Universal Jurisdiction and Third States in the Reform of the Brussels I Regulation

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Contents

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* Literature cited in *abbreviated form*: *Richard Fentiman*, Civil Jurisdiction and third States: Owusu and after: C.M.L. Rev. 43 (2006) 705–734; *Christian Heinze/Anatol Dutta*, Ungeschriebene Grenzen für europäische Zuständigkeiten bei Streitigkeiten mit Drittstaatenbezug: IPRax 2005, 224–230; *Burkhard Hess*, Europäisches Zivilprozessrecht (2010); *Thalia Kruger*, Civil Jurisdiction Rules of the EU and their Impact on Third States (2008); *Ulrich Magnus/Peter Mankowski*, Brussels I on the Verge of the Reform: ZvglRWiss. 109 (2010) 1–41; *Etienne Pataut*, International Jurisdiction and Third States, A view from the EC in Family Matters, in: The External Dimension of EC Private International Law in Family and Succession Matters, ed. by *Malatesta/Bariatti/Pocar* (2008) 123–148; *Haimo Schack*, Internationales Zivilverfahrensrecht[5] (2010).

Materials cited in *abbreviated form*: Convention of 27. 9. 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, O.J. 1972 L 299/32 (cited: Brussels Convention); Council Regulation (EC) No. 44/2001 of 22.12. 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I), O.J. 2001 L 12/1 (cited: BR); *GEDIP*, Proposed Amendment of Regulation 44/2001 in Order to Apply it to External Situations, IPRax 2009, 283–284 (cited: *GEDIP*, Proposed Amendment); *id.*, Proposition de modification du règlement 44/2001 en vue de son application aux situations externes, Commentaire explicatif, <http://www.gedip-egpil.eu/documents/gedip-documents-30.htm> (cited: *GEDIP*, Commentaire explicatif); 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: Green Paper reply/replies); Proposal for a Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(2010) 748 final of 14. 12. 2010 (cited: CP); 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 (cited: Impact Assessment); *Centre for Strategy & Evaluation Services*, Data Collection and Impact Analysis – Certain Aspects of a possible Revision of Council Regulation No. 44, Final Report of 17. 12. 2010 (cited: Data and Impact Report); *Nuyts*, Study on residual Jurisdiction, General Report of 3. 9.

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I. Introduction

In December 2010, the European Commission published a Proposal for a reform of the Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter: BR).[1] One of the cornerstones of the Proposal (hereinafter: CP) is the operation of the Regulation in the international legal order, a subject which has proven to be one of the most intricate issues in European international civil procedure. In its *Owusu* decision, the European Court of Justice (here-

2007, <ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf>; 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).

[1] For the context of the Proposal see *Burkhard Hess*, Die Reform der EuGVVO und die Zukunft des Europäischen Zivilprozessrechts: IPRax 2011, 125–130; *Tanja Domej*, EuGVVO-Reform, Die angekündigte Revolution: ecolex 2011, 124–127.

inafter: ECJ) addressed that question from a central point of view and held that the Regulation also applies to international disputes linked with the territory of only one Member State by the defendant's domicile without any further connections to other Member States, thereby not requiring an additional intra-European element.[2] The Regulation as it stands now does not, however, capture all civil disputes involving third State connections: Art. 4(1) BR provides that national law governs jurisdiction where the defendant is domiciled in a non-Member State unless jurisdiction is vested in the European courts pursuant to exclusive jurisdiction (Art. 22) or a jurisdiction agreement (Art. 23). Thus, the Regulation in general does not contain any rules for the assertion of jurisdiction against defendants resident in third States. The Commission Proposal intends to close this gap by establishing a uniform set of rules leaving no space for any national laws on jurisdiction. It can be summarised as follows: By deleting Art. 4(1) BR it excludes the application of national law. Instead, defendants domiciled in non-Member States are subject to the grounds of special jurisdiction (Art. 4(2) CP). Where these do not confer jurisdiction on a Member State court, two grounds of subsidiary jurisdiction may come into play (Art. 25 and Art. 26 CP). Finally, the Proposal partially lays down rules for declining jurisdiction in favour of non-Member State courts: Art. 34 CP authorises a European court to grant a stay in favour of proceedings on the same cause of action pending in a third State.

The following paper will give a first assessment of the Commission Proposal as regards third State scenarios. After a brief discussion of the Union's competence (II.) and the Union's interest (III.) to legislate in this field, it will turn to the extension of special heads of jurisdiction to third State defendants (IV.), the decline of jurisdiction in favour of third States (V.) and the proposal for new subsidiary grounds of jurisdiction (VI.), before briefly concluding on recognition and enforcement of third State judgments (VII.).

As a preliminary remark, it should be noted that the Proposal is only part of a rapidly growing body of European Private International Law. The Brussels IIbis Regulation[3], the Maintenance Regulation[4], the Insolvency Regu-

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[2] ECJ 1.3. 2005 – Case C-281/02 *(Owusu)*, E.C.R. 2005, I-1383, paras. 24 seq.; 7.2. 2006, General Opinion 1/03, E.C.R. 2006, I-1150, paras. 143 seq.; cf. ECJ 13.7. 2000 – Case C-412/98 *(Group Josi)*, E.C.R. 2000, I-5925.

[3] See Art. 7 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, repealing Regulation (EC) No. 1347/2000, O.J. 2003 L 338/1: If the defendant is resident in a third State, a national court may resort to its national law only where no other court has jurisdiction pursuant to the Regulation, ECJ 29.11. 2007 – Case C-68/07 *(Sundelind Lopez)*, E.C.R. 2007, I-10405, paras. 18 seq.

[4] See Art. 3 and Recital 15 Regulation (EC) No. 4/2009 of 18.12. 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, O.J. 2009 L 7/1: The Regulation is applicable irrespective of the

lation[5], the Community Trade Mark Regulation[6] and the Proposal for an International Succession Regulation[7] also address third State relations, albeit not in a consistent manner. It will be left to future legislation to put all instruments on an equal footing – yet, the Brussels I Reform Proposal may serve as a guideline and promote amendments in other areas of European law.

II. EU Competence

An objection constantly raised against the Europeanisation of third State cases is that they lack a sufficiently close connection with the internal market and thus lie outside the competence of the European Union (EU).[8] The ECJ, however, does not seem to share these concerns. In *Owusu* and in the legal opinion on the Lugano Convention, the court seemed to indicate that the consolidation of the rules on jurisdiction in relation to third States *as such* would benefit the internal market.[9] Moreover, the concerns with regard to

defendant's domicile. Recourse to national rules on jurisdiction is only made in cases of Art. 3(c) and (d) for connected proceedings on the status of a person or parental responsibility, see *Herbert Roth*, Zum Bedeutungsverlust des autonomen Internationalen Zivilprozessrechts, in: Europäisierung des Rechts, ed. by *id.* (2010) 171 seq. Article 6 provides a basis for subsidiary jurisdiction, Art. 7 a *forum necessitatis* similar to Art. 26 CP.

[5] Regulation (EC) No. 1346/2000 of 29. 5. 2000 on insolvency proceedings, O.J. 2000 L 160/1. Article 3(1) EIR, restricts the scope to debtors having their centre of main interests in a Member State, cf. *Christoph Paulus*, Europäische Insolvenzverordnung[3] (2010) Art. 3 para. 6. It is unclear whether the EIR is applicable where the cross-border element of the insolvency proceedings is exclusively related to third States – for a wide scope *Re BRAC Rent-A-Car International Inc*, [2003] EWHC 128.

[6] Article 97(2), (3) Regulation (EC) No. 207/2009 of 26. 2. 2009 on the Community trade mark, O.J. 2009 L 78/1 also applies for actions against third State defendants. Cf. Art. 82(2) and (3) of Council Regulation (EC) No. 6/2002 of 12. 12. 2001 on Community designs, O.J. 2002 L 3/1.

[7] Proposal for a Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, COM(2009) 154 final of 14. 10. 2009. Article 6 provides for European residual jurisdiction.

