THE PROPOSED RECAST OF THE BRUSSELS I REGULATION: RULES ON JURISDICTION

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1. The Brussels I Regulation on jurisdiction, *lis pendens*, and the recognition of enforceable titles[1] is largely considered the most important and the most successful instrument of European procedural law; it operates as "the matrix of civil judicial co-operation in the European Union".[2] However, there is equally a large consensus that legislative improvement of the Regulation is needed.[3] In December 2010, the EU Commission presented its long-awaited, legislative proposal for a recast of the Regulation.[4] The legislative initiative had been carefully prepared in a Green Paper,[5] in two comparative studies,[6] and in several conferences in

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[1] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *O.J.E.C.* L 12 of 16 January 2001, at 1, quoted as "Judgments Regulation"/"JR".

[2] Commission's Proposal of 14 December 2010, Explanatory Memorandum, at 1.

[3] HESS B./PFEIFFER T./SCHLOSSER P., *Heidelberg Report* (2008), para 59; DICKINSON A., "The Revision of the Brussels I Regulation", *YPIL* 2011, 247, 248.

[4] COM (2010) 748 final (fn 2). Unless otherwise stated, references to the Recitals and Article numbers refer to the Proposal of the Commission ("CP") and to the Recitals and Article numbers of the Brussels I Regulation ("JR").

[5] Green Paper on the review of Council Regulation (EC) No 44/2001. A public consultation conducted on the basis of a questionnaire on the Green Paper

the EU-Member States. One principal decision of the Commission's proposals of December 2010 was not to fundamentally change the present system of rules on jurisdiction as provided for in the second chapter of the Regulation, except some minor adaptations. This concept is in line with the findings of the *Heidelberg Report*,[7] most of the reactions to the Green Paper,[8] and the recommendations of the Impact Assessment. According to these statements, the operation of the Regulation regarding the allocation of jurisdiction between the EU Member States has proved to be satisfactory.

Nonetheless, the following paper[9] shall address some unresolved jurisdictional issues and leftovers which have been triggered by recent case law of the ECJ. Furthermore, some wider perspectives shall be explored – especially collective redress. Finally, the paper shall ask whether the present system of exclusive, general, and specific heads of jurisdiction corresponds to the practical needs of litigants in the European Judicial Area. Accordingly, this paper addresses the following articles of the Regulation: general jurisdiction under Articles 2 and 59 CP; the special heads of jurisdiction in contractual and tortuous matters under Articles 5(1) and 2 CP; multiple defendants under Article 6(1); the recurrent issue of choice of court agreements, (Article 23 CP); and, finally, the proposed new article 5(3) CP introducing a *forum rei sitae* for claims in movables. Finally, I would like to address a more fundamental issue and ask whether the new regime on the automatic enforcement of judgments will affect the present system of jurisdiction of the Regulation.

2. The Regulation is based on the distinction between general and specific heads of jurisdiction. With regard to general jurisdiction, which allots matters unrelated to the subject matter

received about 130 answers. The submissions of Member States and stakeholders to the EU Commission with regard to the Green Paper are available at: http://ec.europa.eu/justice_home/news/consulting_public/news_consulting_0002_en.htm

[6] HESS B./PFEIFFER T./SCHLOSSER P., *Heidelberg Report* (2008); NUYTS A., *Study on Residual Jurisdiction*.

[7] HESS B./PFEIFFER T./SCHLOSSER P., *Heidelberg Report* (2008), paras 145 ff (authored by PFEIFFER T.)

[8] *Supra* (fn 4).

[9] Enlarged version of the presentation was given in Milan on 25 November 2011.

of the claim to the competent court, the Regulation endorsed the concept of *actor sequitur forum rei*. Accordingly, the plaintiff must sue the defendant in his or her domicile. Although this concept openly privileges the defendant is not beyond doubt,[10] the ECJ constantly held that Article 2 of the Regulation embodies the basic principle,[11] and, consequently, that the specific heads of jurisdiction of the Regulation must be regarded as exceptions and thus interpreted narrowly.[12] In 2001, the European legislator indirectly endorsed this case law in Recital 11 of the Regulation. However, in legal literature this basic interpretation of the Regulation's system is criticised, as the specific heads of jurisdiction are "based on a close link between the court and the cause of action in order to facilitate the sound administration of justice" (cf Recital 12). Accordingly, the mere existence of Article 2 JR should not entail the "preponderance of a restrictive interpretation" of the specific heads of jurisdiction.[13]

A first leftover in the Commission's proposal is found in Article 59. In the current version of the Regulation, Article 2 JR refers to the definition of the defendant's domicile in Article 59 JR. This provision – surprisingly – does not provide for an autonomous concept (as does Article 60 for the seat of moral persons), but refers to the respective conflict-of-law provisions of the EU Member States. This reference contradicts the general concept of an autonomous and uniform interpretation of the Regulation and entails that the scope of the basic EU instrument is determined differently by (complicated and not harmonised) national rules and concepts.[14] Thus, it seems necessary to adjust Article 59 of the Regulation to other EU instruments that do not refer to the domicile, but to the permanent residence of the defendant.[15] With regard to the predictability and legal certainty, the

[10] PFEIFFER T., Internationale Zuständigkeit und prozessuale Gerechtigkeit, Frankfurt a.M. 1995, 596 ff.

