

University of Dundee

Judicial Discretion in light of the New European Rules on Jurisdiction in Civil and Commercial Matters

Fiorini, Aude

Published in:
Hanyang Journal of Law

Publication date:
2014

Document Version
Peer reviewed version

[Link to publication in Discovery Research Portal](#)

Citation for published version (APA):

Fiorini, A. (2014). Judicial Discretion in light of the New European Rules on Jurisdiction in Civil and Commercial Matters: Reform or Continuity? Common law perspectives. *Hanyang Journal of Law*, 1(1), 67-93.

General rights

Copyright and moral rights for the publications made accessible in Discovery Research Portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

Take down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

**Judicial Discretion in light of the New European Rules on Jurisdiction in
Civil and Commercial Matters: Reform or Continuity?
*Common Law Perspectives***

Aude Fiorini

Senior Lecturer, University of Dundee Law School (UK)

In what is now known as the European Union (EU), a process of integration started in the 1950s, leading to the gradual creation of an internal market¹ where goods, people, services and capital move freely. The free movement of judgments can be presented as a necessary corollary of the four above-mentioned European freedoms. If widespread economic integration may be achieved notwithstanding significant differences between legal systems², the reciprocal recognition and enforcement of judgments is, in Europe, considered to be a key factor in the promotion of cross-border legal transactions. Indeed “certain differences between national rules governing jurisdiction and the recognition of judgments hamper the sound operation of the internal market”.³ This then justifies the adoption of “provisions to unify the rules of conflict of jurisdiction in civil and commercial matters, and to ensure rapid and simple recognition and enforcement of judgments given in a Member State”.⁴

¹ The creation of a common market was an objective of the 1957 Treaty of Rome, which established the EEC (European Economic Community). The European Court of Justice has defined what is meant by this expression. In Case 15/81, *Gaston Schul Douane Expéditeur BV v Inspecteur der Invoerrechten en Accijnzen, Roosendaal*, ECR 1982, 01409, it stated (at para 33): “The objectives of the Treaty (...) are laid down in Articles 2 and 3 among which appears, in the first place, the establishment of a common market. The concept of a common market as defined by the court in a consistent line of decisions involves the elimination of all obstacles to intra-community trade in order to merge the national markets into a single market by bringing about conditions as close as possible to those of a genuine internal market. It is important that not only commerce as such but also private persons who happen to be conducting an economic transaction across national frontiers should be able to enjoy the benefits of that market.” *The Treaty of Lisbon replaced the references to “common” or “single” markets with that of “internal market”. According to Art 26 of the Treaty on the Functioning of the European Union (TFEU), ex Art 14 TEC, “1. The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties. 2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties”.*

² See, eg, J Smits, *The Making of European Private Law: Towards a Ius Commune Europaeum as a Mixed Legal System*, Intersentia, Antwerpen, 2002, at 32.

³ Regulation (EU) 1215/2012 of the European Parliament and the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), OJ 2012 L 351/1, Recital 14.

⁴ *Ibid.*

The first step towards the adoption of such harmonized provisions was made in 1968 with the conclusion of the Brussels Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (which was subsequently modified by accession conventions as the number of Member States of the European Communities progressively grew).⁵ In 1999, the entry into force of the Treaty of Amsterdam transferred the competence to legislate in the field of judicial cooperation in civil matters from the Member States to the European Union.⁶ This led to the transformation of the 1968 Brussels Convention, an instrument of inter-governmental cooperation, into a Regulation, a legal instrument of the Union that is binding and directly applicable, even to new Member States.⁷ The Regulation (EC) 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, colloquially known as 'Brussels I' is, on the substance, a slightly modified version of the 1968 instrument: the Europeanisation process was not used as an opportunity to overhaul the instrument. This opportunity however arose again through Art 73, which provided that "no later than five years after the entry into force of this Regulation, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Regulation. The report shall be accompanied, if need be, by proposals for adaptations to this Regulation". Following the publication of academic reports on the operation of Brussels I, the European Commission issued in 2009 its own Report⁸ and Green Paper⁹. A year later, the Commission presented a legislative proposal for a Recast (reform) of the Brussels I Regulation.¹⁰ This signalled the start of a legislative procedure, which concluded two years later with the adoption of a new Regulation on Jurisdiction and the Recognition and Enforcement of

⁵ See the consolidated text of the Brussels Convention : OJ 1998 C 27/1.

⁶ See Art 81 TFEU (ex Article 65 TEC): "1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States. 2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring: (a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases; (b) the cross-border service of judicial and extrajudicial documents; (c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction; (d) cooperation in the taking of evidence; (e) effective access to justice; (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States; (g) the development of alternative methods of dispute settlement; (h) support for the training of the judiciary and judicial staff. (...)"

⁷ See Art 288 TFEU.

⁸ COM(2009) 174 final.

⁹ COM (2009) 175 final.

¹⁰ COM (2010) 748 final.

Judgments in Civil and Commercial Matters (Recast)¹¹ which amended Brussels I and will replace it from 10 January 2015.¹²

The Recast will be applicable in *all* 28 EU Member States. This is all the more notable that three EU Member States benefit from a special position since the entry into force of the Treaty of Amsterdam: Denmark, Ireland and the United Kingdom are not in principle bound by measures taken by the EU in the Area of Freedom, Security and Justice.¹³ Yet all three elected to participate in the Brussels I Recast. Such decisions were made at different stages of the reform process and had different legal bases.

