

This article is published in a peer-reviewed section of the Utrecht Law Review

Procedural Justice for ‘Weaker Parties’ in Cross-Border Litigation under the EU Regulatory Scheme

Vesna Lazić*

1. Introduction

The unequal bargaining position of parties in commercial legal relationships will usually be attempted to be corrected and the imbalance minimised not only by provisions of a substantive nature, but also by procedural and private international law rules. In particular, the existing legal framework, both on the EU and on the national level, is being adapted so as to ensure that any advantage presumed or achieved by a contracting party with a dominant bargaining position will remain without legal entitlement and effect. Consequently, certain rights obtained in such legal transactions will be unenforceable against a ‘weaker party’. From the point of view of procedural law, rules on jurisdiction may be adjusted so as to protect the position of a weaker party in legal proceedings.

The present paper will analyse how procedural justice for weaker parties has been maintained in the legal instruments of the EU legislator, in particular in the recently revised Brussels Jurisdiction Regulation¹ (Brussels Ibis Regulation).² A reference to a ‘weaker party’ in the EU private international law rules in civil and commercial matters usually relates to consumers, employees and insurance policy holders or other beneficiaries under insurance contracts. Other legal instruments harmonising or unifying substantive rules of private law may protect other parties considered to have a weaker bargaining position in certain legal relationships, such as agency and distributorship agreements. Such substantive law rules are not discussed in the present contribution. Also jurisdictional and private international law rules relating to matters of legal status and family law are not analysed in greater detail, but may occasionally be referred to.

The analysis focuses on rules on jurisdiction, the enforcement of judgments in civil and commercial matters, as well as on instruments that unify certain rules of civil procedure. Within that context, express provisions dealing with weaker party disputes, especially those relating to consumers contained in the applicable EC regulations, as well as the relevant case law of the Court of Justice of the European Union

* Dr. Vesna Lazić (e-mail: V.Lazic@uu.nl) is associate professor of Private Law, Utrecht University (the Netherlands), and is affiliated with Utrecht University’s Montaigne Centre for Judicial Administration and Conflict Resolution.

1 Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, pp. 1-23 (hereinafter: Brussels I Regulation or Regulation 44/2001 or Brussels Jurisdiction Regulation).

2 Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), OJ L 351, 20.12.2012, pp. 1-32 as amended by Regulation No. 542/2014 of the European Parliament and of the Council of 15 May 2014 amending Regulation (EU) No. 1215/2012 as regards the rules to be applied with respect to the Unified Patent Court and Benelux Court of Justice, OJ L 163, 29.5.2014, pp. 1-4 (hereinafter: Brussels I Recast or Regulation 1215/2012 or Brussels Ibis Regulation).

(CJEU),³ are addressed. The purpose is to assess the degree of coherence among different legal sources in providing for procedural justice for consumers and to evaluate whether there is unity or diversity in the EU legal regulation.

Within the context of rules on jurisdiction, the relevance of the EU legislation for the validity and enforceability of jurisdictional clauses against weaker parties is examined. The analysis includes express provisions in the EU legislation and relevant case law of the CJEU regarding forum-selection clauses or a prorogation of jurisdiction.

2. Procedural position of weaker parties – provisions on jurisdiction

Rules on the jurisdiction of courts in civil and commercial disputes are unified on the EU level in the Brussels Jurisdiction Regulation. They include jurisdictional grounds for certain categories of disputes that involve ‘weaker parties’, in particular consumers, employees, insurance policy holders, the insured and beneficiaries under insurance contracts. Rules on international jurisdiction in some matters that are excluded from the substantive scope of application of the Brussels I Regulation are unified in other EU private international law instruments, such as the Brussels Ibis Regulation,⁴ and the Regulation on Wills and Successions.⁵ These legal sources are not scrutinised in the present contribution, but are briefly addressed within the context of prorogation of jurisdiction (forum-selection clauses or choice of court agreements).⁶ Instead, the discussion is focused on jurisdictional grounds concerning ‘weaker parties’ in the Brussels I Regulation, both in the current text (Section 2.1, *infra*) and the revised version which applies from 15 January 2015 (Brussels Ibis Regulation; Section 2.2, *infra*).

2.1. Jurisdictional rules under the Brussels I Regulation

The Brussels I Regulation is one of the most important private international law instruments of the EU legislator. Besides unifying grounds of jurisdiction, it ensures the efficient recognition and enforcement of judgments rendered in the EU Member States. More generally it facilitates judicial cooperation in civil and commercial matters. The Regulation applies to all EU Member States. Denmark was not initially bound by the Regulation as it has a special regime for judicial cooperation under the EC Treaty. In 2006 it concluded an agreement with the EU on the basis of which the Regulation became applicable in Denmark, as well.⁷

2.1.1. Scope of application

The substantive scope of application is defined in Article 1(1) according to which the Regulation applies to ‘civil and commercial matters’, regardless of the court or tribunal. Thus, it is intended to apply to private law matters, with a general exclusion of matters of public law. The clear distinction between matters of private law and those pertaining to public law is not always easily made. Especially in disputes involving

3 It is also referred to as the ECJ (European Court of Justice) when referring to earlier case law.

4 Council Regulation (EC) No. 2201/2003 of 27 November 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, OJ L 338, 23.12.2003, pp. 1-29.

5 Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (OJ L 201, 27.7.2012, pp. 107-134). Maintenance was initially within the scope of the Brussels Regulation (and the 1968 Brussels Convention which was converted into the Brussels I Regulation) and was regulated in Art. 5(2). That provision became redundant in 2011 when the Maintenance Regulation became applicable (Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 7, 10.1.2009, pp. 1-79). Further, some other civil and commercial matters are also excluded from the substantive scope of application, in particular those pertaining to social security, arbitration and bankruptcy. The latter is the subject of legal regulation on the EU level in Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, OJ L 160, 30.6.2000, pp. 1-18. Certain aspects of arbitration, in particular arbitration agreements and the recognition and enforcement of arbitral awards are regulated in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, United Nations, Treaty Series, vol. 330, p. 38 No. 4739 (1959) (hereinafter: 1958 New York Convention). The 1958 New York Convention was the major reason for excluding arbitration from the substantive scope of application of the 1968 Brussels Convention.

6 The terms ‘prorogation of jurisdiction’, ‘forum selection clause’ and ‘choice of court agreement’ are used interchangeably.

7 The EU concluded an agreement with Denmark by means of Council Decision 2006/325/EC of 27 April 2006, OJ L 120, 5.5.2006, p. 22.

a public authority it may appear difficult to determine the meaning and the reach of the wording 'civil and commercial matters'.⁸

The territorial (personal or formal) scope of application with respect to jurisdictional rules may be derived from Articles 2, 3 and 4, as well as Recitals (8) and (9).⁹ It follows that the Regulation only applies if a defendant is domiciled in a Member State, with the exception of Articles 22 and 23. In cases of exclusive jurisdiction (Article 22) and a prorogation of jurisdiction (Article 23) the courts in the Member States may establish their jurisdiction regardless of the defendant's domicile. Thus, under these provisions the courts of a Member State may assume jurisdiction even when the defendant is domiciled in a third state, provided that the criteria in Articles 22 and 23 are met.¹⁰ In all other cases a defendant domiciled in a Member State can be sued in the courts of another Member State only on the basis of the rules of jurisdiction provided in the Regulation. No rules on international jurisdiction under national procedural law may be relied upon to assume jurisdiction against defendants domiciled in EU Member States. Such rules, however, may be applied against a defendant that has no domicile in a Member State, including those that may be considered as 'exorbitant' jurisdictional grounds. Any person domiciled in a Member State shall, notwithstanding his/her nationality, be able to rely on the national rules of jurisdiction applicable in this state in proceedings against a defendant domiciled in a 'third country'.¹¹ However, the domicile of the claimant is irrelevant for the applicability of the Regulation.¹²

Within the context of the territorial scope of application, 'weaker' parties – consumers, employees and insurance policy holders – in the European Union can benefit from the jurisdictional rules only against defendants domiciled in the EU Member States under the Brussels I Regulation. Indeed, the rules on international jurisdiction intended to protect the procedural position of a weaker party may also be provided in the national laws of the Member States.¹³ Yet such rules are not necessarily identical, so that the 'level of protection' may vary among different EU Member States. Therefore, the changes introduced in the revised Regulation 1215/2012 (Brussels Ibis) are to be met with approval: the territorial scope of application in certain 'weaker party disputes' is widened, as will be explained in greater detail in Section 2.2, *infra*.

