

Themis Competition 2018  
Semi-Final C: European Civil Procedure



PARTY AUTONOMY  
UNDER REGULATION NO 1215/2012



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## Chapter I: Introduction

Brussels I BIS Regulation ("recast Regulation") covers, like its predecessor, the jurisdiction of courts and the recognition and enforcement of judgments in civil and commercial matters in cross-border disputes within the EU. This Regulation continues the reign of the 1968 Brussels Convention and of the 2001 Regulation, being founded on the same basis and principles.

The reason why we chose the prorogation of jurisdiction topic is because, nowadays, in many contracts are included jurisdiction clauses, which makes the evolution of their contractual relation more predictable. Also, there are many situations when the defendant appears before the court and it's very important for him to acknowledge the procedural consequences.

### **Time and space application of Regulation no. 1215/2012**

The Regulation no. 1215/2012 applies since 10 January 2015. According to Article 66 of Regulation no. 1215/2015 "*This Regulation shall apply only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 10 January 2015*"<sup>1</sup>. The legal proceedings instituted before 10 January 2015, will be governed by Regulation no. 44/2001.

The Regulation applies between all Member States of the European Union, including Denmark and United Kingdom.

### **Cross-border litigation. Existence of an international element**

A first condition that the national court has to verify in order to determine if the litigation falls under the scope of Regulation no 1215/2012 is the existence of an international element. As stated in Recital (3), the matter must have cross-border implications.

If the only international element is the chosen court, the question is if the Regulation could apply on the pure consent of the parties<sup>2</sup>. Seeing the mentions above, we consider that the sole designation of the courts of another Member State by the parties is not sufficient to make it an international case. This is an effect of the fact that in internal litigations the applicable law is the one of each Member State and the parties should not be allowed to elude these provisions. Nonetheless, it has been argued<sup>3</sup> that the Convention should apply in such cases for the benefits

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<sup>1</sup> *Case Sanicentral GmbH v. Collin* [1979], C-25/79, EU:C:1979:255, par. 6.

<sup>2</sup> Andrew Dickinson, Eva Lein (coord.), Marie-Elodie Ancel, Stefania Bariatti, Andrea Bonomi, Jonathan Fitchen, Pietro Franzina, Francisco Garcimartin, Martin George, Martin Illmer, Xandra Kramer, Matthias Lehmann, Louise Merrett, Arnaud Nuyts, Pippa Rogerson, Helene van Lith, *The Bruxelles I Recast Regulation*, Oxford University Press, 2015, p. 285.

<sup>3</sup> A. Dickinson, E. Lein, A. James "*The Brussels I Regulation Recast*", Oxford University Press (2015), p. 286.

that this interpretation brings: it would reduce the difficulties that arise from the delimitation between domestic and international cases and from the application of national law of each State.

### **Jurisdiction under The Regulation no. 1215/2012**

*The basic jurisdiction rule*, according to Article 4 of Brussels I is that, for persons domiciled in the territory of a Member State, jurisdiction is exercised by the courts of the Member State in which the defendant is domiciled, regardless of his or her nationality.

Articles 7 to 9 of the Regulation contain rules on *special jurisdiction alternative to the general rule* in Article 4, giving the plaintiff the choice between the courts of the Member State of the defendant's domicile and the courts of another Member State having a special jurisdictional basis. Article 24 introduces cases of exclusive jurisdiction.

*Prorogation or choice-of-court* under Article 25 refers to the situation where parties to a contract have agreed to refer any dispute arising from the contract to the decision of a specific court or of the courts of a specific Member State. A jurisdiction clause can be included in a broader contract on the substance of the legal relationship between the parties or it can be drawn up separately. Such an agreement can also deal with disputes other than those arising out of a contract, since the wording of the Regulation does not prohibit it.

A court of a Member State before which a defendant enters an appearance will be regarded as having jurisdiction, by virtue of Article 26. This does not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction pursuant to Article 24.

### **Preliminary matter regarding the domicile of the defendant**

Under the previous version of Brussels I, an agreement to choose a court in a Member State could be entered between parties, one or more of whom had a domicile in a Member State. However, the Brussels I BIS has removed that condition and therefore has extended the scope<sup>4</sup> of application of the provision: Article 25 applies if the parties have designated the court or courts of a Member State, regardless of where they are domiciled.

Another aspect is whether Article 26 demands the domicile of the defendant to be in a Member State. *It was argued*<sup>5</sup> that, given the fact that Article 25 no longer stipulates such condition, and considering that Article 26 introduces a case of prorogation of jurisdiction(an implicit one), the

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<sup>4</sup> Emmanuel Guinchard, „*Le nouveau règlement Bruxelles I bis, collection Droit de l'Union Européenne*”, p. 106.

<sup>5</sup> Thomas Rauscher (coord.), Stefan Leible, Peter Mankowski, Ansgar Staudinger, *European Civil Procedural Law and European International Private Law. Bruxelles I Regulation. Lugano 2007 Convention*, third edition, ed. Sellier, European Law Publisher, Munchen 2011, page 824, cited in Zidar Liviu, *Jurisdiction in civil matters according to Regulation Bruxelles I bis (no. 1215/2012)*, Hamangiu, 2017, page 468.

latter should follow the same rule. However, *in another opinion*<sup>6</sup>, it was considered that based on its wording, the Regulation appears to require for the defendant to be domiciled in a Member State. Article 6 of the Regulation stipulates that in the case of defendants domiciled in third states, the jurisdiction of the courts of each Member State shall be determined by the law of that Member State. The exceptions to this rule are the following: Article 18(1), Article 21(2), Article 24 and Article 25, while Article 26 is not one of the mentioned exceptions. We consider the second opinion to be the conclusion we can extract from the provisions of the Regulation and only the CJEU is entitled to give a different interpretation to this matter.

