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The death of the torpedo action? The practical operation of the Recast's reforms to enhance the protection for exclusive jurisdiction agreements within the European Union

Ian Bergson*

The Brussels I Recast introduces a priority mechanism in favour of the court designated in exclusive choice of court agreements, which is designed to enhance the protection for such agreements in the EU. However, little attention has been paid to how this mechanism is intended to operate in practice and what must be shown before a non-chosen court is obliged to stay their proceedings in favour of the chosen court. This article considers this question and assesses whether there remains any scope for parties to bring a “torpedo” action in order to derail proceedings in the chosen court.

Keywords: Recast; 1215/2012; Article 31(2); exclusive jurisdiction agreement; priority mechanism; torpedo; *lis pendens*; Gasser; Gothaer

The practical problems arising from the Court of Justice of the European Union (“CJEU”)’s decision in *Erich Gasser GmbH v MISAT Srl*¹ have been well documented.² The decision, concerning the *lis pendens* provisions of the Brussels Convention, applies a strictly chronological approach (based on the time of seisen) to determine which of two courts has priority to decide on its jurisdiction to hear a case, even where proceedings are brought in the first seised court (the “non-chosen court”) in breach of an exclusive jurisdiction agreement in favour of the second seised court (the “chosen court”). This gives rise to obvious incentives for a party looking to derail proceedings in the chosen court, by bringing a pre-emptive “torpedo” action in a non-chosen court.

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¹C-116/02 *Erich Gasser GmbH v MISAT Srl* [2003] ECR I-14693.

²J Mance, “Case Comment: Exclusive Jurisdiction Agreements and European Ideals” (2004) 120 *Law Quarterly Review* 357; A Briggs, “The Impact of Recent Judgments of the European Court on English Procedural Law and Practice”, *Oxford Legal Studies Research Paper No 11/2006*.

The purpose of this article is not to rehearse the arguments concerning *Gasser*, but to assess the European legislative response to this issue in the Brussels I Recast Regulation³ (the “Recast”) which applies from 10 January 2015.⁴ We shall refer to the Brussels Convention and the Brussels I Regulation⁵ (which have both now been superseded by the Recast) as the “Convention” and the “old BR” respectively. The Recast has been welcomed as overturning *Gasser*’s first-in-time rule in the context of exclusive jurisdiction agreements and providing for the chosen court to have priority to determine the validity and application of the agreement to the dispute in question.⁶ While this is undoubtedly a laudable aim, we shall examine how the priority mechanism is intended to operate in practice and question whether there remains any scope for a party to bring a torpedo action in a non-chosen court to derail any proceedings that may be brought in the chosen court.

This article will examine five distinct issues:

- A. The background to the decision in *Gasser* and its practical effects.
- B. How do the reforms in the Recast address the practical issues raised by *Gasser*?
- C. The non-chosen court: what approach should a non-chosen court take when faced with an application to stay its proceedings where the defendant alleges that the chosen court has jurisdiction under an exclusive jurisdiction agreement?
- D. The chosen court: what approach should the chosen court take when considering whether it has jurisdiction under an exclusive jurisdiction agreement? Is the chosen court bound by any of the findings of the non-chosen court?
- E. What are the limits of the reforms introduced by the Recast to address the problems arising from *Gasser*?

A. Background: the CJEU’s decision in *Gasser* and its practical effects

In *Gasser*, MISAT (an Italian company) and Gasser (an Austrian company) contracted for the sale of children’s clothing on the basis of an exclusive jurisdiction agreement in favour of the Austrian courts. MISAT brought proceedings against

³Regulation (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) [2012] OJ L351/1.

⁴Recast, Arts 66 and 81. See further section E-4, *infra*.

⁵Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1.

⁶A Briggs, *The Conflict of Laws* (Oxford University Press, 3rd ed, 2013), 97, n 244 and 110. Professor Briggs notes that the “problem inherent in the idea that there ‘is’ such a jurisdiction agreement, when its validity and scope may genuinely be a matter for dispute, is evidently regarded as less compelling than the damage which has been done in those outrageous cases in which a jurisdiction clause for a Member State is torpedoed by proceedings brought in another Member State which may take an age to get rid of them again”.

Gasser in Italy and around seven months later Gasser responded by bringing proceedings in Austria. MISAT challenged the Austrian court's jurisdiction, on the basis *inter alia* that the Italian courts were first seised.⁷ The CJEU held that the fact that Austrian court was the chosen court did not affect the chronological application of the *lis pendens* rule in Article 21 of the Convention.⁸ The second seised chosen court was never in a better position than the first seised (non-chosen) court to determine if the chosen court has jurisdiction. Therefore, the Austrian court was obliged to stay its proceedings under (what was formerly) Article 21 of the Convention, until the Italian courts determined whether they had jurisdiction. It was irrelevant that the duration of the proceedings in the Italian courts to determine whether they had jurisdiction was likely to be excessively long and take several years. The CJEU also gave short shrift to the UK Government's concern about delaying tactics by parties who might start proceedings ahead of time in a non-chosen court, knowing that it lacks jurisdiction, in order to delay settlement of the dispute.⁹

The CJEU's decision in *Gasser* can be supported based on the wording of the Convention and the old BR, which admit of no exception to the *lis pendens* provisions where there is an exclusive jurisdiction agreement in favour of another court.¹⁰ However, the practical effect of the decision was undoubtedly unfortunate. This can be best demonstrated by considering the subsequent English High Court decision in *JP Morgan Europe Ltd v Primacom AG*.¹¹ A German borrower brought proceedings in Germany against JP Morgan for declaratory relief in relation to various facility agreements between the parties, in breach of exclusive jurisdiction agreements in favour of the English courts in the agreements in question. JP Morgan responded by bringing *inter alia* an English action for a declaration that Primacom was in default under the loan agreements. Primacom successfully applied for a stay

⁷MISAT also alleged that the jurisdiction agreement had not been agreed. Gasser relied on the choice of court clause which appeared on all of its invoices sent to MISAT, on the basis that this reflects a usage in international trade and commerce which applied to the parties, *Gasser, supra* n 1, [13] and [18].

⁸*Gasser, supra* n 1, [47].

⁹*Gasser, supra* n 1, [53]. The court held that these difficulties were "not such as to call in question the interpretation of any provision of the Brussels Convention, as deduced from its wording and its purpose".

¹⁰It should be noted that the CJEU has recently held that the approach in *Gasser* does not apply where a court has exclusive jurisdiction under Art 22 of the old BR, despite the fact that (on the face of the old BR) there is no exception to the *lis pendens* provisions in this situation: C-438/12, *Weber v Weber*. The CJEU's reasoning was principally based on the wording of Art 35 of the old BR, which allows a Member State court to refuse to recognise a judgment that conflicts with Art 22 of the old BR ([54]–[55] of the judgment). No similar exception exists in the old BR or the Recast for judgments given in breach of an exclusive jurisdiction agreement (see *infra* n 73).

¹¹[2005] EWHC 508 (Comm).

of this action on the basis of Article 27 of the old BR pending the German court's decision on jurisdiction. Cooke J (although seemingly reluctant to reach this conclusion), held that the effect of *Gasser* was that a stay must be granted once it was concluded that the causes of action in Germany and England were the same, despite the fact that it was difficult to see how the German courts could find that they had jurisdiction owing to the exclusive jurisdiction clause in favour of England.¹²

It is clear that *Gasser* allowed a party ("X") to obtain considerable advantages by bringing pre-emptive proceedings against a counterparty ("Y") in a non-chosen court of X's choosing in breach of an exclusive jurisdiction agreement. Irrespective of whether the non-chosen court ultimately accepts that it has jurisdiction to hear the case, proceedings in the chosen court will be blocked pending the non-chosen court's decision on jurisdiction, which may take a number of years. This will delay the resolution of the dispute in the parties' chosen forum and this may lead to considerable expense and inconvenience for Y having to litigate in the non-chosen forum to challenge jurisdiction.¹³ If the non-chosen court ultimately accepted that it had jurisdiction,¹⁴ the chosen court would be obliged to decline jurisdiction¹⁵ and X will have been successful in thwarting Y's attempts to have the dispute resolved in the parties' agreed forum.

This gave insufficient protection to parties' legitimate expectations when agreeing exclusive jurisdiction clauses and undermined legal certainty and predictability.¹⁶ Professor Briggs has persuasively criticised the outcome in *Primacom* as a "disgraceful state of affairs" on the basis that giving the German courts priority to

¹²*Primacom*, *supra* n 11, [34]–[38].

¹³Depending on the national procedural rules in the non-chosen court in question, it may not be possible to challenge jurisdiction prior to consideration of the merits of the dispute. Where this is the case, this will further increase the costs incurred by the innocent party and delay any consideration of the matter by the chosen court.

¹⁴For example, because it rules that the jurisdiction agreement is invalid or does not cover the dispute between the parties.

