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# An End to Abusive Litigation Tactics within the EU? New Perspectives under Brussels I Recast

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## Introduction

For more than eleven years, Regulation (EC) 44/2001 (the 'Brussels I Regulation'),<sup>1</sup> which succeeded the '1968 Brussels Convention on jurisdiction and enforcement of judgments', has been one of the most relevant pieces of legislation in the European Union (EU),<sup>2</sup> and has established a European judicial area with uniform rules on jurisdiction, recognition and enforcement of civil judgments. It is based on the mutual trust of the Member States in each other legal systems and judicial institutions<sup>3</sup> and on the principle of legal certainty.<sup>4</sup>

The Brussels I Regulation applies to all proceedings in "civil or commercial matters".<sup>5</sup> For the purpose of the subsequent analysis, it seems useful to remind that, in laying down rules allocating jurisdiction, the Brussels I Regulation affirms the general principle '*actor sequitur forum rei*'.<sup>6</sup> In compliance with this principle, the jurisdiction is to be exercised by the Member State in which the defendant is domiciled (Article 2). Special rules of jurisdiction are listed in Articles 5–8, and provide the claimant with additional options on where to sue a defendant. The Court of Justice of the European Union (the 'CJEU') has emphasised that these special rules "must be strictly interpreted and cannot be given an interpretation going beyond the cases expressly envisaged" by the Brussels I Regulation itself.<sup>7</sup> Article 8 and subsequent provisions concern jurisdiction in specified areas (insurance, consumer contracts, and employment contracts): they are aimed to protect certain categories of litigants

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<sup>1</sup> [2001] OJ L12/1. The Brussels Convention of 1968 continues to apply only with respect to those territories of EU countries that fall within its territorial scope and that are excluded from the regulation pursuant to Article 355 TFEU. To parties seated in Norway, Iceland and Switzerland, the Lugano Convention is applicable (Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, [1988] OJ L 319/9).

<sup>2</sup> Peter Arnt Nielsen, "The new Brussels I Regulation" (2013) *Common Market Law Review* 503.

<sup>3</sup> Recital 16 of the Preamble. See also C-159/02 *Turner v Grovit* [2004] ECR I-3565.

<sup>4</sup> Case 38/81 *Effer* [1982] ECR 825, para 6.

<sup>5</sup> On the meaning of "civil and commercial matters" see *ex pluribus* Case C-645/11 *Land Berlin v Ellen Mirjam Sapir and others* [2013] not yet published.

<sup>6</sup> *Inter alia*, David Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (Sweet and Maxwell, 2010), 20; Ugo Patroni Griffi, *Manuale di di Diritto commercial Internazionale* (Giuffrè Editore, 2012), 474.

<sup>7</sup> Case C-168/02 *Kronhofer* [2004] ECR I-6009, para 14 and case law cited. See also Case C-440/97 *GIE Groupe Concorde and Others* [1999] ECR I-6307, para 24.

who are seen to be in a weaker position than their adversary.<sup>8</sup> Notably, Article 22 provides for cases of exclusive jurisdictions (in proceedings concerning rights *in rem* in immovable property; the validity of the constitution, the nullity or the dissolution of companies or other legal persons; the validity of entries in public registers; IPRs; enforcement of judgments).

The Brussels I Regulation also contains a specific provision that recognises ‘choice of court’ agreements. Article 23(1) provides that:

“[i]f 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. Such jurisdiction shall be exclusive unless the parties have agreed otherwise”.

Once the jurisdiction in the terms of Article 23 has been established, its effects are to exclude the application of Article 2 and Articles 5 *et seq.*<sup>9</sup>

Articles 27–30 provide for rules to solve conflicts of jurisdictions to avoid irreconcilable decisions in case of parallel proceedings, i.e. proceedings which concern or the same or different, but related, causes of actions.<sup>10</sup> In the first case, known as *lis alibi pendens*, identical proceedings are commenced in different jurisdictions. In the second case, actions in which there is some form of relevant connection among the causes of action are commenced in different jurisdictions.<sup>11</sup> Parallel proceedings can occur also when an exclusive jurisdiction clause exists: while a party brings an action in the chosen court, or the chosen court may be seised to decide the merits of the case, proceedings in a non-chosen court may be commenced by another party e.g. to question the validity or the existence of a jurisdiction clause.

According to Article 27:

“where proceedings involving the same cause of action and between the same parties<sup>12</sup> 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”.

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<sup>8</sup> Recital 13 of the Preamble.

<sup>9</sup> Joseph (n 5), 29.