### **Structure of the paper**

Our paper represents an analysis of prorogation of jurisdiction under Regulation no 1215/2012. In the following chapters we will analyze Articles 25 (Chapter II) and 26 (Chapter III) of this Regulation, since these provisions settle the legal regime of prorogation of jurisdiction.

## **Chapter II: Prorogation of jurisdiction pursuant to Article 25**

Article 25 of the Recast Regulation introduces a case of prorogation of jurisdiction based on a choice-of-court clause.

This type of *ex ante* agreement presents considerable advantages for the parties since it represents a manner for them to express their will and it assures the predictability and the certainty of which court that will settle their case.

### **1. The designated Court must be a Court (or Courts) of a Member State**

Art. 25(1) from the recast Regulation is applicable only if the designated court is from a Member State. This conclusion can be deduced from the text of Article 25, and it was also drawn by the CJEU with the mention that a more general clause which would only institute some criteria upon which the designated court could appreciate its own competence is sufficient. Also, the Court stated that “*a jurisdiction clause referring to ‘the courts’ of a city of a Member State refers implicitly but necessarily, for the exact determination of the court before which an action must be taken, to the system of jurisdiction rules in force in that Member State*”<sup>7</sup>.

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<sup>6</sup> Andrew Dickinson, Eva Lein (coord.), Marie-Elodie Ancel, Stefania Bariatti, Andrea Bonomi, Jonathan Fitchen, Pietro Franzina, Francisco Garcimartin, Martin George, Martin Illmer, Xandra Kramer, Matthias Lehmann, Louise Merrett, Arnaud Nuyts, Pippa Rogerson, Helene van Lith, *The Bruxelles I Recast Regulation*, Oxford University Press, 2015, page 307.

<sup>7</sup> *Case Coreck Maritime GmbH v. Handelsveem BV [2000]*, C-387/98, EU:C:2000:606, par. 14.

## 2. Validity conditions

### a. Formal conditions

In what concerns the formal conditions, the recast Regulation hasn't brought new elements from the 2001 Regulation. As it was established in the prior Regulation, the Contracting States are not free to lay down formal requirements other than those contained in the Convention as the main purpose is to ensure legal certainty and that the parties have given their real and effective consent<sup>8</sup> in order to “*protect the weaker party to the contract by avoiding jurisdiction clauses, incorporated in a contract by one party, going unnoticed*”<sup>9</sup>. These alternative formal conditions are designed also to assure the proof that the parties understood the conditions of the agreement, being given that the purpose of this agreement is to designate the courts of a Member State which will have exclusive jurisdiction in accordance with the consensus between the parties<sup>10</sup>. The court before which the matter is brought has the duty of examining whether the clause conferring jurisdiction upon it was in fact the subject of consensus between the parties, fact which must be clearly and precisely demonstrated<sup>11</sup>.

#### a1. In writing

Art. 25(1) letter a) states that the agreement conferring jurisdiction shall be in writing or evidenced in writing.

The existence of a valid contract as *negotium iuris* between the parties implies their consent on every aspect stated in that contract. The CJEU stated that in the particular case in which there was a written convention containing a choice-of-court agreement and this convention has expired but continued to serve as basis for the contractual relations between the parties, “*the choice-of-court agreement satisfies the formal requirements of art. 17 from the convention, if under the law applicable, the parties could validly renew the original agreement otherwise than in writing, or if, conversely, one of the parties has confirmed in writing either the jurisdiction clause or the set of terms which has been tacitly renewed and of which the jurisdiction clause forms part, without any objection from the other party to whom such confirmation has been notified*”<sup>12</sup>.

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<sup>8</sup> *Case Elefanten Schuh [1981], C-150/80, EU:C:1981:148, par. 26; Case Estasis Salotti di Colzani Aimò e Gianmario Colzani s.n.c. v Rüwa Polstereimaschinen GmbH [1976], C-24/76, EU:C:1976:177, par. 7.*

<sup>9</sup> *Case Transporti Castelletti [1999], C-159/97, EU:C:1999:142, par. 19.*

<sup>10</sup> *idem, par. 48.*

<sup>11</sup> *Case Jaouad El Majdoub c. CarsOnTheWeb.Deutschland GmbH [2015], C-322/14, EU:C:2015:334, par. 29.*

<sup>12</sup> *Case Iveco Fiat [1986], C-313/85, EU:C:1986:423, par. 10.*

Many times, parties choose to include the jurisdiction clause in their general conditions of sale. For this to make a valid choice of court, the contracts signed by both parties should contain an express reference to those general conditions<sup>13</sup>.

Considering art. 25(2) from the recast Regulation, we can conclude that e-mails are sufficient in what concerns formal conditions if the jurisdiction clause is included in the standard terms of the contract, and the e-mail contains a reference to those standard terms. In a recent case<sup>14</sup> the Court was asked if Article 25(2) a) must be interpreted as meaning that the method of accepting general terms and conditions of contract for sale by ‘click-wrapping’, concluded electronically, containing an agreement conferring jurisdiction, constitutes a communication by electronic means capable of providing a durable record of that agreement. The conclusion was that the fact that a webpage containing the information does not open automatically on registration on the website and during each purchase cannot call into question the validity of the agreement conferring jurisdiction, and so, it must be considered that it provides a durable record of the agreement, where that method makes it possible to print and save the text of those terms and conditions before the conclusion of the contract.

