Chapter 3
Procedural Position of a 'Weaker Party' in the Regulation Brussels Ibis

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Abstract This contribution discusses the changes introduced by the revised Regulation regarding cross-border disputes involving a policyholder, the insured or a beneficiary under the insurance agreements, a consumer or an employee. It addresses most important amendments particularly those relating to expanding the Regulation's scope of application *ratione personae*, adjustments of the rule on tacit prorogation and on the revised rules on enforcement that have bearing on disputes involving parties with a weaker bargaining position.

Keywords Regulation Brussel Ibis · Weaker parties · Consumer disputes · Insurance contracts · Individual contracts of employment · Jurisdiction · Recognition and enforcement of judgements · *Lis pendens* · Choice of court agreements

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3.1 Introduction

The jurisdictional and enforcement regime of the Brussels I Regulation[1] contain provisions the purpose of which is to minimise the imbalance and to restore the bargaining position of 'weaker' parties in commercial legal relationships. These provisions intend to ensure that any advantage presumed or achieved by a contracting party with a dominant bargaining position will remain without legal entitlement and effect. Consequently, certain rights obtained in such legal transactions will be unenforceable against a 'weaker party'. To this end rules on jurisdiction and enforcement are adjusted so as to enhance the position of a weaker party in proceedings before national courts. The provisions aiming at protecting a weaker party relate to disputes arising under insurance contracts, and consumer and labour disputes.[2]

Additionally, a prorogation of jurisdiction is only valid to the extent that it complies with the special rules provided for weaker party disputes. Consequently, the courts in the EU Member States can establish jurisdiction against a weaker party defendant only on the basis of the Regulation. The applicability of national rules on jurisdiction is thereby excluded. In other words, such defendants are 'protected' against national rules on jurisdiction in EU Member States including exorbitant jurisdictional grounds.

The revised Regulation[3] further enhances the level of protection of weaker parties. The present contribution addresses the major changes in that respect.

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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, OJ L 12, 16.2.2001, pp. 1–23 (hereinafter: Regulation Brussels I).

[2] As such these rules prevail over both the general rule in Article 2 and alternative jurisdictional grounds in Articles 5, 6 and 7. See e.g., ECJ Judgment in *FBTO Schadeverzekeringen* of 13 December 2007, Case C–463/06, EU:C:2007:792, para 28. On the other hand, the rules on exclusive jurisdiction have prevalence over the jurisdictional rules in Sections 3, 4 and 5. Among the latter rules themselves, the rules on insurance contracts prevail over the rules on jurisdiction in consumer disputes.

[3] Regulation (EU) No. 1215/2012 of the European Parliament and of The Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351, 20.12.2012, pp. 1–32, it applies from 10 January 2015 (hereinafter: Brussels Ibis Regulation).

3.2 Rules on Jurisdiction in Brussels I Regulation

The provisions aimed at protecting the position of a weaker party in litigation under the Brussels I regime can be summarised as follows:

(a) A weaker party—a policyholder, the insured or a beneficiary, consumer or employee—has a choice to bring proceedings against the other party to a contract either in the court of the Member State in which that other party is domiciled or in which it is more convenient to a weaker party (most likely in the country of its own domicile) or which is otherwise closely related to the dispute.
(b) Conversely, proceedings may be brought against a weaker party to the contract only in the courts of the Member State in which the 'weaker' party is domiciled.
(c) Forum selection clauses in these disputes have limited binding effect against a 'weaker' party. In other words, they may be successfully invoked against a weaker party only if the conditions provided in the relevant provisions of the Regulation are met.[4]

Thus, an insurer domiciled in a Member State may be sued in the Member State of its domicile or in the Member State where the plaintiff is domiciled if an action is brought by a policyholder, the insured or a beneficiary. A co-insurer may be sued in a Member State where proceedings were brought against the leading insurer.[5] With respect to liability insurance or the insurance of immovable property, the insurer may also be sued in the courts of the place where the harmful event occurred.[6] The same holds true 'if movable and immovable property are covered by the same insurance policy and both are adversely affected by the same contingency'.[7] Also, the insurer may be joined in the proceedings initiated by an injured party against an insured if the law of the court where such proceedings are pending so permits. However, it is only the injured party that is to be protected under Article 11(2) of the Brussels I Regulation and not any statutory assignee. A social security institution cannot be considered to be a weaker party deserving protection in the application of the rules on the international jurisdiction of courts. Therefore, an insurer (a statutory assignee) cannot sue the insurer of an injured party before the courts of its Member State when the insurer is located in another Member State.[8]

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[4] This issue is addressed in a greater detail in Sect. 3.2.2.1, infra.

[5] Article 9(1) Regulation Brussels I.

[6] No definition of 'where the harmful event occurred' can be found in the Recast, but it must be assumed that an interpretation similar to that of Article 7(1)(b)(2) should be applied. See also, Kropholler & von Hein 2011, Article 10 note 1.

[7] Article 10 Brussels I Regulation.

[8] ECJ Judgment in *VorarlbergerGebietskrankenkasse v. WGV-SchwäbischeAllgemeineVersicherungs AG* of 17 September 2009, Case C-347/08, EU:C:2009:561.

