



**CHOICE-OF-COURT AGREEMENTS UNDER
BRUSSELS I RECAST REGULATION.**

A check-list for European Judges

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Summary

In many international commercial transactions parties use choice-of-court agreements, also named forum selection clauses, in order to choose the court that will have jurisdiction to settle any present or future dispute that arises in connection with their particular legal relationship. Since different instruments at European and International level govern these clauses, this paper analyses the different scenarios a Spanish Judge, as a European Judge, will have to tackle, trying to offer a practice guide for judges.

1. Context

Choice-of-court agreements are often used in international trade and investment. In fact, it is estimated that approximately 70% of European companies providing products and services in the European Union use, in their contracts, choice of forum clauses¹. By choosing the court that will settle the disputes, parties increase legal certainty and predictability, since they not only decide where to litigate and thereby avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen, but also reduce the time and expense that courts and businesses face when litigating.

Different instruments are aimed to ensure effectiveness of agreements conferring jurisdiction, as by doing so, greater certainty to business engaging in cross-border activities is provided and a legal environment more amenable to international trade and investment is created. A Member State Judge will have to deal with all these applicable instruments. This paper tries to examine how a Spanish Judge as European Judge has to act in relation to cases where there is a choice of court agreement in civil and commercial matters.

¹ Commission, Staff Working Paper, Impact Assessment, SEC (2010) 1547 final, 2.3.1.3, p 30.

2. Applicable instrument

Brussels I Recast², the Hague Convention on Choice of Forum Agreements³, the Lugano 2007 Convention⁴ and also domestic rules⁵ govern choice-of-court agreements in civil and commercial matters. A Spanish Judge that is served with a claim regarding a forum clause is bound by all these instruments. Therefore, the first issue is to decide which instrument applies.

2.1) Brussels I Recast

Brussels I Recast regulates jurisdiction and recognition and enforcement of judgments in civil and commercial matters. According to its Article 1, it shall apply in civil and commercial matters, (with the exclusions of art. 1.2)⁶. It binds all Member States, even countries with a special status, such as Denmark, Ireland and the United Kingdom⁷. It is part of the *acquis communautaire* and therefore also applicable in Croatia, even though this country did not participate in the negotiations.

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 of 20.12.2012)

³ Convention of 30 June 2005 on Choice of Court Agreements concluded in Hague. The text of this Convention can be found at [www. hcch.net](http://www.hcch.net).

⁴ Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 339 of 21.12.2007)

⁵ In Spain rules on international jurisdiction are contained in art. 22 of the Ley Orgánica del Poder Judicial (LOPJ) [BOE núm. 157 of 02.07. 1985.

⁶ *Vid.* Article 1 of Brussels I Recast.

⁷ Although Denmark was not initially part of Brussels I Recast Convention, it is currently bound by it, since it signed an agreement with the European Community on the 21th of March 2013, by which Brussels I Recast became applicable in the Kingdom of Denmark.

In accordance with Article 3 of the Protocol of the position of the United Kingdom and Ireland, annexed to the TEU and to the then Treaty establishing the European Community, these countries have the right to choose whether to take part in the adoption of legislative instruments in civil and commercial matters. They decided to take part in the adoption and application of Regulation (EC) No 44/2001, that is,

Article 81 Brussels I Recast states that the Regulation shall enter into force on the twentieth day following its publication in the Official Journal of the European Union⁸, but that it shall apply from the 10th of January 2015. Courts shall apply the Regulation on claims concerning choice-of-courts agreements if they are seised after the 10th of January 2015 (art. 66.1), even though the agreement was entered into before that date. As the CJEU has established in its case law, the applicable rules to an agreement will be those in effect when proceedings are commenced, and not the rules in effect when the agreement was entered into by parties in a contract⁹.

The provisions on jurisdiction contained in Brussels I Recast are based on the principle that jurisdiction is generally based on the defendant's domicile. However, there are other alternative grounds of jurisdiction based on a close connection between the court and the action or in order to facilitate the sound administration of justice¹⁰. Moreover, some rules on exclusive jurisdiction are established, and in matters relating insurance, consumer and employment contracts, the weaker party is protected by rules of jurisdiction more favourable to its interests than the general rules. In addition, parties can also depart from the provisions of the Regulation by a choice-of-court agreement.