Under Protocol No 22 Denmark does not participate in any measure taken on the basis of Title V of the TFEU but Brussels I has exceptionally been applicable in Denmark since 2007, following a special agreement negotiated in 2005¹⁴ and linked to the fact that Denmark had been a contracting State of the 1968 Brussels Convention. In extending the application of the Brussels I Regulation to Denmark, the terms of the 2005 agreement also opened the possibility for this country to decide whether or not it wanted to be bound by any future measure modifying Brussels I.¹⁵ Denmark notified its decision to be bound by the Brussels I recast a few days after it was adopted.¹⁶

The position of the UK and Ireland, the only common law countries of the European Union, is actually generally much more flexible than that of Denmark: Protocol 21 allows them to decide on a case by case basis whether they would like to be bound by the European measure adopted within the Area of Freedom, Security and Justice. The default position is that they do not participate in any measures in this field, unless they so choose. Such a choice can be made either within 3 months of the publication by the European Commission of a proposal for a Regulation, or after the text is finally adopted – the latter option allows them to make a decision in view of the actual substance of the measure in question.¹⁷ Both

¹¹ Regulation (EU) 1215/2012 of the European Parliament and the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), OJ 2012 L 351/1.

¹² Art 81.

¹³ This special position was reaffirmed following the Treaty of Lisbon. See Protocol No 22 on the Position of Denmark, OJ 2012, C 326/299, and Protocol No 21 on the Position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, OJ 2012, C 326/295.

¹⁴ OJ 2005 L 299/62. This was linked to the fact that Denmark was bound by the Brussels Convention.

¹⁵ Ibid. Art 3(2).

¹⁶ OJ 2013 L 79/4.

¹⁷ See Arts 3 & 4 of Protocol No 21.

the UK and Ireland however elected to take part from the outset in the elaboration of the Brussels I Recast under Art 3 of Protocol No 21.¹⁸

At this juncture, it is important to recall that in the area of judicial cooperation in civil matters, individual States do not have individual control of the destiny of a proposed measure, except in the field of family law.¹⁹ The legal basis for the adoption of the Brussels I Recast was indeed Art 81(2) of the TFEU and implied the use of the so-called “ordinary legislative procedure” whereby only qualified majority voting is required at the Council (each State having one vote), for a measure to be adopted. In this procedure, individual States are therefore bound by the will of the (qualified) majority.²⁰ The notification of the wishes of the UK and Ireland to take part in the adoption of the Recast was thus all the more remarkable that, under Protocol 21, neither could subsequently retract its acceptance (and opt-out): the participation to the adoption process implies that the State will be bound by whatever measure comes out of the legislative process, even if its final content is markedly different from that of the initial proposal. Although the alternative path (declaration of opt-in only once the measure has been adopted, under Art 4) has been used since 2006, for example in the UK in the context of the adoption of the Rome I and Maintenance Regulations, it would have been very uncomfortable politically and the British Government was keen to avoid such a re-occurrence in the context of the Brussels I Recast.²¹ Nonetheless participating in the adoption of the new Regulation was a real gamble. Indeed the majority of stakeholders were against the extension, contained in the Commission Proposal, of the scope of the Brussels I Recast to defendants domiciled in third States. This modification of the criteria of applicability of the instrument and the proposed inclusion of harmonised subsidiary grounds of jurisdiction would have meant the suppression of domestic rules on jurisdiction and thus very substantially limited the possibility for courts in the UK and Ireland to continue to rely on their common law approaches to jurisdiction including the discretionary devices that have developed alongside these (e.g.: *forum non conveniens* doctrine and anti-suit injunctions). This paper evaluates the extent to which the new jurisdiction rules of the Brussels I Recast impact on the exercise of judicial discretion by courts in the EU. This question is closely linked with the nature of Brussels I as a civilian instrument. Part I will consider how the activism of the European Court of Justice (now Court of Justice of the EU) had reinforced the

¹⁸ Recital 40, Regulation (EU) 1215/2012 of the European Parliament and the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), OJ 2012 L 351/5.

¹⁹ Art 81(3) TFEU

²⁰ Art 16(3) TEU.

²¹ See A. Fiorini, ‘Le Règlement Bruxelles I bis à l’épreuve des institutions de *common law* - le cas particulier des injonctions anti-suit’, in E Guinchard, *Le Nouveau Règlement Bruxelles I bis*, Bruylant, Bruxelles, 2014, p. 388.

civilian imprint of the Brussels I Regulation. Part II will assess whether the Recast is breaking away from what has been, for a period, considered the ‘systematic dismantling of the common law of conflict of laws’²² by the EC (now EU).

I. Brussels I Regulation and the ‘systematic dismantling of the common law of conflict of laws’

One of the great divides between the common law and civil law approaches to jurisdiction concerns judicial discretion: “The idea that a national court has discretion in the exercise of its jurisdiction either territorially or as regards the subject matter of a dispute does not generally exist in Continental legal systems. Even where, in the rules relating to jurisdiction, tests of an exceptionally flexible nature are laid down, no room is left for the exercise of any discretionary latitude. It is true that Continental legal systems recognize the power of a court to transfer proceedings from one court to another. Even then the court has no discretion in determining whether or not this power should be exercised. In contrast, the law in the United Kingdom and in Ireland has evolved judicial discretionary powers in certain fields. In some cases, these correspond in practice to legal provisions regarding jurisdiction which are more detailed in the Continental States, while in others they have no counterpart on the Continent”.²³ While it was understood from the outset that the Brussels regime was to operate along civilian lines (A), the full extent of the implications of such an approach was only understood after interpretative difficulties emerged out of the practical operation of this instrument (B).

A. The Brussels Convention’s approach

It is important to recall that when the Brussels I Convention was adopted in the 1960’s, all the Member States of the then European Economic Community (Belgium, France, Germany, Italy, Luxembourg and the Netherlands) belonged to the civil law tradition. The Convention was thus naturally conceived as a civilian instrument. The general jurisdiction rule followed the Roman principle *actor sequitur forum rei*: jurisdiction was to lie in the courts of the defendant’s domicile

²² T. Hartley, ‘The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws’ *I.C.L.Q.* 2005, p. 813.