On the other hand, the insured, policy holder or beneficiary as a weaker party may be sued only in the courts of the Member State of its domicile. Thus, a weaker party may choose among the possibilities given in Articles 9 and 10 when filing an action against the insurer, whilst it can be sued exclusively in the country of its domicile. The only exception is in the case of direct actions by an injured party against the insurer when the law governing such direct actions provides that the policy holder or the insurer may be joined as a party.[9]

Similarly, when a contract complies with the definition of a 'consumer contract' under Article 15 of the Regulation,[10] a consumer may choose between the *forum rei* and *forum actoris*.[11] Conversely, a consumer may only be sued in the courts of the place where he/she is domiciled (Article 16(2)). As in the case of insurance contracts,[12] the right to bring a counterclaim in the court where the original claim is pending is retained.[13]

Also, an employee may only be sued in the Member State of his/her domicile. The action against an employer may be brought in the courts of the country of its domicile, in the country where the employee habitually carries out or has carried out his work or in the courts where the business which engaged the employee is or was situated, if the employee does not carry out his work in any one country. Accordingly, an employee may choose between the *forum rei* and *forum laboris*—the courts where he habitually carries out his work or the courts of the last place where he carried out his work. If the employee does not habitually carry out his work in any one country, he/she may choose between the courts of the employer's domicile and the courts where the business that engaged the employee is or was situated.[14]

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[9] Articles 12(1) and 11(3) Brussels I Regulation. See also, Kropholler and von Hein (2011) stating that rhe concept 'matters relating to a contract' must be interpreted broadly in order to include a wide variety of agreements, for example, life insurance policies'.

[10] For more particulars, see Sect. 3.2.1.2 infra.

[11] Article 16(1) Brussels I Regulation. In the CJEU Judgment in *Armin Maletic,Marianne Maletic v. lastminute.com GmbH, TUI Österreich GmbH* of 14 November 2013, Case C–478/12, EU:C:2013:735, the Court stated that Article 16(1) also applies with respect to jurisdiction in proceedings against 'the contracting partner of the operator with which the consumer concluded that contract and which has its registered office in the Member State in which the consumer is domiciled'.

[12] Article 12(2) Brussels I Regulation.

[13] Article 16(3) Brussels I Regulation.

[14] Article 19 Brussels I Regulation reads: 'An employer domiciled in a Member State may be sued:
1. in the courts of the Member State where he is domiciled; or
2. in another Member State:
(a) in the courts for the place where the employee habitually carries out his work or in the courts for the last place where he did so, or
(b) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.

In applying the Regulation and its predecessor, the 1968 Brussels Convention, the relevant case law of the ECJ illustrates that the criterion 'habitually carries out his work' can also be applied when the work is carried out in the performance of a contract of employment in more than one Member State. According to the relevant case law of the CJEU, it is the place where an employee has established the effective centre of his working activities.[15] In order to identify that place, certain relevant circumstances need to be taken into account, such as where the employee spends most of his working time, 'where he has an office where he organises his activities for his employer and to which he returns after each business trip abroad'.[16] In the absence of an office, it will be the place in which employee carries out the majority of his work.[17] The Court, in its various decisions interpreting jurisdictional grounds, has emphasised the need to guarantee adequate protection to the employee as the weaker of the contracting parties also when the employee carries out his work in more than one contracting state.[18] In other words, such an employee should not be deprived of procedural protection under the Regulation. Only if the effective centre of his working activities cannot be established will the employee have to file the claim against his employer either in the courts of the employer's domicile or the courts where the business that engaged the employee is or was situated. The need to ensure 'more adequate protection for the party who from the socio-economic point of view is regarded as the weaker in the contractual relationship'[19] is reflected not only in private international law instruments that regulate procedural issues, but also in those that unify conflict of law rules.[20]

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[15] See the CJEU Judgment in *Heiko/Koelzsch* of 15 March 2011, Case C-29/10, EU:C:2011:151.

[16] ECJ Judgment in *Petrus Rutten v. Cross Medical Ltd* of 1 December 1995, Case C-383/95, EU:C:1997:7. See also, ECJ Judgment in *Mulox IBC Ltd v. Hendrick Geels* of 13 July 1991, Case C-125/92, EU:C:1993:306.

[17] CJEU Judgment in *Weber* of 3 April 2014, Case C-37/00, EU:C:2014:12, para 42.

[18] See e.g., ECJ Judgment in *Petrus Rutten v. Cross Medical Ltd* of 1 December 1995, Case C-383/95, EU:C:1997:7, Para. 22; ECJ Judgment in *Giulia Pugliese v. Finmeccanica SpA, Betriebsteil Alenia Aerospazio* of 10 April 2003, Case C-437/00, EU:C:2003:219, para 18.

[19] Giuliano and Lagarde 1980, p. 1.

[20] See e.g., 1980 Convention on the law applicable to contractual obligations, converted into Regulation No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, OJ L 177, 4.7.2008, pp. 6–16 (Rome I Regulation) in which party autonomy in determining the applicable law is somewhat restricted so as to ensure that the rights and interests of consumers and employees receive maximum protection. With respect to contracts of employment, the objective of the relevant provision of Article 6 of the Convention is to guarantee adequate protection for the employee. Within that context, the ECJ emphasized that the criterion of the country in which the employee 'habitually carries out his work' must be given a broad interpretation. The subsidiary criterion—the place of business through which the employee was engaged—can determine the applicable law only in cases where the court cannot determine the place where the employee habitually carries out his work. See e.g., CJEU Judgment in *Heiko Koelzsch v. Luxembourg of* 15 March 2011, Case C-29/10, EU:C:2011:151, para 44 and CJEU Judgment in *Jan Voogsgeerd v. Navimer SA* of 15 December 2011, Case C-384/10, EU:C:2011:842. For more particulars on the topic, including the commentaries on the relevant case law, see van Hoek 2011, pp. 650–658; Van den Eeckhout 2014, pp. 3–8; Even 2013, pp. 13–24; Laagland 2012, pp. 63–78; Derks 2011, pp. 8–11; Boonstra 2014.

