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THE REGIME OF PARTY AUTONOMY IN THE BRUSSELS I RECAST: THE SOLUTIONS ADOPTED FOR AGREEMENTS ON JURISDICTION

MÓNICA HERRANZ BALLESTEROS*

A. Introduction

There can be no doubt as to the importance of jurisdiction agreements in civil and commercial matters; nor in this regard as to the relevance of the EU Regulation 44/2001 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters ("Brussels I Regulation"). The time is therefore ripe to undertake some reflections with regard to the modifications incorporated in EU Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[1] ("Brussels I Recast").

B. Substantive Validity of Choice-of-Court Agreements

1. Substantive Validity of Jurisdiction Agreements as a Separate Issue

The Court of Justice of the European Union (CJEU) in cases such as *Gasser*[2] took the view that the issue as to what jurisdiction applies must be determined only according to the requirements of Article 23 of Brussels I. Council Regulation (EU) N 1215/2012 has now incorporated an applicable law provision on substantive validity. Adrian Briggs has correctly commented that: "the presence of writing may provide evidence, but cannot amount to irrefutable proof, of genuine consent: that there always was an issue of substance to address, and it

* Professor in Private International Law at National Distance University, Spain. I wish to express my gratitude to Professor Edwin Peel (Fellow and Tutor in Law at Keble College, Oxford). This paper was finished in the Institute of European and Comparative Law (University of Oxford, Faculty of Law) with the support of the Program Santander Universidades, and is included in the Project "Gobernanza y reforma internacional tras la crisis financiera y económica: el papel de la Unión Europea" DER2010-2014-C02-02 (subprograma JURI). Part of this article was presented at the Fifth Journal of Private International Law Conference in Madrid. I am very grateful to the referees for their comments.

1 [2012] OJ L/351/1.

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

is to be welcomed that this is now acknowledged".[3] Additional evidence, apart from the formal requirements, will be taken into consideration to test the material validity of the jurisdiction clause.

Article 25(1) of the Brussels I Recast states:

> "If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, *unless the agreement is null and void as to its substantive validity under the law of that Member State*. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be either: (a) in writing or evidenced in writing; (b) in a form which accords with practices which the parties have established between themselves; or (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned." (emphasis added)

The Brussels I recast endorsed the Commission Proposal[4] and the reactions have been mixed. The acknowledgement of the material validity of the agreement as something separate from the form has been welcomed by some academics such as Briggs.[5] But others argue that this solution seems unnecessary;[6] Dickinson, for example, explains that the CJEU had already achieved a high level of legal certainty by affirming that the consent of the parties is to be determined solely by reference of the requirements of Article 23(1) of Regulation (EC) N 44/2001.[7]

Kessedjian argues that introducing a conflict-of-laws element into the substantive validity of jurisdiction agreements will have the knock-on effect of increasing the number of disputes concerning the validity of such agreements.[8] It can also be argued that non-regulation could be a recipe for litigation, so

[3] A Briggs, "The Brussels I bis Regulation Appears on the Horizon" [2011] *Lloyd's Maritime and Commercial Law Quarterly* 157, 161.

[4] COM(2010) 748 final available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0748:FIN:EN:PDF (accessed 11 February 2014). Art 23(1) of the Commission Proposal states: "If the parties have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, *unless the agreement is null and void as to its substance under the law of that Member State*."

[5] Briggs, *supra* n 3, 161. C Kessedjian, "Commentaire a la refonte du Réglément n 44/2001" (2011) 47 *Revue trimestrelle de droit europeen* 126. U Magnus, "Choice of Court Agreements in the Review Proposal for the Brussels I Regulation" in E Lein (ed), *The Brussels I Review Uncovered* (British Institute of International and Comparative Law, 2012), 84, 92.

[6] See A Dickinson, "The Revision of the Brussels I Regulation" (2010) 12 *Yearbook of Private International Law* 247, 301.

[7] *Ibid*, 285. *Gasser*, *supra* n 2, [51].

[8] Kessedjian, *supra* n 5, 126–27.

perhaps this is the moment to close the discussion, with the acceptance that this issue does not lend itself to any easy solution.

The truth is that regulating the substantive validity of jurisdiction agreements as opposed to just a consideration of their formal requirements was a common starting point between the Commission and the Committee for Legal Affairs of the European Parliament in its Draft Report. But there were significant differences between the documents published by the two institutions.[9] Finally, this common starting point has been included in Article 25 of the Brussels I Recast and the final version of this provision is more in line with the Commission Proposal than the European Parliament Draft Report.

The Brussels I Recast seems to follow the idea that the tools best suited for the analysis of choice-of-court agreements are contractual ones.[10] Some authors suggest applying the principle of good faith,[11] but as Beaumont and McEleavy remark "the ECJ has not developed an autonomous meaning of substantive

[9] EP document 2010/0383 (COD) [28.6.2011]. The provision incorporated by the Draft Report of the European Parliament's Committee on Legal Affairs included a new type of conflict-of-laws rule; this rule was considered pro-validity, and therefore the agreement will be valid as to its substance if only one of the optional applicable laws recognises the material validity of the jurisdiction clause. Such an agreement conferring jurisdiction shall be either:

"1. An agreement conferring jurisdiction shall be valid as to its substance if it is regarded as being such by: (a) the law of the Member State of the court or courts designated by the agreement, or (b) the law chosen by the parties to govern the agreement, or (c) in the absence of such choice, the law applicable to the contract of which the agreement forms a part, or (d) in all other cases, the law applicable to the particular legal relationship from which the dispute between the parties arose.

2. The law designated by points (b) to (d) of paragraph 1 shall apply even if that law is not the law of a Member State.

3. The law of any State designated by paragraph 1 means the rules of substantive law in force in that State with the exception of its rules of private international law.

4. The law designated by paragraph 1 shall not govern legal capacity. The reality of the consent of the parties to the agreement shall be governed by Article 23(1)."

The main objective of this rule is to establish the substantive validity of the agreement. A universal approach has been included in the draft Report of the European Parliament, the law designated by Article 23 (1) shall apply even if it is the law of a third state.

