Choice of Court Agreements, Coordination of Proceedings and Provisional Measures in the Reform of the Brussels I Regulation

By Christian Heinze, Hamburg*

Contents

* Literature cited in *abbreviated form*: *Dickinson*, Provisional Measures in the "Brussels I" Review: Disturbing the Status Quo?: IPRax 2010, 203–214 (longer version published in J. Priv. Int. L. 6 [2010] 519–564); *Domej*, Rechtshängigkeit und in Zusammenhang stehende Verfahren, Gerichtsstandsvereinbarungen, einstweilige Maßnahmen, Paper presented at the 23. IPR Tagung – Revision der Verordnung 44/2001 (Brüssel I) of the Swiss Institute of Comparative Law on 8. 4. 2011 (Vortragsmanuskript); *Fentiman*, Case note on Case C-116/02 *(Erich Gasser GmbH v. MISAT Srl)*: C.M.L. Rev. 42 (2005) 241–259; *Magnus/Mankowski*, Brussels I on the Verge of Reform, A Response to the Green Paper on the Review of the Brussels Regulation: ZvglRWiss. 109 (2010) 1–41; *Mankowski*, Die Brüssel I-Verordnung vor der Reform, in: Interdisziplinäre Studien zur Komparatistik und zum Kollisionsrecht, ed. by *Verschraegen* I (2010) 31–79; *Radicati di Brozolo*, Choice of Court and Arbitration Agreements and the Review of the Brussels I Regulation: IPRax 2010, 121–128.

Materials cited in *abbreviated form*: *Hartley/Dogauchi*, Explanatory Report on the 2005 Hague Choice of Court Agreements Convention (2007) (cited: *Hartley/Dogauchi*, Report); *Hess/Pfeiffer/Schlosser*, The Brussels I-Regulation (EC) No. 44/2001 – The Heidelberg Report on the Application of Regulation Brussels I in 25 Member States (Study JLS/C4/2005/03) (2008) (cited: Heidelberg Report *[-author]*); Green Paper on the review of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(2009) 175 final of 21. 4. 2009 (cited: Green Paper); the replies to the Green Paper can be obtained from the website of the European Commission at <http://ec.europa.eu/justice/news/consulting_public/news_consulting_0002_en.htm> (cited: Reply); European Parliament Report on the implementation and review of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 29. 6. 2010, A7-0219/2010; adopted by European Parliament resolution on the implementation and review of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 7. 9. 2010 (2009/2140(INI)), T7-0304/2010 (cited: Parliament Resolution); Opinion of the European Economic and Social Committee on the 'Green Paper on the review of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters' of 22. 9. 2010, O.J. 2010 C 255/48 (cited: EESC Opinion); Proposal for a Regulation of the European Parliament and of the

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I. Introduction

In December 2010, the European Commission published a Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereafter CP or Commission Proposal), the Brussels I Regulation (hereafter BR)[1]. The Commission proposes significant amendments which would considerably change the structure of the Regulation. In view of these developments in an area which is central for European cooperation in civil matters and the development of European private international law in general, the following papers will give a first assessment of the Commission Proposal. The round is started by this general article discussing the changes proposed for choice of court agreements (II.), for coordination of legal proceedings (III.) and for provisional measures (IV.). Following suit is a more

Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 14. 12. 2010, COM(2010) 748 final (cited: Commission Proposal or CP).

[1] Council Regulation (EC) No. 44/2001 of 22. 12. 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J. 2001 L 12/1.

specific paper on the amendments concerning the operation of the Regulation in the international legal order[2] before a final contribution turns to the interface between the Regulation and arbitration[3]. Abolition of exequatur had already been discussed in the preceding issue of this journal[4].

II. Enhancing the Effectiveness of Choice of Court Agreements

Enhancing the effectiveness of choice of court agreements was one of the most pressing issues on the reform agenda of the Commission. The roots of the problem go back to the controversial decision in *Gasser*, where the European Court of Justice (ECJ) held that the *lis pendens* rule in Art. 27 BR "must be interpreted as meaning that a court second seised whose jurisdiction has been claimed under an agreement conferring jurisdiction must nevertheless stay proceedings until the court first seised has declared that it has no jurisdiction"[5]. While a strict *lis pendens* rule fosters legal certainty and prevents parallel proceedings as well as conflicting judgments[6], it may – as all strict rules – suffer from abuse. In particular, litigants can "delay the resolution of the dispute … by seizing a non-competent court" which takes several months or even years to decline its jurisdiction, thereby blocking proceedings in the competent court[7]. In order to address this "torpedo problem"[8] and to give "full effect to the will of the parties and avoid abusive litigation tactics" (Recital 19 CP), the Commission proposes essentially two[9] modifications, namely a "harmonised conflict of law rule for the validity of jurisdiction agreements"[10] (Art. 23(1)1 CP) and priority for the court designated in a choice of court agreement to determine its jurisdiction (Art. 32(2) CP).

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[2] *Weber*, in this issue, p. 619.

[3] *Illmer*, in this issue, p. 645.

[4] *Cuniberti/Rueda*, Abolition of Exequatur: Addressing the Commission's Concerns: RabelsZ 75 (2011) 286–316.

[5] ECJ 9. 12. 2003 – Case C-116/02 *(Gasser)*, E. C. R. 2003, I-14693, para. 54.

[6] ECJ 9. 12. 2003 (previous note) para. 41.

[7] Commission Proposal 3 (1.2).

[8] *Franzosi*, Worldwide Patent Litigation and the Italian Torpedo: Eur. Intellectual Property Rev. 19 (1997) 382.

[9] A third modification is the extension of Art. 23 BR to jurisdiction agreements concluded by parties from third states, on this see *Weber*, in this issue, p. 627. A further point concerns the deletion of Art. 23(3) BR, which would no longer be necessary if Art. 32(2) CP was adopted.

[10] Commission Proposal 9 (3.1.3.).

1. Harmonised conflict rule for jurisdiction agreements

At present, the Brussels Regulation does not define the law applicable to those aspects of a jurisdiction agreement which are not governed by Art. 23 BR. For this reason, the Court of Justice had to refer to the "applicable national law" for a number of issues, in particular the renewal of a jurisdiction agreement[11], the adoption of a jurisdiction clause in the statutes of a company[12], the succession of a third party into a jurisdiction agreement[13] and the interpretation of jurisdiction agreements[14]. As choice of court agreements are also excluded from the Rome I Regulation[15] (Art. 1(2)(e) Rome I), the "applicable national law" is determined by national conflict rules[16], which may lead to a different outcome depending on where the issue is decided.

a) The Commission Proposal

The Commission proposes to change this situation by introducing a "harmonised conflict of law rule on the substantive validity of choice of court agreements"[17] in Art. 23(1)1 BR, which will then read (changes in italics):

> "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".*

This proposal is inspired by Art. 5(1) Hague Choice of Court Convention[18] and would have two consequences[19]. First, it creates a welcome presumption in favour of the validity of a jurisdiction agreement ("unless")[20]. Second, it refers questions regarding the nullity of the jurisdiction agreement "as to its substance" to the law of the Member State whose courts are

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[11] ECJ 11. 11. 1986 – Case 313/85 *(Iveco Fiat)*, E. C. R. 1986, 3337, paras. 7–8.

[12] ECJ 10. 3. 1992 – Case C-214/89 *(Powell Duffryn)*, E. C. R. 1992, I-1745, para. 21.

[13] ECJ 9. 11. 2000 – Case C-387/98 *(Coreck Maritime)*, E. C. R. 2000, I-9337, para. 24; see also pending case C-543/10.

[14] ECJ 3. 7. 1997 – Case C-269/95 *(Benincasa)*, E. C. R. 1997, I-3767, para. 31.

[15] Regulation (EC) No. 593/2008 of 17. 6. 2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I), O. J. 2008 L 177/6.

[16] But see *Merrett*, Article 23 of the Brussels I Regulation, A Comprehensive Code for Jurisdiction Agreements: Int. Comp. L. Q. 58 (2009) 545 (564). Even under this position a uniform conflict rule could be useful for matters other than validity such as interpretation or third party effects.

[17] Commission Proposal 9 (3.1.3.).

[18] Available under <http://www.hcch.net/index_en.php?act=conventions.text&cid=98>.

[19] Commission Proposal 9 (3.1.3.).

[20] *Briggs*, Agreements on Jurisdiction and Choice of Law (2008) para. 13.11.

chosen in the agreement. The general thrust of both amendments is welcome, as they foster consistency with the Hague Convention and further the uniform application of Art. 23 BR by a uniform conflict rule[21]. Unfortunately, the text in its present wording may not fully deliver what the Commission aims to achieve.

On the one hand, it may be asked why the conflict rule refers only to the question whether "the agreement is null and void as to its substance". The phrase "void as to its substance" is probably meant to clarify that the provision applies only to *substantive* grounds of invalidity (or voidability) such as fraud, mistake, misrepresentation, duress and lack of capacity[22], as *formal* validity shall be governed exclusively by Art. 23(1), (2) BR. In the interest of legal certainty, however, it appears sensible to extend the conflict rule to other questions such as the interpretation or the scope of jurisdiction agreements.

Another drawback of the proposed amendment flows from the Hague Convention. In the report to Art. 5(1) of this Convention, it is explained that the phrase "law of that State" is meant to include the choice of law rules of the forum State[23]. If the corresponding phrase in Art. 23(1) CP is to be understood in the same way, the amendment does not introduce a truly uniform conflict rule, but merely refers to the national (Art. 1(2)(e) Rome I) conflict rules of the designated forum. Now it may be argued that this is sufficient to ensure that all European courts apply the same law for jurisdiction agreements. However, if it is right that a diversity of national jurisdiction rules cannot be tolerated in relation to third states, why does the European Union (EU) not also create "a complete set of rules" (Recital 17 CP) for jurisdiction agreements in favour of its own courts? Such a conflict rule should be subject to the requirements of Art. 23 BR for consent and formal validity and include not only substantive validity, but also all other aspects of jurisdiction agreements. As long as the presumption of validity is upheld, it would not conflict with the Hague Convention, which – as we have seen – refers to the law of the forum State, including its choice of law rules, and thus leaves room for an EU internal conflict rule for jurisdiction agreements in favour of European courts.

b) Proposed amendments

If it is thus agreed that a truly European conflict rule for jurisdiction agreements would be preferable, the decisive question becomes how such a rule should be drafted. As we are dealing here with an agreement to choose

[21] See also Heidelberg Report *(-Pfeiffer)* para. 327.
[22] For these examples *Hartley/Dogauchi*, Report para. 126.
[23] *Hartley/Dogauchi*, Report para. 125 (at n. 158).

a court, it seems appropriate to apply the law of the parties' choice. In the likely event that the parties fail to make a (separate) choice for their jurisdiction agreement, two solutions are conceivable. First, we could resort to the substantive law of the chosen court. While this solution has an appeal of simplicity – no application of foreign law at the jurisdiction stage – it may create problems if the jurisdiction agreement is included in a complex contract, such as the articles of association of a company, and the law of the chosen court is not the same as the law which applies to the substantive contract[24]. Applying the substantive law of the chosen court to the existence, validity, interpretation and scope of such a choice of court agreement would separate the jurisdiction clause from its contractual environment and lead to the *lex fori* being applied to the incorporation of clauses which were devised against the background of a different substantive law (*lex contractus*).