¹⁵Article 27(2) of the old BR. This is a particular issue in the context of disputes about the scope of a jurisdiction agreement which is a matter of interpretation for the national court to resolve (*C-214/89 Powell Duffryn v Petereit* [1992] ECR I-1745, [37]). It is commonly understood (at least as a matter of English law) that this analysis must be conducted by reference to the substantive law governing the contract (Dicey, Morris and Collins, *The Conflict of Laws* (London, Sweet and Maxwell, 15th ed, [12-127]). There is no European instrument establishing a general choice of law rule for jurisdiction agreements, which increases the likelihood of inconsistent outcomes depending on the national court which considers the issue.

¹⁶These criticisms were acknowledged by the European Commission in formulating the Recast. See 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 (Recast) (COM (2010) 748 final, 14 December 2010), section 1.2.

decide what to do “stands common sense on its head and is inconsistent with the basic rule of *pacta sunt servanda*”.¹⁷

B. How do the reforms in the Recast address the practical issues raised by Gasser?

In its 2009 report on the application of the old BR, the European Commission noted concerns that the old BR provided insufficient protection for exclusive choice of court agreements,¹⁸ which has led to delays, increased costs and parties instituting proceedings prematurely to ensure that their choice of court agreements are effective. The Commission’s Green Paper for the Recast put forward a number of proposals to address these concerns, including releasing the chosen court from its obligation to stay pursuant to the old BR’s *lis pendens* rule and giving priority to the chosen court to determine its jurisdiction under the old BR.¹⁹

The solution ultimately enacted in the Recast is a combination of these proposals – the obligation on national courts to stay proceedings in a *lis pendens* situation in Article 29 of the Recast (formerly Article 27 of the old BR) is qualified by a new article, Article 31(2).²⁰ The European Commission’s Proposal for the Recast in 2010 stated that these reforms were designed to “increase the effectiveness of choice of court agreements and eliminate the incentives for abusive litigation in non-competent courts”.²¹

The new Article 31(2) provides as follows:

“Without prejudice to Article 26,^[22] where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.”

This provision is intended to give priority to the chosen court to make a determination of its own jurisdiction regardless of whether any non-chosen court may be

¹⁷A Briggs, “The Impact of Recent Judgments of the European Court on English Procedural Law and Practice”, *Oxford Legal Studies Research Paper No 11/2006*, 21.

¹⁸Report from the European Commission on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (COM (2009) 174 final, 21 April 2009), 6.

¹⁹Green 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, 21 April 2009), 5.

²⁰Article 29(1) of the Recast provides that it is “[w]ithout prejudice to Article 31(2)”. This should be read as qualifying the second seised court’s obligation to stay its proceedings insofar as Art 31(2) applies.

²¹*Supra* n 16, 9. It should be noted that there are a number of differences between the proposal put forward by the European Commission in this document and Art 31(2) and Recital (22) as finally enacted.

²²See section E-2 *infra*.

seised first. This is amplified by Recital (22), which clarifies the rationale for the change and provides in terms for the chosen court to have priority:

“in order to *enhance the effectiveness of exclusive choice-of-court agreements and to avoid abusive litigation tactics*, it is necessary to provide for an exception to the general *lis pendens* rule in order to deal satisfactorily with a particular situation . . . where a court not designated in an exclusive choice-of-court agreement has been seised of proceedings and the designated court is seised subsequently of proceedings involving the same cause of action and between the same parties. In such a case, the court first seised should be required to stay its proceedings as soon as the designated court has been seised and until such time as the latter court declares that it has no jurisdiction under the exclusive choice-of-court agreement. This is to ensure that, in such a situation, the *designated court has priority to decide on the validity of the agreement and on the extent to which the agreement applies to the dispute pending before it*. The *designated court* should be able to proceed *irrespective of whether the non-designated court has already decided on the stay of proceedings*.” (Emphasis added.)

It is plain from the wording of Article 31(2) and Recital (22) that the Recast effects a legislative reversal of *Gasser* by giving priority to the chosen court even where it is second seised. Any other court will be obliged to stay their proceedings where there is an exclusive jurisdiction agreement and the chosen court is seised. Once the chosen court has established jurisdiction under the agreement, any other court is obliged to decline jurisdiction.²³

The wording of the Recast leaves a number of questions regarding the practical operation of the new provisions unanswered, such as the matters with regard to which the non-chosen court must be satisfied before staying its proceedings and what effect this determination has on the chosen court. We shall now consider the position of the non-chosen court and the chosen court in turn.

C. The non-chosen court: of what must a non-chosen court be satisfied before it stays its proceedings under Article 31(2) of the Recast?

1. Introduction

The wording of Article 31(2) suggests that there are two pre-requisites to the non-chosen court’s obligation to stay their proceedings: (i) the court of another Member State is seised of the dispute; and (ii) that court is the chosen court, ie, it is nominated under an exclusive jurisdiction agreement under Article 25 of the Recast.

The central difficulty with Article 31(2) of the Recast is determining the approach that a court should take to satisfying itself that issue (ii) is made out, namely whether there is an exclusive jurisdiction agreement within Article 25 of the Recast when a defendant challenges jurisdiction by seeking a stay under Article 31(2). There appear to be three possible approaches to that issue:

²³Recast, Art 31(3).

- A. **No determination:** the non-chosen court does not need to make any determination as to whether there is an exclusive jurisdiction agreement. Once the defendant in the proceedings asserts the existence of an exclusive jurisdiction agreement and shows that proceedings have been commenced in the putative chosen court, the non-chosen court must stay its proceedings in favour of the putative chosen court.
- B. **Full determination:** the non-chosen court must make a full determination as to whether there is an exclusive jurisdiction agreement in favour of the chosen court or not, in the same manner as it would if it were determining whether it had jurisdiction under Article 25 of the Recast.
- C. **A “middle ground” determination:** the non-chosen court merely needs to be satisfied that there is some evidence that an exclusive jurisdiction agreement exists before staying its proceedings. It will be argued that this option is the appropriate approach for a court considering an application under Article 31(2) and we shall explore in greater detail below precisely what this means in practice.

2. *No determination*

It is arguable that there should be no need for the non-chosen court to make a determination that there is an exclusive jurisdiction agreement, and that the obligation to stay arises as soon as such a jurisdiction clause is alleged to exist in a jurisdictional challenge and it is shown that proceedings have been commenced before the chosen court. Professor Dickinson's Report on the Commission's 2010 reform proposals of the old BR²⁴ (the “Dickinson Report”) suggests such an approach.²⁵ However, this was not ultimately adopted and the wording of Article 31(2) clearly envisages that some sort of determination be made as to whether there is an exclusive jurisdiction agreement.²⁶ This controls whether a non-chosen court is under an obligation to stay its proceedings. The same approach is evident in the wording of Recital (22), which provides that Article 31(2) does not apply where

²⁴A Dickinson, “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 (Recast)” Sydney Law School, Legal Studies Research Paper No 11/58.

²⁵*Supra* n 24, 33: “The courts of Member State whose *jurisdiction is contested on the ground that the parties have agreed that the court or courts of another Member State have exclusive jurisdiction* under Article 23(1) shall . . . stay proceedings once the Member State court or courts which are claimed to have been chosen are seised of proceedings to determine, as their main object or as an incidental question, the existence, validity or effects of the choice of court agreement with respect to the dispute between the parties” (emphasis added).

²⁶Article 31(2) of the Recast refers to the “court . . . on which an agreement as referred to in Article 25 confers exclusive jurisdiction” and the “court seised on the basis of the agreement”.

the parties have entered into conflicting exclusive choice of court agreements, where the general *lis pendens* rules of the Recast shall apply. This suggests that the non-chosen court must determine whether or not this is the case, because this will determine whether it is obliged to stay its proceedings or whether it can proceed as the court first seised.

This approach can be justified in principle because otherwise it would be open to a defendant seeking to avoid a dispute being litigated in a particular forum to assert that there is a jurisdiction agreement in favour of a particular forum, despite having no basis to support this assertion. If the putatively non-chosen court were obliged to stay its proceedings in this situation simply because the defendant brought proceedings in the putatively chosen court, this would effectively amount to a “reverse torpedo” allowing the defendant to derail the claimant’s proceedings for a considerable period pending a determination on jurisdiction by the putatively chosen court.

It is therefore suggested that Approach A set out above is contrary to the wording of the Recast and would be objectionable in principle due to the potential for abuse by parties seeking to avoid litigating in a particular forum.²⁷ The better view is that some kind of determination regarding the exclusive jurisdiction agreement must be made before the non-chosen court is obliged to stay its proceedings. It is self-evident that this determination must be made by the non-chosen court, because Article 31(2) is premised on the fact that the chosen court is not first seised²⁸ and has not yet determined whether it has jurisdiction.

3. Full determination

An alternative approach would be for the non-chosen court to make a full determination of whether the jurisdiction agreement exists, its validity and its applicability to the dispute between the parties, in the same manner as if it were deciding whether it has jurisdiction under Article 25 of the Recast. It is submitted that this approach would be contrary to the structure of Article 31(2) and Recital (22).

The purpose of an application for a stay of the non-chosen court’s proceedings under Article 31(2) is not to determine whether the chosen court has

²⁷Professor Dickinson acknowledges the potential for abuse from the proposed priority mechanism inherent in the proposal set out *supra* n 24, 19, but argues that these abuses can be addressed by requiring a party contesting jurisdiction to commence proceedings in the chosen court to determine that it has jurisdiction over the dispute and by an appropriate costs sanction. It is questionable whether this gives rise to a sufficient disincentive, particularly if it will take a long time for the putatively chosen court to determine whether it has jurisdiction.

