concern the limited extension of the scope of applicability against defendants from third states and jurisdiction based on the entering of an appearance. Although these changes improve the procedural protection of the weaker parties in principle, some new dilemmas arise, which are liable to jeopardize certainty and predictability of the jurisdictional regime.*

Keywords: *Brussels I Regulation; international jurisdiction; weaker parties; jurisdiction agreement; recognition and enforcement.*

I. Introduction

Parties that are regarded as weaker from the socio-economic point of view in a contractual relationship must be offered adequate protection not only in substantive but also in procedural law.¹ The latter also extends, although not exclusively, to the requirement that such parties should be protected by the rules of jurisdiction more favourable to their interests than the general rules. The Brussels I Regulation contains three special sections establishing a protective jurisdictional regime: for policyholders and other beneficiaries under insurance contracts (Section 3), for individual contracts of employment (Section 5 of Chapter II), and for (certain categories of²) consumer contracts (Section 4). The system of protection introduced in these sections of the Brussels I Regulation is based on the idea that these parties are in a weaker position vis-à-vis the other party to the contract (insurers, employers, or traders), regarding their bargaining power, the cost

* Dr. Aleš Galič is Full Professor of Civil Procedure and International Private Law at the University of Ljubljana, Slovenia.

1 Cf. Vesna Lazić, *Procedural Justice for “Weaker Parties” in Cross-Border Litigation under the EU Regulatory Scheme*, *UTRECHT LAW REVIEW*, Nov. 2014, 100; Giuliano and Lagarde Report on the Convention on the law applicable to contractual obligations, OJ C 282, 31. 10. 1980, 1.

2 Pursuant to Art. 15 of the Brussels I Regulation (now Art. 17 of the Brussels I Recast), procedural protection for consumers only applies if “(a) it is a contract for the sale of goods on instalment credit terms; or (b) it is a contract for a loan repayable by instalments, or for any other form of credit made to finance the sale of goods; or (c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer’s domicile or, by any means, directs such activities to that Member State [...]”

risk of litigation, their level of knowledge, and access to legal information and advice.³ These parties should not be discouraged from suing by being compelled to bring action before the courts in the Contracting State in which the other party to the contract is domiciled.⁴ Pursuing a claim in a foreign jurisdiction would rarely be a realistic option for a weaker party – due to the higher cost risk, the loss of time due to travel, unfamiliarity with the foreign court and law system, as well as the language of the proceedings. Thus the right of access to court would remain guaranteed on a purely theoretical level only; it would, however, be ineffective in practice. *Mutatis mutandis*, the same reasoning applies to the weaker party who must act as a defendant in a foreign jurisdiction. Defending a claim in a foreign jurisdiction is usually unrealistic for a consumer, employee, or the insured.

The legal framework of protection concerning consumer and insurance contracts was established already in the 1968 Brussels Convention.⁵ However, individual employment contracts were ignored in the mentioned Convention,⁶ consequently subjecting them to the general rules and to the special rule on contractual obligations. Certain steps towards better protection of employees were taken in the case law of the CJEU⁷ and, later, in the 1989 amendment to the Brussels Convention.⁸ The protection of employees was further extended in the Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which further elaborated the system applying to consumer and insurance disputes.

On 10 January 2015 the Brussels I Regulation Recast (Regulation No. 1215/2012⁹) entered into force, marking the implementation of the long-awaited reform of the Brussels regime. Certain changes adopted through this reform also affect the protective jurisdictional regime for the weaker parties.

The special protective jurisdictional regime consists of three main elements: (1) additional and favourable bases for jurisdiction are available for the weaker party when he acts as the claimant, such as the place of the claimant's domicile in consumer and insurance disputes or the place where the employee habitually carries out his work in individual labour disputes; (2) a restriction prescribing that the weaker party, when in the position of a defendant, may only be sued in the place of his domicile; (3) the possibility for the parties to enter a jurisdiction agreement departing from the aforementioned jurisdictional regime is significantly restricted.

3 E.g., High Court – Queen's Bench Division (UK) 7. 11. 2005 – [2005] EWHC 2115 – The Channel Tunnel Group Ltd & Ors. See also PETER STONE, EU PRIVATE INTERNATIONAL LAW (2010) 123, *Giuliano and Lagarde* Report on the Convention on the law applicable to contractual obligations, OJ C 282, 31. 10. 1980, 1.

4 For consumer disputes see, e.g. CJEU 19. 1. 1993, C-89/91, *Shearson Lehmann Hutton*; for a comprehensive overview of the CJEU's case law concerning jurisdiction in labour disputes, see the Opinion of AG Trstenjak delivered on 16 December 2010 in C-29/10, *Heiko Koelzsch/Luxembourg*, paras. 53–58. The case relates to the determination of the applicable law for labour contracts, but the findings are equally relevant for the issue of jurisdiction. For disputes relating to insurance contracts, see CJEU 13. 7. 2000, C-412/98, *Group Josi/UGIC*.

5 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, OJ L 299, 31. 12. 1972, 32–42.

6 At that time it was expected that international labour law would be subject to regulation in a separate convention, however this plan has never materialised. See Abbo Junker, *Arbeitsverträge im Internationalen Privat- und Prozessrecht*, in Festschrift für Peter Gottwald zum 70. Geburtstag 293, 296 (Burkhard Hess et al. eds., 2014).