2.1.2. Rules on jurisdiction in disputes arising under insurance, consumer and individual employment contracts

The provisions on jurisdiction in disputes involving 'weaker' parties are contained in Sections 3, 4 and 5 of the Brussels I Regulation. They relate to disputes arising under insurance contracts, and consumer and labour disputes respectively. The rules on jurisdiction in these Sections are independent from other jurisdictional rules in the Regulation¹⁴ and aim at protecting the jurisdictional position of a weaker party.¹⁵ They prevail over both the general rule in Article 2 and alternative jurisdictional grounds in Articles 5, 6 and 7. On the other hand, the rules on exclusive jurisdiction have prevalence over the jurisdictional rules in Sections 3, 4 and 5. Among the latter rules themselves, the rules on insurance contracts prevail over the rules on jurisdiction in consumer disputes.¹⁶

8 See e.g., the case law of the ECJ in the Judgment in *LTU Lufttransportunternehmen GmbH & Co. KG v. Eurocontrol* of 14 October 1976, Case 29/76, EU:C:1976:137; Judgment in *Sonntag v. Waidmann* of 21 April 1993, Case C-172/91, EU:C:1993:144; Judgment in *Gemeente Steenbergen v. Baten* of 14 November 2002, Case C-271/00, EU:C:2002:656; Judgment in *TIARD SA v. Staat der Nederlanden* of 15 May 2003, Case C-266/01, EU:C:2003:282.

9 The scope of application of the Regulation with respect to recognition and enforcement may be derived from Arts. 32 et seq., implying that the Regulation applies to judgments rendered by a court of an EU Member State. The domicile of the defendant is thereby irrelevant.

10 See also, I. Pretelli, et al., *Possibility and terms for applying Brussels I Regulation (Recast) to extra-EU disputes*, Study for the JURI Committee, European Parliament, European Union, 2014, p. 9. The same conclusion follows from the relevant case law of the ECJ, e.g., ECJ Judgment in *Group Josi Reinsurance Company SA v. Universal General Insurance Company (UGIC)* of 13 July 2000, Case C-412/98, ECLI:EU:C:2000:399; ECJ Judgment in *Overseas Union Insurance Ltd and Deutsche Ruck UK Reinsurance Ltd and Pine Top Insurance Company Ltd v. New Hampshire Insurance Company* of 27 June 1991, Case C-351/89, ECLI:EU:C:1991:279.

11 The definitions of 'domicile' for legal persons are given in Art. 60, whereas the provision of Art. 59 refers to the conflict of law rules to determine the 'domicile' of natural persons.

12 See also, A. Briggs & P. Rees, *Civil Jurisdiction and Judgments*, 2009, p. 61.

13 See e.g., Art. 6(c) and (d) of the Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*), which incorporates the jurisdictional rules of the Regulation with respect to employees and consumers respectively.

14 See also, M. Bogdan, *Concise Introduction to EU Private International Law*, 2012, p. 53.

15 See e.g., ECJ Judgment in *FBTO Schadeverzekeringen* of 13 December 2007, Case C463/06, EU:C:2007:792, Para. 28.

16 See also, Magnus/Mankowski/Nielsen, *Brussels I Regulation*, 2nd ed. 2012, Introduction, n. 2, p. 365.

Additionally, in accordance with Article 23(5), a prorogation of jurisdiction is only valid to the extent that it complies with the special rules provided for weaker party disputes. The rules in Sections 3, 4 and 5 do not modify or otherwise affect the provision of Article 5(5) relating to disputes arising out of a branch, agency or other establishment and the provisions concerning the right to bring a counterclaim.¹⁷ A 'stronger party' with no domicile in a Member State, but which has a branch, agency or other establishment in a Member State is to be considered as domiciled in a EU Member State regarding a dispute arising out of the operations of a such branch, agency or other establishment.¹⁸ Consequently, the courts in the EU Member States can establish jurisdiction against such a defendant only on the basis of the Regulation. The applicability of national rules on jurisdiction is thereby excluded. In other words, such defendants are 'protected' against national rules on jurisdiction in EU Member States including exorbitant jurisdictional grounds. What these provisions have in common can be summarised as follows:

- a) A weaker party – a policyholder, the insured or a beneficiary, consumer or employee – has a choice to bring proceedings against the other party to a contract either in the court of the Member State in which that other party is domiciled or in which it is more convenient to a weaker party (most likely in the country of its own domicile) or which is otherwise closely related to the dispute.
- b) Conversely, proceedings may be brought against a weaker party to the contract only in the courts of the Member State in which the 'weaker' party is domiciled.
- c) Forum selection clauses in these disputes have limited binding effect against a 'weaker' party. In other words, they may be successfully invoked against a weaker party only if the conditions provided in the relevant provisions of the Regulation are met.¹⁹

Thus, an insurer domiciled in a Member State may be sued in the Member State of its domicile or in the Member State where the plaintiff is domiciled if an action is brought by a policyholder, the insured or a beneficiary.²⁰ A co-insurer may be sued in a Member State where proceedings were brought against the leading insurer.²¹ With respect to liability insurance or the insurance of immovable property, the insurer may also be sued in the courts of the place where the harmful event occurred.²² The same holds true 'if movable and immovable property are covered by the same insurance policy and both are adversely affected by the same contingency'.²³ Also, the insurer may be joined in the proceedings initiated by an injured party against an insured if the law of the court where such proceedings are pending so permits. However, it is only the injured party that is to be protected under Article 11(2) of the Brussels I Regulation and not any statutory assignee. A social security institution cannot be considered to be a weaker party deserving protection in the application of the rules on the international jurisdiction of courts. Therefore, an insurer (a statutory assignee) cannot sue the insurer of an injured party before the courts of its Member State when the insurer is located in another Member State.²⁴

On the other hand, the insured, policy holder or beneficiary as a weaker party may be sued only in the courts of the Member State of its domicile. Thus, a weaker party may choose among the possibilities given in Articles 9 and 10 when filing an action against the insurer, whilst it can be sued exclusively in the country of its domicile. The only exception is in the case of direct actions by an injured party against the insurer when the law governing such direct actions provides that the policy holder or the insurer may be joined as a party.²⁵

17 Arts. 12(2), 16(3) and 20(2).

18 See the references to Art. 5(5) in Arts. 8, 15 and 18.

19 This issue is addressed in a greater detail in Section 2.2.1, *infra*.

20 See F. Ibili, *T&C Burgerlijke Rechtsvordering*, commentary on Arts. 8-13.

21 Art. 9(1) Regulation Brussels I.

22 No definition of 'where the harmful event occurred' can be found in the Recast, but it must be assumed that an interpretation similar to that of Art. 7(1)(b)(2) should be applied. See also P. Vlas, *Groene Serie Burgerlijke Rechtsvordering*, Art. 10 note 1 and J. Kropholler & J. von Hein, *Europäisches Zivilprozessrecht – Kommentar zu EuGVO, Lugano-Übereinkommen 2007, EuVTVO, EuMVVO und EuGFVO*, 2011, Art. 10 note 1.

23 Art. 10 Brussels I Regulation.

24 ECJ Judgment in *Vorarlberger Gebietskrankenkasse v. WGV-Schwäbische Allgemeine Versicherungs AG* of 17 September 2009, Case C-347/08, EU:C:2009:561.