The separation from the law applicable to the main contract would also create problems for third party succession into contractual rights and obligations, as different conflict rules for the jurisdiction agreement and the substantive contract could lead to a third party being bound to the contract, but not to the jurisdiction agreement. For these reasons, it seems preferable to apply the same law to the choice of court agreement which governs the issue in dispute[25] in the main contract in which the agreement is incorporated[26]. The substantive law of the chosen court should apply only if no main contract exists, i.e. if we are dealing with the case of an isolated jurisdiction agreement. A solution could thus read[27]:

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[24] While choice of court and choice of law may often coincide, this is not necessarily the case, see Recital 12 Rome I Regulation (choice of court "one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated").

[25] The reference to the "issue in dispute" shall clarify that there may be questions, in particular capacity and representation, Art. 1(2)(g), Art. 13 Rome I, which are not necessarily governed by the same law which applies for the main contract.

[26] Barreaux de France Reply para. 3.5; *Dicey/Morris/Collins (-Briggs)*, The Conflict of Laws[14] (2010) paras. 12–090, 12–105, 12–108; BGH 21. 11. 1996, IPRax 1999, 367 (371); *Domej* IV B.

[27] An explicit provision in Brussels I would be preferable to the alternative of deleting the exception in Art. 1(2)(e) Rome I Regulation, as the scope of application of Rome I and Brussels I is not completely identical and the application of Art. 3, 4 Rome I may not necessarily lead to the same solution which is proposed in this paper.

Commission Proposal **Article 23**	**Proposed amendments** **Article 23**
1. 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. (…)	1. 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~~ *under the law designated by paragraph 5.* (…) 5. *Subject to the provisions of this Regulation, an agreement referred to in paragraph 1 shall be governed by the law chosen by the parties, in the absence of such choice by the same law which governs the issue in dispute in the main contract in which the agreement is incorporated, and in the absence of a main contract by the substantive law of the Member State whose court or courts have been chosen in the agreement.*

2. Priority for the chosen court to determine its jurisdiction

As a second measure to enhance the effectiveness of choice of court agreements, the Commission proposes to "grant priority to the court designated in the [jurisdiction] agreement to decide on its jurisdiction, regardless of whether it is first or second seised" (Recital 19 CP). This policy is implemented by an amendment of Art. 27 BR (Art. 29 CP), which makes the *lis pendens* rule subject to a new Art. 32(2) CP ("without prejudice to Article 32(2)"). This new Art. 32(2) CP has been added as a second paragraph to the existing provision on exclusive jurisdiction of several courts in Art. 29 BR (Art. 32(1) CP) and reads:

"2. With the exception of agreements governed by Sections 3, 4 and 5 of this Chapter, where an agreement referred to in Article 23[28] confers exclusive juris-

[28] Some versions of the Commission Proposal refer to "paragraph 1" (of Art. 29 BR/Art. 32 CP) instead of "Article 23", which is probably an editing mistake.

diction 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".

Article 32(2) CP aims to reverse the obligation to stay under the strict *lis pendens* rule of Art. 27 BR (Art. 29 CP) – which operates "clearly and solely in the chronological order in which the courts involved are seized"[29] – in favour of a priority (Recital 19 CP) for the courts designated in exclusive[30] choice of court agreements to decide on their jurisdiction, even if these courts are second seised[31]. A similar provision exists today in Art. 23(3) BR for jurisdiction agreements concluded by non-EU parties, however without an explicit exception to the *lis pendens* rule. The general policy of Art. 32(2) CP can easily be supported, as it strengthens jurisdiction agreements and underlines the importance of party autonomy in international civil litigation[32]. On a more technical level, however, the consequences of Art. 32(2) CP deserve closer attention.

a) Duplication of proceedings and empirical evidence of abuse

While Art. 32(2) CP may reduce "the incentives for abusive litigation in non-competent courts"[33], the provision would also increase costs by resulting in a duplication of proceedings in those instances where an "innocent" party has to establish that she is not bound to a jurisdiction agreement in the (allegedly) chosen court first before being permitted to seise the competent court[34]. The case for Art. 32(2) CP thus depends crucially on empirical evidence demonstrating how significant abuse has been, in particular in comparison with the rate of success of actions which were legitimately brought outside the (allegedly) designated court because the jurisdiction agreement was later held to be not binding on the parties. In the search for such evi-

[29] ECJ 9. 12. 2003 (supra n. 5) para. 47.

[30] Exclusivity is presumed under Art. 23(1)2 BR, so Art. 32(2) CP would apply for most jurisdiction agreements.

[31] Commission Proposal 8 (3.1.3.).

[32] *Fentiman* 256; Belgian Reply 4; Bulgarian Reply 7; Danish Reply 3; French Reply 11; Estonian Reply 2; Greek Reply 14; Italian Reply 3; Latvian Reply 6; Lithuanian Reply 2; Netherlands Reply 6; Polish Reply 4; Slovenian Reply 5; UK Reply I para. 19; UK House of Lords Reply para. 68; Bundesrechtsanwaltskammer Reply 6; Hague Conference Reply 4; Parliament Resolution para. 12; *Magnus/Mankowski* 12, 19; *Mankowski* 43; *Radicati di Brozolo* 124; more sceptical Austrian Reply 6; German Reply 8; Maltese Reply 2; Romanian Reply 2; Swiss Reply 4; EESC Opinion para. 4.7.4.

[33] Commission Proposal 9 (3.1.3.).

[34] Green Paper 5 (Question 3).

dence, we might turn to the Impact Assessment accompanying the Commission Proposal, where we find the following[35]:

> "It is difficult to obtain reliable figures which would quantify the risk of abuse of the existing rules. According to one survey[36], 7.7% of companies reported that in the past five years their contractual counterpart did not comply with the clause designating the competent court and took the dispute before a different court, almost half of these companies faced this problem more than once. 5.7% of companies stated that their choice of court agreement was held invalid over the same period." [A footnote explains that it can be presumed that the companies are referring to the same cases.]

As a result of these findings, the Impact Assessment infers that abusive litigation tactics concerned between 2 and 7.7% of all companies. While there may be disparate views on whether this number is high enough to justify legislative action, the data seems to suggest another, more important finding, which is not made explicit in the Impact Assessment: If 7.7% of all surveyed companies reported that a jurisdiction agreement had not been honoured by their counterpart yet 5.7% of all companies reported (presumably in reference to the same cases) that their choice of court agreement was ultimately held to be invalid, this would seem to suggest that in more than 70% of all cases (5.7% in relation to 7.7%) where jurisdiction agreements were not respected, the challenge to the agreement was legitimate as the agreement was later held to be invalid. This, however, would be a strong argument against Art. 32(2) CP, as it would lead to a wasteful duplication of proceedings in more than 50% of all cases in which jurisdiction agreements are disputed, forcing the party which rightfully challenges the agreement to first establish its invalidity in the allegedly chosen court and later bring proceedings in another court. Even if the existing data (or my understanding of it) is too narrow to justify this conclusion[37], the least that can be said is that

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[35] Commission Staff Working Paper Impact Assessment Accompanying document to the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 14. 12. 2010, SEC(2010) 1547 final, p. 30 (2.3.1.3).

[36] The Impact Assessment cites the European Business Test Panel (EBTP) survey on commercial disputes and cross-border debt recovery, of which I could only find a summary, <http://ec.europa.eu/yourvoice/ebtp/consultations/2010/cross-border-debt-recovery/report_en.pdf>.

[37] By contrast, on p. 33 under 2.3.6.3 of the Impact Assessment (supra n. 35) it is said that the percentage of choice of court agreements which are declared invalid concerns only 1.1% of companies per year. In the Commission Staff Working Paper Summary of the Impact Assessment Accompanying document to the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 14. 12. 2010, SEC(2010) 1548 final, p. 6 (2.3.4), it is added that this number concerns cases "where the designated court eventually holds the agreement invalid", which would exclude cases where proceedings are commenced in other courts.

the European legislator should carefully reconsider the empirical evidence before introducing a change as fundamental as Art. 32(2) CP[38].

b) Risk of legal uncertainty

Another consequence of Art. 32(2) CP would be an increased risk of legal uncertainty as to which of several courts has priority to proceed with a case. Article 32(2) CP grants priority to the nominated court "where an agreement referred to in Article 23[39] confers exclusive jurisdiction to a court or the courts of a Member State". The application of this provision may be straightforward if a specific document with the signature of both parties is produced and the validity of this specific agreement is disputed between the parties[40]. Things become more complicated, however, if the parties disagree whether an agreement in the sense of Art. 23 BR has been concluded at all or disagree in favour of which court, with each party presenting a jurisdiction agreement in their standard terms pointing to a different court[41]. If both parties start proceedings in different courts, each designated in their respective standard terms, it is difficult to determine, on the basis of Art. 32(2) CP alone and without a complex analysis of this "battle of the forms", which court shall be competent to proceed with the case. To put it in different words: While it may be easily agreed that a jurisdiction agreement shall carry a presumption of consent and validity if the formal requirements of Art. 23 BR are met, justifying in turn the priority of the court designated in the agreement to decide on its effects, it is more difficult to grant such priority to an (allegedly) designated court if the formal basis of the presumption is itself already in dispute, if a third party shall be bound on the mere allegation of an agreement or – even worse – if diverging jurisdiction clauses are presented[42].

Article 32(2) CP does not give a clear answer for such scenarios as it speaks merely of "an agreement referred to in Article 23" without specifying (i) which standard has to be met for such a finding on the level of jurisdiction (actual agreement, alleged agreement, prima facie agreement?), (ii) which

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[38] For similar doubts see Austrian Reply 6.

[39] Supra n. 28.

[40] A dispute as to the validity of a jurisdiction agreement is to be decided by the courts designated in the agreement, ECJ 3. 7. 1997 (supra n. 14) paras. 22–32.

[41] For this example *Magnus/Mankowski* 14.

[42] In an (to my knowledge) unpublished paper distributed at a conference of the Spanish EU Presidency and of the Commission in Madrid on 15 March 2010 on reform of the Brussels I Regulation, *Briggs* (at para. 10) identified no less than nine different reasons why a party might (legitimately) think it is not bound by a jurisdiction agreement. He concludes (at para. 34): "The truth is that we do not have a reliable mechanism by which to distinguish bona fide from mala fide objections to an alleged agreement on jurisdiction. To try and do this is, as I see it, almost certain to produce a high degree of uncertainty and general conflict."

court has to decide this question (only the designated court or also the court first seised?), or (iii) what the consequences are for the proceedings in the court first seised (stay of proceedings or dismissal of the action?)[43]. Under the present wording, it could even be argued that the court first seised may review all aspects of the jurisdiction agreement and proceed with the case if it finds that it is not binding for the parties, because in this situation no "agreement referred to in Article 23" confers exclusive jurisdiction to another court[44]. This argument, even if it does not mirror the purpose of Art. 32(2) CP (see Recital 19 CP)[45], could be supported by referring to the comparable provision for arbitration agreements in Art. 29(4) CP, which speaks – unlike Art. 32(2) CP – of jurisdiction being (merely) "contested on the basis of an arbitration agreement".

c) Possible solutions

A solution to this problem is not easy. A rule giving priority to the designated court should not be unqualified; rather, it will have to define somewhere the minimum threshold which triggers the obligation of the court first seised to stay proceedings in favour of the designated court, at least to prevent abuse and to cope with situations where diverging jurisdiction agreements are presented[46]. In doing so, different options lie on the table.