7 CJEU 26. 5. 1982, C-133/81, *Ivenel/Schwab*.

8 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.

9 Official Journal of the European Union, 20 December 2012, L 351/1.

II. The Extension of Territorial Scope: Defendants from Third States

As a rule, the 44/2001 Brussels I Regulation was applicable only if the defendant was domiciled in an EU Member State. If an action was filed against a third-state defendant, the court in a Member State determined its international jurisdiction on the basis of the national law of this State. This principle remains in force also after the Recast. However, it no longer applies to jurisdiction over consumer contracts and individual contracts of employment (Arts. 6, 18(1), 21(2)). Employees and consumers can thus rely on the protection offered by the Brussels I Regulation in disputes with employers and traders from third states (Arts. 6, 18(1), 21(2)).¹⁰

This additional protection applies only to consumers and workers when they are in the position of a claimant. On the contrary, consumers and employees from third states, when they are in the position of a defendant, do not fall within the scope of the Brussels I regime. A trader or an employer from an EU Member State can still rely on the jurisdiction rules in the national law of the forum state in the proceedings against employees or consumers from third states. Nor does the discussed extension of the territorial scope of the Regulation apply to disputes arising from insurance contracts.

The extension of the applicability of the Brussels I regime to third-state defendants could also produce detrimental effects to the weaker party. For instance, some national laws provide for even more claimant-friendly rules on international jurisdiction.¹¹ This concern, which is not particularly relevant for consumer disputes, is much more relevant for disputes relating to employment contracts. Here the protective jurisdictional rule in the Brussels I Regulation (now Art. 21(2)) does not go as far as to establish a proper *forum actoris*.¹² Rather, the place where the employee habitually carries out his work is where an action can be brought.¹³ In most cases, this place will correspond to the place of the employee's domicile, but not necessarily. In addition, unlike in consumer cases, most national laws of the EU Member States have traditionally contained special protective rules of jurisdiction over employment contracts.¹⁴ Often these rules are considerably more employee-friendly than those determined in the Brussels I Regulation. They offer jurisdictional bases such as *forum actoris* (based on either the nationality or domicile of the employee) or they provide for a jurisdictional basis when at least a part – although not a predominant or even a significant one – of the work was performed within the jurisdiction. Moreover, generally applicable exorbitant bases of jurisdiction could also be invoked, thus enabling the employee to bring a lawsuit in his own country (such as the presence of the defendant's assets within the jurisdic-

¹⁰ A certain extension of the applicability of the Brussels I regime towards defendants from third states was achieved already in the previous Regulation – but only where these had a branch, agency, or other establishment in one of the Member States and the dispute arose from the operation of this branch, agency, or other establishment (Art. 18/2 and Art. 15/2). In such cases, the defendant was deemed to be domiciled in that Member State.

¹¹ Peter Mankowski, in *EUROPÄISCHES ZIVILPROZESS- UND KOLLISIONSRECHT – KOMMENTAR, BRUESSEL IA-VO Art. 21* Brüssel Ia-VO Rz 72 (Thomas Rauscher ed., 2016); Sandrine Giroud, Niklaus Meier & Rodrigo Rodriguez, *Le règlement Bruxelles I bis, un modèle pour une nouvelle convention de Lugano?* in *LE NOUVEAU RÈGLEMENT BRUXELLES I BIS* 419, 430 (Emmanuel Guinchard ed., 2014).

¹² See also *id.* Art. 21 Brüssel Ia-VO Rz 72.

¹³ Due to the CJEU's extensive construction of the "habitual place of work" by the (CJEU 15. 3. 2011, C-29/10, *Heiko Koelzsch/État du Grand-Duché de Luxembourg*), the second alternative in Art. 21(1) – jurisdiction in the place of the engaging business – has lost its practical significance.

¹⁴ See Commission Staff Working Paper, Impact Assessment, Accompanying Document to 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, Brussels, 14. 12. 2010 SEC(2010) 1547 final, 22 and 62–63, available at: http://ec.europa.eu/justice/policies/civil/docs/sec_2010_1547_en.pdf (last visited 3. 1. 2016).

tion). Hence, if Art. 21(2) of the Brussels I Recast is interpreted as eliminating and replacing the national laws of the Member States, an employee whose habitual place of work is not in the EU (and who was not engaged by a business situated in an EU Member State) can no longer establish the jurisdiction of *any* court in the EU against an employer without a domicile or a deemed domicile in the EU.

Some authors submit that the Articles 18(1) and 21(2) of the Recast Brussels I Regulation merely lay down additional bases (an EU-wide “minimum standard”) for jurisdiction against third-state defendants, without abolishing the possibility for the employees to invoke broader jurisdiction rules in the national law.¹⁵ The opposite view is that national rules of jurisdiction do not apply if the matter falls within the scope of Arts. 18(1) or 21(2).¹⁶

