Pragmatism in the European Union: Recasting the Brussels I Regulation to Ensure the Effectiveness of Exclusive Choice-of-Court Agreements

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Abstract

The Brussels regime of international instruments governing jurisdiction and the recognition and enforcement of judgments in civil and commercial matters provides a comprehensive framework of uniform rules for allocating jurisdiction and promoting the free circulation of judgments. In general, this regime has successfully facilitated cross-border litigation in the European judicial area. Nevertheless, it has been significantly criticised for its treatment of exclusive choice-of-court agreements. The European legislature intends to address such criticism with the recasting of the Brussels I Regulation. This article examines, inter alia, the key modifications in the Recast Regulation concerning this area, namely, the reversal of the priority ruling and the introduction of a harmonised choice-of-law rule. These reforms are purportedly designed to achieve two fundamental goals: to enhance the effectiveness of choice-of-court agreements and to ensure that such agreements are treated consistently in both the Recast Regulation and the Hague Convention of Choice of Court Agreements. It is suggested that, in the main, the proposed amendments should satisfy these objectives. However, the article also maintains that the reforms should have been extended to improve the treatment of jurisdictional agreements in favour of non-European States.

1. Introduction

The aim of the Brussels I Regulation¹ is to further the ideal of an internal market by promoting the free circulation of civil and commercial judgments within the European Union (EU).² This goal is achieved, in part, by strictly allocating jurisdiction in

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² The Regulation, Recital 6. See also A Bell, Forum-Shopping and Venue in Transnational Litigation (OUP 2003) 52.
accordance with a hierarchy of jurisdictional rules. In 2009, however, a report on the application of the Regulation published by the European Commission identified inter alia two major concerns regarding the instrument's treatment of valid choice-of-court agreements. The first was that the regime inadequately protected exclusive choice-of-court agreements, while the second concern arose from the need to ensure that choice-of-court agreements were effective both within and beyond EU borders. The Report also highlighted the need for coherency between the rules of the Recast Regulation and the Hague Choice of Court Agreement Convention (HCCA), a treaty which primarily focuses on improving the legal certainty of jurisdiction agreements in international commercial relationships.

In December 2010, the European Commission advanced the process for reforming the Regulation by releasing its Recast Proposal. The draft amendments proposed by the Commission were subjected to an extensive review by the European legislature and it was not until 20 November 2012 that the European Parliament voted

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4 European Commission, 'Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 44/2001 COM (2009) 174 final [21.4.2009]. Hereinafter this report shall be referred to as the 'Commission's Report' or the 'Report'. See also Article 73 of the Regulation, which provides that, no later than five years after its entry into force, the Commission shall prepare a report on the operation of the Regulation.


6 Ibid (COM (2009) 174 final) 6. An exclusive jurisdiction clause not only confers jurisdiction on a particular court but also precludes a party from litigating in another forum. Alternatively, a non-exclusive jurisdiction clause merely amounts to a submission to the jurisdiction of the specified court and does not prevent litigation from being initiated elsewhere. See J Fawcett, 'Non-exclusive Jurisdiction Agreements in Private International Law' [2001] LMCLQ 234, 234-36. Note that jurisdiction agreements in both the Regulation and the Hague Convention of 30 June 2005 on Choice-of-Court Agreements (HCCA) are presumed to be exclusive. Article 23(1) of the Regulation provides that: '[j]urisdiction shall be exclusive unless the parties have agreed otherwise', while Article 1 of the HCCA holds that this treaty applies in '(...) international cases to exclusive choice-of-court agreements concluded in civil and commercial matters.' References to choice-of-court agreements in this article should be assumed to be of the exclusive form. Hereinafter, the HCCA shall also be referred to as 'the Convention'.


8 Ibid.

9 Impact Assessment (n 5) 29. The HCCA is not yet in force. However, on 26 September 2007, Mexico became the first State to accede to the Convention. The United States signed on 19 January 2009 and the European Union followed on 1 April 2009. To date, Mexico, the United States and the European Union are the only States to have signed the Convention. See Hague Conference on Private International Law, 'The Hague Convention of 30 June 2005 on Choice of Courts Agreements' <http://www.hcch.net/index_en.php?act=conventions.status&cid=98> accessed 29 June 2013.

in favour of the revised text. On 6 December 2012, the EU Council also adopted the Recast. It is worth noting that, although the instrument entered into force on 9 January 2013, the revised European jurisdictional regime will apply only to proceedings initiated on or after 10 January 2015.

The Recast incorporates a number of measures that purportedly enhance the effectiveness of choice-of-court agreements. The fact that the Regulation has been described as '(...) the most successful instrument on international civil procedure of all time' and is considered a fundamental component of commercial and legal practice in the EU requires that the revisions to the Regulation be 'closely scrutinised' and 'not accepted without demur'. In light of these strong claims, and the significance of the Brussels regime to the operation of the internal market, the central purpose of this article is to critically assess the amendments in the Recast.