<sup>10</sup> Fabrizio Marongiu Buonaiuti, ‘*Lis Alibi Pendens* and Related Actions in Civil and Commercial Matters within the European Judicial Area’ (2009) *Yearbook of Private International Law*, 511, 512.

<sup>11</sup> Marongiu Buonaiuti (n 9), 512.

<sup>12</sup> The requirement that both proceedings must be between the same parties has been interpreted by the CJEU as there is no need that the parties have the same procedural position in both cases. Therefore, parties in a case can be considered the ‘same’ as another case even if the parties are not legally identical, so long as they have the same legal interest (Case C-351/96 *Drouot Assurances SA v Metallurgical Industries and Ors case* [1996] ECR I-375).

and

“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”.

In case of proceedings which are so closely connected that it is expedient to hear and determine them together, to avoid the risk of irreconcilable judgments, the court of a Member State second seised may stay (i.e. has the faculty, but is not obliged) its proceedings in favour of the first seised court in related actions (Article 28).

The civil law concept of *lis pendens* adopted by the Brussels I Regulation to determine which Member State’s court is the most appropriate venue for litigation and to solve conflicts of jurisdiction is unambiguous and highly predictable. However, the strict interpretation given by the Court of Justice (CJEU) of the rule according to which the second seised court must give priority to the court first seised in time, regardless of the closest connection between the forum and the dispute, or the intention of the parties, has enabled the parties to bypass ‘choice of court’ agreements, in order to delay the final enforceable decision (so called ‘Italian torpedo’), and even to avoid enforcement of adverse arbitration awards.

To prevent (or, more realistically, to reduce) the unfortunate abuse of these litigation tactics (stigmatized in the *Heidelberg Report* on the application of the Brussels I Regulation),<sup>13</sup> a new regulation, the Brussels I Recast Regulation, was passed in December 2012 and will enter into force in January 2015.<sup>14</sup>

This article will examine the abusive litigation tactics that have developed under the Brussels I Regulation and will then examine whether the amendments and the new provisions adopted by the Brussels I Recast might be deemed, at least potentially, adequate to prevent these tactics. Further to these introductory remarks, this article is divided into other four sections. Section 2 focuses on the application of the *lis pendens* rule in case of ‘choice of court’ agreements, in light of the *Gasser* decision.<sup>15</sup> It also discusses to what extent the CJEU’s judgement encourages a party to evade a valid jurisdiction agreement and to seize a judge in a different Member State. Section 3 analyses how the duty to proceed (and the limited discretion of a court of a Member States on whether deciding a case) can infringe an arbitration agreement in light of the *West Tankers* case.<sup>16</sup> Section 4 critically analyses the relevant provisions of the Brussels I Recast to prevent these abusive tactics. Even if the complexity and interrelation of the amendments introduced by the Brussels I Recast would require a lengthier and surely more in-depth investigation, we limit ourselves to focus on the *lis pendens* rule and on the renewed exclusion of arbitration. Section 5 concludes.

<sup>13</sup> [Http://ec.europa.eu/civiljustice/news/docs/study\\_application\\_brussels\\_1\\_en.pdf](http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf) (accessed 1 May 2013).

<sup>14</sup> Regulation (EU) No 1215/2012 [2012] OJ L351/1.

<sup>15</sup> Case C-116/02 *Erich Gasser GmbH v MISAT Srl* [2003] ECR I-14693.

<sup>16</sup> Case C-185/07 *Allianz SpA v West Tankers Inc* [2009] ECR I-663.

### **‘Choice of Court’ Agreements and Torpedo Claims**

One of the major problems developed under the Brussels I Regulation is the abuse of the *lis pendens* rule to bypass ‘choice of court’ agreements. Such an abuse has been to some extent ‘allowed’ by the interpretation of Article 27 given by the CJEU.