[10] A different position has been adopted by A Briggs who states that: "That agreement when it is given or made, is in substance a *unilateral* renunciation of the jurisdiction or jurisdictions which would otherwise have been applied. It is therefore an act which is significant enough to require a degree of formality to show that it really was done, but it is neither dependent on there being a contract or necessarily referable to any contract", in A Briggs, "The Subtle Variety of Jurisdiction Agreements" [2012] *Lloyd's Maritime and Commercial Law Quarterly* 378–79. Briggs argues that "Article 23 does not require, and is not necessarily satisfied by, a contractually-binding agreement on jurisdiction" in A Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press, 2008), [7.35].

[11] R Fentiman, *International Commercial Litigation* (Oxford University Press, 2010), [2.45–2.48]; L Merrett, "Article 23 of the Brussels I Regulation. A Comprehensive Code for Jurisdiction Agreements" (2009) 58 *International and Comparative Law Quarterly* 545, 560. It is well known that the origin of the principle of good faith in the enforcement of jurisdiction agreements is the decision of the CJEU in Case 221/84 *F Berghoefer GmbH Co KG v ASA SA* [1985] ECR 2699.

validity in 30 years of case law and that there is no political will in the Council to harmonise European contract law".[12]

2. The Law Applicable to the Substantive Validity

The Brussels I Recast acknowledges that there is an issue of substance to address. The following sections discuss the solution incorporated into the new Regulation to test the validity of a jurisdiction agreement with regard to: (a) the applicable law and (b) the scope of this law.

(a) Which Law Should Be Applied?

The Commission Proposal made reference to the "law of the Member State chosen", so there was no express attempt made to address issues involving the conflict-of-laws rules.[13] Subsequently a draft report of the European Parliament's Committee for Legal Affairs proposed a different provision referring only to the substantive law and not to the conflict-of-laws rules.[14] In the text presented on 1 June 2012 by the Presidency to the Council there was a proposal to insert the following text: "the reference to the law of the Member State's chosen court should include the conflict of laws rules of that State". However, the proposal was included in the Recitals and not in the Article governing the rules on choice-of-court agreements. In November 2012 the European Parliament voted a text in which the latter provision was included in Recital 20.[15] In December 2012 the Council adopted the redrafted Brussels I Regulation with the same provision.

Finally Article 25 of the Brussels I Recast states:

[12] P Beaumont and P McEleavy, *Private International Law, Anton* (W Green/SULI, 3rd edn, 2011), [8.108].

[13] This interpretation has been supported by some authors: I Queirolo, "Prorogation of Jurisdiction in the Proposal for a Recast of the Brussels I Regulation" in F Pocar, I Viarengo and F Villata (eds), *Recasting Brussels I* (CEDAM, 2012), 183, 191. A Briggs in an article about the Commission Proposal said: "But why the solution chosen, should be to look to the law, presumably *domestic law*, of the Member State chosen, is not at all clear" in A Briggs, "What Should be Done about Jurisdiction Agreements?" (2012) 12 *Yearbook of Private International Law* 315, 331 (author's italics). However, the explanatory memorandum to the Commission Proposal, *supra* n 5, 9, stated that the new conflict of laws' rule on substantive validity of choice of court agreements was being introduced to reflect the solution established in the Hague Choice of Court Agreements Convention 2005. That Convention intended a reference to the conflict of laws rules of the country of the chosen court, see the T Hartley and M Dogauchi Explanatory Report at para 125, available at www.hcch.net/index_en.php?act=publications.details&pid=3959&dtid=3 (accessed 11 February 2014).

[14] EP document 2010/0383 (COD) [28.6.2011].

[15] For the full text see: www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0412+0+DOC+XML+V0//EN&language=ES#BKMD-1 (accessed 12 February 2014).

> "If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes … that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State."

Before this solution different possibilities were applied, namely: the law of the court seised of the matter; the law on which the derogated court is based; or the law applicable to the agreement.[16] Finally the selected option was the law of the chosen court in the agreement. The court of the Member State chosen in the agreement will usually be the court seised. The law of the chosen court allows the courts of all Member States always to apply the same law, wherever disputes about the validity of the agreement are determined. The option for the law of the chosen court was advanced by Advocate General Slynn in the *Elefanten Schuh* case[17] and it was included in the 2005 Hague Convention on Choice of Court Agreements.[18] The selected solution follows the maxim *qui eligit judicem, elegit ius.*[19]

The law of the Member State chosen in the agreement will work when the jurisdiction agreement is a simple clause, but what happens if it is a complex one? Often in commercial contracts parties decide to conclude a complex jurisdiction agreement; for example, in the *Meeth v Glacetal*[20] case the jurisdiction agreement was as follows: "if Meeth sues Glacetal the French courts alone shall have jurisdiction, if Glacetal sues Meeth the German courts alone shall have jurisdiction". Another recent case is *Ms X v Banque Privée Edmond de Rothschild.*[21]

[16] See H Gaudemet-Tallon, *Compétence et exécution des jugements en Europe* (LDGJ, 4th edn, 2010) no 152; and Beaumont and McEleavy, *supra* n 12, [8.109–8.110].

[17] Case 150/80 *Elefanten Schuh GmbH v Pierre Jacqmain* [1981] ECR 1671. Advocate General Sir Gordon Slynn held: "The question in the present case, as I see it, is which national law decides those other requirements as to whether there is a valid agreement. … In my opinion, having regard to the objects and purposes of the Convention, Article 17 is to be read as implicitly laying down the rule that where a particular forum is referred to in writing in what is alleged to be, or to be evidence of, a valid agreement, the law of that forum must decide whether the agreement is valid. Only in this way can any principle of uniformity be satisfied."

[18] Art 5 of the 2005 Hague Convention provides: "The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State." So there is no mention in the provision to the conflict-of-laws rules, but see the Hartley and Dogauchi, Explanatory Report, *supra* n 13.

[19] According to Recital 12 of the Rome I Regulation: "An agreement between the parties to confer on one or more courts or tribunals of a Member State exclusive jurisdiction to determine disputes under the contract should be one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated."