²³ P. Schlosser, Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland 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, *O.J. 1979 C 59/71* at para 76.

as understood in continental Europe²⁴. The Convention system of jurisdiction was organised around the principle of legal certainty, through a series of usually narrow and rigid jurisdiction rules²⁵, with a chronological approach to the solution of *lis pendens*²⁶ cases. The possible place within the instrument of *forum non conveniens* or indeed anti-suit injunctions, both of which were unknown in the legal systems of the drafters, was evidently not contemplated.

The enlargement of the EEC to incorporate two European common law systems, UK and Ireland in the early 1970's provided the first occasion to discuss the place of these discretionary tools within the Brussels I Convention. Indeed negotiations took place for 6 years to elaborate the necessary accession Convention.²⁷ Although the very terms of the Act of Accession provided that the "new Member States undertook 'to accede to the Conventions provided for in Article 220 of the EEC Treaty, and to the Protocols on the interpretation of those Conventions by the Court of Justice, signed by the original Member States and to this end to enter into negotiations with the original Member States in order to make the *necessary adjustments* thereto²⁸", the notion of necessary adjustments was not defined and required some discussions within the Working Party. It was understood that

²⁴ On the minor differences existing within the civilian definitions of domicile and the major differences between these and the common law concept, see Schlosser Report, *op. cit.*, at para 71-72.

²⁵ This contrasts with the traditional common law approach, cf Schlosser Report, *op. cit.*, at para 85: "According to the principles of common law which are unwritten and apply equally in the United Kingdom and Ireland, a court has jurisdiction in principle if the plaintiff has been properly served with the court process. The jurisdiction of Irish (and United Kingdom) courts is indirectly restricted to the extent of the limits imposed on the service of a writ of summons. Service is available without special leave only within the territory of Ireland (or the United Kingdom). However, every service validly effected there is sufficient to establish jurisdiction; even a short stay by the defendant in the territory concerned will suffice. Service abroad will be authorized only where certain specified conditions are satisfied. As regards legal relations within the EEC — especially because of the possibility of free movement of judgments resulting from the 1968 Convention — there is no longer any justification for founding the jurisdiction of a court on the mere temporary presence of a person in the State of the court concerned. This common law jurisdiction, for which of course no statutory enactment can be cited, had therefore to be classed as exorbitant."

²⁶ The convention's approach contrasts with the traditional common law approach in this area, cf Schlosser Report, *op. cit.*, at para 181: "The rules governing *lis pendens* in England and Wales, and to some extent in Scotland, are more flexible than those on the Continent. Basically, it is a question for the court's discretion whether a stay should be granted. The doctrine of *lis pendens* is therefore less fully developed there than in the Continental States. The practice is in a sense an application of the doctrine of *forum conveniens*".

²⁷ Council Convention on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland 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 (Signed on 9 October 1978) (78/884/EEC)

²⁸ Schlosser Report, *op. cit.*, para 1.

whilst a very narrow interpretation in the sense of indispensability was possible²⁹, it would make it more difficult for the Brussels Convention to take root in the new Member States. Four considerations rendered a wider interpretation necessary, one of which being linked to “the special structural features of the legal systems of the new Member States”.³⁰

Discussions took place regarding the use of *forum non conveniens* but negotiators concluded that the practical reasons in its favour would “lose considerably in significance as soon as the Convention entered into force in the UK and Ireland” and thus *forum non conveniens* would become “largely unnecessary”.³¹ Therefore the “United Kingdom and Irish delegations did not press for a formal adjustment of the 1968 Convention on this point”.³² This does not mean that courts in England subsequently refrained from using the *forum non conveniens* doctrine entirely when seised on the basis of the Brussels I Convention. Indeed, while its availability where the matter fell within the scope of the Convention was controversial, and while this technique was not used in the context of intra-EU disputes, the English court of Appeal, held that an English court seised under the Convention’s general jurisdiction rule could stay or dismiss proceedings on the ground of *forum non conveniens* in favour of a third State court.³³

The availability of anti-suit injunctions was not discussed during the negotiation of the accession convention but it is difficult to believe that the entry into force of the Brussels Convention could not have affected the availability of these injunctions in the UK or Ireland. Several factors indeed rendered their compatibility with the Brussels regime rather questionable. Not only did they entail a form of judicial discretion that was foreign to the civilian character of the Convention, but they were tools that had been developed to deal with the “jungle of separate, broadly based, jurisdictions all over the world” and could thus be considered out of place in the context of an organised regional jurisdictional system such as that established by the Convention.³⁴ In addition, the ECJ determined quite clearly in the context of the continuing application by courts of their domestic procedural rules that “the application of national (...) rules may not impair the effectiveness of the Convention”.³⁵ Given that an anti-suit injunction indirectly impacts on the exercise of its jurisdiction by the court seised by the addressee of the injunction, it could be expected that this tool should not be used where it interferes with the exercise of jurisdiction allocated to a European under

²⁹ *Ibid.*, para 15.

³⁰ *Ibid.*, para 16.

³¹ *Ibid.*, para 78.

³² *Ibid.*

³³ *Re Harrods (Buenos Aires) Ltd* [1992] Ch 72.

³⁴ *Airbus Industrie GIE v Patel and Others* [1999] 1 AC 119, per Lord Goff, pp. 132-134.

³⁵ *Kongress Agentur Hagen GmbH v Zeehaghe bV (Case C-365/88)* [1990] ECR I-1845, paras 17-20.

the Regulation. This being said anti-suit injunctions could appear as an effective and legitimate tool at least to respond to the breach of a dispute resolution clause and were granted in such cases for some years even where the Brussels regime applied.³⁶

The restrictions to the use of judicial discretion brought about by the Brussels regime were seen, in many ways, as a necessary compromise. As stated by Lord Goff in the *Airbus* case³⁷: “a system, developed by distinguished scholars, was embodied in the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1968) (...) under which jurisdiction is allocated on the basis of well-defined rules. This system achieves its purpose, but at a price. The price is rigidity, and rigidity can be productive of injustice. The judges of this country, who loyally enforce this system (...) have to accept the fact that the practical results are from time to time unwelcome”. This (resigned) goodwill was however put to the test by a series of interpretative rulings of the European Court of Justice which revealed the extent to which the traditional British approach had been truncated by the harmonised rules.