[8] Green Paper replies: Deutscher Richterbund 2, United Kingdom paras. 7, 10; cf. replies Estonia 1, *Andrew Dickinson* para. 16; *Oliver Remien*, European Private International Law, the European Community and its emerging Area of Freedom, Security and Justice: C.M.L. Rev. 38 (2001) 53–86 (76); *Ulrich G. Schroeter*, UN-Kaufrecht und Europäisches Gemeinschaftsrecht (2005) § 11 paras. 77 seq. These objections have already been considered but rebutted by *Jürgen Basedow*, Europäisches Zivilprozeßrecht, Allgemeine Fragen des Europäischen Gerichtsstands- und Vollstreckungsübereinkommens (GVÜ), in: Handbuch des Internationalen Zivilverfahrensrechts I (1982) Chap. II paras. 166 seq.

[9] ECJ 1. 3. 2005, para. 34; 7. 2. 2006, para. 143 (both supra n. 2). Pro EU competence for universal rules Opinion of the European Economic and Social Committee of 22. 9. 2010, O.J. 2010 C 255/48 (51); *Jürgen Basedow*, The Communitarization of the Conflict of Laws under the Treaty of Amsterdam: C.M.L. Rev. 37 (2000) 687–708 (703); *Stefan Leible/Ansgar*

the Union's competence have lost most of their force as a result of recent changes in EU primary law. Article 81(2) TFEU[10] provides a basis for all measures with implications for the judicial cooperation between the Member States and singles out the proper functioning of the internal market only as an example.[11] Therefore, the creation of a European area of freedom, security and justice has become a goal of European policy which is independent of the internal market.[12] Where an action against a non-Member State defendant is linked to several Member States, it is useful to coordinate the exercise of jurisdiction of different European courts. Moreover, when it comes to the coordination of parallel proceedings and the recognition and enforcement of Member State judgments[13] against third State defendants,[14] the underlying rules on international jurisdiction serve as a correspondingly acceptable basis for their recognition.

III. The Union's Interest in Universal Jurisdiction

Even if Art. 81(2) TFEU may thus grant legislative competence to the Union, it still needs to be asked whether any action in this field is desirable. A possible answer lies in potential benefits for the internal market and the abolition of inconsistencies under the current regime.

1. Benefits for the internal market

The ECJ's finding that a uniform approach to international jurisdiction in third State cases is apt to promote the internal market seems correct. First, it is hardly possible to develop a watertight criterion for defining an intra-Union dispute.[15] Such a criterion would give rise to ambiguities impeding both

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Staudinger, Art. 65 EGV im System der EG-Kompetenzen: European Legal Forum (EuLF) 2000/2001, 225–235 (229).

[10] Treaty on the Functioning of the European Union, O.J. 2008 C 115/47.

[11] *Rudolf Geiger (-Kotzur)*, Vertrag über die Europäische Union und Vertrag über die Arbeitsweise der Europäischen Union[5], EUV, AEUV (2010) Art. 81 AEUV para. 2; *Wolfgang Hau*, Rahmenbedingungen einer Vergemeinschaftung des Internationalen Vertragsrechts, in: Das Grünbuch zum Internationalen Vertragsrecht, ed. by *Leible* (2004) 13–24 (18). Contra *Ulrich G. Schroeter*, Europäischer Verfassungsvertrag und Europäisches Privatrecht: ZEuP 2006, 513–551 (539).

[12] This is underlined by Art. 3(2) and (3) TEU (O.J. 2008 L 115/13). Cf. ECJ 8. 11. 2005 – Case C-443/03 *(Leffler)*, E.C.R. 2005, I-9611, para. 45.

[13] Art. 81(2)(a) TFEU.

[14] See ECJ 27. 6. 1991 – Case C-351/89 *(Overseas Union)*, E.C.R. 1991, I-3317, para. 14.

[15] *Heinze/Dutta* 224; *Pataut* 128. An interesting proposal is presented by *Marc Fallon*, Approche systémique de l'applicabilité dans l'espace de Bruxelles I et Rome I, in: Enforcement

the functioning of the internal market and the Regulation.[16] This does not only hold true for uncertainties as to the degree of market relevance required. It may become relevant also in multiparty cases with relations to several Member States and third States, where it would be odd to split up multiparty relations and apply different regimes according to the parties involved.[17] Secondly, a uniform set of rules reduces transaction costs as a *professional* can use a single set of standard contract terms containing the same forum selection clause.[18] Market participants could initiate proceedings against defendants from both Member and non-Member States according to the same rules across Europe. This would simplify the present system leading to lower litigation costs. Moreover, under a uniform regime consumers could rely on jurisdictional consumer protection irrespective of whether the professional maintains a branch in a Member State or not. Thirdly, distortions for the internal market may result from an unequal access to justice within the Member States[19] as some Member States may be more generous in providing grounds of jurisdiction against defendants from third States than others. This may put some market participants at a disadvantage as they have to incur higher transaction costs where they have to bargain for a jurisdiction agreement in order to confer jurisdiction upon the courts of the state of their domicile whereas others do not. Finally, it might become easier to establish branches in other Member States if these branches can operate in relation to third States according to the same set of rules as the head office.

2. Inconsistencies

Not only the benefits for the internal market, but also the revision of inconsistencies under the present law militates in favour of implementing a universal concept of jurisdiction in the Brussels I Regulation. As a result of *Owusu*, it stands firm that the Regulation already captures some third State disputes. This leads to hardly comprehensible consequences: It seems odd that the domicile of the defendant alone can constitute a sufficient link with the territory of the EU, whereas the other connecting factors employed by the special heads of jurisdiction in Sections 2 to 5 do not suffice for exercis-

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of International Contracts in the European Union, ed. by *Meeusen/Pertegás/Straetmans* (2004) paras. 4–63 seq.

[16] See ECJ 1. 3. 2005 (supra n. 2) para. 34.

[17] *Basedow* 703; *Leible/Staudinger* 229 (both supra n. 9).

[18] See *Leible/Staudinger* (supra n. 9) 230.

[19] Green Paper 3; Impact Assessment 20; *Basedow* (supra n. 8) para. 166; *Burkhard Hess/Thomas Pfeiffer/Peter Schlosser (-Pfeiffer)*, Report on the Application of Regulation Brussels I in the Member States (2007) para. 158.

ing jurisdiction[20] even though they create a close link with a particular court irrespective of the defendant's domicile.[21] It is hard to explain why an insurance policyholder, a consumer or an employee domiciled in a Member State can benefit from the European jurisdiction[22] favourable to them only in relation to defendants from Member States and deserves less protection if they enter into a transaction with a non-EU party.[23] This issue is delicate with regard to guaranteeing the application of mandatory secondary law.[24] Furthermore, it is particularly awkward that the application of the Regulation may depend on the parties' procedural roles as either defendant or plaintiff.[25] The Commission Proposal to abandon the restriction in Art. 4(1) and extend the special heads of jurisdiction to third State defendants deserves support.[26] As a consequence, it would also bring the Brussels Regulation in line with the development in other areas of European law. Brussels IIbis, the Maintenance Regulation, the Regulations on the Community Trade Mark and on Community Designs and the International Succession Regulation Proposal apply also to defendants from non-Member States.[27] Furthermore, the Rome I, the Rome II and the Rome III Regulations all claim universal application.[28] Finally, the harmonisation of national rules on jurisdiction would bring the idea of the duality principle already deeply rooted in the

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[20] CP Recital 17; Data and Impact Report 73; Green Paper replies: Bulgaria 4, House of Lords Q 19 *(Fentiman)*; *Magnus/Mankowski* 8; *Nuyts* paras. 146, 154 and 164.

[21] ECJ 6. 10. 1976 – Case 12/76 *(Tessili)*, E.C.R. 1976, 1473, para. 13; 30. 11. 1976 – Case 21/76 *(Bier)*, E.C.R. 1976, 1735, para. 11; *P. Jenard*, Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, O.J. 1979 L 59/1 (22).

[22] Laid down by Art. 9(1), Art. 15(1) and Art. 19.

[23] *Hess* § 5 para. 15; *Magnus/Mankowski* 7; *Peter Mankowski*, Die Brüssel I-Verordnung vor der Reform, in: Interdisziplinäre Studien zur Komparatistik und zum Kollisionsrecht I (2010) 1–49 (40); *Nuyts* para. 161; *Pataut* 128. See with respect to consumer contracts ECJ 15. 9. 1994 – Case C-318/93 *(Brenner)*, E.C.R. 1994, I-4275, para. 16.

[24] Impact Assessment 21. Cf. infra n. 106.

[25] *Karl Kreuzer*, Zu Stand und Perspektiven des Europäischen Internationalen Privatrechts: RabelsZ 70 (2006) 1–88 (71); *Nuyts* para. 155; *Pataut* 127.

