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POLICY DEPARTMENT C
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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)

Contribution by Dr Florian Horn

NOTE

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LEGAL AFFAIRS

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Abstract

This note examines the recast of Regulation (EC) N° 44/2001 ("Brussels I") as proposed in COM (2010) 0748. Important issues include the abolition of *exequatur*, rules for third country defendants, rules for choice of court agreements, the interface with arbitration proceedings, a new head on jurisdiction on rights *in rem*, compatibility with the right to collective actions, and other topics as cooperation in the context of protective measures.

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List of Abbreviations 4

Executive Summary 5

1. Introduction 8

2. The question of *Exequatur* 11

2.1. Assessment of the Proposal 11

2.2. The exclusion of collective redress and personality rights from the amendment 15

2.3. Conclusions and recommendations 16

3. The question of reflexive effect 16

3.1. Assessment of the Proposal 16

3.2. Jurisdiction based on the location of property 17

3.3. *Forum necessitatis* 18

3.4. Conclusions and recommendations 19

4. The question of choice of court agreements 19

4.1. Assessment of the Proposal 19

4.2. Applicable law on the validity of a choice of court agreement 20

4.3. *Lis Pendens* 22

4.4. Conclusions and recommendations 24

5. The question of the interface with arbitration 26

5.1. Assessment of the Proposal 26

5.2. Conclusions and recommendations 29

6. The question of jurisdiction for *Rights in Rem* 29

7. The question of industrial actions (Art 85) 30

8. Other important issues 33

8.1. Cumulation of claims regarding individual work contracts 33

8.2. Cooperation in the context of provisional measures 34

References 35

LIST OF ABBREVIATIONS

Brussels I Convention	Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters
Brussels I Regulation or "The Regulation"	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, 16.1.2001, p. 1
CFREU	Charta of Fundamental Right of the European Union, OJ C 83, 30.03.2010, p. 389
ECHR	Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms
"The Proposal"	Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), COM (2010) 748 final
Rome I Regulation	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, 4.7.2008, p. 6
Rome II Regulation	Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007, p. 40

EXECUTIVE SUMMARY

Background

In COM (2010) 748 final the Commission proposes a recast of Regulation (EC) 44/2001, the "Brussels I Regulation". This Regulation is in force since 2002 and did not undergo any substantial changes since its adoption. It is the replacement for the Brussels I Convention of 1968 which entered into force in 1973. The Regulation has taken over most of this convention's rules and provides for uniform rules on jurisdiction, recognition and enforcement in civil and commercial matters. Proceedings including third country defendants are presently excluded from the scope of application of the Regulation. Only under some provisions of the Regulation third courty defendants are drawn into jurisidiction under the Brussels I regime.

Concerning enforcement, the Brussels I Regulation in its present form relies on the so-called *exequatur* procedure, whereby a court in the Member State where enforcement is sought has to declare a foreign decision enforceable by a national decision. Only this additional decision brings the title for enforcement into existence in the respective Member State. There are several grounds to refuse such declaration of enforceability, including in particular the existence of conflicting decisions and reasons of *public policy* of the enforcement state.

The Commission's Proposal is backed up with several academic studies, fact analysis and public consultations. It proposes major changes in some parts of the Regulation. Important issues include the abolition of the *exequatur* procedure, new rules for third country defendants, rules for choice of court agreements, the interface with arbitration proceedings, a new head on jurisdiction on rights in rem, compatibility with the right to collective actions, and other topics as the cross-referencing to the Charta of Fundamental Rights of the European Union.

Aim

This note was commissioned in order to examine in particular the following topics:

- The abolition of the exequatur and the accompanying procedural safeguards and remedies;
- The operation of the Regulation in the broader international order (reflexive effect of the Regulation's rules);
- The provisions aiming at improving the effectiveness of choice of court agreements;
- The interface of the Regulation with arbitration proceedings;
- New head of jurisdiction as regards *rights in rem* and possession in moveable property;
- New provision laid down in Article 85 concerning collective actions.

Where appropriate the review also gives proposals for possible amendments.

Findings

On many issues this note agrees with the Commission's Proposal. Most amendments proposed by the Commission improve the functioning of the Brussels I Regulation and enhance the protection of the parties to legal disputes. Only on some issues deeper consideration might lead to further necessary amendments.

Regarding the abolition of *exequatur* the Proposal seems well balanced. It is important that the element of procedural public policy is retained of the former public policy-exception to recognition and enforcement of foreign decisions. It is reasonable to closely base this procedural public policy exception on Art 47 CFREU and Art 6 ECHR respectively. By moving the review of issues affecting a decision's general validity to the Member State where this decision was taken, the Proposal streamlines the proceedings and prevents conflicting decisions in different enforcement states. Such general issues are in particular problems with service or other reasons that prevented a party from effectively defending itself in the proceedings.

It seems well reasoned to retain the *exequatur* procedure for the area of personality rights including defamation, because of the high divergence of the national material laws. However, there is no apparent reason to keep the *exequatur* procedure for certain actions of collective redress for damages.

Regarding the reflexive effect of the Regulation's rules, the Proposal of the Commission to include third country defendants in the scope of the substantial jurisdiction rules of the Regulation can be supported. The provisions of residual jurisdiction introduced for third country defendants are a) the forum at the location of property of the defendant and b) the *forum necessitatis* in case a claimant cannot protect its rights otherwise. These provisions are basically well-balanced. The forum at the location of property might however be narrowed down to pecuniary claims while deleting the requirement of an additional close connection apart from the property located in that Member State. This additional requirement might otherwise impede the working of the provision in practice.

On choice of court agreements it is doubtful if the Commission's Proposal can reach the set aim to give preference to a chosen court and to ameliorate the overall working of choice of court agreements. The proposed rule on the applicable law for choice of court agreements is very narrow and is likely to pose problems that would outweigh the benefit of uniform collision rules. To remedy this situation either the current state governed by national law might be retained or a more complex rule roughly based on the Rome I convention might be introduced. The amendment of *lis pendens* rules regarding choice of court agreements does not ameliorate the legal situation and might be prone to abuse by giving parties the possibility to launch torpedo actions even after a court was validly seised. According to the new rule the defendant could simply claim a choice of court agreement for another court and launch proceedings in that venue to stop proceedings in the court first seised. Here the amendment of the Regulation might be used to redraft the *lis pendens* rules in general to achieve a concise and practical set of rules.

Regarding the interface with arbitration agreements, the Commission's Proposal is able to remedy the major problems perceived in recent case law of the ECJ. The introduction of specific rules on *lis pendens* regarding arbitration agreements is to be preferred over a total exclusion of any question relating to arbitration outside the scope of the Regulation. Such

exclusion might lead to conflicting judgments and the reintroduction of divergent national jurisdiction rules on a wide scale. Leaving it to the defendant to put a procedure outside the scope of the Regulation simply by claiming an arbitration agreement may increase procedural abuse. Only minor amendments seem necessary explicitly restricting the obligation of a national court to stay its proceedings for reasons of parallel arbitration proceedings once there is a final and binding decision on that court's jurisdiction.

Regarding *rights in rem* and possession in moveable property this provision is likely to bring more difficulties than benefit. The location of moveable property is not such as to establish a sufficiently close connection with the venue. In this aspect moveable property is different from real estate. This provision could also enable forum shopping for declaratory action confirming a *right in rem* or possession by simply moving the property into the jurisdiction of another Member State.

Regarding the provision concerning industrial actions (Art 85 of the proposal), this provision seems to have been introduced because of case law of the ECJ on industrial actions which has incited much controversy. Regarding industrial action it is particularly important that a court has jurisdiction to decide the case which knows – without major research effort – the necessary principles of public policy of the Member State affected by an industrial action. Additionally the new provision of Art 9 of the Rome II Regulation provides that it is the law of the Member state where an industrial action is taken which is applicable on damages by industrial actions. Instead of a soft rule as proposed by the Commission it might therefore be more reasonable to introduce a new head of jurisdiction for industrial actions, which ensures that in the majority of the cases it is the same Member State whose courts are competent to hear the case and whose law respectively public policy rules are to be applied.

In addition to the set tasks there is another issue regarding the wording of the reintroduction of Art 6 (1) of the Regulation for actions of employees to jointly sue several employers in one venue. The wording should be adapted to clearly exclude comparable actions of one employer against several employees, which could lead to abuse.

And finally there is good reason to give more flexibility to the courts deciding on provisional measures in coordination with the court deciding on the subject matter. The proposed mandatory coordination before a measure is to be taken could jeopardise the effectiveness of provisional measures which – in urgent cases – widely depends on their swiftness. This does however not prevent a national court to consult with other relevant courts after the measure was taken und alter any taken measure according to new findings.