(1) The Hague model. – A first option would be to follow the model of the Hague Choice of Court Convention[47]. Like Art. 32(2) CP, Art. 6 Hague Convention obliges a court not chosen to "suspend or dismiss proceedings to which an exclusive choice of court agreement applies". In contrast to Art. 32(2) CP, however, Art. 6 of the Hague Convention defines five exceptions to the obligation of the court not chosen to suspend or dismiss proceedings, namely the situation where the jurisdiction agreement is null and void (Art. 6 lit. a), where a party lacked the capacity to conclude the agreement (Art. 6 lit. b)[48], where giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the

[43] The Commission has a stay of proceedings in mind, Commission Proposal 8 (3.1.3.).

[44] This understanding finds support in the *Schlosser* Report, O.J. 1979 C 59/71, para. 177 (on Art. 17(1)3 Brussels Convention): a jurisdiction agreement by parties not domiciled in the EU "must be observed … provided the agreement meets the formal requirements of Article 17."

[45] *Domej* IV A; *Hess*, Die Reform der EuGVVO und die Zukunft des Europäischen Zivilprozessrechts: IPRax 2011, 125–130 (129).

[46] Opinion of Advocate General (AG) Léger delivered on 9. 9. 2003 – Case C-116/02 *(Gasser)*, E.C.R. 2003, I-14693, para. 74; *Fentiman* 256; Heidelberg Report *(-Weller)* para. 400; against any exception *Radicati di Brozolo* 124.

[47] Supra n. 18.

[48] These exceptions, as it is explained in the memorandum, are partially inspired by

state of the court seised (Art. 6 lit. c), where a jurisdiction agreement cannot be reasonably performed (Art. 6 lit. d) and where the chosen court has decided not to hear the case (Art. 6 lit. e). In all of these cases, Art. 6 of the Hague Convention does not exclude a court other than the chosen court from ruling on the validity of the choice of court agreement, capacity of the parties, etc[49], but in effect only releases the court designated in an exclusive choice of court agreement from its obligation to stay proceedings under the *lis pendens* rule.

A similar solution (mere release from the obligation to stay) had already been proposed in the Green Paper[50], but it was rightly not taken up by the Commission. Even if some of the exceptions in Art. 6 Hague Convention were deleted for intra-European disputes (in particular Art. 6 lit. c and d), the solution to simply release the chosen court from its obligation to stay proceedings under the *lis pendens* rule would necessarily give more leeway for parallel proceedings which may lead to irreconcilable judgments[51]. In particular, this solution would create a race to judgment[52], as under the present Arts. 32, 34 BR (Arts. 38, 43 CP) the judgment which is rendered first on the issue of jurisdiction would have to be recognised and enforced in all EU states, including the country where the parallel proceedings are conducted[53]. The Hague Convention solves this problem by broader grounds of non-recognition (Art. 9), which is not a viable option for the European legislator who aims at reducing rather than expanding the exceptions to recognition of foreign judgments.

(2) A test of obviousness or prima facie existence. – A second option would be to allow the court second seised which is designated in the jurisdiction agreement to deviate from the *lis pendens* rule "only where there is no room for

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Art. II(3) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *Hartley/Dogauchi*, Report para. 147.

[49] See *Hartley/Dogauchi*, Report para. 149, where it is stated that the court seised and the chosen court shall issue consistent judgments on the validity of the choice of court agreement, which implies that the court seised may also rule on this matter under Art. 6; *Rühl*, Das Haager Übereinkommen über die Vereinbarung gerichtlicher Zuständigkeiten: Rückschritt oder Fortschritt?: IPRax 2005, 410–415 (413); *R. Wagner*, Das Haager Übereinkommen vom 30. 6. 2005 über Gerichtsstandsvereinbarungen: RabelsZ 73 (2009) 100–149 (123).

[50] Green Paper 5 (Question 3).

[51] Green Paper 5 (Question 3); *Steinle/Vasiliades*, The Enforcement of Jurisdiction Agreements under the Brussels I Regulation: Reconsidering the Principle of Party Autonomy: J. Priv. Int. L. 6 (2010) 565–587 (581).

[52] *McGuire*, Verfahrenskoordination und Verjährungsunterbrechung im Europäischen Prozessrecht (2004) 127.

[53] Art. 34(3) BR (Art. 43 lit. a CP) allows for non-recognition only if the court of the Member State of enforcement has already handed down a judgment, *Geimer/Schütze (-Geimer)*, Europäisches Zivilverfahrensrecht[3] (2010) Art. 34 A.1 para. 158. But see ECJ 22. 12. 2010 – Case C-497/10 PPU *(Mercredi)* para. 71 (not yet published).

any doubt as to the jurisdiction of the court second seised"[54]. This solution would involve a full analysis of all aspects of the jurisdiction agreement by both the court first seised and the chosen court which is seised second[55], with the hope that the court second seised would only deviate from the *lis pendens* rule in obvious cases where the court first seised would come to no other result, thus reducing the risk of irreconcilable decisions. A similar solution building on the "obviousness" of a jurisdiction agreement would be to allow the chosen court to take up proceedings only where a standard form jurisdiction agreement has been used[56]. Another alternative could be to reverse priority where at least the *prima facie* existence of a jurisdiction clause can be demonstrated[57]. While these proposals are conceptually sound, they may bring about a problem of inconsistent application in a Union with 27 Member States. As these proposals would introduce a further category of jurisdiction agreement, the "evidently valid" or "prima facie" jurisdiction agreement, they may prompt uncertainty and divergent opinions between Member States' courts as to when a jurisdiction agreement is "evidently valid" or "*prima facie* existent" or how small deviations from the standard form may be in order to still be tolerated[58]. The most likely result of permitting both the court first seised and the chosen court to review all aspects of the jurisdiction agreement (even only against a test of obviousness or *prima facie* existence) would be a race to a first judgment on jurisdiction, which, by way of recognition, would terminate all discussion on jurisdiction in the parallel proceedings.

(3) Formal validity and consent as the trigger to reverse priority. – A third option would be to explicitly spell out in Art. 32(2) CP the requirements which trigger priority of the designated court[59]. This could be done by streamlining the criteria for jurisdiction and arbitration agreements and letting it suffice that "jurisdiction is contested on the basis of an exclusive choice of court agreement which (a) meets the formal requirements of Article 23 and (b) to

[54] Opinion of AG Léger (supra n. 46) para. 82; Finnish Reply 4; see also *Grothe*, Zwei Einschränkungen des Prioritätsprinzips im europäischen Zuständigkeitsrecht: ausschließliche Gerichtsstände und Prozessverschleppung: IPRax 2004, 205–212 (210). For a test of prima facie validity *Domej* IV A.

[55] See Opinion of AG Léger (supra n. 46) paras. 77–81.

[56] *Delaygua*, Choice of Court Clauses: Two Recent Developments: Int. Company and Commercial L. Rev. 15 (2004) 288–296 (295): "creation of a European registered form of choice of court agreement"; Heidelberg Report *(-Weller)* para. 396; Green Paper 5 (Question 3).

[57] *Fentiman* 256 ("demonstrate at least the *prima facie* existence of a jurisdiction clause"); UK House of Lords Reply para. 58.

[58] *Magnus/Mankowski* 13–14; *Mankowski* 45–46.

[59] The proposal to refuse recognition if an exclusive jurisdiction agreement has been disregarded (*Fentiman* 255–256; *Mankowski* 48) will not be discussed further as it contradicts the Commission's effort to reduce rather than expand the grounds of non-recognition.

which the parties have consented or in which they have succeeded according to the applicable national law". The word "contested" would clarify that a full examination of the jurisdiction agreement shall be reserved for the court designated in the agreement. On the other hand, the "formal requirements of Article 23" and "to which the parties have consented or in which they have succeeded according to the applicable national law" would indicate that priority for the chosen court (and thus the exception to the *lis pendens* provision) depends on two requirements which are the only points the court first seised is allowed to review[60], namely (a) whether the form of Art. 23 BR has been observed[61] and (b) whether the parties have consented to the agreement or whether they have succeeded into this agreement under the applicable national law. The first two of these three elements (form and consent) derive directly from Art. 23 BR and may thus be interpreted and applied with the same authority by both courts involved[62]. The third – succession under the applicable national law – is an alternative to consent[63] which cannot be left out of the picture as otherwise the priority rule would exclude most third party effects of jurisdiction agreements. On the other hand, it is particularly in third party cases where it will be problematic to force the third party claiming the ineffectiveness of a jurisdiction agreement to litigate this question in the (presumably) chosen court merely because the other party alleges that it is bound to a jurisdiction agreement concluded with somebody else. The reservations proposed for Art. 32(2) CP would make it more acceptable to grant priority to the (presumably) chosen court, as the third party could at least argue in the court first seised that she has not consented or succeeded to the agreement or that the agreement does not meet the form of Art. 23 BR. These minimum requirements would also exclude most attempts to challenge jurisdiction on the basis of the mere artifice of a jurisdiction agreement[64]. Moreover, a limitation to these aspects would reduce the risk of conflicting judgments as it narrows the scope for disagreement between the courts involved to form and consent/succession.

As a further amendment, the priority of the chosen court should depend on this court being actually seised (as in Art. 29(4) CP)[65]. This caveat is important to prevent abuse because the additional cost and effort of seising another court are much stronger indicators of a serious objection to jurisdic-

[60] A stricter position is taken by *Radicati di Brozolo* 124: "no exception for situations where it is alleged that the agreement is invalid or inexistent or that the dispute falls outside its scope".

[61] For a similar proposal Bundesrechtsanwaltskammer Reply 6. The requirement of form applies also under Art. 23(3) BR, at least according to the *Schlosser* Report (supra n. 44).

[62] ECJ 9. 12. 2003 (supra n. 5) para. 48.

[63] ECJ 9. 11. 2000 (supra n. 13) paras. 24–26.

[64] A concern in the Opinion of AG Léger delivered on 9. 9. 2003 (supra n. 46) para. 74; Bar Council of England & Wales Reply para. 3.7.