This article will initially elaborate on the main issues that obscured the enforcement of jurisdiction agreements under the Regulation. Following an outline of the relevant amendments in the Recast, a critical evaluation of the key reforms to the law governing choice-of-court agreements in Europe shall be presented. The reforms will then be assessed in the context of the HCCA. The article maintains that the proposed amendments are not only necessary but, in view of the growth in cross-border business transactions in the global economy and the concomitant demand for greater certainty in international commercial litigation, can rightfully be described as pragmatic and meaningful. Firstly, however, it is essential to appreciate the problems that currently taint the relationship between the Regulation and choice-of-court agreements.

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13 E Crawford and J Carruthers, 'Brussels I bis - the Brussels Regulation recast: closure (for the foreseeable future)' (2013) SLT 89, 89. For the adopted text, see Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (recast), [2012] OJ L351/1. Hereinafter the adopted recast Regulation shall be referred to as the 'Recast Regulation' or the 'Recast').


2. The Interaction Between Choice-of-Court Agreements and the Regulation

The parties’ autonomous choice of venue is accorded significant respect within the Regulation’s rigid framework of jurisdictional rules. For instance, Article 23 of the Regulation provides for the exclusive jurisdiction of a Member State’s courts where the parties have incorporated an exclusive choice-of-court agreement prorogating that particular court. This provision is an exception to the general rule contained in Article 2 which specifies that the defendant can only be sued in their country of domicile. The Brussels regime, though, must also consider other values and a fundamental objective is to negate the risk of producing irreconcilable judgments. The possibility of concurrent proceedings, and subsequent inconsistent decisions, is prevented by a 'simple test of chronological priority' articulated in Article 27(1) of the Regulation that grants precedence to the first seised court in resolving conflicts of jurisdiction. This provision provides that:

[w]here proceedings involving the same cause of action between the same parties are brought in the courts of different member States, any court other than the court first seised shall (...) stay its proceedings until such time as the jurisdiction of the court first seised is established.

The test expressed in the Regulation's Article 27 is also referred to as the 'first-in-time' rule or the doctrine of *lis pendens*.

Gardella and Radicati di Brozolo maintain that the *lis pendens* doctrine is designed to ensure 'neutrality, predictability and certainty' in litigation. Further, these authors contend that this procedural system for allocating jurisdiction is typical of the civil law tradition which has largely influenced the rules of the Brussels regime. In effect, the first-in-time rule creates certainty by strictly curtailing the discretionary power of the judiciary. This approach contrasts starkly with the common law doctrine of *forum non conveniens* for resolving conflicts of jurisdiction, which effectively proposes that a court may decline jurisdiction on the grounds that it is not the appropriate forum.

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21 Clarke (n 17) 7.
23 *ibid* 612.
and that considerations of justice require that the dispute is resolved in the courts of another State.\textsuperscript{24}

Critically, the Court of Justice of the European Union (CJEU) unequivocally endorsed the \textit{lis pendens} doctrine in \textit{Gasser}, the leading authority concerning the interplay between Articles 23 and 27 of the Regulation. In this case, an Austrian manufacturer and supplier, Erich Gasser, and MISAT, an Italian distributor, held a long-term contract for the supply of children's clothing.\textsuperscript{25} The contract included a clause that granted exclusive jurisdiction to the courts of Austria.\textsuperscript{26} MISAT, in breach of the jurisdictional clause, commenced proceedings before a court in Rome for a declaration that the contract had been terminated. The supplier subsequently brought proceedings before the designated Austrian court.\textsuperscript{27} MISAT contested the validity of the Austrian court's jurisdiction claiming that, pursuant to Article 21 of the Brussels Convention (now Article 27 of the Regulation), it was for the Italian court to decide this matter as the first seised court.\textsuperscript{28} The primary question referred by the Austrian appellate court to the CJEU for clarification was whether the second seised court, which had exclusive jurisdiction pursuant to the choice-of-court agreement, could review the jurisdiction of the first seised court.\textsuperscript{29} The CJEU confirmed that if one party commences proceedings in breach of a jurisdiction agreement before the other party brings an action in the putatively chosen court, the second seised court must stay proceedings until the first court has ascertained whether it holds jurisdiction.\textsuperscript{30}

\textit{Gasser} has been subjected to substantial criticism. Although the Court upheld the strictures of the first-in-time rule,\textsuperscript{31} legal commentators objected to the fact that the decision encourages 'abusive litigation tactics'\textsuperscript{32} in commercial practice as proceedings may be initiated in 'bad faith' in a forum other than that agreed upon by the parties.\textsuperscript{33} A race to court often eventuates to effect control of the forum.\textsuperscript{34} Briggs asserts that this outcome is 'lamentable' and attributes the blame on '(...the weakness of Article 23, the stiffness of Article 27 and \textit{Gasser}).'\textsuperscript{35} Furthermore, in \textit{Turner v Grovit},\textsuperscript{36} the CJEU ruled that the use of anti-suit injunctions, which can be used to strengthen the effect of jurisdiction agreements by restraining a party from pursuing proceedings before a non-