The seminal case in this respect is *Gasser*.<sup>17</sup> It concerned an Austrian company, Gasser, and an Italian distributor, MISAT, which had entered into a contract for the sale of goods. The contract did not contain any ‘choice of court’ agreements. However, subsequent invoices sent by Gasser contained an exclusive jurisdiction clause indicating Austrian courts as competent. When a dispute arose, MISAT commenced a proceeding before a court in Rome for a declaration that the contract had been terminated. After the Italian Court had been seised, Gasser brought a proceeding before the Austrian Court, indicated in the jurisdiction clause printed on the invoices. MISAT contested the validity of this ‘choice of court’ agreement and argued that it was for the Italian Court to decide this matter as court first seised. MISAT relied on former Article 21 of the Brussels Convention (Article 27 of the Brussels I Regulation),<sup>18</sup> which, as mentioned above, requires any court other than the court first seised to stay its proceedings until the jurisdiction of the court first seised is established. Pursuant to this rule, the Austrian Court decided to stay its proceedings and wait for the Italian Court’s decision. Gasser appealed to a higher Austrian Court which referred for preliminary ruling to the CJEU and asked, *inter alia*, whether Article 27:

“must be interpreted as meaning that, where a court is the second court seised and has exclusive jurisdiction under an agreement conferring jurisdiction, it may, by way of derogation from that article, give judgment in the case without waiting for a declaration from the court first seised that it has no jurisdiction”.<sup>19</sup>

The Court also asked whether the *lis pendens* rule may be derogated, in cases in which the duration of proceedings before the court first seised is excessively and unjustifiably long.

The CJEU confirmed that the *lis pendens* rule requires a national court second seised to suspend proceedings until the court first seised has established

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<sup>17</sup> See *supra* n 14.

<sup>18</sup> In so far as the Brussels I Regulation replaces the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters ([1978] OJ L 304/36), as amended by the successive accession conventions for the new Member States, in the relations between Member States, the interpretation provided by the Court in respect of the provisions of that convention is also valid for those of the regulation whenever the provisions of those instruments may be regarded as equivalent (see, *inter alia*, Case C-133/11 *Folien Fischer and Fofitec* [2012] not yet published, para 31). On the interrelation between the Brussels Convention and the Brussels I regulation: Carlo Bonaduce, “L’interpretazione della convenzione di Bruxelles del 1968 alla luce del regolamento n. 44/2001 nelle pronunce della Corte di giustizia” (2003) *Rivista di diritto Internazionale* 746.

<sup>19</sup> Para 28.

or declined jurisdiction, even if the court seized second was nominated by an agreement which is valid under Article 23. The European judges strictly applied the chronological rule provided for in Article 27. They stated that where there is an agreement conferring jurisdiction, the parties always have the option of declining to invoke it and the defendant has the option of entering an appearance before the court first seised, without alleging that it lacks jurisdiction on the basis of a 'choice of court' agreement. According to the CJEU, it is incumbent only on the court first seised to verify the existence of the agreement and eventually to decline jurisdiction.<sup>20</sup> Moreover, the CJEU rejected the argument that an excessive length of proceedings before the court first seised may create any exception to the application of the *lis pendens* rule. The Brussels I Regulation does not envisage any such exception, and if it were to be created it would undermine mutual trust in each other's legal systems and judicial institutions, which is at the basis of the Regulation.<sup>21</sup>

*Gasser* is considered by many scholars and common law practitioners a product of a very formal approach, "the one which prized (legitimately, if awkwardly), logic above consequences, theory above practice".<sup>22</sup> It represents for them a "victory of formality",<sup>23</sup> with detrimental practical effects, because gives a party the possibility to commence proceedings in breach of a jurisdiction agreement and prevent the other party from instituting the proceedings before the designated court. In this respect, Lord Mance stated:

"It may comfort theoreticians that the Community has rules of ideological purity and logical certainty. But the result can only be practical uncertainty, with large scope for tactical manoeuvring".<sup>24</sup>

In other words, the interpretation given by CJEU has been severely criticized because it opens the field to 'torpedo' claims, especially claims for negative declaratory relief in no-chosen courts. It gives the possibility to litigants, acting in bad faith, to frustrate choice of court clauses, in view of delaying the resolution of the dispute in the forum chosen by the parties, by first seising a non-competent court. Since across Europe the length of proceedings is not uniform, the strict application of the *lis pendens* advocated by the CJEU allows to "use" slow courts to "sink" legitimate proceedings in Member States having jurisdiction.<sup>25</sup>

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<sup>20</sup> Para 54.

<sup>21</sup> Para 72. The CJEU underlined the importance of the concept of mutual trust also in subsequent cases (e.g. Case C-159/02 *Turner v Grovit* [2004] ECR I-3565).

<sup>22</sup> Richard Fentiman, "Case note on *Gasser*" (2005) *Common Market Law Review* 241, 251.