²⁸See the concluding words of Recital (22), which provide that the exception in Art 31(2) does not apply if the chosen court is first seised. This is because the non-chosen court would be obliged in this situation to stay its proceedings under Art 29 of the Recast in any event, following the usual chronological approach applied to the Recast’s *lis pendens* provisions.

jurisdiction, but to determine the logically distinct question of which court has competence to make the determination of whether the chosen court has jurisdiction. The structure of the Article and the wording of Recital (22) make clear that the putatively chosen court is intended to have priority in making this determination and the non-chosen court should stay its proceedings in the meantime. In practical terms, it is difficult to see how this can work if the non-chosen court applies the same standard to determine whether there is a jurisdiction clause to the chosen court. This would be a recipe for parallel proceedings and inconsistent decisions because it would mean that the only time that the non-chosen court would defer to the chosen court is if it were independently satisfied that the chosen court has jurisdiction. Otherwise, the non-chosen court would refuse a stay notwithstanding the fact the chosen court had not ruled on whether it has jurisdiction. The very purpose of the priority rule is to avoid such a situation and to provide for the non-chosen court to defer to the chosen court.

In addition, if the non-chosen court made a full determination of the existence, validity and scope of the jurisdiction agreement, such a determination would appear to be a judgment recognisable and enforceable throughout the European Union under Chapter III of the Recast, which would bind the chosen court. This follows from the CJEU's decision in the *Gothaer*²⁹ case, which is discussed in full in section D below. The priority rule set out in Recital (22) would therefore be subverted, because there would be no room for the chosen court to make its own assessment of the jurisdiction agreement in the manner contemplated by Recital (22). The non-chosen court would have effectively arrogated for itself the role of the chosen court, contrary to the priority rule set out in the Recast. It is therefore suggested that Approach B should also be rejected.

4. "Middle ground" determination

We have rejected the options of the non-chosen court making no determination or a full determination of the existence, validity and scope of the jurisdiction agreement on the basis that this would be contrary to the scheme introduced by the Recast. It follows that a "middle ground" option is appropriate, which broadly speaking requires the non-chosen court to stay its proceedings once it is satisfied that there is some evidence that a jurisdiction agreement exists (and that proceedings have been commenced in the chosen forum).

What standard of proof should be applied by the non-chosen court when considering this question and what evidence needs to be adduced to obtain a stay in favour of the chosen court?

Under the Convention, the CJEU has recognised (in the context of determining whether jurisdiction exists under what is now Article 7(2) of the Recast) that the

²⁹C-456/11, *Gothaer Allgemeine Versicherung AG and others v Samskip GmbH* [2013] QB 548.

Convention does not govern the standard of proof applied by national courts and the evidence that must be adduced by a claimant before a national court to enable it to rule on the merits of the case, provided that the effectiveness of the Convention is not thereby impaired.³⁰ This has subsequently been applied by the Privy Council in the context of the old BR.³¹ There appears to be no reason why the same approach is inapplicable in the context of the Recast.

5. *The appropriate standard under English law*

For the time being, we shall proceed on the assumption that national law determines the standard of proof for determining whether there is an exclusive jurisdiction agreement under Article 31(2) of the Recast. What evidential standard should the English courts apply to determine the existence of the exclusive jurisdiction agreement, assuming they are faced with an application for a stay under Article 31(2) in favour of a chosen court elsewhere?

There are three key possibilities, from the English case law on this issue:

- **Balance of probabilities:** given that the issue of whether to grant a stay will be determined by the court at an interlocutory stage without the benefit of cross examination or disclosure, the court will be unable to apply the ordinary civil standard of the balance of probabilities. Any preliminary determination on the existence or validity of the jurisdiction agreement does not preclude a different determination being made at trial.³² Moreover, applying this standard would clearly be inappropriate since it would mean that a higher test would be applied under Article 31(2) to determine whether to stay proceedings in favour of the chosen court than is applied to determine whether jurisdiction exists under the old BR.³³
- **Good arguable case:** this test is applied by the English courts in the context of the old BR to determine whether their jurisdiction is established.³⁴ As Lord Rodger put it in *Bols Distilleries BV and another v Superior Yacht Services Ltd*, “[t]he rule is that the court must be satisfied, or as satisfied as it can be having regard to the limitations which an interlocutory process imposes, that factors exist which allow the court to take jurisdiction”.³⁵ This means the claimant has to show they have a much better argument on the material

³⁰C-68/93, *Shevill and others v Presse Alliance SA* [1995] ECR I-415, [37]–[39].

³¹*Bols Distilleries BV and another v Superior Yacht Services Ltd* [2006] UKPC 45, [2007] 1 WLR 12.

³²*Joint Stock Company “Aeroflot-Russian Airlines” v Berezovsky and others* [2013] EWCA Civ 784, [2013] 2 Lloyd’s Rep 242, [50].

³³*Bols Distilleries, supra* n 31.

³⁴*Ibid.*

³⁵*Ibid.*, [28].

available.³⁶ The Court of Appeal has subsequently interpreted the word “much” to mean that if the two arguments are equal, the party asserting that there is a jurisdiction agreement under Article 23 of the old BR will not succeed.³⁷

- **Serious issue to be tried:** this lower test is applied by the English courts to assess the merits of the claimant’s claim where they are seeking leave to serve out of the jurisdiction under the common law rules on jurisdiction. In order to obtain permission to serve out, the claimant must show that he has a serious issue to be tried on the merits.³⁸ This entails showing that there is a real (as opposed to a fanciful) prospect of success.³⁹ However, the good arguable case test continues to apply to establish the jurisdiction of the court, ie, that one of the gateways applies on the alleged facts.⁴⁰

As a matter of principle, the “good arguable case” test is inapposite in the context of Article 31(2) of the Recast. As argued in section C-3 above, the purpose of Article 31(2) is not to determine whether the chosen court has jurisdiction, but to determine which Member State court has competence to determine on the validity, existence and scope of the jurisdiction agreement (in order to defer to the chosen court in this regard). If the “good arguable case” test were applied to a stay under Article 31(2), the English courts would effectively be making a full determination and would be applying the same standard that is used to determine whether they have jurisdiction under the Recast. We have rejected this approach in section C-3 above, on the basis that it would subvert the priority rule anticipated by the Recast and give rise to a clear risk of parallel proceedings and inconsistent decisions.

Therefore, it is suggested that a lower standard is warranted for considering whether there is an exclusive jurisdiction agreement under Article 31(2). As a matter of English law, it is suggested that the “serious issue to be tried” test is appropriate. If there is a real (as opposed to a fanciful) prospect of showing that the parties have entered into an exclusive jurisdiction agreement, the non-chosen court should stay its proceedings pending the determination of the chosen court. This ensures that priority is given to the chosen court, in the manner envisaged by Recital (22).

³⁶*Ibid.* In *Bols Distilleries* (*supra* n 31), which concerned the issue of whether a jurisdiction clause had been agreed, this meant showing that the formal requirements of Art 23(1) of the old BR had been met and that it could be established clearly and precisely that the clause was the subject of consensus between the parties (*C-24/76 Estasis Salotti di Colzani Aimo et Gianmario Colzani v Rüwa Polstereimaschinen GmbH* [1976] ECR 1831). The claimant could not meet this test on the facts.

³⁷*Berezovsky*, *supra* n 32, [50].

³⁸*Seaconsar Far East Ltd v Bank Markazi* [1994] 1 AC 438.

³⁹*AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804, [71].

⁴⁰*Seaconsar*, *supra* n 38, 454.

6. *The appropriate standard under EU law*

Alternatively, there is a strong argument that applying a test that is more exacting than “serious issue to be tried” to determine whether there is an exclusive jurisdiction agreement for the purposes of Article 31(2) would impair the effectiveness of the priority rule in favour of the chosen court which is established by the Recast. Therefore, the CJEU may be minded to develop a standard to be applied by all Member State courts as a matter of Community law, in order to ensure a uniform approach to the interpretation of Article 31(2) of the Recast. It is submitted that this approach has much to commend it, to avoid the priority rule set out in Recital (22) being stultified by differing national court approaches to stay applications under Article 31(2) and to minimise the potential for inconsistent decisions between non-chosen and chosen courts.

It is suggested that an appropriate Community law standard for the non-chosen court would be whether there is a *prima facie* case that the exclusive jurisdiction agreement exists by reference to Article 25 of the Recast (which includes the requirements from the CJEU’s case law that the consensus on the jurisdiction agreement be clearly and precisely demonstrated).⁴¹ If this low evidential threshold can be overcome, the non-chosen court should stay its proceedings and defer to the chosen court.⁴² The crucial point to note is that there should be no final determination one way or another on the existence of the jurisdiction agreement at this stage. This final determination is a matter for the chosen court, thus giving effect to the priority rule in Recital (22) and ensuring that the chosen court can consider the matter afresh, without being bound by the non-chosen court’s judgment.