2.2) The Hague Convention

The Hague Convention deals with international cases where there is an exclusive choice of court agreement concluded in civil or commercial matters, apart from certain well-defined matters, such as consumer and employment contracts¹¹. The Hague Convention's scope is limited to exclusive choice of court agreements, but contracting states have the possibility of extending its scope to cover non-exclusive choice of court agreements (art.22).

Brussels I Convention, and they also notified their wish to be bind by its Recast. Therefore, Brussels I Recast became applicable in those countries, as well.

⁸ It was published d on the 20th of December 2012.

⁹ *Sanicentral GmbH vs Collin*: C-25/79[1979] ECR 3423

¹⁰ *Vid.* Recital 16 of Brussels I Recast.

¹¹ *Vid.* Article 1 and 2 of Hague Convention.

The Convention was ratified by Mexico in 2007, and signed by the United States of America, the EU and Singapore in 2009 and 2015¹². On 4 and 5 December 2014, the Council of the EU adopted the decision on the ratification, on behalf of the European Union, of the Hague Convention. The Convention will 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 (art. 31 of the Convention). It will therefore become applicable very soon, probably during the course of 2015, after its ratification by the EU.

Since Brussels I Recast and the Hague Convention both regulate jurisdiction in cases regarding agreements conferring jurisdiction, it is necessary to decide which instrument applies in a given case. This issue is dealt with in Article 26 of the Convention. Brussels I Recast will always be applied if both parties in the agreement are domiciled in a Member State of the European Union; if one or both parties to the agreement are domiciled in a State party that is not a EU Member State the Convention becomes applicable. If the parties are domiciled in a State or in States that are neither State parties to the Convention nor EU Member States and the court of a member State is chosen the Recast governs.

To our purposes this means that the Recast will be applied in the vast majority of cases. Therefore, this research paper will focus on this Regulation and leave the Convention, which is not in force yet, aside. It is as well worthwhile mentioning that the Regulation is aligned to the Convention in order to avoid difficulties.

2.3) Lugano Convention

The 2007 Lugano Convention that was concluded between the EU, Denmark¹³ and Non EU States such as Switzerland, Iceland and Norway also contains rules on choice of court in art. 23. A European judge seised of a claim involving a choice of law clause needs therefore to decide whether to apply the Regulation or the Convention. The matter is solved in art.64.2 a) of the Lugano Convention. This instrument applies if the

¹² Signing the Convention does not imply any further obligation as to ratify it or not, but the intention to become a party. It is just the ratification that creates the legal obligation to apply the Convention.

¹³ Denmark does not participate in instruments of cooperation in civil matters and therefore the EU has no external competence to conclude Treaties that bind Denmark.

chosen court is the court of a State party that is not a EU Member State. As regards the matter under examination a Spanish judge would therefore not be bound by the Convention.

2.4) Domestic Rules

Each Member State has its own rules on international jurisdiction. In Spain, these rules are contained in article 22 of Ley Orgánica del Poder Judicial (LOPJ). Art. 22.2 LOPJ refers to choice of court agreements. If a Spanish Court is seised of a claim involving a choice of court agreement, the court needs to decide whether to apply the LOPJ or the Recast. The matter is settled according to the principle of supremacy of EU law. The Regulation takes precedence; domestic rules only apply in areas not covered by EU law (residual jurisdiction). Domestic rules apply if the subject matter of the claim is outside the Regulation's scope, provided that there are no other Regulations and Conventions applying¹⁴. Brussels I Recast has moreover amplified the scope of European regulation in relation to choice of court agreements in favour of EU Member State courts. They are covered by the Regulation even if the parties are not domiciled in the European Union (art 25). This leaves little room for domestic rules that will therefore not be further analysed.

3. Judicial responses to the different scenarios posed by choice-of-court agreements

According to Article 25 of Brussels I Recast, the parties, regardless of their domicile¹⁵, can agree that a court of a Member State shall have jurisdiction to settle any dispute that has arisen or may arise in connection with a particular legal relationship¹⁶.

¹⁴ There are other Regulations that deal with jurisdiction such as Regulation 1346/2000 on insolvency, Regulation 2201/2003 on matrimonial matters and parental responsibility, Regulation 4/2009 on maintenance, and Regulation 650/2012 on succession.

¹⁵ Brussels I Recast has amplified the scope of European regulation in relation to choice-of-court agreements, providing that the provisions of the Recast will be applied and jurisdiction will be given to the prorogated court of a Member State even if the parties are not domiciled in the European Union.

¹⁶ *Vid* Article 25 of Brussels I Recast.