1. INTRODUCTION

For many of the Member States of the EU the Brussels I Regulation is in force for more than 9 years.[1] Legislation history dates back from the Brussels I Convention, which entered into force in 1973 for the Members of the European Community at that time. Since the early days of these European civil procedure rules, amendments were undertaken on a regular basis. At the time of the Brussels I Convention there have been four accession agreements for new member states in 1978[2], 1982[3], 1989[4], and 1996[5]. Of these accession agreements the first and the third have brought substantive amendments to the convention itself. Finally, the Brussels I Regulation entered into force on 1 March 2002, thereafter replacing the Brussels I Convention in its entirety[6] and introducing major amendments to the existing rules. Up to date there have been additional technical amendments to the Regulation but no substantive changes.[7]

The Commission's Proposal for a recast of the Regulation has been well prepared by scholarly research, empiric fact finding and working groups on different levels of the acting parties. Already in 2007 a report by *Hess/Pfeiffer/Schlosser* on the Application of the Brussels I Regulation in the Member states[8], a study by *Nuyts* on residual jurisdiction[9] and an impact assessment by the consultancy enterprise GHK about the accession of the EU to the Hague convention on the choice of Courts[10] were published by the Commission. On 21 April 2009 the Commission gave a report on the application of the Brussels I Regulation.[11] From 21 April to 30 June 2009 public consultations have taken place about a Green Paper on the Review of the Brussels I Regulation.[12] In 2009 the Commission published a comparative study on the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality.[13] The Commission has organised conferences on the topic in 2009 and 2010. On 7 September 2010 the European Parliament has adopted a non legislative declaration to the Commission's Green Paper.[14] On 17 December 2010 the Centre for Strategy and Evaluation Services (CSES) completed a study ordered by the Commission, which compiled further empirical data on certain aspects of the application of the Brussels I Regulation.[15] Finally a Commission staff working paper was prepared, which also accompanied the legislative proposal.[16] [17]

The Commission's Proposal contains the following substantial amendments (underlined amendments are treated in this paper):

[1] Entry into force on 1 March 2002 for Belgium, Germany, Finland, France, Greece, Ireland, Italy, Luxemburg, Netherlands, Austria, Portugal, Sweden, Spain, UK (Art 76 Brussels I).
[2] Accession of Denmark, UK, and Ireland.
[3] Accession of Greece.
[4] Accession of Spain and Portugal.
[5] Accession of Austria, Finland and Sweden.
[6] Safe for a minor remaining field of application for the Brussels Convention for certain dependent territories.
[7] One major amendment is introduced by the Maintenance Regulation of 18 December 2008 (Regulation [EC] N° 4/2009) which will however not enter into force before 18 June 2012.
[8] http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf
[9] http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf
[10] No longer available on the website of the Commission.
[11] COM (2009) 174 final; http://ec.europa.eu/civiljustice/news/docs/report_judgements_en.pdf
[12] COM (2009) 175 final; http://ec.europa.eu/justice/news/consulting_public/0002/green_paper_en.pdf
[13] http://ec.europa.eu/justice/doc_centre/civil/studies/doc/study_privacy_en.pdf
[14] P7_TA(2010)0304, addressing the Green Paper of the Commission.
[15] http://ec.europa.eu/justice/doc_centre/civil/studies/doc/study_CSES_brussels_i_final_17_12_10_en.pdf
[16] SEC (2010) 1547 final, and summary in SEC (2010) 1548 final.
[17] For an overiew of legislation history see also Hess (2011) 2 IPRax 125.

- Explicit and implied cross-references to the CFREU throughout the Proposal,[18]
- definitions of specific terms,[19]
- application of the regulation on third country defendants including specific subsidiary jurisdiction at the place of the location of property of the defendant and in a Member State with "sufficient connection" to the dispute,[20]
- application of the regulation on questions of *lis pendens* relating to arbitration proceedings,[21]
- introduction of a new head of jurisdiction regarding *rights in rem* or possession in moveable property at the place where the property is situated,[22]
- possibility for employers to cumulate claims against several employees and for employees against several employers at one place of jurisdiction according to Art 6 (1) of the regulation,[23]
- possibility for parties to tenancy agreements of premises for professional use to deviate from Art 22 (1) of the regulation by a choice of court agreement,[24]
- introduction of a collision rule on the law applicable to the assessment of the validity of a choice of court agreement exclusively pointing to the law of the chosen court,[25]
- information requirement for documents instituting proceedings in matters relating to insurance (Section 3), consumer contracts (Section 4), or individual employment contracts (Section 5) on the possible contestation of jurisdiction,[26]
- new obligation for the court to check its jurisdiction under the regulation on its own motion when it is seised and no longer only if the defendant does not enter an appearance,[27]
- new obligation for courts to decide the question of jurisdiction within 6 months, but without any consequences in event of a breach of this obligation,[28]
- obligation for courts deciding on provisional measures to cooperate with the court on the substance of the case before such measures are taken,[29]
- provision newly inside the lis pendens rules relating to (exclusive) choice of court agreements,[30]
- amendment of the definitions when a court is seized,[31]
- provision to stay proceedings in event of concurring proceedings in a third state including a rule on interruption of limitation periods,[32]

[18] In particular items (24) and (27) of the whereas-clauses, Art 26, Art 46, and Art 85 of the Proposal.
[19] Art 2 of the Proposal, replacing also Artt 32 of the existing Regulation.
[20] Art 3 of the Proposal; and new heads of jurisdiction for third party defendants in Artt 25 and 26 of the Proposal.
[21] Art 1 (2) lit e, Art 29 (4), and Art 33 (3) of the Proposal.
[22] Art 5 (3) of the Proposal.
[23] Art 18 (1) of the Proposal.
[24] Art 22 (1) lit b of the Proposal.
[25] Art 23 (1) of the Proposal.
[26] Art 24 (2) of the Proposal.
[27] Art 27 and 28 of the Proposal.
[28] Art 29 (2) of the Proposal.
[29] Art 31 of the Proposal.
[30] Art 32 (2) of the Proposal.
[31] Art 33 of the Proposal.
[32] Art 34 of the Proposal.

- new rules on recognition of provisional measures differentiating between measures of courts in the Member State with jurisdiction as to the substance matter and courts of other member states, where the decisions of the former are to be recognised without restriction whereas decisions of the latter are not to be recognised in any event, [33]
- abolition of the *exequatur* procedure, whereas *exequatur* remains necessary for the following exceptions:
  - non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation,
  - actions in some defined forms of collective redress on harm caused by unlawful business practices,[34]
- abolition of the possibility to refuse recognition and enforcement of a decision which was rendered in conflict with the jurisdiction rules relating to insurance (Section 3), consumer contracts (Section 4), or individual employment contracts (Section 5),[35]
- new sets of time limits for appeals, applications, etc in the enforcement proceedings at 30, 45 and 90 days, instead of the time limits measured in month which were used so far,[36]
- soft obligation of the court seized with an appeal against the decision on the application for a declaration of enforceability to decide within 90 days,[37]
- new obligation to stay the appeals procedure against the decision on the application for a declaration of enforceability and of proceedings on the recognition of a decision if the enforceability of the decision on the substance is suspended in the Member State of origin by reason of an appeal,[38]
- parties applying for enforcement can no longer be required to have an address or a representative in the Member State of enforcement,[39]
- possibility to adapt measures or orders of the court of origin to the laws of the Member State of enforcement,[40]
- convergence of the recognition and enforcement rules for authentic instruments and court settlements with the respective rules for decisions including the abolition of any remaining legalisation requirements,[41]
- deletion of transitional provisions in event the proceedings on the subject matter were started before the applicability of the convention,[42]
- improved provisions on information duties of the Member States in the European Judicial Network,[43]
- facilitated adaption of Annexes by the Commission,[44]

[33] Artt 35, 36, and 2 lit a of the Proposal.
[34] New Artt 37 to 46 of the Proposal and Art 47 seq of the Proposal replicating the old rules.
[35] Deletion of Art 35 of the Regulation.
[36] Artt 45 (5), 46 (4), 56 (5), and 58 (2) of the Proposal.
[37] Art 58 (2) of the Proposal.
[38] Artt 49 and 59 (1) of the Proposal.
[39] Art 65 and 52 of the Proposal, deleting Art 40 (2) of the Regulation.
[40] Art 66 of the Proposal.
[41] Art 70 seq of the Proposal, in particular Art 70 (1) and also Art 72 of the Proposal.
[42] Art 77 of the Proposal.
[43] Artt 86 and 87 of the Proposal.
[44] Artt 88 seq oft he Proposal.

- restriction of the application of the European enforcement order (Regulation [EC] N° 805/2004 to any decisions where the exequatur procedure remains applicable under the Commission's proposal, i.e. violations of privacy and rights relating to personality, including defamation, and certain actions of collective redress,[45]
- new standard forms in the Annexes I to VIII.

To this proposal the European Economic and Social Committee reacted with a largely positive opinion dated 5 May 2011.[46] There is also a draft report of the Rapporteur of the European Parliament's Committee of Legal Affairs dated 28.06.2011.[47] This draft report basically rejects the main changes proposed by the Commission for different reasons. In this context of the legislative procedure of the European Parliament and the Commission this note will briefly comment on the impact assessment conducted by the European Commission and provide an in-depth analysis of the elements of reform proposed by the Commission with a focus on the following aspects:

- The abolition of the exequatur and the accompanying procedural safeguards and remedies;
- The operation of the Regulation in the broader international order (reflexive effect of the Regulation's rules);
- The provisions aiming at improving the effectiveness of choice of court agreements;
- The interface of the Regulation with arbitration proceedings;
- New head of jurisdiction as regards *rights in rem* and possession in moveable property;
- New provision laid down in Article 85 concerning collective actions.

Possible amendments to the Commission proposal will be described at the relating chapters of this note.

2. THE QUESTION OF *EXEQUATUR*

2.1. Assessment of the Proposal

According to the Commission Proposal the abolition of *exequatur* shall remove an obstacle for the free circulation of judgments. This should reduce costs and delays for the party seeking enforcement thereby removing deterrents for companies and citizens to make full use of the internal market.

In its impact assessment the Commission considered 3 of originally 5 policy options in detail:[48]

[45] Art 92 (2) of the Proposal.
[46] INT/566 – CESE 795/2011 – 2010/0383 (COD).
[47] PE467.046v01-000 – 2010/0383 (COD).
[48] SEC (2010) 1547 final.