25 Arts. 12(1) and 11(3) Brussels I Regulation. The concept 'matters relating to a contract' must be interpreted broadly in order to include a wide variety of agreements, for example, life insurance policies, J. Kropholler & J. von Hein, *Europäisches Zivilprozessrecht – Kommentar*

Similarly, when a contract complies with the definition of a 'consumer contract' under Article 15 of the Regulation,²⁶ a consumer may choose between the *forum rei* and *forum actoris*.²⁷ Conversely, a consumer may only be sued in the courts of the place where he/she is domiciled (Article 16(2)).²⁸ As in the case of insurance contracts,²⁹ the right to bring a counterclaim in the court where the original claim is pending is retained.³⁰

Also, an employee may only be sued in the Member State of his/her domicile. The action against an employer may be brought in the courts of the country of its domicile, in the country where the employee habitually carries out or has carried out his work or in the courts where the business which engaged the employee is or was situated, if the employee does not carry out his work in any one country. Accordingly, an employee may choose between the *forum rei* and *forum laboris* – the courts where he habitually carries out his work or the courts of the last place where he carried out his work. If the employee does not habitually carry out his work in any one country, he may choose between the courts of the employer's domicile and the courts where the business that engaged the employee is or was situated.³¹

In applying the Regulation and its predecessor, the 1968 Brussels Convention, the relevant case law of the ECJ illustrates that the criterion 'habitually carries out his work' can also be applied when the work is carried out in the performance of a contract of employment in more than one Member State. According to the relevant case law of the CJEU, it is the place where an employee has established the effective centre of his working activities.³² In order to identify that place, certain relevant circumstances need to be taken into account, such as where the employee spends most of his working time, 'where he has an office where he organises his activities for his employer and to which he returns after each business trip abroad'.³³ In the absence of an office, it will be the place in which employee carries out the 'essential part of his duties vis-à-vis his employer'.³⁴ The Court, in its various decisions interpreting jurisdictional grounds, has emphasised the need to guarantee adequate protection to the employee as the weaker of the contracting parties also when the employee carries out his work in more than one contracting state.³⁵ In other words, such an employee should not be deprived of procedural protection under the Regulation. Only if the effective centre of his working activities cannot be established will the employee have to file the claim against his employer either in the courts of the employer's domicile or the courts where the business that engaged the employee is or was situated. The need to ensure 'more adequate protection for the party who from the socio-economic point of view is regarded as the weaker in the contractual relationship'³⁶ is reflected not only in private international law instruments that regulate procedural issues, but also in those that unify conflict of law rules.³⁷

zu EuGVO, Lugano-Übereinkommen 2007, EuVTVO, EuMVVO und EuGFVO, 2011, p. 282.

26 For more particulars, see Section 2.1.2 infra.

27 Art. 16(1) Brussels I Regulation. In the CJEU Judgment in *Armin Maletic, Marianne Maletic v. lastminute.com GmbH, TUI Österreich GmbH* of 14 November 2013, Case C478/12, EU:C:2013:735, the Court stated that Art. 16(1) also applies with respect to jurisdiction in proceedings against 'the contracting partner of the operator with which the consumer concluded that contract and which has its registered office in the Member State in which the consumer is domiciled'.

28 See F. Ibili, *T&C Burgerlijke Rechtsvordering*, commentary on Arts. 15-17.

29 Art. 12(2) Brussels I Regulation.

30 Art. 16(3) Brussels I Regulation.

31 Art. 19 Brussels I Regulation reads:

'An employer domiciled in a Member State may be sued:

1. in the courts of the Member State where he is domiciled; or

2. in another Member State:

(a) in the courts for the place where the employee habitually carries out his work or in the courts for the last place where he did so, or

(b) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.'

32 See the CJEU Judgment in *Heiko/Koelzsch* of 15 March 2011, Case C-29/10, EU:C:2011:151: see also Briggs & Rees supra note 12, p. 160.

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

34 CJEU Judgment in *Herbert Weber v. Universal Ogden Services Ltd*, of 27 February 2002, Case C-37/00, EU:C:2014:12, Para. 42.

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

36 *Giuliano and Lagarde Report on the Convention on the law applicable to contractual obligations*, OJ C 282, 31.10.1980, p. 1, referring to Art. 6 containing conflict of law rules for individual contracts of employment.

37 See e.g., 1980 Convention on the law applicable to contractual obligations, converted into Regulation No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, OJ L 177, 4.7.2008, pp. 6-16 (Rome I Regulation) in which party autonomy in determining the applicable law is somewhat restricted so as to ensure that the rights and interests

The analysis of the rules on jurisdiction illustrates that the Brussels I Regulation departs, to a certain extent, from the general rule contained in Article 2 – domicile of the defendant – in lawsuits against a ‘stronger party’.³⁸ In disputes arising under consumer and insurance contracts, a weaker party is given the possibility to choose between the *forum rei* and *forum actoris* (consumers) and some other fora (the insured). Although following similar lines, a slightly different approach has been adopted in setting out the grounds for jurisdiction in disputes arising from individual employment contracts. A weaker party – an employee – is given the possibility to choose between fora closely related to the individual contract of employment. In particular, he/she can file the claim in the courts where he/she habitually carries out his/her work. However, differently from insurance and consumer contracts, the choice does not expressly include the *forum actoris*, even though in practice the place where an employee habitually carries out his work and his domicile will most frequently be in the same country. Outside the context of ‘weaker party disputes’, the domicile of the plaintiff, as well as the nationality of a claimant, is generally considered to be an exorbitant jurisdictional ground – i.e., a criterion that, according to internationally accepted standards, does not justify assuming jurisdiction against a defendant domiciled abroad.

2.1.3. Interpretation of Article 15 by the CJEU

The fact that one of the parties to the contract is a consumer does not necessarily imply that the consumer is a ‘weaker’ party entitled to the procedural protection under the jurisdictional rules in Articles 16 and 17 of the Brussels I Regulation. In particular, it would be inappropriate if a business party was to be compelled to appear before a foreign court when it never intended to pursue any professional activity abroad. For example, a tourist domiciled in France who purchases a souvenir in Greece from a local shop would not be a ‘consumer’ entitled to the procedural protection under the Regulation enabling him to sue the owner of the shop in France considering that the seller has never pursued its commercial activities abroad. In other words, such a person would not be a ‘consumer’ within the meaning of Article 15 of the Regulation. This provision defines agreements that are considered as ‘consumer contracts’ as follows:

- (a) it is a contract for the sale of goods on instalment credit terms; or
- (b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or
- (c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer’s domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.’

Only if one of the requirements indicated in Article 15 is fulfilled can the consumer make use of the jurisdictional grounds and procedural protection provided under Articles 16 and 17. If the contract is not a ‘consumer contract’ as defined in Article 15, the consumer will not be able to rely on the jurisdictional grounds under Section 4. Instead he/she will have to sue either in the Member State of the trader’s/ professional’s domicile in accordance with Article 2 or to rely on one of the alternative jurisdictional

of consumers and employees receive maximum protection. With respect to contracts of employment, the objective of the relevant provision of Art. 6 of the Convention is to guarantee adequate protection for the employee. Within that context, the ECJ emphasised that the criterion of the country in which the employee ‘habitually carries out his work’ must be given a broad interpretation. The subsidiary criterion – the place of business through which the employee was engaged – can determine the applicable law only in cases where the court cannot determine the place where the employee habitually carries out his work. See e.g., CJEU Judgment in *Heiko Koelzsch v. Luxembourg* of 15 March 2011, Case C-29/10, EU:C:2011:151, Para. 44 and CJEU Judgment in *Jan Voogsgeerd v. Navimer SA* of 15 December 2011, Case C-384/10, EU:C:2011:842. For more particulars on the topic, including the commentaries on the relevant case law, see A.A.H. van Hoek, ‘Heiko Koelzsch tegen Groothertogdom Luxemburg’, 2011 *Ars Aequi*, pp. 650-658; V. van den Eeckhout, ‘De ontspanningsclausule van art. 6 lid 2 EVO. Hoe bijzonder is de zaak Schlecker?’, 2014 *Tijdschrift Recht en Arbeid* 31, no. 4, pp. 3-8; Z. Even, ‘Het toepasselijk recht op arbeidsovereenkomsten. Artikel 6 EVO en 8 Rome I steeds verder ontrafeld’, 2013 *Nederlands Internationaal Privaatrecht*, no. 1, pp. 13-24; F.G. Laagland, ‘Grenzeloze problemen bij grensoverschrijdende arbeid’, 2012 *Arbeidsrechtelijke Annotaties* 11, no. 3, pp. 63-78; C.B.G. Derks, ‘Toepasselijk recht: hoe gewoon is de gewone werkplek in de internationale arbeidsverhouding?’, 2011 *Arbeidsrecht. Maandblad voor de praktijk* 45, pp. 8-11; K. Boonstra, ‘EVO/Rome I beoogt *law shopping* te voorkomen, maar niet om *cherry picking* te bevorderen’, 2014 *Tijdschrift Recht en Arbeid*, issue 6/7, no. 58.

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

grounds, most likely those in Articles 5(1)³⁹ and 5(3).⁴⁰ The latter provisions define the rules on jurisdiction for contractual and extra-contractual obligations respectively. Also, the consumer will not be entitled to procedural protection under Article 17 which restricts the binding nature of forum-selection clauses in consumer contracts.