When a Member State court is seised of a matter regarding the prorogation agreement, the scenarios the court will have to face differ.

On the one hand, the plaintiff can comply with the agreement and bring an action before the court designated in the agreement. In this case, the defendant can appear and not contest the court's jurisdiction, he can appear in order to contest the court's jurisdiction, and, finally, it can happen that the defendant does not appear.

On the other hand, the plaintiff can disregard the agreement and bring an action before a court that is not the one designated. In this situation, the defendant has the same options mentioned before. That is, he can enter an appearance and not contest the court's jurisdiction, he can contest it, and he can decide not to enter an appearance. Additionally it is also possible that the defendant brings an action before the chosen court and argues *lis pendens*.

The different scenarios will now be analysed from the perspective of the competent authority.

Scenario 1. The Spanish court is the designated one in the choice-of-court agreement.

If the plaintiff brings an action before the designated Spanish court the defendant, as mentioned before, can adopt different positions.

Scenario 1.a.

If the defendant enters an appearance and does not contest jurisdiction, Article 26 of Brussels I Recast becomes applicable. This Article refers to tacit prorogation by stating that a court of a Member State before which the defendant enters an appearance shall have jurisdiction. Nevertheless, this rule shall not apply when the jurisdiction is contested –*scenario 1.b*- or where another court has exclusive jurisdiction by virtue of Article 24.

Moreover, Article 26 also states, in its paragraph 2, that if the defendant is a weaker party –Sections 3, 4 or 5 Chapter II of Brussels I Recast- the court should, before assuming jurisdiction, ensure that the defendant is informed of his right to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance. This new provision is meant to protect weaker parties.

In conclusion, if the defendant enters an appearance and does not contest jurisdiction, the matter is settled. There is no need to further analyse whether the agreement is or is not valid because the defendant has actually accepted jurisdiction by entering an appearance. In order to continue with the procedure, the court has to ensure that no other court has exclusive jurisdiction according to Article 24 (see Scenario 1b1), because this issue has to be controlled *ex officio* according to art. 27 and, if the defendant is a weaker party, that he has been properly informed of his rights to contest and of the consequences of entering an appearance.

The Regulation does not specify how weaker parties should be informed, but the European Judicial Network has proposed a non-binding text which could be used by courts. This reads as follows:

You are being sued before the court of a Member State of the European Union under Regulation 1215/2012. Under Article 26 of this Regulation the court before which a defendant enters an appearance shall - in principle - have jurisdiction even if jurisdiction cannot be derived from other provisions of the Regulation. This rule, however, does not apply where appearance was entered to contest jurisdiction. If you are certain that the court has no jurisdiction under the other provisions of the Regulation, you need not respond to the lawsuit in any way. If you have doubts about the issue of jurisdiction, it is advisable that you challenge jurisdiction of the court prior to entering into the subject-matter of the lawsuit.

Scenario 1.b.

The defendant can enter in appearance in order to contest the court's jurisdiction on different grounds. He can allege that jurisdiction falls under an exclusive jurisdiction rule, that the agreement does not comply with the conditions required for weaker party agreements, or that the agreement conferring jurisdiction is null and void as to its substantive or formal validity.

Scenario 1.b.1.

If the defendant alleges that a court of another Member State has exclusive jurisdiction by virtue of Article 24, the Spanish court shall examine if the claim is principally concerned with a matter over which another court has exclusive jurisdiction in accordance to art. 27. The court is actually bound to apply article 27 of its own motion, independently of the defendant's arguments (see 1.a)

If another court has exclusive jurisdiction according to the mentioned rules, the Spanish court shall declare, of its own motion, that it has no jurisdiction, by virtue of Article 27 of Brussels I Recast, regardless of the agreement. If no other court has exclusive jurisdiction or the claim is not principally concerned with a matter of exclusive jurisdiction, the Spanish court will be able to assume jurisdiction and continue proceedings.

Scenario 1.b.2.

The defendant can also allege that the agreement conferring jurisdiction does not fulfil the requirements established in Articles 15, 19 and 23, which state the conditions that choice-of-court agreements should follow in matters relating insurance, consumers, and employment. Section 3 of Brussels I Recast includes provisions that govern jurisdiction in matters relating to insurance, Section 4 governs jurisdiction over consumer contracts and Section 5 does the same over individual contracts of employment.