[11] HESS B., *Europäisches Zivilprozessrecht*, Heidelberg 2010, § 6 II, paras 34 ff.

[12] ECJ, 27 September 1988, Case 189/87, *Kalfelis v Schroeder* [1988] ECR 5565, para. 19; 10 June 2004, Case C-168/02, *Kronhofer v Maier* [2004] ECR I-6009, para. 13; 23 April 2009, Case C-533/06, *Falco Privatstiftung Thomas Rabitsch v Gisela Weller-Lindhorst* [2009] ECR I-3327, para. 30.

[13] HESS B. (fn 11), § 6 II, para. 36; MANKOWSKI P., *sub* Article 5, in: MAGNUS U./MANKOWSKI P. (eds), *Brussels I Regulation*[2], München 2012, para. 13. It seems advisable to realign the wording of Recital 11.

[14] HESS B./PFEIFFER T./SCHLOSSER P., *Heidelberg Report* (2008), para 177.

[15] HESS B. (fn 11), § 6 II, paras 38 ff.

objective concept of permanent residence seems the better concept of personal jurisdiction over the defendant, as it only refers to objective criteria and not to subjective intentions of the defendant, which are difficult to ascertain and to prove. Accordingly, regarding Article 59, the Commission's Proposal needs further improvement.

3.1. A major legislative step of the 2001 Regulation compared to the 1968 Convention was the adoption of an autonomous concept of jurisdiction in matters relating to a contract that is based on the place of performance. The new concept is mainly found in Article 5(1)(b) JR. The main intention of the EU legislator in 2001 was to simplify the old system, which required the court to specify the place of performance of each individual claim according to the applicable rules of private international law. The second disadvantage of the old system was that, according to the critics put forward by legal scholars, Article 5(1) of the Brussels Convention offered especially to the vendor a head of jurisdiction at his domicile with regard to his claim for payment.[16] Article 5(1)(b) now provides that the place of performance in cases of contracts of sale is the place of the delivery of goods, and in the case of contracts on the provision of services, the place where the services are provided or should have been provided according to the contract. Therefore, the characteristic obli-gation of the contract is decisive. The ECJ constantly stresses that these provisions are based on two guiding principles: the proximity between the place of performance and the competent court and the need of predictability of jurisdiction.[17]

If one takes into account the case law of the ECJ, one might doubt whether these objectives have been achieved. The sheer number of references to the ECJ demonstrates the practical problems surrounding this provision.[18] The new concept of an

[16] HESS B./PFEIFFER T./SCHLOSSER P., *Heidelberg Report* (2008), paras 182 ff.

[17] ECJ, 5 March 2007, Case C-386/05, *Color Drack GmbH v Lexx International Vertriebs GmbH* [2007] ECR I-3699, paras 24 and 26; 9 July 2009, Case C-204/08, *Peter Rehder v Air Baltic Cooperation* [2009] ECR I-6073, para. 34.

[18] MAGNUS U./MANKOWSKI P., "The Proposal for a Reform of the Regulation Brussels I", *ZVglRWiss* 2011, 253, 300; JUNKER A., "Der Gerichtsstand des Erfüllungsortes nach der Brüssel I-Verordnung im Licht der neueren EuGH-Rechtsprechung", in: GEIMERR./SCHÜTZE R.A. (Hrsg.), *Recht ohne Grenzen. Festschrift für Athanassios Kaissis zum 65. Geburtstag*, München 2012, 439 ff;

autonomous concept of the place of performance, as provided for by Article 5(1) JR, has proved to be extremely complicated.[19] In practice, the ECJ determines the place of performance according to the contractual agreement and to the individual circumstances. The entry into force of the Rome I Regulation entails substantive improvements and an alignment of Article 5(1)(a) and (b) JR with the parallel provision of Articles 3 and 4 of the Rome I Regulation. As a result, the parallelism between the two, EU instruments might result in the convergence of the specific head of jurisdiction and the applicable law, which are both determined according to the agreed place of performance, otherwise by the place where the of the typical obligation of the contract was performed. In this respect, the list of Article 4(1) of the Rome I Regulation should be decisive for the determination of the place of performance. As a result, Article 5(1)(a) and (b) JR would result in a *Gleichlauf* (parallelism of the competent court and the applicable law). Although legal scholars of private international law have rejected this idea for a long time, it has, nevertheless, some benefits. From a practical perspective, applying foreign law in civil litigation is usually time-consuming, uncertain, and largely dependent on the requested opinions of the legal experts. Thus, there is a practical need to avoid this unfortunate situation. Interpreting the place of performance in a way that entails the application of the *lex fori* of the court seized may improve the effectiveness of cross-border litigation in the European Judicial

GAUDEMET-TALLON H., "La réfonte du Règlement Bruxelles I", in: GUINCHARD E./DOUCHY-OUDOT M. (eds), *La justice européenne en marche*, Paris 2012, 21, 29 f. even proposes to abolish Article 5(1) JR.

