Prorogation by submission under art. 26 of Brussels Ibis Regulation and the protection of weaker parties

Prorrogação por submissão nos termos do art. 26 do Regulamento Bruxelas Ibis e a proteção das partes mais fracas

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Abstract: Section 7 of Chapter II of the Brussels Ibis Regulation deals with prorogation of jurisdiction. The choice of jurisdiction can be made by a choice-of-court agreement or by a trust provision (Art. 25), or by submission to the court seized (Art. 26).

The purpose of Art. 26 is, in part, common to the purpose of Art. 25: to respect freedom of choice. However, where one of the parties is a typically weaker party, it may be appropriate to limit freedom of choice or, as it is the case in Art. 26(2), to provide for a duty of information aimed at overcoming the information asymmetry between the parties. The present essay addresses the main interpretation and gap filling issues arising therefrom.

Keywords: Prorogation by submission; Brussels Ibis Regulation; Protection of weaker parties; Choice of court

Resumo: A Secção 7 do Capítulo II do Regulamento Bruxelas I bis trata da extensão de competên-cia. A escolha do foro pode ser feita por um pacto de jurisdição ou por um ato constitutivo de um trust (art. 25.º), ou por submissão ao tribunal em que a ação foi proposta (Art. 26.º).

A finalidade do art. 26,º é, em parte, comum à finalidade do art. 25.º: respeitar a autonomia da vontade. No entanto, quando uma das partes é uma parte tipicamente mais fraca, pode ser adequado limitar a autonomia da vontade ou, como é o caso do art. 26.º/2, estabelecer um dever de informação destinado a corrigir a assimetria de informação entre as partes. O presente estudo procura dar resposta às principais questões de interpretação e integração de lacunas daí resultantes.

Palavras-Chave: Submissão tácita; Regulamento Bruxelas I bis; Proteção da parte mais fraca; Escolha de foro

I. Introduction

1. Section 7 of Chapter II of the Brussels Ibis Regulation (EU Regulation no. 1215/2012) deals with prorogation of jurisdiction. Within certain limits, jurisdiction may be chosen by the parties. This choice can be made by a choice-of-court agreement or by a trust provision, according to Art. 25, or by submission, according to Art. 26.

What does prorogation by submission mean?

Where a defendant domiciled in one Member State is sued in a court of another Member State and *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 (Art. 28(1)).

On the contrary, where the court of a Member State, which, in principle, has no jurisdiction, is seized, and the defendant *enters an appearance* without contesting the jurisdiction, there is prorogation by submission (Art. 26(1)) ([1]).

In this case, the prorogation of jurisdiction results from *an implied agreement formed during the proceedings* ([2]). The plaintiff wants to bring the case in a given court and the defendant tacitly accepts this choice.

The rule does not apply where appearance was entered to contest the jurisdiction, regardless of the fact that the defendant also contests the merits of the case.

According to the JENARD Report, it will be necessary to refer to the rules of procedure in force in the State of the court seized of the proceedings in order to determine the point in time up to which the defendant will be allowed to contest the jurisdiction, and to determine the legal meaning of the term "appearance" ([3]).

The first part of this statement has been upheld by the ECJ ([4]), but it was limited by its case law regarding the point in time up to which the jurisdiction has to be contested. The case law requires for this purpose that the challenge to jurisdiction, if it is not previous to the first defense in the merits, occur the latest in the moment considered by the forum procedural law as the first defense addressed to the court seized ([5]). This requirement is also met where the challenge to the jurisdiction of the court seized is raised in the defendant's first submission in the alternative to other objections [6]).

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[1] See also Art. 24 of Brussels I Regulation, Art. 18 of Brussels and Lugano 1988 Conventions and Art. 24 of Lugano 2007 Convention.

[2] Cf. ECJ 20/5/2010, in the case Česká [ECLI:EU:C:2013.165], para. 20;