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\textsuperscript{24} \textit{Spiliada Maritime Corp v Cansulex Ltd} [1987] AC 460, [476] (Lord Goff).
\textsuperscript{25} \textit{Gasser} (n 16) [11].
\textsuperscript{26} \textit{ibid} [12].
\textsuperscript{27} \textit{ibid} [13].
\textsuperscript{28} \textit{ibid} [14].
\textsuperscript{29} \textit{ibid} [20].
\textsuperscript{30} \textit{ibid} [54].
\textsuperscript{31} Harris (n 18) 368.
\textsuperscript{32} Impact Assessment (n 5) 28.
\textsuperscript{33} Harris (n 18) 368. See also D Sancho Villa, 'Jurisdiction over Jurisdiction and Choice-of-Court Agreements: Views on the Hague Convention of 2005 and Implications for the European Regime' (2010) 12 Yrbk Priv Intl L 399, 402.
\textsuperscript{34} \textit{ibid} (Sancho Villa) 402.
\textsuperscript{36} \textit{Turner v Grovit} [2004] ECR I-3565.
chosen court,\textsuperscript{37} is incompatible with the principle of mutual trust that the Member States are required to extend to '(... one another's legal systems and judicial institutions.'\textsuperscript{38}

The CJEU's case law has been regularly criticised for promoting tactical manoeuvres that are commonly referred to as 'Italian torpedo' actions.\textsuperscript{39} This is a particularly effective tactic employed by unscrupulous parties whereby the court of a Member State with an inordinately slow procedural system is seised first.\textsuperscript{40} The subsequent delay can secure an advantage for the party that launched the initial proceedings in the non-designated or 'wrong' court by frustrating the opposing party in terms of both time and the extra costs incurred from protracted litigation.\textsuperscript{41} Mance asserts, therefore, that the CJEU's literal interpretation of the Regulation presents real 'problems for legitimate claimants' and opportunities for those litigants who are unwilling to meet their contractual obligations.\textsuperscript{42}

In addition, the absolutist interpretative approach adopted by the CJEU has significant potential to undermine the effectiveness of jurisdiction agreements which nominate the courts of a non-Member State.\textsuperscript{43} On this point, there is no provision in the Regulation's text that directly regulates the relationship between the courts of Member States and non-Member States.\textsuperscript{44} Nevertheless, the CJEU's decision in \textit{Owusu v Jackson}\textsuperscript{45} has caused 'general unease' amongst a number of common law lawyers on the basis that the Court's jurisprudence does not adequately protect the parties' intention to litigate in a non-EU court.\textsuperscript{46}

In \textit{Owusu}, the plaintiff, a UK domiciliary, was seriously injured while on vacation in Jamaica. Mr Owusu brought suit in the High Court of England and Wales against Mr Jackson, the owner of the premises where the plaintiff was injured, and five Jamaican legal entities that supervised the premises.\textsuperscript{47} Crucially, Jackson was also domiciled in the UK. The defendants sought for the proceedings to be stayed, basing their claim on the common law doctrine of \textit{forum non conveniens} and arguing that Jamaica was the natural forum.\textsuperscript{48} The CJEU rejected the application and ruled that the mandatory nature of the jurisdictional rule in Article 2 prohibited a stay of proceedings.

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\textsuperscript{38} Turner v Grovit (n 36) [24].
\textsuperscript{39} Cachia (n 37) 77.
\textsuperscript{40} T Hartley, \textit{International Commercial Litigation} (CUP 2009) 254-5.
\textsuperscript{42} Mance (n 20) 357.
\textsuperscript{43} Harris (n 18) 371. See also Mance (n 20) 362.
\textsuperscript{44} CMV Clarkson and J Hill, \textit{The Conflict of Laws} (3rd edn, OUP 2006) 117.
\textsuperscript{45} Owusu v Jackson Case C-281/02 [2005] ECR I-1383 (hereinafter 'Owusu').
\textsuperscript{46} Harris (n 18) 371. See also E Peel, 'Forum non conveniens and European Ideals' [2005] LMCLQ 363, 367-72.
\textsuperscript{47} Owusu (n 45) [11], [12] and [14].
\textsuperscript{48} \textit{ibid} [15].
\end{flushright}
under the principle of *forum non conveniens*. The concern of some UK conflicts scholars with respect to *Owusu* is that the mandatory acquisition of jurisdiction under the auspice of Article 2 could override a mutual agreement that confers jurisdiction on a non-EU court. It is suggested that the Court's commitment to legal certainty in this case highlights the ideological divide between the civil law and common law traditions over jurisdictional issues.

The applicable law governing the validity of the parties' agreement is another source of uncertainty within the Regulation. The CJEU provides that in the context of validity, the concept of an 'agreement conferring jurisdiction' must be construed autonomously. Essentially, the case law illustrates that if the formal requirements are satisfied, then consensus is established for the purpose of upholding the choice-of-court agreement. Under this interpretation, there is 'little room for national law'. That construction, though, is open to criticism because '(...) if the national court is not entitled to examine the essential validity of the agreement' the fundamental purpose of Article 23 may be frustrated.