B. The ECJ's interpretation

The civilian imprint of the Brussels Convention was either fully clarified or further exacerbated by the ECJ in a string of preliminary opinions chiefly delivered between 2003 and 2005. These curtailed the traditional English approaches in areas in which the text of the Convention did not provide clear responses as to whether judicial discretion was open and which revealed the true extent of the gaps between common law and civil law principles underlying jurisdiction in cross-border cases.

1. *Gasser v Misat*³⁸

In this case, the ECJ established that the *lis pendens* rule of the Convention had to be “interpreted as meaning that a court second seised whose jurisdiction has been claimed under an agreement conferring jurisdiction must nevertheless stay proceedings until the court first seised has declared that it has no jurisdiction” and that it could not “be derogated from where, in general, the duration of proceedings before the courts of the Contracting State in which the court first seised is

³⁶ *OT Africa Line Ltd v Hijazy (The Kribi) (No.1)* [2001] 1 Lloyd's rep. 76; [2001] C.L.C. 148; [2002] I.L.Pr. 18; *Continental bank NA v Aeakos Compania Naviera SA* [1994] 1 WLR 588; *The Angelic Grace* [1995] 1 Lloyd's rep 87.

³⁷ *Airbus Industrie GIE v Patel and Others*, *op. cit.*, pp. 131-132.

³⁸ *Erich Gasser GmbH v MISAT Srl* (Case C-116/02) [2013] ECR I-14693.

established is excessively long”.³⁹ In support of an opposite view, the representative of the UK Government had, among other aspects, stressed the importance of examining the relationship of the prorogation and *lis pendens* provisions of the Convention bearing in mind the “the needs of international trade” and showed how supporting party autonomy would contribute to legal certainty since prorogation clauses “enable the parties, in the event of a dispute, easily to determine which courts will have jurisdiction to deal with it”.⁴⁰

The court however chose to adhere rigidly to two principles hitherto unwritten in the Convention: the principle of legal certainty and the principle of mutual trust: “the Brussels Convention is necessarily based on the trust which the Contracting States accord to each other’s legal systems and judicial institutions. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established (...). It is also common ground that the Convention thereby seeks to ensure legal certainty by allowing individuals to foresee with sufficient certainty which court will have jurisdiction”.⁴¹

Given the terms of the decision and the interpretation of the principles of legal certainty and mutual trust that they reveal it could probably be inferred from this interpretative ruling that chosen courts that were second seised could not protect their jurisdiction by granting anti-suit injunctions affecting other courts in the EU.

2. *Turner v Grovit*⁴²

The express outlawing of intra-European anti-suit injunctions within the Brussels regime, much anticipated in the aftermath the Gasser case, was confirmed just half a year later. In this case, the Court of justice again used the principle of mutual trust to justify its ruling, according to which anti-suit injunctions, seen as “constituting an interference with the jurisdiction of a foreign court” were “incompatible with the system of the Convention”.⁴³ The fact that the Court could infer such incompatibility from the principle of mutual trust was not in itself a surprise, given the position of the Brussels regime on the power of courts to review the jurisdiction of foreign courts. However this principle, which is a necessary core of the Brussels system, is based on the still unrealistic if not entirely fictional idea of the equivalence between the European judicial systems, which weakens it somewhat. Further, its application in the *Turner* case was all the more unpalatable from a pragmatic point of view to some of the commentators

³⁹ *Ibid*, para 73 & operative part.

⁴⁰ *Ibid*, at para 31.

⁴¹ *Ibid*, para 72.

⁴² *Gregory Paul Turner v Felix Fareed Ismail Grovit, Harada Ltd & Changepoint SA* (Case C-159/02), [2004] ECR I-3565.

⁴³ *Ibid*, para 27.

that the anti-suit injunction could have been used, in this particular instance, to support and protect deficient conventional mechanisms.

3. *Owusu v Jackson*⁴⁴

The final instalment of what came to be referred to as the ‘systematic dismantling of the common law of conflict of laws’ happened when the ECJ took position for the first time on the extent to which Member States courts may rely on *forum non conveniens* when competently seised under the Convention. In the *Owusu* case, proceedings had been started in England against several defendants, only one of whom was domiciled in the UK, in relation to severe injuries the claimant had suffered while holidaying in Jamaica.

Drawing again from the principle of legal certainty⁴⁵, the Court of Justice decided that the Brussels Convention precluded “a court of a Contracting State from declining the jurisdiction conferred on it by Article 2 of that convention on the ground that a court of a non-Contracting State would be a more appropriate forum for the trial of the action even if the jurisdiction of no other Contracting State is in issue or the proceedings have no connecting factors to any other Contracting State”⁴⁶.

The net result of these interpretative rulings, as seen from London, was that anti-suit injunctions could only be used to restrain non-European proceedings, party autonomy was not efficiently protected and *forum non conveniens* could at best be used where the Regulation jurisdiction rules did not apply. As the Court of Justice had also relied on the principle of legal protection of persons established in the EC⁴⁷ to justify its ruling in the *Owusu* case, it could be argued that *forum non conveniens* could not be used even where jurisdiction was established under the residual rules on jurisdiction as declining proceedings in such cases could deprive the claimant of the benefit of a European judgment, and thus of the system of free movement of judgments within the EC/EU.

It may be important to stress that it is not the reduction of the domain of the traditional British approach to jurisdiction and the deprivation of judicial discretion itself that was difficult to accept for the United Kingdom but rather the unwelcome consequences that the too rigid European approach was considered to lead to: promotion of solutions that are contrary to the individual justice or the

⁴⁴ *Andrew Owusu v Nugent B Jackson, trading as “Villa Holidays Bal-Inn Villas” & others* (Case C-281/02), [2005] ECR I-1383.

⁴⁵ *Ibid*, para 38-41.