We shall proceed on the basis that a *prima facie* test based on the existence of the jurisdiction agreement is more likely to be adopted if the matter is considered by the CJEU. We shall therefore apply this test for the remainder of this article. In practice, it is questionable how far this proposed test differs in terms of its likely result from the “serious issue to be tried” test outlined above.

7. *A distinction between existence and validity?*

Recital (22) provides that “the designated court has priority to decide on the validity of the agreement and on the extent to which the agreement applies to the dispute pending before it”. It is suggested that this is designed to make clear that the non-chosen court should not investigate the validity of the exclusive jurisdiction clause or issues of scope when considering whether to stay its proceedings under Article 31(2). It is notable that this Recital omits any reference to the

⁴¹C-24/76 *Estasis Salotti di Colzani Aimo et Gianmario Colzani v Rüwa Polstereimaschinen GmbH* [1976] ECR 1831.

⁴²A similar proposal is put forward by Trevor Hartley: T Hartley, *Choice-of-Court Agreements under the European and International Instruments* (Oxford University Press, 2013), 229, [11.20].

existence of the agreement. This suggests that there is a distinction between issues of existence (which must be considered at a preliminary stage by the non-chosen court) and issues of validity and scope (which are exclusively for the chosen court).

The distinction between existence and validity is of considerable importance because Article 25(1) of the Recast introduces a new exception to the prorogation of jurisdiction from a jurisdiction agreement under the Recast where “the agreement is null and void as to its substantive validity” under the law of the chosen court. A full discussion of the intended meaning of this provision is outside of the scope of this article,⁴³ but it appears to be intended to provide a uniform choice of law rule for assessing the substantive validity of jurisdiction agreements under the Recast. This must be applied in light of the Recast’s recognition of separability and the express provision that jurisdiction agreements are independent of their containing contracts.⁴⁴

It is likely to be expensive and time consuming for the non-chosen court to investigate the validity of the exclusive jurisdiction agreement under its proper law before determining whether to stay proceedings under Article 31(2).⁴⁵ It is difficult to see the rationale for conducting such an investigation in view of the priority which is given to the chosen court under the Recast. In addition, the chosen court is plainly better placed to conduct this analysis, since its law is likely to be applicable to the issue of substantive validity⁴⁶ and may also apply to determine the scope of the clause.⁴⁷

It is therefore suggested, based on the wording of Recital (22), that the non-chosen court should not investigate issues of validity and scope when faced with a stay application under Article 31(2). In accordance with the priority rule embodied in Recital (22), these are matters for the chosen court. In addition, the non-chosen court should only investigate issues of existence insofar as required to satisfy itself that there is a *prima facie* case that an exclusive jurisdiction agreement exists (as suggested in section C-6 above). Once this low evidential threshold is overcome, the non-chosen court must stay its proceedings in favour of the chosen court.

8. Conclusion on the non-chosen court’s approach

It has been argued that the non-chosen court is obliged to stay its proceedings under Article 31(2) of the Recast where there is a *prima facie* case that the

⁴³See A Briggs, *supra* n 6, 109.

⁴⁴Article 25(5) of the Recast.

⁴⁵This is likely to require expert evidence of foreign law to be adduced before the non-chosen court.

⁴⁶Article 25(1) of the Recast. It should be noted that the Recast allows for the principle of *renvoi* to apply to point to a different law (*per* Recital (20)).

⁴⁷*Supra* n 15.

exclusive jurisdiction agreement exists by reference to the formal requirements in Article 25 of the Recast. This gives full effect to the legislative reversal of *Gasser* and the priority rule embodied in Recital (22) of the Recast. Once the non-chosen court stays its proceedings, the final word on the existence of the clause and any issues as to its validity or scope should be determined by the chosen court.

D. The chosen court: what approach should the chosen court take when considering whether it has jurisdiction under an exclusive jurisdiction agreement? Is the chosen court bound by any of the findings of the non-chosen court?

1. Introduction

In broad terms, this section considers the question of what the chosen court should do when there is a contest for jurisdiction between two Member State courts, one of whom is seised under an exclusive jurisdiction agreement.

There are three different scenarios, depending on whether the non-chosen court has rendered a judgment and has decided whether to stay its proceedings:

- A. Prior to any decision by the non-chosen court.
- B. The non-chosen court stays its proceedings in favour of the chosen court.
- C. The non-chosen court refuses to stay its proceedings in favour of the chosen court.

We shall consider these scenarios in turn.

2. Prior to any decision by the non-chosen court

It is helpful at this stage to consider a practical example involving a contest for jurisdiction between the English and Ruritanian courts.⁴⁸ Suppose there is an exclusive jurisdiction agreement in favour of the English courts in a commercial contract between an English seller (“S”) and a Ruritanian buyer (“B”). B is aware that S is likely to sue for amounts due under the contract in England so S commences proceedings pre-emptively in Ruritania for a declaration of non-liability. S challenges the Ruritanian court’s jurisdiction and brings proceedings for sums allegedly due under the contract in England. Assume further that the Ruritanian courts would take a number of years to determine any jurisdictional challenge. This is a classic example of a torpedo action, where (prior to the Recast) *Gasser* would prevent the English action from proceeding pending the Ruritanian court’s decision on jurisdiction.

Following the coming into force of the Recast, S will be able to seek a stay of the Ruritanian proceedings under Article 31(2). However, the crucial point to

⁴⁸Ruritania should be assumed to be a member of the European Union.

note is that the English courts will no longer be obliged to stay their proceedings pending this determination.⁴⁹ Therefore, in a case where the existence or validity of the jurisdiction agreement is contested, S will be able to obtain a preliminary ruling on this issue from the English court relatively quickly. When the chosen court is determining whether it has jurisdiction, it is submitted that it should follow the same approach which it otherwise would when determining whether it has jurisdiction pursuant to a jurisdiction agreement under the Recast. In the case of the English courts, this requires that there is a good arguable case that the requirements of Article 25 of the Recast are met.⁵⁰

In practice, this means that the utility of a torpedo action is significantly reduced because the English court does not have to wait for the Ruritanian court before making its own decision on its jurisdiction and proceeding to hear the merits.⁵¹ Assuming that the English court ruled on the existence or validity of the jurisdiction clause⁵² or the merits of the dispute, this judgment would be a Regulation judgment within Chapter III of the Recast and (subject to the limited exceptions in Article 45) should be recognised and enforced in Ruritania.

Therefore, in practice there is likely to be little scope for parties to bring torpedo actions to derail proceedings in the chosen court, thus achieving one of the Recast's key objectives.

The question is whether this conclusion still holds good if the Ruritanian court makes a determination regarding the exclusive jurisdiction agreement *before* the English court has made any determination of the issue. This may seem far-fetched in the context of the above example, but it is easy to imagine situations where the non-chosen court makes a determination first (for example, if S is slow in bringing proceedings in England or if the courts' roles were reversed, so the jurisdiction agreement is in favour of the Ruritanian courts and S commences pre-emptively in England in order to obtain a quick ruling on the jurisdiction agreement to outflank the Ruritanian courts). The issue then arises as to what status that judgment has in the chosen court.

3. *The non-chosen court stays its proceedings*

This section considers the scenario where the Ruritanian court stays its proceedings after making a *prima facie* determination that the jurisdiction agreement exists (as suggested in section C above) before the English court considers the matter. This is an easy case from the English court's perspective.

⁴⁹See Art 29 of the Recast and *supra* n 20.

⁵⁰*Bols Distilleries*, *supra* n 31.

⁵¹Recital (22) expressly provides that the "designated court should be able to proceed irrespective of whether the non-designated court has already decided on the stay of proceedings".

⁵²The issue of the recognition of a judgment concerning the existence or validity of a jurisdiction agreement is considered in greater detail in the sections that follow.

In this situation, it is clear that the Ruritanian court's judgment will not bind the English court to find that the jurisdiction agreement exists. This is inherent in the fact that the Ruritanian court's decision is preliminary. The usual approach to jurisdictional findings should apply, such that the English court is not precluded from coming to a different conclusion once further evidence has been collected and considered.⁵³ The possibility of inconsistent findings between the chosen and non-chosen courts is plainly contemplated by the wording of Article 31(2), which provides that the non-chosen court's stay of proceedings shall last until the chosen court declares it has no jurisdiction under the agreement.

4. *The non-chosen court refuses to stay its proceedings*

A much more difficult case is where the Ruritanian court refuses to stay its proceedings on the basis that no jurisdiction agreement exists. The question arises of what impact the Ruritanian court's decision has on the English court.

Assuming that the Ruritanian court has applied the Community law standard suggested in section C above, they will have determined that it cannot be established (even on a *prima facie* basis) that the existence requirements of Article 25 of the Recast are met. This is a low evidential threshold for S to surmount and the Ruritanian court's judgment effectively amounts to a finding that there is no arguable basis for S asserting that the dispute is subject to an exclusive jurisdiction agreement.