Especially the interpretation and application of the requirement under (c) of Article 15 may prove problematic. Namely it is not always easy to determine whether or not a professional directs its commercial activity to the country of the consumer's domicile so that a contract can be considered as a 'consumer contract' within the meaning of Article 5(1)(c). When services and products are offered on the internet it may prove particularly difficult to determine whether or not business activities are directed to the Member State of the consumer's domicile, as the information may be accessed from anywhere in the world. The national courts of the Member States have on several occasions submitted questions for interpretation to the CJEU and a substantial case law has developed on this issue. The interpretation of Article 15 of the Regulation illustrates that the idea of protecting the procedural position of weaker parties incorporated in the Regulation is firmly supported by the CJEU's case law.

Thus, the possibility to access the website in itself is not sufficient to conclude that a trader whose activity is presented on its website can be considered to be 'directing' its activity to the Member State of the consumer's domicile. Rather it is necessary to establish that it is apparent from the website and the professional's overall activity that the trader envisaged doing business with consumers domiciled in one or more Member State, including the Member State of that consumer's domicile, 'in the sense that it was minded to conclude a contract with them'.⁴¹ The Court has established a rather extensive list of circumstances that may be relevant and capable of constituting evidence from which it can be concluded that the commercial party's activity is directed to the Member State of the consumer's domicile, as follows:

'(...) the international nature of the activity, mention of itineraries from other Member States for going to the place where the trader is established, use of a language or a currency other than the language or currency generally used in the Member State in which the trader is established with the possibility of making and confirming the reservation in that other language, mention of telephone numbers with an international code, outlay of expenditure on an internet referencing service in order to facilitate access to the trader's site or that of its intermediary by consumers domiciled in other Member States, use of a top-level domain name other than that of the Member State in which the trader is established, and mention of an international clientele composed of customers domiciled in various Member States'.⁴²

Obviously, such a wide range of relevant aspects that may be considered when establishing the fact that the commercial activity is directed to the Member State of the consumer's domicile favours the consumer's position when interpreting Article 15(1)(c). The same holds true as far as the nature of some of the relevant points is concerned, especially circumstances such as telephone numbers with an international code and the use of a top-level domain name other than that of the Member State in which the trader is established. Such a broad interpretation of the relevant provision and the wide approach in defining factors relevant to identify the fact that a professional 'directs' its commercial activity have been the subject of criticism in legal writings.⁴³

In order to comply with the requirement in Article 15(1)(c) it is not necessary that the contract between the professional and the consumer is concluded at a distance.⁴⁴ Besides, it is not required that there is a causal link between the means employed to direct the commercial or professional activity to the

39 See e.g., ECJ Judgment in *Petra Engler v. Janus Versand GmbH* of 20 January 2005, Case C-27/02, EU:C:2005:33.

40 See also, F. Ibbili, *T&C Burgerlijke Rechtsvordering*, commentary on Art. 15 note 3.

41 CJEU Judgment in *Peter Pammer v. Reederei Karl Schlüter GmbH & Co KG* of 7 December 2010, Case C144/09, EU:C:2010:740. For a comment on this decision, see, D.J.B. Svantesson, 'Pammer and Hotel Alpenhof – ECJ decision creates further uncertainty about when e-business "direct activities" to a consumer's state under the Brussels I Regulation', 2011 *Computer Law & Security Review* 27, no. 3, pp. 298 et seq.

42 CJEU Judgment in *Peter Pammer v. Reederei Karl Schlüter GmbH & Co KG* of 7 December 2010, Case C144/09, EU:C:2010:740.

43 Ch. Bisping, 'Mandatorily Protected: The Consumer in the European Conflict of Laws', 22 *European Review of Private Law* 14, no. 4, pp. 513 et seq.; see also, Svantesson, supra note 41.

44 CJEU Judgment in *Daniela Mühlleitner v. Ahmad Yusufi, Wadat Yusufi* of 6 September 2012, Case C190/11, EU:C:2012:542.

Member State of the consumer's domicile and the conclusion of the contract. Thus, when it is established on the basis of the information on the website and the professional's overall activity that the commercial activity is directed to the Member State of the consumer's domicile, it is irrelevant whether the consumer has learned about the product by searching the website or from another source. Yet the 'existence of such a causal link constitutes evidence of the connection between the contract and such activity'.⁴⁵ The rules on jurisdiction in Section 4 apply only when a contract is concluded between a professional and a consumer, but not in transactions between two persons not engaged in commercial or professional activities.⁴⁶

In general, the case law of the CJEU offers useful guidelines in interpreting the provisions of the Regulation. The decisions here addressed illustrate that the CJEU is inclined to interpret the provisions on privileged jurisdiction so as to maximise the protection of weaker parties. The legal reasoning in these decisions indicates that the CJEU gives prevalence to the higher degree of protection for consumers over the interests of commercial parties.

2.2. Regulation no. 1215/2012 (*Brussels Ibis, Recast*) – consequences for weaker party disputes

The Commission submitted its Proposal to revise Regulation 44/2001 on 14 December 2010.⁴⁷ The final text of Regulation (EU) No. 1215/2012 was adopted on 12 December 2012 and will apply as of 15 January 2015. It introduces changes in a number of areas.⁴⁸ Among the changes which are relevant to the issues discussed in the present contribution, extending the territorial (or formal) scope of application in disputes involving weaker parties has to be mentioned. Besides, a number of new provisions are inserted either to ensure a greater degree of protection for weaker parties or to clarify the existing regulatory scheme aimed at the protection of such parties.

2.2.1. Scope of application

In the Commission's Proposal the universal application of jurisdictional rules and their extension to disputes involving third party defendants was suggested.⁴⁹ The so-called 'universal scope' would result in the abolition of the dual regime of jurisdictional rules in cross-border cases within the European Union. Consequently, no exorbitant jurisdictional grounds could be relied upon in cases involving defendants from outside the European Union. The idea of universal application has not been accepted in the Recast Regulation. Yet its territorial (personal or formal) scope of application has been somewhat extended. In principle, the Regulation still applies only if the defendant is domiciled in an EU Member State. The exceptions in cases of choice of court agreements and exclusive jurisdiction have been retained. The scope of application in cases of prorogation of jurisdiction has thereby been expanded even further, so that the domicile of the parties has become irrelevant. Consequently, the provision of Article 25 (the current Article 23 of Regulation 44/2001) will apply in all cases where the jurisdiction of a court in an EU Member State has been agreed upon.⁵⁰ Choice of court agreements providing for the jurisdiction of a court of a third state will still be governed by national rules.

45 CJEU Judgment in *Lokman Emrek v. Vlado Sabranovic* of 17 October 2013, Case C218/12, EU:C:2013:666.

46 See e.g., CJEU Judgment in *Walter Vapenik v. Josef Thurner* of 5 December 2013, Case C508/12, EU:C:2013:790. It should be mentioned that this decision does not involve the interpretation of the Brussels I Regulation, but relates to the European enforcement order for uncontested claims – Regulation (EC) No. 805/2004. However, the reasoning of the Court may also be relevant for the rules on jurisdiction under Section 4 of the Brussels I Regulation.

47 Proposal of 14 December 2010 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, COM(2010) 748 final 2010/0383 (COD) (hereinafter: Proposal or Commission's Proposal).

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

49 For detailed comments on the proposal for universal jurisdiction, see J. Weber, 'Universal Jurisdiction in Third States in the Reform of the Brussels I Regulation, 2011 *Rabels Zeitschrift* 75, pp. 620 et seq.

50 Under Art. 25 of Regulation 1215/2012 it is no longer required that one of the parties to the agreement on jurisdiction is domiciled in an EU Member State. Under the current regime of Art. 23 of Brussels I, for its applicability it is required that a court of an EU Member State is agreed upon and that one of the parties is domiciled in a Member State. Under the revised Art. 25 it applies to prorogation clauses providing for the jurisdiction of a court in a Member State regardless of the domicile of the parties.