Articles 15, 19, and 23 of the Recast allow the parties to depart by agreement from the rules contained in those sections provided that the agreement fulfils some requirements. Thus, in these matters, the defendant, who is a weaker party, could invalidate the agreement arguing that the agreement:

- a) Was entered into before the dispute arose.
- b) Does not allow the policyholder, the insured or a beneficiary in an insurance, the consumer or the employee to bring proceedings in courts other than those indicated in Sections 3, 4 and 5, respectively.

These conditions are not controlled by the court of its own motion but have to be pleaded by the party (art 27 *a contrario*).

In conclusion, if the weaker party argued that the agreement did not comply with the conditions specified in arts. 15, 19 and 23 the court will analyse these issues and proceed accordingly. If the agreement is valid, proceedings can be continued. If the agreement conferring jurisdiction has no legal force jurisdiction will be governed by general provisions stated in Section 3, 4 or 5. If, according to those rules, the court has no jurisdiction, it will file the case. If, according to those rules, it has jurisdiction, proceedings can be continued.

Scenario 1.b.3

The defendant can allege that the agreement conferring jurisdiction is null and void as to its formal validity¹⁷ according to the requirements established by Article 25. The court shall then ensure that the agreement is either:

- a) In writing or evidenced writing
- b) In a form which accords with practices which the parties have established between themselves

¹⁷ Brussels I Recast distinguishes, for the first time, between formal and substantive validity. Formal validity is ruled by the Regulation, particularly its Article 25, and substantive validity, is governed by national rules, including international private rules.

c) Or, in cases over international trade or commerce, in a form which accords with a usage of which parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

The CJEU has established in its case law that formal requirements to the agreements validity are exclusively governed by European Regulation¹⁸. Besides, the CJUE has also established that the purpose of these formal requirements is to ensure that the consensus between the parties is in fact established¹⁹. For example in *Berghoefer*²⁰, the CJEU sanctioned that the formal requirements can be considered satisfied if jurisdiction was conferred by an express oral agreement and the written confirmation of that agreement was sent by one party and received by the other without objection.

That is, if the defendant questions the formal validity of the agreement, the seised court shall examine whether the requirements stated in Article 25 are properly fulfilled according to the CJUE case law interpretation. If they are correctly followed, the matter is settled and the court can continue hearing the case. If requirements are not fulfilled, the agreement is null, so it cannot be applied. The court shall analyze whether it has or not jurisdiction under the general applicable rules of Brussels I Recast regulation and proceed accordingly.

Scenario 1.b.4

The defendant can allege that the agreement conferring jurisdiction is null and void as to its substantive validity. In this case the Spanish court shall take into consideration Articles 25 and Recital 20 of Brussels I Recast. Article 25 states that an agreement conferring jurisdiction will have no legal force under the Regulation if it is null as to its substantive validity under the law of the Member State of the designated

¹⁸ Judgment 150/80 *ElefantenSchuh GmbH v Pierre Jaqmain* 1981 ECR 01671, para 25. Also in case 116/02 *Erich Gasser GmbH v MISAT srl* 2003 ECRI-4693 and in *Trasporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA*: C-159/97.

¹⁹ Case 24-76 *Estasis Salotti di Colzani Aimò e Gianmario Colzani v Riiwa Polstereimaschinen GmbH*, 1976 ECR, para 7.

²⁰ Judgment 11 July 1985, Case 221/1984, Fifth Chamber

court. In addition, Recital 20 of the Preamble clarifies that this includes the conflict-of-laws rules of that Member State²¹.

In the scenario under consideration since the matter is analysed by the designated court, the Spanish court applies its own domestic substantive and private international law rules. The court needs first to characterize the claim in order to select which choice of law provisions to apply.

The validity of a choice of court agreement can be characterized as a procedural matter. The law of the forum applies according to the rule *lex fori regit processum*. Spanish law would thus become applicable.

It may however as well be characterized as a contractual matter. Choice of law provisions on contractual obligations are contained in Regulation Rome I²². This instrument however establishes in its Article 1.2.e, that agreements on choice of court are excluded from its scope of application. The court would therefore need to apply the conflict of law rule contained in art. 10.5 of the Spanish Civil Code. This provision states that the law applicable to contractual obligations is the law chosen by the parties provided that it has some connection with the matter, failing that the law of the common nationality of the parties and failing that the law of the place where the contract was entered into. The result might be that foreign law governs, which might be difficult to ascertain and understand (see Section 2 b).