[20] Case 23/78 *Nikolaus Meeth v Glacetal* [1978] ECR 2133.

[21] Annotated by P Ancel and G Cuniberti, "One Sided Jurisdiction Clauses – A Casenote on Rothschild" [2013] February, *Journal de Tribunaux* 7. R Fentiman, "Unilateral Jurisdiction Agreements in Europe" (2013) 72 *Cambridge Law Journal* 23; A Briggs, "One-sided Jurisdiction Clauses: French Folly and Russian Menace" [2013] *Lloyd's Maritime and Commercial Law Quarterly* 138. M-E Ancel, L Marion and L Wynaendts, "Reflections on One-sided Jurisdiction Clauses in Inter-

If the parties did not select just one court the question then arises as to which law the validity of the agreement is to be tested under? It is possible that one of the parties alleges that the consent to the choice-of-court agreement has been obtained by fraud, duress, etc. Different options include the option to test the validity of the agreement under the law of each court designated in the agreement. This solution involves testing the material validity of the choice-of-court agreement under the law of all the courts designated in the jurisdiction clause. Another option is to apply the law of the chosen court which is actually seised of a dispute. If the court seised is one of the courts designated under the jurisdiction clause, the agreement will be valid if under its law, including its private international law rules, the choice-of-court agreement is not vitiated. But if the court seised is not one of the courts selected in the jurisdiction clause, this court must decline its jurisdiction irrespective of whether the agreement was valid under the law of one of the designated courts if one of the chosen courts is seised of the dispute.[22] The latter option has been adopted from the perspective of the forum and is the more pragmatic solution. It is the author's view that an answer to the above scenario is not clearly provided under the Brussels I Recast, so in effect it will be for the different courts to decide such questions on a case-by-case basis. Recital 20 of the Brussels I Recast appears to be written on the assumption that only one Member State will be designated in the agreement:

> "Where a question arises as to whether a choice-of-court agreement in favour of a court or the courts of a Member State is null and void as to its substantive validity, that question should be decided in accordance with the law of the Member State of the court or courts designated in the agreement, *including the conflict-of-laws rules of that Member State*." (emphasis added)

The law of the chosen court is taken to include its conflict-of-laws rules. If under the domestic legislation of the designated court there is a conflict-of-laws rule that refers to the law of another state – foreign law – to test the validity of the agreement the doctrine of *renvoi* has a role to play.[23] This arises if there are two conflicts of law, one concerning a rule included under Article 25, and the second one could arise with regard to a conflict of law under the law of the chosen court. So the substantive validity of the agreement will be upheld if the clause is valid according to the applicable law governing such conflicts-

national Litigation (About the Rothschild Decision, French Court de Cassation, 2 September 2012)", available at: http://ssrn.com/abstract=2258419 (accessed 11 February 2014).

[22] *Ibid*, Ancel and Cuniberti, 9. Art 31(2) of the Brussels I Recast.

[23] T Hartley, *Choice-of-Court Agreements under the European and International Instruments* (Oxford University Press, 2013), [5.1], 165–66. A Nuyts, "La refonde de règlament Bruxelles I" (2013) 102 *Revue Critique de Droit International Privé* 1, 55.

of-law germane to the chosen court. There could be arguments to support the application of the doctrine of *renvoi* to determine, for example, the law applicable to the capacity to enter into an agreement on jurisdiction[24] and not to apply the internal law of the chosen court when there is an express choice of a different law in the contract, but when there is an express choice of law of the country chosen in the jurisdiction agreement there is no place for the *renvoi*.[25]

When all the courts of the Member States treat a choice-of-court agreement in accordance with the same substantive validity, conflict-of-laws rule uniformity should be promoted.[26] Although the idea of a uniform conflicts rule for all Member States under which all the courts treat a choice-of-court agreement in the same way is to be welcomed, it is possible that the conflict-of-laws rules of the chosen court refer to a foreign law. Unfortunately the application of the foreign law in different courts does not always involve the same outcome, so this is not a solution that completely discourages parallel litigation.[27]

The jurisdiction agreement has a contractual aspect.[28] The agreement on jurisdiction and the choice-of-law clause are usually included in a contract (or could be the contract itself). Of course it is generally held that jurisdiction agreements and also choice-of-law agreements are severable from the main contract;[29] therefore a choice-of-court agreement that forms part of a contract shall be treated as an agreement independent of the other terms of the contract, and the validity of the agreement cannot be challenged solely on the ground that the contract is invalid. This principle is included under Article

[24] T Ratković and D Zgrabljić Rotar, "Choice-of-Court Agreements under the Brussels I Regulation (Recast)" (2013) 9 *Journal of Private International Law* 245, 258.

[25] See the examples in Beaumont and McEleavy, *supra* n 12, [8.111].

[26] This argument was applied by Advocate General Slynn in *Elefanten Schuh*, *supra* n 17.

[27] D Sancho Villa, "Jurisdiction Over Jurisdiction and Choice of Court Agreements: Views on the Hague Convention of 2005 and Implications for the European Regime" (2010) 12 *Yearbook of Private International Law* 399, 411. In relation to this point, see also the arguments of M Requejo, "Cláusulas de elección de foro: fórmulas de protección" [2009] *Anuario Español de Derecho Internacional Privado* 264.

[28] There is a well-known academic debate on the procedural/contractual character of jurisdiction agreements: see G Kaufman-Kholler, *La clause d'élection du for dans le contrats internationaux* (Helbing & Lichtenhahn, 1980).

[29] This principle was accepted and affirmed by the CJEU in Case C-269/95 *Benincasa v Dentalkit Srl* [1997] ECR I-3767, [24]–[25] and [29]. In the Case C-159/97 *Trasporti Casttelli Spedizioni Internazionali SpA* [1997] ECR I-1597 the CJEU pointed out the approach to the severability principle and also that the validity of the jurisdiction agreement must not be affected by any review, as the agreement had to comply with the requirements of Art 17 of the then Brussels Convention (now Art 25 of the Brussels I Recast). See E Peel, "The Brussels Convention 1999–2000" (2001) 20 *Yearbook of European Law* 332, 343. For a different opinion see J Harris, "Jurisdiction Clauses and Void Contracts" (1998) 23 *European Law Review* 279, 281-83.