[26] *GEDIP*, Proposed Amendment 283 seq.; *id.*, Commentaire explicatif para. 1; *Heinrich Nagel/Peter Gottwald*, Internationales Zivilprozessrecht[6] (2007) § 3 para. 35; *Hess* § 5 paras. 11, 19; *Kreuzer* (previous note) 72; *Magnus/Mankowski* 7; *Kruger* para. 8.11; *Pataut* 125 seq.; Green Paper replies: Belgium 3, Bulgaria 4, Danmark 2, Finland 2, France 6, Deutscher Bundesrat 2, Greece 5, Italy 2, Latvia 3, Slovakia 2, Deutscher Anwaltverein 4, Deutscher Richterbund 2, Österreichischer Rechtsanwaltskammertag 3.

[27] See supra notes 3 to 7.

[28] Art. 2 Regulation (EC) No. 593/2008 of 17. 6. 2008 on the law applicable to contractual obligations (Rome I), O.J. 2008 L 177/6; Art. 3 Regulation (EC) No. 864/2007 of 11. 7. 2007 on the law applicable to non-contractual obligations (Rome II), O.J. 2007 L 199/40; Art. 4 Council Regulation (EU) No. 1259/2010 of 20. 12. 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, O.J. 2010 L 343/10 (Rome III).

Brussels Convention[29] to a perfect end: If the basis for European-wide recognition and enforcement of judgments has to be seen in common grounds for jurisdiction in general, this should also apply to judgments passed down against non-Member State defendants.[30]

3. Conclusion: Full harmonisation

To ensure an identical level of judicial protection for economic actors in all Member States, to provide them with a simple and certain set of rules and to take the duality principle to its logical end, it would not be sufficient to either simply extend the special grounds of jurisdiction and leave national rules on jurisdiction (or at least exorbitant jurisdiction) in force[31] or to refer to national law where the Regulation does not provide a forum against a third State defendant.[32] Only a full harmonisation at the European level can ensure that these goals will be achieved. It is thus to be welcomed that Art. 4(2) CP and Recital 16 embark on this route by excluding any recourse to national law. Such an approach lies also in the interest of third State defendants as it mitigates the burdensome effects created by national, potentially exorbitant grounds of jurisdiction (Art. 4(2) BR) and minimises the recognition of judgments based on these grounds throughout Europe.[33] More importantly, a uniform set of rules would make it easier for third State residents to engage in business activities within Europe. Irrespective of where their European business partners are seated they would be subject to the same set of jurisdiction rules.[34]

IV. Extending Jurisdiction

While the extension of the Regulation to third State defendants deserves full support, its implementation in the Commission Proposal needs to be considered in more detail.

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[29] See *Jenard* (supra n. 21) 13.

[30] *Kreuzer* (supra n. 25) 72 seq.

[31] Green Paper reply: House of Lords para. 46, Q 16, 18 (*Fentiman*).

[32] Impact Assessment 26 seq. Yet, this is the approach in Art. 7(1) and Art. 14 Brussels IIbis Regulation.

[33] *Hess* § 5 para. 17.

[34] Data and Impact Report 81.

1. Extending Art. 23(1) to non-EU parties

The Commission has proposed to widen the scope of Art. 23 (1) by applying it to parties none of whom is domiciled in a Member State. This is welcome.[35] As seen, Art. 22 already applies to disputes between non-EU domiciliaries provided that the relevant connecting factor (e.g. place of immovable property) refers to the EU (Art. 4(1) BR). Consequently, the same should apply to jurisdiction agreements. Disputes between non-EU parties entering into transactions that are linked with the EU can raise difficult questions concerning the allocation of jurisdiction within the EU. Therefore, extending Art. 23 to third State defendants would provide third State defendants a uniform regime for prorogation of European courts, thereby fostering foreseeability for the parties. The English example illustrates that it can benefit the local legal service industry if a neutral forum for international parties is available. As far as their judicial resources are affected,[36] Member States are free to absorb their use by means of special cost rules.

2. Special heads of jurisdiction and the defendant's domicile

With respect to the special heads of jurisdiction the Commission Proposal removes all restrictions as to the domicile of the defendant, thereby enabling plaintiffs to sue domiciliaries from third States in European courts according to the same set of rules as defendants from the EU. As a result, a defendant from a third State could be sued under Art. 5(1) at the place where the contract is performed or under Art. 5(2) CP/Art. 5(3) BR where the harmful event occurred. As argued above, this is to be applauded. Yet, the Proposal makes one exception as far as jurisdiction for multiple defendants (Art. 6(1)) is concerned. The relevant provision in Art. 6(1) CP provides that "[a] person domiciled in a Member State may also be sued and is one of a number of defendants, in the courts for the place where any one of them is domiciled [...]", thereby excluding actions against non-EU defendants. It follows that a third State defendant cannot be joined to proceedings taking place in the Member State of another defendant's domicile unless another special ground attributes jurisdiction to it. This exception is unfortunate[37]: If Art. 6(1) aims to promote procedural efficiency and avoid inconsistent judgments there is no reason not to apply it in relation to a non-EU defend-

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[35] Contra Green Paper replies: United Kingdom para. 10, Estonia 1, *Andrew Dickinson* para. 16.

[36] See See *Gerhard Wagner*, Prozeßverträge (1998) 359.

[37] See *Hess/Pfeiffer/Schlosser (-Pfeiffer)* (supra n. 19) para. 165; *Nuyts* para. 158; *Pascal Grolimund*, Drittstaatenproblematik des europäischen Zivilverfahrensrechts (2000) para. 423; *Kruger* para. 2.145; Green Paper reply: Czech 3.

ant.[38] The risk of irreconcilable judgments is equally virulent in relation to these defendants as another Member State court may claim jurisdiction over them on a different ground of jurisdiction. It does not make sense why the Regulation should only subject EU domiciliaries to jurisdiction under Art. 6(1) and treat them less favourably than those from outside the EU.[39] The situation would become even worse than at present as the Commission Proposal ousts national rules on jurisdiction completely (Art. 4(2) CP), thereby excluding a joinder which may today be possible under national law. Therefore, Art. 6(1) CP should be put on an equal footing with the other grounds of jurisdiction enumerated in Art. 6 by deleting the restriction "domiciled in a Member State". As a minimum antidote, the disadvantageous consequences could be attenuated by drawing an analogy to Art. 9(2), Art. 15(2) and Art. 18(2), i.e. by deeming a third State defendant with a branch or an agency in a Member State as domiciled in the Union for the purpose of Art. 6(1).[40]

A further shortcoming of Art. 6(1) CP may be seen in the fact that it does not allow joining an EU defendant to proceedings in a Member State instituted against a third State defendant.[41] According to its wording the provision is not engaged where jurisdiction against the first defendant is founded upon a special ground.[42] Yet, the arguments for preserving the status quo seem to carry stronger force. The limitation aims at protecting the second defendant[43] from an unduly wide ground of jurisdiction particularly where jurisdiction against the first defendant is based on a jurisdiction agreement. From the perspective of a defendant resident in the EU, it does not matter whether the first defendant is a Member or a non-Member State resident; he deserves an equal level of protection in both cases. Moreover, it seems correct to award additional defendants from third States the same protection as European ones as making a distinction would unjustifiably discriminate

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[38] For Art. 6(1) BR see *Jens Adolphsen*, Internationale Dopingstrafen (2003) 377; *Thomas Rauscher/Alexander Fehre*, Das Ende des *forum non conveniens* unter dem EuGVÜ und der Brüssel I-VO: ZEuP 2006, 459–475 (473). Contra Cass. civ. 12.11. 2009, Rev. crit. d.i.p. 2010, 372; OLG Hamburg 9. 7. 1962, IPRspr. 1992 No. 193 (p. 438); *Hélène Gaudemet-Tallon*, Compétence et exécution des jugements en Europe[4] (2010) para. 247.

[39] *Thomas Rauscher (-Leible)*, Europäisches Zivilprozess- und Kollisionsrecht (Bearbeitung 2011) Brüssel I-VO Art. 6 para. 7 (cited: *Rauscher [-author]*); *Rauscher/Fehre* (previous note) 472 seq.

[40] Considered but rejected by *Alexander Layton/Hugh Mercer*, European Civil Practice[2] I (2004) paras. 11.001 seq.