[19] In *Falco Privatstiftung* (fn 12), the ECJ had to deal with the term of "contract for the provision of services". Here, the ECJ held that Article 5(1)(b) second indent Brussels I has to be interpreted in the way that a contract under which the owner of an intellectual property right grants its contractual partner the right to use that right in turn for remuneration is not a contract for the provision of services according to that provision. While *Color Drack* concerned the sale of goods (Article 5(1)(b) first indent) and the question whether this provision is applicable in case of several places of delivery within a single Member State, in *Wood Floor Solutions* the ECJ had to answer the question, whether Article 5(1)(b) second indent Brussels I can be applied in cases where services are provided in several Member States. In view of the previous judgments given in *Color Drack* and *Rehder*, the ECJ answered this question in the affirmative and held that the court having jurisdiction has to be the court in whose jurisdiction the place of the main provision is situated (ECJ, 11 March 2010, Case C-19/09, *Wood Floor Solutions Andreas Domberger GmbH v Silva Trade SA* [2010] ECR I-2121).

Area. Accordingly, the ECJ should refrain from determining the place of performance according to the factual delivery of the goods or the service and include the issue of the applicable law (as determined according to Article 4(1) of the Rome I Regulation). However, this alignment is not a subject for European legislation, but should be envisaged by the ECJ in its case law.

3.2. Regarding jurisdiction in torts, the Commission proposed not to change the present wording of Article 5(3) JR, which shall be found in the new article 5(2) CP. This decision is remarkable due to the massive lobbying of European publishers against the ECJ's judgment in the *Shevill* case.[20] European publishers complain that the *Shevill* decision permits victims of any alleged, defamatory publication to start litigation in all Member States where the publication was distributed and harmed the victims' reputations. This large head of jurisdiction would harm the constitutional guarantee of the free press.[21] According to *Shevill*, however, the jurisdiction at the place where the harm occurred is limited (and localised) to the harm caused in the State of the court seised. With regard to internet publications, the publishers argue that they are subject to all courts in EU Member States as online publications are available worldwide. Accordingly, the publishers proposed to locate the jurisdiction in these constellations in the Member State of the publisher's seat. The EU Commission did not endorse this proposal, but exempted judgments concerning defamation and violations of privacy from the new system of automatic, cross-border enforcement (see Article 37(3)(a) CP). This proposed exception is heavily criticised by the legal literature.[22]

[20] ECJ, 11 March 2010, Case C-68/93, *Fiona Shevill and Others v Presse Alliance SA* [1995] ECR I-415, paras 20 and 21, 33; HESS B., "Der Schutz der Privatsphäre im Europäischen Zivilverfahrensrecht", *JZ* 2012, 89, 90 ff.

[21] The publishers' position is summarized by *Wade* (European Publishers Corporation), The Link between Brussels I and Rome II in Cases Affecting the Media, available at http://conflictoflaws.net/2010/epc-on-the-link-between-brussels-i-and-rome-ii-in-cases-affecting-the-media/.

[22] WELLER M., "Der Kommissionsentwurf zur Reform der Verordnung Brüssel I", *GPR* 2012, 34, 36.

Few weeks ago, the Grand Chamber of the ECJ addressed the issue in the joint cases *eData Advertising* and *Martinez*.[23] In the first case, a German, called X who had been convicted for murder of the well-known, German actor Walter Sedelmayr and who later had been released on parole, sought an injunction against an Austrian provider of an internet portal *(eData Advertising)*. This portal had informed that X had initiated a constitutional complaint against his conviction and reported about the crime. X sought the removal of the post, which was mainly addressed to an Austrian audience, but equally accessible to the German public. In the second case, the French actor *Olivier Martinez* and his father asserted that the English defendant, the *Sunday Mirror*, had infringed their right to privacy. The English defendant had posted on a website accessible at the internet address www.sundaymirror.co.uk, a text in English entitled: "Kylie Minogue is back with Olivier Martinez", with details of their private meeting. Thus, in both cases the question arose whether the courts seized were competent to hear the respective cases under the Brussels I Regulation and therefore how the term "place where the harmful event may occur" in Article 5(3) JR had to be interpreted with regard to infringements committed on the internet.

The judgment of October 25, 2011, rendered by the Grand Chamber, reinforces the position of the individual victim by interpreting Article 5(3) JR widely so that the individual has the option of bringing an action for liability, in respect of all the damage caused, either before the courts of the Member State in which the publisher of that content is established, or before the courts of the Member State in which the centre of his interests is based. In addition, the court held that the infringed person could also bring an action before the courts of each Member State in the territory in which content has been placed online or has been accessible. Those courts will have jurisdiction only in respect of the damage caused within the territory of the Member State of the court seized.[24]

[23] ECJ, 25 October /2011, Joined cases C-509/09 and C-161/10, *eData Advertising v x and Olivier Martinez, Robert Martinez v MGN Limited,* annotated by HESS B., *JZ* 2012, 89-94.