#### a2. Oral agreement confirmed in writing

The second alternative that art. 25(1) letter a) provides is an oral agreement confirmed in writing. For this provision to apply, there are two elements required: the oral consent, express or implicit and the confirmation by writing which must be in strict accordance with the previous oral consent. If the parties refer to terms and conditions which contain a choice-of-court agreement, for this to be a valid clause, it must have been notified to the party in advance, otherwise it is reasonable to conclude that the party could not have known the content or even the existence of the choice-of-court agreement included in those terms<sup>15</sup>. The Court stated that it would be sufficient for only one party to confirm the oral agreement in writing, even if this party is the one that imposes the clause. Also, such a clause, even in the absence of a prior oral convention, may have a mandatory effect if it comes within the framework of a continuing business relationship between the parties<sup>16</sup>.

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<sup>13</sup> *Case Estasis Salotti di Colzani Aimò e Gianmario Colzani s.n.c. v Riiwa Polstereimaschinen GmbH* [1976], C-24/76, EU:C:1976:177, par. 10. As stated in the case *Coys of Kensington v. Tiziana Pugliese*, the fact that a party does not have a copy of the standard terms is not relevant.

<sup>14</sup> *Case Jaouad El Majdoub c. CarsOnTheWeb.Deutschland GmbH* [2015], C-322/14, EU:C:2015:334, par. 39-40.

<sup>15</sup> *Case Galeries Segoura* [1976], C-25/76, EU:C:1976:178, par. 7.

<sup>16</sup> *Case Tilly Russ* [1984], C-71/83, EU:C:1984:217, par. 17, 18.

In a recent case-law the CJEU established<sup>17</sup> that a jurisdiction clause set out in the general conditions of sale mentioned in invoices issued by one of the parties does not satisfy the requirements of Article 25, when the contract was concluded verbally and was not evidenced in writing. The Court stated that where a jurisdiction clause is stipulated in the general conditions, such a clause is lawful where the text of the contract signed by both parties itself contains an express reference to general conditions which include a jurisdiction clause. After a party makes the confirmation in writing, the other party may object to it within a reasonable time, because otherwise, as the Court stated, it would represent a breach of good faith for a party who did not raise any objections subsequently to contest the application of the oral agreement<sup>18</sup>.

### a3. Parties practices

There are several conditions that practices between the parties must fulfil to justify the equivalence between a formal choice of a court and these practices. A specific one refers to the need for the practices to be established on a continuous basis, to have an ongoing and repeated character (at least two operations). This provision doesn't refer to general commerce practices, but to practices that the parties have concluded between them based on an original agreement, that can be proved<sup>19</sup>.

### a4. International trade usages

Art. 25(1) letter c) refers to international trade or commerce and to the possibility for parties to make a choice-of-court agreement in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to parties to contracts of the type involved in the particular trade or commerce concerned.

The Court built up some principles based on which we can define the notion of 'usages'<sup>20</sup>. Firstly, the usage must be in association with a branch of international trade or commerce in which parties operate. Next, we need a proof that a certain conduct is generally and regularly followed by operators in that branch. Publicity, even if is not strictly necessary, may help to prove this fact. Also, the parties must have been aware of the usages or they ought to have been aware; this would be the case for example if they had "*previous trade relations, or if in that sector a particular course of conduct is sufficiently well known because is generally and regularly followed when a*

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<sup>17</sup> *Case Saey Home & Garden NV/SA v Lusavouga-Máquinas e Acessórios Industriais SA* [2018], C-64/17, EU:C:2018:173, par. 24-29.

<sup>18</sup> *Case Berghoefer* [1985], C-221/84, EU:C:1985:337, par. 15.

<sup>19</sup> See also Zidaru, Liviu, *Jurisdiction in civil matters according to Regulation Bruxelles I bis (no. 1215/2012)*, Hamangiu, 2017, pg. 410.

<sup>20</sup> *Case Transporti Castelletti* [1999], C-159/97, EU:C:1999:142, par. 28-42.

*particular type of contract is concluded*". It's up to the national court to verify all the conditions mentioned above, according to the evidence presented by the parties.

b. Material conditions

These aspects are important because the formal conditions stated by the regulation are meant to ensure the fact that between the parties there was a real consent.

Article 25(1) refers to the law of the chosen court as a whole, including the rules from this law which settle if the substantive validity rendering this agreement null and void are determined by the national law, by the law of the contract or by any other law<sup>21</sup>. This means that a court before which the case is brought and that is not the court designated in the agreement, should not apply its national conflict law or any other internal provisions.

The designated court by the parties has, accordingly to Article 25 exclusive competence to decide in all matters concerning that case.

If the choice-of-court agreement does not refer to a single court from a Member State or to the court/courts of a single Member State, this means that the agreement is not exclusive. If the clause is then being challenged before one of the designated courts, this court shall accept jurisdiction, if the clause is valid under that court's national law. The court seized by the plaintiff will only analyse the substantive validity of the clause according to its own law, not also according to the law of the other court/courts designated by the parties. If this court appreciates that the clause is not valid, it will decline jurisdiction.

But, if the clause is being challenged before any other court, this court shall examine the validity of the agreement according to the national law of the States designated in the agreement. This court must accept jurisdiction only if the clause is invalid under the national law, including the conflict-of-law rules of the State/States whose courts have been designated by the agreement<sup>22</sup>.

If the choice-of-court agreement is part of a contract and the parties have not chosen a different law to govern the choice-of-court agreement, the material validity of this clause will be governed by the law of the main contract. The law that will govern the contractual obligations is determined by Regulation Rome I<sup>23</sup>, which expressly excludes from its scope choice-of-court agreements. But if this Regulation governs the main contract, in this context it will also govern the choice-of-court

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<sup>21</sup> A. Dickinson, E. Lein, A. James "*The Brussels I Regulation Recast*", Oxford University Press (2015), p. 301.

