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Civil jurisdiction rules of the European Union and their impact on third States

(Doctoral thesis)

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List of abbreviated publications

AA	*Ars Aequi*
AC	*Appeal Cases, English Law Reports*
AJT	*Algemeen Juridisch Tijdschrift*
All ER	*All England Reports*
Am J Comp L	*American Journal of Comparative Law*
Am J Int L	*American Journal of International Law*
Arb Int	*Arbitration International*
Austr Y Int L	*Australian Yearbook of International Law*
BGHZ	*Entscheidungen des Bundesgerichtshofes in Zivilsachen*
BS	*Belgisch Staatsblad*
Bost U L Rev	*Boston University Law Review*
Brookl L Rev	*Brooklyn Law Review*
BYIL	*British yearbook of international law*
Cah Dr Eur	*Cahier de droit européen*
Calif L Rev	*California Law Review*
Camb LJ	*The Cambridge Law Journal*
CMLR	*Common Market Law Review*
Coll C	*Collected Courses of the Hague Academy for International Law*
Colum J Eur L	*Columbia Journal of European Law*
Colum L Rev	*Columbia Law Review*
Comp Law	*Company Lawyer*
Corn ILJ	*Cornell International Law Journal*
DePaul L Rev	*DePaul Law Review*
Dickens JIL	*Dickenson Journal of International Law*
Duke L J	*Duke Law Journal*
ECR	*European Court Reports*
ELR	*European Law Review*
FamRZ	*Zeitschrift für das gesamte Familienrecht*
Fordham Int LJ	*Fordham International Law Journal*
Ga J Int & Comp L	*Georgia Journal of International and Comparative Law*
Harv L Rev	*Harvard Law Review*
Hast LJ	*The Hastings Law Journal*
ICLQ	*International and Comparative Law Quarterly*
Int Arb L R	*International Arbitration Law Review*
Int Bus LJ	*International Business Law Journal*
Int Spect	*The International Spectator*
IPRax	*Praxis des internationalen Privat- und Verfahrensrechts*
J Bus L	*Journal of Business Law*
JDI	*Journal de droit international*
J Int Bank L	*Journal of international Banking Law*
JLMB	*Jurisprudence de Liège, Mons et Bruxelles*
JT	*Journal des tribunaux*
J Pers Inj Lit	*Journal of Personal Injury Litigation*
JTDE	*Journal des tribunaux. Droit européen*
JWIP	*Journal of World Intellectual Property*
Law & Contemp Prob	*Law and Comtemporary Problems*
Lloyd's Rep	Lloyd's Law Reports
LMCLQ	*Lloyd's Maritime and Commercial Law Quarterly*
L Q Rev	*Law Quarterly Review*
Louis L Rev	*Louisiana Law Review*
Mich L Rev	*Michigan Law Review*
NILR	*Netherlands International Law Review*
NIPR	*Nederlands Internationaal Privaatrecht*
NJ	*Nederlandse Jurisprudentie*
NJW	*Neue Juristische Wochenschrift*

NjW	*Nieuw Juridisch Weekblad*
NTBR	*Nederlands Tijdschrift voor Burgerlijk Recht*
NTER	*Nederlands Tijdschrift voor Europees recht*
OJ	*Official Journal of the European Communities*
RabelsZ	*Rabels Zeitschrift für Ausländisches und Internationales Privatrecht*
RCDIP	*Revue critique de droit international privé*
Rec Dalloz	*Recueil Dalloz*
Rev Arb	*Revue de l'arbitrage*
Rev Prop Intel	*Revue de la propriété intellectuel*
RIDC	*Revue internationale de droit comparé*
RIW	*Recht der Internationalen Wirtschaft*
RMUE	*Revue du Droit de l'Union Européenne*
RW	*Rechtskundig Weekblad*
SALJ	*South African Law Journal*
SEW	*Sociaal-economische wetgewing: tijdschrift voor Europees en economisch recht*
SJ	*La Semaine juridique*
SZIER	*Schweizerische Zeitschrift für internationals und europäisches Recht*
TBH	*Tijdschrift voor Belgische Handelsrecht*
Tex Int LJ	*Texas International Law Journal*
Tex L Rev	*Texas Law Review*
T Not	*Tijdschrift voor het Notariaat*
TRD	*Tijdschrift voor Rechtsdocumentatie*
TRV	*Tijdschrift voor rechtspersoon en vennootschap*
UC Dav L Rev	*UC Davis Law Review*
U Chic L Rev	*University of Chicago Law Review*
Vanderb L Rev	*Vanderbilt Law Review*
WLR	Weekly Law Reports
WPNR	*Weekblad voor Privaatrecht, Notariaat en Registratie*
Yale LJ	*The Yale Law Journal*
YEL	*Yearbook of European Law*
YPIL	*Yearbook for Private International Law*
ZEuP	*Zeitschrift für Europäisches Privatrecht*

List of Regulations, Conventions, explanatory reports

1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters; *OJ L* 299, 31 December 1972, p 32; consolidated version *OJ C* 27, 26 January 1998 p 1 (Brussels Convention)

Jenard Report on the 1968 version; *OJ C* 59 of 5 March 1979 p 1

Schlosser Report on the 1978 version; *OJ C* 59 of 5 March 1979, p 71

Almeida Cruz/Desantes Real/Jenard Report on 1989 version (San Sebastian); *OJ C* 189 of 28 July 1990, p 35

1988 Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters

Jenard/Möller Report; *OJ C* 189 of 28 July 1990, p 57

Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; *OJ L* 12 of 16 January 2001, p 1 (Brussels I Regulation)

Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (including an explanatory memorandum); *OJ C* 376E of 28 December 1999, p 1

Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses; *OJ L* 160 of 30 June 2000, p 19 (Brussels II Regulation)

Borrás Report on the Convention, drawn up on the basis of Article K.3 of the Treaty on the European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters; *OJ C* 221 of 16 July 1998, p 27

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; *OJ L* 338 of 23 December 2003, p 1 (Brussels II*bis* Regulation)

Practice guide for the application of the Regulation, drawn up by the European Commission in consultation with the European Judicial Network in civil and commercial matters; http://www.europa.eu.int/comm/justice_home/ejn

Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings; *OJ L* 160, 30 June 2000, p 1 (Insolvency Regulation)

Virgos/Schmit Report on the Convention on Insolvency Proceedings (unpublished)

Hague Convention on the Civil Aspects of Child Abduction (1980)

Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (1996)

Hague Convention on Choice of Court Agreements (2005)

Introduction

1. Introduction

The European Union (EU), like its main pillar, the European Community (EC), and their predecessor, the European Economic Community (EEC), is an important international economic player. It has internal rules regulating its internal market. Very early on, it became apparent that economic integration needed support by legal rules. The European judicial area constitutes the legal (civil and criminal law) framework that facilitates the functioning of the area of free movement of persons, goods, capital and services; it is the judicial side to the internal market. However, as the EU acts on the international scene, its effects are not limited to its own territory. Some elements to a dispute might be located in the EU while others are in third States, *ie* States that are not members of the EU; international contracts, torts and family relations do not stay either within or outside of the EU, or the European judicial area.

The fact that legal disputes are not always limited to the well-defined territory of the European judicial area has two aspects that will be examined in this thesis. Firstly, the EU's internal rules may affect parties or property in third States. Secondly, the EU and its Member States have to coordinate their actions towards the outside world, *ie* in their negotiations and contracting with third States.

The problems discussed in the thesis no doubt also occur in other domains of the law.[1] The thesis, however, focuses on a specific piece of EU legislation, namely civil jurisdiction. It examines the relationship between those rules and third States.

2. Civil jurisdiction

In the sphere of civil jurisdiction, international contacts raise many policy issues, such as sovereignty and international comity. These contacts also become more and more frequent as commerce and family relations pay less and less respect to political borders.

The EEC already in 1968 started its activity in the sphere of civil jurisdiction, by way of the Brussels Convention. The aim of the Convention was to facilitate the recognition and enforcement of judgments in the EEC. For that purpose, jurisdiction rules were inserted. The basic structure was that the then six Member States agreed on which bases of jurisdiction to use so that they could recognise and enforce each other's judgments without further ado.

[1] TC Hartley, *The Foundations of European Community Law* (5th edn, Oxford: Oxford University Press, 2003) p 91 stated: "[*I*]*t is not always easy to discern exactly where a legal system begins and ends: the community legal system, like most other legal systems, has fuzzy edges*."

The recognition and enforcement of judgments were essential for the functioning of the EEC market that was being developed: if cross-border trade were to be efficient, one would have to be able to enforce a civil judgment against one's debtor in another EEC country where he had assets.

As a pure matter of international law, the Brussels Convention was a multilateral treaty. It did not form part of EEC legislation. The European Court of Justice only had power to interpret the Convention because it had been granted such power by way of a protocol that was added to the Convention. Every time new Member States joined the EEC, the Convention had to be renegotiated. Then it had to be signed and ratified by all the Member States, in the manner that is custom in public international law.

It was only in 1999 that the European Community obtained authority to legislate on civil jurisdiction. That brought, among others, the three instruments that are the focus of this thesis: the Brussels I Regulation (jurisdiction and the recognition and enforcement of judgments in civil and commercial matters), the Brussels II*bis* Regulation (jurisdiction and the recognition and enforcement of judgments on divorce and parental responsibility), and the Insolvency Regulation. Chapter 1, providing the background for this thesis, will deal with that evolution of European private international law, specifically concerning civil jurisdiction, in more detail.

Of these three Regulations the Brussels I Regulation will receive the greatest attention because it contains the most diverse set of rules. The Brussels II*bis* Regulation deals only with divorce and parental responsibility so that the rules are not as varied. There are no exclusive bases of jurisdiction in the true sense of the word: the Brussels II*bis* Regulation deals with divorce and parental responsibility and not with matters of immovable property or registration which are closely linked to one specific territory. The possibility for parties to conclude a forum clause is very limited: divorce and parental responsibility are in general not seen as matters where party autonomy should reign. Even more so, the Insolvency Regulation deals with a limited and specialist field of law. Once again forum clauses are out of the question: companies and persons in financial difficulty cannot agree with their creditors to have the insolvency proceedings conducted in the courts of an EU Member State of their choice.

Another reason for the weight given to the Brussels I Regulation is the wealth of case law not only from the European Court of Justice, but also from national courts that dates back to the Brussels Convention. The other Regulations still need to establish their case law and will for the time being have to learn from the existing examples.

3. The particularity of civil jurisdiction and third States

The determination of the scope of international conventions on applicable law is different from conventions or regulations on jurisdiction. Some conventions on applicable law require reciprocity for their application, others not. For example, the

Convention on the law applicable to contractual obligations (Rome, 1980) does not require reciprocity. This means that when a judge in the EU applies the Convention and concludes that the law of Mexico is applicable, Mexican law will be applied, notwithstanding the fact that Mexico is not party to the Rome Convention. The reverse is true of the Hague Convention on the law applicable to maintenance obligations of children (1956), requiring reciprocity. When a judge applies the Convention and concludes that the rules of a specific State should be applied, this can only be followed if that state is also Party to the Convention. The application of rules in a State despite the fact that it is not party to a convention, is not disturbing. After all, it amounts to the application of foreign law. The exact paths to a specific legal system can vary: they can be found in national law, in international conventions or in EU law.

However, the demarcation of a jurisdiction treaty is a more sensitive matter. Exercising jurisdiction is more intrinsically linked to sovereignty than the application of legal rules. The fact that a case can be decided in a country, or, even more so, may not be decided in a country, has a fundamental impact on the State's sovereignty.

Moreover, it is important to have one's case heard in the appropriate forum. Different courts will apply different conflict of law rules that will lead to different foreign laws. Courts may apply mandatory rules of their own domestic system, while these rules might not exist in other domestic systems.

The jurisdictional rules of the Brussels I, Brussels II*bis* and Insolvency Regulations fall in the ambit of this thesis. Frequent reference will be made to the rules on recognition and enforcement. The EU's civil jurisdiction rules exist in the first place to facilitate recognition and enforcement in the EU. Jurisdiction rules do not constitute a goal in themselves. At the same time, researching only the recognition and enforcement rules is not worthwhile in itself. It is clear that the recognition and enforcement rules apply to EU judgments and not much further discussion seems necessary from the point of view of third States. This explains why the Enforcement Order Regulation, which deals only with the enforcement of non-contested claims within the EU, is not relevant for the purposes of this thesis.

There are other EU Regulations concerning civil procedure which are not dealt with. The Service and Evidence Regulations come to mind. These Regulations seek to simplify cross-border elements of civil proceedings in the EU. The link between the EU instruments and third States is not directly apparent.[2] Similarly, the rules on applicable law of the Insolvency Regulation will not be examined, because they are distinct from the core issues dealt with in this thesis.

[2] See, however, JJ Forner, "Service of judicial documents within Europe and third States", C Besso, "Taking of evidence abroad: from the 1970 Hague Convention to the 2001 Evidence Regulation", P de Vareilles-Sommières, "Le règlement communautaire sur l'obtention de preuves à l'étranger et les rapports avec les Etats tiers" in A Nuyts & N Watté, *International civil litigation in Europe and relations with third States* (Brussels: Bruylant, 2005).

International Conventions on particular matters exist in many fields. They will be referred to at different points.

4. Structure of the thesis

The boundary around the EU's jurisdictional rules is not a perfect circle. It has a few angles, or cornerstones. Four of these foundation stones have been identified, so that one can speak of a quadrangle. These cornerstones, varying in size and importance, have become Chapters 2 to 5 of the thesis.

Before dissecting the quadrangle, Chapter 1 gives a brief background on the EU in general and takes a closer look at where civil jurisdiction fits in. For readers from third States, this general background will render the complexities of EU law more easily comprehensible.

The first cornerstone, the domicile of the defendant, will be discussed in Chapter 2. Broadly speaking, if the defendant is domiciled in the EU, the EU's jurisdictional rules apply and if not, they do not. In this Chapter habitual residence and nationality, the Brussels II*bis* Regulation's alternatives to domicile as ground for jurisdiction, are included. The Insolvency Regulation has introduced a new variant of domicile, habitual residence and nationality: the centre of the main interests.

Additional defendants brought before the same judge as the first defendant's domicile are also considered in this Chapter. Voluntary appearance is likewise included as this ground for jurisdiction requires reference to the domicile of the defendant to determine whether the EU rules apply or not.

The Brussels I Regulation's rules for special jurisdiction in (for instance) contract and tort cases only come into play when the defendant is domiciled in the EU. Similarly, the Regulation's protective rules are applicable to certain 'weaker' parties that are domiciled in the EU. Hence their discussion in Chapter 2 of the thesis. The reader will thus understand why Chapter 2 is the longest chapter of the thesis

Chapter 3 is based on the following, narrower, cornerstone: the exclusive bases of jurisdiction. Under the Brussels I Regulation, some cases can only appropriately be heard in one forum, despite the domicile of the defendant, and despite parties concluding a forum clause. Examples are claims regarding immovable property and the validity of legal persons, intellectual property rights or entries in public registers. The exclusivity of course only becomes important at the time of recognition and enforcement: only the judgment by the court of the EU Member State where exclusive jurisdiction lay, can be recognised and enforced in the EU. The presence in the EU of immovable property means that disputes regarding that property will fall under the Brussels I Regulation. Where the parties come from is irrelevant. The same principle

applies to the other bases of exclusive jurisdiction. What then about immovable property situated in third States while the defendant is domiciled in the EU? For this eventuality the Brussels I Regulation does not provide a rule. Of course the Regulation cannot grant jurisdiction to a court in a third State. However, the Regulation does not even grant a basis for refusal of jurisdiction by EU courts in such cases. The possible solutions will be regarded in Chapter 3.

The next cornerstone in the strangely shaped quadrangle is forum clauses. The Brussels I Regulation explicitly states that it applies to forum clauses between parties, at least one of whom is domiciled in the EU, electing an EU Member State court. The Brussels II*bis* Regulation permits forum clauses only in very limited cases. Chapter 4 will examine why the line has been drawn at exactly that point. This Chapter deals briefly with the Convention on Choice of Court Agreements, adopted in The Hague on 30 June 2005. If the EU and third States become party to the Convention, that is a way of resolving relations with third States. Outside that Convention, a similar problem to that of the previous Chapter might occur here: what about forum clauses in favour of third State courts while the defendant is domiciled in the EU? Again, the Brussels I Regulation provides no solution.

On the last corner, one finds the hybrid rules of *lis pendens*, *forum non conveniens*, related actions and anti-suit injunctions. These are not rules granting jurisdiction, but rules of civil procedure that have an indispensable influence on jurisdiction. In fact, to attempt to discuss civil jurisdiction without examining these rules, would be incomplete work. Regarding their scope, these rules have more in common with recognition and enforcement than with jurisdiction. That means that their scope is determined by the courts involved, rather than by the domicile of the parties or some other element of the dispute. However, this is not the whole truth. Since the rules impact on jurisdiction, one also has to regard the jurisdictional rules to define their exact scope. Chapter 5 deals with some of the most fundamental problems of the interaction between jurisdictional rules in the EU and third States.

Some authors would have made this thesis a (lobsided) pentagon instead of a quadrangle. That is because of that intangible matter of provisional and protective measures. These are discussed in Chapter 6, where it will be argued that provisional and protective measures do not merit their own cornerstone, or their own rule determining their scope. They are integrated into the system that has been expounded above.

The last Chapter of the thesis takes a few steps back from the quadrangle and ponders whether it can in any way be seen as a piece of a larger puzzle. This requires again delving into EU law, specifically into the theories and case law on the EU's external relations. Can the EU and/or the EU Member States contract with third States in order to conclude conventions? In this sense the Hague Conference on Private International

Law is an important forum to be investigated. Some of its conventions and projects dealing with civil jurisdiction merit special investigation.

Chapter 1: Background

Article 220 of the EC Treaty (Rome):
Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals:
...
- the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards .

Article 65 of the EC Treaty (Nice version):
Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 an in so far as necessary for the proper functioning of the internal market shall include:

a) *improving and simplifying:*
   - *the system of cross-border service of judicial and extra-judicial documents,*
   - *co-operation in the taking of evidence*
   - *the recognition and enforcement of decisions in civil and commercial cases, including decisions in extra-judicial cases;*

b) *promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;*

c) *eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.*

Article 67 of the EC Treaty (Nice version):

During a transitional period of five years following the entry into force of the Treaty of Amsterdam, the Council shall act unanimously on a proposal from the Commission or on the initiative of a Member State and after consulting the European Parliament.

After this period of five years:

- *the Council shall act on proposals from the Commission; the Commission shall examine any request made by a Member State that it submit a proposal to the Council,*
- *the Council, acting unanimously after consulting the European Parliament, shall take a decision with a view to providing for all or parts of the areas covered by this title to be governed by the procedure referred to in Article 251 and adapting the provisions relating to the powers of the Court of Justice.*

…

By derogation from paragraph 1, the Council shall adopt, in accordance with the procedure referred to in Article 251:

- *…*

- *The measures provided for in Article 65 with the exception of matters relating to family law.*

Article 68 of the EC Treaty (Nice version):

Article 234 shall apply to this title under the following circumstances and conditions: where a question on the interpretation of this title or on the validity or interpretation of acts of the institutions of the Community based on this title is raised in a case pending before a court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

…

1. Introduction

Before turning to the substance of this thesis, a general background on various issues is necessary. Firstly, one has to bear in mind that the rules discussed emanate from the European Union and have now taken the form of EU legislation. This Chapter will give the necessary background to the development of European private international law, of which civil jurisdiction is a part. The reach of the EU civil jurisdiction rules will also be regarded generally. The relationship that the EU civil jurisdiction rules have with conventions on specific matters and with the Lugano Convention are of importance for third States and deserve some attention.

The analysis will be critical of the EU's unclear policy towards the outside world. Its goal is not to be sceptical of the entire EU and its functioning. What concerns this study, is the relationship the EU maintains with third States and the spill-over effect that EU legislation has on third States. The interest is limited to civil jurisdiction, and that perspective will be used.

In the last place, this Chapter will refer to the Hague Conference on Private International Law, which is an important meeting place between the EU and third States in the sphere of civil jurisdiction.

2. The EU and the development of European private international law, including civil jurisdiction

Background to the European Union

The origins of the European Union go back to the 1950s. That early association was comprised of three communities:

- the European Coal and Steel Community (ECSC) that entered into force in 1952 and terminated in 2002 as it was concluded for a period of 50 years.[1]
- European Economic Community (EEC), established by the Treaty of Rome that entered into force on 1 January 1958,[2] and
- the European Atomic Energy Community (EURATOM), that also entered into force on the first day of 1958.[3]

The separate treaties meant many separate institutional bodies. The Treaty establishing a Single Council and a Single Commission (commonly known as the Merger Treaty) remedied that situation in 1967.[4] This step did not yet merge the communities, but only their institutions.

The initial six Member States were Belgium, France, West Germany, Italy, Luxembourg and The Netherlands. This was an attempt to bind the European economies together so that future wars would become impossible.

From its establishment, the EEC evolved, not only by including a growing number of Member States (now 25), but also by increasingly integrating economic and social policies. Civil jurisdiction was only one of the elements of that integration and its roots will now be regarded.

The Brussels Convention

In 1968 the then six Member States concluded the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in Brussels, which gave it its name as the Brussels Convention. The legal basis was Article 220 of the Rome Treaty. That provision encouraged Member States to co-operate in the field of the recognition of judgments, but contained no reference to rules of jurisdiction.[5] It was the drafters of the Brussels Convention that considered the establishment of jurisdiction rules useful for the purpose of facilitating recognition and enforcement. The argument was that if jurisdictional rules are brought on the same line, recognition and enforcement could be semi-automatic. There would be no possibility to refuse recognition or enforcement on the basis that the court had taken jurisdiction on an

[1] Treaty establishing the European Coal and Steal Community, Paris, 18 April 1951.
[2] Treaty establishing the European Economic Community, Rome, 25 March 1957.
[3] Treaty establishing the European Atomic Energy Community, Rome, 25 March 1957. For an overview of the history of the European Union, see TC Hartley, *The Foundations of European Community Law* (5th edn, Oxford: Oxford University Press, 2003), p 3-9; P Craig & G De Búrca, *EU Law* (3rd edn, Oxford: Oxford University Press, 2003), p 3-53; K Lenaerts & P Van Nuffel (ed R Bray), *Constitutional Law of the European Union* (2nd edn, London: Sweet & Maxwell, 2005), p 3-75; P-O Lapie, *Les trois communautés* (Paris: Librairie Arthême Fayard, 1960).
[4] Signed in Brussels in 1965 and entered into force in 1967.
[5] On the relationship between that provision and the Brussels Convention, see H Duintjer Tebbens, "De Europese bevoegdheids- en executieverdragen: uitlegging, samenloop en perspektief" in PAM Meijknecht & H Duintjer Tebbens, *Europees bevoegdheids- en executierecht op weg naar de 21ste eeuw* (Deventer: Kluwer, 1992) p 53-117 at p 63-66.

exorbitant basis. This idea was quite novel at the time, when many bilateral recognition and enforcement conventions existed which did not contain a unified set of jurisdiction rules.[6] Multilateral recognition and enforcement conventions that existed at that time and in the 1970s did not contain unified jurisdiction rules either. Examples of this kind are the Montevideo Convention of May 1979 on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards, drawn up in the framework of the Organisation of American States (OAS) and in force in a number of South American countries,[7] and the Hague Convention of February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.[8] In this way the distinction between simple and double recognition and enforcement conventions came about: the old style conventions were classified as simple, while the Brussels Convention was double, since it contained jurisdiction rules as well as recognition and enforcement rules.[9] Double conventions became more common after the success of the Brussels Convention.[10] The Hague Conference has attempted, in its global jurisdiction convention which was never concluded, a third category, namely a mixed convention.[11] That convention would not be completely double since it would contain a number of jurisdictional rules, while other jurisdictional rules would be left to national law.

The fact that the Brussels Convention was an international convention and not EU legislation does not deter from the important principle of EU law that it has precedence over national law; that is so whether the EU instrument takes the form of a convention or a regulation. However, an international convention meant that a new version had to be negotiated and concluded every time more States joined the EU. In this way the

[6] Many of these Conventions existed between EU Member States, the oldest dating back to 1899 (between Belgium and France); see Art 69 Brussels I Regulation, stating that the Regulation now supersedes these conventions. It is interesting to note here that the USA is not party to any bilateral treaty governing enforcement of its judgments in foreign countries. The reason for this failure is said to be British insurers' wariness of large American jury verdicts; see PJ Borchers, "Comparing Personal Jurisdiction in the US and the EC: Lessons for American Reform" (1992) *Am J Comp L* p 121-157.

[7] This convention can be found at http://www.oas.org; reference number: B-41. States Party are Argentina, Bolivia, Brazil, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela.

[8] This Convention can be found at the website of the Hague Conference on Private International Law: http://www.hcch.net. This Convention was only adopted by Cyprus, the Netherlands (including Aruba), Portugal and Kuwait. Its failure has been attributed to, *ia*, its unusual and complex structure and the success of the Brussels and Lugano Conventions. The Convention required bilateralisation, which means that apart from the primary convention, a state would have to conclude a separate agreement with other Contracting States in which it wishes its judgments to be enforced; see Art 21 on supplementary agreements.

[9] See in general, on this distinction, Report by P Nygh & F Pocar on the Preliminary Draft Convention on jurisdiction and foreign judgments in civil and commercial matters, Preliminary Document No 11 of the Judgments Project of the Hague Conference for Private International Law (2000) p 26-30; see http://www.hcch.net.

[10] For example the Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children (1996), which regulates exhaustively the jurisdiction that authorities of Contracting States may exercise, even regarding children not habitually resident in a Contracting State; http://www.hcch.net. See also the Report by P Lagarde, *Proceedings of the Eighteenth Session (1996), vol II, Protection of children*, p 539-541.

[11] For a brief discussion of this project, see *infra*, p 2 *et seq.*

Brussels Convention was modified when Denmark, Ireland and the United Kingdom became Party to it (1978), when Greece became Party (1982), when Spain and Portugal became Party (significant changes were made at this point in what was called the San Sebastian version, 1989) and lastly when Austria, Finland and Sweden became Party (1997).

The Treaty of Rome was modified and replaced in 1992 by the Treaty of Maastricht, which entered into force in 1993.[12] This Treaty, although of significance for EU law, marking not only the transformation of the European Economic Community in the European Community, but also the creation of the European Union, did not herald great changes for the domain of civil jurisdiction. At that time the European Union was installed as the 'roof' to three pillars, being the community pillar (which encompassed the European Communities), common foreign and security policy, and intergovernmental co-operation in justice and home affairs.[13] The fact that the first pillar, the communities, was now only a part of the larger Union, amounted to an admission that the European club had expanded to more than their communities. The second and third pillars involved sensitive matters, closely connected to State sovereignty. Therefore Member States were and are more reluctant to allow European Community integration or harmonisation in these fields. Private international law, named "Judicial co-operation in civil matters" remained an intergovernmental matter and was therefore part of the third pillar. The Brussels Convention and its amendment conventions was part of the third pillar. The legal basis that already existed in the Rome Treaty (Art 220) was retained.

The Treaties of Amsterdam and Nice

In 1997 the Treaty of Amsterdam was concluded and it entered into force in 1999.[14] This treaty brought a significant change for the European life of the entire subject of private international law, including civil jurisdiction.[15] It transposed judicial co-operation in civil matters to the first pillar. This pillar is the so-called Community pillar. It means that the European Union can now adopt legislation, instead of the Member States negotiating and subsequently ratifying treaties.

[12] Published in *OJ C* 191, 29 July 1992, p 1.
[13] See K Lenaerts & P Van Nuffel, *op cit* (fn 1) p 53-57.
[14] Published in *OJ C* 340, 10 November 1997. This Treaty repealed the Merger Treaty, as it was no longer necessary.
[15] See, in this regard, H Van Houtte, "De gewijzigde bevoegdheid van de Europese Unie inzake IPR" in H Van Houtte & M Pertegás Sender (eds), *Het Europese IPR: van verdrag naar verordening* (Antwerp: Intersentia Rechtswetenschappen, 2001) p 1-10; CA Joustra, "Naar een communautair internationaal privaatrecht!" in CA Joustra & MV Polak, *Internationaal, communautair en nationaal IPR* (The Hague: TMC Asser Press, 2002) p 1-60 at p 11-20; A-M Van den Bossche, "L'espace européen de justice et le (rapprochement du) droit judiciaire" in M Storme & G de Leval (eds), *Het Europees gerechtelijk recht & procesrecht* (Bruges: die Keure, 2003) p 1-23.

The legal basis for this private international law legislation is Article 65 of the Treaty of Amsterdam. The fact that the Treaty still uses the word "co-operation" in the first pillar (Art 65) is confusing. According to some, this terminology should be changed, since first pillar matters are not issues of co-operation, but of community legislation. Co-operation in this Article means something different, though. It refers to the interaction between Member States that the Treaty wishes to establish. A measure such as the Evidence Regulation can be seen as co-operation: the Member States co-operate in the sense that they help each other in the quest for evidence in civil proceedings. The same can be said of the Service Regulation: Member States co-operate by ensuring that judicial and extra-judicial documents from other Member States are forwarded in an efficient way. The Brussels I, Brussels II*bis* and Insolvency Regulations as well as the Enforcement Order provide forms of co-operation regarding jurisdiction, applicable law and the enforcement of foreign judgments.

The Treaty of Nice entered into force in February 2003.[16] While allowing for the enlargement of the EU to 25 Member States, it did not contain any change relevant for civil jurisdiction.

A Constitutional Treaty for the European Union had been signed in Rome in November 2004.[17] Remaining a Treaty in the international law sense, the Constitution would incorporate the EU's Charter of Fundamental Rights into the text. The establishment of a constitution caused great political turmoil, although the Treaties always performed the same function.[18] The fate of the Constitution is uncertain, but irrespective of whether it will ever be adopted or not, it remains a useful text for reference. It defines concepts of European Union law and in this sense it will be used in this thesis.

The Constitution would have opened the door for more European private international law; the text also explicitly refers to conflict of laws and jurisdiction, alternative dispute settlement, and family law.[19]

The European Court of Justice and the interpretation of the civil jurisdiction instruments

The European Court of Justice, with its seat in Luxembourg, guards over the application of EU law. It does so in many respects: it may review the legality of EU legislation and acts (or failures to act) by the institutions; it may give preliminary rulings

[16] Treaty of Nice published in *OJ C* 80, 10 March 2001, p 1. The consolidated version of the Treaty now in force can be found in *OJ C* 325, 24 December 2002, p 33.
[17] Published in *OJ C* 310, 16 December 2004, p 1.
[18] See also TC Hartley, "International Law and the Law of the European Union – A Reassessment" (2001) *BYIL* p 1-35 at p 3-4, arguing that the Treaties really ammounted to a constitution.
[19] See Art III-269.

on the interpretation of EU law; it may hear disputes between Member States on EU law; it may give opinions on the competences of EU institutions.[20] The special capacity to interpret EU law includes responding to preliminary questions posed by courts of the Member States. The European Court of Justice gives only an answer to the legal question. It has to be provided with the factual background to enable it to make a ruling, but it will not rule on the facts. Upon receiving a response, the application to the facts is up to the referring court. For the civil jurisdiction instruments the European Court of Justice derives this power directly from the EC Treaty.[21] For the interpretation of the Brussels Convention, the Court also had this power, based on a protocol added to the Convention in 1971.[22] The judgments interpreting the Brussels Convention stay relevant to the extent that the Brussels I Regulation has not modified the rule in question. That protocol provided that any national court sitting as appellate body may pose a preliminary question.

The EC Treaty limits the preliminary questions for a number of politically sensitive matters (such as visas, asylum and immigration) and also for the civil jurisdiction instruments, which form part of the same title of the EC Treaty. Only the highest court in every Member State may (and must if uncertainty exists) pose a preliminary question in these matters.[23] The Constitution purported to separate *judicial co-operation in civil matters* from *visas, asylum and immigration* so that the exception for the preliminary questions would no longer apply to private international law. Any court might then pose a preliminary question.[24] If there are more preliminary questions at an earlier stage, that will result in more interpretation and clarity. On the other hand, preliminary questions can be an ideal way to delay judgment. Arguing about jurisdiction, even under national law, is often a means of delay by an unwilling party. If this delay can be extended with a further two years to allow the European Court of Justice to give a preliminary judgment, justice will not always come in time. It is therefore with mixed feelings that this change is perceived. The provision of the protocol to the Brussels Convention seemed the perfect compromise, adapted to the needs of the field of law. The first court of appeal could pose a preliminary question - not too soon, not too late.

There is another problem with the interpretation capacity of the European Court of Justice in the field of civil jurisdiction. This domain of the law necessarily implies internationality. This may be within the borders of the European Community, but may also reach beyond. One or several Member States and a third State may be involved.

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[20] See Arts 230-239 EC Treaty (Nice version); Arts III-270 - III-280 Constitution.
[21] Art 234 EC Treaty (Amsterdam and Nice versions).
[22] Protocol 2 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters.
[23] Art 68 EC Treaty (Amsterdam and Nice versions). See ECJ case C-555/03, order of 10 June 2004, *Warbecq v Ryanair Ltd*, not yet published in *ECR*, see http://www.curia.eu.int, where the European Court of Justice was unable to respond to a question by the *Tribunal du travail* (Employment Tribunal) of Charleroi. See also case note by T Kruger (2004-2005) *Colum J Eur L* p 203-206.
[24] Art I-29(3)(b) Constitution.

The European Court of Justice, though, is supposed to interpret and apply European Union law. Even if other legal problems come up, the Court might lack the capacity to point them out and deal with them.[25] The European Court of Justice is not like a State's highest national court that has competence to rule on anything; it is an institution of the European Union and in that sense has a clearly demarcated task. Judgments are reasoned from the point of view of European Union Law.

3. Member States and their participation

General

As the concern of this study is the position of third States, or non-Member States of the EU, a precise circumscription of the Member States is necessary. Giving the names of the 25 Member States is not difficult. The six original states were Belgium, France, West Germany,[26] Italy, Luxemburg and The Netherlands. Since that time the club expanded at regular intervals. Denmark, Ireland and the United Kingdom joined in 1973;[27] Greece in 1981;[28] Portugal and Spain in 1986;[29] Austria, Finland and Sweden in 1995;[30] Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia in 2004.[31]

However, there are a number of territories whose status is less clear. Furthermore, knowing the Member States does not fully clarify the scope of EU law.[32] None of the civil jurisdiction Regulations names its exact territorial scope. As they are EU legislation, the answer as to the territorial scope can only be found in the general rules of EU law (*ie* the EC Treaty). This was of course different when civil jurisdiction was still organised by way of convention. The States and territories party to the Brussels Convention were not determined by the EC Treaty.

The pre-1989 versions of the Brussels Convention contained a provision allowing Contracting States to declare it applicable to territories where they were responsible for the external relations.[33] In the first version this concerned France and The Netherlands

[25] S Francq, *L'applicabilité spatiale du droit communautaire dérivé au regard de la théorie générale du droit international privé*, (unpublished doctoral thesis, Université catholique de Louvain, 2004), p 468 states that the European Court of Justice provides an illustration of unilateralist reasoning.
[26] Upon the reunification of Germany in 1990, the old East Germany joined alongside West Germany.
[27] Accession Treaty published in *OJ L* 73, 27 March 1972.
[28] Accession Treaty published in *OJ L* 291, 19 November 1979.
[29] Accession Treaty published in *OJ L* 302, 15 November 1985.
[30] Accession Treaty published in *OJ L* 241, 29 August 1994.
[31] Accession Treaty published in *OJ L* 236, 23 September 2003. See also Art IV-440 Constitution, naming all the current EU Member States.
[32] S Francq, *op cit* (fn 25) p 383 compares that defining the EU territory to defining the borders of a State.
[33] Old Art 60 Brussels Convention.

and in the next version Denmark and the United Kingdom.[34] Whether this possibility remained under public international law despite the deletion of the provision, was uncertain,[35] but the controversy has lost its relevance. For the Regulations, being EU law, such declarations are not possible. The Brussels Convention remains in force in the territories where it was applicable but which are excluded from the Regulation.[36]

The result is that the Brussels Convention was or is applicable in some territories, while the Brussels I, Brussels II*bis* and Insolvency Regulations are not. This will be discussed below.

Participation of some of the Member States

Some of the EU Member States in certain maters do not wish to go quite all the way that the others go.[37] For private international law, including civil jurisdiction (Art 65 of the Amsterdam and Nice Versions of the EC Treaty) Denmark, Ireland and the United Kingdom have negotiated special terms. These special terms do not only relate to judicial co-operation in civil matters, but also to judicial co-operation in criminal matters, police co-operation, visas, asylum and immigration (title IV). Of all these matters judicial co-operation in civil matters is the least politicised. However, it is treated in the same title of the EC Treaty and therefore the same special arrangements apply.[38] The arrangements were introduced by the Treaty of Amsterdam by way of protocols. Those protocols were reintegrated without change by the Treaty of Nice.

Protocol 4 on the Position of the United Kingdom and Ireland determines that title IV does not apply to those States. They do, however, have a right to 'opt-in'. They may inform the President of the Council, within three months after the proposal or initiative has been presented to the Council, that they wish to participate in a measure.[39] They

[34] Art 60 Brussels Convention. The provision on those declarations was deleted by the Treaty on the Accession of Portugal and Spain to the Brussels Convention. It never existed in the Lugano Convention. One of the reasons for its disappearance was the old favourite Gibraltar and the Spanish fear that the United Kingdom would declare the Conventions applicable there. On the other hand, many thought that the possibility to extend the Convention to overseas territories would be useful to prevent debtors placing assets beyond the reach of creditors in these territories to which access was easy, but enforcement difficult. It is possible that the rule mentioned above, allowing for declarations, survived in the other conventions, despite its deletion, on the basis of general international law; see H Duintjer Tebbens, "Het toepassingsgebied van de verdragen van Brussel en Lugano naar onderwerp, tijd en ruimte", in H Van Houtte & M Pertegás Sender (eds), *Europese IPR-Verdragen* (Leuven: Acco, 1997) p 37-38.

[35] See GAL Droz, "La Convention de San Sebastian alignant la Convention de Bruxelles sur la Convention de Lugano" (1990) *RCDIP* p 1-21 at p 17.

[36] Rec 23 Brussels I Regulation.

[37] For example, regarding the elimination of internal borders, Ireland and the United Kingdom have a special regime and are not parties to the Schengen treaty. For some other matters Denmark has obtained exceptions.

[38] Title IV of part three.

[39] Art 3 of Protocol 4.

may also after the adoption of the measure inform the Council and the Commission that they wish to accept the measure.[40] Ireland may notify the President of the Council that it no longer wants to be bound by the protocol, which would delete its special regime with the result that all EU legislation in this field would apply in Ireland.[41] A similar provision does not exist for the United Kingdom. Both Ireland and the United Kingdom have decided to participate in all the Regulations that have been adopted in the field of civil jurisdiction thus far.

Protocol 5 on the position of Denmark is less flexible. It merely states that Denmark does not participate in title IV. Therefore, no measures taken under title IV in general, or Article 65 specifically, are applicable in Denmark. Thus none of the private international law Regulations is applicable there. According to the Protocol Denmark may inform the other Member States that it no longer wishes to avail itself of the Protocol or a part of it, in which case Denmark's special position will be deleted and all EU legislation in this field will apply to it.[42] Denmark does not have the "opt in" possibility (for a specific instrument) that the United Kingdom and Ireland have.

It is important to note that the Brussels Convention is still applicable in Denmark; it applies in the relations between Denmark and the other Member States. That Convention needs to be updated so that the substance of the rules that apply to Denmark are identical to those that apply in the other Member States. An Agreement between the European Community and Denmark has been signed to this effect.[43] Probably conventions will also be concluded with Denmark on the other private international law matters: divorce and parental responsibility, insolvency, service and evidence. In this way, Denmark circumvents for private international law, including civil jurisdiction, the protocol it has ensured for the sensitive matters such as visas, immigration and asylum.

The Constitution would have retained these Protocols. The Protocol on the position of Denmark would have contained the possibility to be altered so that it resembles that on the position of the United Kingdom and Ireland. The result of such a change, if and when it takes place, would be that Denmark would also be able to 'opt-in' for a specific measure.[44] The Protocols to the Constitution would still allow Ireland and Denmark to desert them.

For matters of civil jurisdiction, Denmark, and, to the extent that they had not opted in, the United Kingdom and Ireland, therefore have a special status. They are of course EU Member States, but to a certain extent they seem not to be Member States. This distinction becomes of interest in the examination of the external competence of the

[40] Art 4 of Protocol 4.
[41] Art 8 of Protocol 4.
[42] Art 7 of Protocol 5.
[43] See *OJ L* 299 of 16 November 2005, p 62-70. See also the discussion on Denmark in Chapter 7, p 2 *et seq*.
[44] Art 9 of the Protocol.

European Community. As these States do not, or only partly, recognise the EC's competence over a matter, they will not be fully bound by the external competence of the EC. This issue will be investigated more closely in the last Chapter on external competence.[45]

Overseas territories and European territories with special status and specific European territories

Overseas territories, as the name indicates, are not geographically part of Europe, but have a special relation with one of the Member States and therefore with the EU. These overseas territories have varying degrees of independence or connection with the Member States. In the same sense, EU civil jurisdiction rules have different influences in these areas.[46]

Some territories are in actual fact part of the European Member State and the civil jurisdiction Regulations apply in them to the full extent that they are applicable in the EU Member States. These are the French overseas departments (Guadeloupe, French Guiana, Martinique and Réunion), the Azores, Madeira and the Canary Islands.[47]

For the remaining overseas territories, listed in an annex to the EC Treaty,[48] the answer is less simple. EU law applies in varying degrees to them. The EU Regulations of civil jurisdiction do not apply in these territories. These territories are in an advantaged position because of their association with the EU. The special arrangements include trade, customs duties, investment and the freedom of establishment. These arrangements may be detailed by legislation.[49]

EU law applies to European territories that are dependent on a Member State for its external relations; these are of course not 'overseas' strictly speaking. Gibraltar falls in this category, as it is geographically linked to Spain as a peninsula, but the United Kingdom is responsible for its external relations. It joined the EU with the United Kingdom. There are however certain exceptions to the application of EU law in Gibraltar.[50] The civil jurisdiction Regulations apply in Gibraltar if the United Kingdom

[45] See Chapter 7, p 2 *et seq.*
[46] See K Lenaerts & P Van Nuffel, *op cit* (fn 1) p 843-846.
[47] Art 299 EC Treaty (Nice version); Art IV-440 Constitution.
[48] Annex II to the EC Treaty. These are Greenland, New Caledonia and Dependencies, French Polynesia, French Southern and Antarctic Territories, Wallis and Futuna Islands, Mayotte, Saint Pierre and Miquelon, Aruba, Netherlands Antilles (Bonaire, Curaçao, Saba, Sint Eustatius, Sint Maarten), Anguilla, Cayman Islands, Falkland Islands, South Georgia and the South Sandwich Islands, Montserrat, Pitcairn, Saint Helena and Dependencies, British Antarctic Territory, British Indian Ocean Territory, Turks and Caicos Islands, British Virgin Islands, Bermuda. (Annex II of the Constitution text contains the same list.)
[49] Arts 182-188 EC Treaty (Nice version); Arts III-286 – III-291 Constitution.
[50] The difficult position of Gibraltar, since 1713, has lead to many conflicts between Spain and the United Kingdom. One of these disputes provided a part of the reason for the United Kingdom never to sign the Insolvency Convention; see P Wautelet, "De Europese

opts in so that the instrument is applicable there. It has done so for all EU civil jurisdiction instruments thus far.[51] Before the advent of these regulations, provisions corresponding to those of the Brussels Convention were applicable as between the United Kingdom and Gibraltar.[52]

The logical next step is that if a measure is not applicable in the United Kingdom, it is not applicable in Gibraltar. The United Kingdom has the power to decide not to participate in a regulation on private international law. It has not yet done so, but the possibility remains open. It seems that Gibraltar will then follow and remain outside the regulation, just as the United Kingdom.

Greenland is a special case. It became part of the EU alongside Denmark in 1971, as it was at that stage under Danish authority. Regarding the Brussels Convention, Denmark made a declaration (after the conclusion of the convention) to the effect that it was not applicable in Greenland. This is strange, since Article 60 of the Brussels Convention explicitly stated that it would apply to Greenland, as European territory of Denmark. It can even be questioned whether the subsequent declaration was in conformity with international law.[53] Greenland obtained home rule in 1979 and stepped out of the EU and is now treated as overseas territory.[54]Just as other EU legislation, the civil jurisdiction regulations are not applicable in Greenland. If Denmark later obtains the possibility to opt into private international law (including civil jurisdiction) instruments, such opting-in would be irrelevant for Greenland, which will stay outside the scope of EU law.

The Faeroe Islands, which are part of the Danish monarchy, are not subject to EU law. The islands have had home rule since 1948, before Danish accession to the EU. Denmark could have made a declaration to the effect that the Brussels Convention would be applicable in the Faeroe Islands, but did not do so and the Convention is not applicable.[55]

In the Åland Islands, the self-governing province of Finland, EU law is applicable with certain derogations, provided for by the Accession Treaty of Austria, Finland and Sweden. These derogations are justified by the special status of the province under

insolventieverordening', in H Van Houtte & M Pertegás Sender (eds) (2001), *op cit* (fn 15) p 103-167, at 113-114. The Schengen agreement does not apply to Gibraltar, as it does not apply to the United Kingdom.

[51] See *supra*, p 2.

[52] See P North & JJ Fawcett, *Cheshire and North's Private International Law* (13th edn, London: Butterworths, 1999) p 180.

[53] See H Duintjer Tebbens, "Het toepassingsgebied van de verdragen van Brussel en Lugano naar onderwerp, tijd en ruimte", in H Van Houtte & M Pertegás Sender (eds) (1997), *op cit* (fn 34) p 38; GAL Droz, "La Convention de San Sebastian alignant la Convention de Bruxelles sur la Convention de Lugano" (1990) *RCDIP* p 1-21 at p 16.

[54] See Annex II to the EC Treaty; Annex II to the Constitution.

[55] H Duintjer Tebbens, "Het toepassingsgebied van de verdragen van Brussel en Lugano naar onderwerp, tijd en ruimte", in H Van Houtte & M Pertegás Sender (eds) (1997), *op cit* (fn 34) p 37.

international law and the aim of maintaining a viable local economy.[56] The civil jurisdiction Regulations are not part of the derogations and do therefore apply in the Åland Islands.[57]

In the sovereign base areas of the United Kingdom in Cyprus (Akrotiri and Dhekelia), the civil jurisdiction regulations and other EU law do not apply.[58] Neither does the Brussels Convention.[59]

EU law is applicable in the Channel Islands and the Isle of Man only to the extent necessary for the implementation of specific arrangements.[60]

Countries and territories that have special relations with the United Kingdom, but that are not contained in the list in the annex to the EC Treaty,[61] are not subject to EU law, and thus not to the civil jurisdiction regulations.

The Netherlands declared the Brussels Convention applicable in Aruba, but only the 1978 version. Therefore, that version of the Convention remains applicable for Aruba.[62]

The independent States of Andorra, Monaco, San Marino, Liechtenstein[63] and the Vatican are not EU Member States, nor are they associated with the EU in any of the ways described above. Therefore no EU legislation applies in those States and they remain third States.

Candidate Member States

The European Union was enlarged a number of times and in this ongoing process, the EU now has three candidate States, namely Bulgaria, Romania and Turkey (although Turkey's accession is foreseen further in the future than that of the other two States). A candidate State sits in a waiting room while taking measures necessary for entry to the

[56] Protocol no 2 to the Accession Treaty of Austria, Finland and Sweden, published in *OJ C* 241, 29 August 1994, p 1.
[57] For most areas of civil and criminal law, the Åland Islands fall under the authority of Finland.
[58] There are certain exceptions to this general rule, but those are not relevant for the current topic. See protocol no 3 to the Accession Treaty of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, published in *OJ L* 236, 23 September 2003, p 1.
[59] A Briggs & P Rees, *Civil Jurisdiction and Judgments* (3rd edn, London: LLP, 2002) p 41.
[60] Art 299 EC Treaty (Nice version); Art IV-440 Constitution; protocol 3 to the Treaty on the Accession of the Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Poland, Malta, Slovakia and Slovenia; Treaty on the Accession of Denmark, Ireland and the United Kingdom.
[61] See *supra*, fn 48. For a full account of the application of the Brussels and Lugano Conventions in the Overseas Territories, see GAL Droz, "La Convention de San Sebastian alignant la Convention de Bruxelles sur la Convention de Lugano" (1990) *RCDIP* p 1-21 at p 15-19.
[62] See Rec 23 Brussels I Regulation.
[63] Liechtenstein is member of the European Free Trade organisation (EFTA) and can therefore become party to the Lugano Convention according to Arts 60, 62 & 63.

EU. The most important preparatory measure is the acceptance of the *acquis communautaire*. This literally means that the national legal order has to integrate thousands of pages of European Union legislation and adapt accordingly.

While being in the waiting room, the States are not yet subjected to EU legislation that does not require conversion. Therefore the Regulations of civil jurisdiction are not yet applicable in those States. For purposes of examining the effect the Regulations have on third States, these States can be considered third States.

Before the last accession of ten new Member States in 2004, the idea was that those States would accede to the Lugano Convention while they were in the waiting room. That only materialised for Poland. Acceding to the Lugano Convention would encompass moving gradually from third State to EU Member State for the purposes of civil jurisdiction: the Lugano Convention rules are similar to those of the Brussels I Regulation so that its Contracting States form a special category of third States, unlike those that stand completely on the outside.

4. Delimiting the EU civil jurisdiction rules

General

The three Regulations that form the main focus of this thesis are legislative acts of EU law. They purport to harmonise some of the civil jurisdiction rules in the EU Member States. Therefore it is useful to regard EU legislation and how it is delimited.

The nature of private international law, including civil jurisdiction, is such that it is concerned with situations where different States are involved. That differs from rules such as those on fishery or State aid in competition where one can clearly limit the sphere of application of the rules to the EU's territory. Civil jurisdiction rules, and private international rules in general, concerned with international trade and international families, cannot be restrained to apply only in the EU and cannot ignore the outside world. However, in the drafting of EU legislation, it is the interests of the EU and its internal market that form the main motivation. The outside world is not regularly considered at the time of legislating. Therefore one would often find that clear scope rules are missing in EU legislative acts.[64]

Delimiting EU legislation by way of principles of EU law

At the same time, the European Union's legislative power is not borderless, but limited by the principles of conferral, subsidiarity and proportionality.[65] According to the first

[64] See S Francq, *op cit* (fn 25), p 33-47.

[65] Art I-11 of the Constitution text usefully defines these concepts of EU law: *1. The limits of Union competences are governed by the principle of conferral. The use of Union competences*

principle, the EU only exists, and only has powers, because of the Member States' willingness to *confer* powers upon it. For civil jurisdiction the conferral is found in the EC Treaty: the Member States have agreed that there may be EU legislation on private international law "*in so far as necessary for the proper functioning of the internal market*".[66] Applying those words, it seems that recognition and enforcement of judgments in civil matters are clearly necessary for the proper functioning of the internal market. The same can be said regarding insolvency proceedings. On the other hand, one might wonder whether civil jurisdiction rules in the field of family law were really necessary for the internal market. However, the protagonists explained that some steps onto this road were necessary to ensure the proper functioning of the internal market in the sense of allowing the free movement of persons within that market.[67]

The second principle, namely that of subsidiarity, has two elements.[68] Firstly, for the EU to take action, it must be impossible for the Member States to sufficiently achieve the objectives of the proposed actions. Secondly, it must be clear that these objectives can be better achieved by the Union. The principle of subsidiarity in effect limits the competences or the intensity of the exercise of competence by the EU. It might even be an instrument of the Member States to push back a too activist Commission.[69] This principle is relevant in the area of civil jurisdiction to the extent that the Union does not

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is governed by the principles of subsidiarity and proportionality. 2. Under the principle of conferral, the Union shall act within the limits of the competences conferred upon it by the Member States in the Constitution to attain the objectives set out in the Constitution. Competences not conferred upon the Union in the Constitution remain with the Member States. 3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments shall ensure compliance with that principle in accordance with the procedure set out in that Protocol. 4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Constitution. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

[66] Art. 65 EC Treaty (Amsterdam and Nice versions).

[67] See, in general, P McEleavy, "The Brussels II Regulation: How the European Community has moved into Family Law', (2002) *ICLQ*, p 883-908; J-Y Carlier, "La libre circulation des personnes dans l'Union europeenne", (2004) *JT*, p 74-80; E Caracciolo di Torella & A Masselot, "Under Construction: EU Family Law" (2004) *ELR* p 32-51; V Van den Eeckhout, "Communitarization of private international law: Tendencies to 'liberise' international family law", (2004) *Tijdschrift@ipr.be*, p 52-70; V Van den Eeckhout, "Communitarization of international family law as seen from a Dutch perspective: what is new? A prospective analysis" in A Nuyts & N Watté (eds), *International civil litigation in Europe and relations with third States* (Brussels: Bruylant, 2005) p 509-561.

[68] Art. 5 EC Treaty (Amsterdam and Nice versions) states that "*Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty*."

[69] See TC Hartley, *op cit* (fn 1) p 114-118; M Wathelet, "Propos liminaires" in F Delpérée, *Le principe de subsidiarité* (Brussels: Bruylant, 2002) p 17 and J Verhoeven "Analyse du contenu et de la portée du principe de subsidiarité" in the same book, 376-389, making critical observations about the use of the principle of subsidiarity.

have exclusive competence.[70] Where the Community has exclusive competence, there is no question of the Member States being able to regulate the matter sufficiently and therefore their competence does not have to be limited, so that the purpose of the principle of subsidiarity falls away.

Subsidiarity is of course of special interest when the relations with third States are at stake. The question can arise why the EU should take responsibility for dealing with an issue that has effects outside the borders of the EU, and why the Member States are not in a better position to take these measures.[71]

It is especially the elaboration of EU civil jurisdiction rules on family law that raises subsidiarity concerns. Family law is a matter that is intricately linked with not only the morals but also the culture and usages of a State. Rules on divorce, for instance, differ greatly between legal systems: some systems have fault as a relevant element in divorce, others do not; some systems allow divorce on the basis of factual separation, others do not; some legal systems have legal separation as something between being married and being divorced, others require such middle step and yet others do not know the phenomenon at all or have abolished it. The EU's interference has been justified in terms of the free movement of persons. Free movement of persons traditionally means that persons should be allowed to practise their trades throughout the EU without hindrance. To this end they need to be able to establish themselves in foreign countries without too many formalities such as work permits and visas. The argument is that if the EU does not assist in the area of family law, the free movement of persons would be hampered. If a trader from Germany wants to open a shop in Austria, he should not only have the opportunity to take his wife along, but should also be able to divorce in Germany and have that divorce easily recognised in Austria (or vice versa) so that he can marry again. One has to admit that this last part of personal adventure is not really related to a person's trade in the internal market any more. It would take an attenuated test of the principle of subsidiarity to ensure that it passes muster. That principle determines that the EU should not take measures that are not really necessary for its functioning.[72]

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[70] See also K Lenaerts, "De Europese Unie: doel of middel" (1998-1999) *RW* p 689-710. The external competences of the EU will be discussed *infra*, p 2 and further. See also P-E Partsch, *Le droit international privé européen: De Rome à Nice* (Brussels: Larcier, 2003) at p 327, stating that measures in the domain of private international law tend to be more in line with the principle of subsidiarity since it is less upsetting to national systems than the unification of material law. This thesis does not compare various domains where EU Law might have an influence and therefore takes no view on this point.

[71] See, in general, K Lenaerts, "The principle of subsidiarity and the environment in the European Union: keeping the balbnce of federalism" (1993-1994) *Fordham Int LJ* p 846-895 at p 848-852.

[72] See *supra*, p 2. Specifically on the principle of subsidiarity in relation to the Brussels II project, see P Beaumont & G Moir, "Brussels Convention II: A New Private International Law Instrument in Family Matters for the European Union or the European Community?" (1995) *ELR* p 268-288 at p 281-285. See also, more generally, P McEleavy, "The Brussels II Regulation: How the European, Community has moved into Family Law" (2002) *ICLQ* p 883-908; E Caracciolo di Torella & A Masselot, "Under Construction: EU family law" (2004) *ELR*

Necessary or not, the field of family law is being Europeanised. In the Tampere (1999) and Hague (2004) Conclusions of the European Council, provision has been made for the elaboration of rules in this area. Both of these conclusions refer explicitly to family law. To go even further, the law of succession will also be engaged.[73]

A uniform system of divorces (applicable law), or at least the recognition of divorces, has an impact for third State nationals. A third State spouse of an EU national has certain rights in the EU. If a person is regarded as divorced in one EU Member State, but still married in another EU Member State, he will have different statuses in those States.[74]

One might ask whether the principle of subsidiarity is being respected if the EU legislates in an area where well-functioning international conventions such as those of the Hague Conference on Private International Law already exist.[75] It seems difficult in these cases to indicate that the EU Member States cannot sufficiently achieve a goal that has to an extent already been achieved, and that the EU can achieve it more efficiently. In this sense subsidiarity is of significant interest to third States. Hague Conventions are open to them so that they will then be bound by the same international rules as the EU Member States, instead of remaining independent of and unaffected by specific legislation that influences them in ways to be discussed further in this thesis.

In the EU on the other hand, the belief is that in an international organisation where there is mutual trust of each other's legal systems, the legislation can encompass more and there can be closer co-operation than in an international convention. However, that argument still does not seem to comply with the subsidiarity test. According to P Beaumont and G Moir, deeper agreement is not possible in a larger EU to the same extent as it was when there were only six Member States. They wrote that about an EU of 15. The argument is much stronger in an EU of 25. They propose that the EU

p 32-51; V Van Den Eeckhout, "Communitarization of Private International Law: Tendencies to 'liberalise' European Family Law", (2004) (3) *Tijdschrift@ipr.be* p 52-70; V Van Den Eeckhout, "Communitarization of international family law as seen from a Dutch perspective: what is new? – A prospective analysis" in A Nuyts & N Watté (eds), *op cit* (fn 67) p 509-561.

[73] See Tampere European Council, Presidency Conclusions of 15 and 16 October 1999 (http://www.europarl.eu.int/summits/tam_en.htm), esp para 34 and the Hague Programme of the Presidency Conclusions of 4 and 5 November 2004 (http://www.europarl.eu.int/summits/pdf/bru1104_en.pdf), esp p 46-47 of Annex 1.

[74] See P Beaumont & G Moir, "Brussels Convention II: A New Private International Law Instrument in Family Matters for the European Union or the European Community?" (1995) *ELR* p 268-288 at p 276.

[75] See CA Joustra, "Naar een communautair internationaal privaatrecht!" in CJ Joustra & MV Pollak, *Internationaal, communautair en nationaal IPR* (The Hague: TMC Asser Press, 2002) p 27-34. She states, however, at p 54 that the political will to continue on the way of Community private international law seems stronger than than a judicial reference to the principle of subsidiarity. Judging the political will is difficult, but a proper legal basis to act is essential and the principle of subsidiarity cannot be ignored.

Member States rather be part of a larger field (that created by the Hague Conference) in situations where more intensive co-operation is not possible.[76]

In some areas a separate EU instrument would probably be less effective than an international convention. For instance, children are not only abducted within the EU. Such acts are not restrained to any form of borders. Therefore creating a separate system actually does not contribute much. Fortunately the Brussels II*bis* Regulation does contain references to the Hague Conventions on child abduction (1980)[77] and on the protection of children (1996).[78] That will be discussed later.[79] It seems that when drawing up the initial Brussels II Convention, the EU remained in contact with the Hague Conference.[80] Both the Brussels I and Brussels II*bis* Regulations contain references to the Hague Service Convention (1965) for cases to which the Service Regulation[81] does not apply.[82]

The third principle, namely that of proportionality, in essence means that the burden that a measure imposes may not be out of proportion to the object. The measure must be reasonably likely to bring about the object envisaged. At the same time, it must not harm the public disproportionately. It has its roots in German law ("*Verhältnismässigkeit*", which is regarded as underlying certain provisions of the German Constitution). It can also be compared to the English concept of reasonableness:[83] is the means selected suitable with a view to the end? For civil jurisdiction, this principle does not often come into play. What the EU has done until now, is promoting the co-operation of the judiciary organs of Member States. That does not impose a burden on anyone in the EU in the way that specific economic law rules can impose burdens. The burden, the costs, the harm to the public, and the avoidance of creating something excessive refer to elements in the EU. Whether a measure would be proportional is not influenced by the interests of third States.

[76] P Beaumont & G Moir, "Brussels Convention II: A New Private International Law Instrument in Family Matters for the European Union or the European Community?" (1995) *ELR* p 268-288 at p 288.
[77] Arts 11, 42 and 60.
[78] Arts 12 and 61.
[79] See *infra*, p 2.
[80] See Borrás Report, para 9, p 31.
[81] Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, *OJ L* 160, 30 June 2000, p 37-52.
[82] Art 26(4) Brussels I Regulation; Art 18(3) Brussels II*bis* Regulation.
[83] See TC Hartley, *op cit* (fn 1) p 151. See also GA Bermann, "Proportionality and Subsidiarity" in C Barnard & J Scott (eds), *The Law of the Single European Market* (Oxford: Hart publishing, 2002) p 75-99, at p 79: "*[I]n the Community law system, as in so many national law systems, proportionality figures conspicuously among the doctrinal weapons in the general arsenal of weapons that may be levelled at the legality of a legislative measure*."

The EU jurisdictional rules and their interaction with national law

When should third State domiciliaries adhere to the Brussels I Regulation and when, if not to other international conventions, to domestic law? Where exactly the EU Regulations and the national rules on jurisdiction meet each other, is discussed throughout this thesis.[84] There are two main visions on this interaction that should be mentioned at the outset.

The first is that the EU Regulations have completely taken over jurisdiction in civil and commercial matters.[85] GAL Droz speaks of the "*code judiciaire européen*" (European code of civil procedure).[86] Briggs and Rees, supporting this view, state that it is a misreading of the instruments to interpret them as amending and partly replacing the rules of common law, or to state that common law continues to apply except where the Conventions apply. They state that the Conventions and Regulations are the new starting points every time there is a question of jurisdiction, recognition or enforcement in civil and commercial cases.[87] Domestic rules only remain if and in so far as they are authorised by these Regulations.[88] Therefore, when a case falls in the material scope of any of the Regulations, the Regulation is the point of departure. Only when the Regulation states that for the case at hand reference may be made to domestic jurisdictional rules, can those be activated.

The foundation of this viewpoint is mostly in EU law. The EU wanted to create an area of justice, freedom and security and therefore, the further the integration reaches, the better. However, there is a conceptual difficulty in justifying broad EU rules by EU interests, where a case has nothing to do with the European judicial area.

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[84] See also R Fentiman, "National law and the European juridiction regime" in A Nuyts & N Watté (eds), *op cit* (fn 67) p 83-128; P Grolimund, *Drittstaatenproblematik des europäischen Zivilverfahrensrechts* (Tübingen: Mohr Siebcek, 2000) esp p 25-70.

[85] For support of this view, see L Pålsson, "Interim Relief under the Brussels and Lugano Conventions" in J Basedow, I Meier, AK Schnyder, T Einhorn, D Girsberger (eds), *Private Law in the International Arena. Liber Amicorum Kurt* Siehr (The Hague: TMC Asser Press, 2000) p 633, who writes about the indirect application of the [Regulation] via Art 4. B Audit, *Droit international privé* (3rd edn, Paris: Economica, 2000) p 436; A Saggio, "The outlook for the System for the Free Movement of Judgments Created by the Brussels Convention" in Court of Justice of the European Communities, *Civil Jurisdiction and Judgments in Europe* (London: Butterworths, 1992) p 201; A Briggs & P Rees, *op cit* (fn 59) p 3-5; A Briggs, *The Conflict of Laws* (Oxford: Oxford University Press, 2002) p 91; D McClean, *Morris: The Conflict of Laws* (5th edn, London: Sweet & Maxwell, 2000) p 123.

[86] GAL Droz, "Les règles du traite CEE sur la compétence judiciaire et l'exécution des décisions en matière civile et commerciale" in P Bourel, U Drobnig, GAL Droz, B Goldman, O Landon, K Lipstein, C Morse, J Pipkorn & F Pocar, *The Influence of the European Community upon Private International Law of the Member States* (Brussels: Larcier, 1981) p 49-76, at p 51.

[87] A Briggs & P Rees, *op cit* (fn 59) p 3-5.

[88] The references to national law are found in Art. 4 Brussels I Regulation and in Art 7 Brussels II*bis* Regulation. For more information on the difficulties that Art 7 has lead to, see Chapter 2, Part C, *infra*, p 2 *et seq.*

The second viewpoint is that the Regulation governs international jurisdiction as between the EU Member States in so far as the European judicial area is concerned. If not, national rules apply as part of the national legal system, independent of the Regulation. Therefore, there are in every EU Member State two sets of rules on civil jurisdiction that exist side by side: the EU rules and the national rules. The thesis will point out when the national rules apply, particularly where the facts are linked with a third State and not with the EU, for example when the defendant is resident in a third State. In such a situation the application of the national rules, according to this second viewpoint, does not result from their appointment by the regulation, but emanates from the rules themselves. The rules have a *raison d'être* independently of the EU rules.

The opinion of Advocate General Darmon in *Brenner & Noller v Dean Witter Reynolds*,[89] although not totally clear, might be support for this view. The Advocate General stated that the Brussels Convention was not applicable to a case where the defendant was domiciled in a third State. In support of this finding, he called the reference in the Brussels Convention to national law (Art 4) a "reminder".[90] The Court did not pay much attention to this point and merely stated that Article 4 (thus national law) governed the case.[91] The essence of this second viewpoint is that the reference to national law in the Brussels Convention, which has been taken over in the Brussels I Regulation, does not make national law applicable. It only reminds of the relevant national rules. This view is appealing because of its limitation of EU legislation towards the outside world. There are two regimes in EU Member States: one for the co-Member States and one for the outside world.

Whichever of the viewpoints one agrees with, once it has been determined that an EU civil jurisdiction regulation applies, these rules have precedence over the rules of national law. This principle was enunciated by the European Court of Justice and applied in several cases.[92]

There is, however, a tendency to season the systems of the Regulations with national elements. This seasoning can take various forms, for instance by using a national rule to neutralise a ground for jurisdiction of the Regulation, such as *forum non conveniens*. The European Court of Justice has ruled that this doctrine of English law may not be

[89] ECJ case C318/93, judgment of 15 September 1994 [1994] *ECR* I-4275 (Opinion of 8 June 1994).
[90] At para 10-20.
[91] At rec 16-18.
[92] ECJ cases 25/79, judgment of 13 November 1979, *Sanicetral v Collin* [1979] *ECR* 3423, at rec 5; 288/82, judgment of 15 November 1983, *Duijnstee v Goderbauer* [1983] *ECR* 3663, at rec 13-14; 432/93, judgment of 11 August 1995, *Société d'Informatique Service Réalisation Organisation v Ampersand Software BV* [1995] *ECR* I-2269. See also A Nuyts, "Questions de procedure: la dificile coexistance des règles conventionelles et nationales" in R Fentiman, A Nuyts, H Tagaras & N Watté (eds), *The European Judicial Area in Civil and Commercial Matters* (Brussels: Bruylant, 1999) p 235-250; F Salerno, "European International civil procedure" in B Von Hoffmann (ed), *European Private International Law* (Nijmegen: Ars Aequi Libri, 1998) p 151-153.

used to decline jurisdiction that has been based on the domicile of the defendant under the Brussels I Regulation (Art 2). Courts might wish to add something to the rules, such as rules taking public policy into account or jurisdiction to prevent a denial.[93] This is not permissible, since the European Court of Justice has ruled that adding criteria for the validity of forum clauses that are not contained in the Brussels Convention, is not permitted.[94]

The limitation of the EU civil jurisdiction rules to international cases

An issue that has remained unclear for a very long time is whether the EU civil jurisdiction rules also apply to cases that are linked to only one EU Member State and a third State. The case is international, but has no cross-border element within the EU; it seems that the case has no relevance for the European judicial area. The European Court of Justice has finally resolved this controversy in the *Owusu* case.[95] In that case the defendant was domiciled in England, as was the plaintiff. A number of co-defendants were domiciled in Jamaica and the facts that led to the dispute took place in Jamaica as well. No parties from any other EU Member State were involved. Neither was there a basis of exclusive jurisdiction that tied the case to another EU Member State, a forum clause in favour of another EU Member State, or a contract that had to be performed or a tort that was committed in another EU Member State. The European Court of Justice found that the link to Jamaica made the case international and that that was sufficient for the Brussels Convention to apply if the defendant was domiciled in the EU. The fact that the plaintiff was domiciled in the same EU Member State was irrelevant, as long as the case had some element of internationality (in this case the co-defendants and the place of the facts). That internationality does not have to involve another EU Member State.

5. The relationship between the EU civil jurisdiction rules and conventions on specific matters

In some instances the EU Member States are obliged under international law to respect other conventions (on various matters) they have with third States, despite the fact that a conflict might exist with the Brussels I Regulation or the Brussels II*bis* Regulation. Conflicts with the Brussels I Regulation can arise frequently, as that Regulation covers a large area of civil and commercial law. The transport treaties come to mind: the international transport of both passengers and goods is a specialised economic activity that often requires particular legal rules. Many of the conventions on

[93] See H Born, M Fallon & J-L Van Boxstael, *Droit judiciaire international. Chronique de jurisprudence 1991-1998* (Brussels: Larcier, 2001) p 61-62.
[94] ECJ case 150/80, judgment of 24 June 1981, *Elefanten Schuh GmbH v Pierre Jacqmain* [1981] *ECR* 1671.
[95] ECJ case C-281/02, judgment of 1 March 2005, *Owusu v Jackson*, not yet published in *ECR*, see http://www.curia.eu.int.

specific matters might contain provisions on jurisdiction and/or on the recognition and enforcement of foreign judgments.

The Brussels I Regulation explicitly acknowledges that it leaves such Conventions intact.[96] For instance, the Convention on the Contract for the International Carriage of Goods by Road (CMR Convention)[97] is applied in the Member States with regard to disputes on transport contracts. If one party is from the EU and another from a third State (CMR Contracting State), a dispute on a transport contract will fall under the CMR Convention. That will be the case even if the parties had chosen, by way of a jurisdiction clause, the courts of an EU Member State. In other words, that jurisdiction clause, because it belongs to the transport sector, will be adjudicated as to its validity, on the basis of the CMR Convention and not on the basis of the Brussels I Regulation. The same will of course apply if the same two parties chose a court in a third State which is party to the CMR Convention. Even if the parties are both from EU Member States and appointed, by way of a forum clause, an EU court, the CMR Convention will prevail.[98] The European Court of Justice has confirmed that the jurisdictional rules of that CMR Convention apply even if the criteria regarding the personal scope of the Brussels Convention are fulfilled. In the *Portbridge* case, when the defendant did not appear, the *Oberlandesgericht* (District Court of Appeal) of Munich posed a preliminary question as to whether it might assume jurisdiction on the basis of the CMR Convention.[99] The Court replied that the jurisdictional rules of the CMR Convention were retained, and applied to the same extent as those of the Brussels Convention itself. Therefore, the German Court clearly had jurisdiction and could hear the case.[100]

Similarly, the Air Carriage Convention[101] is applied regarding disputes on carriage by air, even if both parties are domiciled in EU Member States.[102] Therefore, ***a fortiori***, it will apply if only one of the parties is from the EU and the other from a third State. The Arrest Convention[103] also takes precedence over the Brussels I Regulation, as has been recognised by the English Court in *The Linda*.[104] In that case jurisdiction was based on the arrest of ships, in accordance with the Arrest Convention.

[96] Art 71 Brussels I Regulation.
[97] Geneva, 1956.
[98] See Belgian Hof *van Cassatie* (Court of Cassation), 29 April 2004, http://www.juridat.be; *Rechtbank van koophandel* (Commercial Court) of Hasselt (Belgium), 24 November 2004 (AR 04/4119), http://www.euprocedure.be.
[99] ECJ case 148/03, judgment of 28 October 2004, *Nürnberger Allgemeine Versicherungs AG v Portbridge Transport International BV*, not yet reported in *ECR*, see http://www.curia.eu.int.
[100] Art 20 Brussels Convention applied; Art 26 Brussels I Regulation.
[101] Convention for the unification of certain rules relating to international carriage by air (Warsaw, 1929). This Convention has in the mean time been updated by the Montreal Convention of the same name (1999).
[102] *Milor SRL & others v British Airways plc* [1996] QB 702; [1996] ILPr 426 (CA).
[103] International Convention for the Unification of Certain Rules relating to the Arrest of Seagoing Ships (Brussels, 1952).
[104] *The Linda* [1988] 1 Lloyd's Rep 175.

If the convention on a specific matter contains jurisdiction rules, but no rules on *lis pendens* or related actions, the Brussels I Regulation can be applied to resolve that issue between the courts of two EU Member States. This has been affirmed by the European Court of Justice in *The Tatry*[105] regarding the Arrest Convention[106] and in the *Mærsk Olie* case,[107] regarding the International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships,[108] although the facts of these cases did not permit the application of the *lis pendens* rule, since respectively the parties and the causes of action were not identical.

Likewise, the recognition and enforcement of judgments can fall under the Brussels I Regulation even though jurisdiction has been based upon a convention on a specific matter. The European Court of Justice, in the *Mærsk Olie* case, ruled that a limitation of liability established by an EU Member State court according to the International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships, was a "judgment" for purposes of the Brussels Convention and therefore had to be recognised under the Brussels Convention. It did not take account of the basis of jurisdiction. Therefore, parties from third States could easily give greater effect to the limitation of their liability under the Limitation of Liability Convention by obtaining a declaration from an EU Member State court (provided that such a court has jurisdiction to do so under the Limitation of Liability Convention). The limitation of liability would automatically be valid throughout the EU.

The Hague Convention on Choice of Court Agreements,[109] which deals with one of the topics of the Brussels I Regulation, will be considered in Chapter 4 on forum clauses.[110]

Possible conflicts with the Brussels II*bis* Regulation also exist, mainly because of the recent and successful activities of the Hague Conference on Private International Law. The Brussels II*bis* Regulation respects the international conventions already in force. However, regarding relations between Member States, the Regulation will supersede these conventions.[111]

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[105] ECJ case 406/92, judgment of 6 December 1994, *The owners of the cargo lately laden on board the ship "Tatry" v the owners of the ship "Maciej Rataj"* [1994] *ECR* I-5439.
[106] International Convention for the unification of certain rules relating to the arrest of sea-going ships (Brussels, 1952)
[107] ECJ case C-39/02, judgment of 14 October 2004, *Mærsk Olie & Gas A/S v Firma M de Haan en W de Boer*, not yet published in *ECR*, see http://www.curia.eu.int.
[108] (Brussels, 1957)
[109] Adopted on 30 June 2005.
[110] See *infra*, Chapter 4, p. 2 *et seq.*
[111] See H Gaudemet-Tallon, "Le Règlement no. 1347/2000 du Conseil du 29 mai 2000: 'Compétence, reconnaissance et exécution des decisions en matière matrimoniale et en matière de responsabilité parentale des enfants communs' ", (2001) *JDI* p 381-430, at p 421-426; M Jänterä-Jareborg, "Marriage dissolution in an integrated Europe: The 1998 European Union Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (Brussels II Convention)" (1999) *YPIL* p 1-36 at p 27-31.

The Insolvency Regulation is still a bit unique and not many international conventions exist in that field.

6. The relationship between the EU civil jurisdiction rules and the Lugano Convention

The Lugano Convention came into existence in 1988. A number of European States that were direct neighbours of the EU, had seen the benefits of an easy system of the recognition and enforcement of judgments. The new Convention was virtually a carbon copy of the Brussels Convention.[112] The current Contracting States are the fifteen old EU Member States (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain, Sweden and the United Kingdom), Poland, Switzerland, Iceland and Norway. It is a closed system in the sense that it is not possible for all States to become party to become party to the Lugano Convention. The Contracting States created a system of invitation. It is in this way that Poland (when it was still a candidate EU Member State) joined the Convention in 2002. The nine remaining new EU Member States (Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Slovakia, Slovenia) are not yet party to the Lugano Convention, but they will be able to join a new version of the Lugano Convention since they are now EU member States.

The rules of the Brussels Convention and of the Lugano Convention were almost identical so that the question as to which of the two applied, was often rather academic. On the other hand there were small differences, which might be pertinent in a particular case. Moreover, there is one broad exception to the similarity: the interpretative authority of the European Court of Justice. If a court is unsure as to the application of the Brussels Convention, it may refer a preliminary question to the European Court of Justice. That is not possible when the court is applying the Lugano Convention.

With the conversion of the Brussels Convention to the Brussels I Regulation, however, the parallelism was lost as some of the rules were changed or updated. The intention is to restore that parallelism with the updating of the Lugano Convention. The European Court of Justice will of course remain incompetent to interpret the Lugano Convention. Negotiations to allow for the updating of the Lugano Convention to make its rules parallel to the Brussels I Regulation were stalled by a dispute between the EU Member States and the EC (embodied by the Commission) regarding the external competence of the EC and who may negotiate and sign the new Lugano Convention. That dispute will be discussed in Chapter 7.[113]

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[112] Regarding the history of the Lugano Convention, see PAM Meijknecht, "The verdrag van Lugano en het toetredingsverdrag van San Sebastian, in onderling verband" in PAM Meijknecht & H Duintjer Tebbens, *Europees bevoegdheids- en executierecht op weg naar de 21ste eeuw* (Deventer: Kluwer, 1992) p 3-49 at p 7-11.

[113] See *infra,* p 2 *et seq*.

The relationship between the Brussels I Regulation and the Lugano Convention manifests itself on different points, namely the rules of jurisdiction, procedural rules related to jurisdiction, such as *lis pendens* and related actions, and rules on recognition and enforcement.

Turning first to the jurisdictional rules, it has to be borne in mind that this thesis concentrates on the Brussels I Regulation and its borders. It is submitted that the jurisdictional rules of the Lugano Convention do not influence the scope of the jurisdiction rules of the Brussels I Regulation. Therefore, for third States other than the Lugano States, the mere existence of the Lugano Convention will not influence the rules considered in this study. The Lugano Convention must not be seen as more than what it is: an extension to a number of neighbouring States of the rules of the Brussels I Regulation. Support for this view can be found in article 54*ter* of the Lugano Convention, which states that the Lugano Convention shall not prejudice the application of the Brussels I Regulation in the EU.[114]

Therefore, the exact borderlines of the Brussels I Regulation affects the Lugano Convention (and not vice versa). One will firstly have to determine the scope of the Brussels I Regulation. If it does not apply, and there are no other international conventions, one will refer to the domestic rules. However, in relations with Iceland, Norway and Switzerland, the Lugano Convention has in some instances replaced those domestic rules. Then, because of the similarity of the rules, the Lugano Convention's scope is similar and the conclusions drawn in this thesis, apply *mutatis mutandis*. In that sense, Iceland, Norway and Switzerland are not third States like other third States which are considered in this thesis.

Regarding general bases of jurisdiction, the Lugano Convention is applicable if the defendant is domiciled in a Lugano Contracting State that is not an EU Member State (*ie* Iceland, Norway or Switzerland). Nationality, as under the Brussels I Regulation, plays no role. If there are multiple defendants, jurisdiction over every defendant is determined according to his/her domicile. Therefore if one defendant is domiciled in France, the Brussels I Regulation will be applied. For his/her co-defendant domiciled in Switzerland, the Lugano Convention will be applied. For a third co-defendant domiciled in South Africa, the domestic rules of the forum will be applied.[115]

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[114] In the text the reference is to the Brussels I Convention, but it should be read as the Brussels Regulation, as successor instrument to the Brussels Convention. This article took the negotiaters a long time to reach concensus on; Y Donzallaz, *La Convention de Lugano du 16 septembre 1988 concernant la compétence judiciaire et l'exécution des décisions en matière civile et commerciale* (Berne: Editions Stæmpfli + Cie SA Berne, 1996) vol 1, p 101-104. See, in general, on the limitation between the Brussels I Regulation and the Lugano Convention: GAL Droz, "La convention de Lugano parallèle à la convention de Bruxelles concernant la compétence judiciaire et l'exécution des décisions en matière civile et commerciale" (1989) *RCDIP* p 1-51 at p 7-9; J Erauw, "De verdragen van Brussel en Lugano uitmekaar houden" (1996) *TBH* p 772-782, at p 780; A Briggs & P Rees, *op cit* (fn 59) p 239-250.

[115] See Chapter 2, Part B, p 2 *et seq* for more detail. See also M Carpenter, "Developments in the Law relating to the International Conventions Considered in the Context of the European

This basic standpoint is important for defendants from Iceland, Norway and Switzerland, as a specific category of third States (*ie* third States with regard to the Brussels I Regulation, subject of the thesis).

However, the English courts incorrectly did not follow this basic rule in *Canada Trust and others v Stolzenberg and others*.[116] One defendant was domiciled in England, some others in Switzerland and yet others in Liechtenstein, Panama and the Netherlands Antilles. The House of Lords, like the courts from which the appeal came, applied the Lugano Convention to the entire case. The rule providing jurisdiction to the courts of the place where the defendant is domiciled, is the same in the Brussels Convention and the Lugano Convention, so that at first sight no harm was really done to the particular defendants from Switzerland in this case.[117] However, as has been indicated, there are small differences between the Brussels I Regulation and the Lugano Convention (for instance, before altering the Lugano text, with regard to employees).

Furthermore, it so happened that there was a difficult point of interpretation that surfaced in this case: the defendant domiciled in England moved between the moments of the issue of the writ and service. The House of Lords interpreted this point without reference to the European Court of Justice, since it found that it could not pose preliminary questions of interpretation regarding the Lugano Convention. If it had posed the preliminary question and the European Court of Justice had come to a different conclusion than the House of Lords, the result might have been that the English courts in fact did not have jurisdiction over the first defendant. That might have changed the matter for all the third State defendants (the Swiss and the others): the English courts might not have had jurisdiction over any of them.

On the jurisdictional level, the relationship between the Brussels I Regulation and Lugano Convention can also be determined by the exclusive bases of jurisdiction. The Lugano Convention applies if an exclusive basis of jurisdiction (*eg* immovable property) is situated in a Lugano Contracting State that is not an EU Member State.[118]

Judicial Area", in Court of Justice of the European Communities, *op cit* (fn 85) p 234; Y Donzallaz, *op cit* (fn 114) vol 1, p 104; H Duintjer Tebbens, "De Europese bevoegdheids- en executieverdragen: uitlegging, samenloop en perspektief" in PAM Meijknecht & H Duintjer Tebbens, *Europees bevoegdheids- en executierecht op weg naar de 21ste eeuw* (Deventer: Kluwer, 1992) p 53-117 at p 89-90.

[116] [2002] 1 AC 1 (HL). For a more detailed discussion of this case, see *infra*, Chapter 2, p 2 *et seq*.

[117] The case was decided before the enactment of the Brussels I Regulation; of course the rule on the domicile of the defendant is the same in the Regulation as well.

[118] See Art 54*ter*(2)(a) Lugano Convention. Art 16 Lugano Convention is almost identical to Art 22 Brussels I Regulation (exclusive bases of jurisdiction). For a more detailed discussion of this rule, see Chapter 3, p 2 *et seq*.

Similarly, if a forum clause appoints the courts of a Lugano Convention Contracting State that is not an EU Member State, while one of the parties is domiciled in any Lugano Convention Contracting State (EU or non-EU), the Lugano Convention will apply.[119] Whether the other party is domiciled in an EU Member State, in a non-EU Lugano State, or in another third State, is not relevant.

Turning to the second point on the relationship between the Brussels I Regulation and the Lugano Convention, namely *lis pendens* and related actions, the distinction does not lie with the parties involved, but with the courts. If there is a problem of *lis pendens* between two Lugano Contracting States, one of which is an EU Member State and the other not, the Lugano Convention will govern the relation. It makes no difference which court was first seised, nor whether jurisdiction was based on the rules of the Brussels I Regulation.[120] This solution is in line with the basic rule of the Brussels I Regulation that those provisions only apply if both courts are EU Member States.[121]

Lastly, regarding recognition and enforcement, the principle is the same: if one of the courts (the court that gave the judgment or the recognising or enforcing court) is in a non-EU Lugano Contracting State, the Lugano Convention will apply.[122] The basis of the initial jurisdiction (whether domestic law, the Lugano Convention or the Brussels I Regulation) is irrelevant. Jurisdiction will not be tested at the time of recognition or enforcement, except if an exclusive basis of jurisdiction in an EU Member State or Lugano Convention Contracting or a protective basis of jurisdiction with regard to consumers or insured parties is concerned.

There are, however, authors that do not agree with this straight-forward construction, even though it seems perfectly in line with the borders of the Brussels I Regulation. The argument has been advanced for an extended interpretation of the concept of domicile. The Lugano Convention should then be applied if the defendant has one of the elements of his patrimonium in a Lugano Contracting State that is not an EU Member State, even if jurisdiction is not based on that element. An example is given of a defendant sued in Germany on the basis of his domicile there. If the defendant has a branch in Switzerland, the Lugano Convention should be applied and not the Brussels I

[119] See Art 54*ter*(2)(a) Lugano Convention. Art 1 Lugano Convention is almost identical to Art 23 Brussels I Regulation (forum clauses). For a more detailed discussion of this rule, see Chapter 4, p 2 *et seq*.
[120] See Art 54*ter*(2)(b) Lugano Convention; M Carpenter, “Developments in the Law relating to the International Conventions Considered in the Context of the European Judicial Area”, in Court of Justice of the European Communities, *op cit* (fn 85) p 234; Y Donzallaz, *op cit* (fn 114) vol 1, p 105; GAL Droz, "La convention de Lugano parallèle à la convention de Bruxelles concernant la compétence judiciaire et l’exécution des décisions en matière civile et commerciale" (1989) *RCDIP* p 1-51 at p 9-10.
[121] See Chapter 5, p 2 *et seq* for more detail.
[122] See Art 54*ter*(2)(c) Lugano Convention ; Y Donzallaz, *op cit* (fn 114) vol 1, p 105-110; GAL Droz, "La convention de Lugano parallèle à la convention de Bruxelles concernant la compétence judiciaire et l’exécution des décisions en matière civile et commerciale" (1989) *RCDIP* p 1-51 at p 8.

Regulation.[123] This does not seem correct and, as has been indicated, conflicts with the borders of the Brussels I Regulation regarded in their own right.

7. The Hague Conference on Private International Law as meeting place between the EU and third States

General

Established already in 1893 in The Hague, The Netherlands, the goal of the Hague Conference on Private International Law is the progressive unification of the rules of private international law.[124] Although it was first set up only among European States, the Conference currently has 65 Member States from all over the world.[125] Non-Member States may also attend meetings of the Hague Conference as observers.[126] This possibility is likewise available to non-governmental and international organisations. The European Communities, since their early days, observed the work of the Hague Conference, as did the Council of Europe.[127]

In this sense the Hague Conference has become a forum for negotiating international conventions of all kinds in the field of private international law. Because of the negotiating opportunities it offers, it has also become a school for comparative private international law in its own right. The different views that exist in various legal systems on civil jurisdiction have probably nowhere else given rise to such confrontation and such search for creative solutions as at the Hague Conference.

[123] Y Donzallaz, *op cit* (fn 114) vol 1, p 104.
[124] See Art 1 of the Statute of the Hague Conference, which entered into force in 15 July 1955 (from 1928 to 1951 the Confrence was inactive). See also its website: http://www.hcch.net.
[125] Albania, Argentina, Australia, Austria, Belarus, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, Chile, China, Croatia, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, Former Yugoslav Republic of Macedonia, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Jordan, Republic of Korea, Latvia, Lithuania, Luxembourg, Malaysia, Malta, Mexico, Monaco, Morocco, The Netherlands, New Zealand, Norway, Panama, Paraguay, Peru, Poland, Portugal, Romania, Russian Federation, Serbia and Montenegro, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Suriname, Sweden, Switzerland, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay and Venezuela.
[126] Before it became a Member State in 1964, the United States of America was such an observer; KH Nadelmann & WLM Reese, "The Tenth Session of the Hague Conference on Private International Law" (1964) *Am J Comp L* p 612-615 at p 612. At that point English became the the second official language of the Conference (alongside French); specifically on the language issues, see KH Nadelmann & AT Von Mehren, "Equivalences in treaties in the conflicts field" (1966-1967) *Am J Comp L* p 195-203 at p 195.
[127] See the Documents, Conférence de la Haye de Droit international privé, les 2 avant-projets (1996) *NILR* p 327-336 at p 327.

The Hague Conference and the EU

All 25 Member States of the European Union are Members. Although the European Community as institution has many legislative powers in the domain of private international law, including external competence,[128] it is not yet a Member of the Hague Conference. The reason is that the Hague Conference's 1955 Statute permits only States to be Members. In June 2005, the Member States of the Hague Conference reached agreement on amending the Statue in order to allow Regional Economic Integration Organisations (REIOs) to become Members. The new Statute now needs to be approved by two thirds of the Member States (44) before it can enter into force and the European Community can become a Member.