[41] ECJ 27. 10. 1998 – Case C-51/97 *(Réunion européene)*, E.C.R. 1998, I-6511, para. 44.

[42] ECJ 27. 10. 1998 (previous note) para. 44.

[43] ECJ 27. 9. 1988 – Case 189/87 *(Kalfelis)*, E.C.R. 1988, 5565, paras. 7 seq.; 27. 10. 1998 (supra n. 41) para. 46.

against them.[44] Again, it seems advisable to put branches or agencies of third State defendants on an equal footing with Member State domiciliaries.

3. Deleting Arts. 9(2), 15(2) and 18(2)?

As a result of the Commission Proposal to extend the grounds of special jurisdiction to third State residents, the jurisdiction at the place of branch in Art. 5(5) will apply in disputes against third State defendants arising out of the operation of a branch in a Member State. As a consequence, one may consider deleting Art. 9(2), Art. 15(2) and Art. 18(2), applying, respectively, in disputes against third State insurers, professionals and employers "arising out of the operations of the branch, agency or establishment" in an EU State. Yet, a minor difference emerges as the parties may deviate from Art. 5(5) by means of a jurisdiction agreement whereas Arts. 13, 17 and 21 exclude such a possibility. Thus, as Art. 9(2), Art. 15(2) and Art. 18(2) can preserve a sensible, albeit narrow, scope, they should not be removed.

V. Declining Jurisdiction

While the Commission's effort to extend European jurisdiction to third State defendants may be welcome, it is regrettable that the CP is mainly concerned with broadening its international scope but pays less attention to any limitation in favour of third State courts.

1. The puzzling status quo

In *Owusu* the ECJ decided that the provisions of the Regulation were mandatory and barred a court from declining jurisdiction under national law.[45] The English courts were not allowed to deny jurisdiction under Art. 2(1) BR and apply their doctrine of *forum non conveniens*.[46] For three scenarios in particular, that finding has caused great uncertainty as to whether a court can ever refrain from exercising jurisdiction conferred upon it by the Regulation: First, where the parties have entered into an exclusive jurisdiction agreement in favour of a third State. Secondly, where the courts of a third State have exclusive jurisdiction due to connecting factors comparable to those in Art. 22 BR. Thirdly, where the same cause of action is pending

[44] *Rauscher (-Leible)* (supra n. 39) Art. 6 para. 7; contra *Rauscher/Fehre* (supra n. 38) 473 n. 44.

[45] ECJ 1. 3. 2005 (supra n. 2) paras. 37 seq.

[46] See *Spiliada Maritime Corp* v. *Cansulex Ltd*, [1987] A.C. 460 (475 seq.).

before a non-Member State court. It is quite clear that the Regulation does not directly address these questions: Art. 22 (exclusive jurisdiction), Art. 23 (jurisdiction agreement) and Art. 27 (*lis pendens*) merely embrace connecting factors referring to the territory of a Member State. There is a huge variety of possible solutions on how to fill in this lacuna: (i) One strand of argument suggests that *Owusu* has to be interpreted strictly and that the goal of legal certainty prohibited a court from granting relief under its national law in any case.[47] (ii) The opposite position gives the rules in the Brussels Regulation a direct *reflective effect* and endorses their analogous application.[48] (iii) An intermediary approach argues that national law can step in where it consistently mirrors the rules of the Regulation (indirect *reflective effect*).[49] It seems that the ECJ prefers the latter solution as it held in *Coreck* that the validity of a jurisdiction agreement in favour of third States had to be assessed according to national law.[50]

2. Third State jurisdiction

a) Art. 34 CP – an exhaustive rule?

It is unfortunate that the Commission Proposal does not adress these three questions on the *reflective effect*. It is only in Art. 34 CP that conditions for a stay in favour of parallel proceedings in a third State have been specified. Given the fact that the Commission – while fully aware of the problem[51] – intentionally desisted from proposing rules for third State jurisdiction agreements and exclusive jurisdiction, it is no longer possible to construe Arts. 22 and 23 as having a direct *reflective effect*. But it is uncertain which further consequences derive from the silence of the Proposal. First, one could read Art. 34 CP as an exhaustive rule determining the complete range of cases where a derogation from jurisdiction is permitted. This would, however,

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[47] Green Paper reply: Hungary 3. For Art. 27: *Gowshawk Dedicated Limited* v. *Life Receivables Ireland Limited*, [2008] I.L.Pr. 816 (831 seq.) (Irish H.C.); *Catalyst Investment Group Ltd* v. *Lewinsohn*, [2010] 2 W.L.R. 839 (856 seq.) For Art. 23 Cour d'appel Versailles 26. 9. 1991, Rev. crit. d.i.p. 1992, 333. For Art. 22: *Reinhold Geimer/Rolf A. Schütze (-Geimer)*, Europäisches Zivilverfahrensrecht[3] (2010) Art. 22 EuGVO para. 14.

[48] For Art. 22: *Heinze/Dutta* 227 seq. For Art. 23: *Schack* para. 531.

[49] For Art. 22: *Grolimund* (supra n. 37) para. 507; *R Griggs Group Ltd.* v. *Evans*, [2005] Ch. 153 para 80. For Art. 23: *Konkola Copper Mines Plc* v. *Coromin*, [2005] 2 Lloyd's Rep. 555 (573) (H.C.); *Albert Venn Dicey/Lawrence Collins*, The Conflict of Laws[14] I (2006) para. 12–022; *Adrian Briggs/Peter Rees*, Civil Jurisdiction and Judgments[5] (2009) para. 2.258. For Art. 27: *Johannes Weber*, Rechtshängigkeit und Drittstaatenbezug im Spiegel der EuGVVO: RIW 2009, 620–625 (623 seq.).

[50] ECJ 9. 11. 2000 – Case C-387/98 *(Coreck Maritime)*, E.C.R. 2000, I-9337, para. 19. Cf. ECJ 7. 2. 2006 (supra n. 2) paras. 143 seq.

[51] Green Paper 4.

entail that there would be no power to give effect to a jurisdiction agreement in favour of a non-Member State unless it is party to a multilateral instrument such as the Hague Convention on Choice of Court Agreements (HCCA).[52] It would break with fundamental principles of private law and cause tremendous uncertainty if a choice of court agreement could no longer be enforced if it provides for jurisdiction for non-EU courts. Thus, it cannot be assumed that the Commission Proposal, which aims to strengthen jurisdiction agreements in general (Recital 19), would defy a private consensus and rigorously assert jurisdiction. One may be inclined to assume that Recitals 16 and 17 point to the contrary. But the converse is probably true. Recital 16, providing that "there should no longer be any referral to national law" is presumably intended to generally refer to Art. 4(2) CP on asserting jurisdiction over third State defendants. Recital 17, which maintains that the Regulation "establish[es] [...] a complete set of rules on international jurisdiction of the courts *in the Member States*", could also be interpreted as referring only to the assertion of jurisdiction and not its decline in favour of third States where this would consistently reflect the Brussels I criteria. Still, for the sake of clarification it seems highly recommendable to amend these recitals by at least adding a new sentence to Recital 17:

> "The Regulation shall not prejudice the application of national law as far as non-Member State's exclusive jurisdiction and exclusive jurisdiction agreements in favour of a non-Member State are concerned".

b) Third State jurisdiction agreements

As a result of these considerations, national law will continue to govern third State jurisdiction agreements. Even if this may be a workable solution which mirrors the present state of the law, it stands in stark contrast with the goal of creating legal certainty for the benefit of the internal market through a harmonised set of rules. Furthermore, it is difficult to determine precisely to which extent a recourse to national law is allowed and where discretionary considerations contravene the principle of legal certainty.[53] Therefore, it could be advisable to supplement Art. 23 CP with a new paragraph along the lines of Art. 6 HCCA which also features the requirements of Art. 23(1) CP. Thus, a Member State should be compelled to give effect to a third State jurisdiction agreement if the requirements of Art. 23(1) are met unless (i) the agreement is null and void under the law of the prorogated state (including its conflict of laws regime in order to ensure that the third State court will accept jurisdiction), (ii) the party lacked the capacity to conclude the agree-

[52] Concluded 30 June 2005 <www.hcch.net>. The Convention was signed by the EU on 1 April 2009, O.J. 2009 L 133/1.