25(5) of the Brussels I Recast,[30] so whether the substantive contract was void or voidable is irrelevant for the choice-of-court agreement.[31]

In the EU the Rome I Regulation is applied to determine the law applicable to contractual obligations. The material validity of a choice-of-law agreement is determined by the chosen law (the existence and validity of a contract, or of a term of a contract shall be determined by the law which would govern it under this Regulation, Article 10(1) of Rome I). Choice-of-law and choice-of-jurisdiction clauses are usually included in the same contract, and in accordance with the views of some academics they are usually agreed under the same circumstances, concluded in the same terms and accepted under the same process.[32]

Article 1(2)(e) of the Rome I Regulation excludes from its material scope "arbitration agreements and agreements on the choice of court".[33] At the outset, therefore, this Regulation does not provide the relevant conflict-of-laws rule to be applied by the chosen court to determine the applicable law governing the substantive validity of the agreement.[34]

[30] "An agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid." The 2005 Hague Convention has a very similar provision (Art 3(d): "an exclusive choice of court agreement that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid." There was no reference in the Commission Proposal to severability of the agreement from the contract in which it was drafted. Subsequently the Legal Affairs Committee of the European Parliament incorporated a provision in its Draft Report: Art 23 (b): "An agreement conferring jurisdiction which forms part of a contract shall be regarded as being an agreement distinct from the other clauses of the contract. It shall not be affected by the nullity, the non-existence, the lapsing, the termination or the determination or any other cause of the ineffectiveness of the contract", EP document 2010/0383 (COD) [28.6.2011]. This article is very similar to the provision of the UNCITRAL Model Law on International Commercial Arbitration 1985 (Art 16(1)). The Council Working Party on the Brussels I Recast took over the severability test from the Hague Convention 2005.

[31] Briggs (2012), *supra* n 10, 364–81.

[32] Z Tang, "The Interrelationship of European Jurisdiction and Choice of Law in Contract" (2008) 4 *Journal of Private International Law* 35, 48. For a different view, see A Briggs, "An agreement to waive or to renounce the general jurisdiction rule contained in Article 2 [of Brussels I] need not be made in a contract: there is no requirement to assess that party's agreement to jurisdiction in contractual terms" in A Briggs, *The Conflicts of Law* (Oxford University Press, 3rd edn, 2013), 78.

[33] In the Report on the 1980 Rome Convention, Professors Giuliano and Lagarde explained that the validity of agreements on jurisdiction is in the sphere of procedure and formed part of the administration of justice, and implementing uniform rules on this matter may have endangered the ratification of the 1980 Rome Convention, "Report on the Convention on the Law Applicable to Contractual Obligations" (hereinafter Giuliano–Lagarde Report), [1980] OJ C282/1, [5]. For a suggestion that these reasons were more political than legal, see A Dinelli, *Agreements on Choice of Jurisdiction and Choice of Law: The Quest for Certainty in the Resolution of Disputes*, DPhil thesis, University of Oxford, 2008, 93.

[34] C Heinze, "Choice of Courts Agreements and Coordination Proceedings" (2011) 75 *Rabel Journal of Comparative and International Private Law* 581, 586. Queirolo, *supra* n 13, 190. P Nielsen,

However, in relation to Article 1(2)(e) some academics are in favour of extending the application of the Rome I Regulation to this issue.[35] There are several arguments that support this viewpoint. The scope of the Brussels I Recast can be extended to satisfy the uniformity principle when the courts of the Member States have to determine the law regulating the substantive validity of choice-of-court agreements. Hence, there is a new provision referring the substantive validity of the choice of jurisdiction to the conflict-of-laws rules of the Member State chosen; however, the Brussels I Recast does not establish anything more and no special rules for this matter are provided. Therefore there is support for the position that in such circumstances the conflict-of-laws rule of the Rome I Regulation should be applied.[36] In the views of some commentators application of the Rome I Regulation is appropriate when the law of the chosen court does not provide conflicts rules to regulate the material validity of the jurisdiction clause.[37]

From the practical perspective the exclusion of choice-of-court agreements from the scope of the Rome I Regulation does not mean that the courts cannot apply by reference the principles contained in the Rome I Regulation,[38] but rather that they are not bound to apply the Rome I Regulation rules.

If the latter option is excluded, this means that the conflict-of-laws rule of the designated court will not be determined under a uniform Regulation (Rome I Regulation), and the applicable law shall be determined by the internal con-

"The New Brussels I Regulation" (2013) 50 *Common Market Law Review* 503, 523. F Garau, *Los acuerdos internacionales de elección de foro* (Colex, 2008), 199.

35 M Virgos, "Obligaciones contractuales", *Derecho internacional privado*. Parte especial (EUROLEX, 6th edn, 1995), 145–46. J Carrascosa, *La ley aplicable a los contratos internacionales: el Reglamento Roma I* (Colex, 2009), 100. E Castellanos, *El 'Reglamento Roma I' sobre la ley aplicable a los contratos internacionales y su aplicación por los tribunales españoles* (Comares, 2009), 25. For the common law view on this option see, Briggs, *supra* n 32, 231. In reality, during the negotiations leading up to the Rome I Regulation the purpose of extending its ambit to regulate agreements on jurisdiction was not on the agenda: O Lando and P Nielsen, "The Rome I Regulation" (2008) 45 *Common Market Law Review* 1687.

36 Magnus, *supra* n 5, 94. For example, in Belgium the Law of 16 July 2004 holding the Code of Private International Law establishes: "The law applicable to contractual obligations is determined by the Convention on the Law applicable to contractual obligations concluded in Rome on 19 June 1980. Except in the cases otherwise provided for by law, the contractual obligations which are excluded from the scope of application of the Convention are governed by the law that is applicable by virtue of articles 3 until 14 thereof." This extension of the scope of application of the Rome I Regulation is applied primarily to the validity of the choice of court agreements. Therefore, the law established by Rome I Regulation will be applied to test the validity of the jurisdiction agreements. See H Boularbah, "Le nouveau droit international privé belge" [2005] March *Journal des Tribunaux*, no 6173, 190.