[2]7/2/2014, in the case *Cartier parfums-lunettes and Axa Corporate Solutions assurances* [EU:C:2014:109], para. 34; 11/9/2014, in the case *A.* [EU:C:2014:2195], para. 53-54, holding that the provision "is based on a deliberate choice made by the parties to the dispute regarding jurisdiction"; 11/4/2019, in the case *Ryanair* [EU:C:2019:311], para. 38; Calvo Caravaca/Carrascosa González, "La sumision tácita como foro de competencia judicial internacional y el artículo 24 del reglamento 44/2001, de 22 di Diciembre 2000", in *Cuestiones Actuales del Derecho Mercantil Internacional*, ed. by Calvo Caravaca and Carrascosa González, 203-216, Madrid, 2005, para. 1 et seq.; Geimer/Schütze, *Europäisches Zivilverfahrensrecht. Kommentar*, 3rd ed., Munich, 2010, Art. 24 para. 4; Pierre Callé, note ECJ 11/9/2014, *R. crit.* (2015) 904-921, 921; Hélène Gaudemet-Tallon and Marie-Elódie ancel, *Compétence et exécution des jugements en Europe - Matières civiles et commerciales,* 7th ed., Paris, 2024, para. 180; cp. Geimer/Schütze/Geimer, *Europäisches Zivilverfahrensrecht. Kommentar*, 4th ed., Munich, 2020, Art. 26 para. 24. For a different view, Sabine Schulte-Beckhausen, *Internationale Zuständigkeit durch rügelose Einlassung im Europäischen Zivilprozessrecht*, Bielefeld, 1994, 90 et seqs., envisaging here a materialization of the preclusion procedural principle based on reasons of procedural economy; Étienne Pataut, note ECJ 20/5/2010, *R. crit.* (2010) 575-587, 583 et seq., considering that the provision is based on reasons of procedural efficiency; Haimo Schack, *Internationales Zivilverfahrensrecht mit internationalem Insolvenzrecht und Schiedsverfahrensrecht*, 8th ed., Munich, 2021, para. 602, holding that it is a case of procedural preclusion. See further Ansgar Staudinger, "Wer nicht rügt, der nicht gewinnt – Grenzen der stillschweigend Prorogation nach Art. 24 EuGVVO", *IPRax* (2011) 548-554, 550-551, and Felix Koechel, "Zur (rügelosen) Einlassung des Abwesenheitskurators", *IPRax* (2015/4) 303-309, 305. It shall be understood that the pre-requisites of this agreement are only defined by Art. 26 and not by the law of the Member State where the proceedings were brought, except regarding procedural rules left for the law of this Member State and substantive issues mentioned below regarding the protection of weaker parties. For a different view, Helmut Grothe, "Forum non conveniens und rügelose Einlassung", in Grothe, H./Mankowski, P./Rieländer, F. (eds.), *Europäisches und internationales Privatrecht. Festschrift für Christian von Bar zum 70. Geburtstag*, Munich, 2022, 115-124, 121-122.

[3] Cf. "Report on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters", *OJEU* (1979) C 59, 156. See also Fausto Pocar, "Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 30 October 2007 — Explanatory report", *OJEU* C 319/1, of 23/12/2009, para. 112.

[4] 24/6/1981, in the case *Elefanten Schuh* [*CTCE* (1981) 1671, para. 16-17.

[5] Cf. ECJ 24/6/1981, in the above mentioned case *Elefanten Schuh*, para. 17, confirmed by ECJ 22/10/1981, in the case *Rohr* [*ECR* (1981) 2431]; 14/7/1983, in the case *Gerling* [*ECR* (1983) 2503]; 13/6/2013, in the case *Goldbet Sportwetten* [ECLI:EU:C:2013:393], para. 37; and 27/2/2014, in the case *Cartier parfums* [ECLI:EU:C:2014:109], para. 36. See further Dieter Leipold, "Zuständigkeitsvereibarung un rügelose Einlassung nach dem Europäischen Gerichtsstands- und Vollstreckungsübereinkommen", *IPRax* (1982) 222-225, 223-224; Magnus/Mankowski/Calvo Caravaca/Carrascosa González, *Brussels Ibis Regulation*, 2nd ed., Köln, 2023, Art. 26 para. 12-14.

[6] Cf. ECJ 13/7/2017, in the case *Bayerische Motoren Werke* [EU:C:2017:550], para. 35-36.

On the contrary, the concept of "appearance" shall be interpreted autonomously, as it is in general the case of the concepts used in the Regulation, as a participation of the defendant in the proceedings directed towards the rejection of the claim, either based upon procedural or substantive grounds ([7]).

The absence of defendant's observations following an invitation from the registry of the court to submit observations on the possible international jurisdiction of that court to hear the claim at issue in the main proceedings does not amount to an appearance ([8]).

2. To avoid prorogation by submission the defendant has to contest the international jurisdiction explicitly or implicitly, for example, by referring to arbitration agreement ([9]).

If the defendant contests the international jurisdiction, the procedure rules of the forum will be applicable to the determination of the issue ([10]), but some principles developed by the ECJ case law shall be respected ([11]). It is advisable that the defendant duly substantiates his or her defense. However, in any case, if the defendant contests the international jurisdiction, the court shall decide the issue based upon the other governing jurisdiction rules ([12]), given the fact that the court's jurisdiction cannot be based on an implied agreement.