[53] Green Paper reply: Greece 5; *Weber* (supra n. 49) 624.

ment under the law of the state of the court seised (including its conflict rules)[54], (iii) the conditions of Art. 26(a) or (b) CP are met[55] or (iv) the chosen court has decided not to hear the case. It is important to note that contrary to what is proposed by Art. 32(2) CP for intra-European disputes, exclusive jurisdiction for determining the validity of the jurisdiction agreement in favour of third States should not be vested in the third State court.[56] This is not only because in relation to that state the principle of mutual trust does not apply, but also because the HCCA allows a review of the jurisdiction agreement by both the courts chosen and first seised. This is all the more important as a third State court might not apply Art. 23(1).

c) Third State exclusive jurisdiction

Whereas the need for respecting jurisdiction agreements is compelling, it might be different as far as the exclusive jurisdiction of a third State is at stake. It has been argued that the *reflective* application of Art. 22 BR is unreasonable because it is not clear whether the third State will accept jurisdiction. As a result, negative competence conflicts could entail.[57] Leaving aside the fact that the third State will typically accept jurisdiction, such a risk is excluded if the Regulation is supplemented by a *forum necessitatis* such as Art. 26 CP.[58] It simply does not make sense to entertain proceedings as the third State itself claiming exclusive jurisdiction will routinely not recognise the judgment and this will render a judgment obtained in a Member State worthless. Of course, it is up to the plaintiff to decide whether to run that risk.[59] The defendant, however, would also bear the risk of a burdensome duplicity of proceedings. In addition, giving Art. 22 CP a *reflective effect* to third States would enhance procedural efficiency: Because the third State court is the clearly more appropriate forum, a stay should be granted. In other words: The *reflective effect* amounts to a standardised assessment of third State proceedings as being more adequate comparable to the approach of *forum non conveniens*, which, however, focuses on the individual case. If it is not merely for courtesy but for procedural efficiency that the foreign court is better situated to hear the case, it should not matter whether that court

[54] See *Trevor Hartley/Masato Dogauchi, Masato*, Convention of 30 June 2005 on Choice of Court Agreements, Explanatory Report para. 150 <www.hcch.net>.

[55] Comparable to Art. 6(c) and (d) HCCA. This also ensures that a stay is not granted where the judgment will not be recognisable in the court seised.

[56] Apparently tending to the other position *GEDIP*, Proposed Amendment 284, Art. 23bis; *id.*, Commentaire explicatif para. 5.

[57] *Magnus/Mankowski* 5; *Mankowski* (supra n. 23) 38; Green Paper replies: Greece 6, Latvia 4, Slovakia 2, Bar Council of England and Wales 3.

[58] *Hess* § 5 para. 14; cf. Green Paper replies: Czech 4, Netherlands 5, Slovenia 4.

[59] *Magnus/Mankowski* 6; *Rauscher (-Mankowski)* (supra n. 39) Art. 22 para. 2d; Green Paper replies: Latvia 4, University of Bern 8.

regards its jurisdiction as exclusive.[60] Eventually, exercising jurisdiction would become too cumbersome and complicated if the judge was expected to carefully examine the jurisdiction regimes of third States.[61]

Finally, the idea of *reflective effect* has attracted substantial political support.[62] That is an additional factor why the idea of extending Arts. 22 and 23 to third State scenarios should be seriously considered.

d) Other grounds

However, it is not advisable to apply the Regulation *reflectively* in all situations where jurisdiction would necessarily be vested in a Member State court. A particularly difficult case is consumer protection. According to the CP, an EU professional may sue a third State consumer in a Member State on the basis of Art. 5(1), a jurisdiction agreement (Art. 23) or Art. 25 CP (location of assets) as the protective rules in Section 4 apply in general only to consumers domiciled in Member States. If the law subjects third State professionals to the strict rules on jurisdiction for the benefit of European consumers, it is worth considering whether the EU legislator should deal with the reverse scenario in a reciprocal manner and insert a new Article in Section 4 stating that European courts shall stay or decline jurisdiction in favour of the courts at the consumer's domicile where that consumer has entered into a contract under circumstances analogous to Art. 15(1) BR. On the other hand, it should not be forgotten that, while it is legitimate to protect consumers as an aspect of European policy, it is less convincing to export this policy choice to other countries. If the third State in which the consumer resides recognises the Member State judgment, it is not the task of European law to object to that policy. But the case does not seem totally clear. In this context it is interesting to see that Rome I does not unilaterally prefer EU domiciliaries and applies the conflict rules on consumer protection (Art. 6 Rome I) indiscriminately to non-EU residents.[63]

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[60] Contra *GEDIP*, Proposed Amendment 284, Art. 22bis; *id.*, Commentaire explicatif, para. 4; *Heinze/Dutta* 228; *Schack* para. 359. Arguably, European rules on exclusive jurisdiction can be far-reaching. Where a third State jurisdiction regime is more generous and does not claim exclusive jurisdiction, there would be no reason to decline jurisdiction. Yet, for the sake of simplicity it seems preferable to not examine third State jurisdiction rules.

[61] *Magnus/Mankowski* 5; *Mankowski* (supra n. 23) 39.

[62] Green Paper replies: Bulgaria 5, Deutscher Bundesrat 3, Italy 2, Latvia 4, Netherlands 5, Poland 3; Slovenia 4, Allen & Overy para. 20; Deutscher Richterbund 3, University of Valencia 4. Parliament Resolution paras. 16 seq.; *GEDIP*, Proposed Amendment 284, Art. 22 bis; *id.*, Commentaire explicatif para. 4; *Kruger* para. 8.14, Arts. A, F. For Art. 23. Green Paper replies: Bar Council of England and Wales 3, Conseil des barreaux européens (CCBE) 4. Contra: Green Paper replies: Greece 6, Slovakia 2, Czech 3, Spain 2; *Magnus/Mankowski* 5; *Nuyts* para. 183.

[63] *Francisco J. Garcimartín Alférez*, The Rome I Regulation: Much ado about nothing?: EuLF 2008, I-61–79 (71).

3. Third State *lis pendens*

Article 34 CP provides a welcome clarification with respect to the situation of parallel proceedings pending before a Member and a non-Member State court. The Commission Proposal has formulated the rules for intra-Union *lis pendens* (Art. 27 BR/Art. 29 CP) but has adjusted them to third State particularities. A stay in favour of third State proceedings may be granted under Art. 34 CP if (i) the same cause of action is involved, (ii) the third State court was seised first in time, (iii) the third State judgment will be handed down within reasonable time, (iv) the third State judgment will be capable of recognition and enforcement in the Member State court second seised and (v) a stay is necessary for the proper administration of justice.

a) Difference in relation to intra-Union cases: Same cause of action

In contrast to intra-Union cases where the *lis pendens* provisions aim to avoid the risk of conflicting judgments, such a risk appears in third State cases only if national law gives effect to the third State judgment. Therefore, a European rule cannot do without a referral to national law. By taking into account two parallel proceedings with "the same cause of action", Art. 27 BR/Art. 29 CP aims at preventing the danger of mutually exclusive decisions which result in irreconcilable judgments refused recognition under Art. 34(3) BR/Art. 48(3) CP.[64] Unlike in intra-European cases where the "same cause of action" and "irreconcilability" are linked by an autonomous interpretation[65], European law so far does not provide rules for a clash between a third State decision and a Member State judgment. Thus, the definition of "same cause of action" in Art. 34(1) CP can only be assessed with reference to the national law of the court seised, i.e. with the risk of non-uniform outcomes.

b) Desirability of harmonisation despite differences between EU and third State cases

But if Art. 34(1) CP cannot ensure uniformity in either the definition of "same cause of action" or the recognition and enforcement of third State judgments, one may doubt the usefulness of such a rule. Yet, the rules on *lis pendens* amount to much more than an annex to rules on the recognition and enforcement of judgments. This is illustrated by the fact that they do not

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[64] ECJ 8. 12. 1987 – Case 144/86 *(Gubisch Maschinenfabrik)*, E.C.R. 1987, 4861, para. 8.