<sup>22</sup> *Idem*, p. 296.

<sup>23</sup> 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.

clause. Also, the Court stated<sup>24</sup> that the concept of ‘*jurisdiction clause*’ referred to in Article 25 must be interpreted not as a simple reference to the national law of one or other of the States concerned but as an independent concept.

### **3. The severability of the choice-of-court agreement in relation to the main contract**

The rule of the independence of the choice-of-court agreement from the main contract is now expressly stated in the fifth paragraph of Article 25. This principle was recognized by the Court on the grounds of the Brussels Convention, regardless of the fact that it was not mentioned in its provisions. In case *Benincasa*<sup>25</sup>, the Court stated that there must be made a distinction between the choice-of-court agreement clause and the substantive provisions of the contract in which it is incorporated. It implies that the clause cannot be challenged on the ground that the contract is not valid.

For these reasons, the validity conditions of the agreement will always be analysed only in accordance with the criteria set out in Article 25; the formal conditions will be governed by Article 25 and the substantive conditions will be governed by the law of the Member State of the chosen court.

The independence principle stated in the fifth paragraph of Article 25 means that if the clause is valid according to the criteria mentioned above, the designated court will have jurisdiction to analyse the validity of the main contract and to hold it, if necessary, formally invalid.

### **4. Effects of choice-of-court agreement**

#### **a. General effect**

The general effect of Article 25 from the recast Regulation is to confer *exclusive* jurisdiction to the designated courts, unless the parties have agreed otherwise.

Based on this provision, the court designated in a valid way by the parties shall accept its jurisdiction.

The parties can also agree that only one of them can designate a court from a Member State that will decide on their dispute (a unilateral choice-of-court clause). In this case, if the party bound by the clause brings the case before any other court than those designated in the clause, this court will analyse the material validity of the clause and will decline jurisdiction if the clause is valid under the law of the court designated by the party.

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<sup>24</sup> *Case Powell Duffryn [1992], C-214/89, EU:C:1992:115, par 13-14.*

<sup>25</sup> *Case Benincasa [1997], C-269/95, EU:C:1997:337, par. 24-25.*

Of course, by the means of a choice-of-court agreement, the parties don't have to choose a specific court to settle on their potential disputes; they can only remove the jurisdiction of one or more (but not all) courts, or they can establish an alternative competence<sup>26</sup>.

b. Effects of jurisdiction agreement regarding third parties

Regarding the effects that the jurisdiction clause produces, the Court stated<sup>27</sup> that the jurisdiction clause incorporated in a contract may, in principle, produce effects only in the relations between the parties who have given their consent, while for a third party to rely on the clause it is necessary to give his consent separately.

In another case the CJEU established that<sup>28</sup> a jurisdiction clause in a contract between two companies cannot be relied upon by the representatives of one of them to dispute the jurisdiction of a court over an action for damages which aims to render them jointly and severally liable for supposedly tortious acts carried out in the performance of their duties. The action in the main proceedings was brought against the party that signed the contract and against the two representatives of that party. In the judgement, the court pointed out that a choice-of-court agreement in a contract may produce effects only in the relations between the parties who concluded the agreement. The representatives of the party that signed the contract are not part to the agreement since they have not consented to conclude a jurisdiction clause. Furthermore, the other party to the agreement did not consent to be bound to those representatives.

Also, the Court stated<sup>29</sup> that only if a third party in rapport to the main contract in question had succeeded to an original contracting party's rights and obligations in accordance with national substantive law as established by the application of the rules of private international law of the court seized of the matter could that third party be bound by a jurisdiction clause to which it had not agreed.

c. The situation of *lis pendens* and exclusive<sup>30</sup> choice-of-court agreement

Under the Brussels Convention, the Court stated in *Gasser v. MISAT* that in case of a conflict of jurisdiction between courts from two different Member States, from which one was designated by

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<sup>26</sup> See also Th. Rauscher, S. Leible, P. Mankowski, A. Staudinger, *Europaisches Zivilprozess und Kollisionsrecht*. EuZPR/EulPR. Brussel I-VO, LugUbk 2007, p.789.

<sup>27</sup> *Case Refcomp Spa v Axa Corporate Solutions Assurance SA, Axa France IARD, Emerson Network, Climaveneta SpA* [2013], C-543/10, EU:C:2013:62, par. 25-29.

<sup>28</sup> *Case Georgios Leventis, Nikolaos Vafeias v Malcon Navigation Co. ltd., Brave Bulk Transport Ltd.*[2017], C-436/16, EU:C:2017:497, par. 35-36.

<sup>29</sup> *Case Cartel Damage Claims (CDC) Hydrogen Peroxide SA v. Akzo Nobel NV* [2015], C-352/13, EU:C:2015:335, par 65

<sup>30</sup> It's also important to note that Art. 31(2) refers to exclusive jurisdiction of the designated court, which means that only these courts benefit from the exception to the general rule on *lis pendens*.

a choice-of-court agreement and one was not designated by an agreement, the *lis pendens* rule applied according to the chronological order in which the courts were seized. The second seized court, which was designated by the parties and even if it was designated in an exclusive choice-of-court agreement, “*is not in a better position than the court first seized to determine whether the latter has jurisdiction*”<sup>31</sup>.

This fact draws the conclusion that the second court seized had to stay in proceedings until the court that was first seized decided on its jurisdiction. This analysis made by the Court in *Gasser* was very criticized<sup>32</sup> especially because it could block the efficiency of the agreement by giving rise to delaying tactics.