Policy Option 1: Status quo,
Policy Option 3: Maintain exequatur but alleviate some of the burden for the applicant, and
Policy Option 4A: Abolish the exequatur procedure, while introducing the necessary safeguards for the protection of the right to a fair trial.

The impact assessment favoured option 4A because it would be the only option to fully remove barriers for the free circulation of judgements, would have a positive economic impact consisting of reduced cost of enforcement and of bringing more SME's into cross-border business transactions, while only causing temporary costs for the Member States in the adaption phase to the new procedural rules. Furthermore the Commission considered that protection of the debtor could be maintained on an equal level as before even when abolishing *exequatur*.

A reduction of enforcement cost by abolishing *exequatur* is evident. The exact amount of costs could be in dispute, but for general review this exact amount is not relevant.[49] Also the positive economic impact of the abolition of *exequatur,* which was found by the Commission, is realistic but should not play the major role in the decision of such a sensitive issue. The primary purpose of the judicial system is not to enhance commercial activities but to provide citizens with effective, comprehensible and fair vehicle to solve disputes, thereby strengthening the stability of the civil society. Regarding enforcement it is the relevant benchmark how well a system supports claimants in enforcing their claims while preventing unjustified enforcement as far as possible. For this the overall structure of the proposed provisions and the provided safeguards are relevant.

In the existing Regulation the reasons to refuse enforcement (and recognition) are:

- Art 34 (1) if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;
- Art 34 (2) where [the judgement] was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;
- Art 34 (3) if [the judgement] is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought;
- Art 34 (4) if [the judgement] is irreconcilable with an earlier judgment given in another Member State or 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.
- Art 35 (1) if [the judgement] conflicts with Sections 3, 4 or 6 of Chapter II, or in a case provided for in Article 72.

The main steps of the enforcements procedure according to the existing Regulation are:

- The interested party will make an application for the judgement to be declared enforceable in the enforcement state according to Artt 39 and 40 and the applicable national procedural rules;

[49] The CSES impact analysis found average cost of € 2.208 per application, with lower values in some new Member States predominantly in the CEE area between € 1.000 and € 1.500 and a maximum in the UK and Italy at around € 3.900. From the perspective of a practitioner these amounts seem reasonable.

- Subsequently the Court in the state of enforcement will decide on enforceability without hearing the debtor (Art 41);
- Then the declaration of enforceability will be served on the debtor (Art 42).

At this point in time the debtor will have to act. If he does not, the declaration of enforceability will bring an enforcement title into existence. The procedure in the enforcement state will go as follows:

- Within one month after service (or within 2 months if the debtor is domiciled in another country than the enforcement state) the debtor will have the possibility to appeal at a court of the state of enforcement (Art 43);
- After decision on the appeal there might be another appeal to a higher court (Art 44);
- The result of this procedure may be that a judgment is not enforceable in the designated enforcement state. The judgment will however remain in force and can be enforced in the origin state and possibly any other states in the Union wherever the interested party succeeds to get a declaration of enforceability.

If the debtor wants to go beyond preventing enforceability in the enforcement state he will already in the scope of the existing Regulation have to start parallel proceedings in the state of origin along the following lines:

- The debtor will lodge an appeal against the judgment on the substance in the state of origin. The reasons for this appeal have to be found in the procedural law of that state. Most if not all legal systems know of remedies under specific circumstances even after a decision became enforceable. In case a problems of service of the documents initiating proceedings a debtor might also rely on Art 19 of the Service Regulation[50].
- In connection with lodging such appeal the debtor might apply to stay the proceedings on the appeal against the declaration of enforceability in the enforcement state (Art 46).
- Only the appeal in the state of origin will remove the judgement and prevents the use of the judgment anywhere else in the EU. As long as the judgment exists a debtor with property in different member states might be threatened by additional enforcement measures in all states where the question of enforceability has not been finally decided.

It is easy to see from this outline that this system is in no way easy to work neither for the interested party nor for the debtor. This complicated system of legal protection is to be seen in the context of the factual findings of the different studies. Already the Study of *Hess/Pfeiffer/Schlosser* states that only 1 to 5 % of declarations of enforceability are successfully contested.[51] In these cases the ground of public policy is often invoked but seldom successful.[52] Inside the heading of public policy substantive public policy (i.e. a decision bringing a result or relying on provisions of material law that are so abhorrent that courts of the enforcement state shall not apply the judgment) are even rare to succeed. Most cases of success with the public policy argument rely on procedural public policy and

[50] Council Regulation (EC) No. 1393/2007 of 13 November 2007.
[51] Hess/Pfeiffer/Schlosser, Report, page 221.
[52] Hess/Pfeiffer/Schlosser, Report, page 244.

more precisely on cases of procedural fraud.[53] These findings were confirmed by the Study of CSES, which estimated a success rate of 93 % of exequatur proceedings with only 7 % being dismissed after appeal.[54]

The existing system puts a high burden of cost and effort on both parties additionally to an ordinary enforcement procedure of the enforcement state. The additional review by the exequatur procedure is, however, only relevant for a small minority of parties.

The new framework without exequatur as proposed by the Commission splits the grounds of appeal between the courts of the enforcement state and the state of origin. For applications in the enforcement state the following grounds stay relevant:

- if [the judgement] is irreconcilable with a judgment given in a dispute between the same parties in the Member State of enforcement (Art 43 lit a of the Proposal = Art 34 (3) of the Regulation);
- if [the judgement] is irreconcilable with an earlier judgment given in another Member State or 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 of enforcement (Art 43 lit b of the Proposal = Art 34 (4) of the Regulation).
- where such recognition or enforcement would not be permitted by the fundamental principles underlying the right to a fair trial (Art 46 of the Proposal = the part of procedural *ordre public* of Art 34 (1) of the Regulation).

Art 45 of the Proposal moves the following grounds to the review in the state of origin (compare Art 34 (2) of the Regulation):

- A defendant who did not enter an appearance in the Member State of origin shall have the right to apply for a review of the judgment before the competent court of that Member State

  where:

  (a) he was not served with the document instituting the proceedings or an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence; or

  (b) he was prevented from contesting the claim by reason of force majeure or due to extraordinary circumstances without any fault on his part;

  unless he failed to challenge the judgment when it was possible for him to do so.

The grounds moved to the state of origin are indeed such grounds that should necessarily lead to a full removal of the judgment rather than just a refusal of enforcement in one Member State. Effectively the Proposal only removes: a) the substantive *ordre public* (Art 34 (1) of the Regulation), while retaining the complete procedural *ordre public* by reference to the wording of Art 47 CFREU and Art 6 ECHR, and b) Art 35 (1) of the regulation, i.e. the check for openly apparent errors in certain jurisdiction decisions from the judgment itself.

[53] Hess/Pfeiffer/Schlosser, Report, page 248 seq.

[54] CSES, Impact Analysis, Section 3.2; there are some issues about low success rates in Bulgaria (56 %), Cyprus (75 %), Estonia (78 %), Lativa (76 %), Lithuania (83 %) and Slovakia (83 %), which might however explained e.g. by statistically unreliable results because of the low number of cases.

The removal of substantive *ordre public* seems acceptable, when keeping in mind the very view cases where substantive *ordre public* led to a refusal of enforcement but also the limited practical importance of this rule. A refusal by violation of the substantive *ordre public* alone would mean that a debtor was informed in time of the proceedings and had a chance to defend himself, there were no violations of his right for a fair trial and nevertheless the debtor wants to hinder enforcement because legal provision lawfully applied in one Member State were incompatible with the legal framework of another Member state. The Regulation only concerns civil and commercial matters, i.e. a field of law that is not too controversial as might be issues of family law, succession or the like. At the stage of integration reached inside the EU such situation leading to a violation of substantive *ordre public* is therefore hard to imagine within the scope of application of the Regulation. Also from these general considerations it becomes clear why such cases indeed are so rare in practice.

As a consequence the measures as late as in the enforcement stage delaying and burdening the vast majority of applicants with an unnecessary procedures are not efficient. If the legal community identifies areas of law, where defendants are facing hardship in one Member State which might even amount to a violation of *ordre public* in another Member State, the material law provisions in question should be the topic of discussion on the Union level.

2.2. The exclusion of collective redress and personality rights from the amendment

The Commission gives good reasons for the necessity to retain the *exequatur* procedure for non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.[55] The main issue here is the absence on harmonised conflict of law rules and the diverging material law provisions. This area is indeed sensitive. The provision of Art 37 (4) of the Proposal also allows re-evaluating the exclusion.

However, the second exclusion regarding collective proceedings is not so well-based. The main reason the Commission gives for this exclusion is the divergence not of material law provisions, but of the procedural law. Keeping in mind that procedural *ordre public* will be retained even when abolishing exequatur, this argument put forward by the Commission is of less relevance.

Additionally the scope of the restriction is not precise and possibly leads to arbitrary results. First of all there is no apparent reason why collective redress because of “harm caused by unlawful business practices” shall be treated any differently than any other claim for collective redress. Furthermore also the affected claimant entities are chosen arbitrarily and will most probably not cover all claims for collective redress. E.g. Austria claims with an effect similar to actual collective redress proceedings are often brought by assigning the individual claims of several damaged persons to one legal entity or natural person, who then will act as the sole claimant in the proceedings. Also such claims would fall out of the exception.[56]

[55] See Art 37 (3) lit a of the Proposal.
[56] Unless the assignee is a state body or NGO, see Art 37 (3) lit b (i) and (ii) of the Proposal.