In practice, in this scenario it must be conceded that it is unlikely that the English court would take a different view on the existence of the jurisdiction agreement, given the low evidential threshold applied by the Ruritanian court. However, the English court may wish to examine the matter afresh and, having done so, there remains the possibility that the English court will be minded to come to a different conclusion.⁵⁴ The Recast does not contemplate the potential for disagreement between the non-chosen and chosen courts in relation to the jurisdiction agreement – it anticipates that the non-chosen court will defer to the chosen court in the manner envisaged by Article 31(2) and Recital (22). Although this assumption will be warranted in the vast majority of cases, there appears to be a potential lacuna in the drafting of Article 31(2) if the chosen court would have come to a different conclusion to the non-chosen court on the existence of the jurisdiction agreement. This is because the Recast does not explicitly address the status of the non-chosen court's judgment and whether it binds the chosen

⁵³ *Berezovsky*, *supra* n 32.

⁵⁴ See, for example *The Wadi Sudr* [2009] EWCA Civ 1397, [2009] EWHC 196 (Comm) (in the context of a dispute concerning the existence of an arbitration agreement, the English and Spanish courts reached different decisions regarding whether such an agreement was incorporated into the bill of lading and was binding on the parties).

court. On the basis of the CJEU's decision in *Gothaer*,⁵⁵ it is arguable that the non-chosen court's decision is binding on the chosen court.

5. The CJEU decision in *Gothaer*

The CJEU's decision in *Gothaer*⁵⁶ confirms the general principle that judgments of Member States on jurisdictional matters are Regulation judgments which are entitled to recognition throughout the European Union. In outline, the case concerned a dispute between a German claimant and their insurance companies (for convenience, "Gothaer") who engaged another German company ("Samskip") to deliver a brewing installation to a customer in Mexico. Gothaer brought proceedings in the Belgian courts for damage allegedly caused to the installation during transit. The Belgian courts ruled the action was inadmissible on the grounds that there was a jurisdiction agreement in favour of the Icelandic courts in the bill of lading. Gothaer subsequently sought to bring proceedings against Samskip in Germany, who successfully argued before the CJEU that this was impermissible because the Belgian court's decision on jurisdiction was a Regulation judgment and thus was binding in Germany.

The CJEU held that the concept of a "judgment" under the old BR covers any judgment given by a Member State court, without a distinction being made as to its content. It therefore included a judgment where a Member State court declines jurisdiction on the basis of a jurisdiction clause.⁵⁷ The CJEU supported its conclusion by reference to the concept of mutual trust between Member State courts, noting that refusing recognition to a judgment declining jurisdiction could run counter to the system to allocate jurisdiction under Chapter II of the old BR.⁵⁸ The CJEU refused to sanction the creation of a category of judicial decisions which are not entitled to recognition and are not listed in the exhaustively listed exceptions to recognition set out in Article 34 and 35 of the old BR⁵⁹ (which are to be restrictively interpreted).⁶⁰ Accordingly, in this case, the Belgian court had found the jurisdiction agreement to be valid⁶¹ and it would be contrary to the principle of mutual trust to allow another Member State court to review that very same

⁵⁵*Supra* n 29.

⁵⁶*Ibid.*

⁵⁷*Ibid.*, [23].

⁵⁸*Ibid.*, [29].

⁵⁹Compare Art 45 of the Recast, which is in similar terms, although note that the Recast expands the grounds for non-recognition to cover a situation where a judgment conflicts with the employment provisions in Section 5 of Chapter II of the Recast.

⁶⁰*Gothaer*, *supra* n 29, [31].

⁶¹Under Art 23 of the Lugano Convention (which is in equivalent terms to Art 23 of the old BR), because Iceland is not an EU Member State. The position under the Lugano Convention following the entry into force of the Recast is considered in section E-5 below.

issue of validity afresh.⁶² It was irrelevant that German law considered that the Belgian judgment was a “judgment on a procedural matter” which would not have been entitled to recognition because the scope of the Belgian court’s decision was to be determined as a matter of EU law rather than varying according to domestic rules on *res judicata*.⁶³

This judgment was handed down by the CJEU on 15 November 2012, less than a month before the final text of the Recast was finalised and published.⁶⁴ It is therefore doubtful that the decision was taken into account when considering possible legislative reforms to the old BR.⁶⁵ However, there appears to be no reason why the approach in *Gothaer* does not apply in the context of the Recast.⁶⁶

6. *The effect of the non-chosen court ruling that there is no jurisdiction agreement*

To return to our example, we should now assume that the Ruritanian court gives a judgment ruling that there is no jurisdiction clause prior to the English courts making a determination on the matter. Is the English court bound by this determination? The underlying intention behind the legislative reforms suggests that the answer to this question should be in the negative⁶⁷ because otherwise there would remain an incentive on B to obtain a judgment from the Ruritanian court as quickly as possible ruling that the jurisdiction agreement does not exist. However, there is nothing in the Recast expressly providing that such a judgment is not entitled to recognition under Chapter III and *Gothaer* suggests that such a judgment would be binding.

In the Dickinson Report, Professor Dickinson notes the existence of this potential loophole noting that the Commission’s policy objectives could be frustrated if the non-chosen court makes a preliminary ruling that the choice of court agreement is invalid or does not apply to the dispute.⁶⁸ It would be both unfortunate and ironic if a mechanism introduced to give priority to the chosen court by obliging the non-chosen court to stay their proceedings in favour of the chosen court led to the chosen court being bound by the non-chosen court’s decision when it hands down a judgment first in time.

⁶²*Gothaer*, *supra* n 29, [35]–[36]. This finding was also supported by Art 36 of the old BR, preventing the enforcing court from reviewing the foreign judgment as to its substance.

⁶³*Gothaer*, *supra* n 29, [32] and [39].

⁶⁴On 12 December 2012 (see the text following Art 81 Recast).

⁶⁵The judgment post-dates the documents cited *supra* nn 16, 18 and 19.

⁶⁶For these purposes, the definition of “judgment” in the Recast is materially identical, albeit it has been moved to a different part of the Regulation (compare Art 2(a) of the Recast and Art 32 of the old BR). The amendments in the Recast to include provisional and protective measures in the definition of “judgment” for the purposes of Chapter III do not detract from this conclusion (see the second part of Art 2(a) of the Recast).

⁶⁷See *supra* text to n 21.

⁶⁸*Supra* n 24, 20.

What arguments are available to escape the conclusion that the chosen court is bound by the non-chosen court's decision that there is no jurisdiction agreement?

It might be argued that *Gothaer* should be distinguished on the basis that the ruling in that case concerning the validity of the jurisdiction clause and to decline jurisdiction was final. By contrast, the present example concerns a judgment providing for the affirmation of jurisdiction due to the non-existence of the exclusive jurisdiction agreement. In most EU countries, such a judgment is only provisional and may be reviewed on appeal.⁶⁹ It is submitted that this is not a persuasive distinction and the reasoning in *Gothaer* strongly suggests that the decision is not confined to situations where the court of origin declines jurisdiction.⁷⁰ The fact that there is greater scope for the Ruritanian judgment affirming jurisdiction to be reviewed on appeal means that (in practical terms) the risk of inconsistent judgments between the English and Ruritanian courts may be reduced.⁷¹ However, the susceptibility of the judgment to appeal in Ruritania is not relevant to the issue of principle of whether the Ruritanian court's judgment falls within Chapter III of the Recast (and is thus *prima facie* entitled to recognition elsewhere in the EU).

A more promising textual argument against recognising the Ruritanian judgment is that this is inconsistent with the scheme of Article 31(2) and Recital (22), which is intended to provide the chosen court with "priority to decide on the validity of the agreement and the extent to which [it] applies to the dispute pending before it". It would drive a coach and horses through this scheme for the decision of the Ruritanian courts to bind the English courts to decline jurisdiction.

In addition, it may be argued that Recital (22) expressly envisages the possibility of irreconcilable judgments on jurisdiction because it provides that the chosen court "should be able to proceed *irrespective* of whether the non-designated court *has already decided* on the stay of proceedings" (emphasis added). This sentence can be interpreted in two ways. The narrower interpretation is that it is solely concerned with the procedural matters, namely whether the English court must stay its proceedings pending the Ruritanian court's decision on jurisdiction. A broad interpretation is also tenable, namely that any decision of the Ruritanian court does not bind the English court, so the English court can proceed irrespective of what the Ruritanian court decides. It is submitted that the narrower view is more compelling, given the emphasised text suggests that this provision is focussed on the chronological order of the decisions, as opposed to the substantive content of the non-chosen court's judgment.

⁶⁹I am very grateful to one of the anonymous referees for this point.

⁷⁰See *supra* text to n 60. It should also be noted that Advocate General Bot's judgment in *Gothaer* expressly supports this view: "a judgment by which a court of a Member State rules on its international jurisdiction, *whether it accepts or declines jurisdiction*, falls within the concept of 'judgment' within the meaning [the old BR]" ([59], emphasis added).

⁷¹See Art 38(a) of the Recast, which allows a court before which a judgment given in another Member State is invoked to suspend the proceedings if the "judgment is challenged in the Member State of origin".