The analysis of the rules on jurisdiction illustrates that the Brussels I Regulation departs, to a certain extent, from the general rule contained in Article 2—domicile of the defendant—in lawsuits against a 'stronger party'.[21] In disputes arising under consumer and insurance contracts, a weaker party is given the possibility to choose between the *forum rei* and *forum actoris* (consumers) and some other fora (the insured). Although following similar lines, a slightly different approach has been adopted in setting out the grounds for jurisdiction in disputes arising from individual employment contracts. A weaker party—an employee—is given the possibility to choose between fora closely related to the individual contract of employment. In particular, he/she can file the claim in the courts where he/she habitually carries out his/her work. However, differently from insurance and consumer contracts, the choice does not expressly include the *forum actoris*, even though in practice the place where an employee habitually carries out his work and his domicile will most frequently be in the same country. Outside the context of 'weaker party disputes', the domicile of the plaintiff, as well as the nationality of a claimant, is generally considered to be an exorbitant jurisdictional ground—i.e., a criterion that, according to internationally accepted standards, does not justify assuming jurisdiction against a defendant domiciled abroad.

3.2.1 Brussels Ibis Regulation—Consequences for Weaker Party Disputes

The Brussels Ibis Regulation applies as of 10 January 2015. It introduces changes in a number of areas.[22] Among the changes which are relevant to the issues discussed in the present contribution, extending the territorial (or formal/ratione personae) scope of application in disputes involving weaker parties has to be mentioned. Besides, a number of new provisions are inserted either to ensure a greater degree of protection for weaker parties or to clarify the existing regulatory scheme aimed at the protection of such parties.

3.2.1.1 Scope of Application Ratione Peronae

In the Commission's Proposal the universal application of jurisdictional rules and their extension to disputes involving third party defendants was suggested.[23]

[21] The domicile of the defendant is the main rule under the Regulation and is a generally accepted standard for international jurisdiction (*actor sequitur forum rei*).

[22] The amendments relate to the provisional measures, the *lis pendens* rule and choice of court clauses, expanding the territorial scope of application, and some new provisions intended to ensure a further protection of weaker parties. With respect to the enforcement of judgments, the exequatur is no longer required, but the public policy exception has been retained among the grounds for refusing recognition and enforcement.

[23] For detailed comments on the proposal for universal jurisdiction, see Weber 2011, pp. 620 et seq.

The so-called 'universal scope' would result in the abolition of the dual regime of jurisdictional rules in cross-border cases within the European Union. Consequently, no exorbitant jurisdictional grounds could be relied upon in cases involving defendants from outside the European Union. The idea of universal application has not been accepted in the Recast Regulation. Yet its territorial (personal or formal) scope of application has been somewhat extended. In principle, the Regulation still applies only if the defendant is domiciled in an EU Member State. The exceptions in cases of choice of court agreements and exclusive jurisdiction have been retained. The scope of application in cases of prorogation of jurisdiction has thereby been expanded even further, so that the domicile of the parties has become irrelevant. Consequently, the provision of Article 25 (the current Article 23 of Regulation 44/2001) will apply in all cases where the jurisdiction of a court in an EU Member State has been agreed upon.[24] Choice of court agreements providing for the jurisdiction of a court of a third state will still be governed by national rules.

Additionally, the personal scope is expanded in the Recast Regulation so as to include certain 'weaker' party disputes, notably consumer and labour law disputes. The provision of Article 6(1) of the Recast Regulation (the current Article 4 of the Brussels I Regulation) reads as follows:

> 1. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 18(1), 21(2) and Articles 24 and 25, be determined by the law of that Member State.

The reference to Articles 24 and 25 relates to exclusive jurisdiction and a prorogation of jurisdiction respectively (the current Articles 22 and 23). The provisions of Articles 18 and 21 relate to disputes involving consumers and employees.

Thus, a court in a Member State may establish its jurisdiction on the basis of the jurisdictional rules of Brussels Ibis Regulation in all disputes involving a consumer or an employee regardless of the domicile of the other party. The provision of Article 6(1) refers only to consumer (Article 1(1)) and labour disputes (Article 21(2)), but there is no reference to insurance contracts. Consequently, the jurisdictional rules contained in Sect. 3.3 relating to insurance contracts only apply if a defendant is domiciled in an EU Member State.[25] The relevant provisions on jurisdiction in

[24] Under Article 25 of Brussels Ibis Regulation it is no longer required that one of the parties to the agreement on jurisdiction is domiciled in an EU Member State. Under the current regime of Article 23 of Brussels I, for its applicability it is required that a court of an EU Member State is agreed upon and that one of the parties is domiciled in a Member State. Under the revised Article 25 it applies to prorogation clauses providing for the jurisdiction of a court in a Member State regardless of the domicile of the parties.

[25] For more particulars on the territorial scope of application of the Recast Regulation, see Lazić in Bodiroga-Vukobrat et al. 2013, pp. 184–188.

Article 18[26] relating to consumer contracts (Article 16 of the Brussels I Regulation) and Article 21[27] relating to contracts of employment (Article 19 of the Brussels I Regulation) have been adjusted so as to reflect the changes introduced to the territorial scope of application in Article 6 of the Recast. Accordingly, the new regulatory scheme further enhances the protection of consumers and employees. In particular, such 'weaker parties' may rely on the rules on international jurisdiction in disputes against professionals and employees domiciled outside the European Union. On the other hand, the Regulation continues to apply only to claims against consumers and employees domiciled in the EU Member States. Such a conclusion follows from the fact that Article 6 refers only to Article 18 para 1[28] and Article 21 para 2 respectively.