2.3. Conclusions and recommendations

From the considerations as given above the Commissions proposal to abolish exequatur for most claims while splitting grounds of review between the state of origin and the enforcement state seems reasonable. The exclusion of claims for collective redress from the abolition of exequatur should however be deleted.

This would mean the following change to the Commission proposal:

Article 37

1. This Chapter shall govern the recognition, enforceability and enforcement of judgments falling within the scope of this Regulation
2. Section 1 shall apply to all judgments with the exception of those referred to in paragraph 3.
3. Section 2 shall apply to judgments given in another Member State
   ~~(a)~~ concerning non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation~~, and~~
   ~~(b) in proceedings which concern the compensation of harm caused by unlawful business practices to a multitude of injured parties and which are brought by~~
   ~~i. a state body,~~
   ~~ii. a non-profit making organisation whose main purpose and activity is to represent and defend the interests of groups of natural or legal persons, other than by, on a commercial basis, providing them with legal advice or representing them in court, or~~
   ~~iii. a group of more than twelve claimants~~.

[...]

3. THE QUESTION OF REFLEXIVE EFFECT

3.1. Assessment of the Proposal

The Commission proposes to apply the jurisdiction rules of the Regulation also to third country defendants. By this step the Regulation will replace all national jurisdiction rules within its field of application, whereas national rules will stay applicable in all matters outside the scope of the Regulation and outside the scope of the other European instruments.

The main reasoning of the Commission for this change is to provide uniform jurisdiction rules in all Member States. The Proposal shall also extend the possibilities of companies and citizens to sue third country defendants in the EU. The protection of consumers, employees and insured shall be enhanced in relation to third country parties. In this reasoning the Commission follows the impact assessment SEC (2010) 1547, which is in conformity with the impact analysis of CSES. The chosen route was therefore a full harmonisation of jurisdiction rules without harmonising the rules for enforcement of third country decision.

Quickly summarised the Proposal provides for a full application of all existing jurisdiction rules of the Regulation also on third country defendants.[57] In addition to those rules the Proposal defines two heads of jurisdiction which are only applicable on third country

[57] Art 4 (2) of the Proposal.

defendants and not on defendants of another Member State. This are a) a forum based on the location of property of the defendant at a certain value[58] and b) the *forum necessitatis*.[59] This framework is completed by a specific *lis pendens* rule for third country defendants which gives more flexibility to the Member State courts to continue their proceedings even in case of pending proceedings in front of a third country court under certain conditions.[60]

The general aim to harmonise jurisdiction rules throughout the EU also for third country defendants is to be seen advantageous in principle. Uniform rules enhance foreseeability of the forum for parties of different jurisdictions. The main issue is to choose the right jurisdiction rules for third country defendants which will – at the same time – be acceptable for the Member States and be functional in the Brussels I framework. It is also reasonable to provide additional jurisdiction rules for third country defendants to widen jurisdiction of Member State courts under certain conditions. While inside the EU claimants can be assured that in most cases an obtained judgment can be enforced in the other Member States there is no guarantee that a judgement of third country court may be enforced inside the EU. Also procedural safeguards outside the EU are not always certain. Therefore there has to be a possibility to obtain a judgment of a Member State court in such cases.

3.2. Jurisdiction based on the location of property

The first jurisdiction rule exclusively provided for third country defendants reads:

Article 25

Where no court of a Member State has jurisdiction in accordance with Articles 2 to24, jurisdiction shall lie with the courts of the Member State where property belonging to the defendant is located, provided that

(a) the value of the property is not disproportionate to the value of the claim; and

(b) the dispute has a sufficient connection with the Member State of the court seised.

A head of jurisdiction at the location of property is not uncommon in the legal systems of the Member States. *Nuyts* has found location of property of is used to establish jurisdiction in 20 of 28 jurisdictions[61] in the EU.[62] Of these 20 jurisdictions 10 allow also proceedings which are not directly related to the specific property, whereas 2 jurisdictions of these 10 know restrictions to this jurisdiction regarding the minimum value of the property and one knows a restriction of a "sufficient national connection".[63] Presently grounds of jurisdiction based on the location of property not necessarily related to the claim fall under the *exorbitant fora* listed in Annex I of the Regulation. It is however the most common ground of jurisdiction among those rules.[64]

[58] Art 25 of the Proposal.
[59] Art 26 of the Proposal.
[60] Art 34 of the Proposal.
[61] Apart from the 27 Member States the jurisdictions of England and Scotland are assessed separately.
[62] Nuyts, Residual Jurisidiction, para 51; the study is however not clear if not also Latvia as the 21st Member State knows a jurisdiction rule regarding the location of the property because of the citation in the table at para 80.
[63] Nuyts, Residual Jurisidiction, para 77; the study is however not clear if not also Denmark as the 11th Member State knows a general jurisdiction at the location of the property because of the citation in the table at para 80.
[64] Nuyts, Residual Jurisidiction, para 80 and 174, while *Nuyts* at para 174 is more sceptical on the possibility to pick any of the exorbitant fora apparently because none of the is uniformly applied in all Member States.

Apart from widespread experience with this rule there are also practical considerations. A considerable part of civil and commercial litigation is certainly conducted to get money either as contractual payment, damages, etc. This purpose is only reasonably met if a decision can in fact be enforced upon the defendant. This is ensured if the defendant has property in one of the Member States of the EU and it is even easier if the property is located in the Member State of the deciding court. On the contrary, if there is no property of the defendant located inside the EU, even successful proceedings on the subject matter might prove to be a more academic exercise without practical value. Of all thinkable jurisdiction rules extending the ordinary rules of the Regulation it is also the closest to a defendant. If a defendant has property in one of the Member State, the defendant is also most likely to have a closer connection to this Member State than to another. However, since the main argument for this jurisdiction rule is based on enforcement of claims for money it might be considered to restrict the scope of the provision to such claims.[65]

The last issue of this provision is the proposed criterion of a "sufficient connection with the Member State of the court seised". It is to fear that such criterion would devalue the easy approach of this clear cut provision. The "sufficient connection" is a very open provision which is in apparent contrast to the very factual requirement to prove some kind of property in the territory of the Member State. By introducing an additional criterion of a sufficient connection also in Art 25 one would in fact double the provisions of *forum necessitatis* of Art 26. From another perspective the existence of a not disproportionate amount of property might also be seen as a special case of a "sufficient connection" so that it is not apparent what kind of additional connection would be required.

3.3. *Forum necessitatis*

The second jurisdiction rule exclusively provided for third country defendants reads:

Article 26

Where no court of a Member State has jurisdiction under this Regulation, the courts of a Member State may, on an exceptional basis, hear the case if the right to a fair trial or the right to access to justice so requires, in particular:

(a) if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the dispute is closely connected; or

(b) if a judgment given on the claim in a third State would not be entitled to recognition and enforcement in the Member State of the court seised under the law of that State and such recognition and enforcement is necessary to ensure that the rights of the claimant are satisfied;

and the dispute has a sufficient connection with the Member State of the court seised.

Nuyts has found *forum necessitatis* rules are used to establish jurisdiction in 10 of 28 jurisdictions in the EU and notes that even the lack of existing rules would not necessarily

[65] An argument that would support the provision also for other claims would be the costs of proceedings which could be covered by enforcement into the property nevertheless. It is, however, unclear if this is a sufficiently strong connection to apply such a simple and rough rule as the location of property. It may be considered that such cases might maybe better covered by the *forum necessitatis* where it is not excluded that also considerations of property located in a member state may form one element of the assessment.

lead to a rejection of jurisdiction in the remaining Member States.[66] The two traditional requirements to apply the *forum necessitatis* are a) an obstacle that prevents the claimant from obtaining justice abroad and b) some kind of connection with the forum.[67] Both traditional requirements are adopted in the Commission's Proposal.

It is clear that this rule of jurisdiction is very vague and wide and would have to be interpreted by the seised court on a case-specific basis. This may lead to additional effort in the initial stages of the proceedings. However, it has to be considered that this jurisdiction rule will only be applied if no other rule (including the proposed Art 25) could establish jurisdiction, thereby limiting this effort to very few cases. Additionally, the flexibility of the rule can also be seen as its advantage. It is the national courts who have to bring life to the provisions of the Regulation. In this they are not only bound by the Regulation itself but also by the rights of the parties as stipulated in Art 47 CFREU and Art 6 ECHR. It can be doubted if this delicate weighting of rights and interests of claimant and defendant – in particular in the difficult context of jurisdiction and enforcement outside the scope of the Regulation – could be brought into a more mechanical provision. Therefore the proposed Art 26 seems to be an adequate solution as a general residual jurisdiction rule.

3.4. Conclusions and recommendations

The Commission Proposal achieves the set aims. According to the reasoning given above Art 25 of the Proposal might be amended by deleting the requirement of a sufficient connection with the Member State of the court seised. The jurisdiction at a location with a close connection apart from the location of property is sufficiently represented in Art 26 of the Proposal. To counterweigh the widened scope of Art 25 of the Proposal it might be considered to restrict this rule to pecuniary claims where the reasoning to allow jurisdiction for a future possible enforcement into this property is most valid. Therefore the following amendment might be reasonable:

Article 25

Where no court of a Member State has jurisdiction in accordance with Articles 2 to 24, jurisdiction for any pecuniary claims shall lie with the courts of the Member State where property belonging to the defendant is located, provided that

~~(a)~~ the value of the property is not disproportionate to the value of the claim~~; and~~

~~(b) the dispute has a sufficient connection with the Member State of the court seised~~.