The recast Regulation however strengthens in Article 29(1) that Article 31(2) is an exception to the *lis pendens* rule (“*Without prejudice to Article 31(2) ...*”), which means that under the new provision, the court designated by the agreement has preference if proceedings involving the same cause of action and between the same parties are brought before it. This court can proceed without the need to wait for the non-designated court to stay its proceedings. Conversely, it also means that the seized court which was not designated by an agreement, must stay in proceedings until the court seized on the basis of the agreement decides on its own jurisdiction.

According to the Recital (22) from the Regulation, the non-designated court should not be able to decide on the validity of the agreement or to the extent to which the agreement applies to the dispute pending before it, until the designated court doesn’t decline jurisdiction.

The exception stated in Art. 31 should not cover situations where a court designated in an exclusive choice-of-court agreement has been seized first. In such cases, the general *lis pendens* rule apply. This general rule should also apply if the designated court decides that the agreement is null and void, case in which the non-designated court, that was first seized, will have priority under the *lis pendens* rule.

d. Special conditions for the jurisdiction clause

The fourth paragraph of Article 25 states that agreements conferring jurisdiction shall have no legal force if they are contrary to special conditions set up by Article 15, in matters relating to insurance, by Article 19, in matters relating to the jurisdiction over consumer contracts and by Article 23 in matters relating to individual contracts of employment. In these cases, a jurisdiction

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<sup>31</sup> *Case Gasser v. MISAT [2003], C-116/02, EU:C:2003:657, par. 48.*

<sup>32</sup> See A. Dickinson, E. Lein, A. James “*The Brussels I Regulation Recast*”, Oxford University Press (2015), p. 337.

clause can be concluded only if the restrictive conditions set up by these provisions with a protective role are complied. Also, a choice-of-court agreement cannot be concluded in cases of exclusive jurisdiction stated by Article 24 because these matters are very closely related to the nature of the litigation itself and there is also an element of interest of the Member States that must be protected.

### **Chapter III: Prorogation of jurisdiction pursuant to Article 26**

Article 26 of Regulation no 1215/2012 introduces a situation of implied prorogation of jurisdiction. For a better understanding, this article should be read along with Articles 27 and 28 of the Regulation: if the litigation does not imply a case of exclusive jurisdiction (Article 24) and the defendant domiciled in a Member State does not enter an appearance (Article 26), the court shall verify *ex officio* its international jurisdiction.

The purpose of Article 26 is to widen the range of courts having jurisdiction over a case and consequently reduce legal uncertainty as regard the rules on jurisdiction. Such a flexible interpretation of Article 26 does not come in contradiction with the strict formalism required for an express jurisdiction agreement under Article 25. The difference comes from the very nature of the two kinds of prorogation of jurisdiction: one is based on the law (Article 26) and the other one on a contract (Article 25).

#### **1. The condition of entry of appearance**

This *essential condition* refers to the behaviour of the defendant against whom a claim was filed before a court that does not have jurisdiction. The defendant must enter an appearance before the court<sup>33</sup>. The terms *entering an appearance* are autonomous EU law concepts. It is not necessary for the defendant to be present in court, being sufficient that he submits written defenses. According to some authors<sup>34</sup>, “*an appearance implies an act of presence by the defendant in the process, in such a manner that allows him to intervene as a procedural party*”.

Regarding the manner and time in which a defendant must enter an appearance before the court it is applicable the national law of the court seized, in accordance with the procedural autonomy

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<sup>33</sup> Otherwise, the respective court shall declare of its own motion that it has no jurisdiction, as Article 28 paragraph 1 states.

<sup>34</sup> A. Dickinson, E. Lein, A. James “*The Brussels I Regulation Recast*”, Oxford University Press (2015), page 308.

principle. These aspects are highly related to and can be better understood by analyzing the exception mentioned in Section 2 b).

a. The case of the representative *in absentia*

The European Court decided<sup>35</sup> that if the court of a Member State appoints, in accordance with national legislation, a representative *in absentia* for a defendant upon whom the documents instituting proceedings have not been served because his place of domicile is not known, the appearance entered by that representative does not amount to an appearance being entered by the defendant for the purpose of Article 26 of the Regulation<sup>36</sup>. The Court pointed out<sup>37</sup> that all the provisions of this Regulation express the intention to ensure that proceedings leading to the delivery of judicial decisions take place in such a way that observes the right of the defense enshrined in Article 47 of the Charter. Furthermore, the Court stated<sup>38</sup> that Article 26 has its fundament in the fact that the defendant, being aware of the proceedings brought against him, made a deliberate choice regarding the jurisdiction. On the contrary, a defendant who has been appointed a representative *in absentia* is unaware of the action brought against him (which makes him unable to effectively contest the jurisdiction or to accept it in full knowledge of the facts). Furthermore<sup>39</sup>, the opposite interpretation would not be consistent with the objective of predictability, since the international jurisdiction would be based on the appearance entered by a representative *in absentia*.

b. Counter-claim

We mentioned above that the condition is related to the behavior of the defendant. Regarding this aspect, the CJEU<sup>40</sup> established that Article 26 applies also to the case in which the *original claimant, confronted with a counter-claim, enters an appearance before the court* (without contesting the jurisdiction). The CJEU drew attention to the fact that a defendant who enters an appearance without contesting the jurisdiction is by implication signifying his consent to the hearing of the case by a court that would otherwise not have jurisdiction. In addition, the Court expressed that<sup>41</sup> the understanding of this article should not be reduced to a literal interpretation,

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<sup>35</sup> *Case A v. B and others* [2014], C-112/13, EU:C:2014:2195.

<sup>36</sup> This conclusion applies although under the national law the procedural acts of a court-appointed representative (who is under a duty to safeguard the interests of the party represented) have the same legal effect as those of an ordinary legal representative.