37 M Virgos and JF Garcimartín, *Derecho procesal civil internacional. Litigación internacional* (Thomson Civitas, 2007), 285; S Alvarez González, "The Spanish Tribunal Supremo Grants Damages for Breach of a Choice-of-Court Agreement" (2009) 6 *Praxis des Internationalen Privat- und Verfahrensreschts* 529, 513; and M Requejo Isidro, "Violación de acuerdos de elección de foro y derecho a indemnización: Estado de la cuestión" [2009] *Revista Electrónica de Estudios Internacionales* 17, available at www.reei.org (accessed 11 February 2014).

38 See Fentiman, *supra* n 11, [2.51].

flict-of-laws rules applicable in the chosen court.[39] If this solution is accepted in effect a different set of rules may be applied to agreements: one to establish the *lex contractus*, and also to regulate the validity of a choice-of-law clause if it is included in the contract (Rome I Regulation, Article 10); and another set of rules to decide as to the substantive validity of the choice-of-court agreement. And the possibility could arise that ultimately two substantive laws may be applied to the agreements: the *lex contractus* to determine the validity of the contract – or any term thereunder – and another different law to the material validity of the jurisdiction agreement. Is this solution appropriate and reasonable for contractual parties?

The problems are the possibility of conflicting results and especially the obligation to apply two different laws. From the perspective of the severability principle, applying two different laws to the contract and to the jurisdiction agreement is not as such an incorrect option, as the applicability of the principle of severability with regard to contracts is well established. But applying different rules to the subject matter of the contract is controversial and could potentially give rise both to uncertainty and difficulties in the field of international commerce.[40]

Finally, the application of two different laws to the case could complicate how the matter is decided, and two different systems will be imposed on the contractual framework: one to regulate the choice-of-court agreement and another to regulate the contract and also to regulate the choice-of-law clause included in the contract. If the purpose is to achieve uniformity in the regulation of choice-of-court agreements in the EU, would it be appropriate to remove this exclusion from the Rome I Regulation? The problem with this solution is that Rome I simply excludes *renvoi* in Article 20. Article 25 of the

[39] In English law a jurisdiction agreement is governed by the law expressly chosen by the parties to govern the agreement and in the absence of an express choice of law to govern the agreement the law which governs the contract of which the agreement is part will also generally govern the jurisdiction agreement. This solution is analysed as a matter of common law principles with regard to conflict of laws: see L Collins (ed), *Dicey, Morris & Collins, The Conflict of Laws* (Sweet & Maxwell, 15th edn, 2012), [12-103]; Popplewell J in *Mauritius Commercial Bank Limited v Hestia Holdings Limited and another* [2013] EWHC 1328 (Comm) [19] and D Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (Sweet and Maxwell, 2nd edn, 2010), [6.28].

[40] For example, in Spain if the national courts decide not to apply the *lex contractus* obtained by the application of Rome I to the material validity of the agreement of jurisdiction, because choice-of-court agreements are excluded from the material scope of the European text, the question arises as to whether Article 10.5 of the Civil Code will be applicable. Spain's solution is quite different from the Rome I Regulation. Article 10.5 of the Civil Code says: "The law to which the parties have expressly submitted shall apply to contractual obligations, provided that it has some connection with the transaction in question; in the absence thereof, the law of the common nationality of the parties shall apply; and in the absence of such law, then that of their common habitual residence and, lastly, the law of the place where the contract has been entered into." See Tang, *supra* n 32. A Quiñones Escamez, "Evolución de la admisibilidad de la cláusula atributiva de la competencia internacional en Derecho español y comparado" (1987) 4 *Revista Jurídica de Catalunya* 83.

Brussels I Recast has created an applicable law rule to govern the substantive validity of a choice-of-court agreement – the law of the chosen court is applicable – whilst permitting a *renvoi* away from that substantive law. The only remaining lack of uniformity is as to when the *renvoi* to another law should happen, and if so on what basis.[41]

The last argument supporting the application of the conflict-of-laws rules of the chosen court is the intention of harmonising the Brussels I Regulation with the 2005 Hague Convention. It has been stated that this provision reflects the solution established in the 2005 Hague Convention.[42] Although in this regard it is the author's view that while there are strong grounds for this argument, it is far from being decisive. It is to be welcomed that the European legislator has taken into consideration solutions adopted by other international organisations with regard to codification in attempting to achieve, where possible, harmonious solutions but this should not be the only reason given for adopting a rule.

(b) Scope of the Applicable Law

In accordance with Article 25 of the Brussels I Recast the law of the court chosen should be applied to determine whether "the agreement is null or void as to its substantive validity".[43]

If we have a look to the previous regulations governing this area it is possible to discern that the final provision endorses, albeit with modifications, the Proposal presented by the Commission in 2010. The Commission Proposal stated "that court or those courts shall have jurisdiction unless the agreement is null and void as to its substance under the law of that Member State".

The European Parliament in its Draft Report modified the text presented by the Commission, and the new version states that: "an agreement … shall be valid as to its substance". The reference to null or void terms has been eliminated in the Draft Report.

These concepts were as included in the Addendum note sent by the Presidency to the Council on June 2012. In this document the Commission proposed modifications to the Parliament's Draft Report and also to its recast Proposal. The text stated: "that court or those courts shall have jurisdiction unless the agreement is null or void as to its substantive validity".

Which grounds are governed by the new provision?

[41] About different solutions, see Hartley, *supra* n 23, [7.104]–[7.112].

[42] This was the *only* argument used by the Commission to justify the choice of the law of the chosen court in its explanatory memorandum to its Proposal for the Brussels I Recast, *supra* n 55. Support for this argument from Ratković and Zgrabljić Rotar, *supra* n 24, 256. See Hartley, *supra* n 23, [7.115].

[43] This provision is included in the 2005 Hague Convention but it does not specifically refer to "substantive" validity. From the point of view of Beaumont and McEleavy, the same idea is present in both instruments, to have a rule to govern the substantive rather than formal validity because the latter is covered by other provisions in the instruments: *supra* n 12, [8.125].

