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## SEE-LAW NET: Networking of Lawyers in Advanced Teaching and Research of EU Law post-Lisbon

Outcome of the SEE Graduates EU Law Teaching & Research Academy 2013  
Collection of Papers

Skopje and Saarbrücken, December 2013

**DAAD**

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Auswärtiges Amt

One of the major handicaps in Albania regarding the protection of the environment is the lack of an efficient monitoring system. In the last years a system for monitoring the air quality has been established only in the major cities and only for some of the components of air pollutants, while the monitoring of the environment in the rural areas is inexistent. The monitoring infrastructure is very weak, there is a lack of technical appliances and the wrong methodologies are applied. Further, the coordination between the central and the local government is weak, especially when they are governed by opposing political parties. Waste management remains very problematic and it is an area that requires drastic measures, both legislative and practical. Recycling rates are very low and there are no incentives to encourage them. As far as climate change is concerned, although Albania associated itself with the Copenhagen accord, it has not undertaken a mitigation commitment. It should do so in line with the EU Green Paper on climate and energy policies.<sup>31</sup> Also, Albania has participated regularly in the climate component of the Regional Environmental Network for Accession (RENA). Financial and human investments must be increased to ensure the protection of the environment. In general, the implementation of the *acquis communautaire* remains at a very early stage.<sup>32</sup>

However, there are causes for a better perspective as far as the environment protection is concerned, since Albania is determined in following the road towards the European integration. Its progress is closely monitored by the EU and a positive sign was the recent recommendation of the EU Commission to the Council to grant Albania the status of a candidate country for future EU membership.

Despite the progress Albania has made in enacting a set of laws aiming at the protection of the environment, it has to be underlined that the mere existence of a good regulatory framework does not ultimately guarantee the protection of the human rights. It is the people themselves that must use their powers granted by the legislation to ensure the protection of their rights. As one of the Founding Fathers of the United States of America has stated: "I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion."<sup>33</sup> This must become one of the most important duties for us lawyers.

As stated by Prof. *Klaus Bosselmann*: "There is no point of prolonging the life of homo oeconomicus occidentalis. This species should vanish together with all the ideas of anthropocentrism, individualism and materialism. Postmodern constitutionalism should cater for the emerging species of homo ecologicus universalis."<sup>34</sup> In the end, the ultimate aim of any legal efforts should be to ensure a safe environment for all humans.

31 European Commission, "Green Paper: A 2030 framework for climate and energy policies," accessed 5/12/2013, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0169:FIN:EN:PDF>.

32 European Commission, "Albania 2013 Progress Report," accessed 5/12/2013, [http://ec.europa.eu/enlargement/pdf/key\\_documents/2013/package/brochures/albania\\_2013.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/brochures/albania_2013.pdf).

33 Thomas Jefferson, letter to Charles Jarvis, September 28, 1820. Cited in Aaron Sachs, "Eco-Justice: Linking Human Rights and the Environment," *Worldwatch Paper* 127 (1995): 9.

34 Bosselmann, "Human Rights and the Environment: Redefining Fundamental Principles?"

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## THE "LIS PENDENS" RULE IN EUROPEAN PRIVATE INTERNATIONAL LAW AND ITS RELATION TO THE RULE ON CHOICE OF COURT AGREEMENTS

### I. Introduction

In 1968, the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (hereinafter: the Brussels Convention)<sup>1</sup> was adopted as the first European multilateral instrument which regulated the jurisdiction of Contracting States in civil and commercial matters, as well as the conditions for enforceability of judgments among Contracting States.<sup>2</sup>

The Article 21 of the Brussels Convention addressed the problem of concurrent proceedings in different Contracting States. Pursuant to the Article 21(1), "*where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion decline jurisdiction in favour of that court*". In case of proceedings between the same parties and in the same cause of action, the court that was first seised has the precedence to hear the action over any other court. According to the second paragraph, "*a court which would be required to decline jurisdiction may stay its proceedings if the jurisdiction of the other court is contested*". The Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (hereinafter: the Jenard Report)<sup>3</sup> explains that this paragraph was introduced so that the parties would not have to commence the new proceedings if the court first seised declined jurisdiction.

In 1989, the San Sebastian Accession Convention<sup>4</sup> amended the Article 21 of the Brussels Convention. The first paragraph of the revised provision was worded as follows: "*Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established*." According to the second paragraph "*where*

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1 OJ L 304 of 30/10/1978, 36.

2 See Fausto Pocar, "Brussels I and the European Judicial Integration – Keynote Address," in *The Brussels I Regulation: Challenges for Croatian Judiciary*, eds. Vesna Tomljenović and Ivana Kunda (Rijeka: Rijeka Faculty of Law, 2012), 20. Since the European Communities, at the time, did not have the legislative basis for the unification of private international law, convention was the only instrument appropriate for accomplishing "[...] simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals [...]", the aim set in Art. 293 of the Treaty Establishing the European Community, OJ C 321 E/37, 29 December 2006.

3 OJ C 59 of 5/3/1979.

4 Convention on the accession of the Kingdom of Spain and the Portuguese Republic to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice with the adjustments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland and the adjustments made to them by the Convention on the accession of the Hellenic Republic, OJ L 285 of 3/10/1989.

the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court".

Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter: the Brussels I Regulation)<sup>5</sup> entered into force on 01 March 2002 and replaced the Brussels Convention.<sup>6</sup> The Article 27 in Section 9 of the Brussels I Regulation corresponds to the Article 21 of the Brussels Convention as it was amended by the San Sebastian Accession Convention.<sup>7</sup> The wording of the provision remained unchanged, merely the expression "Contracting State" was replaced by "Member State".<sup>8</sup>

At the end of 2012, the 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) was adopted (hereinafter: the Brussels I Recast),<sup>9</sup> which amended the Brussels I Regulation. The Brussels I Recast was a result of the priorities and aims in the area of freedom, security and justice determined by the Stockholm Programme<sup>10</sup> for the period of 2010-2014. This paper will focus on the amendments relevant for the topic.