[24] ECJ (fn 23), para 59. This head of jurisdiction corresponds to the ECJ's case-law in *Shevill*.

As a result, the position of the individual claimant has been reinforced by a comprehensive *forum actoris*, and the restrictive approach of the *Shevill* decision has been given up to a large extent.[25] The main arguments for extending the jurisdiction under Article 5(3) JR were the ubiquity of the internet (different from the distribution of printed newspapers) and the serious nature of the harm that may be suffered by the affected individual. According to the Grand Chamber, publishers can easily ascertain the "centre of the interests of the affected person" (which will normally correspond with its permanent residence, but may be extended in the case of persons belonging to the "international jet set")[26] in order to foresee the court where the companies might eventually be sued.

By establishing this interpretation of Article 5(3) Regulation No 44/2001, the Court struck a fair balance between the interests of both parties. On the one hand, it averts forum shopping of (prominent and wealthy) victims as the jurisdiction at the "center" of the alleged victim depends on objective criteria.[27] On the other hand, the position of the alleged victims has been reinforced as the latter may bring their action at their hometown without being obliged to institute proceedings abroad (at the publisher's seat).[28] As a result, the Court introduces a *forum actoris*, which is often necessary to effectively protect personality rights. In this context, it should not be forgotten that persons targeted (by the yellow press) are usually in a weaker position *vis-à-vis* with the media industry.[29]

The criterion developed by the Court deviates from proposals in legal literature. A prevalent opinion proposed to limit Article 5(3) JR in the sense that the website of the publisher should be directed at the respective Member State. This interpretation of Article 5(3) JR was oriented towards jurisdiction in

[25] Although the ECJ still permits lawsuits in Member States where only partial damage occurred, the practical importance of such relief might be limited, different opinion: HEINZE T., *EuZW* 2011, 947, 949 ff.

[26] ECJ (fn 23), para 49.

[27] So-called, libel tourism, see HARTLEY T., "'Libel Tourism' and Conflict of Laws", *ICLQ* 2010, 25.

[28] Thus, the home advantage of the publisher (in the courts at his seat) will be avoided.

[29] See MANSEL H.-P./THORN K./WAGNER R., "Europäisches Kollisionsrecht 2011: Gegenläufige Entwicklungen", *IPRax* 2012, 1, 12; differing: HEINZE T. (fn 25), 947, 949.

consumer matters under Article 15(1)(c) JR.[30] To the potential plaintiff, the solution of the ECJ seems more attractive: it is oriented towards protection of the infringed person and does not focus on the intention (or direction) of the wrongful behavior. The (alleged) infringer and his victim are placed on equal footing with the result that the victim can usually bring an action at his habitual residence.[31]

4. In the recent past, Article 6(1) JR has become one of the most important heads of jurisdiction. Although the scope of this head of jurisdiction is still disputed, it is more and more often applied in mass tort litigation against multiple defendants, especially in cases of securities litigation, patent infringements, and cartel damage claims. This Article permits a centralisation of collective litigation by bundling parallel lawsuits against several defendants domiciled in different EU Member States. According to this provision, several co-defendants can be sued at the domicile or seat of one co-defendant ("the anchor defendant"). It presupposes a connection between the causes of action. Such a factual or legal connection is easy to argue in product liability and cartel claims. Hence, if several enterprises with headquarters in different Member States are sued for the same cause of action,

[30] HESS B. (fn 11), § 6 II para. 73.

[31] On November 23rd, 2011, the Committee for Legal Affairs adopted the following proposal for a rule on conflict of laws for the infringement of privacy to be included to the Rome II Regulation, 2009/2170/INI. It reads as follows: "Article 5a – Privacy and rights relating to personality – (1) Without prejudice to Article 4(2) and (3), the law applicable to a non-contractual obligation arising out of violations of privacy and rights relating to personality, including defamation, shall be the law of the country in which the rights of the person seeking compensation for damage are, or are likely to be, directly and substantially affected. However, the law applicable shall be the law of the country in which the person claimed to be liable is habitually resident if he or she could not reasonably have foreseen substantial consequences of his or her act occurring in the country designated by the first sentence. (2) When the rights of the person seeking compensation for damage are, or are likely to be, affected in more than one country, and that person sues in the court of the domicile of the defendant, the claimant may instead choose to base his or her claim on the law of the court seised. (3) The law applicable to the right of reply or equivalent measures shall be the law of the country in which the broadcaster or publisher has its habitual residence. (4) The law applicable under this Article may be derogated from by an agreement pursuant to Article 14." However, this proposal is not entirely convincing as it entails a split between the competent forum and the applicable law, see HESS B. (fn 23), 89, 92 ff.