⁴⁶ *Ibid*, para 46.

⁴⁷ *Ibid*, para 39.

needs of commerce, weakening of the principle of party autonomy and absence of remedies preventing, or responding to, purely tactical behaviour.

Nonetheless, as was pointed out above, the UK decided to participate in the adoption of the Recast, with no guarantee that the final text would be satisfactory. This of course revealed that there was general satisfaction with the European Commission's proposal (notably in that it sought to correct the difficulties that had emerged in the practical operation of Brussels I –as exemplified by the *Gasser* and *West Tankers* case law).⁴⁸ It was also the sign that the Government believed that a compromise could be found to safeguard residual rules of jurisdiction, and, with these, the availability of the *forum non conveniens* doctrine.⁴⁹ Was such faith misplaced?

II. Brussels I Regulation Recast – reform or continuation?

The adopted text of the Recast does not contain any mention of the notions of anti-suit injunctions or indeed *forum non conveniens*. Instead its Recital refers to the very principles of mutual trust⁵⁰ and legal certainty⁵¹, on which the (in)famous decisions in *Gasser*, *Turner*, *Owusu* and *West Tankers*⁵² were based, as well as the principle of continuity.⁵³ Does this imply that the Recast has maintained the *status quo* and the largely civilian imprint of the Brussels regime? To answer this question, the analysis of the impact of the Brussels I Recast on the use of discretionary devices such as *forum non conveniens* and anti-suit injunctions will be considered.

A. To what extent might courts moderate the exercise of their own competence?

⁴⁸ The decision by the UK Government to opt-in to the adoption of the Brussels I Recast was supported by the majority of stakeholders who responded to the Government consultation, as well as the Lord Chancellor's Advisory committee on private international law, presided by Lord Mance, and the EU Select Committee of the House of Lords.

⁴⁹ A Fiorini, 'Le Règlement Bruxelles I bis à l'épreuve des institutions de common law', *op.cit.*, p. 389.

⁵⁰ Recital 26.

⁵¹ Recital 16.

⁵² *Allianz SpA (formerly Riunione Adriatica di Sicurtà SpA) v West Tankers Inc* (C-185/07) [2009] 1 AC 1138; [2009] E.C.R. I-663. This decision confirmed thatn despite the exclusion of arbitration in Art 1(2) of Brussels I, anti-suit injunctions may not be used to sanction the breach of an arbitration clause if they lead to restraining European proceedings. The immediate consequences of this ruling are similar to those flowing from the *Gasser* pronouncement.

⁵³ Recital 34.

Since the preliminary ruling in the *Owusu* case, it is clear that, where the Brussels I Regulation applies, a court seized on the basis of the general jurisdiction rule of Art 2 (defendant's domicile) may not apply *forum non conveniens* where a court outside of the EU is found to be substantially more appropriate even if there exists no other link to the EU. This decision of the Luxembourg Court was linked to the finding that Art 2 was mandatory. As the Recast has however introduced a certain level of flexibility in the exercise of jurisdiction, the question arises whether these changes may lead to a widening of the situations in which *forum non conveniens* would be possible.

1. In case of parallel proceedings

- a. Parallel proceedings involving two EU Member States courts

As was the case under the Brussels I Regulation, the Recast contains a series of provisions on *lis pendens* and related actions involving two courts situated within the EU: Arts 29-32. According to Art 29, "(...) 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 established⁵⁴ (...) 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". The provision further organises the cooperation between courts in such situations: "upon request of the court seised of the dispute, any other court seised shall without delay inform the former court of the date when it was seised". Importantly it now also incorporates an "anti-Gasser" exception. Indeed Art 29 is reversed where the court second seised is the court the parties had chosen in an exclusive jurisdiction agreement, under Art 31(2). Where Art 29 does not apply, Art 30 provides for a similar chronological solution to the problem of parallel proceedings in the case of simply related actions.

With these provisions, even as amended, the Recast contains express rules which specify the situations in which a court shall or might stay or decline proceedings, thus leaving no room for a discretionary device such as *forum non conveniens*. There is no change in this respect on the Recast.⁵⁵

- b. Parallel proceedings involving an EU Member State court and a Third State court

⁵⁴ Art 32 defines what is required for a court to be considered seised, for the purposes of Section 9 of the Regulation.

⁵⁵ See, concurring, L. Usunier 'Le Règlement Bruxelles Ibis et la théorie de l'abus de droit', in in E Guinchard, *Le Nouveau Règlement Bruxelles I bis*, Bruylant, Bruxelles, 2014, p. 462.

The Brussels I Regulation, in its 2001 version, contained no provision dealing with proceedings running in parallel in a court situated in a Member State of the EU and a court situated outside of the EU. Although the case of *Owusu* did not involve a situation of *lis pendens*, and concerned a court seised on the basis of the general jurisdiction rule, the reasoning (in terms of legal certainty) and findings of the ECJ/CJEU in this case could probably be generalised to imply that the jurisdiction rules of the Regulation are all to be considered rigid and that courts of the EU competently seised under that Regulation could therefore not stay their proceedings or decline jurisdiction in favour of a court situated in a third State.⁵⁶ One of the innovations of the Recast is the introduction of two provisions, Arts 33 & 34, which cover the situations of *lis pendens* and related actions in courts within and outwith the EU. According to these new rules, if a court situated in the EU is seised under the general or special jurisdiction rules of the Recast (Arts 4 or 7-9) and parallel proceedings are already pending outside of the EU, the European court may stay its proceedings if the foreign decision is expected to be entitled to recognition in that State (bearing in mind that this issue is not governed by the Brussels regime) and if a stay is considered to be necessary for the proper administration of justice.⁵⁷ In case the proceedings concern actions that are not identical but merely related, an additional condition is imposed in that it has to be expedient to hear and determine the related actions together.⁵⁸ The new provisions also specify the conditions that apply to the continuation of the proceedings in such a situation as well as the declining of jurisdiction. Articles 33 and 34, in introducing a flexible mechanism to deal with parallel proceedings in the EU and in third States, represent a partial reversal of the *Owusu* case law: indeed the general and special jurisdiction rules of the Recast are no longer rigidly mandatory for European courts. However of course, this reversal does not allow EU Member States to deal with the situation these provisions cover on the basis of their domestic approaches (*forum non conveniens* in the common law systems and international *lis pendens* in the civil law systems that allow it). Instead, Arts 33 & 34 introduce a harmonised tool so that all EU Member States can use the same level of judicial discretion to deal with such situations.⁵⁹