4. THE QUESTION OF CHOICE OF COURT AGREEMENTS

4.1. Assessment of the Proposal

Of the amendments concerning choice of Court agreements the provision of Art 22 (1) lit b of the Proposal does not seem problematic. This provision empowers parties to tenancy agreements for professional use to deviate from Art 22 (1) of the Regulation. Since such

[66] Nuyts, Residual Jurisdiction, para 83.
[67] Nuyts, Residual Jurisdiction, para 84 and 85.

professional parties typically are able to sufficiently inform themselves about consequences of such choice, there is no need for the law to intervene. This provision will therefore not be examined in detail.

However, Art 23 (1), which introduces new collision rule on the law applicable to the assessment of the validity of the choice of court agreements, and Art 32 (2) on *lis pendens* relating to choice of court agreements require closer examination.

4.2. Applicable law on the validity of a choice of court agreement

Different courts can be confronted with questions of validity of choice of court agreements. It may be the chosen court or it may also be another court, where the defendant claims lack of jurisdiction on the basis of an (alleged) choice of court agreement and the claimant replies by challenging the validity of this agreement. Some of the issues concerning validity in a broad sense are regulated in the Regulation itself, e.g. the required meeting of minds in the interpretation of the ECJ, the formal validity of the agreement according to the lit a) to c) of Art 23 (1), etc. There are however remaining questions of the material validity which are not dealt with in Art 23, e.g. capacity of the parties, errors in declaration, and valid representation. At present those questions are also not dealt with in any other instrument of the EU. The Rome I Regulation excludes choice of court agreements from its scope of application as such[68] and also explicitly excludes questions of legal capacity of natural persons[69] and the principal agent relation[70]. There are provisions on consent and material validity[71] and incapacity[72], which are also not directly applicable on choice of court agreements because of the exclusion first mentioned.

Consequently any court encountering such additional questions of validity will turn to its national rules on conflict of laws to determine the applicable law. Those national rules might then point to another national law. This applicable law might differ for different sub-questions. Questions in close relation to the personal capacity of a person are very often bound to criteria also close to the person itself, e.g. the habitual residence. Other questions closer to the agreement might also fall under the same law as the agreement or even the substantial agreement containing the jurisdiction clause. The use of the conflict of law rules of the forum is generally accepted.[73]

The provision proposed by the Commission simply reads:

> 1. If the parties~~, one or more of whom is domiciled in a Member State,~~ have 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 ⇦ . Such jurisdiction shall be exclusive unless the parties have agreed otherwise. […]

This provision points exclusively to the law of the (allegedly) chosen court and thereby

[68] Art 1 (2) lit e Rome I.
[69] Art 1 (2) lit a Rome I.
[70] Art 1 (2) lit g Rome I.
[71] Art 10 Rome I.
[72] Art 13 Rome I.
[73] Kropholler/von Hein, *EuZPR* (2011), Art 23 EuGVO para. 28; Mankowski in Rauscher, *EuZPR/EuIPR* (2011), Art 23 Brüssel I-VO para. 41 seq.; see also Horn in Fucik/Klauser/Kloiber (ed.), *ZPO* (Manz, 2011), p. 688; more differentiating: Geimer in Geimer/Schütze, *EuZVR* (2010), Art 23 EuGVVO para. 81 seq.

poses serious problems for the legal practitioner. It is unclear to what extent the law applicable on the validity of the choice of court agreement shall be regulated. The wording seems to imply that this conflict rule points to the material law of a member state and not to its conflict of law rules as it used to be. An agreement can also be "null and void as to its substance" out of different reasons.[74] On its face the Proposal seems to define the same applicable law for any question of material validity, while conflict of law rules usually point to different laws for different aspects of the legal relation.

Finally the law of the Member State of the (allegedly) chosen Court may be problematic as well, which becomes evident from the following simple example: **A** is a Spanish company situated in Spain and **B** a Danish company situated in Denmark. **A** and **B** have concluded a contract on rendering services in France. In a legal dispute **B** starts proceedings in France on the basis of Art 5 (1) lit b of the Regulation. **A** challenges jurisdiction of the court with the allegation that an employee of **B** has signed a jurisdiction agreement giving exclusive jurisdiction to a Spanish court. **B** replies that the person in question did not represent the company and therefore **B** is not bound by this agreement.

This is a straight forward case with the most probable solution for the French court considering French conflict of law rules and coming to the conclusion to apply the Danish company law applicable to **B** to determine if the agreement was entered into validly. Taking the wording of the Commission proposal very strictly this simple solution is overturned. The French court would have to consider that the parties might have chosen a Spanish court. Spanish law would have to be applied on the validity of the choice of law agreement. This results in the French Court trying to apply Spanish company law on a Danish company concerning a contract to be carried out in France. It is clear that such result is not reasonable.[75]

The Commission sets as one aim to make the Regulation more compatible with the Hague Convention on Choice of Court Agreements 2005 (CCCA) to maybe enable the Union's ratification of this convention in the future. The CCCA only regulates the question of the applicable law implicitly in Artt 5, 6 and 9. In this convention there are different collision rules for procedures at the allegedly chosen court and any other court:

- If a party files a suit at the chosen Court, Art 5 is applied, which provides that this court shall have jurisdiction "unless the agreement is null and void under the law of that state".
- If a party files a suit with another court and the defendant presents the choice of Court agreement as a defence against jurisdiction, Art 6 is applied. This court shall suspend or dismiss proceedings unless certain alternative cases are met. Either – as above – "the agreement is null and void under the law of that state". However, the court can also accept jurisdiction if "a party lacked the capacity to conclude the agreement under the law of the state of the court seised", "giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the state of the Court seised."
- And then finally, according to Art 9 also any court of another state where a judgement based on the alleged choice of court would be enforced can refuse

[74] The German version of the Proposal reads "materiell nichtig", the French version reads "entachée de nullité sur le fond".
[75] The situation would only be ameliorated if the Commission proposal would be read as a rule pointing to the full Spanish national law including conflict of law rules, still making determination of the applicabel law more complicated than before.

> enforcement if “the agreement was null and void under the law of the State of the chosen court, unless the chosen court has determined that the agreement is valid”, “a party lacked the capacity to conclude the agreement under the law of the requested State [i.e. the enforcement state]”, and for other reasons similar to the Brussels I Regulation.

This shows that the CCCA has a different safeguard system than the Regulation in case the overly simple collision rule referring to the chosen court come to inadequate results. Any non-chosen court can continue (parallel) proceedings if it comes to the conclusion by applying its national law that the parties lacked e.g. legal capacity to enter the agreement, leading to possibly conflicting decisions. And even after the completed procedure the enforcement of the decision in a different country can be challenged on the basis of the law of the enforcement state.

This system is certainly less integrated than the existing European system and not desirable because of the danger of conflicting decisions. However, without introduction of this full framework the collision rules of the CCCA do not make any sense. One solution might therefore be not to change the provision at all and let the national laws of the Member States decide which law to apply on the question of validity of a choice of Court agreement. If harmonised European collision rules to this regard are desired the provisions will have to be more complex. Art 10 and 13 of the Rome I Regulation might serve as a model:

Artt 10 and 13 of the Rome I Regulation read:

> Article 10. Consent and material validity
> 1. The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid.
> 2. Nevertheless, a party, in order to establish that he did not consent, may rely upon the law of the country in which he has his habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1.
>
> Article 13. Incapacity
> In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from the law of another country, only if the other party to the contract was aware of that incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.

The decisive point in these provisions is that in addition to the law applicable to the contract on the substance, the law of the habitual residence might also be considered. Regarding the capacity of a person in principle national law applies, but Art 13 adds an additional element of trust.

4.3. *Lis Pendens*

The Commission claims that the second proposal concerning *lis pendens* rules shall achieve the following: “Where the parties have designated a particular court or courts to resolve their dispute, the proposal gives priority to the chosen court to decide on its jurisdiction,

regardless of whether it is first or second seised. Any other court has to stay proceedings until the chosen court has established or – in case the agreement is invalid – declined jurisdiction. This modification will increase the effectiveness of choice of court agreements and eliminate the incentives for abusive litigation in non-competent courts."[76]

It has to be stated clearly that this is a legitimate aim, to give parties concluding a choice of court agreement certainty that the choice will be upheld. In practise so-called torpedo actions have proven to be particularly tedious.[77] It is however doubtful if this aim can be achieved by the proposed provisions.

The "new" provision of Art 32 (2) was indeed only moved from its former place in Art 23 (3) to the provisions on *lis pendens*. This step is insufficient because Art 23 (3) obviously never was intended for such procedural purpose but was merely defining the material scope and effect of choice of court agreements.

Reading them completely, the relevant *lis pendens* rules for intra EU cases as proposed by the Commission read:

> *Article ~~27~~29*
>
> 1. ⇨ Without prejudice to Article 32(2), ⇦ ~~W~~where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
> 2. In cases referred to in paragraph 1, the court first seised shall establish its jurisdiction within six months except where exceptional circumstances make this impossible. Upon request by any other court seised of the dispute, the court first seised shall inform that court of the date on which it was seised and of whether it has established jurisdiction over the dispute or, failing that, of the estimated time for establishing jurisdiction.
> ~~2~~3. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.
> 4. […]
>
> […]
>
> *Article ~~29~~32*
>
> 1. Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.
> 2. 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.

It is visible on the first glance that the structure of this rules is getting more complicated by the introduction of Art 32 (2). Furthermore Art 32 (2) does not provide for any specific consequences. It is left open if the non-chosen court shall stay proceedings, dismiss the action with possible consequences for the statute of limitation, or react in any different form. The wording chosen might therefore leads to serious complications for the practitioner.