the plaintiff may freely select among the courts of the different Member States.[32] Accordingly, this head of jurisdiction opens up the gateway for forum shopping in different courts and judicial systems of EU Member States. Recently, the ECJ rectified its former case law[33] and held that the close relationship between the parallel claims does not presuppose that the claims are based on an identical, legal basis.[34]

In the context of mass claims litigation, a recent development in the Netherlands deserves specific attention: In 2005, the Dutch legislator adopted a new legal framework[35] for a binding settlement concluded between one or more liable parties and representative organisations for the benefit of the group of affected persons to whom the damages were caused.[36] Once the settlement is reached, the parties may access the Amsterdam Court of Appeal for a binding declaration on the validity of the settlement. If the Court grants the request, the agreement binds all persons described by its terms, unless these persons expressly opt out from the settlement. Although this Act was initially conceived for the settlement of domestic disputes, it is more and more applied in international situations.

A recent example was the *Converium* settlement. In this case, a Swiss insurance company, which was listed on the Zurich and New York Stock Exchanges, had made several announce-

[32] This concept is expressly endorsed by Article 6(3)(b) Regulation Rome II. Under this provision, several defendants can be sued in the court of a Member State where one defendant is domiciled if the market in that Member State is directly and substantially affected by the anti-competitive behaviour of all defendants. The common, anti-competitive behaviour constitutes the connecting link among the co-defendants. It seems to be predictable that Article 6(1) JR will be interpreted systematically by reference to Article 6(3) of the Rome II Convention.

[33] ECJ, 13 July 2006, Case C-539/03, *Roche Nederland BV u.a. v F. Primus, M. Goldenberg* [2006] ECR I-6535.

[34] ECJ, 12 April 2011, Case C-145/10, *Eva-Maria Painer v Standard VerlagsGmbH et al.*, para. 84.

[35] *Wet collectieve afwikkeling masseschadens* (Act on the Collective Settlement of Mass Claims) of July 27, 2005. The original objective of the Act was the settlement of domestic disputes. However, since 2008, it has been applied to transnational cases, especially with regard to American class action litigation, see generally, VAN LITH H., *The Dutch Collective Settlement Act and Private International Law*, 2010, available at http://ec.europa.eu/competition/consultations/2011_collective_redress/saw_annex_en.pdf, at 16 ff.

[36] VAN LITH H. (fn 35), 36 ff; MOM A., *Kollektiver Rechtsschutz in den Niederlanden*, Tübingen 2011, 380 ff.

ments in 2004 that led investors to believe that *Converium* had deliberately underestimated the insurance. These announcements caused a massive drop of the share value. In October 2004, the first of several securities class action complaints was filed against *Converium* and some of its directors in the United States. Eventually, the United States District Court for the Southern District of New York excluded from the class action all non-U.S. persons who had purchased *Converium* shares on any non-U.S. exchange, leaving them empty-handed.[37] However, *Converium* had convinced the Court that a settlement would be sought for these non-U.S. purchasers through the Dutch collective settlement system. Accordingly, *Converium* and a specific Dutch Foundation for the representation of non-U.S. persons (mainly domiciled in Switzerland and EU Member States) concluded a settlement for the compensation of this group. Both parties sought the binding declaration of the Amsterdam Court of Appeal.

The Amsterdam Court of Appeal based its jurisdiction to declare the settlement binding mainly on Article 6(1) JR and the Lugano Convention. The Court stated that the claims of the various purchasers were so closely connected that it was expedient to hear and decide them together. Interestingly, the Amsterdam Court did not treat the Swiss Company as the defendant, but the Dutch representative organisations and the purchasers of the shares. As the Court already had jurisdiction over the Dutch purchasers, Article 6(1) Regulation Brussels I and the Lugano Convention made it possible to assume jurisdiction in the combined case.[38]

The application of Article 6(1) JR in this case demonstrates that the situation of mass claims and respective settlements under the Regulation (EC) No 44/2001 has not yet been fully explored.[39] The first question pertains to the applicable provisions of the Regulation, but the answer depends on the qualification of the settlement. Should the result be regarded as a settlement in the sense of Article 57 JR or as a judgment under Article 32 JR?

[37] Finally, the litigation in New York ended with a settlement of the claims of the American investors, *In re Scor Holding (Switzerland) AG Securities Litigation* 04 cv-7894-DLC (S.D.N.Y. 2009).

[38] Amsterdam Court of Appeal, 12 November 2010, Case No 200.070.039/01, http://www.converiumsettlement.com/images/stories/documents/Judgment%2012%20November%202010.pdf.

[39] HESS B., "Mutual Recognition in the European Law of Civil Procedure", *ZVglRWiss* 2012, 1, 12 ff.