Some authors believe that the wording in Arts. 17 and 20 – that the jurisdiction norms in the chapters concerning consumers and employees are “*without prejudice to Article 6*” – leaves no doubt that national jurisdiction rules can still be relied on as stipulated in Art. 6.¹⁷ However this is not the case. The reference to Art. 6 in Arts. 17 and 20 of the Brussels I Recast indeed means that this Article remains applicable also in consumer and labour disputes. Yet the problem is that there is now a certain restriction of the scope of its applicability in Art. 6. Article 6(1) reads as follows: “If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, *subject to* (emphasis added) Articles 18(1), 21(2) [...] be determined by the law of that Member State.” Articles 18 and 21 contain jurisdiction rules for disputes against non-EU based traders and employers. So the decisive question concerns the relation, in light of the phrase “*subject to*”, between Art. 6, on the one hand, and Arts. 18(1) and 21(2), on the other. It could represent an exception to the general rule that a non-EU based defendant can be sued pursuant to national jurisdiction rules. Yet it can also be construed as providing merely for an additional option for the claimant. In any case, the grammatical interpretation calls primarily for construction of the wording “*subject to Art. 18(1), 21(2)*” in Art. 6(1) and not merely the wording “*without prejudice to Art. 6*” in Arts. 17 and 20.

One should look for answers concerning this interpretation in the legislative history. One of the most ground-breaking amendments of the Commission’s first Draft Proposal of the Brussels I Recast was the extension of all rules of jurisdiction to defendants domiciled in third states.¹⁸ This controversial plan was rejected by most member states and it was agreed to extend merely some

15 Miriam Pohl, *Die Neufassung der EuGVVO – im Spannungsfeld zwischen Vertrauen und Kontrolle*, 33 IPRAX, 109, 109–114 (2013), Tanja Domej, *Die Neufassung der EuGVVO – Quantensprünge im europäischen Zivilprozessrecht*, 78 RABELSZ, 508, 523 (2014); Florian Scholz, *Alles neu im Europäischen Zivilprozessrecht?* 26 ECOLX, 4, 5 (2015); Andrea Bonomi, *Jurisdiction over Consumer Contracts*, in THE BRUSSELS I REGULATION RECAST 213, 230 (Andrew Dickinson & Eva Lein eds., 2015).

16 Paul Vlas, in EUROPEAN COMMENTARIES ON PRIVATE INTERNATIONAL LAW, VOLUME I, BRUSSELS I BIS REGULATION Art. 6 Brussels Ibis Regulation Rz 1 (Ulrich Magnus & Peter Mankowski eds., 2016); Mankowski, *supra* note 11, Art. 20 Brüssel Ia-VO Rz 2, Art. 21 Brüssel Ia-VO Rz 72; Giroud, Meier & Rodriguez, *supra* note 11, 430-432; Hélènevan Lith, *Jurisdiction – General Provisions*, in THE BRUSSELS I REGULATION RECAST 113, 124 (Andrew Dickinson & Eva Lein eds., 2015); Beatriz Campuzano Diaz, *Las normas de competencia judicial internacional del Reglamento 1215/2012 y los demandados domiciliados fuera de la UE: Análisis de la reforma*, REVISTA ELECTRONICA DE ESTUDIOS INTERNACIONALES, Dec. 2014, 16 et seqq. available at: dialnet.unirioja.es/descarga/articulo/4956064.pdf (last visited 15. 1. 2016).

17 Pohl, *supra* note 15, 111; Domej, *supra* note 15, 523; Scholz, *supra* note 15, 5. On the contrary, some authors believe that the grammatical interpretation clearly leads to exactly the opposite result: Giroud, Meier & Rodriguez, *supra* note 11, 430–432.

18 Brussels, 14. 12. 2010 COM(2010) 748 final 2010/0383 (COD) 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).

of the existing jurisdiction rules. Commentators agree that this was a compromise solution.¹⁹ A document of the Danish Presidency of the EU, adopted in January 2012 (thus in the time, when the mentioned compromise was being negotiated), discusses four options.²⁰ Besides the full harmonisation and the maintenance of the status quo, two possible compromise solutions are mentioned. One is the so-called “minimum harmonisation”, which would extend the jurisdiction rules of the Brussels I Regulation to disputes involving third-state defendants, but at the same time allow the national rules on jurisdiction to apply to the extent that they provide further access to national courts.

Another alternative (that had, as the document states, not yet been addressed in the negotiations) could be to extend the jurisdiction rules of the regulation to particular types of disputes involving third-state defendants (“partial harmonisation”).²¹ If these were the only available options, it was obviously the “partial harmonisation” that was finally adopted. Of course, it cannot be ruled out that in the later stages of negotiations yet another option finally prevailed. Unfortunately “the public track” as to what exactly was negotiated during the final year of recasting the Brussels I is blurred.²² In a document adopted on 18 October 2012, the European Parliament’s Committee on legal affairs rejected the Commission’s proposal for full harmonisation and stated “[...] *it is therefore proposed that rules be included in the Regulation to introduce only a partial reflexive effect for disputes in the field of employment, consumer and insurance contracts, in order to protect the weaker party in those situations.*”²³

The finally adopted solution has nothing to do with a “reflexive effect”. Nevertheless this document enables an insight into what was a very controversial issue at that point: the question of whether in “external relations” the EU protective rules for weaker parties should also protect non-EU domiciled employees and consumers (which was one of the Commission’s proclaimed goals in its initial proposal).²⁴ This idea of “reflexive effect” was deliberately rejected in the end.²⁵ It is therefore possible that the inclusion of reference to Art. 6 in Arts. 18 and 20 was intended to prevent the Regulation’s “reflexive effect” in favour of non-EU based employees and consumers. The debate in the EU Parliament on the adoption of the proposed text did not address the issue either – although the extension of the applicability of certain jurisdiction rules vis-à-vis third-state

19 Vlas, *supra* note 16, Art. 6 Brussels Ibis Regulation Rz 4; Andrew Dickinson, *Background and Introduction to the Regulation, in THE BRUSSELS I REGULATION RECAST* 1, 12 (Andrew Dickinson & Eva Lein eds., 2015); Mankowski, *supra* note 11, Art. 6 Brüssel Ia-VO Rz 7, Campuzano Diaz, *supra* note 16, 17.