3.2.1.2 Revised Provision on Tacit Prorogation

Besides the scope of application and relevant rules on jurisdiction in disputes involving consumers and employees, there is a further amendment to the provision on the tacit prorogation of jurisdiction. It has been amended so as to better accommodate the interests of 'weaker' parties. Under the current regime of Brussels I, if a defendant enters an appearance, a court in an EU Member State in principle does not examine *ex officio* whether or not it has jurisdiction under the Regulation. The exception is an obligation to examine whether a court in another state has exclusive

[26] Article 18 of Brussels Ibis Regulation reads as follows:
'1. A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, *regardless of the domicile of the other party*, in the courts for the place where the consumer is domiciled.
2. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.
3. This Article shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.' (emphasis added).

[27] Article 21(1) of Brussels Ibis Regulation reads as follows:
'1. An employer domiciled in a Member State may be sued:
(a) In the courts of the Member State in which he is domiciled; or
(b) In another Member State:
(i) in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so, or
(ii) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.
2. An employer not domiciled in a Member State may be sued in a court of a Member State in accordance with point (b) of paragraph 1.' (emphasis added).

[28] Article 18(1) determines jurisdiction when a professional is the defendant, see the text supra note 51.

jurisdiction according to Article 22. This follows from the current text of Article 24 of Brussels I which relates to tacit prorogation,[29] as well as from Article 25.[30]

The jurisdictional rules in disputes involving weaker parties are not mentioned in Article 24 of Brussels I Regulation. Yet a violation of the jurisdictional grounds in disputes arising out of insurance contracts and consumer disputes, as well as the rules on exclusive jurisdiction, presents a valid ground to refuse the enforcement of the judgment under Article 35(1) of the Brussels I Regulation. Considering that the provision on tacit prorogation in Article 24 of Brussels I Regulation does not refer to disputes involving weaker parties, the CJEU has held that the court seised could validly assume jurisdiction in such disputes if a weaker party enters an appearance without contesting jurisdiction.[31] It reasoned, inter alia, that 'although in the fields concerned by Sections 3 to 5 of Chap. II of that regulation the aim of the rules on jurisdiction is to offer the weaker party stronger protection (…), the jurisdiction determined by those sections cannot be imposed on that party'.[32] One could expect that a weaker party should be put in a position to be fully aware of the effects of submitting his/her defence as to the substance and that the court seised should therefore determine *ex officio* what is the intention of entering an appearance. However, the Court held that '[s]uch an obligation could not be imposed other than by the introduction into Brussels I Regulation of an express rule to that effect'.[33]

Thereby the protection intended to be ensured in Article 35(1) is somewhat undermined, as the 'violation' of the jurisdictional rules referred to therein would not qualify as a ground for refusing the enforcement of the judgment even if a weaker party was unaware of the protection of its procedural position provided

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[29] Article 24 of Brussels I Regulation reads as follows:
'Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 22.'

[30] Where a court of a Member State is seised of a claim which is principally concerned with a matter over which the courts of another Member State have exclusive jurisdiction by virtue of Article 22, it shall declare of its own motion that it has no jurisdiction.

[31] See CJEU Judgment in *Česká podnikatelská pojišťovna as, Vienna Insurance Group v. Michal Bilas* of 20 May 2010, Case C-111/09, EU:C:2013:165, where the Court held that 'Article 24 (…) must be interpreted as meaning that the court seised, where the rules in Section 3 of Chap. 2 of that regulation were not complied with, must declare itself to have jurisdiction where the defendant enters an appearance and does not contest that court's jurisdiction, since entering an appearance in that way amounts to a tacit prorogation of jurisdiction.'.

[32] Ibid., para 30. Majority took the view that the holding expressed in this judgement was not only valid for insurance contracts, but would also apply to consumer contracts and individual contracts of employment. See, e.g., Magnus et al. (2016a, b) Article 26, p. 678, para 24.

[33] Ibid. With respect to a dispute against consumers, when interpreting the Consumer Directive, the ECJ on various occasions held that that the courts were to examine *ex officio* whether a dispute settlement clause, including forum-selection clauses, had to be considered as unfair contractual terms. See e.g., the ECJ Judgment in *Pannon GSM Zrt*. of 4 June 2009, Case C-243/08, EU:C:2009:350. For more particulars, see Sect. 2.2.3, infra.

under the Regulation. The newly introduced provision in Article 26(2) of the Recast Regulation remedies such a result and improves the positions of weaker parties. It reads as follows:

> In matters referred to in Sections 3, 4 and 5 (…) where the policyholder, the insured, the injured party of a beneficiary of the insurance contract, the consumer or the employee is the defendant, the court, before assuming jurisdiction under paragraph 1, shall ensure that the defendant is informed of his right to contest the jurisdiction and of the consequences of entering or not entering an appearance.

Thus, the court seised is under an obligation to inform a 'weaker' party defendant i.e., a policy holder/an insured/injured party/a beneficiary of the insurance contract, a consumer or an employee of the consequences of entering an appearance. Such additional protection for a weaker party is to be met with approval.[34]

The provision of Article 24 of Brussels I Regulation has remained unchanged and is contained in Article 26(1) of the Brussels Ibis Regulation. In accordance with para 1 of this provision, a weaker party will be 'protected' as any other party domiciled in a one Member State sued in a court of another Member State but does not enter an appearance. In such a case, the court seised is required to declare *ex officio* its lack of competence if it cannot establish its jurisdiction based on the provisions of the Regulation. When a defendant does enter an appearance the court seised is only required to examine jurisdiction on its own motion when the courts of another Member State have exclusive jurisdiction under the Regulation. As already explained, according to the new regulatory scheme of Brussels Ibis Regulation, the court will have to warn a weaker party about the need to contest jurisdiction and the consequences of its failure to do so. A failure to inform a weaker party under Article 26(2) should present a reason to refuse the enforcement of a judgment according to Article 45 Regulation Brussels Ibis.[35]

The further amendments affecting the regulatory scheme on the prorogation of jurisdiction are discussed infra Sect. 3.2.1.3.