In the present case law of civil courts in EU Member States, there is a tendency of qualifying court-approved settlements as "judgments" in the sense of Article 32 JR[40] – but the issue is still unresolved. Furthermore, even if the settlement was qualified as a decision in the latter sense, the affected purchaser could hardly be qualified as "defendant(s)" in the sense of Article 6(1) JR.[41] This example demonstrates that the proposed exclusion of collective litigation from new rules on automatic enforcement of the recast (Article 37(3) CP) seems too narrow. These proceedings should not be included in the scope of the Regulation, but be dealt with in a specific instrument.[42]

5. Articles 8-14, 15-17, and 18-21 of the Brussels I Regulation provide for "protective heads of jurisdiction" in insurance, consumer, and employment matters.[43] In the recast, the EU Commission does not propose to change these provisions, although some judgments of the ECJ in this area were criticised by the legal literature. Practical problems will be demonstrated by the following examples.

5.1. Jurisdiction over consumer contracts must still be considered an unsettled area of the Regulation. Most of the uncertainties relate to the question of whether an "activity" is being "directed" towards the domicile of the consumer within the terms of Article 15(1)(c). The practical importance derives from Article 16 of Regulation No 44/2001 providing for exclusive jurisdiction for actions instituted against the consumer at his domicile.[44]

[40] PERREAU SAUSSINE L., "Quelle place pour les class actions dans le règlement Bruxelles I ?", *Sem. Jur.* 2011, 992, 993 f.

[41] STADLER A., "Kollektiver Rechtsschutz und Revision der Brüssel I-Verordnung", in: GEIMER R./SCHÜTZE R.A. (Hrsg.) (fn 18), 951, at 959-960.

[42] HESS B., "Kartellrechtliche Kollektivklagen in der Europäischen Union – Aktuelle Perspektiven", *WuW* 2010, 493 and 499 f.; different VAN LITH H. (fn 35), 36 ff.

[43] HESS B./PFEIFFER T./SCHLOSSER P., *Heidelberg Report* (2008), paras 282 ff; HESS B. (fn 11), § 6 II, paras 94 ff.

[44] Accordingly, the regime on consumer protection of the Regulation 44/2001 has been criticised by the retailing industry as being "over-protective". For a contrary opinion see KIENINGER E., "Die Abschaffung des Vollstreckbarerklärungsverfahrens in der EuGVVO und die Zukunft des Verbraucherschutzes", *VuR* 2011, 243, 248 f.

This question was recently raised in *Alpenhof* and *Pammer*.[45] Both cases related to the conclusion of consumer contracts via the internet. Mr Pammer, an Austrian resident had booked a voyage by freighter from Triest to the Far East through a German Company which operated a website providing information on the voyage. Mr Pammer requested additional information by e-mail and booked the voyage by post. As the description did not correspond with the situation on the ship, Mr Pammer refused to embark and sued the German defendant in Austria. In *Alpenhof*, a German guest had left a hotel in Austria without paying because he was not satisfied with the hotel's services. He had booked the hotel via Internet. When the hotel instituted proceedings in Austria, the defendant raised the plea under Article 16 of Regulation No 44/2001 that the court lacked jurisdiction.

In both cases, the crucial issue was whether the business activities had been directed towards the domicile of the consumers. The Grand Chamber held that for activities being "directed" within the terms of Article 15(1)(c) of the Brussels I Regulation it is not sufficient that the website of the party with whom a consumer concluded a contract can be consulted via the internet in the Member State of the consumer's domicile.[46] The Court also rejected the idea that the difference between active and passive websites should be decisive, because this differentiation had been rejected by a joint declaration[47] of the Commission and the Council.[48] The Grand Chamber held that there must be an intention of the trader to do business with consumers in other Member States. This intention may be indicated by several factors which the national court had to ascertain; important criteria are the content of the website and the whole business activities of the trader. The Grand Chamber added a non-exhaustive list of additional items of evidence, which are, combined with others, sufficient to make an assumption that an activity is

[45] ECJ, 12 July 2010, Joined cases C-585/08 and C-144/09, *Peter Pammer v Reederei Karl Schlüter GmbH& Co KG* and *Hotel Alpenhof GesmbH v Oliver Heller*.

[46] ECJ (fn 45), para. 74.

[47] The binding force of this declaration is disputed, the ECJ avoided directly addressing this issue, see HESS B. (fn 11), § 4 I, paras 35-36 (subsidiary means of interpretation).

[48] ECJ (fn 45), para 79, different opinion WAGNER G., *sub* Article 15 Regulation 44/2001, in: STEIN F./JONAS M., *Kommentar zur Zivilprozessordnung*[22], Tübingen 2011, paras 45-47.

directed to the Member State of the consumer's domicile. These criteria include the international nature of the activity of the trader, the use of a top-level, internet domain, telephone numbers with international codes, as well as the use of several languages.[49]

It remains to be seen whether national courts will be able to apply these criteria in a coherent way. The main disadvantage of a multitude of different criteria is the lack of predictability and legal certainty regarding the jurisdiction of the court.[50] It seems difficult to give traders a clear guidance for the design of their respective websites. However, the ECJ clearly took up the intention of the European legislator to protect consumers comprehensively in cross-border situations. A possible reaction of the trading industry might be the establishment of online dispute resolution mechanisms that reduce costs and delays in cross-border litigation considerably.