If the concept includes the material validity of choice-of-court agreement as a whole, does this mean that doctrines such as *potestivité* (for French law)[44] or consideration (for English law) have to be taken into account when the validity of the agreement is under discussion?[45] In other words, which issues relate to the material validity of the contract and not to the material validity of the choice of court agreement (severability) and which issues should be characterised as formal rather than substantive and are therefore covered by the formal requirements of Article 25? From the author's point of view the essence of Article 25 (1), previously Article 23 of Brussels I, must be kept. This means that internal considerations (of the different national laws) in the formation of the agreement do not interfere with the formal requirements of Article 25.[46] Another issue is if one of the parties alleges that his consent has been vitiated. In this case all the formal requirements could be fulfilled but the substantive validity of the choice-of-court agreement has to be tested under the law of the chosen court.

As is generally known, there are different circumstances that can automatically render an agreement void, but it is also the case that other circumstances can render an agreement "voidable".[47] The question is whether Article 25(1) of the Brussels I Recast, which uses the term "void", also covers "voidable" agreements? It is the author's view that void and voidable acts are included, and that this was the aim of the Commission from the outset.[48] One of the arguments that supports this interpretation is based on the notion of harmonisation between the 2005 Hague Convention and the Brussels I (recast). The phrase "null and void" is explained in the Explanatory Report to the 2005 Hague Convention in the following terms: "the null and void provision refers primarily to generally recognised grounds like fraud, mistake, misrepresentation or duress and lack of capacity",[49] so it seems that acts that do not automatically nullify the agreement come within the scope of the provision.

[44] See *Ms X v Banque Privée Edmond de Rothschild* [2013] ILPr 12, in which the Cour de Cassation does not apply the French law directly but rather the concept.

[45] The same question was presented in the Commission Proposal for the Brussels I Recast and is not clarified in the final text: see Magnus, *supra* n 5, 92-93. Unilateral clauses are very controversial in the jurisprudence. In Spain there is a recent decision in relation to hybrid or optional resolution clauses, but the jurisdiction agreement was not asymmetric. See A López de Argumendo, "La controvertida validez de las claúsulas híbridas y asimétricas en Europa. A propósito del Auto de 18 de octubre de 2013 de la Audiencia Privincipal de Madrid", *Diario La Ley* 841/2014.

[46] See Briggs, *supra* n 21, 138–43. Some academics divide the validity of choice-of-court agreements in three parts: formal validity, validity as to prima facie consent (referred to as formal consent) and substantive validity which includes flaws in the creation of the consent and capacity, see Ratković and Zgrabljić Rotar, *supra* n 24.

[47] In relation to problems in the interpretation of null and void, see Briggs, *supra* n 13, 161.

[48] The same idea is to be found in Heinze, *supra* n 34, 585.

[49] Hartley and Dogauchi, *supra* n 13, para 126.

If the concepts null and void refer only to substantive grounds, this means that other grounds which are neither formal nor substantive are not included;[50] therefore these aspects will be decided under a national law that may not be the law of the chosen court. When the Commission published its recast Proposal, some commentators proposed amending this provision by removing the terms "as to its substance". The aim was to extend this harmonised conflict-of-laws rule to other issues for which – in accordance with CJEU jurisprudence – national law is applicable.[51]

In fact the role of national law in regulating other grounds, far from being challenged, has been confirmed by CJEU decisions.[52] Although it is also the case that the CJEU has changed its position in an interesting way on some issues, for instance with regard to third parties in a chain of contracts under EU law. In *Refcomp SpA v Axa Corporate Solutions Assurance SA*[53] the CJEU determined that in cases involving a succession of contracts:[54]

> "a jurisdiction clause agreed in the contract concluded between the manufacturer of goods and the buyer thereof cannot be relied on against a sub-buyer … unless it is established that that third party has actually consented to that clause under the conditions laid down in that article".[55]

The CJEU did not refer to national law to decide if the sub-buyer is bound by a jurisdiction clause agreed in the first contract.[56] Instead the solution adopted

[50] In this sense see, Heinze, *supra* n 34, 585. Hartley affirms that the meaning of substantive validity must be restricted to the validity of the agreement as a contract and the reference to Member State law covers only issues that can arise with regard to any kind of contract and not issues that pertain specifically to choice-of-court-agreements, *supra* n 23 [7.05].

[51] Heinze, *ibid*, 587.

[52] Such as renewal of a jurisdiction agreement in Case 313/85 *SpA Iveco Fiat v Van Hool NV* [1986] ECR 3337, [7]–[8]; the adoption of a jurisdiction clause in the statutes of a company in Case C-214/89 *Powell Duffryn v Wolfgang Petereit* [1992] ECR I-1745, [21]; whether the issue in dispute falls within the scope of the agreement in Case C-269/95 *Francesco Benincasa v Dentalkit Srl* [1997] ECR I-03767, [31].

[53] Case C-543/10 *Refcomp SpA v Axa Corporate Solutions Assurance SA*, judgment of 7 February 2013. C Oró, "El alcance subjetivo de los acuerdos de elección de foro: el caso de las 'cadenas de contratos'" (Comentario a la Sentencia del Triunal de Justicia (Sala 1ª) de 7 de febrero de 2013, asunto C-543/10: *Refcomp SpA c Axa Corporate Soluitons Assurance SA y otros*), *La Ley*, núm., 5 junio 2013.

[54] Defined by the CJEU as "a succession of contracts transferring ownership which have been concluded between economic operators established in different Member States of the European Union" (at [15]).

[55] *Ibid*, [41].