3.2.1.3 Limited Binding Nature of Choice of Court Agreements Under the Brussels Ibis Regulation

The idea of limiting the effectiveness of choice of court agreements has been retained in the revised Regulation. In fact, no changes have been introduced

[34] See also, Hays 2013, p. 4; Lazić 2013a, b, p. 12.

[35] *Contra*, Magnus et al. (2016a, b), p. 682, para 35, refereing to Nuyts, La refonte du règlement Bruxelles I, RCDIP 2013, 1, 60. The author, however, gives no reason or argumentation in support of such a view. Others merely conclude that Article 26(2) neither expressly no impliedly provides which consequences follow from a breach of the obligation by a court to inform a weaker party of the right to contest jurisdiction, but offer no suggestion on how to interpret and apply the changes introduced. Magnus et al. (2016a, b) Article 19, para 49.

regarding the provisions specifically regulating the validity of forum-selection clauses with respect to weaker party disputes. Yet some alterations to the general provision on prorogation of jurisdiction in Article 25 (ex Article 23 of the Regulation Brussels I), as well as changes to the *lis alibi pendens* rule in Article 29 (ex Article 27) may have some bearing on the regulation of forum-selection clauses in disputes involving weaker parties. The analysis of the changes introduced is preceded by an outline of the regulatory scheme under the Brussels I Regulation.

Choice of Court Agreements Under the Brussels I Regulation

Prorogation of jurisdiction is dealt with in Article 23 of the Brussels I Regulation. In particular, the definition of the 'written form requirement' is provided in paras 1 and 2. The issue of substantive validity is to be determined on the basis of the applicable national law. In accordance with Article 23(5), a jurisdiction agreement concluded in violation of the provisions of Articles 13, 17 and 21 will have no legal force. These provisions define the conditions for the validity of prorogation agreements in insurance, consumer and labour law disputes respectively. In the same vein, no effect will be given to agreements purporting to exclude the jurisdiction of the courts having exclusive jurisdiction under Article 22.[36]

Only an insured person, a consumer and an employee are protected by the rules restricting the effectiveness of jurisdiction agreements. No other category of 'weaker parties' is protected by the provision on the prorogation of jurisdiction under the Regulation, even though some other parties such as commercial agents, distributors and franchisees also have a weaker bargaining position.[37] The same was true of claims arising out of maintenance which had been within the substantive scope of application of Brussels I before the Maintenance Regulation came into force. The latter permits the prorogation of jurisdiction in Article 4, but only in favour of the courts in a Member State which either has a close connection with the parties and their relationship[38] or the courts which are otherwise competent to hear certain closely related disputes.[39]

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[36] Some authors have argued that such an agreement will be invalid as far as international jurisdiction is concerned, but may still be valid as an agreement on local jurisdiction within a Member State, if such agreements would be valid and permitted under the relevant national law. See Magnus and Mankowski 2012, p. 497.

[37] Compare ibid., referring to a principal-agent relationship.

[38] The courts in a Member State of the habitual residence or nationality of either party, Article 4(1)(a) and (b).

[39] According to Article 4(1)(c), in disputes concerning maintenance obligations between spouses or former spouses the parties may agree on the jurisdiction of the court which has jurisdiction in matrimonial matters or the court in a Member State of their last common habitual residence for a period of at least one year. Besides, according to Article 4(3) of the Maintenance Regulation the provision on the choice of court agreements 'shall not apply in a dispute relating to a maintenance obligation towards a child under the age of 18'.

The special regime on the restricted effectiveness of prorogation agreements in disputes involving insured persons, consumers and employees can be summarised as follows:

(a) Jurisdiction agreements entered into after a dispute(s) has arisen may successfully be relied upon by both parties. Thus, there are no restrictions on the biding nature and enforceability of such agreements in disputes relating to insurance, consumer and individual contracts of employment.[40]
(b) Prorogation of jurisdiction stipulated before a dispute has arisen may successfully be invoked by a weaker party if it gives the possibility to a weaker party to sue in courts other than those indicated in the relevant Sections 3, 4 and 5.[41] However, against a weaker party such an agreement either cannot be enforced at all[42] or has biding effect only if the parties have agreed on the jurisdiction of courts in a particular Member State connected to the dispute as determined under the relevant provisions of the Regulation.[43]

Thus, an agreement on jurisdiction entered into after a dispute has arisen is enforceable against both an employee and an employer. An agreement on jurisdiction entered into before a dispute has arisen may be relied upon by an employee, when such an agreement allows the employee to sue in courts other than the courts specified in Section 5. However, it cannot be successfully invoked against him.[44]

In a similar vein, choice of court agreements involving consumers entered into after a dispute has arisen are binding upon both parties (Article 17(1) Brussels I Regulation). Jurisdictional clauses entered into before a dispute has arisen are binding if relied upon by a consumer, allowing the consumer to bring proceedings in courts other than those specified in Section 4 (Article 17(2) of the Brussels I Regulation).[45] Both parties may successfully invoke an agreement which provides for the jurisdiction of courts in the EU Member State of their common domicile or habitual residence at the moment of contracting, if such an agreement is permitted under the law of that Member State.[46] Thus, when the parties (or one of them) change their domicile or habitual residence from the moment of the conclusion of the contract, a forum-selection clause providing for the jurisdiction of the courts of

[40] Articles 13(1), 17(1) and 21(1) of Brussels I Regulation.

[41] Articles 13(2), 17(2) and 21(2) of Brussels I Regulation.

[42] This is the case relating to individual contracts of employment.

[43] Articles 13(3)–(5) and 17(3) of the Brussels I Regulation.

[44] Article 21 of the Brussels I Regulation.