These changes to the Statute were primarily made to welcome the European Community, although the general wording would allow other international organisations with similar status and competences in the future to join the Hague Conference as full Members. In Africa many regional organisations exist, but they are only starting to develop, such as the African Union (AU), the Southern African Development Community (SADC), the Southern African Customs Union (SACU), the Organisation for the Harmonisation of Business Law in Africa (OHBLA, better know by the French acronym OHADA), the Economic and Monetary Community of Central Africa (CEMAC, French acronym) and the Economic Community of West Africa States (ECOWAS).[129] How far these organisations will go down the integration route, remains to be seen. The furthest seems to be OHADA, which has adopted uniform acts. Therefore more general REIO clauses might be able to serve them. The Organisation of American States (OAS) is also a regional organisation, enhancing co-operation in fields such as human rights, peace, security and trade. However, it does not seem that it will ever develop so far as to be able to create legislation. Some of the former USSR States are associated in the Commonwealth of Independent States (CIS). This Organisation cannot draft legislation, but facilitates co-operation between its Member States by way of treaties and co-ordinating institutions.[130]

In practice

The Hague Conference functions by way of *special commissions* and *diplomatic sessions.* A *special commission* is a negotiation between experts from the Member States. A *diplomatic session* is the finalising negotiations and adoption by representatives from the Member States. Member States are not obliged to ratify all

[128] On the external competences of the EU, see *infra*, Chapter 7, p 2 *et seq*.
[129] See, in general, H Van Houtte, *The Law of International Trade* (2nd edn, London: Sweet & Maxwell, 2002) p 48-52.
[130] See Preliminary Document No 27 of the Judgments project of the Hague Conference on Private International Law: The relationship between the judgments project and certain regional instruments in the arena of the Commonwealth of Independent States, prepared by E Gerasimchuk.

conventions, even if they had participated in the negotiations. On the other hand, non-Member States may also accede to conventions.

Furthermore, the Hague Conference has a secretariat, the Permanent Bureau, which is responsible for the preparatory research for conventions and the preparation and organisation of *special commissions* and *diplomatic sessions* between the Member States. The Foreign Ministry of The Netherlands has a special role in the Hague Conference: it serves as the depositary of the conventions.

The Hague Conference has to date adopted 43 conventions on various private international law topics concerning jurisdiction, applicable law, recognition and enforcement and international procedure. The most successful of these conventions are the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents,[131] the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters,[132] the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters,[133] the Convention on the Civil Aspects of International Child Abduction[134] and the Convention on Protection of Children and Co-operation in respect of Intercountry Adoption.[135] The Child Abduction Convention has gained importance by its partial incorporation in the Brussels II*bis* Regulation of the European Union and is in force in all EU Member States. Instead of creating a new system for international child abduction, the Brussels II*bis* Regulation uses the system installed by that Convention.[136]

The themes of the recognition and enforcement of foreign judgments and of civil jurisdiction returned several times to the agenda of the Hague Conference.

The 1971 Hague Convention[137]

An early venture at a recognition and enforcement convention in civil matters came in 1960 when the Council of Europe suggested a general regularisation of the issue. A Special Commission studied the subject.[138] The negotiations for this Convention started after the 1964 publication of the Common Market Draft of the Brussels Convention. All of the then 23 Member States of the Hague Conference were present: the meetings

[131] 5 October 1961.
[132] 15 November 1965.
[133] 18 March 1970.
[134] 25 October 1980.
[135] 29 May 1993.
[136] See Art 11 of the Regulation.
[137] Hague Convention on the recognition and enforcement of foreign judgments in civil and commercial matters (1971)
[138] Explanatory report by CN Fragistas, published in Conférence de La Haye de droit international privé (1969) *Actes et documents de la Session extraordinaire* p 360-388 at p 361. See also P Mercier, “Le projet de convention du marché commun sur la procédure civile internationale et les états tiers” (1967) *Cah Dr Eur* p 367-368 & 513-531, esp p 515-517.

provided a forum for discussing the threats that the Draft Brussels Convention posed.[139] The negotiations of this Hague Convention and the Brussels Convention continued simultaneously. It even seemed as if there was a race between the two as to which could be completed first.[140]

Another reason for the project was that many States required reciprocity for recognition and enforcement of judgments. In other States recognition and enforcement are only possible if a convention to that effect exists.[141] The best way to allow for recognition and enforcement is therefore concluding conventions, or creating a framework for the conclusion of conventions.

One of the main features of the Convention is that it requires bilateralisation. That means that it cannot enter into force between two Contracting States before they have concluded an extra agreement. These extra agreements can broaden or narrow the scope of the Convention, broaden the permitted bases of jurisdiction, define exclusive bases of jurisdiction or alter the procedure of recognition or enforcement. It allows States to adapt the Convention to their particular needs.[142]

This feature was inserted into the Convention because there were differences among the experts on whether a model for bilateral conventions or a multilateral convention where parties remained free to select their partners, should be created.[143] Jenard explains that bilateralisation differs from a model law: Contracting States do not have an unlimited possibility to modify the convention; in principle they can now only freely choose their partners. Modifications can only be made to the extent that they are permitted by the Convention itself.[144]

This bilateralisation is cumbersome as it requires more negotiation, more signing and more ratification. The reason for its introduction was mistrust. Member States of the Hague Convention could not know in advance which States would want to accede to

[139] See BM Landay, " Another Look at the EEC Judgments Convention: Should Outsiders be Worried?" (1987-88) *Dickens JIL* p 25-44 at p 33.
[140] (1969) *Actes et documents de la Session extraordinaire* p 10.
[141] (1969) *Actes et documents de la Session extraordinaire* at p 11; Explanatory report by CN Fragistas in the same volume of the *Actes et documents*, p 360-338 at p 360.
[142] Arts 21-23 of the 1971 Convention; see also P Jenard, "Rapport du Comité restreint sur la bilateralisation" and Explanatory report by CN Fragistas, both published in (1969) *Actes et documents de la Session extraordinaire* p 145-151 and p 360-388 at p 362-364; GAL Droz, "La récent projet de Convention de La Haye sur la reconnaissance et l'exécution des jugements étrangers en matière civile et commerciale" (1966) *NILR* p 225-242 at p 242. KH Nadelmann & AT Von Mehren, "The extraordinary session of the Hague Conference on Private International Law" (1966) *Am J Int Law* p 803-806 at p 804 state that the feature of bilateralisation was perhaps a first in treaty law; TC Hartley in AF Lowenfeld & LJ Silberman (eds), *The Hague Convention on Jurisdiction and Judgments* (USA: Juris Publishing, 2001) p 110-115.
[143] KH Nadelmann & AT Von Mehren, "The extraordinary session of the Hague Conference on Private International Law" (1966) *Am J Int L* p 803-806 at p 803.
[144] P Jenard, "Rapport du Comité restreint sur la bilateralisation" (1969) *Actes et documents de la Session extraordinaire* p 145-151 at p 145 & p 146-147.

the Convention and therefore they built in a safety net. It can be compared with the safety net of the Lugano Convention, providing that States may only become party to the exclusive club if they are invited.[145]

The Convention did not directly prescribe jurisdictional rules, but only indirectly; in other words it would be a "simple" convention, as opposed to a "double" one.[146] This means that Contracting States would remain free to determine their own jurisdictional rules; if recognition is sought in another Contracting State, however, the court may consider the jurisdictional basis of the judgment. If the jurisdictional basis is not contained in the "blessed" list of the Convention, recognition or enforcement may be refused. It was thought that a "double" convention, as was at the same time being negotiated between the Member States of the European Community, would be too difficult to achieve because of the great number of Member States of the Hague Conference.[147] This is ironic, since the number of Member States of the Hague Conference at that time was smaller than the number of Member States that the European Union now has. Probably it was not only the number of Member States that caused difficulty, but also their diversity.[148]

The Convention was adopted by the Extraordinary Session of 1966, but eventually ratified or acceded to by only four states: Cyprus, The Netherlands, Portugal and Kuwait. The first three of these states are Member States of the European Union with the effect that the Convention does not really have any added value for the relations between them. Kuwait only acceded in 2002. The bilateralisation requirement further disables this Convention. States have to conclude extra agreements in any event so that the Convention in itself is not very useful.

A global Hague jurisdiction convention

In 1992, on the initiative of the United States of America,[149] a fresh attempt was made: the Hague Conference started preliminary work on a convention on international jurisdiction and the effects of judgments in civil and commercial matters. One of the reasons for taking the theme up once more was yet again the Brussels Convention and the fact that it was so favourable to EU Member States while so unfavourable to third States. Moreover, in some countries recognition and enforcement of foreign judgments

[145] Arts 60 and 62 of the Lugano Convention.
[146] On the difference between simple and double conventions, see *supra*, p 2 *et seq*; GAL Droz, "La récent projet de Convention de La Haye sur la reconnaissance et l'exécution des jugements étrangers en matière civile et commerciale" (1966) *NILR* p 225-242 at p 226.
[147] (1969) *Actes et documents de la Session extraordinaire* p 10-11.
[148] See also Explanatory report by CN Fragistas, (1969) *Actes et documents de la Session extraordinaire* p 360-388 at p 362.
[149] In a Letter from the United States Legal Adviser of 5 May 1992; see *Acts & Proceedings of the Seventeenth Session,* I, 1993, p 231.

outside a treaty is difficult, if not impossible.[150] The USA had also come to understand that its liberal approach to recognising and enforcing foreign judgments was not being reciprocated. If you cannot beat them, join them. Or rather, if you cannot lead by example, join them by the rules of their game.

The reasons for choosing the Hague Conference as forum were the Secretariat's interest in the topic, the preparatory and logistical support that the Conference could provide and the fact that the USA would then not stand alone as it would if it were to negotiate only with the EU or Lugano States.[151] Preparatory work was done and at the eighteenth Diplomatic Session (1996) it was decided to refer the matter to a Special Commission.[152] Five Special Commission meetings followed between 1997 and 1999. The last text of the Special Commission will be referred to as the 1999-text.[153]

Thereafter the matter was sent to the nineteenth Diplomatic Session. That Diplomatic Session was spread over two sessions, the first of which took place in June 2001. The text then adopted (the 2001-text) was full of square brackets, the Hague Conference's way of indicating lack of consensus.[154] The text became so complex, that one could not understand it without reading the footnotes indicating the underlying issues. Because of the many remaining difficulties, the work was put on hold and replaced by a consideration of whether the work on this project should proceed and what the alternatives were.

The negotiations were made more difficult by the fact that the experts or representatives did not vote a single time. Everything had to be agreed by consensus. When there was lack of consensus, even if this concerned only one Member State, square brackets were inserted in the draft text. Another difficulty was that the position of the European Community was unclear: it was not a member of the Hague Conference, but in the course of the negotiations, with the entry into force of the Amsterdam Treaty, it gained external competence in the matters under discussion. Whether or not that competence became exclusive by the adoption of the Brussels I Regulation, was and remains uncertain.[155] The practical solution that the European Union and its Member States found for this dilemma was to co-ordinate their

[150] See A Bucher, "Vers une convention mondiale sur la compétence et les jugements étrangers" (2000) *SJ* p 77-133 at p 79; G Walter & SP Baumgartner (eds), *Recognition and Enforcement of Foreign Judgments Outside the Scope of the Brussels and Lugano Conventions* (The Hague: Kluwer 2000) at p 5; see also the national reports.
[151] See AT von Mehren, "Recognition and Enforcement of foreign Judgments: a New Approach of the Hague Conference?" (1994) *Law & Contemp Prob* p 271-287 at p 273.
[152] See Preliminary Document No 11, the report of the Special Commission by P Nygh and F Pocar (available at http://www.hcch.net) at 25; *Final Act* Part B, No 1 *of the Eighteenth Session*, I, 1996, p 47.
[153] See Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, adopted by the Special Commission on 30 October 1999 (amended version with new numbering) on http://www.hcch.net.
[154] See Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6 – 20 June 2001 on http://www.hcch.net.
[155] See Chapter 7 on the external competence of the European Community, *infra*, p 2 *et seq.*

viewpoints. Practically this meant that the experts or representatives had co-ordination meetings before the negotiations to align their views on the points to be discussed.

The ambitious idea was to negotiate a convention that would include jurisdictional rules and facilitate recognition and enforcement of judgments from other Contracting States. It would be a “mixed convention”, mixed referring to the fact that it would be neither a single nor a double convention.[156] The drafters were of the view that a single convention, dealing only with recognition and enforcement, would not address the needs sufficiently. A double convention, unifying jurisdictional rules as do the Brussels I Regulation and the Lugano Convention, on the other hand, was seen to be a good goal, but too ambitious. For this reason the Special Commission decided on a "mixed convention", a structure that would have some of the advantages of a double convention, yet still flexible.[157]

The proposed Convention never saw the light of day in that form, but its structure is nevertheless interesting to explore briefly. It contained a list of required bases for jurisdiction to be used in the Contracting States. This was called the “white list” and these bases of judgments would suffice for the recognition and enforcement of judgments. An example of uncontroversial white list jurisdiction is the domicile of the defendant. The Convention also had a list, the “black list” of excluded bases of jurisdiction, which might not be used except possibly with regard to parties from non-Contracting States. These were the rules that are outlawed by Article 3 of the Brussels I Regulation and Lugano Convention.[158] If used, the judgments resulting from these bases of jurisdiction would not be recognised in other Contracting States. Between these two categories a so-called “grey zone” was created, explaining the “mixed” nature of the Convention. These were bases of jurisdiction that were neither required nor excluded. Enforcement via the Convention would then not be automatic.

[156] For that distinction, see *supra*, p 2 *et seq.*

[157] On the debate between the specialists on the issue of whether the convention should be a double or a mixed one, see Preliminary Document No 7 of the Judgments Project of the Hague Conference for Private International Law (1997), prepared by C Kessedjian; http://www.hcch.net. See also Report by P Nygh & F Pocar, *op cit*, *supra*, fn 9.

[158] Although these instruments only outlaw them to the extent that the defendant is domiciled in a Member State or Contracting State, and not with regard to defendants from outside the protected zone. This has been severely criticised in the United States of America: see, for example, AT von Mehren, “Recognition and Enforcement of foreign Judgments: a New Approach of the Hague Conference?” (1994) *Law & Contemp Prob* p 271-287 at p 280-281; KH Nadelmann, “Jurisdictionally Improper Fora in Treaties on Recognition of Judgments: The Common Market Draft” (1967) *Colum L Rev* p 995-1023 at p 1002-1004 & 1019; F Juenger, “Judicial Jurisdiction in the United States and in the European Communities: a comparison” (1984) *Mich L Rev* p 1195 at p 1210-1212; AT von Mehren, “Recognition and Enforcement of Sister-State Judgments: Reflection on General Theory and Current Practice in the European Economic Community and the United States” (1981) *Colum L Rev* p 1044-1060 at p 1057-1060; BM Landay, “Another Look at the EEC Judgments Convention: Should Outsiders be Worried?” (1987-88) *Dickens JIL* p 25-44 at p 28-29 & 40; P Hay, “The Common Market Preliminary Draft on the Recognition and Enforcement of Judgments – Some Considerations of Policy and Interpretation” (1968) *Am J Comp L* p 149-174 at p 172-174.

However, enforcement would not be prevented and would remain possible via national law.

This idea came from Professor Von Mehren, who had realised that the differences not only in specific rules of national law, but also in approaches to jurisdiction are so big that they pose insurmountable problems to unification.[159] Professor Lowenfeld agreed with this idea, referring to green, red and yellow jurisdictional bases.[160]

Despite this attempt at flexibility, the differences still proved fundamental. Especially the United States of America and the European Union (negotiating as a single block) could not find each other on essential points. These approaches clashed and agreement could not be reached as to the category (white, black or grey) in which these rules should be put.

Some saw the Brussels and Lugano Conventions as a model for the worldwide convention. It was well-recognised that the Brussels and Lugano Conventions served their purposes with great efficacy: determining jurisdiction and the recognition and enforcement of judgments in the EU and between Lugano States was easy and the procedures were clear. In case of doubt, there was always the European Court of Justice (for the application of the Brussels Convention, and used as example for the Lugano Convention). However, that model did not assist the worldwide convention as much as hoped. On the contrary, it enlarged the gap, if not dungeon, between the European Union and other negotiating States. The systems in force in Europe exhibited a different legal and specifically procedural law character. The United States of America, for example, could not accept many of the rules in those conventions.[161] At the same time those conventions are embedded in closer economic unions, which made them desirable and necessary.[162] Naturally the conventions follow the European habit of enlisting permitted bases of jurisdiction and outlawing exorbitant bases. That would be the so-called white and black lists in the Von Mehren model. There is not much room left for grey possibilities and discretions. For the United States of America a complete “cataloguing” of bases of jurisdiction, would not be acceptable.[163]

[159] See AT von Mehren, “Recognition and Enforcement of foreign Judgments: a New Approach of the Hague Conference?” (1994) *Law & Contemp Prob* p 271-287 esp at p 285-287.
[160] See AF Lowenfeld, “Thoughts about a Multinational Judgments Convention: A Reaction to the Von Mehren Report” (1994) *Law & Contemp Prob* p 289-303. See also AF Lowenfeld & LJ Silberman (eds), *op cit* (fn 142) at viii, referring to the different groups as essential, exorbitant and tolerable.
[161] AT von Mehren, “Recognition and Enforcement of foreign judgments: a New Approach for the Hague Conference?” (1993-94) *Law & Contemp Prob* p 271-287 at p 280-281 states that even if invited, the United States of America would not be able to accede to the Lugano Convention because its article 3 violates due process standards.
[162] See A Bucher, “Vers une convention mondiale sur la compétence et les jugements étrangers” (2000) *SJ* p 77-133 at p 78.
[163] See AT von Mehren, “Recognition and Enforcement of foreign judgments: a New Approach for the Hague Conference?” (1993-94) *Law & Contemp Prob* p 271-287 at p 281.

In the USA jurisdiction is based on comity and the main test is compatibility with the Due Process Clause of the Constitution.[164] This is very different from the much stricter civil law approach.[165] The European approach opts for certainty and has clear rules on jurisdiction that cannot be interpreted liberally. For the Europeans "doing business" seems too uncertain and almost too arbitrary to be a basis for jurisdiction. These two different points of view can be called the "Court-Claim Nexus" and the "Court-Defendant Nexus". The "Court-Claim Nexus" is commonly found in civil law countries while the "Court-Defendant Nexus" is commonly found in common law countries.[166]

Reciprocity is often required for enforcement.[167] The US is considered to be open to enforce foreign judgments because it is always done in the absence of treaties, while other countries often refuse to enforce US judgments because of its broad jurisdictional rules and far-reaching punitive damage awards. One should note here that recognition and enforcement is regulated at the state level in the USA,[168] except for the Uniform Foreign Money-Judgments Recognition Act,[169] which has been accepted by many states and the principles of which are followed by other states that have not adopted it. In order to accept a worldwide treaty, fundamental changes in federal legislation would be necessary.

From the US point of view, the European approach clashes with the due process approach since some of the specific rules may lead to taking jurisdiction in a situation that would be constitutionally unsound. It is, for instance, unthinkable for the American approach to accept jurisdiction in tort solely on the basis of the place of injury or jurisdiction in contract solely on the basis of the place of performance. On the other

[164] United States Constitution, Fifth Amendment (1791): "*No person shall ...nor be deprived of life, liberty, or property, without due process of law;...*" and the State-law equivalent in the Fourteenth Amendment (1868): "*...nor shall any State deprive any person of life, liberty, or property, without due process of law...*". See also GB Born & D Westin, *International Civil Litigation in United States Courts*, (Deventer/Boston: Kluwer, 1989) p 23; P Hay, RJ Weintraub & PJ Borchers, *Conflict of Laws Cases and Materials* (11th edn, New York: Foundation Press, 2000) p 35-39.

[165] See also H Gaudemet-Tallon, "De quelques raisons de la difficulté d'une entente au niveau mondial sur les règles de compétence judiciaire international directe" in JAR Nafziger & SC Symeonides (eds), *Law and Justice in a Multistate World. Essays in Honor of Arthur T von Mehren* (Ardsley: Transnational Publishers, 2002) p 55-71 at p 62-65; RA Brand, "Jurisdictional Common Ground: in Search of a Global Convention" in the same book p 11-32.

[166] See M Dogauchi, Professor of Law at the University of Tokyo in his paper "The Hague Draft Convention from the Perspective of Japan", submitted to the Seminar on the Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, organised by UIA (Union International des Avocats), on 20-21 April 2001 in Edinburgh. Interestingly, he states that Japan is closer to a civil law system but adheres to the "Court-Defendant Nexus" principle; LJ Silberman, "Comparative Jurisdiction in the International Context: will the Proposed Hague Judgments Convention be Stalled?" (2002) *DePaul L Rev* p 319-349 at p 330-331.

[167] See G Walter & SP Baumgartner (eds), *Recognition and Enforcement of Foreign Judgments Outside the Scope of the Brussels and Lugano Conventions*, (The Hague: Kluwer, 2000) p 34-35.

[168] *Erie RR Co v Tompkins*, 304 US 64 (1938). See also L Silberman in AF Lowenfeld & LJ Silberman (eds), *op cit* (fn 142) at p 119-124 esp p 122.

[169] Of 1962; reproduced in AF Lowenfeld & LJ Silberman (eds), *op cit* (fn 142) at p D-71-D-73.

hand, for countries that are not familiar with activity as basis for jurisdiction and constitutional tempering, it is difficult to see in which cases jurisdiction would not be allowed.[170]

The Brussels I Regulation is only one small lane of a larger common road. It is necessary to ensure the four freedoms of the EU (free movement of persons, goods, capital and services). Some even see it as a fifth freedom: the free movement of judgments. The Regulation states in its preamble:
"*The Community has set itself the objective of maintaining and developing an area of freedom, security and justice, in which the free movement of persons is ensured. In order to establish progressively such an area, the Community should adopt, amongst other things, the measures relating to judicial cooperation in civil matters which are necessary for the sound operation of the internal market.*"[171]

At the same time, a convention on jurisdiction and the recognition and enforcement of foreign judgments may be experienced as an infringement of State sovereignty,[172] especially if States are not used to give up a part of their sovereignty, as are the European Union Member States. In the absence of such a common road, worldwide co-operation has proved to be very difficult. A Convention regulating the recognition and enforcement of judgments in itself will be useful, but the incentive for common rules of jurisdiction was perhaps not great enough to be an adequate reward for the efforts.[173]

Furthermore, a world-wide jurisdiction treaty would require trust in foreign legal systems, for example with regard to the notions of *forum non conveniens* and the principle of *lis alibi pendens*. Especially if there is no higher court to force a court to stay its proceedings and the national court knows that its own legal system can provide a judgment before the court of the other legal system, it is an open question whether it will decline its jurisdiction. The rise of the anti-suit injunction has confirmed the distrust that can exist between legal systems.[174] To make all of that fear and distrust dissolve by one convention proved very difficult. There would have to be mutual trust that other Contracting States would apply the convention and not assume jurisdiction contrary to it. This is also important for the subsequent enforcement of judgments. The trust should exist to such an extent that a court accepts that the other court used its jurisdiction in

[170] One of the problems encountered at the Edinburgh Informal Meeting (23-26 April 2001) was the delimitation of activity-based jurisdiction within the white and grey lists. Another problem was whether activity should be defined negatively or positively. In the June 2001 versions of Articles 6 (*Contracts*) and 10 (*Torts and Delicts*) of the Hague Convention, activity as basis for jurisdiction was included for the first time.
[171] Rec 1.
[172] See H Gaudemet-Tallon, "De quelques raisons de la difficulté d'une entente au niveau mondial sur les règles de compétence judiciaire international directe" in JAR Nafziger & SC Symeonides (eds), *Essays in Honor of Arthur T von Mehren, op cit* (fn 76) p 55-71 at p 58-62.
[173] See also AT Von Mehren in AF Lowenfeld & LJ Silberman (eds), *op cit* (fn 142) at p 63-64.
[174] See *supra*, Chapter 5, Part E, p 2 *et seq*.

accordance with the convention and to merit enforcement. Courts would need to trust each other that they will decline jurisdiction in matters where another court has exclusive jurisdiction or where there is a choice of court agreement in favour of another court.

Jurisdiction, involving the recognition and enforcement of foreign judgments, is probably the area in civil law where politics can play the greatest role. States can impose sanctions by extending their own jurisdiction or express political objections by refusing to recognise judgments of co-Signatory States, or by ignoring the jurisdiction of their courts. It is questionable whether the desire for uniform international jurisdiction, as a goal in itself, will be strong enough to trump parochial political considerations.

In the end, the negotiators' ambition could not be tempered. They attempted to put almost everything in either the white or the black list. They seemed to have forgotten the grey list, which would have made the project more realistic. The different legal cultures could not agree on filing in only two categories. A part should have been left uncategorised: agreeing to disagree. The political will seemed lacking to realise the formidable project.

However, ten years of effort and money had not been lost; the project produced an enormous source of comparative law and legal understanding of underlying principles and fears.[175] The disputes arising from the inclusion or exclusion of specific bases of jurisdiction that gave rise to difficulties at the negotiations will be referred to throughout the substantive part of this thesis.

The Hague Convention on choice of court agreements

It was then decided to start with something smaller, try to reach consensus, and, if that worked, build further conventions. The starting point was choice of court agreements in business-to-business contracts and this led to the adoption in June 2005 of a Convention.[176] The negotiators realised that this was a field in which consensus should not be too difficult. At the same time, it could become an extremely useful convention. The New York Convention already facilitates the enforcement of foreign arbitral

[175] As AF Lowenfeld and LJ Silberman wrote in the preface of their book *op cit* (fn 142) at vii: "*Whether or not the proposed Hague Convention on Jurisdiction and Foreign Judgments enters into effect among a large group of states, the negotiations and successive drafts have provoked fresh thinking throughout the world about international litigation, about one's own and other legal systems, and about what is a matter of custom or taste in the approach to civil procedure, in contrast to what is truly fundamental*." See also the preliminary documents for the Hague Convention on Choice of Court Agreements (2005); http://www.hcch.net.

[176] See Preliminary Document No 19 of the Hague Conference on Private International Law: "Reflection paper to assist in the preparation of a convention on jurisdiction and recognition and enforcement of foreign judgments in civil and commercial matter", prepared by A Schulz (http://www.hcch.net).

awards.[177] If the same type of rules could be created for choice of court agreements, legal certainty and protection for international trading would be provided. Businesses would then be more comfortable with choice of court clauses in favour of Contracting States' courts:[178] if they obtain a judgment, at least it will be readily enforceable in other countries and reliance would no longer have to be placed on comity. The specific rules of this new Convention and its disconnection from the Brussels I Regulation will be considered in Chapter 4 on forum clauses.[179]

8. Conclusion

This Chapter has provided the necessary background before the substantive investigation regarding the civil jurisdiction and third States can begin. It has indicated the origins of EU civil jurisdiction, which started already in 1968 with the Brussels Convention and was significantly changed by the advent of the Amsterdam version of the EC Treaty.

The Chapter has paid some attention to the interaction between the EU civil jurisdiction rules and national rules on the topic. The scope of the EU civil jurisdiction rules will be examined throughout the thesis, but two underlying viewpoints had to be explained and will be referred to when the need arises in the course of the thesis.

The reader has to be aware of the parallel Lugano Convention, which makes Iceland, Norway and Switzerland third States of a particular category: they often have the same civil jurisdiction rules and can therefore in practice not really be seen as third States in the same way as other third States. Some conventions on specific matters exist and have EU Member States and third States as Parties. Those conventions will be respected and applied, and this sometimes entails a carve-out of the Brussels I Regulation or of the Brussels II*bis* Regulation.

Lastly, the importance of the Hague Conference on Private International Law as meeting place between the EU and third States has been pointed out. Its efforts will also be referred to during the discussions that follow.

[177] Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This Convention is old (it was signed in 1958), but because of its simplicity and uncontroversial nature, it has proved very successful in international arbitration and currently has 134 Contracting States.
[178] See the research done by the International Chamber of Commerce in this respect: http://www.iccwbo.org/law/jurisdiction/.
[179] See *infra*, p 2 *et seq*.

Chapter 2: First cornerstone: domicile of the defendant

Part A: General

Article 59 of the Brussels I Regulation:
in order to determine whether a party is domiciled in the Member State whose courts are seised of a matter, the court shall apply its internal law.
If a party is not domiciled in the Member State whose courts are seised of the matter, then, in order to determine whether the party is domiciled in another Member State, the court shall apply the law of that Member State.

Article 60 of the Brussels I Regulation:
For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:

a) statutory seat, or
b) central administration, or
c) principal place of business.

For the purposes of the United Kingdom and Ireland 'statutory seat' means the registered office or, where there is no such office anywhere, the place under the law of which the formation took place.
In order to determine whether a trust is domiciled in the Member State whose courts are seised of the matter, the court shall apply its rules of private international law.

Recital 13 of the Insolvency Regulation:
The 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.

Recital 14 of the Insolvency Regulation:
This Regulation applies only to proceedings where the centre of the debtor's main interests in located in the Community.

Article 3 of the Insolvency Regulation:
The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.
Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of the latter Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.
…

1. Introduction

The best place to start the substantive part of this thesis, is the general rule of jurisdiction: the domicile (under the Brussels I Regulation[1]), habitual residence or nationality (under the Brussels II*bis* Regulation[2]) of the defendant or the centre of the main interests of the debtor (under the Insolvency Regulation[3]) can grant jurisdiction. This rule also provides the first general delimitation of the scope of the Regulations.

The Brussels I Regulation applies to defendants domiciled in the EU.[4] The reverse side of the coin is found in the provision that defendants domiciled in third States do not fall under the rules of the Brussels I Regulation, but national bases of jurisdiction apply to them.[5] The rule of the domicile of the defendant is the first of three main rules on the scope of the Brussels I Regulation. As will be seen in the following chapters, the other two rules are the existence of exclusive bases of jurisdiction,[6] and forum clauses in favour of an EU Member State court if one of the parties is domiciled in the EU.[7]

Habitual residence and nationality performs the same function for the Brussels II*bis* Regulation, although uncertainty exists as to its exact delimitation. The centre of a debtor's main interests provides the borderline for the applicability of the Insolvency Regulation.

After a brief overview of general jurisdiction, the term "domicile" as compared to "habitual residence" and "centre of the main interests" will be discussed. These concepts need to be regarded for natural and legal persons. Next, the positions of plaintiffs and defendants inside and outside the EU will be investigated. The international nature of the dispute needs attention. After these themes, the Chapter will turn to the issues that arise when there are multiple defendants, actions on warranties and guarantees, or counter-claims.

[1] Art 2 Brussels I Regulation.
[2] Art 6 Brussels II*bis* Regulation.
[3] Art 3 Insolvency Regulation.
[4] Jenard Report, p 13; A Saggio, "The outlook for the System for the Free Movement of Judgments Created by the Brussels Convention" in Court of Justice of the European Communities, *Civil Jurisdiction and Judgments in Europe* (London: Butterworths, 1992) p 201; GAL Droz, *Pratique de la convention de Bruxelles du 27 septembre 1968* (Paris: Dalloz, 1973) p 17 & 39; P Gothot & D Holleaux, *La Convention de Bruxelles du 27.9.1968. Compétence judiciaire et effets des jugements dans la CEE*, (Paris: Editions Jupiter, 1985) p 19; H Born, M Fallon & J-L Van Boxstael, *Droit judiciaire international. Chronique de jurisprudence 1991-1998* (Brussels: Larcier, 2001) p 25; B Audit & GA Bermann, "The application of private international norms to "third countries": the jurisdiction and judgments example" in A Nuyts & N Watté (eds), *International Civil Litigation in Europe and Relations with Third States* (Brussels: Bruylant, 2005) p 55-82 at p 66-68.
[5] Art 4 Brussels I Regulation.
[6] See *infra*, Chapter 3, p 2 *et seq.*
[7] See *infra*, Chapters 4, p 2 *et seq*.

2. What is general jurisdiction?

General jurisdiction refers to the basis upon which a court can always assume jurisdiction with regard to a specific defendant, irrespective of the legal nature of the action. The same general ground for jurisdiction could be used against a defendant in a tort case, a claim for maintenance, divorce or the non-performance of a contractual obligation.

The basis of the rule lies in Roman law: *actor sequitur forum rei*. At first this was a principle of domestic law, but it was later transferred to international disputes.[8] The historical concept of jurisdiction was based on the sovereign's relationship with the defendant or his/her property and not the character of the dispute. The exercise of power over the defendant was important and in a sense seen as a confirmation of sovereignty over him/her, so that he/she could be brought before the courts.

This exercise of power extended in strange forms. In the nineteenth century, in most cases the parties could be found where the dispute arose. All claims, except those regarding immovable property, could be decided in any forum where the defendant was found.

Different legal systems developed the concept differently. Service was seen as a form of physical power, because that entailed getting hold of the defendant.[9] In the USA, a defendant who was regularly found in a jurisdiction, because he does business there, could be subjected to the US courts. A distinction developed in the USA between general jurisdiction and specific jurisdiction. Whereas general jurisdiction meant that a court had jurisdiction over a defendant, whatever the claim, specific jurisdiction was issue-related.[10] A court then only had jurisdiction over the specific matter concerned with the defendant's business in the area. The distinction in the EU between jurisdiction based on the domicile of the defendant and jurisdiction on the basis of the performance of a contract or the committing of a tort, is very similar to that between general and specific jurisdiction.

Another underlying thought in civil jurisdiction is that if the plaintiff wants to bother the defendant by suing him/her, the plaintiff should go to the place of the defendant. The plaintiff controls the institution of the proceedings and many are of the view that the

[8] See AT Von Mehren & DTT Trautman, "Jurisdiction to Adjudicate: A Suggested Analysis" (1966) *Harv L Rev* p 1121-1179 at p 1127-1128.

[9] See M Twitchell, "The Myth of General Jurisdiction" (1988) *Harv L Rev* p 610-681 at p 614-622. See also *McDonald v Mabee*, 243 US 90, 37 S Ct 343 (1917); *Michigan Trust Co v Ferry*, 228 US 346, 33 S Ct 550 (1913); See JJ Fawcett, "A new Approach to Jurisdiction over Companies in Private International law" (1988) *ICLQ* p 645-667, at p 648.

[10] Borcher makes the distinction that general bases of jurisdiction are independent of the dispute while specific bases are dependent on the dispute; PJ Borchers, "Comparing Personal Jurisdiction in the US and the EC: Lessons for American Reform" (1992) *Am J Comp L* p 121-157 at p 133.

plaintiff might abuse this power and therefore the defendant should be protected.[11] In theory a defendant is also in a stronger position when litigating in his/her own court, where he/she knows the procedural law.

Whether these ideas still hold true, is questionable. Von Mehren and Trautman stated, already in 1966, that the emerging bases of jurisdiction founded upon activity results in a movement away from the bias favouring the defendant toward permitting the plaintiff to insist that the defendant come to him.[12] After all, if the plaintiff finds him/herself in a situation where there is no choice but to start court proceedings in order to obtain what legally belongs to him/her, that cannot reasonably be labelled "trouble-maker". The plaintiff might have acted totally in accordance with his/her rights and obligations and be confronted by a defaulting contracting party, or might be the victim of a delict or tort. In such a case, one could question the emphasis on the protection of the defendant, as opposed to the "trouble-making" plaintiff.

In most EU legal systems, the general basis of jurisdiction is, however, still the domicile or residence of the defendant.[13] The European Court of Justice has confirmed the general nature of this rule on many occasions.[14] The parallel movement in Europe can

[11] See ER Sunderland, "The provisions relating to trial practice in the new Illinois Civil Practice Act" (1933-1934) *U Chic LR* p 188-223 at p 192.

[12] AT Von Mehren & DTT Trautman, "Jurisdiction to Adjudicate: A Suggested Analysis" (1966) *Harv L Rev* p 1121-1179 at p 1128. It was in this article that the concepts of "general" and "specific" jurisdiction were first used; it was then taken over by the courts; see PJ Borchers, "Jurisdiction to Adjudicate Revisited" in JAR Nafziger & SC Symeonides (eds), *Law and Justice in a Multistate World. Essays in Honour of Arthur T von Mehren* (Ardsley: Transnational Publishers Inc, 2002) p 4.

[13] See, for example, Art 126 of the Netherlands *Wetboek van burgerlijke rechtsvordering* (Code of Civil Procedure); Art 5 of the Belgian *Code de droit international privé* (Private International Law Code), Act of 16 July 2004, published in *BS* 27 July 2004; Arts 42 and 43 of the French *Nouveau code de procedure civile* (New Code of Civil Procedure).

[14] See ECJ cases 24/76, judgment of 14 December 1976, *Estasis Salotti di Colzani Aimo et Gianmario Colzani v Rüwa Polstereimaschinen GmbH* [1976] *ECR* 1831, at rec 7; 73/77, judgment of 14 December 1977, *Sanders v Van der Putte* [1977] *ECR* 2383, at rec 8-9; 23/78, judgment of 9 November 1978, *Meeth v Glacetal*, *ECR* 1978, 2133, at rec 5; 33/78, judgment of 22 November 1978, *Somafer SA v Saar-Ferngas AG*, *ECR* 1978, 2183, at rec 7 & 11; 56/79, judgment of 17 January 1980, *Zelger v Salinitri* (No 1) [1980] *ECR* 89 at rec 3; 220/84, judgment of 4 July 1985, *AS-Autoteile Service GmbH v Pierre Malhé* [1985] *ECR* 2267 at rec 15-16; C-261/90, judgment of 26 March 1992, *Mario Reichert, Hans-Heinz Reichert and Ingeborg Kockler v Dresdner Bank AG* (No 2) [1992] *ECR* I-2149, at rec 10; C-26/91, judgment of 17 June 1992, *Jakob Handte & Co GmbH v Traitements Mécano-chimiques des Surfaces SA* [1992] *ECR* I-3967 at rec 14; C-89/91, judgment of 19 January 1993, *Shearson Lehmann Hutton Inc v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH* [1993] *ECR* I-139 at rec 14-15; C-288/92, judgment of 19 June 1994, *Custom Made Commercial Ltd v Stawa Metallbau GmbH* [1994] *ECR* I-2913 at rec 12; C-364/93, judgment of 19 September 1995, *Antonio Marinari v Lloyds Bank plc and Zubaidi Trading Company* [1995] *ECR* I-2719 at rec 13; C-106/95, judgment of 20 February 1997, *Mainschiffahrts-Genossenschaft eG (MSG) v Les Gravières Rhénanes SARL* [1997] *ECR* I-911 at rec 14; C-269/95, judgment of 3 July 1997, *Benincasa v Dentalkit* [1997] *ECR* I-3767, at rec 13; C-51/97, judgment of 27 October 1998, *Réunion européenne SA and others v Spliethoff's Bevrachtingskantoor BV and the Master of the vessel Alblasgracht V002* [1998] *ECR* I-6511 at rec 16; C-256/00, judgment of 19 February 2002, *Besix SA v WABAG GmbH & Co KG &*

be seen in the use of the place of the performance of a contract, or the place of the commission of a tort as basis for jurisdiction. These places often coincide with the domicile or residence of the plaintiff.[15]

The criterion of the domicile of the defendant seems relatively clear and easy to apply,[16] but it will be indicated that it is not always as straightforward as it appears at first sight.

3. The concepts of domicile, habitual residence and centre of the main interests

Preliminary remarks

It is important to note at this stage that the Brussels I Regulation attaches no importance to the notion of nationality. The domestic jurisdiction rules that are based on the nationality of one of the parties, have been listed in Article 3 among the exorbitant bases of jurisdiction. These have been abolished for defendants domiciled in the EU. The most often quoted examples are the French rules that a Frenchman may always bring proceedings in France[17] and that a Frenchman may always be sued in the courts in France.[18]

The result of the irrelevance of nationality is that a dispute between an Irishman and a German both domiciled in France, will not fall under the Brussels I Regulation, but under French national rules on jurisdiction.[19] The fact that one party has Irish and the other German nationality, is not an international element to the dispute. The reverse side is that the Regulation will apply between two French nationals, one domiciled in France and the other in Ireland. If a French national, domiciled in France, wants to bring action in the EU against an Irish national domiciled in Hawaii, he/she would have to search for a basis of jurisdiction not in the Regulation but in the relevant national

Plafog GmbH & Co KG [2002] *ECR* I-1699 at rec 26 & 50. See also K Hertz, *Jurisdiction in Contract and Tort under the Brussels Convention* (Copenhage: Jurist-og Økonomforbundets Forlag, 1998) p 47.

[15] See P Nygh, "The criteria for judicial jurisdiction" in AF Lowenfeld & LJ Silberman (eds), *op cit* (fn 89) p 13; E Jayme, "The role of Article 5 in the scheme of the convention. Jurisdicton in matters relating to contract" in Court of Justice of the European Communities, *op cit* (fn 4) p 74 and the discussion *infra*, p 2 *et seq*.

[16] See JJ Fawcett, "A new Approach to Jurisdiction over Companies in Private International law" (1988) *ICLQ* p 645-667 at p 648.

[17] Art 14 French *code civil* (Civil Code).

[18] Art 15 French *code civil* (Civil Code). This rule also existed in Belgium, but was deleted in 2004, with the entry into force of the *Code de droit internaitonal privé* (Private International Law Code), Act of 16 July 2004, published in *BS* of 27 July 2004.

[19] H Born, M Fallon & J-L Van Boxstael, *op cit* (fn 4) p 70. see also *Cour d'appel* (Court of Appeal) of Paris, judgment of 27 March 1987 with case note by A Huet, (1988) *JDI* 140-143, finding that the Ivorian nationality of the defendant was irrelevant since he was domiciled in France.

systems. That is because the defendant is not domiciled in the EU. The Irish nationality of the defendant is once again irrelevant.

In the Insolvency Regulation, as in the Brussels I Regulation, nationality plays no role.

Nationality does, however, play a role in the jurisdiction rules of the Brussels II*bis* Regulation.[20] The nationality of one party is never sufficient to grant jurisdiction, but nationality plus habitual residence, or the common nationality of the parties can grant jurisdiction.[21] The concept of nationality does not need further elaboration, while the problems relating to dual nationality will be discussed in Part C on the jurisdictional bases of the Brussels II*bis* Regulation.[22]

Earlier versions of the Brussels Convention contained a separate rule for determining the domicile of dependent persons:
"*The domicile of a party shall, however, be determined in accordance with his national law if, by that law, his domicile depends on that of another person or on the seat of an authority.*"
This provision was deleted from the San Sebastian version (1989) of the Convention. The reasoning given in the Almeida/Cruz/Jenard report is that the provision was no longer necessary with regard to women as the domestic laws of the States had changed. In deciding whether someone is minor, a court would have to apply its own conflict of law rules.[23]

Domicile of natural persons

The term "domicile" is used throughout the Brussels I Regulation, mostly that of the defendant, but in cases of maintenance and protective bases of jurisdiction, also that of the plaintiff.[24] However, no clear and binding definition exists in the Regulation. It was thought, at the time of negotiation of the first version of the Brussels Convention that a definition of "domicile" would exceed the Convention and would amount to a uniform law.[25] The drafters feared to multiply the definitions and in this way encourage

[20] One can debate whether a distinction on the basis of nationality is justified in EU law, where all EU citizens are supposed to be treated equally and discriminaton on the basis of nationality is not permitted (Art 12 EC Treaty). That fine-tuning of EU law falls beyond the ambit of this thesis. Note that for Ireland and the United Kingdom, nationality is not important, but rather domicile in its common law understanding. See *infra*, p 2 *et seq*.
[21] Art 3(1) Brussels II*bis* Regulation; see also Part C of this Chapter, p 2 *et seq*, dealing with the jurisdictional rules of this Regulation in more detail.
[22] See *infra*, p 2 *et seq*.
[23] See Almeida/Cruz/Jenard Report, p 80-81. See also PAM Meijknecht, "Het verdrag van Lugano en het toetredingsverdrag van San Sebastian, in onderling verband" in PAM Meijknecht & H Duintjer Tebbens, *Europees bevoegdheids- en executierecht op weg naar de 21ste eeuw* (Deventer: Kluwer, 1992) p 3-49 at p 35.²
[24] Arts 5(2), 8(1)(b) and 16(1) Brussels I Regulation.
[25] Y Donzallaz, *La Convention de Lugano du 16 septembre 1988 concernant la compétence judiciaire et l'exécution des décisions en matière civile et commerciale* (Berne: Editions Stæmpfli + Cie SA Berne, 1996) vol 1, p 394.

incoherence. At the same time, the evolution of national law could have rendered the definition outdated.[26]

In the civil law European countries, domicile and residence are in principle the same. It generally means the place where a person has his/her main residence and is enrolled as such in the public registers.[27]

In English and Irish law, domicile has a different meaning, encompassing both a mental and a physical element. Living in a place does not in itself provide a domicile; one must also have the intention of staying there for an undetermined period. Every person is ascribed a domicile of origin, which lasts until that person decides to move somewhere else for an indefinite period of time. Lord Cranworth in *Wicker v Hume* made the following remark on domicile:

"*By domicile we mean home, the permanent home. And if you do not understand your permanent home, I'm afraid that no illustration drawn from foreign writers or foreign languages will very much help you*."[28]

Such a flexible concept does not fit into the civil law systems of the European continent. Therefore this concept of English law never played any role in the Brussels Convention or Brussels I Regulation. In English and Irish private international law, domicile as connecting factor is rather comparable with nationality than with the domicile concept in civil law systems. In that sense nationality as such is not an important connecting factor in those systems. Therefore, the Brussels II*bis* Regulation, which attributes a limited role to nationality, replaces "nationality" with "domicile" for Ireland and the United Kingdom.[29]

Consequently, in English and Irish law two meanings of domicile now exist side by side. For purposes of the Brussels I Regulation, domicile is defined in the European civil law meaning.[30] For most cases it is equated to residence in combination with a

[26] Jenard report, p 15.
[27] See, for instance Art 4 of the Belgian *Code de droit international privé* (Private International Law Code), Act of 16 July 2004, published in *BS* 27 July 2004; B Audit, *Droit international privé* (3rd edn, Paris: Economica, 2000) p 303.
[28] *Wicker v Hume* (1858) 7 HLC 124. The importance of this notion of domicile has decreased for purposes of jurisdiction, but is still used for conflicts of law. On this concept of English law, see J O'Brien, *Smith's Conflict of Laws* (2nd edn, London: Cavendish Publishing Ltd, 1999) p 65-88; L Collins, *Dicey and Morris on the Conflict of Laws* (13th edn, London: Sweet & Maxwell, 2000) vol I, p 107-154; PM North & JJ Fawcett, *Ceshire and North's Private international Law* (13th edn, London: Butterworths, 1999) p 133-176; CMV Clarkson & J Hill, *Jaffey on the Conflict of Laws* (2nd edn, London: Butterworths, 2002) p 21-49; P Kaye, "The Meaning of domicile under United Kingdom Law for the Purposes of the 1968 Brussels Convention on Jurisdiction and the enforcement of Judgments in Civil and Commercial Matters" (1988) *NILR* p 181-195.
[29] Art 3(2) Brussels II*bis* Regulation
[30] A Briggs & P Rees, *Civil Jurisdiction and Judgments* (3rd edn, London: LLP, 2002) p 112; see also Civil Jurisdiction and Judgments Act of 1982.

substantial connection.[31] For English common law, the concept stays as it was. The exact delimitation between the Brussels I Regulation and national rules is thus important, since a person from a third State can be domiciled in the EU (in particular in England), but have the intention to return to his/her country after a certain period. This person would be domiciled in the EU for purposes of the Brussels I Regulation, although he is domiciled in a third State for purposes of English national law.

To find some guidance on the interpretation that should be afforded to the concept of domicile in the Brussels I Regulation, one has to turn to its general provisions. The domicile of a natural person should be determined by national law. In order to determine whether a person is domiciled in an EU Member State, one has to apply the national law of that State.[32] For instance, if a case is brought before a judge in Austria, he has to determine according to Austrian law whether the defendant is domiciled in Austria. If he finds that the defendant is domiciled in Austria, he has jurisdiction. If, on the other hand, he finds that the defendant is not domiciled in Austria, he has to apply French law to determine whether the defendant is domiciled in France. In the English case *Haji-Ioannou and others v Frangos and others*, the defendant was domiciled in Monaco.[33] However, the court had to interpret the Greek provision on special domicile in order to determine whether the defendant had such a special domicile in Greece. If that were the case, the Brussels Convention would be applicable, since a domicile in the EU would exist. The court at first instance found that the defendant had no special domicile in Greece, but the Court of Appeal found that he did, with the result that the Brussels Convention and its rules on parallel proceedings became applicable. This indicates the relevance of an interpretation of "domicile" according to the law of another EU Member State.

However, nothing is said of the determination of domicile outside the EU. If a person were indeed domiciled in a third State, the Brussels I Regulation would not apply (except for exclusive bases of jurisdiction[34] and forum clauses[35]). The Brussels I Regulation cannot grant jurisdiction to the courts of a third State. In which third State a party is domiciled is irrelevant for purposes of the Brussels I Regulation. An EU court will only consider whether there is a domicile in the EU or not.

The framework of the Regulation is broad so as to draw defendants into its sphere of application. For instance, it might happen that a person could be considered domiciled

[31] See *Bank of Dubai Ltd v Abbas* [1997] I L Pr 308, CA at 309. See also P North & JJ Fawcett, *op cit* (fn 28) p 188; L Collins, *op cit* (fn 28) vol I, p 284-287.
[32] Art 59 Brussels I Regulation. See also *Bank of Credit and Commerce International SA (in liquidation) and Another v Wajih Sirri Al-Kaylani and Others* [1991] I L Pr 278 (CA), where the defendant contended that he was domiciled in Tunesia and not in France so that the jurisdictional rules of the Brussels I Regulation could not be applied to him. The English court applied French law to determine whether he was domiciled in France (at 379-380 and 285).
[33] [1999] 2 Lloyd's Rep 337 (CA). This case is discussed in more detail (regarding *forum non conveniens*) *infra*, Chapter 5, p 2
[34] See *infra*, Chapter 3, p 2 *et seq*.
[35] See *infra*, Chapter 4, p 2 *et seq*.

in an EU Member State under the national law of that Member State (in accordance with the test set by the Brussels I Regulation), but at the same time, that person might be domiciled in a third State according to the law of that third State. The EU courts will in such event, if they adhere to the letter of the Brussels I Regulation, give preference to the domicile in the EU. The courts might not investigate further to determine whether there is indeed a second domicile in a third State; a domicile in the EU suffices for jurisdiction.

The *Cour d'appel* (Court of Appeal) of Paris was confronted with such a case.[36] The Court considered whether French law or the law of Saudi Arabia had to be applied to determine the domicile of the defendant, a Saudi Arabian prince. Contrary to the finding of the court at first instance, the Court of Appeal came to the conclusion that French law could not be applied and consequently that the courts of Saudi Arabia had exclusive jurisdiction.[37] According to Audit, the debate of which law had to be applied had become irrelevant since the advent of the Brussels Convention.[38] The Convention is applicable if the defendant is domiciled in an EU Member State. In order to assess whether a defendant is domiciled in an EU Member State, as has been set out, the Convention determines that the court should apply its own law.[39] Therefore the Brussels Convention should have been applied first to determine whether the defendant had a domicile in France. If the answer were yes, the court would have had jurisdiction and the other domicile would not be taken into account. If the answer were no, the court would be able to rely on other national bases of jurisdiction (such as the nationality of the plaintiff) in order to assume jurisdiction. If there were no bases of jurisdiction in national law, as in this case, the court would have to find that it lacks jurisdiction. The court cannot conclude that a third State court has jurisdiction; only the courts of that third State can make such a ruling.

Moreover, the EU rules of civil jurisdiction are sometimes broadened incorrectly. This happened, for instance, in another judgment of the *Cour d'appel* of Paris. The Court applied the Brussels Convention, but based its jurisdiction on the defendant's residence in Paris, while ignoring his Brazilian domicile.[40] It was uncontested in the case that the residence in Paris was no domicile. The case has been criticised.[41] One cannot apply the EU rules and broaden them even further so as to base jurisdiction on residence.

If a defendant is simultaneously domiciled in two EU Member States, the courts of both those States will be able to assume jurisdiction, since every court's investigation would end when it finds a domicile in its own territory.

[36] 18 February 1994, (1994) *Rec Dalloz* p 351 (summary and case note by B Audit).
[37] Although a French court can of course not rule on the jurisdiction of the courts of another State; see B Audit, (1994) *Rec Dalloz* p 351.
[38] B Audit, (1994) *Rec Dalloz* p 351; H Born, M Fallon & J-L Van Boxstael, *op cit* (fn 4) p 75.
[39] Art 52 Brussels Convention; Art 59 Brussels I Regulation.
[40] Judgment of 30 November 1990 (1992) *JDI* p 192-195.
[41] Note by A Huet, (1992) *JDI* p 192-195.

The Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, which was never concluded, while using "habitual residence" and not "domicile", did foresee a rule for the situation where a person is habitually resident in more than one State. One then had to look at his/her principal residence. If that could not be found, the person could be sued in any of the Contracting States in which he/she was resident.

Domicile of legal persons

Firstly, it needs to be pointed out that in private international law, there are two main theories on the domicile of a legal person. The first is that a legal person is domiciled at the place where it is incorporated. This is called the incorporation theory. The supporters of this theory are drawn by the legal certainty it ensures. The United Kingdom, Ireland, The Netherlands, Denmark, Finland and Sweden apply this theory to determine the domicile of a legal person.

The opposing theory, called the real seat theory, determines the domicile of a legal person by reference to where it truly operates. Incorporation is a relevant factor in the process of seeking the true seat, but it is not decisive. One may also regard the central administration and the management of the legal person. Belgium, France, Germany, Greece, Luxembourg and Spain apply this theory in varying degrees.[42]

The Brussels Convention contained a similar but not identical rule for the determination of the domicile of legal persons as that for natural persons, referring to the national laws of the EU Member States. However, it did not refer to the rules of the EU Member State where the legal person is presumed to be domiciled, but merely to the private international law of the forum.[43] The explicit reference to the private international law of

[42] For a thorough study on and comparison of these theories, see J Meeusen, "De werkelijke zetel-leer en de communautaire vestigingsvrijheid van vennootschappen" (2003) *TRV* p 95-127. See also H Born, M Fallon & J-L Van Boxstael, *op cit* (fn 4) p 73 *et seq.* Regarding English law, see P North & JJ Fawcett, *op cit* (fn 28) p 188-189. This debate has caused endless trouble in private international law and can lead to the application of the doctrine of *renvoi*. The European Court of Justice has ruled that legal persons incorporated in one EU Member State, have to be recognised in the other EU Member States; see ECJ cases C-212/97, judgment of 9 March 1999, *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] *ECR* I-1459; C-208/00, judgment of 5 November 2002, *Überseering BV v Nordic Construction Company Baumanagement* GmbH [2002] *ECR* I-9919; C-167/01, judgment of 30 September 2003, *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd* [2003] *ECR* I-10155. I will not discuss these judgments in detail, as they are a good example of interaction between the legal systems within the EU, but have no relevance for third States. The European Court of Justice has not prohibited either of the theories (incorporation or real seat), but has emphasised that the difference between these theories may not hamper the free movement of (legal) persons in the EU.

[43] The English Court of Appeal nevertheless applied the rule in the same way as the rule for natural persons; see *The Deichland* [1990] 1 QB 361 (CA) at 375, where it was found that a company incorporated in Panama, but having its central management and control in Germany,

the forum, probably served the purpose of making clear that EU Member States could adhere to their own preference between the two main visions discussed above. The Brussels Convention did not compel them either way.

The Brussels I Regulation introduced an autonomous definition of the domicile of legal persons. A legal person is domiciled where it has its statutory seat, central administration or principal place of business.[44] While it is true that the Regulation refrained from choosing between the two main theories, the seemingly innocent amendment of the Brussels I Regulation might have broadened its personal scope. Setting the criteria as alternatives for the determination of the domicile of legal persons, has the result that an EU Member State does not necessarily have to apply the criterion for domicile that it would apply according to its domestic private international law.

In other words, a court under the Brussels Convention applied only one criterion for domicile (although that rule might not be the same in different EU Member States, as explained above). Conversely, under the Regulation, the different possibilities pose alternatives for every court to pick and choose from. Let us take the example of a company incorporated in India, but having its activities exclusively in England. Under the Brussels Convention the English court would, according to its rules of private international law, regard this company as domiciled in India. Now the English court will have to consider the alternatives. According to at least one of the alternatives (the principal place of business), the company is domiciled in England, thus domiciled in the EU. A similar example can be given of a company incorporated in Spain, but having its principal place of business in Mexico. Under the Brussels Convention, the Spanish courts would consider the company domiciled in a third State. The Regulation, on the other hand, providing a list of alternative criteria, draws that company into its sphere of application.

Interestingly, the same amendment was not made in the provision in the Regulation on the exclusive basis of jurisdiction for the validity of legal persons. For these matters the courts of the place of the seat of the legal person retain exclusive jurisdiction. To determine the seat of a legal person, the provision states that a court shall apply its rules of private international law.[45]

In some instances legal persons are presumed to be domiciled at the place in the EU where they have a branch or other establishment. This is particularly the case when protective bases of jurisdiction exist. For instance, if a consumer buys something from a Canadian company, which has a branch in France, the company might be presumed

was domiciled in Germany. The English Court of Appeal relied on German law, which would view the company as domiciled in Germany.

[44] Art 60 Brussels I Regulation.

[45] See Art 22(2) Brussels I Regulation. This issue is discussed *infra*, Chapter 3, p 2 *et seq*. See also P Vlas, case note on *Coreck* (2001) *NJ* no 599, p 4442-4445 at p 4444-4445.

to be domiciled in France for jurisdictional purposes. These examples will be treated later in this Chapter.[46]

In other matters, suing a defendant at the place of its branch or establishment is only possible if the defendant is also domiciled in the EU and the dispute has arisen from the operations of the establishment. This rule will also be regarded later in this Chapter.[47]

The Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters used "habitual residence" instead of "domicile" and contained four alternatives for legal persons: where it had its statutory seat, the law under which it was incorporated, its central administration or its principal place of business. Those alternatives took sufficient account of the difference between the legal systems so that all could accept the provision at the time of the negotiations. An extension to this general jurisdictional rule caused more disagreement. It could be extended to the place where a defendant had a branch, agency or establishment.[48] The existence of a subsidiary would not necessarily amount to a branch for purposes of jurisdiction. Another option was the extension to places where the defendant has carried on regular commercial activity by other means. Both these grounds would only apply if the dispute arose from the activity of the branch or of the particular regular commercial activity.

The time of domicile

In *Canada Trust and others v Stolzenberg and others*[49] jurisdiction was based on the domicile in England of Mr Stolzenberg, despite the fact that he was moving to Germany. There were many interim measures at the beginning of the proceedings to prevent assets from being moved and this delayed the issue of writ. The question before the House of Lords was what the relevant time of the defendant's domicile was for purposes of the Lugano Convention (although it seems that the Brussels Convention should have been applied[50]). The writ was issued when Mr Stolzenberg was still domiciled in England. When the writ was served, he was not found in England and there was uncertainty as to his domicile. The House of Lords, dismissing the appeal against the judgment of the Court of Appeal,[51] found that the relevant time for

[46] See *infra*, Part G of this Chapter, p 2 *et seq* for a discussion of these issues.
[47] Art 5(5) Brussels I Regulation; see *infra*, Part F of this Chapter, p 2 *et seq* for a more detailed discussion of this provision.
[48] Art 9 of 2001-text.
[49] [2002] 1 AC1 (HL)
[50] See, on that issue, *supra*, Chapter 1, p 2. ECJ case C-412/98 judgment of 13 July 2000, *Group Josi Reinsurance Company SA v Universal General Insurance Company (UGIC)* [2000] *ECR* I-5925, made it clear that the domicile of the defendant in a Contracting State is sufficient to make the Convention applicable. For a more detailed discussion of this case, see *infra*, p 2. The Lugano Convention does not change this; see Art 54*ter* Lugano Convention. However, the rule under discussion here is identical under the Brussels I Regulation and the Lugano Convention.
[51] *The Canada Trust Company v Stolzenberg* [1998] ILPr 290 (CA); [1998] 1 WLR 547.

determining domicile was the time of the issue of the writ. It stated that that provided certainty for the plaintiff and prevented defendants from changing their domicile for the purpose of circumventing the jurisdiction of a court. Mr Stolzenberg's domicile was of particular importance in this case, because he was only one of a number of defendants. None of the other defendants were domiciled in England, but in Switzerland, Liechtenstein, Panama and the Netherlands Antilles. They could all be hooked onto the procedure in England on the basis of the Lugano Convention and English national law.[52]

The House of Lords noted that other provisions, such as the ones on *lis pendens* and related actions, referred to a different moment for the institution of the proceedings, but that different factors were relevant for the application of those provisions.[53]

Habitual residence

The Brussels I Regulation does not, and the Convention did not, employ the concept of "habitual residence", because the notion of "habitual" was not the same in all the Member States.[54] A combination of the two terms, domicile and habitual residence, did not seem like a good and clear alternative either. This would have led to a multiplication of courts with jurisdiction.[55] The Regulation does use the notion of habitual residence with regard to maintenance claims.[56] Apart from that provision, domicile is of importance, rather than habitual residence.

For purposes of the Brussels II*bis* Regulation, domicile (in the civil law sense) is not important, but the jurisdiction rules are to a large extent based on habitual residence.[57] In family law matters, the concept of habitual residence has become more and more popular in modern legal texts.[58] It is preferred above domicile because of the flexibility it allows, especially in matters affecting persons in a time of personal crisis, where they often move from one country to another. A habitual residence does not necessarily coincide with the place where a person is registered as living.

The Brussels II*bis* Regulation does not define "habitual residence", and neither does the Borrás Report. The best one finds, is a type of justification in the preamble of the Regulation:

[52] See the discussion on multiple defendants *infra*, p 2.
[53] At p 10-11.
[54] Jenard Report, p 15; Y Donzallaz, *op cit* (fn 25) vol 1, p 395.
[55] Jenard Report, p 16.
[56] Art 5(2) Brussels I Regulation.
[57] Arts 3(1) and 8 Brussels II*bis* Regulation; see also Part C of this Chapter, p 2 *et seq*.
[58] See, for example, the Hague Conventions on civil aspects of child abduction (1980), on protection of children and co-operation in respect of intercountry adoption (1993), on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children (1996). See also P Rogerson, "Habitual residence: the new domicile?" (2000) *ICLQ* p 86-107.

"*The grounds of jurisdiction accepted in this Regulation are based on the rule that there must be a real link between the party concerned and the Member State exercising jurisdiction; the decision to include certain grounds corresponds to the fact that they exist in different national legal systems and are accepted by the other Member States*."[59]

Although the flexibility should be welcomed in this area of the law, it does provide difficulties to draw the borderline for applicability. A dispute about where exactly a person is habitually resident, will arise more easily than a dispute as to domicile, which is often written down in some register.

It is interesting to note that many Hague Conventions use "habitual residence" instead of "domicile".[60] The Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, which was never concluded, also used the term "habitual residence", while the Hague Convention on Choice of Court Agreements[61] uses only "residence".

Centre of the main interests

This weird and wonderful phrase, unlike its peers discussed above, is a new concept, introduced in civil jurisdiction by the Insolvency Regulation. The negotiation of an insolvency convention between the EU Member States (before a Regulation in this matter was possible[62]) proved very difficult because of the difference between the legal systems of EU Member States regarding the issue of the domicile of a legal person.

It seemed impossible that the Insolvency Regulation would choose between the incorporation and real seat theories (discussed above[63]). At the same time, a clear criterion had to be found. The structure of the Regulation is such that insolvency proceedings, from the moment they are opened in an EU Member State, are recognised throughout the EU. If different Member States have opposing views on where the insolvent person is domiciled, that would cripple the working of the Regulation to such an extent that it would become a dead letter.

A compromise was found in the "centre of the main interests" (COMI). Fortunately the Insolvency Regulation does provide aid in the interpretation of this new notion it introduces: for legal persons, the registered office is presumed to be the COMI. The starting point therefore coincides with the incorporation theory. It is, however, only a presumption and the contrary may be established. If, for instance, a company is

[59] Consideration 12 Brussels II*bis* Regulation.
[60] Notably the Convention on Protection of Children and Co-operaton in respect of Intercountry Adoption (1993); Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (1996); Convention on the International Protection of Adults (2000) *etc*.
[61] Adopted on 30 June 2005.
[62] See Chapter 1, Part A, p 2 *et seq* for an explanation of the framework of EU legislation.
[63] See the discussion on the domicile of legal persons *supra*, p 2 *et seq*.

incorporated in Canada, but has almost all its activities in Sweden and is managed there, the Swedish court might come to the conclusion that the COMI is situated in Sweden, so that the Swedish courts will be able to open insolvency proceedings. It is also problematic that the concept of COMI exists only within the EU. One is not comparing domicile with domicile or habitual residence with habitual residence, but totally different things.

COMI could be interpreted very broadly. The fear is that as soon as either the statutory seat or the central administration is in the EU, while other elements are outside, the COMI will be found to be in the EU.

The Regulation has brought about a workable compromise, but it is not free of flaws. Even within the EU, disputes have arisen with regard to the situation of the COMI.

The *Rechtbank van koophandel* (Commercial Court) of Tongeren (Belgium) incorrectly opened secondary insolvency proceedings with regard to a debtor for which a main insolvency had been opened in Luxembourg.[64] Normally a secondary insolvency is opened if a separate establishment exists in another EU Member State. However, that was not the case here. The debtor had its statutory seat in Luxembourg, but its factual seat in Belgium. A correct interpretation of the Insolvency Regulation would have rendered the Commercial Court of Tongeren without jurisdiction after the opening of the insolvency proceedings in Luxembourg. It seems that the Belgian Court used the secondary insolvency because it did not agree with the Luxembourg court's interpretation of the COMI.

In the Parmalat insolvency a similar difference of interpretation arose between the Irish and Italian courts. Eurofood IFCS Ltd, was part of the Parmalat group, but was incorporated in Ireland. The High Court of Ireland had appointed a provisional liquidator on 27 January 2004. That was the first step to an insolvency, but the insolvency was only opened later, on 23 March 2004, but retroactively as if it were opened on 27 January 2004. However, a court in Parma, Italy, had opened insolvency proceedings for the entire Parmalat group between those two dates, on 20 February 2004. It considered Eurofood part of this group. The High Court of Ireland did not recognise the decision of the court in Parma on the basis that it was contrary to public policy. An appeal was brought against the decision of the Irish High Court to the Supreme Court. That Court referred several questions of interpretation to the European Court of Justice, where the case is still pending.[65] One of those questions regards the location of the COMI. While acknowledging that the COMI needs to be determined on the facts of each case, Advocate General Jacobs in his Opinion states that the COMI of a subsidiary may be different from that of the parent company if the subsidiary conducts the administration of its interests in a manner ascertainable by third parties

[64] Judgment of 20 February 2003, published in 2004 *TBH* p 70-71; case note by T Kruger, p 71-74; see also http://www.euprocedure.be.
[65] ECJ case C-341/04, reference published in *OJ C* 251, 9 October 2004, p 7.

and in respect of its own corporate identity in the Member State in which it is incorporated.[66]

Certainly similar questions will also arise when it is unclear whether the COMI is situated in the EU, or the registered office or principle place of business is located in a third State.

This thesis deals only with jurisdiction rules and their impact on third States. Therefore the rights, privileges and disadvantages of creditors in third States, and the effects of rights *in rem* in property situated in third States, have not been investigated.[67]

[66] See the Opinion of the Advocate General of 27 September 2005, para 123-126; available at http://www.curia.eu.int

[67] The reader is referred to C Barbé & V Marquette, "Council Regulation (EC) No 1346/2000. Insolvency Proceedings in Europe and Third Countries. Status and Prospects" in A Nuyts & N Watté (eds), *op cit* (fn 4) p 419-507.

Part B: Jurisdiction based on the domicile of the defendant

Article 2 of the Brussels I Regulation

1. *Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.*
2. *Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.*

Article 3 of the Brussels I Regulation

1. *Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Section 2 to 7 of this Chapter.*
2. *In particular the rules of national jurisdiction set out in Annex I shall not be applicable as against them.*

Article 4 of the Brussels I Regulation

1. *If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State.*
2. *As against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that State of the rules of jurisdiction there in force, and in particular those specified in Annex I, in the same way as the nationals of that State.*

1. Defendants domiciled in third States

General

As has been pointed out in Part A of this Chapter, domicile as criterion for applicability is of importance for the Brussels I Regulation. The basic principle is that its jurisdictional rules apply if the defendant is domiciled in the EU. On the other hand, if the defendant is domiciled in a third State, an EU court need not regard the jurisdictional rules of the Brussels I Regulation, but can base its jurisdiction on its national rules. Some of these national rules allow jurisdiction in cases where the court has a very tenuous link with both the dispute and the parties. These rules are outlawed when the defendant is domiciled in the EU, but still apply if the defendant is domiciled in a third State.[68]

The fact that the rules of the domestic legal systems of the Member States may be used in this situation, may be based on Article 4, or merely on the fact that the Regulation does not even come into play. Although the result may be the same, this is an important conceptual distinction. Underlying is the question whether the Regulation replaces all rules of international jurisdiction in the Member States and that one can

[68] Arts 3 and 4 Brussels I Regulation.

only fall back on the (old) domestic rules if and when the Regulation so permits (by its Art 4) or whether the Regulation only governs disputes of international jurisdiction as between the Member States.[69]

At this stage one notices a severe distinction between defendants who are domiciled in the EU and those who are not. The discrepancy does not end here. When one turns to the rules of recognition and enforcement of judgments, one finds the true source of concern for parties from third States. A judgment granted by any EU court must be recognised and enforced throughout the EU. At the stage of recognition and enforcement, the identities of the parties, and to a large extent the jurisdictional bases,[70] become irrelevant. Therefore, if jurisdiction was based on an exorbitant ground in France, that judgment does not have effects only in France, but throughout the EU.

In other words, the worst habits of every EU Member State are exported to all the others. This result has since the entry into force of the first version of the Brussels Convention been heavily criticised by authors from outside the EU, even going so far as accusing the EU States of being chauvinists.[71] The effect has also been pointed out by case law.[72]

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[69] See *supra*, p 2 *et seq* on this discussion.

[70] Except for the rules on exclusive jurisdiction (see *infra*, Chapter 3, p 2) and some of the protective bases of jurisdiction (see *infra*, Part G of this Chapter, p 2 *et seq*).

[71] See Y Donzallaz, *op cit* (fn 25) vol 1 p 22; PJ Borchers, "Comparing Personal Jurisdiction in the US and the EC: Lessons for American Reform" (1992) *Am J Comp L* p 121-157 at p 132-133, stating that "*[t]he Brussels Convention overtly discriminates against outsiders*"; KH Nadelmann, "Jurisdictionally improper fora in treaties on recognition and enforcement of judgments. The Common Market draft" (1967) *Colum L Rev* p 995-1023; P Mercier, "Le projet de convention du marché commun sur la procédure civile internationale et les états tiers" (1967) *Cah Dr Eur* p 367-368 & 513-531 (from a Swiss point of view); BM Landay, "Another look at the EEC Judgments Convention: should outsiders be worried?" (1987-1988) *Dickens JIL* p 25-44; FK Juenger, "La Convention de Bruxelles du 27 septembre 1968 et la courtoisie internationale, Réflexions d'un américain" (1983) *RCDIP* p 37-51; AT von Mehren, "Recognition and Enforcement of Foreign Judgments: a new approach for the Hague Conference?" (1994) *Law & Contemp Prob* p 271-287. AT von Mehren, "Recognition and enforcement of sister-state judgments: reflection on general theory and practice in the European Economic Community and the United States" (1981) *Colum L Rev* p 1044-1060 states at p 1060: "*Unless and until [modified], this aspect of the Brussels Convention will remain the single most regressive step that has occurred in international recognition and enforcement practice in this century. If not corrected, the example set by the Convention may well set in motion forces that will undermine much of what theory and practice have done during our century to create, with respect to recognition and enforcement of judgments, a decent and workable international order*." Conversely, the US jurisdictional principles are even-handed: the same jurisdictional bases apply to Americans from different states and to foreigners; *Helicopteros Nacionales de Colombia SA v Hall,* 466 US 408, 104 S Ct 1868 (1984); *Insurance Corp of Ireland, Ltd v Compagnie des Bauxites de Guinee*, 456 US 694, 102 S Ct 2099 (1982); *Asahi Metal Industry Co v Superior Court*, 480 US 102, 107 S Ct 1026 (1987). Regarding jurisdictional rules in the USA, see also F Juenger, "Judicial Jurisdiction in the United States and in the European Communities: a comparison" (1984) *Mich L Rev* p 1195-1212; HS Lewis Jr, "A brave new world for personal jurisdiction: flexible tests under uniform standards" (1984) *Vanderb L Rev* p 1-66; AT von Mehren, *op cit* (this fn), stating at p 280-281 that the USA would not be able to accede

The Draft Hague Convention on Jurisdiction and Foreign Judgments also dealt with the matter differently: that Convention would have been applicable in the courts of the Contracting States, except if both parties were domiciled in the same Contracting State.[73] The domicile of the defendant would in itself not be relevant for the determination of the scope. In this way Contracting States would vow true comity to each other and not create an exclusive club as that of the EU is sometimes seen.

On the other hand, according to Gaudemet-Tallon the EU Member States have committed themselves toward each other to exclude these exorbitant bases of jurisdiction because they trust the other judges of the EU and also because this commitment is mutual. If the EU Member States agreed to abandon their exorbitant bases of jurisdiction with regard to all defendants, this would be a unilateral gesture and not a mutual arrangement.[74]

To understand this difference in viewpoints, one has to turn back to the nature of double conventions (or regulations).[75] The jurisdictional rules are linked to recognition and enforcement in such a way that recognition becomes automatic because of the unified rules of jurisdiction. However, leaving the defendants from outside the EU out of the Regulation's jurisdictional rules, but including the recognition and enforcement of subsequent judgments in the scope of the Regulation, brings about some concerns. The structure of the Brussels I Regulation should be in equilibrium. Either it is a double Regulation, linking jurisdiction completely to recognition and enforcement, or it is not. In other words, if the Regulation does not apply to defendants from outside the EU, neither should the resulting judgments be permitted to fall under its scope. Conversely, if the EU truly wants to create a European judicial area where all judgments can travel freely, the jurisdiction rules must be equitable in all the judgments that are included in this zone of free movement. The down-side of the rule has led some to state that the

to the Lugano Convention (with the same provisions as the Brussels Convention), even if it were invited, because its Art 3 violates due process standards under US law.

[72] See Paris 17 November 1993 (1994) *JDI* p 671-676, note A Huet, p 676-678; also published in (1994) *RCDIP* p 115-117, note by H Gaudemet-Tallon, p 117-120, admitting Juenger's criticism.

[73] Art 2, see the *Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference* (2001); http://www.hcch.net. See also B Audit & GA Berman, "The application of private international norms to 'third countries': the jurisdiction and judgments example" in A Nuyts & N Watté (eds), *op cit* (fn 4) p 55-82 at p 68. For a more detailed discussion of the judgments project of the Hague Conference for Private International Law, see *infra*, Chapter 4, p 2 *et seq*.

[74] H Gaudemet-Tallon, "Les frontières extérieures de l'espace judiciaire européen: quelques repères" in A Borrás, A Bucher, AVM Struycken, M Verwilghen, *E Pluribus unum. Liber Amicorum Georges AL Droz* (The Hague: Martinus Nijhoff Publishers, 1996) p 94.

[75] See the explanation *supra*, Chapter 1, p 2 *et seq*.

Convention should really contain universal rules on jurisdiction, as that the exorbitant bases of jurisdiction disappear entirely from the EU.[76]

It has to be borne in mind that Article 4, dealing with defendants from outside the EU, is subject to the exclusive bases of jurisdiction[77] and forum clauses for EU courts if one of the parties is domiciled in the EU.[78] For the rules on *lis pendens* and related actions, the domicile of the defendant is irrelevant.[79]

Exceptions

Some defendants from outside the EU can become subject to the Regulation. One thinks, for instance, of refugees and stateless persons.[80] According to the Convention relating to the status of refugees, a refugee or stateless person should be treated as a national/domiciliary.[81] Therefore, the Regulations are extended to these persons through a fiction of domicile (Brussels I), or of nationality (Brussels II*bis*). The situation regarding candidate refugees is unclear. It has been suggested that the same should apply to these persons, since determining otherwise would practically deny justice to them.[82] The Court of Brussels has followed this point of view.[83]

Who is the defendant?

It is not always clear in a specific matter who the defendant is. The first example that comes to mind, is claims *in rem*. By definition there is no clear defendant if an action is *in rem*. In admiralty claims *in rem*, the ship owner can be seen as the defendant, but so can other interested parties. In these cases one needs to consider the "reality of the matter" to determine who the defendant is. The English Court of Appeal has admitted that even if formally speaking there is no defendant, the ship owners were interested in the outcome of the case and wished to contest the merits of the plaintiffs' claim.[84]

Subrogation may make it difficult to know who the true defendant is. The applicable domestic law determines the extent to which a party takes over the rights and

[76] See, for instance, CA Joustra, "Naar een communautair internationaal privaatrecht!", in CA Joustra & MV Pollak, *Internationaal, communautair en nationaal IPR* (The Hague: TMC Asser Press, 2002) p 25.
[77] Art 22; these bases of jurisdiction and their personal scope are discussed *infra*, Chapter 3, p 2 *et seq*.
[78] Art 23; forum clauses and their personal scope are discussed *infra*, Chapter 4, p 2 *et seq*.
[79] Arts 27 and 28; these procedural rules related to jurisdiction are discused *infra*, Chapter 5, p 2 *et seq*.
[80] H Born, M Fallon & J-L Van Boxstael, *op cit* (fn 4) p 35.
[81] Geneva, 1951.
[82] H Born, M Fallon & J-L Van Boxstael, *op cit* (fn 4) p 35.
[83] Brussels, 25 September 1996, 1997 *JLMB*, p 100 referring to article 6 of the European Convention on Human Rights (Rome, 1950).
[84] See *The Deichland* [1990] 1 QB 361 (CA) at 374.

obligations of another party.[85] A judgment of the *Rechtbank* (Court of First Instance) of Rotterdam illustrates the point.[86] The contract concerned the transport of oil from Algeria to the United States of America on board the "Orembae", a ship belonging to Ananias, domiciled in Cyprus. The bill of lading contained a clause for arbitration in London and a choice for English law. However, the plaintiffs claimed damages before the *Rechtbank* of Rotterdam from Ananias because the oil showed shortcomings when it arrived in New York. The defendant, Ananias, claimed that the Dutch court lacked jurisdiction and stated that the dispute did not have any connection with The Netherlands. Only Interlloyd, the insurer, and one of the plaintiffs, were domiciled in The Netherlands, while all other parties were domiciled outside The Netherlands. One of Ananias's arguments was that if the insurance contract were valid, that contract would be subject to English law. According to English law a subrogated insurer (since it had already paid to the insured) cannot institute a claim in its own name, but should do so in the name of the indemnified insured party.

Since the defendant was domiciled in a third State,[87] the Dutch court could base its jurisdiction on the domicile of the plaintiff.[88] The issue of subrogation was not further at issue. The case does, however, illustrate the point of how domestic substantial law can influence the identity of the litigating parties.

2. What about the plaintiff?

"*Plaintiffs deserve as much protection as defendants*."[89]

If the plaintiff is domiciled in a third State and the defendant is domiciled in the EU, the plaintiff is drawn into the system of the Regulation. At first sight, and especially with the rule *actor sequitur forum rei* in mind, this is not disturbing. The plaintiff can now also make use of the other bases of jurisdiction provided for by the Regulation, such as the place of performance of the contract or the place of damage.[90] He/she can sue other defendants at the same forum.[91]

On the other hand, other jurisdictional grounds that may exist in national law, are denied to this plaintiff. The exorbitant bases of jurisdiction are outlawed as regards

[85] This has been decided by the European Court of Justice with regard to the provision on forum clauses, see ECJ cases 71/83, judgment of 19 June 1984, *Tilly Russ & Ernest Russ v NV Haven- & Vervoerbedrijf Nova & NV Goeminne Hout* [1984] *ECR* 2417 at rec 26; C-387/98, judgment of 9 November 2000, *Coreck Maritime GmbH v Handelsveem BV & others* [2000] *ECR* I-9337, at rec 23-24.
[86] Judgment of 16 September 1988, published in (1990) *NIPR* p 366-369.
[87] The Brussels I Regulation only became applicable in Cyprus on 1 May 2004.
[88] Art 126(3) and (5) of the *Wetboek van burgerlijke rechtsvordering* (Code of Civil Procedure).
[89] A Bucher in AF Lowenfeld & LJ Silberman (eds), *The Hague Convention on Jurisdiction and Judgments* (USA: Juris Publishing, 2001) p 24.
[90] Art 5 Brussels I Regulation.
[91] Art 6(1) Brussels I Regulation.

defendants domiciled in the EU. The advantage or disadvantage of the plaintiff is not at issue, but the requirements of justice and equity.[92] This does not mean that plaintiffs should receive special protection, but merely that their rights as proceeding parties should not be infringed.

The *Josi* judgment[93] provides a fine example of a plaintiff domiciled in a third State that was prohibited from using domestic French rules of jurisdiction. The case investigated the connection with the European judicial area that is sufficient to make the EU jurisdictional rules applicable. Universal General Insurance Company (UGIC) was an insurance company, incorporated in British Columbia, Canada. It looked for a reinsurance company to reinsure certain home occupiers' insurance policies based in Canada. It instructed its agent, Euromepa, a company incorporated under French law, to find a reinsurer. This led to the conclusion of a contract between UGIC and Group Josi Reinsurance Company SA (Josi), a company incorporated under Belgian law, for the reinsurance of the home-occupiers' insurance policies in Canada.

UGIC, in liquidation, claimed a sum of money from Josi pursuant to this contract. However, Josi refused to pay because it had been induced to enter into the contract on the basis of information that subsequently turned out to be false. Subsequently, UGIC brought an action before the Tribunal de Commerce in Nanterre (France) for payment of this sum. Josi contested its jurisdiction on the basis that, according to the Brussels Convention Article 2, UGIC would have to sue Josi in the country of its domicile, *ie* Belgium.

The Tribunal de Commerce in Nanterre ruled that it had jurisdiction according to French law and ordered Josi to pay the claimed sum to UGIC. Josi appealed against this judgment to the Cour d'appel in Versailles.

The Cour d'appel in Versailles referred a preliminary question to the European Court of Justice concerning the application of the Brussels Convention not only to intra-Community disputes but also to disputes that are integrated into the Community. More particularly, it asked whether a defendant established in a Member State could rely on the specific rules on jurisdiction set out in that Convention if the plaintiff was domiciled in Canada.

The European Court of Justice found that the EU jurisdiction rules did apply in this situation. If one regards the question merely from the point of view of the Brussels I Regulation, the answer does seem to be that defendants in the EU fall in the scope of

[92] See H Gaudemet-Tallon, "Les frontières extérieures de l'espace judiciaire européen: quelques repères" in A Borrás, A Bucher, AVM Struycken, M Verwilghen, *Liber Amicorum Georges AL Droz, op cit* (fn 74) p 85-104, at p 89.

[93] ECJ case C-412/98, judgment of 13 July 2000, *Group Josi Reinsurance Company SA v Universal General Insurance Company*; *ECR* 2000, I-5925.

the Regulation, irrespective of the domicile of the plaintiff. For this reason the judgment was accepted without much criticism.

However, the reasoning of both the Advocate General and the Court was quite one-sided. For instance, the Advocate General relied on the Jenard Report's statement that a Convention of direct jurisdiction ensures legal certainty more effectively. While this statement might be true, the justification for enacting a double convention (also containing jurisdiction rules) and the concern for legal certainty within the European Union, can hardly be seen as authority for determining its scope of application when parties from third States are involved.

Moreover, the Advocate General stated that the application of Article 2 without consideration of the plaintiff's domicile, would increase legal certainty since the uncertainties of national private international law rules would not come into play.[94] However, the reverse argument might also hold true – that if the domicile of the plaintiff were relevant, local private international law could be applied and the foreigner has to regard only the local rules of the forum that he chooses, and does not have to take into account the possible application of a technical Convention which is not part of the legal system of his/her home country. Some might say that searching for the national law rules on civil jurisdiction is more difficult than applying the Brussels I Regulation, but that probably depends on the particular plaintiff. Some parties might be active only in one EU Member State and know the private international law rules of that State, so that the application of the Regulation would add a difficulty for them.

The Advocate General also stated that the Convention provided a comprehensive scheme encompassing all defendants. If plaintiffs domiciled outside the European Community were not included in the scope of the Brussels Convention, this would be an illogical gap in its scheme and would jeopardise the working of the provisions on *lis pendens* and related actions.[95] The argument then went further to state that if there were nothing specific on foreign plaintiffs in the Convention, they must be included in its scope in order to make the scheme complete, rather than leaving them out of the picture. Once again the arguments to determine the scope of civil jurisdiction rules are based solely on EU principles. Furthermore, the scope of application of the provisions on *lis pendens* and related actions are determined independently of the domiciles of the parties, as will be pointed out in Chapter 5 of this thesis.[96] Therefore those phenomena cannot influence the scope of the jurisdiction rule that the Brussels I Regulation applies if the defendant is domiciled in the EU.

Even before this line taken by the European Court of Justice, the English court had come to the same conclusion. In the case of *Sameon co SA v NV Petrofina SA &*

[94] At para 15.
[95] See paras 19 and 20 of the Opinion.
[96] See *infra*, p 2 *et seq.*

another[97] the plaintiff, Sameon, was a Panama company managed in Hong Kong. It sued two Belgian companies in England. The court did not put the applicability of the Brussels Convention in question and used it to determine jurisdiction.

Similarly, in another English case, *Re Harrods (Buenos Aires) Ltd*[98] the plaintiff was Swiss and the defendant was incorporated in the UK, but doing business exclusively in Argentina. At that time the Lugano Convention was not yet in force. Jurisdiction was based on the Brussels Convention even though Switzerland was not Party to it and the plaintiff was Swiss.[99]

3. What if the plaintiff and the defendant are domiciled in the same EU Member State?

This determination is important for relations with third States, since it is an indication of the exact delimitation between the Brussels I Regulation and national rules on civil jurisdiction.

In principle a case where the plaintiff and the defendant are domiciled in the same EU Member State is purely internal. Lacking internationality, the Brussels I Regulation does not apply.[100] The Jenard Report states that the Brussels regime "*alters the rules of jurisdiction in force in each Contracting State only where an international element is involved*."[101] A cross-border link was necessary to trigger the Convention, and later the Regulation.

However, the matter does not end there. A case before an EU Member State court may become international because a second defendant is domiciled in another State. The case then being international, the Brussels I Regulation would apply to it. Whether the second defendant is domiciled in another EU Member State or a third State does not influence the international nature of the dispute. That means that the basis of jurisdiction, being the domicile of the first defendant, would be the Brussels I Regulation instead of national law.

This rule was clarified by the European Court of Justice in the *Owusu* case,[102] where both the plaintiff and the defendant were domiciled in England and the action was brought in the High Court there. The facts of the case took place in Jamaica. The

[97] Judgment of 30 April 1997 (England), Court of Appeal (Civil Division), case no QBCMI 96/0476/B, unreported.
[98] [1992] Ch 72.
[99] This case will also be discussed *infra*, Chapter 5, p 2 *et seq*, with regard to the compatibility of the doctrine of *forum non conveniens* with the EU jurisdictional rules.
[100] See also the discussion on the limitation of the EU civil jurisdiction rules to international cases in Chapter 1, *supra*, p 2.
[101] Jenard Report, p 8.
[102] ECJ case C-281/02, judgment of 1 March 2005, *Owusu v Jackson*, not yet published in *ECR*, see http://www.curia.eu.int.

question arose whether the Brussels Convention applied to this case. The European Court of Justice had little trouble in finding that the situation was governed by the Brussels Convention.[103] How a case became international was of less importance to the court. What was important was the fact that it was international, which made the Brussels Convention and its rule on the domicile of the defendant applicable.

Part D of this Chapter will discuss the rules of jurisdiction that will apply to the additional defendants domiciled outside the EU.[104]

4. Conclusion

This Part has investigated the primary delimitation of the Brussels I Regulation: it applies when the defendant is domiciled in the EU and it does not apply when the defendant is domiciled in a third State. The domicile of the plaintiff is irrelevant, although this rule might in some instances lead to inequitable results. This basic cornerstone has further specifications, as will be indicated in the remainder of this Chapter.[105] It also has to give way when other cornerstones regulate the matter.[106]

[103] Judgment of 1 March 2005. See also C Thiele, "Forum non conveniens im Lichte europäischen Gemeinschaftsrechts" (2002) *RIW* p 696-700 at p 689-699.
[104] See *infra*, p 2 *et seq*.
[105] See *infra,* Parts D-G of this Chapter, p 2 *et seq*.
[106] See *infra*, Chapters 3, 4 and 5, p 2 *et seq*.