Additionally, trying to prevent "torpedo actions" by giving unequivocal precedence to an

[76] Item 3.1.3 of the explanatory memorandum of the Proposal.
[77] Those actions are not only relevant for choice of court agreements but in the context of any head of jurisdiction.

(allegedly) chosen court might just lead the abusive party to amend its strategy by claiming also a choice of court agreement for the country where they want to lodge a torpedo action. This would not only take the effect of the amendment, but pose an even larger threat for any claimant only relying on an ordinary jurisdiction rule of the Regulation. An unequivocal precedence for the allegedly chosen court could in theory even lead to "improved" torpedo actions being lodged by claiming a choice of court agreement even after the claimant has initiated proceedings in another (valid) jurisdiction.

A possible solution might be to give more flexibility to the courts seised. It are mainly considerations of cost and effort to decide which proceeding should continue or even continue in parallel to another proceeding which is seen to be dismissed sooner or later. In these considerations the respective claimants are the parties responsible to bear these costs in case such effort turns out to be futile because in the end a court would have to refuse jurisdiction. Therefore claimants should also have some right of application in this context and no proceeding should be continued against the respective claimants will.

The only hard criterion which any amendment would have to consider is that conflicting judgements within the EU must be prevented. This results in a requirement that no decision on the substance matter must be taken before the question of jurisdiction has been solved.

4.4. Conclusions and recommendations

Regarding conflict of laws, a first option would be to keep the current rules applying national law and national collision rules. The second option would be to introduce rules in conformity to the Rome I Regulation, which may lead to an amendment along the following lines:

Article 23

1. If the parties~~, one or more of whom is domiciled in a Member State,~~ have 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 ⇦~~ . Such jurisdiction shall be exclusive unless the parties have agreed otherwise. […]

Article 23a

(1) Complementing the rules laid down in Article 23, an agreement conferring jurisdiction according to Art 23 shall be governed by the law applicable to the legal relationship which the agreement is serving. If the agreement conferring jurisdiction does not serve a specific legal relationship or serves several legal relationships being governed by different laws, the law of the chosen court shall apply including its conflict of law rules.
(2) Nevertheless, a party, in order to establish that it did not consent, may rely upon the law of the country in which the party has its habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1.
(3) To determine the law which is applicable on the question, if the parties had the legal capacity to enter into the agreement conferring jurisdiction and if the parties had been validly represented, the conflict of laws rules of the seised court shall apply.
(4) In an agreement concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from the law of another country, only if the other party to the contract was aware of that incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.

Regarding the *lis pendens* rules the considerations as given above might lead to the following amendments which provide for new general rules on *lis pendens*:

Article ~~27~~29

1. ⇨ Without prejudice to Article 32(2), ⇦ ~~W~~where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, ~~any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.~~ only one of these courts (primary court) shall continue proceedings and decide on its jurisdiction, while the other courts (secondary courts) shall on their own motion stay their proceedings until this decision is reached.
2. If in the continued proceedings jurisdiction of the primary court is refused by a final and binding decision, another primary court shall be determined from the remaining secondary courts.
3. The primary court shall be determined in the following consecutive order:
- courts where the claimant bases jurisdiction on Sections 3, 4 and 5 of this Chapter in the order of the time they were seised;
- courts which are chosen in an agreement according to Article 23 in the order of the time they were seised;
- any other courts in the order of the time they were seised.
4. A primary court may not refuse jurisdiction on the ground that another court or the courts of another Member State would have jurisdiction, where such jurisdiction was already refused by a final and binding decision.
~~2.~~5. A primary court ~~In cases referred to in paragraph 1, the court first seised~~ shall establish its jurisdiction within six months except where exceptional circumstances make this impossible. Upon request by any secondary court ~~other court seised of the dispute~~, the primary court ~~court first seised~~ shall inform that court of the date on which it was seised and of whether it has established jurisdiction over the dispute or, failing that, of the estimated time for establishing jurisdiction.
~~23.~~6. Where the jurisdiction of the primary court ~~court first seised~~ is established, any other court ~~other than the court first seised~~ shall decline jurisdiction in favour of that court.
~~4.~~7. […]

Article 29a

1. The claimant in any secondary court may apply to this court to continue proceedings on the substance matter under the following conditions:
- there is a high probability that the primary court will eventually refuse jurisdiction;
- there is a high probability that the secondary court has jurisdiction to hear the case;
- the claimant is obliged to reimburse the defendant for legal costs in the event that this secondary court finally has to decline jurisdiction in accordance with Article 23 (6).
2. Any secondary court continuing proceedings shall not make a formal decision on jurisdiction or on the substance matter of the case before any prior primary court refuses jurisdiction in accordance with Article 23 (1) to (5).

[…]

~~Article~~ ~~29~~32

~~1. Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.~~
~~2. 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.~~

5. THE QUESTION OF THE INTERFACE WITH ARBITRATION

5.1. Assessment of the Proposal

At present – by the letter of the law – arbitration is excluded from the scope of the Regulation by virtue of Art 1 (2) lit d. The consequence is that jurisdiction for such proceedings is governed by national rules and that decisions of those proceedings cannot be enforced by application of the Regulation. The national rules on arbitration are in many instances influenced or formed by international treaties on the topic. The most widely accepted treaty is the New York Convention of 1958 on the recognition and enforcement of arbitral rewards.

According to case-law the following types of court proceedings relating to arbitration fall outside the scope of the Regulation: The decision on the person of the arbitrator,[78] on the venue of arbitration,[79] anti-suit injunctions supporting arbitration proceedings,[80] any proceedings to invalidate, change, confirm, transpose, recognise or enforce an arbitral award.[81] While touching arbitration in a functional understanding certain other court proceedings fall within the scope of the Regulation: Provisional and/or protective measures regarding the claim as such and not the arbitration proceedings or the enforcement of the arbitral award,[82] any other court proceedings where the question of validity is an incidental question, i.e. the decision on the existence of an arbitration agreement brought as a defence in court proceedings.[83]

In particular the ECJ decision of *West Tankers*[84] has raised high concern with arbitration practitioners (in particular with a common law back-ground), because the decision forbid the use of anti-suit injunctions (which used to be a common instrument to counter court proceedings contravening an arbitration agreement) and it explicitly gave national courts jurisdiction to incidentally decide upon validity of an arbitration agreement. This concern mainly focuses on the possibility of torpedo actions, parallel proceedings, and a loss of factual enforceability of arbitral rewards because of conflicting court decisions. The Proposal tries to address those issues.[85]

In the explanatory memorandum of the Proposal the Commission states that the proposed

[78] ECJ case C-190/89 *Marc Rich* [1991] ECR I-3855.
[79] Geimer in Geimer/Schütze, *EuZVR* (2010), Art 1 EuGVVO para. 154; Mankowski in Rauscher *EuZPR/EuIPR* (2011), Art 1 Brüssel I-VO para 28.
[80] ECJ (Grand Chamber) case C-185/07 *West Tankers* [2009] ECR I-663 para 23, even though outside the scope of the Regulation such anti-suit injunctions compromise the ability of courts in other Member states to decide on their jurisdiction so that anti-suit injunction are still not compatible with the Brussels I Regulation (para. 32); Kropholler/Van Hein, *EuZPR* (2010), Art 1 EuGVO para 45; part of the doctrine would see anti-suit injunctions falling inside the scope of application of Brussels I but comes to the same conclusion as to their impermissibility by directly applying ECJ case C-159/02 *Turner* [2004] ECR I-3565 (see e.g. Illmer (2009) 4 IPRax 312 and its references in footnote 34).
[81] Mankowski in Rauscher, *EuZPR/EuIPR* (2011), Art 1 Brüssel I-VO para 28.
[82] ECJ case C-391/95 *Van Uden* [1998] ECR I-7091 para 34; Kropholler/Van Hein, *EuZPR* (2010), Art 1 EuGVO para 44.
[83] ECJ (Grand Chamber) case C-185/07 *West Tankers* [2009] ECR I-663 para 31.
[84] ECJ (Grand Chamber) case C-185/07 *West Tankers* [2009] ECR I-663.
[85] Among many papers a submission to the Commission's Green Paper COM (2009) 175 final by the Arbitration Committee of the International Bar Association may be pointed out, which – after a very critical review of the considerations of the Commission in the Green Paper – spelled out a clear list of requirements and safeguards which were mostly implemented in the current Proposal (document available on the website of DG Justice in the context of the public consultations to COM (2009) 175 final).

amendments will "enhance the effectiveness of arbitration agreements in Europe, prevent parallel court and arbitration proceedings, and eliminate the incentive for abusive litigation tactics".

The underlying impact assessment[86] assessed besides the status quo the policy options: (Option 2) extending the exclusion of arbitration and (option 3) enhancing the effectiveness in particular by a rule on *lis pendens*. These options were evaluated along the criteria: avoidance of parallel proceedings, ensuring effectiveness of arbitration, economic impact, and fundamental rights. Both options were found to enhance the economic impact. While both options also are said to enhance the effectiveness of arbitration and fundamental rights, Option 3 was considered even more advantageous.

The main difference in the assessment lies with the possibility to avoid parallel proceedings. Here Option 2 is considered to be a major step backwards, by falling back on the national law of all 27 Member states and enabling "cynical litigants" to prevent any recognition and enforcement of a decision under the Regulation simply by claiming an arbitration agreement – independent if this contention is correct or not. Already *prima facie* this reasoning seems plausible. The note will however attempt an independent review of the proposed provisions.