[45] Article 17(2) of the Brussels I Regulation provides that such a clause is enforceable if it allows the consumer to bring proceedings in courts other than those indicated in this Section.

[46] Article 17(3) of the Brussels I Regulation provides that provisions on jurisdiction under that Section may only be departed from by an agreement 'which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State'.

the parties' common domicile or habitual residence may be successfully invoked against a consumer, subject to the condition that such a choice is permitted under the law of the Member State of the chosen court.

As to matters relating to insurance, jurisdiction agreements entered into before a dispute(s) has arisen is binding upon an insurer if it permits an insured to institute proceedings in courts other than those mentioned in Sect. 3.3. Against the ensured such an agreement will be binding under the conditions provided for in Article 13(3)–(5). Thus, it will be enforceable against a weaker party if it provides for the jurisdiction of the courts in the Member State of the parties' common domicile or habitual residence even though a harmful event occurred abroad, if such an agreement is not contrary to the law of that state.[47] Also, such an agreement will be enforceable in cases of compulsory insurance or insurance related to immovable property in a Member State against a policy holder who is not domiciled in a Member State or if a contract of insurance covers one or more risks set out in the Regulation.[48] Just as in the case of employment and consumer contracts, choice of court agreements entered into after a dispute has arisen will be binding against both parties.

Choice of Court Agreements in Brussels Ibis Regulation

The provisions relating to choice of court agreements in insurance, consumer and labour law contracts have remained unchanged in Brussels Ibis Regulation. Yet it introduces a number of amendments to the prorogation of jurisdiction in Article 25 (Article 23 of Brussels I). First of all, the applicability of this provision is extended so that it is no longer required that one of the parties to the agreement on jurisdiction is domiciled in an EU Member State. Under the current regime of Brussels I, for Article 23 to apply it is required that a court of an EU Member State is agreed upon and that one of the parties is domiciled in a Member State. Under the revised Article 25, it applies to prorogation clauses providing for the jurisdiction of a court in a Member State regardless of the domicile of the parties. Forum-selection agreements providing for the jurisdiction of a court of a third state are accordingly governed by national rules. As to 'weaker party' disputes, expanding the scope of application with respect to choice of court agreement will have consequences regarding insurance contracts and to some extent with respect to individual employment and consumer contracts, even though the personal scope of application is extended in Brussels Ibis Regulation as already explained.[49]

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[47] Such an agreement confers jurisdiction on the courts in a Member State which is closely connected with both parties. See also, Kropholler and von Hein 2011, Article 13, nos. 3 and 4.

[48] Articles 13(3)–(5) and 14 of the Brussels I Regulation. For more particulars on jurisdiction in insurance contracts, see Vassilakakis 2014, pp. 1079 et seq.

[49] See Sect. 3.2.2, supra.

Another amendment is a conflict of law rule for the substantive validity of prorogation agreements. According to the newly introduced rule, the law of the Member State of the chosen court will govern the substantive validity of such agreements.[50] The relevant decisions of the ECJ illustrate that the same law will also apply with respect to the interpretation of the choice of court agreement, its renewal or succession into a forum-selection agreement.[51] Recital (20) of Brussels Ibis Regulation clearly states that the reference to the law of the Member State of the chosen court includes the conflict of law rules of that state. Such a solution under Brussels Ibis Regulation is a major shortcoming of the newly introduced rule on the choice of law for the substantive validity of prorogation agreements. This provision does not present a true uniform private international law rule. Instead, it merely refers to the national conflict of law rules of the Member State whose court has been chosen. Consequently, there is no uniform conflict of law rule within the EU for the law applicable to the substantive validity of jurisdiction agreements.[52] This provision will also apply to the prorogation of jurisdiction in weaker party disputes.

The most important change is the revision of the *lis pendens* rule so as to depart from the 'priority rule' expressed in Article 27 of the Brussels I Regulation. According to this provision, the court of a Member State seised of a matter involving the same cause of action and between the same parties shall of its own motion stay its proceeding until the court first seised has established its jurisdiction. With a view of enhancing the efficiency of choice of court agreements and combating 'torpedo actions',[53] Brussels Ibis Regulation provides for an exception to this rule when there is a prorogation of jurisdiction. In such a case, any court seised other than the court designated in an exclusive choice of court agreement shall stay the

[50] Article 25(1) provides that a court or the courts of a Member State designated by an agreement between the parties shall have jurisdiction 'unless the agreement is null and void as to its substantive validity under the law of that Member State'.

[51] Under Article 23 of the Brussels I Regulation these issues are to be dealt with in accordance with the national substantive law determined by national conflict of law rules. See e.g., the ECJ Judgment in *Benincasa* of 3 July 1997, Case C-269/95, EU:C:1997:337, para 31; ECJ Judgment in *Iveco Fiat* of 11 November 1986, Case C-313/85, EU:C:1986:423, paras 7–8; ECJ Judgment in *Coreck Maritime* of 9 November 2000, Case C-387/98, EU:C:2000:606, para 24.

[52] On the criticism relating to the provision on the substantive validity of forum-selection clauses, see Lazić 2013a, b, p. 16. With respect to comments on the Proposal, see Heinze 2011, p. 8, electronic copy available at http://ssrn.com/abstract=1804111 (last visited 8 October 2014); Camilleri 2011, p. 298. But see Beaumont and Yüksel, in Boele-Woelki et al. (eds.) 2010, pp. 563–577. At pp. 575–577, in their comments to the Proposal the authors favour the solutions in both the 2005 Hague Convention and the changes suggested to be introduced in Article 23, including *renvoi*.