Also, there is no prorogation by submission where another court has exclusive jurisdiction by virtue of Art. 24.

3. Prorogation by submission displaces the heads of jurisdiction in insurance ([13]), consumer contracts and individual contracts of employment matters ([14]).

This is justified, because the submission is at stake after the dispute has arisen and the weaker party may avoid it by contesting the jurisdiction or even by not appearing in court. This is in line with the provisions of the Regulation allowing choice-of-court agreements with weaker parties after the dispute has arisen (Arts. 15(1), 19(1) and 23(1)) ([15]).

Nevertheless, paragraph 2 of Art. 26 adds that in matters referred to in Sections 3, 4 or 5 where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee is the defendant, the court shall, before assuming jurisdiction under paragraph 1, *ensure that the defendant is informed of his or her right to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance.*

This paragraph was an improvement introduced in the Brussels Ibis Regulation, in line with the considerations made by the ECJ in the case Česká ([16]).

In this case, the Czech and Slovak Governments pointed out in their observations that, in order to treat the entering of an appearance by the defendant as amounting to the prorogation of jurisdiction in a dispute in matters of insurance, the defendant, the weaker party, should be put in a position to be fully aware of the effects of his defense as to substance. The court seized should therefore ascertain of

[7] See also Kropholler/Von Hein, *Europäisches Zivilprozeßrecht. Kommentar zum EuGVO*, *Lugano-Übereikommen 2007, EuVTVO, EuMVVO und EuGFVO*, 9th ed., Frankfurt-am-Mein, 2011, Art. 24 para. 7, and Peter Mankowski, note on *Bundesarbeitsgericht* 2/7/2008, *Nachschlagewerk des Bundesarbeitsgerichts. Arbeitsrechliche Praxis* (1/2009) 111, 115 et seq.

[8] Cf. ECJ 11/4/2019, in the case *Ryanair* [ECLI:EU:C:2019:311], para. 39.

[9] Cf. Kropholler/Von Hein (fn. 7) Art. 24 para. 11.

[10] Cf. Jenard (fn. 3) 156, and Calvo Caravaca/Carrascosa González (fn. 2) para. 13.

[11] See L. de Lima Pinheiro, *Direito Internacional Privado*, vol. III, tomo I, *Competência Internacional*, 3rd. ed., Lisbon, 2019, § 84 L.

[12] See also the remarks of Schulte-Beckhausen (fn. 2) 223-224.

[13] Cf. ECJ 20/5/2010, in the case Česká [ECLI:EU:C:2013.165].

[14] Cf. Gothot/Holleaux, *La Convention de Bruxelles du 27 Septembre 1968*, Paris, 1985, 111; Gaudemet-Tallon/Ancel (fn. 2) para. 182; Calvo Caravaca/Carrascosa González(fn. 2) para. 21. Cp. Magnus/Mankowski/Mankowski, *Brussels I Commentary*, Munich, 2007, Art. 35 para. 30.

[15] See also Rauscher/Staudinger, *EuZPR/EuIPR Kommentar*, Vol. I, *Brüssel Ia-VO*, 5th. ed., Köln, 2021, Art. 26, para. 11. For a different view, see Peter Mankowski, "Besteht der europäische Gerichtsstand der rügelosen Einlassung auch gegen von Schutzregimes besonders geschützte Personen?", *RIW* (2010) 667-672, 669 et seq. and 672.

[16] 20/5/2010.

its own motion, in the interest of the protection of the weaker party, whether that party's manifestation of intention is in fact deliberate and designed to give that court jurisdiction ([17]).

The ECJ held that such an obligation could not be imposed other than by the introduction of an express rule into the Regulation to that effect. However, it deemed open to the court seized to ensure, having regard to the objective of the rules on jurisdiction resulting from Sections 3 to 5 of Chapter II of the Regulation, which is to offer stronger protection of the party considered to be the weaker party, that the defendant being sued before it in those circumstances is fully aware of the consequences of his or her agreement to enter an appearance ([18]).

4. Prorogation by submission also displaces the jurisdiction resulting from the choice of another Member State's courts or of the courts of a third State ([19]). As held by the ECJ in the case *Taser International*, even in this last case the seized court is precluded from declaring of its own motion that it does not have jurisdiction ([20]).