<sup>37</sup> *Case A v. B and others* [2014], C-112/13, EU:C:2014:2195, par. 51.

<sup>38</sup> *idem*, par. 54-55.

<sup>39</sup> *ibidem*, par. 57.

<sup>40</sup> *Case Hannelore Spitzley and Sommer Exploitation SA* [1985], C-48/84, EU:C:1985:105.

<sup>41</sup> *ibidem*, par. 17-19.

but it should also consider the purpose and context of the provision. In this regard, the plaintiff who, when faced with a counter-claim, does not contest the jurisdiction of the court is in a similar position to that of the defendant expressly referred to in Article 26. Moreover, the Court emphasized that the application of Article 26 is not affected by the fact that the defendant's counter-claim (in this case it was a claim for a set-off) is not based on the same contract or subject matter as the main application, this matter being related to the admissibility of a counter-claim governed by the *lex fori* (as an application of the procedural autonomy principle).

c. The relation between Article 26 and the European Order of Payment Regulation

The CJEU clarified this link<sup>42</sup>, concluding that a statement of opposition to an European order of payment cannot be regarded as constituting the entry of appearance within the meaning of Article 26, even when the defendant does not contest the jurisdiction and submits substantive arguments. To reach such conclusion, some aspects regarding this special procedure introduced by Regulation no 1896/2006 are extremely important. Firstly, the Court reminded<sup>43</sup> that in the non-adversarial system introduced by Regulation no 1896/2006, the statement of opposition is designated to compensate for the fact that the defendant cannot participate in the procedure. The Court pointed out<sup>44</sup> that an opposition in which the defendant does not contest the jurisdiction cannot produce other effects than those mentioned in Article 17(1) of the Regulation (such effects consisting in the termination of the European order of payment procedure and in leading to the automatic transfer of the case to ordinary civil proceedings). Therefore, such opposition cannot be considered an entry of appearance. The Court established that the same conclusion applies when the defendant puts forward arguments on the substance of the case. Such a statement of opposition coupled with substantive arguments cannot be regarded as the first defence put forward in ordinary proceedings for the following reasons<sup>45</sup>: it would mean that the European order of payment procedure and the subsequent ordinary civil procedure represent a unique procedure (even though they may not be conducted in the same court) and it would infringe the objective of the statement of opposition (since in this procedure the defendant is not required to specify the reasons for which he contests the claim; therefore, that opposition is not intended to serve as a framework for a defence on the merits).

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<sup>42</sup> Council Regulation n°2015/848 of 20 May 2015 on insolvency proceedings, OJ L 141, 5.6.2015.

<sup>43</sup> *Case Goldbet Sportwetten GmbH v. Massimo Sperindeo* [2013], C-144/12, EU:C:2013:393, par. 30.

<sup>44</sup> *Idem*, par. 31-32.

<sup>45</sup> *Ibidem*, par. 39.

d. Possible problems

Some authors<sup>46</sup> mentioned that if there are *several claims brought against the same defendant in a unique litigation*, Article 26 will apply separately for each of them. Such situation has not been referred to the CJEU. Another possible solution would be that for the case of closely connected claims contesting the jurisdiction on one of the claims would be sufficient for the court not to gain jurisdiction on neither of the claims.

Another possible problem would be the one of an action introduced by a plaintiff against several defendants.

One hypothesis is the one in which *only one defendant enters an appearance, while the others do not participate in any form in the proceedings*. The question would be whether the court would have jurisdiction over the entire action, or just in what concerns the defendant that entered an appearance. This issue has not been the object of any preliminary question before the CJEU so far. However, we consider that the solution to it can result through an analogy with Article 8 Paragraph 1 of the Regulation. This provision introduces a case of alternative jurisdiction for the situation of co-defendants. Pursuant to Article 8 (1), the courts for the place where any of the defendants is domiciled will have jurisdiction, under certain conditions: the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgements resulting from separate proceedings. Consequently, subject to the conditions expressly mentioned in Article 8(1), the connection of a Member State with just one of the co-defendants is sufficient for the courts of that Member State to have jurisdiction. For this reason, we consider that the CJEU, in a preliminary ruling on this aspect, would state that for the application of Article 26 it is sufficient the entry of appearance by only one of the defendants, irrespective of the conduct of the other co-defendants.

Another hypothesis is when the claims are closely connected within the meaning of Article 8(1) and of all the co-defendants only one challenges the jurisdiction, while the others enter an appearance before the court. A possible interpretation would be that given the fact that the jurisdiction was challenged the court shall examine the submission. If the conclusion is that the court does not have jurisdiction based on other provision of the Regulation, the court will decline jurisdiction for the entire case. Another interpretation would be that since the connection with just one co-defendant is sufficient, the challenge of jurisdiction from a defendant should not have any

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<sup>46</sup> DICKINSON, 9.104, pag. 309.

effect. However, such interpretation could allow for abuse from defendants. This situation has not been brought before the Court, so the national courts can adopt either of the views.

## **2. Situations in which jurisdiction is not gained by the defendant's appearance**

Regarding this aspect, Article 26 prevails over other provision of the Regulation no 1215/2012. In particular, we will further examine the CJEU case-law that stated on the link between Article 26 and Sections 3 to 5 of the Chapter II. The only article that limits the implied prorogation of jurisdiction is Article 24. If the defendant enters an appearance to challenge the jurisdiction, the appearance will not lead to prorogation of competence.

### **a. Provisions instituting a protective regime**

The Court stated<sup>47</sup> that since the rules on jurisdiction on matters of insurance are not rules on exclusive jurisdiction, the court seized, where those rules and not complied with, must declare itself to have jurisdiction if the defendant enters an appearance without contesting the jurisdiction. In the same judgment the Court established that this situation does not constitute a ground to refuse the recognition of the judgment given by that court.