On this view, there is no clear textual hook in the Recast providing that the non-chosen court's decision under Article 31(2) does not bind the chosen court. Taking the reasoning in *Gothaer* to its logical conclusion, any such decision would fall within the definition of "judgment" in Article 2(a) of the Recast and there is no scope for creating a category of decisions that are not susceptible to enforcement that are not set out in the "exhaustively-listed exceptions" set out in Article 45 of the Recast.⁷² This interpretation also derives some support from the new Recital (30) in the Recast which provides that "the recognition of a judgment, should, however, be refused only if one or more of the grounds for refusal provided for in [the Recast] are present". Therefore, assuming for present purposes that there is a valid exclusive jurisdiction agreement in favour of the English courts, the fact that the Ruritanian court has ruled to the contrary is not a ground for refusing recognition to the Ruritanian judgment.⁷³ This suggests that the Ruritanian court's judgment is binding on the English court.

Given the legislative intent behind the Recast of giving priority to the chosen court and avoiding abusive litigation tactics,⁷⁴ it is to be hoped that if the CJEU were faced with this issue, the court would not follow this approach and would hold that *Gothaer* is inapposite to decisions by the non-chosen court in the context of Article 31(2) of the Recast. One of the grounds relied upon by the CJEU in *Gothaer* to recognise the judgment was that do otherwise would have compromised the effective operation of the jurisdictional rules set out in Chapter II old BR.⁷⁵ In the context of our Ruritanian example, this argument points to the opposite result, namely the non-recognition of the judgment. It is submitted that the effective operation of Article 31(2) and Recital (22) requires that any decision by the Ruritanian court in relation to the jurisdiction agreement should not bind the English court lest the priority rule introduced by the European legislature be undermined. In the author's view, this is a persuasive basis for distinguishing *Gothaer* and allowing the English court to proceed regardless of the decision of the Ruritanian court.

7. *Conclusion on the effect of the non-chosen court's judgment*

Bearing in mind the practical considerations outlined in section D-2 above, the effectiveness of torpedo actions can be expected to be substantially reduced now that the

⁷²*Gothaer*, *supra* n 29, [31]. See *supra* text to n 60.

⁷³This replicates the position under the old BR. See Art 45(1)(e) of the Recast, which does not allow recognition of a judgment to be refused on the basis that it conflicts with section 7 of the Recast (which contains the provisions concerned with prorogation of jurisdiction). See also Art 45(3) which provides the general principle that the "jurisdiction of the court of origin may not be reviewed" and Art 52 which provides that "under no circumstances may a judgment given in a Member State be reviewed as to its substance in the Member State addressed".

⁷⁴This is expressly provided by Recital (22).

⁷⁵*Gothaer*, *supra* n 29, [29]. See *supra* text to n 58.

Recast has come into force. However, it cannot be said that the Recast has completely eliminated the possibility of such actions.

Bearing in mind the analysis in section D-4 above, there remains the possibility of parties seeking to obtain juridical advantages from obtaining a ruling on the exclusive jurisdiction agreement from a non-chosen court. It has been argued that the CJEU should prevent any such jurisdictional manoeuvring by holding that any decision of a non-chosen court concerning a jurisdiction agreement does not bind the chosen court. This would ensure that the legislative intent underlying the Recast of enhancing the effectiveness of exclusive choice of court agreements is given full effect. It remains to be seen whether the CJEU will adopt this course.

E. What are the limits of the reforms introduced by the Recast to address the problems introduced by *Gasser*?

We shall now briefly consider a number of other issues concerning the limits of Article 31(2) of the Recast, which may be expected to be tested in the courts now that the Recast is in force.

1. What counts as an exclusive jurisdiction agreement for the purposes of Article 31(2)?⁷⁶

There is no definition of exclusive jurisdiction agreement in the Recast. It should be noted that the concept of an “agreement conferring jurisdiction” in Article 25 of the Recast will not be coterminous with this concept, given that a non-exclusive jurisdiction agreement may fall within Article 25 of the Recast.⁷⁷ It is clear from the wording of Article 31(2) that the exception to the general chronological *lis pendens* rules will not apply to such a non-exclusive agreement. Whether any such agreement is exclusive is a question of construction of the relevant agreement, the question being whether it obliges the parties to bring proceedings in the designated jurisdiction⁷⁸ and questions of construction of the agreement are, under Article 25, left to national law to determine.⁷⁹

⁷⁶I am very grateful to Stephen Lacey for his input and insight on this section and to one of the anonymous referees for inviting me to address the relevance of the 2005 Hague Convention on Choice of Court Agreements.

⁷⁷See Art 25(1) of the Recast, which provides that “Such jurisdiction shall be exclusive unless the parties have agreed otherwise”. This reflects the position under Art 23(1) of the old BR.

⁷⁸Dicey, Morris and Collins, *The Conflict of Laws* (London, Sweet and Maxwell, 15th ed), [12–105]; in the context of Art 25 of the Recast, this must however be considered in light of the presumption referred to *supra* n 77.

⁷⁹A Briggs and P Rees, *Civil Jurisdiction and Judgments* (London, Informa, 5th ed, 2009), para 2.126 (in the context of the old BR). See also C-214/89 *Powell Duffryn v Petereit* [1992] ECR I-1745.

The question arises whether a one-sided jurisdiction clause (obliging one party to sue in a particular forum but allowing the other to sue in any available forum) qualifies as an “exclusive jurisdiction” agreement for the purposes of Article 31(2). This is a matter of considerable importance given the prevalence of such clauses in finance documentation and the decision of the French Cour de Cassation in the *Rothschild* case⁸⁰ which held that such an agreement was null and void on account of its “potestative” character (ie because the clause was for the sole benefit of one party). The arguments concerning the decision in *Rothschild* have been considered in depth elsewhere and are outside the scope of this article.⁸¹ The matter is considered here to assess whether an “exclusive jurisdiction” agreement under Article 31(2) of the Recast requires both parties to be under an obligation to sue in the chosen forum (a “wholly exclusive agreement”).

It is submitted that there is no principled basis for confining the meaning of “exclusive jurisdiction” agreement in Article 31(2) to wholly exclusive agreements. First, a clause under which one party is obliged to sue in the chosen forum is clearly exclusive when viewed from the perspective of the promisor (for convenience, the “borrower”, who has limited the fora in which he may bring proceedings) and the promisee (the “bank”, who is the beneficiary of the promisor’s promise). The fact that there is no reciprocal promise by the bank to the borrower should be irrelevant. Secondly, the legislative policy encapsulated in Recital (22) is to enhance the effectiveness of exclusive choice-of-court agreements and there would appear to be no reason to read this concept restrictively. Thirdly, it is submitted that the real issue in relation to one-sided jurisdiction agreements is whether they are compatible with the Recast. Assuming that such agreements are valid under Article 25 of the Recast, there is nothing in the text of the Recast to suggest that a one-sided agreement falls outside Article 31(2).⁸² Fourthly, in any event, even if *Rothschild* is correct and one-sided jurisdiction agreements are invalid under Article 25, this would not be a reason for a non-chosen court to refuse to stay its proceedings in favour of a chosen court in

⁸⁰*Soc Banque privée Edmond de Rothschild Europe v X*, Cour de Cassation (26 September 2012).

⁸¹For criticism, see A Briggs, “One-Sided Jurisdiction Clauses: French Folly and Russian Menace” [2013] *Lloyd’s Maritime and Commercial Law Quarterly* 137. See also *Mauritius Commercial Bank Ltd v Hestia Holdings Ltd* [2013] EWHC 1328 (Comm) which notes that the decision in *Rothschild* is controversial ([34]) and held that such one-sided jurisdiction clauses are valid under English law.

⁸²In this respect, in addition to the controversy generated by *Rothschild* (ie, whether such clauses are *per se* objectionable under Art 25), the new provision introduced by the Recast that a court shall have jurisdiction “unless the agreement is null and void as to its substantive validity under the law of that [ie the chosen] Member State” (such law being inclusive of that state’s conflict of laws rules – *per* Recital (20)) may need to be taken into account. This suggests that an agreement may be ineffective for the purposes of Art 25 if the relevant applicable law does not recognise one-sided jurisdiction agreements (such as, seemingly, French law). For discussion, see A Briggs, *supra* n 81, 141.

view of the distinction between existence and validity that has been advocated in section C-7 above.

One possible argument to the contrary worthy of discussion is rooted in the 2005 Hague Convention on Choice of Court Agreements (the “Hague Convention”) which is due to finally come into force following the EU’s deposit of its instrument of approval in summer 2015.⁸³ In brief, the Hague Convention is an international instrument that will require chosen and non-chosen courts in Contracting States to respect an exclusive choice of court agreement in favour of another Convention State. For present purposes, the potentially important point is that the Hague Convention only has within its scope “exclusive choice of court agreements”. This carries a narrow meaning⁸⁴ and the Hartley/Dougauchi Explanatory Report on the Hague Convention (the “Hartley/Dougauchi Report”) makes clear that this definition does not include one-sided jurisdiction agreements.⁸⁵

Why might this be relevant to the Recast and, in particular, Article 31(2)? In short, it might be contended that this restrictive definition should colour what qualifies as an exclusive choice of court agreement under Article 31(2) of the Recast. This argument derives some support from Recital (22), which refers to “exclusive choice-of-court agreements” which, on its face, is the same term used in Article 3 (a) of the Hague Convention. In addition, the Hague Convention was taken into account in the drafting of the Recast, and the Recast’s legislative history indicates that the modifications in respect of choice of court agreements had consistency with the Hague Convention as one of their aims. For example, the Commission Proposal stated that the proposals therein “reflect the solutions established in the 2005 Hague Convention on the Choice of Court Agreements, thereby facilitating a possible conclusion of this Convention by the European Union”.⁸⁶

⁸³Council Decision of 4 December 2014 on the approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements [2014] OJ L353/5. Assuming no other state takes any relevant action in the interim, the position will then be that both Mexico and the EU have completed the process of becoming Contracting States, upon deposit by the EU of the instrument of approval, triggering Art 31(1) of the Hague Convention: “This Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the second instrument of ratification, acceptance, approval or accession referred to in Article 27”.