[65] Contra *Domej* IV A.

tion than mere rhetoric offered in a pending procedure. Furthermore, one needs to prevent a party from awaiting the developments of the proceedings in the court first seised before contesting jurisdiction on the basis of a jurisdiction agreement[66]. As Art. 24 BR may not be a sufficient safeguard against such behaviour since it allows jurisdiction to be contested until the first oral hearing[67], the best solution would seem to be excluding the priority rule if the defendant fails to contest jurisdiction within three months after he has been served with the document instituting the proceedings[68]. Finally, to underline the parallels between jurisdiction and arbitration agreements, Art. 32(2) CP could be relocated to Art. 29 CP, and the provision should make it clear that the court first seised only has to stay (not dismiss) its proceedings until such time as the court designated in the agreement decide on jurisdiction[69]. A new Art. 32(2) (relocated in Art. 29 CP) could read:

Commission Proposal Article 32	**Proposed Amendments Article 29**
(1) (…)	(1)–(5) (see below III. 1.)
(2) With the exception of agreements governed by Sections 3, 4 and 5 of this Chapter, where an agreement referred to in Article 23 confers exclusive jurisdiction to a court or the courts of a Member State,	6. With the exception of agreements governed by Sections 3, 4 and 5 of this Chapter, where ~~an agreement referred to in Article 23 confers exclusive jurisdiction to a court or the courts of a Member State,~~ *jurisdiction is contested on the basis of an exclusive choice of court agreement which* *(a) meets the formal requirements of Article 23 and* *(b) to which the parties have consented or in which they have succeeded according to the applicable national law,*
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.	the courts of ~~other~~ *the* Member States *first seised* shall ~~have no jurisdiction over the dispute~~ *stay proceedings once the courts of the Member State designated in the agreement have been seised of proceedings to determine, as their main object or as an incidental ques-*

[66] Austrian Reply 7; Latvian Reply 6.

[67] *Rauscher (-Staudinger)*, Europäisches Zivilprozess- und Kollisionsrecht[3] (2011) Art. 24 Brüssel I-VO para. 25.

[68] See *Freitag*, Vertrauen ist gut, Kontrolle ist besser, in: Jahrbuch junger Zivilrechtswissenschaftler 2004 (2005) 399–433 (430) ("innerhalb angemessener Frist").

[69] *Domej* IV A.

> *tion, whether the agreement confers exclusive jurisdiction to them* ~~until such time as the court or courts designated in the agreement decline their jurisdiction~~. *Once this jurisdiction is established, the court first seised shall decline jurisdiction. This paragraph shall not apply if jurisdiction is not contested within three months of the defendant having been served with the document instituting the proceedings.*

While these amendments would probably give more guidance than Art. 32(2) CP as to which questions shall be reserved for the chosen court and which may be reviewed by the court first seised, they would not solve all problems. In particular, it remains possible that the court first seised and the chosen court could come to different results in those aspects which both are allowed to review. Assuming we do not want to force private parties to litigate in a presumably chosen court on the basis of the mere allegation of a jurisdiction agreement (which appears doubtful not only in view of the unclear empirical evidence of abuse), it seems unavoidable that the risk of conflicting proceedings (and judgments) will increase if the *lis pendens* rule is relaxed. This is why it is so important that the European legislator carefully considers the empirical evidence before adopting any amendment. In undertaking such an effort, it should not be forgotten that torpedo actions attacking jurisdiction agreements are just part of a broader picture. The much more important step would be to address the underlying problem of incompetent courts taking too long to decline jurisdiction[70]. A solution to this problem requires more courage as it would involve prescribing for national courts a preliminary procedure with a short time frame in which a decision on jurisdiction has to be made (below III.1.), but it would also be much more rewarding as it could solve the problem at its roots and might even make the adoption of a rule such as Art. 32(2) CP dispensable.

III. Better Coordination of Legal Proceedings

In the context of the coordination of proceedings, two issues need to be separated. The first (major) point concerns the operation of the *lis pendens* provision (below III. 1.), the other the obligation to cooperate between the court seised with proceedings as to the substance and other courts which are

[70] Slovenian Reply 6; Spanish Reply 2.

seised with an application for provisional relief (below III. 2.). Only a minor – welcome – clarification is made in Art. 28(2) BR/Art. 30(2) CP, where the consolidation of related actions is made easier by doing away with the requirement that consolidation has to be possible under national law[71].

1. Operation of the *lis pendens* rule

At present, the operation of the *lis pendens* rule in Art. 27(1) BR does not depend on the rapidity of the proceedings in the court first seised, nor are there any European rules in the Regulation on the time frame in which a decision on jurisdiction has to be rendered. The Commission proposes change in this respect, adding a new second paragraph to the *lis pendens* rule of Art. 27 BR (Art. 29 CP):

> "2. In cases referred to in paragraph 1, the court first seised shall establish its jurisdiction within six months except where exceptional circumstances make this impossible. Upon request by any other court seised of the dispute, the court first seised shall inform that court of the date on which it was seised and of whether it has established jurisdiction over the dispute or, failing that, of the estimated time for establishing jurisdiction."

As a result of this amendment, the court first seised would be under a duty to establish its jurisdiction within six months, "except where exceptional circumstances make this impossible". Equally important, the court first seised shall inform other courts of the date on which it was seised, whether it has established jurisdiction or when it plans to do so. While this reporting obligation may appear minor, it can have a significant effect, as it forces judges first seised to concede to other judges that their proceedings are not progressing at a reasonable pace[72]. Whereas the general idea of an expedited procedure for a decision on jurisdiction can only be applauded[73], the Commission Proposal lacks some important clarifications which may significantly reduce its impact.

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[71] This will make it easier for German courts to consolidate actions as German national procedural law (arguably) does not allow this, *Geimer/Schütze (-Geimer)* (supra n. 53) Art. 28 A. 1 para. 34. For the consequences of Art. 30 CP *Domej* III.

[72] For a more elaborated cooperation system French Reply 17–18.

[73] Bulgarian Reply 7; Spanish Reply 2; UK Reply II para. 7; Bar Council of England and Wales Reply para. 3.5; Parliament Resolution para. 12; EESC Opinion para. 4.7.4; *Mankowski* 56.

a) The beginning of the six-month period

First, the beginning of the time frame specified in Art. 29(2) CP should be reconsidered. Article 29(2) CP provides that the period of six months applies only "[i]n cases referred to in paragraph 1", i.e. where proceedings have already been brought in the courts of different Member States. In other words, Art. 29(2) CP obliges a party wishing to speed up proceedings to bring a second action in a court which is from the outset doomed to fail, as Art. 29(2) CP provides nowhere that a failure of the court first seised to decide in six months allows the second court to take up the case. As private litigants have a constitutional right to a decision within a reasonable time (Art. 6(1) ECHR, Art. 47(2) EU Charter), it is difficult to understand why the period of six months should start to run only once a party has initiated wasteful parallel proceedings in a second court. Is it really appropriate that the party which has started the second proceedings has to pay the costs for an action which was initiated only to speed up proceedings in a court first seised? In order to avoid such a wasteful duplication of proceedings, it seems preferable to grant an unqualified right to a decision on jurisdiction within a reasonable time which should start on the date the court was seised in accordance with Art. 30 BR (Art. 33 CP)[74]. In deleting the reference to paragraph 1 in Art. 29(2) ("In cases referred to in paragraph 1"), it would also be clarified that the duty to establish jurisdiction in six months applies also in proceedings which are referred under the new Arts. 29(4), 32(2) CP to the courts (or tribunals) presumably chosen in a jurisdiction or arbitration agreement.

b) Maximum time limit

Second, there is no maximum time limit for "exceptional circumstances". While it may be understandable that complex cases can take longer than six months, the provision should contain a maximum cap, for example one year[75], and it should specify that the court wishing to invoke this exception has to issue a formal decision in this regard. A further clarification is needed where a decision on jurisdiction is under appeal. While six months plus an additional six months (in exceptional circumstances) may be appropriate for a first instance judgment, a further six months should be allowed for any appellate procedure, leading to a maximum of two years for a final decision on jurisdiction in the third instance[76]. In this context, it may also be clarified

[74] *Domej* II B 3.

[75] *Grothe* (supra n. 54) 212 (1,5 years); *McGuire* (supra n. 52) 139 (5 years for the entire proceedings); Heidelberg Report *(-Weller)* para. 405 (6 months).

[76] See also *Domej* II B 3, who reads Art. 29(2) as referring only to a decision in first instance.

that the time running from a reference to the European Court of Justice through the return of the case to the court of the Member State shall not count against these periods. A period of six months in any instance, plus an extra six months, should not be too ambitious to allow for a decision on jurisdiction, as all national courts are already obliged under Art. 6 ECHR and Art. 47(2) EU Charter to hand down decisions (not just on jurisdiction) in a reasonable time. Should the Member States have difficulty in guaranteeing this right because courts are unfamiliar with the rules of the Brussels Regulation, they are free to assign such cases to special chambers which may acquire sufficient expertise to decide on jurisdiction expeditiously.

c) Clear sanction

Finally, Art. 29(2) CP should provide for a clear sanction (next to Art. 258 TFEU) if the time limit is not complied with[77]. According to the case law of the European Court of Human Rights (ECHR), a remedy for excessively long proceedings is regarded as effective in the sense of Art. 13 ECHR if it can be used either to expedite a decision by the courts dealing with the case *or* to provide the litigant with adequate redress (damages) for delays that have already occurred[78]. This solution, in particular the alternative to grant damages for delays that have already occurred, is not really helpful for a party which seeks a decision on the merits as opposed to tangential litigation on the liability of a Member State for unreasonable delay in court proceedings[79]. The better solution would be to draw a consequence on the jurisdictional level by allowing the frustrated party to bring proceedings in the courts of a different Member State[80]. In order to avoid tactical litigation, this should be possible only within three months of the period specified under paragraph 2 having lapsed, and it should be subject to the court second seised establishing its jurisdiction to avoid a denial of justice. In order to cope with the problem of conflicting decisions on the level of enforcement[81], the decision rendered by the slow court should be excluded from Chapter III of the Regulation once the court second seised has taken up jurisdiction[82]. In sum, the following amendments may be proposed for Art. 27 BR (Art. 29 CP):

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[77] *Domej*, EuGVVO-Reform, Die angekündigte Revolution: ecolex 2011, 124 (126).

[78] ECHR 8. 6. 2006 – Case 75529/01 *(Sürmeli)*, E. C. H. R. 2006-VII, 227, para. 99.

[79] *Pfeiffer*, Internationale Zuständigkeit und prozessuale Gerechtigkeit (1995) 467.

[80] *Heiderhoff*, Die Berücksichtigung ausländischer Rechtshängigkeit in Ehescheidungsverfahren (1998) 104; Heidelberg Report *(-Weller)* para. 380; *Schmehl*, Parallelverfahren und Justizgewährung (2011) 368, 374–75. *Domej* II B 2 predicts a race to judgment after the six months period under Art. 29(2) CP has lapsed.

[81] See *McGuire* (supra n. 52) 143.

[82] More sceptical *Domej* II B 2, 6.