Part C: Jurisdiction based on habitual residence or nationality

Article 3 of the Brussels II*bis* Regulation:

1. In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State

a) in whose territory:

the spouses are habitually resident, or

the spouses were last habitually resident, insofar as one of them still resides there, or

the respondent is habitually resident, or

in the event of a joint application, either of the spouses is habitually resident, or

the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or

the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her 'domicile' there;

b) of the nationality of both spouses or, in he case of the United Kingdom and Ireland, of both spouses.

2. For the purpose of this Regulation, 'domicile' shall have the same meaning as it has under the legal systems of the United Kingdom and Ireland.

Article 5 of the Brussels II*bis* Regulation:

Without prejudice to Article 3, a court of a Member State that has given a judgment on a legal separation shall also have jurisdiction for converting that judgment into a divorce, if the law of that Member State so provides.

Article 6 of the Brussels II*bis* Regulation:

A spouse who:

(a) is habitually resident in the territory of a Member State; or

(b) is a national of a Member State, or, in the case of the United Kingdom and Ireland, has his or her 'domicile' in the territory of one of the latter Member States,

may be sued in another Member State only in accordance with Articles 3, 4 and 5.

Article 7 of the Brussels II*bis* Regulation:

1. *Where no court of a Member State has jurisdiction pursuant to Articles 3, 4 and 5, jurisdiction shall be determined, in each Member State, by the laws of that State.*
2. *As against a respondent who is not habitually resident and is not either a national of a Member State or, in the case of the United Kingdom and Ireland, does not have his 'domicile' within the territory of one of the latter Member States, any national of a Member State who is habitually resident within the territory of another Member State*

may, like the nationals of that State, avail himself of the rules of jurisdiction applicable in that State.

Article 8 of the Brussels II*bis* Regulation:

1. The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised.

…

Article 12 of the Brussels II*bis* Regulation:

1. The courts of a Member State exercising jurisdiction by virtue of Article 3 on an application for divorce, legal separation or marriage annulment shall have jurisdiction in any matter relating to parental responsibility connected with that application where:

a) at least one of the spouses has parental responsibility in relation to the child;

and

b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by the spouses and by the holders of parental responsibility, at the time the court is seised, and is in the superior interests of the child.

...

4. Where the child has his or her habitual residence in the territory of a third State which is not a contracting party to the Hague Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children, jurisdiction under the Article shall be deemed to be in the child's interest, in particular if it is found impossible to hold proceedings in the third State in question.

Article 14 of the Brussels II*bis* Regulation:

Where no court of a Member State has jurisdiction pursuant to Articles 8 to 13, jurisdiction shall be determined, in each Member State, by the laws of that State.

1. Introduction

This Part deals mainly with the Brussels II*bis* Regulation. The reason for treating this Regulation alongside the Brussels I Regulation was twofold. Firstly, the Brussels II*bis* Regulation provided a natural extension of the Brussels I Regulation and an examination of the one necessarily leads to comparison with the other. Secondly, the Brussels II*bis* Regulation provides a fine example of one-sided EU rules that are difficult to understand from the point of view of third States.

The numbering of the articles as in the Brussels II*bis* Regulation (which is applicable since 1 March 2005[107]) will be used, although reference will be made to the Brussels II Regulation, its predecessor, for the sake of completeness and history.

[107] Art 72 Brussels II*bis* Regulation.

The scope of application of the Brussels II*bis* Regulation, and the Brussels II Regulation before it, caused and still causes a great deal of confusion.[108] The basic problem lies in two contradictory provisions, which seem crucial for any attempt at finding the borders of the Regulation. At the same time, the Brussels II*bis* Regulation does not contain a clear structure with three main rules indicating its outer limits as does the Brussels I Regulation (with some nuances). The Brussels II*bis* Regulation granted great importance to the availability of fora for separating couples and parents seeking custody of or access rights to their children. In this preoccupation, which is doubtless an important one for those concerned, a consideration of the exact extent of the Regulation seems to have been forgotten.

The resulting confusion, although widely spread, is best dealt with under two sub-headings: firstly divorce, legal separation and marriage annulment and secondly parental responsibility. Brief reference to the interaction between this Regulation and the Hague Conventions on Abduction (1980) and the Protection of Children (1996) is necessary in this Part. Thereafter, the specific jurisdictional rules will be investigated, while keeping the structure: first divorce *etc* and then parental responsibility. In the last instance this Part will regard problems surrounding nationality and dual nationality.

2. Scope for divorce, legal separation and marriage annulment

Habitual residence and nationality

On the one hand the Brussels II*bis* Regulation states that a spouse who is habitually resident in the territory of an EU Member State or is an EU national (or is a domiciliary of Ireland or the United Kingdom) may only be sued in another EU Member State court on one of the bases of jurisdiction of the Regulation.[109] This rule seems similar to that of the Brussels I Regulation.[110] However, it differs in two important respects.

Firstly, the delimitation is not based on domicile, but on habitual residence. Domicile, in the civil law sense, is much easier to ascertain than habitual residence, the last being

[108] See V Van den Eeckhout, " 'Europees' echtscheiden. Bevoegdheid en erkenning van beslissingen op basis van de EG Verordening 1347/2000 van 29 mei 2000" in H Van Houtte & M Pertegás Sender (eds), *Het nieuwe Europese IPR: van verdrag naar verordening* (Antwerp: Intersentia, 2001) p 69-101 at p 76-82; J-Y Carlier, S Francq & J-L Van Boxstael, "Le règlement de Bruxelles II Compétence, reconnaissance et execution en matière matrimoniale et en matière de responsabilité parentale" (2001) *JT* p 73-90, at p 77-79; N Watté & H Boularbah, "Les nouvelles règles de conflit de jurisdictions en matière de désunion des époux. Le règlement dit 'Bruxelles II' ", 2001 *JT* p 369-378 at p 374; P McEleavy, "The Brussels II Regulation: How the European Community has moved into Family Law" (2002) *ICLQ* p 883-908 at p 886-887; ThM de Boer, "Jurisdiction and Enforcement in International Family Law: A Labyrinth of European and International Legislation" (2002) *NILR* p 307-345 at p 313-314 & 327-328; P McEleavy, "The Communitarization of Divorce Rules: What Impact for English and Scottish Law?" (2004) *ICLQ* p 605-642 at p 610-617.

[109] Art 6.

[110] Arts 3 and 4 Brussels I Regulation; see Part B, *supra*, p 2.

based on factual criteria that can change quickly. Domicile in the civil law sense, on the other hand, is most often a registered residence which is easily traceable. Therefore, the chance that two States simultaneously claim that the same person is habitually resident in their territory, is bigger than for domicile. The possibility of abuse is also greater.

Secondly, not only the habitual residence plays a role, but also the nationality of the defendant. That extends the protection of people who have a link with the EU, but seriously interferes with the sphere of judicial systems of third States. There are many examples of people with an EU nationality who have not resided in the EU for a long time. They might be completely integrated in the legal system of a third State while their link with the EU might be tenuous. However, they stay subjected to the Brussels II*bis* Regulation. To go even further, that EU national's spouse, who has a third State nationality and who has lived his/her entire married life in a third State, might find him/herself influenced by this rule of the Brussels II*bis* Regulation. He/she will not be able to rely on national bases of jurisdiction of the EU Member States that differ from those of the Brussels II*bis* Regulation.

For Ireland and the United Kingdom, nationality is irrelevant, but one has to look at domicile in its common law meaning. This concept comprises a semi-permanent residence with the intention (or *animus*) of staying in that place indefinitely. It has its roots more firmly in reality (including the free will of people) than nationality does and therefore according to the common law legal systems represents a better connection to form the basis of jurisdiction. It might come as less of an unpleasant surprise to spouses than the above-mentioned examples.

EU jurisdiction in the first place

The unclarity grows as the next provision of the Regulation promptly states that where no court in an EU Member State has jurisdiction according to the rules of the Brussels II*bis* Regulation, the national laws of the Member States shall determine jurisdiction.[111] This provision also seems to be drawing the borderline of the Regulation. That borderline would be where each basis of jurisdiction lies. In other words, an EU court first has to determine whether there is any EU court that could have jurisdiction according to the Regulation. If so, the Regulation applies. The Regulation, one could say, always imposes itself.

To concretise the problem, one has to consider national bases of jurisdiction that are wider, on the one hand, and others that are narrower, on the other hand, than those of the Regulation. For example, a French court has jurisdiction because the plaintiff is a French national.[112] A French woman could marry a Mexican and they could stay for

[111] Art 7.
[112] Art 14 French *code civil* (Civil Code).

their entire married lives in Mexico. When the woman returns to France and wants to file for divorce, should she rely on the Brussels II*bis* Regulation, or could she file immediately according to the French national rule just mentioned? The Regulation would bid her to wait for six months because the defendant is a third State national and has his habitual residence in a third State. Therefore, it seems that she can ignore the entire Regulation and file according to French national rules. The Regulation does not seem to apply to a case where the defendant is a third State national with habitual residence in a third State.[113]

The rule that the French court can only use that national basis of jurisdiction if no other EU court has Regulation-based jurisdiction seems to be a rule that only starts playing once it is clear that the Regulation is applicable. That rule cannot determine the scope of the Regulation, because not only does it draw the Regulation far too broad, it is also difficult to make sense of. One cannot let personal scope be determined by the exercise of all bases of jurisdiction in conjunction with each other. One needs to alter the example slightly to illustrate the point: the French woman does not return to France, but to Belgium. She stays there for more than a year and then only decides to commence a divorce action against her Mexican husband. If one contends that the provision that national rules may only be used when no other EU court has jurisdiction, is a rule determining the scope of the Regulation, then the French court would have lost its jurisdiction since the Regulation grants jurisdiction to the Belgian courts on the basis that the plaintiff has lived there for more than a year. However, it is submitted that that rule pushing back the national bases of jurisdiction is not a scope rule. It can only come into play when the Regulation is already applicable. Therefore, in this example the Regulation is not applicable as the defendant is neither an EU national, nor habitually resident in the EU. That nationality and habitual residence determines the scope of the Regulation. As a consequence, the French courts will have jurisdiction on the basis of their national rules. The Regulation and its complicated structure are irrelevant.[114]

If the provision that national rules may only be used when no other EU court is available were a scope-rule, the reach of the Regulation would be very far. Some of the advocates of this point of view might acknowledge that this goes too far and is not consistent with the principle of subsidiarity, while arguing that a limitative interpretation of the Regulation itself cannot set that right; the only way to solve the problem would be an application to the European Court of Justice that the powers had been transgressed

[113] See, however, J Meeusen, "Nieuw internationaal procesrecht op komst in Europa: het EEX II-verdrag" (1998-1999) *RW* p 755-758, who gives a similar example at 756 and states that the Regulation will apply, despite the third State habitual residence and nationality of the defendant.

[114] Criticism has been formulated on this line of thought, but it seems to be the only way in which to logically draw a line around the Regulation. See, for a similar interpretation, P McEleavy, "The Brussels II Regulation: How the European Community has moved into Family Law" (2002) *ICLQ* p 883-908 at p 886; P McEleavy, "The Communitarization of Divorce Rules: What Impact for English and Scottish Law?" (2004) *ICLQ* p 605-642 at p 614.

in the making of the Regulation and then the Court would have to call on the legislator to fix its work. However, the wide application of the EU system seems incorrect and unclear. It is very hard to determine the scope of the Brussels II*bis* Regulation in advance, so that spouses will probably find it hard to determine whether or not they have to take account of the Brussels II*bis* rules or of the national rules of EU Member States. National courts should exercise their powers in such a way that they distinguish between EU cases and cases where the EU has no interest. Once the EU's interests are not at stake, and there is no real link with the EU, the national judge should act accordingly. Of course this distinction should not be arbitrary and the best way to draw it, is by a limitation to the defendants habitually resident in the EU or with an EU nationality, criteria that can be found in the Regulation.

The converse problem regards a legal system that has narrower rules than the Regulation. The Belgian legislator has used the Brussels II*bis* Regulation as model when drawing up the similar provisions for the Belgian *Code de droit international privé* (Private International Law Code).[115] The legislator, however, did not go quite as far as the Regulation. Therefore Belgium now has narrower bases of jurisdiction on this matter than the Regulation provides. For instance, the basis of jurisdiction for a plaintiff who has lived in an EU Member State for six months and has the nationality of that State, does not exist in this new Belgian code. Changing the example once again, a Belgian woman marries a Mexican man and they live in Mexico for their entire married life. The Belgian spouse returns to Belgium and wants to file for divorce there. According to the Brussels I Regulation she would be able to do that after six months. However, according to the Belgian national law, the court of the plaintiff's domicile would only have jurisdiction if she has lived there for at least a year (nationality is irrelevant). Thus she would have to wait for a year. The question is the application of the Regulation. The defendant is neither EU national, nor does he have his habitual residence in the EU. One would have to admit that this situation falls outside the scope of the Regulation. The woman would then have to wait for a year to be able to use the Belgian national bases of jurisdiction.

This seems a logical place for the application of the national rules and for the exclusion of the Brussels I Regulation. It is clear and the Regulation does not impose itself in every possible situation where it can apply.

Solution?

Trying to find a solution by juxtaposing of the two conflicting provisions remains difficult.[116] However, it seems that this is what the drafters envisaged. However, despite

[115] Act of 16 July 2004, published in *BS* 27 July 2004. For the position in the Netherlands, see PMM Mostermans, "Nieuw Europees scheidingsprocesrecht onder de loep. De rechtsmacht bij echtscheding" (2001) *NIPR* p 293-305 at p 302-304.

[116] Following this route, see J Meeusen, "Nieuw internationaal procesrecht op komst in Europa: het EEX II-verdrag" (1998-1999) *RW* p 755-758 at p 756; J-Y Carlier, S Francq & J-L Van

the presumed intentions of the drafters, one has to try to make sense of it. Basing the scope of the Regulation on the provision on the habitual residence or the nationality of the defendant (Art 6) seems to make the most possible sense.

Some argue that the provision on the nationality or habitual residence of the defendant (Art 6) is not a scope rule, but only a rule pointing out that the bases of jurisdiction are exclusive.[117] That does not seem to make sense. How can the provision make the jurisdictional bases exclusive without making them exclusive in relation to *something*? That *something* is, it would seem, the national bases of jurisdiction. Therefore the provision does in fact demarcate the border between the Regulation and national rules and is in this sense a scope rule. According to the argument of these authors, the only limitation of the scope is the all-embracing rule on residual jurisdiction, referring to the national bases of jurisdiction only when the Regulation has not appointed a competent court. That means that the Regulation always applies if it can appoint any court. If it cannot appoint a court, one has to revert to national bases of jurisdiction. If that were the scope rule of the Regulation, one would never be able to know in advance whether the Regulation would apply or not.

Others state that the reference to national bases of jurisdiction has the effect of giving the Regulation a universal scope. In other words, one can only revert to national bases of jurisdiction once it is clear that the matter falls outside the material scope of the Brussels II*bis* Regulation.[118] This raises a problem of subsidiarity, which limits the legislative powers of the EU, as has been pointed out in Chapter 1,[119] The principle determines that before the EU can legislate in an area, it must be clear that the EU Member States cannot achieve the goal themselves and that the EU can achieve the goal more effectively. According to that principle, the Brussels II*bis* Regulation cannot regulate issues that could better be regulated by the EU Member States. Whether or not an EU Member State court has jurisdiction to hear a divorce, if the matter has no or a very weak link with the European judicial area, can probably not be regulated in a more effective way by EU legislation. For example, a Frenchman married with a woman from Madagascar, and living in Madagascar might want to divorce in France. Whether or not a French court would have jurisdiction to grant such divorce can best be regulated by French national law. One cannot argue that the EU has an interest to regulate the matter. The divorce, if granted in France, would be recognised throughout the EU, independent of the basis of jurisdiction. As a result, the Frenchman would be

Boxstael, "Le règlement de Bruxelles II Compétence, reconnaissance et execution en matière matrimoniale et en matière de responsabilité parentale" (2001) *JT* p 73-90, at 77-79; M Traest, *De Europese Gemeenschap en de Haagse Conferentie voor het Internationaal Privaatrecht* (Antwerp: Maklu, 2003) p 234-235.

[117] V Van den Eeckhout, " 'Europees' echtscheiden. Bevoegdheid en erkenning van beslissingen op basis van de EG Verordening 1347/2000 van 29 mei 2000" in H Van Houtte & M Pertegás Sender (eds) (2001), *op cit,* (fn 108) at p 78-79.

[118] See H Gaudemet-Tallon, "Le Règlement no. 1347/2000 du Conseil du 29 mai 2000: 'Compétence, reconnaissance et exécution des decisions en matière matrimoniale et en matière de responsabilité parentale des enfants communs' ", (2001) *JDI* p 381-430, at p 397.

[119] See *supra*, p 2 *et seq*.

able to remarry in any EU Member State. That seems to be the only interest for the European judicial area in this example (namely the subsequent free movement of the Frenchman, while his civil status is being recognised).

This points to another problem, which has also been discussed in relation to the Brussels I Regulation: the Brussels II*bis* Regulation is supposed to be a double instrument, but the parallel between the jurisdiction rules and the rules on recognition and enforcement is incomplete.[120] All judgments can be recognised, irrespective of whether jurisdiction had been based on the Regulation or national rules. This can bring about unfair results for parties habitually resident in third States, since exorbitant bases of jurisdiction used against them can lead to a judgment that has effects not only in the EU Member State where it had been granted, but throughout the EU. A possible solution could be to harmonise all jurisdiction rules, but this will again pose difficulties of subsidiarity.

Third State nationals are further prejudiced by the elaboration of national bases of jurisdiction as against them. When the defendant is not habitually resident in, or a national of, an EU Member State, the plaintiff may bring an action based on the national grounds for jurisdiction. Moreover, those national grounds that are built on nationality are opened up for all EU Member State nationals.[121] In practice, not only French national plaintiffs will be able to bring suit in France because of their French nationality,[122] but all EU nationals habitually resident in France will be permitted to do so. This elaboration ensures that there is no differentiation in treatment between plaintiffs of different EU nationalities.

In an ideal world the border of the EU legislation would coincide with the sphere of interest that the European judicial area has. If one were to rely too heavily on the rule that national bases can only be applied if no EU court has jurisdiction (Art 7) and make it a scope rule, one would use the Regulation rules in situations where the EU is not concerned at all. Therefore, that rule (Art 7) should not be used to determine the scope of the Regulation.

3. Scope for parental responsibility

The basic rule for the scope of the Regulation concerning parental responsibility is the habitual residence of the child: if the child resides in the EU, the Regulation will apply, otherwise it will not.[123] However, the rule is not so straightforward as to stop there.

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[120] See the general discussion on single and double instruments in Chapter 1, *supra*, p 2 and the discussion on the Brussels I Regulation in Part B, *supra*, p 2.
[121] Art 7(2).
[122] Art 14 French *code civil* (Civil Code).
[123] See also ThM de Boer, "Jurisdiction and Enforcement in International Family Law: A Labyrinth of European and International Legislation" (2002) *NILR* p 307-345 at p 328.

If an EU court has jurisdiction in an action for divorce, legal separation or marriage annulment, and the parental responsibility of their children is at issue, the spouses may choose that court to hear the case on parental responsibility if it is in the superior interests of the child.[124] These children may be third State nationals and have a habitual residence in a third State. Since this basis of jurisdiction is dependent on the marriage of the spouses and a forum choice, the inclusion in the scope of the Regulation is not disturbing.

In the same fashion, a court that has a substantial connection to a child may also be chosen. This provision can also influence the personal scope of the Regulation: the child in question does not need to be habitually resident in the EU.[125] Children who are unfortunate enough to live in a third State that is not a Party to the 1996 Hague Convention on the Protection of Children, have an extra chance to be drawn into the sphere of application of the Brussels II*bis* Regulation. This possibility enters through the back door of a presumption: when there is a possibility to choose a forum, the requirement is that the jurisdiction must be in the best interests of the child. If the child lives in a third State that is not Party to the 1996 Hague Convention on the Protection of Children, the jurisdiction in an EU Member State is presumed to be in his/her best interests.[126] As will be indicated in Chapter 7 on the external relations of the EU, the Brussels II*bis* Regulation has a special relation to that Hague Convention. The Regulation's references to the Convention's rules are a plausible attempt to use a good system that was already in place.[127]

Regarding child abduction, the Regulation deals with unlawful removals of children from one EU Member State to another and with the unlawful retention of a child in another EU Member State than that of his/her habitual residence.[128] When a child is abducted from the EU to a third State or from a third State to the EU, the Regulation refers to the 1980 Hague Convention on Child Abduction.

In some instances the mere presence of the child can grant jurisdiction. This is specifically so if the habitual residence of a child cannot be established.[129] Hopefully this provision will not turn out to be an easy way to draw children into the sphere of application of the Brussels II*bis* Regulation, instead of genuinely trying to ascertain the true habitual residence of a child, especially if this is probably in a third State. This rule can also be applied to refugee children or children displaced internationally because of disturbances in their country. These children will more often than not come from third States. Such a provision that aims at the protection of children should be welcomed. However, "disturbances" is a very vague term.

[124] Art 12(1).
[125] Art 12(3).
[126] Art 12(4).
[127] See *infra*, p 2 *et seq*.
[128] Arts 10 and 11.
[129] Art 13.

The section on jurisdiction with regard to parental responsibility also includes a rule stating that if no court in an EU Member State has jurisdiction according to the rules of the Regulation, jurisdiction may be based on the national rules of an EU Member State. It is submitted that this provision, as that in the section on divorce jurisdiction, should not affect the scope of the Regulation. The scope must be determined before this provision can be applied.[130]

Lastly, there is a limited possibility of choosing a forum to hear a dispute on parental responsibility. The choice is limited to courts that has jurisdiction over divorce, legal separation or marriage annulment proceedings, or with which the child has a substantial connection. The rule referring to the court that has jurisdiction over divorce, legal separation or marriage annulment proceedings, does not influence the scope of the Brussels II*bis* Regulation. Referring to a substantial connection between the child and the court, however, does influence the scope. Since that influence is concerned with the choice, this issue will be briefly discussed in Chapter 4, where the relevant cornerstone for the application of the EU's civil jurisdiction rules is the choice by the parties.[131]

4. Interaction with the Hague Conventions on Child Abduction and Child Protection

The Brussels II*bis* Regulation operates in a sector in which there are two recent Hague Conventions: one on Child Abduction (1980) and one on the Protection of Children (1996). All 25 EU Member States are Party to the 1980 Convention, which currently has 75 Contracting States.[132] All EU Member States except Malta have signed the 1996 Convention, but it has only been ratified (or acceded to) by and entered into force in six EU Member States: the Czech Republic, Estonia, Latvia, Lithuania, the Slovak Republic and Slovenia.[133] It will probably enter into force on the same day for all the other EU Member States as the EC has obtained external competence in this field by the adoption of the Brussels II Regulation.[134] These Conventions, which are relevant in

[130] See *supra*, p 2.
[131] See Chapter 4, *infra*, p 2 *et seq*.
[132] Apart from the EU Member States these are Argentina, Australia, Bahamas, Belarus, Belize, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Canada, Chile, China, Columbia, Costa Rica, Croatia, Dominican Republic, Ecuador, El Salvador, Figi, Georgia, Guatamala, Honduras, Iceland, Israel, Mauritius, Mexico, Moldova, Monaco, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Romania, Saint Kitts and Newis, Serbia and Montenegro, South Africa, Sri Lanka, Switzerland, Thailand, Trinidad and Tobago, The Former Yugoslav Republic of Macedonia, Turkey, Turmenistan, United States of America, Uruguay, Uzbekistan, Venezuela and Zimbabwe. See http://www.hcch.net.
[133] The other Contracting States to the Convention are currently Australia, Ecuador, Monaco and Morocco. See http://www.hcch.net.
[134] See Chapter 7, *infra*, p 2 *et seq* on the external relations of the EU.

the material of parental responsibility and not divorce, legal separation and marriage annulment, will briefly be discussed in turn.[135]

The Hague Convention on Child Abduction (1980)

The Brussels II*bis* Regulation replaces, as between the EU Member States, the Hague Convention on Child Abduction, but the Regulation also explicitly refers to the Hague Convention's mechanism for the return of children.[136] Therefore, if a child is to be returned from one EU Member State to another, the Brussels II*bis* Regulation, which has modified and intensified some of the rules of the Hague Convention, applies.

The Brussels II*bis* Regulation contains rules that indicate more trust between EU Member State courts. For instance, the Hague Convention provides that an authority is not bound to order the return of a child if there is a grave risk that the return would expose the child to physical or psychological harm or otherwise place him/her in an intolerable situation.[137] The Brussels II*bis* Regulation states that EU Member State courts may not refuse the return of a child on that basis if adequate arrangements have been made to secure the protection of the child after return.[138] This modified rule only applies if a child is to be returned from one EU Member State to another. Whether this rule, testimonial of EU trust, is justified and will work fairly in practice, remains to be seen.[139]

The Regulation furthermore contains a provision stating that if there had been a judgment from an EU Member State court of non-return of a child under the Hague Convention and subsequently an EU Member State judgment requiring the return of the child, the latter judgment will be enforced according to the semi-automatic procedure of the Brussels II*bis* Regulation.[140]

Judgments from EU Member State courts regarding the return of abducted children are automatically recognised and enforced, without the need for enforcement proceedings.[141] The Hague Convention explicitly permits its Contracting States to alter

[135] See also A Schulz, "Internationale Regelungen zum Sorge- und Umgangsrecht" (2003) *FamRZ* p 336-348; A Schulz, "Die Zeichnung des Haager Kinderschutz-Übereinkommens von 1996 und der Kompromiss zur Brüssel-IIa Verordnung" (2003) *FamRZ* p 1351-1354.
[136] Arts 11, 42 & 60(e) Brussels II*bis* Regulation.
[137] Art 13(b) Hague Abduction Convention.
[138] Art 11(4) Brussels II*bis* Regulation. See also the pactice guide for the application of the Regulation, drawn up by the European Commission in consultation with the European Judicial Network in civil and commercial matters; http://www.europa.eu.int/comm/justice_home/ejn, at p 32-33.
[139] A Schulz *op cit* (fn 135) at p 1353 points out the dangers that this modification might give rise to in common law systems, where judges have a large amount of discretion.
[140] Arts 11(8) & 40-45 Brussels II*bis* Regulation.
[141] Art 42 Brussels II*bis* Regulation. See also the practice guide, *op cit* (fn 138) at p 28 & 38-39.

the grounds for refusal as between themselves.[142] This intensification of the Hague Convention rules within the EU will hopefully add to its efficiency.

The Hague Convention on Protection of Children (1996)

This Hague Convention is broader than the 1980 Convention. The Brussels II*bis* Regulation also refers explicitly to the Hague Child Protection Convention.[143] For instance, where the best interests of a child has to be determined for purposes of jurisdiction under the Brussels II*bis* Regulation, there is a presumption that the jurisdiction is in his/her best interests if he/she is habitually resident in a third State that is not Party to the Hague Child Protection Convention. In this manner the influence of the Hague Convention is extended and third States are encouraged to become Party to that Convention: in that manner they will at least be assured of reciprocity.

The rules of jurisdiction of the Brussels II*bis* Regulation and the Hague Convention are similar. The main rule is that the courts of the habitual residence of the child has jurisdiction. The interesting interaction comes at the point of the recognition and enforcement of judgments. All judgments given by EU Member State courts must be recognised and enforced in all other EU Member States, irrespective of the basis of jurisdiction. One could imagine a situation in which a court in Argentina has jurisdiction as the child in issue habitually resides there. A Spanish judgment (for whatever reason the court had jurisdiction) concerning the child is automatically effective in the entire EU, while the situation under the Hague Convention might be different: one of the grounds for the refusal of recognition or enforcement is that jurisdiction had not been based on a ground in the Convention.[144] On first sight it seems positive for the Hague Convention that wider effect is given to judgments. However, in this field of the law, there are sensitive concerns on more than one front. Taking away this ground for refusal in the entire EU, weakens the position of Argentina, where the child is habitually resident.[145] Such a situation will probably not occur frequently, as the jurisdiction rules in the Brussels II*bis* Regulation and the Hague Convention are to a large extent similar. However, the possibility exists that third States could be affected adversely.

It is worth noting that the Hague Convention also contains rules on applicable law, while the Brussels II*bis* Regulation does not. After the entry into force of the Convention in the EU Member States and until the EU enacts such rules, the Hague Convention will apply as between the EU Member States.

[142] Art 36 Hague Abduction Convention. See also A Schulz, *op cit* (fn 135) at p 1352.
[143] Art 12(4) Brussels II*bis* Regulation. See also the practice guide, *op cit* (fn 138) at p 44-45.
[144] Art 23(2)(a) Hague Convention.
[145] See C Gonzalez Beilfuss, "EC legislation in matters of parental responsibility and third States" in A Nuyts & N Watté, *op cit* (fn 4) p 493-507 at p 506.

5. Jurisdiction rules for divorce, legal separation and marriage annulment

The jurisdictional rules of the Brussels II*bis* Regulation differ greatly from those of the Brussels I Regulation. Instead of a hierarchy of rules, the Regulation just creates alternative bases of jurisdiction. The idea was to create many possibilities for Europeans to go to court in a situation of family difficulty. When international families fall apart, people often move, whether it is back to the country of their nationality or another country. These people need to have easy access to justice.

The Borrás Report summarises four elements that jurisdiction in family law matters have to consider:

a) the interests of the parties;
b) flexible rules to deal with mobility;
c) individual needs;
d) legal certainty.[146]

These are all important considerations worthy to pursue in an international instrument. However, if that international instrument is only applicable in a certain area, there are additional elements that should be considered: the borders of the instrument, subsidiarity and the concerns of other parties. Family ties, like international trade, do not keep themselves to the EU borders. International families that are linked to both the EU and a third State seem to have been left in great uncertainty.

Seven alternative bases of jurisdiction are provided:

a) the habitual residence of both spouses;
b) the last habitual residence of both spouses if one of them still resides there;
c) the habitual residence of the respondent;
d) in the case of a joint application, the habitual residence of either of the spouses;
e) the habitual residence of the applicant if he/she resided there for at least a year immediately before the application;
f) the habitual residence of the applicant if he/she has resided there for at least six months immediately before the application and has the nationality of that State, or, in the case of Ireland or the United Kingdom, is domiciled there;
g) the State of the nationality of both spouses or, in the case of Ireland or the United Kingdom, the domicile of both spouses.[147]

Habitual residence is not defined in the Regulation, and the concept is supposed to be a factual one, but practice has shown that there are some difficulties in ascertaining habitual residence. For instance, how long does it take to establish a habitual residence? Can one move to a new country and immediately have a habitual residence there, even if one then plans to move away again after a few months? Different States

[146] Borrás Report, para 27, p 37.
[147] Art 3 Brussels II*bis* Regulation.

can interpret the concept differently, so that persons can simultaneously be habitually resident in more than one EU Member State.[148]

Nationality, of course, is determined independently by every Member State. The same is true for domicile (in the common law sense[149]) in Ireland or the United Kingdom: these States determine who is domiciled in their territories.

The court that has jurisdiction to hear the case also subsequently has jurisdiction to convert a legal separation that it granted into a divorce.[150] This basis of jurisdiction is necessary because not all legal systems know the legal phenomenon of legal separation. However, not all limping situations will be solved, because the Brussels II*bis* Regulation provides that this basis of jurisdiction can only exist if it exists under the law of the Member State in question. If the court that granted the legal separation loses its jurisdiction and the legal system(s) of the court(s) that has/have jurisdiction at a specific moment do(es) not know any form of legal separation other than divorce, the parties will be left in an eternal limping legal situation. This will probably not happen often, but is nonetheless possible.

The Brussels II*bis* Regulation states that the above-mentioned bases of jurisdiction are exclusive if a spouse is habitually resident in the territory of a Member State or is a national of a Member State or, in the case of Ireland or the United Kingdom, is domiciled there.[151] Although this rule is found in the chapter on jurisdiction, it really causes more problems concerning the determination of the scope of the Regulation. So does the following provision, referring to the residual national bases of jurisdiction when no court in the EU has jurisdiction and even extending them.[152]

National bases of jurisdiction, when they are allowed to apply, are broadened. Jurisdiction on the basis of nationality is opened up for all EU citizens habitually resident in the particular State.[153] For instance, in France jurisdiction can be based on the French nationality of the plaintiff.[154] Instead of applying this exorbitant basis of jurisdiction only to French people, the French courts will now be permitted to take jurisdiction when the plaintiff with EU nationality is habitually resident in France. The idea behind this elaboration is of course that all EU citizens are equal and should be treated in exactly the same way. However, to use such a principle of European Union law to justify elaborating exorbitant bases of jurisdiction so that any EU citizen habitually resident in France can now sue in France, seems to go a bit too far. Any

[148] On the uncertainty of the concept, see P McEleavy, "The Communitarization of Divorce Rules: What Impact for English and Scottish Law?" (2004) *ICLQ* p 605-642, at p 622-623; P Rogerson, "Habitual Residence: the New Domicile?" (2000) *ICLQ* p 86-107.
[149] See the discussion on domicile *supra*, p 2 *et seq.*
[150] Art 5 Brussels II*bis* Regulation.
[151] Art 6 Brussels II*bis* Regulation.
[152] Art 7 Brussels II*bis* Regulation. See *supra*, p 2.
[153] Art 7(2).
[154] Art 14 French *code civil* (Civil Code).

person with a third State nationality and habitually resident in a third State that married an EU citizen who subsequently resides in France, may be sued in the French courts.

The provision refers to EU citizens habitually resident in an EU Member State that do not have the nationality of that State, or, in the case of Ireland or the United Kingdom, is not domiciled there. When stating that the bases of jurisdiction resting on nationality are open to these people, the provision fails to refer to the bases of jurisdiction in Ireland and the United Kingdom that rest on domicile. Are these bases also broadened? For instance, in England, a returning spouse has a basis of jurisdiction for divorce: a person who is domiciled in England can file there for divorce. According to P McEleavy, this basis of jurisdiction cannot be extended to other EU nationals that return to England.[155] He gives the example of an Irish domiciled spouse returning to England and wanting to divorce from her American domicile husband. She will not be able to use the basis of jurisdiction in England as if she were domiciled in England merely because she has the Irish nationality. Logic compels one to agree with this analysis. EU law seeks to make all nationalities the same, not all domiciles.[156] Furthermore, in the uncertainty jurisdictional bases should rather be limited than broadened; they are broad enough already.

6. Jurisdiction rules for parental responsibility

The rules on jurisdiction in cases of parental responsibility are contained in a separate section because of the specificity of the matter.[157] The Brussels II Regulation dealt only with parental responsibility over children of both spouses and only when this issue was linked to procedures for divorce, legal separation or the annulment of a marriage. The Brussels II*bis* Regulation changed this, elaborating the scope to draw more cases of parental responsibility into its sphere of application.

Unlike the previous section, there is only one general basis of jurisdiction, which can be overridden by particular rules. The basic rule is that the court of the habitual residence of the child has jurisdiction to hear cases of parental responsibility.[158] For four other cases the Regulation creates special rules that derogate from the general basis of jurisdiction. These are the (limited) continuing jurisdiction if the child moves, prorogation of jurisdiction, jurisdiction in cases of child abduction, and jurisdiction regarding the return of the child.

If the child legally moves to a different EU Member State, while a person that has rights of access stays in the first EU Member State, and a court in that first Member State had

[155] P McEleavy, "The Communitarization of Divorce Rules: What Impact for English and Scottish Law?" (2004) *ICLQ* p 605-642 at p 615.
[156] Art 12 EC Treaty contains the principle of non-discrimination on the basis of nationality within the EU.
[157] Sec 2 of Chapter II, comprised of Arts 8-15.
[158] Art 8.

given a judgment on rights of access, the courts of the same Member State retain jurisdiction to amend that order for a period of three months, except if the person who has rights accepts the jurisdiction of the courts of the State of the child's new residence.[159] This rule does not seem to extend jurisdiction in the EU if the child moves to a third State.

Not only wrongfully removing, but also wrongfully retaining a child amounts to abduction so that such an act cannot constitute an easy way to establish a new habitual residence for a child. The court of the habitual residence just before the child abduction will maintain jurisdiction until all persons and institutions with rights of custody have acquiesced in the removal or retention, or the child has resided in the new State for at least a year and return is no longer sought (by persons or institutions that have custody rights) or possible.[160]

Regarding the return of the child, the system of the 1980 Hague Convention on Child Abduction is followed.[161]

Where a child's habitual residence cannot be determined and there can be no jurisdiction on the basis of prorogation, the courts of the Member State where the child is present shall have jurisdiction. This rule particularly applies to refugee children, or children internationally displaced because of disturbances in their country. Here once again the EU applies its rules far beyond its borders. One can argue that such pity is well-placed, but the question is whether this should be the task of the EU or the individual Member State where the refugee children are present.

If it is in the best interests of the child, the following courts can be chosen:

- the court that has jurisdiction to grant a divorce, legal separation of annulment of marriage in the same proceedings if at least one of the spouses has parental responsibility over the children;
- the courts of an EU Member State with which the child has a substantial connection (for instance the nationality of the child or the habitual residence of one of the holders of parental responsibility).[162]

Third States beware: if a child has his/her habitual residence in a third State which is not party to the fairly new 1996 Hague Convention on parental responsibility, it will be deemed to be in the best interests of the child that jurisdiction be had by the chosen court. While this reference might be positive for the Hague Convention,[163] no mention is made of bilateral conventions or other multilateral conventions. If third States were

[159] Art 9.
[160] Art 10.
[161] Art 11 Brussels II*bis* Regulation, referring to the 1980 Hague Convention.
[162] Art 12.
[163] See *supra*, p 2.

Party to such, that fact could possibly be ignored when determining the best interests of the child.

Lastly the Brussels II*bis* Regulation contains the same rule on residual jurisdiction as does the section on divorce. If no EU Member State court has jurisdiction according to the rules mentioned, the national rules of the Member States will determine jurisdiction.[164]

7. The nationality problem

The Brussels II*bis* Regulation uses nationality for purposes of jurisdiction. The use is limited, namely only when the spouses have the same nationality or when the plaintiff has been living in a Member State for six months and also has the nationality of that Member State. This seems contradictory to the philosophy of the EU, namely that nationality does not matter if one is a citizen of the EU; all nationalities are equal. Discrimination on the basis of nationality is not tolerated.[165]

The more serious difficulty is that of dual nationality. The Borrás Report states only the following:
"*The [Regulation] is silent on the consequences of dual nationality, so the judicial bodies of each State will apply their national rules within the framework of general Community rules on the matter.*"[166]

Some of the EU Member States are party to the Hague Convention on Certain Questions relating to the Conflict of Nationality Laws of 1930.[167] The Regulation does not contain a reference to this Convention. According to that Convention, when a person has two nationalities, one should look at the one of the State with which he/she has the closest link.[168] However, if one of the nationalities is that of the State where the procedure is taking place, that State will be able to give preference to the forum nationality.[169] As stated above, distinguishing between EU nationalities has become an evil. This seems to raise two difficulties: the first is the treatment of a person with two EU nationalities (and its effects on the counter-party from a third State) and the second is a person who has a third State nationality and an EU Member State nationality other than the one of the State where the procedure is taking place.

[164] Art 14.
[165] Art 12 EC Treaty states: "*Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited*."
[166] Borrás Report, para 33, p 39.
[167] Belgium, Cyprus, Malta, The Netherlands, Poland, Sweden and the United Kingdom are party. Other, namely Austria, Czechoslovakia (as it then was), Denmark, Estonia, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Luxembourg, Portugal, Spain, Yugoslavia (as it then was), have signed ut not ratified the Convention.
[168] Art 5.
[169] Art 3.

The Borrás Report, as quoted, states that one should take the framework of general Community rules into account, for instance the principles of the free movement of persons. Therefore case law of the European Court of Justice can also be important when interpreting the Brussels II*bis* Regulation, in this instance with regard to dual nationality.

Firstly, if a person has two EU nationalities, no distinction should be made between these nationalities. This principle was emphasised in the *Garcia Avello* case.[170] A Spanish father (Garcia Avello) and a Belgian mother (Weber) had two children. In Belgium they had been registered as Garcia Avello, according to the Belgian law that children get the surnames of their fathers. In Spain these children had the names Garcia Weber, according to the Spanish law that children get the first surname of their father and the first surname of their mother. The parents wanted to have the Belgian surnames of the children changed to Garcia Weber, so that they would have the same name in both countries, and therefore throughout the EU. The Belgian authorities refused to change the names because the children also had the Belgian nationality which meant, certainly according to the Hague Convention, that they could in Belgium be regarded as Belgian citizens and Belgian law would be applicable on their names. Finally a preliminary question was referred to the European Court of Justice. The Court found that this distinction could not be made and that the Belgian authorities were under an obligation to change the names of the children if they (or their parents) chose to have another EU law, of which they also had the nationality, applied to their name. In this sense the effect of the 1930 Hague Convention was reduced to be subordinate to that of the equality of all EU nationalities.

When drafting the Belgian *Code de droit international privé* (Private International Law Code), which was enacted shortly after this judgment, the legislator interpreted this judgment a restrictively.[171] The new rule permits a person with the Belgian and another EU nationality to change his/her name according to the law of the State of his/her other EU nationality. The case was not interpreted to have any bearing on the giving of the name in the first place, or on other situations where dual nationality might cause confusion. It seems as yet unclear how far the ripples of the judgment will reach.[172]

Probably the European Court of Justice wanted to establish a general principle that had to be respected. The *Gerechtshof* (Appeal Court) of s'Hertogenbosch,

[170] ECJ case 148/02, judgment of 2 October 2003, *Carlos Garcia Avello v the Belgian State*, not yet reported in *ECR*; see http://www.curia.eu.int; see P Lagarde, case note on *Garcia Avello* (2004) *RCDIP* p 192-202; G-R de Groot & S Rutten, "Op weg naar een Europees IPR op het gebied van het personen- en familierecht" (2004) *NIPR* p 273-282.

[171] Act of 16 July 2004, published in *BS* of 27 July 2004; the Code entered into force on 1 October 2004.

[172] For a more detailed analysis of the bearing of this judgment on third State nationals, see G-R de Groot & S Rutten, "Op weg naar een Europees IPR op het gebied van het personen- en familierecht" (2004) *NIPR* p 273-282 at p 278-279.

The Netherlands, gave the judgment a wider interpretation than the Belgian legislator. In a similar case of dual Dutch-Spanish citizenship of the child, it found that the parents could choose Spanish law to be applied already at the time of giving the name and not only at the time when a change of name is requested.[173]

One should be glad that the European Court of Justice gave an exact response. Of course it could not dictate to courts and administrative authorities which law to apply in cases that were not before it. However, the *Garcia Avello* judgment has even led some authors to conclude that the private international law family rules should be unified by the European Union, merely because it will be more efficient.[174] The spirit of the judgment probably goes further than only change of name. If one recognises the precedent system, the judgment could be seen as an interpretation of the concept of dual EU nationality.

Thus when a person has two EU nationalities, no distinction should be made between those nationalities. A party from a third State would have to take both nationalities of his/her counter-party into account.

The second question that might arise, regards the simultaneous nationality of an EU Member State and a third State. An example can be found if someone with Australian and Dutch nationality marries a French person. The Australian/Dutch is resident in Australia and he has a much closer link to Australia than to The Netherlands. According to the Brussels II*bis* Regulation, persons that have an EU nationality may not be sued within the EU on the basis of other jurisdictional rules.[175] Outside the Regulation, the French courts always have jurisdiction if the plaintiff has French nationality. The French court, in applying the 1930 Hague Convention on conflict of nationality laws,[176] would be able to state that the Australian nationality was the relevant one. However, could the plaintiff argue that since he also has Dutch nationality (even if he has no link with The Netherlands) so that that EU nationality would have to be preferred. The Dutch court would consider the EU nationality more important than the third State nationality; should the French court be doing the same? In other words, should all EU Member State courts give preference to the EU nationality of parties, even if the nationality of the forum is not concerned?

A person qualifies to benefit of the free movement rules as soon as he/she has any EU nationality. The fact that it is a person's second nationality and that he/she has no link

[173] Gerechtshof 's Hertogenbosch, 27 January 2004; (2004) *NIPR* p 183-184, no 106; http://www.rechtspraak.nl.
[174] G-R de Groot & S Rutten, "Op weg naar een Europees IPR op het gebied van het personen- en familierecht" (2004) *NIPR* p 273-282 at p 282. For a critic view of this far-reaching influence and the difficulties the case introduces, see P Lagarde, case note to *Garcia Avello* (2004) *RCDIP* p 192-202, esp at p 195-197 & 200-201.
[175] Art 6.
[176] It serves to be reminded here that both France and The Netherlands are States Party to that Convention; see *supra*, fn 167.

with the specific EU Member State is irrelevant. The extent to which this principle can be transposed to jurisdiction rules, is unclear.

One cannot avoid wondering about the extent of the equalisation of every EU nationality. If the treatment of dual nationality is such that any EU nationality should be seen as equal to the EU nationality of the court where the procedure is, the Brussels II*bis* Regulation will be extended even further.

These examples furthermore show that nationality is not a suitable criterion for jurisdictional rules in an EU where all nationalities are equal and no distinction on the basis of nationality is tolerated. This ground of jurisdiction in conjunction with the principle of non-discrimination on the basis of nationality will probably only draw more and more people, especially those with dual nationality, into the sphere of the Regulation.

Part D: Additional defendants

Article 6 of the Brussels I Regulation

A person domiciled in a Member State may also be sued:

1. *where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments from separate proceedings;*
2. *as a third party in an action on a warranty or guarantee or in any other third party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case;*
3. *on a counter-claim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending;…*

Article 4 of the Brussels II*bis* Regulation:

The court in which proceedings are pending on the basis of Article 3 shall also have jurisdiction to examine a counterclaim, insofar as the latter comes within the scope of this Regulation.

1. Introduction

In international disputes it often happens that there are more than two parties. Additional defendants can have various capacities. They can be co-defendants, *ie* all defendants to the main claim. Another possibility is that the first defendant calls a third party in an action on a warranty or guarantee. Lastly there is the possibility that a defendant may bring counter-claims: regarding the counter-claim, the original plaintiff becomes a defendant. The Brussels I Regulation contains rules for these three types of defendants, if they are domiciled in the EU. One sees that these are a special type of defendants. They are not the first or only defendants in a procedure. Thus, an interaction between the Brussels I Regulation and national rules is possible. For instance, jurisdiction over the original proceedings can be conferred by national rules because the first defendant was domiciled in a third State. Jurisdiction over the additional defendants can then be based on the Brussels I Regulation's rules.

The Brussels II*bis* Regulation contains a rule only regarding counter-claims. One might wonder why there is no rule on co-defendants. Regarding divorce, the answer seems straight-forward: there could only be two parties, *ie* one plaintiff and one defendant. Regarding parental responsibility and the abduction of children, one might envisage situations in which there are more than one defendant.[177]

[177] The question why the drafters did not create rules for such a situation, falls beyond the scope of this thesis.

The Insolvency Regulation, dealing with the insolvency of a specific debtor, does not contain rules on additional defendants either.

2. Co-defendants

General

Under the Brussels I Regulation, a plaintiff may bring an action where a defendant is domiciled, not only against that defendant, but also against co-defendants in the same case.[178] The provision permitting such joinder of defendants states clearly that it deals with defendants domiciled in the EU. Co-defendants domiciled outside the EU cannot be usurped by the Regulation on the basis that they are natural co-defendants to cases pending in an EU court where another defendant is domiciled.

The order of service of the defendants is of no importance. In the English case *Canada Trust & others v Stolzenberg & others*[179] the defendant domiciled in England was served only after the co-defendants domiciled in Switzerland (on application of Art 6(1) of the Lugano Convention). The Court found that this was not material with regard to its jurisdiction over the defendants domiciled in Switzerland.

The European Court of Justice has ruled that the provision must be interpreted restrictively, *ie* one can only use the co-defendants rule if one of the defendants is domiciled at the place of the forum and not if jurisdiction is based on the place of the performance of the contract or the place of the commission of a tort.[180]

Only other defendants domiciled in the EU may be drawn into the same court on the basis of the provision under discussion. That means that one might in one case see the applicability of the Brussels I Regulation to some defendants and of domestic rules on other defendants.

To each his/her own rule

In the case *Canada Trust Co & others v Stolzenberg & others*,[181] for example, the first defendant was domiciled in England, others in Switzerland (party to the Lugano Convention), and yet others in Panama, Liechtenstein and the Netherlands Antilles (third States). On the defendant domiciled in England, the Lugano Convention was

[178] Art 6(1) Brussels I Regulation.
[179] [1998] ILPr 290 (CA) at 312-313. This point was not overturned by the House of Lords, [2002] 1 AC 1 (HL).
[180] ECJ case C-51/97, judgment of 27 October 1998, *Réunion européenne SA and Others v Spliethoff's Bevrachtingskantoor BV and the Master of the vessel Alblasgracht V002* [1998] *ECR* I-6511.
[181] [2002] 1 AC 1 (HL).

applied, although it seems that the Brussels Convention should have been applied.[182] Regarding the parties domiciled in Switzerland, the House of Lords also relied on the Lugano Convention, which contains the same provision as Article 6(1) of the Brussels I Regulation.[183] For jurisdiction over the other parties, the House of Lords applied English domestic law.[184] Similarly, the Belgian *Hof van Cassatie* (Court of Cassation) applied domestic law regarding the joining of a defendant domiciled in the Congo.[185]

Further difficulties may arise where one defendant is domiciled in an EU Member State and another in a third State while jurisdiction is based on contract or tort. Let us assume that the national court in question has jurisdiction over the party domiciled in another EU Member State on the basis of Article 5 (for instance a contract was to be performed at the place where the Court is situated). On the basis of some national procedural rules, it is possible to join cases that are narrowly connected.[186] Under the Brussels I Regulation, it is possible to join two connected cases if they are pending before the courts of different EU Member States. This is, however, a procedural rule dealing with pending cases, and not a jurisdictional rule that can allow joining the cases in the first place.[187]

Therefore, defendants from the EU can only be joined in limited cases, while defendants from third States might be joined on the basis of wider criteria, found in national law.

However, the European Court of Justice, in *Réunion européenne*[188] did not clearly distinguish between EU domiciled defendants and defendants from third States either. The case concerned actions in tort and contract against transporters of fruit. Some of the defendants were domiciled in Australia and others in The Netherlands. In responding to the questions of the French *Cour de cassation* (Court of Cassation), the European Court of Justice was silent on the fact that the co-defendants were from a third State. It gave an elaborate interpretation of the interaction of the provision on multiple defendants with the jurisdictional rules based on contract and tort. The European Court of Justice should plainly have stated that co-defendants from third States do not fall under the EU jurisdictional rules, but under domestic law.

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[182] The domicile of the defendant in a Contracting State is sufficient to make the Brussels Convention applicable: ECJ case C-412/98 judgment of 13 July 2000, *Group Josi Reinsurance Company SA v Universal General Insurance Company (UGIC)* [2000] *ECR* I-5925. The Lugano Convention does not adjust the sphere of application of the Brussels Convention (or now of the Brussels I Regulation); see Art 54*ter* Lugano Convention. On this issue in the *Stolzenberg* case, see *supra*, Chapter 1, p 2.

[183] Art 6(1) Lugano Convention.

[184] RSC Ord 11, r 1(1)(c)

[185] Judgment of 2 November 2001; (2004) (1) *Tijdschrift@ipr.be* p 73-75.

[186] See, for example, Art 9 of the Belgian *Code de droit international privé* (Private International Law Code), Act of 16 July 2004, published in *BS* 27 July 2004.

[187] Art 28 Brussels I Regulation. For more information, see *infra*, Chapter 5, Part D, p 2 *et seq*.

[188] ECJ case C-51/97, judgment of 27 October 1998, *Réunion européenne SA and Others v Spliethoff's Bevrachtingskantoor BV and the Master of the vessel Alblasgracht V002* [1998] *ECR* I-6511; note by H Gaudemet-Tallon (1999) *RCDIP* p 333-340.

Once a judgment is obtained in a court in the EU, the judgment can move freely throughout the EU. Thus enforcement is possible against the foreign defendant in all other EU Member States. What in fact happens here is the strange co-operation of two sets of legal rules to the detriment of a party from outside the EU. If only the Brussels I Regulation or Lugano Convention were applied, such detriment to a defendant would not be possible. It seems problematic that parties coming from third States should be adversely affected by the Regulation to this extent.

Different rules to one defendant?

On the other hand, in some domestic systems, such as the English, it has to be investigated for each defendant separately whether he is a necessary or proper party. This rule has close connections with the doctrine of *forum non conveniens*. In *Molnlycke AB and Another v Procter & Gamble Ltd and others*[189] the Court combined the Brussels Convention rule with this requirement of English law. The reason was that it was clear in this case that the additional defendant (a subsidiary domiciled in Germany) was only sued in order to get hold of documents that would not otherwise be available during discovery proceedings. The Court of Appeal considered the fact that evidence could be obtained in Germany by way of the Hague Evidence Convention[190] for purposes of whether the German company could be joined to the proceedings on the basis of he Brussels Convention's rule on co-defendants. However, that argument was not pursued further, since the court found that it also had jurisdiction over the German company on the basis of the fact that the tort was committed in England (Art 5(3) Brussels Convention).

This combining of the Brussels rule and domestic law seems incorrect. The only consideration that the Brussels I Regulation permits, is whether the claims are so closely connected that it is expedient to hear them together to avoid irreconcilable judgments.[191] The Brussels and domestic rules cannot be combined with regard to the same defendant, especially not after the European Court of Justice's rejection of the doctrine of *forum non conveniens* in conjunction with Article 2 of the Brussels I Regulation.[192]

[189] [1992] 4 All ER 47; [1992] RPC 21 (CA).
[190] Convention on the taking of evidence abroad in civil or commercial matters (1970).
[191] Art 6(1) Brussels I Regulation. This provision is identical to that in the Brussels Convention, upon which the *Molnlycke* case was determined.
[192] ECJ case C-281/02, judgment of 1 March 2005, *Owusu v Jackson*, not yet published in *ECR*, see http://www.curia.eu.int, also discussed *infra*, Chapter 5, p 2 *et seq*. See also JJ Fawcett, "Multi-party litigation in private international law", (1995) *ICLQ* p 744-770 at 754.

A bad rule?

English law is not the only where stricter rules apply for the joining of additional defendants. Under US law, such a jurisdictional rule would not pass the due process test as this test has to be applied separately to each defendant.[193] The 1999-text of the Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters contained a provision to join defendants at the place of the residence of one defendant, on condition that there was a substantial link between the State and the dispute involving every defendant not resident in that State.[194] It had subsequently been agreed between the negotiators to delete the multiple defendants jurisdictional basis from the Convention.[195] It is interesting that the European negotiators could be convinced to delete this provision.

3. Parties in warranty or guarantee

Jurisdiction can also be extended to third parties in an action on a warranty or guarantee or in other third party proceedings.[196]

Combination with national rules

This basis of jurisdiction can be combined with national rules. Two interactions can be envisaged. Firstly the first defendant can be from outside the EU, so that national bases of jurisdiction are applied for him. EU parties in an action on a warranty or guarantee can then be sued before the same court on the basis of this rule. A case of the French *Cour de cassation* provides an example.[197] The court based its jurisdiction on Article 14 of the French *code civil* (Civil Code), *ie* the fact that the plaintiff was a French national. The defendant was Saudi-Arabian and the EU jurisdictional rules were therefore not applicable. The Court then used Article 6(2) against a third party domiciled in The Netherlands in the action on a guarantee.[198]

Secondly, the jurisdiction as to the main claim can be based on the Brussels I Regulation, while the party in an action on a warranty is sued on the basis of national rules, because he/she is from a third State. This happened in the case before the *Rechtbank van koophandel* (Commercial Court) of Veurne (Belgium).[199] In that case

[193] See also the discussion *supra*, Chapter 2, Part D, p 2 *et seq*. The rule might be pushed back if the *forum non conveniens* doctrine were applied by the courts of the European Union, but that is not the case. The anomaly has been well illustrated by the *Owusu* case, ECJ case C-281/02, judgment of 1 March 2005, *Owusu v Jackson*, not yet published in *ECR*, see http://www.curia.eu.int.
[194] See Art 14 of the 1999-text.
[195] See Art 14 of the 2001-text.
[196] Art 6(2) Brussels I Regulation.
[197] Cass civ 1re ch, 14 May 1992, approving note by A Huet, 1993 *JDI*, p 151-152.
[198] See H Born, M Fallon & J-L Van Boxstael, *op cit* (fn 4) p 26.
[199] Judgment of 21 April 2004, AR A/02/00464, unpublished.

the question arose with regard to a party joining a pending dispute voluntarily, *ie* without being sued by one of the parties to join. The plaintiff was domiciled in Belgium and the defendant in France. The Brussels I Regulation was therefore clearly applicable. A party domiciled in Costa Rica then joined the proceedings, claiming damage from the plaintiff. An intricate dispute on jurisdiction arose. The main action was one in contract and tort. The Court ruled that it lacked jurisdiction, because the forum clause was not valid and the places of performance of the contract and commission of the tort were not Belgium. The defendant, as stated, was domiciled in France. After having found that it lacked jurisdiction as to the main claim, the court considered its jurisdiction regarding the claim by the Costa Rican party, who voluntarily joined the proceedings. The Court pointed out that this was an incidence of "aggressive" joining, because the party sought to protect its own interests. The admissibility of the claim was adjudicated according to Belgian law. With regard to jurisdiction, the Court found that the defendant of the voluntary claim was domiciled in Belgium (the original plaintiff). The Court therefore found that it had jurisdiction with regard to this claim on the basis of Article 2 of the Brussels I Regulation.

This result is strange and hard to justify. In the first place, if a court has found that it lacks jurisdiction as to the main claim, it seems that that is the end of the story. The Court cannot then take on a claim that had been hooked onto the main claim, which it has just refused to hear. Furthermore, parties from outside the EU that voluntarily join proceedings pending in the EU, can hardly be seen as plaintiffs for purposes of the scope of the Regulation. Likewise, EU plaintiffs failing to establish jurisdiction can hardly be seen as defendants for the purposes of determining the scope of the Brussels I Regulation.

It should be reminded here that all judgments of EU Member State courts can be recognised and enforced in all other EU Member State courts, independent of the residences of the parties to the dispute. Therefore, in this case the effects on the party from a third State is broader than only in Belgium.

A bad rule?

This basis of jurisdiction was also found to be quite problematic at the negotiations of the Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters. Joinder of these parties is not always fair and may lead to strange results concerning parties from other States. Like for co-defendants, the negotiators had decided to delete the rule.

4. Counter-claims

The Brussels I and II*bis* Regulations also allow parties to bring counter-claims arising from the same contract or facts as the main claim.

Combination with national rules

In the Brussels I Regulation, the provision deals with a counter-claim against a person domiciled in the EU. In the application of the provision one might once again see an interaction between the Brussels I Regulation and the national rules of jurisdiction.

If a plaintiff from a third State brings an action in an EU court where the defendant is domiciled, the provision of the Brussels I Regulation on counter-claims will not be applicable. If the defendant wishes to bring a counter-claim against the plaintiff domiciled in a third State, the possibility will have to be adjudicated according to domestic law. This analysis has been followed by the German *Bundesgerichtshof* (Federal Supreme Court) in proceedings between a plaintiff domiciled in Finland and a defendant domiciled in Germany, before Finland was an EC Member State, so that it can be considered as a third State.[200] The jurisdiction over the counter-claim by the German domiciled defendant was adjudicated according to German national law.

Conversely, if a plaintiff from the EU brings an action in an EU court against a party from a third State, the national rules of jurisdiction will apply. It seems in line with the approach that if the party from the third State then wishes to bring a counter-claim, he/she may do so on the basis of the Brussels I Regulation.

The Brussels II*bis* Regulation

In the Brussels II*bis* Regulation, the applicability of the provision is not as clear. The starting point of the provision seems not to be the defendant on counter-claim, but the court. The rule states that the court that has jurisdiction also has jurisdiction to hear the counter-claim. A plaintiff habitually resident in a third State and with the nationality of a third State bringing proceedings against a defendant habitually resident in the EU, may then be subjected to the rules of the Brussels II*bis* Regulation regarding counter-claims. The counter-claim against him may be based on the Regulation.

One can see that the Brussels II*bis* Regulation is broader at this point than the Brussels I Regulation. In this instance, for once, the broad nature of the Regulation is not shocking. Tying the rule on counter-claims to the court instead of the defendant does have procedural advantages. It means that the jurisdiction for all the claims will more often be adjudicated by the same instrument, rather than the interaction described above.

[200] Judgment of 8 July 1981, (1981) *NJW* p 2644-2646. See also P Grolimund, *Drittstaatenproblematik des europäischen Zivilverfahrensrechts* (Tübingen: Mohr Siebeck, 2000) p 57-58.

5. Conclusion

Dragging more defendants into the same court often requires combining the Brussels I Regulation's rules with those of national law. Even so, the rules of the Brussels I Regulation sometimes lead to inequitable results.

Part E: Voluntary appearance

Article 24 of the Brussels I Regulation

Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 22.

1. Introduction

Is voluntary appearance a form of tacit jurisdiction clause? One could say that the defendant tacitly agreed with the forum chosen by the plaintiff, and therefore did not contest jurisdiction.[201] This argument is supported by the fact that voluntary appearance will only be accepted in areas where parties may choose a court. Where there is an exclusive basis of jurisdiction, another court seised in the action, must of its own motion declare that it has no jurisdiction.[202] Similarly, in the sphere of the Brussels II*bis* Regulation, which concerns family law, voluntary appearance is not a basis of jurisdiction and the court has to investigate its jurisdiction of its own motion.[203] Under the Insolvency Regulation, because of the nature of insolvency, the rule on voluntary appearance of course does not exist.

On the other hand, some have the view that voluntary appearance cannot be likened to a forum clause. They argue that voluntary appearance is a matter between the defendant and the court and has nothing to do with the plaintiff. It is rather seen as submission by the defendant, which is to be distinguished from submission by way of consent between the parties in some common law states.[204]

2. Parties from third States

What is the delimitation of this provision? Which voluntarily appearing defendants will be bound by the jurisdiction of the court? To answer these questions, one has to enter into the technicalities of the Brussels I Regulation. The often-quoted Article 4 states that as against defendants not domiciled in the EU, jurisdiction shall not be determined according to the rules of the Regulation, but according to the national bases of

[201] The Jenard Report, p 36-38, supports the view that voluntary appearance amounts to a tacit choice of forum.
[202] Art 25 Brussels I Regulation.
[203] Art 17 Brussels II*bis* Regulation.
[204] On different forms submission can take and how they function as basis of jurisdiction, see CF Forsyth, *Private International Law* (4th edn, Lansdowne: Juta, 2003) p 202-205.

jurisdiction of the Member States.[205] Article 4 provides an exception for Articles 22 and 23; those are the provisions on exclusive jurisdiction and forum clauses. Article 24 is not mentioned. According to the letter of the rule in Article 4, only defendants domiciled in the EU will thus be subjected to the jurisdiction of a court in front of which they have voluntarily appeared. At the same time, Article 24 on voluntary appearance does not determine its own scope, as do some provisions of the Brussels I Regulation (for instance the sections providing protective bases of jurisdiction for so-called weaker parties[206]).

How the exact scope of the provision on voluntary appearance should be determined, is not clear. The European Court of Justice in the *Josi* case made an *obiter* statement on this provision to the effect that it applies irrespective of the domicile of the defendant and irrespective of the domicile of the plaintiff.[207] As an *obiter* statement, this finding does not bind the European Court of Justice nor the national courts when interpreting the provision in future. Moreover, the interpretation is unclear. Does it mean that one of the parties may be from outside the EU, but the other must be from in the EU for this provision to apply (although it does not matter which party is from where)? Did the European Court of Justice perhaps mean that neither party has to be domiciled in the EU?

If the provision is in fact a tacit choice of forum agreement, one might think that the same limits as those of the provision on forum clauses (Art 23, discussed in Chapter 4[208]) would apply. That means that the provision will apply if one of the parties (it does not matter whether that is the plaintiff or the defendant) is domiciled in the EU.[209] That would be in the line with the first possible reading of what the European Court of Justice meant in the *Josi* case. Of course the court before which the voluntary appearance takes place will have to be an EU one, otherwise the question of the application of the Brussels I Regulation will not arise. According to this logic, a party from outside the EU that inadvertently voluntarily appears before an EU court, can be drawn into the system of the Brussels I Regulation.

The second possible reading would permit the provision to go even further. If a party from a third State tried his luck and sued another party from (the same or a different) third State in the EU and the defendant does not immediately contest jurisdiction, the

[205] See Part B of this Chapter, p 2 *et seq*.
[206] See Part G of this Chapter, p 2 *et seq*.
[207] ECJ case C-412/98, judgment of 13 July 2000, *Group Josi Reinsurance Company SA v Universal General Insurance Company* [2000] *ECR* I-5625, rec 44-45. See case notes by F Leclerc, (2002) *JDI* p 623-628; P Vlas (2003) *NJ* no 597, p 4584-4586; A Staudinger (2000) *IPRax* p 483-488. This case is discussed in further detail in Parts B of this Chapter, *supra* p 2.
[208] See *infra*, p 2 *et seq*.
[209] For support of this view, see J Kropholler, *Europäisches Zivilprozeßrecht. Kommentar zu EuGVO und Lugano-Übereinkommern* (7th edn, Heidelberg: Verlag Recht und Wirtschaft GmbH, 2002) p 318-319; A Staudinger, (2000) *IPRax*, p 483-488 at p 485.

court would assume jurisdiction.[210] This broad reading does not require either party to be domiciled in the EU. It does not seem that the Brussels I Regulation should regulate this matter. Voluntary appearance, also in cases of tort, is not known in all legal systems as a basis of jurisdiction.[211] Defendants from third States should have to investigate only the rules on voluntary appearance of the State they are appearing and not of the Brussels I Regulation. When two parties domiciled in third States purport to proceed in an EU Member State court, the national rules of that EU Member State should be applied in order to find jurisdiction.

It is submitted that fairness and reasonableness require the letter of Article 4 to be followed. Jenard shares this point of view in his report. He states that the rule only applies if a defendant domiciled in the EU is sued in the courts of another EU Member State.[212] The German *Bundesgerichtshof* (Federal Supreme Court) also found in this line.[213] The plaintiff in the case was domiciled in Germany while the defendant was domiciled in Switzerland. The Lugano Convention was not yet in force at the relevant time, so that Switzerland can be seen as a third State to the Brussels Convention. The court found that the Brussels Convention's provision on voluntary appearance was not relevant if the defendant was domiciled in a third State.

According to the rule in Article 24, when the defendant first begins to defend him/herself as to the substance of the claim, he/she loses the right to contest jurisdiction.[214] This non-contesting of jurisdiction might be due to a lack of knowledge of the jurisdictional rules of the European Union, rather than a true agreement.[215] Furthermore, the rule might differ in different States. According to some legal systems, for instance, it might not be possible to assume jurisdiction in this way over delictual claims.

Permitting a different rule for the scope of the provision on voluntary appearance and a forum clause, acknowledges the fundamental difference between these provisions – a forum clause can, and usually does, come into existence before a dispute arises between the parties. At that stage it is unknown what the capacities of future litigants

[210] For support for the view that the provision applies even when the defendant is domiciled in a third State, see GAL Droz, *Pratique de la convention de Bruxelles du 27 septembre 1968* (Paris: Dalloz, 1973), p 38-39; P Gothot & D Holleaux, *op cit* (fn 4) p 111; Advocate General Darmon in ECJ case C-318/93, opinion of 8 June 1994, *Brenner & Noller v Dean Witter Reynolds Inc* [1994] *ECR* 4275 at paras 13 & 15 (this view was not essential for the decision in the case).
[211] This had been pointed out at the negotiations of the Hague Convention on Choice of Court Agreements (adopted on 30 June 2005); see *Procès verbal* No 7, p 8
[212] At p 38.
[213] Judgment of 21 November 1996, (134) (1998) *BGHZ* p 127-137. See also P Grolimund, *op cit* (fn 200) p 55.
[214] Except if he contests jurisdiction and in the alternative brings an argument on the substance; ECJ case 150/80, judgment of 24 June 1981, *Elefanten Schuh GmbH v Jacqmain* [1981] *ECR* 1671.
[215] See H Gaudemet-Tallon, *Compétence et exécution des jugements en Europe* (3rd edn, Paris: LGDJ, 2002) p 119-120.

(plaintiff or defendant) will be. Therefore legal certainty requires that a clause will be respected if one of the parties is domiciled in the EU, and not only if the defendant is domiciled in the EU. That argument does not hold for voluntary appearance: at that stage, it is inevitably clear which party is the plaintiff and which the defendant.[216] At the same time, the structure of the Brussels I Regulation seems to support this analysis. Section 7 contains only two provisions, namely that on forum clauses (Art 23) and that on voluntary appearance (Art 24). If the drafters had intended the same rule on scope to apply to both provisions, they could have stated so at the beginning of the section, as has been done for the protective bases of jurisdiction.[217] Alternatively both rules could have been inserted in the same article. In line with this view, the Jenard Report in its explanation on the provision clearly refers to "*a defendant domiciled in a Contracting State*".[218]

The argumentation that has been elaborated here goes against the European Court of Justice's finding in the *Josi* case, but as has been pointed out, the finding was *obiter* and has no binding legal force. Allowing voluntary appearance by third State defendants to confer jurisdiction on EU courts according to the Brussels I Regulation, would allow the Brussels I Regulation to stretch to cases that have a very tenuous link with the EU.[219]

3. Renunciation of written forum clauses

Voluntary appearance can amount to a tacit renunciation of a valid, written forum clause. In the cases of *Elefanten Schuh GmbH v Jacqmain*[220] and *Spitzley v Sommer Exploitation*[221] the European Court of Justice stated that where a court has jurisdiction pursuant to a jurisdiction clause and the case is brought before another court, but the defendant does not contest jurisdiction, that court will have jurisdiction. In both these cases the appointed court was in the EU. The cases therefore deal with the interaction between certain provisions of the Brussels I Regulation, rather than truly examining relations with third States.

Transposing the facts to relations with third States, a party from India and one from Belgium, for instance, conclude a forum clause for a court in London. Subsequently the Indian party brings suit in a court in Belgium. If the Belgian party appears without contesting jurisdiction, the legal construction is that the parties have implicitly agreed that the court in Belgium should hear their dispute. They have to this effect implicitly

[216] See J Kropholler, *op cit* (fn 209) p 318-319.
[217] Sections 3, 4 and 5; see Part G of this Chapter, p 2 *et seq*.
[218] Jenard Report, p 38.
[219] See H Gaudemet-Tallon, *op cit* (fn 215) p 120.
[220] ECJ case 150/80, judgment of 24 June 1981 [1981] *ECR* 1671. See case notes by H Gaudemet-Tallon, (1982) *RCDIP* p 152-161; TC Hartley, (1982) *ELR* p 237-239.
[221] ECJ case 48/84, judgment of 7 March 1985 [1985] *ECR* 787; see case notes by H Gaudemet-Tallon (1985) *RCDIP* p 687-688; TC Hartley, (1986) *ELR* p 98. This case dealt with jurisdiction over a counterclaim, see *infra*, p 2.

renounced their first choice for the London court. Difficult to make, but easy to renounce, such is the nature of these forum clauses.

If one switches the roles of the parties around, so that the Belgian party is the plaintiff and the Indian the defendant, the same visions as discussed above recur. According to the first viewpoint, which maintains the same scope rules as for forum clauses, the Brussels I Regulation would regulate the matter, since one of the parties is domiciled in the EU. According to the second viewpoint, the Brussels I Regulation would also regulate the matter because the proceedings are in an EU court. Lastly, according to the third vision, which seems best in line with the general rule on the defendant, the Brussels I Regulation would not regulate the matter. Since the defendant is domiciled in a third State, the national rules on jurisdiction would have to be applied.

It may happen that a court outside the EU is appointed and that an action is subsequently brought in an EU Member State court. If one accepts that that EU court can have jurisdiction on the basis of the voluntary appearance of the defendant, it will probably assume jurisdiction. It will probably not have to consider the jurisdiction clause in favour of the third State court, since the parties had, according to the legal construction, renounced that former choice by a latter consent. If consent is clear and the defendant does not wish to contest jurisdiction, there is no reason to hold the parties to an old forum clause. If the forum clause were for an EU court, they would not have been held to the forum clause either.

4. Counter-claims

The provision on voluntary appearance also applies to counter-claims. The plaintiff, who had now become the defendant on the counter-claim, is bound to the jurisdiction of the court if he voluntarily appeared, *ie* did not contest jurisdiction. This rule had been established by the European Court of Justice in the above-mentioned *Spitzley* case,[222] where the counter-claim did not relate to the same contract as the original claim. Regarding the contract from which the counter-claim arose, a forum clause existed in favour of another EU court. However, the European Court of Justice stated that even in those circumstances could the provision on voluntary appearance be applied.

5. Conclusion

Although the phenomenon of voluntary appearance has some similarities to forum clauses, assuming jurisdiction in such a case touches the defendant more severely than the plaintiff, who has made the decision to go to a specific EU court. This rule of the Brussels I Regulation should only apply if the voluntarily appearing defendant is

[222] See *supra*, fn 221.

domiciled in the EU. If the defendant is domiciled in a third State, the national rules on voluntary appearance should regulate the matter.

Part F: Special bases of jurisdiction

Article 5 of the Brussels I Regulation:

A person domiciled in a Member State may, in another Member State, be sued:

1. (a) in matters relating to contract, in the courts for the place of performance of the obligation in question;

(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,

in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided,

(c) if subparagraph (b) does not apply then subparagraph (a) applies;

2. in matters relating to maintenance, in the courts for the place where the maintenance creditor is domiciled or habitually resident or, if the matter is ancillary to proceedings concerning the status of a person, in the court which, according to its own law, has jurisdiction to entertain those proceedings, unless that jurisdiction is based solely on the nationality of the parties;

3. in matters relating to tort, delict *or* quasi-delict*, in the courts for the place where the harmful event occurred or may occur;*

4. as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings;

5. as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated;

6. as settlor, trustee or beneficiary of a trust created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing, in the courts of the Member State in which the trust is domiciled;

7. as regards a dispute concerning the payment of remuneration claimed in respect of the salvage of a cargo or freight, in the court under the authority of which the cargo or freight in question:

(a) has been arrested to secure such payment, or

(b) could have been so arrested, but bail or other security has been given;

provided that this provision shall apply only if it is claimed that the defendant has an interest in the cargo or freight or had such an interest at the time of salvage.

Article 6 of the Brussels I Regulation

A person domiciled in a Member State may also be sued:

…

4. in matters relating to a contract, if the action may be combined with an action against the same defendant in matters relating to rights in rem *in immovable property, in the court of the Member State in which the property is situated.*

1. Introduction

Firstly it is necessary to situate this provision in the scheme of the Brussels I Regulation. (A similar provision does not exist in the Brussels II*bis* or Insolvency Regulation.) This rule can only come into play when there is neither exclusive jurisdiction[223] nor protective jurisdiction for a weaker party.[224] Article 5 is also subordinate to a forum clause, in matters such as contract where parties may chose a forum.[225] In essence this provision is on the same level, in the form of an alternative, to the general basis of jurisdiction, namely the domicile of the defendant.[226] This means that the plaintiff can choose whether to sue the defendant at the domicile of the defendant, or at this alternative forum.

Regarding the scope, this provision falls in the same category as the jurisdictional rule on the domicile of the defendant. In other words, Article 5 applies to defendants domiciled in the EU. That explains why this Part of the thesis might be shorter than expected: although the provisions are often used, the impact on third States is smaller than some of the other provisions. It is the impact on third States which will receive the main focus here.

The existence of the rules in this provision is justified by a link between the facts and the forum.[227] That link does sometimes clearly exist, for instance if a tort was entirely committed and had its effects in some place in the EU, other than the domicile of the defendant. Granting jurisdiction to the courts of that place seems entirely reasonable. However, the facts of international civil disputes are not always that straightforward and the link is therefore not always that direct and visible. Drafting the rule in such a way that it grants jurisdiction where the court should have such jurisdiction, without in some cases granting exorbitant jurisdiction, is difficult, if at all possible.[228]

A particularity of Article 5 that should be mentioned, is that it does not only refer to the EU Member State that has jurisdiction, but directly to a specific court. For the most of the other provisions, the Brussels I Regulation only indicates in which EU Member State the competent court is. The internal rules of that Member State then has to determine which court has jurisdiction. Article 5, on the other hand, because of its direct link to the facts, appoints a court directly.

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[223] See Chapter 3, *infra*, p 2 *et seq*
[224] See Part G of this Chapter, *infra*, p 2 *et seq*.
[225] See Chapter 4, *infra*, p 2 *et seq*.
[226] See Part B of this Chapter, *supra*, p 2 *et seq*.
[227] According to the Jenard Report, p 22: "*Adoption of the 'special' rules of jurisdiction is also justified by the fact that there must be a close connecting factor between the dispute and the court with jurisdiction to resolve it*." See also H Gaudemet-Tallon, *op cit* (fn 215) p 125.
[228] Some authors, specifically from outside the EU, have criticised this rule as inherently exorbitant; see, for instance, AT von Mehren, *Theory and Practice of Adjudicatory Authority in Private International Law: a comparative study of the doctrine, policies and practices of common- and civil-law systems. General course on Private International Law* (2002) *Rec des Cours*, vol 295 p 72.

Because the provision under discussion derogates from the defendant's natural forum, the European Court of Justice has emphasised that the provision should be interpreted strictly, so as to promote foreseeability.[229] For instance, an EU defendant may not be sued as a co-defendant in the place where the contract was performed. In other words, jurisdiction for each defendant needs to be established separately if the plaintiff pursues on the basis of Article 5.[230] On the other hand, if he sues at the domicile of one of the defendants, he may join co-defendants in the same forum.[231] How this limitation of application works with relation to parties from third States, will be analysed throughout the Chapter.

Advocate General Léger in his opinion in the *Owusu* case[232] made a distinction between the sphere of application of Articles 2 and 5. According to him, Article 5 is applicable only if the dispute or the situation of the parties is connected with two or more EU Member States. That, in his view, is different from Article 2 that applies regardless of the domicile of the plaintiff, *ie* even if the plaintiff and the defendant are domiciled in the same EU Member State. For Article 5 a cross-border element is required according to him.[233]

However, it is submitted that the cross-border element is not a separate requirement for the application of Article 5, but rather a logical consequence of its mechanics. The provision states that a defendant domiciled in *an* EU Member State may be sued in *another* EU Member State on several grounds. Often the alternative forum provided by Article 5 would be popular since it will coincide with the domicile of the plaintiff.[234] This realisation makes the provision seem largely irrelevant to parties from third States: the defendant has to be domiciled in the EU for the provision to apply; the plaintiff, also domiciled in the EU, then goes to his own court, which is conveniently also the court of

[229] See ECJ cases 189/87, judgment of 27 September 1988, *Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and Co and others* [1988] *ECR* 5565 rec 19; C-220/88, judgment of 11 January 1990, *Dumez France v Hessische Landesbank,* [1990] *ECR* I-49 rec 17; C-26/91, judgment of 17 June 1992, *Handte & co GmbH v Traitements Mécano-chimiques des Surfaces SA* [1992] *ECR* I-3967 rec 18; C-440/97, judgment of 28 September 1999, *GIE Groupe Concorde and Others v The Master of the vessel "Suhadiwarno Panjan" and Others* [1999] *ECR* I-6307, rec 24; C-256/00, judgment of 19 February 2002, *Besix SA v WABAG and Plafog* [2002] *ECR* I-1699 rec 26 and 53.

[230] ECJ case C-51/97, judgment of 27 October 1998, *Réunion européenne SA and Others v Spliethoff's Bevrachtingskantoor BV and the Master of the vessel Alblasgracht V002* [1998] *ECR* I-6511.

[231] Art 6(1) Brussels I Regulation; see Part D of this Chapter, p 2 *et seq*.

[232] ECJ case C-281/02, judgment of 1 March 2005, *Owusu v Jackson*, not yet published in *ECR*, see http://www.curia.eu.int.

[233] para 126.

[234] P Nygh, "The criteria for judicial jurisdiction" in AF Lowenfeld & LJ Silberman (eds), *op cit* (fn 89) p 13; E Jayme, "The role of Article 5 in the scheme of the convention. Jurisdicton in matters relating to contract" in Court of Justice of the European Communities, *op cit* (fn 4) p 74. This was even more the case under the old rule of the Brussels Convention that gave jurisdiction to the court of the place of payment, under many legal systems the residence of the creditor, thus the plaintiff; see A Briggs & P Rees, *op cit* (fn 30) p 120-121.

the place of the performance of contract or of commission of the tort. The matter ends there with two parties from the EU, two EU courts that have jurisdiction and no link with third States. However, the domicile of the defendant is a broad notion, as has been indicated in Part A of this Chapter.[235] In other words, the defendant company might have two domiciles only one of which is in the EU. Furthermore, there might be more than one defendant drawn in by this rule. The place of the performance of the contract or of the commission of the tort might be (partially) outside the EU. These are some of the issues that will be discussed in this Chapter.

In this Chapter the special rules of jurisdiction will be discussed in the sequence as they are in the Regulation, namely contracts, maintenance, torts, criminal proceedings, agency, trusts and salvage of ships or cargo. Although an explanation of the provisions and the existing perplexity is necessary, all the confusion to which Article 5 has led will not be discussed in detail. It might happen that both (or all) parties are domiciled in the EU, but that a contract is to be performed in a third State, or that a tort had been committed (or damage occurred) in a third State. This situation, and the effects that recent case law of the European Court of Justice had on it, will be discussed.

2. Contracts

Brief historical overview: under the Brussels Convention

Contracts jurisdiction under the Brussels Convention has been severely complicated by the European Court of Justice, already in the first judgments it gave on the interpretation of the Convention.[236] The rule states that one may sue the defendant in the place of the performance of the obligation at stake.

Article 5 of the Brussels Convention merely stated:
A person domiciled in a Contracting State may, in another Contracting State, be sued:
1. in matters relating to a contract, in the courts for the place of performance of the obligation in question;…

No presumptions existed to find the "*place of performance*". Two questions soon arose: (1) which obligation, and (2) according to which law should the place of performance be determined?

[235] See *supra*, p 2 *et seq.*
[236] See, in general, K Hertz, *Jurisdiction in Contract and Tort under the Brussels Convention* (Copenhagen: DJØF Publishing, 1998); W Kennet, "Place of Performance and Predictability" (1995) *YEL* p 193-218; J Hill, "Jurisdiction in Matters relating to a Contract under the Brussels Convention" (1995) *ICLQ* p 591-619; P Kaye, *Law of the European Judgments Convention* (Chichester: Bary Rose, 1999) vol 2.

The European Court of Justice found that one had to look at the obligation which gave rise to the dispute.[237] If the litigation concerned the payment, suit could be brought at the place where payment had to be made. If the dispute was about the (faulty or non-) delivery, the case could be brought at the place where the delivery took place or should have taken place. This did not simplify matters, since it often meant that a different court would have jurisdiction depending on which action was brought first. Often the buyer does not pay because of non-conform delivery. If the seller sued for payment, the court of the place of payment would have jurisdiction. If the buyer sued for damages or reparation, the court of the place of payment would have jurisdiction. However, if the seller sued first, the buyer might of course bring a counter-action for damages against the seller in the same court.[238] This dichotomy led to a proliferation of the available fora and to confusion, legal uncertainty and even encourages a race to the courtroom.

The question of which law to apply in order to determine the place of performance, was also solved in a rather cumbersome manner. The European Court of Justice ruled that the EU Member State courts had to use their conflict of law rules to find the applicable law and use that to determine where the obligation in question had to be performed.[239]

The practical inequity with this application of the Brussels Convention was particularly clear when the seller sued the buyer for payment, which, of course, is not a rare event. According to the old Article 5(1), one would have to determine, in accordance with the applicable law, where the place of performance was. The place of payment is, according to some legal systems of the EU, the domicile of the debtor, and according to others, the domicile of the creditor.[240] Fortunately, with regard to professional sales contracts, a degree of uniformity had been attained by the frequent application of the Vienna Sales Convention (CISG).[241] According to the Convention, the place of payment for an international sales contract is the place of business of the seller.[242] The CISG is in force in 21 of the 25 EU Member States; the abstainers are Ireland, Malta, Portugal and the United Kingdom.[243] The Convention does not regulate all sales contracts, but a large number. When the place of performance is the domicile of the seller, this amounts to the court of the domicile of the plaintiff having jurisdiction, even in cases where the facts had a very tenuous link, or none at all, with that forum. In cases where the defendant is domiciled in the EU, while the rest of the dispute has little bearing on the EU, jurisdiction may be found on the basis of the place of the payment.

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[237] ECJ case 14/76, judgment of 6 October 1976, *A De Bloos, SPRL v Société en commandite par actions Bouyer* [1976] *ECR* 1497.
[238] According to Art 6(3) Brussels I Regulation.
[239] ECJ case 12/76, judgment of 6 October 1976, *Industrie Tessili Italiana Como v Dunlop AG* [1976] *ECR* 1473.
[240] See A Briggs & P Rees, *op cit* (fn 30) p 143.
[241] United Nations Convention on Contracts for the International Sale of Goods (Vienna 1980). This Convention currently has 64 Contracting States; see http://www.uncitral.org; http://www.cisg.law.pace.edu.
[242] Art 57(1) CISG
[243] See http://www.uncitral.org; http://www.cisg.law.pace.edu.

Did the Brussels I Regulation simplify matters?

The Brussels I Regulation attempted to simplify the maze the European Court of Justice has created in contracts jurisdiction. Whether or not the drafters succeeded, remains to be seen. The Brussels I Regulation has created presumptions of the "place of performance of the obligation in question" for two types of contracts: sales and services. Those two types embrace the largest number of contracts. For contracts that cannot be categorised as sales or services, the old rule remains in force.

The new presumption is that sales contracts are to be performed at the place of delivery of the goods, under the contract, unless otherwise agreed. The presumption for service contracts is that the place of performance is where the services had to be provided under the contract, unless otherwise agreed. Only if neither of the presumptions applies can one fall back on the general rule, which is the same as the old provision.[244] The new rule has caused great confusion amongst legal writers.[245]

The first question is what "under the contract" means. If the contract did not specify where the goods had to be delivered, can one then assume that the court of the place of the actual delivery has jurisdiction? Or should one, in the absence of specification in

[244] For instance, for contracts of rent, see *Rechtbank van koophandel* (Commercial Court) of Hasselt, Belgium, judgment of 11 December 2002 (AR 02/03167), unpublished, or contracts for the lease of movables, see *Rechtbank van koophandel* (Commercial Court) of Hasselt, judgment of 22 January 2003 (AR 03/0196), unpublished and *Rechtbank van koophandel* (Commercial Court) of Hasselt, judgment of 24 September 2003 (AR 03/3011), unpublished, or a tiling contract, *Rechtbank van koophandel* (Commercial Court) of Hasselt, judgment of 11 February 2004 (AR 03/4286), unpublished; see http://www.euprocedure.be.

[245] See, for instance, K Vandekerckhove, "Internationale koopovereenkomsten" in H Van Houtte (ed), *Themis vormingsonderdeel 10: Internationaal handelsrecht en arbitrage*, (Bruges: die Keure, 2001) p 9-13 and M Pertegás Sender & Y Van Couter, "Internationale distributiecontracten en IPR, recente ontwikkelingen" in the same book, p 45-48; A Nuyts, "La communautarisation de la convention de Bruxelles. Le règlement 44/2001 sur la compétence judiciaire et l'effet des décisions en matière civile et commerciale" (2001) *JT* p 913-922 at p 916; P Vlas, "Herziening EEX: van verdrag naar verordening" (2000) *WPNR* p 745-753; I Couwenberg & M Pertegás Sender, "Recente ontwikkelingen in het Europees bevoegdheids- en executierecht" in H Van Houtte en M Pertegás Sender (eds) (2001), *op cit* (fn 108) p 45-50; GAL Droz & H Gaudemet-Tallon, "La transformation de la convention de Bruxelles du 27 septembre 1968 en Règlement du Conseil concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale" (2001) *RCDIP* p 601-652; C Bruneau, "Les règles européennes de compétence en matière civile et commerciale (2001) *SJ* p 533-541; JJ Van Haersolte-Van Hof, "EEX-verordening treedt in werking per 1 maart 2002" (2001) *NIPR* p 244-248; P Vlas, "Stoeien met verbintenissen, worstelen met Art 5 sub 1 EEX-Verordening" (2002) *WPNR* p 301-302; A Briggs & P Rees, *op cit* (fn 30) p 130-134; H Gaudemet-Tallon, *op cit* (fn 215) p 158-164; K Broeckx., "Wat voor nieuws brengt de EEX-verordening?" (2003) *NjW* p 186-196; S Rutten, "IPR-aspecten met betrekking tot de betaling van de koopprijs – art 5, 1° b) EEX-Verordening", noot onder Hb Gent 31 januari 2002 (2002-2003) *RW* p 664-669; T Kruger, "Reactie: Antwoord op de annotatie «IPR-aspecten met betrekking tot de betaling van de koopprijs – art 5, 1° b) EEX-Verordening»" (2002-2003) *RW* p 1636-1637; wederantwoord door S Rutten, (2002-2003) *RW* p 1637-1639.

the contract, return to the general rule? Contracts are not always in writing and proving what the parties exactly agreed, might be very difficult.[246]

The next question regards the meaning of "unless otherwise agreed". When does such an agreement exist? It is clear that this phrase does not refer to a forum clause, because that is dealt with in a separate provision, with different conditions.[247] This "otherwise" agreement must have something to do with the place of performance. The question has arisen whether the specification of a place of payment in the contract results in "otherwise agreed". The case law on this point, even in a single Member State, is inconsistent.[248] Whether or not parties can indicate a place of payment outside the EU so as to negate the jurisdiction that would have lied at the place of delivery, is thus uncertain.