⁸⁴Hague Convention, Art 3(a) provides that “‘exclusive choice of court agreement’ means an agreement concluded by two or more parties that meets the requirements of Art 3(c) and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts”.

⁸⁵T Hartley and M Dougauchi, *Explanatory Report on the 2005 Hague Choice of Court Agreements Convention* (2013, available online: <http://www.hcch.net/upload/exp137final.pdf> accessed on 10 May 2015), 37 (para 32) and 51 (paras 105 and 106).

⁸⁶*Supra* n 21. See also Recital (5) to the Council Decision, *supra* n 83, which provides that “With the adoption of Regulation (EU) No 1215/2012 the Union paved the way for the approval of the [Hague] Convention, on behalf of the Union, by ensuring coherence

It is submitted that the scope of the Hague Convention and Article 31(2) of the Recast are distinct and the two provisions should not be conflated. It is unnecessary and unjustified to read Article 31(2) narrowly due to the Hague Convention for two reasons.

First, the Recast and the Hague Convention are very different instruments in terms of their treatment of choice of court agreements. Article 25(1) of the Recast clearly regulates all types of jurisdiction clause in favour of a Member State court. Any suggestion that Article 25 is now limited to giving effect to exclusive jurisdiction clauses (within the meaning of the Hague Convention) would clearly be wrong.⁸⁷ The Recast (unlike the Hague Convention) also has within its scope one-sided jurisdiction clauses in favour of Member State courts.⁸⁸ If an application of Article 25(1) then treats such a clause as valid and effective, the result before Member State courts is that (i) jurisdiction is validly prorogated in favour of the chosen court, and (ii) other Member State courts cannot accept jurisdiction other than in accordance with the terms of the clause. Against this background, it is submitted that it would be an utterly perverse result for Article 31(2) to then not apply. The result would simply be to preserve torpedo actions in respect of a clause which the Recast regards as otherwise effective to preclude a court from accepting jurisdiction over the dispute (which is the exact mischief that Article 31(2) exists to prevent). Moreover, the wording of Article 31(2) strongly supports the view that the provision covers any exclusive jurisdiction agreement which falls within Article 25 of the Recast (and thus captures one-sided exclusive jurisdiction agreements).⁸⁹

Secondly, what about the legislative statements of intent discussed above? These provide no basis for reaching any other conclusion because they can, in fact, can be seen as dealing with a far more straightforward issue which is consistent with the above analysis. Once the Hague Convention comes into force in the EU, when a Member State court assesses an exclusive choice of court agreement (within the meaning of the Hague Convention) in its favour or in favour of another Member State, the Hague Convention will be capable of taking precedence over the Recast in terms of which instrument governs the clause.⁹⁰ Therefore, so far

between the rules of the Union on the choice of court in civil and commercial matters and the rules of the [Hague] Convention”.

⁸⁷*Supra* n 77. See also *C-23/78 Meeth v Glacetal* [1978] ECR 2133.

⁸⁸For example, a one-way exclusive clause in favour of the English courts which would be governed by the Hague Convention upon its entry into force *but for* the one way exclusivity (for example if entered into by an English party and a Mexican party) would, if tested before an EU Member State court, then be subject to the Recast’s regime. Therefore, the consequence of a clause falling outside the Hague Convention is not that a clause is void, ineffective or otherwise prejudiced.

⁸⁹Article 31(2) applies “where a court of a Member State *on which an agreement as referred to in Article 25 confers exclusive jurisdiction* is seised . . .” (emphasis added).

⁹⁰Such situations will be significantly limited (at least at first) by the width of the “give-way” rule in Art 26(6) of the Hague Convention but, the point remains as a matter of principle.

as exclusive choice of court agreements (within the meaning of the Hague Convention) are concerned, it makes sense, from the perspective of maximising legal certainty, for the instruments to deal with such clauses in the same way.⁹¹ However, just because the Recast therefore incorporated concepts from the Hague Convention to facilitate treatment of like with like in such a situation, why should it then follow that, in cases outside this situation, that the Recast should be unable to adopt its own solutions? Such a suggestion makes a sizable leap in logic (which is unfounded for the reasons given above) and makes even less sense in the context of Article 31(2) when one considers that this is an exception to the *lis pendens* rules in Articles 29 and 30 of the Recast which do not even have a direct equivalent in the Hague Convention and so are, by definition, a separate part of the Recast's regime.⁹²

2. *When may a party apply for a stay under Article 31(2) of the Recast?*

Professor Briggs has noted that it remains to be seen how late a party may seek to rely on Article 31(2) to obtain a stay of a non-chosen court's proceedings.⁹³ It would be unfortunate if the reforms introduced in response to *Gasser* allowed a party to require a non-chosen court to stay its proceedings in the midst of a trial, because one of the parties felt that they were likely to lose, and so brought proceedings in a chosen court in another Member State in order to have a second bite of the cherry elsewhere.⁹⁴

It is clear that Article 31(2) may only be invoked by a defendant to seek a stay of proceedings up until the moment that he or she submits to the jurisdiction of the non-chosen court by entering an appearance (other than for the purpose of contesting jurisdiction). This is provided by the opening words of Article 31(2), which provide that the article is "without prejudice to Article 26". Article 26 of the

⁹¹This is implemented in the Recast by the introduction of the "substantive validity" rule and releasing the chosen court from its obligation to stay proceedings under the *lis pendens* provisions (see *supra* n 20). The position in relation to a non-chosen court is not as aligned (see *infra* n 92).

⁹²As regards the chosen court, where the Hague Convention applies and there is a *lis pendens* in a non-chosen court, the chosen court is in any event obliged to ignore such issues and to continue with proceedings (Art 5(2) Hague Convention and Hartley/Dougauchi Report, *supra* n 85, 57 (paras 133 and 134)). As regards the non-chosen court, it remains free to reach a determination on the application of Article 6 Hague Convention to the clause. There is no direct equivalent to this provision in the Recast and it should be apparent that Art 31(2) of the Recast works differently and potentially offers greater protection to the clause.

⁹³*Supra* n 6, 110.

⁹⁴This example is postulated by Professor Briggs *supra* n 6, 110. This article does not address whether a stay may be inappropriate in this situation under Art 31(2) of the Recast, on the basis that the proceedings elsewhere amount to an abuse of process. See, by analogy, *Ferrexpo AG v Gilson Investments Ltd* [2012] EWHC 721 (Comm).

Recast covers the situation where a Member State court has jurisdiction due to the defendant's appearance.

Once the defendant has submitted in the non-chosen court, Article 26 applies to give the non-chosen court jurisdiction. Therefore, Article 31(2) no longer has any application and the defendant cannot thereafter require proceedings in the non-chosen court to be stayed by bringing proceedings in the chosen court and seeking a stay in the non-chosen court. If, despite this, the defendant brings proceedings in the chosen court, it is suggested that the chosen court must stay its proceedings and the exception to the chronological *lis pendens* rule in the Recast does not apply. This follows from the fact that the obligation on a Member State court to stay its proceedings under Article 29 Recast is “[w]ithout prejudice to Article 31 (2)”, which (as noted above) is itself “[w]ithout prejudice to Article 26”. If Article 31(2) no longer has any application due to the defendant entering an appearance before the non-chosen court under Article 26 of the Recast, the general chronological *lis pendens* rule should prevail.

However, the difficult case is where Article 26 of the Recast does not apply, because the defendant enters an appearance before the non-chosen court only to contest jurisdiction.⁹⁵ In certain Member States, the issue of jurisdiction will not be determined by the court prior to the merits of the dispute, so the defendant will also make submissions on the merits at the same time without entering an appearance for the purposes of Article 26.⁹⁶ It is tentatively suggested that in this situation, provided the defendant has maintained its jurisdictional challenge, there is nothing to stop the defendant from bringing proceedings in the chosen court at any time while its jurisdictional challenge is on foot. On this view, until any decision on the jurisdictional challenge (or any submission by the defendant to the non-chosen court's jurisdiction), the non-chosen court would be obliged to stay its proceedings in favour of the chosen court under Article 31(2) of the Recast if proceedings are brought in the chosen court. This appears to be an unattractive result if the defendant delays in bringing proceedings in the chosen court, due to the waste in costs that could result.