The purpose of Art. 26 is, in part, common to the purpose of Art. 25: to respect freedom of choice. In principle, the parties are the best judges of their own interests. Another part of the purpose of Art. 25 – to foster certainty and foreseeability regarding the jurisdiction – does not extend to Art. 26. On the other hand, *Art. 26 is also grounded in a principle of economy*: if the defendant does not contest the jurisdiction of the court seized it is more expeditious and less costly to accept this jurisdiction.

Where one of the parties is a typically weaker party, can be appropriate to limit freedom of choice or, as it is the case in Art. 26(2), to provide for *a duty of information aimed at overcoming the information asymmetry between the parties*. To adopt, in this case, an *ex officio* control of jurisdiction would be excessive ([21]).

5. My contribution to the present issue of the *Cuadernos de Derecho Transnacional* dedicated to honoring the eminent Professor Alfonso-Luis Calvo Caravaca will deal with the protection of weaker parties in this context. This subject-matter seems to me fully appropriate for this tribute since Professor Calvo Caravaca is co-author, together with Professor Carrascosa González, of a study on Art. 24 of the Brussels I Regulation ([22]), and of the comment to Art. 26 in the *Brussels Ibis Regulation Commentary* edited by Professors Ulrich Magnus and Peter Mankowski ([23]), in which I also had the privilege of participating ([24]).

II. The duty of information in general

6. As previously mentioned, Art. 26(2) provides that the seized court shall 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. *It seems clear that the court shall do it of its own motion* ([25]).

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[17] Para. 31.

[18] Para. 32.

[19] Cf. ECJ 24/6/1981, in the case *Elefanten Schuh* [*ECR* (1981) 1671], para. 11; 7/3/1985, in the case *Spitzley* [ECR (1985) 787], para. 25, and 17/3/2016, in the case *Taser International* [ECLI:EU:C:2016:176], para. 4-25; Gothot/Holleaux (fn. 14) para. 192; Leipold (fn. 5) 222-223; Magnus/Mankowski/Calvo Caravaca/Carrascosa González (fn. 5) Art. 26 para. 25. In the aforementioned case *Spitzley*, the ECJ also held that a plaintiff who, when faced with a claim for a set-off made by the defendant and in respect of which the court seized of the proceedings does not have jurisdiction, submits arguments relating to the substance of that claim without contesting the jurisdiction of the said court is in a similar position to that expressly referred to in Article18 Brussels Convention (now Art. 26 Brussels Ibis Regulation) of a defendant who enters an appearance before the court seized of the proceedings by the plaintiff without contesting that court's jurisdiction [para. 19].

[20] ECJ 17/3/2016, para. 36.

[21] In the sense of allowing this possibility to the court, see Pataut (fn. 2) 587.

[22] *Supra* fn. 2.

[23] *Supra* fn. 5.

[24] For a more developed analysis of Art. 26(1), see the Calvo Caravaca/carrascosa González comment and Lima Pinheiro (fn. 11) § 84 J, with further references.

[25] See Magnus/Mankowski/Calvo Caravaca/Carrascosa González (fn. 5) Art. 26 para. 33.

The provision prevails over any domestic ordinary provision but does not refer to the obligation of the defendant to be assisted by a lawyer or about the language of the information.

The obligation of lawyer's assistance is left to the procedural law of the seized court ([26]).

Regarding the language of the information, an autonomous interpretation shall be preferred. In the light of the provision's purpose, the information shall be provided in a way that can be correctly understood by the defendant ([27]).

Therefore, in the case of an oral information, the information shall be translated in a language well known by the defendant, if the defendant does not understand the language of the court's Member State.

In the case of a written information, if the information is provided through service of a document in another Member State, Regulation 2020/1784 on the service of documents applies, and therefore the defendant may refuse to accept the document if the document is not written in, or is not accompanied by a translation into, either a language which the addressee understands; or the official language of the Member State addressed or, if there are several official languages in that Member State, the official language or one of the official languages of the place where service is to be e fected (Art. 12(1)) ([28]).

In other cases of written information, the same general principle applies, and therefore the document shall be provided in a language that the defendant understands.

7. *The European Judicial Network in civil and commercial matters* established a *non-mandatory standard text* containing the information which the court could use to fulfill its obligation to provide to the defendant the information pursuant to Art. 26(2). This text 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".

This text is available in all the official languages of the Member States. The courts shall use this text in a language that can be understood by the defendant.

However, *this standard text should just be a starting point. The content of the information shall be adjusted to the circumstances of the particular case* ([29]), as happens in the case of an invalid choice of court agreement in favor of the seized court, that I am going to examine later.