[56] The CJEU held that it is possible to have different outcomes because the national law of the Member States may interpret the relationship between the manufacturer of goods and the sub-buyer in a different way. The CJEU has determined that the relationship between the manufacturer – who is not the seller – and sub-buyer is not a contractual one; thus it is not included in the material scope of Art 5(1) of Brussels I, *ibid* [32]; see also Case C-26/91 *Jakob Handte & Co GMH and Traitements Mécano-chimiques des Surfaces SA (TMCS)* [1992] ECR I-3967. There is no provision on this point in the 2005 Hague Convention, Hartley and Dogauchi, *supra* n 13, para 97, refer the matter to the application of national law. The 2005 Hague Con-

by the CJEU was not to transfer the jurisdiction agreement, and this solution is not based on the national law. To waive the application of national law to decide whether a third party is bound or not by the jurisdiction agreement, the CJEU has employed principles and objectives of Brussels I that unify the rules of jurisdiction (Recital 2) or that ensure the predictable application of that Regulation (Recital 11), and declare that the application of national law would not be consistent with these goals. Thus, the CJEU has constructed a material rule based on a consideration of the provisions of Article 23 of Brussels I and the aims and objectives of the Regulation but without giving consideration to national law.[57]

The CJEU decision differs from other judgments adopted in previous case law. In *Refcomp* the CJEU decided not to apply national law to interpret the scope of the choice-of-court agreement, in particular with regard to the transfer of it. It expressly said that the concept of "jurisdiction clause" must be interpreted as an "independent concept".[58] The transfer of jurisdiction agreements "in a chain of contracts" is not expressly dealt with in Article 25 of the Brussels I Recast, and therefore the material rule created by the CJEU in *Refcomp* could be applied after the Recast comes into force. The CJEU solution is far from the conflict-of-laws approach adopted for substantive validity under Article 25(1) of the Recast. It seems that these new provisions make the regulation of jurisdiction agreements even more complicated.[59]

C. Trust in the Validity of the Agreement?

The idea of starting from a position of trust in the validity of the agreement was present in the Commission Proposal for the Brussels I Recast and the Draft Report on it of the European Parliament. As is well known the Commission's policy objective was to improve the effectiveness of jurisdiction agreements (Recital 19 of the Commission Proposal and Recital 22 of the final Recast).

vention will be concluded by the EU. According to the Proposal for a Council Decision on the approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements COM(2014) 0046, it would be appropriate for the Convention to enter into force in the Union on the same date of the entry into application of Regulation (EU) No 1215/2012, so the 2005 Hague Convention will be covered by Article 267 TFEU. The latter means that any court or tribunal of a Member State may make a reference to the CJEU to interpret the 2005 Hague Convention.

[57] See Case C-543/10 *Refcomp*, *supra* n 53, [39]. The Parliament considered that as part of the process of redrafting Regulation 44/2001 it would lay down an autonomous substantive rule. Resolution of the European Parliament of 7 September 2010 on the implementation and review of Regulation N 44/2001 [2009/2140(INI) 034, recital 0 and 13].

[58] *Refcomp*, *ibid*, [40].

[59] The author's views are not with regard to whether the solution adopted by the CJEU is appropriate or not, but rather as to the degree of complication involved in the system of choice of court agreements.

To understand the solution adopted in the Proposal it is essential to be aware of the problem the Commission was addressing arising from issues raised in the *Gasser* case.[60] Problems arise under Brussels I if a party to a choice-of-court agreement institutes proceedings against another party to the agreement in a court different to one selected in the agreement and the other party institutes proceedings in the designated court, then Article 27 of the Regulation must be applied. This means that any court – other than the court first seised of the matter – must stay its proceedings until such time as the jurisdiction of the court first seised has been established. If the court first seised decides it has jurisdiction then the court second seised has to decline jurisdiction. This rule gave rise to the problems that were demonstrated in the *Gasser* case because of the risk that the validity of the choice-of-court clause is determined in the courts of a Member State that may be notoriously slow and therefore encourage the party who wants to abide by the choice-of-court agreement to have to settle the dispute on less favourable terms.

The final text adopted in Article 31(2) of the Brussels I Recast provides that:

> Without prejudice to Article 26, where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.[61]

The court designated can decide if the agreement is valid or invalid regardless of whether that court is the first or second or third to be seised of the matter. If it was the first, then the usual *lis pendens* rule is applicable (see Article 29).

The new provision should be applied when the chosen court under the agreement is not the one first seised of the matter. In such cases a number of options arise. Firstly, when the court seised and chosen declares itself to have jurisdiction, then the court of another Member State has to decline jurisdiction (Articles 31 and 32). Secondly, when the court designated in the agreement declares that it has no jurisdiction, then the court first seised of the matter can continue with the proceedings.

The rule under Article 31(2) is only applicable to regulating the relationship between *lis pendens* and jurisdiction agreements; therefore it must be applied carefully because it is an exception to the general *lis pendens* rule. Thus if the chosen court in the agreement declares that it lacks jurisdiction under the

[60] *Supra* n 2.

[61] This is a less far-reaching provision than the original Commission Proposal which in Art 32(2) states that: "where an agreement referred to in Article 23 confers exclusive jurisdiction to a court or the courts of a Member State, the courts of other Member States shall have no jurisdiction over the dispute until such time as the court or courts designated in the agreement decline their jurisdiction". In the final Recast it is necessary for the chosen court to be seised before the non-chosen court is obliged to stay its proceedings.

agreement (because the agreement is invalid) the rule contained in Article 31(2) cannot be applied. If the selected court under the agreement sets the jurisdiction agreement aside because the court declares that the agreement is invalid, then the general rule of *lis pendens* will be applied.[62] So this court cannot avail itself of another jurisdiction rule to assume jurisdiction. In this case Article 29 of the Brussels I Recast gives priority to the court first seised, and the second court has to stay its proceedings until such time as the jurisdiction of the court first seised is established.

In accordance with Article 31(2) of the Recast the non-chosen court under the agreement is obliged to stay the proceedings when: (a) there is an "agreement" as referred to in Article 25(1) of the Recast; and (b) this agreement confers exclusive jurisdiction on the chosen court. However, although it was the Commission's policy objective and that of the final Regulation to give priority to the designated court, the non-chosen court is not clearly prohibited from testing an agreement to see if it confers exclusive jurisdiction to the court designated in the agreement. In such circumstances two options are possible: (1) the court chosen in the agreement has the first opportunity to decide on the issue of whether there is an agreement and whether it grants exclusive jurisdiction to that court in all cases; (2) a non-chosen court that is seised first can test if there is an agreement and if it confers exclusive jurisdiction on another court.