Will the European Court of Justice come up with yet another autonomous definition? It might be difficult for legal systems to have one definition (prescribed by the European Court of Justice) of service contracts for purposes of jurisdiction and another (the old national one) for purposes of substantive law. Therefore, EU Member States might transpose the European Court of Justice's definition to their national substantive rules. Parties from third States should also realise that this classification of their contract with an EU counter-party might have unforeseen implications for jurisdiction. The European Court of Justice might provide a broader definition of "services" than the definition of the particular EU Member State in which a party from a third State carries on commercial activities. Such parties might be surprised, for various reasons the least of which is not jurisdiction, at the new classification of their contracts.

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[246] The *Rechtbank van koophandel* (Commercial Court) of Kortrijk, Belgium, in its judgment of 4 December 2003 (AR 04279/03, unpublished, see http://www.euprocedure.be) expressed the lack of clarity and regretted that it, as court of first instance, could not pose a preliminary question to the European Court of Justice (on the basis of Art 68 of the EC Treaty).

[247] The European Court of Justice has ruled that if parties appoint a fictitious place of delivery, in order to circumvent the formalities for forum clauses, that agreement will not be given effect with respect to jurisdiction; ECJ case C-106/95, judgment of 20 February 1997, *Mainschiffahrts-Genossenschaft eG v Les Gravières Rhénanes SARL* [1997] *ECR* I-911 rec 31-35. See also A Briggs & P Rees, *op cit* (fn 30) p 131, calling the words "unintelligible" and stating further: "They can be forgotten until an imaginative court is able to breathe meaning into them."

[248] The *Rechtbank van koophandel* (Commercial Court) of Hasselt, Belgium, has decided that a specification of place of payment can lead to jurisdiction of the court of that place if the dispute concerns the payment: judgment of 15 May 2002 (AR 02/1058), published in 2002 *TBH* p. 595-596; and an unpublished judgment of the same day (AR 02/1132). The *Rechtbank van koophandel* of Kortrijk has also taken this stance, although it found that there had been no "otherwise" agreement in the case at hand since the general conditions of the seller had not been incorporated into the contract: Judgment of 8 December 2004 (AR 5491/2003), unpublished. However, the *Rechtbank van koophandel* of Hasselt later found that the mere specification of a place of payment does not amount to "otherwise agreed": judgment of 4 December 2002 (AR 02/3871), published in 2003 *TBH* p 352; 2004-2005, *RW* p 833-835; judgment of 19 November 2003 (AR 03/3758), unpublished; judgment of 24 November 2004 (AR 04/4426), unpublished; see http://www.euprocedure.be.

Another uncertainty that has arisen, was whether one had to take account of the legal place of delivery (for instance referring to the INCOTERMS[249]) or whether it is the actual destination of the goods that is important. Some have argued that one has to refer to the factual place of delivery. They state that some legal forms of delivery, such as FOB (free on board), present no real link with the place in question. If a German contracting party sells the goods FOB Antwerp to an Irish buyer, for example, there seems to be no reason why the court in Antwerp should have jurisdiction.[250] These authors find authority for their proposition in the Explanatory Memorandum of the Commission that accompanied the proposal for the Regulation.[251] The problem with that authority, though, is that not all language versions contain the reference to "factual". The English version only refers to a "pragmatic" approach, although the Dutch, German, French, Italian and Spanish versions contain the adjective "factual". Probably it was not the intention of the European legislator to make a distinction between a legal and a factual delivery. The word "factual" was merely used as describing delivery as a more appropriate indicator of jurisdiction.[252]

Factual delivery as new criterion would lead to tremendous uncertainty. In the first place it is very difficult to prove where the goods were eventually delivered – more so for international sales than for service contracts. Legal delivery is something lawyers know. Moreover, legal delivery presents the passing of the risk. This is often a place where important evidence will have to be gathered: were the goods damaged before or after the passing of the risk? It is hard to see, therefore, why a different and unknown criterion of factual delivery should now be used.

It is submitted that the place of delivery has to be ascertained in a legal sense. Delivery has always been a term with a specific legal meaning and it would lead only to confusion to now devoid the term of that well-known meaning. This argument was also followed by the *Rechtbank van koophandel* of Hasselt, Belgium.[253] If the place of delivery is not determined in the contract, it would have to be ascertained with

[249] INCOTERMS is an acronym for International Commercial Terms. These are standard terms used in international trade and published under the auspices of the International Chamber of Commerce. Since there is a common understanding, with a few letters, an entire clause is in fact written, including rules on the transfer of property and risk. See H Van Houtte, *The Law of International Trade* (London: Sweet & Maxwell, 2002) p 171-175.

[250] S Rutten, "IPR-aspecten met betrekking tot de betaling van de koopprijs – art 5, 1° b) EEX-Verordening", noot onder Hb Gent 31 januari 2002 (2002-2003) *RW* p 666-669 and (2002-2003) *RW* p 1637-1639; A Nuyts, "La communautarisation de la convention de Bruxelles. Le règlement 44/2001 sur la compétence judiciaire et l'effet des décisions en matière civile et commerciale", (2001) *JT* p 913-922 at p 916.

[251] COM(1999) 348 final, of 14 July 1999; this document was not published in the *Official Journal* with the Regulation, but can be found on the website of the EU: http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/1999/com1999_0348en01.pdf.

[252] See also T Kruger, "Reactie: Antwoord op de annotatie «IPR-aspecten met betrekking tot de betaling van de koopprijs – art 5, 1° b) EEX-Verordening»" (2002-2003) *RW* p 1636-1637.

[253] Two judgment of 16 April 2003 (AR 03/211 and AR 03/592), unpublished, see http://www.euprocedure.be.

reference to the law applicable on the contract.[254] Linked to this problem is the question of what happens when the goods were delivered at a different place than contractually agreed.

To conclude: many hoped that revision would bring improvement,[255] but one wonders whether the new rule is better than the old one. The European Court of Justice will have to create as complex a set of interpretation rules as they had done for the old provision.

Performance or eventual delivery outside the EU

If the performance of a contract took place or should have taken place in a third State while the defendant was domiciled in the EU, the jurisdiction of the EU court of the domicile of the defendant is compulsory. That court may not decline jurisdiction in favour of the third State court that might be more appropriate to hear the case. This has been specified by the European Court of Justice in the *Owusu* case.[256] The defendants, only one of whom was domiciled in England, were sued there. The action was partly based on a contract that had to be performed in Jamaica. English court had jurisdiction according to Article 2 of the Brussels Convention (which was identical to Article 2 of the Brussels I Regulation). Yet the Court wanted to decline jurisdiction by applying the *forum non conveniens* rule. Before doing so, the Court of Appeal posed a preliminary question to the European Court of Justice. That Court found that Article 2 jurisdiction is mandatory so that the English court was not permitted to decline jurisdiction on the basis of *forum non conveniens*. The reasoning of the European Court of Justice was based on considerations of European Union law and the fact that not all national legal systems know the doctrine of *forum non conveniens*.

The Brussels I Regulation also contains an exception if the courts of a third State are appointed by Article 5. The Explanatory Memorandum of the European Commission that accompanied their proposal for the Brussels I Regulation states:
"*Where the effect of the autonomous definition is to designate a court in a non-member country, rule (a) will apply rather than rule (b). Jurisdiction will lie with the court designated by the rules of*

[254] In support of this view, see A Briggs & P Rees, *op cit* (fn 30) p 142-143.
[255] See, for instance, A Bucher, "Vers une convention mondiale sur la compétence et les jugements étrangers" (2000) *SJ* p 77-133 at p 85; B Audit, "A view from France" in AF Lowenfeld & L Silberman (eds), *op cit* (fn 89) p 124-129 at p 125; PM North & JJ Fawcett, *op cit* (fn 28) p 210; E Jayme, "The Role of Article 5 in the Scheme of the Convention. Jurisdiction in Matters relating to Contract", in Court of Justice of the European Communities, *op cit* (fn 4) p 73-80 at p 79-80.
[256] ECJ case C-281/02, judgment of 1 March 2005, *Owusu v Jackson and others*, not yet reported in *ECR*; see http://www.curia.eu.int. For a more detailed discussion of this case and the doctrine of *forum non conveniens*, see *infra*, Chapter 5, p 2 *et seq*.

private international law of the State seised as the court for the place of performance of the obligation in question (c)."[257]

In other words, the drafters of the Brussels I Regulation went to trouble to bend the rule in such a way that performance should rather be located inside than outside the EU. Effectively, the presumptions are overruled if they point to performance outside the EU. Then one should fall back on the old, complicated rule of looking at the performance that lies at the base of the dispute and determine its location by reference to the conflict of law rules and without the help of the new presumptions. The rule does not have any logic beyond drawing more disputes into the legal sphere of the EU. Looking at the Regulation from outside, there is a complete lack of objectivity and clarity.

In a case before the *Rechtbank van koophandel* (Commercial Court) of Hasselt, Belgium, there were several deliveries in question.[258] The invoices were FCA Houthalen, Belgium. The goods were transported to the port of Antwerp, Belgium, from where they were shipped. FCA means that the seller delivers by way of handing over the goods to a carrier appointed and paid by the buyer.[259] The final, or factual, destination of some of the goods was Hong Kong, of others Germany, and of yet others unknown. There were therefore final destinations inside and outside the EU. The Court was not sure which destinations to take into account, nor the weight that should be given to the factual end destinations. The judge therefore afforded the parties a further opportunity to present argument on the point. In a subsequent judgment, the Court held that it had to take the legal delivery into account.[260] It assumed jurisdiction over the contracts since the legal delivery was in Belgium. It did not take account of the factual places of delivery, which were even impossible to establish.

The location of contractual performances inside and outside the EU

Of course not all contractual performances can be clearly located. For instance, parties might agree *not to do something*. Where is the place of performance of such a contract? The contract is then not limited to the European judicial sphere. The breach can as easily take place outside the EU as inside. Should one then regard the place of contracting, the place of the eventual breach, or the place of the primary obligation to which the obligation not to do something is linked (in cases where there is such primary obligation)?

[257] At p 14. See also I Couwenberg & M Pertegás Sender, "Recente ontwikkelingen in het Europees bevoegdheids- en executierecht" in H Van Houtte & M Pertegás Sender (eds) (2001), *op cit*, (fn 108) p 31-68 at p 49; P Vlas, "Herziening EEX: van verdrag naar verordening", 2000 *WPNR* p 745-753 at p 750.
[258] Judgment of 5 February 2003 (AR 03/211), unpublished; see http://www.euprocedure.be.
[259] See H Van Houtte, *The Law of International Trade* (2nd edn, London: Sweet & Maxwell, 2002) p 173-174.
[260] Judgment of 16 April 2003 (AR 03/211), unpublished; see http://www.euprocedure.be.

Another question is what happens if the defendant is domiciled in the EU, but the contract was actually to be performed outside the EU.

Both these questions arose before the European Court of Justice in the case *Besix SA v WABAG and Plafog.*[261] Besix was a company incorporated and domiciled in Belgium. WABAG and Plafog, both members of the Deutsche Babcock group, were companies incorporated in Germany and domiciled in Kulmbach, Germany. Regarding the parties, there was no link to third States. However, the facts were at least partly located outside the EU. Besix and WABAG agreed to submit a joint tender for a project of the Ministry of Mines and Energy of Cameroon to supply water in 11 urban centres in Cameroon. In this agreement they committed themselves to co-operate exclusively with each other and not to join other partners for tenders. It later turned out that Plafog had submitted a tender together with a Finnish firm. They were awarded a part of the contract, while Besix and WABAG were awarded nothing. Besix subsequently sued WABAG and Plafog for damages before the *Rechtbank van koophandel* (Commercial Court) of Brussels, Belgium. The question was where the place of performance of this contract was. The judge at first instance found that he had jurisdiction because the exclusivity agreement had to be performed in Belgium and since the exclusivity agreement was really a corollary to the preparation of the joint tender. On the substance Besix did not succeed and therefore appealed to the *Hof van beroep* (Appeal Court) of Brussels. By way of cross-appeal WABAG argued that the German courts had exclusive jurisdiction. The *Hof van beroep* posed a preliminary question to the European Court of Justice:
"*Must Article 5(1) of the [Brussels] Convention... be interpreted as meaning that a defendant domiciled in a Contracting State may, in another Contracting State, be sued, in matters relating to a contract, in the courts for any of the places of performance of the obligation in question, in particular where, consisting in an obligation not to do something - such as, in the present case, an undertaking to act exclusively with another party to a contract with a view to submitting a joint bid for a public contract and not to enter into a commitment with another partner - that obligation is to be performed in any place whatever in the world?*
If not, may that defendant be sued specifically in the courts for one of the places of performance of the obligation and, if so, by reference to what criterion must that place be determined?"

The reasoning of the European Court of Justice was based on the concerns of protecting EU defendants and ensuring clarity for the plaintiff as to where he/she may sue. The court also considered it important to avoid a multiplication of fora with jurisdiction. These are of course important considerations, but one might think that the element outside the EU received too little attention.

The European Court of Justice found that basing jurisdiction on the place of performance, in a case where the performance has to take place everywhere, cannot

[261] ECJ case C-256/00, judgment of 19 February 2002, *Besix SA v WABAG and Plafog* [2002] *ECR* I-1699; see case notes by P Vlas, (2004) *NJ* p 1283-1297; JJ Van Haersolte-Van Hof (2002) *NTER* p 226-229; J Verlinden (2002) *Colum J Eur L* p 493-497.

be permitted.[262] Moreover, the Court found that the place of performance cannot be deduced from the facts of the particular case, as the *Rechtbank van koophandel* of Brussels had done, so that one would be able to state that a particular case had a close connection to a particular forum.[263]

Referring to the place where the breach occurred, as that can be located even if the place where one had to perform the obligation cannot, was not a satisfactory solution to the Court as that would amount to a reversal of its case law that have always connected contracts to the place of the performance of the contract.[264]

A last option was to let the obligation to refrain from doing something follow the primary obligation, namely submitting the tender. This argument was based on the decision in *Shenevai*, in which a corollary performance was ruled to follow the primary one.[265] The *Shenevai* construction, although based on good sense and useful in practice, had not often been followed. Where there are not clearly distinguishable main and subsidiary obligations, the European Court of Justice has held that a court only has jurisdiction over the claim on the obligation that had to be performed in its territory.[266] In *Besix* too the Court did not accept the argument of primary and corollary obligations; it found that, upon a strict reading of the provision, one had to look at the place of performance of the obligation *in question*.[267] Therefore the Court came to the conclusion that Article 5(1) could not be applied to grant jurisdiction in this dispute. The plaintiff could only sue at the domicile of the defendant.

One cannot help to wonder whether the outcome would have been different if the tender was for a project somewhere in the EU. Would the Court then have had less difficulty in letting the obligation not to do something follow the main obligation of the tender?

The other point about which one could wonder, is what the outcome of the case would have been if the dispute had arisen at a later stage. What would the Court have said if Besix and Wabag had been awarded part of the contract, and in executing their contractual duties a dispute arose?

Other viewpoints on this rule of the Brussels I Regulation

The failed Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters again offers an interesting lesson in comparative law. Regarding

[262] At rec 34-35.
[263] At rec 37.
[264] At rec 41; see ECJ case 12/76, judgment of 6 October 1976, *Industrie Tessili Italiana Como v Dunlop AG* [1976] *ECR* 1473.
[265] ECJ case 266/85, judgment of 15 January 1987, *Shenavai v Kreischer* [1987] *ECR* 239.
[266] ECJ case C-420-97, judgment of 5 October 1999, *Leathertex Divisione Sintetici SpA v Bodetex BVBA* [1999] *ECR* I-6747.
[267] At rec 44.

contracts two broad ideas were represented in the 2001-text.[268] On the one side was the American idea of doing business. This concept relies on the presence in the forum of a defendant. If a company consistently trades in a certain area, and has become part of that market, it should not be surprised that it can be sued in the courts of that area or that market. This rule caused much disaccord between the negotiators. To those from the USA, it seemed logical and fair. The Europeans, on the other hand, would rather have seen that basis of jurisdiction in the black list (prevented bases of jurisdiction) than anywhere else.

Even if this alternative had been accepted, the circumstances under which "doing business" would be sufficient for jurisdiction were controversial. Should the "doing business" take place in the State, or could it be directed into a State from outside the State? Would this entail the negotiation of the contract, or the promotion that preceded the contract? Could this "doing business" encompass the performance of the contract? If so, the difference with the European alternative was not that big. However, the "doing business" basis was not such a stringent one and would have to be circumscribed by some criteria; in the USA it was in each case subjected to the due process constitutional test, but that would obviously not be possible in all the Contracting States that would have to be able to use this clause. A convention of this kind demanded a clear rule that would promote due process by itself.

The European alternative was similar to the Brussels I Regulation: a well-defined but stringent rule granting jurisdiction to the courts of the place of performance of the contract. That was further specified as the place of the supply of goods or services, or, where both goods and services were involved, the place of the principal obligation. To find the court that had jurisdiction, one would have to make the detour via the applicable law. In the EU, conflict of law rules regarding contracts have been unified.[269] However, in a global context, to find jurisdictional rules by first referring to the applicable law, would lead to divergent results.[270] Moreover, this rule was subject to criticism for its inflexible nature.[271] It could very well sometimes be exorbitant to grant jurisdiction to the court where the defendant had never even been, but just sent someone to deliver goods. One should also realise that this "place of performance" is frequently, if not almost always, the residence of the counter-party, *ie* the plaintiff. For the US, the rule posed constitutional concerns.[272]

[268] Art 6.
[269] By the Convention on the law applicable to contractual obligations, signed in Rome in 1980; consolidated version published in *OJ C* 27, 26 January 1998, p 34-46.
[270] A Bucher, "Vers une convention mondiale sur la compétence et les jugements étrangers" (2000) *SJ* p 77-133 at p 85.
[271] See, for instance, B Audit in AF Lowenfeld & LJ Silberman (eds), *op cit* (fn 89) at p 127; A Bucher, "Vers une convention mondiale sur la compétence et les jugements étrangers" (2000) *SJ* p 77-133 at p 84-87.
[272] A Bucher, "Vers une convention mondiale sur la compétence et les jugements étrangers" (2000) *SJ* p 77-133 at p 84.

3. Maintenance

The fact that this provision is present in the Brussels I Regulation is surprising from a material scope point of view. The Regulation is supposed to be on civil and commercial matters, with the exception of family law. Maintenance obligations are civil matters and concern money judgments, but they are, in the first place, part of family law.[273]

At the time of drawing up the Brussels Convention, the argument was that a Convention which did not include a forum for maintenance actions, would be of limited value.[274] Even if that was a justification in 1968 for including maintenance obligations, that justification might have fallen away with the EU adopting a separate instrument on family law matters. The provision on maintenance could easily have been hauled over to the Brussels II and later Brussels II*bis* Regulations.

The first part of Article 5(2) does not really pose a threat to third States. Like the entire Article 5, the provision can only come into play when the defendant is domiciled in the EU.

The provision grants an alternative basis of jurisdiction: the domicile or habitual residence of the maintenance creditor. The normal criterion used by the Brussels I Regulation is domicile (in the civil law sense) and not habitual residence.[275] This means another expansion of scope since habitual residence has found its way into the provision. An example is provided by a couple domiciled in Morocco. After a divorce, one spouse moves to France to live there. The other spouse remains domiciled in Morocco, but assumes a habitual residence in Belgium. Whereas the jurisdiction in the EU would normally only be based on domicile, the Regulation in this situation creates an extra jurisdictional basis.

On the other hand, the second part of Article 5(2) does have a hidden snake for third State parties. It hisses in the form of a subtle link to national bases of jurisdiction. If a court has jurisdiction on the basis of its national law in an action concerning the status of a person, then that court may also grant an order for maintenance. Many national legal systems have such rule in any event and therefore it is not inherently disturbing. However, the maintenance claim is now given an EU blessing. This means that the maintenance part of the judgment can travel freely throughout the EU. It can be recognised everywhere, even if jurisdiction had been based on a strange national basis of jurisdiction. There is only one limitation: jurisdiction may not have been founded only on the basis of the nationality of the parties.

[273] A Briggs & P Rees, *op cit* (fn 30) p 148 state that the inclusion of this part of family law has its origins in Roman Law.
[274] See Jenard Report, p 25.
[275] See Part A of this Chapter, *supra*, p 2 *et seq*.

4. Torts, delicts and quasi-delicts

General

Actions with regard to these obligations can also be brought at the court of the place where they were committed. For the provision to come into play, the defendant once again must be domiciled in the EU. The main application of the provision is therefore that a party domiciled in one Member State can be sued in the courts of another Member State.

Torts, delicts and quasi-delicts can vary in different legal systems and the European Court of Justice has not really provided an autonomous definition of what exactly these entail. It has held that the provision "*covers all actions which seek to establish the liability of a defendant and which are not related to a 'contract' within the meaning of Article 5(1)*."[276] That is a very broad definition, if it is worth the name of definition at all. Whether or not an act is a tort or delict under the law of a specific EU Member State, it might be so considered for purposes of jurisdiction of the courts of that State.

Pre-contractual liability, also a matter that is not always easy to qualify, equally falls in the scope of the provision on tort.[277]

Not only torts *etc* already committed but also the threat of unlawful acts, fall in the scope of the provision. That change was brought by the Brussels I Regulation. The extension to acts not yet committed did not exist explicitly under the Brussels Convention, although some contended that it was included in any event.[278]

The European Court of Justice has found that the place where the harmful event occurred has to be defined autonomously, rather than permitting a link to the applicable law in order to find that place of the harmful event or the place of the damage.[279]

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[276] ECJ case 189/87, judgment of 27 September 1988, *Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and Co and others* [1988] *ECR* 5565 rec 17.

[277] ECJ case 334/00, judgment of 17 September 2002, *Fonderie Officine Meccaniche Tacconi SpA v Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS)* [2002] *ECR* I-7357.

[278] The Schlosser Report, para 134, p 111 states: "*There is much to be said for the proposition that the courts specified in Article 5(3) should also have jurisdiction in proceedings whose main object is to prevent the imminent commission of a tort.*" See also A Briggs & P Rees, *op cit* (fn 30) p 165; H Gaudemet-Tallon, *op cit* (fn 215) p 167-168. H Duintjer Tebbens, "Jurisdiction in Matters relating to Tort or Delict and to the Operations of a Branch, Agency or Other Establishment", in Court of Justice of the European Communities, *op cit* (fn 4) p 87-98 at p 90-91 & 92 mentions the possibility that actions aimed at preventing torts might be included under the old provision; he also states that such explicit extension of the Brussels Convention might not be necessary because an action to prevent a tort might be brought at the domicile of the defendant (Art 2), or under the provision allowing provisional and protective measures (Art 24 Brussels Convention, Art 31 Brussels I Regulation).

[279] ECJ case C-364/93, judgment of 19 September 1995, *Marinari v Lloyds Bank plc and Zubaidi Trading Company* [1995] *ECR* I-3719 rec 18-19.

Damage in a third State

How would Article 5(3) be applied if the damage occurred in a third State while the defendant was domiciled in the EU? In that case Article 5(3) would not be applicable. The Brussels I Regulation can of course only grant jurisdiction to EU courts, in this case if damage occurred inside the EU. Conversely, if damage arises in a third State so that the case is closely linked with that State, there is no mechanism in the Brussels I Regulation to decline jurisdiction of the defendant domiciled in the EU. This has become clear in the *Owusu* case, where the plaintiff had based his action on both contract and tort. The European Court of Justice found that the English courts were compelled to assume jurisdiction on the basis that the defendant was domiciled in England, despite the fact that the damage occurred entirely in Jamaica.[280]

Financial loss

For the determination of the place of the harm, the European Court of Justice has held that the mere arising of financial loss for an indirect victim is irrelevant.[281] The same holds true for financial loss as a result of wrongful conduct by sellers of call options relating to shares.[282] In these cases it will be the courts of the place where the initial harm occurred that will have jurisdiction, and not the courts of the place where the loss was felt in the estate of the plaintiff.

If the financial loss were suffered in a third State, Article 5(3) would not be applicable. In *Marinari v Lloyds Bank plc and Zubaidi Trading Company*,[283] the facts took place both inside and outside the EU. Mr Marinari had lodged with the Manchester branch of Lloyds Bank promissory notes issued by the Negros Oriental province of the Republic of the Philippines in favour of Zubaidi Trading Company of Beirut. The bank refused to return the notes and informed the police that they were of dubious origin. Mr Marinari was subsequently arrested and the promissory notes sequestered. Mr Marinari sued Lloyds Bank in Italy, stating that he had incurred damage there (where he was domiciled). The European Court of Justice found that the place where the victim suffered financial damage is not the place where the harmful event occurred. That can certainly not be contested. However, the facts that at least part of the damage had occurred outside the EU and that one of the defendants (possibly instrumental to the damage) was domiciled in a third State (Lebanon), were not considered by the Court.

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[280] ECJ case C-281/02, judgment of 1 March 2005, *Owusu v Jackson and others*, not yet reported in *ECR*; see http://www.curia.eu.int; see also *supra*, p 2 on contracts performed in a third State. For a more detailed discussion of this case and the doctrine of *forum non conveniens*, see *infra*, Chapter 5, p 2 *et seq*.

[281] ECJ case C-220/88, judgment of 11 January 1990, *Dumez France v Hessische Landesbank* [1990] *ECR* I-49.

[282] ECJ case C-168/02, judgment of 10 June 2004, *Kronhofer v Maier and others*; not yet reported in *ECR*, see http://www.curia.eu.int.

[283] ECJ case C-364/93, judgment of 19 September 1995 [1995] *ECR* I-3719.

Quasi-contractual obligations?

Quasi-contractual liability (such as *negotiorum gestio* and unjustified enrichment) might fall under the quite broad definition of torts, delicts and quasi-delicts as well, if one interprets the requirement of obligation *other than a contractual obligation* literally. If unjustified enrichment falls under the provision on tort, then the occurrence of the facts in a third State will not be taken into account so that only the place of the domicile of the defendant in the EU will result in Regulation-based jurisdiction. That jurisdiction will be compulsory, so that the facts in a third State will not be able to lead to the declining of jurisdiction.

Some authors argue that jurisdiction for quasi-contractual liability will lie only with the court of the domicile of the defendant (Art 2).[284] They rely on the *Kalfelis* judgment[285] to support the argument. It does not seem, however, that the judgment contains authority for the argument. The action in question concerned claims in contract, tort and quasi-contract (unjustified enrichment). The European Court of Justice stated that if jurisdiction over a part of the action could be based on Article 5(3), that jurisdiction could not be elaborated to parts of the action that did not fall under the provision. The Court did not specify whether it was referring to both the contractual and quasi-contractual part of the action. It was referring to something other than the tort part of the action. If it were referring to the contract and unjustified enrichment action, then it would seem that unjustified enrichment falls only under the general basis of jurisdiction. If, however, it was referring only to the contractual obligation, it could have implied that unjustified enrichment did fall under Article 5(3).

If quasi-contractual obligations do not fall within the tort provision, then only Article 2 on the domicile of the defendant will apply to it. In any event, there will be Regulation-based jurisdiction in the EU only if the defendant is domiciled in the EU and not if he is not (in that case one would fall back on national bases of jurisdiction).

The influence of this provision on national rules of jurisdiction as regards third States

The case law on the Brussels Convention also has an influence on the national legal systems of the Member States courts. In the English judgment *Berezovsky v Michaels and Others; Glouchkov v Michaels and Others*[286] the question regarded jurisdiction in a libel case. Forbes, an American fortnightly magazine, published a defamatory article on two influential Russian men, Berezovsky (businessman and politician) and Glouchkov (First Deputy Manager and later Managing Director of Aeroflot, Russian airline). The magazine was circulated in various places: most readers were in the US, an estimated 6.000 in the UK and only about 13 in Russia. The magazine was also available on the

[284] See H Gaudemet-Tallon, *op cit* (fn 215) p 138-139.
[285] See *supra* fn 276.
[286] 2000 WL 544123; [2000] 2 All ER 986; [2001] ILPr 21; [2000] EMLR 643.

internet. The plaintiffs brought action in an English court against Forbes Inc (publisher of the magazine) and Michaels (editor), both established in the United States of America. The question was whether this court had jurisdiction. The plaintiffs contended that they had extensive contacts with England (business and in the case of Mr Bezezovsky, family). Both of them also spoke English well.

At first instance, the court granted a stay on the basis of *forum non conveniens* and directed the defendants to submit to the jurisdiction of the Russian courts, which it considered to be the more appropriate forum.[287] When new evidence on the detrimental effect of the articles on the reputation of the plaintiffs in England was brought before the Court of Appeal, that court reversed the decision and found that the English court did have jurisdiction.[288] Counsel for Forbes contended that "the correct approach is to treat multi-jurisdiction cases like the present as giving rise to a single cause of action and then to ascertain where the global cause of action arose". He relied *ia* on the US Uniform Single Publication Act which provides that for a single publication only one action for damages is possible. In the House of Lords, Lord Steyn, giving the leading part of the majority judgment, however, disagreed and made reference to English law and also to the case law of the European Court of Justice, specifically *Shevill*.[289] According to this case, separate actions in every relevant jurisdiction would be permissible. Lord Steyn admitted that the *Shevill* case dealt with the Brussels Convention, while the case before him did not. Yet he used the argument of the *Shevill* case as part of his reasons. The appeal was dismissed. This shows the subtle way in which the case law on the Brussels Convention has an effect on parties established outside the EU. None of the parties in this case was from the EU.

The Belgian legislator has also taken up this rule established by the European Court of Justice that one can cut the action into pieces. The new *Code de droit international privé* (Private International Law Code) states that the Belgian courts have jurisdiction if, or *in so far as*, the damage has occurred or may occur in Belgium.[290] This partial jurisdiction does not seem to fit into national law. Having it in the Brussels I Regulation is somehow more logical because there is a group of friendly States dividing jurisdiction between their courts and they do not want to tread on each others' territories. In a unilateral system, such as national rules on jurisdiction, a chopped-up rule on jurisdiction does not seem useful, or inciting legal certainty and foreseeablility for international disputes.

The splitting up of cases often arises, as in *Shevill*, and as in the *Berezovsky* case discussed above, in libel cases. With internet publications the splitting up becomes

[287] Judgments of 20 October 1997 and 19 December 1997. For further information on *forum non conveniens*, see *infra* Chapter 5, Part C, p 2 *et seq*.
[288] [1999] ILPr 358; [1999] EMLR 278.
[289] ECJ case C-68/93, *Fiona Shevill and others v Presse Alliance SA* [1995] *ECR* I-415.
[290] Act of 16 July 2004, published in *BS* 27 July 2004, Art 96(2). According to the Parliamentary documents, the provision was inspired by the case- law of the European Court of Justice; BZ 2003, 3-27/1 p 121-122.

more and more difficult. Such chopped-up and old-fashioned rule should not exist anymore, and should not be copied into national legal systems. Jurisdiction should lie with a court that has a proper link to the case. If no such proper link exists, a court should plainly lack jurisdiction, instead of getting a meagre opportunity to hear a tiny part of the case. Moreover, outside the framework of the Brussels I Regulation there is no guarantee that, if the action were chopped up, the other courts would assume jurisdiction on the basis of their national rules.

Other viewpoints on this provision of the Brussels I Regulation

This rule was one of the subjects of discussion at the negotiations of the Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters. The European rule formed the first alternative: the courts of the place where the act was committed or where the injury arose, have jurisdiction. The US approach was to look at the direction of activity (as for contracts): if the defendant had engaged in frequent and significant activity, or directed activity into a State, and the injury resulted form that activity, the court of that place would have jurisdiction. Attempts to limit this basis of jurisdiction include factors such as that the link between the defendant and the court had to be reasonable; that it would not apply if the defendant had taken all reasonable steps to avoid directing activity into that State and that the court would only have jurisdiction with regard to the injury resulting from the tort and nothing else. The article remained for the largest part between brackets, meaning that no consensus could be reached between the negotiators.

This basis of jurisdiction, as the one for contracts, clearly shows the different approaches to jurisdiction. One can either link the dispute, such as the tort, to the court, or one can link the defendant to the court. The argument is that if a corporation enters into a market, it implicitly subjects itself to that entire market, including its courts.[291]

While some found the provision on tort too wide, human rights activists lobbied to broaden it in order to catch violators of human rights, international criminal law and international humanitarian law. The requirement of the direction of activity would be too restrictive for this purpose. They argued that victims should be allowed to sue perpetrators in the courts of the place of the injury, even if the defendants were present in that place only for a short period of time. They would also eliminate the exception of the defendant taking reasonable steps to avoid directing activity into the particular State. Being in favour of broad protection for victims and the facilitation of reparations, they would grant jurisdiction to the court of the place of the injuries even if those injuries in that place were not foreseeable.

[291] See RA Brand, “Jurisdictional Common Ground: in Search for a Global Convention”, in JAR Nafziger & SC Symeonides (eds), *Essays in Honor of Arthur T von Mehren, Law and Justice in a Multistate World. Essays in Honour of Arthur T von Mehren* (Ardsley: Transnational Publishers Inc, 2002) p 11-32 at p 19-20.

5. Criminal proceedings

Article 5(4) permits EU Member States where civil proceedings can be linked to criminal proceedings to retain such rule.[292] In effect one hooks one's claim for damage or restitution onto the already pending criminal action, rather than bringing a separate action.[293] In other legal systems, one may bring civil claims against administrative actors or people vested with public authority in civil or in criminal courts.[294] The civil law part of the resulting judgment would thus be recognised and enforced under the Brussels I Regulation, even though jurisdiction was in the first place founded on a law of criminal procedure.

One can think of a situation in which a person domiciled in a third State is accused of a criminal act in an EU Member States. In some EU Member States, it would be possible for victims to hook civil actions against this person onto the criminal proceedings. The judgment on the civil actions will be recognisable and enforceable against the third State domiciliary throughout the EU.

6. Branch, agency or other establishment

General

This rule grants jurisdiction to the courts of the place of a branch, agency or other establishment when the dispute arises out of the operations of that establishment. As throughout Article 5, this basis of jurisdiction only exists if the legal person-defendant is domiciled in the EU.[295] If one considers the EU's internal market where goods, services, capital and persons are supposed to move freely, this basis of jurisdiction makes sense: if corporations are permitted to easily operate throughout Europe, they should also be easy to sue throughout Europe at the place where they are active.

The European Court of Justice has extended the reach of this provision to situations where two separate but identical legal persons exist. In the *Schotte* case[296] there were two separate legal persons, one incorporated in France and the other in Germany. They had the same name and identical management. The German entity negotiated and conducted business in the name of the French entity and the French entity used the German entity as an extension of itself. The European Court of Justice found that

[292] See ECJ cases C-172/91, judgment of 21 April 1993, *Sonntag v Waidmann*, [1983] *ECR* I-1963; C-7/98, judgment of 28 March 2000, *Krombach v Bamberski*, [2000] *ECR* I-1935.
[293] For instance in Belgium: Art 4 of the *Code d'instruction criminelle* (Code of Criminal Procedure), published in *Bull. Off.* 214*bis*, 27 November 1808. See, in general, R Verstraeten, *Handboek Strafvordering* (Antwerp: Maklu, 1999) p 133-169.
[294] For a thorough legal comparative analysis, see the opinion of Advocate General Darmon in ECJ case 172/91, judgment of 2 December 1992, *Sonntag v Waidmann*, [1993] *ECR* I-1963.
[295] Regarding the domicile of a legal-person-defendant, see *supra* Part A of this Chapter, p 2 *et seq*.
[296] ECJ case 218/86, judgment of 9 December 1987, *SAR Schotte v Parfums Rothschild SARL* [1987] *ECR* 4905.

the German courts had jurisdiction in a dispute between the French entity and another party because of the establishment in Germany despite the fact that it was legally a separate entity. The true test seems to be whether or not the establishment acts on behalf of or for the defendant and not whether the establishment has separate legal personality.[297]

"Operations" encompass the management of the branch in itself, including contracts and torts which that entail. It also comprises contractual and non-contractual obligations undertaken in the name of the parent legal person at the business place of the branch, agency or establishment and performed at that place.[298]

Third State corporations?

It has been stated that this provision is supposed to come into play only if the defendant-corporation is domiciled in the EU. That corporation can then be sued in other EU Member States where it has a branch. This basis of jurisdiction is not, as the protective bases of jurisdiction, a fiction that a legal person domiciled in a third State is deemed to be domiciled in the EU at the place of its branch, agency or other establishment.[299]

However, it has to be recalled here that the domicile of corporations definition (Art 60) is a broad one.[300] A company with statutory seat in Texas and real seat in France, will be domiciled in the EU for purposes of the Brussels I Regulation. Actions relating to the operations of that company's branch in London would then also fall under the Brussels I Regulation.

One could also change the example slightly: would a company with statutory seat in Texas and real seat in London be domiciled in the EU for purposes of the Brussels I Regulation? England (like the United States of America) adheres to the incorporation theory. Therefore, according to English law (and according to US law) the company would be seen as domiciled in Texas. However, the Brussels I Regulation states in Article 60 that there are three alternatives an EU Member State court might apply when determining the domicile of a legal person. Every EU Member State court might thus decide to see a company as domiciled at the place of its statutory seat, its central administration or its principal place of business. Although an English court would not have done so the principles of its own law, it would be able to see the Texas company as domiciled in London. The as yet unanswered question is whether the English court

[297] See also PM North & JJ Fawcett, *op cit* (fn 28) p 220-222.
[298] See ECJ case 33/78, judgment of 22 November 1978, *Somafer SA v Saar-Ferngas AG* [1978] *ECR* 2183 rec 13; see also H Duintjer Tebbens, "Jurisdiction in Matters relating to Tort or Delict and to the Operations of a Branch, Agency or Other Establishment", in Court of Justice of the European Communities, *op cit* (fn 4) p 87-98 at p 96-98.
[299] See *infra*, Part G of this Chapter, p 2.
[300] See the discussion on the domicile of legal persons *supra*, p 2 *et seq.*

might even be compelled to see the Texan company as domiciled in the EU, since the EU jurisdictional rules are compulsory (as had been found in the *Owusu* case[301]). Disputes regarding the operations of the French branch, would fall under the Brussels I Regulation if the corporation is domiciled in the EU. French law adheres to the real seat theory and a French judge would probably be inclined to see the company as domiciled in London, by which it would fall under the rules of the Brussels I Regulation and the French court would have jurisdiction over the operations of the branch.

The *Cour d'appel* (Court of Appeal) of Versailles, France, has made a rather strange construction in a case where a branch in France was concerned. It assumed jurisdiction over a French branch of City Bank, domiciled in New York.[302] The operations that gave rise to the dispute in this situation, were not even based on the operations of the bank's French branch (in Nanterre), but of its branch in Monaco. No specific reference was made in the judgment to Article 5(5), but, strangely, jurisdiction was based on the general basis of jurisdiction, the domicile of the defendant in France (Art 2) in combination with French national rules on jurisdiction. Gaudemet-Tallon has severely criticised this judgment, stating that as regards a defendant domiciled in a third State, Article 5(5) could not be applied.[303] Furthermore, since the dispute did not even arise from operations of the French branch, another requirement for the application of Article 5(5) was not fulfilled. This case therefore seems incorrect and one can only hope that it was a lone stray case.

The irrelevance of the place of the obligation

For the application of this provision on branches, the place of performance of a contract is irrelevant. The place of contract is a separate basis of jurisdiction, which has nothing to do with the provision on branches. The European Court of Justice has confirmed that in *Lloyd's Register of Shipping v Société Campenon Bernard.*[304] In this case the contract between Lloyd's Register of Shipping and Société Campenon Bernanrd regarded the testing of concrete reinforcing steel for the construction of a motorway in Kuwait. Société Campenon Bernard had contracted through Lloyd's French branch. According to the contract, the steel (whether it complied with a US technical standard) would be tested in Spain, by another of Lloyd's branches. Note that at the time of the facts, and at the time of the proceedings, Spain had not yet become Party to the Brussels Convention so that one can see Spain as a third State in this matter.

After the testing and the finding that the steel did comply with the standard, the Kuwait Ministry of Public Works refused to accept the steel, which in its view did not comply

[301] See the discussion of this case *supra*, p 2.
[302] Judgment of 26 September 1991, published in (1992) *RCDIP*, p 333-336 and in (1993) *JDI*, p 49-51. See also *infra*, Chapter 4, p 2 where the forum clause (and its invalidity) of this case will be discussed.
[303] Case notes by H Gaudemet-Tallon (1992) *RCDIP* p 336-340; A Huet (1993) *JDI* p 51-53.
[304] ECJ case 439/93, judgment of 6 April 1995 [1995] *ECR* I-961.

with the specified standard. This resulted in Société Campenon Bernard's action against Lloyd's in France, at the place of the branch through which it had contracted. The French *Cour de cassation* posed a preliminary question to the European Court of Justice, regarding the fact that the performance of the contract did not take place at the place of the branch and whether that influenced the jurisdiction on the basis of the operations of the branch.

The European Court of Justice ruled that the place of performance of the contract was irrelevant. It stated that to require that the contract must be performed in the EU Member State where the branch was situated, would be to make Article 5(5) redundant.

While this argumentation does not show any lack of logic, it has to be pointed out that it opens the door to legal constructions so as to manipulate jurisdiction within the EU, when the contract is to be performed outside the EU. The provision can only come into play when the defendant is established in the EU, so that the manipulation would have a limited effect.

7. Trusts

Jurisdiction over matters relating to trust lies, in addition to the general basis of jurisdiction in Article 2, with the court of the place where the trust is domiciled. This provision only comes into play when the defendant is domiciled in a different EU Member State than the one in which the trust is situated. However, it is perceivable that the trustee-defendant is domiciled in the EU while the beneficiary is domiciled in a third State or *vice versa*. In that sense, the provision might provide a useful alternative for parties from third States that want to bring actions.

A rule referring to the domicile of the trust is the only reasonable solution for a legal instrument that exists in some of the legal systems of the EU, but not in all.[305] Granting jurisdiction to the place where the trust is domiciled, creates legal certainty, also for parties from outside the EU who want to create a trust under the law of, for example, England. On the other hand, it might also open the possibility to legal constructions, creating a trust in an EU Member State where it is possible, in order to escape legal rules in EU Member States or in third States where the phenomenon of the trust is unknown.

[305] It exists in the United Kingdom and Ireland. Article 5(6) has been added to the Convention at the time of the accession of Ireland and the United Kingdom, since it was thought that the Convention needed such rule to deal with these legal entities without legal personality; see Schlosser Report, p 105-108 paras 109-120.

8. Salvage of ship or cargo

This basis of jurisdiction certainly can influence parties from third States. Ships sailing under the flags of third States can equally be the subject of this basis of jurisdiction. Salvaging ships is an internationally acknowledged practice. Therefore the Brussels I Regulation grants jurisdiction to the courts of the EU Member State where the cargo or freight had been arrested or could have been arrested, but bail or other security had been given. It is required, though, that the defendant be domiciled in another EU Member State for this basis of jurisdiction to be triggered.

9. Contracts related to rights *in rem*

There is one more provision on contracts that should be briefly mentioned. Tucked away at the end of Article 6, there is a rule providing that in matters relating to contract, if the action may be combined with an action regarding rights *in rem* in immovable property, the contractual action may be brought in the EU Member State court where the property is located. The actions have to be against the same defendant. The provision specifically states that it is concerned with defendants domiciled in the EU. In this sense the rule is not at all earth shattering.

As will be indicated in Chapter 3, if immovable property is situated in the EU, the EU Member State court of the location has jurisdiction on the basis of the Brussels I Regulation, irrespective of the domicile of the parties.[306] The hooking-on provision under discussion here, however, can only come into play if the defendant is domiciled in the EU. If the immovable property action is pending in an EU Member State court against a defendant from a third State, the Brussels I Regulation cannot allow this extension. One would have to look at domestic law to determine whether a contract claim can be brought in the same court against the defendant.

10. Conclusion

Article 5 provides alternative jurisdiction. 'Alternative' should be understood in relation to the general basis of jurisdiction of the domicile of the defendant (Article 2). The provision limits its own application to cases where the defendant is domiciled in an EU Member State; bases are provided to sue these EU defendants in other EU Member States. That explains the shorter ambit of this Part, even though the provisions of Article 5, especially the bases of jurisdiction relating to contract and tort, are often used in practice.[307] This Part has pointed out, however, that concerns might arise where contracts are to be performed in a third State or where torts had been committed in a third State.

[306] See *infra*, p 2 *et seq*.
[307] This is clear from the case law of the European Court of Justice. For the application in Belgium, see http://www.euprocedure.be.

Part G: Protective bases of jurisdiction

Section 3 of the Brussels I Regulation:

Article 8:
In matters relating to insurance, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5.

Article 9:

1. *An insurer domiciled in a Member State may be sued:*
   a) *in the courts of the Member State where he is domiciled, or*
   b) *in another Member State, in the case of actions brought by the policyholder, the insured or a beneficiary, in the courts for the place where the plaintiff is domiciled,*
   c) *if he is a co-insurer, in the courts of a Member State in which proceedings are brought against the leading insurer.*
2. *An insurer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.*

Article 12:

1. *Without prejudice to Article 11(3)* [direct actions]*, an insurer may bring proceedings only in the courts of the Member State in which the defendant is domiciled, irrespective of whether he is the policyholder, the insured or a beneficiary.*
2. *The provisions of this Section shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.*

Article 13:
The provisions of this Section may be departed from only by an agreement:

1. *which is entered into after the dispute has arisen, or*
2. *which allows the policyholder, the insured or a beneficiary to bring proceedings in courts other than those indicated in this Section, or*
3. *which is concluded between a policyholder and an insurer, both of whom are at the time of the conclusion of the contract domiciled or habitually resident in the same Member State, and which has the effect of conferring jurisdiction on the courts of that State even if the harmful event were to occur abroad, provided that such an agreement is not contrary to the law of that State, or*
4. *which is concluded with a policyholder who is not domiciled in a Member State, except in so far as the insurance is compulsory or relates to immovable property in a Member State, or*
5. *which relates to a contract of insurance in so far as it covers one or more of the risks set out in Article 14.*

Section 4 of the Brussels I Regulation: Jurisdiction over consumer contracts:

Article 15:

1. *In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5, if:*
   a) *it is a contract for the sale of goods on instalment credit terms; or*
   b) *it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or*
   c) *in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.*
2. *Where a consumer enters into a contract with a party who is not domiciled in the Member State but has a branch, agency or other establishment in one of the Member States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State.*
3. *This Section shall not apply to a contract of transport other than a contract which, for an inclusive price, provides for a combination of travel and accommodation.*

Article 16:

1. *A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled.*
2. *Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.*
3. *This Article shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.*

Article 17:

The provisions of this Section may be departed from only by an agreement:

1. *which is entered into after the dispute has arisen; or*
2. *which allows the consumer to bring proceedings in courts other that those indicated in this Section; or*
3. *which is entered into by the consumer and the other party to the contract, both of whom are at the time of the conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State.*

Section 5 of the Brussels I Regulation: Jurisdiction over individual contracts of employment:

Article 18

1. *In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5.*

2. Where an employee enters into an individual contract of employment with an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operations of that branch, agency or establishment, be deemed to be domiciled in that Member State.

Article 19:

An employer domiciled in a Member State may be sued:

1. in the courts of the Member State where he is domiciled; or

2. in another Member State:

a) in the courts for the place where the employee habitually carries out his work or in the courts for the last place where he did so, or

b) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.

Article 20:

1. *An employer may bring proceedings only in the courts of the Member State in which the employee is domiciled.*
2. *The provisions of this Section shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.*

Article 21:

The provisions of this Section may be departed from only by an agreement on jurisdiction:

1. *which is entered into after the dispute has arisen; or*
2. *which allows the employee to bring proceedings in courts other than those indicated in this Section.*

Article 35 of the Brussels I Regulation:

1. *Moreover, a judgment shall not be recognised if it conflicts with Sections 3, 4 or 6 of Chapter II, or in a case provided for in Article 72.*
2. *…*

1. Introduction

The rules for the protection of certain weaker parties have many similarities to the special rules discussed in the previous Part. They also derogate from the general rule. However, they have a certain priority above the special rules of Article 5, rather than just providing an alternative to jurisdiction of the court of the domicile of the defendant (Art 2). They must be applied when one of the parties matches the definition of a party needing protection. Moreover, the application of these specific rules does not necessarily presuppose that the defendant should genuinely be domiciled in an EU Member State. It is possible that the jurisdictional rules will apply when the legal

relationship involves an EU Member State and a non-EU Member State rather than two EU Member States. There is also a rule that deems a party to be domiciled in the EU even though it is not, while it has an agency or branch there.[308]

So-called 'weaker' parties are those who lack the bargaining power which their counter-parties have. For instance, consumers that receive order forms in the mail and fill them in have no say in the contractual terms, often already imprinted as general conditions on the reverse side of the order form. The advent of internet purchases only aggravated the situation. The European Union has always regulated in such a way as to provide protection for weaker parties so that they are not trapped by contractual terms to which they never really agreed, but against which they could not protest.[309] The underlying philosophy is fairness; one should rectify the lack of party autonomy by not holding the weaker parties to contracts they did not really agree to.

On the other hand, these protective bases of jurisdiction hamper international trade (and trade in general, but that is not the current concern). Sellers and providers of services need to be able to contract quickly and with the assurance that their contractual terms will be respected. If market operators cannot rely on this certainty, the economy will be hampered and the result (whether direct or indirect) will often be that the products or services become more expensive for the consumer.[310] The US approach to weaker parties is more business-friendly. The argument is that one cannot expect businesses to take every possible legal system into account when selling products and services to persons in foreign countries, especially if those sales are via internet.

This difference in policy could be clearly seen at the negotiations of the failed Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters.[311] E-commerce had blown up this problem during the time of the negotiations. In the 2001-text, there were various alternatives regarding the consumer contracts provision. Consumers would be protected in the same way as under the Brussels I Regulation: a consumer could sue the counter-party in the State where the consumer was habitually resident if the other party had directed its activity into that State and the consumer was not in another State when taking the steps necessary for the conclusion of the contract or when the goods or services were delivered. Neither was it clear whether or not a choice of forum would be permitted and under what conditions. A

[308] See the Opinion of Advocate General Léger in ECJ case C-281/02, *Owusu v Jackson*, judgment of 1 March 2005, not yet published in *ECR*, see http://www.curia.eu.int, para 132-134.
[309] See P Nygh, "Arthur's Baby: The Hague Negotiations for a World-Wide Judgments Convention" in JAR Nafziger & SC Symeonides (eds), *Essays in Honor of Arthur T von Mehren, op cit* (fn 76) p 151-172 at p 169-170.
[310] This debate also took place at the negotiations for the conversion of the Brussels Convention into a Regulation; see C Bruneau, "Les règles européennes de competence en matière civile et commerciale" (2001) *SJ* p 533-541, at p 538.
[311] Arts 7 and 8 of 2001-text.

possibility of declarations was left open. Another alternative was removing business to consumer contracts from the scope of the Convention altogether.

The provision regarding employment contracts, which was equally controversial, contained four proposals.[312] Three of these were more or less the European approach, namely the rule in the Brussels I Regulation: employees could be sued at their habitual residence or at the place where they usually worked while they could sue an employer at its habitual residence, at the place where they habitually worked or at the place of the establishment that engaged them; a choice of court agreement would only be valid if entered into after the dispute had arisen, if it allowed more possible fora to the employee or if it was permitted under the law of the State where the employee performed the work. The fourth proposal allowed States to make reservations at ratification with regard to this provision. Another option was to allow declarations that a State will not recognise or enforce judgments regarding employment contracts or that it will only recognise and enforce these judgments under certain conditions.

2. Structure of the provisions

The Regulation protects three categories of weaker parties, namely insured parties, consumers and employees. This protection is afforded to weaker plaintiffs and to weaker defendants. The sections containing the protective bases of jurisdiction have precedence over the general basis of jurisdiction (domicile of the defendant; Art 2[313]) and the alternative bases (place of performance of a contract, place of tort or delict ***etc***; Art 5[314]). For protective parties there are also specific rules that regulate the validity of forum clauses. The normal rules on forum clauses (Art 23[315]) are not applicable. The protective bases of jurisdiction in some instances even have precedence over exclusive bases of jurisdiction (Art 22[316]). This issue will probably not arise for employment contracts. It can, however, raise questions regarding consumer contracts. The reach of the protection for consumer contracts is broad, so as to include a wide range of contracts.

Weaker plaintiffs are protected by granting jurisdiction to the forum of the domicile of the weaker party, thus a *forum actoris*, which is usually seen as exorbitant jurisdiction. These plaintiffs may also bring action at the place of domicile of the defendant.

The strength of the protection afforded to the weaker parties lies in the rules on recognition and enforcement in the EU. If the rules regarding jurisdiction in consumer

[312] This issue was not discussed at the Diplomatic Session, but at a meeting in Edinburgh in April 2001, just prior to the second part of the Diplomatic Session. It was agreed to insert the Edinburgh text of the employment contracts provision into an annex.
[313] Discussed *supra*, Part B of this Chapter, p 2 *et seq*.
[314] Discussed *supra*, Part F of this Chapter, p 2 *et seq*.
[315] Discussed *infra*, Chapter 4, p 2.
[316] Discussed *infra*, Chapter 3, p 2.

and insurance contracts were not respected by an EU Member State, that would provide a ground for the refusal of recognition and enforcement of the resulting judgment in other EU Member States.[317] However, such an exception of the obligation to recognise and enforce does not exist for employment.[318]

3. Who qualifies as a protected party?

The Brussels I Regulation should be autonomously interpreted and legal terms will not necessarily have the same meaning as they have in the national legal systems of the EU Member States. Some terms are explicitly defined in the Brussels I Regulation, and for others one has to rely on the interpretation given by the European Court of Justice.

The underlying philosophy that weaker parties should be protected against the consequences of terms they did not agree to, has been explained above.[319] The justification is the unequal bargaining power between the parties. However, Bill Gates buying a chair for his house fulfils the definition of a "consumer", while a single trader buying that chair for his only office cannot be considered a consumer. This example indicates that a precise protection of those who need it, without providing unnecessary protection to economically strong parties, is very difficult to find, if not impossible.

Protection is granted on the basis of an unequal bargaining power.[320] Therefore a contract between two consumers does not fall in the scope of the provision.[321] For example, the individual sale of a second hand car would not give rise to jurisdiction under the protective bases of jurisdiction discussed in this Chapter, but would fall under the normal rules of the Regulation.

"Weaker" parties are widely protected in litigation under the Brussels I Regulation. Both plaintiffs and defendants are protected. Weaker plaintiffs may of course still bring proceedings in the normal forum, *ie* the court of the place of the domicile of the defendant. Additionally, they may bring proceedings in the courts of the place of their own domicile, if the contract falls in one of the definitions discussed below. For weaker

[317] According to Art 35(1) Brussels I Regulation.
[318] It is unclear why this lack of parallel exists. It has been suggested in the Explanatory Memorandum of the Commission that the employee (weaker party) will almost always be the plaintiff so that a control of jurisdiction would prejudice, rather than help that party (p 23). Whether this argument should be different for employees than for insured parties or consumers, lacks justification; see C Bruneau, "La reconnaissance et l'exécution des décisions rendues dans l'union européenne" (2001) *SJ* p 801-808 at p 805; H Gaudemet-Tallon, *op cit* (fn 215) p 312-313.
[319] See *supra*, p 2.
[320] See ECJ cases 201/82, judgment of 14 July 1983, *Gerling and Others v Amministrazione del Tesoro dello Stato* [1983] *ECR* 2503, rec 17; C-412/98, judgment of 13 July 2000, *Group Josi Reinsurance Company SA v Universal General Insurance Company* [2000] *ECR* I-5625 rec 64.
[321] See Art 15(1)(c).

defendants the bases of jurisdiction are limited. The counter-party may only bring proceedings in the courts of the place of the weaker party's domicile.

Insured parties

Talking about "insured" parties" is too narrow. In fact, the Brussels I Regulation protects not only insured parties, but also policyholders and beneficiaries.[322]

It is particularly difficult to distinguish insured parties that deserve special protection from those that do not. Of course big economic operators also insure their losses. They are therefore also insured parties, but do not need any special protection as they might be economically stronger than their insurers and do not lack the necessary bargaining power.

The European Court of Justice has had the occasion to adjudicate whether or not reinsurance contracts fall in the scope of the protective bases of jurisdiction. The *Josi* judgment has already been discussed as one of the few cases of the European Court of Justice that deal directly with the question of third States.[323] The plaintiff, an insurance company domiciled in Canada, sued the Belgian reinsurance company in the *Tribunal de commerce* (Commercial Court) of Nanterre, France. The French court had jurisdiction on the basis of French national law (although the exact basis is not apparent). The defendant contended that the French national jurisdictional rules were inapplicable and that the Brussels Convention had to be respected since it, as defendant, was domiciled in the EU. After a referral by the *Cour d'appel* (Court of Appeal) of Versailles, the European Court of Justice found that this argument was correct: the Belgian defendant had to be sued according to the rules of the Brussels Convention. The court had referred another question to the European Court of Justice, namely whether reinsurance contracts fell under the protective bases of jurisdiction provided by the Brussels Convention for insurance contracts. The European court of Justice found that these contracts did not fall in the ambit of the protection granted to insured parties.[324] Insurance companies could not be seen as economically weak parties when dealing with or litigating against reinsurance companies.

A similar question as with regard to reinsurance contracts arises when one thinks of insurers of great risks. Sometimes the insured risk is so big that one cannot by any stretch of the imagination contend that the insured owner of the risk is economically weak and needy of special procedural protection. However, the distinction is difficult to

[322] See Art 9(1)(b).
[323] ECJ case C-412/98, judgment of 13 July 2000, *Group Josi Reinsurance Company SA v Universal General Insurance Company* [2000] *ECR* I-5625. See case notes by C Van Schoubroeck (2001) *TBH* p 146-148; F Leclerc (2002) *JDI* p 623-628; P Vlas (2003) *NJ* no 597, p 4584-4586; A Staudinger (2000) *IPRax* p 483-488. See also *supra*, p 2.
[324] At rec 66-67. This is also in line with the Schlosser Report, para 151, p 117. The English court had already reached this conclusion in 1997; see *Agnew v Lansförsäkringsbílagens AB* [1997] 4 All ER 937, confirmed by the House of Lords, [2001] 1 AC 223 (HL).

draw and the result is that all risks great and small can fall in the ambit of the provision. For some of these big contracts the limitation on forum clauses is alleviated.[325]

Consumers

The Brussels I Regulation contains an explicit definition of "consumer". A consumer is a person who concludes a contract "*which can be regarded as being outside his trade or profession*." This definition has also been used in other European Union instruments, such as the Consumer Credit Directive.[326]

The active consumer, who crosses the border to do shopping, or who orders a suit while he is on holiday, cannot invoke the protective bases of jurisdiction. The counter-party must have directed its activities to the EU Member State where the consumer is domiciled. This provision remains the same for consumer contracts concluded via the internet.[327]

Traders sometimes, by way of aggressive marketing, promises prizes or gifts to consumers, in order to attract new customers. The European Court of Justice has had two occasions to rule on the applicability of the protective bases of jurisdiction on the resulting contracts.[328] The court has introduced a nuanced rule: if the consumer bought goods in order to obtain his prize, a consumer contract has come into existence and the protective bases of jurisdiction apply (that was the case of Mr Gabriel). If, on the other hand, the consumer sues for the prize that was supposed to be available even without any obligation to buy, there is no consumer contract. Mrs Engler, who was party to such a contract, could not use the protective bases of jurisdiction but had to sue either at the place of the domicile of the defendant (Art 2) or at the place where the contract had to be performed (Art 5).

It might happen that a party concludes a single contract that is partially related to his trade and partially for personal purposes. Whether or not such party can be considered a consumer (entitled to procedural protection) is a question that has been referred to

[325] This issue also gave rise to difficult discussions at the time that the United Kingdom and Ireland joined the Brussels Convention; see Schlosser Report, paras 136-147, p 112-116. It was eventually decided to allow jurisdiction clauses for some risks, which entailed contracts that were important for the London insurance market (Art 12*bis* Brussels Convention; Art 14 Brussels I Regulation). See also the discussion of this subject in *New Hampshire Insurance v Strabag Bau* [1992] 1 Lloyd's Rep 361 (CA); [1992] ILPr 478 CA. See also *infra*, p 2 *et seq*.

[326] Art 1(2)(a) of Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, *OJ L* 42, 12 February 1987, p 48-53.

[327] See C Bruneau, "Les règles européennes de competence en matière civile et commerciale" (2001) *SJ* p 533-541 at p 537-538.

[328] ECJ cases C-96/00, judgment of 11 June 2002, *Gabriel* [2002] *ECR* I-6367; C-27/02, judgment of 20 January 2005, *Engler v Janus Versand GmbH*, not yet published in *ECR,* see http://www.curia.eu.int.

the European Court of Justice in *Gruber v Bay Wa AG*.[329] The case concerned an Austrian farmer, Mr Gruber, who bought roof tiles from a German seller, Bay Wa, after having received an advertisement. These tiles were to cover the pigsty and storage room as well as of the part of the farm that served as residence to Mr Gruber and his family. The residential part encompassed approximately 60% of the floor space. Mr Gruber was not satisfied with the quality of the tiles and brought an action against Bay Wa on the basis of the warranty. The *Oberster Gerichtshof* (Supreme Court) of Austria referred a number of questions to the European Court of Justice. Some of the questions concerned the way of contracting (including telephone calls), but those are not relevant for the current study. The European Court of Justice ruled that a contract that entails partly professional and only partly personal activities, is not a consumer contract for purposes of the EU jurisdictional rules granting protection to consumers. Only when the professional part of the contract is negligible can the buyer rely on the protective bases of jurisdiction for consumers.

Employees

Only employees with individual contracts of employment can rely on the protective bases of jurisdiction; collective employment contracts do not fall under these provisions. Here again one sees the requirement of unequal bargaining power before the protection can be granted. An individual employee has much less power to determine the terms of the contract than does the employer. On the other hand, in the case of collective agreements, trade unions are strong and are able to have a substantial impact at the negotiation table and influence the terms of the contract.

Employees habitually working on the continental shelf, can be considered to be habitually working on the territory of the particular EU Member State. That has been decided by the European Court of Justice in a case where a cook worked first on The Netherlands' part and subsequently on the Danish part of the continental shelf.[330] Extending the EU jurisdiction rules to work performed on the continental shelf of an EU Member State, does not seem unreasonable. Such application of the rules does not pose a threat to third States. There is no reason why the rules of any third State should regulate such matters and not applying the EU rules would probably lead to a vacuum.

4. Weaker parties from third States

The European rules cannot endow the courts of third States with jurisdiction. In this sense the Brussels I Regulation cannot possibly grant the same protection to weaker parties from third States as it grants to weaker parties domiciled in the EU.

[329] ECJ case C-464/01, judgment of 20 January 2005, not yet published in *ECR,* see http://www.curia.eu.int.
[330] ECJ case C-37/00, judgment of 27 February 2002, *Weber v Universal Ogden Services Ltd* [2002] *ECR* I-2013.

Third State insured parties

In the *Josi* Case, referred to above,[331] the European Court of Justice found that the contracts between insurance and reinsurance companies fall outside the scope of the protective bases of jurisdiction. It is interesting that the Court considered this question at all and did not rule it inadmissible. Universal General Insurance Company, the insurance company that would have been able to rely on the protective bases of jurisdiction, was domiciled in Canada, while the reinsurance company was domiciled in Belgium. One could presume for a moment that the Court had found that reinsurance contracts did fall in the ambit of the protective bases of jurisdiction for insurance contracts. That would mean that Universal General Insurance Company would be able to rely on this protection. However, the protective bases of jurisdiction provide that the insured party may bring proceedings at the place of its domicile, which was in this case outside the EU. Of course the Brussels Convention could not (and the Brussels I Regulation cannot) grant jurisdiction to the Canadian courts. Therefore, the protection has no sense. The insurer is also permitted to bring an action at the courts of the place where the defendant is domiciled. That basis of jurisdiction exists whether there is a protected party involved or not.

In the French case *Ben Lassin v Payne*,[332] a French businessman domiciled in Geneva, Switzerland had contracted with an insurance broker in Liechtenstein. The broker insured the risks via a London broker with Lloyd's of London, established in London. The *Cour d'appel* (Court of Appeal) of Paris found that the Brussels Convention could not grant jurisdiction to the French courts in this case because the insured party plaintiff was domiciled in a third State and the agents were domiciled in Liechtenstein or in Great Britain, not in France.[333] Note that the Lugano Convention had not yet entered into force when the proceedings were brought, so that that Convention could not have been used to base jurisdiction either. The French nationality of the businessman was irrelevant. There was no basis of jurisdiction under French national law either, so that the French courts lacked jurisdiction.

[331] See *supra*, p 2.
[332] An English translation of the case was published in [1995] ILPr 17.
[333] See also P Kaye, *op cit* (fn 236) vol 3, p 1798-1799. He states that a plainer solution was simply that an insurance broker is not an insurer for purposes of article 8, except that a defendant insurer may be deemed to be domiciled in a Contracting State in which its branch, agency or establishment operated according to article 8(2).

Third State consumers

The *ICS Computing Ltd & Fargell Ltd v Capital One Services Inc* case[334] pointed out that third State consumers do not receive protection under the Brussels regime, even though upon the facts of this case the defendant was found not to be a consumer at all. The defendant was a company incorporated in the state of Delaware and had a branch in Nottingham, England. The two plaintiffs, established respectively in Northern Ireland and in England, had contracted with the defendant to set up a computer system for payroll and personnel services for it. The plaintiffs subsequently brought an action for breach of contract, *ie* non-payment, in Northern Ireland. The question was whether the contract had to be performed in Northern Ireland, so that that court had jurisdiction.

The defendant further contested the jurisdiction of the court in Northern Ireland by contending that it was a consumer and consequently that the court in England where its branch was situated, had exclusive jurisdiction, since it should be deemed to be domiciled there. The judge did not accept the argument that the defendant was a consumer. He added that even if it were a consumer, jurisdiction could not lie with the English Court on that basis. The provision deeming a party from a third State to be domiciled at the place of its branch in the EU, applies to the counter-party in a consumer contract, and not to the consumer.

The outcome of the case seems correct according to the rules of the Brussels Convention. One has to admit that contending to be a consumer while one has a branch abroad is a bit far-fetched and the result of the case is probably equitable. The Court also stated that being economically weaker than the counter-party in itself did not make one a consumer. The case indicates two borderlines of the Brussels regime in a very clear way: firstly the line of parties deemed to be domiciled in the EU, and secondly the line determining which parties are granted protection by the EU jurisdiction rules.

Employees in third States, or employment in third States

The case *Mulox IBC Ltd v Geels*,[335] dealt with employment in various States, some of which were EU Member States and some of which were not. Mulox was a company incorporated under English law and had its registered office in London. Mr Geels, a Dutch national residing in France, was employed as its international marketing director. He was employed in 1988 and he established his office in Aix-les-Bains, France and sold Mulox products initially in Belgium, The Netherlands, Germany and the

[334] High Court of Justice in Northern Ireland, unpublished case WEAC3561, judgment of 11 January 2002; see http://www.courtsni.gov.uk/en-gb/judicial+decisions/judgments/j_j_weac3561.htm.

[335] ECJ case C-125/92, judgment of 13 July 1993 [1993] *ECR* I-4075. See case notes by M Fallon, (1993) *JT/droit européen* p 37; N Watté (1993) *TBH* p 1117; A Briggs (1993) *YEL* p 520-525; A Kohl (1994) *JLMB* p 463-465; A Huet (1994) *JDI* p 539-546; P Lagarde (1994) *RCDIP* p 574-577; TC Hartley (1994) *ELR* p 540-545; H Tagaras (1995) *Cah Dr Eur* p 188-191.

Scandinavian countries. He travelled frequently to these countries. As from 1990, he worked in France. Upon termination of his contract, Mr Geels sued Mulox before the *Conseil de prud' hommes* (Labour Conciliation Tribunal) of Aix-les-Bains, France for compensation in lieu of notice and for damages. The tribunal held that it had jurisdiction. Mulox appealed to the *Cour d'appel* (Court of Appeal) of Chambéry, France contesting jurisdiction. The court referred a preliminary question to the European Court of Justice asking whether, for the application of Article 5(1), it was necessary that the obligation characterising the employment contract be wholly in the State where jurisdiction was sought or whether it was sufficient that a part (maybe the principal part) was performed there. The European Court of Justice responded that jurisdiction could not be shared between all the places where the employee performed his work. It is necessary to define the place of performance as the place where or from which the employee principally discharges his obligations towards the employer.[336]

When this case was decided, Denmark was the only Scandinavian country that was part of the EC and party to the Brussels Convention. The court did not consider the fact that some of the obligations were performed in third States as an impediment for its application. The Scandinavian countries were, at that stage, parties to the Lugano Convention, which had the same provision as the Brussels Convention. This Convention could thus have been applied. Of course the European Court of Justice lacks the capacity to grant preliminary judgments of interpretation on the Lugano Convention, but it could have ruled that the Brussels Convention was not applicable. The national court should probably have made this first step of applying the Lugano Convention and not the Brussels Convention.

Similarly, the case *Rutten v Cross Medical Ltd* [337] concerned an employee, Mr Rutten, who worked in many different places and domiciled in The Netherlands. His employment contract was concluded with Cross Medical BV, established in The Netherlands, a subsidiary of Cross Medical Ltd, established in London. After a year, Mr Rutten's contract with Cross Medical BV was terminated and he was then employed by Cross Medical Ltd. The first contract contained a jurisdiction clause in favour of the *Kantonrechter* (Cantonal Court) of Amsterdam, but the second contract contained no jurisdiction clause. Under both contracts, the employment duties were performed for two-thirds in The Netherlands, and for the rest in other places including Belgium, Germany, the United Kingdom and the United States of America. Mr Rutten's contract was terminated and he brought action against his former employer before the *Kantonrechter* of Amsterdam, claiming salary arrears and interest.

The case went all the way to The Netherlands' *Hoge Raad* (Supreme Court), which posed three related preliminary questions to the European Court of Justice regarding

[336] Rec 26.
[337] ECJ case C-383/95, judgment of 9 January 1997 [1997] *ECR* I-57; see case notes by Ph Antonmattei (1997) *SJ – ed enterprise II,* no 659; H Gaudemet-Tallon (1997) *RCDIP* p 341-346; M Pertegás Sender (1997) *Colum J Eur L* p 292-298.

the place where the employment was habitually carried out. The Court responded that one had to look at the place where the employee had established the effective centre of his working activities. Factors such as whether the employee spends most of his working time in one of the EU Member States in which he has an office where he organises his work and to which he returns after each business trip.

On first sight, one cannot contest the conclusion of the case. However, it is a bit bothering that neither the Court nor the Advocate General took any cognisance of the fact that one of the places where the employee worked was outside the EU, namely in the United States of America. It seems clear from the facts that Mr Rutten spent more time inside the EU than outside: only a fraction of a the third not spent in The Netherlands was spent in the United States of America. Therefore in this case the negation of the employment outside the EU did not amount to any excessive or exorbitant exercise of jurisdiction.

Yet, one can imagine a situation where an employee is employed by a company in The Netherlands, but performs only one-third of his work in the EU, and the remaining two-thirds in the United States of America. In such a case, an employee would be permitted to bring proceedings in The Netherlands in any event, because that is the domicile of the employer (defendant). The question arises whether there would in this case be an alternative court in an EU Member State that would have jurisdiction on the basis that the employee habitually performs his employment there. One can assume for a moment that of the one third of his employment time in the EU, the employee spends most in Belgium. Would the Belgian court have jurisdiction? The issue is whether only the employment in the EU has to be taken into account when determining where the employee habitually works. If so, then the Belgian courts could have jurisdiction on the basis that the employee habitually worked there. However, if one looks at the complete picture, one would have to find that there is no place of habitual employment in the EU. That finding can then lead to one of two conclusions. The first regards the next step of the rule, namely that where the employee does not habitually work in one EU Member State, the courts of the Member State of the establishment that employed the employee have jurisdiction. That could be stretched to this situation; in other words, one would equate not habitually working in the EU to not habitually working in one specific EU Member State. This seems to go further than the intention of the rule: it was merely drafted for situations in which the employee travelled so much within the EU that it was impossible to say where he habitually worked. The other possibility, which seems to be the correct one, would be that if there is no place in the EU where the employee habitually worked, one simply cannot use that basis of jurisdiction. The employee would have to bring his action at the courts of the domicile of the employer (defendant) if he wants to proceed in the EU.

5. Counter-parties from third States

General

The sections providing special protection for weaker parties explicitly determine that they apply without prejudice to Articles 4 and 5(5) of the Regulation.[338]

Article 5(5), as has been discussed in the previous Part, grants jurisdiction to EU courts where a branch, agency or other establishment of a legal person is situated in another EU Member State than it is itself domiciled.[339] The provision deals with defendants from the EU and in this sense has a limited influence for parties from third States.

Article 4 determines that if a defendant is domiciled in a third State, the rules of the Brussels I Regulation do not apply, but one has to revert to the national rules on jurisdiction of each EU Member State. Therefore, if the defendant in a dispute concerning an insurance, consumer or employment contract is domiciled in a third State, the provisions of the Brussels I Regulation are likewise inapplicable.

So far so good, but of course the rules are once again not as straightforward as they seem. Counter-party defendants that are domiciled outside the EU may be considered to be domiciled in the EU Member State where they have a branch, agency or other establishment. The qualification is that the dispute must have arisen out of the operations between that branch, agency or establishment on the one hand, and the insured, consumer or employee on the other hand.[340] This of course means that insurers, sellers (or providers of services) to consumers and employers domiciled in third States should pay particular attention. Opening a branch in the EU, may have the result of creating a domicile where one is not truly domiciled.

Furthermore, having a forum in the EU might lead to the application of EU protective rules, which are more concerned with the protection of a party with less bargaining power than with the free functioning of a capitalist market. Regarding the law applicable to insurance contracts, the EU has adopted a number of directives to protect EU insured parties if the risks are situated in the EU.[341] In principle these directives only

[338] Arts 8(1), 15(1) and 18(1).
[339] See *supra*, Part F of this Chapter, p 2.
[340] Arts 9(2), 15(2) and 18(2).
[341] For instance Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance, *OJ L* 345, 19 December 2002, p 1-51; Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 73/239/EEC, *OJ L* 172, 4 July 1988, p 1-14, as amended by Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive), *OJ L* 228, 11 August 1992, p 1-23. Note that these directives are in force throughout the European Economic Area, *ie* the EU and Iceland, Liechtenstein and Norway.

apply if the insurer is domiciled in one EU Member State and the risk is situated in another. However, directives are only charts that need to be transposed into the national law of the Member States. In transposing directives into national law, Member States might choose to extend the applicability of the rules. In Belgium, for instance, it is unclear whether the legislator had intended an extension to the EU directives to the effect that the rules also to apply to third State insurers of risks in Belgium.[342]

The same difficulty might arise with regard to the EU directives concerning material rules for the protection of consumers.[343] Also in the field of employment law, the influence of EU legislation should not be underestimated.[344]

[342] See C Van Schoubroeck & H Cousy, "Internationale verzekeringsovereenkomsten" in H Van Houtte & M Pertegás Sender (eds), *Europese IPR-verdragen* (Leuven: Acco, 1997) p 281-309 at p 287.

[343] See, for instance, Council Directive 84/450/EC of 10 September 1984 relating to the approximations of laws, regulations and administrative provisions of the Member States concerning misleading advertisements, *OJ L* 250, 19 September 1984, p 17-20; Directive 97/55/EC of European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising, *OJ L* 290, 23 October 1997, p 18-23; Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, *OJ L* 144, 4 June 1997, p 19-27; Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), *OJ L 149*, 11 June 2005, p 22-39; Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, *OJ L* 42, 12 February 1987, p 48-53; Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *OJ L* 95, 21 April 1993, p 29-34; Commission's Proposal for a Directive of the European Parliament and of the Council on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers repealing Directive 87/102/EC and modifying Directive 93/13/EC, document of 28 October 2004, COM(2004)747final, http://www.europa.eu.int/comm/consumers/cons_int/fina_serv/cons_directive/credit_cons_en.pdf; Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, *OJ L* 171, 7 July 1999, p 12-15; Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises -"door to door selling", *OJ L* 372, 31 December 1985, p 31-33. See also J Stuyck, "Internationale Consumentenovereenkomsten", in H Van Houtte & M Pertegás Sender (eds) (1997), *op cit* (fn 342) p 259-280; J Basedow, "Consumer Contracts and Insurance Contracts in a Future Rome I-Regulation", in J Meeusen, M Pertegás Sender & G Straetmans (eds), *Enforcement of International Contracts in the European Union* (Anwerpen:Intersentia, 2004) p 269-294; G Straetmans, "The Consumer Concept in EC Law" in the same book, p 295-322.

[344] See, in general, H Storme & S Bouzoumita, "Arbeidsovereenkomsten in internationaal privaatrecht" (2005) *NjW* p 290-3147; C Engels, "Arbeidsovereenkomsten met een internationaal aspect", in H Van Houtte & M Pertegás Sender (eds) (1997), *op cit* (fn 342) p 235-257; MV Polak, " '*Laborum dulce lenimen*'? Jurisdiction and Choice-of-law aspects of employment contracts", in J Meeusen, M Pertegás Sender & G Straetmans (eds), *op cit* (fn 343) p 323-342.

Insurers

The case *Jordan Grand Prix Ld v Baltic Insurance Group & others*[345] concerned the question whether the special rules of the Brussels Convention on insurance contracts were applicable in cases where the insurer was domiciled in a third State. The facts were quite complicated, but the case provides a good example of insurance contracts between insured parties in the EU and insurers in third States. Jordan, an English company engaged in Formula 1 racing, promised its employees a bonus payment if their team finished among the first six in the Constructors' Formula One World Championships. This exposure to contractual liability was insured with Baltic, a Lithuanian company through Baltic's Belgian agent, Compagnie d'Investissements Universelle (CIU) and with the intervention of another Belgian company, Special Risks Insurance (SRI). Moreover, Jordan contracted with Quay Financial Software, an Irish company, to the effect that Jordan would promote its products and Quay would pay Jordan a sum if the team finished first to seventh in the championships. It was in dispute whether this liability was also covered by Baltic through the intervention of SRI. Jordan's team finished fifth. Baltic refused to pay and alleged conspiracy by Jordan, Quay and others.

Jordan then brought an action against Baltic and two Belgian re-insurers in the English courts. Baltic brought a counter-claim for damages against Jordan, Quay, the two intermediaries, the two re-insurers and various directors of these companies (altogether twelve defendants to the counter-claim). Three of the defendants on the counter-claim (Quay and its two directors) were not plaintiffs in the original claim, but were joined by Baltic on the counter-claim. The case went all the way to the House of Lords. There were two main issues: whether Baltic, as plaintiff on the counter-claim had to bring proceedings on the basis of the Brussels Convention rules; and whether a counter-claim could be brought against parties not involved in the initial proceedings.

The House of Lords first considered whether an insurer-plaintiff (on counter-claim), domiciled outside the EU was held to the rule in the Brussels Convention that an insurer may sue a defendant only in the courts of the domicile of the defendant.[346] The House of Lords found that that rule also bound insurers from outside the EU, if they were plaintiffs. This conclusion is in line with the general rule of the later *Josi* judgment of the European Court of Justice.[347] In that judgment, it will be recalled, the European Court of Justice made it clear that the rules of the Brussels Convention applied regardless of the domicile of the plaintiff; the important factor was the domicile of the defendant. The House of Lords further stated that a contrary conclusion would undermine the purpose of the provision.[348] That provision is aimed at protecting weaker

[345] [1999] 2 AC 127 (HL). See also the judgment of the Court of Appeal, [1998] 3 All ER 418 (CA).
[346] Art 11 Brussels Convention.
[347] ECJ case C-412/98, judgment of 13 July 2000, *Group Josi Reinsurance Company SA v Universal General Insurance Company* [2000] *ECR* I-5625; see *supra*, p 2.
[348] At p 133.

parties. The argument is that the protection is necessary as against plaintiffs both from inside and outside the EU.

The following question regarded the parties to the counter-claim: could Baltic bring a counter-claim in which he sued parties that were not involved in the original claim? Those parties were domiciled in Ireland. The House of Lords found that extending the counter-claim to these parties was not possible. It relied on the structure of the Brussels Convention, arguing that that dictates a strict interpretation of the possibility to bring counter-claims. Secondly the House of Lords referred to the fact that a plaintiff was not allowed to join co-defendants under the jurisdictional rules on insurance contracts. Therefore, allowing a defendant to do so would create an asymmetry.

Thirdly, the House of Lords emphasised that the section on insurance contracts comprised an "independent code".[349] The resulting conclusion was that Baltic, an insurer domiciled in Lithuania, could not bring a counter-claim in the English courts as against its insured, domiciled in Ireland, which were not party to the original proceedings.

In the earlier case of *New Hampshire Insurance v Strabag Bau*,[350] the English Court of Appeal found that an action by an American insurance company against insured domiciled in Germany and Austria, fell under the protective bases of jurisdiction of the Brussels Convention and. The English courts therefore lacked jurisdiction. Once again the domicile of the plaintiff was irrelevant for purposes of the application of the Brussels Convention.

Counter-parties in consumer contracts

In the case of *Shearson Lehman Hutton v TVB mbh*,[351] the European Court of Justice had to give clarity on the ambit of the provisions on consumer protection. A German, who happened to be a judge, had instructed the brokers EF Hutton & Co Inc to carry out certain transactions under an agency contract. EF Hutton was later taken over by Shearson Lehman Hutton Inc. Both EF Hutton and Shearson Lehman Hutton were companies incorporated in New York. EF Hutton Inc had offered its services through press advertisement in Germany. The business relationships were arranged through EF Hutton & Co GmbH, a company with its registered office in Germany and dependent on EF Hutton Inc: its shares belonged to EF Hutton International Inc, a

[349] At p 135.
[350] [1992] 1 Lloyd's Rep 361 (CA); [1992] ILPr 478 CA.
[351] ECJ case C-89/91, judgment of 19 January 1993, *Shearson Lehmann Hutton Inc v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH* [1993] *ECR* I-139. See case notes by H Van Houtte (1993) *TRD* p 153-154; H Gaudemet-Tallon (1993) *RCDIP* p 325-332; A Briggs (1993) *YEL* p 511-517; A Kohl (1994) *JLMB* p 457-459; TC Hartley (1994) *ELR* p 537-538.

wholly-owned subsidiary of Hutton Inc. In addition, many persons having managerial responsibilities within Hutton Inc also had like responsibilities within Hutton GmbH.

The German assignor lost almost all his investments. Instead of bringing suit himself, he assigned his rights to TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH, incorporated in Munich, Germany. TVB instituted an action in the *Landgericht* (Regional Court) of Munich claiming from Hutton Inc the return of the sums lost by the assignor. This court held that it did not have jurisdiction. The *Oberlandesgericht* (District Court of Appeal) of Munich overturned that decision. Hutton Inc appealed to the *Bundesgerichtshof* (Federal Supreme Court), which referred several preliminary questions to the European Court of Justice. The first question was whether the protection extended to a case where the counter-party was established in a third State (the United States of America in this case) because it had an intermediary in the EU Member State where the consumer was domiciled.

Before answering those questions, the European Court of Justice stated that it had to pay attention to a preliminary question, namely whether the protective bases of jurisdiction still applied if the consumer had assigned his rights to a third so that the consumer was not the litigant. The Court emphasised that the protective bases of jurisdiction derogated from the general rules of the Brussels I Regulation. Therefore the protective bases had to be interpreted strictly so as not to grant protection in cases where such protection was not justified.[352] The fact that the original contracting party was a consumer could not extend procedural protection to a party to whom the consumer had subrogated his rights. Therefore if a corporation from a third State trades through a branch in the EU with a consumer and if that consumer assigns his rights, he will lose the protective bases of jurisdiction.

The European Court of Justice therefore did not respond to the specific questions put by the German *Bundesgerichtshof*. However, there seems to be an argument that the first question, concerning the applicability of the protection of the intermediary was domiciled in the EU despite the defendant being established in a third State, should actually have been dealt with first. It concerns the applicability of the EU rules altogether, even before one comes to the question of which rule (the general or the protective) should be applied.

According to Advocate General Darmon, even if the answer were that the third State corporation could be considered domiciled at the place of the independent intermediary, Germany, the jurisdictional rules of the Brussels Convention would have lacked applicability, since all the parties (consumer, counter-party and party to whom the rights had been subrogated) were domiciled in Germany so that German national rules on jurisdiction would have to be applied.[353]

[352] At rec 15-19.
[353] Opinion of the Advocate General, paras 58-69.

Turning to consider the unanswered question, can acting through an independent intermediary, with separate legal personality, draw a third State corporation into the scope of the Brussels I Regulation? Advocate General Darmon, in his opinion, stated that the Brussels I Regulation did not apply to a defendant from a third State acting through an independent intermediary. According to him the essential question was whether the establishment could conclude contracts to bind the principal.[354] Gaudemet-Tallon agrees with this conclusion, stating that the presumption of domicile in the EU at the place of a branch has to be interpreted limitedly, because it draws defendants from outside the EU into EU courts.[355] The situation could of course be different if there is a case for piercing of the corporate veil and the 'independent' company in the EU was not independent at all, but a mere scheme to circumvent the EU rules.

The following year the European Court of Justice had the opportunity to consider a similar case. *Brenner and Noller v Dean Witter Reynolds Inc*[356] also concerned the commissioning by German consumers of the defendant, a US corporation for investments (commodity futures transactions in this case). In this case the advertisement had been done through Dean Witter Reynolds GmbH, a German company based in Frankfurt, while the contracts were mediated by Metzler Wirtschafts- und Boersenberatungsgesellschaft mbH, also based in Frankfurt. As in the case discussed above, there was no branch in the EU through which Dean Witter Reynolds Inc contracted. The consumers lost their money and sued the defendant for damages due to a breach of contractual and pre-contractual obligations, and on the bases of tort and unjust enrichment.

The *Bundesgerichtshof* (Federal Supreme Court) of Germany referred four preliminary questions to the European Court of Justice. Two of those are relevant for third States. They concerned the fact that the defendant was domiciled in a third State and the bearing of the advertisement in the EU. The Court found that there could be no jurisdiction on the protective bases of the Brussels Convention if the defendant is domiciled outside the EU. Only if the defendant has a branch in the EU, can it be considered domiciled in the EU so as to fall in the scope of these bases of jurisdiction. The Court then considered it unnecessary to respond to the other questions posed by the *Bundesgerichtshof*.[357]

[354] At paras 36-57.
[355] H Gaudemet-Tallon (1993) *RCDIP* p 325-332, at 330.
[356] ECJ Case C-318/93, judgment of 15 September 1994 [1994] *ECR* I-4275; see also P Kaye, *op cit* (fn 236) vol 1, p 664 & vol 3, p 1879-1889 and case note by R Libschaber (1995) *RCDIP* p 758-769.
[357] See also the opinion of Advocate General Darmon, para 22, referring to Art 4 and its place in the Brussels Convention.

Employers

The case *Six Constructions v P Humbert*[358] pointed out the influence that the Brussels regime can have on employers from outside the EU.

Mr Humbert, domiciled in France, was employed by Six Constructions, incorporated under the law of Sharjah, one of the United Arab Emirates. Six Constructions had a branch in Brussels, Belgium. Under the employment contract Mr Humbert conducted work in Libya, Congo (then Zaire) and Abu Dhabi (another of the United Arab Emirates). After being dismissed, he sued the employer before the *Conseil de prud' hommes* (Labour Conciliation Tribunal) in Bordeaux, France for payment in lieu of notice, damages, gratuities and various amounts by way of compensation and arrears of salary.