Also, for this reason the information shall be provided even if the defendant already has knowledge, obtained in other proceedings, of the consequences of an appearance without contesting the jurisdiction ([30]).

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[26] See Magnus/Mankowski/Calvo Caravaca/Carrascosa González (fn. 5) Art. 26 para. 33.

[27] For a different view, Daphne-Ariane Simotta, "Zur Heilung der Unzuständigkeit in Versicherungs-, Verbraucher- und Arbeitssachen (Art. 26 EuGVVO)", *Zeitschrift für vergleichende Rechtswissenschaft* 115 (2016/1) 95-135, 118-119.

[28] Art. 12(2) The receiving agency shall inform the addressee of the right provided for in paragraph 1 where the document is not written in, or is not accompanied by a translation into, a language referred to in point (b) of that paragraph, by enclosing with the document to be served form L in Annex I, which shall be provided in:

(a) the official language or one of the official languages of the Member State of origin; a

(b) a language referred to in point (b) of paragraph 1.

If there is an indication that the addressee understands an official language of another Member State, form L in Annex I shall also be provided in that language.

Where a Member State translates form L in Annex I into a language of a third country, it shall communicate that translation to the Commission with a view to making it available on the European e-Justice Portal.

[29] See also Simotta (fn. 27) 117 et seq.

[30] See also Peter Mankowski, "Neues beim europäischen Gerichtsstand der rügelosen Einlassung durch Art. 26 Abs. 2 EuGVVO n. F.", *RIW* (2016) 245-253, 248.

On the other hand, the text is written using legal concepts that may not be understood by many non-lawyers ([31]). *The information shall be provided in a way that appropriate to the specific defendant in question and having in mind whether or not he is assisted by a lawyer.*

The information shall be provided as early as necessary to allow the defendant to contest the jurisdiction as required in order to avoid submission under Art. 26(1) ([32]).

Art. 24(2) of the EU Commission's Proposal provided that the document instituting proceedings or the equivalent document must contain information for the defendant on his or her right to contest the jurisdiction of the court and the consequences of entering an appearance. This part of the provision was not adopted in the Regulation. Therefore, there is no duty on the part of the claimant to provide this information to the defendant. *The duty of information is incumbent on the court* ([33]).

III. Scope of application of the duty of information

8. The duty of information arises whenever the defendant is a weaker party in matters of insurance, consumer contracts and individual employment contracts or only where all the pre-requisites of application of Sections 3 to 5 are fulfilled

The issue is particularly relevant in matters of consumer contracts, in which the special regime is only applicable to contracts for the sale of goods on instalment credit terms, credit contracts made for financing the sale of goods and to contracts concluded with a person who pursues professional activities in the Member State of the consumer's domicile or who, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities (Art. 17(1)).

If the fulfillment of this pre-requisite is required, a consumer domiciled in a third State may not be protected by Art. 26(2).

9. I agree with MANKOWSKI ([34]), who defended that this pre-requisite is not required. The argument that the ECJ follows a strict interpretation of the jurisdiction rules of Section 4 does not weigh against this understanding ([35]), in view of the fact that Art. 26 has a spatial scope of application that is different from Section 4, and I see no reason to deprive the typically weaker party of protection within the entire scope of its application ([36]).

In a case where the weaker party assigns its credit, and the other party starts negative declaratory proceedings, it is discussed if there is a duty of information regarding the assignee.

The best approach seems to be in line with the general idea underlying the ECJ case law regarding the availability of the weaker party heads of jurisdiction to assignees ([37]). This case law is not entirely consistent, but the prevailing understanding is that assignees can only take advantage of the weaker party heads of jurisdiction if they are also a weaker party needing protection.

Only in this case shall a duty of information in relation to the assignee be asserted. The same understanding may be extended to other successors on the right of the protected weaker party ([38]).

A particular situation arises where there is an invalid choice of court agreement in favor of the seized court. The defendant may be misled by this agreement and submit to the jurisdiction of the court in the belief that it has jurisdiction by virtue of the agreement.

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[31] See also Mankowski (fn. 30) 250, also holding that the third paragraph of the text is not covered by Art. 26(2).

[32] See Rauscher/Staudinger (fn. 15) Art. 26 para. 22.

[33] See also Mankowski (fn. 30) 248.

[34] Peter Mankowski, "Änderungen im Internationalen Verbraucherprozessrecht durch die Neufassung der EuGVVO", *RIW* (2014) 624-632, 628.