Commission Proposal Article 29	Proposed Amendments Article 29
1. Without prejudice to Article 32(2), where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.	1. ~~Without prejudice to Article 32(2), w~~*W*here proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
2. In cases referred to in paragraph 1, the court first seised shall establish its jurisdiction within six months except where exceptional circumstances make this impossible.	2. ~~In cases referred to in paragraph 1, t~~*T*he court first seised shall establish its jurisdiction within six months *from the date on which it was seised in accordance with Article 30 [33]* ~~except where exceptional circumstances make this impossible~~. *In exceptional circumstances, the court first seised may extend this period by court order for another six months. If the decision establishing jurisdiction of the court first seised is appealed, any appellate court shall decide on jurisdiction within a further six months. The time running from a reference to the European Court of Justice through the return of the case to the court of the Member State shall not count against these periods.*
Upon request by any other court seised of the dispute, the court first seised shall inform that court of the date on which it was seised and of whether it has established jurisdiction over the dispute or, failing that, of the estimated time for establishing jurisdiction.	*3.* Upon request by any other court seised of the dispute, the court first seised shall inform that court of the date on which it was seised and of whether it has established jurisdiction over the dispute or, failing that, of the estimated time for establishing jurisdiction.
3. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.	~~3.~~ *4.* Where the jurisdiction of the court first seised is established *in accordance with paragraph 2*, any court other than the court first seised shall decline jurisdiction in favour of that

	court. *Where the jurisdiction of the court first seised is not established in accordance with paragraph 2, this court shall forfeit jurisdiction if*
	(a) proceedings involving the same cause of action and between the same parties have been brought in the courts of a different Member State within three months of the expiration of the period in paragraph 2 and
	(b) the court second seised has established its jurisdiction.
	Once the court second seised has established its jurisdiction, any decision eventually rendered by the court first seised shall not be regarded as a 'judgment' for the purposes of Chapter III.
4. (…)	4. *5.* (…)
	6. (see above under II. 2.)

2. Coordination of substantive and provisional relief

As a further point, the Commission proposes to introduce an obligation to cooperate between the court seised with proceedings as to the substance and other courts which are seised with an application for provisional relief. This provision seems to be the remnant of a more far-reaching proposal in the Heidelberg Report to grant the court seised with the merits the "power to discharge, to modify or to adapt to its own legal system any provisional measure granted by a court of another Member State"[83]. As such a power has been perceived as undermining the principle of non-interference by a court in the affairs of another national court[84], the Commission probably chose Art. 31 CP as a milder measure. Unfortunately, it is not entirely clear what is meant by the obligation ("shall") to cooperate "in order to ensure proper coordination" (Art. 31 CP) of substantive and provisional relief. Article 31

[83] Heidelberg Report *(-Schlosser)* para. 654. See also Art. 20(2) Council Regulation (EC) No. 2201/2003 of 27. 11. 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, O.J. 2003 L 338/1.

[84] German Reply 14; Greek Reply 20; Slovenian Reply 10; UK Reply II para. 32; UK House of Lords Reply para. 85; *Dickinson* 210; Parliament Resolution para. 31; *Mankowski* 58; less sceptical Bulgarian Reply 11; Lithuanian Reply 4; Polish Reply 7; Bar Council of England and Wales Reply para. 6.2.

second sentence CP explains that the court seised with an application for provisional measures "shall seek information from the other court on all relevant circumstances of the case, such as the urgency of the measure sought or any refusal of a similar measure by the court seised as to the substance"[85]. While the exchange of information between courts is always useful (not only in the context of provisional measures), the strict "shall" may not be helpful in all cases, in particular in the context of provisional measures where a court needs to decide quickly about the application before cooperating with a foreign court. The legislator may thus consider reducing the "shall" to a "may" and clarifying further the form of cooperation which is envisaged, in particular its impact on the decision of the court seised with an application for provisional measures.

IV. Provisional Measures

Another – often neglected – field of particular practical importance in international litigation is provisional measures. At present, the Brussels Regulation establishes a two-track system of provisional relief: Jurisdiction can be based either on the Regulation itself (a court having jurisdiction as to the substance of a case in accordance with Arts. 2–24 BR also has jurisdiction to order provisional measures[86]) or it can be based on Art. 31 BR in connection with the different national rules on jurisdiction for provisional measures. In particular the second, "national" avenue of provisional relief may be dangerous for the uniform application of the Brussels Regulation, as national courts might grant far-reaching "provisional" measures which effectively pre-empt the decision on the substance of the case. For this reason, the ECJ has subjected provisional measures based on Art. 31 BR to additional requirements, namely (1) the existence of a real connecting link between the subject matter of the measures sought and the territorial jurisdiction of the Member State of the court before which those measures are sought[87], (2) an autonomous definition of provisional measures which (3) includes interim payment orders only if, first, repayment to the defendant of the sum awarded is guaranteed in case the plaintiff is unsuccessful regarding the substance of his claim and, second, the measure sought relates only to specific assets of the defendant located or to be located within the confines of the territorial jurisdiction of the court to which application is made[88]. In light of these developments,

[85] Supported by EESC Opinion para. 4.9.3.
[86] ECJ 17. 11. 1998 – Case C-391/95 *(Van Uden)*, E.C.R. 1998, I-7091, para. 19.
[87] ECJ 17. 11. 1998 (previous note) para. 40.
[88] ECJ 17. 11. 1998 (supra n. 86) para. 47.

the text of Art. 31 BR gives only a very incomplete picture of the law and should be amended[89].

1. Definition of provisional measures

A first amendment concerns the definition of provisional measures. Recital 22 CP rightly points out that the notion of provisional measures should be clarified[90]. Unfortunately, the Commission Proposal does so only for orders to obtain information or preserve evidence (below IV. 1. a). It does not introduce a general definition of provisional measures[91], although the ECJ has, for the purposes of Art. 31 BR, defined provisional measures in *Reichert* as measures "intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is otherwise sought from the court having jurisdiction as to the substance of the case"[92]. This phrase could, with a minor amendment so as to include arbitration ("court *or arbitral tribunal*"[93]) and with a clarification so as to include post-judgment provisional measures ("is *or has been* otherwise sought")[94], serve as a general definition in Recital 22 and Art. 2(b) CP[95]. As the *Reichert* definition already reflects the *acquis communautaire* for Art. 31 BR, the effect of moving it to the recitals would be its application not only for provisional measures based on Art. 31 BR (Art. 36 CP), but also for provisional measures issued by a court having jurisdiction as to the substance of the matter (Art. 35 CP). Such a generalisation would provide a useful common denominator for the new provisions on the coordination (Art. 31 CP) and enforcement of provisional measures (Arts. 2(a), 42(2) CP), which apply also (or exclusively) to provisional measures granted by the court having jurisdiction as to the substance. Being suitable as a start-

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[89] *Dickinson* 208; *Mankowski* 57.

[90] Supported by French Reply 20; Netherlands Reply para. 25; sceptical German Reply 14.

[91] For an earlier proposal to define provisional measures see Art. 18a(1) Proposal for a Council act establishing the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters in the Member States of the European Union of 22. 12. 1997, COM(1997) 609 final.

[92] ECJ 26. 3. 1992 – Case C-261/90 *(Reichert)*, E. C. R. 1992, I-2149, para. 34; 28. 4. 2005 – Case C-104/03 *(St. Paul Dairy)*, E. C. R. 2005, I-3481, para. 13.

[93] The explicit reference to arbitration will depend on the general approach of the new Brussels Regulation towards arbitration.

[94] On post-judgment provisional measures (obiter) *Masri* v. *Consolidated Contractors International (UK) Ltd (No 2)*, [2008] EWCA (Civ) 303, paras. 104, 106, 123.

[95] *Dickinson* 208, 213. Dickinson also proposes to clarify that the court may make provisional measures subject to conditions guaranteeing their provisional character, see ECJ 17.11 1998 (supra n. 86) para. 38. As this power is inherent under national procedural law and less an issue of jurisdiction, it probably need not be spelled out explicitly, but it could be.

ing point, the *Reichert* definition nonetheless requires clarification for certain measures.

a) Measures to obtain information or preserve evidence

First, it is unclear whether orders to obtain information or preserve evidence may qualify as provisional measures. In *St. Paul Dairy*, the ECJ held that a measure ordering the hearing of a witness is not covered by the notion of provisional measure in Art. 31 BR if it serves no other aim than to allow the applicant to assess the chances for bringing successful court proceedings[96]. As a result of this decision, it has been argued[97] that evidence measures are governed exclusively by the Evidence Regulation 1206/2001[98], leading to the absurd result that in order to secure evidence, an applicant may not apply directly to the courts where that evidence is located (which would be competent as the place of enforcement under Art. 31 BR), but rather has to apply to the court having jurisdiction on the merits and ask this court to seek judicial assistance under the Evidence Regulation[99]. In order to allow the courts where the evidence is located to directly secure this evidence, a different reading of *St. Paul Dairy* appears preferable[100]. Possible solutions include making the qualification as a provisional measure dependent on the qualification under national procedural law[101], drawing the line between substantive and inner-procedural instruments to obtain information[102] or distinguishing between discretionary (BR) and non-discretionary (Evidence Regulation) court orders[103]. While these proposals take full account of the diversity of evidentiary measures in Europe, their disadvantage

[96] ECJ 28. 4. 2005 (supra n. 92) para. 25.

[97] Opinion of Advocate General Kokott delivered on ECJ 18. 7. 2007 – Case C-175/06 *(Tedesco)*, E. C. R. 2007, I-7929, para. 93; this view may find support in an *obiter dictum* in ECJ 28. 4. 2005 (supra n. 92) para. 23.

[98] Council Regulation (EC) No. 1206/2001 of 28. 5. 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, O. J. L 174/1.

[99] *Mankowski*, Selbständige Beweisverfahren und einstweiliger Rechtsschutz in Europa: JZ 2005, 1144–1150 (1146).

[100] *De Miguel Asensio*, Cross-border Adjudication of Intellectual Property Rights and Competition between Jurisdiction: Annali italiani del diritto d'autore, della cultura e della spettacolo 16 (2007) 105–154 (133); Heidelberg Report *(-Schlosser)* para. 610; Parliament Resolution para. 27.

[101] *Hess/Zhou*, Beweissicherung und Beweisbeschaffung im europäischen Justizraum: IPRax 2007, 183–190 (189–190); *Ahrens*, Internationale Beweishilfe bei Beweisermittlungen im Ausland nach Art. 7 der Enforcementrichtlinie, in: FS Michael Loschelders (2010) 1–13 (9–10).

[102] *Rauscher (-von Hein)*, Europäisches Zivilprozess- und Kollisionsrecht (2010) Art. 1 EG-BewVO para. 51.

[103] *Rushworth*, Demarcating the boundary between the Brussels I Regulation and the Evidence Regulation: Lloyd's Marit. Com. L. Q. 2009, 196–209 (206).

lies in the recourse to the categories of national law which may lead to different outcomes for functionally equivalent measures. A more "European" solution would be a distinction extrapolated from the *St. Paul Dairy* judgment. In that case, the ECJ did not exclude evidentiary measures *per se* from the definition of provisional measures, but rather advanced a distinction between evidentiary measures having the sole purpose of enabling the applicant to decide whether to bring a case (as it was the case with the hearing of the witness in *St. Paul Dairy*) and other evidentiary measures which – at least partly – perform also the purpose of preserving evidence or information, such as search and seizure orders under Directive 2004/48/EC[104]. The latter "protective" form of an evidentiary measure falls under the definition of provisional measures, as it "preserves a factual or legal situation so as to safeguard rights" and thus fulfils the general definition of provisional measures in the *Reichert* judgment[105]. This reading of *St. Paul Dairy* is now endorsed in Art. 2(b) and Recital 22 CP. It has a number of advantages: Not only does it clarify that the Evidence Regulation can no longer be regarded as *lex specialis* for evidentiary measures, it also introduces a European concept of evidentiary measure into the Brussels Regulation which is consistent with the Union's legislation in other fields. Even more important, it ensures that the court where the evidence is located has jurisdiction to immediately secure that evidence, without a lengthy detour via the Evidence Regulation.

b) Measures which may pre-empt the decision on the merits

A second point concerns measures which may pre-empt the decision on the merits. For interim payments, the ECJ has held that such measures constitute provisional measures in the sense of Art. 31 BR only if, first, repayment of the sum awarded is guaranteed if the plaintiff is unsuccessful as regards the substance of his claim and, second, the measure sought relates only to specific assets of the defendant located or to be located within the confines of the territorial jurisdiction of the court to which application is made[106]. While the second (territorial) limitation does not really concern the definition of provisional measures (but rather jurisdiction or enforcement),

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[104] Directive 2004/48/EC of 29. 4. 2004 of the European Parliament and of the Council on the enforcement of intellectual property rights, O.J. 2004 L 157/45.