It is submitted that this is mitigated for three reasons. First, this is unlikely to happen in practice because a well advised defendant would not delay in bringing proceedings in the chosen court if they are challenging jurisdiction in the non-chosen court. Secondly, the claimant in the non-chosen court should be on notice of the jurisdictional challenge from early in the proceedings so cannot complain that he has been surprised if proceedings are commenced in due course in the chosen court. Thirdly, any unfairness to the claimant from the defendant's delay can be mitigated by a costs sanction against the defendant in the non-chosen court at the point a stay is granted.

⁹⁵Recast, Art 26(1).

⁹⁶C-150/80, *ElefantenSchuh GmbH v Pierre Jacqmain* [1981] ECR 1671.

3. *What happens if the non-chosen court stays its proceedings in favour of the chosen court, but the chosen court concludes that the only jurisdictional basis for its proceedings is not based on Article 25 of the Recast?*

It is helpful to consider this situation by returning to our example of a jurisdictional contest between the English and Ruritanian courts. Suppose that the Ruritanian court stays its proceedings in favour of the English courts, because there is a *prima facie* case that there is an exclusive jurisdiction agreement designating England. The English court subsequently considers the matter and concludes the jurisdiction agreement does not apply to the dispute between S and B, but considers that it nonetheless has jurisdiction on some other basis under the Recast.⁹⁷ In this situation, is the English court obliged to stay its proceedings in favour of the Ruritanian court, on the basis that the latter court was first seised?

This issue is not expressly dealt with by Articles 29 and 31(2), but it is submitted that the answer in principle should be in the affirmative. The wording of Article 31(2) clearly supports the view that the Ruritanian court need only stay its proceedings pending the English court's decision on the applicability of the jurisdiction agreement. The Ruritanian court must stay its proceedings "until such time as the court seised on the basis of the agreement declares that it has no jurisdiction *under the agreement*" (emphasis added).⁹⁸ Accordingly, once the English court finds it has no jurisdiction under the agreement, the stay of the Ruritanian proceedings falls away, Article 31(2) does not apply and the general chronological *lis pendens* rule in Article 29 should be applicable instead. This means that the English court must defer to the Ruritanian court (as the court first seised) and must stay its proceedings pending the decision of the Ruritanian court on jurisdiction.

4. *When do the reforms apply and do they have any application where proceedings have already been brought in violation of an exclusive jurisdiction agreement prior to 10 January 2015?*

The starting point is that the Recast applies from 10 January 2015, *inter alia* to "legal proceedings" instituted on or after that date.⁹⁹ The Recast repeals the

⁹⁷For example, because the place for the performance of the contract is in England, because this is the place where the goods were delivered under the contract (see Art 7(1)(b) of the Recast).

⁹⁸See also Art 31(3) of the Recast, which provides that "where the court designated in the agreement *has established jurisdiction in accordance with the agreement*, any court of another Member State shall decline jurisdiction in favour of that court" (emphasis added). Recital (22) also provides that the court first seised should stay its proceedings "until such time as the latter court declares that it has no jurisdiction *under the exclusive choice-of-court agreement*" (emphasis added).

⁹⁹Recast, Arts 66 and 81.

old BR¹⁰⁰ but there is a saving provision such that the old BR continues to apply to legal proceedings instituted before 10 January 2015.¹⁰¹ These transitional provisions are clear on their face and provide that the applicability of the Recast turns on when the proceedings before the relevant Member State court are initiated.

However, the transitional provisions do not address what happens if there is a jurisdictional contest between two courts that straddle the Recast's coming into force. To return to our Ruritanian example, suppose that B initiates proceedings in breach of an exclusive jurisdiction agreement in Ruritania in December 2014 (before the Recast came into force) and S responds by bringing proceedings in England in late January 2015 (once the Recast is in force). Is the English court obliged to stay its proceedings and follow *Gasser* by staying its proceedings pending a Ruritanian decision on jurisdiction?

It is arguable that the answer is in the negative, on the basis that it is the date of the commencement of the English proceedings that matters, so the obligation on the English courts to stay its proceedings under Article 29 Recast is qualified by Article 31(2) as of 10 January 2015. The problem with this analysis is that the Ruritanian proceedings are initiated under the old BR and pre-date the Recast. Therefore, Article 31(2) of the Recast does not apply and there is no obligation for the Ruritanian court (as the court first seised under the old BR) to stay their proceedings in favour of the English court. The wording of Articles 29 and 31(2) of the Recast suggest that the English court's release from the chronological *lis pendens* rule is contingent on the Ruritanian court being under an obligation to stay its proceedings in favour of the English courts.¹⁰² In a case where the first seised court is under no obligation to stay its proceedings, there is no basis on which the chosen court can proceed. Were the position to be otherwise, this would replicate the situation which the CJEU was concerned to avoid in *Gasser*, namely two national courts simultaneously being able to determine whether they have jurisdiction to hear the case.¹⁰³ It is doubtful that the European legislature intended this result, which would arise if the Ruritanian court and the English court applied the old BR and the Recast respectively, without considering the interaction between the two instruments.

Accordingly, although the matter is far from clear, it is suggested that in this example the English court should defer to the Ruritanian court because that court is not obliged to stay its proceedings under Article 31(2) of the Recast. This means the exception introduced by the Recast does not apply, so the English courts should stay their proceedings pending a Ruritanian decision on jurisdiction.

¹⁰⁰Recast, Art 80.

¹⁰¹Recast, Art 66(2).

¹⁰²Presumably, the policy rationale for drafting the Recast in this manner is due to a concern to avoid concurrent proceedings which may give rise to inconsistent judgments (see generally Recital (21)).

¹⁰³*Gasser*, *supra* n 1, [51]. I am very grateful to Stephen Lacey for this point.

It is to be hoped that the number of cases which straddle the coming into force of the Recast will be relatively small, so this issue may not need to be litigated before national courts or the CJEU.

5. *Does the Recast change the position under the Lugano Convention?*

The Lugano Convention¹⁰⁴ governs jurisdiction and the recognition and enforcement of judgments between the European Union and Iceland, Norway and Switzerland. The Lugano Convention uses the same wording in the *lis pendens* provisions as the old BR (which was interpreted by the CJEU in *Gasser* to give the first seised court priority to determine its jurisdiction). The Lugano Convention has not been amended in light of the Recast, so there is no exception to the *lis pendens* provisions, such as that introduced by Article 31(2) of the Recast. In addition, the Recast expressly provides that it does not affect the application of the Lugano Convention.¹⁰⁵

Against this background, it is submitted that the chronological approach remains applicable under the Lugano Convention and that *Gasser* continues to apply. Trevor Hartley has sought to avoid this conclusion by arguing that the obligation to “pay due account” to, *inter alia*, CJEU decisions under the old BR when interpreting the Lugano Convention should not require *Gasser* to be followed in view of the legislative reversal in the Recast.¹⁰⁶ In the author’s respectful view, this is unpersuasive. It is submitted that it is not possible to interpret the Lugano Convention’s *lis pendens* provisions as if they contained a priority rule in equivalent terms to Article 31(2) of the Recast. Although it would be desirable for the Lugano Convention’s *lis pendens* provisions to be amended to be consistent with the Recast, this should not be achieved through the guise of interpretation (by reading in provisions which are not there) but by a revised text being agreed by the states in question.

F. Conclusion

The reforms introduced by the Recast to enhance the effectiveness of choice of court agreements are to be welcomed. The new priority rule in favour of the chosen court will reverse the unfortunate consequences of the CJEU’s decision in *Gasser* and is likely to reduce sharply the scope for parties to bring parallel proceedings before non-chosen courts to derail proceedings in the parties’ chosen forum.

¹⁰⁴The Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L339/3.

¹⁰⁵Recast, Art 73(1).

¹⁰⁶T Hartley, *supra* n 42, 230, [11.24], citing Lugano Convention, Protocol 2, Art 1(1)).

Nonetheless, it cannot be concluded at this stage that the torpedo action is dead, even if it may be in its dying throes. There remains the potential for parties to seek to undermine the new regime by obtaining a ruling on the existence of a jurisdiction agreement from the non-chosen court and seeking to enforce that ruling in the chosen court to undermine the exclusive jurisdiction agreement.

It is to be hoped that this risk is more theoretical than real for three reasons. First, non-chosen courts should stay their proceedings in favour of the chosen court on the basis of a low evidential threshold that a jurisdiction agreement exists under Article 31(2) of the Recast (namely if a *prima facie* case can be shown, as suggested in section C above). This approach minimises the potential for inconsistent decisions between chosen and non-chosen courts. Secondly, if the non-chosen courts take a considerable period to rule on whether to stay their proceedings, in the meantime the party seeking to uphold the jurisdiction agreement can obtain a ruling from the chosen court on the existence and validity of the clause and (potentially) on the merits of the dispute which should bind the non-chosen court. Thirdly, if the non-chosen court does rule that the jurisdiction agreement does not exist prior to the chosen court considering the matter, it has been argued that the CJEU should hold that any such ruling does not bind the chosen court, which would be free to consider the matter afresh. This would ensure that the priority rule in favour of the chosen court is given full effect, and would rightly consign torpedo actions to the history books.