[35] For a different view, Rauscher/Staudinger (fn. 15) Art. 26 para. 22; see also Simon Röss, "Rügelose Einlassung bei grenzüberschreitenden Verbrauchersachen", *NJW* (2018) 3745-3750, 3745, and Stein/Jonas/Thole, *Kommentar zur Zivilprozessordung*, vol. XII, 23rd ed., *Brussels Ibis*, Tübingen, 2022, Art. 26, para. 4.

[36] Regarding the applicability of Art. 26(2) in cases of third-party intervention of the weaker party, see the remarks of Mankowski (fn. 30) and Simotta (fn. 27) 108-109.

[37] For a different view, see *M*ünchKommZPO/Gottwald, 6th ed., Munich, 2022, Art. 26 para. 10.

[38] For instance, an heir. See also Simotta (fn. 27) 108, and Rauscher/Staudinger (fn. 12) Art. 26 para. 23a.

The invalidity of the choice of court agreement can result from limitations set on the choice of court agreements by the provisions of Sections 3 to 5 of Chapter II (Arts. 15, 19 and 23).

The invalidity of a choice of court clause can also result from being unfair in a consumer contract under the domestic rules transposing the Directive on unfair terms in consumer contracts interpreted according to this Directive ([39]).

10. Regarding consumer contracts, this Directive has a scope of application that is wider than Section 4 of Chapter II of the Brussels Ibis Regulation, since it does not require that the consumer is domiciled in a Member Sate (as Art. 17(1)(c) of the Regulation does) does it nor exclude contracts of transport (as Art. 17(3), in principle, does) ([40]).

According to the ECJ, *this regime on unfair terms in consumer contracts is applicable to choice of court agreements even within the scope of application of the Brussels Ibis Regulation*. In the case *DelayFix* ([41]), the ECJ held that this legal regime is applicable to the substantive validity of the choice of court clause as part of the legislation of the Member State whose courts are designated in the clause under Art. 25 of the Brussels, interpreted in conformity with the Directive ([42]).

What is the relevance of this particular situation to the theme of this presentation?

Fist of all, in my opinion, if there is a risk that the defendant will be misled in accepting the jurisdiction of the seized court by an invalid choice of court agreement within the scope of application of Art. 26(2), there is a reinforced duty of information on the part of the court ([43]). The court shall specify that the choice of court agreement is invalid.

On the other hand, for those who require, for the operation of Art. 26(2), the fulfillment of all pre-requisites of Sections 3 to 5 of Chapter II, it is defensible that the duty of information of other consumers result from the domestic rules transposing the unfair terms Directive, interpreted in conformity with the Directive and within its scope of application ([44]).

IV. Consequences of non-compliance with art. 26(2)

11. What are the consequences of court failing to fulfill the duty of information under Art. 26(2)?

The consequences are not specified in the Regulation and there are major divergences among authors.

According to the prevailing view, *if the information is not provided there is no prorogation of court by submission* (NUYTS, CALVO CARAVACA/CARRASCOSA GONZÁLEZ, GEIMER, MAYR, GOTTWALD, GONÇALVES, TEIXEIRA DE SOUSA) ([45]). The decision of the court may be appealed if an appeal can be lodged on the ground of lack of jurisdiction. (GOTTWALD, GEIMER) ([46]).

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[39] Directive 93/13/EEC.

[40] A choice of court clause which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer (Art. 3(1)), namely by having the object or effect excluding or hindering the consumer's right to take legal action or exercise any other legal remedy (No. 1(q) of the Annex).

[41] 18/11/2020.

[42] Para. 49 and 61.

[43] Compare the remarks of Stein/Jonas/Tholes (fn. 35) para. 46.

[44] See Rauscher/Staudinger (fn. 15) Art. 26 para. 33. In cases regarding domestic territorial jurisdiction, the ECJ held that the seized court shall control, of its own motion, the unfairness of the choice of court agreement and inform the consumer accordingly – cf. 4/6/2009, in the case *Pannon*, para. 32-35, and 3/4/2019, in the case *Aqua Med*, para. 27.

[45] Cf. Arnaud Nuyts, "La refonte du règlement Bruxelles I", *R. crit.* (2013) 1-63, 60; Magnus/Mankowski/Calvo Caravaca/Carrascosa González (fn. 5) Art. 26 para. 35, Zöller/Geimer, "EuGVVO", *in Zöller ZPO*, 31st ed., *Köln,* 2016, Art. 26 para. 13; Peter Mayr, *Europäisches Zivilprozessrecht*, 2nd ed., Vienna, 2020, II/228; *MünchKommZPO/*Gottwald (fn. 37) Art. 26 para. 10; Anabela de Sousa Gonçalves, "Prorogation of Jurisdiction in Brussels I *bis* Regulation", *in Temas de Direito Internacional Privado e de Processo Civil Internacional* (2019), 479-496, Porto, 2018, 494; and Castro Mendes/Teixeira de Sousa, *Manual de Processo Civil*, Lisboa, 2022, 221. For a divergent view, see Mankowski (fn. 34) 628-629, and Rauscher/Staudinger (fn. 15) Art. 26 para. 24.