<sup>23</sup> Petr Briza, "Choice-of-Court Agreements: Could the Hague Choice of Court Agreements Convention and the Reform of the Brussels I Regulation Be the Way Out Of The *Gasser-Owusu* Disillusion?" [2009] *Journal of Private International Law* 537, 543, *et seq.*

<sup>24</sup> Lord Mance, "Exclusive Jurisdiction Agreements and European Ideals" (2004) LQR 357, 360, cited in Jonathan Harris, "The Brussels I Regulation and the Re-Emergence of the English Common Law" (2008) *The European Legal Forum* 181.

<sup>25</sup> *Inter alia* Michal Bogdan, "The Brussels/Lugano *Lis pendens* Rule and the 'Italian Torpedo'" (2008) *Scandinavian Studies in Law* 90. Felix Blobel and Patrick Spath, "The Tale

Notably, whereas the negative practical consequences brought by the *Gasser* decision have been widely acknowledged, other scholars sympathize with the CJEU's reasoning. According to Steinle and Vasiliades:

“[f]rom a legal perspective, it was necessary and correct to uphold the *lis pendens* principle, since it is impossible for a court to find an exception in the *lis pendens* rule if the Regulation provides none”.<sup>26</sup>

According to Bogdan:

“to allow the courts of one Member State to review the jurisdiction of the courts in other Member States could lead to chaos and undermine not only the jurisdictional rules but also the rules on recognition and enforcement of judgments”.<sup>27</sup>

Leading Italian scholars did not share the criticism on the CJEU's decision, too. Among others, Marinelli has welcomed the *Gasser* judgment as a sound interpretation of the Brussels I Regulation, that guarantees legal certainty and mutual trust among the Member States.<sup>28</sup> According to this author, the Court could not have interpreted the *lis pendens* rule but in this way. In addition, perhaps in a 'nationalistic' way, Marinelli and one of the most outstanding Italian civil procedure experts, Consolo,<sup>29</sup> have stigmatised the argument advanced by the Austrian Court (and sustained by the Government UK as *pars interveniens* in front of the CJEU) according to which the length of proceedings should be conceived as a reason to derogate to Article 27. They welcomed the decision of the CJEU in this respect. Both the Authors underline that mutual trust is the basis of judicial cooperation and cannot be disregarded. In addition, they highlight that the 'torpedo claims' can be easily blocked by Italian courts themselves through the preliminary objection of jurisdiction procedure provided for in Article 41 of the Italian Civil Procedure Code (*regolamento di giurisdizione*).

All in all, the practical disadvantages of the interpretation given by the CJEU in the *Gasser* case could not be denied. However, it seems that the CJEU could hardly have given a different interpretation of the clear and straightforward rule set forth in Article 27. It is not a matter of formalistic approach: interpretation must be rooted in the text. By contrast, the interpretation somewhat suggested by the Austrian court would have neglected the formulation of the provision. In this respect, *Gasser*

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of Multilateral Trust and the European Law of Civil Procedure” (2005) *European Law Review* 528, 532.

<sup>26</sup> Jonas Steinle and Evan Vasiliades, “The Enforcement of Jurisdiction Agreements under the Brussels I Regulation: Reconsidering the Principle of Party Autonomy” (2010) *Journal of Private International Law* 565, 571.

<sup>27</sup> Bogdan (n 25). See also Felix Blobel and Patrick Spath, “The Tale of Multilateral Trust and the European Law of Civil Procedure” (2005) *European Law Review* 528, 532.

<sup>28</sup> Marino Marinelli, “Litispendenza comunitaria, clausola di proroga esclusiva e durata irragionevole del processo preveniente” (2004) *Giurisprudenza Italiana* 69, 73.

<sup>29</sup> Claudio Consolo, “La Italian Torpedo non fa naufragare per la seconda volta la petroliera Erika e la buona fede processual-internazionalistica (grazie al “ricarburato” e non più vituperando nostro regolamento di giurisdizione)” (2003) *Int'l Lis* 97.

is anchored both to the text and system of the Brussels I Regulation and *Gasser's* rationale has been confirmed in subsequent cases,<sup>30</sup> such as *Turner* and *Owusu*.<sup>31</sup>

It also appears that it is the extensive length of proceedings before some courts that confers the torpedo action a detrimental effect. However, to allow a derogation of the *lis pendens* rule in cases in which the duration of trials before the court first seised is excessively long would open the field to a large discretion of the court second seised and would seriously weaken the principles of legal certainty and mutual trust. When is a proceeding excessively long? Which parameters must be taken into account to consider the length? Is a national court of a Member State really in the position to consider and judge over other Member States' procedural rules? These questions are open ones. National courts could adopt different positions, ultimately undermining the uniform application of the Brussels I Regulation. Thus, on the one hand, the solution to overcome 'torpedo' actions should be achieved amending the Article 27 (which has been done through the new Brussels I Recast, as will be examined below). On the other hand, the danger of the 'torpedo' could be neutralized through a deeper integration and 'harmonization' among the legal systems of the Member States.