⁵⁶ It should be noted that notwithstanding the fact that the reasoning of the ECJ in *Owusu* could have been equally applied in the context of other measures of judicial cooperation in civil matters, English courts have held that *forum non conveniens* applies to jurisdiction in divorce cases falling within the Brussels II a Regulation (Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000), see *Mittal v Mittal* [2013] EWCA Civ 1255; [2014] 2 W.L.R 1033; as well as jurisdiction in maintenance cases, see *O v P* [2014] EWHC 2225 (Fam).

⁵⁷ Art 33(1).

⁵⁸ Art 34(1).

⁵⁹ For a critical evaluation of the provisions, see C. Chalas, 'L'affaire Ferrexpo: baptême anglais pour l'effet réflexe des articles 22, 27 et 28 du Règlement Bruxelles I', *Revue Critique de Droit International Privé* 2013, pp. 359 et seq.

Yet this harmonised mechanism has very different features compared to those of the *forum non conveniens* doctrine⁶⁰ and the judicial discretion it entails is encased by conditions which are different from those governing the use of *forum non conveniens*. In particular, where *forum non conveniens* may be available even if no other court is seised – it is sufficient that the court is satisfied that a foreign court is available that could be competently seised – Arts 33 and 34 only apply where such foreign court has been seised already and indeed was seised before the court situated in a Member State.⁶¹ While under English law, a court would only consider the *forum non conveniens* doctrine if the defendant has raised the matter, the Brussels I Recast does not impose this restriction and indeed allows courts in Member States to apply Arts 33 and 34 either on application by one of the parties or “where possible under national law, of its own motion”. In addition, to bring a successful *forum non conveniens* application, the parties in the English proceedings would have to show not only that an available and competent foreign court is substantially more appropriate for the interests of all the parties and for the ends of justice but also that justice does not demand that the case be continued in England. While the burden of proof of the first leg of the reasoning is on the defendant, it shifts to the claimant as regards the second leg. Given the terms of the Recast, it would appear that, at least in States which do not allow courts to use the first paragraph of Arts 33 & 34 on their own motion, the onus of proof would remain on the defendant. However the claimant could always, at a second stage, claim that the continuation of the proceedings is required under the second paragraph of Arts 33 & 34 by establishing that the proceedings in the court of the Third State are themselves stayed or discontinued or unlikely to be concluded within a reasonable time or that the continuation of the proceedings is required for the proper administration of justice.

Under Arts 33 & 34, the aim of the court will not be to identify the natural forum⁶² and assess whether it is not unjust that the claimant be deprived of English proceedings. Rather it is to assess that the court first seised’s judgment is capable of recognition and if so whether “the proper administration of justice” militates in favour of a stay.⁶³ While Arts 33 & 34 do not further define what is meant by the proper administration of justice⁶⁴ and in particular whether this is to be evaluated

⁶⁰ For the English approach, see *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460

⁶¹ Arts 33(1) & 34(1).

⁶² Factors pointing to the natural forum include e.g.: convenience, expense, the applicable law, residence or place of business of the parties, extent to which the proceedings are part of a larger dispute which should not be fragmented.

⁶³ Considering that the criterion of good administration of justice is a blanket provision allowing the court to decide generally on the opportunity of the stay, see L. Usunier, ‘Le Règlement Bruxelles Ibis et la théorie de l’abus de droit’, *op. cit. & loc. cit.*

⁶⁴ The reference to the good administration of justice was already found in the proposal and had been interpreted by some as a sign of the influence of *forum non conveniens*, see, e.g. C. Kessedjian, ‘Commentaire de la refonte du Règlement n°44/2001’, *Revue Trimestrielle de Droit Européen* 2011, pp. 117 et seq. & E. Guinchard, ‘Votre cadeau de Noël est arrivé! Vous serez invité à l’échanger dans 10 ans’, *Revue Trimestrielle de Droit Européen* 2013, pp. 329 et seq.

from a public law (the State's) or private law (the parties') perspective or a combination of both, some guidance is provided in Recital 24. Paragraph one clarifies that the Member State court is expected to follow a holistic approach: "when taking into account the proper administration of justice, the court of the Member State concerned should assess all the circumstances of the case before it." Paragraph one then itemises some of the circumstances that may be taken into account ("connections between the facts of the case and the parties and the third State concerned, the stage to which the proceedings in the third State have progressed by the time proceedings are initiated in the court of the Member State and whether or not the court of the third State can be expected to give a judgment within a reasonable time") but the use of the expression "may include" shows that courts could choose to take account of other factors in addition or indeed instead of those listed. Interestingly, in stating that "that assessment may also include consideration of the question whether the court of the third State has exclusive jurisdiction in the particular case in circumstances where a court of a Member State would have exclusive jurisdiction", the second paragraph of Recital 24 further allows courts to give a reflexive effect to Art 24 (exclusive jurisdiction) and 25 (jurisdiction agreements). Such reflexive effect had been advocated by academics for 40 years⁶⁵ and had received some judicial support.⁶⁶

2. In the absence of parallel proceedings

In England the *forum non conveniens* doctrine could be applied even in situations in which only one court is seised: one of the factors to be considered by the court is whether a competent foreign court is available but it is not required that proceedings are on-going before the foreign court.⁶⁷ Is judicial discretion similarly available in the absence of parallel proceedings under the Recast?