On 26 July 2013, the Commission published the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.<sup>11</sup> The reason behind this was the so-called "patent package" which consists of two regulations, referred to as the "Unified Patent Regulations", and the "Unified Patent Court Agreement" which together aim at establishing the unitary patent protection in the European Union.<sup>12</sup> Proposed amendments will be examined insofar as they affect the *lis pendens* rule.

5 OJ L 12 of 16/1/2001.

6 Treaty of Amsterdam (OJ C 340 of 10/11/1997) shifted judicial cooperation from the third to the first pillar of the EU and introduced a new heading "Visas, asylum, immigration and other policies connected with the free movement of persons" into the Treaty Establishing the European Community. Art. 65 within this heading provided that one of the measures in the field of judicial cooperation is "recognition and enforcement of decisions in civil and commercial cases [...]". This provision enabled that the Brussels Convention be replaced by the Brussels I Regulation. See Vesna Tomljenović, "Communitarisation of International Private and Procedural Law" (original title in Croatian: „Pozajedničenje” međunarodnog privatnog i procesnog prava), *Zbornik Pravnog Fakulteta Sveučilišta u Rijeci* Suppl. 3 (2003): 693-737.

7 Two years after adopting the Brussels Convention, the Lugano Convention was introduced as a legal instrument that regulates the same issues as the Brussels Convention and serves as a "parallel convention" to the Brussels Convention, but with different *ratione territorii* scope. The Lugano Convention was concluded between the Member States of the European Community and certain Member States of the European Free Trade Association (EFTA). The revised provision on *lis pendens* that was introduced into the Brussels Convention after the San Sebastian Accession Convention was copied from Art. 21 of the Lugano Convention (OJ L 319 of 25/11/1988, 9). In 2007, the new Lugano Convention was adopted (OJ L 339 of 21/12/2007, 3) and replaced the 1988 Lugano Convention. The text of Art. 27 of the 2007 Lugano Convention corresponds to Art. 21 of the 1988 Lugano Convention. See Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 30/10/2007, Explanatory report by Fausto Pocar, OJ C 319 of 23/12/2009.

8 Section 9 of the Brussels I Regulation *Lis pendens - related actions* "Article 27

1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established."

2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

9 OJ L 351 of 20/12/2012.

10 The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens, OJ C 115, 4/5/2010.

11 European Commission, Proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM (2013) 554 final, 26/7/2013.

12 "Patent package" is the result of the enhanced cooperation of all the Member States, except Italy, Spain, and Croatia.

## II. The *Lis Pendens* Rule and its Interpretation

Pursuant to the Article 27, if there are parallel proceedings before the courts of different Member States that involve the same cause of action and the same parties, any other court, except the court first seised, must stay the proceedings until the court first seised decides on its jurisdiction. If the court first seised asserts jurisdiction, other courts must decline their jurisdiction. The Article 27 does not confer substantive jurisdiction but the jurisdiction to determine jurisdiction, *i.e.* *Kompetenz-Kompetenz*. Only the court first seised can decide whether it has jurisdiction and the court second seised must not examine the jurisdiction of the court first seised.<sup>13</sup>

### 1. The Purpose of the *Lis Pendens* Rule

The purpose of the Article 27 is prevention of parallel proceedings conducted in different Member States and avoidance of conflicting judgments being brought as a result. Basically, this Article enforces the principle of mutual trust among the Member States. A certain degree of such mutual trust among different Member States is implied in the very scheme which reserves only to the court first seised the right to review its jurisdiction.<sup>14</sup> The Recital 15 of the Brussels I Regulation explains that minimizing the possibility of concurrent proceedings and ensuring that irreconcilable judgments will not be given in two Member States is "in the interests of the harmonious administration of justice".

The ultimate logic behind this rule is clearly the proper functioning of the internal market. If there is a risk of irreconcilable judgments being rendered in different Member States, there is also a possibility of a judgment originating in one Member State not being recognized in another Member State, since this is one of the grounds for refusal of the recognition of a judgment.<sup>15</sup> The fact that the judgment is not enforceable might prevent a person from exercising a freedom of movement in the EU.

### 2. The Notion of Conflicting Decisions

In order for the Article 27 to be applied, parallel proceedings must involve "the same cause of action" and "the same parties". However, this does not mean that parties must have the same procedural role and that there has to be an identical relief in the concurrent proceedings. In practice, the reality will usually be that the party which occurs in one proceedings as a claimant will in the other proceedings have the position of a defendant.<sup>16</sup>

In *Marsk Olie & Gas A/S v. Firma M. de Haan en W. de Boer*, Court of Justice of the European Union (hereinafter: the CJEU) identified three cumulative conditions that must be satisfied before the *lis pendens* rule can be applied. Those are: the same parties, the same subject matter and the same cause of action.<sup>17</sup>

a) **The same cause of action.** The cause of action ought to be understood as the foundation for the action, not the claim or a relief itself. Otherwise, the scope of the Article 27 would be too narrow to cover all the materially congruent actions, for instance a situation in which the defendant files a counterclaim in another Member State. The term cause of action "comprises the facts and the rules of law relied on as the basis of the action".<sup>18</sup> For instance, the same cause of action condition is fulfilled if a

13 CJEU, case C-351/89, *Overseas Union Insurance Ltd and Deutsche Ruck Uk Reinsurance Ltd and Pine Top Insurance Company Ltd v. New Hampshire Insurance Company*, ECR 1991, I-3317, para. 26; Richard Fentiman, "Section 9. *Lis pendens* – related actions," in *Brussels I Regulation*, eds. Ulrich Magnus and Peter Mankowski, 2nd ed. (München: Sellier, 2012), 566-567, para. 22.