Moreover, the Commission's Report highlighted that not only is the substantive validity of jurisdiction agreements sometimes regulated on a residual basis by the various national laws but difficulties can arise throughout the European judicial area due to different choice-of-law rules in the Member States. In applying their own conflict rules to ascertain the applicable law, some Member States' courts refer to the *lex fori*, due to the procedural purpose of the jurisdiction clause, while others apply the *lex causae*. Therefore, there is an inherent risk that the agreement's substantive validity may be assessed differently in different Member States. In turn, this raises the

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49 *ibid* [46].
51 Harris (n 18) 381.
52 Sancho Villa (n 33) 402. Such disputes generally relate to the 'existence of the agreement' - for example, whether there was proper consent - and other elements regarding the substantive validity of the impugned agreement such as capacity, fraud or duress (see Sancho Villa (n 33) 400).
54 Article 23(1) of the Regulation specifies the formal requirements of a choice-of-court agreement and stipulates that the agreement must be: (a) in writing; or (b) in a form established in practice between the parties; or (c) in a form that accords with international trade usage.
55 Case 24/76 *Salotti v RUWA* [1976] ECR 1831[7]. See also *Deutsche Bank AG v Asia Pacific Broadband Wireless Communications Inc* [2008] EWCA Civ 1091 [23] (Longmore LJ); Dickinson, ‘Surveying the Proposed Regulation’ (n 53) 285.
56 Sancho Villa (n 33) 402.
58 COM (2009) 174 final (n 4) 5.
59 Steinle and Vasiliades (n 3) 578.
60 Case C-269/95 *Benincasa v Dentalkit* [1997] ECR I-3767 [25].
61 COM (2009) 174 final (n 4) 5.
62 Sancho Villa (n 33) 403.
pragmatism in the European Union prospect of forum shopping, as a party may seise a particular court to have the jurisdiction agreement declared invalid.\textsuperscript{63} In summary, the Brussels regime has been routinely criticised for not suitably protecting 'the sanctity of jurisdiction agreements'.\textsuperscript{64} The Recast Regulation intends to address this criticism and attention now turns to the relevant amendments.

3. The Specific Legislative Reforms

The Recast supports the enforcement of choice-of-court agreements by substituting the current priority mechanism for an approach that grants precedence to the forum designated in the parties' agreement.\textsuperscript{65} The priority rule is reversed by the cumulative effect of three strategic changes.\textsuperscript{66} Firstly, Article 31(2) provides:

\begin{quote}
(... where a court of a Member State on which an agreement referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.
\end{quote}

Secondly, the first-in-time rule is now located under Article 29 and explicitly states that this provision is 'without prejudice' to Article 31(2). Finally, Recital 22 emphasises that the parties' designated court is granted priority to establish jurisdiction regardless of whether it is first or second seised.\textsuperscript{67}

Another noteworthy change to the European jurisdictional area provided by the Recast Regulation relates to the rules on international \textit{lis pendens}.\textsuperscript{68} The Recast introduces two new provisions which grant the Member States' courts a discretion to stay proceedings in circumstances where the court of a non-Member State has already been seised: whereas Article 33 of the Recast operates where the proceedings involve the same cause of action and the same parties, Article 34 concerns conflicting proceedings involving related actions.\textsuperscript{69} These novel provisions can also be considered

\begin{thebibliography}{99}
\bibitem{63} Steinle and Vasiliades (n 3) 578.
\bibitem{65} The Recast Regulation, Recital 22.
\bibitem{66} Dickinson, 'Surveying the Proposed Regulation' (n 53) 290.
\bibitem{68} European Council (n 12) 1.
\bibitem{69} Crawford and Carruthers (n 13) 92.
\end{thebibliography}
exceptions to 'the otherwise strict operation' of the court-first-seised mechanism for allocating jurisdiction.\textsuperscript{70}

There are, however, important limitations to the application of the international \textit{lis pendens} rules, namely: the conflicting proceedings must have been initiated first in the third State;\textsuperscript{71} the court of the third State is expected to render a judgment capable of recognition and enforcement in that Member State;\textsuperscript{72} and the Member State's court must be satisfied that staying the matter is necessary for the 'proper administration of justice'.\textsuperscript{73} On this last limitation, Recital 24 of the Recast elaborates on the features that should be assessed by the court in exercising its discretionary power to suspend proceedings. Interestingly, the assessment has characteristics of the common law's \textit{forum non conveniens} technique for declining jurisdiction in that the court is advised to take into account all of the circumstances of the case.\textsuperscript{74} Such circumstances include, \textit{inter alia}, the connections between the dispute, the parties and the third State, as well as the stage to which proceedings in the non-Member State have progressed.\textsuperscript{75} Crawford and Carruthers observe that this exercise of judicial discretion is '(…) an unusual notion in a civilian inspired instrument.'\textsuperscript{76} It is important to note, nonetheless, that the flexible mechanism provided by the Recast in relation to actions pending before the courts of third States does not extend to the situation in \textit{Owusu} because in that case the litigation in the Jamaican forum had not commenced.\textsuperscript{77}