Regarding these Sections (in which the aim of the rules on jurisdiction is to offer the weaker party stronger protection<sup>48</sup>) Regulation no 1215/2012 introduced an obligation for the court before which the defendant enters an appearance.

The second paragraph of Article 26 states that the court shall inform the defendant about his right to contest the jurisdiction and about the consequences of entering or not entering an appearance. The court shall comply with this obligation in such a way that the defendant understands his rights. Even further, the obligation subsists when the party is represented by a lawyer, given the fact that the provision of the Regulation makes no distinction between these cases.

*A possible problem* would be to determine the consequences of the situations in which the court does not observe this obligation. Relevant to this matter is the wording of Article 26(2), which stipulates that the court shall, *before assuming jurisdiction under paragraph 1*, inform the defendant of the abovementioned aspects. By this, it results that informing the defendant is a preliminary step in order to gain jurisdiction.

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<sup>47</sup> Case *Česká podnikatelská pojišťovna as, Vienna Insurance Group v. Michal Bilas* [2010], C-111/09, EU:C:2010:290, par. 26. This judgement refers to a litigation on insurance, but the reasoning applies to matters related to consumer contracts and individual contracts of employment.

<sup>48</sup> Case *FBTO Schadeverzekeringen NV v Jack Odenbreit* [2007], C-463/06, EU:C:2007:792, par. 28.

However, the real consequences can only be defined by the CJEU. We appreciate that *possible solutions* are the following: to consider that in these cases the jurisdiction has not been gained based on Article 26<sup>49</sup> or to apply the sanction stipulated in the national law of the court seised, as an application of the procedural autonomy principle.

b. Contesting the jurisdiction

A *preliminary* aspect is about the fact that the submission of the defendant must refer to the international jurisdiction. For this reason, it is not sufficient that the defendant contests the local jurisdiction (unless from the submissions results that through this he also challenges the international jurisdiction) or the subject-matter jurisdiction. Such defendant will be considered to have entered an appearance pursuant to Article 26 and the court will only assume international jurisdiction.

A dispute brought before the CJEU referred to whether the defendant must submit only arguments regarding the jurisdiction, or he can also include arguments related to the substance of the action. The Court stated<sup>50</sup> that according to Article 26 the defendant must challenge the jurisdiction, and this can also be done by contesting the jurisdiction as well as the substance of the claim. An argument brought by the Court is that in some Member States a defendant who only contested the jurisdiction without raising any other matter related to the trial might be barred from making his submissions as to the substance if the court rejects the plea that it has no jurisdiction. For this reason, the interpretation that the challenge of jurisdiction must be the only submission made by the defendant would be contrary to the right of defense.

In another case<sup>51</sup> the Court concluded that Article 26 must be interpreted to the effect that a challenge to the jurisdiction of the court seised, raised in the defendant's first submission in the *alternative to other objections of procedure raised in the same submission*<sup>52</sup>, cannot be considered to be acceptance of the jurisdiction of the court seised, and therefore does not lead to prorogation of jurisdiction. The Court considered<sup>53</sup> that the other submissions made by the defendant do not change the aspect that he challenged in an unambiguously manner the jurisdiction, and the relevant

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<sup>49</sup> A. Dickinson, E. Lein, A. James “*The Brussels I Regulation Recast*”, Oxford University Press (2015), page 311. The author argued that, in principle, if the information is not provided, the entering of appearance should not be qualified as submission and that only this consequence can ensure the effectiveness of the protection introduced by Article 26 (2).

<sup>50</sup> *Case Elefanten Schuh GmbH v. Pierre Jacqmain* [1981], C-150/80, EU:C:1981:148, par. 14.

<sup>51</sup> *Case Bayerische Motoren Werke AG v. Acacia Srl* [2017], C-433/16, EU:C:2017:550, par. 36.

<sup>52</sup> In the dispute in the main proceedings the defendant raised, as preliminary points, two objections: that the notification of the application was non-existent or void and that the mandate of the plaintiff's counsel was non-existent or void. In the alternative, but still as a preliminary matter, the defendant contested the jurisdiction.

<sup>53</sup> *Case Bayerische Motoren Werke AG v. Acacia Srl* [2017], C-433/16, EU:C:2017:550, par. 35.

aspect is that the defendant expressed, from his first defense, the intention not to accept the jurisdiction of the court seised.

Another problem<sup>54</sup> raised refers to the time limit in which the jurisdiction must be contested and, more specifically, whether it should be done *in limine litis*. The Court reminded that the concept of *in limine litis* would be difficult to apply given the fact that there are appreciable differences between the legislations of the Member States regarding bringing actions before courts, the appearance of defendants and the way in which the parties to an action must formulate their submissions. The conclusion was that if the defendant makes submissions on the substance of the action and the challenge of jurisdiction is not preliminary to any defense as to the substance of the claim, the submission on jurisdiction should not occur after making the submissions which under national procedural law are considered to be the first defense addressed to the court seised.

In what concerns the procedural differences between the legislations of the member states, there are cases when the national court should apply the regulation and not the national law.

In particular, some national legislations stipulate that the lack of international jurisdiction can be invoked in any state of the proceedings, whilst other state that it should be done *in limine litis*. Nonetheless, for cases that fall under the scope of Regulation no 1215/2012, the challenge of jurisdiction should not occur after making the submissions which under national procedural law are considered to be the first defense addressed to the court seised, regardless of what the procedural law of the court seised stipulates. For these reasons, Article 26 of the Regulation limits the application of the national law regarding the moment in which the defendant can or should challenge the jurisdiction.