14 Fentiman, "Section 9. *Lis pendens* – related actions," 558-563, paras. 1-14.

15 See Art. 34 of the Brussels I Regulation.

16 Fentiman, "Section 9. *Lis pendens* – related actions," 584, para. 6.

17 ECJ, case C-39/02, *Marsk Olie & Gas A/S v. Firma M. de Haan en W. de Boer*, ECR 2004, I-9657, para. 34.

18 ECJ, case C-406/92, *The owners of the cargo lately laden on board the ship "Tarry" v. The owners of the ship "Maciej Ratay"*, ECR 1994, I-5439, para. 39.

seller brings an action for the payment of the price before the court of one Member State and the buyer institutes a proceedings seeking rescission of a contract before the court of another Member State.<sup>19</sup>

In *Mærsk Olie*, the CJEU further clarified the notion of the same cause of action. The proceedings were instituted before a court of a Member State by a ship owner seeking to have a liability limitation fund established, in which the potential victim of the damage is indicated. The victim brought an action for damages against the ship owner before the court of another Member State. Having in mind the fact that the action for damages is based on the law governing non-contractual liability, whereas the application for the establishment of a liability limitation fund is based on the International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships of 10 October 1957 and on the Dutch legislation, proceedings did not have the same cause of action.<sup>20</sup> In *Tarry*, on the other hand, an action for the declaration of non-liability for the contamination of the cargo and the action for damages brought subsequently by cargo owners on the basis of shipping contracts, concerning the same cargo transported in bulk and damaged in the same circumstances had the same cause of action.<sup>21</sup>

**b) The same parties.** One of the necessary prerequisites of qualifying two proceedings as concurrent must be the identity of the parties. As abovementioned, parties can be in switched positions in the parallel proceedings. The broad interpretation of the notion of same parties allows that even different persons are considered the same party if their interests are "identical and indissociable" and a "judgment delivered against one of them would have the force of *res judicata* as against the other" as the CJEU stated in *Drouot Assurances SA*.<sup>22</sup> In the case where some of the parties in the proceedings are the same as the parties in the previously commenced proceedings, the *lis pendens* rule should be applied between the same parties, while those which are not the same remain untacked by the *lis pendens* rule and proceedings are continued in relation to them.<sup>23</sup>

**c) The same subject-matter or object.** Although the English version of the Brussels I Regulation does not contain the term "subject-matter", it is apparent from the other language versions that this condition should also be considered. For instance, the text in the Italian language mentions "*il medesimo oggetto*" and "*il medesimo titolo*", where "*il medesimo oggetto*" corresponds to the notion of "the same subject-matter". Both the French and Spanish language versions provide that the proceedings must share "*le même objet*" and "*el mismo objeto*" respectively.<sup>24</sup> The meaning of the "subject matter" should correspond to "the end the action has in view".<sup>25</sup>

For instance, the action for the enforcement of an international sale of goods contract and the action for the rescission of the same contract, clearly have the same cause of action because both actions are based on the same contractual obligation. But do they have the same subject-matter? According to the CJEU, those two actions have the same subject-matter, bearing in mind the fact that the concept

19 ECJ, case 144/86 *Gubisch Maschinenfabrik KG v. Giulio Palumbo*, ECR 1987, 4861, para. 20. See Ruth Hayward, *Conflict of Laws*, 4th ed. (Sydney, London: Cavendish publishing, 2006), 81.

20 ECJ, case C-39/02, *Mærsk Olie & Gas A/S v. Firma M. de Haan en W. de Boer*, ECR 2004, I-9657, para. 38.

21 ECJ, case C-406/92, *The owners of the cargo lately laden on board the ship "Tarry" v. The owners of the ship "Maciej Rataj"*, ECR 1994, I-5439, para. 40.

22 ECJ, case C-351/96, *Drouot Assurances SA v. Consolidated Metallurgical Industries (CMI Industrial Sites), Protea Assurance and Groupements d'Intérêt Économique (GIE) Réunion Européenne*, ECR 1998, I-3075, paras. 19 and 26. See James Fawcett, Janeen Caruthers and Peter North, *Private International Law*, 14th ed. (New York: Oxford University Press, 2008), 307.

23 ECJ, case C-406/92, *The owners of the cargo lately laden on board the ship "Tarry" v. The owners of the ship "Maciej Rataj"*, ECR 1987, 4861, para. 34. See Geert Van Calster, *European Private International Law* (Oxford and Portland: Hart Publishing, 2013), 106.

24 However, the German language text, like the English one, does not distinguish the cause of action and subject-matter. It mentions only *denselben Anspruch*. Having in mind the European Union legislation is drafted in several languages which are all equally authentic, the proper interpretation must include the comparison of different language versions, ECJ, case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health*, ECR 1982, 3415, para. 18.

25 ECJ, case C-111/01, *Gantner Electronic GmbH v. Basch Exploitatie Maatschappij BV*, ECR 2003, I-4207, para. 25. See Calster, *European Private International Law*, 107.

cannot simply be restricted to identical actions.<sup>26</sup> Actions have the common legal objective of establishing whether contractual liability exists because of the supposed invalidity of the contract.

In *Mærsk Olie*, the CJEU explained that while the action for damages seeks to have the defendant declared liable, the application to limit liability is designed to ensure, in the event that the person is declared liable, that such liability will be limited and therefore those two actions cannot be considered to have the same subject-matter.<sup>27</sup> In order to ascertain whether claims have the same subject-matter the grounds of defence raised by a defendant must not be taken into consideration. Account should only be taken of the claims of the respective applicants.<sup>28</sup>

### III. Relation between the *Lis Pendens* Rule and the Rule on the Choice of Court Agreement

One of the most notable issues which occurred in the course of application of the Article 27 of the Brussels I Regulation was its relation with the provision allowing for party autonomy to determine the competent court. The Article 23 of the Brussels I Regulation allows the parties to select internationally competent forum. Pursuant to this Article, parties can agree on a court that will settle the dispute that has arisen or may arise between them. Unless parties agree otherwise, thus prorogated jurisdiction becomes an exclusive jurisdiction.<sup>29</sup> In practice, tactical litigation, especially the phenomenon of the race to the court, became problematic. One party, namely the debtor, expecting to be sued because of the non-performance of the contract, would commence the proceedings before a non-competent court that is known to be notoriously slow and would seek merely a negative declaratory relief. Afterwards the creditor would institute the proceedings before the competent court. By virtue of the *lis pendens* rule, the court second seised must stay its proceedings until the time the court first seised decides whether it has jurisdiction or not. Having in mind that the judiciary of the Member State of the court first seised acts slowly, the result is a great deal of time which may pass before the first-seised court decides on its jurisdiction. Creditor, confronted with the long proceedings, would eventually accept a settlement agreement and maybe give up a certain amount of his claim.