20 Discussion Paper – Informal Justice and Home Affairs Ministers’ Meeting Copenhagen 26–27 January 2012 Session I (Justice) Brussels I-Regulation Access to Union courts in civil cases with third country defendants, Ministry of Justice, available at: http://www.justitsministeriet.dk/sites/default/files/media/Pressemeddelelser/pdf/2012/Discussion_paper_4_Brussels_I-Regulation.pdf (last visited 3. 8. 2016).

21 *Ibidem*; See also Christian Rauscher, *Die Brüssel I Verordnung und ihre Reform, in EUROPÄISCHES ZIVILVERFAHRENSRECHT IN ÖSTERREICH III – 10 JAHRE BRÜSSEL I-VERORDNUNG* 1, 7 (Bernhard König & Peter G. Mayr eds., 2012).

22 The text, which in relevant parts corresponds to the finally adopted Regulation, is first included in 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) – First reading, Brussels, 1 June 2012, 10609/12 ADD 1 JUSTCIV 209 CODEC 1495, available at: <http://register.consilium.europa.eu/doc/srv?!=EN&f=ST%2010609%202012%20ADD%201> (last visited 15. 8. 2016).

23 Report on the proposal for a regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), (COM[2010]0748 – C7-0433/2010 – 2010/0383[COD]), 15 October 2012, Committee on Legal Affairs.

24 See, e.g. Beate Gsell, *Entwicklungen im Europäischen Verbraucherzuständigkeitsrecht – Reform der EuGVO und Rechtsprechung des EuGH zum Merkmal des “Ausrichtens” in Art. 15 Abs. 1 lit. c EuGVO*, 127 ZZP, 431, 437 (2014).

25 See *id.* at 437, Carla M. Gulotta, *L’estensione della giurisdizione nei confronti dei datori di lavoro domiciliati all’estero: il caso Mahamdia e il nuovo regime del regolamento Bruxelles I-bis.*, 49 RDIPP 619 (2013).

defendants was discussed.²⁶ In addition, the press release of the Council of the EU accompanying the adopted Brussels I Recast stated that “no national rules of jurisdiction may be applied any longer by Member States in relation to consumers and employees domiciled outside the EU.”²⁷ Perhaps this offers a glimpse into how the Brussels I Recast was then understood (although erroneously since the extension in the Brussels I Recast applies to non-EU based traders and employers, not consumers and employees). The text of Recital No. 14 does not give answers in this regard either. One would, however, legitimately expect that if such an important change in the concept of the Regulation really was adopted (providing that certain rules of the Regulation apply against non-EU based defendants, although without replacing the national jurisdiction rules), this should at least be indicated in the Recital or framed in clearer terms.

The question, however, arises what is objectively the best possible interpretation. By extending the territorial scope, the Brussels I Recast (as confirmed in Recital 14) intended to enhance the procedural protection of employees (and consumers). It would not be compatible with this purpose if the newly introduced regime meant that employees who habitually carry out work in a non-Member State were no longer able to invoke favourable bases for jurisdiction in the national law of their countries against third-state employers. It is true that doing away with exorbitant jurisdictions in national laws is a desired goal. It would be incoherent, however, if it were exactly the most vulnerable categories of claimants – in contrast to all other possible categories of claimants – who would no longer be able to invoke exorbitant bases of jurisdiction provided for in national laws against non-EU-based defendants. Since there is no provision on “emergency jurisdiction” in the Brussels I Regulation, this could, in extreme cases, lead to the denial of justice for employees domiciled in the EU: non-availability of any court in the EU and no guarantee that any third state will accept jurisdiction (or be able to ensure effective access to court).

Hence, the objective goal of the norm – when it comes to labour disputes – would support the view that national jurisdiction rules can still be relied on although Art. 18(2) provides for an EU-wide uniform rule applicable also against non-EU-based employers. However, the reference to Art. 6 is identical in both Art. 17 and Art. 20 of the 1215/2012 Regulation, thus it applies to consumer disputes as well. Yet, with regard to consumers, the stakes are different. The *forum actoris* of Art. 18(1) ensures that an EU-domiciled consumer will always be able to sue “at home”. There is no need to maintain the possibility for the consumer to invoke exorbitant national jurisdiction rules of any other EU Member States. Thus, the goal of the norm – when it comes to consumers – would support the interpretation that national jurisdiction rules can no longer be invoked in disputes against third-state traders. In addition, the purpose of the (proposed) extension of the applicability of the Brussels I regime towards third-state defendants was not just to protect weaker parties, but also to ensure legal certainty as well as the predictability and transparency of the jurisdictional legal framework and to put EU-domiciled claimants on an equal footing con-

26 Transcripts of the EU parliamentary debate of 19 November 2012, Strasbourg; Available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20121119&secondRef=ITEM-017&language=EN&ring=A7-2012-0320> (last visited 3. 8. 2016).