⁶⁵ GAL Droz, *Compétence judiciaire et effets des jugements dans le marché commun*, Dalloz, Paris, 1972, pp. 165 et seq & 216 et seq.

⁶⁶ *Ferrexpo AG v Gilson Investment Ltd and others* [2012] EWHC 721 (Comm).

⁶⁷ Contrary to popular belief on the continent, the fact that proceedings are indeed on-going abroad is not however without relevance within the *forum non conveniens* approach, cf. *The Abidin Daver* [1984] AC 398: "Where a suit about a particular subject matter between a plaintiff and a defendant is already pending in a foreign court which is a natural and appropriate forum for the resolution of the dispute between them, and the defendant in the foreign suit seeks to institute as plaintiff an action in England about the same matter to which the person who is plaintiff in the foreign suit is made defendant, then the additional inconvenience and expense which must result from allowing two sets of legal proceedings to be pursued concurrently in two different countries where the same facts will be in issue and the testimony of the same witnesses required, can only be justified if the would-be plaintiff can establish objectively by cogent evidence that there is some personal or juridical advantage that would be available to him only in the English action that is of such importance that it would cause injustice to him to deprive him of it", at pp. 411-412.

Under the Brussels I Regulation the answer was in the negative as was confirmed by the European Court of Justice in the *Owusu* case. According to the ECJ, “no exception on the basis of the *forum non conveniens* doctrine was provided for by the authors of the Convention”⁶⁸ and the application of the doctrine is “liable to undermine the predictability of the rules of jurisdiction laid down by the Convention, and consequently to undermine the principle of legal certainty, which is the basis of the Convention”.⁶⁹

As was the case of the 1968 Convention and of Regulation 44/2001, Regulation 1215/2012 does not contain any provision on the power of courts competently seised under the jurisdiction provisions of this instrument to stay proceedings or even decline jurisdiction in the absence of parallel proceedings. The partial reversal of the *Owusu* case introduced by Arts 33 & 34 and described above is limited to situations in which not only there are parallel proceedings abroad – in a third State – but these were started prior to the proceedings pending in the EU. There is thus no doubt that, *a contrario*, where a court is seised on the basis of a jurisdiction rule of the Recast, it cannot discretionarily stay its proceedings or decline jurisdiction in favour of a court situated in a third State. In situations not covered by Arts 33 & 34, the principles laid down by the ECJ in *Owusu* should continue to apply.⁷⁰ Given that jurisdiction grounds are organised in a hierarchy, in the majority of cases only one court will have jurisdiction under the Regulation. The only situations where courts in more than one Member State could potentially be competently seised of the same dispute would be in the context of the general jurisdiction or the special jurisdiction rules (for example in case the defendant can be considered domiciled in more than one Member State or in case the court with jurisdiction under Art 4 does not coincide with the court with jurisdiction under Art 7). The fact that all rules of jurisdiction in the Regulation are considered appropriate (those which are not prohibited and where a real conflict arises – situation of *lis pendens* – it is resolved entirely neutrally on the basis of a chronological criterion) means that there is absolutely no space in the Regulation for judicial discretion in the exercise of jurisdiction unless otherwise provided by the terms of the instrument.

Of course, where the Recast does not apply and courts exercise jurisdiction on the basis of their residual grounds of jurisdiction, they are at liberty to have resort to *forum non conveniens* where applicable under their own law. It is to be noted however in this context that the Recast has extended the scope of application of the Brussels I regime to situations hitherto not covered by the 2001 text. Indeed, in addition to situations of exclusive jurisdiction in the EU or jurisdiction agreement in favour of an EU Member State court (to which the Brussels I regime

⁶⁸ *Owusu v Jackson*, *op. cit.*, para 37.

⁶⁹ *Ibid*, para 41.

⁷⁰ Cf the principle of continuity in Recital 34.

traditionally applied), Art 6(1) extends the scope of the Recast to defendants not domiciled in the EU where Art 18(1) and 21(2) apply, i.e. to disputes involving consumers domiciled in the EU or employees habitually carrying out their work in the EU or employed by businesses situated in the EU to carry out work in more than one country. This extension of the applicability of the Brussels I regime to hitherto ‘unchartered territories’ will mechanically restrict the scope of use of *forum non conveniens* (or similar discretionary devices) by courts in the EU.

B. To what extent might courts influence the exercise by other courts of their competence?

1. Injunctions restraining European proceedings

Anti-suit injunctions are traditionally used in England to regulate the exercise of jurisdiction in situations in which the English court is the natural forum and the foreign proceedings are oppressive, vexatious or otherwise unconscionable or, very importantly, to sanction the breach of dispute resolution agreement by one of the parties.⁷¹

It is well established, at least since the *Turner* case, that anti-suit injunctions cannot be used where the Brussels I Regulation regime applies to restrain European proceedings.⁷² The Brussels I Recast continues, of course, to refer to the principle of mutual trust (without which the free movement of judgments could not be achieved). However it also markedly reinforces party autonomy. The question therefore arises whether this new orientation might impact on the availability of anti-suit injunctions in Europe.

a. Could an anti-suit injunction restraining proceedings in one EU Member State be granted in the event of the breach of a jurisdiction agreement in favour of another Member State?

In case of parallel proceedings in two Member States of the EU, the Recast provides in Art 31(2), that by way of exception to the *prior tempore* rule that Art 25 maintains, where a court of a Member State designated in an exclusive jurisdiction agreement is seised, “any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement”. This provision obviously largely removes the need for anti-suit injunctions, unless, of course, the non-

⁷¹ *Donohue v Armco Inc* [2001] UKHL 64; [2002] 1 Lloyd’s Rep. 425; [2002] C.L.C. 440.

⁷² *Turner v Grovit*, *op. cit.*

chosen court were to fail to stay its proceedings as imposed by the Recast. Could use be made of an injunction in such an exceptional situation? Arguably not.

