The New Design of the Brussels I Regulation:
Choice of Court Agreements and Parallel Proceedings

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I. Introduction

In December 2012, “the matrix of judicial cooperation in the European Union”1 was redesigned by the European legislature.2 The Brussels I Regulation of 20003 set the rules for jurisdictional conflicts, as well as for recognition and enforcement of judgments in civil and commercial matters within the European judicial area, i.e. within the Area of Freedom, Security and Justice. This directly applicable measure of European procedural law significantly increased legal certainty by, inter alia, reducing the number of potential fora for cross-border civil and commercial disputes, and is considered to be one of the most successful European Union (EU) legislative instruments.4 Nevertheless, several other jurisdictional and enforcement problems remained.

The European Commission (Commission) identified four main shortcomings of the Brussels I Regulation: (1) unnecessary costs and delays related to the procedure for recognition and enforcement of a judgment in another Member State (“exequatur”) undermining the objective of free movement of judgments; (2) unsatisfactory access to justice in the EU in disputes involving defendants from outside the EU; (3) inadequate application of the lis pendens rule to the relationship between choice of court agreements and parallel proceedings, resulting in abusive litigation strategies; and (4) unclear interface between

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2 Regulation (EU) 1215/2012 of 12 December 2012 (L. 351) (EU). Technically, it is not a new piece of legislation, but a “recast.” As explained by the European Commission, “[r]ecasting is like codification in that it brings together in a single new act a legislative act and all the amendments made to it. The new act passes through the full legislative process and repeals all the acts being recast. But unlike codification, recasting involves new substantive changes, as amendments are made to the original act during preparation of the recast text.” Available at http://ec.europa.eu/dgs/legal_service/recasting_en.htm (last visited Feb. 9, 2013).
arbitration and litigation, resulting in unpredictable judgments of the Court of Justice of the European Union (CJEU).  

In 2009 the Commission launched the review process and in December 2010 presented its very progressive “recast” proposal. The review process lasted three years and the original proposal was substantially watered down. Still, the modified Brussels I Regulation (Recast Regulation) introduces significant amendments that should be of interest to international litigators.

The modified EU jurisdictional regime will take effect on January 10, 2015. This paper addresses one of the most important amendments to the Brussels I Regulation: coordination of parallel proceedings when the parties have designated in advance by contract a particular forum to resolve a dispute.

II. Choice of Court Agreements and Parallel Proceedings

A. The EU Approach to Jurisdiction

The EU approach to jurisdiction substantially differs from that of the U.S. Whereas U.S. law employs flexible and discretionary tools to resolve the problem of parallel proceedings, such as the forum non conveniens doctrine, EU law treats jurisdictional bases as nondiscretionary and uses the lis pendens rule. The lis pendens embodies a formal criterion to avoid parallel proceedings: if another court is already seized of a matter, the second court seized must decline jurisdiction. The purpose of this jurisdictional criterion is to ensure predictable, certain and neutral litigation outcomes.

The CJEU case law has strengthened the importance of the lis pendens rule. In Erich Gasser GmbH v. MISAT Srl, it confirmed that the lis pendens rule of the Brussels I Regulation requires the court second seized to suspend proceedings until the court first seized has established or declined jurisdiction. This puts exclusive choice of court agreements at risk. Since the lis pendens criterion takes precedence over a contractual choice of forum, a party

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6 Proposal for the Recast Regulation, supra n. 1.
8 Brussels I Regulation, Article 27.
10 Case C-116/02, 2003 E.C.R. I-14693.
can bring a claim in a non-chosen court and thereby freeze the proceedings in the chosen court. As a result, parties to a choice of forum agreement cannot be sure that the chosen court will eventually decide the case.

In Turner v. Grovit, the CJEU further confirmed that procedural devices existing under national law aimed at strengthening the effect of choice of court agreements (such as anti-suit injunctions) are incompatible with the Brussels I Regulation because they interfere with the jurisdiction of foreign courts. Such an interference undermines the principle of mutual cooperation underlying the EU jurisdictional system.

B. Abusive Litigation Strategies: the Problem of “Italian Torpedoes”

The practical consequence of the lis pendens rule is that a court is automatically blocked from hearing a case when it is already pending before a court in a different Member State. Strict enforcement of the lis pendens rule provides litigants with incentives to race to court, giving rise to abusive litigation strategies called “Italian torpedoes.” In fact, litigants even used the lis pendens rule to their advantage by commencing proceedings in a court lacking jurisdiction. Additionally, litigants were strategically choosing fora known for lengthy judicial proceedings, in breach of choice of court agreements. Consequently, the chosen court had to stay the proceedings before it and wait until the court first seized determined its jurisdiction. The resulting parallel action led to delays that created advantage for a party that launched a “torpedo.” This kind of abusive litigation strategy was indirectly authorized by the CJEU in Gasser. Furthermore, in Turner, the CJEU precluded anti-suit injunctions with regard to proceedings in other Member States, even when the proceedings were brought in bad faith.

C. Commission Proposals to Address Abusive Litigation Strategies

In its Green Paper of 2009, the Commission put forward six solutions for the problems with the operation of the lis pendens rule. First, it proposed to eliminate the obligation of the court designated in an exclusive choice of court agreement to stay proceedings before it.

11 Case C-159/02, 2004 E.C.R. I-3565.
12 Id., para. 20.
14 Id., at 820.
15 Id., at 822.
16 Green Paper, supra n. 5, at 5-6.
Second, it suggested a reversal of the priority rule – the court designated by the agreement was to have priority to determine its jurisdiction and any other court seized would have to stay proceedings until the jurisdiction of the chosen court is established. Third, it recommended that a mechanism of direct communication and cooperation be established between the two seized courts. Such a mechanism could entail a deadline for the court first seized to decide on the question of jurisdiction and an obligation to report to the court second seized on the progress of its proceedings. Fourth, the Commission contemplated introduction of damages for breach of choice of court agreements. Fifth, it suggested that courts exclude application of the *lis pendens* rule in situations where one of the parallel proceedings deals with merits and the other with declaratory relief. Finally, in the Commission’s view, introduction of a standard choice of court clause would accelerate the decision-making of the courts on questions of jurisdiction.

**D. The Solution Adopted in the Recast Regulation**

To eliminate the kinds of problems that were illustrated by the *Gasser* case, the Recast Regulation adopted the second solution proposed by the Commission. Reversal of the priority rule seeks to effectively eliminate Italian torpedoes by giving the court chosen by the parties precedence over all other courts, regardless of when any other proceedings were commenced. According to Article 31(2) of the Recast Regulation, courts designated by the parties as having exclusive jurisdiction are to determine their jurisdiction themselves, regardless of whether they are first or second seized. Furthermore, a harmonized conflict of law rule on the substantive validity of choice of court agreements was introduced in Article 25(1), designating the law of the Member State chosen to govern this question.

**III. Concluding Remarks**

Under the old the Brussels I Regulation, there were concerns that the Regulation did not sufficiently protect exclusive choice of court agreements. Strict enforcement of the *lis pendens* rule encouraged a race to court and abusive litigation strategies. The new rule on choice of court agreements and parallel proceedings introduced by the Recast Regulation is supposed to improve the existing EU jurisdictional regime by reinforcing the effectiveness of

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17 *Supra* n. 10.
choice of court agreements out of respect for the principle of party autonomy.\textsuperscript{18} It is too early to evaluate the effectiveness of this new policy choice, but that choice is definitely a move in the right direction.

\footnote{Recast Regulation, recitals 19, 22.}