[65] ECJ 8. 12. 1987 (previous note) para. 11; *Mary-Rose McGuire*, Verfahrenskoordination und Verjährungsunterbrechung im Europäischen Prozessrecht (2004) 81.

necessarily concur as to reasoning.[66] *Lis pendens* is much more closely aligned with the operation of jurisdiction rules than it may seem at first glance. The rules determine which of two equally appropriate courts shall exercise jurisdiction.[67] Focusing on English law, it does not come as a surprise that *lis pendens* is inextricably linked to the doctrine of *forum non conveniens* and the identification of the appropriate forum.[68] Moreover, by incorporating the priority principle the Regulation gives effect to the fundamental principle of legal certainty[69] and enables the parties to foresee which court will assume jurisdiction.[70] Even more importantly, if the matter were left to national law, the basic idea behind the unification of jurisdiction would be seriously affected: When proceedings were commenced in a third State, a court could decline jurisdiction under its national law irrespective of whether proceedings in the third State court were instituted first or second in time[71] or related to the same cause of action. This would considerably jeopardise the concept that only uniform conditions and not divergent national rules are capable of ensuring an equal access to justice and putting the parties into the position to foresee with relative ease which court will have jurisdiction and whether it will exercise it. There is a risk that courts will smuggle national principles through the backdoor of *lis pendens*, claiming that a stay in favour of third State proceedings was outside the Regulation.[72] Yet, the Regulation enshrines the principle that whenever its provisions confer jurisdiction upon a court this court is as appropriate as any other court[73]. Thus, a discretionary stay would raise serious concerns with respect to the principle of *effet utile*[74] as this would subvert legal certainty and the effectiveness of the uniform application of Art. 2 to Art. 24 BR.[75] Thus, a rule like Art. 34 CP is essential for the operation of the Regulation in the international legal order.

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[66] Article 27(1) BR is based on the priority rule whereas Art. 34(3) BR is not, see *Gaudemet-Tallon* (supra n. 38) para. 421. Also note the difference between Art. 19(2) and Art. 22(e) Brussels IIbis.

[67] *McGuire* (supra n. 65) 36.

[68] *The Abidin Daver*, [1984] A.C. (412, per Lord Diplock).

[69] ECJ 9. 12. 2003 – Case C-116/02 *(Gasser)*, E.C.R. 2003, I-14693, para. 51.

[70] ECJ 1. 3. 2005 (supra n. 2) para. 42.

[71] *Nuyts* para. 185.

[72] See *JKN* v. *JCN*, [2010] EWHC 843 (critical comment *Pippa Rogerson*, Forum Shopping and Brussels IIbis: IPRax 2010, 553–556); *Konkola Copper Mines Plc* v. *Coromin*, [2005] 2 Lloyd's Rep. 555 (573) (H.C.); *Chris Hare*, Forum non Conveniens in Europe: Game Over or Time for 'Reflexion'?: J. Bus. L. 2006, 157–179 (176).

[73] ECJ 4. 3. 1982 – Case 38/81 *(Effer)*, ECR 1982, 825, para. 7.

[74] ECJ 10. 2. 2009 – Case C-185/07 *(West Tankers)*, E.C.R. 2009, I-663, para. 24.

[75] *Weber* (supra n. 49) 624.

c) Minor ambiguities

Nevertheless, the Commission Proposal suffers from some minor ambiguities: The introductory words of Art. 34(1) CP remain profoundly vague. They say that a stay in favour of third State proceedings may be granted "notwithstanding Articles 3 to 7". This could mean that Art. 34 CP is without prejudice to the application of these rules and does not allow a stay where they are engaged. Obviously, the opposite is intended, i.e. that despite the mandatory character of these rule, it is exactly (and only) in cases relating to these Articles that a court may relinquish an exercise of ist. This interpretation would make more sense as, for example, in cases related to Arts. 8 to 20 a weaker party is (generally) involved that presumably should not be deprived of proceedings before a Member State court.[76]

Furthermore, the requirement that the third State judgment will be handed down within "reasonable time" needs further clarification. It would be logical to apply Art. 29(2) CP *a fortiori* and principally exclude a stay if jurisdiction in the third State court has not been or will not be established within six months. Article 34 CP is designed to promote procedural efficiency by embracing a trade-off between the risk of conflicting judgments and the administration of justice. Therefore, the test of reasonableness in terms of time should differ from that under Art. 26 CP (the *forum necessitatis*), i.e. from the minimum guaranteed by the right of access to justice[77], and could be guided by a combined approach of absolute (e.g. maximum of 3 years) and relative terms comparing the expected length of proceedings of the court seised with that of the third State court (e.g. more than twice as long).

d) Necessary for the proper administration of justice

Article 34(1)(c) CP provides that a stay in favour of third State proceedings may only be granted if it is "necessary for the proper administration of justice". It is tempting to read Art. 34(1)(c) as a partial introduction of the doctrine of *forum non conveniens*: European proceedings based on the Regulation take preference unless (i) the third State proceedings can claim time-

[76] A restriction in that sense has been proposed by *Nuyts* para. 185. In exception from that, a stay should not be excluded if the stronger party, e.g. the professional, commenced proceedings in a Member State and the weaker party asks for a stay, or in cases under Art. 25 CP where the connections between the forum and the dispute are weak in any event.

[77] Article 47 Charter of Fundamental Rights, O.J. 2000 C 364/1; Art. 6 European Convention of Human Rights. See ECHR 29. 5. 1986, No. 9384/81 *(Deumeland)*, Series A No. 100, paras. 78–89; ECJ 17. 12. 1998 – Case C-185/95 P *(Baustahlgewebe)*, E.C.R. 1998, I-8417, paras. 29 seq. Cf. *Christian Heinze*, Europäisches Primärrecht und Zivilprozess: EuropaR 2008, 654–690 (667 seq.); *Benedetta Ubertazzi*, Intellectual Property Rights and Exclusive (Subject-Matter) Jurisdiction: GRUR/Int 2011, 199–212 (205 seq.).

wise priority and (ii) the third State court is more appropriate to hear the case according to the facts of the particular case. Yet, it would be odd if the Regulation saddled itself with *forum non conveniens* although it is basically not familiar with the concept. If *forum non conveniens* is not a ground for a stay between Member States, it is difficult to see why it should be admitted in relation to third States as there is no mechanism of judicial cooperation in relation to them.[78] "Proper administration of justice" can only be construed with the help of principles that mirror preferences of the Regulation itself. Therefore, granting a stay will principally comply with the requirement of proper administration of justice where third State proceedings have been commenced earlier and the judgment will be recognised, as this corresponds to the mechanism in Art. 27(1) BR/29(1) CP for intra-Union actions. But the result may be different where the third State court lacks competence in the light of European jurisdiction rules, particularly where jurisdiction is exclusively vested in European courts pursuant to Arts. 22/23. The idea behind such an approach would be a standardised method in assessing the appropriateness of third State proceedings. But arguably, Art. 34(1)(c) CP can be interpreted as referring to the ends of justice in the individual case, thereby allowing discretionary considerations such as the availability of proof and witnesses. But again, this would sharply contrast with the principle of foreseeability of jurisdiction. At the least, it seems clear that only matters of judicial administration come into consideration and issues of substantive law such as shorter limitation periods justify a stay only if the third State judgment would not be recognised for reasons of *ordre public* (Art. 34(1)(a) CP). "Proper administration of justice" is a vague phrase which will serve as a gateway for preserving national doctrines and will be very difficult to interpret in a uniform manner. It should therefore be deleted but could be replaced by a rule that would reflect the European jurisdictional principles and enforce these principles on the level of *lis pendens*. A stay would only be allowed if "the third State court is competent pursuant to the rules on jurisdiction in Section 1 to 8."

VI. Subsidiary Jurisdiction

It is the objective of the Commission Proposal to transform the Brussels I Regulation into an instrument of full harmonisation. Because third State defendants do not have a place of general jurisdiction in the EU, subsidiary jurisdiction rules are needed if gaps in the access to justice are to be avoid-

[78] Notably, Art. 15(1) Brussels IIbis and Art. 5(1) Succession Proposal permit a referral under *forum conveniens* considerations only to another Member State court.

ed.[79] It holds true that Member States rely on a wide ranging set of different connecting factors in their rules on subsidiary jurisdiction. Though full harmonisation cannot bring down these different legal traditions to a common denominator,[80] it is for the sake of clarity and uniform application that the CP includes provisions on subsidiary jurisdiction. The system of subsidiary jurisdiction pursues a bifurcated approach by providing jurisdiction at the place of the defendant's property (1.) and a *forum necessitatis* (2.).