Which is the correct characterization? In Spanish Private international law the issue is not settled. But should the claim be characterized the Spanish way or should there not be an autonomous European characterization in order to guarantee a uniform interpretation of the Regulation? If the matter arises, perhaps the Spanish Court should consider requesting a preliminary ruling.

²¹ As mentioned before, substantive validity is governed by national rule, and not by European rules. Some authors do not agree with the idea of domestic rules governing substantive validity, and suggest that it shall be governed by creating a commonly accepted principle of good faith at European level. However the CJEU has not developed in 30 years an autonomous meaning of substantive validity and there's neither a political will in the Council for it.

²² Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

To conclude; if the defendant argues that the agreement is not valid as regards its substance the issue needs to be analysed according to the law of the chosen court, including its Private international law rules. If the agreement is valid, the court continues proceedings, if the agreement is void, the court would need to analyse whether it is or is not competent according to the general provisions and continue or discontinue the proceedings depending on the outcome.

Scenario 1.c.

If the defendant does not enter an appearance, Article 28 of Brussels I Recast applies. This Article states that if the defendant does not enter an appearance, the court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of the Regulation.

However, in order to continue proceedings, and according to Article 28.2, the court needs to ensure that the defendant has been correctly served in sufficient time to enable him to arrange for his defense, or that all necessary steps have been taken to this end. If these rules are not respected the resulting judgment may be refused recognition in other Member States according to art. 45.1 b) of the Recast.

By virtue of Article 28.3 and 28.4, if the defendant is domiciled in a Member State, he shall be served according to the European Regulation²³, while if the defendant is not domiciled in a Member State but in a country party of the Hague 1965 Convention²⁴, he shall be served in accordance to the latter instrument. If none of these apply, the Spanish court shall check if there is no other international instrument ruling the serving of legal documents abroad, such as the Panama Convention²⁵ or a bilateral instrument. Only if there is no other international instrument applicable regarding this

²³ Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters.

²⁴ Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters

²⁵ The Panamá Convention binds Spain with Argentina, Bolivia, Brasil, Colombia, Costa Rica, Chile, Ecuador, El Salvador, United States, Guatemala, Honduras, Mexico, Panamá, Paraguay, Perú and Venezuela-

matter, the defendant will be served according to the court's own domestic rules on the service of documents abroad contained in arts. 276- 279 LOPJ.

If the defendant has been properly served and it can thus be concluded that he has chosen not to appear the court will need to analyze whether it has jurisdiction in compliance to art. 28 Recast. The agreement must not refer to a matter that is of the exclusive competence of a court in another Member State since this issue needs to be controlled *ex officio* according to art 27. Issues in connection to the agreement only arise at the parties' request. Formal and substantive validity needs therefore not be controlled. What happens to agreements concerning weaker parties? The Regulation's provisions are not conclusive in this regard- bearing in mind that the Judge has a certain protective role in these matters because judges need to inform the weaker party in accordance to art. 26 it might be wise to scrutinize whether the agreement fulfills the conditions established in arts. 15, 19 and 23. This interpretation is reinforced by the fact that a decision rendered in breach of these provisions would not be recognized and enforced abroad (art. 45.1 e) of the Recast)

Consequently, in order to continue hearing the case when the defendant does not enter in appearance, the court will have to ensure a) that the defendant has been correctly served b) that the agreement is not in breach of rule of exclusive jurisdiction in favour of the courts of another Member State, and c) in the case of weaker parties that the conditions of arts. 15, 19 and 23 have been complied with.

Scenario 2. The Spanish court is not the designated one in the choice-of-court agreement.

If the plaintiff brings an action before the Spanish court, despite not being the chosen one, the defendant, as mentioned before, can adopt different positions.

Scenario 2.a.

If the defendant enters an appearance and does not contest jurisdiction, the court will face the situation analysed in *Scenario 1.a*. That is, Article 26 of Brussels I Recast becomes applicable and the matter is settled by virtue of a tacit agreement, which becomes a new agreement that pre-empts the old one.

The court shall continue with the proceedings, according to the new tacit agreement that confers jurisdiction, provided that there no other Court has exclusive jurisdiction and, if there is a weaker party, that this party has been properly informed²⁶.