Additionally, the legislators have subjected Article 23 of the Regulation, the current provision governing the prorogation of jurisdiction, to two important amendments. The first is that Article 25, the equivalent provision in the Recast, will operate irrespective of the parties' domicile.\textsuperscript{78} The Recast has therefore effectively widened the scope of jurisdiction agreements captured by the instrument by removing the requirement in the existing Article 23 that at least one of the parties to the agreement is domiciled in a Member State.\textsuperscript{79} The second amendment concerns a harmonised conflict of law rule that has been introduced to govern the substantive validity of the jurisdiction agreement.\textsuperscript{80} The applicable law prescribed by the Recast's Article 25(1) is the law of the chosen forum.\textsuperscript{81} Specifically, this provision states that the chosen court

\textsuperscript{70} ibid.
\textsuperscript{71} The Recast Regulation, Articles 33(1) and 34(1).
\textsuperscript{72} The Recast Regulation, Articles 33(1)(a) and 34(1)(b).
\textsuperscript{73} The Recast Regulation, Articles 33(1)(b) and 34(1)(c).
\textsuperscript{74} Crawford and Carruthers (n 13) 93.
\textsuperscript{75} The Recast Regulation, Recital 24.
\textsuperscript{76} Crawford and Carruthers (n 13) 93.
\textsuperscript{77} ibid 92. See also the Recast Regulation, Recital 23.
\textsuperscript{78} Crawford and Carruthers (n 13) 92.
\textsuperscript{80} COM (2010) 748 final (n 10) 9.
\textsuperscript{81} Recital 20 of the Recast Regulation confirms that the applicable law which will be applied to determine the essential validity of the impugned jurisdiction agreement shall include both the law of the designated court and the conflict-of-law rules of that court's Member State.
shall have jurisdiction ‘(…) unless the agreement is null and void as to its substantive validity under the law of that Member State.’

The Commission considers that two of the main changes proposed by the Recast to the present jurisdictional scheme, the new choice-of-law rule and the revised priority ruling, ‘(…) reflect the solutions established in the HCCA and thereby [should] facilitate a possible conclusion to the Convention by the EU’. However, before discussing the Recast's alignment with the HCCA, it is important to analyse the impact of these reforms from both a regional and an international perspective.

4. Analysis of the Reforms

A. The Recast's Lis Pendens Rules

(i) The Revised Operation of the First-in-time Rule within Europe

The reversal of the priority ruling authorised by Article 31(2) of the Recast is primarily underscored by strong policy considerations, namely, to increase the effectiveness of jurisdiction agreements; discourage tactical proceedings; and to promote the ‘(…) sound development of international commercial relations.’ Likewise, the theory supporting the revised priority rule is also sound. For instance, the drafting of the Recast's Article 31(2) is essentially based on Article 23(3) of the Regulation which presently provides that when non-EU domiciliaries nominate a Member State court, all other courts shall have no jurisdiction over the dispute until the nominated court declines jurisdiction. Article 23(3) clearly bestows ‘(…) great respect for the party autonomy of non-EU domiciliaries' that choose an EU court to resolve their dispute. Beaumont avers that it is 'entirely logical' that the same respect should be extended to the autonomous choices of EU domiciliaries.

Yet reversing the supremacy attributed to the first-in-time rule is not without certain drawbacks. In particular, proceedings could be brought on the artifice of 'sham jurisdictional agreements'. That is, by alleging the existence of a choice-of-court agreement and starting proceedings in the 'court supposedly designated', judgment will be delayed until jurisdiction is declined. Horn argues that granting an '(...)' unequivocal precedence for the allegedly-chosen court could in theory lead to

82 COM (2010) 748 final (n 10) 9.
83 The Recast Regulation, Recital 22. See also Fentiman (n 16) 247.
84 AG Leger in Case C-116/02 Erich Gasser GmbH v Misat Srl 9 September 2003 ECR I-14693 [71].
85 Article 23(3) of the Regulation has been removed and, as indicated above, its substance is now found in Article 31(2) of the Recast.
87 ibid.
88 Sancho Villa (n 33) 404. See also AG Leger (n 84) [74].
89 ibid (AG Leger) [74].
"improved" torpedo actions.\textsuperscript{90} Despite Horn's claim, the allegedly-chosen court should be entitled to jurisdictional primacy on the basis that, in the many instances where the parties have negotiated a valid jurisdiction agreement,\textsuperscript{91} the possibility of thwarting the effectiveness of the agreement by pre-emptively striking in another court is negated.\textsuperscript{92} Furthermore, awarding the chosen court with first say in establishing jurisdiction ‘(…) fosters certainty and foreseeability in international commercial relations’.\textsuperscript{93} To counter the possible threat of 'reverse' torpedo actions, however, appropriate costs sanctions could be introduced to limit the attraction of unconscionably raising a jurisdictional challenge.\textsuperscript{94}

Moreover, in all European jurisdictional conflicts under the Recast - even if the validity of the jurisdiction agreement cannot be supported - a solution is provided that is '(...) neutral to the order in which proceedings are brought'.\textsuperscript{95} Most importantly, the temporal neutrality of the new policy reduces the parties' incentive to rush to the courthouse.\textsuperscript{96} Notwithstanding the enhanced treatment of jurisdiction agreements in favour of Member State courts, there is disquiet over the application of jurisdictional clauses which nominate the courts of a third state. These concerns are the focus of the next section.