### Abusive Litigation Tactics To Bypass Arbitration Clauses

Unlike many other areas of commercial law, Member States enjoy a very broad freedom in matters of arbitration. This is so because the most important international instrument in this field, the New York Convention,<sup>32</sup> to which all the Member States are parties, does not provide for a complete regulation of arbitration and of arbitration-related court litigation: thereby it leaves most issues to be determined by national law. More than that, this is so because arbitration has remained outside the scope of EU rules. The Article 1(2)(d) of the Brussels I Regulation provides for an exclusion as regard to arbitration. The scope of this exclusion has been subject to an intensive debate, but the CJEU has been clear in affirming, *inter alia* in *Marc Rich*,<sup>33</sup> that the 'arbitration exception' applies not only to arbitration proceedings, but also to court proceedings in which the subject matter is arbitration.

The lack of harmonised jurisdictional criteria applicable to arbitration-related proceedings:

“means that in principle there is no certainty as to which Member State courts will have jurisdiction over the different types of proceedings that may be

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<sup>30</sup> Bríza (n 23).

<sup>31</sup> *Turner* cited *supra* (n 21); C-281/02 *Andrew Owusu v NB Jackson and Others* [2005] ECR I-1383. This case, according to Bríza (n 23) may lead to the conclusion that the court of the defendant's domicile is not permitted to decline its jurisdiction under Art 2 of the Brussels Convention/Regulation on the basis of a jurisdiction agreement in favour of a non-Member State (agreements which are not covered by Art 23) and ultimately frustrates party autonomy and the principle *pacta sunt servanda*. See also Richard Fentiman, "Civil Jurisdiction and Third States: *Owusu* and After" (2006) *Common Market Law Review* 705.

<sup>32</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html) (accessed 20 May 2013).

<sup>33</sup> Case C-190/89 *Rich* [1991] ECR I-3855; Case C-391/95 *Van Uden* [1998] ECR I-7091.

brought before a domestic court in relation to a given arbitration agreement or arbitration proceedings".<sup>34</sup>

These include proceedings for the granting of measures in support of arbitration (e.g. appointing or replacing arbitrators, evidentiary and provisional measures) and proceedings relating to the validity of arbitration agreements and to the validity of arbitral awards (typically setting aside proceedings).

One of the main disputed issues is the interrelation between the Brussels I Regulation and arbitration,<sup>35</sup> and, in particular, the possibility of 'torpedo claims' aimed to question the existence, validity, scope of effects of a arbitration agreement. Again, it is plain that these actions have been somewhat 'allowed' by the CJEU.

The seminal case in this respect (in the 'Gasser-line'<sup>36</sup>) is *Allianz SpA (formerly Riunione Adriatica di Sicurtá SpA) and Generali Assicurazioni Generali SpA v West Tankers Inc*, which has spurred a surfeit of commentary.<sup>37</sup> The case originated after a vessel owned by West Tankers and chartered by Erg Petroli Spa collided with a jetty owned by Erg in Italy. Erg claimed compensation from their insurances Allianz and Generali and began arbitration proceedings in London for recovery of the excess. West Tankers denied any liability. After compensation had been paid to Erg, Allianz and Generali launched court proceedings against West Tankers in Italy to recover the sum they paid to Erg. West Tankers alleged that the court in Italy had no jurisdiction because of the validly concluded arbitration agreement. In addition, West Tankers filed a proceedings in the United Kingdom for an anti-suit injunction, to restrain Allianz and Generali from continuing their action in Italy. The House of Lords issued a request for a preliminary ruling to the CJEU and asked:

"whether it is incompatible with Regulation No 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement, even though Article 1(2)(d) of the regulation excludes arbitration from the scope thereof".<sup>38</sup>

The CJEU, in substance, was asked to rule on the compatibility of anti-suit injunctions<sup>39</sup> with the Brussels I Regulation.

<sup>34</sup> Luca Radicati di Brozolo, "Arbitration and the Draft Revised Brussels I Regulation: Seeds Of Home Country Control And Of Harmonisation?" (2011) *Journal of Private International Law*, 423, at 426.

<sup>35</sup> Jonathan Harris and Eva Lein, "A Neverending Story? Arbitration and the Brussels I: The Recast" in Eva Lein, *The Brussels I Review Uncovered* (BIICL, 2012) 31.