5.2. In insurance matters, the ECJ held in *FBTO*[51] that the victim of a street accident is able to sue directly the insurer of the car in the Member State of his domicile. At first sight, this judgment implements the objective of the Regulation to protect the private victim as the weaker party by providing a possibility to sue the insurance company "at his home". However, in practice, the implementation of this judgment has proven to be extremely costly and time-consuming. Usually, the underlying accidents did not occur in the forum state and the courts must scrutinise the applicable law at the place of the accident, cf. Article 4(1) Rome I Regulation.[52] Since 2007, German civil courts have been flooded with lawsuits arising out of car accidents abroad and the courts had to request legal opinions on the applicable foreign law by German Institutes for Private

[49] ECJ (fn 45), paras 84 and 93.

[50] For a similar critique see BOGDAN M., "Website Accessibility as a Basis for Jurisdiction", *YPIL* 2010, 565, 567.

[51] ECJ, 13 December 2007, Case C-463/06, *FTBO Schadeverzekeringen NV. v JackOdenbreit* [2007] ECR 2007 I-11321.

[52] JAYME E., "Der Klägergerichtsstand für Direktklagen am Wohnsitz des Geschädigten (Art. 11 Abs. 2 i.V.m. Art. 9 EuGVO): Ein Danaergeschenk des EuGH für die Opfer von Verkehrsunfällen", in: KRONKE H./KARSTEN T. (Hrsg.), *Grenzen überwinden – Prinzipien bewahren. Festschrift für Bernd von Hoffmann zum 70. Geburtstag*, Bielefeld 2011/2012, 656 ff.

International and Comparative Law.[53] Although the underlying facts and legal issues in these cases are usually not very complicated, the sheer number of requests entailed practical delays. This example demonstrates the intrinsic link between jurisdiction and applicable law. In this area of law, the coordination between the Regulations Brussels I and Rome II requires improvement.

6.1. Regarding the choice-of-court agreements, the Commission proposes a slight amendment of Article 23 JR in order to align the Regulation with the Hague Choice of Court Convention which will be ratified by the European Union in a close future. The present provisions on choice-of-court agreements (Article 23 JR) generally work. The ECJ interprets the formal requirements of this provision broadly in order to ensure the material consent of the parties.[54] With regard to the material validity of the clause on jurisdiction, Article 23(1) CP refers to the law of the Member State of the designated court.[55] This proposal seems to be helpful as the determination of the applicable law of the chosen court will certainly reduce legal uncertainty in this respect. However, there will be constellations where a party contests his (valid) representation or capacity to conclude a jurisdiction clause. In these constellations, the reference to the law of the chosen court cannot be relied on. However, a broad application of the improved Article 23(1) CP will reinforce the implementation of choice of court agreements.

In practice, the main problems relate to situations where a party tries to circumvent the agreement by instituting proceedings (often for a negative declaration) in a derogated forum (so-called torpedo actions). Under the present legal regime, Article 27 JR provides that the court seized first decides on the admissibility of the action, although the court seized second must stay the

[53] According to Section 293 German Code of Civil Procedure, the Courts must investigate the applicable foreign law, which is usually done by expert opinions elaborated by university institutes for private international and comparative law.

[54] See HESS B./PFEIFFER T./SCHLOSSER P., *Heidelberg Report* (2008), paras 323 ff.

[55] According to the objectives of the Article 23(1) CP, this reference should be understood as a reference to the substantive law of the chosen jurisdiction.

proceedings until the court seized first issues its decision.[56] The Hague Choice of Court Convention of 2005 provides for a different solution by conferring priority to the chosen court. According to its Articles 4 and 5, the court shall decide upon the validity and the extent of the arbitration clause, unless the latter is null and void or incapable of being performed. According to Article 32(2) CP, such a residual control by the derogated court will be excluded in the European Judicial Area.[57] The decision on the validity and the extent of the clause shall be conferred to the designated court in order to prevent abusive and tactical litigation. However, the proposal does not mean that the mere allegation of a party that a choice-of-court clause exists will immediately exclude the jurisdiction of the court seized first. Moreover, a party relying on a choice of court agreement must substantiate the prima facie existence and pertinence of the clause with regard to the subject matter of the claim.[58] The proposed solution should be principally endorsed, although the wording of Article 32(2) CP should be aligned to the wording of Article 29(4) CP.[59]

6.2. The other express innovation regarding the heads of jurisdiction is a new Article 5(3) CP. This article provides for special jurisdiction regarding rights *in rem* in movable property. The Proposal was inspired by the *Heidelberg Report*,[60] which referred to a case where a defendant domiciled in a third State was sued for the restitution of a painting, which allegedly had been stolen from a museum after WW II. The painting was found in Austria at a gallery where it was to be sold at a public auction. Finally, the piece of art was deposited at an Austrian civil court. Under Articles 2 and 5 JR, the courts of the EU Member States

[56] ECJ, 9 December 2003, Case C-116/02, *Gasser v MISAT* [2003] ECR I-14693, according to the Commission's Proposal, this case-law will be reversed.