(ii) The Problems Associated with Third State Exclusive Jurisdiction Agreements and the International \textit{Lis Pendens} Rules

Whilst Article 25 of the Recast applies regardless of whether the parties are EU domiciliaries, the scope of this provision remains limited to a choice of Member State courts.\textsuperscript{97} In short, if a non-EU forum is designated in the parties' jurisdiction agreement, then such an agreement is not regulated by the Recast.\textsuperscript{98}

On this note, it is acknowledged that in conflicts of jurisdiction involving third States, the new international \textit{lis pendens} rules in the Recast Regulation will offer some assistance to the Member States' courts in determining the venue for litigation.\textsuperscript{99} However, it is submitted that in the interests of legal certainty, the ambit of the new regime should have been extended to include choice-of-court agreements designating non-Member States. A hypothetical case scenario illustrates the need for such an

\begin{itemize}
  \item Horn (n 64) 24.
  \item The Impact Assessment provides that a significant majority of EU corporations (70\% of all companies and 90\% of the larger companies that engage more than 250 employees) involved in cross-border trade incorporate choice-of-court agreements in their international contracts. See Impact Assessment (n 5) 28.
  \item Beaumont and McEleavy (n 86) 259.
  \item Dickinson, 'Surveying the Proposed Regulation' (n 53) 296.
  \item Dickinson, 'The Proposed "Brussels I Bis" Regulation' (n 15) 19.
  \item \textit{ibid}.
  \item Crawford and Carruthers (n 13) 92.
  \item \textit{ibid}.
  \item Garvey (n 79) 5.
\end{itemize}
inclusion. If, for example, a party elected to defy an exclusive jurisdiction agreement in favour of Hong Kong by initiating an action in the UK (perhaps on the basis of the defendant's domicile), then the Recast does not expressly permit the seised UK court to suspend its proceedings. The 'concession to discretionary reasoning' provided for in Articles 33 and 34 of the Recast is invoked if the proceedings in Hong Kong are on foot but the new international *lis pendens* rules do not cover those circumstances where the non-Member State court is seised second. In essence, in the absence of a priority ruling for choice-of-court agreements in favour of third states, the UK court is compelled to accept jurisdiction and therefore acquiesce to the breach of contract.

It is possible that other issues could arise with respect to the Recast's mechanism for dealing with conflicting proceedings involving third States. First, the requirement in Articles 33 and 34 for the proceedings to have commenced first in a non-EU State creates an incentive to rush to court and could motivate defensive litigation strategies. Secondly, at present the EU does not provide harmonised rules on the recognition and enforcement of non-Member State judgments. Accordingly, the possibility remains under the Recast regime for torpedo actions to be instigated by the simple expedient of bringing an action in the court of a Member State that does not recognise a judgment rendered in a third State.

B. The Choice of Law Rule

The Commission asserts that the harmonised choice-of-law rule should promote legal certainty by ensuring uniform outcomes irrespective of the court seised. Some commentators have questioned this assertion. Layton and Dickinson, for instance, allege that this proposed amendment to Article 23 of the Regulation could seriously impact on the case law developed by the CJEU on matters of validity. It is important to note, however, that Article 25 of the Recast expressly introduces the words 'as to substantive validity' to prevent 'recourse to the choice-of-law rule' being applied to matters concerning formal validity. In other words, reference to the applicable law is strictly limited to determining the substantive validity of a choice-of-court agreement.

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100 This jurisdictional base is pursuant to the general rule in Article 4 of the Recast, formerly Article 2 of the Regulation.
101 Garvey (n 79) 5.
102 Crawford and Carruthers (n 13) 92.
103 The Recast Regulation, Articles 33(1) and 34(1).
104 Garvey (n 79) 5.
105 *ibid* 7.
107 COM (2010) 748 final (n 10) 9.
108 Layton (n 67) 15. See also Dickinson, 'Surveying the Proposed Regulation' (n 53) 300.
109 Beaumont and McEleavy (n 86) 262.
Thus, the CJEU's case law on the formal requirements of the Regulation's Article 23 will be preserved.\textsuperscript{110}

Generally, jurists and stakeholders have been supportive of the proposed uniform choice-of-law rule.\textsuperscript{111} Steinle and Vasiliades claim that procedural and economic benefits should accrue if the court designated in the putative jurisdiction agreement verifies the substantive validity of the agreement in accordance with its own law.\textsuperscript{112} Such benefits relate to savings on time and court costs and predominantly arise because the external expertise of foreign lawyers is not required to advise on the laws of a foreign legal system.\textsuperscript{113}