1. Jurisdiction at the place of property

According to Art. 25 CP, a defendant domiciled in a third State may be sued in the EU state where property belonging to the defendant is located provided that (i) no other European court is competent on a special ground of jurisdiction, (ii) the value of the property is not disproportionate to the value of the claim and (iii) the dispute has a sufficient connection with the State of the court seised. One may critically consider whether the Regulation should not content itself with providing a *forum necessitatis* (Art. 26 CP) and refrain from laying down an exorbitant jurisdiction rule at all.[81] If according to the European rules there is no close connection between the dispute and any forum in the EU, but rather a third State is appropriate to hear the case, it seems consistent that European courts should claim competence only in the case of a negative competence conflict. In accord with this view, the Netherlands have abolished exorbitant jurisdiction from their national law.[82] But a caveat has to be made: The world is not an ideal one and this holds also true when it comes to access to justice. In the interest of an efficient enforcement of rights, European law should provide an additional ground for jurisdiction in cases where the claimant cannot demonstrate that his case meets the high threshold of the *forum necessitatis* (Art. 26 CP). Moreover, a *forum necessitatis* has to rely on vague criteria and will be difficult to apply with sufficient legal certainty. It is therefore preferable to create an additional ground of jurisdiction in relation to third State defendants using a more precise connecting factor.

National legal systems employ different policies as regards the assertion of jurisdiction over non-Member State defendants. According to French law the citizenship of the claimant or defendant as such provides a sufficient

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[79] *Nuyts* paras. 145, 150, 168; Impact Assessment 24.

[80] Data and Impact Report 74; *Magnus/Mankowski* 9; *Nuyts* para. 174.

[81] See *GEDIP*, Proposed Amendment 284, Art. 24bis; *id.*, Commentaire explicatif para. 7; Green Paper replies: Latvia 3, Slovenia 4.

[82] *Antonius van Mierlo/C. J. J. C. van Nispen/M. V. Polak (-Polak)*, Burgerlijke Rechtsvordering[3] (2008) Boek 1, Titel 1, Afd. Inl. Opm. para. 8. For Belgium see *Nuyts* para. 83.

ground for jurisdiction.[83] Similarly, it would be possible to assume jurisdiction based on the domicile or the centre of main interests of the claimant.[84] These criteria are easy to handle. Yet, a connecting factor that is exclusively claimant-oriented completely fails to take into account the interests of the defendant and can produce harsh results, especially because rights can be assigned to any person domiciled in any state.[85] Alternatively, European law could rely on a defendant-orientated "minimum contacts doctrine" as developed by US courts[86] or follow the English model based on the defendant's presence.[87] But these rules cannot be viewed in isolation from the doctrine of *forum non conveniens* which serves as an additional check to control exorbitant results. Consequently, it would be advisable to incorporate them into European law only as a package. Additionally, jurisdiction founded on the presence of the defendant is not helpful if the defendant does not have assets in the territory of the EU since the (potential) enforcement of the judgment would then be unclear.

Combining models from several European legal systems,[88] the Commission proposes to introduce jurisdiction on the basis of assets (Art. 25 CP). Unlike Art. 5(3) CP, it is not limited to actions specifically connected with the located property and serves as a general ground for jurisdiction. Therefore, Art. 25 CP might be considered to be harassing third State defendants by means of an unduly exorbitant ground of jurisdiction. To meet these concerns, the Commission has decided to soften the rigorous consequences of a forum of assets with two limiting requirements: First, jurisdiction is only amenable if the value of the property is not disproportionate to the value of the claim (Art. 25(a) CP). This is borrowed from Austrian law,[89] where that condition is met if the value of property amounts to roughly 20% of the value of the claim.[90] Thus, an umbrella forgotten in a hotel room would not suffice to institute proceedings in the amount of a million Euros. Second, along the lines of German and Austrian case law[91], Art. 25(b) CP requires further that the dispute has a sufficient connection with the Member State of the court seised. It is obvious that such a vague formula cannot

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[83] Arts. 14 and 15 Code Civil.

[84] Green Paper reply: France 7; cf. Art. 28(2), (3), (5) Latvian Code of Civil Procedure.

[85] *Schack* para. 368.

[86] Green Paper reply: Greece 5, see *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945).

[87] See *Dicey/Collins* (supra n. 49) para. 11R-096.

[88] Germany: § 23 Zivilprozessordnung; Austria: § 99 Jurisdiktionsnormen (JN), Czech: Art. 86(2) and Art. 88 (l) občanský soudní řád; Denmark: § 248 (2) Retsplejelov; Finland: Ch. 10, s. 18(2) Oikeudenkäymiskaari; Poland: Art. 1103(2) Kodeks postępowania cywilnego; Sweden: Ch. 10, s. 3 Rättegångsbalk.

[89] § 99 (1) S. 2 JN.

[90] OGH 6. 6. 1991, IPRax 1992, 164 (165).

[91] BGH 2. 7. 1991, BGHZ 115, 90 (94); OGH 29. 10. 1992, JBl. 1993, 666 (668).

guarantee legal certainty[92], particularly because the quality of the connection required is unlikely to be construed in a uniform manner throughout all Member States. A broad formula will invite national courts to fall back to their national principles on exorbitant jurisdiction. One conceivable remedy would be to outline more precisely a coherent policy as to the quality of "sufficient connection" in the Recitals of the Regulation instead of leaving the ECJ with that task as it could take decades until the court will have singled out the relevant criteria. These factors may include the claimant's domicile[93] or citizenship[94]; the governing law[95] and, if so, its complexity[96]; doing business in the state even if the dispute has not arisen out of business itself[97]; the availability of proof and witnesses[98]; the expertise of the court in related disputes[99]; connected cases pending between the same or different parties[100]; and certain aspects regarding the subject matter of the jurisdiction such as a breach of contract or the place where the contract was made.[101] Moreover, it should be clarified whether one factor suffices or has only to be considered when weighing up the parties' interests. In this context, it would be advisable to specify what "sufficient" means. The Regulation addresses clearly appropriate fora in Arts. 2 to 24; thus the threshold has to be probably lower than under the *forum non conveniens* standard under English law.[102]

Nevertheless, even if the term "sufficient connection" was to be explained in the Recitals of the Regulation, such a clarification could only cover just a small part of a wide range of cases. It still would give rise to ambiguities, thereby sitting at odds with the Regulation's principle of legal certainty. The legislator should carefully consider whether it is wise to sacrifice the advantages of a practicable forum of assets by burdening it with such a vague formula. There is much to be said in favour of removing the criterion of "sufficient connection" entirely. As this, however, would be to the detriment of the defendant, it would be recommendable to strengthen his position by tightening the disproportionality clause and require a ratio of one to one between the value of the claim and the property.[103]

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[92] *Friedrich Stein/Martin Jonas (-H. Roth)*, Zivilprozessordnung[22] I (2003) § 23 paras. 10 seq.

[93] See supra n. 84; BGH 2. 7. 1991 (supra n. 91) 94.

[94] See supra n.83; BGH 29. 4. 1992, NJW-RR 1993, 5.

[95] *Spiliada Maritime Corp* v. *Cansulex Ltd*, [1987] A.C. 460, 481.

[96] *Nima Sarl* v. *Deves Insurance Public Co Ltd (The Prestrioka)*, [2002] EWCA (Civ) 1132 para. 73.

[97] See *Saab* v. *Saudi American Bank*, [1999] 1 W.L.R. 1861 (C.A.).

[98] *Spiliada Maritime Corp* v. *Cansulex Ltd*, [1987] A.C. 460 (478).

[99] "Cambridgeshire" factor, see *Spiliada Maritime Corp* v. *Cansulex Ltd* (previous note) 484 seq.

[100] See *Donohue* v. *Armco Inc*, [2002] 1 Lloyd's Rep. 425 (H.L.).

[101] See CPR (UK) PD 6B 3.1.6. and 7.; cf. BGH 22. 10. 1996, IPRax 1997, 257.

[102] CPR (UK) 6.37.3; *Dicey/Collins* (supra n. 49) para. 11–149.