[57] In this respect, the proposed recast goes further than the Hague Convention as it gives preference to the designated court and does not allow any parallel proceedings in the designated court and the court seised, WELLER M. (fn 22), 34, 40; critical GAUDEMET-TALLON H. (fn 18), 21, 31.

[58] Correctly WELLER M. (fn 22), 34, 40-41.

[59] DICKINSON A. (fn 3), 257.

[60] Cf HESS B./PFEIFFER T./SCHLOSSER P., *Heidelberg Report* (2008), paras 152-153.

did not have jurisdiction to hear the case, because there was no contractual or tortious relationship between the parties.[61]

The new Article 5(3) CP proposes to confer jurisdiction to the courts of the Member State where the movable property is located. However, it seems advisable to clarify that this provision shall only apply to tangible movables.[62] Furthermore, the proposed head of jurisdiction seems unnecessary, as the proposed Article 25 CP, which directly connects the exercise of subsidiary jurisdiction to the Member State where property belonging to the defendant is located, will cover the described situation.

7. What conclusions can be drawn from the preceding – limited – outlook?

1. The time has come to realign the relationship between the so-called principle of general jurisdiction at the domicile of the defendant and the exceptional specific heads of jurisdiction. The ECJ's case law on the exceptional character of the specific heads of jurisdiction under Article 5 JR should be given up. This system was elaborated at a time where the recognition of foreign judgments was the exception (entailing the need of suing the defendant at a place – his domicile – where usually his assets were located in order to secure future enforcement)[63] and where the summoning of the defendant was only possible in the court's district.[64] Today, this rationale for the preference to the defendant's seat has lost its convincing reasons. The main argument for maintaining the current system is the need to provide for heads of jurisdiction with a great amount of predictability.[65]

However, the heads of jurisdiction related to subject matter in Article 5 JR should not be regarded as exceptions, but as counterbalances to the defendant-oriented principle of Article 2

[61] JAYME E., "Ein internationaler Gerichtsstand für Rechtsstreitigkeiten um Kunstwerke – Lücken im europäischen Zuständigkeitssystem", in: GRUPP K./HUFELD U. (Hrgs.), *Recht - Kultur - Finanzen: Festschrift für Reinhard Mußgnug zum 70. Geburtstag am 26. Oktober 2005*, Heidelberg 2005, 517 ff.

[62] DICKINSON A. (fn 3), 257.

[63] PFEIFFER T. (fn 10), p. 602.

[64] Usually, the defendant was present at his domicile and could easily be summoned by the court (or the bailiff) see OBERHAMMER P., *Inaugural Lecture Vienna*, October 2011, not yet published.

[65] The present structure of Article 59 JR contradicts to this objective, see *supra* text at fn 10 ff.

JR. It remains to be seen whether the application of Article 5 JR to defendants in third states will generally improve the importance of heads of jurisdiction that are based on a close connection between the forum and the subject matter of the dispute. Against this background, the recent judgment of the ECJ in *eData Advertising* may be understood as a first sign of the ECJ's willingness to correct and to improve the general relationship between Articles 2 and 5 of the Brussels I Regulation.

2. A second conclusion relates to the relationship between jurisdiction and applicable law. In European Union law, these issues were regulated separately, as the competences of the European Communities under the Rome and Maastricht Treaties did not include private international law. Under the Amsterdam and the Lisbon Treaties, the situation has changed: as the competence lies with the Union now, European legislations should address both areas of law from a common perspective. This approach has been adopted in several, recent instruments, especially in the areas of maintenance and successions, and permits a regulation of jurisdiction and applicable law by the same connecting factors. As a result, the competent courts will usually apply their domestic laws and avoid the complicated and time-consuming determination and application of foreign law. However, a comprehensive approach to both private international and procedural law presupposes that the same connecting factors are suited for jurisdiction and conflict of laws. Recent experience with Article 11 JR and with Article 5(3) JR and the diverging structure of Articles 3 and 4 of the Rome II Regulation shows that further alignment is needed.

3. According to the EU Commission, the Regulation Brussels I is "the matrix of civil judicial cooperation in the European Union".[66] If the Regulation shall operate in this way in the future, every suggestion of any amendment of the text must carefully consider this objective. Accordingly, the recast of the Regulation should avoid addressing specific and sophisticated issues that deserve a separate and genuine regime. In this respect, the proposal not to include collective redress in the Regulation deserves support. The multitude of problems in this field (ranging

[66] COM(2010) 748 final (fn 2), 1.

from jurisdiction in often non-contentious proceedings, standing of the plaintiffs, information and service of represented parties, coordination of parallel proceedings, and the recognition of settlements, including their preclusive effects) is not apt to be regulated in the Brussels I Regulation. In this respect, a self-standing EU instrument seems preferable.[67]

[67] Cf HESS B., "Kartellrechtliche Kollektivklagen in der Europäischen Union – Aktuelle Entwicklungen", in: REMIEN O. (Hrsg.), *Schadenersatz im europäischen Privat- und Wirtschaftsrecht* (to be published in 2012).