This situation became known as the "Italian torpedo". The Italian judiciary was known to be very slow. It took a long time for Italian courts to dismiss a case due to the lack of jurisdiction. Belgium was also "famous" for misuse in the context of the torpedo tactics. This kind of race to the court was often related to intellectual property litigation. One of the parties would commence an action for the declaration that there is no infringement of an intellectual property right before a court lacking jurisdiction, while any proceedings commenced afterwards by the right holder for a claim of infringement, had to be stayed.<sup>30</sup>

One of the most noted cases in which the said issue of relation between the rule on choice of court agreement and the *lis pendens* rule was presented is *Gasser*.<sup>31</sup>

26 ECJ, case 144/86 *Gubisch Maschinenfabrik KG v. Giulio Palumbo*, ECR 1987, 4861, paras. 15-17.

27 ECJ, case C-39/02, *Mærsk Olie & Gas A/S v. Firma M. de Haan en W. de Boer*, ECR 2004, I-9657, para. 35.

28 ECJ, case C-111/01, *Gantner Electronic GmbH v. Basch Exploitatie Maatschappij BV*, ECR 2003, I-4207, para. 32.

29 "Article 23

1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. [...] In the Brussels Convention Art. 17 regulated prorogation of jurisdiction. The only difference between prorogation of jurisdiction in the Brussels Convention and the Brussels I Regulation is the fact that the Brussels Convention did not allow for the parties to rule out the exclusive jurisdiction of the chosen forum.

30 See Michael Bogdan, "The Brussels/Lugano Lis Pendens Rule and the 'Italian Torpedo'," *Scandinavian Studies in Law* 51 (2007): 92-93; Pierre Véron, "ECJ Restores Torpedo Power," *International Review of Intellectual Property and Competition Law* 35 (2004): 638-639; Mario Franzosi, "Torpedoes are Here to Stay," *International Review of Intellectual Property and Competition Law* 33 (2002): 157; Vincenzo Jandoli, "The 'Italian Torpedo'" *International Review of Intellectual Property and Competition Law* 31 (2000): 788.

31 ECJ, case C-116/02, *Erich Gauer GmbH v. MISAT Srl*, ECR 2003, I-14693.

## 1. Gasser

For several years Gasser, whose registered office was in Austria, sold children's clothing to MIS-AT, a company incorporated under Italian law. Gasser and MISAT agreed that in the case of a dispute, Austrian court would be the competent court. This choice of court clause appeared on invoices sent by Gasser to MISAT and MISAT never objected to it. After the contractual relation between the parties was broken off, MISAT sued Gasser before the Civil and Criminal District Court in Rome. MISAT sought the declaration that it had not failed to perform its contractual obligation and damages because Gasser supposedly did not fulfil its obligations of fairness, diligence and good faith. Afterwards, Gasser brought an action against MISAT before the Regional Court in Austria for obtaining payment of outstanding invoices. By virtue of the Article 27 of the Brussels I Regulation, the Regional Court in Austria decided to stay the proceedings as it was the court second seised. Gasser appealed contending that the Austrian court should not have stayed the proceedings. MISAT, on the other hand, contested the existence of choice of court clause. The Higher Regional Court in Austria, after establishing that the choice of court agreement was valid, was not sure whether the obligation to stay the proceedings exists, regardless the fact that the jurisdiction of the court second seised is exclusive.<sup>32</sup> The Higher Regional Court in Austria decided to refer a set of questions to the CJEU for preliminary ruling. The national court wished to establish whether interpretation of the *lis pendens* rule allows that the court second seised, which has exclusive jurisdiction under an agreement conferring jurisdiction, gives judgment in the case without waiting for a declaration from the court first seised that it has no jurisdiction. Besides that, the court wished to ascertain if the Article 27 could have been derogated from in the case where the duration of the proceedings before the court first seised was excessively long.<sup>33</sup>

Gasser and United Kingdom Government proposed that the Article 27 should be interpreted as meaning that the court second seised, designated by the choice of court agreement, could decide without waiting the court first seised to rule on its jurisdiction. They relied upon judgment in *Overseas Union Insurance and Others* in which the CJEU explained that the Article 22 of the Brussels I Regulation<sup>34</sup> overrules the Article 27 of the Brussels I Regulation.<sup>35</sup> So if a court second seised was the court of exclusive jurisdiction pursuant to the Article 22, the *lis pendens* rule would not apply. MISAT, the Italian Government and the Commission were in favour of application of the Article 27 *in stricto sensu*. The Advocate General proposed that the standing of the CJEU in *Overseas Union Insurance and Others* could be extended to circumstances in which the court second seised had exclusive jurisdiction under an agreement conferring jurisdiction. The reasoning of the Advocate General laid in the fact that the CJEU used the adverb "in particular", which indicated the clear intention of not confining the derogation applied in *Overseas Union Insurance and Others* solely to the cases of exclusive jurisdiction covered by the Article 22.<sup>36</sup> The United Kingdom Government's suggestion of giving precedence to the chosen court in the context of the *lis pendens* rule reflects the practice accepted by the English courts. For instance, in *Continental Bank N.A. v. Aeakos Compania Navimera S. A. and others*, an English court, designated by the prorogation clause in the loan agreement, disregarded the *lis pendens* rule and refused to stay the proceedings although the Greek court was the one first seised.<sup>37</sup> Besides this, English courts

32 Ibid., paras. 11-19.

33 Ibid., para. 20.

34 Art. 16 of the Brussels Convention regulates exclusive jurisdiction. With minor amendments the text was copied to Art. 22 of the Brussels I Regulation.