The endorsement provided by the UK's Ministry of Justice also exemplifies the support extended to the substantive validity choice-of-law rule.\textsuperscript{114} After observing that considerable disparity existed between the laws of the Member States on the conditions determining the essential validity of jurisdiction agreements, the Ministry insisted that it was 'most unlikely' that a consensus could be reached on a uniform interpretation of matters such as capacity, fraud or duress.\textsuperscript{115} The UK maintained that a harmonised choice-of-law rule most appropriately addressed the uncertainty which pervades the determination of substantive validity under the Regulation.\textsuperscript{116}

This analysis suggests that the revised priority ruling and the uniform choice-of-law rule should increase the robustness of jurisdiction agreements within the EU. In addition, by holding the parties to their jurisdictional bargains, the proposed changes enhance the legal protection of European citizens.\textsuperscript{117} Accordingly, the Recast's two major amendments are, at the very least, meaningful. It is also necessary, however, to assess these reforms in light of the EU's intention to ratify the HCCA and the article will now address that requirement.

\textsuperscript{110} Dickinson, 'Surveying the Proposed Regulation' (n 53) 286.
\textsuperscript{112} Steinle and Vasiliades (n 3) 582.
\textsuperscript{113} ibid.
\textsuperscript{115} ibid [20].
\textsuperscript{116} ibid.
\textsuperscript{117}AG Leger (n 84) [3].
5. Alignment with the HCCA

The HCCA is an international treaty that applies to a specific group of transnational commercial disputes, namely, civil and commercial matters in which the parties have contracted for an exclusive choice-of-court agreement. Primarily, the Convention is premised on the assumption that such agreements have overriding value. The basic requirements on the courts of Contracting States are twofold. While the first is to validate party autonomy by upholding choice-of-court clauses, the second is to recognise and enforce the resulting judgments which emanate from the designated court. Most significantly, the HCCA is structured to make litigation outcomes more predictable which, in turn, promotes international trade and investment by reducing the risk associated with cross-border commercial transactions.

Put simply, the Convention’s framework of rules is designed to ensure that a valid choice-of-court agreement confers exclusive jurisdiction to the parties' chosen court. Three core principles underpin this objective. First, Article 5(1) obligates the chosen court to assume jurisdiction. Critically, Article 5(2) reinforces the effectiveness of the parties' agreement by precluding the chosen court from resorting to the common law doctrine of forum non conveniens or applying the first-in-time rule. Secondly, Article 6 holds that a seised court in a contracting state, which is not the chosen court, must refrain from exercising jurisdiction. The final principle, one that Kruger considers 'goes to the very heart of the Convention', is provided by Article 8(1) which specifies that the courts in other Contracting States must recognise and enforce a judgment delivered by the designated court.

Hartley observes, however, that in situations of 'an exceptional nature', the Convention authorises exemptions to the obligations detailed in Articles 6 and 8(1). A common exception is that based on the validity of the jurisdiction agreement under the

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120 ibid 557.
121 Sancho Villa (n 33) 405.
124 Kruger (n 122) 451.
125 ibid 452.
127 The five exceptions to Article 6 of the Convention are set out in Articles 6(a) - (e) while the grounds of refusal to the recognition or enforcement of judgments are established in Articles 9(a) - (g).
applicable law of the chosen court.\textsuperscript{128} Hence, the three courts entitled to examine the validity of the jurisdiction agreement, namely, the designated court,\textsuperscript{129} the non-chosen court\textsuperscript{130} and the enforcing court,\textsuperscript{131} are compelled to review the matter in accordance with the same law - the law of the chosen court.\textsuperscript{132} Consequently, the harmonised applicable law is of paramount importance to the Convention because it minimises 'the possibility of irreconcilable judgments'.\textsuperscript{133}

\textit{Prima facie}, this brief outline suggests that the Recast complies with the main structural provisions of the Convention.\textsuperscript{134} The substance of the Recast's Article 31(2) accords with the provision in Article 5(2) of the Convention that the parties' chosen court is not obliged to stay proceedings if it was not the first court seised.\textsuperscript{135} The Recast also adopts the uniform choice-of-law rule, the law of the chosen court, for assessing the substantive validity of the jurisdiction agreement.\textsuperscript{136}

The Recast has also been aligned with the Convention in relation to the scope of its application.\textsuperscript{137} As previously indicated, Article 25(1) of the Recast applies 'regardless of domicile'. The test for application has therefore been reduced from the need to satisfy two conditions - domicile and the nominated court - to merely the requirement that an EU court is nominated.\textsuperscript{138} This amendment in the Recast will 'ease the application of Article 26(6) of the Convention' in ascertaining whether the Regulation or the Convention applies to a particular dispute because the residence of the parties will solely determine which text applies.\textsuperscript{139}