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

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

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

Thus, a court in a Member State may establish its jurisdiction on the basis of the jurisdictional rules of Regulation 1215/2012 in all disputes involving a consumer or an employee regardless of the domicile of the other party. The provision of Article 6(1) refers only to consumer (Article 1(1)) and labour disputes (Article 21(2)), but there is no reference to insurance contracts. Consequently, the jurisdictional rules contained in Section 3 relating to insurance contracts only apply if a defendant is domiciled in an EU Member State.⁵¹ The relevant provisions on jurisdiction in Article 18⁵² relating to consumer contracts (Article 16 of the Brussels I Regulation) and Article 21⁵³ relating to contracts of employment (Article 19 of the Brussels I Regulation) have been adjusted so as to reflect the changes introduced to the territorial scope of application in Article 6 of the Recast. Accordingly, the new regulatory scheme further enhances the protection of consumers and employees. In particular, such 'weaker parties' may rely on the rules on international jurisdiction in disputes against professionals and employees domiciled outside the European Union. On the other hand, the Regulation continues to apply only to claims against consumers and employees domiciled in the EU Member States. Such a conclusion follows from the fact that Article 6 refers only to Article 18 paragraph 1⁵⁴ and Article 21 paragraph 2 respectively.

2.2.2. Revised provision on tacit prorogation

Besides the scope of application and relevant rules on jurisdiction in disputes involving consumers and employees, there is a further amendment to the provision on the tacit prorogation of jurisdiction. It has been amended so as to better accommodate the interests of 'weaker' parties. Under the current regime of Brussels I, if a defendant enters an appearance, a court in an EU Member State in principle does not examine *ex officio* whether or not it has jurisdiction under the Regulation. The exception is an obligation to examine whether a court in another state has exclusive jurisdiction according to Article 22. This

51 For more particulars on the territorial scope of application of the Recast Regulation, see V. Lazić, 'Enhancing the Efficiency of Dispute Settlement Clauses in the European Union', in N. Bodiřoga-Vukobrat et al. (eds.), *Legal Culture in Transition – Supranational and International Law Before National Courts*, 2013, pp. 184-188.

52 Art. 18 of Regulation 1215/2012 reads as follows:

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

53 Art. 21(1) of Regulation 1215/2012 reads as follows:

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

54 Art. 18(1) determines jurisdiction when a professional is the defendant, see the text *supra* note 51.

follows from the current text of Article 24 of Brussels I which relates to tacit prorogation⁵⁵ as well as from Article 25.⁵⁶

The jurisdictional rules in disputes involving weaker parties are not mentioned in Article 24 of Regulation 44/2001. Yet a violation of the jurisdictional grounds in disputes arising out of insurance contracts and consumer disputes, as well as the rules on exclusive jurisdiction, presents a valid ground to refuse the enforcement of the judgment under Article 35(1) of the Brussels I Regulation. Considering that the current provision on tacit prorogation in Article 24 of Regulation 44/2001 does not refer to disputes involving weaker parties, the CJEU has held that the court seised could validly assume jurisdiction in such disputes if a weaker party enters an appearance without contesting jurisdiction.⁵⁷ It reasoned, *inter alia*, that ‘although in the fields concerned by Sections 3 to 5 of Chapter II of that regulation the aim of the rules on jurisdiction is to offer the weaker party stronger protection (...), the jurisdiction determined by those sections cannot be imposed on that party’.⁵⁸ One could expect that a weaker party should be put in a position to be fully aware of the effects of submitting his/her defence as to the substance of the dispute. It could therefore be expected that the court seised would determine *ex officio* what is the intention of entering an appearance. However, the Court held that ‘[s]uch an obligation could not be imposed other than by the introduction into Regulation No 44/2001 of an express rule to that effect’.⁵⁹

Thereby the protection intended to be ensured in Article 35(1) is somewhat undermined, as the ‘violation’ of the jurisdictional rules referred to therein would not qualify as a ground for refusing the enforcement of the judgment even if a weaker party was unaware of the protection of its procedural position provided under the Regulation. The newly introduced provision in Article 26(2) of the Recast Regulation (currently Article 24 Brussels I Regulation relating to tacit prorogation) remedies such a result and improves the positions of weaker parties. It reads as follows:

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

Thus, the court seised is under an obligation to inform a ‘weaker’ party defendant of the consequences of entering an appearance (i.e., a policy holder/an insured/injured party/a beneficiary of the insurance contract, a consumer or an employee). Such additional protection for a weaker party is to be met with approval.⁶⁰

The provision of Article 26 of Regulation 44/2001 has remained unchanged and is contained in Article 28(1) of the Brussels I Regulation. In accordance with paragraph 1 of this provision, a weaker party will be ‘protected’ as any other party domiciled in a one Member State sued in a court of another Member State but does not enter an appearance. In such a case, the court seised is required to declare *ex officio* its

55 Art. 24 of Regulation 44/2001 reads as follows:

‘Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 22.’

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

57 See CJEU Judgment in *Česká podnikatelská pojišťovna as, Vienna Insurance Group v. Michal Bilas* of 20 May 2010, Case C-111/09, EU:C:2013:165, where the Court held that ‘Article 24 (...) must be interpreted as meaning that the court seised, where the rules in Section 3 of Chapter II of that regulation were not complied with, must declare itself to have jurisdiction where the defendant enters an appearance and does not contest that court’s jurisdiction, since entering an appearance in that way amounts to a tacit prorogation of jurisdiction.’ That seems to have been a prevailing view in the literature, as well, see e.g., Bogdan, *supra* note 14, p. 65; Briggs & Rees, *supra* note 12, p. 53-55.

58 *Ibid.*, Para. 30.

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

60 See also, P. Hays, ‘Notes on the European Union’s Brussels-I “Recast” Regulation – An American Perspective’, 2013 *The European Legal Forum*, no. 1, p. 4; V. Lazić, ‘The Revised *Lis pendens* rule in the Brussels Jurisdiction Regulation’, 2013 *Review of European Law*, no. 2, p. 12.

lack of competence if it cannot establish its jurisdiction based on the provisions of the Regulation. When a defendant does enter an appearance the court seised is only required to examine jurisdiction on its own motion when the courts of another Member State have exclusive jurisdiction under the Regulation. As already explained, according to the new regulatory scheme of Regulation 1215/2012, the court will have to warn a weaker party about the need to contest jurisdiction and the consequences of its failure to do so.

The further amendments affecting the regulatory scheme on the prorogation of jurisdiction are discussed in Section 3, *infra*.

The jurisdictional grounds under Regulation 44/2001 have been expressly referred to in some other EU private international law instruments. Thus, the European Order for Payment Procedure⁶¹ in Article 6(1) provides that for the purposes of its application, 'jurisdiction shall be determined in accordance with the relevant rules of Community law, in particular Regulation (EC) No 44/2001'. Additionally, it specifically provides that the consumer may be sued only in the courts of its domicile. With respect to determining domicile, reference is made to Article 59 of Regulation (EC) No. 44/2001 (Article 6(2) of the European Order for Payment). Certain rules of Regulation 44/2001 have also been referred to in the European Enforcement Order for uncontested claims,⁶² as will be addressed in greater detail in Section 4, *infra*. However, there is no reference to a 'weaker' party or a 'consumer' in the Regulation on a European Small Claims Procedure.⁶³

3. Limited binding nature of choice of court agreements under the Brussels I Regulation and Regulation 1215/2012 (Recast)

The idea of limiting the effectiveness of choice of court agreements has been retained in the revised Regulation. In fact, no changes have been introduced regarding the provisions specifically regulating the validity of forum-selection clauses with respect to weaker party disputes. Yet some alterations to the general provision on prorogation of jurisdiction in Article 25 (ex Article 23 of the Regulation Brussels I), as well as changes to the *lis alibi pendens* rule in Article 29 (ex Article 27) may have some bearing on the regulation of forum-selection clauses in disputes involving weaker parties. The analysis of the changes introduced is preceded by an outline of the regulatory scheme under the Brussels I Regulation.

3.1. Choice of court agreements under the Brussels I Regulation

Prorogation of jurisdiction is dealt with in Article 23 of the Brussels I Regulation. In particular, the definition of the 'written form requirement' is provided in Paragraphs 1 and 2. The issue of substantive validity is to be determined on the basis of the applicable national law. In accordance with Article 23(5), a jurisdiction agreement concluded in violation of the provisions of Articles 13, 17 and 21 will have no legal force. These provisions define the conditions for the validity of prorogation agreements in insurance, consumer and labour law disputes respectively. In the same vein, no effect will be given to agreements purporting to exclude the jurisdiction of the courts having exclusive jurisdiction under Article 22.⁶⁴

Only an insured person, a consumer and an employee are protected by the rules restricting the effectiveness of jurisdiction agreements. No other category of 'weaker parties' is protected by the provision on the prorogation of jurisdiction under the Regulation, even though some other parties such

61 Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, OJ L 399, 30.12.2006, pp. 1-32.