35 ECJ, case C-351/89, *Overseas Union Insurance Ltd and Deutsche Rück UK Reinsurance Ltd and Pine Top Insurance Company Ltd v. New Hampshire Insurance Company*, ECR 1991, I-3317, para. 26.

36 Opinion of AG Léger, case C-116/02, *Erich Gasser GmbH v. MISAT Srl*, ECR 2003, I-14693, paras. 48 and 58.

37 In that respect, the English judge pointed out that "[...] if Article 17 [of the Brussels Convention] applies its provisions take precedence over the provisions of articles 21 and 22.", Court of Appeal, *Continental Bank N.A. v. Aeakos Compania Navimera S. A. and others*, The Weekly Law Report, 22/4/1994, "Court of Justice of the European Union", accessed 5/12/2013, <http://curia.europa.eu/common/reco/doc/convention/gemdoc94/pdf/18-U-en-94.pdf>, 588-599.

used injunction that prohibits a party to institute or continue with proceedings in another country, as a procedural device for circumventing the *lis pendens* rule where it was clear that parallel proceedings were a result of abusive *forum shopping*. Anti-suit injunctions were declared contrary to mutual trust between the Member States on which the Brussels/Lugano system is founded.<sup>38</sup>

The CJEU's ruling in *Gasser* was that the court second seised must stay the proceedings regardless the fact it has exclusive jurisdiction under the prorogation clause. The Article 27 of the Brussels I Regulation cannot be derogated from where the proceedings before the court first seised is excessively long. The CJEU justified its ruling by the fact that the court second seised is never in a better position than the court first seised to determine whether the latter has jurisdiction. Although exclusive jurisdiction under the Article 22 of the Brussels I Regulation represents an exception from the application of *lis pendens* rule, this interpretation could not be broadened to the extent that it includes jurisdiction under the Article 23 of the Brussels I Regulation. The Article 27 is merely a mechanical rule based on the chronological order in which courts are seised.

## 2. Substantial Validity of the Choice of Court Clause

The CJEU's ruling in *Gasser* is not surprising. When proposing the application of the derogation established in *Overseas Union Insurance and Others*, Advocate General Léger failed to observe one important fact. The rule contained in the Article 22 of the Brussels I Regulation enumerates five situations in which courts of the Member States have exclusive jurisdiction and any defendant can predict in advance whether he may be sued under this provision with high legal certainty. On the other hand, the Article 23 does not regulate the substantive validity of the choice of court clause.<sup>39</sup> Furthermore, the Rome I Regulation expressly excludes from its material scope of application agreements on the choice of court<sup>40</sup> which means that substantial validity of the prorogation clause is governed by the private international law rules of the deciding court.<sup>41</sup> If the prorogation clause is contained in a contract for which applicable law is chosen, the substantive validity of the prorogation clause will probably be governed by the chosen law.<sup>42</sup> The problem will occur in the situations where such choice on applicable law does not exist.

The Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No. 44/2001 on

38 ECJ, case C-159/02, *Gregory Paul Turner v. Felix Fareed Ismail Grovis, Harada Ltd and Changepoints SA*, ECR 2004, I-3565.

39 Art. 23 of the Brussels I Regulation (formerly Art. 17 of the Brussels Convention) regulates mainly the formal validity of the prorogation of jurisdiction. "[...] Such an agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing; or

(b) in a form which accords with practices which the parties have established between themselves; or

(c) in international trade or commerce, in a form which accords with a usage of which the 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 only substantive requirement that Art. 23 provides is that at least one of the parties has to have a domicile in the EU. Pursuant to paragraph 3 of Art. 23 (formerly paragraph 2 of Art. 17 of the Brussels Convention) parties with the domicile outside the EU can also agree on competent forum in the EU, but then the formal and substantive validity of the prorogation clause are not regulated by the Brussels I Regulation. See Ulrich Magnus, "Section 7. Prorogation of jurisdiction," in *Brussels I Regulation*, 463, para. 54; Calster, *European Private International Law*, 82 and 33.

40 Regulation (EC) No 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I Regulation), OJ L 177 of 4/7/2008, 6, Art. 2(1)(e).

41 Paul Beaumont, "Choice of Forum Clauses and the Brussels I Regulation: The Impact of the 2005 Hague Convention on Choice of Court Agreements," in *The Brussels I Regulation: Challenges for Croatian Judiciary*, 124-129.

42 In a certain number of legal orders, substantive validity is governed by the law applicable to the contract. Having in mind the fact that party autonomy is largely accepted principle of private international law, it can be concluded that the substantive validity of the prorogation clause will often be subjected to law governing the contract. On the other hand, in other legal orders prorogation clause is considered as a separate contract and ordinary conflict of law rules are used to determine applicable law. See Mario Giuliano and Paul Lagarde, Council Report on the Convention on the law applicable to contractual obligations, OJ C 282 of 31/10/1980.

jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter: the Report on the application of the Brussels I Regulation) and Report on the Application of Regulation Brussels I in the Member States, by prof. dr. Burkhard Hess, prof. dr. Thomas Pfeiffer and prof. dr. Peter Schlosser (hereinafter: the Heidelberg Report) acknowledged the problem of the law applicable to the choice of court agreement, elaborating that in certain Member States the substantial validity of the prorogation clause is made subject to the *lex fori* while in others, it is governed by the *lex causae*, which leads to a result that it is valid in one Member State and invalid in another.<sup>43</sup> The Green Paper on the Review of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter: the Green Paper) proposed prescribing a standard choice of court clause.<sup>44</sup> The Heidelberg Report, on the other hand, suggested referring to Common Frame of Reference,<sup>45</sup> an instrument that represents harmonized rules of European contract law. Another proposed solution was the approach accepted in the Article 5(1) of the 2005 Hague Convention on Choice of Court Agreements.<sup>46</sup> According to this provision "the court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State".