The Commission's Proposal contains the following amendments and new rules concerning arbitration:

Article 1

[…]

2. This Regulation shall not apply to: […]

(d) arbitration ⇨ , save as provided for in Articles 29, paragraph 4 and 33, paragraph 3⇦

SECTION ~~9~~10

***LIS PENDENS* — RELATED ACTIONS**

Article ~~27~~29

[…]

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

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

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

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

Article ~~30~~33

[…]

3. For the purposes of this Section, an arbitral tribunal is deemed to be seised when a party has nominated an arbitrator or when a party has requested the support of an institution, authority or a court for the tribunal's constitution

[86] SEC (2010) 1547 final in item 2.4.

The provisions proposed by the Commission fulfil the set aim in enhancing the interoperability of arbitration and court proceedings. Basically the provisions read together with the existing case-law provide for the following framework:

- The problem perceived in *West Tankers* is solved not by introducing anti-suit injunctions, which were found incompatible with the Brussels I framework in general no matter if they fall within or outside the scope of application,[87] but by an adaption of the existing and functional system of *lis pendens* rules.
- The proposal empowers a party which does not agree to litigation in a different country to initiate arbitral proceedings[88] at any time. Even if litigation in front of a Member State court was commenced first, this court in application of Art 29 would have to stay and eventually abandon its proceedings.
- On the other hand, a party simply claiming an arbitration agreement in a court proceedings without going the required steps to initiate such proceedings will neither be able to move the court proceedings outside the scope of the Regulation nor to take this court's competence to decide on its own jurisdiction.
- There is a natural time limit for the party which wants to uphold an arbitration agreement to take action. It would probably not be reasonable to allow for a motion to refuse jurisdiction after the Member state court has accepted jurisdiction by a final decision. Since the proposal is not totally clear to this point an addition should be made.
- According to the case-law of the ECJ supporting provisional and protective support by Member State courts remains possible.[89] By the adaption of the rules on provisional measures in the Proposal these measures include evidentiary support.[90] In the context of arbitration there is no Member State court which has subject matter jurisdiction already because of the exclusion by Art 1 (2) lit d. This means that protective measures in support of arbitration cannot be enforced or recognised in other Member States,[91] but that each Member State may take such measures according to its own national law.[92]
- Enforcement of arbitration awards is still not covered by the Regulation.
- There may still be problems of conflicting decisions in arbitration and national court proceedings. If the interested party acts in time, conflicting decision can however be prevented by the *lis pendens* rules. Therefore there is no need of further rules regarding enforcement of decisions, which conforms to the aim to exclude arbitration proceedings from the scope of the Regulation is widely as possible.

Another proposed alternative, i.e. to exclude from the scope of application of the Regulation also proceedings deciding on the validity as an interim or preliminary question as proposed in the Draft Report of the Committee of Legal Affairs of the European

[87] ECJ (Grand Chamber) case C-185/07 *West Tankers* [2009] ECR I-663 para 32; case C-159/02 *Turner* [2004] ECR I-3565.
[88] Or court proceedings to force the other party into arbitration.
[89] ECJ case C-391/95 *Van Uden* [1998] ECR I-7091 para 34.
[90] Item (22) in the whereas clauses and Art 2 lit b of the Proposal.
[91] Art 2 lit a of the Proposal.
[92] Art 36 of the Proposal.

Parliament[93] would not achieve all this aims. It would lead to serious frictions in any dispute where an opponent claims the existence of an arbitration agreement validly or not. This could also cause great hardship for any claimant who initiates proceedings at a legitimate venue under the Regulation only to possibly see this jurisdiction fall away once the defendant makes an (even unsubstantiated) allegation of an arbitration agreement. It would also not solve the problem of conflicting decisions of the resulting national decisions outside the scope of the Regulation and the arbitration decision. Without applying the Regulation there could even be potentially separate conflicting decisions in several Member States if any party initiates proceedings in several Member States.

5.2. Conclusions and recommendations

According to the reasoning as given above the Commission Proposal seems adequate. For the sake of clarity it could be considered to include the following small amendment:

Article ~~27~~29

[…]

4. Where the agreed or designated seat of an arbitration is in a Member State, the courts of another Member State whose jurisdiction is contested on the basis of an arbitration agreement shall stay proceedings once the courts of the Member State where the seat of the arbitration is located or the arbitral tribunal have been seised of proceedings to determine, as their main object or as an incidental question, the existence, validity or effects of that arbitration agreement.
This paragraph does not prevent the court whose jurisdiction is contested from declining jurisdiction in the situation referred to above if its national law so prescribes.
Where the existence, validity or effects of the arbitration agreement are established, the court seised shall decline jurisdiction.
This paragraph does not apply in disputes concerning matters referred to in Sections 3, 4, and 5 of Chapter II and in any proceedings where a final and binding decision on the question of jurisdiction has been taken.

6. THE QUESTION OF JURISDICTION FOR *RIGHTS IN REM*

The Commission's Proposal contains a new head of jurisdiction in Art 5 (3) which reads:

Article 5

~~A person domiciled in a Member State may, in another Member State, be sued~~ ⌦ The following courts shall have jurisdiction ⌫ :

[...]

3. as regards *rights in rem* or possession in moveable property, the courts for the place where the property is situated;

The Commission does not give any reasons for the introduction of this new jurisdiction rule in the explanatory notes to the Proposal other than that "it improves the practical

[93] The draft report contains the following proposed wording for Art 1 (2) lit d : "(d) arbitration, including judicial procedures ruling on the validity or extent of arbitral competence as a principal issue or as an incidental or preliminary question".

functioning of the jurisdiction rules".[94] Also the impact assessment does not give any further reasoning for this amendment.

The first question to ask is: What is moveable property? Just judging from the wording of the provision this could be anything from tangible assets to bank deposits.[95] Secondly, the proposed rule concerns 1) *rights in rem* and 2) possession. This even goes further than the existing rule for immoveable property in Art 22 (1) of the Regulation, which only concerns *rights in rem*. There are a lot of disputes imaginable that concern possession. Consequently, the new rule is potentially widely applicable making it particularly prone to abuse. In effect any person claiming possession of property could by this rule bring jurisdiction for declaratory action at his seat or domicile where the moveable property is most commonly located. This would in fact overturn the general rule of jurisdiction at the domicile of the defendant in Art 2 of the Regulation. Additionally serious issues of interpretation would have to be solved in the relation of the new provision to the existing rules for contractual and non-contractual claims in Art 5 of the Regulation. Introducing this rule in the proposed form would result in legal uncertainty at least until further interpretation by the ECJ.[96]

Equally a person in possession of moveable property could resort to moving this property to change jurisdiction. Therefore, the provision also allows for extensive "forum shopping". And finally, the location of moveable property is of little or no significance for a close connection to this place, which would justify to address a court at this location. As easily as moveable property can be moved into the sphere of a court, it can be moved out of it again.

The rule could compromise foreseeability of the venue of jurisdiction by the parties without bringing a clear advantage over the present rules. It should therefore be deleted without replacement.

7. THE QUESTION OF INDUSTRIAL ACTIONS (ART 85)

The Commission's Proposal introduced in the Final Provisions an Article dealing with the right to industrial action which reads:

Article 85

> This Regulation shall not affect the right of workers and employers, or their respective organisations, to engage in collective action to protect their interests, in particular the right or freedom to strike or to take other actions, in accordance with Union law and national law and practices.

[94] Item 3.1.6 of the explanatory memorandum of the Proposal.

[95] *Franzino* (2011, 3 Diritto del commercio internazionale [in print]) argues that the proposed rule only covers (or should cover) tangible assets. This argument is based on the practical and legal difficulties to determine the situs rei for intangible property. It may however be noted that the Draft Common Frame of Reference available at http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf defines "movables" as "corporeal and incorporeal property other than immovable property, while "immovable property" means only "land and anything so attached to land as not to be subject to change of place by usual human action". Even tough the DCFR is not binding there is a high danger that also the ECJ might come to a similar interpretation for the new proposed rule considerably broadening its scope.

[96] Even *Franzino* (see last footnote) – while restricting the scope of the proposed rule to tangible assets and to a very restricted view of "possession" – comes to the conclusion that the proposed rule is more disadvantageous in particular because of the difficult practical operation of the provision over only limited advantages.

The Commission gives no reasoning for this provision in the Proposal. In the context of fundamental rights in the explanatory memorandum the Commission basically repeats the wording of this provision.[97] There is however a deep issue of concern regarding collective action, which was not spelled out by the Commission but which seems to be the obvious reason for the amendment.

In the case law of the ECJ the right of workers and their respective organisations to take collective action including strike action according to Art 28 of the Charta is not absolute but subject to possible restrictions. In the Case Viking Line[98] the ECJ decided an 11 December 2007 that Art 43 TEC (now Art 49 TFEU) is capable of conferring rights on a private undertaking against a trade union, which takes actions that could compromises this undertaking's freedom of establishment inside the EU.[99] In this context the provisions of the TFEU and the CFREU have to be reconciled in accordance with the principle of proportionality.[100] The ECJ continued its observations that the right to take collective action and the protection of workers are of possible overriding reasons to justify a restriction to the freedom of establishment.[101] The test of proportionality would however have to be undertaken by the national court seised with the matter.[102]

After this judgement on 11 January 2009 the Rome II Regulation entered into force. This Regulation, which is concerned with the law applicable to non-contractual obligations, also contains a provision about the law applicable to damages caused by industrial action. In principle the law of the Member State where the industrial action is to be or has been taken applies. Art 9 of the Rome II Regulation reads:

> Article 9. Industrial action
>
> Without prejudice to Article 4(2), the law applicable to a noncontractual obligation in respect of the liability of a person in the capacity of a worker or an employer or the organisations representing their professional interests for damages caused by an industrial action, pending or carried out, shall be the law of the country where the action is to be, or has been, taken.