The French *Cour de cassation* (Court of Cassation) eventually referred two preliminary questions to the European Court of Justice regarding jurisdiction in a dispute arising from an employment contract. The Court of Justice stated that where the employment was to be performed outside the EU, jurisdiction could not be based on the protective bases of jurisdiction. Only the general rule, namely the domicile of the defendant, could apply. Six Constructions was at first thought to be domiciled in Belgium, and the case proceeded on that basis. The Court did not consider Brussels, to which Mr Humbert regularly returned to make reports, as the place of performance of the employment contract.[359]

It is important to note that this case was decided on a version of the Brussels Convention that did not contain the possibility, as the Regulation now does, that, if the employment is not habitually carried out in one country, the employer may also be sued in the place where the business that engaged the employee is situated.[360] Would this new rule have made a difference? It can only be triggered if the employee does not habitually carry out his employment in one country. The facts given do not permit us to classify the place of performance in this case with certainty. If Mr Humbert usually carried out his employment in, for instance, Abu Dhabi, and only occasionally went to the other countries, the rule cannot be triggered. The outcome of the case should be the same: the employee does not habitually carry out his work in one country and therefore the protective bases of jurisdiction are inapplicable. If, however, it were impossible to determine the place of habitual employment, under the new rule, Mr Humbert would probably be able to sue Six Constructions in a court in Belgium. That is the place of the business that concluded the employment contract. Six Constructions,

[358] ECJ case 32/88, judgment of 15 February 1989 [1989] *ECR* 341. See case notes by A Huet (1989) *JDI* p 461-465; TC Hartley (1989) *ELR* p 236-238; P Rodière (1989) *RCDIP* p 560-567; A Briggs (1989) *YEL* p 323-328; T Rauscher (1990) *IPRax* p 152-157; H Tagaras (1990) *Cah Dr Eur* p 676-681.
[359] Rec 11; for criticism on this conclusion, see A Briggs (1989) *YEL* p 323-328 at p 324-235.
[360] Rec 8. For the current rule, see Art 19(2)(b) Brussels I Regulation.

domiciled outside the EU, will be considered, for the protective bases of jurisdiction, to be domiciled in the EU at the place of its branch, *ie* Brussels, Belgium.

6. Forum clauses

General

The respect for forum clauses is one of the fundamental principles of party autonomy. Therefore the Brussels I Regulation contains the rules on the validity of these clauses.[361] However, the protection of "weaker parties" would not have much sense if their counter-parties could impose on them standard contract terms containing forum clauses. In such a way economically strong parties would be able to negate the protection granted to weaker parties and force them to go to far-off courts (whether as plaintiffs or as defendants). Therefore the Brussels I Regulation also extended the protection of weaker parties to the possibility to conclude forum clauses.[362]

Forum clauses are only permitted under certain conditions. They either have to be concluded after the dispute has arisen, or they have to provide more available fora to the weaker party plaintiff. The European Court of Justice has ruled that an insured party other than the policyholder may also rely on a favourable forum clause between the insurer and the policyholder, even though he was not originally party to it.[363]

An exception to this general rule exists for insurance contracts covering specific risks relating to seagoing ships and certain transport contracts. Furthermore, parties insuring certain large risks do not enjoy procedural protection, as they can not really be considered "weak" in the sense of unequal bargaining power.[364]

Protected parties from third States

The provisions limiting forum clauses pose themselves not as exception to the general rule on forum clauses (Art 23), but as an exception to the limited bases of jurisdiction contained in the protective sections. Those entire sections, as has been explained, are exceptions to the general rules on jurisdiction contained in the Regulation. The protection is aimed at weaker parties domiciled in the EU. Those parties can only be deprived from their protection by way of a forum clause that fulfils the stricter requirements.

[361] Discussed *infra*, Chapter 4, p 2 *et seq*.
[362] See Arts 13, 17 and 21 Brussels I Regulation.
[363] ECJ case 201/82, judgment of 14 July 1983, *Gerling and Others v Amministrazione del Tesoro dello Stato* [1983] *ECR* 2503.
[364] Art 14 Brussels I Regulation.

Weaker parties from third States do not enjoy the protection granted by these sections.[365] Therefore, there is nothing to provide an exception for. Weaker parties from third States will be bound by forum clauses under the normal rules:

- the counter-party is domiciled in an EU Member State,
- a court of an EU Member State is appointed, and
- the validity requirements of Article 23 are fulfilled.[366]

This is explicitly confirmed in the Brussels I Regulation for insurance contracts: forum clauses with policyholders not domiciled in a Member State may derogate from the general protective rules.[367] No similar provisions are to be found for consumer or employment contracts. This might provoke one to think that consumers and employees from third States do fall in the protective rules on forum clauses. However, according to the logic just set out, this is not the case. One might rather think that the explicit statement regarding policyholders from outside the EU is superfluous.

Of course the Brussels I Regulation cannot grant jurisdiction to a third State court where the weaker party is domiciled. The issue is much rather what an EU Member State court would respond to the argument by the consumer that he had to be sued in a third State because of a protective basis of jurisdiction that exists there. Let us assume that the EU court has jurisdiction on the basis of a forum clause that would not have been valid had the consumer been domiciled in the EU. The Brussels I Regulation does not contain a mechanism to decline jurisdiction in such a case. Whether or not such a possibility to decline can be read into the provisions, is as yet uncertain. Droz established the theory of the *effet réflexe* (reflexive effect) of some of the provisions: where a third State court might have exclusive jurisdiction on a similar basis than the exclusive bases of jurisdiction that exist in the Brussels I Regulation, the EU courts have to decline jurisdiction in order to respect that exclusive jurisdiction. That theory has not yet been accepted by the European Court of Justice and will be discussed in more detail in the next Chapter on exclusive bases of jurisdiction.[368] If accepted, that theory might be applied to protected parties in this case. An EU Member State court would then decline to take jurisdiction on the forum clause, because a third State court actually affords protection to the weaker party. Another possibility is to permit EU Member State courts to decline jurisdiction on the basis of national law, such as the English rule of *forum non conveniens*. The European Court of Justice has, however, outlawed that rule in a case where the facts took place in a third State while the defendant was domiciled in England.[369] The case did not deal with a protective basis of jurisdiction in a third State, so that the operation of the rule in such a situation cannot be totally excluded.[370]

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[365] See *supra*, p 2.
[366] See *infra*, Chapter 4, p 2 *et seq*.
[367] Art 13(4) Brussels I Regulation.
[368] See *infra*, Chapter 3, p 2 *et seq*.
[369] ECJ case C-281/02, judgment of 1 March 2004, *Owusu v Jackson*; not yet published in *ECR*, see http://www.curia.eu.int;
[370] See also the discussions of the *Owusu* judgment *supra*, p 2 and *infra*, p 2 *et seq.*

Furthermore, the explicit rule for policyholders from outside the EU was at least partly intended to introduce an exception. The provision goes on to state: "*except in so far as the insurance is compulsory or relates to immovable property in a Member State*". Therefore, a close link to an EU Member State will draw the case back into the sphere of the EU jurisdictional rules.

A question arises with regard to the term "*compulsory*". To which law should one have regard? The intention was probably to refer to the law of an EU Member State that imposes a type of insurance, and to give the courts of that EU Member State jurisdiction. That jurisdiction would probably be granted by the national law imposing the insurance.[371] The Brussels I Regulation does not prevent jurisdiction because the policyholder is domiciled outside the EU. The same applies with regard to the insurance of immovable property in a Member State. The fact that the immovable property belongs to a person domiciled in a third State does not put the contract entirely outside the EU and beyond the EU jurisdictional rules.

Counter-parties from third States

The structure laid out in the previous paragraph leads to the contrary result for counter-parties domiciled in third States of contracts with weaker parties domiciled in the EU. Plaintiffs are subjected to the protective rules. In line with this, they cannot circumvent those rules by forum clauses. That would negate the purpose of these protective rules for weaker parties.

Defendants fall outside the scope of the rules, because the entire sections on protective jurisdiction were made subject to the rule that defendants domiciled in third States do not fall under the Brussels I Regulation, but under the national jurisdiction rules of the Member States.[372]

Therefore third State insurers, traders and employers should be particularly careful when contracting with weaker parties from the EU. Forum clauses will be of no use when one wants to sue the weaker party. EU courts will refer to the protective bases of jurisdiction that were created for these weaker parties.

On the other hand, the weaker parties will be permitted to rely on those forum clauses if they point to an EU court.

[371] See B Audit, *op cit* (fn 27) p 459.
[372] Art 4 Brussels I Regulation; see *infra*, Part B of this Chapter, p 2 *et seq*.

7. Conclusion

Granting procedural protection to weaker parties is not the villain in itself. However, one would be forgiven for thinking that these protective bases of jurisdiction were drawn up without bearing the connection between the Brussels I Regulation and third States in mind. The result is a confusion of rules. Furthermore, parties from outside the EU contracting with EU weaker parties are put in an extremely adverse position: Not only can they easily be drawn into EU courts, but it is also difficult to figure out when they can rely on contractual terms (such as forum clauses) and when those terms would be invalid.

Chapter 3: Second cornerstone: exclusive jurisdiction

Article 22 of the Brussels I Regulation:
The following courts shall have exclusive jurisdiction, regardless of domicile:

1. *in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Member States in which the property is situated.*
   However, in proceedings which have as their object tenancies of immovable property concluded for temporary use for a maximum period of six consecutive months, the courts of the Member State in which the defendant is domiciled shall also have jurisdiction, provided that the tenant is a natural person and that the landlord and the tenant are domiciled in the same Member State;
2. *in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural persons, or of the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat. In order to determine the seat, the court shall apply its rules of private international law;*
3. *in proceedings which have as their object the validity of entries in public registers, the courts of the Member State in which the register is kept;*
4. *in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of a Community instrument or an international convention deemed to have taken place.*
   Without prejudice to the jurisdiction of the European Patent Office under the Convention on the Grant of European Patents, signed at Munich on 5 October 1973, the courts of each Member State shall have exclusive jurisdiction, regardless of domicile, in proceedings concerned with the registration or validity of any European patent granted for that State;
5. *in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced.*

Article 25 of the Brussels I Regulation:
Where a court of a Member State is seised of a claim which is principally concerned with a matter over which the courts of another Member State have exclusive jurisdiction by virtue of Article 22, it shall declare of its own motion that it has no jurisdiction.

Article 29 of the Brussels I Regulation:
Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.

Article 35 of the Brussels I Regulation:

3. *Moreover, a judgment shall not be recognised if it conflicts with Sections 3, 4 or 6 of Chapter II, or in a case provided for in Article 72.*
4. *…*

1. Introduction

Some matters have a particularly close link with a specific territory and therefore the Brussels I Regulation grants exclusive jurisdiction to the courts of the EU Member State. The Brussels II*bis* and Insolvency Regulations do not regard such matters and will not be discussed in this Chapter.

The Brussels I Regulation provides for five cases in which the close link might arise: for immovable property, the validity of legal persons, the validity of entries in public registers, the validity or registration of intellectual property rights and the enforcement of judgments. This provision is highest in the hierarchy of the jurisdictional rules of the Brussels I Regulation. It applies irrespective of the domiciles of the parties.[1] The possibility of parties to choose a forum[2] is limited only by Article 22.[3] Similarly, if a defendant voluntarily appears without contesting jurisdiction, this submission would not grant jurisdiction if a matter is concerned for which an exclusive basis of jurisdiction in another EU Member State exists.[4]

The reverse side of the coin is the obligation on EU courts to decline jurisdiction if a party brings an action in an EU court while the courts of another EU Member State has exclusive jurisdiction according to this provision.[5]

Further proof of the importance of the exclusive bases of jurisdiction for the Brussels I Regulation, is found in the grounds for refusal of recognition or enforcement. If a judgment was given by an EU court in a case over which the courts of another EU Member State in fact had exclusive jurisdiction, the judgment will not be recognised or enforced.[6] This is an exception to the general rule of the Brussels I Regulation that EU Member States recognise and enforce each other's judgments without evaluating the basis of jurisdiction.[7]

In this Chapter, one has to regard the situation where the link is in the EU so that an EU court has exclusive jurisdiction. One also has to consider the situation where exclusive jurisdiction lies with a court outside the EU and whether the EU courts would in such cases decline jurisdiction. The theory of the *effet réflexe*, or reflexive effect, will be the starting point. The five bases of exclusive jurisdiction will then be discussed in

[1] See Jenard Report, p 34.
[2] Discussed *infra*, Chapter 4, p 2.
[3] Art 16 of the Brussels Convention. See F Salerno, "European International civil procedure" in B Von Hoffmann (ed), *European Private International Law* (Nijmegen: Ars Aequi Libri, 1998) p 155.
[4] See Art 24 Brussels I Regulation, which specifically provides an exception for Art 22. For a discussion on Art 24 and the voluntary appearance of defendants, see *supra*, Part E of Chapter 2, p 2 *et seq*.
[5] Art 25 Brussels I Regulation.
[6] See Art 35(1) Brussels I Regulation.
[7] The exception exists only in one other case, namely insurance and consumer contracts (not even employment contracts); see *supra*, Part G of Chapter 2, p 2 *et seq*.

the order that they appear in Article 22 of the Brussels I Regulation. The issue of simultaneous exclusive jurisdiction for different States can also impact on third States and this will be discussed next. Thereafter one has to turn to remaining issues regarding all bases of exclusive jurisdiction and third States: where a forum clause exists in favour of an EU court while exclusive jurisdiction should lie with the courts of a third State, and the incidental question. Lastly, the situation where a case has links to only one EU Member State and to a third State will be regarded (*ie* the situation where there is no link with the European judicial area).

2. Exclusive jurisdiction outside the EU: the reflexive effect

General

It might happen that a defendant is domiciled in the EU, while the dispute concerns immovable property situated in a third State. The Brussels I Regulation does not contain rules for such cases. Might one invoke a rule to respect such third State jurisdictional rule?

The theory of the *effet réflexe* (reflexive effect), developed by Droz, is based on reciprocity, self-restraint and comity: if EU courts are to take exclusive jurisdiction in certain cases, then they also have to allow third State courts to exercise jurisdiction in similar cases.[8] EU courts must respect such jurisdiction by declining their own jurisdiction, even if it is based on another provision of the Brussels I Regulation, for instance the domicile of the defendant in the EU. Droz supported the idea that jurisdiction was imperative, but in certain cases it may be refused, he argued.[9]

The theory makes sense; it does not appear logical that a French court could be radically incompetent as to property situated in Germany, but competent as to property situated in Japan.[10] With regard to the property situated in Germany, the French court would have to declare that it lacks jurisdiction.[11] Furthermore, the competing jurisdiction could rest on a weaker basis. If the dispute concerns immovable property outside the

[8] See GAL Droz, "Entrée en vigueur de la Convention de Bruxelles révisée sur la compétence judiciaire et l'exécution des jugements" (1987) *RCDIP* p 251-303 at p 260-261; GAL Droz, "La Convention de San Sebastian alignant la Convention de Bruxelles sur la Convention de Lugano" (1990) *RCDIP* p 1-21 at p 14. See also P Gothot & D Holleaux, *La Convention de Bruxelles du 27 septembre 1968* (Paris: Jupiter, 1985) p 84; A Nuyts, "La théorie de l'effet réflexe" in M Storme & G de Leval (eds), *Le droit processuel et judiciaire européen* (Brussels: die Keure, 2003) p 73-89. Specifically with regard to intellectual property, see M Pertegás Sender, *Cross-border Enforcement of Patent Rights* (Oxford: Oxford University Press, 2002) p 157-161.

[9] GAL Droz, "Entrée en vigueur de la Convention de Bruxelles révisée sur la compétence judiciaire et l'exécution des jugements" (1987) *RCDIP* p 251-303 at p 260-261.

[10] See H Gaudemet-Tallon, "Les frontières extérieures de l'espace judiciaire européen: quelques repères" in A Borrás, A Bucher, AVM Struycken, M Verwilghen, *Liber Amicorum Georges AL Droz, op cit* (fn 31) p 95.

[11] According to Art 25 of the Regulation.

EU, the courts of an EU Member State might be considered to have jurisdiction on the basis of the domicile in the EU of the defendant,[12] the place of the performance of the contract in the EU,[13] a forum clause in favour of[14] or the voluntary appearance in an EU court.[15] All these bases of jurisdiction are lower in the hierarchy of the Brussels I Regulation when the jurisdiction in the EU is concerned.

If the Brussels I Regulation acknowledges that some bases of jurisdiction are stronger than others, the same standard would have to be applied with regard to jurisdictional bases situated outside the EU. Moreover, if the EU courts refuse to take such incontestably reasonable jurisdictional rules of third States (which are in accordance with the EU rules themselves) into account, the resulting judgments from the EU courts might lack effectiveness: if the judgment attempts to regulate a dispute on immovable property situated in a third State, this judgment would often need recognition or enforcement in that particular third State. If the third State were to have rules equally logical than those of the Brussels I Regulation, recognition and enforcement would be refused if the judgment concerns immovable property situated in its own territory. The EU rules would have been stringently respected, but would have led to a completely useless judgment.

The theory of the reflexive effect actually means that EU courts should decline jurisdiction that they strictly speaking have under the Brussels I Regulation because of the existence of a stronger, or hierarchically higher, basis of jurisdiction in a third State. Of course the Brussels I Regulation cannot grant jurisdiction to a court in a third State, but the national jurisdictional rules of the third State provide a basis of jurisdiction in these cases. The fact that a State considers a jurisdictional rule to be exclusive is not always directly visible, but often found in the refusal of recognition of cases where the State addressed would have had jurisdiction on such a basis as the location of immovable property. The EU courts should decline jurisdiction in order for the third State court to exercise its jurisdiction. In that sense, the theory of the reflexive effect does not create a jurisdictional basis, but a rule for declining jurisdiction.[16]

The theory of the reflexive effect was developed because the Regulation gives Article 2 an imperative nature. Therefore, if a defendant is domiciled in an EU Member State, the courts of that State *will* have jurisdiction.[17] The theory of the reflexive effect seeks to provide an escape to that imperative nature.

[12] Art 2 Brussels I Regulation; see *supra* Chapter 2, Part B, p 2 *et seq*.
[13] Art 5 Brussels I Regulation; see *supra* Chapter 2, Part F p 2 *et seq.*
[14] Art 23 Brussels I Regulation; see *infra* Chapter 4, p 2 *et seq.*
[15] Art 24 Brussels I Regulation; see *supra* Chapter 2, Part D, p 2 *et seq.*
[16] See A Nuyts, “La théorie de l’effet réflexe” in M Storme & G de Leval (eds), *op cit* (fn 8) p 73-89 at p 75-76.
[17] H Born, M Fallon & J-L Van Boxstael, *Droit judiciaire. Chronique de jurisprudence 1991-1998* (Brussels: Larcier, 2001) p 289.

The ground to refuse jurisdiction

Uncertainty has arisen with regard to the ground for refusal of jurisdiction under the theory of the reflexive effect: is the ground something embedded in the Regulation, although it is not explicitly there, or is the ground for declining jurisdiction to be found in national law?

According to the first point of view, the Brussels I Regulation should really have contained an explicit rule to tell the EU courts that they should decline Regulation-based jurisdiction if the dispute concerns immovable property in a third State.[18] That is to the advocates of this interpretation a logical and coherent extension of the rules of the Brussels I Regulation.[19] Briggs and Rees even go as far as speaking of a "textual omission".[20] Theoretically, this first viewpoint follows the principle that the Regulation contains a universal set of rules.[21] The Regulation always applies and its rules must be followed, except in cases where the Regulation itself allows the rules to be set aside, as by the theory of the reflexive effect. The advantage of this expounding of the reflexive effect is that the result will be the same in all the EU Member States. One would not have to deal with differences in the national rules on declining jurisdiction.

The second point of view is that one would have to revert to the national laws of the Member States to find the basis for declining jurisdiction. The argument goes that the Brussels I Regulation did not attempt to solve the situation.[22] Therefore it can only be solved by a reference to national law. This solution creates a harmonious interaction between the Brussels I Regulation, the Lugano Convention and national rules of jurisdiction. If the property is situated in the EU, the Brussels I Regulation is applicable. If the property is situated in a non-EU Lugano Contracting State, the Lugano Convention is applicable. If the property is situated in a third State, neither the Regulation nor the Convention is applicable, but the domestic rules of the forum state. Those domestic rules can then be used to decline jurisdiction. An example of such a domestic rule is *forum non conveniens*, but other rules can be envisaged as well.[23]

[18] Some uses the name ***effet réflexe*** only for this first, more limited, interpretation. However, that difference in terminology is not material for the discussion.
[19] See H Gaudemet-Tallon, "Les frontières extérieures de l'espace judiciaire européen: quelques repères" in A Borrás, A Bucher, AVM Struycken, M Verwilghen, *E Pluribus unum. Liber Amicorum Georges AL Droz* (The Hague: Martinus Nijhoff Publishers, 1996) p 85-104 at p 99.
[20] See A Briggs & P Rees, *Civil Jurisdiction and Judgments* (3rd edn, London: LLP, 2002) p 75 & 228-230.
[21] See, for instance, A Briggs & P Rees, *op cit* (fn 20) p 3. See also the discussion *supra*, in Chapter 1, p 2 *et seq*.
[22] Y Donzallaz, *La Convention de Lugano du 16 septembre 1988 concernant la compétence judiciaire et l'exécution des décisions en matière civile et commerciale* (Berne: Editions Stæmpfli + Cie SA Berne, 1996) vol 1, p 423; P *Gothot* et D Holleaux, *op cit* (fn 8) p 84.
[23] The doctrine of *forum non conveniens* will be discussed in Part C of Chapter 5 *infra*, p 2 *et seq.*

Such domestic declining took place in the case *In the matter of Polly Peck International Plc*,[24] dealing with property situated in Northern Cyprus (not part of the EU; this case even dates from before the Greek part of Cyprus joined the EU). The defendant was a company incorporated in the UK. An old English rule, established in the *Mozambique case*,[25] determined that an action concerning the title to or rights of possession of immovable property situated outside England, could not be decided by an English court. The rule was later tempered, however, so that the English Courts may rule on torts relating to immovable property situated outside England, unless the proceedings are principally concerned with a question of title or right of possession of that property.[26] In this case the judge on appeal found that the question to the title of the property was not merely incidental. Therefore, the Court lacked jurisdiction. The judge further found that the general basis of jurisdiction of the Brussels Convention did not prevent the English court from applying its national rule to refuse jurisdiction. He relied on the judgment in *Re Harrods*, an English case that permitted the application of the rule of *forum non conveniens* in conjunction the EU jurisdictional rules.

Unfortunately, and hopefully unintended, such interpretation has perhaps become problematic since the *Owusu* judgment.[27] In that case the European Court of Justice replied, upon a question put to it by the English Court of Appeal, that the basis of jurisdiction of the domicile of the defendant (Art 2) is compulsory. The English court was not permitted to decline its Regulation-based jurisdiction in favour of the courts in a third State (in this case Jamaica) by applying the rule of *forum non conveniens.* The European Court of Justice added that this was so even if the dispute did not have any connection with another EU Member State. The rules are, according to the Court, compulsory, also when the EU judicial space is not affected.

The European Court of Justice formulated its rule generally and did not specifically cater for exceptions when immovable property is situated in a third State. However, the case concerned contractual and non-contractual liability for damage that arose in Jamaica. The facts had all taken place in Jamaica. It was not concerned with immovable property situated in a third State. Therefore the case cannot strictly speaking prevent an EU court in the future from declining jurisdiction by applying a national rule such as *forum non conveniens* because of immovable property in a third State.

[24] *Polly Peck International Plc (in administration) (No 2)* [1998] 3 All ER 812.
[25] Formulated in the case *British South Africa Company v The Companhia de Moçambique* [1893] AC 602. See also L Collins, *Dicey and Morris on the Conflict of Laws* (13th edn, London: Sweet & Maxwell, 2000) vol II, p 945-955.
[26] Section 30 of the Civil Jurisdiction and Judgments Act 1982.
[27] ECJ case C-281/02, judgment of 1 March 2005, *Owusu v Jackson and others,* not yet reported in *ECR*, see http://www.curia.eu.int. For a more detailed discussion of this judgment and the relationship between the theory of *forum non conveniens* and the Brussels I Regulation, see *infra*, Chapter 5, Part C, p 2.

The second analysis, allowing EU courts to decline jurisdiction on the basis of their national rules, does not necessarily support the view that the Brussels I Regulation contains an integrated set of rules that always apply in the EU courts. It allows for two different sets of rules, namely the Regulation rules when the European judicial area is at stake, and national rules when relations with third States are concerned. This analysis is preferable. A dispute on immovable property outside the EU will in all likelihood not have much of a connection to the European judicial area. Later issues of recognition and enforcement of the resulting judgment in the EU (if necessary) would have to be solved under the national law of the EU Member State involved. Therefore, it is best to refer at the time of jurisdiction (or the declining of it) to the national rules. That way one will prevent judgments that follow the EU rules but that are subsequently not recognisable or enforceable.

The judgment of the European Court of Justice in the *Coreck Maritime* case is also relevant for the debate on the reflexive effect.[28] Dealing with the question of a forum clause in favour of the courts of a third State, the European Court of Justice stated that the validity of such a clause had to be determined according to national law, including the conflict of law rules, of the forum.[29] Although the Court did not explicitly state that the domicile of the defendant in the EU was irrelevant, the judgment contains an acknowledgment of a possibility of declining Regulation-based jurisdiction, for instance by way of the reflexive effect, if a third State court would have exclusive jurisdiction or if a forum clause appoints the courts of a third State.

The reach of the theory of the reflexive effect

Another point of lack of clarity is the reach of the reflexive effect. Will a court be able to refuse jurisdiction in every case where it would have had exclusive jurisdiction under the Brussels I Regulation? The rules in the Brussels I Regulation in some instances go further than those of national law. For instance, the Brussels I Regulation also grants exclusive jurisdiction to the courts of the EU Member State where the immovable property is situated in disputes relating to tenancies. According to other legal systems, a tenancy may be regarded as a contract like another and be subject to the jurisdictional rules for contracts. Many legal systems would accept forum clauses for resolving these disputes. Strictly applying the reflexive effect to these situations might result in a lack of forum. For instance, a dispute arises between a person domiciled in Austria and the owner of a house in third State X, which he had rented for a year. According to the Brussels I Regulation the dispute, if concerning immovable property in the EU, would fall under the exclusive jurisdiction of the courts of the EU Member State where the property is situated. If the reflexive effect were to be applied consistently, an Austrian court would have to decline jurisdiction if the plaintiff were to bring

[28] ECJ case C-387/98, judgment of 9 November 2000, *Coreck Maritime GmbH v Handelsveem BV and others* [2000] *ECR* I-9337. On this judgment, see also *infra*, Chapter 4, p 2 & 2.
[29] Rec 19.

proceedings there. However, it is possible that the domestic rules of third State X have no basis for jurisdiction. Applying the reflexive effect would result in a lack of forum.

This anomaly further pleads for the application of national law when declining. That would build some flexibility into the rule. The national court would be able to regard the jurisdictional rules of the competing forum and take jurisdiction if it observes that the competing forum would not have jurisdiction.

3. Immovable property

General

The rule of the Brussels I Regulation can come as no surprise: if the dispute concerns immovable property, the court of the place where the immovable property is situated, has exclusive jurisdiction. Other EU courts must decline jurisdiction. The rule that a claim with regard to real property located outside the forum could not be decided upon by a court, even if the defendant was served locally, developed already in the fourteenth century, probably in England.[30]

On the other hand, the wide scope of the rule is not all that self-evident. Granting jurisdiction to the court of the place of the immovable property makes sense if the dispute concerns real rights, such as who the owner is, or whether a valid *usufruct* exists. That judge is indeed in the best position to adjudicate the matter and evaluate evidence where necessary.[31] The rule in the Brussels I Regulation goes further: not only disputes relating to rights *in rem*, but also those concerning tenancies of immovable property will fall in the exclusive jurisdiction of the court of the place where the immovable property is situated.

This means that parties cannot conclude a forum clause in lease agreements. Take, for instance, a Canadian company renting a building as business premises in Paris might sublet a floor to a US company. If a dispute arises between those companies, they have to bring the case to the courts in Paris. Even if the contract contained a forum clause for a Canadian court, the court in Paris will ignore it and assume jurisdiction over the case.

[30] M Twitchell, “The Myth of General Jurisdiction” (1988) *Harv L Rev* p 610-681 at 615-616

[31] See H Gaudemet-Tallon, “Les frontières extérieures de l’espace judiciaire européen: quelques repères” in A Borrás, A Bucher, AVM Struycken, M Verwilghen, *Liber Amicorum Georges AL Droz, op cit* (fn 19) p 88.

Immovable property situated outside the EU: general

If immovable property is situated outside the EU, which court will have jurisdiction? There are different possible solutions to this question.[32]

The Reports of De Almeida Cruz/Desantes Real/Jenard and Jenard/Möller both state that Article 2 (or Art 4, as the case may be) prevails if immovable property is situated outside EU.[33] That means that if a defendant is domiciled in an EU Member State, but the dispute concerns immovable property in a third State, the EU Member State court will still have jurisdiction. Because the result seems entirely inequitable, authors have construed the reflexive effect theory in order to try to rescue the situation.

Short-term tenancies

The Article on exclusive jurisdiction in matters of immovable property explicitly provides an exception for short-term tenancies, which was added after the judgment in the case *Rösler v Rottwinkel*.[34] The dispute arose between two parties domiciled in Germany regarding the lease for three weeks of a holiday villa in Italy. The European Court of Justice upheld a strict interpretation of the exclusive jurisdiction of the courts of the EU Member State where the immovable property is situated. The judgment, although correct on the letter of the Brussels Convention as it stood at that time, gave rise to criticism on the grounds of equity to the parties; some also raised concerns that the Convention should be amended.[35]

How does this provision relate to third States? The answer to this question will depend on whether or not the theory of the reflexive effect is accepted. If two persons domiciled in the same third State, conclude such short-term tenancy contract with regard to property in the EU, does this exception apply to them? The tenancy contract regards immovable property in the EU, so that on first sight the Brussels I Regulation applies. The exception states that if the two parties are domiciled in the same EU Member State, the courts of that Member State also have jurisdiction. The question is what the response of the court would be if the defendant states that he prefers to be sued in the third State where he (and the plaintiff) is domiciled. This would not be an instance of exclusive jurisdiction in the third State court. The reflexive effect might be permitted to reach that far, but it seems unlikely. Moreover, one has to bear in mind that the

[32] See L Barnich, “Les droits réels immobiliers et les locations de vacances” in R Fentiman, A Nuyts, H Tagaras & N Watté, *The European Judicial Area in Civil and Commercial Matters* (Brussels: Bruylant, 1999) p 85-101 at p 86-87.
[33] De Almeida Cruz/Desantes Real/Jenard Jenard Report on the San Sebastian (1989) version of the Brussels Convention, p 47; Jenard/Möller Report on the Convention of Lugano, p 76; para 54 (both published in C 189 of 28 July 1990). The older Jenard and Schlosser Reports do not seem to contain such statements.
[34] ECJ case 241/83; judgment of 15 January 1985 [1985] *ECR* 99.
[35] See, for instance case notes by FA Mann, (1985) *L Q Rev* p 329-330; TC Hartley, (1985) *ELR* p 361-363; GAL Droz, (1986) *RCDIP* p 135-142; K Kreuzer, (1986) *IPRax* p 75-80.

resulting third State judgment might have to be enforced in the EU. One would want to prevent a situation where the EU court of the place where the immovable property is situated, refuses to enforce a third State judgment on the basis that the EU Member State court should have given the judgment.

Conversely, if two parties domiciled in the EU conclude a short-term contract with regard to immovable property in a third state, will jurisdiction be declined in favour of the exclusively competent court, or will the exception grant jurisdiction to the court of the domicile of the parties? This seems like a clearer reflexive effect case. If the theory is accepted, the first step is that an EU court will decline jurisdiction despite the fact that the defendant is domiciled there. However, the next step might be that the EU court rules that it will not decline jurisdiction: the case of short-term tenancy that provides an exception to the exclusive jurisdiction within the EU, might similarly be seen as an exception to the functioning of the reflexive effect theory. That argument seems convincing. If there would be no exclusive jurisdiction in the EU if the immovable property had been in the EU, then why should the third State be considered to have exclusive jurisdiction? Yet, here again one should consider the consequences of possible recognition and enforcement in the third State where the property is situated. A third State court might refuse recognition and enforcement on the ground that it in fact had exclusive jurisdiction (not knowing the same exception as that of the Brussels I Regulation for short-term tenancies).

Time-share

Time-share does not fall in the scope of the exclusive jurisdiction. This has only recently been clarified by the European Court of Justice in response to a preliminary question posed by the *Oberlandesgericht* (District Court of Appeal) of Hamm.[36] In that case the defendant, the company managing the time-share, and having contracted with the plaintiffs, was established in the Isle of Man, a third State for purposes of the Brussels I Regulation.[37]

Classifying time-share is not easy. On the one hand, the use of immovable property is at stake (in a way that is to an extent comparable to tenancy). On the other hand, the construction of time-share is such that one pays for membership to a club and in exchange receives a right to use a holiday house or apartment on a part-time basis, for instance one week per year for twenty years. Some authors have stated that time-share should fall under the protective bases of jurisdiction.[38] Advocate General Geelhoed in his opinion reminded that the content and legal nature of time-share arrangements vary greatly in the EU Member States. In some Member States these fall

[36] ECJ case C-73/04, judgment of 13 October 2005, *Klein & Klein v Rhodos Management Ltd*, not yet published in *ECR*.
[37] See Art 299(6)(c) EC Treaty (Nice version); see *infra*, Chapter 1, p 2.
[38] See C Bruneau, "Les règles européennes de competence en matière civile et commerciale" (2001) *SJ* p 533-541 at p 537.

under the law of obligations, in others under company law, and in yet others under property law.[39]

The result reached by the European Court of Justice seems equitable. Parties from third States administering time-shares would then not be surprised by exclusive jurisdiction in a court with which their contract has a tenuous link. Leaving time-share out of the exclusive jurisdiction provision permits the parties to rely on the legal arrangement, *eg* contract or company, they have used. Choice of court agreements would also be respected and parties will not be forced to litigate in an EU court in a place where they set foot only one week per year.

4. Validity of legal persons

Article 22(2) grants exclusive jurisdiction to the courts of an EU Member State in which a legal person has its seat in matters relating to the validity, nullity or dissolution of legal persons, or the validity of the decisions of its organs. The board of directors of a company has been stated to be an "organ" of a company.[40]

To determine the seat, the court is to apply its private international law rules. This determination differs from that applicable with respect to the jurisdiction based on the domicile of the defendant (Art 2). The domicile of a legal person is for that purpose determined autonomously by Article 60. As has been pointed out,[41] that provision may extend the application of the Brussels I Regulation. It is conceivable that a company might be incorporated in an EU Member State while it has its real seat in a third State or *vice versa*. In both situations an EU Member State court would be able to find that the company is domiciled in the EU, notwithstanding the court's own private international law rules.

The advent of the Regulation did not alter the determination of domicile under the provision on validity of legal persons as it did for purposes the general basis of jurisdiction of the domicile of the defendant.[42] This rule has the advantage that it does not extend the exclusive bases of jurisdiction beyond what would be in line with the national laws of the EU Member States. In other words, an EU Member State which views, according to its own private international law rules, a legal person to have its seat at the place of its incorporation, would not find itself having exclusive jurisdiction over a legal person incorporated elsewhere but with its real seat in that State.

[39] Opinion of 7 April 2005 at para 20.
[40] See *Grupo Torras SA and Torras Hostench London Ltd v Sheikh Fahad* [1996] 1 Lloyd's Rep 7 at p 15; *Speed Investment Ltd, SLEC Holdings Ltd v Formula One* [2004] WL 1640302 at para 29; [2004] ILPr 46.
[41] See Chapter 2, Part A, *supra*, p 2.
[42] See also P Vlas, case note on *Coreck* (2001) *NJ* no 599, p 4442-4445 at p 4444-4445.

On the other hand, the rule does not always provide a foreseeable result. While one can determine whether a specific EU Member State supports the incorporation or real seat doctrine, the outcome will not always be clear. One can imagine a company with statutory seat in the United States of America and with its principal place of business in France. According to the third State (United States of America), applying the incorporation theory, the corporation would have its seat there, while according to French law, applying the real seat doctrine, the corporation would have its seat in France. In such a situation the French courts would take (exclusive) jurisdiction because it would consider the corporation's seat to be in its territory. Moreover, in States adhering to the real seat theory, confusion might arise as to when a legal person move its principal place of business from within the EU to a third State or *vice versa*. National law will determine when exactly the moving of the legal person takes effect.

The question arises how this determination of exclusive jurisdiction, by reference to national law, relates to the obligation of other EU Member State courts to decline jurisdiction. If a case is brought before the courts of an EU Member State, while the courts of another EU Member State have exclusive jurisdiction, the court seised must of its own motion declare that it has no jurisdiction to hear the case.[43] The application of this declining should be in line with Article 22, where the exclusive bases of jurisdiction are provided. Therefore, when a court questions whether it can take jurisdiction because of the possibility of exclusive jurisdiction in the courts of another EU Member State, it must regard the same rules than the courts that might have exclusive jurisdiction would apply. A court would therefore have to consider whether a legal person is domiciled in another EU Member State according to the private international law rules of that State. For example, a company incorporated in some exotic island (third State) has its administration and main activities in England. According to the private international law rules of England, that company has its seat in the exotic island. The fact that the private international law rules of some EU Member States will determine the seat to be England, where the so-called "real seat" is, is irrelevant. The courts of other EU Member States would not have to decline jurisdiction because the courts of England have exclusive jurisdiction. It should decline jurisdiction in favour of the third State courts, on the basis of the theory of the reflexive effect.

5. Validity of entries in public registers

Public registers may contain civil matters, which do in general fall in the scope of application of the Brussels I Regulation. If civil matters are taken up in public registers and those registers need to be corrected, the disputes have to be heard by the courts of the EU Member State in which the registers are situated. In these actions, the domiciles of the parties are irrelevant for the purposes of jurisdiction.

[43] According to Art 25 Brussels I Regulation.

A case may fall simultaneously within the rules on public registers and on immovable property.[44] In the majority of cases, this will not pose problems, because a land registry is most often in the country where the land is located. The English courts have held that registers held by companies may also be considered "public registers" as they are open to the public.[45] Such registers would most often be kept at the seat of the company. If not, one might have conflicting exclusive jurisdictions at the place of the registers and at the place of the seat, if the dispute concerns actions by the company or its organs as well as its registers. The issue of simultaneous exclusive jurisdiction will be discussed later.[46]

Regarding registers in third States, the hope is that if the dispute arises in an EU Member State court, that court will apply the theory of the reflexive effect to decline jurisdiction.[47]

6. Validity and registration of intellectual property rights

General

The Brussels I Regulation grants exclusive jurisdiction in matters concerning the validity or registration of "*patents, trade marks, designs, or other similar rights required to be deposited or registered*". The open-ended phrase permits for the further development of the law in this area.[48] Moreover, the rules on which rights need to be registered, are not the same in all EU Member States.[49]

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[44] See, for instance, *In re Hayward* [1997] Ch 45; *Bradley v Halsall and others* [2002] WL 1654856.

[45] See *Re Fagin's Bookshop Plc* [1992] Butterworth's Company Law Cases, p 118, (short case note in 1992 *Comp Law* 117) concerning the register of shareholders and *Speed Investment Ltd, SLEC Holdings Ltd v Formula One* [2004] WL 1640302 at para 31; [2004] ILPr 46 concerning the register of directors. See also A Briggs & P Rees, *op cit* (fn 20) p 70. Note, however, that GAL Droz, *Pratique de la convention de Bruxelles du 27 septembre 1968* (Paris: Dalloz, 1973) p 32 and P Gothot & D Holleaux, *La convention de Bruxelles du 27.9.1968. Compétence judiciaire et effets des jugements dans la CEE* (Paris: Editions Jupiter, 1985) p 88 state that the jusitification for the exclusive jurisdiction regarding public registers is that they touche the functioning of the public services. If that is so, one might question whether registers of shareholders and registers of directors should fall under the rule on exclusive jurisdiction.

[46] See *infra*, p 2.

[47] See *supra*, p 2 *et seq*.

[48] Such as geographical indications, plant variety rights, utility model, traditional knowledge and folklore rights. Attempting to find an exact definition for different intellectual property rights has posed grave difficulties in the negotiations of the Hague Conference, because the rights that exist in national legal systems and the registration required, vary significantly. Copyright, for instance, must be registered in some legal systems, may be registered in others (although registration is not required), and are unregistered rights in yet others. See Report of the experts meeting on the intellectual property aspects of the future convention on jurisdiction and foreign judgments in civil and commercial matters, Preliminary Document No 13 of the Judgments Project of the Hague Conference on Private international Law (2001) (http://www.hcch.net).

[49] The provision also makes reference to the Convention on the Grant of European Patents (Munich, 1973). That Convention falls beyond the scope of this thesis, as do other developments in intellectual property law in the EU, such as the Regulation on the Community

Advocate General Rozès in her opinion on the case *Duijnstee v Goderbauer*,[50] seemed to support, in a matter-of-fact way, the reflexive effect for patents registered in third States.[51] The case concerned patents registered in 22 countries, some of which were EEC Member States, others not. The dispute between the liquidator of a company and one of the former employees of that company regarded the ownership and entitlement to use the patents. The European Court of Justice ruled that the exclusive basis of jurisdiction did not apply to such a case, since the validity of the rights was not in dispute. Advocate General Rozès, however, stated that after the dispute in the case at hand had been solved, the issue of the transfer of the rights might arise in the other EEC Member States, and in the countries which were not party to the Convention.[52] Although this statement was by no means relevant for the questions in the case, it is interesting to note that the Advocate General seemed to acknowledge that there must be a mechanism for EU Member State courts to decline to take jurisdiction if patents registered in a third State are at stake.

How far does the exclusive jurisdiction go?

The provision granting the exclusive jurisdiction explicitly states that it only applies if the case deals with validity or registration. A dispute on the infringement of intellectual property rights does not fall in the scope of the exclusive basis of jurisdiction, but may be brought before the courts of the place of domicile of the defendant, or before the courts where the infringement took place.[53] However, it might happen, and it often does in practice, that the defendant raises the non-validity of the intellectual property right as defence to an infringement claim. The question then arises whether the court should now declare that it lacks jurisdiction, so that the court with exclusive jurisdiction over the validity issue can hear the case. This issue will be dealt with later in the Chapter, in the discussion on the incidental question.[54]

Furthermore, the possibility for courts to grant provisional and protective measures, even if they do not have jurisdiction over the main claim, should not be forgotten.[55]

Trademark (Council Regulation 40/94 of 20 December 1993, published in *OJ L* 11, 14 January 1994, p 1-36). For further information on these issues, see, in general, JJ Fawcett & P Torremans, *Intellectual Property and Private international Law* (Oxford: Clarendon Press, 1998); M Pertegás Sender, *Cross-border Enforcement of Patent Rights* (Oxford: Oxford University Press, 2002).

[50] ECJ case 288/82, judgment of 15 November 1983 [1983] *ECR* 3663. See case notes by G Bonet, (1984) *RCDIP* p 366-372; D Staunder, (1985) *IPRax* p 76-79; TC Hartley, (1984) *ELR* p 64-66.

[51] Opinion of 5 October 1983.

[52] At p 3683.

[53] Art 2, respective 5(3) Brussels I Regulation. See M Pertegás Sender, *op cit* (fn 8) p 83-127; *Pearce v Ove Arup Partnership Ltd* [2000] Ch 403; [2000] 3 WLR 332; [1999] 1 All ER 769; [1999] ILPr 442.

[54] See *infra*, p 2.

[55] Art 31 Brussels I Regulation.

Provisional measures provide a useful tool for litigation on intellectual property.[56] This provision, as will be argued later,[57] only becomes applicable if the Brussels I Regulation is already applicable on some other basis. In that sense, its impact on third States is limited.

That the issue of the reach of the exclusive basis of jurisdiction for intellectual property is controversial has been proved beyond doubt at the negotiations in The Hague, first for the broader Draft Convention on Jurisdiction and Foreign Judgments and then on the Convention on Choice of Court Agreements.[58] The first tough issue also in The Hague was whether only validity of patents, trademarks and other intellectual property should be subjected to exclusive jurisdiction, or also infringement. Exclusive jurisdiction would belong to the court of the place of registration or, in the case of unregistered rights, where those rights arose. If infringement did not give rise to exclusive jurisdiction, would it then at least give rise to alternative jurisdiction; in other words, can infringement cases be heard, in addition to the other grounds of jurisdiction, in the courts of the place of the registration of the rights?[59] This would widen the scope of the exclusive jurisdiction so that many defendants would be drawn to a faraway court. On the other hand, infringement and validity disputes are so intertwined that it is difficult to treat them separately. Different results on the two issues might be incompatible so that recognition and enforcement become impossible. Another possible solution would be that the court faced with infringement proceedings stays such proceedings so as to give the court that has exclusive jurisdiction regarding validity the opportunity to rule on validity.

[56] See M Pertegás Sender, *op cit* (fn 8) p 127-150; W von Meibom & J Pitz, "The reach and limitations of European transborder jurisdiction" (1999) *JWIP* p 593-605.
[57] See *infra*, Chapter 6, p 2*et seq*.
[58] A special meeting was organised in Geneva in February 2001 to discuss intellectual property; see Preliminary Document No 13, "Report of the experts meeting on the intellectual property aspects of the future Convention on jurisdiction and foreign judgments in civil and commercial matters", http://www.hcch.net.
[59] Regarding this discussion on the similar provision of the Brussels I Regulation, see M Pertegás Sender, *op cit* (fn 8) p 154-157 & p 161-174; JJ Fawcett & P Torremans, *Intellectual Property and Private International Law* (Oxford: Clarendon Press, 1998) p 175-176; M Pertegás Sender & B Strowel, "Grensoverschrijdende octrooigeschillen: Spannend afwachten op de arresten van het Europees Hof van Justitie" (2004) *TBH* p 755-763. Two cases on this mater are pending at the European Court of Justice (C-4/03, *GAT* and C-453/03, *ABNA*). In case C-4/03, Advocate General Geelhoed in his opinion of 16 September 2004 discussed the possible solutions and came to the following conclusion: the court of the place of registration has exclusive jurisdiction from the moment that the validity or nullity of the right is at issue; this holds true even if, in an infringement case, the defendant raises the issue of validity, or in applications for an order of non-infringement, the plaintiff raises the issue of validity.

7. Enforcement of judgments

General

This Article states that the court of the place of enforcement has exclusive jurisdiction to declare a judgment enforceable. This principle makes perfect sense:[60] if a person wants to attach goods in Germany, on the basis of a judgment from elsewhere, the only place to seek enforcement of his judgment is a German court.

The provision applies, in the words of the Jenard Report, only to proceedings that arise from "*recourse to force, constraint or distraint on movable or immovable property in order to ensure the effective implementation of judgments and authentic instruments*."[61] The European Court of Justice followed this principle in its judgment in *Reichert-Kockler v Dresdner Bank AG (II)*,[62] finding that an action to preserve the interests of the creditor with a view to a subsequent enforcement of the obligation, did not fall in the scope of the provision.[63]

Third State judgments

This Article encompasses only judgments from EU Member State courts and not judgments from third State courts. This is in conformity with the definition of "judgment" in the Brussels I Regulation as "*any judgment given by a court or tribunal of a Member State*".[64]

A judgment from a third State can only be recognised in an EU Member State according to the national law of that EU Member State. Having a judgment recognised in one EU Member State does not provide a visa for the judgment to travel through the entire EU. If the judgment creditor of a third State judgment seeks enforcement in several EU Member States, he will have to apply in each State separately.

The European Court of Justice has made that clear in *Owens Bank Ltd v Bracco and Bracco Industria Chemica SpA*.[65] Owens Bank had obtained a court order from the High Court of Justice of Saint Vincent and the Grenadines against Bracco for the repayment of a loan. Owens Bank then applied in both Italy and England for the

[60] The Jenard Report refers to national law rules with the same effect, see p 36; see also A Briggs & P Rees, *op cit* (fn 20) p 73-74.
[61] Jenard Report, p 36.
[62] ECJ case C-261/90, judgment of 26 March 1992 [1992] *ECR* I-2149.
[63] At rec 28. The case concerned the French *action paulienne*. See also A Briggs & P Rees, *op cit* (fn 20) p 73. For a further discussion of this case with regard to provisional measures, see *infra*, Chapter 6, p 2.
[64] Art 32 Brussels I Regulation. See also A Briggs & P Rees, *op cit* (fn 20) p 74.
[65] ECJ case C-129/92, judgment of 20 January 1994 [1994] *ECR* I-117. See case notes by A Huet, (1994) *JDI* p 546-550; R Fentiman, (1994) *The Cambridge Law Journal* p 239-241; E Peel, (1994) *L Q Rev* p 386-390; H Gaudemet-Tallon, (1994) *RCDIP* p 382-387; TC Hartley, (1994) *ELR* p 545-547; P Kaye, (1995) *IPRax* p 214-217.

enforcement of the order. The House of Lords posed a preliminary question to the European Court of Justice regarding the applicability of the rules on *lis pendens*.[66] The Court stated that the Brussels Convention's exclusive basis of jurisdiction of the court where enforcement is sought, was inapplicable to judgments from third States.[67] In the same vein, the *lis pendens* rule of the Brussels Convention was held to be inapplicable if the enforcement in different EU Member States of a third State judgment were at stake.[68] The rule on *lis pendens* cannot apply to these proceedings: the third State judgment might have to be enforced in different EU Member States and each enforcement order would be valid only in the State where granted. The enforcement of a third State judgment cannot in itself be enforced in another EU Member State. Therefore the *lis pendens* rule loses its effect: conflicting rulings will not harm the European judicial area.

8. Simultaneous exclusive jurisdiction

It may occur that a court in the EU and one outside the EU simultaneously have exclusive jurisdiction.[69] A company can, for instance, be established in one country according to its private international law rules and in another country according to its private international law rules. If both these countries are EU Member States, the case is settled by the *lis pendens* rule of the Regulation, determining that where there are two courts that are simultaneously competent, the court where the case was first brought should hear it.[70] This provision cannot be applied where a case is simultaneously pending in an EU court and in a third State court. One would then have to apply the national rules of the particular EU Member State on *lis pendens*, if these exist.

Furthermore, a difficulty might arise as to the application of the Brussels I Regulation. If an EU Member State court has jurisdiction under one of the Regulation's exclusive bases of jurisdiction, there is no mechanism for that court to decline its jurisdiction. Even if the theory of the reflexive effect were accepted, one doubts whether it will be applied in a case where there is also exclusive jurisdiction in the EU. The theory seems only to seek to respect exclusive bases of jurisdiction in third States if the basis of jurisdiction that the Regulation contains is weaker, or more general, such as the domicile of the defendant.

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[66] For a more detailed discussion of this judgment on the point of *lis pendens*, see *infra*, Chapter 5, Part B, p 2.
[67] Rec 24.
[68] For a more detailed discussion of this conclusion on the *lis pendens* rule, see *infa*, Chapter 5, p 2 *et seq.*
[69] H Gaudemet-Tallon, "Les frontières extérieures de l'espace judiciaire européen: quelques repères" in A Borrás, A Bucher, AVM Struycken, M Verwilghen, *Liber Amicorum George AL Droz, op cit* (fn 19) p 96.
[70] Art 27 Brussels I Regulation.

9. Exclusive jurisdiction vs forum clauses

There might be a forum clause in favour of a court in one State, while the courts of another State in fact has exclusive jurisdiction. If both courts are in EU Member States, the provision on exclusive jurisdiction will prevail. However, one of the courts might be situated on a third State. For example, a Canadian company rents office space in London to a French company. Their contract contains a forum clause in favour of the French courts. It is clear that the forum clause will have no effect. The Brussels I Regulation is clear that the rules of exclusive jurisdiction are highest in the hierarchy of jurisdictional rules. If the French court takes jurisdiction on the basis of the forum clause, its resulting judgment will not be recognised in the EU.[71]

The forum clause might also be in favour of the Canadian courts, while the office space is in London. In this example, the Brussels I Regulation is applicable because an exclusive basis of jurisdiction exists in the EU. If one party brings the case to a court in London, that court will take jurisdiction irrespective of the forum clause. A party from outside the EU might be unpleasantly surprised to have to travel to London for a dispute regarding a tenancy, even despite a forum clause. If the Canadian court, on the other hand, takes jurisdiction, the resulting judgment will not fall under the Brussels I Regulation for purposes of recognition and enforcement, since it is not a judgment from an EU court. Recognition and enforcement would take place via national law.

Such a conflict arose in the English case of *Speed Investment Ltd, SLEC Holdings Ltd v Formula One*.[72] The dispute regarded the validity of the appointment of certain directors of a company incorporated in England. With respect to one of the defendants, domiciled in Switzerland, there was a forum clause in favour of the courts of Geneva. The company had its seat in England, so that the English courts had exclusive jurisdiction according to the Brussels I Regulation. However, because one of the defendants was domiciled in Switzerland, the Court applied the Lugano Convention to him. The Court then regarded the relationship between the bases of exclusive jurisdiction and the rules on forum clauses in the Lugano Convention. The simple conclusion was that the exclusive bases of jurisdiction prevail over the forum clause.[73]

The result is probably correct, although the Brussels I Regulation should have been applied. Then the relationship between the Brussels I Regulation and the Lugano Convention would be at issue.[74] One would have to evaluate the exclusive basis of jurisdiction according to the Brussels I Regulation. This is independent of the domiciles

[71] According to Art 35(1) Brussels I Regulation.
[72] [2004] WL 1640302; [2004] ILPr 46.
[73] At para 36.
[74] The Lugano Convention provides in its Art 54B that it shall not prejudice the application by the Member States of the Brussels Convention (now Regulation). It specifically states that if immovable property is situated in a Lugano State that is no EU Member State (*ie* Iceland, Norway or Switzerland), or a forum clause appoints such State, the Lugano Convention is applicable. That was not the situation in this case.

of the parties. The forum clause, on the other hand, had to be evaluated by the Lugano Convention, since the courts of a Lugano Contracting State (Switzerland) were chosen and one of the parties was domiciled in that State. In this case it seems that the English court would still have to give preference to the exclusive basis of jurisdiction. Those bases of jurisdiction are elevated above forum clauses both in the Brussels I Regulation and the Lugano Convention. Therefore, combining these two instruments, it seems that the same hierarchy should have been maintained.

The reverse conflict might also occur: the office block is in Canada and the tenancy contract between the Canadian and French companies contains a forum clause in favour of the courts in England. If the dispute is brought to the courts in England, the question arises whether that court will decline jurisdiction on the basis that a court in a third States should have exclusive jurisdiction. For disputes regarding tenancy, an exclusive basis of jurisdiction might not exist in third States. However, other disputes regarding real rights in immovable property will in most States be a basis for exclusive jurisdiction. If the theory of the reflexive effect were accepted, it would probably have to come into play in this case: under the Brussels regime exclusive bases of jurisdiction have precedence over forum clauses. Therefore the same hierarchy should apply when using the theory of the reflexive effect in a coherent way.

The recognition of the judgment from Canada, will not fall under the Brussels I Regulation. If, however, there is a judgment from an English court, on the basis of the forum clause, that judgment will be recognised and enforced under the Regulation. An exception exists if the judgment conflicts with an earlier judgment from a third State involving the same cause of action and between the same parties, if that judgment can be recognised or enforced in the EU Member State were recognition or enforcement is sought.[75]

10. The incidental question or counter-claim

Disputes, especially international ones, are not always so simple as to deal with only one issue where the exclusive jurisdiction of one court is clear. A dispute might relate to a matter for which there is no exclusive basis of jurisdiction, while it is then perfectly possible that the defendant brings a counter-claim that does fall under an exclusive basis of jurisdiction. In the same way it is possible that the court needs to investigate a matter for which an exclusive basis of jurisdiction exists in the course of a case on a different matter. For example, in order to rule on a specific personal right in immovable property, a court might have to determine the ownership of the property, which is a real right and can only be determined by the courts of the place where the immovable property is situated. In intellectual property cases, an infringement action can be brought at the place of the infringement. A defence of non-validity of the intellectual

[75] Art 34(4) Brussels I Regulation.

property right is quite common. However, exclusive jurisdiction exists for validity issues; only the court of the place of registration may hear such actions.

This issue influences third States because the criteria for the applicability of the Brussels I Regulation differ. For the jurisdiction rules of the domicile of the defendant and the place of a tort or delict, the Regulation is applicable if the defendant is domiciled in the EU.[76] For the rules on exclusive jurisdiction, the Regulation applies as soon as the immovable property or registration is situated in the EU.[77]

Several solutions to the problem of the incidental question have been suggested.[78] The first is the absolute respect for exclusive bases of jurisdiction. The consequence is that whenever an incidental question arises, or a defence is brought that falls under the exclusive jurisdiction of another EU Member State court, the court where the action was being heard, should decline jurisdiction to allow the court with exclusive jurisdiction to deal with the entire issue. This solution respects the rules strictly and is conducive to legal certainty. On the other hand, it can bring about great delays and possibilities for abuse. Whenever a defendant wishes to transfer the entire case to another forum, all he would have to do, is bring up an issue that falls in the exclusive jurisdiction of that court. If this solution is chosen, the question is whether the reflexive effect will be respected likewise. For instance, an action for the infringement of a patent registered in Mexico is brought in Germany against a defendant domiciled in Germany. The defendant raises the issue of validity of the Mexican patent. If one argues that the court of the place of registration should now hear the entire case, the reflexive effect will prescribe that the same should apply if that court happens to be outside the EU. However, the European Court of Justice has ruled that Article 2 is mandatory.[79] As has been stated above,[80] this ruling was formulated generally and did not deal with the issue of exclusive jurisdiction in a third State. The problem is that in this case there is an obvious link with the European judicial area: an EU court clearly has jurisdiction over the main part of the claim. One can wonder whether the European Court of Justice would allow the entire case to be stayed in favour of a third State court. As the situation within the European Union is unclear on this point, speculation with relation to third States becomes very difficult.

The second solution is much bolder, and leads to the contrary result: incidental questions should be ignored for jurisdictional purposes. Once a court has jurisdiction over a case, it cannot lose that jurisdiction because of an incidental issue or counter-

[76] See *infra*, Chapters 2, p 2 *et seq* in general.
[77] See *supra*, p 2.
[78] See, for a more detailed discussion, M Pertegás Sender, *op cit* (fn 8) p 161-174. This discussion also arose during the negoatiations of the Hague Convention on Choice of Court Agreements (2005); see the Draft Report by TC Hartley and M Dogauchi, Preliminary Document No 26 at p 37-39; http://www.hcch.net,.
[79] ECJ case C-281/02, judgment of 1 March 2005, *Owusu v Jackson and others,* not yet reported in *ECR*, see http://www.curia.eu.int.
[80] See *supra*, p 2.

claim. It may rule on the incidental issue or counter-claim if that is necessary in order to reach a result in the case. The effect of the judgment on the incidental issue, then provides further questions. The most common viewpoint is that the ruling on the incidental issue would not bind other courts in future. For instance, if a court has found that an intellectual property right has not been infringed because the right was not valid, future courts are not bound by the decision of invalidity of the court that did not have exclusive jurisdiction to make such a ruling. Such a construction is practical and time-efficient. The solution provides no legal certainty as between the EU courts, nor in relations with third States. An issue that should be determined by only one court, can end up being thoroughly examined by another. At least this solution will bring about equilibrium in- and outside of the EU and the problems discussed in the previous paragraph do not arise.

The third solution to incidental questions is that the court that has been hearing the dispute, must postpone the case so as to permit the court with exclusive jurisdiction to rule on the issue. After the ruling by the appropriate court, the first court can continue with its action. This solution respects the rules, but again can cause delays. It also assumes an efficient co-operation and co-ordination between courts in different EU Member States, which does not always correspond with reality. This solution is difficult in relations with third States. There is no framework for the same level of interaction between an EU court and a third State court. If an action is stayed to allow a third State court to rule first on the matter, that must happen according to the national rules of the Member State granting the stay. Once again, the situation differs from the reflexive effect, because there is a part of the action over which an EU court clearly has jurisdiction and only the incidental question or counter-claim should actually be adjudicated by a third State court.

A question on how the incidental question should be treated has been posed to the European Court of Justice.[81] In that case, the plaintiff sought an order declaring that it was not infringing the defendant's patent, arguing that the defendant's patent was invalid. The *Landgericht* (Regional Court) of Düsseldorf took jurisdiction over the case, even though the patents were registered in France. After an appeal, the *Oberlandesgericht* (District Court of Appeal) of Dusseldorf posed a question of interpretation of the Brussels Convention to the European Court of Justice. The case is still pending. Advocate General Geelhoed stated in his opinion that whenever the question of validity of a patent arises, that has to be determined by the court with exclusive jurisdiction. Whether the entire case, including the infringement action, has to be transferred to that court (first solution discussed above), or whether a stay should be granted so that the competent court can decide the validity issue before the first court

[81] ECJ case C-4/03, *Gesellschaft für Antriebstechnik mbH & Co KG (GAT) v Lamellen und Kupplungsbau Beteiligungs KG (LuK)*, still pending, see opinion of Advocate General Geelhoed of 16 September 2004, http://www.curia.eu.int. Note that the question had also been posed in 2000: ECJ case C-186/00, *Boston Scientific v Cordis*, but the case has been removed from the register; http://www.curia.eu.int.

continues with the rest of the case (third solution above), was left open by the Advocate General.[82] He rejected the second solution discussed above, namely that if validity arises only incidentally, the court hearing the infringement case can rule on it.

The issue of incidental questions also came up at the negotiations of the Draft Hague Convention on Jurisdiction and Foreign Judgments and the Hague Convention on Choice of Court Agreements. All disputes concerning those contracts should not be able to be drawn to the court of the registration of the intellectual property right. That would amount to abuse and manipulation of forum. The reach of an incidental question varies in different legal systems.[83]

11. No link with the European judicial area

If a case has a link with only one EU Member State and a third State, while it has no connection with the European judicial area, the question arises whether the Brussels I Regulation governs the matter. A discussion has arisen with regard to forum clauses: if a German and Canadian party contractually agree that the German courts are to have jurisdiction, the matter seems to have no link with the European judicial area. While there is case law to the contrary, most authors view the situation to be in the scope of the Brussels I Regulation.[84]

That discussion cannot be likened completely with the rule on exclusive bases of jurisdiction. The exclusive bases of jurisdiction apply irrespective of the domiciles of the parties, while the domicile of one of the parties is relevant for the determination of the scope of the forum clause rule. The exclusive bases of jurisdiction would come into play even if the case has a link with a third State and only one EU Member State. For example, if a dispute arises between a party domiciled in South Africa and a party domiciled in The Netherlands, regarding immovable property situated in The Netherlands, it is the Brussels I Regulation, rather than national law, that will determine the jurisdiction of the courts of The Netherlands.

However, the English courts have decided otherwise in a case regarding a company incorporated in England, Newtherapeutics.[85] The company sued two of its former directors regarding the validity of their actions. One of the directors was domiciled in France. The Court applied the Brussels Convention on him and found that it did have jurisdiction over the acts of the former director, on the basis of the exclusive jurisdiction rule. However, since there was no serious case to be made against this director and

[82] See para 46 of the Opinion.
[83] See Preliminary Document No 13, "Report of the experts meeting on the intellectual property aspects of the future Convention on jurisdiction and foreign judgments in civil and commercial matters" at 6, http://www.hcch.net.
[84] See also the discussion *infra*, Chapter 4, p 2 *et seq*.
[85] *Newtherapeutics Ltd v Katz and another* [1991] Ch 226.

the action was bound to fail, the Court set aside the service of writ against him.[86] The second director, domiciled in the United States of America, was then viewed by the Court as the sole defendant. Interestingly, the Court did not consider service outside England as permitted under the Brussels Convention with regard to the US director. According to English law, one needs permission from a court to serve outside England, but where the Brussels I Regulation (previously the Brussels Convention) or Lugano Convention gives the court jurisdiction, service is possible as of right.[87] It used national law to regard this defendant. It seems, however, that an exclusive basis of jurisdiction in the Brussels Convention exists regardless of the domiciles of the parties. Therefore, the English Court could have applied the Brussels Convention on the US director, even though he was not domiciled in the EU.

The later English judgment of *Speed Investment Ltd, SLEC Holdings Ltd v Formula One*[88] pursues the same reasoning. The dispute in this case concerned the appointment of certain directors of a company incorporated in England. The court made a distinction on the basis of the domiciles of the defendants and applied the Lugano Convention to the ones domiciled in Switzerland and the Brussels I Regulation to the ones domiciled in the EU. If the scope of the rule on exclusive jurisdiction is blind as to the parties, one should apply the Brussels I Regulation if the company has its seat in the EU, irrespective of some defendants being domiciled in Switzerland. The rule at hand is the same in the Brussels I Regulation and the Lugano Convention, but in principle it seems that only the Brussels I Regulation should have been applied in this case.[89]

12. Conclusion

The rule seems simple: when immovable property is situated in the EU, the Brussels I Regulation applies, irrespective of the domiciles of the parties. Similarly, if the action concerns the validity of a company that has its seat in the EU, or the validity of entries in registers in the EU, or the validity of intellectual property rights registered in the EU, the Brussels I Regulation determines jurisdiction, irrespective of where the parties are domiciled. The same applies to the enforcement of EU judgments sought in the EU: the Brussels I Regulation determines that the courts of the place of enforcement has exclusive jurisdiction, while the domiciles of the parties are irrelevant.

However, it is unclear what the rule is when these strong links exist with courts outside the EU. The theory of the reflexive effect provides an equitable solution, but has not yet been explicitly accepted by the European Court of Justice.

[86] At 251.
[87] See A Briggs and P Rees, *op cit* (fn 20) p 252.
[88] [2004] WL 1640302; [2004] ILPr 46.
[89] Art 54B Lugano Convention; see also fn 74.

Chapter 4: Third cornerstone: forum clauses

Article 23 of the Brussels I Regulation:

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. 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, an regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to "writing".

3. Where such an agreement is concluded by parties, none of whom is domiciled in a Member State, the courts of other Member States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.

4. The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between these persons or their rights or obligations under the trust are involved.

5. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 13, 17 or 21, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 22.

Article 12(3) of the Brussels II*bis* Regulation:

The courts of a Member State shall also have jurisdiction in relation to parental responsibility in proceedings other than those referred to in paragraph 1 where:

a) the child has a substantial connection with that Member State, in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State;

and

b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the time the court is seised and is in the best interests of the child.

1. Introduction

Prorogation means that parties grant jurisdiction to a court by way of an agreement between them. Derogation is the reverse side of the coin, meaning that other courts are deprived of their jurisdiction by the fact that (a) specific court(s) had been chosen.

Forum clauses can be one provision of an agreement or can comprise a contract in their own right. The provision refers to 'a particular legal relationship'. Not only contractual matters are covered. For instance, a trust in the common law legal systems may contain a choice of forum for an EU court that will be respected according to Article 23 of the Brussels I Regulation. The wording was adapted to allow this at the time of the accession of Ireland and the United Kingdom.[1]

In this Chapter the test of the applicability of the provision on forum clauses will first be set out. The requirements for validity and the exclusivity of forum clauses will be regarded next. The difficult relationship between forum clauses and parallel proceedings may cause unpleasant surprises for parties from third States and therefore deserves attention in this Chapter. The delimitation between the Brussels I Regulation and the Hague Convention on choice of court agreements will then be discussed. If courts outside the EU are appointed, in situations where the Hague Convention does not (yet) apply, one might turn to the theory of the reflexive effect, which has been set out in the previous Chapter.[2] In some instances forum clauses are not invoked against the original Contracting partner, but against someone who has taken over his rights and/or obligations; that might influence parties from third States as well. The situation of a forum clause that falls under the rules of the Brussels I Regulation, but does not influence the European judicial area, will be considered. Of course forum clauses are not possible under the Insolvency Regulation. A very limited possibility to choose a forum exists under the Brussels II*bis* Regulation. That might influence the sphere of application of that Regulation and will thus be briefly discussed before concluding this Chapter.

2. Test of application of the Brussels I Regulation regarding forum clauses

General

The test for the application of the Brussels I Regulation to determine the validity of a forum clause, is different to that for the other provisions of the Regulation. Article 4 determines that the national rules are to apply if the defendant is domiciled in a third State. However, it states explicitly that Articles 22 (exclusive jurisdiction) and 23 (forum clauses) are excluded from this rule. Article 23[3] is applicable when one of the parties is domiciled in a Member State and the courts of a Member State are appointed.

The rule contained in Article 23 of the Brussels I Regulation is that the court inside the EU appointed by contracting parties, one of whom is domiciled in an EU Member State, has exclusive jurisdiction, except if the parties did not wish the jurisdiction to be

[1] See Schlosser Report para 178, p 124.
[2] See *supra*, p 2 *et seq.*
[3] Art 17 of the Brussels and Lugano Conventions.

exclusive.[4] One of the parties needs to be domiciled in the EU, but this is not necessarily the defendant. The reason is that it would not make much sense to require that the defendant be domiciled in an EU Member State, since it is not known at the time of contracting who will be the plaintiff and who the defendant.[5] Thus, a defendant from outside the EU can be drawn into the sphere of application of the Brussels I Regulation.

Why broaden the scope to include parties from outside the EU? The Brussels I Regulation could have provided that both parties had to be domiciled in the EU. That would have limited the number of forum clauses that would fall under the Regulation, but that would at the same time not have had such a big impact on parties from third States.

On the other hand, stating that the Regulation would apply as soon as two parties, no matter where they are domiciled, appoint an EU court, would have enlarged the scope to include cases to which the EU's link is tenuous. This is the solution that the Hague Convention on choice of court agreements has opted for, because a broader scope of the convention would ensure the enforcement of more judgments under the Convention.[6] To understand the different choices made by the drafters of the Brussels I Regulation and those of the Hague Convention, one needs to go back to the goals of the instruments: the Brussels I Regulation seeks to advance the European internal market and judicial area and to establish jurisdictional rules that would lead to easy recognition and enforcement. The validity of forum clauses as such, if they do not have a link with the European judicial area, is not the concern of the EU. The Hague Conference on Private International Law, on the other hand, seeks to aid international trade by creating an instrument that will ensure the respect of forum clauses in as many countries as possible and that will aid in the recognition and enforcement of as many judgments as possible.

The importance of knowing exactly when the Brussels I Regulation rules on forum clauses apply as opposed to those in national law is that different conditions for validity apply. If parties conclude their agreement in conformity with the law in one State, they might be surprised by a different set of rules imposed by the Regulation. The Regulation is interested in preventing conflicting judgments within the EU and therefore contains a provision to compel non-chosen courts in the EU to respect the choice of the parties.[7] For example, a party domiciled in the USA and one in Canada conclude a forum clause in favour of the courts in London (as often happens in certain branches of international trade). Possibly a French court also has jurisdiction according to its national rules (for instance if one of the parties were a French national). That French

[4] See also Jenard Report, p 38.
[5] See A Philip, "The scope of Article 17" in Court of Justice of the European Communities, *Civil Jurisdiction and Judgments in Europe* (London: Butterworths, 1992) p 151-152.
[6] Art 3 of the Hague Convention on Choice of Court Agreements (2005). See also *infra* Chapter 7, Part B, p 2 *et seq*.
[7] Art 23(3) Brussels I Regulation.

court is prohibited from exercising its jurisdiction and has to respect the clause in favour of London. The London court will assess the validity of the clause according to its national rules and not according to the rules of the Brussels I Regulation.[8] This has been confirmed by the German *Bundesgerichtshof* (Federal Supreme Court) in *Re Exchange Control and a Greek Guarantor*, where it was found that the Convention did not govern a forum clause in favour of a court in Greece because Greece was not a Contracting State at the initiation of the action.[9] In *Aectra Refining and Marketing Inc v Exmar NV (The "New Vanguard")*[10] the Court of Appeal stated *obiter* that where a jurisdiction clause exists in favour of a non-EU State, the English court has a discretion "under its inherent jurisdiction".[11] This is in line with the view that the court should apply its national rules when adjudicating the forum clause.

If the chosen court declines jurisdiction, for instance on the basis of *forum non conveniens*, or because the clause is invalid according to its national law, the other EU court (in the example the French court) may hear the case.

If two parties domiciled in the same EU Member State conclude a forum clause in favour of a court in that Member State, the Brussels I Regulation does not apply to this internal attribution of jurisdiction. The result is not changed by the fact that one of the parties has the nationality of a third State. This occurred in a case before the *Cour d'appel* (Court of Appeal) of Paris, where all parties involved were domiciled in France. The fact that the defendant was Ivorian was deemed irrelevant.[12]

The time of domicile

If parties from outside the EU appoint a court in the EU, the validity and effect of the forum clause will be determined by national law.[13] However, if a Court in the EU is appointed by parties outside the EU, other EU courts may not hear the matter before the court appointed has found itself without jurisdiction,[14] or maybe also if that court has used a discretion to decline jurisdiction.[15] Although the validity is not determined by the Regulation, forum clauses have wide protection within the EU and a party can keep his/her case out of all other courts of the EU by choosing one competent court in the EU. Recognition and/or enforcement of this judgment in the EU will take place via the

[8] See B Audit, *Droit international privé* (3rd edn, Paris: Economica, 2000) p 468.
[9] [1993] I L Pr 298, *Bundesgerichtshof* (German Supreme Court).
[10] [1995] 1 Lloyd's Rep 191, CA See also P Kaye, *Law of the European Judgments Convention* (Chichester: Bary Rose Law Publishers, 1999) vol 3, p 2510-2511.
[11] At p 200.
[12] *Cour d'appel* (Court of Appeal) of Paris, judgment of 27 March 1987 with case note by A Huet, (1988) *JDI* 140-143.
[13] For a discussion on which national law, see *infra*, p 2.
[14] Art 23(3) of the Regulation. This subarticle was added in 1978.
[15] P North & JJ Fawcett, *Cheshire and North's Private International Law,* (13th edn, London: Butterworths, 1999) p 236.

Brussels I Regulation. In this sense the Regulation can have a wide influence, also for parties from third States.

When should the domicile of the parties be determined? This question arises when parties move. For instance, none of them is domiciled in the EU at the time of contracting, but one of them subsequently moves to the EU. The opposite situation may also pose difficulties, namely when one of the parties is domiciled in the EU at the time of contracting but subsequently moves away. Should this be determined, as under Article 2, at the time of the bringing of the action, or should one now rather look at the time when the jurisdiction clause was concluded? A third possibility is to apply a cumulative test: the Brussels I Regulation would then only apply if the domicile requirement were fulfilled both at the time of contracting and at the time of litigating. Lastly one can apply an alternative test: the rule in the Brussels I Regulation would be applicable if one of the parties were domiciled in the EU either at the time of contracting or at the time of litigating.

The arguments in support of the time of bringing the action are that it is in line with the other provisions of the Brussels I Regulation (again an EU-perspective argument). At the same time one has to admit this perspective on the time of domicile requirement ensures a link with the EU at the time the court actually takes jurisdiction.[16] Some might read support for this viewpoint in the opinion of the Advocate General in the *Sanicentral* case,[17] but one should be careful to do so since the case dealt with the temporal applicability of the first version of the Brussels Convention. However, this solution does lead to difficulty regarding legal certainty. At the time of contracting, parties cannot possibly know where their counter-parties will be domiciled at the time of a later dispute. Diamond refers, by way of contrast, to the European Contracts Convention.[18] Its Article 4(2) states that the relevant time of the habitual residence of a party is the time of the conclusion of the contract. Since that Convention deals with substantive law, it has a different solution than a procedural convention should have, he states.[19] This argument does not seem convincing. It purposefully establishes two different times for adjudicating the residence of the contractual parties. For the same dispute, and sometimes even to determine the validity of two provisions (forum clause and applicable law) of the same contract, parties might be resident in different places. This does not contribute in any way to legal certainty.

The second solution, that of the time of contracting, has the benefit that it ensures legal certainty and predictability. It is also in line with the good faith that should exist between contracting parties. The supporters of this proposition consider the wording of the

[16] See, in support of this perspective AL Diamond “Jurisdiction Clauses” in Court of Justice of the European Communities, *op cit* (fn 5) p 141.
[17] ECJ case 25/79, judgment of 13 November 1979, *Sanicentral v René Collin*, [1979] ECR 3423 at 3436.
[18] Convention on the law applicable to contractual obligations (Rome, 1980), consolidated version published in *OJ C* 27 of 26 January 1998, p 34-46.
[19] AL Diamond *op cit* (fn 16) at p 141-142.

provision to be in their favour. One has to read with a bit of bias to come to this conclusion, although a bias that deserves enthusiastic support. The text states: "*If the parties, one or more of whom is domiciled in a Member State, have agreed...*" The supporters say that "*one or more of whom is domiciled*" is (clearly) a quality of the contracting parties and they have to possess that quality at the moment that they conclude the forum clause.[20] The downside of this solution is that it means that an EU court can test the validity of a forum clause on the basis of the Brussels I Regulation rules while none of the parties has a link with the EU. That, some admit, would be contrary to Article 4 that states that defendants from outside the EU should be left out of the scope of the Regulation.[21]

The third solution limits the Brussels I Regulation the most. If one requires that at least one party be domiciled in the EU both at the time of contracting and at the time of litigating, one is ensuring a proper link with the EU in order to justify the application of EU rules. The solution also ensures legal certainty.

The fourth solution broadens the scope of the Brussels I Regulation as far as possible. It would suffice that one of the parties be domiciled in the EU either at the time of contracting or at the time that the action is brought.[22] Such an elaboration is not equitable to parties from third States. It is confusing and nobody will be able to tell when he/she will be absorbed by the EU rules. National law will then only be applied if none of the parties is or was domiciled in an EU Member State at any of the two moments in time.

When exactly a court is seised was unclear under the Brussels Convention and national law was to determine whether an action is pending.[23] This was changed by the Brussels I Regulation. Article 30 of the Regulation determines the time that a court is seised for purposes of sections 9, on *lis pendens* and related actions. However, this rule can probably also be used in other cases when one needs to determine when a court is seised. This is also the criteria used by the Brussels II*bis* Regulation (Art 16).[24]

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[20] See P Gothot & D Holleaux, *La Convention de Bruxelles du 27 septembre 1968* (Paris: Editions Jupiter, 1985) p 94-95; F Schockweiler, "Jurisdiction Clauses" in Court of Justice of the European Communities, *op cit* (fn 5) p 119-128; H Gaudemet-Tallon, "Jurisdiction Clauses" in the same book p 129-140 at 130-131; B Audit, *op cit* (fn 8) p 468; H Gaudemet-Tallon, *Compétence et exécution des jugements en Europe* (3rd edn, Paris: LGDJ, 2002) p 93; A Layton, & H Mercer, *European Civil Practice* (2nd edn, London: Sweet & Maxwell, 2004) p 695-696.

[21] P Gothot & D Holleaux, *op cit* (fn 20) p 95.

[22] L Collins, *Dicey and Morris on the Conflict of Laws* (13th edn, London: Sweet & Maxwell, 2000) p 431; GAL Droz, *Pratique de la convention dde Bruxelles du 27 septembre 1968* (Paris: Librairie Dalloz, 1973) p 35-36; A Philip, *op cit* (fn 5) p 153.

[23] ECJ case 129/83, judgment of 7 June 1984, *Siegfried Zelger v Sebastiano Salinitri* [1984] *ECR* 2397.

[24] 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, *OJ L* 338, 23 December 2003, p 1-29. Its predecessor, the Brussels II Regulation, contained the same rule in its Art 11; Council

Article 30 determines when an action is pending and gives two possibilities, to allow for differences in national procedural rules: an action is pending at the time when the document instituting the proceedings is lodged with the court or when the document is received by the defendant if he has to be served before the lodging at the court.

3. Requirements for validity of the clause

As validity is determined by the Brussels I Regulation and parties from third States might be subjected to these rules, an evaluation is necessary.

Writing/practice/usage

The Brussels I Regulation provides three alternatives for the formal validity of a forum clause. The agreement must be:

- in writing, or evidenced in writing;
- in a form which accords with the practices between the parties; or
- in a form which accords with a usage in the particular branch of international trade and of which the parties were aware, or ought to have been aware.

The Brussels II*bis* Regulation does not require writing. The purpose of the writing requirement is to prove the existence of consensus between the parties. Therefore a forum clause in the general conditions on the reverse side of a contract is only valid if there is an explicit reference to it on the front.[25] If the parties had agreed on a forum orally and this was confirmed in writing and not contested by the other party, the clause is valid. The Brussels I Regulation explicitly states that electronic means that provide a durable record of the agreement, satisfy the writing requirement. This probably includes e-mail, which can be saved or printed out. On the other hand, a voice mail should not be included. Could a text message (or sms), which can be saved, be valid? These messages can be saved.[26]

The second and third possibilities were inserted by the 1978 version of the Brussels Convention. That was the version for the accession of Denmark, Ireland and the United Kingdom. The amendments were aimed at catering for the specific needs of international trade.[27]

Regulation (EC) no 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, *OJ L 160,* 30 June 2000, p 19-36.

[25] ECJ case 24/76, judgment of 14 December 1976, *Estasis Salotti di Colzani Aimo et Gianmario Colzani v Rüwa Polstereimaschinen GmbH* [1976] *ECR* 1831, rec 10.

[26] See A Briggs & P Rees, *Civil Jurisdiction and Judgments* (3rd edn, London: LLP, 2002) p 96, stating that e-mail should be valid but voice mail and text messages not.

[27] See the explanation by the European Court of Justice in ECJ case C-159/97, judgment of 16 March 1999, *Transporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA* [1999] *ECR* I-1597 rec 18.

The second form for validity can relax the requirement of writing. If a practice has been established between parties who often trade with each other to include forum clauses on the back of invoices, they can be accepted as valid. This extension does not apply if the final place of delivery of the goods or provision of the services is in Luxembourg. Luxembourg accepts only agreements in writing or evidenced in writing, an exception that will remain valid until 1 March 2008.[28]

An example of a usage in a specific branch of trade, is maritime law and the bill of lading that tends to live a life of its own. Everybody active in the sector of maritime transport knows this, and the practice is therefore accepted under the Brussels I Regulation. The European Court of Justice has ruled that this kind of forum clause does not mean that consent between the parties is lacking. It does mean, however, that consent is presumed to exist when the parties have acted in accordance with a usage in their branch of international trade that they knew or ought to have known.[29] This extension, like the one discussed above, does not apply to Luxembourg until 1 March 2008.

The European Court of Justice has ruled that the validity of the forum agreement is a separate issue from that of the validity of the entire contract. Therefore a party cannot invoke the invalidity of the entire contract and in this way circumvent the forum clause.[30]

Why are these rules of validity relevant for parties from third States? As indicated above, third State parties can sometimes be subjected to the rules of the Brussels I Regulation, with the result that the validity of their clause will be adjudicated according to the rules of the Brussels I Regulation.

The importance of these rules of validity further lies in the fact that EU courts may not take other requirements into account when determining the validity of a forum clause. In this way, according to the European Court of Justice, the Regulation ensures legal certainty. The courts of all Member States should subject the clause to the same test of validity. For instance, the court may not consider the language of the clause, even if national law requires the agreement to be in a specific language.[31] Therefore, the validity requirements of the Brussels I Regulation provision are all-encompassing.

[28] Art 63 Brussels I Regulation.
[29] ECJ cases C-106/95, judgment of 20 February 1997 *Mainschiffahrts-Genossenschaft eG (MSG) v Les Gravières Rhénanes SARL* [1997] *ECR* I-911 rec 17-19 and C-159/97, judgment of 16 March 1999 *Transporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA* [1999] *ECR* I-1597 rec 19-21.
[30] ECJ case 269/95, judgment of 3 July 1997 *Benincasa v Dentalkit Srl* [1997] *ECR* I-3767, rec 24-29.
[31] ECJ case C-150/80, judgment of 24 June 1981 *Elefanten Schuh GmbH v Pierre Jacqmain* [1981] *ECR* 1671, rec 26-29.

What about substantive validity?

The Brussels I Regulation contains nothing on the questions of fraud, duress, misrepresentation, incapacity *etc*. How should these substantial elements of validity be determined? Different solutions are possible: one can refer to the *lex fori*, or the law of the court seised, which may or may not be the chosen court. One can look for the answer in the law of the derogated court. One can refer to the law of the chosen court. Alternatively, one can use the *lex causae*, in other words the law applicable on the contract. A last possibility is that the European Court of Justice will autonomously determine the substantial validity of the agreement. The European Contracts Convention,[32] which contains the conflict of law rules for contracts and is applicable in the 15 "old" EU Member States, excludes the validity of forum clauses from its scope.[33] No solution is to be found there.

The Schlosser Report refers, for the validity of forum clauses in favour of third States, to the *lex fori*.[34] Whether this can be understood as including substantial validity is not certain. It is obviously a simple solution for the court seised – check according to your own law whether the clause is valid or not. Applying the *lex fori* does not seem totally equitable. It allows for forum shopping and a party would be perfectly aware of which court to go to in order to get the clause declared invalid.

The law of the derogated court is not necessarily the same as the forum, although it will often be. The use the law of the derogated court, if not the forum, does not seem like a satisfactory solution; there can be many derogated courts. Should one only refer to the courts that would have had jurisdiction on the basis of the Brussels I Regulation but for the forum clause, or any court that would have jurisdiction according to its own rules? Should the rules of these courts be cumulatively applied?

The law of the chosen court seems an equitable solution. It is not a random solution, as is the *lex fori*. This has also been advanced as preferable solution by Advocate General Slynn in his opinion to the *Elefanten Schuh* case.[35] It would facilitate international trade considerably if the European Court of Justice were to take the future Hague Convention into consideration when they have to decide this point. Whether or not the Convention is in force at the time the question reaches the European Court of Justice, it does document a viewpoint by experts in the field. The European Court of Justice has regrettably in the past not been keen to have regard to these types of international activities.[36]

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[32] Convention on the law applicable to contractual obligations (Rome, 1980), consolidated version published in *Official Journal C* 27 of 26 January 1998, p 34-46.
[33] Art 1(2)(d).
[34] At para 176.
[35] See ECJ case C-150/80, judgment of 24 June 1981 *Elefanten Schuh GmbH v Pierre Jacqmain* [1981] *ECR* 1671 at 1697-1398.
[36] See, for instance, ECJ case C-116/02, judgment of 9 December 2003 *Enrich Gasser GmbH v MISAT srl*, not yet published in *ECR*, see http://www.curia.eu.int.

Looking at the *lex causae* poses a bit of a circular argument: the validity of an agreement has to be determined by the law applicable to it, but maybe the agreement is invalid and then there is no law to regulate it. The circle becomes particularly pertinent when the parties have chosen the law applicable to their contract, and the contract also contains a forum clause. If one party alleges that the contract is invalid because of some substantial flaw, such as fraud, then it seems problematic to use the chosen law to evaluate that argument, especially since the averment would be that the choice of law clause is invalid as well. It is submitted that this remains a better solution than that of the *lex fori* or an autonomous EU concept.

An autonomous test established by the European Court of Justice would be in line with the strict interpretation of the formal requirements and the fact that EU Member States cannot impose other requirements for formal validity.[37] However, such an autonomous interpretation would take a long time to establish while existing legal systems already contain such a test. At the same time, another set of rules would make things even more difficult and unclear for parties from third States.

Jurisdictional renvoi: different rulings on validity

It might happen that the prorogated court finds that the prorogation is not valid. This means that the remaining rules of the Brussels I Regulation will be activated. The judge of the domicile of the defendant or the judge of the place where the contract was performed or should be performed or the place where the tort was committed, will be competent. But this judge might decline jurisdiction because of the jurisdiction clause appointing another court.

The opposite can also happen: one of the parties can try his luck at a court other than the chosen one. He would then argue invalidity and if he wins on that point, the not-chosen court will be able to base its jurisdiction on a different ground, such as the domicile of the defendant or the place of performance of the contract. What if the chosen court then finds that it does have jurisdiction because the clause is in fact valid. In other words, a problem arises because of the different conclusions on validity reached by the two courts.

If both courts are in the EU, it seems that the European Court of Justice will solve the question with the strict rule of *lis pendens* at the time that the two actions are pending.[38] If there is a judgment by one court, that judgment will have to be recognised in all other EU courts. The first court is right and has to be followed.

[37] ECJ case C-150/80, judgment of 24 June 1981 *Elefanten Schuh GmbH v Pierre Jacqmain* [1981] *ECR* 1671. See also, in support of this view, A Briggs & P Rees, *op cit* (fn 26) p 107-108.

[38] ECJ case C-116/02, judgment of 9 December 2003 *Enrich Gasser GmbH v MISAT srl*, not yet reported in *ECR*, see http://www.curia.eu.int.

The question arises of how this principle would operate in relation to third States. Let us take the example where one of the parties is domiciled in the EU and an EU court was appointed in a jurisdiction clause. According to the letter of Article 23 the Brussels I Regulation would be applicable. If the prorogated court finds that the clause is invalid and that it therefore does not have jurisdiction, the plaintiff might want to bring the action in another court, this time a court outside the EU. This court might refuse to take jurisdiction since there is a jurisdiction clause in favour of another court. It may reach this conclusion on the basis of a convention, or on the basis of its national law. The court might even evaluate the validity of that clause according to its own rules and find it to be valid. In this interaction between the Regulation and a national legal system, a vacuum has arisen.

It is also possible that the sequence of events is different: one of the parties first goes to a third State court in violation of an existing jurisdiction clause that he claims to be invalid. The third State court then refuses to take jurisdiction because it rules that there is a valid jurisdiction clause in favour of another court. That court subsequently finds the jurisdiction clause invalid. One is faced with the same vacuum and, if no solution is found, a denial of justice.

A solution might in these instances be provided by the Hague Convention on Choice of Court Agreements. In the absence of a convention, there is no certain solution at hand.