### 3. Art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms

One of the questions submitted to the CJEU in *Gasser*, that remained unanswered due to it being unnecessary, sought to establish whether legal consequences provided for by the Italian Law No. 89 of 24 March 2001 justified the application of the Article 27 of the Brussels I Regulation even if a party is at risk of detriment caused by the excessive length of the proceedings before the Italian court. The Italian Law No. 89 of 24 March 2001 on the equal compensation in case of violation of the reasonable length of a trial<sup>47</sup> was introduced as a result of numerous proceedings against Italy before the European Court of Human Rights based on infringement of the Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR), a right to a fair trial. The Law No. 89 regulates conditions and procedure for exercising a right to compensation because of the excessive length of the proceedings.

*Gasser* raised another important issue in the proceedings before the CJEU, it claimed that the Article 27 must be interpreted as excluding excessively protracted proceedings for they are contrary to the Article 6 of the ECHR, with further explanation that the responsibility of the European Union is to identify those States in which it is well known that legal proceedings are excessively protracted. Therefore, *Gasser* proposed that if a decision on jurisdiction has not been given within six months, or final decision on jurisdiction within one year, the Article 27 should be derogated from. According to

43 Report on the application of the Brussels I Regulation, COM (2009), 174 final, 21/4/2009, 5; Burkhard Hess, Thomas Pfeiffer and Peter Schlosser, "Report on the Application of Regulation Brussels I in the Member States" (Heidelberg Report), Study JLS/C4/2005/03 (Munich, final version September 2007), 159.

44 European Commission, Green Paper on the Review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM (2009), 175 final, 21/4/2009, 5.

45 European Commission, Common Frame of Reference was first mentioned in A More Coherent European Contract Law, An Action Plan, COM (2003), 68 final, 12/2/2003. In 2009 Study Group on a European Civil Code (the "Study Group") and the Research Group on Existing EC Private Law (the "Acquis Group") presented the revised and final academic Draft of a Common Frame of Reference (DCFR). See Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), Christian von Bar et al., ed., *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR), Outline Edition* (Munich: Sellier, 2009). Parts of DCFR were used in Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM (2011), 635 final, 11/10/2011.

46 "Hague Conference on Private International Law", accessed 5/12/2013, <http://www.hcch.net/upload/conventions/txt37en.pdf>.

47 Legge di 24 marzo 2001, n. 89, Previsione di equa riparazione in caso di violazione del termine ragionevole del processo e modifica dell'articolo 375 del codice di procedura civile, Gazzetta Ufficiale n.78 del 3/4/2001.

the United Kingdom Government, the Article 27 must be interpreted in conformity with the Article 6 of the ECHR and exception of the application of the Article 27 must be introduced where the claimant has brought proceedings in bad faith before a non-competent court and the court first seised has not decided the question of its jurisdiction within a reasonable time. The Commission raised the issue of admissibility of this question stating that, considering the fact that the Brussels I Regulation is based on mutual trust between Member States, infringement of rights based on excessive length of proceedings cannot be settled in the context of the Brussels I Regulation but before the European Court of Human Rights.<sup>48</sup> The question that poses is whether this would be the case today when European Union decided to accede to the ECHR.

### IV. Amendments to the *Lis Pendens* Rule and the Rule on the Choice of Court Agreement

The Report on the application of the Brussels I Regulation recognized the problem of insufficient protection of exclusive choice of court agreements in the cases where one party commences the proceedings before a non-competent court and violates prorogation clause and admitted these kinds of actions could undermine the proper functioning of the internal market. Signing the 2005 Hague Convention on the Choice of Court Agreements was suggested as a way of coping with the problem.<sup>49</sup> The 2005 Hague Convention solves the problem of parallel proceedings by providing that if an exclusive choice of court agreement exists in favour of the court of a Contracting State, courts of other Contracting States, with certain exceptions, must suspend or dismiss proceedings.<sup>50</sup>

The Green Paper on the review of the Brussels I Regulation proposed several solutions to the existing problem of the rule on choice of court agreement and the *lis pendens* rule relation: releasing the court designated in an exclusive choice of court agreement from its obligation to stay proceedings under the *lis pendens* rule; by providing that the court designated by the agreement would have priority to determine its jurisdiction and any other court seised would stay proceedings until the jurisdiction of the chosen court is established; maintaining the existing *lis pendens* rule and providing direct communication and cooperation between seised courts and a deadline for the court first seised to decide on its jurisdiction; excluding the application of the *lis pendens* rule where one of the actions in parallel proceedings is an action for negative declaratory relief.<sup>51</sup>

The Heidelberg Report, on the other hand, recommended standard forms of choice of court agreements and two alternative approaches: either the court designated under the prorogation clause will have precedence in determining its jurisdiction regardless the fact some other court is the court first seised or providing that the court first seised will have precedence in a six month period.<sup>52</sup>

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 (hereinafter: the Recast Proposal) suggested the two ways in which the effectiveness of the choice of court agreements might be improved. First of all, by giving priority to the chosen court to decide on its jurisdiction even if some other court is the court first seised, with the effect that any other court must stay proceedings until the chosen court establishes or declines its jurisdiction.<sup>53</sup> This rule was supposed to operate as

48 ECJ, case C-116/02, *Erich Gasser GmbH v. MISAT Srl*, ECR 2003, I-14693, paras. 59-69.

49 Report on the application of the Brussels I Regulation, COM (2009), 174 final, 21/4/2009, 6.

50 2005 Hague Convention, Art. 6. See GHK, Study to inform Impact Assessment on the Ratification of the Hague Convention on Choice of Court Agreements by the European Community, Directorate-General Justice, Freedom and Security (London: December 2007), accessed 5/12/2013, [http://ec.europa.eu/justice/civil/files/ia\\_choice\\_courts\\_agreement\\_en.pdf](http://ec.europa.eu/justice/civil/files/ia_choice_courts_agreement_en.pdf), 103-104.