<sup>36</sup> Bríza (n 23), 540 *et seq.*

<sup>37</sup> See *supra* n 17.

<sup>38</sup> Para 19.

<sup>39</sup> For a succinct analysis on the use of anti-suit injunctions in English courts see Patrizio Santomauro, 'Sense And Sensibility: Reviewing West Tankers and Dealing with Its Implications in the Wake of the Reform of EC Regulation 44/2001' (2010) *Journal of Private International Law* 281, 283.



The CJEU, first, found that the Regulation did apply to situations such as that occurred in *West Tankers*. Secondly, it stated that the use of an anti-suit injunction to prevent a court of a Member State, which normally has jurisdiction to resolve a dispute under Article 5(3) of the Brussels I Regulation, from ruling, in accordance with Article 1(2)(d) of that regulation, on the very applicability of the regulation to the dispute brought before it, necessarily amounts to stripping that court of the power to rule on its own jurisdiction.<sup>40</sup> In addition, it found that an anti-suit injunction runs counter to the trust which the Member States accord to one another's legal systems and judicial institutions, if it obstructs the court of another Member State in the exercise of the powers conferred on it by the Regulation.<sup>41</sup> Citing *Gasser and Overseas Union Insurance and Others*,<sup>42</sup> the CJEU stated that "in no case is a court of one Member State in a better position to determine whether the court of another Member State has jurisdiction".<sup>43</sup> Further, the CJEU clearly ruled that counter-measures to parallel proceedings, such as anti-suit injunctions, do not comply with provisions of the Regulation.

It is evident that *West Tankers* does not affect the ability of international arbitral tribunals to grant anti-suit injunctions, neither affects the issuance of anti-suit injunctions in aid of arbitration in non-EU Member States. However, it freezes the use of anti-suit injunctions to protect arbitration agreements in the EU (use which had been fostered by English courts).<sup>44</sup> Thus, *West Tankers* increases the risk that a party, reluctant to arbitrate, may seek to 'torpedo' a arbitration agreement, by pre-emptively filing suits elsewhere in Europe. As underlined by Briza:<sup>45</sup>

"the *West Tankers* case shows clearly that even after several years of sustained critique and in the face of all the problems it has caused for practice, the *Gasser* logic is still firmly present in the Luxembourg oracle":

and claims that

"one cannot expect any help from the [CJEU] in dealing with practical problems to which *Gasser* and its progeny lead".

Again, despite this harsh criticism, it seems that the interpretive solution adopted by the CJEU is not surprising and can, to some extent, be shared. Anti-suit injunctions are an important common law remedy protect a party's right to arbitrate or to refer proceedings to a particular court's jurisdiction by defeating competing

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<sup>40</sup> Paras. 29 *et seq.*

<sup>41</sup> Para 30.

<sup>42</sup> Case C-351/89 *Overseas Union Insurance and Others* [1991] ECR I-3317.

<sup>43</sup> Para. 29.

<sup>44</sup> *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd* [2005] 1 Lloyd's Rep 67, para 65. See Christian Andreas Heinze and Anatol Dutta, "Enforcement of Arbitration Agreements by Anti-suit Injunctions in Europe – From Turner to West Tankers" (2007) *Yearbook of Private International Law* 415.

<sup>45</sup> Briza (n 23), 546.

proceedings commenced in breach of an arbitration agreement.<sup>46</sup> However, as underlined by Clifford and Browne,<sup>47</sup> anti-suit injunctions are not granted by the courts of all the Member States, and it is apparent that the CJEU cannot recognise (or be influenced by the fact) that the courts of some Member States are less efficient and reliable than others. It is also worth noting that an anti-suit injunction constitutes an indirect interference in foreign proceedings: this interference could undermine the effectiveness of the Brussels I Regulation in reaching its goals of ensuring both mutual trust and certainty.<sup>48</sup>

In addition, again, it is difficult to imagine a different interpretation of the Brussels I Regulation, and from a more substantive point of view, contractual provisions cannot prevent parties from bringing court actions. Legal protection must prevail over private autonomy. As stated by Santomauro:

“the protection of the judicial right to access national courts makes it necessary that even proceedings outside the scope of the Regulation may not impede other proceedings that are within the scope and that the arbitration exception is interpreted narrowly”.<sup>49</sup>

### **Brussels I Recast: A legislative Solution to Practical Problems**

The prospects for any effective solution of the undeniable detrimental practical effects brought by CJEU’s case law (and compatible with the text of the Brussels I Regulation) have been considered rather implausible. As regard to the infringement of arbitration or jurisdiction clauses, the idea of claim for damages for breach of them has been advocated, but considered unlikely under the current regime.<sup>50</sup> A successful handy technique to avoid bypassing of choice of court agreements has been described as ‘suing first’ strategy: when an infringed party is aware of the potential abusive claim of the infringing party and sues the latter first. However, this practice has a ‘dark side’: it increases litigation and discourages parties from finding amicable solutions.