62 Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ L 143, 30.04.2004, pp. 5-39.

63 Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ L 199, 31.7.2007, pp. 1-22. The latter is currently the subject of revision – Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure and Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure of 19 November 2013, COM(2013) 794 final, 2003/0403(COD), {SWD(2013) 459 final} {SWD(2013)460 final}. The Commission's proposal suggests introducing some modifications, such as widening its scope, extending the definition of cross-border cases and improving the use of information technology.

64 Some authors have argued that such an agreement will be invalid as far as international jurisdiction is concerned, but may still be valid as an agreement on local jurisdiction within a Member State, if such agreements would be valid and permitted under the relevant national law. See Magnus/Mankowski/Magnus, *Brussels I Regulation*, 2nd ed. 2012, Art. 24 note 132 and the literature referred to in note 409.

as commercial agents, distributors and franchisees also have a weaker bargaining position.⁶⁵ The same was true of claims arising out of maintenance which had been within the substantive scope of application of Brussels I before the Maintenance Regulation came into force. The latter permits the prorogation of jurisdiction in Article 4, but only in favour of the courts in a Member State which either has a close connection with the parties and their relationship⁶⁶ or the courts which are otherwise competent to hear certain closely related disputes.⁶⁷

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

- (a) Jurisdiction agreements entered into after a dispute(s) has arisen may successfully be relied upon by both parties. Thus, there are no restrictions on the binding nature and enforceability of such agreements in disputes relating to insurance, consumer and individual contracts of employment.⁶⁸
- (b) Prorogation of jurisdiction stipulated before a dispute has arisen may successfully be invoked by a weaker party if it gives the possibility to a weaker party to sue in courts other than those indicated in the relevant Sections 3, 4 and 5.⁶⁹ However, against a weaker party such an agreement either cannot be enforced at all⁷⁰ or has binding effect only if the parties have agreed on the jurisdiction of courts in a particular Member State connected to the dispute as determined under the relevant provisions of the Regulation.⁷¹

Thus, an agreement on jurisdiction entered into after a dispute has arisen is enforceable against both an employee and an employer. An agreement on jurisdiction entered into before a dispute has arisen may be relied upon by an employee, when such an agreement allows the employee to sue in courts other than the courts specified in Section 5. However, it cannot be successfully invoked against him.⁷²

In a similar vein, choice of court agreements involving consumers entered into after a dispute has arisen are binding upon both parties (Article 17(1) Brussels I Regulation). Jurisdictional clauses entered into before a dispute has arisen are binding if relied upon by a consumer, allowing the consumer to bring proceedings in courts other than those specified in Section 4 (Article 17(2) of the Regulation Brussels I).⁷³ Both parties may successfully invoke an agreement which provides for the jurisdiction of courts in the EU Member State of their common domicile or habitual residence at the moment of contracting, if such an agreement is permitted under the law of that Member State.⁷⁴ Thus, when the parties (or one of them) change their domicile or habitual residence from the moment of the conclusion of the contract, a forum-selection clause providing for the jurisdiction of the courts of the parties' common domicile or habitual residence may be successfully invoked against a consumer, subject to the condition that such a choice is permitted under the law of the Member State of the chosen court.

As to matters relating to insurance, jurisdiction agreements entered into before a dispute(s) has arisen is binding upon an insurer if it permits an insured to institute proceedings in courts other than those mentioned in Section 3. Against the insured such an agreement will be binding under the conditions provided for in Article 13(3)-(5). Thus, it will be enforceable against a weaker party if it provides for the

65 Compare *ibid.*, referring to a principal-agent relationship.

66 The courts in a Member State of the habitual residence or nationality of either party, Art. 4(1)(a) and (b).

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

68 Arts. 13(1), 17(1) and 21(1) of Regulation 44/2001.

69 Arts. 13(2), 17(2) and 21(2) of Regulation 44/2001.

70 This is the case relating to individual contracts of employment.

71 Arts. 13(3)-(5) and 17(3) of the Brussels I Regulation.

72 Art. 21 of the Brussels I Regulation.

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

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

jurisdiction of the courts in the Member State of the parties' common domicile or habitual residence even though a harmful event occurred abroad, if such an agreement is not contrary to the law of that state.⁷⁵ Also, such an agreement will be enforceable in cases of compulsory insurance or insurance related to immovable property in a Member State against a policy holder who is not domiciled in a Member State or if a contract of insurance covers one or more risks set out in the Regulation.⁷⁶ Just as in the case of employment and consumer contracts, choice of court agreements entered into after a dispute has arisen will be binding against both parties.

3.2. Choice of court agreements in Regulation 1215/2012 (Recast)

The provisions relating to choice of court agreements in insurance, consumer and labour law contracts have remained unchanged in Regulation 1215/2012. Yet it introduces a number of amendments to the prorogation of jurisdiction in Article 25 (Article 23 of Brussels I). First of all, the applicability of this provision is extended so that it is no longer required that one of the parties to the agreement on jurisdiction is domiciled in an EU Member State. Under the current regime of Brussels I, for Article 23 to apply it is required that a court of an EU Member State is agreed upon and that one of the parties is domiciled in a Member State. Under the revised Article 25, it applies to prorogation clauses providing for the jurisdiction of a court in a Member State regardless of the domicile of the parties. Forum-selection agreements providing for the jurisdiction of a court of a third state are accordingly governed by national rules. As to 'weaker party' disputes, expanding the scope of application with respect to choice of court agreement will have consequences regarding insurance contracts and to some extent with respect to individual employment and consumer contracts, even though the personal scope of application is extended in Regulation 1215/2012, as already explained.⁷⁷

Another amendment to Regulation 1215/2012 is a conflict of law rule for the substantive validity of prorogation agreements. According to the newly introduced rule, the law of the Member State of the chosen court will govern the substantive validity of such agreements.⁷⁸ The relevant decisions of the ECJ illustrate that the same law will also apply with respect to the interpretation of the choice of court agreement, its renewal or succession into a forum-selection agreement.⁷⁹ Recital (20) of Regulation 1215/2012 clearly states that the reference to the law of the Member State of the chosen court includes the conflict of law rules of that state. Such a solution under Regulation 1215/2012 is a major shortcoming of the newly introduced rule on the choice of law for the substantive validity of prorogation agreements. This provision does not present a true uniform private international law rule. Instead, it merely refers to the national conflict of law rules of the Member State whose court has been chosen. Consequently, there is no uniform conflict of law rule within the EU for the law applicable to the substantive validity of jurisdiction agreements.⁸⁰ This provision will also apply to the prorogation of jurisdiction in weaker party disputes.

75 Such an agreement confers jurisdiction on the courts in a Member State which is closely connected with both parties. See also, J. Kropholler & J. von Hein, *Europäisches Zivilprozessrecht – Kommentar zu EuGVO, Lugano-Übereinkommen 2007, EuVTVO, EuMVVO und EuGFVO*, 2011, Art. 13 nos. 3 and 4.

76 Art. 13(3)-(5) and Art. 14 of the Brussels I Regulation. For more particulars on jurisdiction in insurance contracts, see E. Vassilakakis, 'International Jurisdiction in Insurance Matters under Regulation Brussels I', in *Essays in honour of Spyridon Vi. Vrellis*, 2014, pp. 1079 et seq.

77 See Section 2.2, *supra*.

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

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

80 On the criticism relating to the provision on the substantive validity of forum-selection clauses, see V. Lazić, 'The Revised *Lis pendens* rule in the Brussels Jurisdiction Regulation', 2013 *Review of European Law*, no. 2, p. 16. With respect to comments on the Proposal, see Ch. Heinze, 'Choice of Court Agreements, Coordination of Proceedings and Provisional Measures in the Reform of the Brussels I Regulation', 2011 *Max Planck Private Law Research Paper*, no. 11/5, p. 8, electronic copy available at <<http://ssrn.com/abstract=1804111>> (last visited 8 October 2014); S.P. Camilleri, 'Article 23: Formal Validity, Material Validity or both?', 2011 *Journal of Private International Law* 7, no. 2, p. 298. But see P. Beaumont & B. Yüksel, 'The Validity of Choice of Court Agreements under the Brussels I Regulation and the Hague Choice of Court Agreements Convention', in K. Boele-Woelki et al. (eds.), *Convergence and Divergence in Private International Law*, 2010, pp. 563-577. At p. 575-577, in their comments to the Proposal the authors favour the solutions in both the 2005 Hague Convention and the changes suggested to be introduced in Art. 23, including *renvoi*.