51 European Commission, Green Paper, COM (2009), 175 final, 21/4/2009, 5 and 7.

52 Hess, Pfeiffer and Schlosser, "Report on the Application of Regulation Brussels I in the Member States," 216-217.

53 European Commission, 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, 14/12/2010, Art. 32 (2).

an exception of the general *lis pendens* rule which would remain the same. Secondly, by introducing harmonised rule of conflict of law on the substantive validity of choice of court agreements according to which the law of the Member State of the designated court would apply to the question whether the jurisdiction agreement is valid as to its substance.<sup>54</sup> Additionally, the Recast Proposal introduced a time limit of six months for the court first seised to decide on its jurisdiction, unless exceptional circumstances make this impossible.

The Article 30 of the Brussels I Regulation contains the autonomous determination of time when the court is deemed to be seised.<sup>55</sup> The Recast Proposal made it even easier to examine the exact date when the court was seised by establishing the obligation of the court first seised to inform any other court upon its request of the date on which it was seised and of whether it has established jurisdiction or estimated time for establishing jurisdiction.<sup>56</sup>

The Brussels I Recast adopted the majority of amendments in the Recast Proposal in this area. The proposed amendment on chronological order of establishing jurisdiction where one of the courts involved in the parallel proceedings is the court designated under the choice of court agreement was adopted.<sup>57</sup> The *lis pendens* rule remained the same: any other court except the court first seised must of its own motion stay the proceedings until such time as the jurisdiction of the court first seised is established. If the jurisdiction of the court first seised is established, any other court has to decline its jurisdiction. The exception from this rule is the case where prorogation of jurisdiction exists. The chronological order of deciding upon jurisdiction changes in favour of the designated court. Hence, any other court shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction. If a court designated in the agreement has established jurisdiction in accordance with the agreement, any court of another Member State has to decline its jurisdiction. Furthermore, the Brussels I Recast expressly states that this precedence of the chosen court will not apply if a consumer, an employee, a policyholder, the insured or a beneficiary of the insurance contract is the claimant and the choice of court agreement is not valid under the provisions on additional requirements of the prorogation clause in consumer contracts, individual contracts of employment and insurance contracts.

Such precedence of the court designated in the choice of court agreement solves the problem of abusive litigation in cases like *Gasser*, in which the damaged party is the one relying *bona fide* on the existing and valid prorogation clause. However, it does not fully prevent torpedo actions. In fact, it opens the door for a new kind of torpedo actions, the ones in which the debtor, relying on a non-existing choice of court agreement, abusively commences the proceedings before the allegedly designated

court with the aim of delaying rendering the judgment by the competent court.<sup>58</sup> Such fraudulent contention on the existence of the choice of court agreement might be possible, particularly in the context of the subparagraph (b) and (c) of the Article 25(1) of the Brussels I Recast, where a debtor, in the absence of firm, written evidence, alleges the existence of the prorogation clause according to the practice previously established with the creditor or usage accepted in international trade or commerce. Perhaps, the more appropriate approach for achieving the harmonious functioning of the *lis pendens* rule with regard to the rule on choice of court agreement would be introducing the proposed time limit of six months in which the court first seised has to decide on its jurisdiction, but without giving precedence to the court designated in the choice of court agreement.

Regarding the information on the exact date when the court was seised, there are differences between the Recast Proposal and the Brussels I Recast. While the Recast Proposal suggested that the court first seised should have the obligation to provide the information to any other court upon their request on the time when it was seised, the Brussels I Recast slightly altering this paragraph provided for a more equal position of the courts involved – any court has to inform the other court seised of the dispute between the same parties and the same cause of action on the date when it was seised.<sup>59</sup>

The Brussels I Recast adopted the approach of the Recast Proposal regarding the conflict of law rule on substantive validity of the prorogation clause.<sup>60</sup> However, the time limit of six months for the court first seised to decide on its jurisdiction was not included in the Brussels I Recast.

The amendments of the Brussels I Recast are already envisaged in the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. In order to establish unitary patent protection in the European Union, a set of legislative acts known as “patent package” was introduced. It is proposed that the coordination of the jurisdiction between Member States laid down by the Brussels I Recast be extended to Benelux Court of Justice and newly founded Unified Patent Court. The main rule is that those courts should have jurisdiction anytime a national court of a Contracting Member State has jurisdiction according to the Brussels I Recast provisions. In that respect, it is suggested that the application of the provisions on *lis pendens* and related actions should be broadened to include the relation between the Unified Patent Court or the Benelux Court of Justice and courts of non-Contracting Member States, as well as between the Unified Patent Court and national courts of Contracting Member States during the transitional period provided by Unified Patent Court Agreement.

## V. Conclusion

When *Gasser* judgment was rendered, it was highly controversial and heavily criticized topic treated in the number of scholarly papers. The CJEU was accused of giving too much importance to legal certainty and predictability at the expense of party autonomy. While it is true that this case, along with other cases which appeared before the national courts, particularly English courts, indicated that the relation between the *lis pendens* rule and the rule on the choice of court agreement was not clearly

54 European Commission, Proposal Recast, COM (2010) 748 final, 14/12/2010, Art. 23 (1). The condition that at least one party has to have a domicile in the EU was excluded from Art. 23. This approach was in line with the general proposal of extending the jurisdiction rules of the Brussels I Regulation to disputes involving third country defendants.