Consequently for decisions on damages caused by industrial action respectively the lawfulness of industrial action the state of development in material law of the EU requires national courts to apply the law of the Member State where the industrial action is taken (or is to be taken). Furthermore the national courts potentially have to engage in a delicate weighing of public interest to take industrial action with freedom of establishment of the affected company.

For the recast of the Regulation only the procedural aspects of this situation are relevant. It is however doubtful if the Proposal has sufficiently taken into account the practical requirements of the material side of the issue. Since the economies of the EU are getting more integrated and companies increasingly are engaging also in cross-border operations, industrial action concerning several Member States might increase. Taking this into account there are two issues which need to be addressed: First of all the parties to such industrial

[97] Item 3.4 of the Explanatory memorandum of the proposal
[98] Case C-438/05 *Viking Line* [2007] ECR I-10779.
[99] This case concerned actions against the re-flagging of ferry vessel from Finland to Estonia.
[100] Case C-438/05 *Viking Line* [2007] ECR I-10779, para. 46 citing cases C-112/00 *Schmidberger* [2003] ECR 1-5659, para 74 and C-36/02 Omega [2004] ECR 1-9609, para. 36.
[101] Case C-438/05 *Viking Line Viking Line* [2007] ECR I-10779, para. 77 with further references.
[102] Case C-438/05 *Viking Line Viking Line* [2007] ECR I-10779, para. 83 seq.

dispute should be able to foresee where litigation on the legality of the action might be taken, and secondly the court seised should not regularly be required to apply foreign law or make assessments of foreign public policy that would require considerable research effort from this court going beyond the acceptable workload in similar national cases.

In a the *Torline* judgment of 5 February 2004[103] the ECJ had to deal with such cross border dispute and came to the conclusion that according to the existing Regulation Art 5 (3) has to be applied to damage caused by industrial action and ancillary proceedings concerning the legality of industrial action. This result in a whole range of possible jurisdiction according to the theory of ubiquity,[104] which gives jurisdiction to any court where the damaging action was taken or any part of the damage occurred. In the *Torline* case it may be noted that a Danish company sued a Swedish trade union in front of a Danish court because of industrial action taken in relation to a Vessel tough Danish flagged, travelling the route Sweden / UK with a Polish crew. Also in the Viking Line case cited above,[105] where a Finnish company lay in dispute with a Finnish trade union about a reflagging of a ship to Estonia jurisdiction was established not in Finland but in the UK. In that case jurisdiction was based on the seat of a transnational association of trade unions seated in London which supported the Finnish trade union by informing its national members of this dispute and requiring their support. The jurisdiction with regard to the Finnish trade union in the UK was then brought by application of Art 6 (1) of the Regulation, because of a connection of the claims. Keeping in mind that there was a support call to all national members of the association, proceedings could have been launched in any of those Member States.

In the light of the developments of European law providing since 2009 for clear collision rules pointing at the law of the state where industrial action is taken, there is no reason why not also the courts of this Member State shall be competent to hear this case. Those courts are also the most involved and directly concerned with the considerations of public policy and proportionality as set by the ECJ.

Furthermore jurisdiction in the state where the industrial action is taken would concentrate the dispute for employers, employees and their respective associations in on venue. It has to be clear that court proceedings, collective actions and negotiations are parallel means to address a dispute. Not by chance the ECJ and the ECHR see collective actions as one of the main ways in which trade unions legitimately protect the interests of their members.[106] Concentrating both ways to address the dispute in one venue might enhance the chance to resolve the dispute.

The Proposal of the Commission does however not reach this aim. It is not to expect that the proposed Art 85 would enable the ECJ to define more appropriate jurisdiction rules for industrial action. To achieve a maximum concentration in one venue it might be a possibility to introduce instead of Art 85 a new head of compulsory jurisdiction in Art 22. Since the parties in industrial action are however highly informed and also capable to interact it might be possible to consider an additional possibility for those parties to establish another venue if both parties consent.[107]

[103] Case C-18/02 *Torline* [2004] ECR I-1417.
[104] Compare Case 21/76 *Mines de potasse d'Alsace* [1976] ECR 1735.
[105] Case C-438/05 *Viking Line* [2007] ECR I-10779.
[106] Case C-438/05 *Viking Line* [2007] ECR I-10779, para. 86 with further references.
[107] That such solution is thinkable is already shown by the Commission proposal itself, which provides that professional parties may mutually agree to another court than defined in Art 22 (1) lit b of the proposal.

A possible amendment might be found along the following lines:

Article 22

The following courts shall have exclusive jurisdiction~~, regardless of domicile~~:

[...]

6. in proceedings concerning the lawfulness of industrial action including strikes and damages arising out of such action the courts of the Member state where the action is to be, or has been, taken. However parties to the dispute may agree that a court or the courts of a Member State are to have jurisdiction in accordance with Article 23. Nothing in this provision shall modify the rules of Section 5 for disputes between the individual employees and the employer.

~~*Article 85*~~

~~This Regulation shall not affect the right of workers and employers, or their respective organisations, to engage in collective action to protect their interests, in particular the right or freedom to strike or to take other actions, in accordance with Union law and national law and practices.~~

8. OTHER IMPORTANT ISSUES

8.1. Cumulation of claims regarding individual work contracts

The Commission states in the explanatory memorandum that the possibility for employees to sue several (joint) employers in one Court according to Art 6 (1) of the Regulation shall be (re)introduced.[108] This possibility has existed in the Brussels I Convention, because there the jurisdiction for individual work contracts was still less developed and located inside Art 5 (1) in the context of the ordinary contractual jurisdiction. The Commission refers to case C-462/06[109] which in effect forces an employee with two closely connected employers to sue each of them in a separate venue. It can be agreed that an adaptation of the Regulation in this regard is reasonable.

There is however no reason to give employers the same possibility in relation to their employees. The reasoning of the Commission that this situation does not arise in practice is not well founded. There is no significance that up to now there has been no use of the Art 6 (1) by employers in practice since the use of this provision was clearly excluded by the rules governing individual work contracts. And also without further consideration there is a higher statistical probability that an employer wishes to sue several employees than the opposite.

Consequently the following amendment might provide a more adequate solution:

[108] Item 3.1.6 of the explanatory memorandum of the Proposal
[109] ECJ case 462/06 *Rouard* [2008] ECR I-3865.

Article 18

1. In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to ~~Article 4 and~~ point 5 of Article 5 ~~⇨ and Article 6(1) ⇦~~.
2. In addition to the rules of this Section employees may also rely on Article 6 (1).
3.~~2.~~ Where an employee enters into an individual contract of employment with an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.

8.2. Cooperation in the context of provisional measures

In the context of provisional measures it is possible that courts of different Member States decide on different measures in parallel. According to the Proposal this can be seen as the general situation. Decisions about provisional measures other than by the court with jurisdiction on the substance matter will no longer be enforceable[110] and will therefore need to be sought in the individual Member States.

The primary aim of provisional measures is to prevent a defendant from counteracting present or imminent litigation by illegitimate means (e.g. by moving assets outside the jurisdiction, destroying evidence, etc). For this provisional measures have to be taken with certain swiftness. The protection of the defendant is in general guaranteed in a review procedure and at time with requirements even in a measure without hearing the defendant which ensures that the defendant will be held harmless (e.g. provision of a security by the claimant).

It is doubtful if the wide reaching obligation of court to coordinate measures will not in fact counteract efficiency. There is no advantage if a national court, which has to assess urgency, threatening harm etc according to its own law, has to consult with a foreign court if this court might be of the same opinion or not. By such coordination before a measure is taken the issue of urgency might very often indeed be "solved" because the defendant will have succeeded with whatever the claimant wanted to prevent him to do. The measure will come too late. There is however no reason why in case of urgency coordination could not take place after a measure was taken. A possible attempt to amend the Proposal would be the following:

Article 31

If proceedings as to the substance are pending before a court of a Member State and the courts of another Member State are seised with an application for provisional, including protective measures, the courts concerned shall cooperate in order to ensure proper coordination between the proceedings as to the substance and the provisional relief.
~~In particular, the court seised with an application for provisional, including protective measures shall seek information from the other court on all relevant circumstances of the case, such as the urgency of the measure sought or any refusal of a similar measure by the court seised as to the substance.~~ This cooperation shall not compromise the urgency of the measure sought. If no cooperation has been possible before the decision on the measure was taken, the court ordering the measure shall contact and exchange information with the court of the proceedings on the substance after the measure was taken. If by this exchange the court issuing the measure comes to a different evaluation of the measure sought, it shall - in coordination with any other courts involved - repeal or amend the measure without further application of the parties.

[110] Art 2 lit a of the Proposal.

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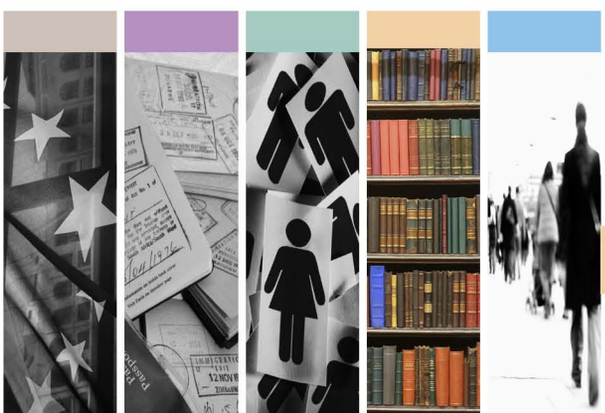

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