[105] *Heinze*, Einstweiliger Rechtsschutz im europäischen Immaterialgüterrecht (2007) 112–116; *id.*, Beweissicherung im europäischen Zivilprozessrecht: IPRax 2008, 480 (483–485); *Ubertazzi*, The EC Council Regulation on evidence and the "description" of goods infringing IP rights: European Legal Forum (EuLF) 2008, I-80 (I-85); *Vlas/Ibili/Zilinsky/Vlek*, Civil Jurisdiction and Enforcement of Judgments in Europe: Neth. Int. L. Rev. 2009, 245–272 (270); French Reply 20; Romanian Reply 3; Swiss Reply 7 (pointing to priority of the Evidence Regulation); UK Reply I para. 31; Parliament Resolution para. 26; sceptical Finnish Reply 6; German Reply 14.

[106] ECJ 17. 11. 1998 (supra n. 86) para. 47.

the requirement of guaranteed repayment should be preserved: Interim performance, in particular interim payment, can be very dangerous for the defendant and a potential way to circumvent the jurisdiction rules in Arts. 2–24 BR. In addition, maintenance actions, where the inability of the applicant to lodge a bank guarantee due to a lack of funds and/or credit worthiness was probably most acute, are no longer governed by the Brussels Regulation, instead falling under Regulation 4/2009[107], where a different solution can apply. Therefore, the legislator should leave the restrictions on interim performance orders intact[108] and merely clarify that (negative) injunctions do not fall under the more stringent regime of positive interim performance orders. This could be done through a definition of provisional measures which, first, adopts the general definition of provisional measures from *Reichert*, second, clarifies the understanding of *St. Paul Dairy* as proposed by the Commission, and, third, stipulates specific conditions for positive interim performance orders (see proposal for Art. 2(b) and Recital 22 CP below).

2. Jurisdiction for provisional measures

At present, jurisdiction for provisional measures can either be based on jurisdiction as to the substance of a case in accordance with Arts. 2–24[109] or it may rest on Art. 31 BR in connection with the different national rules on jurisdiction for provisional measures. As explained above (IV. 1.), additional restrictions apply for jurisdiction based on Art. 31 BR, namely (1) the existence of a real connecting link[110] and (2) an autonomous Regulation definition of provisional measures. This system is sound in principle and should be preserved. It builds on the concept of procedural justice enshrined in the jurisdiction rules of Arts. 2–24 BR, but adds to them the idea of quick and effective interim relief under the national rules where the measure is to be enforced. If it was abandoned and the measures based on Art. 31 BR were not subject to any qualification at all, we would run the risk of exorbitant jurisdiction for provisional measures, which can be dangerous for the defendant even if such measures are later revoked by the court seised with the substance of the case. However, for the sake of clarity, the two-track jurisdictional system should be made explicit in the text of the Regulation. The

[107] Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, O.J. 2009 L 7/1.

[108] Bulgarian Reply 11; French Reply 20; German Reply 15 (against legislative action); Greek Reply 20; EESC Opinion para. 4.9.4–4.9.5; *Mankowski* 59.

[109] ECJ 17. 11. 1998 (supra n. 86) para. 19.

[110] ECJ 17. 11. 1998 (supra n. 86) para. 40.

Commission Proposal is thus to be welcomed for introducing a much clearer distinction between provisional measures issued by a court having jurisdiction as to the substance of the matter (Art. 35 CP) and provisional measures issued by other courts (Art. 31 BR/Art. 36 CP).

a) Measures issued by a court having jurisdiction as to the substance

At first sight, provisional measures issued by a court having jurisdiction as to the substance do not pose significant problems. As the issuing court is competent for the substance of the case, there does not seem to be a risk that the decision on the merits could be pre-empted by far-reaching provisional measures. It is therefore hardly surprising that the ECJ has accepted in *van Uden* that "the court having jurisdiction as to the substance of a case under one of the heads of jurisdiction laid down in the [Regulation] also has jurisdiction to order provisional or protective measures, without that jurisdiction being subject to any further conditions"[111]. Article 35 CP codifies this principle:

> "Where the courts of a Member State have jurisdiction as to the substance of a matter, those courts shall have jurisdiction to issue provisional, including protective measures as may be available under the law of that State."

At closer inspection, however, some questions appear. First, it is not entirely clear what is meant by "jurisdiction as to the substance of a matter". The clear case is the scenario where a court has already been seised with an action on the merits in accordance with Chapter II of the Regulation. More problematic is a situation in which no court has yet been seised with the merits. As both Art. 35 CP and the ECJ in *van Uden* speak of "jurisdiction as to the substance", not of "proceedings as to the substance [which] are pending" (as Art. 31 CP does), and as other Union law requires that provisional measures be available even before a court has been seised with the substance of a case[112], jurisdiction under Art. 35 CP should also be available before any proceedings on the merits have been started[113]. To clarify this point, Art. 35 CP should refer (as *van Uden* does) to "jurisdiction in accordance with Sections 1 to 8 of this Chapter" and mirror the language of Art. 7(1) Directive 2004/48/EC ("even before the commencement of proceedings on the merits of the case").

If this premise is shared, it brings up the question whether jurisdiction under Art. 35 CP persists after an action on the merits has been started in a

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[111] ECJ 17. 11. 1998 (supra n. 86) paras. 19, 22.

[112] Art. 7(1) Directive 2004/48/EC (supra n. 104).

[113] See ECJ 17. 11. 1998 (supra n. 86) para. 29 (for measures based on Art. 31 BR); *Domej* V B 3. Contra *Dickinson* 208 who proposes to restrict jurisdiction based on Arts. 2–24 BR to cases where the court is actually seised of proceedings.

different court. The question is, in other words, whether "jurisdiction as to the substance" under Art. 35 CP requires only that the respective court has (potential) jurisdiction on the merits in accordance with Sections 1 to 7[114] of Chapter II of the Brussels Regulation, or whether it is also necessary that this jurisdiction is not excluded by the *lis pendens* rule (Art. 27 BR/Art. 29 CP) given that the action on the merits is pending in a different court. The *van Uden* decision of the ECJ seems to support the former view, as the court speaks of "jurisdiction as to the substance of a case in accordance with Articles 2 and 5 to 18 [24] of the Convention [Regulation]"[115] and does not mention the *lis pendens* provision. In addition, it seems counterintuitive to allow that jurisdiction based on Art. 31 BR (Art. 36 CP) in connection with national law – which is available even where proceedings on the merits have already been commenced elsewhere[116] – is more robust than jurisdiction based on the jurisdiction rules of the Regulation itself. On the other hand, it may be argued that the price for the more liberal jurisdiction rule in Art. 36 CP is that provisional measures based on this provision can – under the Commission Proposal – only be enforced in the Member State granting the measure (Art. 2(a), Recital 25 CP). As this reduces the risk of conflicting provisional measures and gives the court seised with the substance the sole authority to issue cross-border provisional relief, this argument carries some force. An adequate compromise would be to allow provisional measures on the basis of Art. 35 CP even after proceedings as to the substance have started in a different court, but to subject these measures to the same restrictions which apply for measures based on Art. 31 BR (Art. 36 CP) (see proposal below for Art. 35 CP)[117].

b) Provisional measures issued by other courts

A second avenue of provisional relief is opened by Art. 31 BR (Art. 36 CP). Under this provision (changes in Art 36 CP in italics):

> "Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if ~~under this Regulation~~, the courts of another ~~Member~~ State *or an arbitral tribunal* have jurisdiction as to the substance of the matter".

(1) The requirement of a real connecting link. – The Commission does not propose significant changes for this provision (see italics). Most significantly, the Commission does not propose to codify the requirement of a "real con-

[114] Sections 1 to 8 under the Commission Proposal.

[115] ECJ 17. 11. 1998 (supra n. 86) para. 19.

[116] ECJ 17. 11. 1998 (supra n. 86) paras. 29, 34.

[117] *Domej* V B 4 proposes to allow cross-border execution of provisional measures also after another court has been seised with the substance of the matter.

necting link between the subject-matter of the measures sought and the territorial jurisdiction … of the court before which those measures are sought" which the Court of Justice has developed in *van Uden* for jurisdiction based on Art. 31 BR[118]. A reason for this reluctance may be the difficulty in defining the real connecting link. While many authors agree that such a link exists if the court granting a provisional measure is in a position to enforce the measure in the country in which they were granted[119], its outer limits are less certain[120]. For example, it is unclear whether the real connecting link requires the applicant to prove at the time the proceedings are started that the measures can be enforced in the forum state or – the better view – whether it is sufficient to demonstrate a certain probability of enforcement in the forum state when the proceedings are commenced[121]. A further problem arises in the case of an *in personam* order[122] which can be enforced in state A (because the defendant is physically present in A and/or has assets in A) but which aims to regulate the defendant's behaviour not (only) in state A, but (also) in state B (e.g. an injunction against a German domiciled company to stop certain behaviour in Spain). In such a case, the (prospective) place of enforcement would be Germany (where both the defendant and its assets are located and where immediate enforcement takes place), but the effects of the measure would be felt in Spain (where the behaviour is restrained). In other words, the decisive question becomes whether the real connecting link refers to the place where the measure is enforced or to the place where it produces its effects, or even to both[123].

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[118] ECJ 17. 11. 1998 (supra n. 86) para. 40.