Scenario 2.b

The defendant can enter an appearance in order to contest the court's jurisdiction on different grounds, such as, that jurisdiction falls under an exclusive jurisdiction rule, that conditions required if the defendant is a weaker party are not fulfilled, or that the agreement conferring jurisdiction is null and void as to its substantive or formal validity. Therefore, the court shall examine the arguments raised by the defendant in order to decide on its jurisdiction and continue or discontinue proceedings accordingly.

The issues that arise have already been examined under scenario 1.b. However in connection to the situation dealt with in 1b.4, that is, if the defendant has argued that the agreement is null and void on grounds of substantive validity, the Spanish court will have to examine these issues according to the law of the chosen court including its choice of law provisions. This is an even more difficult exercise than the one described under 1b 4, because the Spanish court is not the chosen court and the matter is ruled by foreign law, including foreign choice of law provisions. Under Spanish Private international law foreign law is not applied *ex officio* but only if pleaded and proven by the parties. Is this also to be applied in the present context- when the ascertainment of foreign law comes as a consequence of a EU Regulation- or do courts have to apply foreign law *ex officio* and if so, how are the courts going to get the information on

²⁶ *Vid.* Article 26.2 of Brussels I Recast.

foreign law ? The European Judicial network in civil and commercial matters might assist, but this will only be helpful if the chosen court is the court of a Member State.

Scenario 2.c

If the defendant does not enter an appearance, Article 28 of Brussels I Recast can be applied and the Judge will confront the same situation as the one analyzed in *Scenario 2.b*. That is, in order to continue hearing the case when the defendant does not enter in appearance, the court will have to ensure a) that the defendant has been correctly served b) that the agreement is not in breach of rule of exclusive jurisdiction in favour of the courts of another Member State, and c) in the case of weaker parties, that the conditions of arts. 15, 19 and 23 have been complied with.

Scenario 2.d

If the plaintiff brings an action before a different court than the one designated in the choice-of-court agreement, the defendant can plead *lis pendens* if he or she has seised the court designated in the agreement.

Firstly, the Spanish court should examine whether the court designated in the agreement is a Member State court or not.

Scenario 2.d.1.

If the designated court is a Member State court, the court shall refer to *lis pendens* provisions in Brussels I Recast, particularly to Article 31.2, which is an exception to the general *prior temporis* rule of Article 29²⁷.

²⁷ As Recital 22 of Brussels I Recast establishes, this new *lis pendens* rule conforms an exception to the general first in time rule and has the aim to enhance the effectiveness of choice-of-court agreements in situations in which concurrent proceedings have arisen, since it gives preference to the designated court in an exclusive choice-of-court agreement over another court seised of proceedings involving the same cause of action and between the same parties.

According to Article 31.2, if there are concurrent proceedings, involving the same cause of action and between the same parties, any court other than the designated in the agreement shall stay proceedings until such time as the latter declares that it has no jurisdiction under it. In conclusion, the Spanish court will have to stay proceedings until such time as the designated court decides on its jurisdiction.

The new *lis pendes* rule will however only become applicable provided that the following conditions are fulfilled:

- a) That the defendant has not tacitly accepted the Spanish court's jurisdiction in terms of Article 26, because that would be considered a new agreement preempting the former one.
- b) That the agreement confers exclusive jurisdiction²⁸.

In conclusion, if Article 31.2 becomes applicable the Spanish court will have to stay proceedings until the designated court decides on its jurisdiction. If the latter assumes it, the Spanish court should decline jurisdiction in favor of the chosen one. If the designated court declines jurisdiction on the basis that the agreement is not valid, the Spanish court shall continue proceedings.

Scenario 2.d.2

If the designated court where the defendant brought an action is not a Member State court, the matter might be dealt by the Regulation provided that the claim before the court of a third State was filed first and if the jurisdiction of the Spanish court is based on Articles 4, 7, 8 or 9 of Brussels I Recast²⁹.

If proceedings are pending before a court of a third State at the time when a

²⁸ If the agreement does not confer exclusive jurisdiction, then the "first in time rule" of Article 29 becomes applicable. Therefore, any other court other than the court first seised shall of its own motion stay proceedings until the court first seised establishes its jurisdiction.