55 Art. 30 of the Brussels I Regulation: “For the purposes of this Section, a court shall be deemed to be seised:

1. at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have service effected on the defendant, or

2. if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have the document lodged with the court.” This provision was introduced after recognizing the problem of determining according to national laws the time when each of the courts was seised. See ECJ, case 129/83, *Siegfried Zelger v. Sebastiano Salinetti*, ECR 1984, 2397. The Brussels I Recast added to this provision the clarification that the authority responsible for service referred to in point 2 is the first authority receiving the documents to be served and the obligation of the court or authority responsible for service to note the date of lodging of the document instituting the proceedings or equivalent document or the receipt of the documents to be served (Art. 32 of the Brussels I Recast).

56 The Recast Proposal, Art. 29 (2).

57 Brussels I Recast, Art. 31 (2).

58 See opinion of AG Léger, case C-116/02, *Erich Gasser GmbH v. MISAT Srl*, ECR 2003, I-14693, para. 74; Diana Sancho Villa, “Jurisdiction over Jurisdiction and Choice of Court Agreements: Views on the Hague Convention of 2005 and Implications for the European Regime,” in *Yearbook of Private International Law Vol. XII*, eds. Andrea Bonomi, and Gian Paolo Romano (Petar Šarčević and Paul Volken, founding members) (Munich: Sellier, 2010), 404.

59 The Brussels I Recast, Art. 29 (2): “In cases referred to in paragraph 1, upon request by a court seised of the dispute, any other court seised shall without delay inform the former court of the date when it was seised in accordance with Article 32.”

60 The Brussels I Recast, Art. 25 (1): “If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. [...]”

set, the problem could not simply be solved in the way suggested by the Advocate General. Although it was justified and understandable that the exception from the *lis pendens* rule should exist for the courts with exclusive jurisdiction, the CJEU could not allow for this exception to cover the courts designated under the choice of court agreements. As a result, the jurisdiction of the chosen court became somewhat less exclusive in the context of the *lis pendens* rule, this not being the only difference between the exclusive jurisdiction under the Article 22 of the Brussels I Regulation and the exclusive jurisdiction based on the Article 23 of the Brussels I Regulation. For instance, violation of the the Article 22 jurisdiction provides basis for refusing recognition of enforcement of a foreign decision, while violation of the the Article 23 jurisdiction does not. Furthermore, the Article 22 jurisdiction cannot be brought into question on the basis of private international law rules of the deciding court, while the the Article 23 jurisdiction can.

The Brussels I Regulation does not regulate substantive validity of the choice of court clause. Furthermore, the substantive validity is excluded from the scope of application of the Rome I Regulation. That means that the substantive validity of the prorogation clause depends on the private international law rules of the deciding court. Having that in mind, the decision of the CJEU was reasonable and appropriate. The *lis pendens* rule represents a mechanical rule which merely sets a chronological order for courts to decide, based on objective factors. As a rigid and predictable system of rules for jurisdiction and enforcement of judgments, the Brussels I Regulation comes with a certain price. The only way to balance these disadvantages is to maintain the system without *ad hoc* exceptions, with possible adjustments which intend to meet the parties' needs. However, the issue is whether adjustments of the *lis pendens* rule introduced by the Brussels I Recast, which give the priority to a proceedings commenced before a court designated in a prorogation clause, solve the problem of the torpedo actions or merely allow for a different kind of torpedo actions to take place, namely the ones based on fictitious choice of court agreements.

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## PROTECTION OF MINORITIES IN SOUTH EASTERN EUROPE – ROMA IN CROATIA

### I. Introduction

A "typical image" of Southeast Europe or "the Western Balkans" and its population and problems in literary terms was pictured by the author Karl May.<sup>1</sup>

Even today, the word "Balkan" as a collective term for Albania and the successor states to Yugoslavia (with the exception of Slovenia) holds the potential for conflict.

But even in Karl May's time, criticism was expressed with regard to this term. By using the *technical term* "the Balkans", he pays "less attention to the population of the Balkans and its national struggle for liberation" and is misinformed "about the nature and development of the national struggle of the Balkans population".<sup>2</sup> In Central and Western Europe, even nowadays, the term "Balkan" is associated with political crises, corruption or economic poverty and little education.

Therefore on the occasion of an EU summit in December 1998, the neutral term "the Western Balkans" was supposed to designate the "Southeast European States", which represent the next strategic goal for the enlargement of the EU, following the accession of Romania and Bulgaria.

From the other (historic) point of view, the term "Southeast Europe" can be considered as one bearing less negative connotations than the term "the Balkans" and thus the states Albania, Bosnia and Herzegovina, Kosovo, Croatia, Macedonia, Montenegro and Serbia (alongside other states) are ranked among Southeast Europe.

Only by showing the linguistic problem, we see, there is a high potential of geographical, juridical, political, social and communication problems in the context of this region.

On approaching the multiethnic structure of Southeast Europe and its willingness for accession – including integration measures – to the EU and considering the potential for conflict regarding the political and geographical classification, it becomes more than obvious that the current state of affairs is multi-layered and difficult.

### II. Roma – a National Minority in Europe

One of the most discussed problems in the context of minorities in Europe is the situation of the so called "Roma". With 6.2 million people in the EU and around 11 million people in Europe, the Roma represent the largest national minority.<sup>3</sup>

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1 Claus Roxin, "Bemerkungen zu Karl May's Orientroman," *Karl May Gesellschaft*, accessed 5/12/2013, <http://www.karl-may-gesellschaft.de/kmg/seklit/kms/kms01/83.htm>; Wesselin Radkov, "Politisches Engagement und soziale Problematik in den Balkanländern Karl May's," *MKMG-Mitteilungen der Karl-May-Gesellschaft* 22 (1974): 3-8; Malte Rüstau, "Verbrecher oder Sozialbanditen?," *MKMG* 28 (1976): 10-1.

2 Radkov, "Politisches Engagement und soziale Problematik in den Balkanländern Karl May's," 7 et seq.

3 Council of Europe, Committee of Experts on Roma and Travellers (MG-S-ROM), accessed 5/12/2013, [http://www.coe.int/t/dg3/romatravellers/mgstrom\\_en.asp](http://www.coe.int/t/dg3/romatravellers/mgstrom_en.asp).