The most important change is the revision of the *lis pendens* rule so as to depart from the ‘priority rule’ expressed in Article 27 of the Brussels I Regulation. According to this provision, the court of a Member State seised of a matter involving the same cause of action and between the same parties shall of its own motion stay its proceeding until the court first seised has established its jurisdiction. With a view of enhancing the efficiency of choice of court agreements and combating ‘torpedo actions’,⁸¹ Regulation 1215/2012 provides for an exception to this rule when there is a prorogation of jurisdiction. In such a case, any court seised other than the court designated in an exclusive choice of court agreement shall stay the proceedings until the court seised on the basis of the agreement declares its lack of jurisdiction.⁸² Accordingly, the designated court will have priority ‘to decide on the validity of the agreement and on the extent to which the agreement applies to the dispute pending before it’,⁸³ even if a court of another Member State has been seised first. The court chosen in the agreement can proceed regardless of whether or not the non-designated court has decided to stay proceedings.

However, the rule on the priority of the chosen court is deviated from in some, but not in all cases involving ‘weaker parties’. Thus, Article 31(4) of Regulation 1215/2012 provides that the priority rule in favour of the chosen court does not apply when a ‘weaker party’ is a claimant and the choice of court agreement is invalid under the provisions of the Regulation. Such wording implies that the new ‘priority rule’ does not apply when a prorogation clause is invoked by an insurer, an employer or a professional. Conversely, if a forum-selection clause is invoked by a weaker party, then a court before which a ‘stronger party’ has initiated proceedings will be bound by a new ‘priority in favour of the chosen court’ rule. Accordingly, the provision of Article 31(4) implies no changes with respect to weaker party disputes. It merely ensures that the new rule will not affect the jurisdictional rules of the Regulation intended to protect the procedural position of a weaker party, including those on the prorogation of jurisdiction. Thus, the court seised of a matter by a ‘weaker party’, and not the chosen court, will be competent to rule whether a forum-selection clause is valid and enforceable under the Regulation.

The possibility to determine the jurisdiction of a court by an agreement between the persons involved in a dispute may be restricted in other private international law instruments to an even greater extent. This is the case with respect to disputes concerning maintenance obligations, and even more so in matters of inheritance and family law. Thus, the possibility to choose a competent court is limited in different ways in the Maintenance Regulation.⁸⁴ First, it is limited by the requirement of a ‘link’ between the dispute, the parties and the chosen court (Article 4(1)(a) ad (b)). Besides, there is no possibility to choose the competent court in disputes relating to maintenance obligations towards minors.⁸⁵ These legal sources remain outside the scope of the present contribution and accordingly are not further discussed.

3.3. Relevance of other EU legal sources and the case law of the CJEU for the limited binding nature of choice of court agreements

The procedural position of a weaker party is not only protected in EU private international law instruments. Other legal sources, such as directives, may indirectly serve the same purpose even though they are primarily aimed at the approximation of substantive law. This is particularly so as far as Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts is concerned. In order to protect the procedural position of a weaker party, the effectiveness of dispute resolution clauses – a prorogation of jurisdiction entered into before a dispute has arisen⁸⁶ – may be further restricted. The main reason is that

81 ‘Torpedo actions’ or the ‘Italian torpedo’ refers to actions instituted before a non-chosen court in order to postpone filing an action before the court designated in a forum-selection clause. In accordance with the current priority rule in Article 27, the latter must stay its proceedings until the court first seised has decided on its jurisdiction. For more particulars, see V. Lazić, ‘The Revised *Lis pendens* rule in the Brussels Jurisdiction Regulation’, 2013 *Review of European Law*, no. 2, pp. 5-27.

82 Art. 31(2) of Regulation 1215/2012.

83 Recital (22) of Regulation 1215/2012.

84 Council Regulation (EC) No. 4/2009, supra note 5.

85 In Regulation (EU) No. 650/2012, supra note 5 there is a rather exceptional possibility for the parties in the matter of succession to agree on jurisdiction: if the deceased has made a choice for the applicable law all the parties in the succession can agree that the courts in this country would be competent to rule on all matters in succession. Although it should generally be distinguished from the prorogation of jurisdiction in civil and commercial matters, the regulatory scheme of Council Regulation (EC) No. 2201/2003, supra note 4, as Art. 12 also provides for a limited possibility to deviate from the jurisdictional rules in matters of parental responsibility.

86 The same holds true for arbitration clauses.

such agreements in transactions involving 'weak parties' are in principle not freely negotiated. Usually they are part of the general terms and conditions or rather standard contracts drafted by business parties which consumers automatically adhere to. A weaker party – a consumer – is left with no choice but to accept such a clause if he/she wishes to enter into a particular legal transaction ('take it or leave it'). The same holds true for employees and insurance policy holders or beneficiaries under contracts of insurance.

When interpreting Directive 93/13/EEC, the CJEU firmly supports the protection of the procedural position of a consumer.⁸⁷ Thus, the Court has held that the national courts of the Member States have the power and obligation to examine of their own motion the unfairness of a contractual term conferring jurisdiction on the courts within the meaning of Article 3(1) of the Directive.⁸⁸ In its decision of 4 June 2009 (*Pannon GSM Zrt. V. Erzsébet Sustikné Györfi*) the Court held, inter alia, that 'Article 6(1) of Council Directive 93/13/EEC of 5 April 1993, on unfair terms in consumer contracts, must be interpreted as meaning that an unfair contract term is not binding on the consumer, and it is not necessary, in that regard, for that consumer to have successfully contested the validity of such a term beforehand.' More importantly, the Court has held that a national court is 'required to examine, of its own motion, the unfairness of a contractual term.' Where such a term has been found to be unfair, the national court must not apply it. The same duty exists when the national court ascertains its own territorial jurisdiction.

When determining whether a contractual term is to be categorised as unfair within the meaning of Article 3(1) of Directive 93/13 it has held that a contractual term which was drafted in advance by a professional and was not subject to individual negotiations conferring jurisdiction on a court of the professional's principal place of business satisfies the criteria to be qualified as unfair for the purposes of the application of the Directive.⁸⁹

4. Procedural position of a weaker party – rules on the recognition and enforcement of judgments

The rules on the recognition and enforcement of judgments within the EU are contained in different legal instruments, such as the Brussels I Regulation, Brussels Ibis (or Brussels Iia), the Maintenance Regulation, the Regulation on a European Small Claims Procedure, the European Enforcement Order for uncontested claims and the European Order for Payment. It is outside the scope of this contribution to examine all these legal instruments. The purpose is rather to examine whether there is coherence between different legal sources of EU private international law in ensuring that the rules on jurisdiction intended to protect the position of weaker parties – an insured person, a consumer and an employee – have been respected.

4.1. Rules under the Brussels I Regulation and Brussels Ibis (Recast)

In principle, when deciding on the recognition and enforcement of a judgment rendered by a court of an EU Member State, the courts are not permitted to examine whether or not jurisdiction was properly ascertained. Yet, in exceptional circumstances it is possible to review a decision as to jurisdiction even though such a possibility is very much restricted.⁹⁰ The jurisdiction may be the subject of a review

⁸⁷ For the debate on the case law of the ECJ and whether the ECJ in interpreting these Directives overemphasises consumer interests, see V. Trstenjak & F. Beysen, 'European Consumer Protection Law: *Curia Semper Dabit Remedium?*', 2011 *CML Rev.*, no. 48, pp. 95-124.

⁸⁸ ECJ Judgment in *Pannon GSM Zrt. V. Erzsébet Sustikné Györfi* of June 2009, Case C-243/08, EU:C:2009:350; see also the ECJ Judgment in the joined cases *Océano Grupo Editorial and Salvat Editores* of 27 June 2000, Cases C240/98 to C244/98, EU:C:2000:346, Paras. 21-24.