[119] *Heß/Vollkommer*, Die begrenzte Freizügigkeit einstweiliger Maßnahmen nach Art. 24 EuGVÜ: IPRax 1999, 220–225 (223); *Stadler*, Erlaß und Freizügigkeit einstweiliger Maßnahmen im Anwendungsbereich des EuGVÜ – Auswirkungen der EuGH-Rechtsprechung auf das Gefüge des europäischen einstweiligen Rechtsschutzes: JZ 1999, 1089–1099 (1093); *de Miguel Asensio* (supra n. 100) 132; *Gaudemet-Tallon*, Compétence et exécution des jugements en Europe[4] (2010) para. 311; *Schack*, Internationales Zivilverfahrensrecht[5] (2010) para. 486; *Rauscher (-Leible)*, Europäisches Zivilprozess- und Kollisionsrecht[3] (2011) Art. 31 Brüssel I-VO para. 24; see also *Banco Nacional de Comercio Exterior SNC* v. *Empresa de Telecommunicaciones de Cuba*, [2007] EWCA (Civ) 662, para. 29; *Masri* v. *Consolidated Contractors International (UK) Ltd (No 2)*, [2008] EWCA (Civ) 303, para. 106 (English personal jurisdiction over the defendant as a "real connecting link"); OGH 16. 7. 2008 – Case 16Ok3/08, EuLF 2008, II-115 (II-118) para. 3.14; Cass. com. 8. 6. 2010 – Case 09–13.381 *(Batla minerals ./. Fortis Nederland)*, D. 2010, no. 25, 1566 = Zeitschrift für Gemeinschaftsprivatrecht (GPR) 2010, 220 (221).

[120] The *Pocar* Report on the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 30. 10. 2007, O.J. 2007 C 319/1 para. 127 decided against incorporating the "real connecting link" into the text of the Lugano Convention because it required "further clarification".

[121] *Rauscher (-Leible)* (supra n. 119) Art. 31 Brüssel I-VO para. 25a.

[122] For a similar debate concerning English freezing injunctions *Dickinson* 209–210.

[123] For the distinction between "enforcement" and "effects" Art. 18a(2) of the Commission Proposal 1997 (supra n. 91); *Heinze* (supra n. 105) 246–247, 258.

(2) Alternative solutions. – In view of these difficulties, it has been proposed to abandon the requirement of a real connecting link in Art. 31 BR. As a substitute, the Heidelberg Report suggested a coordination authority be vested in the court seised with the substance "to discharge, to modify or to adapt to its own legal system any provisional measure granted by a court of another Member State"[124]. Alternatively, it has been put forward to abandon the real connecting link in favour of a new recital under which the court should, "in deciding whether to grant, renew, modify or discharge a provisional measure in support of proceedings in another Member State", "take into account all of the circumstances, including (i) whether there is a real connecting link between the measure sought and the territory of the Member State in which it is sought, and (ii) the likely impact of the measure on proceedings pending or to be issued in another Member State"[125].

While both concepts have their virtues, it should not be forgotten that their adoption would lead to a fundamental change of the jurisdiction rules as they stand today. In their results, both proposals want to abolish a – at least in its core meaning of enforcement – clear jurisdictional restriction for provisional measures based on Art. 31 BR. However, the idea that jurisdiction under Art. 31 BR is best attributed to the courts where the assets subject to the measures sought are located, as these courts are "best able to assess the circumstances which may lead to the grant … of the measures sought or to … guarantee the provisional … character of the measures ordered"[126] has been fundamental in the jurisprudence of the Court since the early days of *Denilauler.* It has been the idea of proximity from *Denilauler* and the fear of circumvention of the European jurisdiction rules from *van Uden* which has been the influence behind the real connecting link[127]. It is hard to see how these concerns could be addressed if the real connecting link was abolished. Certainly it is true that the coordination authority will prevent exorbitant provisional measures from lasting too long. Still, in many cases irreparable harm will already have been done before a court can even be seised with the substance and have the opportunity to modify or discharge the measure. It is equally true that the discretionary approach may work well in a common law environment, but it seems predictable that such flexible criteria would compromise legal certainty and uniform application of the Brussels Regulation, in particular in those jurisdictions where judges are used to clear-cut rules defining their competence.

The most important counter-argument, however, stems from the overarching objective of developing a European area of freedom, security and

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[124] Heidelberg Report *(-Schlosser)* para. 654; see above n. 84.

[125] *Dickinson* 210 (mentioning further criteria on 213); Parliament Resolution paras. 29–30.

[126] ECJ 21. 5. 1980 – Case 125/79 *(Denilauler)*, E. C. R. 1980, 1553, para. 16.

[127] ECJ 17. 11. 1998 (supra n. 86) paras. 39–40, 46–47.

justice. This aim and the Union competence to adopt measures in the field of judicial cooperation in civil matters "testify to the will of the Member States to establish such measures firmly in the Community legal order"[128] and lay the foundation for an understanding of the Brussels Regulation as a "unified and coherent system of rules on jurisdiction"[129]. Abandoning a European rule on jurisdiction, even a judge-made rule such as the real connecting link, in favour of national diversity sits at odds with these objectives and runs counter to the idea of "a complete set of rules on international jurisdiction of the courts of the Member States" (Recital 17 CP). Even if the criterion of a real connecting link may be difficult to define at its fringes, the underlying principle of quick and effective interim relief by the courts where the measure shall be enforced is a sensible safeguard against uncontrolled proliferation of provisional measures on the basis of national law[130].

(3) The Commission Proposal: A solution at the enforcement stage. – Possibly to avoid all these difficulties, the Commission did not choose to amend Art. 31 BR (Art. 36 CP) to define the real connecting link, but preferred a solution at the enforcement stage[131]. Article 2(a) CP restricts cross-border enforcement under Chapter III BR to those provisional measures that have been "ordered by a court which by virtue of this Regulation has jurisdiction as to the substance of the matter" (Recital 25 2nd sentence). On the other hand, provisional measures adopted by other courts (Art. 31 BR/Art. 36 CP) "should be confined to the territory of that Member State" (Recital 25 3rd sentence CP).

This solution builds on an understanding of the real connecting link as referring to the place of (prospective) enforcement, but it avoids a definition by simply denying enforcement under Chapter III[132]. It has an appeal of both simplicity and consistency with other European instruments, as both the Brussels IIbis Regulation[133] and the Community Regulations on unitary IP rights[134] have the same rule. It does however come at a price. First, it may

[128] ECJ 8. 11. 2005 – Case C-443/03 *(Leffler)*, E. C. R. 2005, I-9611, para. 45.

[129] ECJ 7. 2. 2006 – Opinion 1/03 *(Lugano Convention)*, E. C. R. 2006, I-1145, para. 151.

[130] For preservation of the real connecting link Bulgarian Reply 11; Estonian Reply 3; French Reply 20; German Reply 15; Lithuanian Reply 4; Netherlands Reply para. 23; University of Oviedo Reply 7.

[131] The same position is taken in the *Pocar* Report (supra n. 120) para. 127.

[132] In order to express this more clearly and to avoid confusion between "enforcement" and "effects" of provisional measures, recital 25 3rd sentence should read (infra text at n. 140): "Where, however, such measures are adopted by a court not having jurisdiction as to the substance, ~~the effect of~~ such measures should ~~be confined to the territory of that Member State~~ *not enjoy free circulation under Chapter III of this Regulation*".

[133] ECJ 15. 7. 2010 – C-256/09 *(Purrucker)* para. 83 (not yet reported). A territorial restriction is also found in Arts. 3(2)2, 27 Council Regulation (EC) No. 1346/2000 of 29. 5. 2000 on insolvency proceedings, O.J. 2000 L 160/1.

[134] Art. 103(2) Council Regulation (EC) No. 207/2009 of 26. 2. 2009 on the Commu-

encourage a transfer of assets outside the forum state once provisional relief is applied for on the basis Art. 31 BR (Art. 36 CP), as the eventual measure will not reach beyond the borders of this state[135]. In addition, it makes it more difficult for a court not having jurisdiction over the substance to "lend its remedies" to another court. This practice may be useful if a jurisdiction has developed specific forms of provisional relief which the court competent for the merits does not possess. Under present law, provided that a real connecting link can be established, the court lending its remedies can issue a provisional measure on the basis of Art. 31 BR which may be enforced in other Member States under Chapter III of the Brussels Regulation[136]. Under the Commission Proposal such a lending of remedies would no longer be possible as the measure based on Art. 31 BR (Art. 36 CP) would not enjoy recognition and enforcement under Chapter III BR. The applicant would either have to seek cross-border provisional relief from the court competent as to the substance of the case (Art. 35 CP) or would have to apply for local relief in every jurisdiction where enforcement was necessary (Art. 36 CP).

While these concerns are relevant, they do not outweigh the advantages of the Commission Proposal. The risk of a transfer of assets is real but may be countered by *ex parte* measures in the enforcement state and by parallel provisional measures taken by the court competent for the substance of the case (which enjoy cross-border enforcement, Art. 2(a) CP). It should also not be forgotten that cross-border enforcement necessarily leads to a separation of the lended remedy from its enforcement context, which will often only be possible at the expense of specific effects of the measure. As the UK government has rightly pointed out in *Purrucker*, the downside of accepting free recognition and enforcement of measures based on Art. 31 BR (Art. 36 CP) is a risk of circumventing the rules of jurisdiction laid down by the Regulation and forum shopping[137]. These concerns are even more relevant in a system where exequatur proceedings are abolished, as allowing several courts to issue cross-border measures which circulate freely in all Member States increases the risk of contradicting orders at the enforcement stage (Recital 25 1st sentence CP)[138]. Finally, it should not be forgotten that an

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nity trade mark, O.J. 2009 L 78/1; Art. 90(3) Council Regulation (EC) No. 6/2002 of 12. 12. 2001 on Community designs, O.J. 2002 L 3/1.

[135] This point has also been made in the parallel discussion on Art. 20 Brussels IIbis Regulation, where it has been rejected by the ECJ on 15. 7. 2010 (supra n. 133) para. 82. See also *Dickinson* 212, who fears "evasive action and a multiplicity of legal proceedings" if measures based on Art. 31 BR were excluded from Chapter III BR; see also Slovenian Reply 10.

[136] See ECJ 27. 4. 1999 – Case C-99/96 *(Mietz)*, E.C.R. 1999, I-2277, paras. 51–56; 6. 6. 2002 – Case C-80/00 *(Italian Leather)*, E.C.R. 2002, I-4995, paras. 39, 41; *Dickinson* 212; *Domej* (supra n. 77) 126.

[137] ECJ 15. 7. 2010 (supra n. 133) para. 91.

[138] Belgian Reply 7; Latvian Reply 10. See ECJ 6. 6. 2002 (supra n. 136) para. 52, where Art. 34(3) BR was applied to provisional measures.

extraterritorial *effect* of provisional measures is not prohibited by Art. 2(a) CP as long as the court issuing the measure can *enforce* it domestically (e.g. because the defendant is present in this jurisdiction)[139]. In order to clarify this point, Recital 25 CP should be amended to reflect the approach of Art. 2(a) CP more clearly[140].

For the sake of simplicity, certainty and consistency with other instruments, and in view of the difficulties in defining the real connecting link, the Commission's solution on the level of enforcement thus deserves to be supported[141]. In the long run, probably the best solution would be a partial harmonisation of specific cross-border provisional remedies[142], as it has been done in intellectual property law[143] and as may soon follow for freezing and disclosure orders[144]. For jurisdiction, it suffices to say that the exclusion of cross-border enforcement of provisional measures based on Art. 31 BR shifts the real connecting link to the enforcement level, which makes it less important to define this requirement at the level of jurisdiction[145].

3. Recognition and enforcement of provisional measures

A further important amendment concerns the recognition and enforcement of provisional measures. It is implemented in the new general provision on definitions in Art. 2 CP, where Art. 2(a) CP defines "judgment" for the purposes for Chapter III on recognition, enforceability and enforcement.