27 Recast of the Brussels I regulation: towards easier and faster circulation of judgments in civil and commercial matters within the EU, Press Release, Brussels, 6 December 2012, available at: http://europa.eu/rapid/press-release_PRES-12-483_en.htm (last visited 3. 8. 2016).

cerning access to justice.²⁸ These two aspects speak against the interpretation that national jurisdiction rules can still be invoked.

To conclude, the question whether jurisdiction rules of national laws continue to apply in proceedings brought by EU-domiciled consumers and employees remains controversial and calls for a reference to the CJEU for a preliminary ruling. The legislative history implies that during the negotiations (under growing time-pressure and in quest for a political compromise) on the uniform EU-wide jurisdiction rules in Arts. 18(1) and 21(2) the possibly problematic nature of the newly introduced system, in certain circumstances liable to deprive employees of the level of protection previously enjoyed, has been simply overlooked.

III. The Exhaustive Nature of Jurisdictional Protective Rules

The bases for determining the jurisdiction in disputes relating to employment, consumer, and insurance contracts set out in Sections 3–5 of the Brussels I Regulation are exhaustive. In such disputes it is not possible to invoke the bases for jurisdiction set out in other chapters of the Regulation unless explicitly provided for otherwise. The only exception was foreseen for the applicability of Art. 5(5) (Art. 7(5) after the Recast) which provides for jurisdiction in the place where the branch, agency, or other establishment is situated. This proved to be especially troublesome in labour disputes where employees were prevented from invoking the jurisdiction for co-defendants pursuant to Art. 6 of the Brussels I Regulation when they wished to bring proceedings jointly against two employers. This is becoming increasingly relevant in cases of employment arrangements within a multinational group or in cases of cross-border agency employment (“cross-border triangular employment relationships”). The CJEU confirmed this restriction.²⁹ Thereby it admitted that this might be a shortcoming in the system of the Brussels I Regulation. Nevertheless it must give priority to an interpretation based on the wording of Art. 18, which is unambiguous and does not leave room for a more creative interpretation.³⁰ This result has been subject to heavy criticism in legal literature.³¹ It can hardly be suggested that the Court of Justice should ignore the clear wording of Art. 18; the criticism was (or should be) therefore directed more at the Regulation itself.

The Commission was also aware of this shortcoming and the problem was addressed in the drafting of the new Recast Brussels I Regulation.³² Art. 20 (which corresponds to Art. 18 of Regulation 44/2001) of the new Regulation No. 1215/2012 makes a special reference to the jurisdictional rule for co-defendants. Thus, under the Brussels I Recast it is possible for an employee to

28 Discussion Paper Informal Justice and Home Affairs Ministers' Meeting Copenhagen 26–27 January 2012 Session I (Justice) Brussels I-Regulation Access to Union courts in civil cases with third country defendants, Ministry of Justice, available at: http://www.justitsministeriet.dk/sites/default/files/media/Pressemeddelelser/pdf/2012/Discussion_paper_4_Brussels_I-Regulation.pdf (last visited 31. 8. 2016)

29 CJEU 22. 5. 2008, C-462/06, *Glaxosmithkline, Laboratoires GlaxoSmithKline/Jean-Pierre Rouard*. Of course, if the employee carries out work for all employees in the same place, a joinder of defendants in one claim is still possible – following the criteria of Art. 19 of the Brussels I Regulation.

30 CJEU 22. 5. 2008, C-462/06, *Glaxosmithkline, Laboratoires GlaxoSmithKline/Jean-Pierre Rouard*.

31 E.g. Sebastian Krebber, *Einheitlicher Gerichtsstand für die Klage eines Arbeitnehmers gegen mehrere Arbeitgeber bei Beschäftigung in einem grenzüberschreitenden Konzern*, 29 IPRAX, 409 (2009); Uglješa Grušić, *Jurisdiction in Employment Matters Under Brussels I: A Reassessment*, 61 ICLQ, 91, 94 (2012).

32 Already in its Report and Green Paper of 21 April 2009, COM(2009), 174 final, at section 3.8.2. and COM(2009) 175 final, at Q.8, the Commission contemplated the possibility of extending jurisdiction over co-defendants pursuant to Art. 6(1) to employment matters.

join co-defendants in a court that has jurisdiction for one of them, provided that the general requirements for such a joinder are met.³³ Only the weaker party (the employee) can benefit from the new rule. Hence, the employer cannot invoke jurisdiction over co-defendants in the event of claims against several employees.