[53] 'Torpedo actions' or the 'Italian torpedo' refers to actions instituted before a non-chosen court in order to postpone filing an action before the court designated in a forum-selection clause. In accordance with the current priority rule in Article 27, the latter must stay its proceedings until the court first seised has decided on its jurisdiction. For more particulars, see Lazić 2013a, b, pp. 5–27.

proceedings until the court seised on the basis of the agreement declares its lack of jurisdiction.[54] Accordingly, the designated court will have priority 'to decide on the validity of the agreement and on the extent to which the agreement applies to the dispute pending before it',[55] even if a court of another Member State has been seised first. The court chosen in the agreement can proceed regardless of whether or not the non-designated court has decided to stay proceedings.

However, the rule on the priority of the chosen court is deviated from in some, but not in all cases involving 'weaker parties'. Thus, Article 31(4) of Brussels Ibis Regulation provides that the priority rule in favour of the chosen court does not apply when a 'weaker party' is a claimant and the choice of court agreement is invalid under the provisions of the Regulation. Such wording implies that the new 'priority rule' does not apply when a prorogation clause is invoked by an insurer, an employer or a professional. Conversely, if a forum-selection clause is invoked by a weaker party, then a court before which a 'stronger party' has initiated proceedings will be bound by a new 'priority in favour of the chosen court' rule. Accordingly, the provision of Article 31(4) implies no changes with respect to weaker party disputes. It merely ensures that the new rule will not affect the jurisdictional rules of the Regulation intended to protect the procedural position of a weaker party, including those on the prorogation of jurisdiction. Thus, the court seised of a matter by a 'weaker party', and not the chosen court, will be competent to rule whether a forum-selection clause is valid and enforceable under the Regulation.

The possibility to determine the jurisdiction of a court by an agreement between the persons involved in a dispute may be restricted in other private international law instruments to an even greater extent. This is the case with respect to disputes concerning maintenance obligations, and even more so in matters of inheritance and family law. Thus, the possibility to choose a competent court is limited in different ways in the Maintenance Regulation.[56] First, it is limited by the requirement of a 'link' between the dispute, the parties and the chosen court (Article 4(1)(a) ad (b)). Besides, there is no possibility to choose the competent court in disputes relating to maintenance obligations towards minors.[57] These legal sources remain outside the scope of the present contribution and accordingly are not further discussed.

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[54] Article 31(2) of Brussels Ibis Regulation.

[55] Recital (22) of Brussels Ibis Regulation.

[56] Council Regulation (EC) No. 4/2009, supra note 5.

[57] In Regulation (EU) No. 650/2012, there is a rather exceptional possibility for the parties in the matter of succession to agree on jurisdiction: if the deceased has made a choice for the applicable law all the parties in the succession can agree that the courts in this country would be competent to rule on all matters in succession. Although it should generally be distinguished from the prorogation of jurisdiction in civil and commercial matters, the regulatory scheme of Council Regulation (EC) No. 2201/2003, Article 12 also provides for a limited possibility to deviate from the jurisdictional rules in matters of parental responsibility.

Relevance of Other EU Legal Sources and the Case Law of the CJEU for the Limited Binding Nature of Choice of Court Agreements

The procedural position of a weaker party is not only protected in EU private international law instruments. Other legal sources, such as directives, may indirectly serve the same purpose even though they are primarily aimed at the approximation of substantive law. This is particularly so as far as Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts is concerned. In order to protect the procedural position of a weaker party, the effectiveness of dispute resolution clauses—a prorogation of jurisdiction entered into before a dispute has arisen[58]—may be further restricted. The main reason is that such agreements in transactions involving 'weak parties' are in principle not freely negotiated. Usually they are part of the general terms and conditions or rather standard contracts drafted by business parties which consumers automatically adhere to. A weaker party—a consumer—is left with no choice but to accept such a clause if he/she wishes to enter into a particular legal transaction ('take it or leave it'). The same holds true for employees and insurance policy holders or beneficiaries under contracts of insurance.

When interpreting Directive 93/13/EEC, the CJEU firmly supports the protection of the procedural position of a consumer.[59] Thus, the Court has held that the national courts of the Member States have the power and obligation to examine of their own motion the unfairness of a contractual term conferring jurisdiction on the courts within the meaning of Article 3(1) of the Directive.[60] In its decision of 4 June 2009 (*Pannon GSM Zrt. V. Erzsébet Sustikné Győrfi*) the Court held, inter alia, that 'Article 6(1) of Council Directive 93/13/EEC of 5 April 1993, on unfair terms in consumer contracts, must be interpreted as meaning that an unfair contract term is not binding on the consumer, and it is not necessary, in that regard, for that consumer to have successfully contested the validity of such a term beforehand.' More importantly, the Court has held that a national court is 'required to examine, of its own motion, the unfairness of a contractual term'. Where such a term has been found to be unfair, the national court must not apply it. The same duty exists when the national court ascertains its own territorial jurisdiction.

When determining whether a contractual term is to be categorised as unfair within the meaning of Article 3(1) of Directive 93/13 it has held that a contractual term which was drafted in advance by a professional and was not subject to individual negotiations conferring jurisdiction on a court of the professional's

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[58] The same holds true for arbitration clauses.

[59] For the debate on the case law of the ECJ and whether the ECJ in interpreting these Directives overemphasises consumer interests, see Trstenjak and Beysen 2011, pp. 95–124.