The need for legislative solutions has been widely argued. On 21 April 2009, the Commission published a Green Paper on the review of the Brussels I Regulation,

<sup>46</sup> Philippa Charles, “Anti-Suit Injunctions: The ECJ Decision of 10 February 2009 in the West Tankers Case, International Arbitration Perspective”, 5, available at <[http://www.mayerbrown.com/files/publication/36dbe57b-8b2d-4adb-a1a5-b849bb64344f/presentation/publicationattachment/faa101f7-5b23-4dd0-a6c4-8a4163b70a34/review\\_internationalarbitration.pdf](http://www.mayerbrown.com/files/publication/36dbe57b-8b2d-4adb-a1a5-b849bb64344f/presentation/publicationattachment/faa101f7-5b23-4dd0-a6c4-8a4163b70a34/review_internationalarbitration.pdf)> (accessed 12 May 2013).

<sup>47</sup> Philip Clifford and Oliver Browne, ‘Lost at Sea or a Storm in a Teacup? Anti-Suit Injunctions after *Allianz Spa (Formerly Riunione Adriatica di Sicurtà Spa) V West Tankers Inc*’, at <<http://www.google.ie/url?sa=t&rct=j&q=&esrc=s&source=web&ccd=2&ved=0CDYQFjAB&url=http%3A%2F%2Fwww.lw.com%2FthoughtLeadership%2Fanti-suit-injunctions-after-allianz-spa&ei=YFGiUeGLLsf7Abu0ICQBw&usg=AFQjCNHVYclQXDr7PuhwZXBuvqcZqY7Liw&bvm=bv.47008514,d.ZG4>> (accessed 10 May 2013).

<sup>48</sup> Santomauro (n 39), 293.

<sup>49</sup> Santomauro (n 39), 293.

<sup>50</sup> Bríza (n 23), 548 *et seq.* Blobel and Spath (n 30), 574 *et seq.*

further to a Report on the application of the Brussels I Regulation. A proposal was then presented in 2010<sup>51</sup>: this was intended to be more than a series of revisions and amendments. Rather, as underlined by Hay, its purpose was to 'recast' the existing rules in the context of contemporary conditions and needs. The proposal underwent much review, amendment and change.<sup>52</sup> The result Regulation (EU) No 1215/2012 (Brussels I Recast) was finally adopted after almost three years of discussion in December 2012, and will enter into force on January 2015.

It is useful to highlight that the Brussels I Recast, among other things, addresses abuses of the *lis pendens* rule. The spread of choice of court agreements, along with the parallel growth of international arbitration, is now understood as particularly positive and deserves to be protected.

Recital 19 (repeating Recital 14 of the current Regulation) refers to respecting the autonomy of the parties. Recital 22 of the Preamble provides that 'in order to enhance the effectiveness of exclusive choice-of-court agreements and to avoid abusive litigation tactics, it is necessary to provide for an exception to the general *lis pendens* rule in order to deal satisfactorily with a particular situation in which concurrent proceedings may arise. This is the situation where a court not designated in an exclusive choice-of-court agreement has been seised of proceedings and the designated court is seised subsequently of proceedings involving the same cause of action and between the same parties'.

The new *lis pendens* rules (provided for in Articles 29 to 34) tackle the problem of abusive tactics. Particularly relevant in this respect is Article 31. This provision, at para 1, provides that "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". This would be relevant to claims concerning a number of issues which might for example fall within several heads of the exclusive jurisdiction rules in existing Article 22, especially in the field of patent (new Article 24). Article 31(2) provides that any court other than the chosen court "shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement". It appears that 'torpedo' claims are forestalled by giving precedence to the chosen court.

The rules relating to jurisdiction and 'choice of court' agreements have been amended too. Article 25(5) expressly states that jurisdiction agreements are separable: it provides that jurisdiction agreements "shall be treated as an agreement independent of the other terms of the contract". The Brussels I Regulation also provides currently that the validity of the jurisdiction agreement cannot be

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<sup>51</sup>European Commission, 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. On the proposal see *inter alia* Pamela Kiesselbach, "The Brussels I Review Proposal – An Overview", in Eva Lein, *The Brussels I Review Uncovered* (BIICL, 2012) 1.