IV. Clarification of the concept of the place where work is habitually carried out

The Regulation provides for jurisdiction regarding claims against the employer in the place where the employee habitually carries out his work. The CJEU has already clarified that where the work is performed in more than one Member State, it is the place in which or from which the employee principally discharges his obligations towards his employer³⁴ or “where, or from which, he in fact performs the essential part of his duties vis-à-vis his employer.”³⁵ In this regard, it is decisive whether an employee has an office in a certain state from which he organises his own work activities or those of his employer and to which he returns after each business trip to another country. If such an office exists, it shall be deemed the habitual place of work.³⁶ If this is not the case, then it must be determined where the employee has established the effective centre of his work activities.³⁷

The Brussels I Recast does not bring any real changes with regard to the presented regime. There is a certain distinction in the wording of the new Article 21(1)b, as it refers to a place where *or from where* the employee habitually carries out his work. Nevertheless, the insertion of the phrase “*or from where*” merely adopts the criterion of the “base”, which has already been firmly established by the CJEU’s case law on Regulation 44/2001 (see *supra*). Therefore, this does not amount to a substantial change but rather a clarification, which also brings the definition in the Brussels I Regulation (essentially) in line with Art. 8 of the Rome I Regulation,³⁸ which lays down a conflict-of-laws rule on the applicable law governing contracts of employment.

Art. 21(1) of the Regulation also enables employees to bring proceedings in the courts of the place where the business that engaged the employee is or was situated if the employee does not or did not habitually carry out his work in any one country. This option is not really favourable for the employee, but rather more for the defendant. It is, hence, not surprising that the CJEU opted for an extensive interpretation of the first option (habitual place of work), thus narrowing the scope of applicability of the second option.³⁹ Since it now seems that it is (almost) always possible to determine the place where the work is habitually carried out (also in the case of employees

33 Pursuant to Art. 8(1) 1215/2012 Regulation, a jurisdiction for co-defendants is available if the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

34 CJEU 13. 7. 1993, C-125/92, *Mulox IBC Ltd/Hendrick Geels*.

35 CJEU 9. 1. 1997, C-383/95, *Petrus Wilhelmus Rutten/Cross Medical Ltd*.

36 *Ibidem*.

37 CJEU 13. 7. 1993, C-125/92, *Mulox IBC Ltd/Hendrick Geels*.

38 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

39 CJEU 15. 3. 2011, C-29/10, *Heiko Koelzsch/État du Grand-Duché de Luxembourg*. The case related to the Rome I Regulation, but its rationale is equally applicable to the Brussels I Regulation; see Alessandra Zanolotti, *Employment Contracts and the Rome Convention, the Koelzsch Ruling of the European Court of Justice*, 3 CUADERNOS DE DERECHO TRANSNACIONAL, 338 (2011); <http://e-revistas.uc3m.es/index.php/CDT/article/view/1340> (last visited 31. 8. 2016); see also CJEU 15. 12. 2011, C-384/10, *Jan Voogsgeerd/Navimer SA*.

performing work in different countries, and even in the event in which no proper “base” can be established⁴⁰), questions are raised whether it makes sense at all to still retain the second option as well.⁴¹ Nevertheless, the Recast did not bring any changes in this regard.

V. Jurisdiction based on entering an appearance

A protective jurisdictional regime favourable for the weaker party can only be effective if it is concurrently ensured that the weaker party may not, in principle, contractually agree to another jurisdiction to the detriment of the procedural protection of sections 3-5 of the Brussels I Regulation. Therefore, Arts. 13, 17, and 21 considerably limit the power of the other party to the contract to depart from procedural protection by means of a jurisdiction agreement. Otherwise, looking at the situation realistically (as the CJEU determines in another context⁴²), the weaker party would be exposed to agreeing to terms drawn up in advance by the other party without being able to influence the content of those terms.

When entering into an employment contract, the average worker, consumer, or insured does not give due consideration to the jurisdiction clause that forms a part of the contract, especially in the context of a pre-formulated standard contract. For this reason, jurisdiction agreements (to the detriment of the jurisdictional norms of Sections 3-5) cannot already be included in the contract. Only subsequent jurisdiction agreements (agreements concluded after the dispute has already materialised) are admissible. At this stage even an average worker, consumer, or insured should be attentive as to the determination of the forum for the resolution of disputes and give due consideration to the potential proposal of the other party to enter into a jurisdiction agreement.

It follows from Art. 24 (which corresponds to Art. 26 in the Recast) that if the weaker party enters, as a defendant, an appearance without contesting jurisdiction, the court may not declare the lack of jurisdiction of its own motion if the provisions of Sections 3-5 are not complied with. Entering an appearance in such a manner amounts to a tacit prorogation of jurisdiction, which is also possible in disputes covered by Sections 3-5. In the context of the jurisdictional regime concerning insurance contracts, the CJEU confirmed this finding in *Bilas*.⁴³

A different question, however, is whether in the early stage of proceedings (such as when it serves the claim and instructs the defendant to file a defence plea) the court should forewarn the defendant that the proceedings were brought in a court that lacks jurisdiction and that he may raise a (timely) objection as to the lack of jurisdiction. If such a requirement is not imposed, this can seriously impede the effectiveness of the protective jurisdictional regime. There is no guarantee that certain employers or traders, for example, would not deliberately file actions against workers in courts lacking jurisdiction, counting on the probability that the weaker party, unfamiliar with the protective regime of the Brussels Regulation and not represented by a lawyer, would fail to raise a timely objection about the lack of jurisdiction.⁴⁴ Furthermore, the lack of uniform

40 CJEU 15. 3. 2011, C-29/10, *Heiko Koelzsch/État du Grand-Duché de Luxembourg*.

41 Uglješa Grušić, *Should the Connecting Factor of the “Engaging Place of Business” be Abolished in European Private International Law?* 62ICLQ, 173 (2013).