Another problem based on the differences between the legislation of the Member States is *whether the court can by its own motion invoke the lack of jurisdiction over a case*. Considering that the national courts would have such attribute, the prorogation would no longer depend on the conduct of the defendant, but on the discretion of the court seised. For these reasons, Article 26 would no longer have practical implications, since it would be possible that, despite the entry of appearance by a defendant, the national court invokes the lack of jurisdiction. Consequently, the conclusion is that a court of a Member State cannot by its own motion invoke the lack of jurisdiction (except for the situations of exclusive jurisdiction under Article 24). This rule represents the logical

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<sup>54</sup> *Case Elefanten Schuh GmbH v. Pierre Jacqmain [1981], C-150/80, EU:C:1981:148, p. 16-17.*

consequence of the fact that, consequently to the defendant entering an appearance before the court without challenging the jurisdiction, the court *already gained* jurisdiction pursuant to Article 26.

### **3. Link between Article 25 and Article 26**

Article 28 gives priority to the entering an appearance, since it states that if the defendant domiciled in a Member State does not enter an appearance, the court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of this Regulation.

The preeminence of Article 26 is sustained by the jurisprudence of CJEU, which stated that in the case of a defendant who enters an appearance the court will have jurisdiction even though the parties concluded an agreement conferring jurisdiction to the courts of a different Member State. The Court stated<sup>55</sup> that the exceptions to Article 26 are mentioned in its second sentence and Article 25 is not one of these. The Court also stated that neither the general scheme nor the objectives of the Convention provide grounds for the view that parties from an agreement conferring jurisdiction within the meaning of Article 25 are prevented from submitting their dispute to a court other than the stipulated in the agreement.

The conclusion reached by the Court is a natural one, given the fact that bringing action before a different court than the one mentioned in the agreement along with the behavior of the defendant who does not contest the jurisdiction represents a case of *mutuus dissensus* (tacit but non-equivoque).

The rule set out is applicable also when the parties agree upon conferring jurisdiction to the courts of a third state and the plaintiff introduces the claim before the courts of a Member State<sup>56</sup>.

## **Chapter III: Concluding remarks**

The rules on jurisdiction contained in Regulation no 1215/2012 are aimed at obtaining an area of freedom, security and justice, inter alia, by facilitating access to justice, in particular through mutual recognition of judicial and extra-judicial decisions in civil matters (Recital 3).

Prorogation of jurisdiction was introduced in order to respect the party autonomy, as Recital 19 states.

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<sup>55</sup> *Case Elefanten Schuh GmbH v. Pierre Jacqmain* [1981], C-150/80, EU:C:1981:148, par. 9-11.

<sup>56</sup> *Case Taser International v. gate 4 Business Central SRL and Cristian Mircea Atanasiu* [2016], C-175/15, EU:C:2016:176, par. 25.

In the case of a choice-of-court clause, such autonomy must result from an agreement that reflects the real intent of the parties. For this reason, Article 25 introduces strict formal conditions to ensure that the parties who conclude a jurisdiction clause are well-informed and can predict the effect of their agreement. The CJEU has an important role in this regard, since it has to establish through its rulings whether jurisdiction clauses concluded in certain conditions can be considered valid under Article 25. This role of *the guardian of the real consent of the parties* has been exercised so far in a proper manner. We can affirm that the jurisprudence of the Court tends to be rather prudent than innovative. This is a consequence of the fact that the implications of a jurisdiction clause are of enormous importance, since such clause may determine that the parties have to engage in high costs in order to appear before a court of another Member State than the one where they domicile. For example, in a very recent case, the Court decided that a jurisdiction clause set out in the general conditions of sale mentioned in invoices issued by one of the contracting parties does not satisfy the requirements of Article 25. We believe that the Court will maintain this strict interpretation view of Article 25, at least regarding the formal conditions for a jurisdiction clause.

The regulation protects the real consent of the parties through the fact that the formal conditions of a jurisdiction clause are stipulated in Article 25 and are not left to be determined by the national law of the court seized.

The choice-of-court clause determines the courts of the Member States chosen to have exclusive jurisdiction to settle the disputes. This rule consolidates the role of the real intent of the parties, which corresponds to the essential place that the party autonomy occupies in the European Union cooperation in civil and commercial matters.

The prevalence of the party autonomy results from one of the most important novelties introduced by Regulation Brussels I Bis. Article 31(2) resolves the situations of *lis pendens* which involves a court that has exclusive jurisdiction pursuant to Article 25. This provision strengthens the party autonomy since it introduces a derogation from the general rule in case of *lis pendens*, which fundamentally relies on the will of the parties.

The autonomy of the parties acquired an even more important role through the fact that the Regulation allows for an implicit agreement to be concluded even after a litigation begins. In such situations, even though the parties have not necessarily been diligent enough to conclude an *ex-ante* agreement in order to seize the courts of the Member State they prefer, the Regulation allows

them to appear before a court that would not have jurisdiction based on other provisions of the Regulation.

Another aspect implying that the real intent occupies a central role is in the cases of weaker parties (the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer of the employee). In these situations, the conditions for a jurisdiction agreement and for the implicit prorogation of jurisdiction are even more restrictive. Through this, the European legislator leave the parties to such contracts without the right to choose the courts of a Member State which will settle their disputes. However, the European legislator remembers to pay special attention in the situation of a weaker party, whose real consent needs to be protected.

Based on the above-mentioned, we assert the provisions of Regulation no 1215/2012 encourage parties from different Member States and even from outside the European Union to conclude cross-border agreements, since they are given the option of choosing, both expressly and implicitly, the courts of the Member States that will settle their disputes.