4. Exclusivity of forum clauses

The Brussels I Regulation gives effect to any choice of court agreement. The Hague Convention on Choice of Court Agreements, on the other hand, deals mainly with exclusive choice of court agreements, although the Convention contains the possibility for Contracting States to declare that its courts would recognise and enforce judgments given by courts of other Contracting States on the basis of non-exclusive choice of court agreements. Non-exclusive choice of court agreements are frequent in some business sectors and can take various forms. A clause can provide that party A may bring proceedings in the courts of State A while party B may bring proceedings in the courts of State B. Another example of a non-exclusive choice of court agreement is a clause giving one party the option of a wide range of courts while compelling the other party to go to a specific court. This type of clause is common in the banking sector and is sometimes called an asymmetrical forum clause.[39]

[39] An example of such a clause is found in the English case *Continental Bank NA v Aeakos Compania Naviera SA and others* [1994] 1 WLR 588: "*Each of the Borrowers... hereby irrevocably submits to the jurisdiction of the English Courts... but the Bank reserves the right to proceed under this Agreement in the Courts of any other country claiming or having jurisdiction in respect thereof.*" This case is discussed in further detail in Chapter 5, *infra*, p 2 *et seq.*

The reason why the Brussels I Regulation includes these clauses and the Hague Convention does not, is the difficulty of *lis pendens*, for which the Brussels I Regulation contains a strict and precise rule. If two courts simultaneously have jurisdiction on the basis of the same choice of court agreement and actions are brought in both courts, the conflict will be resolved by the normal *lis pendens* rule: the court first seised will be able to hear the case. The provision on choice of court agreements does not explicitly so provide, but that would appear to be the only logical conclusion. This logic is contained in Article 29 of the Brussels I Regulation, dealing with the situation where actions come within the exclusive jurisdiction of several courts: then any court other than the court first seised shall decline jurisdiction in favour of that court.

The Hague Convention, on the other hand, does not contain a rule on *lis pendens*. The larger project, the Draft Convention on Jurisdiction and Foreign Judgments, included a rule on *lis pendens*. For fear of reopening up too many contentious issues, the negotiators decided to limit the convention to exclusive clauses. This decision has been met with criticism by experts who stated that the rule on *lis pendens* had been broadly accepted in the larger project so that including it would not raise grave difficulties.[40]

Both the Brussels I Regulation and the Hague Convention contain a presumption that a choice of court agreement is exclusive. In other words, if parties had taken up a (valid) choice of court clause in their agreement, the interpretation that these instruments give the clause is that the parties wished only the chosen court to hear their dispute. The jurisdiction of other courts is therefore excluded, even if they would otherwise have had jurisdiction on the basis of the domicile of the defendant or the place of the performance of the contract. That excluded jurisdiction can be based either on the Brussels I Regulation or on national rules. For instance, a French national, living in New York and a Belgian party domiciled in Belgium conclude a choice of forum clause in favour of a court in England. If the French party brings action in France, on the basis of his own French nationality (Art 14 of the French *code civil*), that jurisdiction would be excluded by the forum clause. Similarly the jurisdiction that a Belgian court would have had on the basis of the domicile of the defendant (Art 2 of the Brussels I Regulation) would also be excluded. Only the English court will have jurisdiction to hear the case. The presumption of exclusivity is not the rule in all legal systems. In some common law countries, a choice of court clause is seen as granting jurisdiction to an extra court while the courts that have jurisdiction on other bases retain such jurisdiction.

The question that arises with regard to third State courts, is whether this exclusivity concerns them as well. This point was dealt with by the English courts in exceedingly complex procedures, which will be discussed without entering into unnecessary

[40] See the comment made by the expert from Switzerland at the negotiations for the Hague Convention; Minutes no 3 of December 2003, p 6.

details.[41] Bouygues, a French company, had contracted with Ultisol, a Bermudan company managed from The Netherlands (and here the complications already start) for the hire of a tug to tow its barge from Pointe Noir in the Congo to Cape Town, South Africa. This agreement contained a forum clause for the High Court of Justice in London. Ultisol had time chartered the tug from Caspian Basu Emergency Salvage Department, a former Azerbaijan government body. Who the owners of the tug were at the time of the accident, was uncertain (and here the complications continue). In the South African waters, the towline parted, the barge stranded and was destroyed. Bouygues brought actions in South Africa against Ultisol, Caspian and Portnet, the South African authorities who allowed the tug to enter despite bad weather conditions. Ultisol sought an anti-suit injunction in England on the basis of the forum clause for the court in London.

When considering whether or not to grant this injunction, the court considered the meaning of "exclusive jurisdiction". It acknowledged that the provision of the Brussels Convention on choice of forum was applicable. The requirements were clearly met: one party was domiciled in the EU (France) and an EU court (in England) was appointed. However, the court gave a limitative interpretation to the words "exclusive jurisdiction" in that provision. It stated, quite creatively, that the exclusiveness related to the EU. In other words, the forum clause in favour of the London court excluded the jurisdiction of all other EU courts. However, that provision did not make the forum clause exclusive as opposed to third State courts.

The court stated:

"In my judgment art 17 was not intended to exclude the jurisdiction of the Courts of non-Contracting States in any circumstances. So for example, where two parties to a contract both domiciled in a Contracting State agree that the Courts of say England and New York are each to have non-exclusive jurisdiction, art 17 does not exclude the jurisdiction of the Courts of New York. The effect of the article is simply to exclude the jurisdictions of other Contracting States. Thus where in the first paragraph it says that... that court or those courts shall have exclusive jurisdiction... it means exclusive jurisdiction as between the Courts in Contracting States."[42]

For this statement the judge relied on *Re Harrods (Buenos Aires) Ltd*,[43] a judgment in which there was no forum clause at issue. The court more generally considered the limits of the Brussels I Regulation and how far it should be permitted to impact on third States. It also referred to the Schlosser Report and stated that this approach is in line with that report. The report does not deal with the exact situation that was before the judge. It deals with the limited scope of the Brussels Convention when two parties from

[41] See *Offshore SA v Caspian Shipping Co and Others* (Nos. 1, 3, 4 and 5), [1998] 2 Lloyd's Rep 461 (CA) and the various first instance decisions relating to the different parties: [1996] 2 Lloyd's Rep 140; [1997] 2 Lloyd's Rep 493; [1997] 2 Lloyd's Rep 533; [1997] 2 Lloyd's Rep 507.
[42] at 146-147.
[43] [1992] Ch. 72. For a more detailed discussion of this case, see *infra*, p 2 *et seq*.

outside the EU appoint an EU court and the non-application of the Convention when a court outside the EU is appointed.

The judge granted the anti-suit injunction. Leave to appeal in this case was granted by the Court of Appeal.[44] In considering the leave to appeal, the court found that the forum clause did not necessarily have to be protected by an anti-suit injunction, although it did not question the court at first instance's ruling on the Brussels Convention. In fact, it did not even refer to the Brussels Convention in its judgment. It agreed that the South African court was the better forum.

While it seems like a good solution that the related disputes should be heard in the same court, and preferably the court of the place where the events took place, the fascinating point of these judgments is that factors such as the evidence, the natural forum for the other parties and the interest to avoid contradicting judgments, outweighed a simple forum clause, valid according to the Brussels Convention. The forum clause was not seen as essential.

5. Forum clauses and parallel proceedings

In the *Gasser* case[45] the European Court of Justice reduced the value of forum clauses by finding that the *lis pendens* rule precedes over the forum clause.[46] In that case an Italian and an Austrian party had concluded a forum agreement in favour of the court in Innsbruck (Austria). One of the parties brought action in a court in Italy. The other subsequently instituted proceedings in the chosen court, arguing that the chosen court did not have to stay proceedings according to the *lis pendens* rule. The Court of Innsbruck posed a preliminary question to the European Court of Justice on that point. The Court of Justice ruled that the fact that there was a forum clause in favour of the court second seised did not give that court the right to go ahead with the action in spite of an earlier action pending in a court of another Member State. The court second seised, even being the chosen court, still has to suspend the action to allow the court first seised to rule on its jurisdiction. If there is indeed a valid forum clause, the first court will come to that conclusion and decline jurisdiction. However, that deprives the chosen court of the possibility to adjudicate the forum clause itself. The underlying thought is that the two courts have to determine the validity of the forum clause on the basis of the same rules (of the Brussels I Regulation) and will come to the same conclusion. Furthermore, the mutual trust between the EU Member States requires that

[44] [1998] 2 Lloyd's Rep 461 (CA). According to the common law legal tradition, one has to ask permission of the court that gave a judgment before appealing it. Leave to appeal is granted if the court acknowledges that there is a reasonable possibility that another court would decide the matter differently. If the court that gave the judgment refuses leave to appeal, one can request the appeal court to grant leave to appeal (this is called a petition).
[45] ECJ case C-116/02, judgment of 9 December 2003 *Enrich Gasser GmbH v MISAT srl*, not yet reported in *ECR*, see http://www.curia.eu.int. See case notes by P Wautelet, (2004) *TBH* p 794-799; H Muir Watt, (2004) *RCDIP* p 459-464.
[46] On this discussion, see also *infra*, p 2 *et seq.*

they confide in each other to make the correct decision on the validity of a forum clause.

However, not all courts will necessarily interpret Article 23 in the same manner. When there is a written contract with a clear choice of forum clause, the chances are good that both courts will come to the conclusion that it is valid. On the other hand, the interpretation of a practice between the parties or a usage in a particular trade might lead to different conclusions. It seems that the chosen court is in the best position to determine the validity of the forum clause. Possibly a trade that is particularly common in that country is concerned and the chosen court would better be able to judge validity.

Furthermore, this solution of the European Court of Justice differs from the direction taken by the Hague Convention on Choice of Court Agreements. That Convention always gives preference to the chosen court. Maybe the reason is again to be found in the different purposes of the Convention and Brussels I Regulation. However, the European Court of Justice, at the time of the project, should maybe have been more willing to follow international trends and to respect choice of court clauses, rather than considering only the European judicial area.

6. Delimitation between the Brussels I Regulation and the Hague Convention on Choice of Court Agreements

Regarding jurisdiction

The Hague Convention enjoys preference over the Brussels I Regulation if an EU court is chosen by a party domiciled in the EU and a party domiciled in a third State (and both those States are Contracting States to the Hague Convention).[47] That means that the validity of the clause will be subjected to the conditions of the Hague Convention and not to those of the Brussels I Regulation. At the same time, it means that not only the EU courts will be obliged to respect the forum clause and refrain from taking jurisdiction, but the courts of all Contracting States to the Hague Convention will have that duty. Thus, assuming that all EU Member States and China are Contracting States to the Hague Convention, if a contracting party domiciled in Germany and one domiciled in China conclude a forum clause in favour of the English courts, the Hague Convention will apply instead of the Brussels I Regulation (even though the requirements for the application of the Brussels I Regulation are fulfilled).

The same solution was not adopted for the Lugano Convention.[48] Thus if a party domiciled in Switzerland and one domiciled in China conclude a forum clause in favour of the English courts, the Lugano Convention will apply, even if all those States are

[47] Art 26(6)(a). See also the Draft Report by TC Hartley and M Dogauchi, Preliminary Document No 26 of the Judgments Project, p 50-51; http://www.hcch.net.
[48] Art 26(3) of the Hague Convention gives precedence to the Lugano Convention. The provision will also apply to updated versions of the Lugano Convention.

Contracting States to the Hague Convention. The reason for this is that all the EU Member States will become Party to the Hague Convention simultaneously, since the EC has external competence in this field.[49] The same is not true for the Lugano Convention Contracting States. Therefore, one might be in a situation where, in the example, the United Kingdom is Party to the Hague Convention, but Switzerland not (yet). If one of the contracting parties brings an action in a Swiss court and while the case is pending, the other party brings an action in an English court, the English court would be in a predicament. According to the Hague Convention it would be compelled to assume jurisdiction (if the clause is valid), but according to the Lugano Convention's *lis pendens* provision, it may not assume jurisdiction until the Swiss court has declined jurisdiction. This is dictated by the European Court of Justice's interpretation in of the Brussels I Regulation *Gasser* (which would be valid for the Lugano Convention as well) that the *lis pendens* rule should receive precedence over a forum clause.[50] With the solution adopted by the Hague Convention, the English court would simply have to adhere to the Lugano Convention and not the Hague Convention. The example indicates how a finding by the European Court of Justice, taking the European judicial area into consideration, can impact on third States.

If a court of an EU Member State has been appointed by two parties from outside the EU, the case will also fall under the Hague Convention. The chosen court, as well as a seised court that has not been chosen, will have to evaluate the validity of the forum clause according to the rules of the Hague Convention. This goes further than the Brussels I Regulation that merely leaves the chosen court in this case to evaluate the validity according to its national law and allows the court to decline the case on the basis of *forum non conveniens* (although not explicitly, this is the result of not regulating jurisdiction). The Brussels I Regulation also places the court of other Member States under an obligation not to hear the case. This obligation will be extended to all Contracting States of the Hague Convention.

Regarding recognition and enforcement

If jurisdiction is based on a forum clause, the resulting judgment given by and EU Member State court will be able to be recognised or enforced according to the simplified procedure of the Brussels I Regulation throughout the EU.[51] The domiciles of the parties and the instrument on which jurisdiction was based (or according to which the forum clause was evaluated) is irrelevant.

Similarly, if a Lugano Convention Contracting State has given a judgment on the basis of a forum clause, that judgment will be recognised and enforced in other Lugano

[49] On the extent of the exclusivity of the external competence of the EC, see Chapter 7, *infra*, p 2 *et seq*.
[50] ECJ case C-116/02, judgment of 9 December 2003 *Enrich Gasser GmbH v MISAT srl*, not yet reported in *ECR*, see http://www.curia.eu.int; see also the discussion *supra*, p 2 *et seq.*
[51] Art 26(6)(b) Hague Convention.

Convention Contracting States according to the Lugano Convention.[52] This is irrespective of the domiciles of the contracting parties and the instrument on which jurisdiction has been based. The Hague Convention does specify that the judgment may not be enforced to a lesser extent than it would be under the Hague Convention.

In other Hague Convention Contracting States which are not EU Member States or Lugano Convention Contracting States, enforcement will be regulated by the Hague Convention, if the court that has given the judgment is a Hague Convention Contracting State.

These ways in which the Brussels I Regulation and Lugano Convention interact with the Hague Convention will ensure the most favourable treatment, and the most possible respect to international forum agreements.

7. Court outside the EU appointed: the reflexive effect

General

The Brussels I Regulation does not contain an explicit provision on forum clauses in favour of third States. The discussion that follows deals with third States that are not (or will not be) linked to the EU by way of the Hague Convention, discussed in the previous paragraph.

Obviously the Brussels I Regulation cannot grant jurisdiction to a court outside the EU. However, what the Brussels I Regulation could have done, is to state that the rules it establishes may be put aside if there is a forum clause in favour of a third State court. This does not in any way affect the sovereignty of any EU Member State or third State. To the contrary, it is in line with international comity, respecting the jurisdiction of other courts. At the same time it respects the important private law principle of party autonomy. Parties from third States, and even parties from EU States, would be better served if they knew that their choice, whether in favour of an EU court, or a third State court, would be respected.

In view of the Brussels I Regulation's silence on the question, a strict interpretation of its wording means that an EU Member State court has to take jurisdiction when it has jurisdiction on the basis of another ground, such as the domicile of the defendant or the place of performance of the contract. The forum clause in favour of a court outside the EU would be ignored. This does not at all seem equitable, or in the interests of international commerce. The Jenard report suggests that the Convention would not be applicable where a court outside the EU is appointed.[53] After the *Josi* judgment that

[52] Art 26(4) Hague Convention. This provision will also apply to subsequent versions of the Lugano Convention.

[53] Jenard Report; see also H Gaudemet-Tallon, "Les frontières extérieures de l'espace judiciaire européen: quelques repères" in A Borrás, A Bucher, AVM Struycken, M Verwilghen,

construction is probably no longer tenable: the domicile of the defendant in an EU Member State is sufficient to lead to the applicability of the EU civil jurisdiction rules.

The German *Bundesgerichtshof* (Federal Supreme Court) has also found that the Brussels Convention was inapplicable in a case where there was a forum clause in favour of a third State court. It considered forum clauses in favour of courts in Switzerland and Austria, before the existence of the Lugano Convention and before Austria became an EU Member State.[54] One can therefore see Switzerland and Austria as third States in these cases. The Court then considered the clauses on the basis of German domestic law. Interestingly, the provision is very similar to that of the Brussels I Regulation: it only deals with the prorogation of the German courts, and not with derogation.[55] Yet the German courts use that provision to recognise forum clauses in favour of foreign courts. That practice provides a good example for the interpretation of the Brussels I Regulation. It is in fact a reflexive effect on small scale.

In a note on the first of these judgments, Geimer wrote that the Brussels Convention should in fact have been applied. He stated that the *Bundesgerichtshof* should have posed a preliminary question to the European Court of Justice on the interaction between the domicile of the defendant in the EU and a forum clause in favour of a third State court.[56] And now, almost 20 years later, the European Court of Justice has given only limited guidance on the point.

The European Court of Justice has confirmed that clauses that refer to the courts of a third State, do not fall in the scope of the rule for forum clauses in the Brussels I Regulation.[57] In the *Coreck Maritime* case the forum clause was formulated in a general way, stating that the courts of the country where the carrier has his principal place of business will have jurisdiction. Upon an interpretation of the facts (which the European Court of Justice did not do, as that is not its function), jurisdiction might have lied with a Russian court in that case. The European Court of Justice stated that if a court in a third State was chosen, the EU Member State court that had been seised, must assess the validity of the clause according to the applicable law, found by its private international law rules.[58]

E Pluribus unum. Liber Amicorum Georges AL Droz (The Hague: Martinus Nijhoff Publishers, 1996) p 99.

[54] Judgments of 20 January 1986 (1986) *NJW* p 1438-1439 and of 4 November 1988 (1989) *NJW* p 1431-1432.

[55] §§ 38 & 40 *Zivilprozessordnung* (Code of Civil Procedure).

[56] (1986) *NJW* p 1439-1440.

[57] ECJ case C-387/98, judgment of 9 November 2000 *Coreck Maritime GmbH v Handelsveem BV and others* [2000] *ECR* I-9337, rec 19; See case notes by F Bernard-Fertier, (2001) *RCDIP* p 367-375; J-M Bischoff, (2001) *JDI* p 701-704; P Vlas, (2001) *Uitspraken in burgerlijke en strafzaken* no 599, p 4442-4445.

[58] At rec 19.

It is the silence of the Brussels I Regulation that has led authors to construe the theory of the reflexive effect, which would function in the same way as in cases where there is an exclusive basis of jurisdiction in a third State.

The Schlosser Report states that there is nothing in the Convention to prevent an EU court from declining jurisdiction.[59] This view has also been supported by F Schockweiler: he stated that if a court of a Member State is appointed by parties none of whom is domiciled in the EU, other courts in the EU, which may have jurisdiction under the provisions of the Regulation, may not exercise this jurisdiction until the appointed court has declined jurisdiction.[60] These statements are better than nothing, but do not go all the way. The report does not state how the declining of jurisdiction should take place. This brings us back to the reflexive effect, discussed above with regard to exclusive jurisdiction.[61]

How to derogate: on the basis of the Regulation or according to national rules

In the discussion of the reflexive effect with regard to exclusive jurisdiction, it has been pointed out that jurisdiction can be declined on the basis of an implicit clause in the Regulation itself, or on the basis of national rules for declining jurisdiction, such as *forum non conveniens*.[62] The preference for declining jurisdiction on the basis of national law, rather than a non-existent rule in the Regulation, has also been indicated. The main reason for this preference, is that it enables a coherent system in which one can easily find the applicable set of rules: the Brussels I Regulation, the Lugano Convention or domestic law.

Interestingly, the European Court of Justice has stated that the validity of a forum clause in favour of a third State must be evaluated according to the law of the forum, including the forum's conflict of law rules. In the *Coreck Maritime* case,[63] the forum clause stated: "*Any dispute arising under this Bill of Lading shall be decided in the country where the carrier has his principal place of business…*" Upon a construction of the facts, that could amount to a Russian court, but that was not completely clear. The European Court of Justice's referral to the national law is interesting and encouraging. The Court did not qualify the statement by concerns such as the domicile of the defendant in the EU. It clearly viewed the EU jurisdictional rules to be inapplicable in such a case. The Court said nothing explicitly of derogation of jurisdiction, but allowing the national courts to determine the validity of the clause does imply that the clause will be given effect.

[59] At para 176.
[60] F Schockweiler, "Jurisdiction Clauses" in Court of Justice of the European Communities, *op cit* (fn 5) p 119-128.
[61] See *supra*, p 2 *et seq.*
[62] See *supra*, p 2 *et seq.*
[63] ECJ case C-387/98, judgment of 9 November 2000, *Coreck Maritime GmbH v Handelsveem BV and others* [2000] *ECR* I-9337, rec 19; see also case notes referred to *supra*, fn 57.

The Oberlandesgericht (Regional Court of Appeal) of Bamberg also evaluated a forum clause in favour of a third State according to national German law.[64] In that case the plaintiff was domiciled in Switzerland and the defendant in Germany. Since the Lugano Convention had not yet entered into force between these States at the relevant time, Switzerland could be seen as a third State.

The English courts have a ready-made solution for declining jurisdiction, namely the doctrine of *forum non conveniens*. The doctrine has the effect that a court that has jurisdiction declines it in favour of another court that also has jurisdiction and that is better suited to hear the dispute.[65] The court's own jurisdiction may be based on its national rules or on the rules of the Brussels I Regulation. When considering whether or not to decline jurisdiction in favour of the other court, the English court will take various factors into account. An important factor is the existence of a forum clause in favour of that court.[66]

For the purposes of declining jurisdiction in favour of a third State in order to respect a forum clause, the doctrine of *forum non conveniens* provides a workable solution. Unfortunately the doctrine is not always known and/or well received in other States.[67] The use of this doctrine has come under strain since the judgment of the European Court of Justice in the *Owusu* case.[68] The facts of that case were such that the English courts had jurisdiction on the basis of the domicile of the defendant in England (Art 2 of the Brussels I Regulation). The competing forum, where the facts (contract and tort) took place, was Jamaica. There was no forum clause involved so that the judgment does not definitely rule out the use of *forum non conveniens* when there is a forum clause in favour of a third State court.

Let us now turn to the incidences where *forum non conveniens* has been used with the desired result. The case *The 'Nile Rapsody'* before the English Court of Appeal concerned a dispute between Hamed El Chiaty & Co, an Egyptian tourist company specialising in Nile cruises, and the Thomas Cook Group, an international holiday and travel company.[69] The contract contained a clear choice for Egyptian law. There was no written forum clause and there was a dispute between the parties as to whether or

[64] Judgment of 22 September 1988, (1990) *IPRax* p 105-108. See also P Grolimund *Drittstaatenproblematik des europäischen Zivilverfahrensrechts* (Tübingen: Mohr Siebeck, 2000) at p 66-67.
[65] For a more detailed discussion on *forum non conveniens*, see *infra*, Chapter 5, Part C, p 2 *et seq*.
[66] See *Baghlaf Al Zafer Factory Co v Pakistan National Shipping,* [1998] 2 Lloyd's Rep 229, CA at 235 and *Aratra Potato Co Ltd and Another v Egyptian Navigation Co*, *The El Amria* [1981] 2 Lloyds Rep 119 at 123.
[67] See H Gaudemet-Tallon, *op cit* (fn 20) p 57-58.
[68] ECJ case C-281/02, judgment of 1 March 2005 *Owusu v Jackson and others,* not yet reported in *ECR*, see http://www.curia.eu.int. For a more detailed discussion of this judgment, see *infra* Chapter 5 Part C, p 2 *et seq.*
[69] [1994] 1 Lloyd's Rep 382, CA.

not there had been an agreement at the stages of negotiation on the Egyptian courts. Hamed brought proceedings in London for breach of contract. Thomas Cook applied for a stay of the proceedings on the basis that there was an exclusive choice of court agreement in favour of the courts in Egypt.

The court accepted that there was an oral choice of court agreement. Thomas Cook was domiciled in England, so that the English courts would have had jurisdiction on the basis of the Brussels Convention (the domicile of the defendant) if one ignored the forum clause.

The Court of Appeal, like the Queen's Bench Division in first instance,[70] stayed the proceedings in favour of the courts in Egypt. The Court did not refer a preliminary question to the European Court of Justice, not because it found the situation absolutely clear, but because there had already been excessive delays in the case. It remains of interest that the Court of Appeal considered it correct to stay the action in favour of a third State court, even though it had jurisdiction on the basis of the Brussels Convention. The court used the English law doctrine of *forum non conveniens* to stay the proceedings. This is based on a discretion of the English judge to stay proceedings.[71] When there is a forum clause in favour of a foreign court, the English judge retains a discretion as to the staying of proceedings. However, the fact that there is a forum clause, based on the will of the parties, should carry considerable weight.

The English Court of Appeal reached a similar conclusion in *Baghlaf Al Zafer Factory Co v Pakistan National Shipping*.[72] In this case coils of steel were carried from Bilboa and damaged when they arrived in Damman. The bill of lading contained a jurisdiction clause in favour of the court of the principal place of business of the carrier. The ship owners had their principal place of business in Pakistan. The cargo owners instituted action in an English court. They argued in the first place that there had been an oral agreement in favour of the English courts. In the alternative they averred that the acceptance by the respondent's (ship owners') solicitors of the writ, conferred jurisdiction on the English courts according to domestic rules. The question was whether the proceedings should be stayed in favour of a Pakistani court. The argumentation was based solely on English law. Under English law, even if there is a forum clause in favour of a foreign court, an English court may hear the dispute under certain circumstances. Factors considered included the location of evidence, the applicable law, the countries with which the parties were (closely) connected, whether the defendants genuinely desired trial in the foreign court or were only seeking procedural advantages, and whether the plaintiffs would be prejudiced by having to sue

[70] [1992] 2 Lloyd's Rep 399 QBD.
[71] For more detail on the theory of *forum non conveniens*, see *infra*, Chapter 5, Part C, p 2 *et seq*.
[72] [1998] 2 Lloyd's Rep 229 CA.

in the foreign court for reasons such as enforcement, time bars or politics.[73] The English Court of Appeal stayed proceedings in favour of a Pakistani court.

These factors show the willingness of the English courts to respect forum clauses in favour of third State courts. This practice should be upheld rather than invalidated by the Brussels I Regulation. No mention was made in this case of the Brussels Convention and it seems from the facts that the court would not have had jurisdiction under the Convention. It would have had jurisdiction on the basis of the English rule of service of process. It seems that whatever the basis of jurisdiction, the court should be able to stay proceedings in this sense.

The judgment was subsequently overturned because of a time bar that applied in Pakistan and that could not be waived.[74] However, the relevant point remains that it is possible to stay proceedings in favour of a third State court appointed by a forum clause.

The French courts' solutions have been less coherent. The *Cour d'appel* (Court of Appeal) of Versailles refused to give effect to a forum clause in favour of the courts of Monaco.[75] It found that the Convention only regulated forum clauses in favour of the courts of Contracting States. Therefore there was no ground to derogate from the rules contained in Article 2 of the Convention. Gaudemet-Tallon has criticised this judgment, stating that Article 2 does not create a "privilege of jurisdiction" that cannot even be derogated from by a forum clause in favour of a third State court.[76]

On the other hand, the French *Cour de cassation* (Court of Cassation), Commercial division, had to consider the jurisdiction of the French courts in an action brought by a German company against a French company, situated in Paris. It was clear that the court had jurisdiction on the basis of Article 2 of the Brussels Convention (domicile of the defendant). However, there was a forum clause in favour of the commercial tribunal of Zurich. This was before the existence of the Lugano Convention, so that Switzerland must be regarded as a third State.[77] The French *Cour de cassation* declined jurisdiction, not on the basis of the Brussels Convention, but on the basis of French and Swiss national law. The rules in the two systems were the same on this point, so that the court did not have to choose between them.[78]

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[73] At 235.
[74] [2000] 1 Lloyd's Rep 1 CA.
[75] Judgment of 26 September 1991, published in (1992) *RCDIP* p 333-336, see also D Alexandres, *Encycl. Dalloz, Droit communautaire,* "Convention de Bruxelles (Compétence)" no 239. See also *supra*, Chapter 2, Part F, p 2, where I have discussed the other anomaly in this case, namely that the defendant is domiciled in a third State, while it had a branch in Nanterre, France.
[76] Case note by H Gaudemet-Tallon, (1992) *RCDIP* p 336-340.
[77] The Lugano Convention was only signed in 1988.
[78] Cour de cassation, 19 December 1978, published in (1979) *RCDIP* p 617-624, with case note by A Huet. The judgment has been approved by P Gothot and D Holleaux, *op cit* (fn 20) p 98.

According to which rules should validity be determined?

The validity of a forum clause in favour of a third State court cannot be determined according to the Brussels I Regulation. The jurisdiction of courts outside the EU is a matter that cannot be regulated by the Brussels I Regulation. Each state determines when it has jurisdiction and when not. However, the nature of the problem at hand is different: according to which rules must a court determine the validity of a clause *depriving* it of jurisdiction. That matter seems to be removed from the sphere of application, but also the sphere of interest, of the Brussels I Regulation. An important factor is the later recognition and enforcement of a resulting judgment. The recognition and enforcement of a judgment from a third State will not fall under the Brussels I Regulation.

In the EU the European Contracts Convention contain the conflict of law rules for contracts.[79] The rules of the Convention are of universal application, meaning that they always apply, irrespective of the law that they point to. The Convention in fact unified the conflict of law rules of the EU. It might come as no surprise that the validity of forum clauses is excluded from the scope of the Convention.[80] In this way, of course, the Convention does not clash with the determination for validity of forum clauses in favour of EU courts as determined by the Brussels I Regulation. However, it leaves the gap of the adjudication of validity of forum clauses in favour of third State courts, in the event that a party brings proceedings, in contravention of the clause, to an EU court. The non-existence of a rule, while the EU has unified conflict of law rules in the field of contracts, indicates yet again that the drafters of EU legislation seem to have forgotten the outside world.

The validity would accordingly have to be investigated with reference to national law. The European Court of Justice has stated (*obiter*) that the validity of a clause pointing to a third State should indeed be adjudicated by national law. It indicated for this purpose to the national law of the forum, including its conflict of law rules.[81] Although the European Court of Justice's reference to national law should be appreciated, it is still unclear exactly what the appropriate conflict of law rule is in this case. The validity could be determined according to several national laws. Four possibilities deserve our attention: the law of the forum, the law of the state of the prorogated court, the law of the state of the derogated court, and the law applicable to the agreement.

[79] Convention on the law applicable to contractual obligations (Rome, 1980), consolidated version published in *OJ C* 27, 26 January 1998, p 34-46. Note that this convention is in force in the 15 old EU Member States, but not yet in the 10 new ones. The European Commission is currently working on a regulation that would replace this Convention.
[80] Art 1(2)(d).
[81] ECJ case C-387/98, judgment of 9 November 2000 *Coreck Maritime GmbH v Handelsveem BV and others* [2000] *ECR* I-9337, rec 19.

The forum law does not seem the best solution. It is not conducive to legal certainty as the forum could be anywhere. The parties at the time of contracting have no possibility of knowing where the subsequent plaintiff will choose to bring proceedings (in breach of the forum clause). At the same time, the forum court may be a court that an opportunistic plaintiff chose, perhaps because of its reputation of the strict interpretation of forum clauses. It may have no connection with the dispute.

The law of the prorogated court, on the other hand, provides a clear and predictable answer. If the parties had chosen a court, they can have no objection to the validity of the clause being subject to the law of that court. The prorogated court will probably in any event use that law, when the case becomes before it and it has to determine whether the prorogation was valid. Therefore, if an EU court uses the same law to adjudicate the validity of the clause, the solution will be uniform and the chances that parties are left with a negative accumulation so that no court seems to have jurisdiction, will be reduced. This seems the most equitable solution, even though the next possibility, that of the law of the derogated court, cannot be totally discarded. It is also the solution adopted by the Hague Convention on Choice of Court Agreements: the chosen court, the seised but not chosen court, and the recognising or enforcing court have to apply the law of the chosen court if they evaluate validity.[82]

Determining validity according to the law of the derogated court has one serious advantage, namely with regard to recognition and enforcement. The derogated court would often be where the defendant is domiciled, of where certain of the facts took place. Therefore, chances are that there are assets in within the territory of that State and that enforcement would have to be sought there. One should attempt to avoid the risk of that court subsequently refusing recognition or enforcement, because according to its own law the forum clause was invalid and it should have adjudicated the case. The German *Bundesgerichtshof* (Federal Supreme Court) has also chosen for this solution, although it found that the Brussels Convention was not applicable in the first place. It found that the German provision on prorogation of jurisdiction could also be used for derogation, if the German courts would have had jurisdiction if there were no forum clause.[83] In a later, similar, case, the *Bundesgerichtshof* applied German law to evaluate the derogation of the German courts, but also considered the law of the prorogated court.[84] The disadvantage of this solution is that there might be more than one derogated court; one would have to consider a number of legal systems in order to find all the courts that might have jurisdiction in absence of a forum clause.

The law chosen by the parties is plausible because it respects the notion of party autonomy, which is important in contract law. However, there is an inequality of result between contracts containing a choice of law clause and contracts that do not. The

[82] Arts 5(1), 6(a) & 9(a) Hague Convention.
[83] Judgment of 20 January 1986 (1986) *NJW* 1438-1439.
[84] Judgment of 4 November 1988 (1989) *NJW* 1431-1432. In this case the prorogate court was Austria, but before it became Member of the EU, so that it can be seen as a third State.

solution might also pose problems if the validity of the entire agreement is in dispute. At the same time, it does not have the other practical advantages as the two above-mentioned solutions.[85]

When not to derogate

Even in the internal hierarchy of the Brussels I Regulation, there are rules that deserve respect, even despite a forum clause. If the Brussels system does not even permit forum clauses in favour of EU Member State courts, forum clauses in favour of third State courts will probably not be respected in the same situations. When an EU Member State court is seised in contravention of the forum clause, the court seised will not take account of the forum clause and take the case in any event.

The two clear cases where forum clauses in favour of third State courts will probably not be respected, are exclusive jurisdiction and protective jurisdiction in the EU.[86] It seems that a high level of respect is required for exclusive bases of jurisdiction so that one cannot circumvent them by appointing a court in a third State. Moreover, if there is an exclusive basis of jurisdiction for one of the EU Member State courts, that means that there is a real link between the dispute and the EU court. Forum clauses binding weaker parties, *ie* insured parties, consumers and employees (Articles 13, 17, 21) and requiring them to go to third State courts, will probably not be tolerated either. These parties need protection and are sometimes more disadvantaged by a clause attributing the courts of a third State than those of another EU Member State[87] – even if the difference is only geographical.

If a judgment based on the forum clause results from a third State court in these situations, recognition and enforcement in the EU might be difficult. The EU Member States will probably want to ensure the protection the Brussels I Regulation grants and would therefore not be favourable of judgments obtained from third States when one of these bases of jurisdiction lay in the EU.

[85] H Gaudemet-Tallon, in a case note to *Cour d'appel* (Court of Appeal) of Versailles of 26 September 1991 (1992) *RCDIP* p 336-340, states that the validity should be determined according to the law of the chosen or derogated court, and in the last instance according to the chosen law.

[86] See H Gaudemet-Tallon, "Les frontières extérieures de l'espace judiciaire européen: quelques repères" in A Borrás, A Bucher, AVM Struycken, M Verwilghen, *Liber Amicorum Georges AL Droz*, *op cit* (fn 53) p 99-100.

[87] H Gaudemet-Tallon, "Les frontières extérieures de l'espace judiciaire européen: quelques repères" in A Borrás, A Bucher, AVM Struycken, M Verwilghen, *Liber Amicorum Georges AL Droz*, *op cit* (fn 53) p 100.

8. Further application of the forum clause if parties domiciled in a third State

It often happens in the domain of maritime law that bills of lading are passed from one party to another, especially where goods are first transported by sea and then by rail or road by a different party. It is conceivable that some of these parties are not EU domiciliaries. If the two initial parties were EU domiciliaries, the forum clause will be governed by the Brussels I Regulation.

In the *Tilly Russ* case the third party, domiciled in Belgium, tried to avoid the forum clause by suing in Belgium while the courts of Hamburg were appointed in the original contract.[88] The European Court of Justice nevertheless held that that party was bound by the forum clause if he succeeded in the rights and obligations of the original contracting party. Gaudemet-Tallon supports this case law, stating that it is in line with contract law in general that contractual provisions are binding not only on the parties to the contract but also to third parties who have particularly close links to the contract.[89]

The case *Dresser v Falcongate*[90] concerned the carriage of goods by the defendants between the places of business of the plaintiffs in Germany and England. Falcongate sub-contracted with Norfolk for the transport by sea from Scheveningen (The Netherlands) to Great Yarmouth (United Kingdom). The bill of lading contained a forum clause in favour of the court in Rotterdam, The Netherlands. The goods were lost at sea and the plaintiffs instituted an action in England against all the carriers. The question was whether the forum clause prevented them from suing in England even though Norfolk was domiciled in England so that Article 2 of the Brussels Convention would grant jurisdiction to the English court. The other defendant, a sister company of Norfolk, could then be sued in England on the basis of the domicile of Norfolk (Art 6 Brussels Convention). The judge at first instance refused the stay and the defendants appealed. The Court of Appeal found that the plaintiffs were not bound as against Norfolk by the jurisdiction clause since there had not been a transfer of rights in the sense of the *Tilly Russ* judgment.[91] Bingham LJ expressed his regret at this state of the law (regarding the choice of court provision of the Brussels Convention) since he thought that a pragmatic legal recognition of the commercial reality would have been better.[92]

[88] ECJ case 71/83, judgment of 19 June 1984, *Partenreederei Ms Tilly Russ and Ernest Russ v NV Haven- & Vervoerbedrijf Nova and NV Goeminne Hout* [1984] *ECR* 2417.
[89] H Gaudemet-Tallon, "Jurisdiction Clauses" in Court of Justice of the European Communities, *op cit* (fn 5) p 129-140 at p 132-133.
[90] [1992] QB 502; [1991] 2 Lloyd's Rep 557.
[91] at 511; see ECJ case 71/83, judgment of 19 June 1984 *Partenreederei ms. Tilly Russ and Ernest Russ v NV Haven- & Vervoerbedrijf Nova and NV Goeminne Hout* [1984] *ECR* 2417.
[92] at 511.

In the *Castelletti* case[93] 22 bills of lading were issued in respect of goods from several Argentine shippers that were put on board a vessel operated by Lauritzen. The vessel was bound for Savona, Italy. There the goods were to be delivered to Castelletti. Problems arose when unloading the goods and Castelletti brought proceedings against Trumpy, the agent for the vessel and for the carrier. Both Castelletti and Trumpy were domiciled in Italy. When considering the forum clause on the back of the bill of lading, the European Court of Justice found that the validity had to be determined as between the original contracting parties.[94] In this case one of the original contracting parties was from a third State (Argentina). It was in the end not involved in the dispute.

This case law might affect parties from third States. If a party from an EU State and a party from a third State conclude a contract containing a jurisdiction clause in favour of a court in the EU, the clause will be adjudicated according to Article 23 of the Regulation. If now the EU party is succeeded by a non-EU party, the reason for the application of the Regulation as to the parties in the litigation, no longer exists. This might leave the door open for abuse. A party wanting the regime of the Brussels I Regulation to apply to his contract would be able to find a party domiciled in the EU and add his name to the contract, just to make sure that Article 23 of the Regulation will apply. Furthermore, parties that have nothing to do with the European judicial area, would be subjected to forum clauses for EU Member State courts, the validity of which will be evaluated according to the Brussels I Regulation. Succeeding in the rights of parties domiciled in the EU requires caution.

9. No link with the European judicial area

In the case where a party from an EU Member State and a party from a third State agree on a forum clause in favour of the EU Member State where the first party is domiciled, the two conditions for the application of Article 23 are fulfilled. Is it, however, correct and equitable to apply the Regulation to test the validity of the clause instead of national law of the EU Member State in question?

It is relevant here to consider the expectations of the parties. This situation came before the *Oberlandesgericht* (District Court of Appeal) of Munich in 1989.[95] A German and a Canadian party (from British Columbia) concluded various agreements. The German order confirmations contained forum clauses in favour of a German court on their reverse sides. After a dispute arose, the German seller sued the Canadian buyer before the *Landgericht* (Regional court) Memmingen, Germany.

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[93] ECJ case C-159/97, judgment of 16 March 1999 *Castelletti Spedizioni Internazionali SpA v Hugo Trumpy* [1999] *ECR* I-1597.
[94] Rec 42.
[95] *Oberlandesgericht* Munich, 28 September 1989 (1991) *IPRax* p 46-51. See also ER Sachpekidou, "Substantive requirements and effects of jurisdiction agreements" in R Fentiman, A Nuyts, H Tagaras & N Watté, *The European Judicial Area in Civil and Commercial Matters* (Brussels: Bruylant, 1999); P Grolimund, *op cit* (fn 64) at p 51-55.

The case reached the *Oberlandesgericht* of Munich, which considered whether the validity of the forum clause had to be determined according to the Brussels Convention (1968 version) or according to the German rules on international jurisdiction. The court took note of the wording of that provision, which stated that one of the parties had to be domiciled in an EU Member State and a court in a Contracting State had to be appointed for the provision to be applicable. It stated that different Contracting States should be concerned: the domicile of one of the parties had to be in a different EU Member State than the chosen court or the chosen court and the derogated court had to be situated in different EU Member States. In the case before it, no other Contracting State than Germany was concerned. There was a German party, but no other Contracting State party. The derogated court was in Canada, and therefore had nothing to do with the Brussels Convention, which had been created for Europe.

The Court also considered the purpose of the Brussels Convention. It stated that if one considered the origin and the system, the Convention did not create an all-encompassing set of international rules on jurisdiction. It envisaged the legal protection of parties from the EU Member States and the facilitation of recognition and enforcement of judgments between these States. None of these ideals were at stake in the case before it. The protection of the Canadian party was not the interest of the Brussels Convention. When only the relationship between a Contracting State and a third State was at stake, the court considered that the national rules should apply.

Therefore the court applied its national law.[96] According to German national law the forum clause was valid while it might not have been valid under the requirements of the Brussels Convention. In this case, it was the Canadian party who wanted to get rid of the clause. However, the specific interests of the third State party in this case aside, the legal point remains interesting. The fact that the case had no link with the European judicial area was given decisive importance. However, on a strict reading of the provision in the Brussels I Regulation on forum clauses, that rule should have been held to be applicable: one party was domiciled in the EU and an EU Member State court was chosen.

After the *Owusu* judgment, however, that construction might no longer be tenable.[97] The European Court of Justice stated in that judgment that the Brussels Convention applies when the case is international, *ie* more than one State is involved, even if that is one EU Member State and one third State. In the *Owusu* case the parties were both domiciled in England, but some of the co-defendants were domiciled in Jamaica. According to the European Court of Justice that case fell under the Brussels

[96] B Piltz, "Die Zuständigkeitsordnung nach dem EWG-Gerichtsstands- und Vollstreckungsübereinkommen" (1979) *NJW* p 1071-1075 at p; 1072 supported such interpretation of the Brussels Convention.

[97] ECJ case C-281/02, judgment of 1 March 2005 *Owusu v Jackson and others,* not yet reported in *ECR*, see http://www.curia.eu.int.

Convention. Although the case did not deal with a forum clause, that determination of the sphere of application of the Brussels Convention will probably be the same for forum clauses. That means that if a party domiciled in a third State and a party domiciled in the EU conclude a forum clause in favour of the courts of the EU court of the second party's domicile, that clause will fall under the Brussels I Regulation, even though the European judicial area is not concerned.

The case of the *Oberlandesgericht* of Munich has nevertheless been followed in Germany by the *Bundesgerichtshof* (Federal Supreme Court)[98] and by the *Oberlandesgericht* (District Court of Appeal) of Dusseldorf.[99] In these two cases, however, the application of the provision of the Brussels Convention and the rule in German domestic law, would have led to the same result.

The English Court of Appeal came to a similar conclusion than the *Oberlandesgericht* Munich upon similar facts, albeit that the procedural history of the case was more complex. In the case *Eli Lilly and Company v Novo Nordisk A/S*[100] a dispute arose concerning patent infringement. Eli Lilly was an Indiana company while Novo Nordisk was from Denmark. The parties had concluded licence agreements regarding the use of Nordisk's patents on certain processes to synthesise human growth hormones (called 'enzyme cleavage'). The agreement at issue contained a forum clause in favour of the courts of London. The forum clause complied with the rules of validity put forward by the Brussels Convention. Novo Nordisk subsequently brought action against *ia* Eli Lilly in New Jersey for the infringement of its patents. Nine months later Eli Lilly issued a writ in England for the rectification of the licence agreement between the parties.

One of the parties was domiciled in an EU Member State and a court in another EU Member State was appointed. It seems plainly that the Brussels Convention should have been applied to determine the validity of the forum clause. However, the court seems to have been confused by the other issue in this case, namely that of *lis pendens.* On the problem of the parallel proceedings, the Brussels Convention could not have been applicable, because one of the courts was in the EU while the other was outside the EU. For the *lis pendens* rule of the Brussels Convention to come into play, both courts where proceedings are pending, have to be in EU Member States.[101] Therefore the court rightly found that the Brussels Convention could not be used to solve the problem of the parallel proceedings. However, the court then deduced that the Brussels Convention was not applicable at all, instead of distinguishing the issue of the forum clause from that of the parallel proceedings. It seems that the court should

[98] Judgment of 14 November 1991 (1992) *IPRax* p 377-380. In this case the defendant was domiciled in Greece, but since at that time Greece was not yet Party to the Brussels Convention, Greece can be seen as a third State.
[99] Judgment of 2 October 1997 (1999) *IPRax* p 38-41.
[100] [2000] 1 L Pr 73.
[101] See *infra*, Chapter 5, Part A, p 2 *et seq.*

have applied the Brussels Convention to the forum clause, even if it could not apply the Convention to the different question of the parallel proceedings.

The English Court of Appeal did assume jurisdiction, but not on the basis of the Brussels Convention. It considered the forum clause and national rules of jurisdiction. Applying national law, the Court considered the causes of action of the two cases to be different. Therefore it did not grant a stay on the basis of the earlier New Jersey proceedings.

These cases indicate the difficult interaction between the Brussels Convention and national rules on jurisdiction when a third State is concerned. Not every element of the case can be considered in the same light. It is possible that the Brussels Convention seeks to be applicable to the basis of jurisdiction, but not to the parallel proceedings issue.

However, in the most cases the wording of the provision is strictly followed.[102] As soon as one party is from an EU Member State and an EU court is appointed, the scheme of the Brussels I Regulation is triggered. Whether or not the problem of parallel proceedings falls under national law should not influence that conclusion on the application of the Brussels Convention on forum clauses.

10. Choice of forum under the Brussels II*bis* Regulation

Prorogation of jurisdiction under the Brussels II*bis* Regulation exists only in cases of parental responsibility and not for divorce, legal separation and marriage annulment. It differs from the rule in the Brussels I Regulation; the choice is limited and the choice must not necessarily be in writing, but express or unequivocal.

There is a possibility that parties may choose to bring proceedings regarding parental responsibility in a court with which the child has a substantial connection. The Regulation gives examples of such substantial connection: the habitual residence of the holders of parental responsibility or the nationality of the child. These factors, as well as others that might indicate a substantial connection, are elaborations of the scope of application of the Brussels II*bis* Regulation.

[102] See, for instance, *Handelsgericht* (Commercial Court) of Zurich, judgment of 9 January 1996, (1997) *SZIER* p 373-384 and case note by P Volken at p 384-386. The forum clause between a party domiciled in Switzerland and one domiciled in Belgium appointed the Swiss courts. The Lugano Convention had at the relevant time not yet entered into force in Belgium, so that Belgium could be seen as a third State. Therefore, there was only one Contracting State of the Lugano Convention involved. The court applied the Lugano Convention as basis for its jurisdiction. See also P Grolimund, *op cit* (fn 95) p 53-54.

11. Conclusion

Forum clauses stand on their own in the scheme of the Brussels I Regulation. They have separate rules regarding their scope. Even if the defendant is domiciled outside the EU, he can be held to a forum clause in favour of an EU court. Whether, when and how the Brussels I Regulation allows for the derogation of EU jurisdiction, is unclear. Parties from third States need to be aware of forum clauses and their validity.

Chapter 5: Fourth cornerstone: procedural rules related to jurisdiction and their scope

Lis pendens, forum non conveniens , related actions and anti-suit injunctions

Part A: General

1. Introduction

In international litigation a plaintiff will, if the possibility exists, seek out a court that he believes is the most favourable to his cause. A defendant will, on the other hand, if the possibility exists, try to avoid appearing in a court that he believes is unfavourable to his cause, and seek to displace the case to a court which he perceives as more advantageous to his interests.

This Chapter deals with the techniques a defendant can use to avoid a hearing in a court chosen by the plaintiff. The main means are *lis pendens, forum non conveniens* and the anti-suit injunction. Rules relating to parallel proceedings and related actions are also relevant in the consideration of a stay of proceedings.

As it is an expression of sovereignty, every State determines its own jurisdiction. This unilateral approach of course leads to clashes - conflicts of procedures.[1] There is no guarantee that there will be only one court with jurisdiction to hear a dispute. Different States' courts having jurisdiction for a single dispute may lead to parallel litigation: the same action is pending in different courts. If both cases are pursued to the end, there might be conflicting judgments, an eventuality that causes recognition and enforcement problems.

One way of dealing with the problem is through a rule of priority. On the other hand, even if there are no parallel procedures, a defendant might argue that the court which the plaintiff elected is not the most appropriate to hear the case and that another court should hear it. Some legal systems have ways of dealing with such arguments, while others ignore it, sticking to the unilateral approach. There is also a more aggressive unilateral way of dealing with parallel procedures, namely anti-suit injunctions, preventing the parties from instituting or continuing proceedings in courts of foreign States. The Brussels I and II*bis* Regulations contain rules on *lis pendens* and related actions, but not on *forum non conveniens* and anti-suit injunctions. Whether these two rules are compatible with the Regulations will be discussed in this Chapter.

[1] See P Wautelet, *Les conflits de procédures. Etude de droit international privé comparé* (unpublished doctoral thesis, Katholieke Universiteit Leuven, 2002).

In a perfect world, there is a perfect combination between the strict and predictable rule of *lis pendens*[2] and the discretion-based *forum non conveniens*.[3] Such perfect rule was sought by the negotiators of the Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters. The general rule of *lis pendens* seemed acceptable, but the extent of this rule in the framework of the Convention was unclear: some thought that it should only apply when jurisdiction is based on one of the grounds of the white list. Others were of the opinion that it might also be applied if jurisdiction was based on a national rule which is consistent with the white list.

Concerning negative declarations, the *lis pendens* rule was suggested to be reversed: it would not be the court asked first for a negative declaration, but the court second seised of the true action that will have the ability to hear the case.[4] This would be a welcome limitation of the blind *lis pendens* rule, since it would take into account that the true defendant should not be permitted to pre-empt and trump the plaintiff's election of a forum. It would also counter the race to the court which the *lis pendens* rule sometimes encourages. A natural defendant would now have to wait until he/she is sued and would lose interest to go to the court first.

The fewer grounds of jurisdiction were excluded and thus the more exorbitant national grounds of jurisdiction came in the "grey zone", the more important a ground for declining jurisdiction would become: Anglo-American legal systems, which accept jurisdiction on the bases of seizure of property, arrest or the fact of doing business in a State, temper their wide reach by policy considerations in the form of the doctrine of *forum non conveniens*.

On the other hand, the *forum non conveniens* rule is difficult because it is discretion-orientated. The doctrine often requires a glance into the alternative forum. This includes the concerns of a fair trial in the foreign country,[5] but goes further. In *Lake v Richardson-Merrell, Inc*[6] the Court did not dismiss the case for *forum non conveniens* because under Quebec law the action would probably have been dismissed on the ground of prescription and the defendant could not waive this defence.[7] Making a policy

[2] Art 21 of the 2001-text.
[3] Art 22 of the 2001-text.
[4] The anti-suit injunction has been discussed *supra*, Chapter 5, Part E, p 2 *et seq*. See also AF Lowenfeld, "Forum Shopping, Anti-Suit Injunctions, Negative Declarations, and Related Tools of International Litigation", (1997) *Am J Int L* p 314-324; J Bomhoff, "Het negatief declaratoir in de EEX-Verordening" (2004) *NIPR* p 1-8.
[5] *Canadian Overseas Ores, Limited, v Compania,de Acero Del Pacifico SA*, 528 FSupp 1337 (DCNY1982) at 1342-1243.
[6] 538 F Supp262 (DC Ohio 1982).
[7] At 270; Battisti CJ stated, at 266-267,: "*The private factors, which involve the 'advantages and obstacles' to a fair trial, include: the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility of a judgment if one is obtained. In weighing these factors, the court should consider whether the plaintiff chose an inconvenient forum to vex or*

consideration while taking into account the alternative that the parties are faced with, is a difficult mental exercise for a judge that is used to clear jurisdictional rules.[8]

The rule of *lis pendens* of the Draft Convention on Jurisdiction and Foreign Judgments allowed another exception: if it is clearly inappropriate to exercise jurisdiction, a court first seised might suspend proceedings. The court would not be able to do so of its own motion, but there would have to be an application by one of the parties. The possibility would not be open if jurisdiction were based on an exclusive ground, on a valid choice of court agreement, a jurisdictional basis that gave special protection to a weaker party, or a national basis of jurisdiction that is inconsistent with the white list. In considering the declining, a court might take into account inconvenience to the parties, the nature and location of evidence and witnesses, limitations and prescription periods and possible recognition and enforcement.

A good compromise, it seems, but there was not total consensus on the extent to which *forum non conveniens* should be permitted under the Convention and under national law.

In this Chapter, after briefly discussing the nature of the rules, the *lis pendens* rule as in the Brussels I Regulation will receive attention. Thereafter the English doctrine of *forum non conveniens* will be discussed before turning back to the Brussels I Regulation and its rule on related actions. The reason for this order is that the discussion of related actions, especially when referring to English case law, makes more sense when comparing it with *forum non conveniens*. In the last instance the anti-suit injunction will get its turn.

2. Nature of the rules

The rules discussed in this Chapter are difficult to classify.[9] On the one hand one might argue that they are jurisdictional rules; on the other hand one might have the view that they are some type of rules of civil procedure other than jurisdictional rules. The distinction is important for a determination of the scope of the rules, the question that

harass the defendant 'by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy.'... In addition, the court must weigh the following factors of public interest: 'administrative difficulties' of hearing litigation in 'congested centers' rather than at 'its origin'; the imposition of jury duty on people in a community with no relation to the litigation; the 'local interest in having localized controversies decided at home;' and, in diversity cases, the choice of law to be applied in the case." See also P Hay, RJ Weintraub & PJ Borchers, *Conflict of Laws Cases and Materials* (11th edn, New York: Foundation Press, 2000); p 181.

[8] See A Philip in AF Lowenfeld & LJ Silberman (eds), *The Hague Convention on Jurisdiction and Judgments* (USA: Juris Publishing, 2001) at p 91-95 pleading against the inclusion of the *forum non conveniens* rule in the Hague Convention; in response, JL Siqueiros pleaded in favour of the rule (at 95-96); see also A Philip, "*Lis pendens* and *forum non conveniens*", in the same book, at A-55-A-60.

[9] See A Nuyts, *L'exception de forum non conveniens. Etude de droit international privé comparé* (Brussels: Bruylant & Paris: LGDJ, 2003) p 241-243.

concerns third States. Therefore a brief analysis of the difference between jurisdiction rules and other procedural rules will follow.

Jurisdictional rules make a specific court competent to hear a case on the basis of a certain connection, such as the domicile of the defendant. Rules on *lis pendens*, *forum non conveniens*, related actions and anti-suit injunctions do not grant jurisdiction. They can only be seen as jurisdictional rules in the sense that they can take jurisdiction away.

The EU civil jurisdiction rules apply according to three basic principles, as has been pointed out in the previous Chapters:

i) the domicile of the defendant: if he/she is domiciled in the EU, the Regulation is applicable (for the Brussels II*bis* Regulation the relevant criteria are habitual residence and nationality and for the Insolvency Regulation it is the centre of the debtor's main interests;[10]
ii) exclusive jurisdiction: if a ground for exclusive jurisdiction is situated in the EU, the Brussels I Regulation is applicable;[11]
iii) forum clauses: if two parties, one of whom is domiciled in the EU, choose a court in the EU, the Brussels I Regulation is applicable.[12]

The European Court of Justice has distinguished jurisdictional rules (contained in the Regulations) from procedure (regulated by national law).[13] Rules of civil procedure determine elements of the process, but do not influence jurisdiction as such. Typical examples are prescription, time bars and the ways of introducing evidence. The European Court of Justice has found on several occasions that the purpose of the Brussels Convention was not to unify procedural rules in the EU Member States; it only established common rules of jurisdiction and facilitated the recognition and enforcement of judgments.[14] However, the European Court of Justice has also found that national rules of civil procedure could not be permitted to impair the functioning of the EU rules on civil jurisdiction.[15] Neither should they convey disloyalty or mistrust

[10] See *supra*, Chapter 2, p 2 *et seq*.
[11] See *supra*, Chapter 3, p 2 *et seq.*
[12] See *supra*, Chapter 4, p 2 *et seq.*
[13] See ECJ case 365/88, *Kongress Agentur Hagen GmbH v Zeehaghe BV*, judgment of 15 May 1990 [1990] *ECR* I-1845, rec 17, where the Court stated: "*It should be stressed that the object of the Convention is not to unify procedural rules but to determine which court has jurisdiction in disputes relating to civil and commercial matters in intra-Community relations and to facilitate the enforcement of judgments*."
[14] See ECJ case C-365/88, *Kongress Agentur Hagen GmbH v Zeehaghe BV*, [1990] *ECR* I-1845, Rec 17-19. See also ECJ cases 148/84, *Deutsche Genossenschaftsbank v SA Brasserie du Pêcheur* [1985] *ECR* 1981 and 145/86, *Hoffmann v Krieg* [1988] *ECR* 645 on the distinction between Convention rules and national rules in the context of enforcement. See also AR Schwartz, "In Re Harrods Ltd: The Brussels Convention and the Proper Application of Forum Non Conveniens to Non-Contracting States (1991-92) *Fordham Int LJ* p 174-206 at p 200, using that case as analogy to *Re Harrods*.
[15] See ECJ case C-365/88, *Kongress Agentur Hagen GmbH v Zeehaghe BV*, [1990] *ECR* I-1845, rec 20.

between the courts of the EU Member States. Therefore, even though not regulated, these rules do influence the functioning of the rules of jurisdiction.

These concerns of the good functioning of the EU's rules on civil jurisdiction, loyalty and trust indicate the hybrid nature of the rules on *lis pendens*, *forum non conveniens*, related actions and anti-suit injunctions: they cannot be viewed as pure procedural rules. Their impact on jurisdiction is inevitable.[16]

The rules on *lis pendens* and on related actions are in the jurisdiction chapter of the Brussels I Regulation.[17] However, the European Court of Justice has indicated, at least implicitly, that these rules are not entirely jurisdictional, in any case not for determining when they apply and when not. In *Overseas Union Insurance v New Hampshire Insurance*[18] the European Court of Justice found that the provision on *lis pendens* was applicable whenever two courts of EU Member States were involved. The bases of jurisdiction were irrelevant. So too were the domiciles of the parties. This determination of applicability brings the rules of *lis pendens* and related actions in line with the rules on recognition and enforcement of judgments.[19] In order to determine the reach of the EU rules, one no longer looks at the domicile of the parties, the existence of an exclusive basis of jurisdiction or a forum clause. Instead, one refers to whether the courts concerned are situated in the EU or not. The scope of the rules on *forum non conveniens* and anti-suit injunctions seem different. That will be regarded later in this Chapter.[20]

That supports the argument that the rules under discussion are not purely jurisdictional in nature. They are *sui generis* rules very narrowly attached to jurisdiction. They have been called procedural rules related to jurisdiction.

[16] See in this sense also R Geimer, "The Right to Access to the Courts under the Brussels Convention" in Court of Justice on the European Communities, *Civil Jurisdiction and Judgments in Europe* (London: Butterworths, 1992) p 39; P North & JJ Fawcett, *Cheshire and North's Private International Law* (13th edn, London: Butterworths, 1999) p 266.
[17] The rule is mirrored in the title on recognition and enforcement: where two irreconcilable judgments on the same issue, involving the same parties, do exist, recognition and enforcement of the second judgment may be refused; Art 34(3) & (4) Brussels I Regulation.
[18] ECJ case C-351/89, judgment of 27 June 1991 [1991] *ECR* 3317.
[19] See also A Briggs & P Rees, *Civil Jurisdiction and Judgments* (2nd edn, London: LLP, 2002) stating at p 90: "*One can classify lis pendens and related actions as preliminary part of the law on recognition and enforcement and not as part of the jurisdictional rules*."
[20] See *infra*, respectively p 2 *et seq* and p 2 *et seq*.

Part B: *Lis pendens*

Article 27 of the Brussels I Regulation:

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.*

Article 29 of the Brussels I Regulation:

Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.

Article 19 of the Brussels II*bis* Regulation

1. *Where proceedings relating to divorce, legal separation or marriage annulment between the same parties are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.*
2. *Where proceedings relating to parental responsibility relating to the same child and involving the same cause of action are brought before courts of different Member States , the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.*
3. *Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court.*

In that case, the party who brought the relevant action before the court second seised may bring that action before the court first seised.

1. Introduction

In this discussion of the *lis pendens* rule, the concept will first be defined in general terms, then for purposes of the Brussels I, Brussels II*bis* and Insolvency Regulations and in national law. The Regulations do not give any clarity as to how parallel proceedings between EU Member States and third States should be treated. Various influences on third States will be evaluated: parties from third States, jurisdiction based on other conventions and *lis pendens* with respect to third State courts. The relationship between the rule and exclusive bases of jurisdiction or forum clauses are also of interest.

2. General definition of the *lis pendens* rule in the EU instruments and in national law

It sometimes happens that the same proceedings between the same parties are pending in more than one court. A defendant may then raise the plea that the second court should not hear the case. It is based on the principle that the same thing should not be demanded more than once as this would amount to harassment of the defendant by causing him unnecessary litigation and extra costs.

The lis pendens rule in the Brussels I Regulation

The Brussels I and II*bis* Regulations' solutions to this occurrence encompass a strict rule of priority;[21] the court first seised, may try the case. The court second seised must stay the proceedings until the court first seised has found that it has jurisdiction. If the first court so finds, the second court has to declare itself incompetent and let go of the matter. Only when the court first seised finds that it has no jurisdiction, can the court second seised continue with the case. There is no discretion in the application of the rule, as in some national systems.

Application of the rule requires the presence of three elements:

a) the same parties;[22]
b) the same dispute;
c) the same cause of action.

The *lis pendens* rule as in the Brussels I Regulation is a common solution only used in bilateral or multilateral treaties. It already existed as early as 1899, in conventions between European States.[23] It is a kind of politeness that says: "You first; I am sure that you can do the job as well as I can." This indicates an essential underlying precept of the rule: it does not really matter which court hears the case, the solution should be more or less the same. Such trust in partner legal systems is essential for the proper

[21] Art 27 Brussels I Regulation. P Wautelet, *op cit* (fn 1) examines different ways of dealing with parallel procedures and at the end pleads for a less rigid priority rule. This means that the priority rule, as contained in the Brussels I Regulation, should be tempered with an exception of the *forum non conveniens* type: if the second court is clearly better placed to hear the case, it should be allowed to do so. The *lis pendens* rule of the Brussels regime being strict, the Courts of the EU Member States seem to interpret the rule restrictively: see H Born, M Fallon & J-L Van Boxstael, *Droit judiciaire. Chronique de jurisprudence 1991-1998* (Brussels: Larcier, 2001) p 418.

[22] The European Court of Justice had found that the plaintiff in the one action may be the defendant in the other: ECJ case C-406/92, judgment of 6 December 1994, *The Owners of the cargo lately laden on board the ship 'Tatry' v The Owners of the ship 'Maciej Rataj'* [1994] *ECR* I-5439 rec 31.

[23] See, for example the bilateral conventions between Belgium and France on Jurisdiction and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments (Paris, 1899) Art 4(1); between Belgium and the Netherlands on Jurisdiction, Bankruptcy, and the Validity an Enforcement of Judgments, Arbitration Awards and Authentic Instruments (Brussels, 1925) Art 6(1).

functioning of the European judicial area. However, it is hard to genuinely believe that the result will be the same in all cases.

The underlying notion of the rule is that conflicting judgments should be prevented as these might pose a difficulty for recognition and enforcement. Therefore, the European Court of Justice has ruled on several occasions that the provision had to be interpreted broadly.[24]

The *lis pendens* rule in Brussels II*bis* Regulation

The principle of the *lis pendens* rule as well as the underlying ideas of politeness and mutual trust in the Brussels II*bis* Regulation are the same as that of the Brussels I Regulation.[25] Regarding parental responsibility the rule is the same in all its elements. However, regarding divorce, legal separation and marriage annulment, the rule differs in that it poses only two of the three requirements:

a) the same parties;
b) the same dispute.

It is not required that the causes of action in the two cases are identical. If an action for legal separation is pending in one EU Member State court and an action for divorce in a court in another EU Member State, the situation will fall in the ambit of the *lis pendens* rule. This flexibility was necessary because not all legal systems within the EU know the phenomenon of legal separation as something different from divorce. In the same vein, not all EU Member States have the same grounds for divorce, which makes the causes of action different. In one State one would be able to divorce on the basis of mutual consent, while another ground would have to be relied upon in a different Member State.

The rule is equally stringent as that of the Brussels I Regulation. There is no way of guaranteeing that the court first seised has a closer connection to the case or is in a better position to assess the facts. The strict priority rule tells parties to rush to the court before they are sued. That is not a manner of acting that should be encouraged, especially not in this delicate branch of family law, where people need time to assess their situations. The court granting the divorce would probably also be adjudicating the financial consequences and therefore has a great impact for the parties.[26]

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[24] ECJ cases ECJ case C-351/89, judgment of 27 June 1991, *Overseas Union Insurance v New Hampshire Insurance* [1991] *ECR* 3317; 116/02, judgment of 9 December 2003, *Enrich Gasser GmbH v MISAT Srl*, not yet reported in *ECR*, rec 41 and C-39/02, judgment of 14 October 2004, *Mærsk Olie & Gas AS v Firma M de Haan en W de Boer*, rec 32; not yet reported in *ECR*, see http://www.curia.eu.int.

[25] Art 19 Brussels II*bis* Regulation.

[26] See P McEleavy, "The Brussels II Regulation: How the European Community has moved into Family Law" (2002) *ICLQ* p 883-908 at p 887.

The *lis pendens* rule in the Insolvency Regulation

The Insolvency Regulation, unlike the other two Regulations, does not contain a rule on *lis pendens.* According to the Virgos/Schmit Report, a conflict of parallel proceedings would not often arise.[27] As soon as insolvency proceedings have been opened in one EU Member State, those proceedings have to be recognised throughout the EU.[28] Secondary insolvency proceedings might be opened in an EU Member State after the opening of the main insolvency proceedings in another EU Member State. Those secondary proceedings, though, would be complementary to the main proceedings: there would be no conflict between the proceedings, but the main proceedings would have universal effect, while the secondary proceedings would be limited to the territory of the Member State where they were opened. The liquidators would have a duty to co-operate with each other.

Recognition comes at an earlier stage than under the other Regulations. This system is not watertight, though. A question has been referred to the European Court of Justice on the appointment of a provisional liquidator, which is a step that often precedes the definite opening of insolvency proceedings: does such appointment amount to the opening of the proceedings so that another Member State cannot between that date and the date of the definite opening open proceedings on the basis of a different interpretation of the centre of the main interests?[29]

The *lis pendens* rule in national law

The *lis pendens* rule does not only exist in conventions or international instruments, but also in some national (civil) legal systems.[30] For instance, Dutch authors are of the opinion that the *lis pendens* rule can be applied on the basis of Dutch private international law as an exception that the parties can invoke. The Dutch judge can then declare the case inadmissible ("*onontvankelijk*") or stay the proceedings.[31] They explain the *ratio* as *ne bis in idem*, or the abuse of procedural law. French law also contains a *lis pendens* rule.[32] The rule is strict and provides little discretion for the

[27] At para 79. On this issue see also P Wautelet, "De Europese insolventieverordening" in H Van Houtte & M Pertegás Sender (eds), *Het nieuwe Europese IPR: van verdrag naar verordening* (Antwerp: Intersentia, 2001), p 103-167 at p 138-139.
[28] Art 16 Insolvency Regulation.
[29] See ECJ case C-341/04, still pending.
[30] For a thorough overview, see P Wautelet, *op cit* (fn 1) p 407.
[31] See JP Vanheul & MWC Feteris, *Rechtsmacht in het Nederlandse internationaal privaatrecht deel 2* (TMC Asser Instituut, Apeldoorn: Maklu, 1986) p 252-255, no 42.2.
[32] *Nouveau Code de Procédure Civile* (New Code of Civil Procedure), Art 100: "*Si le même litige est pendant devant deux juridictions de même degré également compétentes pour en connaître, la juridiction saisi en second lieu doit se dessaisir au profit de l'autre si l'une des parties le demande. A défaut, elle peut le faire d'office.*" See *Nouveau Code de procédure civile* (2002 Dalloz, Paris).

judge.[33] The new Belgian *Code de droit international privé* (Private International Law Code) contains a similar provision.[34] It states that a Belgian court may stay proceedings if a foreign court had been previously seised with the same matter between the same parties. The judge has to take the considerations of justice into account. If the resulting judgment can be recognised in Belgium, the Belgian court has to declare that it does not have jurisdiction.

A *lis pendens* rule in national law does not, as the above-mentioned examples indicate, contain an equally stringent obligation as such rule in a convention. The reason is that the rule is not based on a reciprocal duty and the provision is not part of a framework of sister-courts or trusted friends. Therefore if not in a convention, the rule allows some form of discretion to the national judge.

3. Defendant from outside the EU

The application of the *lis pendens* rule is not dependent on the domicile of the defendant, but on the involvement of two EU Member State courts. This has been made clear by the European Court of Justice in *Overseas Union Insurance v New Hampshire Insurance*.[35] New Hampshire Insurance was a company established under the law of New Hampshire, USA, while it was registered in the United Kingdom as an overseas company and in France as a foreign company. It issued a policy of insurance for certain costs by Société Française des Nouvelles Galeries Réunies, a company incorporated in France with registered office in Paris. It then reinsured a portion of the risk with Overseas Union Insurance (OUI), a Singapore company registered in the United Kingdom as an overseas company, and with Deutsche Ruck and Pine Top, companies incorporated in England with their registered offices in London. A dispute arose on the basis of non-disclosure, misrepresentation and breach of duty on the side of New Hampshire Insurance. The three reinsurers ceased payment and subsequently purported to avoid the contracts. New Hampshire instituted an action in the *Tribunal de commerce* (Commercial Court) in Paris against Deutsche Ruck and Pine Top and a few months later it instituted a similar action against OUI in the same court. Deutsche Ruck and Pine Top contested the jurisdiction of this court and OUI stated that it intended to do the same. These three parties then instituted an action against New Hampshire Insurance in the Queen's Bench Division (Commercial Court), seeking a declaration. This court granted a stay of the proceedings pursuant to the *lis pendens* rule until the French court would have established its jurisdiction. The three parties appealed to the Court of Appeal. That Court referred preliminary questions to the

[33] See H Gaudemet-Tallon, author of the French report in JJ Fawcett, *Declining Jurisdiction in Private International Law* (Oxford: Clarendon Press, 1995) at p 180.
[34] Art 14; *BS* 27 July 2004.
[35] ECJ case C-351/89, judgment of 27 June 1991, [1991] *ECR* 3317. See also the case note by H Gaudemet-Tallon, (1991) *RCDIP* p 769-777; H Born, M Fallon & J-L Van Boxstael, *op cit* (fn 21) p 26.

European Court of Justice in which it *ia* asked whether the rule on *lis pendens* could be applied where some of the parties were not domiciled in the EU.

The European Court of Justice examined the wording of the *lis pendens* provision and drew attention to the fact that it did not refer to the domicile of the parties. It stated that the purpose of the rule was to facilitate the recognition of judgments and therefore to avoid conflicting judgments in the EU. For this reason, it had to be interpreted broadly.

The three parties purported to argue that the Convention contained a rule on conflicting judgments.[36] The mere existence of this provision implied, according to them, that conflicting judgments could come about and that the rule on *lis pendens* could not cover all situations. The Court rejected this argument and referred to *Gubisch Machinenfabriek v Palumbo*,[37] where it was stated that the rule on *lis pendens* aimed to avoid conflicting judgments. The conclusion was therefore that the *lis pendens* rule could be applied even where the parties were not domiciled in the EU.

The consequence of these interpretations by the European Court of Justice is that even if an EU Member State court's jurisdiction is based on its domestic law, the rule of *lis pendens* can be applied. The rule comes into play when a case is pending in two different EU Member State courts, irrespective of why the cases are so pending.[38]

4. *Lis pendens* while jurisdiction based on another convention

The logical consequence of the rule established in the previous paragraph, is that the rule on *lis pendens* can also be applied if jurisdiction had been based, instead of on domestic law, on an international convention. The Brussels I Regulation yields to conventions on specific matters.[39] Some of these conventions specify bases of jurisdiction, but do not contain rules on *lis pendens*. As between the EU Member States, the problems of parallel proceedings may be solved by the Brussels I Regulation rules.

In *The "Linda"*,[40] for example, jurisdiction was based on the Arrest Convention.[41] An action was pending before the English Queen's Bench Division (Admiralty Court) as well as before the District Court of Middelburg (The Netherlands). The proceedings concerned a collision in international waters. Two ships had been arrested in this case; therefore both courts had jurisdiction on the basis of the Arrest Convention, which allows the arrest of ships in respect of maritime claims and makes that a basis of

[36] Art 34(3) Brussels I Regulation; Art 27(3) Brussels Convention.
[37] ECJ case 144/86, judgment of 8 December 1987, [1987] *ECR* 4861. See also case note by A Huet, (1988) *JDI* p 537-544.
[38] See also Jenard report p 20-21; P North & JJ Fawcett, *op cit* (fn 16) p 251.
[39] Art 71 Brussels I Regulation.
[40] [1988] 1 Lloyd's Rep 175.
[41] International Convention for the Unification of Certain Rules relating to the Arrest of Seagoing Ships (1952).

jurisdiction.[42] However, the Convention does not contain rules to resolve such a situation of two courts having jurisdiction. The Queen's Bench Division found that the conflict of procedures could be solved by the *lis pendens* rules of the Brussels Convention.[43]

5. *Lis pendens* and the Lugano Convention

The Lugano Convention contains the same rule on *lis pendens* than the Brussels I Regulation. Problems of parallel proceedings in an EU Member State court and a non-EU Lugano Contracting State court are regulated by the Lugano Convention.[44] This is in line with the general rule that the relevant points of reference are the courts where the proceedings are pending.

6. *Lis pendens* and a third State court

General

If concurrent actions are pending in an EU Member State and a third State, the Brussels I Regulation's *lis pendens* rule does not apply. Such issue would have to be resolved in accordance with bilateral treaties or the national rules on jurisdiction, including those on staying proceedings.[45] It is possible that the court in the EU Member State based its jurisdiction on the Regulation because the defendant was domiciled in the EU. Even in such a case, if the other court is in a third State, the Brussels I Regulation cannot be used to decline jurisdiction. The Regulation is only concerned with proceedings in EU Member State courts and there is no way of determining which court should be permitted to hear the case: a simple rule of priority does not seem workable outside the framework of a convention or regulation.

However, the Brussels I Regulation does not prohibit the observation of *lis pendens* obligations towards third States, on the basis of national law or a bilateral or multilateral treaty between an EU Member State and a third State containing a rule on *lis pendens*.[46]

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[42] Art 7 Arrest Convention.

[43] At 178-179. The judge went further to discuss the provision in the Brussels Convention on related actions, for in case the finding on *lis pendens* was wrong. For a discussion of related actions, see *infra*, Part D, p 2 *et seq*.

[44] Article 54 *ter* (2)(b) Lugano Convention.

[45] P North & JJ Fawcett, *op cit* (fn 16) p 255. This is also the case for the Lugano Convention; See Y Donzallaz, *La Convention de Lugano du 16 septembre 1988 concernant la compétence judiciaire et l'exécution des décisions en matière civile et commerciale* (Berne: Editions Stæmpfli + Cie SA Berne, 1996) vol 1, p 570. See also P Gothot & DHolleaux, *La convention de Bruxelles du 27.9.1968* (Paris: Jupiter, 1985) p 123.

[46] Arts 71 and 72 Brussels I Regulation. See also R Geimer, "The Right to Access to the Courts under the Brussels Convention" in Court of Justice of the European Communities, *op cit* (fn 16) p 42-43. Whether or not new bilateral Conventions can be concluded, is uncertain, see *infra*, Chapter 7, p 2 *et seq.*

If an EU Member State wanted to apply a *lis pendens*-type rule on the basis of comity, one's first reaction would be that that should be possible.[47] However, that seemingly reasonable conclusion has been blurred by the judgment in the *Owusu* case. The European Court of Justice stated that jurisdiction of an EU Member State court on the basis of the domicile of the defendant is compulsory: the court may not refuse to exercise that jurisdiction by applying the *forum non conveniens* rule. The Court said nothing on declining jurisdiction in another way that amounts to international comity. Hopefully declining jurisdiction because the case has been first brought in a third State, would be permissible.

Enforcement of a third State judgment in the EU

The European Court of Justice has found that the EU rule on *lis pendens* does not apply when the enforcement of a judgment from a third State is at issue.[48]

Owens Bank Ltd was a company domiciled in the independent Caribbean State of Saint Vincent and the Grenadines. Bracco Industria Chimica SpA, as well as its managing director, Fulvio Bracco, were domiciled in Italy. Owens Bank claimed that it had lent a sum of money to Fulvio Bracco in 1979. According to the documentation of the loan, the High Court of Justice of Saint Vincent was to have jurisdiction in any dispute arising from the loan. In January 1988 Owens Bank obtained a court order from a court in Saint Vincent against Fulvio Bracco for the repayment of the loan. An appeal was dismissed. Owens bank subsequently applied in Italy to enforce the order there. Fulvio Bracco and Bracco SpA claimed that Owens Bank had obtained the Saint Vincent judgment by fraud. While the proceedings for enforcement were still pending before the Italian court, Owens also applied to an English court to have the same Saint Vincent judgment enforced there under English national law.[49] Fulvio Bracco again claimed that the judgment should not be declared enforceable as it was obtained by fraud. It also relied on the Brussels Convention's rules on *lis pendens* and related actions to request the court to decline jurisdiction or stay proceedings pending the outcome of the Italian proceedings.

[47] See R Geimer, "The Right to Access to the Courts under the Brussels Convention" in Court of Justice of the European Communities, *op cit* (fn 16) p 42-43.
[48] ECJ case C-129/92, judgment of 20 January 1994, *Owens Bank Ltd v Fulvio Bracco and Bracco Industria Chemica SpA* [1994] *ECR* I-117. See also H Born, M Fallon & J-L Van Boxstael, *op cit* (fn 21) p 27; case notes by M Looyens, (1994) *T Not* p 343-347; A Huet, (1994) *JDI* p 546-550; H Gaudemet-Tallon (1994) *RCDIP* p 382-387; P Kaye, (1995) *IPRax* p 214-217 at p 216 describing the judgment as "extremely economical and textual"; I Couwenberg (1993-94) *RW* p 1403; JC Schultsz, (1994) *NJ* no 351, p 1627-1646; E Peel, (1994) *L Q Rev* p 386-390; TC Hartley, (1994) *ELR* p 545-547; P Vlas, (1994) *NILR* p 355-359; H Tagaras, (1995) *Cah Dr Eur* p 195-199.
[49] Sec 9 of the Administration of Justice Act 1920.

The case reached the House of Lords, which referred a preliminary question to the European Court of Justice: were the Brussels Convention's provisions on *lis pendens* and related actions applicable where the enforcement of a third State judgment is pending in the courts of two EU States? The European Court of Justice replied in the negative. It stated that the Brussels Convention only regulated the enforcement of judgments given in the EU. For purposes of the Convention "judgment" meant any judgment given by a court or tribunal in the EU.[50] It also regarded the purpose of the Convention, which was to simplify procedures of recognition in the EU and to see to the legal protection of persons established therein.

The Court pointed out that the recognition in this case would vary from one EU Member State to another, so that a different result does not prejudice the principle of judicial security. The decisions will not really be conflicting. This explains that a decision of enforcement cannot be enforced in another EU Member State ("*exequatur sur exequatur ne vaut*").[51] If a party desires to give effect to the same judgment of a third State in another Contracting State, he/she will have to search enforcement of the original judgment. This, again, will happen according to the national rules of enforcement of that Contracting State. This means that a third State judgment creditor domiciled in a country that has a bilateral enforcement treaty with an EU Member State cannot use this bilateral treaty for easy, or automatic, enforcement of its judgment in all EU Member States. This conclusion is in line with the objective of the Brussels I Regulation, namely to facilitate co-operation in civil and commercial matters and the recognition and enforcement in the European Union.[52]

Fulvio Bracco and Bracco SpA furthermore relied on the *Overseas Union* case, in which it was found that the rules on *lis pendens* and related actions were applicable even if the EU court based its jurisdiction on national law and not on the Convention.[53] However, the Court stated that in that case the subject matter fell in the scope of the Brussels Convention. The enforcement of judgments from third States, on the other hand, falls outside the scope of the Convention, and not only outside its jurisdictional rules.

[50] Art 32 Brussels I Regulation; Art 25 Brussels Convention.

[51] See the Opinion of Advocate General Lenz, para 22: "*This means, in particular, that the decision of Contracting State A by which the judgment of the non-contracting State is declared enforceable in that Contracting State cannot be enforced in Contracting State B pursuant to Article 31 et seq. of the Convention. To permit such 'double execution' would... create the danger that a judgment creditor could circumvent the conditions laid down by a Contracting State for the recognition of judgments of the courts of the non-contracting State in question*." See also case notes by H Gaudemet-Tallon, (1994) *RCDIP* p 382-387 at 383 and 386; JC Schultsz, (1994) *NJ* no 351, p 1627-1646 at p 1631-1632; H Tagaras, (1995) *Cah Dr Eur* p 195-199 at p 196.

[52] See considerations 1, 6 and 10 of the Regulation.

[53] ECJ case C-351/89, judgment of 27 June 1991, *Overseas Union Insurance v New Hampshire Insurance* [1991] *ECR* 3317, see *supra*, p 2 *et seq.*

7. *Lis pendens* and exclusive jurisdiction

The question might arise whether the EU court second seised also has to stay its proceedings if its jurisdiction is exclusive according to the Brussels I Regulation. The rule in the text of the Regulation is not clear on this point, but the European Court of Justice has made an *obiter* statement in *Overseas Union*. It stated that the *lis pendens* rule of priority to the court first seised was established without prejudice to the case where the court second seised has exclusive jurisdiction, "in particular" for the exclusive heads of jurisdiction of the Brussels Convention.[54] This seems to have the effect that if the court second seised has exclusive jurisdiction, it may go ahead without staying its proceedings in favour of the court first seised. The words "in particular" might give rise to confusion: can other grounds of exclusive jurisdiction also be granted precedence over the *lis pendens* rule? In any case, choice of court agreements do not share this privileged position.[55] May the words "in particular" then be understood in such a way that exclusive jurisdiction might also be founded on a domestic rule if the defendant is domiciled in a third State?

For example, A, domiciled in Germany, brings an action against B, domiciled in Australia, in a German court and subsequently in a French court. The German and French Courts may base their jurisdiction on their national rules.[56] Both courts are situated in the EU so that the provision on *lis pendens* of the Brussels I Regulation is applicable.[57] Let us now suppose that there is an exclusive basis for jurisdiction in French domestic law that is relevant in the dispute and that that exclusive basis of jurisdiction does not exist under the Brussels I Regulation.[58] The question now is whether the French court might raise the domestic exclusive basis of jurisdiction as reason not to apply the *lis pendens* rule with regard to the proceedings in Germany. If so, there is a risk of irreconcilable judgments in the EU against the party from a third State.

The national rules of jurisdiction, although permitted by Article 4 of the Brussels I Regulation, did not completely become part of the scheme of the Regulation. The rules are not elevated to the same level as those directly contained in the Regulation and therefore its interaction with the *lis pendens* rule is not exactly the same. However, in the light of the European Court of Justice's continuous emphasis on the mutual trust

[54] ECJ case C-351/89, judgment of 27 June 1991, *Overseas Union Insurance v New Hampshire Insurance* [1991] *ECR* 3317, rec 26. The Brussels I Regulation's exclusive bases of jurisdiction are contained in Art 22; Art 16 Brussels Convention.
[55] See ECJ case C-116/02, judgment of 9 December 2003, *Enrich Gasser GmbH v MISAT srl*, not yet reported in *ECR*, see http://www.curia.eu.int and the discussion *infra*, p 2 *et seq*.
[56] Art 4 Brussels I Regulation.
[57] ECJ case C-351/89, judgment of 27 June 1991, *Overseas Union Insurance v New Hampshire Insurance* [1991] *ECR* 3317.
[58] It is often difficult to determine whether the jurisdictional rules in national law are exclusive. The question of the exclusiveness of the jurisdiction often only comes into play at the recognition or enforcement stage: a court will refuse to recognise or enforce a judgment if it considers that the courts of its own State had exclusive jurisdiction. See, for example, the Belgian *Code de droit international privé* (Private International Law Code), Art 25(7).

between EU Member State courts,[59] the French court would probably be obliged to adhere to the *lis pendens* rule, despite its domestic exclusive bases of jurisdiction.

The Regulation does contain a provision for the situation in which more than one court has exclusive jurisdiction according to its rules (a case that will not occur frequently): all courts other than the court first seised shall decline jurisdiction.[60] This provision is in line with the normal rule of *lis pendens*; preference is given to the court first seised without any margin of appreciation as to which court would be better placed to hear the case. Whether or not this rule will also apply with regard to more than one EU Member State court having exclusive jurisdiction according to their national rules (an even rarer case), when the Brussels I Regulation is not applicable, is unclear.

8. *Lis pendens* and forum clauses

Whether the *lis pendens* rule still applied between two EU Member State courts if there was a forum clause in favour of the EU Member State court second seised, was uncertain until recently.

The practice in the English courts was that the EU Member State court in favour of which there was a forum clause could continue its proceedings, even despite the fact that another EU Member State court had been seised first. Thus, the forum clause was granted preference over the *lis pendens* rule. The English Court of Appeal for instance decided this in *Continental Bank*,[61] stating that the existence of a choice of forum clause was more important. The English court even went further and granted an anti-suit injunction to prevent the borrowers from pursuing the Greek action further.[62]

Interestingly, the lawyer for the borrowers (respondents in the English application; plaintiffs in a Greek action) proposed submitting the question of the relationship between the provisions on *lis pendens* and forum clauses to the European Court of Justice as there was no authority directly in point. The Court of Appeal's response was: "*The more obvious the answer to a question is the less authority there sometime is on it*". The Court had no doubt as to the fact that the provision on forum clauses should enjoy preference and refrained from referring the question. If it had done so, it would have been surprised by the answer that the European Court of Justice later gave in the *Gasser* judgment.

[59] See, for instance, ECJ cases C-116/02, judgment of 9 December 2003, *Enrich Gasser GmbH v MISAT srl*, not yet reported in *ECR*, rec 72 and C-159/02, judgment of 27 April 2004, *Turner v Grovit*, not yet reported in *ECR*, rec 24, see http://www.curia.eu.int.
[60] Art 29 Brussels I Regulation.
[61] *Continental Bank NA v Aekos Compania Naviera SA and Others* [1994] 1 WLR 577
[62] The case will also be discussed in the framework of anti-suit injunctions, *infra* p 2 *et seq*.

After the *Continental Bank* judgment, the English court reached the same result in *OT Africa Line Ltd v Hijazy and Others (The "Kribi")*.[63] The English court, as the court chosen in a forum clause, was not bound to stay its proceedings on the basis that the proceedings in Antwerp were brought first.

However, the European Court of Justice later (in 2003) ruled in the *Gasser* case that the *lis pendens* rule does not bend when there is a forum clause.[64] The parties had concluded a forum clause in favour of a court in Austria. One party brought the case to court in Italy. The other party subsequently brought proceedings in the chosen court in Austria, arguing that the existence of a forum clause has preference above the *lis pendens* rule. In other words, if there is a forum clause in favour of the court second seised, that court is not under the *lis pendens* obligation to stay proceedings. Advocate General Jacobs in his opinion followed that line of reasoning.

The European Court of Justice, however, found that a forum clause is not elevated above the *lis pendens* rule. The defendant in the Italian court should have invoked the forum clause there in order for the Italian court to decline jurisdiction. If the clause were valid, the Italian court would have declined jurisdiction. The Regulation itself gives the requirements for validity of a forum clause, and a Member State may not impose stricter requirements.[65] The principle is that every court in the EU should come to the same conclusion when confronted with a forum clause. Therefore, all things being equal, there is no reason to give preference to the forum clause above the strict rule of *lis pendens*.