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[139] For this distinction supra n. 122 and n. 123. *Domej* V B 4 rightly points out that the effects of provisional measures (e.g. a seizure order) which have already been enforced in the country of origin should continue to be respected in other countries.

[140] Supra n. 132.

[141] An alternative solution would be to grant provisional measures issued by the court having jurisdiction as to the substance of the matter priority at the enforcement stage, which could be implemented by an amendment of Art. 34 BR (Art. 43 CP), see French Reply 21. However, this solution would not exclude from the outset the risk of contradictory decisions, but only alleviate its impacts and may thus be regarded as less efficient than the Commission Proposal. If this proposal is taken up, it may also be clarified that the decision on the merits takes precedence over provisional measures.

[142] *Mankowski* 57–58 (for the jurisdiction rule).

[143] See Arts. 7, 9 Directive 2004/48/EC (supra n. 104), currently under consideration in COM(2010) 779 and SEC(2010) 1589.

[144] European Parliament Committee on Legal Affairs, Draft Report with recommendations to the Commission on proposed interim measures for the freezing and disclosure of debtors' assets in cross-border cases (2009/2169(INI) (16. 12. 2011).

[145] A possible definition in Art. 31 BR/Art. 36 CP could read: "Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if the courts of another State or an arbitral tribunal have jurisdiction as to the substance of the matter*, provided that these measures are to be enforced in the territory of the Member State granting the measure*."

> "For the purposes of Chapter III, the term 'judgment' includes provisional, including protective measures ordered by a court which by virtue of this Regulation has jurisdiction as to the substance of the matter. It also includes measures ordered without the defendant being summoned to appear and which are intended to be enforced without prior service of the defendant if the defendant has the right to challenge the measure subsequently under the national law of the Member State of origin."

This definition introduces two important changes for the law of provisional measures, namely a territorial restriction of provisional measures based on national jurisdiction rules (Art. 31 BR/Art. 36 CP) to the Member State of origin and the free circulation of *ex parte* measures.

a) Territorial restriction for measures based on Art. 31 BR (Art. 36 CP)

Under present law, provisional measures are regarded as "judgments" in the sense of Art. 32 BR and may thus be enforced under Chapter III of the Brussels Regulation[146]. This holds true not only for provisional measures ordered by a court having jurisdiction as to the substance of the matter (Art. 35 CP), but also for provisional measures granted on the basis of Art. 31 BR (Art. 36 CP) in connection with national rules on jurisdiction[147]. For the latter measures, such a grant is subject to a review, at the level of enforcement, whether the measure is in conformity with the definition of provisional measure in Art. 31 BR[148].

Article 2(a) CP will change the law in this regard and restrict cross-border enforcement under Chapter III BR to those measures that have been ordered by a court having jurisdiction by virtue of the Brussels Regulation as to the substance of the matter (Art. 35 CP). On the other hand, the effect of provisional measures adopted by a court not having jurisdiction as to the substance (i.e. having jurisdiction based on Art. 31 BR/Art. 36 CP in connection with national law) "shall be confined to the territory of that Member State" (Recital 25 CP). More specifically, such measures shall not be enforced as "judgments" under Chapter III (Art. 2(a) CP). As pointed out above (IV. 2. b) (3)), this proposal shifts the requirement of a real connecting link from the level of jurisdiction to the enforcement stage and may be seen as a welcome clarification, despite some disadvantages. For the enforcement level, it remains to be asked whether the exclusion of provisional measures based on Art. 31 BR (Art. 36 CP) from cross-border enforcement under the Regulation also pre-empts any recognition and enforcement under more favourable national rules[149]. Drawing an analogy from the *Purrucker* decision

[146] ECJ 14. 10. 2004 – Case C-39/02 *(Mærsk)*, E. C. R. 2004, I-9657, para. 46.

[147] Supra n. 136.

[148] ECJ 27. 4. 1999 (supra n. 136) para. 51.

[149] A further point would be whether an earlier provisional measure granted by a local

on Brussels IIbis, this does not seem to be the case, at least as long as recognition and enforcement is not fully harmonised by European rules[150].

b) Free circulation of ex parte measures

A second amendment concerns provisional "measures ordered without the defendant being summoned to appear and which are intended to be enforced without prior service of the defendant" (*ex parte* measures). The Commission is right to revisit the thirty-year-old *Denilauler*-jurisprudence of the ECJ[151] which excludes *ex parte* measures from cross-border enforcement and to clarify that such measures can be recognised and enforced on the basis of the Regulation if the defendant has the "right to challenge the measure subsequently under the national law of the Member State of origin" (Art. 2(a), Recital 25 4th sentence CP)[152]. As it has been pointed out in legal scholarship, both consistency with Directive 2004/48/EC[153] (which explicitly requires Member States to introduce *ex parte* relief) and the more flexible approach of both the ECJ[154] and the ECHR[155] in the interpretation of the right to be heard in the context of provisional measures militate in favour of such a more liberal approach[156].

Commission Proposal **Recitals**	**Proposed Amendments** **Recitals**
(22) The notion of provisional, including protective measures should be clarified.	(22) ~~The notion of provisional, including protective measures should be clarified.~~ *Provisional, including protective measures are measures*

court can, even if itself excluded from cross-border recognition, exclude enforcement of later provisional measures by other (foreign) courts under Art. 34(4) BR, *Domej* V B 3.

[150] ECJ 15. 7. 2010 (supra n. 133) para. 92.

[151] ECJ 21. 5. 1980 (supra n. 126) para. 18.

[152] Endorsed by Bulgarian Reply 11; Estonian Reply 3; French Reply 19; Greek Reply 19; Italian Reply 3; Lithuanian Reply 4; Polish Reply 7; Swiss Reply 7; UK Reply I para. 30; Bar Council of England and Wales Reply para. 6.1; University of Oviedo Reply 7; University of Valencia Reply para. 6.6 (under certain conditions); Deutscher Anwaltverein Reply para. 2.6; Parliament Resolution para. R; *Mankowski* 60; contra Finnish Reply 6; German Reply 16; Spanish Reply 6 (only recognition of ex parte measures by court competent for the substance).

[153] Directive 2004/48/EC (supra n. 104) Art. 7(1) and Art. 9(4).

[154] ECJ 2. 5. 2006 – Case C-341/04 *(Eurofood)*, E. C. R. 2006, I-3813, para. 66.

[155] ECHR 15. 10. 2009, Case 17056/06 *(Micallef ./. Malta)* para. 86.

[156] *Heinze*, Europäische Urteilsfreizügigkeit von Entscheidungen ohne vorheriges rechtliches Gehör: Zeitschrift für Zivilprozess 120 (2007) 303 (313–317, 320); for earlier proposals to give up *Denilauler* under Brussels I see *Micklitz/Rott*, Vergemeinschaftung des EuGVÜ in der Verordnung (EG) Nr. 44/2001: EuZW 2002, 15 (16); *Geimer/Schütze (-Geimer)* (supra n. 53) Art. 31 A.1 para. 97.

	intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is or has been otherwise sought from the court or arbitral tribunal having jurisdiction as to the substance of the case. ~~They~~ *Such* measures should include, in particular, protective orders aimed at obtaining information or preserving evidence, thus covering search and seizure orders as referred to in Article 6 and 7 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights. They should not include measures which are not of a protective nature, such as measures ordering the hearing of a witness for the purpose of enabling the applicant to decide whether to bring a case. *An order for positive interim performance, in particular interim payment, does not constitute a provisional measure unless the enforcement of the order is subject to the lodging by the applicant of adequate security to ensure repayment of the sum awarded including compensation for any prejudice suffered if the applicant is unsuccessful as regards the substance of his claim.*
They should include, in particular, protective orders aimed at obtaining information or preserving evidence, thus covering search and seizure orders as referred to in Article 6 and 7 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights. They should not include measures which are not of a protective nature, such as measures ordering the hearing of a witness for the purpose of enabling the applicant to decide whether to bring a case.	
(25) The removal of intermediate measures requires an adaptation of the free circulation of provisional, including protective measures. Where such measures are ordered by a court having jurisdiction as to the substance of a dispute, their free circulation should be ensured. Where, however, such measures are adopted by a court not having jurisdiction as to the substance, the effect of such measures should be confined to the territory of that Member	(25) The removal of intermediate measures requires an adaptation of the free circulation of provisional, including protective measures. Where such measures are ordered by a court having jurisdiction as to the substance of a dispute, their free circulation should be ensured. Where, however, such measures are adopted by a court not having jurisdiction as to the substance, ~~the effect of~~ such measures should *not enjoy free circulation under Chapter III of this*

State. Furthermore, the free circulation of measures ordered *ex parte* should be allowed if accompanied by appropriate safeguards.

Article 2

(b) 'provisional, including protective measures' shall include protective orders aimed at obtaining information and evidence;

Article 35

Where the courts of a Member State have jurisdiction as to the substance of a matter, those courts shall have jurisdiction to issue provisional, including protective measures as may be available under the law of that State.

Regulation ~~be confined to the territory of that Member State~~. Furthermore, the free circulation of measures ordered *ex parte* should be allowed if accompanied by appropriate safeguards.

Article 2

(b) 'provisional, including protective measures' *are measures intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is or has been otherwise sought from the court or arbitral tribunal having jurisdiction as to the substance of the case. They* shall include protective orders aimed at obtaining information and evidence. *An order for positive interim performance, in particular interim payment, does not constitute a provisional measure unless the enforcement of the order is subject to the lodging by the applicant of adequate security to ensure repayment of the sum awarded including compensation for any prejudice suffered if the applicant is unsuccessful as regards the substance of his claim*;

Article 35

(1) Where the courts of a Member State have jurisdiction as to the substance of a matter *in accordance with Sections 1 to 8 of this Chapter*, those courts shall have jurisdiction to issue provisional, including protective measures as may be available under the law of that State, *even before the commencement of proceedings on the merits of the case.*

(2) Once a court of a Member State has been seised with proceedings as to the substance of the matter, later provisional measures issued by other courts on the

	basis of paragraph 1 shall not be regarded as a 'judgment' for the purposes of Chapter III.
Article 36	**Article 36**
[no changes]	[no changes][157]

V. Summary

In general, the thrust of the Commission Proposal in all three areas is to be welcomed, albeit with different degrees of enthusiasm. While a European conflict rule for jurisdiction agreements would be a sensible improvement (supra II. 1.), both the empirical basis (supra II. 2. a)) and the ease of implementing a priority rule for jurisdiction agreements (supra II. 2. b) c)) are more difficult to establish. As to the coordination of proceedings, the Commission is undoubtedly on the right track but should go even further than proposed (supra III. 1.). Finally, the proposals for provisional measures, so far the stepchild of European civil procedure, do away with unnecessary complication and uncertainty (supra IV. 1., 2. a)), however at the price of restricting the free circulation of provisional measures granted by courts which lack jurisdiction as to the substance (supra IV. 2. b)). It may be that such a form of "hierachisation"[158] will herald a new era of judicial cooperation in Europe which supplements the doctrine of mutual trust.

[157] For a potential amendment supra n. 145.
[158] *Hess* (supra n. 45) 129.