²⁹ Article 4 states the principle that jurisdiction is generally based on the defendant's domicile, and Articles 7, 8 and 9 state special jurisdiction rules, by tackling situations in which the subject-matter of the dispute or the autonomy of the parties warrants a different connecting factor than the defendant's domicile.

court in a Member State is seised of an action involving the same cause of action and between the same parties, Article 33 states that the Member State court may:

a) *Stay proceedings*, if it is expected that the court of the third state will give a judgment capable of recognition and, where possible, of enforcement in that Member State, and the court of the Member State is satisfied that a stay is necessary for the proper administration of justice.

b) *Continue proceedings*, if the proceedings in the court of the third State are themselves stayed or discontinued, or it appears to the court of the Member State that the proceedings in the court of the third State are unlikely to be concluded within a reasonable time, or the continuation of the proceedings is required for the proper administration of justice.

c) *Dismiss proceedings*, if the proceedings in the court of the third State are concluded and have resulted in a judgment capable of recognition and, where applicable, of enforcement in that Member State.

The situation where the Third State court designated in the agreement is seised second is not dealt with in the Regulation, but if this court were the court of a state party of the Hague Convention on choice of court agreements, art. 6 of this instrument might come into play. According to this provision a court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless -

a) the agreement is null and void under the law of the State of the chosen court;

b) a party lacked the capacity to conclude the agreement under the law of the State of the court seised;

c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised;

d) for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or

e) the chosen court has decided not to hear the case.

4. Graphic scheme

Spanish court is the designated in the agreement

DEFENDANT ENTERS AN APPEARANCE.

- **& does not contest jurisdiction: tacit agreement (Article 26)** - *Proceedings shall continue.*
- **& does contest jurisdiction on different grounds:**
 - **Exclusive jurisdiction of a Court in another Member State(Article 24)** - *Apply Article 27: The court shall declare, from its own motion, that it has no jurisdiction.*
 - **Weaker parties' requirements (Articles 15, 19 & 23) are not fulfilled.**
 - If they are not fulfilled, the agreement has no legal force (Article 25.4). Jurisdiction is governed by rules in Section 3, 4 & 5 - *The court shall decide on its jurisdiction under these provisions of BIR.*
 - If conditions are fulfilled, the agreement has legal force - *The court has jurisdiction and can continue proceedings.*
 - **Formal validity of the agreement.** Check requirements of Article 25 - *If fulfilled, continue proceedings; if not fulfilled, the agreement has no legal force. Decide on its jurisdiction under provisions of BIR.*
 - **Substantive validity (Article 25 & Recital 20)** – *Decide under domestic rules of the designated court, including its conflict-of-laws rules.*

DEFENDANT DOES NOT ENTER AN APPEARANCE

- **If the defendant has not been properly served (Article 28.2)** – *Stay proceedings.*
- **Decide about jurisdiction**
 - under the agreement
 - under the rest of the provisions of BIR– *Continue proceedings or dismiss, accordingly.*

Spanish court is not the designated in the agreement

DEFENDANT ENTERS AN APPEARANCE

- **& does not contest jurisdiction: tacit agreement (Article 26)** – *Continue proceedings.*
 - **& does contest jurisdiction on different grounds:**
 - **Exclusive jurisdiction of a Court in another Member State(Article 24)**
- *Apply Article 27: The court shall declare, from its own motion, that it has no jurisdiction.*
 - **Weaker parties' requirements (Articles 15, 19 & 23) are not fulfilled.**
 - If they are not fulfilled, the agreement has no legal force (Article 25.4). Jurisdiction is governed by rules in Section 3, 4 & 5 - *The court shall decide on its jurisdiction under these provisions of BIR.*
 - If conditions are fulfilled, the agreement has legal force - *The court has jurisdiction and can continue proceedings.*
 - **Formal validity of the agreement.** Check requirements of Article 25 - *If fulfilled, continue proceedings; if not fulfilled, the agreement has no legal force. Decide on its jurisdiction under provisions of BIR.*
 - **Substantive validity (Article 25 & Recital 20)** – *Decide under domestic rules of the designated court, including its conflict-of-laws rules.*

DEFENDANT DOES NOT ENTER AN APPEARANCE

- **If the defendant has not been properly served (Article 28.2)** – *Stay proceedings.*
- **Decide about jurisdiction**
 - under the agreement
 - under the rest of the provisions of BIR– *Continue proceedings or dismiss, accordingly.*

DEFENDANT BRINGS AN ACTION BEFORE THE CHOSEN COURT

- ***Lis pendens* situation**
 - **If the court seised is settled in a Member State** – Apply Article 31.2 if requirements are fulfilled and *stay proceedings* until the chosen court decides.
 - **If the court first seised is a third state Court**– Article 33 –Evaluate and *Stay, continue, or dismiss proceedings*.

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