In the EU it is important that the Member States have trust in each other's legal systems. The understanding should be that all the courts should treat a forum clause the same. This noble idea of sameness in the EU does, however, not always correspond to reality. On the basis of the same provision one court may conclude that there is a valid choice of forum agreement, while another may come to the opposite conclusion: the notions of "practices... established between [the parties]" and "in international trade or commerce... a usage of which the parties are or ought to have been aware" are not free of some appreciation by national judges. It seems a bit strange that a court other than the chosen court has the possibility to adjudicate the validity of the forum agreement rather than the chosen court.

Furthermore, if one is prepared to accept the fiction that all courts in the EU would reach the same result as to the validity of a particular forum clause, one might as well apply the fiction in the opposite direction: if all courts would reach the same result, one could leave the decision to the chosen court instead of the court first seised but not

[63] [2001] 1 Lloyd's Rep 76 at 88.
[64] ECJ case C-116/02, judgment of 9 December 2003, *Enrich Gasser GmbH v MISAT srl*, not yet reported in *ECR*, see http://www.curia.eu.int.
[65] Art 23; see ECJ case C-150/80, judgment of 24 June 1981, *Elefanten Schuh v Jacqmain* [1981] *ECR* 1671, rec 25-26.

chosen. The court first seised would, if there were a valid forum clause, not be able to continue with the action.[66] If, on the other hand, the chosen court were to find that the forum clause was invalid, it would decline jurisdiction and the court first seised would be able to continue the proceedings. This seems like a more logical approach, and one that respects party-autonomy rather that over-emphasising mutual trust in the EU.

This approach may also play against parties from third States. If they are not aware that they should rush to the chosen court first, their forum agreement might be interpreted by a court with a different tradition than the court they have actually envisaged. Thus, the value of a forum clause might be reduced, because the determination of its validity is subjected to another, not chosen, court, even though that court will in theory apply the same rules on validity.

Furthermore, the approach goes in against the recent Hague Convention on Choice of Court Agreements, respecting choice of court agreements to a high degree.[67] It certainly deserves respect in a situation where one party brings proceedings in another court than the prorogated one: the court seised but not chosen has to suspend or dismiss the proceedings.[68] It is a pity that the European Court of Justice did not take a broader view. By the time this judgment was given, a preliminary draft version of the Hague Convention already existed.

9. Exceptions to the application of the *lis pendens* rule

It has been argued that the legal wheels in some States turn slower than in others – a point that it is hard to contest. This fact has been used by some to plead for the court chosen but second seised to deal with the case rather than the first (not chosen) court, which might be a slower one.[69] However, the European Court of Justice refused to accept the argument.[70] The fact that justice may be done faster in the second court than in the first, is not sufficient to defer from the strict rule of priority. The Court emphasised that there should be mutual trust between the courts of the Member States. They should believe that other EU Member State courts are as capable as themselves to deliver good justice.

[66] This point was made by the English Queen's Bench Division (Commercial Court) in *IP Metal Ltd v Ruote OZ SpA* [1993] 2 Lloyd's Rep 60 at 67, although the question in that case regarded related actions and not *lis pendens*; see *infra*, p 2.
[67] Adopted on 30 June 2005; for more information, see *supra*, p 2 *et seq* and *infra*, p 2 *et seq*.
[68] Art 6; there are certain exceptions to this rules, for instance if the agreement is null and void under the law of the State of the chosen court or the chosen court had decided not to hear the case.
[69] See ECJ case C-116/02, judgment of 9 December 2003 *Enrich Gasser GmbH v MISAT srl*, not yet reported in *ECR* (see http://www.curia.eu.int) rec 59-64.
[70] rec 70-73.

The strict rule of *lis pendens* knows few exceptions. Exclusive jurisdiction (based on the rules of the Brussels I Regulation itself) of the court second seised seems to be the only one.

10. Assessment of the *lis pendens* rule

The strict rule of *lis pendens* cannot resolve all problems. Only in cases where the parties are identical can one rely on it. This was explained in *The Tatry* :[71] one party was involved only in the proceedings in Rotterdam (The Netherlands) and not in London, where all the others were involved as well. The Court of Justice ruled that the rule on *lis pendens* could only apply to the extent that the parties were identical. That would of course mean that both actions could continue.[72] The rule has since been slightly liberated in the *Drouot* case,[73] where the Court of Justice admitted that an insurer and the insured parties could be regarded as the same parties for the purposes of *lis pendens* if their interests were identical and inextricable.

There has been much criticism on the priority rule.[74] The choice between the two courts is totally arbitrary. There is no guarantee that the court first seised is in a better position to assess the facts and evidence, or that it is the most convenient forum for all involved parties. Furthermore, at least in some legal traditions, it is seen as courteous to write a letter before just suing. The Regulation discourages this practice, as it gives the other party a head start in the race to the court.[75] The *lis pendens* rule might also discourage out-of-court settlement in the same manner. Rather sue quickly, is the moral of the story.

It is important in this field to bear in mind that the first version of the Brussels Convention was negotiated by the six initial EEC Member States, namely Belgium, France, West-Germany, Italy, Luxembourg and The Netherlands. These States are all part of the continental civil law tradition. Regarding jurisdiction, the tradition is known for its rigid approach of rules rather than principles.

From a common law point of view, the *lis pendens* rule stays too rigid to really make sense. However, it has become accepted. As Sheen J stated:
"Policy was a matter for those who agreed the Convention. The policy of this Convention appears to be to avoid the risks of irreconcilable judgments and to have a simple rule that

[71] ECJ case C-406/92, judgment of 6 December 1994, *The Owners of the cargo lately laden on board the ship 'Tatry' v The Owners of the ship 'Maciej Rataj'* [1994] ECR I-5439.
[72] The correct way to solve that problem would be by way of the rule on related actions, although that rule placed no obligation on the courts, but only created the possibility to allow the combining of the actions.
[73] ECJ case C-351/96, *Drouot Assurances v Consolidated Metallurgical Industries and others* [1998] *ECR* I-3075.
[74] See, *ia*, P Wautelet, *op cit* (fn 1) esp p 641-654 & 675-679.
[75] See A Briggs, "Anti-European teeth for choice of court clauses" (1994) *LMCLQ* p 158-163 at p 158.

litigation will be conducted in the Court first seised of the matter. Under arts 21 and 22 [27 and 28 of the Regulation] *the Court which must decline jurisdiction or stay its proceedings is "any court other than the court first seised". The question: 'Which court would be the more convenient or the more appropriate?' does not arise.*"[76]

[76] *The "Linda"* [1988] 1 Lloyd's Rep 175 at 179.

Part C: *Forum non conveniens*

Article 15 of the Brussels II*bis* Regulation:

2. *By way of exception, the courts of a Member State having jurisdiction as to the substance of the matter may, if they consider that a court of another Member State, with which the child has a particular connection, would be better placed to hear the case, or a specific part thereof, and where this is in the best interests of the child:*
   (a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other Member State in accordance with paragraph 4; or
   (b) request a court of another Member State to assume jurisdiction in accordance with paragraph 5.
3. *Paragraph 1 shall apply:*
   (a) upon application from a party; or
   (b) of the court's own motion; or
   (c) upon application from a court of another Member State with which the child has a particular connection, in accordance with paragraph 3.

   A transfer made of the court's own motion or by application of a court of another Member State must be accepted by at least one of the parties.
4. *The child shall be considered to have a particular connection to a Member State as mentioned in paragraph 1, if that Member State:*
   (a) has become the habitual residence of the child after the court referred to in paragraph 1 was seised; or
   (b) is the former habitual residence of the child; or
   (c) is the place of the child's nationality; or
   (d) is the habitual residence of a holder of parental responsibility; or
   (e) is the place where property of the child is located and the case concerns measures for the protection of the child relating to the administration, conservation or disposal of this property.
5. *The court of the Member State having jurisdiction as to the substance of the matter shall set a time limit by which the courts of that Member State shall be seised in accordance with paragraph 1.*

   If the courts are not seised by that time, the court which has been seised shall continue to exercise jurisdiction in accordance with Articles 8 to 14.
6. *The courts of that other Member State may, where due to the specific circumstances of the case, this is in the best interests of the child, accept jurisdiction within six weeks of their seisure in accordance with paragraph 1(a) or 1(b). In this case, the court first seised shall decline jurisdiction. Otherwise, the court first seised shall continue to exercise jurisdiction in accordance with Articles 8 to 14.*
7. *The courts shall cooperate for the purposes of this Article, either directly or through the central authorities designated pursuant to Article 53.*

1. Introduction

The plea of *forum non conveniens* is raised where the defendant accepts that the court has jurisdiction, but alleges that the case can more conveniently, or more appropriately, be heard by another court, and that the court in which the plea is raised should therefore decline to hear the case. When successful, the court grants a stay on the basis of *forum non conveniens*. That means that if the other forum, for some reason or other does not take jurisdiction, the parties can return to the court that granted the stay and that court will hear the case.

The approach to jurisdiction outside continental Europe is different to the continental understanding. In common law the rules that grant jurisdiction are normally broader than in civil law.[77] Therefore it is sometimes necessary to push back the far-reaching jurisdiction rules. The doctrine is a corrective for the shortcomings that wide jurisdiction rules have.[78] The rule gives the judge a discretion not to exercise jurisdiction, even though it is uncontested that he has jurisdiction; it is seen by common law lawyers as courteous and based on self-restraint.[79]

Furthermore, in the continental European countries, recognition and enforcement conventions have existed already since 1899.[80] Some of these conventions contained rules on *lis pendens*, solving the problem of parallel procedures by granting jurisdiction to the court first seised. In the common law countries, on the other hand, such bilateral conventions are rather rare. One was being negotiated between the United States of America and the United Kingdom at a certain point, but nothing came of it.[81] The result is that the rule of priority is not really known; conflicts of procedures are solved on a unilateral basis. Therefore other ways of dealing with parallel proceedings came about,

[77] For instance, in English common law, the service of process on the defendant.

[78] See AA Ehrenzweig, "The Transient Rule of Personal Jurisdiction. The 'Power' Myth and Forum Non Conveniens" (1955-56) *Yale LJ* p 289-314 at p 312.

[79] Lord Goff of Chieveley stated in a postscript to the judgment in *Airbus Industrie GIE v Patel and Others* [1998] 1 Lloyd's Rep 631 HL at 642; [1999] 1 AC 119; [1999] ILPr 238 at 256: "*The principle is now so widespread that it may come to be accepted throughout the common law world; indeed, since it is founded upon the exercise of self restraint by independent jurisdictions, it can be regarded as one of the most civilized of legal principles. Whether it will become acceptable in civil law jurisdictions remains however to be seen.*"

[80] The Convention between Belgium and France on Jurisdiction and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments (Paris, 1899).

[81] See AT von Mehren, "Recognition and Enforcement of Foreign Judgments: a New Approach for the Hague Conference?" (1994) *Law & Contemp prob* p 271-287 at p 274, stating that the reasons for the failure of the US-UK treaty, of which the negotiations broke down in 1980, were the concerns respecting product liability and the UK insurance industry. Von Mehren added that the "preferred the devil they knew to the one they did not." He also stated that it was more in the European tradition to conclude conventions on recognition and enforcement of foreign judgments. In the USA the law relating to the recognition and enforcement of foreign judgments was developed through case law. See also BM Landay, "Another Look at the EEC Judgments Convention: Should Outsiders be worried?" (1987-1988) *Dickens JIL* p 25-44 at p 41 naming the UK's fear of US money judgments and the UK's wish to exclude anti-trust from the bilateral treaty as the reasons for its failure. He added (at 42) that the USA's liberal approach in the recognition of foreign judgments weakened its bargaining power.

such as *forum non conveniens* and anti-suit injunctions. In our current study the focus will be on these rules of the United Kingdom and their interaction with the European judicial area, especially in cases where third States are concerned.[82]

In the words of Lord Goff of Chieveley:
On the continent of Europe, in the early days of the European Community, the essential need was seen to be to avoid any... clash between member states of the same community. A system, developed by distinguished scholars, was embodied in the Brussels Convention, 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… In the common law world, the situation is precisely the opposite. There is, so to speak, a jungle of separate, broadly based, jurisdictions all over the world. In England, for example, jurisdiction is founded on the presence of the defendant within the jurisdiction, and in certain specified (but widely drawn) circumstances on a power to serve the defendant with process outside the jurisdiction. But the potential excesses of common law jurisdictions are generally curtailed by the adoption of the principle of forum non conveniens - a self-denying ordinance under which the Court will stay (or dismiss) proceedings in favour of another clearly more appropriate forum.[83]

In this Part, a short background of the doctrine will be given and then its interaction with the Brussels I Regulation will be investigated. In the analysis, the different rules of the Brussels I Regulation will be considered. The case law of England will play a central role in this part of the thesis.

2. Background and definition

The doctrine of *forum non conveniens* originated in Scotland in 1892. The effect of the doctrine is that a judge declines to hear an action, despite the fact that he has jurisdiction to hear it, on the basis that his court is not the most convenient one. The doctrine can only be applied if there is another court that has jurisdiction. Otherwise it would amount to a denial of justice. In the case *Sim v Robinow* the court stated:
"…*the plea can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all parties and for the ends of justice*."[84]

[82] For thorough comparative studies of these rules in the United States of America, see A Nuyts, *op cit* (fn 9) and P Wautelet, *op cit* (fn 1). See, for England, A Briggs & P Rees, *op cit* (fn 19) at p 214-231 & 324-333; L Collins, *Dicey and Morris on the Conflict of Laws* (13th edn, London: Sweet & Maxwell, 2000) p 385-405; JJ Fawcett, *op cit* (fn 33), where national reporters were asked to deal with (*ia*) *forum non conveniens* in their legal systems; for Ireland, P Huber, "Forum non conveniens – The Other Way Round" (1996) *IPRax* p 48-52; for the USA, ML Ultsch, "Die Forum-non-Conveniens-Lehre im recht der USA (inbesondere Floridas)" (1997) *RIW* p 26-31; AA Ehrenzweig, "The Transient Rule of Personal Jurisdiction. The 'Power Myth' and Forum non Conveniens" (1955-1956) *Yale LJ* p 289-314 at p 312.
[83] In *Airbus Industrie GIE v Patel and Others* [1998] 1 Lloyd's Rep 631 HL at 636; [1999] 1 AC 119; [1999] ILPr 238.
[84] [1892] 19 R 665. See doctoral thesis A Nuyts, *op cit* (fn 9); P Nygh, "*Forum Non Conveniens* and *Lis Alibi Pendens*: the Australian Experience" in J Basedow, I Meier, AK Schnyder,

The basis upon which that other forum has jurisdiction, is not an all-important factor. The English court rather regards the connection between the case and that forum.[85] In the Lubbe case,[86] for example, the jurisdiction of the alternative forum, a South African court, was based on submission by the defendant. The Court of Appeal found that that alone would not be a reason not to grant a stay on the basis of *forum non conveniens*, but that that would be a factor to consider when applying the discretion, although not a decisive one.[87] Other factors taken into account when considering a stay on the basis of *forum non conveniens* include the applicable law, *lis pendens*, the convenience of witnesses, the convenience of the parties, the existence of a real and close connection between the forum and the dispute, actions on related matters already pending in England, in the case of multiple defendants, whether they can all be sued in England, public policy, expense and time. If the other action is for a negative declaration and in fact amounts to forum shopping, the English court would take that into account as well.[88]

The doctrine of *forum non conveniens* is based on the principle of convenience and the discretionary power that is often given to judges in the common law systems.[89] The advantage of the doctrine is that it breaks away from the rigidity of jurisdictional rules and move towards a more flexible approach. The inflexibility of jurisdictional rules can be tempered in order to prevent injustice.[90]

This doctrine should not be confused with that of the *improper forum.* The latter refers to a basis for jurisdiction that is in itself objectionable, while *forum non conveniens* deals with the application of certain bases of jurisdiction on a particular set of facts: it is not the basis of jurisdiction in itself that is objectionable, but its use in a particular case.[91]

In English law an action could previously only be stayed if the defendant proved that it was vexatious and abusive towards him and no injustice to the plaintiff would result.[92] This differed from the Scottish and American law in the sense that they also allowed a

T Einhorn, D Girsberger (eds), *Private Law in the International Arena. Liber Amicorum Kurt* Siehr (The Hague: TMC Asser Press, 2000) p 511-526.

[85] *Lubbe and Others v PLC Afrika and Othres v Same* [2000] 1 Lloyd's Rep 139; see the concurring judgment by Tuckey LJ at 168.

[86] [2000] 1 Lloyd's Rep 139.

[87] See the concurring judgment of Tuckey LJ at 168.

[88] P Beaumont's report on Great Britain in JJ Fawcett, *op cit* (fn 33) p 212-220.

[89] Y Donzallaz, *op cit* (fn 45) vol 3, p 74-75.

[90] See D Gwynn Morgan, "Discretion to stay jurisdiction" (1982) *ICLQ* p 582-587 at p 582. G Hogan, "The Brussels Convention, *Forum non conveniens* and the Connecting Factors Problem" (1995) *ELR* p 471-493 at p 473.

[91] Y Donzallaz, *op cit* (fn 45) vol 3, p 74.

[92] See H Gaudemet-Tallon, "Le 'forum non conveniens', une menace pour la convention de Bruxelles? (A propos de trois arrêts anglais récents)" (1991) *RCDIP* p 491-524.

stay on the basis that there was a more appropriate forum to adjudicate the case.[93] The English courts relaxed the stringent test over the past 30 years and recognised that an action can also be stayed if another forum is more convenient. However, it is a precondition that another forum in available to the parties. [94]

3. *Forum non conveniens* in civil law systems

The doctrine of *forum non conveniens* is not accepted in most civil law systems.[95] In The Netherlands a form of *forum non conveniens* existed, but it was much more limited than the common law concept.[96] According to the *Wetboek van Burgerlijke rechtsvordering* (Code of Civil Procedure) the application of the doctrine was only possible in proceedings initiated by petition instead of a writ (*verzoekschriftprocedures*). It could only be used in international disputes.[97] The exact relation between a lack of jurisdiction and *forum non conveniens* was not always clear in the case law and it was even extended to cases where a writ had been issued.[98] The courts have described *forum non conveniens* as the judge declaring that he does not have jurisdiction since the case has insufficient links with the legal order of the forum State.[99] The doctrine was subsequently excluded by the legislator when amending the *Wetboek van Burgerlijke rechtsvordering*, the reason being that the heads of jurisdiction were limited and the rule was unnecessary.[100]

In Germany *forum non conveniens* does not exist and the taking up of jurisdiction is mandatory. However, with regard to property, there has been an interesting evolution

[93] See also, in general, AG Slater, "Forum non conveniens, a View from the Shopfloor" (1988) *L Q Rev* p 554-575.
[94] *Spiliada Maritime Corp v Cansulex* Ltd; [1987] 1 Lloyd's Rep 1 at 10; *Intermetal Group Limited & Trans-World (Steel) Limited v Worslade Trading Limited* [1998] ILPr 765 at 775 (Irish Supreme Court).
[95] See Schlosser Report, at para 76, p 97; P North & JJ Fawcett, *op cit* (fn 16) p 262; JJ Fawcett, *op cit* (fn 33) p 21-27 and the national reports. F Juenger, "Judicial Jurisdiction in the United States and in the European Communities: a comparison" (1985) *Mich L Rev* p 1195-1212 at p 1205 mentions German and French and other exorbitant bases of jurisdiction and then states: "*To make matters worse, continental European countries do not recognize the forum non conveniens doctrine, so that their courts cannot decline jurisdiction even if a suit is brought solely to harass the defendant*." This indicates the extent of the opposing views that exist on the two sides of the Atlantic.
[96] Art 429c(15) of the Old Code of Civil Procedure. See also JP Verheul, "The *forum (non) conveniens* in English and Dutch law and under some international conventions" (1986) *ICLQ* p 413-423 at p 416-419.
[97] Y Donzallaz, *op cit* (fn 45) vol 3, p 77.
[98] See, for instance, *Rechtbank* (Court of first instance) The Hague, judgments of 3 October 1990 and 28 January 1991 and *Rechtbank* Alkmaar, judgment of 24 January 1991 (1991) *NIPR* p 99-100.
[99] See *Rechtbank* (Court of First Instance) of Arnhem, judgment of 13 July 1989 (1990) *NIPR* p 317-320.
[100] See CJJC van Nispen, AIM van Mierlo & MV Polak, *Burgerlijke rechtsvordering. Tekst & Commentaar* (Deventer: Kluwer, 2002) p 4-5 & 12; K Boele-Woelki, "Kodifikation des niederländischen Internationalen Privat- und Verfahrensrechts" in (1995) *IPRax* p 264-271 at p 270.

and the archetype solution of civil law. The German *Zivilprozessordnung* (Code of Civil Procedure), attempts to prevent the giving of judgments that will obviously not be recognised in other countries.[101] §23 of the *Zivilprozessordnung* does grant jurisdiction to the German courts on the basis of the location of property of the defendant in Germany – a basis of jurisdiction that is widely seen as exorbitant and outlawed by the Brussels I Regulation. One might argue that this rule goes too far and necessitates a *forum non conveniens* type moderation. However, the German *Bundesgerichtshof* (Federal Supreme Court) has reached a similar outcome in a different way: it found that the provision had to be interpreted in a limited way, so as to be in conformity with international law. The court used considerations such as the (weak) connection with Germany, the forum from which the defendant was withdrawn, the fact that foreign law would have to be applied and forum shopping to find a reason not to base its jurisdiction on §23.[102] The result is the same as *forum non conveniens*: the court has jurisdiction on the basis of the rules but does not exercise it for reasons of comity.

The *Institut de droit international* adopted a resolution[103] recognising that the doctrine of *forum non conveniens* can sometimes be in the interests of justice. It stated that the following factors should be taken into account when a stay is granted in favour of another court with jurisdiction:

a) the adequacy of the alternative forum;
b) the residence of the parties;
c) the location of the evidence (witnesses and documents) and the procedures for obtaining such evidence;
d) the law applicable to the issues;
e) the effect of applicable limitation or prescription periods;
f) the effectiveness and enforceability of any resulting judgment.[104]

They further stated that parallel proceedings should be avoided and emphasised the preference that the court first seised should have.[105]

Gaudemet-Tallon expresses the unease of the civil lawyer when he/she encounters the notion of *forum non conveniens*: it is unclear and includes vague principles such as injustice to the plaintiff. These vague principles are left to the discretion of the judge. They are not inspired by the same source as the Brussels I Regulation, which imposes a system of jurisdiction based on strict and precise rules. The tension between the doctrine of *forum non conveniens* and the Brussels I Regulation (and previously the Convention) is clearly visible in the English case law.[106]

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[101] Art 606a, para 4.
[102] Judgment of 2 July 1991; (115) (1992) *BGHZ* p 90-99
[103] At their session in Bruges, Belgium in 2003. The text has not yet been published in the Institute's Yearbook; see http://www.idi-iil.org and (2003) (4) *Tijdschrift@ipr.be* p 94-96.
[104] Art 2.
[105] Arts 3-4
[106] H Gaudemet-Tallon, "Le 'forum non conveniens', une menace pour la convention de Bruxelles? (A propos de trois arrêts anglais récents)" (1991) *RCDIP* p 491-524 at p 496.

4. *Forum non conveniens* in the scope of the Brussels I Regulation

Historical overview

During negotiations regarding the accession of Denmark, Ireland and the United Kingdom to the Brussels Convention, it was changed on several points. However, the doctrine of *forum non conveniens* was not introduced. On the other hand, it was not explicitly excluded either.[107] The Schlosser report states that the courts of the United Kingdom will no longer be able to apply the doctrine of *forum non conveniens* since the jurisdiction granted by the rules of the Convention are mandatory.[108]

Some authors infer from the absence of reference to the doctrine that it cannot be combined with the Regulation.[109] Others rightly point out that the absence cannot be interpreted either way:[110] it could neither be said that the doctrine is definitely included, nor that it is definitely excluded. This principle was designed to protect the plaintiff's right to recourse to the courts.

It is worth noting at this point that the doctrine of *forum non conveniens* was not as widely accepted in English law in 1978 as it is today. The doctrine was already part of Scottish law, but not beyond all doubt part of English law. The introduction into English law was gradual, but became definite in the *Spiliada* judgment of the House of Lords in 1987.[111]

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[107] An explicit exclusion is seen more and more frequently, *eg* the Hague Convention on Choice of Court Agreements, Art 5(2); see http://www.hcch.net.

[108] Schlosser Report at p 81, para 22; p 97, para 78; p 125 para 181. See *Re Harrods* [1991] 3 WLR 397, CA; [1992] Ch. 72; [1992] ILPr 453, rec 29, where Dillon J found that the Reports (Jenard and Schlosser) did not constitute authority since the Reporters did not contemplate the question and since the doctrine was not as developed at the time of the negotiation of the Convention as it later became. See also R Geimer, "The Right to Access to the Courts under the Brussels Convention" in Court of Justice on the European Communities, *op cit* (fn 16) p 39-40. G Hogan, "The Brussels Convention, *Forum non conveniens* and the Connecting Factors Problem" (1995) *Eur L Rev* p 471-493 at p 475 stated the Schlosser did not address the problem that arose subsequently in *re Harrods*. PA Stone, "The Civil Jurisdiction and Judgments Acts 1982: Some Comments" (1983) *ICLQ* p 477-499 at p 496 states that it is still possible for an English court to grant a *forum non conveniens* stay in favour of a Scottish court. Those internal rules and the effect that the advent of the Brussels Convention had on them, will not be regarded in this thesis.

[109] According to A Briggs, *The Conflict of Laws* (Oxford: Oxford University Press, 2002) p 71, Art 5 of the Regulation shows an indirect awareness of *forum conveniens*. That provision grants jurisdiction to a forum that seems linked to the action and is therefore convenient (see *supra*, Chapter 2 part F, p 2 *et seq*). However, the Regulation does not go further to accept what is for English law the other side of the coin, namely *forum non conveniens*.

[110] A Nuyts, *op cit* (fn 9) p 214.

[111] *Spiliada Maritime Corp v Cansulex* Ltd; [1987] 1 Lloyd's Rep 1. See also the Court of Appeal judgment: [1987] 1 AC 460. See also *Atlantic Star v Bona Spes* [1936] 1 KB 382; *MacShannon v Rockware Glass Ltd* [1978] AC 795. See further F Salerno, "European International civil procedure" in B Von Hoffmann, *European Private International Law* (Ars Aequi Libri, 1998, Nijmegen) p 153-156 and G Hogan, "The Brussels Convention, *Forum non conveniens* and the

However, in 1986, shortly after the Brussels Convention was extended to the UK, Droz wrote that the common law countries have compromised: they transformed their concept of domicile and abandoned the doctrine of *forum non conveniens.*[112] He stated that one could neither add to nor take away from the list in the treaty.[113] The doctrine of *forum non conveniens* had no place in the Convention.

This might have been a bit over-optimistic. Instead, the UK has become the personification of the clash between civil and common law, since they are constantly confronted with the differences between the two legal traditions and have to find bridges (or tunnels). The clash is nowhere clearer visible than in the matter under discussion. The UK, together with Ireland, was faced with becoming part of an already-installed jurisdictional regime of civil law origin at the time of their accession to the European Communities (in 1973). The Brussels Convention was originally negotiated by six civil law countries,[114] and therefore did not contain a discretionary ground to refuse jurisdiction.

When converting the Brussels Convention into English law, the question of *forum non conveniens* was not completely forgotten. The enactment of the Convention, the Civil Jurisdiction and Judgments Act 1982 (the 1982 Act), as amended by the 1991 Act, provides:

"*Nothing in this Act shall prevent any court in the United Kingdom from staying, sisting, striking out or dismissing any proceedings before it, on the ground of forum non conveniens or otherwise, where to do so is not inconsistent with the 1968 Convention* [the Brussels Convention] *or, as the case may be, the Lugano Convention*."[115]

Although this provision has often been quoted in literature as well as case law, it has failed to give guidance.[116] It can be read to allow or disallow the use of *forum non conveniens*. In fact, it says nothing at all. Stating that the doctrine cannot be used if

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Connecting Factors Problem" (1995) *ELR* p 471-493 at p 473 on the principles laid down in the judgment.

[112] GAL Droz, "Entrée en vigueur de la Convention de Bruxelles révisée sur la compétence judiciaire et l'exécution des jugements" (1987) *RCDIP* p 251-303 at p 255.

[113] GAL Droz, "Entrée en vigueur de la Convention de Bruxelles révisée sur la compétence judiciaire et l'exécution des jugements" (1987) *RCDIP* p 251-303 at p p 258.

[114] Belgium, France, Germany, Italy, Luxemburg and The Netherlands.

[115] Sec 49.

[116] See the case law discussed *infra*, p 2 *et seq*. See also *Arkwright Mutual Insurance Co v Bryanston Insurance Co Ltd and Others*, [1990] 2 QB 649; (also published in (1990) 2 All ER 335; [1990] 2 Lloyd's Rep 70), at 653, where Potter J commented as follows on this provision: "*The section does not in itself assist in any way in deciding whether or not the exercise by the court of its hitherto undoubtedly wide discretion to stay proceedings on the grounds of forum non conveniens is, following incorporation of the Convention into English law, to be regarded as inconsistent with the Convention, either generally or in particular categories of case. For that, it is necessary to turn to the terms of the Convention. Further, when considering those terms, it is necessary to approach them unconstrained by the traditional rules of statutory construction previously applied by English courts, but guided by reference to wider sources that* [sic] *the wording of the Convention itself.*"

inconsistent with the Brussels Convention does not answer the question of when it is inconsistent with the Convention.

The first step towards answering that question is to determine who may answer it. According to some English cases it was unnecessary to pose a preliminary question to the European Court of Justice since it was not a matter of the interpretation of European Union law. Much rather it was a matter of the interpretation of English law. Therefore it took some time before the question reached the European Court of Justice. This first happened in *Re Harrods*,[117] when the House of Lords finally disagreed with the Court of Appeal and referred a preliminary question to the European Court of Justice. However, the case was settled before the Court could deal with the question.[118]

The next prejudicial question, *Owusu*, only came to the European Court of Justice in 2002.[119] The Court outlawed the doctrine in cases where jurisdiction is based on the domicile of the defendant in the EU according to the Brussels Convention. However, it will be indicated below that this judgment must not be interpreted broader than pure precedent law requires.

A sliced-up analysis

It does not seem that the question "Is the English rule of *forum non conveniens* compatible with the Brussels I Regulation?" has one simple answer. If that were so, one would have to be satisfied with the *Owusu* judgment and that would be the end of this Part of the thesis. Through an analysis of the case law, it will be pointed out that one can divide the question into several blocks. The *forum non conveniens* rule must in each case be interpreted and determined according to whether the other court is in the EU or in a third State and what the basis of jurisdiction is. Such an analysis remains relevant, even after the *Owusu* judgment.

First is the distinction often made by authors of whether the other court is an EU Member State court or not.[120] This division is the vertical line, the one that remains

[117] ECJ case C-314/92, *Landinimor v Intercomfinanz*.
[118] The case was removed from the role. See *OJ C* 103, 11 April 1994, p 9.
[119] ECJ case C-281/02, judgment of 1 March 2005, *Owusu v Jackson*, not yet reported in *ECR*; see http://www.curia.eu.int. See also the referring judgment of the Court of Appeal [2002] EWCA Civ 877, [2003] PIQR P13, [2002] I L Pr 45.
[120] H Gaudemet-Tallon, "Les frontières extérieures de l'espace judiciaire européen: quelques repères" in A Borrás, A Bucher, AVM Struycken, M Verwilghen, *E Pluribus unum. Liber Amicorum Georges AL Droz* (The Hague: Martinus Nijhoff Publishers, 1996) p 85-104 at p 97. See also P North & JJ Fawcett, *op cit* (fn 16) p 180; L Collins, *op cit* (fn 82) p 392; K Hertz, *Jurisdiction in Contract and Tort under the Brussels Convention* (Copenhagen: Jurist-og Økonomforbundets Forlag, 1998) p 48; L Collins, "Forum Non Conveniens and the Brussels Convention" (1990) *L Q Rev* p 535-539. P Huber, "Forum non conveniens und EuGVÜ" (1993) *Recht der Internationalen Wirschaft* p 977-983 at p 978 makes the distinction between simple *forum non conveniens* and *forum non conveniens* where there are also parallel proceedings.

relevant throughout the discussion. It is important to know to what extent the case is connected with the European judicial area. For *lis pendens* it has been indicated that the mere fact that two courts from EU Member States are involved, triggers the rule.[121] The application of the *lis pendens* rule in these cases has an influence on the extent of the *forum non conveniens* rule. Furthermore, there is an argument that the Brussels I Regulation contains the entire system of rules on international jurisdiction so that the rule of *forum non conveniens* is unnecessary and unwanted.[122]

Secondly, the head of jurisdiction is important. The Jenard Report draws a clear and fundamental distinction between the position of the Community-based defendant and the defendant domiciled elsewhere.[123] Whether or not the strict rule of jurisdiction of the Brussels I Regulation or the (possibly broader) ones of English national law are applied, is relevant for the application of *forum non conveniens*. As has been explained, the need for the *forum non conveniens* rule had been felt because the bases of jurisdiction were so wide.

One has to consider both these factors because of the hybrid nature of the rule.[124] The sliced-up analysis will first deal with jurisdiction based on the domicile of the defendant in the EU, then with national rules on jurisdiction, next with exclusive jurisdiction in and forum clauses in favour of third States and lastly with provisional measures.

5. Jurisdiction based on the domicile of the defendant in the EU

Other court in EU; jurisdiction based on the domicile of the defendant

Jurisdiction based on Article 2 is mandatory. A defendant has the right to be sued before the court of his domicile. The Regulation provides for another possibility, namely the place where a contract has been performed or where a tort was committed.[125] However, the structure of the Regulation makes it clear that this is an alternative jurisdiction. The plaintiff may choose. He may not be hampered in his choice because the court of the domicile of the defendant sees itself as unfit to hear the case.

The *Rechtbank* (Court of First Instance) of Arnhem (The Netherlands) considered a matter where proceedings were also pending in Germany.[126] It found it inappropriate in

[121] ECJ case C-351/89, judgment of 27 June 1991, *Overseas Union Insurance v New Hampshire Insurance* [1991] *ECR* 3317, see the more detailed discussion of this case *supra*, p 2 *et seq*.
[122] See C Bernasconi & A Gerber, "La théorie du forum non conveniens - un regard suisse" (1994) *IPRax* p 3-10 at p 8; GAL Droz, “Entrée en vigueur de la Convention de Bruxelles révisée sur la compétence judiciaire et l’exécution des jugements" (1987) *RCDIP* p 251-303 esp at p 258-261.
[123] See Jenard report at p 13.
[124] See *supra* p 2 on the nature of the rules treated in this Chapter.
[125] Art 5, see Chapter 2, Part F, p 2 *et seq*.
[126] Judgment of 13 July 1989; see also the following judgments in the matter, 1 March 1990 and 1 November 1990, 1990 *NIPR* 317-320, no 227.

the closed system of the Brussels Convention for the judge to rule that he does not have jurisdiction for lack of sufficient connecting factors with the legal system of the forum State. In the case of proceedings pending in The Netherlands and in Germany, the Brussels Convention rule on *lis pendens*[127] could be applied.

Other court in third State; jurisdiction based on the domicile of the defendant

This hypothesis is the one that has been much discussed and has given rise to different opinions, in both case law and literature. This is also the point on which the European Court of Justice has recently provided an answer in the *Owusu* judgment, stating that a stay on the basis of *forum non conveniens* could not be granted when the defendant was domiciled in England and the competing court was in Jamaica. Before discussing that case in further detail, it is worthwhile to first look into previous English judgments on the issue.

In *S & W Berisford Plc and Another v New Hampshire Insurance Co*[128] jurisdiction was not based on the domicile of the defendant in the EU, but on an insurer's branch in the EU.[129] The plaintiffs were a company based in London and its New York subsidiary. They brought an action against their insurer established in New Hampshire. The insurance contract was between the first plaintiff, Berisford, and the defendant, New Hampshire Insurance Co through its London branch. It concerned theft of jewellery from the shop of the second plaintiff in New York. The Brussels Convention could be applied because of New Hampshire Insurance Co's establishment in England: an insurer with seat in a third State can be sued in the EU Member State where it had an establishment. The court found the forum clause not to be exclusive and thus had jurisdiction on the basis of the establishment in England. The defendants applied for a stay on the basis of *forum non conveniens*, since the relevant parties and facts were all located in New York. The English Court considered whether it was possible to grant such stay in the light of the Brussels Convention. It found that it was not. Jurisdiction under the Convention was mandatory and the Court could not stay in favour of another court. The judge went on to state that, on the facts of the case, he would not have granted a stay in any event.

Arkwright Mutual Insurance Co v Bryanstan Insurance Co Ltd and Others,[130] like *Berisford*, concerned insurance contracts, but this time reinsurance. Some of the defendants were domiciled in England, so that jurisdiction over all the defendants could be based on that domicile.[131] In this case the proceedings in London were second to

[127] Art; 21 Brussels Convention; Art 27 Brussels I Regulation.
[128] [1990] 2 QB 631; [1990] 3 WLR 688.
[129] Art 8(3) Brussels Convention; Art 9(2) Brussels I Regulation.
[130] [1990] 2 QB 649, (1990) 2 All ER 335; [1990] 2 Lloyd's Rep 70 QBD See also L Collins, "Forum Non Conveniens and the Brussels Convention" (1990) *L Q Rev* p 535-539. A Briggs, "Spiliada and the Brussels Convention" (1991) *LMCLQ* p 10-15 concluded that *Berisford and Arkwright* were probably wrongly decided.
[131] Arts 2 and 6 Brussels Convention, and Brussels I Regulation.

the proceedings in New York. There was no forum clause between the parties. The Court, after considering the opposite views, followed the decision in *Berisford*. It found that the doctrine of *forum non conveniens* was inconsistent with the Brussels Convention. However, it explained that the result of these two cases would be limited in practice since:

a) as between the Member States of the European Community, many situations are catered for by the detailed rules on jurisdiction, which are founded on the notion of "closest and most real connection" (for instance the rules on exclusive jurisdiction);
b) in relations with third States, the English court would retain the discretion to stay proceedings in cases of exclusive grounds of jurisdiction or forum clauses in favour of third States;
c) in cases that fall outside the scope of application of the Convention, the discretion to grant a stay, will remain, *eg* on applications by nationals of third States served with process on the basis of temporary presence in England.

The judge concluded by stating that even if he were wrong, on the facts of the case he would not have granted the stay since he viewed London as the more appropriate forum.

Then came the controversial Appeal Court judgment in *Re Harrods (Buenos Aires) Ltd*,[132] which was in conflict with previous English jurisprudence, such as *Berisford and Arkwright.* The House of Lords referred a preliminary question to the European Court of Justice, but before these questions could be responded to, the case was settled.[133]

Harrods (Buenos Aires) Ltd was incorporated in England, but its business was carried on exclusively in Argentina. Its central management and control was also in Argentina. Its two shareholders, Intercomfinanz SA (51%) and Ladenimor (49%), were both domiciled in Switzerland. Ladenimor brought proceedings against Intercomfinanz and

[132] [1992] Ch. 72; [1992] ILPr 453. See P North & JJ Fawcett, *op cit* (fn 16) p 264-266; A Briggs & P Rees, *op cit* (fn 19) p 225-226; A Briggs, "Forum non conveniens and the Brussels Convention Again (1991) *L Q Rev* p 180-182; TC Hartley, "The Brussels Convention and forum non conveniens" (1992) *ELR* p 553-555; R Fentiman, "Jurisdiction, discretion and the Brussels Convention" (1993) *Corn ILJ* p 59-99; PA Stone, "The Civil Jurisdiction and Judgments Acts 1982: Some Comments", (1983) *ICLQ* p 477-499; H Gaudemet-Tallon, "Le 'forum non conveniens', une menace pour la convention de Bruxelles? (A propos de trois arrêts anglais récents)" (1991) *RCDIP* p 491-524; P Beaumont, Report for Great Britain in JJ Fawcett, *op cit* (fn 33) p 213-214; AR Schwartz, "In Re Harrods Ltd: The Brussels Convention and the Proper Application of Forum Non Conveniens to Non-Contracting States" (1991-92) *Fordham Int LJ* p 174-206; P Kaye, "The EEC Judgments Convention and the Outer World: Goodbye to Forum Non Conveniens?" (1992) *J Bus L* p 47-76, esp at p 70-75, where the author prefers the solution of *re Harrods* to the earlier judgments, although he admits that "*a very strong case indeed*" should be required before a stay on the basis of *forum non conveniens* can be granted.

[133] ECJ case C-314/92, *Landinimor v Intercomfinanz*. The case was then removed from the register; *OJ C* 103, 11 April 1994, p 9. A ruling in a case of mere theoretical importance is not permitted; see K Lenaerts & D Arts, *Europees Procesrecht* (3rd edn, Antwerp: Maklu, 2003) p 77-82.

Harrods in England. Intercomfinanz argued that Argentina was the competent forum and that a stay should be granted on the basis of *forum non conveniens*.

The Court of First Instance refused the stay, although there was a strong case in favour of a stay on the basis of *forum non conveniens*. The Court admitted that the defendant was *also* domiciled in Argentina. However, it held that the Brussels Convention removed the possibility of granting a stay on the basis of *forum non conveniens*, since the defendant was domiciled in England.

The Appeal Court was of the opinion that the rule as to domicile in Article 2 of the Brussels Convention was not so "overwhelming and all-pervading" as to preclude a stay not explicitly required or permitted by the Convention. In support of this view, the Appeal Court referred to other exceptions to the rule of jurisdiction based on the domicile of the defendant, such as the rules on jurisdiction of the court of the place of performance of a contract, on multiple defendants, on exclusive jurisdiction and on forum clauses.

It added that the *forum non conveniens* rule should not be discarded too easily:
"*Any English Court should be slow to construe the Convention as to inhibit the valuable and important jurisdiction of stay on grounds of* forum non conveniens, *which is designed to promote comity, to encourage efficiency in the resolution of disputes, to prevent duplication of time and cost in litigation, and to avoid inconsistent judgments in two jurisdictions.*"[134]

Dillon J found it difficult to give much weight to the Jenard and Schlosser Reports regarding this question: he did not think that the reporters had contemplated the issue. He turned back to the basis in the EC Treaty on which the Brussels Convention was concluded.[135] Referring to the Schlosser Report, he stated that the desideratum was not met when the defendant was not domiciled in the EU. He stated that Schlosser was only concerned with defendants domiciled in Contracting States and choices between the courts of several Contracting States.[136] This was in line with the Jenard Report, explaining that the Convention was to create an autonomous system of jurisdictional rules between the Member States, to create legal certainty in relations between them.[137]

The Court found that to decline jurisdiction in favour of a court in a third State would not impair these goals of the Convention. The result would in fact be no judgment in the EU, and nothing to be enforced under the Convention. Furthermore, the framework of the Convention would not be destroyed if English Courts had the discretion to refuse jurisdiction on the basis that the courts of a non-Contracting State were the appropriate forum in a case with which no other Contracting State was concerned.

[134] At 94.
[135] Art 220 EC Treaty.
[136] Para 31 of the judgment.
[137] Jenard Report p 7 & 15

He did not agree that Article 2 had a wide mandatory effect, as contended by Hobhouse J in *Berisford*. As a result the court found that it could grant a stay, applying the *forum non conveniens* rule.

The *Lubbe and Others v Cape Plc; Afrika and Others v Same*[138] judgments followed on *Re Harrods*. The case concerned more than 3000 plaintiffs bringing proceedings in England claiming damages for personal injuries or death caused by exposure to asbestos in South Africa (by working or living in certain areas where the defendant was conducting activities related to asbestos). The question was whether the case should rather be tried in South Africa, where the harm was caused, where most of the plaintiffs lived, of which most of the plaintiffs were citizens and where the evidence was situated. The defendant, a company incorporated in England, was in the business of mining, processing and selling asbestos. It obtained companies in the same business incorporated in South Africa and eventually transferred these companies to a South African holding company, which was wholly-owned by the defendant. Those companies were later sold, but the defendant kept an interest in them until 1989. At the date of service, however, the defendant had no assets in South Africa.

The defendants applied for a stay on the ground that South Africa provided a clearly more appropriate forum. The judge at first instance granted the stay, finding that South Africa was the natural forum for the trial. The plaintiffs appealed that decision and the Court of Appeal allowed the appeal, finding that the stay need not be granted.[139] An intricate set of procedures followed, including joining various actions into a group action. A judge at first instance again concluded that South Africa was a more appropriate forum and ordered a stay.[140]

The Court of Appeal refused the appeal without considering Article 2 of the Brussels Convention. In order to avoid a further delay, the plaintiffs had not pursued their initial submission that a stay on the basis of *forum non conveniens* was contrary to the Brussels Convention and that a preliminary question had to be posed to the European Court of Justice.[141] After the appeal was refused in the Court of Appeal, the plaintiffs appealed to the House of Lords, where the main issues in the case were the possibility of continuing the action in the form of a group action in South Africa and the availability of legal aid for the plaintiffs. On the basis of those considerations the House of Lords removed the stay in order that the English courts could hear the action. For that reason the court did not consider whether the stay of an action on the ground of *forum non conveniens* was in conflict with the Brussels Convention.[142]

[138] [2000] 2 Lloyd's Rep 383; [2000] 1 WLR 1545; [2000] 4 All ER 268.
[139] [1998] CLC 1559.
[140] [2000] 1 Lloyd's Rep 139.
[141] At 165
[142] See [2000] 2 Lloyd's Rep 383 at 394.

In *Van der Eist v Pierson, Helding Pierson NV*[143] the Dutch *Hoge Raad* (Supreme Court) found that it had no power to stay proceedings between two Dutch domiciliaries in favour of proceedings pending between them in Switzerland (which was a third State like any other at that point in time since the Lugano Convention had not yet entered into force).[144] The Advocate General in the case explained that there was no obligation on the Dutch courts to stay proceedings; a reference to a foreign court in which the proceedings were already pending was only possible if an international convention existed between the two States. Since no such convention existed between The Netherlands and Switzerland at that stage, the Court ignored the proceedings in Switzerland. The Advocate General acknowledged that irreconcilable judgments should be avoided, but added that that was not always possible.

Owusu v Jackson

The *Owusu* case finally put up the red light.[145] Mr Owusu, domiciled in England, went on holiday in Jamaica, where he rented a flat from another domiciliary of England (Mr Jackson). Mr Owusu went into the sea from the private beach. Diving into the water, he hit his head on a sandbank and broke the fifth cervical vertebrate in his spine. He became quadriplegic. He then brought a claim for damages in England against Mr Jackson, the owner of the villa, in contract. He added damages claims in tort against Jamaican domiciled parties as the owners, occupiers or persons who might have had responsibility for the management and upkeep of the beach.

The defendants domiciled in Jamaica stated various reasons in support of their argument that the courts of Jamaica were in a better position to hear the case, *ia* that most of the defendants were domiciled there, the facts happened there, possible witnesses were there and investigations could take place there. The first defendant (Mr Jackson, domiciled in England) also argued that the matter was most closely connected to Jamaica. His insurance policy was such that it would not pay out for damages awarded by courts of first instance outside Jamaica.

The judge found that no Brussels Convention point arose with regard to the defendants domiciled in Jamaica. But for the Brussels Convention, the judge stated that he would have had no hesitation in holding that Jamaica was a more appropriate forum than England. Since the stay as to the first defendant was made impossible by the Brussels Convention, he found that the entire case should be tried in England. It would not be opportune to grant a stay for some defendants, and not others; that would only result in a duplication, and possibly different conclusions.

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[143] *Hoge Raad* 22 December 1989, 1990 *NIPR* 338-641, nr. 322.

[144] Now, of course, the Netherlands and Switzerland are bound together by the Lugano Convention and the case would have been solved by the rule on *lis pendens* (Art 21 Lugano Convention).

[145] ECJ case C-281/02, judgment of 1 March 2005, *Owusu v Jackson*, not yet reported in *ECR,* see http://www.curia.eu.int.

On appeal, the Court of Appeal stayed the proceedings and referred two preliminary questions to the European, Court of Justice:

"*1. Is it inconsistent with the Brussels Convention on Jurisdiction and Enforcement of Judgments 1968, where a claimant contends that jurisdiction is founded on Article 2, for a Court of a Contracting State to exercise a discretionary power, available under its national law, to decline to hear proceedings brought against a person domiciled in that State in favour of the courts of a non-Contracting State:*

a) if the jurisdiction of no other Contracting State under the 1968 Convention is in issue;

b) if the proceedings have no connecting factors to any other Contracting State?

2. If the answer to question 1(a) or (b) is yes, is it inconsistent in all circumstances or only in some and if so which?"[146]

The Court of Appeal explained that no other EU Member State Court was involved and that the competing jurisdictions were England and Jamaica. If the language of Article 2 were mandatory in this context, no alternative jurisdiction, as provided for by Article 5, would exist, since the places of performance and damage were in Jamaica, a third State.

Previously, two Advocates-General had expressed different views on the issue: Advocate General Lenz in *Owens Bank* thought, contrary to the view of the Commission, that the Convention was applicable to proceedings that had connecting factors with a third State.[147] Advocate General Darmon in *Brenner*, to the contrary, was of the opinion that the Convention did not intend to regulate jurisdiction disputes which might arise between courts in a Contracting State on one hand and those of a non-Contracting State on the other.[148]

The Court of Appeal emphasised that the *Owusu* case concerned *forum non conveniens*, but that the question with regard to discretionary versus mandatory exceptions was broader: it also affected the doctrine of *lis pendens*, prorogation of jurisdiction, or immovable property where third States were concerned. If Article 2 were mandatory, a defendant domiciled in England had to be sued in England in all those cases, even if the Convention would allow or require the action to be brought in another Member State if a domiciliary of another Member State was involved.

The Court of Appeal further explained that, if Article 4 applied, the plaintiff could not be sure which court had jurisdiction. For the English court to refuse jurisdiction in favour of the courts of a third State on the basis of *forum non conveniens*, did not impair the

[146] [2002] EWCA Civ 877, [2003] PIQR P13, [2002] ILPr 45. On this judgment, see also C Thiele, "Forum non conveniens im Lichte europäischen Gemeinschaftsrechts" (2002) *RIW* p 696-700.

[147] ECJ case C-129/92, judgment of 20 January 1994, *Owens Bank Ltd v Fulvio Bracco and Bracco Industria Chimica SpA* [1994] *ECR* I-117, Opinion at para 32.

[148] ECJ case C-318/93, judgment of 15 September 1994, *Brenner and Noller v Dean Witter Reynolds Inc* [1994] *ECR* I-4275, Opinion at para 10.

object of the Convention. There could then be no judgment of an English Court for enforcement in the EU.

The judgment of the Court of Appeal in *Owusu* points out an important problem in the Brussels I Regulation, namely that of multiple defendants. Suing one defendant in England because he is domiciled there does not seem completely unjust. What does not seem fair, is dragging a whole bunch of other defendants, that have nothing to do with England, to the English court on such a tenuous link as the domicile of a person who is not the central figure in the litigation.

The view of the courts in England at the time of the referral of this question appeared to be that Article 2 of the Brussels I Regulation did not grant mandatory jurisdiction to the EU Member State court when another court in a third State also has jurisdiction. Therefore the *forum non conveniens* rule could be applied.

Advocate General Léger did not agree on that point.[149] He found that Article 2 was mandatory except when derogations were permitted by the Convention, for instance the provisions on exclusive jurisdiction, forum clauses, *lis pendens* and related actions. In relations with EU Member States, Article 2 could also be derogated from by the provisions on special jurisdiction (*eg* contracts or torts) and protective jurisdiction (*eg* insurance, consumer and employment contracts).[150] He further found that Article 2 should be applied even if both original parties (the plaintiff and first defendant) were domiciled in the same EU Member State.[151]

The Advocate General was of the opinion that *forum non conveniens* was difficult to reconcile with the objectives of the Convention/Regulation, which had been largely inspired by civil law rules. He stated that *forum non conveniens* undermined legal certainty and detracted from the effectiveness of the Convention/Regulation. In this line of thought he regarded the intentions of the States at the time of negotiation. However, it must be said that the doctrine of *forum non conveniens* has evolved a lot since the negotiation of the 1978 version of the Brussels Convention, which was the version by which the United Kingdom became Party.[152] Even at that time, the doctrine had not been explicitly excluded either.

Furthermore the Advocate General stated that only two EU Member States knew the rule of *forum non conveniens* and permitting it would result in discrimination. It was irrelevant, in his view, whether the competing court was in an EU Member State or in a third State. While the discrimination argument has merit, it does make the world of

[149] Opinion of 14 December 2004.
[150] Paras 241-257.
[151] Paras 112-115, 125, 163-169.
[152] Convention of Accession of 9 October 1978 of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice, published in *OJ L* 304, 30 October 1978, p 1.

difference whether the competing court is in a Member State or in a third State. If the dispute has no connection with the EU and recognition in the EU is not at issue, why then should the strict EU interpretation of the Brussels I Regulation preclude the staying of an action in favour of a third State court?

In his view the English Court's second question was broad and sought to ascertain when the doctrine of *forum non conveniens* could be applied. That question was, according to him, inadmissible since it was hypothetical and the European Court of Justice should only respond to what is strictly necessary to assist the administration of justice.[153]

The European Court of Justice's judgment was short and clear: declining Convention-based jurisdiction in favour of a third State court was not permitted. This holds true, *even if* the jurisdiction of no other EU Member State court was at issue. The motivation of the European Court of Justice was yet again solidly grounded in principles of EU law. Principles such as legal certainty and predictability in the EU and the legal protection of persons domiciled in the EU were quoted.

The second question remained unanswered, for the reasons given by the Advocate General.

The outcome of this case really is a pity. No other EU Member State was involved. The mere fact that one of the defendants was domiciled in England in an international dispute brought the case under the Brussels I Regulation, while it really should be out of the European judicial area.[154] The result is that all the other defendants, who equally have nothing to do with the European judicial area, are dragged into rules that were not created for them and are not concerned with their interests.

The European Court of Justice's formulation was general. Maybe the English courts wanted the doubts solved once and for all. However, this case cannot and should not be authority for disallowing the application of the rule of *forum non conveniens* to decline jurisdiction in situations where a court in a third State has exclusive jurisdiction or has been prorogated by the choice of the parties. The Court specifically refrained from answering the more general question by the Court of Appeal on when *forum non conveniens* might be permitted, since the answer would have been hypothetical.[155] Hopefully the concise answer by the European Court of Justice will not prevent the use of the doctrine in matters where it can really be valuable.[156]

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[153] Paras 71 & 81.
[154] As R Fentiman, "Jurisdiction, discretion and the Brussels Convention" (1993) *Corn ILJ* p 59-99 at 72 stated: "*A court need not, so to speak, switch exclusively into Convention mode simply because it has jurisdiction under Article 2*." He ventures further to argue how the docrine of *forum non conveniens* is adaptable with the Brussels Convention.
[155] At rec 50-52.
[156] See the discussions on exclusive jurisdiction of a third State court *supra*, p 2 *et seq*, on prorogation of a third State court *supra*, p 2 *et seq* and *infra*, p 2.

6. National rules on jurisdiction

General

If the defendant is not domiciled in the EU, the Brussels I Regulation refers the EU Member State courts back to the national rules on jurisdiction.[157] As has been explained, this provision can either be seen as drawing all national rules into the sphere of the Regulation, or as merely leaving those rules intact.[158] The preference for the second of these possibilities has also been indicated. That means that the Brussels I Regulation will not have anything to do with the possible application of the rules on *forum non conveniens* when the defendant is domiciled in a third State.

The other variable is whether the court in favour of which a stay is granted, is an EU Member State court or not. That might bring about a clash between the rules on *forum non conveniens* and *lis pendens.* An analysis of the English case law is once again necessary.

Other court in EU; jurisdiction based on national rules

The 'Xin Yang' and the 'An Kang Jiang' concerned a collision between two ships in Vlaardingen, The Netherlands.[159] The vessel "Jo Aspen" was moored at the Van Ommeren Tank Terminal and was loading when struck by the "Xin Yang", which had a Chinese crew, but Dutch pilot. The "Xin Yang" was arrested to secure Van Ommeren's claim for damages to the jetty. Two days later, the plaintiffs brought proceedings in the Queens Bench Division (Admiralty Court) in England and arrested the "An Kang Jiang", the sister ship of the "Xin Yang". The defendants (the ship owners) two days later submitted a petition to the District Court in Rotterdam (The Netherlands) to limit their liability. They also applied to the English court to stay its jurisdiction on the basis of *forum non conveniens*, stating that the District Court of Rotterdam was better placed to hear the dispute. It was clear that both courts would apply the same law, namely the Convention on Limitation of Liability for Marine Claims.[160] The case, unlike *Berisford*, *Arkwright*, *Re Harrods*, *Lubbe* and *Owusu*, concerned the jurisdiction of two EU Member States.

The English Court found that where jurisdiction of the English Court was based on Article 4, the court retained a discretion to stay the action on the basis of *forum non*

[157] Art 4 Brussels I Regulation.
[158] See discussion *supra*, p 2 *et seq*.
[159] [1996] 2 Lloyd's Rep 217. On this judgment, see also JJ Newton, "Forum non conveniens in Europe (again)" (1997) *LMCLQ* p 337-344. Prior to the judgment, JP Verheul, "The forum (non) conveniens in English and Dutch law and under some international conventions" (1986) ICLQ p 413-423 at p 422 agreed that this would be the correct solution.
[160] Concluded in London in 1976.

conveniens.[161] This was true whether the more convenient forum was one in an EU Member State, or in a third State.[162]

The judge considered the combined effect of the rules of *forum non conveniens* and *lis pendens*: if the court first seised (in this case the English Court) were to stay the proceedings on the basis of *forum non conveniens*, it would not be a case "where the jurisdiction of the court first seised is established".[163] By this comment, the judge made it clear that the staying of an action on the basis of *forum non conveniens* was part of the establishment of jurisdiction, therefore a jurisdictional rule.

If, however, the foreign court were not to view the matter in the same way, and declined to hear the case on the basis of *lis pendens*, or for another reason, the stay in the English proceedings could be lifted.[164] Therefore the stay on the basis of *forum non conveniens* was granted. This view of the interaction between *lis pendens* and *forum non conveniens* has been criticised.[165] The argument is that if the court first seised stays an action, it remains the court first seised so that a court in the EU later seised will be bound to decline jurisdiction by the *lis pendens* rule. However, the reverse can also be argued: it is doubtful whether a court second seised will refuse to take a case if the court first seised has stayed the action and committed itself to drop the case if the second court takes it. How an EU Member State court second seised would act upon a stayed English action within the framework of the Brussels I Regulation, will have to be pointed out by practice.

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[161] However, JJ Newton, "Forum non conveniens in Europe (again)" (1997) *LMCLQ* p 337-344 states that viewing the jurisdiction as based on article 4 was not entirely correct. The jurisdiction was based on the International Convention for the Unification of Certain Rules relating to the Arrest of Seagoing Ships (Brussels, 1952). According to the Schlosser Report (at para 240, p 140) and according to Advocate General in ECJ case C-406/92, judgment of 13 July 1994, *The owners of the cargo lately laden on board the ship "Tatry" v the owners of the ship "Maciej Rataj"* [1994] *ECR* I-5439 (at para 9) the jurisdictional rules of the specific Convention (in this case the Arrest Convention) are to be regarded as if they were provisions of the Brussels Convention. This was also the conclusion of the European Court of Justice in ECJ case C-148/03, judgment of 28 October 2004 *Nürnberger Allgemeine Versicherungs AG v Portbridge Transport International BV*, not yet reported in *ECR*, see http://www.curia.eu.int. However, this viewpoint is only necessary insofar as Art 4 is also part of the Convention: the advocates merely want to see the provision on *lis pendens* being applied to the case. One can achieve that result either by way of incorporating everything into the sphere of application of the Brusels I Regulation, or by acknowledging that the procedural rules related to jurisdiction have a wider scope than the remainder of the jurisdictional rules. This last viewpoint is the one supported in this thesis.

[162] At 222.

[163] In the words of the Brussels I Regulation, Art 27(2); at 222 of the judgment.

[164] At 222.

[165] See, for example, JJ Newton, "Forum non conveniens in Europe (again)" (1997) *LMCLQ* p 337-344 at p 341.

Sarrio SA v Kuwait Investment Authority, a later case, falls in the same category.[166] Sarrio, a Spanish company, sold its special paper business to Torraspapel. The Kuwait Investment Authority (KIA), through its London-based Kuwait Investment Office (KIO) held Grupo Torras (GT), of which Torraspapel was a subsidiary. The KIA was the investment arm of the government of Kuwait and therefore clearly not domiciled in the EU. As part of the price, Sarrio had a "put and call" option, entitling it to transfer the shares in Torraspapel back to Gruppo Torras in three tranches. Gruppo Torras made the first payment, but not the second and third, having been placed under receivership.

Sarrio commenced proceedings in Madrid to hold KIA liable for the sums that GT was supposed to pay. A year later Sarrio brought two actions in England claiming damages for misstatements by or on behalf of KIA (regarding the books of the companies), which induced Sarrio to enter into the sales contract. Since KIA was not domiciled in the EU, jurisdiction could be based on a national ground of jurisdiction.[167] However, the Kuwait Investment Office was its London-based branch.

KIA applied for a stay of the actions in the English courts, relying on the provisions on *lis pendens*[168] or related actions[169] of the Brussels Convention. The Court of First instance (Queen's Bench, commercial court) held that the provision on *lis pendens* could not apply since the causes of action of the actions were not the same.[170] The Queen's Bench then stayed the actions on the basis of the provision on related actions. Sarrio appealed that decision, and KIA cross-appealed against the refusal of the Court to stay proceedings on the basis of *lis pendens.*

The Court of Appeal reversed the judgment of the court of first instance. It reached the same conclusion regarding *lis pendens*.[171] However, it found that the actions were not related as the court of first instance had found: one had to consider the main issues and reasoning to decide whether there was a risk of irreconcilable judgments; the similarity of some issues of non-essential facts or points of law, or the history, was not sufficient to amount to "related actions".[172]

The court then considered whether the proceedings could be stayed on the ground of *forum non conveniens*. It found that if jurisdiction was based on a national rule,[173] there was nothing in the Convention that prevented a stay. In this case the defendants requested a stay in favour of the Spanish courts, where they were going to bring

[166] [1997] 1 Lloyd's Rep 113. This case was reversed on appeal, but on the related actions point; *forum non conveniens* was not considered by the House of Lords; [1998] 1 Lloyd's Rep 129. See *infra*, p 2.
[167] Art 4 Brussels Convention and Brussels I Regulation.
[168] Art 21 Brussels Convention; Art 27 Brussels I Regulation.
[169] Art 22 Brussels Convention; Art 28 Brussels I Regulation.
[170] [1996] 1 Lloyd's Rep 650.
[171] At 120.
[172] At 121-122. On this point the House of Lords ruled differently, see *supra*, fn 166 and *infra* p 2.
[173] According to Art 4, Brussels I Regulation and Brussels Convention.

proceedings. The fact the other court was in an EU Member State, did not exclude the possibility of applying the doctrine of *forum non conveniens*.[174]

On the facts the Court of Appeal refused to exercise the discretion in favour of a stay. One of the considerations was the delay that would be caused by the nature of the proceedings in Spain (where the two actions would have to be accumulated).[175]

This case points out the difficult interaction between *forum non conveniens* and the EU rules. Normally the nature and time of proceedings in other EU Member State courts may never be taken in consideration in the club of friends.[176] If one were to apply the EU rules of *lis pendens* or related actions, that mutual trust and loyalty would be built in. However, when applying *forum non conveniens* an English Court still had a tool to express its limited trust in other EU legal systems, as it did in this case.

In *Haji-Iouannou and Others v Frangos and Others*[177] the question of Article 4 in relation to other EU courts arose only *obiter.* Mr Haji-Ioannou was the father-in-law of Mr Frangos. They were both in the shipping business and Mr Haji-Iaonnou gave sums of money to Mr Frangos to enable him and his various companies to buy vessels. Mr Frangos also worked for Mr Haji-Ioannou. After the marriage between Mr Frangos and Mr Haji-Ioannou's daughter broke down, Mr Haji-Ioannou and a number of companies belonging to him brought proceedings against Mr Frangos for embezzlement. One of the issues was the domicile of Mr Frangos. He had a private residence in Monaco, but he conducted his business from Greece. The point turned on an interpretation of Article 51 of the Greek Civil Code:

"*The person has as domicile the place of his main and permanent establishment. No one can have simultaneously more than one domicile. For matters which relate to the exercise of business, the place where the person exercises that business is considered as special domicile.*"[178]

Did Mr Frangos have a special domicile in Greece? According to the Brussels Convention, each State determines its domiciliaries.[179] The judge at first instance found that Mr Frangos was not specially domiciled in Greece. As he was domiciled in a third State (Monaco), the court based its jurisdiction on the service of Mr Frangos when he was in London.[180] The court then stayed the actions on the basis that Greece was a more appropriate forum. It was this decision that Mr Haji-Ioannou appealed and Mr Frangos cross-appealed.

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[174] At 122-123.
[175] At 126.
[176] See ECJ case C-116/02, judgment of 9 December 2003, *Gasser GmbH v Misat Srl*, not yet published in the ECR, see http://www.curia.eu.int, [2004] 1 Lloyd's Rep 222, rec 73.
[177] [1999] 2 Lloyd's Rep 337 (CA).
[178] Translation as in judgment, at 344.
[179] Art 59 Brussels I Regulation; Art 52 Brussels Convention.
[180] This basis of jurisdiction is permitted if the defendant is domiciled in a third State; see Arts 3 and 4 Brussels I Regulation and Convention.

The Court of Appeal found that Mr Frangos was in fact domiciled in Greece according to the Greek rule on special domicile. That brought Mr Frangos in the sphere of application of the Brussels Convention and provided him with the protection of the EU rules. Therefore he had to be served in Greece, the State of his domicile and the English court had to find that it lacked jurisdiction to hear the dispute.

For the event that that conclusion was wrong, the Court of Appeal also considered the hypothesis of the defendant being domiciled in a third State, namely Monaco (Art 4). In that scenario the court confirmed the judgment in *Sarrio* stating that a court may, when jurisdiction is based on Article 4, stay proceedings in favour of a court in another EU Member State. It stated:
"*[I]f in a case such as the present a Court such as this defers to the Court of another Contracting State which in its considered judgment is significantly better placed, for whatever reason, to administer true justice between the parties, such deference involves not jurisdictional imperialism or chauvinism nor any clash or competition between jurisdictions but the truest comity between Courts of Contracting States*."[181]

The Court admitted that a question should be posed to the European Court of Justice regarding this matter, but stated that it could not do so in the present case because of the conclusion it had reached regarding Article 2 and the domicile of the defendant.[182]

Then the Court turned to the provision on *lis pendens*. It found that the *object* of the cases in Greece and England were not the same and that that provision therefore did not apply.[183] Nor did the provision on related actions apply since the action in Greece was a criminal action, to which the civil actions had been added.[184]

Lastly the Court found that the judge at first instance had reached the correct conclusion on *forum non conveniens.* The Greek court was in a better position to adjudicate the matter than the English court.[185]

To allow the application of the *forum non conveniens* rule in these cases seems correct. Jurisdiction is based on a domestic rule. The judgment in *Owusu* is not relevant for this conclusion. The domestic rules are wide in common law. That was the reason, as has been pointed out, for the development of the doctrine of *forum non conveniens*. To leave the wide rules intact, while deleting their natural limitation, would amount to a severe injustice to defendants from third States. If these defendants do not fall within the scope of the Brussels rules, they should not be further disadvantaged by

[181] At 346.
[182] At 348. A question before the European Court of Justice may not be of mere theoretical importance. See K Lenaerts & D Arts, *op cit* (fn 133) p 77-82.
[183] At 351.
[184] At 352.
[185] At 355-361.

compelling the English courts to take jurisdiction in situations where they would otherwise have had a discretion not to take that jurisdiction.[186]

The rule does, however, pose difficulties with regard to the relations between EU Member States. The doctrine in itself is not contrary to the loyalty that is expected between EU Member State courts. Quite to the contrary, declining to hear a case so that another court can do so, is a sign of trust and respect. It is the consideration of the qualities of the other legal system that might pose difficulties in EU law. Surely it should be possible to allow the rule, while English courts remain cautious not to disrespect their European colleagues. The future practice will point out whether such approach is possible in England and tolerated in the EU.

Other court in third State; jurisdiction based on national rules

The argument that not to allow a stay of proceedings on the basis of *forum non conveniens* would widen the traditional bases of jurisdiction too far, would be true whether the other court is a third State court or an EU Member State court.[187]

If the conclusion in the previous paragraph has been that the rule should be retained, the conclusion here is all the stronger: no EU principles are concerned.

Suffice it to say that the EU rules have nothing to do with this case and the rule of *forum non* conveniens should be left intact. It is, in English law, an essential part of the functioning of the jurisdictional rules.

7. Exclusive jurisdiction in a third State

According to the letter of the Brussels I Regulation, if a defendant is domiciled in an EU Member State, the courts of that State have jurisdiction. The jurisdiction is mandatory.[188] If a court has jurisdiction, there is nothing in the Regulation to permit a court to consider the fact that a court in a third State has exclusive jurisdiction on a similar head of jurisdiction as exists in the Brussels I Regulation, for instance immovable property.

The result, however, seems unfair. Therefore Professor Droz has developed the theory of the reflexive effect.[189] This theory states that in the case that an EU Member State

[186] See L Collins, *op cit* (fn 82) p 392-395; A Briggs, *op cit* (fn 109) p 86-87; PA Stone, "The Civil Jurisdiction and Judgments Acts 1982: Some Comments" (1983) *ICLQ* p 477-499 at p 496-297; P Huber, "Forum non conveniens und EuGVÜ" in (1993) *RIW* p 977-983 at p 982.
[187] See, on the argument in favour of *forum non conveniens*, L Collins, *op cit* (fn 82) p 393.
[188] See Schlosser Report, at para 22, p 81; ECJ case C-281/02, judgment of 1 March 2005, *Owusu v Jackson*, not yet published in *ECR*, see http://www.curia.eu.int.
[189] See GAL Droz, *Pratique de la convention de Bruxelles du 27 septembre 1968* (Paris: Librairie Dalloz 1973) 34; GAL Droz, 'La Convention de San Sebastian alignant la Convention

court has jurisdiction, but a third State court has exclusive jurisdiction, the Member State must refuse to take jurisdiction on the basis of a reflexive effect: the situation mirrors that of an EU Member State having exclusive jurisdiction and therefore the exclusive jurisdiction of the third State court must be respected. This theory is strict in its approach, in line with the strict civil law rules on jurisdiction. However, except for the discretion element, the effect of this theory is the same as that of *forum non conveniens*.[190] A court that has jurisdiction declines to exercise that jurisdiction in favour of another court that has jurisdiction and that is better placed to hear the action.

This proves that the rule of *forum non conveniens* can play an important role to rectify the Brussels I Regulation, especially to bring about respect for third State courts.

8. Forum clause in favour of a third State

Similar to the problem pointed out above, there is no strict rule dictating courts to refuse to hear a case when there is a forum clause in favour of a third State court. How will these rules apply in the framework of the Brussels I Regulation? Professor Droz would have applied the reflexive effect in this situation: respect the forum clause. The situation is similar to that of an exclusive head of jurisdiction in a third State.[191]

Aratra Potato Co Ltd and Another v Egyptian Navigation Co (The 'El Amria')[192] is a pre-Brussels Convention case,[193] but explains the point. It involved the carriage of potatoes between Alexandria (Egypt) and Liverpool (United Kingdom). When the potatoes arrived in Liverpool, it emerged that they had seriously deteriorated. The bills of lading contained forum clauses conferring jurisdiction on the country where the carrier had his principal place of business. The carriers in the case had their principal places of business in Alexandria (Egypt). An action was brought on behalf of the cargo interests in the Admiralty Court in London. The defendants applied for a stay of the proceedings in favour of the courts in Alexandria.

The Court refused the stay since the case was more closely connected to England and the greatest part of the evidence was situated in England. The judge also thought that

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de Bruxelles sur la Convention de Lugano' (1990) *RCDIP* p 1-21 at p 14; P Gothot & D Holleaux, *op cit* (fn 45) p 84; H Gaudemet-Tallon, 'Les frontières extérieures de l'espace judiciaire européen: quelques repères', in *E Pluribus unum. Liber Amicorum George AL Droz* (The Hague Martinus Nijhof Publishers 1996) p 85-104, at 95-97. See the more detailed discussions *supra*, Chapter 3, p 2 *et seq* and Chapter 4, p 2 *et seq.*

[190] See A Nuyts, "La théorie de l'effet réflexe", in M Storme & G de Leval (eds), *Le droit processuel & judiciaire européen* (Bruges: die Keure, 2003) p 73-89 at 84; see also PA Stone, "The Civil Jurisdiction and Judgments Acts 1982: Some Comments" (1983) *ICLQ* p 477-499 at p 297 stating that the *forum non conveniens* doctrine can be applied in this case.

[191] See also PA Stone, "The Civil Jurisdiction and Judgments Acts 1982: Some Comments" (1983) *ICLQ* p 477-499 at p 297 stating that the *forum non conveniens* doctrine can be applied in this case, just as to the case of exclusive jurisdiction in a third State.

[192] [1980] 1 Lloyd's Rep 390 QBD (Adm Ct).

[193] The Brussels Convention only entered into force for the United Kingdom on 1 January 1987.

the proceedings in Alexandria would not be as thorough as in England. The Court of Appeal confirmed the judgment, refusing the stay, but they stated that the judge at first instance should not have taken the nature of the proceedings in Alexandria into account.

The important point of this case is that the court acknowledged that forum clauses in favour of foreign courts should be given effect (by way of a stay of English proceedings) unless there are strong reasons for not doing so.

The more recent *Ace Insurance* case[194] was based in the Lugano Convention, but turns on the same question as would have been the case under the Brussels Convention.[195] It concerned an insurance contract: Zurich Insurance Company (ZIC), established in Switzerland, reinsured its non-American policies with Ace Insurance. The contract contained a "service of suit" clause to the effect that ZIC would accept the jurisdiction of any court in the United States of America of competent jurisdiction. ZIC then transferred its American business to Zurich American Insurance Company (ZAIC), its new US branch, established in New York. When an accident occurred, Ace instituted proceedings against ZIC and ZAIC in England for a declaration of non-liability. The choice of the American court would not, by English or US law, be seen as excluding other fora, such as is the case under the Brussels I Regulation and Lugano Convention. Nevertheless, the American court would have jurisdiction and this is sufficient for the application of *forum non conveniens.*

ZIC and ZAIC applied for a stay in favour of proceedings in Texas on the grounds of *forum non conveniens*. The judge at first instance granted the stay, upon which Ace Insurance appealed to the Court of Appeal.

The main question was whether the stay would be incompatible with the Lugano Convention. The English court had jurisdiction since ZIC submitted to the English court[196] (with a reservation regarding its *forum non conveniens* argument). The Court of Appeal found that it could grant a stay in favour of a third State where there was a forum clause, similar to those provided for by the Convention itself, but in favour of that third State.[197] In support of this conclusion, the Court referred to *Re Harrods* judgment, which permitted a stay in favour of a third State court.[198] In the result the court upheld the stay granted by the Queen's Bench (Commercial Court).[199]

[194] *Ace Insurance SA-NV (Formerly Cigna Insurance Co of Europe SA-NV) v Zurich Insurance Co and Zurich American Insurance Co* [2001] 1 Lloyd's Rep 618.
[195] It was, of course, not possible to refer a preliminary question to the European Court of Justice since this possibility only exists in the framework of the European Union.
[196] Art 18 Lugano and Brussels Conventions; Art 24 Brussels I Regulation
[197] At 626.
[198] At 622; see *supra*, p 2 *et seq*.
[199] At 631.

The *forum non conveniens* rule seems a good solution for his gap in the Brussels I Regulation: a possibility to decline Regulation-based jurisdiction in favour of a third State court that has been appointed in a forum clause.[200]

9. *Forum non conveniens* and provisional measures

As will be indicated in the following Chapter, the Brussels I Regulation contains a far-reaching rule on provisional measures.[201] It seems that the *Cour d'appel* (Court of Appeal) of Paris considered it too far-reaching and refused to apply it in that way.[202] An Italian living in France was appointed as the exclusive commercial agent on French territory of a company with its real seat in Italy. Their contract contained a forum clause for an Italian court. However, after the contract was terminated, the agent sued the company for payment of commission and the appointment of an expert before the President of the *Tribunal de commerce* (Commercial Court) of Paris. The proceedings were of the *référé provision* type (*ie* provisional) and therefore the courts in Paris had jurisdiction despite the forum clause. The court regarded the forum clause and the facts that the defendant was domiciled in Italy and the plaintiff had the Italian nationality. Therefore it came to the conclusion that the Italian court was better placed to grant the provisional measures and declined to do so.

This judgment was criticised, on the basis that it amounted to an application of *forum non conveniens*, a rule that did not exist in French law, nor under the Brussels Convention.[203] The court was obliged to grant the provisional measures sought since it had jurisdiction to do so based on its national law and therefore also according to the Brussels Convention.[204] This application of *forum non conveniens* seems incorrect in view of the wide scope of the provision on provisional measures. The Court of Appeal should rather have based its judgment on the clause regarding provisional measures in the Brussels Convention and found a basis in that provision to grant or not to grant the requested measures. Such a refusal would in any event be easier after the limitations that the European Court of Justice has placed on the rule on provisional measures in the cases *Van Uden* and *Mietz*.[205]

10. *Forum non conveniens* in the EU civil jurisdiction Regulations?

The revision and elaboration of the Brussels II Regulation, the so-called Brussels II*bis* Regulation contained a surprise: a form of *forum non conveniens*?

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[200] See also A Briggs, *op cit* (fn 130) at p 12.
[201] Art 31 Brussels I Regulation. See *infra*, Chapter 6, p 2 *et seq*.
[202] Paris, 17 November, 1987 (1989) *JDI* p 96.
[203] Note by A Huet (1989) *JDI* p 96, H Gaudemet-Tallon, "Les régimes relatifs au refus d'exercer la compétence juridictionelle en matière civile et commerciale: forum non conveniens, lis pendens" (1994) *RIDC* p 423-435 at p 426-427.
[204] Regarding the exact basis for granting provision measures, see *infra*, Chapter 6, p 2 *et seq*.
[205] See *infra*, Chapter 6, p 2 *et seq*.

An EU court may transfer a case to a court that is better placed to hear it.[206] The rule only applies in cases of parental responsibility, and not in claims for divorce, legal separation or annulment of marriages. It attempts to take the reality of moving children into account and acknowledges the need for flexibility. The large number of possible courts with jurisdiction may of course result in more than one court having jurisdiction to hear a specific case. The Regulation does not allow courts under such circumstances to decline their own jurisdiction. It rather encourages dialogue between the courts to ensure that the court that is best placed to hear a case, in the end does hear it.

A court may transfer a case upon application by a party, of its own motion, or upon application by a court in another EU Member State with which the child has a particular connection. If the initiative is taken by one of the courts mentioned, at least one of the parties has to accept the transfer. The provision explicitly states that this type of transfer is an exception.

Since it is not based on the declining of jurisdiction as a unilateral act, one cannot really speak of a *forum non conveniens* rule. The principle present here is acceptable in the civil law systems because it is not a discretionary declining despite a rule granting jurisdiction; it comprises a dialogue between EU courts. Furthermore, discretion is not discretion without guidelines. The Regulation states the following elements to be considered when determining whether a child has a particular connection to a State: the new or former habitual residence of the child, the place of the child's nationality, the habitual residence of a holder of parental responsibility, or the place where property of the child is situated if the case concerns that property. An additional safety net is that the referring EU court sets a time limit for seising the other court (to which the case was referred). If the court is not seised within the time limit, the first court may continue with the case.

It is, all the same, enlightening to see that the strictness of the European rules can be pierced and that there is a real concern for justice and for finding the appropriate forum. This rule seems to acknowledge that the jurisdictional grounds in the Regulation do not always appoint the court best placed to hear the case.[207]

It is not clear whether the doctrine of *forum non conveniens* could be used to decline Regulation-based jurisdiction in favour of a third State court. However, the European Court of Justice has prevented the use of the doctrine in the framework of the Brussels I Regulation if the defendant is domiciled in the EU. The ruling in the *Owusu* case, as has been pointed out, is framed in general terms. However, it dealt specifically

[206] Art 15 Brussels II*bis* Regulation. See also the Hague Child Protection Convention (1996) which contains a similar rule in Arts 8 and 9.
[207] See, advocating this view, P Huber, "Forum non conveniens und EuGVÜ" in (1993) *Recht der Internationalen Wirschaft* p 977-983 at p 980.

with the case where the competent third State court had jurisdiction, but not exclusive. The case should not be interpreted broader than that.[208] Hopefully the concern for the best interests of the child in cases of parental responsibility will tolerate the *forum non conveniens* rule where necessary.

The rule on related actions also has striking similarities to the English law *forum non conveniens* rule. This comparison will be discussed in the Part on related actions.[209]

11. Assessment of the doctrine of *forum non conveniens*

The discussion above has indicated where the doctrine of *forum non conveniens* came from and why it was necessary in the places where it developed. Although it is often misunderstood and unappreciated, the doctrine remains useful in international civil jurisdiction. It provides a solution for the situations in which an EU Member State court has jurisdiction, while a basis of exclusive jurisdiction exists in a third State. Likewise, it can prove useful when an EU Member State court has jurisdiction, while the parties had concluded a forum clause in favour of a third State court.

The judgment of the European Court of Justice in the *Owusu* case has seriously restricted *forum non conveniens*, even in favour of third State courts. However, the effects of the judgment should not be permitted to spill over to fields which were not considered by the European Court of Justice. Moreover, a true application of the law of precedent, would not allow the judgment to have such effects.

Therefore it seems that *forum non conveniens* might still be useful in some instances in order to respect third State courts and their jurisdiction.

[208] ECJ case C-281/02, judgment of 1 March 2005, Owusu *v Jackson*, not yet reported in *ECR*, see http://www.curia.eu.int; see *supra* p 2 *et seq*.
[209] See Part D *infra*, p 2 *et seq*.

Part D: Related Actions

Article 28 of the Brussels I Regulation:

1. *Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.*
2. *Where these actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.*
3. *For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.*

1. General

According to the Jenard Report the provision on related actions has the same goal as that on *lis pendens*, namely to avoid conflicting judgments and to facilitate the proper administration of justice in the European Community.[210] Its approach, however, is different. The rule states that if two cases are pending in the courts of two different EU Member States and those cases are so narrowly related that they should rather be treated together, the court second seised should yield to the court first seised.[211]

This being a procedural rule related to jurisdiction, the domicile of the parties is irrelevant for determining its sphere of application. The rule is applicable if the courts of two different EU Member States are concerned.[212] This is the same rule as for the application of the *lis pendens* provision and for recognition and enforcement under the Brussels I Regulation.

The criteria for related actions to lead to a stay by one court in favour of another, include the fact that there must be a danger of irreconcilable judgments. This factor makes the test stricter than that for *forum non conveniens*.[213] It makes no difference whether jurisdiction is based on the Regulation, national rules or another international (bilateral) convention.[214] It is not permitted, as is sometimes done when applying the *forum non conveniens* rule, to regard the way or the speed by which the other court will do justice.

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[210] At p 41.
[211] The definition that the provision contains was taken from the Belgian *Code judiciaire* (Judicial Code), Art 30.
[212] See H Gaudemet-Tallon, "Les frontières extérieures de l'espace judiciaire européen: quelques repères" in A Borrás, A Bucher, AVM Struycken, M Verwilghen, *Liber Amicorum Georges AL Droz, op cit* (fn 120) p 85-104 at p 91.
[213] P North & JJ Fawcett, *op cit* (fn 16) p 258.
[214] Y Donzallaz, *op cit* (fn 45) vol 1, p 601; H Gaudemet-Tallon, *Compétence et exécution des jugements en Europe* (3rd edn, Paris: LGDJ, 2002) p 276.

In this short Part, after briefly discussing the relationship between forum clauses and the rule on related actions, a comparison between the rule and *forum non conveniens* will be made.

2. Related actions and forum clauses

It is again in English law that one finds examples of the interaction between the different rules. In *IP Metal Ltd v Ruote OZ SpA*,[215] the parties had concluded several agreements containing forum choices for London. The validity of the clauses was in dispute. Proceedings ensued first in the court of Padua (Italy) and then in London. The proceedings in the two courts did not involve the same contracts and could therefore, according to the English court, not fall within the ambit of the *lis pendens* rule.[216] The question was then whether a stay could be granted on the basis of related actions brought earlier in the Italian court.

The English court found that there was a valid choice of court agreement on the basis of the Brussels Convention.[217] For that reason it would not be in accordance with justice to stay the action because there was a related action pending in Italy. The Court was of the opinion that the Italian court should reach the same conclusion as the English court when testing the validity of the forum clause according to the Brussels Convention.[218] However, the defendants pointed out that the Italian court would find the forum clause invalid and hear the action. The English court, however, refused to grant a stay since it found the clause to be valid.

This judgment differs from the later *Gasser* judgment by the European Court Justice.[219] The European Court of Justice made it clear that the *lis pendens* rule has precedence over a forum clause. The court second seised is under an obligation to stay its action in favour of the court first seised even if there is a forum clause in favour of the court second seised. The important difference between the provision on *lis pendens* and that on related actions is indeed that the provision on related actions allows a discretion. Is the mere fact that there is a forum clause in favour of the court second seised sufficient to exercise the discretion so as not to grant a stay, even if the actions are clearly related and a risk of irreconcilable judgments exists?

In interpreting European civil jurisdiction rules, it seems that a forum clause would receive the same relative importance in cases of *lis pendens* and related actions. The fiction that all courts within the European Union will reach the same conclusion on the validity of a forum clause, still seems relevant. However, as the *Gasser* judgment

[215] [1993] 2 Lloyd's Rep 60 QB (Comm Ct).
[216] At 61.
[217] At 67.
[218] At 67.
[219] ECJ case C-116/02, judgment of 9 December 2003, *Gasser GmbH v Misat Srl*, not yet published in the ECR, see http://www.curia.eu.int, rec 73; see *supra* p 2 *et seq*.

received deserved criticism, the rule it established should be interpreted in a limited way. The related actions rule contains a discretion and if the chosen court has a discretion, it is only natural that it would refuse to grant a stay in favour of a not-chosen, but first seised court. The approach of the English Court in the *IP Metal* case might still be tenable after the *Gasser* judgment, but that remains to be seen.

3. Assessment: related actions vs *forum non conveniens*

Von Mehren likened the rule on related actions to a broad form of *forum non conveniens*.[220] There are in fact great similarities: a court has a discretion to decline to hear a case over which it has jurisdiction. There are however differences as well: for the rule on related actions it is required that the two cases must be pending, while that is not a requirement for *forum non conveniens*. The extent of the discretion might be different as well. Firstly, for related actions, a court must consider whether there is a risk of irreconcilable judgments. That might be a consideration in a *forum non conveniens* plea, but the court is not forced to consider that factor.

In *The "Linda"* Sheen J found that the doctrine of *forum non conveniens* could not have any relevance in cases to which the rules on *lis pendens* or related actions applied; according to him the Articles raised the simple question of which court was first seised of a matter.[221]

In later cases, the English courts on several occasions made a distinction between the two rules.

Saville LJ stated in *Sarrio*[222] that the objective of the rule on related actions did not call for an over-sophisticated analysis.[223] Being sure of this conclusion, he did not regard it necessary to pose a preliminary question to the European Court of Justice. He declined jurisdiction in favour of the Spanish court. Interesting in this case is that the House of Lords stayed the case on the basis of a related action in Spain while the Court of Appeal did so on the basis of *forum non conveniens*. This indicates that the English courts do make a distinction between the rules, but one might forgive them for not being certain what that distinction is exactly.

[220] AT von Mehren, "Theory and Practice of Adjuciatory Authority in Private International Law: a comparative study of the doctrine, policies and practices of common- and civil-law systems" in *General courses on Private International Law* (2002 *Rec des Cours* vol 295, p 369.
[221] *The "Linda"* [1988] 1 QB (Adm Ct) 175.
[222] *Sarrio SA v Kuwait Investment Authority* [1998] 1 Lloyd's Rep 129 HL For a discussion of the decision of the Court of Appeal in this case, dealing mainly with *forum non conveniens*, see *supra* p 2. On this judgment, see also JJ Newton, "Forum non conveniens in Europe (again)" (1997) *LMCLQ* p 337-344.
[223] At 135.

In *Haji-Iouannou and Others v Frangos and Others*[224] the English Court of Appeal found that the proceedings in the Greek court and the proceedings in the English court were not related in the sense of the Brussels Convention since the Greek proceedings were 'an appendage' to criminal proceedings. That, according to the Court of Appeal, made the application of the rule on related actions inappropriate.[225] One cannot help but be surprised by this stringent application made by an English court, from which one would expect more flexible interpretations and wider discretions, such as those of *forum non conveniens*. Interestingly, the Court of Appeal reached the opposite conclusion on applying the *forum non conveniens* doctrine to the case. The court thus saw *forum non conveniens* as being more flexible than the provision on related actions. It is not clear on what basis it held this view.