42 CJEU 4. 6. 2009, C-243/08, *Pannon GSM Zrt./Erzsébet Sustikné Gyórfi*.

43 CJEU 20. 5. 2010, C-111/09, *Česká podnikatelská pojišťovna as, Vienna Insurance Group/Michal Bilas*.

44 See, e.g., Uglješa Grušić, *Submission and Protective Jurisdiction under the Brussels I Regulation*, 43 CMLR, 947, 953 (2011).

European standards in this respect can result in a different level of effectiveness of procedural consumer protection in those Member States where national law or practice provide for such a forewarning with regard to the lack of jurisdiction⁴⁵ and those Member States where this is not the case.⁴⁶

Although tacit prorogation of jurisdiction may sometimes occur to the undue detriment of the weaker parties who do not have proper access to legal advice, in *Bilas*⁴⁷ the CJEU refrained from requiring a court to instruct the defendant about the consequences of his possible entering an appearance. In the CJEU's view, such an obligation could not be imposed other than by the introduction of an express rule to that effect in the Brussels I Regulation.⁴⁸ When drafting the recast Regulation, the Commission had due regard for these observations of the CJEU. An express rule to the effect of forewarning the consumer, employee, or insured about his right to contest the jurisdiction of the court and the consequences of entering an appearance is now indeed provided for in the new Brussels I Regulation. Pursuant to Art. 26(2) of the new Regulation, the court will need to ensure, before assuming jurisdiction on the basis of a tacit jurisdiction agreement, that information concerning the consequences of entering an appearance without contesting jurisdiction has been provided to the defendant.

In general, the new rule is properly balanced.⁴⁹ On the one hand, it rejected the radical view that jurisdiction based on entering an appearance should not apply to weaker parties at all,⁵⁰ whereas on the other it acknowledged that a certain level of additional protection is needed. This new rule is, however, likely to give rise to new questions in practice.

First, the new rule does not unambiguously answer the question how precise and explicit the court's instruction to (or information for) the defendant should be. The wording of the rule suggests that it is sufficient for the court to reiterate, in rather abstract terms (although probably in plain language understandable to legally unrepresented parties) the relevant provision of the Regulation concerning the consequences of failure to object the lack of jurisdiction, leaving it for the consumer to (possibly) discover by himself whether the claim was indeed brought in a court lacking jurisdiction. It does not follow from the wording that the court should go one step further and positively advise the consumer that it lacks jurisdiction under the Regulation in the first place.

The practical effect of this issue should not be underestimated. If an (unrepresented) consumer or employee is merely advised of the consequences of entering an appearance, leaving it for the defendant to determine whether there is a lack of jurisdiction in the first place, it can be expected

45 See, e.g., Paragraph 504 of the German ZPO (for *Amtsgerichte*).

46 E.g., in Slovenia the defendant must, in order to not be in default, file a written defence plea on the merits and neither is there any oral communication between the court and the defendant beforehand, nor does the court give, upon serving the claim, any written hints and observations, except the instruction to file a defence plea and the warning that a judgment on default can be rendered if the defendant fails to comply with this instruction; see Art. 277 of the Civil Procedure Act (*Zakon o pravdnem postopku*).

47 CJEU 20. 5. 2010, C-111/09, *Česká podnikatelská pojišťovna as, Vienna Insurance Group/Michal Bilas*.

48 *Ibidem*. However, the CJEU adds that 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 the Brussels I Regulation, i.e. to offer stronger protection to 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.

49 See also Lazić, *supra* note 1, 109.

50 For such view, see: Peter A. Nielsen, in BRUSSELS I REGULATION Art. 17 Brussels I Regulation Rz 15 (Ulrich Magnus & Peter Mankowski eds., 2007).

that not many defendants would actually engage in research on the jurisdictional regime. This would especially be the case if “information” were given in written form and in a formulaic (“copy-paste”) manner (particularly nowadays, when documents served by the court are already accompanied by such an amount of instructions and information that many parties no longer even read all of them carefully).

If, however, the court must, in such cases, positively advise the defendant that the claim (at least) appears to have been brought in a court lacking jurisdiction and provide the information about the consequences of entering an appearance, most defendants would probably raise a plea of lack of jurisdiction. The second option is clearly more weaker-party friendly, but it seems incompatible with the restrictive wording of the discussed provision. In addition, it is not always possible for the court to assess at an early stage of proceedings whether the case indeed concerns a consumer dispute (i.e. whether the defendant was not acting in a professional capacity).

Concerning the question of who needs to inform the defendant (the court or the claimant), it seems logical that this should be the task of the court, probably in written form, when serving the claim on the defendant. Nevertheless, in countries where it is the claimant's duty to serve the claim upon the defendant even before filing it with the court, it is conceivable that proper information should be provided already by the claimant in the statement of the claim. Information should in any case be given as soon as possible. If the court cannot ascertain whether the case concerns a consumer dispute (or if it neglects its obligation to provide proper information), the omission can still be remedied at a later stage. In such case the court – if the defendant objects the lack of jurisdiction after having received such information – must accept it as timely and consider it as admissible even if the defendant has already pleaded his defence on the merits. Art. 26(2) of the Brussels I Recast makes it sufficiently clear that a tacit jurisdiction agreement cannot be concluded before proper information has been given to the defendant. This rule should prevail over any applicable rules of national law determining that pleas of lack of jurisdiction should be raised *in limine litis*.