[103] *Thomas Pfeiffer*, Internationale Zuständigkeit und prozessuale Gerechtigkeit (1995) 235

2. *Forum necessitatis*

The introduction of a *forum necessitatis* (Art. 26 CP) guarantees a right of access to justice and is indispensable in an instrument of full harmonisation. Even if a *forum necessitatis* has to be couched in broad terms, an autonomous rule at the European level appears to be the lesser evil compared to leaving negative competence conflicts to the fragmented and equally uncertain national provisions. Article 26 CP will probably be only of little practical importance, but there might be two scenarios where it comes into play:

(1) Article 26 may apply if the parties have derogated from the jurisdiction of a European Union court in favour of a third State forum and it subsequently turns out that proceedings cannot be reasonably brought therein (Art. 26(a) CP). Although as a result of the Commission Proposal the validity of the jurisdiction agreement will be further determined by national law, it is not for national law but for Art. 26 CP to resolve the negative competence conflict which results from the derogative effect – stemming from the jurisdiction agreement – recognised by the Regulation. Article 26 CP will thus provide the parties with a *forum necessitatis* within the EU. But this will not apply in all cases. Where the third State judgment will not be recognised because the parties themselves have created the lacuna and should have known better[104], Art. 26 CP will not be engaged. An "exceptional basis" would be missing.

Interestingly, Art. 26 CP does not apply in relation to defendants from Member States (Art. 4(1) CP). This seems to stem from the internal logic of the Regulation: An EU defendant can at least be taken to court in the state of his domicile (Art. 3(1) CP). But that does not hold true if the Regulation recognises the derogative effect of a third State jurisdiction agreement between two EU parties. Instead of leaving the gap to be filled by Member State law, Art. 26 CP should enshrine a uniform approach (at least by an analogous extension). Thus, there is strong case for extending the personal scope of Art. 26 CP.[105] Yet, it should be noted such an extension would be superfluous if the Commission adopted a rule on third State jurisdiction as developed in this paper since a derogative effect would accordingly be de-

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seq.; *Kropholler*, Internationale Zuständigkeit, in: Handbuch des Internationalen Zivilverfahrensrechts (supra n. 8) Chap. III, para. 342. Yet, such a rule will aggravate the problem of the proportionality clause where property is spread among various Member States. The claimant will be forced to commence parallel partial actions. However, the first action will trigger a stay under Art. 27(1) BR/29(1) CP if the split claims rely on "the same cause of action". Possible solutions would be to allow parallel proceedings and restrict recognition and enforcement to the territory of the seised court, *(Schack* para. 371), to focus on the value of the property in the EU in total or to permit proceedings where the centre of the property is located.

[104] E.g. the judgment of a third State will not be recognised for lack of reciprocity (this is a ground for non-recognition in at least some Member States).

[105] *Domej* (supra n. 1) 126.

nied where the conditions of Art. 26 were met. Furthermore, it should be noted that the *forum necessitatis* should never apply where at least one European court has jurisdiction under the Regulation. Thus, the Regulation should not be extended to situations where the proceedings before a Member State court would take unreasonably long as this would conflict with the Regulation's principle of mutual trust in the administration of justice in the Member States.

(2) A second field where Art. 26 may become potentially important is the enforcement of mandatory EU law, particularly consumer law.[106] In consumer transactions, applicable law and jurisdiction will concur in most cases (Art. 6 Rome I; Art. 15 BR). However, *forum* and *ius* may diverge in so far as the rules on overriding mandatory provisions in the consumer directives (Art. 23 Rome I) exceed the frame of Art. 15 BR/Art. 6 Rome I.[107] These rules could be undermined if the Brussels I Regulation did not provide a special head of jurisdiction vis-à-vis a non-EU defendant.[108] The same problem may arise in relation to mandatory rights under the Commercial Agents Directive[109]. It would go too far if the attempt was made to derive a *forum legis* from the EU conflict rules. The policy behind jurisdiction pursues an autonomous approach relying on principles different from those in the conflict of laws.[110] A better place to accommodate these cases would be Art. 26(b) CP. This would guarantee a uniform approach towards mandatory law and prevent an unnecessarily complicated fragmentation of the European rules on jurisdiction by additional *fora legum* in the conflict rules. It is only where the recognition of the third State judgment would amount to a violation of the *ordre public* that the *forum necessitatis* should step in. Yet, the mere fact that the third State court does not apply European law will probably not trigger the *ordre public* exception; it should rather depend on a comparison of the expected result of the third State judgment with the substantive principles of fairness effected by mandatory EU law.[111]

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[106] See Impact Assessment 21.

[107] See *Eva-Maria Kieninger*, Der grenzüberschreitende Verbrauchervertrag zwischen Richtlinienkollisionsrecht und Rom I-Verordnung, in: Die richtige Ordnung, FS Kropholler (2008) 499–515 (504).

[108] E.g. because the place of performance is outside the EU, has been otherwise specified (Art. 5(1) BR or a third state jurisdiction agreement (outside the scope of Art. 17 BR) has been made.

[109] Council Directive 86/653/EEC of 18. 12. 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, O.J. 1986 L 382/17. ECJ 9. 11. 2000 – Case C-381/98 *(Ingmar)*, E.C.R. 2001, I-9305. It is open to question, whether Art. 3(4) Rome I has implicitly overruled *Ingmar*, see *Johannes Hoffmann*, Art. 3 Abs. 4 Rom I-VO, Das Ende des europäischen Quellenpluralismus im europäischen internationalen Vertragsrecht?: EWS 2009, 254–261 (260).

[110] See *Pfeiffer* (supra n. 103) 744 seq.

[111] See OLG München 17. 5. 2006, IPRax 2007, 322 (324); *Giesela Rühl*, Die Wirksamkeit

VII. Task for the Future: Recognition and Enforcement of Third State Judgments

It is open to question whether the Proposal should go even further and harmonise the rules on the recognition and enforcement of third State judgments.[112] Although the time may currently not be ripe for taking such a bold step, the argument carries some force. It will be inevitably necesarry for the smooth operation of the Regulation in the future. As seen, the rules on third State *lis pendens* are incomplete, thereby hampering the internal market as long as they are not backed by a common set of rules on the recognition of third State judgments. It would greatly benefit European market participants if they could rely on uniform standards when they are parties to third State proceedings as either claimants or defendants, allowing them to easily determine whether the judgment will be enforced in any EU State. This is particularly important with respect to parties who engage in cross-border business or have their assets spread throughout several Member States. Moreover, competing market participants may be put at a, respective, advantage or disadvantage if it is easier or harder to have a third State judgment recognised. Although the current Proposal does not tackle the problem of third State judgments, it might bring about a harmonisation of the rules on recognition and enforcement under national law through the backdoor as far as the indirect competence of the third State court is concerned. When recognising a non-Member State judgment, a national legal system may further adhere to national rules. But this will no longer be an attractive solution given the fact that the Member State court assumes its jurisdiction (direct competence) under European law.[113]

VIII. Conclusion

The general thrust of the Commission Proposal deserves full support. Its implementation is, however, in need of improvement: The rule for jurisdiction on connected claims (Art. 6(1) CP) should be extended to defendants from third States. It is of particular importance that the Regulation clarifies

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von Gerichtsstands- und Schiedsvereinbarungen im Lichte der Ingmar-Entscheidung des EuGH: IPRax 2007, 294–302 (301). Contra Cass. civ. 22. 10. 2008, Rev.crit.d.i.p. 2009, 69.

[112] Pro Green Paper replies: Deutscher Bundesrat 2, Italy 2, Latvia 5, Lithunia 2. A detailed proposal has been presented by *GEDIP*, Le règlement "Bruxelles I" et les décisions judiciaires rendues dans des Etats non membres de l'Union européenne, IPRax 2011, 103–104. Contra CP 5; Green Paper replies: Czech 4, United Kingdom para. 16, Denmark 2, Finland 2, Netherlands 5, Slovenia 5, Spain 2.

[113] Cf. *Christoph Kern*, Anerkennungsrechtliches Spiegelbildprinzip und europäische Zuständigkeit: Zeitschrift für Zivilprozess 120 (2007) 31–71.

the problem of its *reflective effect*. It is strongly recommendable to create European rules for declining jurisdiction in cases of exclusive third State jurisdiction and jurisdiction agreements. With respect to the principle of legal certainty, Art. 34(1)(c) CP ("necessary for administration of justice") should be deleted. The same should be done with Art. 25(b) ("sufficient connection").

There can be no doubt that a multilateral instrument guaranteeing worldwide recognition of Member State judgments is the optimum solution. But it is welcome that the Commission opted for the second best solution, one which guarantees a consistent approach at least in respect of judicial cooperation within the EU.