[60] ECJ Judgment in *Pannon GSM Zrt. V. Erzsébet Sustikné Győrfi* of June 2009, Case C-243/08, EU:C:2009:350; see also the ECJ Judgment in the joined cases *Océano Grupo Editorial and Salvat Editores* of 27 June 2000, Cases C-240/98 to C-244/98, EU:C:2000:346, paras 21–24.

principal place of business satisfies the criteria to be qualified as unfair for the purposes of the application of the Directive.[61]

3.3 Procedural Position of a Weaker Party—Rules on the Recognition and Enforcement of Judgments

In principle, when deciding on the recognition and enforcement of a judgment rendered by a court of an EU Member State, the courts are not permitted to examine whether or not jurisdiction was properly ascertained. Yet, in exceptional circumstances it is possible to review a decision as to jurisdiction even though such a possibility is very much restricted.[62] The jurisdiction may be the subject of a review pursuant to Article 35 of the Brussels I Regulation, with respect to exclusive jurisdiction, jurisdiction in insurance and consumer disputes and Article 72. If a court violates these rules the judgment rendered may be refused recognition and enforcement in another Member State.

It should be noted that Section 5 relating to disputes arising out of employment contracts are not mentioned. The rationale behind this is that it would be contrary to the interest of an employee considering that the employee is the claimant in the vast majority of cases.[63] Yet, employees are treated differently and less favourably than consumers and insured/policy holders. As rightly emphasised in the literature, it 'generates a split between the rules on jurisdiction on the one hand and the rules on recognition on the other hand'.[64]

The changes introduced in this respect in Brussels Ibis Regulation should be met with approval as they enhance the level of protection for weaker parties. The

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[61] ECJ Judgment in the joined cases *Océano Grupo Editorial and Salvat Editores* of 27 June 2000, C-240/98 to C-244/98, EU:C:2000:346, paras 21–24. The same line of reasoning may be applied with regard to arbitration agreements. In Article 3(3) of the Directive reference is made to the Annex which provides for an indicative and non-exhaustive list of the terms which may be regarded as unfair. The Annex expressly refers to arbitration agreements as follows: '(q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract'. On the interpretation of the Directive with respect to arbitration clauses in consumer contracts, see the ECJ Judgment in *Asturcom Telecomunicaciones SL* of 6 October 2009, Case C-40/08, EU:C:2009:615 and ECJ Judgment in *Elisa María Mostaza Claro v. Centro Móvil Milenium SL* of 26 October 2006, Case C-168/05, EU:C:2006:675. See also, CJEU Judgment in *Katalin Sebestyén v. Zsolt Csaba Kővári, OTP Bank, OTP Faktoring Követeléskezelő Zrt, Raiffeisen Bank Zrt* of 3 April 2014, Case C-342/13, EU:C:2014:1857.

[62] Leyton and Mercer 2004, para 26.086.

[63] Commission Proposal, COM(1999) 348 final, p. 25.

[64] Magnus and Mankowski 2012, p. 711. In general, for criticism on this point in the Brussels I Regulation, see also, Geimer and Schütze 2010, Article 35, n. 14.

revised version deviates slightly from the regulatory scheme of the Brussels I Regulation, where grounds for refusal were contained in separate provisions in Articles 34 and 35. Instead, all the grounds in Brussels Ibs Regulation are consolidated in Article 45. Just as under the Brussels I Regulation, in para 3 it provides that, as a matter of principle, the jurisdiction of the court of origin may not be reviewed, except under the circumstances referred to in para (1)(e). The latter refers to exclusive jurisdiction,[65] as well as disputes in insurance, consumer and employment matters, 'where the policy holder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employer was the defendant'. Thus, employment contracts are now placed on the same footing as other transactions involving 'weaker' parties. Besides, the position of a 'weaker' party is protected to a greater extent in the revised Regulation, considering that a violation of jurisdictional grounds may only be an obstacle to recognition if a weaker party was a defendant in the dispute. Conversely, a 'stronger' party will not be able to invoke a violation of the rules on jurisdiction in Sections 3, 4 or 5 in the enforcement proceedings initiated by a 'weaker' party. Such a legal regulation represents a valuable improvement and clarification with respect to grounds to refuse recognition or enforcement.

3.4 Concluding Remarks

Legal instruments on private international law and especially those relating to international jurisdiction and more generally civil procedure illustrate that the EU legislator attaches great importance to the protection of the procedural position of a party with a weaker position in a legal relationship. In particular, the rules on jurisdiction, as well as on the recognition and enforcement of judgments contained in the Brussels I Regulation are meant to ensure that procedural justice is preserved for certain categories of 'weaker parties'—employees, consumers and insurance policy holders or other beneficiaries of insurance contracts.

Such protection of the procedural position of weaker parties is even further enhanced in the revised Regulation. This is particularly achieved by useful adaptations to the relevant provisions relating to tacit prorogation and grounds to refuse recognition and enforcement of judgments. The latter have been adjusted so as to expressly include violations of the jurisdictional rules in disputes arising under contracts of employment. It is also clearly stated that a violation of the jurisdictional rules presents a reason for refusing enforcement or recognition only if this is relied upon by a weaker party. Besides, the scope of application *ratione personae* of the revised Regulation is widened so that consumers and employees may rely on the privileged jurisdictional rules regardless of the domicile of the other party.

[65] Article 45(1)(e)(ii).

Finally, the revised rule on *lis alibi pendens* reversing the priority in deciding on jurisdiction in case of prorogation of jurisdiction does not apply when weaker parties are claimants.

Regrettably the same approach and level of protection for weaker parties is not maintained in other legal instruments unifying the rules of private international law and civil procedure on the EU level. Thus, some EU Regulations do refer to consumers in connection with the rules on jurisdiction, but decisions on jurisdiction in cases involving consumers cannot be 'controlled' in a Member State of the enforcement.[66] More importantly, the recently revised Regulation on Small Claims[67] makes a passing reference to consumers in Recitals (2) and (3), but just like its predecessor contains no provisions which would aim at protecting the procedural position of consumers.

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[67] Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure as amended in Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure OJ of 24 December 2015, OJ L 341 of 24.12.2015, p. 1, which will apply as from 14 July 2017.

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