Finally, the question arises about the consequences of the court's failure to ensure that the defendant, as the weaker party, has received adequate information. In general, a violation of this protective jurisdictional regime precludes recognition of the judgment in other Member States. The problem is that while Art. 45(1) of the Brussels I Recast (which enumerates the cases in which violations of jurisdictional rules constitute grounds for denial of recognition and enforcement) refers to Sections 2, 3, and 4 of Chapter II, it does not explicitly include a breach of Art. 26(2), which lies in section 7.⁵¹ The purpose and the context of the rule would imply that a violation of the obligation to provide adequate information to the weaker party could result in the sanction of non-recognition of the judgment delivered by the court where the weaker party entered an appearance without contesting jurisdiction (given that this court in fact lacked jurisdiction).

The wording of the Regulation does not preclude such an interpretation. It should be noted that in the *Bilas* case the CJEU already held that a submission by entering an appearance (tacit jurisdiction agreement) is an available basis for jurisdiction in disputes involving weaker parties not-

51 In the relevant parts, Art. 45(1) reads as follows: “On the application of any interested party, the recognition of a judgment shall be refused: [...] if the judgment conflicts with: (i) Sections 3, 4 or 5 of Chapter II where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee was the defendant [...]”

withstanding the fact that the rule on submission is neither contained nor referred to in the three sections containing protective jurisdictional rules.⁵² However, it follows from this reasoning that although after the adoption of the Brussels I Recast, jurisdiction by submission is not *per se* in conflict with Sections 2, 3, and 4 of the Brussels I Regulation, it nevertheless is in such conflict if it was assumed without previously giving adequate information to the weaker party.

VI. Violation of the Protective Jurisdictional Regime as Grounds for Refusal of Recognition and Enforcement of a Foreign Judgment

Regulation No. 44/2001 reinforced procedural protection concerning insurance and consumer contracts providing that the violation of jurisdictional protective norms can, at the request of any interested party, result in a denial of recognition of the judgment pursuant to Art. 35(1). No such safeguard has been established for disputes arising out of employment contracts, however. This was based on a rather pragmatic reasoning that the vast majority of employment disputes in Europe (more than 90 %) concern cases where employees act as claimants and therefore in the vast majority of labour disputes it is not necessary to provide for a special safeguard concerning jurisdiction regarding the recognition and enforcement stage.⁵³

The rule was slightly changed in the Brussels I Recast. Recognition may still be refused on the same grounds already provided for under Regulation 44/2001 (now under Art. 45), whereby breaching the grounds for jurisdiction over individual employment disputes is included as an obstacle to recognition. It is now also explicitly stated that breaching the protective jurisdictional regime is an obstacle to recognition only in cases where the weaker party (a policyholder, the insured, a beneficiary of an insurance contract, an injured party, a consumer, or an employee) was the defendant. The *ratio legis* of the rule would lead to the same result already under the old Brussels I Regulation,⁵⁴ however, at least the wording of its Art. 35(1) would imply that the rule could also adversely affect the weaker party that brought the proceedings in a court lacking jurisdiction.

VII. Conclusion

Although the changes brought about by the Brussels I Regulation Recast to the protective jurisdictional regime for weaker parties are not as far-reaching as in certain other fields (e.g. abolishing of exequatur, enhancing jurisdiction agreements, cross-border effects of protective measures), they are nevertheless important and raise the procedural protection of these parties to an even higher level. The most significant changes concern the limited extension of the scope of applicability against defendants from third states and jurisdiction based on the entering of an appearance. This being said, a conservative approach is preferred when it comes to the reform of such a successful instrument as the Brussels I Regulation undoubtedly proved to be. Therefore, it should not be seen as regretful that certain more ambitious plans for large-scale reform were rejected.

52 See, e.g., Grušić, *supra* note 44, 947.

53 The EU Commission, Explanatory Memorandum accompanying the proposal of the Brussels I Regulation, COM (1999) 348 final, Brussels, 14.07.1999, 23, available at: <http://www.statewatch.org/sem/doc/assets/files/commission/COM-1999-348.pdf> (last visited 31. 8. 2016).

54 REINHOLD GEIMER & ROLF A. SCHÜTZE, *EUROPÄISCHES ZIVILVERFAHRENSRECHT* (2010) Art. 35 at 47 and Art. 16 at 16.

By not substantially departing from the existing regime, the EU legislature also ensured that the rich body of the case law of the CJEU, which has already brought several important clarifications and strengthened legal certainty in this area, remains fully relevant. Although in certain instances it seems that the Brussels I Recast effectively overrules the CJEU's case law (e.g., *Bilas*, *Glaxo-SmithKline*), it should be noted that these are cases where the CJEU itself suggested that the outcomes are not necessarily preferred, but are, however, based on the clear text of the Regulation and it is therefore the responsibility of the EU legislature to intervene. By following these "hints" of the CJEU, the European legislature actually reaffirmed the preeminent position of the Court concerning the development of European civil procedure.

On a negative side, the recast also brought some new dilemmas and uncertainties, perhaps due to its poor drafting, in particular regarding the question whether the rule concerning extension of applicability against non-EU based employers and traders provides merely for an EU-wide minimum standard or removes and replaces jurisdiction rules of member states' national laws.