[46] See *MünchKommZPO/*Gottwald (fn. 37) Art. 26 para. 10, and Zöller/Geimer (fn. 45) Art. 26 para. 13.

12. The contrary view argues that Art. 26(1), sentence 2, does not contain a reservation in this sense ([47]). However, the information required by Art. 26(2) can be seen as a necessary pre-requisite for the submission provided in Art. 26(1): only an informed weaker party can validly submit to a court that has no jurisdiction under the protective rules of the Regulation.

If the decision can not be appealed or the appeal is rejected is there a ground for refusal of recognition?

The authors also diverge on this issue, *which has not yet been ruled on by the ECJ.*

13. The judgment on the Česká case, sometimes invoked in this context ([48]), regarded Art. 24 of the Brussels I Regulation, which did not provide the duty of information in question, and assumed that there was prorogation by submission. If one assumes that the court has no jurisdiction, the issue is open.

According to some authors there are no grounds for refusal of recognition (NUYTS, SCHLOSSER, CALVO CARAVACA/CARRASCOSA GONZÁLEZ, WALLNER-FRIEDL, GONÇALVES, THOLE) ([49]).

Art. 45(3) provides that, without prejudice to point (e) of paragraph 1, the jurisdiction of the court of origin may not be reviewed, and that the test of public policy may not be applied to the rules relating to jurisdiction. Point (e) of paragraph 1 provides that the recognition of judgement shall be refused, on the application of any interested party, if the judgment conflicts with Sections 3, 4 or 5 of Chapter II where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee was the defendant; or with Section 6 of Chapter II.

Art. 26(2) is not contained in these Sections, but in Section 7 of Chapter II ([50]).

Furthermore, according to the ECJ, the grounds for refusal of recognition and enforcement must be interpreted strictly ([51]).

Therefore, *Art. 45 provides an exhaustive list of grounds for refusal of recognition and enforcement* ([52]), that can only be supplemented by other provisions of the Regulation regarding recognition or enforcement (directly or by reference) or stemming from prevailing sources of law.

The contrary view argues that Art. 26(2) flanks the system of protection of Sections 3 to 5 (STAUDINGER)([53]). Furthermore, *it can be said that if the court does not fulfill the duty of information, there is no jurisdiction by submission* ([54]), *and therefore the judgment conflicts with Sections 3, 4 or 5*

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[47] See Rauscher/Staudinger (fn. 12) Art. 26 para. 24.

[48] Para 29: "That provision [Art. 35] concerns non-recognition of judgments given by a court without jurisdiction which has not been seised in accordance with those rules. It is therefore not applicable where the judgment is given by a court with jurisdiction. That is true, inter alia, of a court seised, even though those rules on special jurisdiction are not complied with, before which the defendant enters an appearance and does not contest that court's jurisdiction. Such a court in fact has jurisdiction on the basis of Article 24 of Regulation No 44/2001. Therefore, Article 35 of that regulation does not prevent the recognition of the judgment given by that court".

[49] See Schlosser/Hess/Schlosser, *EU-Zivilprozessrecht. Kommentar*, 4th ed., Munich, 2015, Art. 26 para. 1; Magnus/Mankowski/Calvo Caravaca/Carrascosa González (fn. 5) Art. 26 para. 35; Czernich/Kodek/Mayr/Wallner-Freidl, *Europäisches Gerichtsstands- und Vollstreckungsrecht*, 4th ed., Vienna, 2015, Art. 26 para. 8; Anabela de Sousa Gonçalves (fn. 45) 495; Stein/jonas/thole (fn. 35) para. 44. See also Miriam Pohl, "Die Neufassung der EuGVVO im Spannungsfeld zwischen Vertrauen und Kontrolle", *IPRax* (2013) 109-114, 111 n. 29.

[50] See also, regarding Art. 25, ECJ 21/3/2024, in the case *"Gjensidige" ADB* [ECLI:EU:C:2024:252], para. 67-68.