⁸⁹ ECJ Judgment in the joined cases *Océano Grupo Editorial and Salvat Editores* of 27 June 2000, C240/98 to C244/98, EU:C:2000:346, Paras. 21-24. The same line of reasoning may be applied with regard to arbitration agreements. In Art. 3(3) of the Directive reference is made to the Annex which provides for an indicative and non-exhaustive list of the terms which may be regarded as unfair. The Annex expressly refers to arbitration agreements as follows: '(q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract'. On the interpretation of the Directive with respect to arbitration clauses in consumer contracts, see the ECJ Judgment in *Asturcom Telecomunicaciones SL* of 6 October 2009, Case C-40/08, EU:C:2009:615 and ECJ Judgment in *Elisa María Mostaza Claro v. Centro Móvil Milenium SL* of 26 October 2006, Case C-168/05, EU:C:2006:675. See also, CJEU Judgment in *Katalin Sebestyén v. Zsolt Csaba Kóvári, OTP Bank, OTP Faktoring Követeléskezelő Zrt, Raiffeisen Bank Zrt* of 3 April 2014, Case C-342/13, EU:C:2014:1857.

⁹⁰ A. Leyton & H. Mercer, *European Civil Practice*, 2004, Para. 26.086.

pursuant to Article 35 of the Brussels I Regulation, with respect to exclusive jurisdiction, jurisdiction in insurance and consumer disputes and Article 72. If a court violates these rules the judgment rendered may be refused recognition and enforcement in another Member State.

It should be noted that Section 5 relating to disputes arising out of employment contracts are not mentioned. The rationale behind this is that it would be contrary to the interest of an employee considering that the employee is the claimant in the vast majority of cases.⁹¹ Yet, employees are treated differently and less favourably than consumers and insured/policy holders. As rightly emphasised in the literature, it 'generates a split between the rules on jurisdiction on the one hand and the rules on recognition on the other hand'.⁹²

The changes introduced in this respect in Regulation 1512/2012 should be met with approval as they enhance the level of protection for weaker parties. The revised version deviates slightly from the regulatory scheme of the Brussels I Regulation, where grounds for refusal were contained in separate provisions in Article 34 and 35. Instead, all the grounds in Regulation 1512/2012 are consolidated in Article 45. Just as under the Brussels I Regulation, in Paragraph 3 it provides that, as a matter of principle, the jurisdiction of the court of origin may not be reviewed, except under the circumstances referred to in Paragraph (1)(e). The latter refers to exclusive jurisdiction,⁹³ as well as disputes in insurance, consumer and employment matters, 'where the policy holder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employer was the defendant'. Thus, employment contracts are now placed on the same footing as other transactions involving 'weaker' parties. Besides, the position of a 'weaker' party is protected to a greater extent in the revised Regulation, considering that a violation of jurisdictional grounds may only be an obstacle to recognition if a weaker party was a defendant in the dispute. Conversely, a 'stronger' party will not be able to invoke a violation of the rules on jurisdiction in Sections 3, 4 or 5 in the enforcement proceedings initiated by a 'weaker' party. Such a legal regulation represents a valuable improvement and clarification with respect to grounds to refuse recognition or enforcement.

4.2. Rules in other EU legal instruments on private international law and civil procedure

Respect for jurisdictional rules intended to protect the procedural position of a weaker party incorporated in the Brussels I Regulation is not ensured in the same manner and to the same extent in other EU instruments that unify certain rules of civil procedure and enhance the mutual recognition of judgments. As already addressed, disregarding jurisdictional rules in weaker party disputes represents a reason for refusing the enforcement of a judgment both under the Brussels I Regulation (Article 35) and Regulation 1512/2012 (Article 45(1)(e)(i) of the Recast). The latter is even more precise as it expressly includes disputes arising from individual employment contracts.

In some other legal instruments a jurisdictional rule in certain weaker party disputes must be respected in order to enable a court of the country of origin to certify its judgment for 'free circulation' within the European Union (i.e., to enable recognition or enforcement where no *exequatur* is required). Thus, certain rules of Regulation 44/2001 must be respected if a judgment is to be certified as a 'European Enforcement Order'. Thus, according to Article 6(b) of in the European Enforcement Order for uncontested claims,⁹⁴ a judgment must be rendered in compliance with jurisdictional rules for insurance contracts and exclusive jurisdiction provided in the Brussels Regulation. Besides, a judgment can be certified as a 'European Enforcement Order' if it is rendered against a consumer only by the court in the EU Member State of the consumer's domicile, unless the consumer has expressly agreed to a claim by admission, by means of settlement or in an authentic instrument within the meaning of Article 3(1)(a) and (d) respectively.

91 Commission Proposal, COM(1999) 348 final, p. 25.

92 Magnus/Mankowski, *Brussels I Regulation*, 2nd ed. 2012, Art. 35 note 42. In general, for criticism on this point in the Brussels I Regulation, see also, R. Geimer & R.A. Schütze, *Europäisches Zivilverfahrensrecht*, Kommentar, 2010, Art. 35, n. 14.

93 Art. 45(1)(e)(ii).

94 Regulation (EC) No. 805/2004, *supra* note 62.

The jurisdictional rules of the Brussels I Regulation are also referred to in Article 6 of the European Order for Payment Procedure.⁹⁵ Additionally, in Article 6(2) it specifically provides that the consumer may only be sued in the courts of its domicile. Domicile is to be determined in accordance with Article 59 of the Brussels I Regulation. If these requirements regarding jurisdiction are not met, an application for a European Order for Payment shall not be granted as is expressly provided in Article 11(a) of the European Payment Order.

However, the Regulation on a European Small Claims Procedure does not even mention a 'weaker' party or a 'consumer'.⁹⁶ Yet a judgment rendered in accordance with the procedure regulated therein is enforceable without the need to be declared enforceable in the Member State of enforcement (i.e., exequatur is not required). Accordingly, the conditions for the recognition and enforcement of judgments are similar to those falling under the European Enforcement Order and the European Payment Order, even though there is no requirement for the court in the Member State of origin to respect certain jurisdictional rules in cases involving weaker parties. The reasons for such a discrepancy among the various legal instruments within the European Union are not easily discernible. It is to be hoped that a revised Regulation on a European Small Claims Procedure will bring changes in that respect. This is especially so bearing in mind that the Commission's Proposal suggests increasing the value of the amount in dispute up to 5,000 or even 10,000 euros for the purpose of the application of the Regulation. The considerations on the protection of weaker parties should be incorporated, in the same or a similar manner, in different EU legal instruments regulating certain aspects of international civil procedure.

5. Conclusions

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

Such protection of the procedural position of weaker parties is even further enhanced in the revised Brussels I Regulation. This is particularly achieved by useful adaptations to the relevant provisions relating to tacit prorogation and grounds to refuse recognition and enforcement. The latter have been adjusted so as to expressly include violations of the jurisdictional rules in disputes arising under contracts of employment. It is also clearly stated that a violation of the jurisdictional rules presents a reason for refusing enforcement or recognition only if this is relied upon by a weaker party. Besides, the personal (territorial or formal) scope of application of the revised Regulation is widened so that consumers and employees may rely on the privileged jurisdictional rules regardless of the domicile of the other party. Finally, the revised rule on *lis alibi pendens* reversing the priority in deciding on jurisdiction in case of prorogation of jurisdiction does not apply when weaker parties are defendants.

The protection provided in the legislative instruments has found firm support in decisions by the CJEU, especially those on the interpretation of provisions on jurisdiction relating to consumer and employment disputes. Moreover, the legal instruments intended to harmonise substantive rules on the EU level, such as the Directive on unfair terms in consumer contracts, also enhance the procedural position of a weaker party.

Yet the level of protection is not necessarily identical in different private international law instruments within the European Union. Whereas in some it is ensured that a judgment rendered in violation of jurisdictional rules may not be recognised and enforced within the European Union, others, such as the Regulation on Small Claims, do not seem to express identical concerns in ensuring 'procedural justice' for weaker parties in cross-border disputes. Such discrepancy should be avoided in any future unification

95 Regulation (EC) No. 1896/2006, *supra* note 61. Art. 6(1) provides that for the purposes of its application, 'jurisdiction shall be determined in accordance with the relevant rules of Community law, in particular Regulation (EC) No 44/2001'.

96 Regulation (EC) No. 861/2007, *supra* note 63. The latter is currently the subject of revision, see note 63, *supra*.

of private international and procedural law aspects on the EU level. In other words, the same or similar considerations should be reflected in legal instruments unifying certain aspects of international civil procedure on the EU level. When revising existing legal instruments, such as the Regulation on a European Small Claims Procedure, the opportunity should be used to bring the provisions into line with considerations on the protection of weaker parties in other legal sources of European procedural law. ¶