In giving priority to the chosen (but second seised) court to decide whether it has jurisdiction, the Recast does not give that court the right to assess the jurisdiction of the court first seised: it has simply organised a limited reversal of the priority rule.⁷³ In other words the reform introduced by the Recast does not mean that the reinforcement of the principle of party autonomy is accompanied by a weakening of the principle of mutual trust to the extent that anti-suit injunctions could now be used even where they affect the jurisdiction of sister States. The reasons underpinning the *Turner* case are as valid under the Recast as they were under the Convention.⁷⁴

- b. Could an anti-suit injunction restraining proceedings in one EU Member State be granted in the event of the breach of a jurisdiction agreement in favour of a third State?

Given what has just been said regarding the continued relevance of the principle of mutual trust, an answer would immediately appear to have to be in the negative. This conclusion is actually further reinforced by the analysis of the new Arts 33 & 34. Indeed these provisions allow courts in EU Member States to take account of judicial agreements in favour of third States in certain limited situations; they by no means oblige EU Member State courts to do so.

Either an anti-suit injunction would be entirely pointless (in case the European court decided to stay its proceedings) or it would be contrary both to the principle of mutual trust generally underpinning the Brussels regime and to the specific right to decide whether or not to stay one's proceedings that is now newly set out in Arts 33 & 34.

2. Injunctions restraining third States proceedings

Regulation 44/2001 contains no provision governing the situation of parallel proceedings in the EU and outside of the EU: the provisions of chapter 2 section 9 (*lis pendens* and related actions) and chapter 3 (recognition and enforcement) apply only to intra-EU situations. As a result, States can rely on their traditional rules to manage potential or actual conflict of procedures or of judgments. In the UK, anti-suit injunctions are efficient tools to deal with these situations and have

⁷³ See A. Fiorini, "Le règlement Bruxelles I bis à l'épreuve des institutions de Common Law – Le cas particulier des injonctions anti-suit", *op. cit.*, pp. 393-394.

⁷⁴ *Ibid.*

continued to be used to restrain foreign proceedings whether or not the jurisdiction of the English court, considered to be the natural forum, was based on the Brussels I regime or on residual rules. What is the impact of the new Arts 33 & 34 on the use of anti-suit injunctions to restrain third States proceedings in such situations?

The discretionary mechanism introduced by Arts 33 & 34 is now the only tool courts can use to moderate the exercise of their own jurisdiction where the Brussels I Recast applied. The new text (articles and Recital) does not however state that this new, harmonised approach is to replace all the tools that, in the Member States' legal arsenal have the same aim (the prevention of conflict of decisions) but use different techniques to achieve it (in particular do not work by moderating the court's own competence). Given that Arts 33 & 34 allow Member States courts to stay proceedings when they have jurisdiction pursuant to Arts 4, 7, 8 or 9 (provided of course the other conditions imposed by the Regulation are also met), it follows that Member States courts competently seised on the basis of other provisions of the Recast (exclusive jurisdiction (Art 24), protective jurisdiction (Arts 10-23) or jurisdiction agreements (Art 25)) cannot and should not give way to proceedings in Third States. Using anti-suit injunctions in such situations to protect the exercise of jurisdiction in Europe should be maintained as it would not contradict the harmonised approach and would support the effectiveness of another aim of the Brussels regime: the minimisation of conflicts of decisions. As Art 45(1)(d) maintains the priority (over the decision of another Member State) of the earlier decision of a third State involving the same cause of action and between the same parties provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed, the use of anti-suit injunctions would enable a more "harmonious administration of justice" on the territory of the EU as it would further limit the number of irreconcilable judgments having effect in different Member States.⁷⁵

Conclusions

Under the Brussels I Recast, the domain of both anti-suit injunctions and *forum non conveniens* has, if anything, been even further reduced. However the Recast has not only corrected some of the unwelcome consequences of an overly civilian interpretation of the Brussels I Regulation but simultaneously introduced, on the whole territory of the EU, a harmonised mechanism of jurisdictional regulation

⁷⁵ See Recital 21, sentence 1. For a more detailed discussion, see A. Fiorini, "Le règlement Bruxelles I bis à l'épreuve des institutions de Common Law- Le cas particulier des injonctions anti-suit", *op. cit.*, pp. 397 et seq.

based on judicial discretion (which was hitherto available only in a few Member States). On this aspect, the Recast has the great merit of promoting (at least on paper) a better coordination between European and third States procedures, and one that may be easier to anticipate in third countries. Admittedly, Arts 33 & 34 are not ideal⁷⁶: why, for example, limit their application to the situations where courts in Third States are seised first? Why not use a similar mechanism to resolve *lis pendens* and related actions in intra-EU situations? Will all courts apply these provisions consistently? Ultimately only practice will tell if the price to pay for this aspect of the reform in terms of legal certainty will always be compensated by a net gain in terms of justice.

⁷⁶ Other 'models' could have been considered. Comp. for example Art 3-9 of the Japanese CCP, which introduces judicial discretion in an otherwise civilian approach to international jurisdiction and is used to compensate the absence of any *lis pendens* provision (on this, see Y. Hayakawa, 'Lis pendens', *Japanese Yearbook of International Law* 2011 (54) at p. 332). Art 3-9 provides: "Dismissal of Action on Account of Special Circumstances. Even where the courts of Japan have jurisdiction over an action (excluding cases where the action is filed on the ground of choice of court agreement designating the courts of Japan exclusively), the court may dismiss the whole or a part of such action when it finds special circumstances under which a trial and judicial decision by the courts of Japan would undermine equity between the parties or disturb realization of a proper and prompt trial, taking into consideration the nature of the case, the degree of the defendant's burden of submitting defence, the location of the evidence and any other circumstances". For a general introduction to the new Japanese civil procedure rules on international jurisdiction, see M. Dogauchi, 'New Japanese Rules on International Jurisdiction – General Observation', *Japanese Yearbook of International Law* 2011 (54), pp. 260-277.