[51] In effect, the ECJ held that Art. 27 of the Brussels Convention, that corresponds to Art. 34 of Brussels I Regulation, must be interpreted strictly because it "constitutes an obstacle to the achievement of one of the fundamental objectives of the Convention, which is to facilitate, to the greatest extent possible, the free movement of judgments by providing for a simple and rapid enforcement procedure" (). The same understanding was followed by the ECJ regarding Art. 34 of the Brussels I Regulation () and applies to Art. 45 of Brussels Ibis Regulation.

[52] Cf. *EU Commission Proposal of Brussels I Regulation*, , 22; Recital 30/§ 2nd of Brussels Ibis Regulation; ECJ 13/10/2011, in the case *Prism Investments* [ECLI:EU:C:2011:653], para. 33; 26/9/2013, in the case *Salzgitter Mannesmann Handel* [ECLI:EU:C:2013:597], para. 39; 23/10/2014, in the case *flyLAL-Lithuanian Airlines* [ECLI:EU:C:2014:2319], para. 46; and 21/3/2024, in the case *"Gjensidige" ADB* [ECLI:EU:C:2024:252], para. 61 and 72.

[53] See Rauscher/Staudinger (fn. 15) para. 25. See also Jan von Hein, "Die Neufassung der Europäischen Gerichtsstands- und Vollstreckungsverordnung", *RIW* (2013) 97, 109.

[54] See, for a convergent view, Zöller/Geimer (fn. 45) Art. 26 para. 13; Dickinson/Lein/Garcimartín, *The Brussels I Regulation Recast*, Oxford, 2015, para. 9.111; Simotta (fn. 27) 135; Mayr (fn. 45) II/228. The lack of a mention of paragraph 2 in Art. 26(1)2nd sentence does not seem relevant because both paragraphs shall be read together.

of Chapter II (GEIMER, GARCIMARTÍN, MAYR). There is a ground for refusal of recognition and enforcement even within a strict interpretation of Art. 45.

On the other hand, it seems that if the court fails in its duty of information there can be, under certain conditions, liability of the respective Member State for damages caused to the defendant due to the violation of EU Law ([55]). I am not going to address this issue, which raises some debate in EU Law literature ([56]), in this study.

V. Final remarks

14. As already mentioned, Art. 26(2) prevails over any domestic ordinary provision, but *it is not evident that it displaces any ordinary provision that provides for an equivalent duty of information regarding defendants outside its scope of application*. The authors are divided on this issue ([57]).

The purpose of Art. 26(2) does not contradict the application of domestic rules of procedural nature providing a duty of information in other cases.

However, the ECJ, in the Česká case, seemed to confine the duty of information, even if provided, in the omission of the Brussels I Regulation, by a domestic provision, to those parties considered to be weaker in insurance, consumer contracts and individual employment contracts matters ([58]).

Clarification of the issue by the ECJ will be welcome.

15. Finally, one might ask whether it is possible to improve the regime of this information duty.

Unquestionably, *it is recommended that in an amendment of the Regulation the consequences of the failure to fulfill the duty of information are specifically provided along the guidelines I defended earlier*.

The introduction of an information standard form, to be served on the defendant in due time, namely with the service of the document instituting the proceedings lodged with the court, has also been proposed (MAYR, WALLNER-FRIEDL) ([59]).

However, this is quite doubtful, for the reason given earlier that the information shall take into account all the circumstances of the particular case and be appropriate to the specific defendant ([60]). In my opinion, for the time being *it is preferable to leave to the courts, and namely to the ECJ, the task of materializing the content of the duty of information according to different types of situations*.

[55] See Mankowski (fn. 34) 629; Rauscher/Staudinger (fn. 15) Art. 26 para. 27.

[56] See, namely, Fausto de Quadros, *Direito da União Europeia*, 3rd ed., Coimbra, 2013, 704 et seq., remarking that this regards decisions taken by a last instance court, and Ana Guerra Martins, *Manual de Direito da União Europeia*, 2nd ed., Coimbra, 2017, 566 et seq.

[57] For the non-exhaustive nature of Art. 26(2), Mankowski (fn. 30) 247-248, and Röss (fn. 35) 3749; for the contrary view, Rauscher/Staudinger (fn. 52) Art. 26 para. 31. Geimer/Schütze/Geimer (fn. 2) Art. 26 para. 17, holds that the Regulation does not prevent the operation of domestic provisions in this respect, but the non-compliance with these provisions does not exclude the submission.

[58] Para. 32.

[59] See Czernich/Kodek/Mayr/Wallner-Freidl (fn. 49) Art. 26 para. 6.

[60] See also Mankowski (fn. 30) 251.