The respective texts of the two instruments, however, are not identical. In fact, the obligations on the non-chosen courts are 'radically' different.\textsuperscript{140} Pursuant to Article 31(2), the Recast strictly mandates that the non-chosen court must stay proceedings until the chosen court has established jurisdiction. Article 6(a) of the Convention, however, permits a non-chosen court to determine the validity and effect of a jurisdiction agreement.\textsuperscript{141} Further, the Convention's rules do not ban proceedings from commencing in the parties' chosen court even though '(…) a non-chosen court that was

\begin{footnotesize}
\begin{enumerate}
\item The Convention, Articles 6(a) and 9(a) respectively. See also Hartley, 'The Hague Choice-of-Court Convention' (n 126) 416.
\item The Convention, Article 5(1).
\item The Convention, Article 6(a).
\item The Convention, Article 9(a).
\item Sancho Villa (n 33) 410.
\item \textit{ibid.}
\item Sancho Villa (n 33) 417.
\item \textit{ibid.}
\item Sancho Villa (n 33) 410.
\item \textit{ibid.}
\item \textit{ibid.}
\item \textit{ibid.}
\item It is important to note, however, that the two instruments differ in their approach to interpreting 'validity'. The role of formal validity is more important in the Regulation as consent in the Convention is not implied from the formality requirements. Instead, under the Convention, the existence of consent is governed by the law of the forum. See Hartley and Dogauchi (n 123) [94] - [96].
\item Sancho Villa (n 33) 410.
\item \textit{ibid.}
\item \textit{ibid.}
\item Beaumont and McEleavy (n 86) 259.
\item The Convention, Article 6(a).
\end{enumerate}
\end{footnotesize}
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first seised of the dispute may still be hearing the case'. On this point, the Recast Regulation offers greater respect for party autonomy than the Convention.

The Recast Regulation, though, remains ambivalent on whether a Member State court is obliged to stay proceedings where an exclusive jurisdiction agreement designates a non-EU court. This issue, intimated in Owusu but left open by the CJEU, remains uncertain. Recital 24 of the Recast attempts to shed some light on the issue and advises the Member States’ courts that when exercising their discretion in conflicting proceedings involving third States, the assessment of the circumstances of the case may include ‘(...) consideration of the question whether the court of the third State has exclusive jurisdiction in the particular case'. In other words, a third State exclusive jurisdiction clause is merely one of the factors that a Member State court may consider in determining whether to stay proceedings. In contrast, the Convention respects exclusive choice-of-court agreements that are drafted in favour of any state. In agreement with Dickinson, it is suggested that the EU’s legislators should draft an amendment to the Recast based on Article 6 of the HCCA which obliges the non-chosen court to suspend or dismiss proceedings.

While the texts of the Recast and the Convention are not totally aligned, absolute alignment is not necessary nor, as Beaumont maintains, is it desirable. Rather, the object of recasting the Regulation was to provide a coherent application of both instruments. This objective has, in principle, been met and accordingly, the introduction of the Recast should not preclude the EU from ratifying the Convention.

6. Conclusion

The Recast improves the enforcement of exclusive jurisdiction agreements within the European legal framework by proposing two key amendments. Article 31(2) reverses the priority ruling which currently favours the first seised court while the substantive validity of jurisdiction agreements will be determined by a harmonised choice-of-law rule: the law of the chosen court. It is suggested that these reforms should achieve the primary objectives of the Recast, namely, to enhance the effectiveness of choice-of-court agreements and to ensure that such agreements are treated consistently in the Regulation and the HCCA.

The Recast, however, could have contributed more to increase the overall effectiveness of choice-of-court agreements by addressing the Owusu-type situation

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142 Beaumont and McEleavy (n 86) 259.
143 ibid 260.
144 Dickinson, ‘Surveying the Proposed Regulation’ (n 53) 302.
145 ibid.
146 ibid.
147 Beaumont and McEleavy (n 86) 261.
148 ibid.
149 Sancho Villa (n 33) 417.
where the designated court is a non-EU state. The EU legislators took steps towards improving the treatment of jurisdiction clauses in favour of third States with the introduction of the international *lis pendens* rules in Articles 33 and 34 of the Recast. Nevertheless, there are considerable limitations attached to the application of these provisions and a sense of uncertainty continues to be associated with conflicting proceedings involving non-Member States’ courts. Notably, the potential for tactical litigation remains under the latest instalment of the Brussels regime. In light of these concerns, the inclusion of an express provision in the Recast Regulation granting precedence to the court of a non-Member State designated in an exclusive jurisdiction agreement should be advocated to augment legal certainty in the European judicial area.

Finally, the civilian and common law traditions adopt fundamentally different approaches to resolving conflicts of jurisdictions.150 The formalism at the core of the *lis pendens* doctrine promotes procedural efficiency by negating concurrent proceedings.151 The common law, on the other hand, considers that the rules of jurisdiction are designed to protect the interests of the parties.152 Crucially, civil law concepts have largely influenced the CJEU and it is open to suggestion that the decisions in *Gasser* and *Owusu* were tarnished by the court's fidelity to structural and procedural certainty.153 Accordingly, the proposed jurisdictional agreement reforms, which acknowledge the significance of party autonomy and predictability in international commercial transactions,154 qualify as necessary and meaningful. It is suggested, moreover, that in striking a balance between procedure and justice, the Recast has, correctly, shifted the equilibrium point towards the common law’s position.

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152 Harris ‘Understanding the Europeanisation of Private International Law’ (n 18) 372.
154 *ibid* 817-18.