<sup>52</sup>Peter Hay, "Notes on the European Union's Brussels-I 'Recast' Regulation" (2013) *The European Legal Forum*, 1, at <http://ssrn.com/abstract=2267816> (accessed 26 May 2012).

contested solely on the ground that the contract is not valid.<sup>53</sup> Notably, Brussels I Recast has slightly widened the scope of jurisdiction agreements, by removing the requirement that such an agreement needs at least one party domiciled in a Member State. As noted by practitioners, this relaxation means that the domicile of the parties to such an agreement is irrelevant and makes it easier to establish whether the Brussels I Regulation is applicable, by avoiding the need for a detailed investigation into the domicile of parties.<sup>54</sup>

Brussels I Recast has harmonised the conflicts of law rule on the substantive validity of choice of court agreements. Article 25 contains a new caveat to the founding of jurisdiction according to which the Member State court named in a jurisdiction clause governs questions of substantive validity of the jurisdiction clause itself, even if that is different from the governing law of the contract. However, it is still too early to detect how this rule will really operate.

One of the most controversial aspects of the reform process emerged in relation to the scope of the arbitration exclusion at Article 1(2)(d). While the *Heidelberg Report* suggested the removal of the arbitration exception,<sup>55</sup> the Brussels I Recast maintains the arbitration exclusion. Moreover, this exception is reinforced by Recital 12, which states:

“nothing in this Regulation should prevent courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law”.

This means that a party may seek an order from the court seised dismissing the proceedings before it, and ordering the dispute to be referred back to arbitration. Recital 12 expressly excludes certain judgments on arbitration agreements from the scope of the Brussels I Regulation:

“A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question”.

This paragraph clarifies that a court’s decision upholding or setting aside an arbitration agreement is not binding upon courts of other Member States. Thus, it

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<sup>53</sup> <http://www.allenoverly.com/publications/en-gb/Pages/Reform-of-the-Brussels-Regulation-are-we-nearly-there-yet.aspx> (accessed 26 May 2012).

<sup>54</sup> <http://www.allenoverly.com/publications/en-gb/Pages/Reform-of-the-Brussels-Regulation-are-we-nearly-there-yet.aspx> (accessed 26 May 2012).

<sup>55</sup> See n 12.

reduces the scope for tactical litigation in this area, and the worst effects of *West Tankers* are loosened. Recital 12 also provides that:

“where a court of a Member State, exercising jurisdiction under this Regulation or under national law, has determined that an arbitration agreement is null and void, inoperative or incapable of being performed, this should not preclude that court’s judgment on the substance of the matter from being recognized or, as the case may be, enforced in accordance with this Regulation. This should be without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the New York Convention, which takes precedence over this Regulation”.

This solution does not prejudice recognition and enforcement of an arbitral award under the New York Convention, which takes precedence over the Brussels I Recast and should limit the scope for the circulation within Member States of inconsistent judgments made in respect of certain arbitration matters.

All in all, these amendments relating to arbitration seem to purport some clarity in respect of the scope of the exclusion of arbitration from Brussels I. Notably, the new provisions do not authorise a Member State court to grant an anti-suit injunction, because this would breach the principle of mutual trust which still is at the core of the regulation. This, according to many commentators,<sup>56</sup> still allows ‘torpedo’ claims.

### **Concluding Remarks**

The amendments adopted by the Brussels I Recast seem to offer a viable solution to overcome the detrimental practical effects arisen further to CJEU case law.

In the current EU scenario of judicial cooperation, the new regulation finds a balance between the need of trust and co-operation (instead of intervention) between Member States and the effective protection of party autonomy in individual cases. However, there is a compelling need to overcome fragmentation and disomogeneity among the legal systems. In addition, it might be argued that aggressive litigation tactics are not likely to disappear. Selection of jurisdiction will remain subject to tactical planning, considering the difference in speed of the procedure, the professional background and skills of judges, legal costs, and the likelihood of a court giving out a friendly verdict in a particular matter. Even if it will be more difficult under Brussels I Recast to bypass choice of court agreements and commence ‘torpedo’ claims, the need to ensure the best and most effective defence or strategy to clients will probably lead to the development other aggressive litigation tactics.

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<sup>56</sup>Nielsen (n 2) 511.