If the solution is that the court designated has in *all cases* the first opportunity to assess the agreement this means that priority status is given to the jurisdiction agreement.[63] Although this interpretation has found support,[64] diverging views have also been expressed, namely:

(a) When the solution is focused on the court allegedly designated under the agreement, in general this means that there exists a binding agreement between the parties though this is not always the case. As Briggs argues, "this solution is not necessarily wrong but it calls for open justification".[65] The above interpretation means that the party who argues that it is not bound by the agreement must first demonstrate in the chosen court that it is not bound and may not firstly commence proceedings in the court that

[62] The general *lis pendens* rule – Art 29(1) of the Recast – states: "any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established". Note that the general rule is *prior tempore*.

[63] Briggs, *supra* n 13, 319. SP Camilleri, "Article 23: Formal Validity, Material Validity or Both?" (2011) 7 *Journal of Private International Law* 297, 308.

[64] LG Radicati di Brozolo, "Choice of Court and Arbitration Agreements and the Review of the Brussels I Regulation" (2010) 2 *Praxis des Internationalen Privat- und Verfahrensreschts* 121 and P Beaumont and B Yüksel, "La reforma del Reglamento Bruselas I sobre acuerdos de sumisión y la preparación para la ratificación por la UE del Convenio de La Haya sobre Acuerdos de elección de foro" [2009] *Anuario Español de Derecho Internacional Privado* 129, 158–59.

[65] Briggs argues that the justification to give priority to that court: "cannot be on the basis that the court was chosen. It can only be on the basis that it was alleged to be chosen" (*supra* n 13, 320).

could have jurisdiction on the basis of the other rules of jurisdiction if the agreement does not exist or is not applicable to the case.[66] Thus, for example, in matters relating to a contract if this court is the Member State court with jurisdiction over the place of performance of obligations arising under the contract (see Article 7(1) of the Recast).

(b) The principle of mutual trust has been used in decisions of the CJEU.[67] If the principle of mutual trust between all of the European courts is applied, this means that no matter which court decides as to the status of the agreement, all of them will decline jurisdiction if the agreement is null and void. However this argument has been questioned.[68] The Commission has published a Report on the judicial system of the different Member States and it is clear that there were some difficulties in various areas not only in terms of the length of judicial proceedings, but also concerning issues of public confidence in the judiciary and judicial corruption.[69] So is it possible to apply or extend the principle of mutual trust as an argument?

The second option is to give to the non-chosen court the possibility to test if there is an agreement under Article 25.[70] Therefore the court claiming to have jurisdiction is not vested with an exclusive competence to decide on issues as to its own jurisdiction in cases where although it is the chosen court under the agreement it has not been seised of the matter (the competence–competence principle).[71]

Therefore, the correct interpretation of the Brussels I Recast is that if the defendant does not institute proceedings in the designated court, then the court that is seised of the matter will have to decide as to the validity or otherwise of the choice-of-court agreement,[72] which means that the selected court does not have priority to determine the validity of the agreement in all cases. In addition, if the defendant enters an appearance and fails to contest the jurisdiction of the seised – but non-designated – court in time, then Article 26 of the Brussels I Recast applies and the court seised will have jurisdiction on the basis of submission which takes priority over the chosen court.

[66] This argument has been minimised by Beaumont and Yüksel, *supra* n 64, 154.

[67] The principle of mutual trust has been applied in some important decisions, eg *Gasser*, *supra* n 2, and Case C-159/02 *Turner v Grovit* [2004] ECR I-3565.

[68] Camilleri, *supra* n 63, 308. J Steinle and E Vasiliades, "The Enforcement of Jurisdiction Agreements under the Brussels I Regulation: Reconsidering the Principle of Party Autonomy" (2010) 6 *Journal of Private International Law* 565, 571–72.

[69] A Dickinson, "A Charter for Tactical Litigation in Europe" [2004] *Lloyd's Maritime and Commercial Law Quarterly* 274, 278.

[70] This option has been defended by J Forner Delaygua, "Acuerdos de elección de foro en la UE: Universalización y refuerzo de la eficacia", *Libro Homenaje al professor Dr. Ramón Viñas* (Marcial Pons, 2012), 121–22.

[71] Sancho Villa, *supra* n 27, 416.

[72] See also Art 6 of the 2005 Hague Convention.

If the defendant institutes proceeding in the designated court and has not already submitted to another court then, "this court should be able to proceed irrespective of whether the non-designated court has already decided to stay the proceedings" (Recital 22 of the Brussels I Recast). According to the last part of Recital 22 the general *lis pendens* rule will be applied when the chosen court has been seised first or when the parties have entered into conflicting exclusive choice of court agreements. The latter situation, included in the recital at the last moment,[73] will bring problems of interpretation.

D. Conclusion

Important changes have been included in the Brussels I (recast) with the aim of enhancing the effectiveness of the agreements on jurisdiction. A new rule to test the material validity of the choice-of-court agreements is one of them. Formal and substantive validity of the choice-of-court agreements are now regulated in Brussels I (recast). The law of the chosen court, including its conflict-of-laws rules, will be applied to determine if the agreement is null or void. But some questions still remain open: there is no common conflict-of-laws rule for all Member States to determine the substantive validity of the choice-of-courts agreements so the approach to *renvoi* may vary from Member State to Member State; and there is not a specific solution for complex agreements.

A new rule of *lis pendens* when there is an agreement on jurisdiction has been incorporated in the Regulation. The best interpretation is: if the defendant fails to seise the chosen court the non-designated court could decide about the jurisdiction agreement's validity (this special rule will be applied only to exclusive agreements on jurisdiction); if the defendant objects to the jurisdiction of the non-chosen court by seising the chosen court, then the application of the special rule of lis pendens will be triggered and any non-chosen court has to stay its proceedings. The new rule gives a solution on *lis pendens* when there is an agreement on jurisdiction but its interpretation will bring other problems to resolve by the different courts of the Member States.

[73] See EP document 2010/0383 (COD) [25.09.2012].