Perhaps the fact that in some civil law systems, civil proceedings can be hooked onto criminal proceedings, is relevant. The European Court of Justice has not seen this as an obstacle for the normal application of the Brussels regime to the civil part of those actions. The nature of the tribunal is not relevant.[226] The civil part of the judgment would be recognisable under the Brussels I Regulation.[227]

Whatever the case, the differences between the rules and their effect in practice are not clear. Now that the European Court of Justice has found that the rule on *forum non conveniens* could not be applied if the defendant was domiciled in the EU, the English courts might be able to reach the same result of international comity through the rule on related actions. The problems are that parties would have to go to the trouble and expense of making both actions pending and that the rule on related actions can only be applied if the other court is in an EU Member State.

[224] [1999] 2 Lloyd's Rep 337 CA.
[225] At 352.
[226] Art 1(1) Brussels Regulation.
[227] See ECJ cases 172/91, judgment of 21 April 1993, *Sonntag v Waidmann* [1993] *ECR* 1963, rec 19 and C-7/98, judgment of 28 March 2000, *Krombach v Bamberski* [2000] *ECR* I-1935, rec 30.

Part E: Anti-suit injunctions

1. Definition

Anti-suit injunctions are the most aggressive way of dealing with, or avoiding, parallel proceedings. The effect of such injunction is that parties are prohibited from bringing suit in a different court. Courts that have jurisdiction grant such an order to prevent the occurrence of parallel proceedings[228] or, if there are already parallel proceedings, to prevent conflicting judgments. The conditions for the granting of such injunction are that there must be jurisdiction *in personam* over the party against whom the order is asked and the court should consider that the applicant is entitled to such injunction.[229] The Court thus has a discretion.

The anti-suit injunction emerged from case law: it originated in the English Court of Chancery, but is now based on statutory law.[230] The House of Lords summarised the essential features of an anti-suit injunction as follows:

(a) The applicant is a party to existing legal proceedings in the country;

(b) The defendants have in bad faith commenced and propose to prosecute proceedings against the applicant in another jurisdiction for the purpose of frustrating or obstructing the proceedings in this country;

(c) The court considers that it is necessary in order to protect the legitimate interest of the applicant in the English proceedings to grant the applicant a restraining order against the defendants.[231]

An anti-suit injunction can only be granted if the case has a relation to an English court. *Airbus Industrie GIE v Patel and Others*[232] concerned a domestic flight of Indian Airlines from Bombay to Bangalore. When it landed, the aircraft was damaged and caught fire, resulting in many passengers dying or being injured. The Aircraft had been assembled by Airbus (registered in France) in Toulouse. Four English passengers were killed and four were injured. The English claimants commenced proceedings against Airbus in Texas, USA. The Texan court had jurisdiction on the basis that Airbus had previously done business there and that jurisdiction could not be stayed since Texan law did not know a *forum non conveniens*-like exception (at that time). Airbus sought an anti-suit injunction in England. The judge in first instance considered the advantages of the claimants litigating in Texas and the prejudice to Airbus and held that it would not be appropriate to grant an anti-suit injunction. Airbus appealed. On appeal the anti-suit

[228] W Kennett, "Les injonctions *anti-suit*" in M-T Caupain & G De Leval, *L'efficacité de la justice civile en Europe* (Brussels: Larcier, 2000) p 133-144. See also P Wautelet, *op cit* (fn 1) p 237-347.
[229] A Briggs & P Rees, *op cit* (fn 19) p 365-366.
[230] Supreme Court Act 1981, s 37(1). For a description of the history of anti-suit injunctions, see TC Hartley, "Comity and the Use of Anti-suit Injunctions in International Litigation" (1987) *Am J Comp L* p 487-511 at p 489-490.
[231] *Turner v Grovit and others* [2001] UKHL 65; [2002] ILPr 28 rec 29.
[232] [1998] 1 Lloyd's Rep 631 HL; [1999] 1 AC 119; [1999] ILPr 238.

injunction was granted on the ground that the action of the claimants was oppressive. The claimants appealed to the House of Lords, which allowed the appeal on the ground that the English court did not have a sufficient interest in or connection with the case. The House of Lords considered it inconsistent with comity for the English courts to interfere in this case.

Anti-suit injunctions raise serious objections with regard to comity.[233] The *Institut de droit international* stated in a resolution:[234]

"*Courts which grant anti-suit injunctions should be sensitive to the demands of comity, and in particular should refrain from granting such injunctions in cases other than (a) a breach of a choice of court agreement or arbitration agreement; (b) unreasonable or oppressive conduct by a plaintiff in a foreign jurisdiction; or (c) the protection of their own jurisdiction in such matters as the administration of estates and insolvency*."[235]

The defenders of the anti-suit injunction state that it does not violate rules of comity since it does not interfere with the sovereignty of the foreign court. It gives an order to the proceeding parties and not to the foreign court. However, Hartley points out that that is a false argument.[236] In practice, a court can only exercise its sovereignty (at least in civil matters) if procedures are initiated by the parties. By prohibiting parties from doing so, the sovereignty and independence of the foreign court is necessarily affected. This point was also made by the *Oberlandesgericht* (District Court of Appeal) Dusseldorf[237] concerning the enforcement of an English anti-suit injunction: the Court refused to recognise the injunction stating that it interfered with the sovereignty of the German courts by preventing it from fulfilling its tasks since parties had been prohibited to take steps in the proceedings. Similarly, the *Rechtbank van eerste aanleg* (Court of First Instance) of Brussels refused to give effect to an anti-suit injunction of the District Court of the State of Nevada, Second Judicial District.[238] The Brussels Court found that the injunction was contrary to fundamental principles of access to justice. It barred the defendant in the Brussels proceedings (applicant of the anti-suit injunction) from in any way negating the procedural rights of the plaintiff and imposed a fine if he would do so.

In this Part, after a general introduction of the relation between anti-suit injunctions and the Brussels I Regulation, the situation with respect to courts in the EU and courts in third States will in turn be regarded. Thereafter, the discussion will turn to the utility of anti-suit injunctions to protect forum clauses in favour of EU Member State courts and

[233] On comity in general, see HE Yntema, "The Comity Doctrine" (1966-1967) *Mich L Rev* p 1-32 including the introduction by K Nadelman 1-8.
[234] Adopted at their session in Bruges, Belgium in 2003. The text has not yet been published in the Institute's Yearbook; see http://www.idi-iil.org and (2003) (4) *Tijdschrift@ipr.be* p 94-96.
[235] Art 5.
[236] TC Hartley, 'Comity and the Use of Anti-suit Injunctions in International Litigation' (1987) *Am J Comp L* p 487-511 at p 506. See also J Wilson, "Anti-suit injunctions (1997) *J Bus L* p 424-437 at p 426 stating that anti-suit injunctions have an indirect effect on foreign courts, even though they are granted against a litigant and not against a foreign court.
[237] Judgment of 10 January 1996, [1997] ILPr 320.
[238] Judgment of 18 December 1989 (1990-1991) *RW* p 676-680.

exclusive bases of jurisdiction in EU Member State courts. In conclusion, there will be a brief assessment of the phenomenon of the anti-suit injunction.

2. Anti-suit injunctions and the Brussels I Regulation

Just as *forum non conveniens* the Brussels I Regulation does not explicitly state anything on anti-suit injunctions.[239]

The injunction itself will not conflict with a judgment on the substance of the matter, but might eventually have this result. Probably other EU Member States would regard the injunction as infringing their sovereignty and would not recognise it on the basis that it is contrary to public policy.[240]

The problem is one of mutual trust that should exist between the courts of the EU Member States. Mutual trust goes further than comity: it is the implication that the EU Member States not only have respect, but also blind trust for each other's courts. A recent example of that mutual trust is found in the judgment of the European Court of Justice in *Gasser*,[241] where the Court refused to take into account the argument that the judicial systems of some Member States function slower than those of others, since it was said that the Member States have to trust each other's legal systems.[242]

In line with this view, the European Court of Justice has ruled that the anti-suit injunction is incompatible with the Brussels Convention and the ideas underlying the European judicial area.[243] The nature of anti-suit injunctions, being aggressive and intrusive, does not have an equally close link with jurisdiction as the doctrine of *forum on conveniens*. Anti-suit injunctions will first be considered as against EU Member States and then as against third States.

Although the anti-suit injunction is seen as contrary to the comity of the Brussels I Regulation, and the underlying idea that the Member States trust each other's legal systems, some authors still plead in favour of its utility.[244] The argument is that the anti-

[239] Nor did the Brussels Convention.
[240] A Briggs & P Rees, *op cit* (fn 19) p 37 and *supra*, p 2.
[241] ECJ case C-116/02, judgment of 9 December 2003 *Gasser GmbH v Misat Srll,* not yet reported in *ECR,* see http://www.curia.eu.int; [2004] 1 Lloyd's Rep 222, rec 73; see the discussion *supra*, p 2.
[242] Rec 72 of judgment.
[243] ECJ case C-159/02, judgment of 27 April 2004 *Turner v Grovit* (not yet reported in *ECR,* see http://www.curia.eu.int); see the disccusion *infra*, p 2.
[244] See TC Hartley, "How to abuse the law and (maybe) come out on top: Bad-faith proceedings under the Brussels Jurisdiction and Judgments Convention" in JAR Nafziger & SC Symeonides (eds), *Law and Justice in a Multistate World. Essays in Honour of Arthur T von Mehren* (Ardsley: Transnational Publishers Inc, 2002) p 73-81 at p 81; TC Hartley, "Brussels Jurisdicton and Judgments Convention: Jurisdiction agreement and *lis alibi pendens*" (1994) *ELR* p 549-552 at p 552: "*If the Court of Justice were to rule that the position taken by the English Courts is incorrect, the result would probably be that bankers and other businessmen*

suit injunction can prevent abuse of the rules contained in the Regulation and so protect weaker parties against unscrupulous litigants. It might be a useful tool to prevent abuse of the *lis pendens* rule by bringing proceedings in an EU Member State where the judicial system works slower than in the other EU Member States so that the other party is blocked from bringing proceedings elsewhere in the EU. This tactic has been nicknamed the Italian Torpedo and is often used in intellectual property cases. Hartley suggests that the anti-suit injunction should be used in order to do justice by refusing to hear cases brought in bad faith. However, he adds that the use of the injunction should be limited, so as not to harm the comity between Member States.[245]

3. Anti-suit injunction as against EU Member State courts

The English courts, in a number of cases, granted anti-suit injunctions to restrain proceedings in other EU Member State courts. The European Court of Justice has now overturned this practice in the *Turner* case.[246] The English courts can no longer grant anti-suit injunctions in cases that fall within the scope of application of the Brussels I Regulation and where the other court is in another EU Member State.

There will be a brief overview of the cases where anti-suit injunctions had been given in the past, before turning to the European Court of Justice's judgment prohibiting anti-suit injunctions.

In the *Continental bank* case[247] the forum clause between Continental Bank (domiciled in the United States of America, but having a Greek branch) and the borrowers (one-ship companies registered in Panama and Liberia and managed by Aegis Shipping Co Ltd of Athens) was formulated as follows:

would insert a New York jurisdiction clause into their contracts in place of an English one. This would be good news for New York lawyers, but it would not promote the interests of the Community."

[245] TC Hartley, "How to abuse the law and (maybe) come out on top: Bad-faith proceedings under the Brussels Jurisdiction and Judgments Convention" in JAR Nafziger & SC Symeonides (eds), *Essays in Honour of Arthur T von Mehren, op cit* (fn 244) p 73-81 at p 77-78 & 81.

[246] ECJ case C-159/02, judgment of 27 April 2004, *Turner v Grovit*, not yet reported in *ECR*, see http://www.curia.eu.int.

[247] *Continental Bank NA v Aeakos Compania Naviera SA and others* [1994] 1 WLR 588. See also TC Hartley, "Brussels Jurisdiction and Judgments Convention: Jurisdiction agreement and lis alibi pendens" (1994) *ELR* p 549-552; M McKee, "Case Comment. Jurisdiction Clauses" (1994) *J Int Bank L* 9(4) N85-N86; C Chatterjee, "The legal effect of the exclusive jurisdiction clause in the Brussels Convention in relation to banking matters" (1995) *J Int Bank L* 10(8) 334-340; M Mildred, "The use of the Brussels Convention in group actions' (1996) *J Pers Inj Lit* p 121-134 at p 130; PM North & JJ Fawcett, *op cit* (fn 16) p 256 & 270; TC Hartley, "Anti-suit injunctions and the Brussels Jurisdiction and Judgments Convention" (2000) *ICLQ* p 166-171 at p 170-171; A Briggs & P Rees, *op cit* (fn 19) p 36-38.

"*Each of the Borrowers... hereby irrevocably submits to the jurisdiction of the English Courts... but the Bank reserves the right to proceed under this Agreement in the Courts of any other country claiming or having jurisdiction in respect thereof.*"[248]

A dispute regarding the loans arose and the borrowers sued the bank in the Multi-Membered First Instance Court of Athens, claiming damages and a declaration that the guarantors had been released. The action was based on a provision in Greek law that whoever intentionally and in a manner that violates the commands of morality, causes damage to another, is bound to make reparation.[249] The borrowers argued that the bank had acted contrary to business morality. Subsequently the bank requested the English court to grant an anti-suit injunction to restrain the Greek proceedings which were in contravention of the forum clause. The borrowers applied for the bank's writ and points of claim to be struck from the role or that the action be stayed on the basis of the *lis pendens* or related actions rules of the Brussels Convention. The first question was whether the borrowers had breached the contract by suing in Greece. The Court of Appeal found that there had been a clear intention that the borrowers, but not the bank, be obliged to submit disputes to the English courts and in this sense the borrowers were not permitted to bring proceedings in Greece, as they had done.

The Court ruled that the *lis pendens* rule was not applicable since the proceedings in Greece and the request for an anti-suit injunction in England did not concern the same causes of action. The fact that jurisdiction was at issue in both cases was not sufficient to bring the matter within the scope of the rule. The Court of Appeal further found that the two actions were not "related" in the sense of the Brussels Convention, but were totally different.

The lawyer for the borrowers did not contest the English Courts' inherent power to grant an anti-suit injunction, but argued that the English Court ought to trust the Greek Court. She stated that such interference with the jurisdiction of another EU Member State court could only be justified if the proceedings in the foreign court were vexatious and oppressive and that was not the case. According to her, the English Court had to allow the Greek Court to decide on the jurisdiction issue. However, expert evidence on Greek law had pointed out that the Greek Court would take jurisdiction in the case because of the bank's co-operation at an early stage of the proceedings. The decisive argument for the Court of Appeal was that the injunction would be the only remedy for the breach of contract (*ie* the forum clause) committed by the borrowers. Therefore the Court of Appeal upheld the injunction and rejected the appeal.

[248] The clause provides an example of an a-symmetric choice of court agreement, frequently used in the banking sector. These clauses will not fall in the scope of the Hague Convention on exclusive choice of court agreements (see http://www.hcch.net).
[249] Art 919 Greek Civil Code.

In *The Eras EIL Actions*[250] no anti-suit injunction was granted since it had not been proved that the actions in Illinois were vexatious or oppressive. The actions were also pending in England, so that the English court had an interest in the matter. However, the court did not consider the granting of an anti-suit injunction impossible under the Brussels Convention.

OT Africa Line Ltd v Hijazy and Others, (The "Kribi")[251] concerned a Liberian businessman, Mr Hijazy, who imported and exported goods between Europe and Liberia. He exported sweets to Liberia on board the "Kribi" from the port of Antwerp, but there was a shortage at delivery. Similarly, coffee was imported on board the "Kribi" and upon arrival in Antwerp, there was a delivery shortage. In both cases Mr Hijazi and one of his companies brought proceedings against the ship owners in Antwerp.[252] In the coffee actions, the receivers (Belgian companies) and their insurers were also involved. However, the bills of lading contained forum clauses in favour the Court in London. The ship owners therefore subsequently brought proceedings in London and requested anti-suit injunctions restraining the other parties from continuing the actions in Antwerp.

The Court held that the Brussels Convention did not exclude the possibility to grant an anti-suit injunction. The Civil Jurisdiction and Judgments Act did not prohibit anti-suit injunctions and therefore English common law applied. The court discarded the argument that the Belgian court would be offended by the anti-suit injunction.[253] Therefore the court granted the anti-suit injunction.

The Belgian proceedings were not pursued further and the parties applied to the Commercial Court of Antwerp to have the case removed from the role.[254] Strictly speaking the Belgian Court was not offended. However, it was hampered in its functioning. The parties stopped taking steps in the proceedings and they died quietly. The anti-suit injunction was effective and served its purpose. When seeing this effect, one has to agree at least partially with the European Court of Justice that such interference in the judicial systems of other countries is unwelcome.

Turner v Grovit

The European Court of Justice had the opportunity to consider anti-suit injunctions in *Turner v Grovit*.[255] Mr Turner was a British lawyer domiciled in the United Kingdom. He had been employed in 1990 by the Chequepoint Group, a group of companies directed

[250] [1995] 1 Lloyd's Rep 64 QBD (Comm Ct).
[251] [2001] 1 Lloyd's Rep 76.
[252] Case AR 99/12538.
[253] At 93.
[254] See judgment of 30 January 2001 (AR 99/12538).
[255] ECJ case C-159/02, judgment of 27 April 2004, *Turner v Grovit*, not yet reprted in *ECR*, see http://www.curia.eu.int. See also case note by A. Nuyts (2005) *JT* p 32-35.

by Mr Grovit, as “Group Solicitor”. The business of the group of companies was running various *bureaux de change*. Mr Turner’s contract had initially been with China Security Ltd, but was taken over by the end of 1990 by Chequepoint UK Ltd, both member companies of the Chequepoint Group. Mr Turner performed his work in London, while he sometimes had to travel for his work. In May 1997 he asked for a transfer to Madrid (Spain) and started working there at the premises of Changepoint, a Spanish company of the Chequepoint Group, in November 1997. Chequepoint UK Ltd was taken over by another company in the group, Harada, on 31 December 1997. On 16 February 1998 Mr Turner gave notice of his resignation to Harada. He did not return to the office in Madrid, having worked in Spain for only 35 days.

Back in London, on 2 March 1998, Mr Turner brought an action against Harada before the Employment Tribunal. He argued that they had tried to implicate him in illegal conduct and that that amounted to unfair dismissal.

In July 1998 Changepoint and Harada started conciliation proceedings against Mr Turner in Spain. This was a requirement under Spanish law before legal proceedings could be initiated.

In the mean time, Harada contested the jurisdiction of the Employment Tribunal. It stated that it was incorporated in Ireland and Mr Grovit was resident in Belgium. The argument was dismissed. On 10 September 1998 the Court found that it had jurisdiction, based on Harada’s domicile in the United Kingdom. Harada appealed that judgment to the Employment Appeal Tribunal on 14 October 1998.

On 21 October 1998, after the attempted conciliation, Changepoint brought proceedings for damages for losses resulting from his professional conduct against Mr Turner in the court of First Instance of Madrid.

The appeal to the Employment Appeal Tribunal was dismissed. Mr Turner was awarded damages.

The summons of the Spanish proceedings was served on Mr Turner in London around 15 December 1998. Mr Turner contested the jurisdiction of the Spanish Court and did not take any steps in that procedure, but sought an anti-suit injunction from the High Court of Justice of England and Wales on 18 December 1998. The purpose of the injunction was to restrain Checkpoint from continuing and Mr Grovit and Harada from commencing proceedings Spain. An interlocutory injunction was issued on 22 December 1998, but the High Court refused to extend that injunction on 24 February 1999.

Mr Turner appealed to the Court of Appeal (England and Wales).[256] That Court issued an injunction forbidding the defendants to continue the proceedings commenced in

[256] *Turner v Grovit* [1999] ILPr 656.

Spain and from commencing other proceedings in Spain or elsewhere against Mr Turner regarding his contract of employment (on 28 May 1999). The reasons for the judgment stated that the proceedings in Spain had been brought in bad faith and to vex Mr Turner's application before the Employment Tribunal in London.

The Court of Appeal was not ignorant as to the existence of the Brussels Convention and its possible relevance. It stated:
"*[W]ere the English court to find that the proceedings had been launched in another Brussels Convention jurisdiction for no purpose other than to harass and oppress a party who is already a litigant here, the English court possesses the power to prohibit by injunction the plaintiff in the other jurisdiction form continuing the foreign process.*"[257]

Upon the facts the Court found that the proceedings in Spain were merely abusive and vexatious. It thought that the parties had to be restrained from further acting in a way that abused the proceedings in the Employment Tribunal. The Court was of the view that, by granting the injunction, it was not being disrespectful to the Spanish court, but rather protecting the proper application of the Brussels Convention.[258]

On 28 June 1999 Changepoint discontinued the proceedings pending before the Spanish court. This was done by way of a *desistimiento*, which did not prejudice their rights: there was no waiver of the cause of action or of the right to bring a further action.

Subsequently, Mr Grovit, Harada and Changepoint appealed to the House of Lords on the ground that the English courts did not have the power to make restraining orders preventing the continuation of proceedings in other States bound by the Brussels Convention.

The House of Lords considered the interpretation of European Union law important in the case before them. For that reason they referred a preliminary question to the European Court of Justice:
"*Is it inconsistent with the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters signed at Brussels on 27 September 1968 (subsequently acceded to be the United Kingdom) to grant restraining orders against defendants who are threatening to commence or continue legal proceedings in another Convention country when those defendants are acting in bad faith with the intent and purpose of frustrating or obstructing proceedings properly before the English courts?*"

An anti-suit injunction was based on the presumption that the English courts had *in personam* jurisdiction over parties to proceedings pending before it. Therefore the English courts had the right to prescribe a code of conduct to them. And this code of

[257] At 666.
[258] At 674.

conduct could include its actions towards other courts: parties could be prohibited from bringing or continuing proceedings before other courts. This prohibition, as viewed by the English courts, did not interfere with the sovereignty of other courts, but only told the parties how to act while under the auspices of the English courts. The injunction did not in any way comment on the jurisdiction of the foreign court. In that sense, the terminology "anti-suit" injunction was misleading, the House of Lords explained.

The House of Lords was conscious of the comity problems that anti-suit injunctions could bring about. For that reason the English courts were reluctant to take upon themselves the decision of whether the foreign forum was an inappropriate one. In the sphere of application of the Brussels Convention, an English court would not venture that decision.

According to the House of Lords there was nothing in the Brussels Convention that prohibited anti-suit injunctions. Furthermore, the anti-suit injunction was an effective mechanism to prevent irreconcilable judgments, which was one of the purposes of the Brussels Convention. In the case under discussion, irreconcilable judgments would be prevented by the anti-suit injunction.

The Law Lords added that, if they had to interpret the question, they would have had no problem with finding the anti-suit injunction compatible with the Brussels Convention.

The Advocate General emphasised the importance of reciprocal trust between the various national legal systems of the EU Member States. The English anti-suit injunction seemed to place doubt on this structure of mutual trust. This mutual trust meant that each State recognised the capacity of the other legal systems to contribute to the objectives of integration. No superior control authorities had been appointed, except for the European Court of Justice. He added:
"still less has authority been given to the authorities of a particular State to arrogate to themselves the power to resolve the difficulties which the European initiative itself seeks to deal with."[259]

Courts should not be permitted to influence the jurisdiction of other EU Member States, even if the influence would be only indirect. Furthermore, only legal systems of the common law tradition knew this mechanism and allowing the anti-suit injunction would create an imbalance. This fact was not problematic according to the House of Lords since the purpose of the Brussels Convention was not uniformity, but the creation of clear rules on jurisdiction.[260]

Responding on the assertion by the House of Lords that the injunction was given against parties and not against foreign courts, the Advocate General stated that if a

[259] At para 31.
[260] [2001] UKHL 65; [2002] ILPr 28, rec 37.

party were prohibited, under threat of penalty, from bringing an action in a foreign court, the result would be the deprivation of the foreign court's jurisdiction. The firm opinion of the Advocate General was therefore that the anti-suit injunction in relations with other EU Member States could not be tolerated.

The European Court of Justice, like the Advocate General, emphasised the mutual trust that should exist between the courts of the EU Member States. This was what enabled the system of jurisdiction and a simplified procedure for recognition and enforcement of judgments.

Prohibiting a party from going to a foreign court interfered with that court's jurisdiction. That interference was incompatible with the system of the Brussels Convention. The argument that there was no direct interference, since the injunction is directed at the parties and not at the foreign court, did not convince the European Court of Justice. Even an indirect interference would be too much.

The Court did not accept the argument that an anti-suit injunction could help to reach one of the goals of he Convention, namely to reduce irreconcilable judgments. The Convention had its own rules to deal with that situation, also called *lis alibi pendens* (Art 27). The anti-suit injunction did not fit in with the rest of the Convention: there are no rules on the situation that a foreign court gives a judgment despite an injunction and there were no rules to regulate the existence of two contradictory injunctions.

This judgment has given a long awaited response. But it has also disappointed by the simplicity with which the European Court of Justice has seen the problem. If so many wondered about this for so long,[261] surely there was more to it. There must have been more to consider.

The Court found that the anti-suit injunction could not be tolerated in the light of the mutual trust that should exist between the EU Member States. The point here is not that the anti-suit injunction in itself breaks the rules of the Brussels Convention, but that the value underlying it fundamentally opposes that of the European judicial area.[262] How can, in this sisterly union, one court think itself superior to the extent of telling another court what its job is?

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[261] See, *ia*, J Wilson, "Anti-suit injunctions" (1997) *J Bus L* p 424-437; PM North & JJ Fawcett, *op cit* (fn 16) p 268-272; J O'Brien, *Smith's Conflict of Laws* (2nd edn, London: Cavendish Publishing, 1999) p 218-220; L Collins, *op cit* (fn 82) p 419-420; TC Hartley, "Anti-suit injunctions and the Brussels Jurisdiction and Judgments Convention" (2000) *ICLQ* p 166-171; D McClean, *The Conflict of Laws by Morris* (5th edn, London: Sweet & Maxwell, 2000) p 130; CMV Clarkson & J Hill, *Jaffey on the Conflict of Laws* (2nd edn, London: Butterworths, 2002) p 147-149; P Wautelet, *op cit* (fn 1) p 294 & 298-299; A Briggs & P Rees, *op cit* (fn 19) p 366-368. For a more general reflection on anti-suit injunctions from a continental point of view, see JP Verheul, "Waait de *antisuit injunction* naar het continent over?" (1989) *NIPR* p 221-224.

[262] See TC Hartley, 'Anti-suit injunctions and the Brussels Jurisdiction and Judgments Convention' (2000) *ICLQ* p 166-171 at p 166 & 168.

This crucial argument of mutual trust has overshadowed any argument that could be brought in favour of anti-suit injunctions. They can help to fill a gap in the Convention without negating its existence. The present case might fall in the gap in the absence of an anti-suit injunction. It does not completely fall in the scope of the *lis pendens* rule.[263] The provision on related actions[264] might be relevant, but that Article merely gives a discretion to the judge to join two actions and it is up to him to decide whether they are related. At the same time, it was clear to the English judges that the proceedings in Spain had been brought with the sole purpose of vexing Mr Turner. Changepoint, the plaintiff in Spain, was not the employer of Mr Turner and the amount of damages they claimed was beyond all reasonable proportions, if they had suffered any damage in the first place. If the anti-suit injunction could not be issued and the Spanish judge decided that the proceedings were not adequately related, Mr Turner would have no protection and would be vexed and harassed by the Spanish proceedings.

Anti-suit injunctions protect English proceedings, but not necessarily only English litigants. Any litigant would be eligible for the protection.[265]

4. Anti-suit injunctions as against third State courts

It is also possible that an English court has jurisdiction according to the Brussels I Regulation and the plaintiff seeks an injunction to restrain proceedings in a third State. Here the injunction is not inconsistent with the Regulation, since it will probably uphold the jurisdiction granted under it.[266] Thus such injunction might be granted if the English courts have exclusive jurisdiction based on a forum clause.

The House of Lords formulated their question in *Turner v Grovit* to the European Court of Justice carefully. The question related only to anti-suit injunctions when the other court was situated in an EU Member State. Nothing was discussed relating to third States.

The question whether an English court can grant an anti-suit injunction restraining the parties from commencing or continuing actions in third State courts, remains open. Jurisdiction may be based on the Brussels I Regulation, *eg* because the defendant is domiciled in England while the plaintiff is domiciled in Canada. At the same time, a Canadian court might have jurisdiction. Can an English court issue an anti-suit injunction to keep the litigants out of the Canadian court? According to purely internal English law, this would be possible since the English courts have *in personam* jurisdiction. This injunction would protect the Brussels I Regulation. It would ensure compliance with its rules on jurisdiction. Furthermore, it would prevent contradictory judgments and thus facilitate automatic recognition within the EU: a court can refuse

[263] Art 27 Brussels I Regulation; Art 21 Brussels Convention.
[264] Art 28 Brussels I Regulation; Art 22 Brussels Convention.
[265] A Briggs & P Rees, *op cit* (fn 19) p 365.
[266] See P North & JJ Fawcett, *op cit* (fn 16) p 272-273.

recognition if there is an earlier irreconcilable judgment from a third State, involving the same parties and the same cause of action and which can be recognised in that State.[267] An anti-suit injunction could help to prevent the occurrence of irreconcilable judgments.

The argument that there should be mutual trust between the EU Member States is not relevant in this case. The fact that an English court restrains a party from bringing proceedings in a third State court, has no bearing on the functioning of the European judicial area.

Another case would be where a third State court is involved while jurisdiction is based on a rule of English domestic law, permitted by Article 4 of the Brussels I Regulation. Such will be the case if the defendant is domiciled in a third State. In this case the anti-suit injunction would have the same effect as described above. No mutual trust would be put in question.

If jurisdiction is not based on the Brussels I Regulation and an anti-suit injunction is granted as against a third State court, the European judicial area is not concerned. Those injunctions will remain under English law.

5. Anti-suit injunctions in protection of a forum clause in favour of an EU Member State court

Anti-suit injunctions can be used to safeguard a forum clause that the parties had agreed to in favour of an EU Member State court. An example in this regard is *Ultisol Transport Contractors Ltd v Bouygues Offshore SA and another*.[268] Ultisol, a Bermudan company managed from The Netherlands, and Bouygues, a French company, contracted for the lease of a tug for towing Bouygues's barge from the Congo to Cape Town, South Africa. The contract contained a forum clause for the High Court of Justice in London and a choice for English law. Upon arrival in Cape Town, in stormy weather, the tow line parted and the barge was lost. Bouygues instituted proceedings in South Africa against Ultisol, Caspion, the (Russian or Azerbaijan) owners of the tug and Portnet, the South African port authority, which allowed the vessels to enter despite the bad weather conditions.

Ultisol applied for an anti-suit injunction in England on the basis of the forum clause between it and Bouygues. The court granted the anti-suit injunction, finding that the forum clause was valid under the Brussels Convention. It further found that the Brussels Convention did not exclude the court's discretion to grant an anti-suit

[267] Art 34(4) Brussels I Regulation.
[268] *Ultisol v Bouygues* [1996] 2 Lloyd's Rep 140; the later application *Bouygues Offshore SA v Caspian Shipping Co and Others (No 5) Ultisol Transport Contractors Ltd v Bouygues Offshore SA and Another* [1997] 2 Lloyd's Rep 533; and decision on appeal: *Bouygues Offshore SA v Caspian Shipping Co (Nos 1, 3, 4 and 5)* [1998] 2 Lloyd's Rep 461.

injunction "in circumstances such as these".[269] The anti-suit injunction only restrained Bouygues's proceedings against Ultisol and not against the other parties. Even though leave to appeal was subsequently granted, the point made about the Brussels Convention was not put to question.

The case indicates the use of an anti-suit injunction as against a third State court without in any way harming the European judicial area. To the contrary – the anti-suit injunction protected the proceedings on the basis of a Brussels Convention forum clause in England.

For example, the parties conclude a non-exclusive choice of court agreement for the High Court in London and a court in Australia.[270] If at least one of the parties is domiciled in the EU, the case may fall within the scope of the Regulation.[271] The English court might issue an anti-suit injunction restraining the parties from instituting proceedings in Australia. That injunction, as in the examples above, will protect the scheme of the Brussels I Regulation without denying the mutual trust between the EU Member States. It would, however, not demonstrate comity towards the third State court.

In an even more aggressive fashion, the English court might grant an anti-suit injunction despite the existence of a choice of court clause in favour of a third State, because the court is of the opinion that the clause is invalid, or because an exclusive basis of jurisdiction exists for the courts in England.[272] The injunction, whether tolerable on grounds of comity or not, has nothing to do with the Brussels I Regulation and the European judicial area.[273]

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[269] At 147.

[270] Compare the agreement concluded between the parties in *Continental Bank NA v Aeakos Compania Naviera SA and others* [1994] 1 WLR 588: the borrowers had to bring proceedings in England while the bank retained the right to bring proceedings in any country that had jurisdiction. The Court of Appeal found that there had been a clear intention that the borrowers, but not the bank, be obliged to submit disputes to the English courts and in this sense the borrowers were not permitted to bring proceedings in Greece, as they had done.

[271] Art 23 Brussels I Regulation provides for choice of court clauses in favour of courts in the EU between two parties at least one of which is domiciled in the EU These clauses are exclusive unless the parties have agreed otherwise. In the example mentioned, the application of the Regulation would in fact depend on the court seised: if it is an EU court, the Regulation will be applied. It is worth noting that the future Hague Convention on exclusive choice of court agreements will not apply if the forum election is not exclusive. For further information on the project of that Convention, see http://www.hcch.net.

[272] There is no clarity as yet on this situation (see A Briggs & P Rees, *op cit* (fn 19) p 371), but let us assume for argument's sake that an anti-suit injunction may be granted in this case.

[273] One can make reference here to the ***effet réflexe***, the doctrine of Prof GAL Droz, stating that the courts of EU Member States should decline jurisdiction if there is a forum clause in favour of a third State court. See GAL Droz, *Pratique de la convention de Bruxelles du 27 septembre 1968* (Paris: Librairie Dalloz, 1973) p 34; GAL Droz, 'La Convention de San Sebastian alignant la Convention de Bruxelles sur la Convention de Lugano' (1990) *RCDIP* p 1-21 at p 14; P Gothot & D Holleaux, *op cit* (fn 45) p 84; H Gaudemet-Tallon, 'Les frontières extérieures de l'espace judiciaire européen: quelques repères', in *E Pluribus unum. Liber Amicorum George AL Droz* (The Hague: Martinus Nijhof Publishers, 1996) p 85-104 at p 95-97.

The above-mentioned examples provoke another question: what about an arbitration clause? If the parties have concluded an arbitration agreement, can the English courts prevent the parties from going to arbitration?[274] Can the Brussels I Regulation protect the arbitration proceedings and prevent such anti-suit injunctions in the European Union? After the *Van Uden* judgment,[275] the answers to these types of questions have become less clear.[276]

6. Anti-suit injunctions in protection of an exclusive basis of jurisdiction in an EU Member State court

Whether or not an anti-suit injunction could protect the exclusive bases of jurisdiction of the Brussels I Regulation, is unclear. Perhaps the English courts do not have the same strict view on exclusive jurisdiction as the civil law systems, while the examples of anti-suit injunctions come mostly from English law. Just as is the case for forum clauses in favour of EU Member State courts, the anti-suit injunction might be a useful tool.

7. Assessment: anti-suit injunctions vs *lis pendens*

It might be appropriate at this stage to consider the advantages and disadvantages of the application of the anti-suit injunction in contradistinction to the plea of *lis pendens.* That can be done by considering the applicability of the *lis pendens* rule to the case of *Turner v Grovit*. Firstly, would the courts have viewed the parties as the same? The plaintiff in London was Mr Turner, while the defendant was Harada. The proceedings in Madrid were brought by Changepoint against Mr Turner. Therefore, strictly speaking, the *lis pendens* rule would not apply since the parties were not identical.[277] However, both Harada and Changepoint belonged to the same group, which might have been an argument in favour of a more liberal application of the *lis pendens* rule. If the *lis pendens* rule were not applicable here, the only possible solution would be the application of the rule on related actions, bearing in mind that that rests on a discretion exercised by the judges.

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[274] Regarding the opposite position, namely anti-suit injunctions in support of arbitration, see SR Shackleton, 'Global warming: milder still in England: Part 2' (1999) *Int Arb L Rev* p 117-136 at p 124-125.

[275] ECJ case C-391/95, judgment of 17 November 1998, *Van Uden Maritime BV, trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line and Another* [1998] *ECR* I-7091.

[276] This case dealt with provisional measures requested before a Dutch court despite the existence of an arbitration clause. The Court of Justice found that these provisional measures fell in the scope of the Brussels Convention and in this sense created confusion as to the extent of the exclusion of arbitration proceedings from the Brussels regime (Art 1(2)(d) Brussels I Regulation; Art 1(4) Brussels Convention).

[277] On this requirement with respect to the *lis pendens* rule, see ECJ case C-406/92, judgment of 6 December 1994, *The owners of the cargo lately laden on board the ship "Tatry" v the owners of the ship "Maciej Rataj"* [1994] *ECR* I-5439.

The identical nature of the causes of action is not beyond doubt. The English proceedings concerned wrongful dismissal while the Spanish proceedings related to damages for unprofessional conduct. It was not clear to the English Court of Appeal that the plaintiff in the Spanish actions was even the true employer of Mr Turner.[278] That moves the causes of action of the two matters even further apart.

The priority rule of the *lis pendens* plea is a strict time-based one and does not always ensure the most just outcome.[279] However, that is probably a shortcoming the EU Member States have grown accustomed to. The anti-suit injunction, on the other hand, is flexible in that it takes the more natural forum into account while the strict priority and race to the court does not exist.[280]

Another advantage of the anti-suit injunction is that it can be granted before actions are initiated. One need not have two pending cases before a solution can be sought.

In international civil litigation, the anti-suit injunction is not a phenomenon that should be promoted. It raises problems of comity, as has been set out. Therefore the European Court of Justice has eliminated it in the European judicial area. Since the *Turner* judgment, anti-suit injunctions are no longer possible as against EU Member State courts, but probably still as against third State courts. These can, when foreign proceedings are truly vexatious and the basis of jurisdiction of the forum court is beyond doubt, in some instances be a useful tool. It might even, in some instances, safeguard the Brussels I Regulation.

[278] At 632.
[279] See ECJ case C-116/02, judgment of 9 December 2003, *Gasser GmbH v Misat Srl*, not yet published in *ECR*, see http://www.curia.eu.int; [2004] Lloyd's Rep 222, where the strict priority rule was confirmed. The Brussels Convention required reference to national law for the date of the institution of the action: ECJ case C-129/83, judgment of 4 June 1984, *Zelger v Salinitri* [1984] *ECR* 2397. The Brussels I Regulation has instituted a unified rule. See H Gaudemet-Tallon, *op cit* (fn 214) p 267-269.
[280] See D McClean, *op cit* (fn 261) p 126 *et seq*. See also A Briggs & P Rees, *op cit* (fn 19) p 217, stating that the Brussels I Regulation provides a high degree of uniformity, but a low degree of discretion.

Chapter 6: Provisional and Protective Measures

Article 31 of the Brussels I Regulation:

1. *Application may be made to the courts of a Member State for such provisional, including vent the applicant from availing himself of provisional, including protective, measures in accordance with the law of the Member State requested without a declaration of enforceability under Article 41 being required.*
2. *The declaration of enforceability shall carry with it the power to proceed to any protective measures.*
3. *During the time specified for an appeal pursuant to Article 43(5) against the declaration of enforceability and until any such appeal has been determined, no measures of enforcement may be taken other than protective measures against the property of the party against whom enforcement is sought.*

Article 20 of the Brussels II*bis* Regulation

In urgent cases, the provisions of this Regulation shall not prevent the courts of a Member State from taking such provisional, including protective, measures in respect of persons or assets in that State as may be available under the law of that Member State, even if, under this Regulation, the court of another Member State has jurisdiction as to the substance of the matter.

The measures referred to in paragraph 1 shall cease to apply when the court of the Member State having jurisdiction under this Regulation as to the substance of the matter has taken the measures it considers appropriate.

Consideration 16 of the Insolvency Regulation:

The court having jurisdiction to open the main insolvency proceedings should be enabled to order provisional and protective measures from the time of the request to open proceedings. Preservation measures both prior to and after the commencement of the insolvency proceedings are very important to guarantee the effectiveness of the insolvency proceedings. In that connection this Regulation should afford different possibilities. On the one hand, the court competent for the main insolvency proceedings should be able to order provisional protective measures covering assets situated in the territory of other Member States. On the other hand, a liquidator temporarily appointed prior to the opening of the main insolvency proceedings should be able, in the Member States in which an establishment belonging to the debtor is to be found, to apply for the preservation measures which are possible under the law of those States.

Article 25(1) of the Insolvency Regulation:

Judgments handed down by a court whose judgment concerning the opening of proceedings is recognised in accordance with Article 16 and which concern the course and closure of insolvency proceedings, and compositions approved by that court shall also be recognised with no further formalities…

The first subparagraph shall also apply to judgments deriving directly from the insolvency proceedings and which are closely linked with them, even if they were handed down by another court.

The first subparagraph shall also apply to judgments relating to preservation measures taken after the request for the opening of insolvency proceedings.

Article 38 of the Insolvency Regulation:
Where a court of a Member State which has jurisdiction pursuant to Article 3(1) appoints a temporary administrator in order to ensure the preservation of the debtor's assets, that temporary administrator shall be empowered to request any measures to secure and preserve any of the debtor's assets situated in another Member State, provided for under the law of that State, for the period between the request for the opening of insolvency proceedings and the judgment opening the proceedings.

1. Introduction

Provisional and protective measures are aimed at protecting rights, parties, proceedings or judgments. They can take many forms. Mainly one distinguishes between measures before judgment in the main action and measures after judgment.[1]

These different measures have different bases under the civil jurisdiction Regulations. Firstly it should be mentioned that a court that has jurisdiction under Articles 2-24 of the Brussels I Regulation, also has jurisdiction to grant provisional measures before the judgment.[2] This is also the case under the Brussels II*bis* and Insolvency Regulations, where it is explicitly so stated.[3]

Provisional and protective measures before judgment can be granted on the basis of Article 31 of the Brussels I Regulation.[4] These can even be granted before the main action is instituted.[5] In some cases, main proceedings do not follow. The request for provisional measures can often be used as part of the litigation tactic, attempting to force a party to settlement.[6] In some areas of the law, speedy action is necessary and

[1] See A Briggs & P Rees, *Civil Jurisdiction and Judgments* (3rd edn, London: LLP, 2002) p 401; ECJ case C-398/92, judgment of 10 February 1994, *Firma Mund & Fester v Firma Hatrex International Transport* [1994] *ECR* I-467. CMV Clarkson & J Hill, *Jaffey on the Conflict of Laws* (London: Butterworths, 2002) p 142, state that in English law, extraterritorial injunctions are more likely to be made after judgment that before.
[2] This was confirmed in ECJ case C-391/95, judgment of 17 November 1998, *Van Uden Maritime BV, trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line and Another* [1998] *ECR* I-7091, rec 22.
[3] See Art 20 Brussels II*bis* Regulation and consideration 16 Insolvency Regulation.
[4] Art 24 Brussels Convention.
[5] See K Vandekerckhove, "Voorlopige en bewarende maatregelen in de EEX-Verordening, in EEX-II en in de Insolventieverordening", in M Storme & G de Leval (eds), *Het Europees Gerechtelijk Recht & Procesrecht* (Bruges: die Keure, 2003) p 119-151 at p 124.
[6] G Maher & BJ Rodger, "Provisional and Protective Remedies: The British experience of the Brussels Convention" (1999) *ICLQ* p 302-339 at p 302; A Briggs & P Rees, *op cit* (fn 1) p 406.

disputes often come to an end by a provisional measure granted by a court. This is especially frequent in intellectual property cases.[7]

On the other hand, provisional and protective measures can be granted at the stage of the request for enforcement, or together with the enforcement order according to Article 47. The possibility to grant provisional measures after judgment, but before the declaration of enforceability, in accordance with Article 27(1), is new under the Brussels I Regulation and did not exist under the Brussels Convention.[8]

All possible provisional measures under the different national laws of the EU Member States will not be discussed fully.[9]

After delimiting the personal scope of the civil jurisdictional rules in Chapters 2, 3 and 4, and after examining other procedural rules linked to jurisdiction in Chapter 5, the question of provisional measures remains. The main issue is whether the rules on provisional and protective measures provide an exception to what has already been discussed. Conversely, do the rules on provisional and protective measures follow the scope rules already laid out?

Before those matters can be addressed, it is necessary to look into the definition of provisional and protective measures and their true basis of jurisdiction. An examination of the material scope of provisional and protective measures, compared to the material scope of the other articles is useful; it provides a starting point for the discussion on the personal scope. After discussing the personal scope, the relationship of provisional and protective measures on the one hand, and the reflexive effect on the other will receive the attention. The discussion on the enforcement of provisional measures will be short, because the impact on third States is limited. The above-mentioned discussions will concentrate on the Brussels I and Brussels II*bis* Regulations. At the end of this Chapter, there will be a brief reference to specific issues relating to provisional and protective measures under the Insolvency Regulation, since the nature of that Regulation warrants a separate discussion.

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[7] See M Pertegás Sender, *Cross-Border Enforcement of Patent Rights* (Oxford: Oxford University Press, 2002) p 127; *Rechtbank van Eerste Aanleg* (District court) of Brussels, 14 September 2001, AR 00/1456/C.

[8] See K Vandekerckhove, "Voorlopige en bewarende maatregelen in de EEX-Verordening, in EEX-II en in de Insolventieverordening" in M Storme & G de Leval (eds), *op cit* (fn 5) p 119-151 at p 120.

[9] For a survey of national legal systems, see "Note on Provisional and Protective Measures in Private International Law and Comparative Law", prepared by C Kessedjian, Preliminary Document No 10 of October 1998 of the Judgments Project of the Hague Conference for Private International Law (http://www.hcch.net); A Verbeke & M-T Caupain, *Transparence Patrimoniale. Condition nécessaire et insuffisante du titre conservatoir européen?* (Paris: Les Éditions Juridiques et Techniques, 2001); F Gerhard, "La compétence du juge d'appui pour prononcer des mesures provisoires extraterritoriales. A propos du prononcé d'une worldwide Mareva injunction anglaise à l'appui d'une procédure au fond suisse et de la jurisprudence van Uden de la Cour de Justice des Communautés européennes" (1999) *SZIER* p 97-141.

2. Definition

General

Provisional measures are difficult to define. They are something less than a full judgment. In some legal systems, they might be seen as a fast track way to get the same result as through a proper judgment.[10] Roughly speaking, provisional measures can be divided into "*mesures d'attente*" (maintaining the *status quo*) or "*mesures d'anticipation*" (providing non-final relief).[11]

The Regulations do not contain definitions of provisional measures.[12] The concepts of the Regulations need to be interpreted autonomously. That is a difficult venture, especially since the Brussels I and Brussels II*bis* Regulations (respectively Arts 31 and 20) explicitly refer to national law,[13] instead of giving such autonomous definition. Through the case law of the European Court of Justice, it has become clear that not all measures that are seen as "provisional" or "protective" in national legal systems can be so regarded for purposes of the Regulation.[14]

The Regulations' rules on provisional measures provide an exception to the normal rules of jurisdiction, taking away the defendant's protection.[15] Therefore the Article should be given a limited interpretation.[16]

A clear-cut definition of provisional measures under the Regulation is important for parties from third States. It will inform them on where to request interim measures and what their legal basis is in a specific case – domestic law or the Brussels I Regulation.

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[10] This has specifically become the case under the French *référé-provision* and the Dutch and Belgian *kort geding*. See also P de Vareilles-Sommières, "La compétence internationale des tribunaux français en matière de mesures provisoires" (1996) *RCDIP* p 397-437 at p 398-399.

[11] P de Vareilles-Sommières, "La compétence internationale des tribunaux français en matière de mesures provisoires" 1996 *RCDIP*, p 397-437, at p 405-406.

[12] For the revision of the Brussels Convention that was underway in 1998, the European Commission suggested such an autonomous definition, Art 18a(2): *"For the purposes of this Convention, provisional, including protective measures means urgent measures for the examination of a dispute, for the preservation of evidence or of property pending judgment or enforcement, or for the preservation or settlement of a situation of fact or of law for the purpose of safeguarding rights which the courts hearing the substantive issues are, or may be, asked to recognise."*; *OJ C* 33, 31 January 1998, p 20.

[13] See *infra*, p 2 *et seq*. It is worth noting that the Helsinki Principles (67th Conference of the International Law Association, 1996) expressly stated that they did not seek to confine the existing bases of national jurisdiction; see P Nygh, "Provisional and Protective Measures in International Litigation. The Helsinki Principles" (1998) *RabelsZ* p 115-122 at p 121.

[14] L Pålsson, "Interim Relief under the Brussels and Lugano Conventions" in *Liber amicorum Kurt Siehr: Private Law in the International Arena. From National Conflict Rules Towards Harmonization and Unification* (TMC Asser Press, 2000, The Hague), p 621-638 at 625.

[15] H Gaudemet-Tallon, *Compétence et execution des jugements en Europe* (3rd edn, Paris: LGDJ, 2002) p 246.

[16] G Maher & BJ Rodger, "Provisional and Protective Remedies: The British experience of the Brussels Convention" (1999) *ICLQ* p 302-339 at p 302; A Briggs & P Rees, *op cit* (fn 1) p 306.

The 1996 Hague Convention on the Protection of Children[17] provides a better way of dealing with provisional measures. It grants jurisdiction to grant provisional measures and at the same time sets the conditions for the use of such jurisdiction.[18] Some authors favoured such autonomous definition at the time of the reviewing of the Brussels Convention (which turned into the conversion of the Brussels Convention into the Brussels I Regulation).[19] Their hope that the Article would be modified did not materialise. The wording of the provision of the Brussels I Regulation is identical to that of the Brussels Convention. In fact it is not shocking that the Article was not modified in this manner. Provisional measures are, after all, a strange and hybrid part of the law. One enters a domain where it is difficult to draw the line between procedural and substantive law.[20]

Fortunately, the European Court of Justice has given some guidelines, if inadequate. For instance, it stated in *Reichert II*[21] that regard should be had not to the measure itself but to the rights it aimed to protect. That case dealt with the French *action paulienne*, which did not seek to preserve a factual or legal situation pending a decision of the court having jurisdiction as to the substance of the matter, but could alter legal positions.[22] Therefore, it could not be seen as a provisional or protective measure under the Brussels Convention.[23]

Finding the exact definition of provisional measures under the civil jurisdiction regulations, ingredients of national law and limitations imposed by the European Court of Justice are mixed. These ingredients will be discussed in this paragraph. The definition, to the extent that it can be made, applies only when the Regulation applies, and not every time an EU Member States court seeks to grant provisional measures.[24]

Urgency

Not all provisional measures that exist in national systems strictly require that the relief sought must be urgent. Nor is the requirement of urgency explicitly stated in Article 31

[17] Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in respect of Parental Responsibility and Measures for the Protection of Children; see http://www.hcch.net.
[18] Art 11.
[19] See H Gaudemet-Tallon, case note on *Van Uden* (1999) *Rev Arb* p 152-166 at p 165.
[20] See GA Berman, "Provisional Relief in Transnational Litigation" (1997) *Col JTL* p 553-617.
[21] ECJ case C-261/90, judgment of 26 March 1992, *Reichert-Kockler v Dresdner Bank (Reichert II)* [1992] *ECR*, I-2149. See case notes by B Ancel (1992) *RCDIP* p 720-726 and P Vlas (1993) *NILR* p 499-501. A Huet, in his case note (1993) *JDI* p 461-465 at p 464-465 expresses doubts about the definition adopted by the European Court of Justice.
[22] This action can be used by a creditor of an insolvent debtor to invalidate a disposal of assets in fraud of the rights of a creditor.
[23] This view had also been pronounced, with view to the material scope of provisional measures, in ECJ case 143/78, judgment of 27 March 1979, *Jacques de Cavel v Louise de Cavel (Cavel I)* [1979] *ECR*, 1055; see *infra*, p 2.
[24] See the discussion, *supra*, p 2 *et seq.*

of the Brussels I Regulation. The Brussels II*bis* Regulation does contain an explicit reference to urgency.[25] This has led some authors to conclude, the reference being absent from the Brussels I Regulation, that that requirement does not exist.[26] Others argue the contrary: the mention of urgency is said to be an incorporation of the case law of the European Court of Justice.[27] Whichever argument one follows, it is clear that the measures contain an exception to the general rules on jurisdiction and they should only be reverted to when truly necessary. It seems that a narrow interpretation of the measures pleads in favour of the requirement of urgency.[28]

It is submitted that the requirement should be sought in national law. Analysis of the *Italian Leather* judgment could provide support for that assertion.[29] In that case, Italian Leather sought interim relief (an order restraining the defendant to use a specific brand name) in a German court. The relief was not available under German law, since the judge found that there was no urgency according to the German law interpretation of the requirement: Italian Leather had not proved that there was a risk of irreparable damage or of a definitive loss of rights. Italian Leather then tried obtaining the same interim relief in Italy. There, upon a different view of the requirement of urgency, the relief was granted. The European Court of Justice recognised these different interpretations without choosing one or giving an autonomous interpretation of urgency.

It seems to be in line with the true basis of jurisdiction in national law, that urgency also has to be interpreted according to that law.[30]

Territoriality

Yet another point of lack of clarity of the rule on provisional measures is the extent to which defendants and assets not in the Member State granting provisional measures, can be affected.[31]

[25] See Art 20 Brussels II*bis* Regulation. See also B Ancel & H Muir Watt, "Les désunion européeenne: le Règlement dit 'Bruxelles II' " (2001) *RCDIP* p 403-457 at p 427. By way of comparisson, note that the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (1996) also contains a reference to urgency; see http://www.hcch.net.
[26] See K Vandekerckhove, "Voorlopige en bewarende maatregelen in de EEX-Verordening, in EEX-II en in de Insolventieverordening" in M Storme & G de Leval (eds), *op cit* (fn 5) p 121.
[27] See N Watté & H Boularbah, "Les nouvelles règles de conflits de juridictions en matière de désunion des époux. Le règlement communautaire «Bruxelles II»", (2001) *JT* p 369-378, at p 375.
[28] See H Gaudemet-Tallon, *op cit* (fn 15) p 249-250.
[29] See also K Vandekerckhove, "Voorlopige en bewarende maatregelen in de EEX-Verordening, in EEX-II en in de Insolventieverordening", in M Storme & G de Leval (eds), *op cit* (fn 5) p 122.
[30] See *infra*, p 2 *et seq.*
[31] See B Audit, *Droit international privé* (3rd edn, Paris: Economica, 2000) p 437.

In the English case *Haiti v Duvalier*[32] a Mareva injunction, aimed at freezing the assets of the defendants all over the world, was granted to the plaintiff, the Republic of Haiti, against eleven defendants, only one of whom was domiciled in England. The main proceedings were pending in France since most of the defendants were domiciled there and it was clear that the English court did not have jurisdiction to do more than grant interim measures. The English judge found it reasonable to grant this order, since the case was unusual. The link with England was tenuous. One bank was situated in England and the lawyers dealing with some of the assets (but who were not defendants) were domiciled in England. The case shows the extent of the possible effects of provisional measures outside the European Union. Authors have expressed doubt whether this order would have been possible after the *Van Uden* judgment and the "real connecting link" test.[33] However, these measures would still be possible applying English domestic law. Furthermore, if the main action is outside the European Union, the English courts could grant similar measures. The *Van Uden* limitation would come into play if Article 31 applies. In that sense, defendants and assets from third States are more clearly put outside the reach of provisional measures by European Union law than is the case under some domestic legal systems.

By contrast, the Hague Convention for the Protection of Children[34] states that provisional measures have a territorial effect.[35] An article drafted in such a way is clear to all – those that are Party as well as those that are not Party to the instrument.

As is the case for urgency, it seems that reference should be made to national law to determine how far the measure can reach, with the qualification of the "real connecting link", discussed below.

Real connecting link

The European Court of Justice introduced this important criterion and limitation in the *Van Uden* judgment:

"*It follows that the granting of a provisional or protective measure on the basis of Article 24 is conditional on,* inter alia, *the existence of a real connecting link between the subject-matter of the measures sought and the territorial jurisdiction of the Contracting State of the court before which those measures are sought.*"[36]

[32] [1990] 1 QB 202; [1989] 1 All ER 456.
[33] CMV Clarkson & J Hill, *op cit* (fn 1) p 143.
[34] Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in respect of Parental Responsibility and Measures for the Protection of Children; see http://www.hcch.net.
[35] Art 12.
[36] ECJ case C-391/95, judgment of 17 November 1998, *Van Uden Maritime BV, trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line and Another* [1998] *ECR* I-7091, rec 40.

Many pages have been written on the *Van Uden* judgment,[37] but the uncertainty has remained. What is a "real connecting link"? Does that refer to the territory on which the measure will be executed? The German Government stated, in its arguments before the Court on the *Van Uden* case, that the condition of the real connecting link is satisfied when the provisional measure can be enforced in that State.[38] However, that cannot be the only possible link. Does the "real connecting link" refer to the presence of the assets concerned in the main action? Does it refer to business interests on the territory?[39] Probably a balance of the different interests would have to be made and the establishment of a real link would be a question of fact.

This rule seems to be the whip with which European Union law will punish stray measures - those going too far will be brought back by this vague criterion. The criterion, as it is formulated, can be used to impose an extent of territoriality, or even an extent of urgency.

Furthermore, the European Court of Justice has made it clear in the *Mietz* judgment that the voluntary appearance of the defendant cannot provide unlimited jurisdiction to grant any provisional or protective measures which it might consider appropriate if it had jurisdiction under the Brussels I Regulation as to the substance of the matter.[40] Therefore, if jurisdiction is based on the rule on provisional and protective measures, the requirement of the real connecting link prevents the granting of the same broad order that would have been possible if the court had jurisdiction as to the substance.

One might ask whether this rule may be used in protection of assets situated in third States. However, it seems that the answer lies at a different point. These limitations can only be triggered once it has been established that the Regulation provides jurisdiction to an EU Member State court. If an EU Member State court has jurisdiction, then assets in a third State would also fall under the limitations. That would be the case for the world-wide injunction given in *Haiti v Duvalier* (where the French court had jurisdiction) so that the test of the real connecting link could prevent measures that go

[37] See, for instance, case notes by XE Kramer (1999) *NTBR* p 74-79; JJ Van Haersolte-Van Hof (1999) *NTER* p 66-67; H Gaudemet-Tallon (1999) *Rev Arb* p 152-166; P Vlas (1999) *NILR* p 106-109; A Huet (1999) *JDI* p 613-625; H Boularbah (1999) *TBH* p 604-610; AVM Struycken (2000) *AA* p 579-586. See also M Pertegás Sender, *op cit* (fn 7) p 129-131 & 136-140; L Demeyere, "Voorlopige en bewarende maatregelen (Art 24 EEX) na het arrest Van Uden en het arrest Mietz" (1999-2000) *RW* p 1353-1363; A Schulz, "Einstweilige Maßnahmen nach dem Brüsseler Gerichtsstands- und Vollstreckungsübereinkommen in der Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften (EuGH)" (2001) *Zeitschrift für Europäisches Privatrecht* p 805-836.

[38] See rec 36 of the judgment.

[39] See H Boularbah, "Les measures provisoires en droit commercial international: développements récents au regard des Conventions de Bruxelles et de Lugano" (1999) *TBH* p 604-610 at p 604.

[40] ECJ case C-99/96, judgment of 27 April 1999, *Mietz v Intership Yachting Sneek BV* [1999] *ECR* I-2277, rec 52.

too far.[41] If not, the EU Member State court is free to apply its national rules to their full extent.

Provisional nature

In the *Van Uden* judgment the European Court of Justice emphasised the importance that the measure granted must not be final:
"*Depending on each case and commercial practices in particular, the court must be able to place a time-limit on its order or, as regards the nature of the assets or goods subject to the measures contemplated, require bank guarantees or nominate a sequester and generally make its authorisation subject to all conditions guaranteeing the provisional or protective character of the measure ordered*."[42]

By stating this requirement, as that of the real connecting link, the European Court of Justice gives European Union law the possibility to temper measures that go to far. Measures that are not really temporary and grant relief to the plaintiff, even in some cases to the detriment of the defendant, while it is not certain that the measure will be reversible if the plaintiff is unsuccessful in the main action, will not pass this test.

The Court of Justice did not give a yes or no answer to the question of whether *kort geding* proceedings qualify as provisional measure under the Brussels I Regulation. Thus, for litigants from third States it is important to know whether their cases fall in the Brussels I Regulation or not. If not, national law without tempering may be relied upon. If yes, national law applies, as long as the measure does not go too far, *ie* it is limited by the *Van Uden* judgment.

On the other hand, the Brussels II*bis* Regulation has introduced a sell-by date for provisional measures: the measures will cease to apply when the Member State court with jurisdiction over the substance of the matter has taken the necessary measures.[43] This rule in the youngest of the civil jurisdiction regulations supports the view that provisional measures have a time limit.

[41] See also CMV Clarkson & J Hill, *op cit* (fn 1) p 143.
[42] Rec 38. See also ECJ case C-99/96, judgment of 27 April 1999, *Mietz v Intership Yachting Sneek BV* [1999] *ECR* I-2277, rec 42 and ECJ case C-104/03, judgment of 28 April 2005, *St Paul Dairy Industries NV v Unibel Exser BVBA*, not yet published in *ECR*, rec 14.
[43] See Art 20(2) Brussels II*bis* Regulation. This rule was not contained in the Brussels II Regulation. The Helsinki Principles (67th Conference of the International Law Association, 1996) also contained a time limit for provisional measures. See P Nygh, "Provisional and Protective Measures in International Litigation. The Helsinki Principles" (1998) *RabelsZ* p 115-122, at p 120.

3. Basis of jurisdiction

The Brussels I Regulation's rule and the basis of jurisdiction for provisional measures has led to much discussion and uncertainty. It does not contain a clear rule: there is a reference to the national laws of the Member States, but already on the extent of this reference authors disagree.[44]

At first sight it seems that the jurisdiction of a court requested to grant provisional measures can only be based on a rule of national law. This, of course, has raised the question whether the reference to national law is limited in some way. Before the *Van Uden* judgment, many authors believed that the exorbitant national grounds outlawed by the Brussels I Regulation (Art 3) could not be relied on as a basis of jurisdiction to grant provisional measures, or at least if there were no other link, such as the presence of assets.[45] It was not thought to be possible that these bases of jurisdiction, which all agreed were evil, could re-enter the European judicial area by the unguarded back door of provisional measures.

Then came the *Van Uden* judgment. This case concerned a *kort geding* proceeding in The Netherlands. Jurisdiction was based on the domicile of the plaintiff, according to Article 126(3) of the Dutch *Wetboek van Burgerlijke Rechtsvordering* (Code of Civil Procedure). Not surprisingly, this basis of jurisdiction is seen as exorbitant and outlawed by the Brussels I Regulation.[46] One of the preliminary questions referred to the European Court of Justice was whether, in the case of provisional and protective measures, the jurisdiction of the court could be based on such an exorbitant ground of jurisdiction.[47] The European Court of Justice ruled that jurisdiction could be based on such ground. This conclusion came about in a very formalistic way: the first subparagraph of Article 3 states that a defendant domiciled in a Member State can only be sued in the courts of another Member State by virtue of the rules set out in sections 2 to 6 of the Convention (2 to 7 of the Regulation). These sections contain the rules on special jurisdiction (*eg* for contract and tort), jurisdiction over parties that deserve protection (insured parties, consumers and employees), exclusive jurisdiction (*eg* concerning immovable property) and prorogation of jurisdiction. Other procedural matters, like *lis pendens* and related matters, are dealt with next in the scheme of the Regulation. Only in section 9 of the Convention (10 of the Regulation), the last section of the chapter on jurisdiction, the rule on provisional and protective measures gets its turn. Therefore the Court concluded that the rule on provisional and protective measures is not affected by the limitation in Article 3.

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[44] See also L Pålsson, "Interim Relief under the Brussels and Lugano Conventions" in *Liber amicorum Kurt Siehr: Private Law in the International Arena. From National Conflict Rules Towards Harmonization and Unification* (The Hague: TMC Asser Press, 2000) p 621-638 at p 628-629.

[45] H Gaudemet-Tallon, *Les Conventions de Bruxelles et de Lugano* (2nd edn, Paris: Montchrestien, 1996) p 197.

[46] See Art 3 & Annex I Brussels I Regulation; Art 3 Brussels Convention.

[47] Art 3 Brussels I Regulation refers to the list in Annex I for bases of jurisdiction under national law that are prohibited.

The parties in the *Van Uden* dispute were both domiciled in the EU. Therefore that case did not provide a problem regarding the exact personal scope. Transferring the arguments to that difficult question, should be done with caution.

The Jenard report does not provide more clarity on this question. The explanation of the Article on provisional and protective measures is short. It states merely that application may be made to the competent courts for provisional and protective measures. For the measures that may be granted, the report states that reference should be made to the internal law of the country concerned. Nothing is said on the basis of jurisdiction and it is not clear whether the reference to national law includes the issue of jurisdiction or merely the availability of a remedy.[48]

According to some authors, the rule on provisional measures provides an independent basis of jurisdiction.[49] No subsequent reliance on a national basis of jurisdiction is necessary. This argument states that the reference to national law in the Article refers only to the kind of measure available and not to any jurisdictional rule. This means that a court that does not have jurisdiction according to the Brussels I Regulation can have jurisdiction if it is in a position to grant a provisional measure. Jurisdiction is based on the fact that the purported measure will only be provisional, with certain limits set out by the European Court of Justice. Why then did the Court respond to the question relating to the exorbitant bases of jurisdiction in the way it did? That, according to the advocates of this theory, is because of the way the question was posed.

It is submitted that the existence of a basis for jurisdiction in national law is essential.[50] If one does not insert this requirement, the rule grants to jurisdiction to any court that wants it.[51] Cases can then in fact be decided on a lack of jurisdiction. If a court lacks jurisdiction, it can still have jurisdiction for provisional measures if a certain number of requirements, set by the European Court of Justice in the interpretation of the provision, have been met.

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[48] Jenard Report, p 42.

[49] M Pertegás Sender, *op cit* (fn 7) p 130; M Claeys, "Het international kortgeding en artikel 24 EEX", case note on Hof van Beroep, Gent, 8 December 1994 (1995-96) *AJT* p 151-154 at p 152-153; see also the judgment of the *Rechtbank van Eerste Aanleg* (District court) of Brussels of 22 September 2000, 2000 *Rev Prop Intel* p 292-302.

[50] See, in support of this theory, A Briggs & P Rees, *op cit* (fn 1) p 413; H Gaudemet-Tallon, *op cit* (fn 15) p 250; J Kropholler, *Europäisches Zivilproceßrecht. Kommentar zu EuGVO und Lugano-Übereinkommen* (7th edn, Heidelberg: Verlag Recht und Wirtschaft GmbH, 2002) p 356; H Boularbah, "Les mesures provisoires en droit commercial international: développements récents au regard des Conventions de Bruxelles et de Lugano" (1999) *TBH* p 604-610 at p 604.

[51] See, in support of this interpretation, G Cuniberti, *Les mesures conservatoires portant sur des biens situés à l'étranger* (Paris: LGDJ, 2000) p 320-321, stating: "*Il nous semble tout simplement inconcevable qu'une telle règle de compétence ait été imaginée. Nous ne l'avons jamais rencontrée en droit comparé. Même si elle devait exister, elle serait très certainement considérée comme exorbitante*."

It seems that the wording of the Brussels II*bis* Regulation provides support for this analysis. The rule on provisional and protective measures is formulated negatively: "*the provisions of this Regulation shall not prevent the courts of a Member State from taking such provisional, including protective, measures...*"[52] This formulation makes clear that no jurisdiction is granted by the Regulation; the Regulation merely leaves in place the rules that already exist. The true basis of those rules is to be found in national law. The European Commission states, in its practice guide on the application of the Brussels II*bis* Regulation, that the rule "*is not a rule which confers jurisdiction*".[53]

If that is so, one might venture to ask why the rule on provisional and protective measures was inserted into the Regulations at all. The rule serves two functions. It forces EU Member State courts to make available those measures that exist under national law, to parties from other EU Member States.[54] Such rationale seems perfectly intact with the elaboration of the EU's internal market, while respecting its borders. To those that support the theory that the Brussels I Regulation contains a complete set of rules,[55] the provision permits national rules to remain intact.

4. Material scope and provisional measures

General

Which provisional and protective measures fall in the scope of the rule of the Brussels I Regulation? This has been the subject of several cases before the European Court of Justice. To understand the scope, a brief discussion of the facts of these cases is necessary.

Divorce falls outside the scope of the Brussels I Regulation. In *Cavel I*,[56] a French court ordered, as protective measures pending a divorce, that the wife's furniture be put under seal and assets and accounts be frozen. The husband sought to enforce the order in a German court, where the assets and accounts were situated. The *Bundesgerichtshof* (Federal Supreme Court) posed a preliminary question to the European Court of Justice regarding the applicability of the Brussels Convention to provisional measures granted by a judge of family matters simultaneously with the proceedings for the dissolution of the marriage. The European Court of Justice found

[52] See Art 20 Brussels II*bis* Regulation.
[53] Practice guide for the application of the Regulation, drawn up by the European Commission in consultation with the European Judicial Network in civil and commercial matters; http://www.europa.eu.int/comm/justice_home/ejn, at p 11.
[54] See AVM Struycken, case note on *Van Uden* (2000) *AA* p 579-586 at p 581-582.
[55] On the different viewpoints as to whether the Brussels I Regulation encompasses all rules of civil and commercial jurisdiction, or the Regulation exists alongside national rules, see Chapter 1, p 2 *et seq.*
[56] See ECJ case 143/78, judgment of 27 March 1979, *Jacques de Cavel v Louise de Cavel (Cavel I)* [1979] *ECR* 1055. See case notes by A Huet, (1979) *JDI* p 681-691; T Hartley, (1979) *ELR* p 222-224; GAL Droz, (1980) *RCDIP* p 621-629.

that the inclusion of protective measures in the scope of the Convention is not determined by their own nature, but by the nature of the rights they protect. A distinction could not be drawn between provisional and definitive measures regarding the scope. The fact that a measure is provisional cannot be a justification to extend the scope of the Regulation to excluded matters.

Another prejudicial question followed in the same matter, now concerning a maintenance order.[57] The question concerned the enforcement of an interlocutory maintenance order granted by a French judge in divorce proceedings: was this a "civil matter" and could the Brussels Convention be used for this enforcement? Rights in property arising out of a matrimonial relationship fell outside the scope of the Brussels Convention (according to Art 1(2)), but maintenance fell in its scope (Art 5(2)).[58] The European Court of Justice considered the provisions of the French *code civil* (Civil Code) on which the order was based and stated that it dealt with all financial obligations between former spouses after divorce. They therefore amounted to civil matters and fell within the scope of the Brussels Convention.

This line of reasoning was followed in the judgment in *CHW v GJH*, dealing with the delivery up of a codicil, claimed to encompass an exemption from liabilities resulting from a spouse's management of property.[59] The European Court of Justice held that the issue was closely connected to a matrimonial relationship and therefore outside the scope of the Brussels Convention. It also repeated that the rule on provisional measures might not be relied upon to bring matters that were not within the scope of the convention, within its scope. The Article specifically referred to another court having jurisdiction "under this Convention".

The different rule of the Brussels II*bis* Regulation

Provisional measures outside the scope of the Brussels II*bis* Regulation may also be granted under it: the rule refers to assets, while the scope of the Brussels II*bis* Regulation does not include assets.[60] From an EU point of view such a rule makes sense. Some excluded matters are so closely related that their implication might be essential to safeguard the rights of a party under the Regulation. An example is the law of matrimonial property. Moreover, if provisional measures could not be taken with

[57] ECJ case 120/79, judgment of 6 March 1980, *Louise de Cavel v Jacques de Cavel (Cavel II)* [1980] *ECR* 731. See case notes by GAL Droz, (1980) *RCDIP* p 621-629; A Huet, (1980) *JDI* p 442-448; R Hausmann (1981) *IPRax* p 5-7.
[58] These provisions on the scope have not changed under the Brussels I Regulation.
[59] ECJ case 25/81, judgment of 31 March 1982, *CHW v GJHI* [1982] *ECR* 1189. See case notes by A Huet, (1982) *JDI* p 942-948; JG Sauveplanne, (1983) *IPRax* p 65-67; GAL Droz, (1984) *RCDIP* p 354-561.
[60] See Art 20 Brussels II*bis* Regulation. See also Borrás Report, para 59. See also V Van den Eeckhout, " 'Europees' echtscheiden. Bevoegdheid en erkenning van beslissingen op basis van de EG Verordening 1347/2000 van 29 mei 2000" in H van Houtte & M Pertegás Sender (eds) (2001), *op cit* (fn 27) p 93-94.

respect to assets, where a wrongdoer could feel them, their impact would be very limited. The extension seems to put the limits of the rules to the test yet again. However, if one maintains that the measures can only be taken once it is clear that an EU court has jurisdiction according to the Regulation, the objection seems to fade.[61]

Arbitration

The existence of an arbitration clause will not exclude the possibility to grant provisional measures under the Brussels I Regulation, according to the much-discussed *Van Uden* case.[62] The contract between Van Uden, a Dutch company, and Deco-Line, a German company, contained an arbitration clause. Van Uden instituted arbitration proceedings in The Netherlands and also sought interim relief there in a *kort geding* procedure. The Brussels Convention, as the Brussels I Regulation, did not apply to arbitration.[63] Deco-Line contested the jurisdiction of the court in The Netherlands. It stated that the German courts, place of its seat, had jurisdiction. The European Court of Justice stated that it was accepted that a court that had jurisdiction under the Convention also had jurisdiction to grant provisional or protective measures where necessary. The Article on provisional and protective measures created an additional ground for jurisdiction. Measures available are those which exist under national law. In situations where the parties had concluded an arbitration clause, jurisdiction could not be based on the other jurisdiction rules of the Regulation, but only on its provisional measures rule. The only test for the applicability of the rule on provisional measures was that the dispute should fall in the material scope of the Convention, *ie* civil and commercial matters. The Court stated that provisional measures should not be seen as ancillary to arbitration proceedings, but parallel to them, intended as measures of support.

Drawing this matter within the scope of the Brussels Convention was advantageous for the defendant. He could then rely on the Brussels Convention to limit the jurisdiction, while under Dutch law such limitation did not exist. It is clear that the Brussels Convention (as well as the Regulation) provides extra protection.

Although the outcome of the *Van Uden* case is not altogether surprising, the argumentation has caused much academic debate and many headaches.[64] According to the slot/space charter agreement, Van Uden undertook to make available to Deco-Line cargo space on board a vessel operated by Van Uden. The resulting legal dispute is clearly one within the ambit of “civil and commercial” matters. The fact that the agreement contained an arbitration clause did not alter its civil and commercial nature. Arbitration, as an excluded matter, is *sui generis*; it does not define a branch of

[61] See *infra*, p 2 *et seq.*
[62] ECJ case C-391/95, judgment of 17 November 1998, *Van Uden Maritime BV, trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line and Another* [1998] *ECR* I-7091
[63] See Art 1(4).
[64] See *supra*, fn. 37.

substantive law like the status or capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession, bankruptcy or social security.[65] Arbitration can be distinguished from these exceptions by the fact that it only refers to a chosen procedure. In fact, an arbitration clause does not differ much from a choice of court clause in the sense that it is a chosen forum or a chosen procedure. The exception rather refers to the fact that the Brussels I Regulation does not regulate the recognition of arbitral awards. For this purpose the efficient and widely accepted New York Convention existed.[66] All EU Member States are party and it would therefore have been superfluous to regulate the matter. It would not have been a good idea to create a conflict of Conventions.[67]

One should distinguish between the material scope of the Regulation regarding the substance of legal relations on the one hand and procedural matters on the other hand. Arbitration, as a procedure, is excluded. That does not mean that provisional measures sought in a court, while parties respect the arbitration clause, are no longer of a civil and commercial nature. They should fall under the Brussels I Regulation. However, the arbitration proceedings themselves and their recognition do not fall under the Regulation.[68]

Synthesis

The purpose of this short overview of case law is to indicate that the rule on provisional and protective measures has the same scope as the other articles of the Brussels I Regulation. Only when a (civil or commercial) matter is already within the scope of the Regulation, can provisional and protective measures be taken on the basis of the regulation. The Van Uden judgment has not altered that conclusion, as has been indicated: when a case falls materially in the scope of the Regulation, it is not removed by the existence of an arbitration clause. This procedural eventuality does not change the fact that a matter is civil or commercial in the meaning of the Brussels I Regulation.

[65] These exceptions to the material scope of the Brussels I Regulation are contained in Art 1.
[66] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). This Convention has 125 States Party. All the Member States of EFTA are also States Party to the Convention, so that the same argument for exclusion of arbitration from the Lugano Convention applied. It should be noted, however, that Art 220 of the Rome Treaty, the basis of the Brussels Convention, expressly provided for the recognition of arbitral awards. See also the opinion of the Advocate General in the *Van Uden* case, para 50-53.
[67] See B Audit, *op cit* (fn 31) p 433.
[68] This thesis will not attempt to answer the question whether a decision to annul or invalidate arbitration proceedings should be recognised in another EU Member State according to the Brussels I Regulation. The Advocate General in his opinion to the *Van Uden* case, stated that the recognition of such was not excluded from the Brussels Convention (para 55). According to B Audit, *op cit* (fn 31) p 433, the matter is excluded from the regime of the Brussels I Regulation. See also H van Houtte, "May Court Judgments that Disregard Arbitration Clauses and Awards be Enforced under the Brussels and Lugano Conventions?" (1997) *Arb Int* p 85-92 esp p 88.

5. Personal scope and provisional measures

Introduction

The conclusion of the previous paragraph, brings us to the starting point of the discussion on the personal scope of provisional and protective measures. Just as is the case regarding the material scope, the rule on provisional and protective measures does not have its own personal scope. It can only be triggered once the Regulation in question is already applicable.

This parallelism seems to be supported by the UK's *Civil Jurisdiction and Judgments Act*, which incorporated the Brussels Convention into the law of the UK:

> *(1) The High Court in England and Wales or Northern Ireland shall have power to grant interim relief where—*
>
> *(a) proceedings have been or are to be commended in a Brussels or Lugano Contracting State or a Regulation State other than the United Kingdom or in a part of the United Kingdom other than that in which the High Court in question exercises jurisdiction; and*
>
> *(b) they are or will be proceedings whose subject-matter is within the scope of the Regulation as determined by Article 1 of the Regulation (whether or not the Regulation has effect in relation to the proceedings)*.[69]

This provision supports the argument that the rule on provisional measures is only triggered when the matter falls in the scope of the Brussels I Regulation. That is so with regard to both the material and the personal scope.

The rule on provisional measures does not influence the scope of the Regulation

It has been pointed out above that three rules are relevant for defining the personal scope of the Brussels I Regulation:

i) The domicile of the defendant (Arts 2-4). This is the general rule and therefore the most important and also the most common. If the defendant is domiciled in the EU, the Regulation is applicable, if not, it is not.[70] This rule, in a modified version, defines the scope of the Brussels II*bis* Regulation; then one has to look at habitual residence or nationality.[71]

ii) Exclusive basis of jurisdiction, *eg* immovable property situated in the EU (Art 22).[72]

iii) A forum clause in favour of a court in the EU by parties at least one of whom is domiciled in the EU (Art 23). [73]

[69] *Civil Jurisdiction and Judgments Act* (1982), Art 25(1).
[70] See *supra*, Chapter 2, Part B, p 2 *et seq*.
[71] See *supra*, Chapter 2, Part C, p 2 *et seq.*
[72] See *supra*, Chapter 3, p 2 *et seq.*
[73] See *supra*, Chapter 4, p 2 *et seq.*

According to some authors, Article 31 should be added to this list, as a determinant of the personal scope of the Regulation.[74] That means that if a party requested provisional measures from a court in the EU, that court would have jurisdiction through Article 31. The limitations set down by the *Van Uden* judgment would apply. The domicile of the parties would be irrelevant for this application. The advocates of this interpretation base their argument partly on the *Van Uden* judgment: the European Court of Justice stated that the limitation in Article 3 does not apply to provisional measures. Therefore, so the argument goes, Articles 2 and 4 do not apply to provisional measures either and the rule on provisional measures has a scope of its own. Thus, if a court in the EU were requested to grant provisional measures, the court would necessarily base its jurisdiction on Article 31 if the case were not purely domestic. All third State domiciliaries and assets would be submitted to an all-encompassing Article 31. That would mean that if a procedure is pending in a third State and the plaintiff seeks provisional measures in the EU, the Brussels I Regulation would have to be applied instead of national law.

According to the analysis of Article 31 supported in this thesis, the above argumentation cannot be correct.[75] The rule, and its limitations established by the European Court of Justice, can only be invoked once it is clear that the Regulation is applicable. The words "*under this Regulation*" make it clear that the Regulation's applicability must be ascertained *before* Article 31 can be applied. The argument's basis in the *Van Uden* judgment does not seem stable. It is not because the exorbitant bases of jurisdiction can be used for provisional measures, that the link with the Regulation and its bases of jurisdiction should be denied. Furthermore, the *Van Uden* judgment dealt only with the material scope and the bases of jurisdiction permitted by the Convention. The reasoning of the European Court of Justice cannot blindly be transposed to the personal scope.

To extend the rule on provisional measures that far, would be unreasonable to parties from third States. It would furthermore not comply with the principle of subsidiarity of European Union law. There is no reason for European Union law to regulate all possible provisional measures any court within the EU might grant as soon as it has an international element. Furthermore, not all jurisdiction rules in the EU are harmonised, even though all EU judgments can be recognised and enforced in throughout the EU. The need to recognise and enforce provisional measures would arise less frequently than for other judgments.[76] It therefore seems unnecessary that all provisional

[74] See E Guinchard, in S Guinchard & T Moussa (eds), *Droit et pratique des voies d'exécution, coll. "Dalloz Action"* (3rd edn, Paris: Dalloz, 2004-2005) para 9969.
[75] See, in support of the view that the general rule on the scope of the Regulation applies: XE Kramer, *Het kort geding in internationaal perspectief. Een rechtsvergelijkende studie naar de voorlopige voorziening in het internationaal privaatrecht* (Deventer: Kluwer, 2001) p 121-122; J Kropholler, *op cit* (fn 50) p 356.
[76] On the enforcement of provisional measures, see *infra*, p 2 *et seq.*

measures granted by EU Member State courts in civil and commercial matters should be based on the Brussels I Regulation.

Defendants outside the European judicial area

As has been set out, whenever a defendant is domiciled in the EU, the Brussels I Regulation regulates the matter. In the scenario of Article 31, the courts of another Member State have jurisdiction as to the substance of the matter. That jurisdiction can be based on the domicile of the defendant, or on the place of performance of contract or of commitment of a tort, provided that the defendant is domiciled in the EU. Then any other court in an EU Member State may grant provisional measures.

It is possible to bring the action requesting provisional measures prior to the main action. The same criterion then applies: if a court of another EU Member State has jurisdiction under the Regulation, the court may grant provisional measures. If the matter falls in the civil and commercial sphere, should the court requested for provisional measures decide preliminarily on the jurisdiction of a court in another Member State in order to establish its jurisdiction? According to Briggs and Rees, the court should assume that it does not have jurisdiction and not exercise broader powers than it would have under Article 31.[77] This point of view certainly deserves support where a court in the EU could have jurisdiction (therefore the Regulation could apply and Article 31 could be triggered) or a court in a third State could have jurisdiction. If proceedings are subsequently instituted in a third State court, the measures granted should expire as soon as the court that has jurisdiction as to the substance makes the necessary rulings or takes the necessary measures.

Regarding domicile, further questions such as the determination of domicile and moving are raised. According to Article 59 of the Brussels I Regulation, the domicile in an EU Member State should be decided according to the law of that State.[78] A court requested to grant a provisional measure should thus, in a speedy and efficient way, for such is the nature of provisional and protective measures, determine whether the defendant is domiciled in EU Member State X according to the laws of Member State X. If not, the search must go on: is he then domiciled in EU Member State Y according to the laws of Member State Y?

For companies or legal persons, the investigation becomes, if not more difficult, at least less certain.[79] For instance, the courts of Belgium are requested for provisional measures. The defendant is incorporated in the USA, but has its main business centre in France. According to the Brussels I Regulation (Art 60), the corporation could be

[77] A Briggs & P Rees, *op cit* (fn 1) p 412.
[78] This provision is the same as that of the Brussels Convention (Art 52).
[79] The issue of the domicile of legal persons has been discussed in Chapter 2, *supra*, p 2 *et seq.*

deemed to be domiciled either in the USA or France.[80] Depending on how the judge applies the Regulation, he could have jurisdiction to grant provisional measures on the basis of the Brussels I Regulation or he could not. One must remember that the national rules on provisional measures will apply if the Brussels I Regulation does not govern the matter.

A further question arises as to the consequences of the decision of the judge requested to grant provisional or protective measures as to his jurisdiction. Is a French judge, in a subsequent procedure as to the substance, in any way bound to the finding of the Belgian judge – that he has or does not have jurisdiction?

Exclusive jurisdiction and provisional measures

Another rule of personal application of the Brussels I Regulation, as has been discussed, is exclusive jurisdiction in specific circumstances, such as the court where immovable property is situated, or the place of registration of patents, trade marks, designs, or other similar rights.

Article 31 states that even if the courts of another EU Member State have jurisdiction as to the substance of the matter, provisional and protective measures may be granted by another court. Can exclusive jurisdiction under Article 22 be included under this rule, *ie* can an EU court, other than the one with exclusive jurisdiction, grant provisional measures? This might be necessary if a lessor would like to freeze assets, or request a bank guarantee to secure unpaid rent he has claimed or intends to claim from the lessee. The matter as to the substance will have to be brought at the court where the immovable property is situated, but one can imagine that the lessee/debtor does not have any assets there, and might not even live there. The same type of problem might arise as to intellectual property rights. The validity must be contested in the courts of the place of registration. However, a party might wish to request provisional measures in another court.

Once again, the position is not clear on this point. On the one hand, one can argue that it is advisable to limit Article 31 as much as possible since it gives broad power to the national rules of the Member States. On the other hand, a literal interpretation of Article 31 seems to permit provisional measures also when the substance of the dispute is subject to an exclusive jurisdiction rule.[81]

[80] On the application of that provision on the domicile of legal persons, see Chapter 2, *infra*, p 2 *et seq.*

[81] See, on this debate, M Pertegás Sender, "Handhaving van intellectuele rechten in internationaal perspectief. Welke rechter is bevoegd voor voorlopige maatregelen?" in M Storme & G de Leval (eds), *op cit* (fn 5) p 160; See, for instance, XE Kramer, *op cit* (fn 75) p 139-143.

The interpretation of the interaction between these articles is of importance to parties from third States. If provisional measures are available in cases where an EU court has exclusive jurisdiction, a party from outside the EU is once again drawn into the entire European judicial area. The mere fact of renting an apartment or business premises in an EU Member State would then open the door to all EU courts for provisional measures.

Forum clauses and provisional measures

The third general rule on the personal scope is that if a forum clause exists in favour of a court in the EU and one of the parties is domiciled in the EU, the forum clause falls under the scope of the Brussels I Regulation. In the words of Article 31, a court of an EU Member State has jurisdiction. Therefore, any court within the EU may grant provisional measures. In the *Italian Leather* judgment, the European Court of Justice accepted the possibility for a court other than the prorogated court to grant provisional measures.[82] The courts of Bari (Italy) had been chosen. Italian Leather applied to the *Landgericht* (Regional Court) Koblenz, the domicile of the defendant, WECO, for an order restraining WECO from using a brand name. The European Court of Justice, without going in on the question, stated:
"*By way of preliminary point, the Court proceeds on the assumption that, the court competent to adjudicate on the substance being the Tribunale di Bari, the Landgericht Koblenz did not by its judgment of 17 November 1998 exceed the limits, as interpreted by the Court, of the jurisdiction which it derived from Article 24 of the Brussels Convention.*"

For parties from third States this has effects: concluding a forum clause with a party domiciled in the EU in favour of an EU court, opens the channels not only to that court, but to all EU courts. The counter-party can request provisional measures from every court within the EU court and assets within the EU can be reached easily.

To go even further, in the *Van Uden* case the European Court of Justice accepted that an EU court could grant provisional measures despite the existence of an arbitration clause.

One can pose the question of the applicability of the Brussels I Regulation's provisional measures where an arbitration clause has been concluded by two parties from third States, or one party domiciled in the EU and one domiciled in a third State. Different solutions can be envisaged as to the personal scope of the Regulation in this instance.

The first is that the Regulation's provisional measures apply under the general criterion: if the defendant is domiciled in the EU, the Regulation is applicable and provisional

[82] ECJ case C-80/00, judgment of 6 June 2002, *Italian Leather SpA v WECO Polstermöbel GmbH & Co* [2002] *ECR* I-4995, rec 39. See case note by XE Kramer, (2003) *CMLR* p 953-964. See also Pres. Arnhem 22 December 1999, KG 2000, 58.

measures can be granted according to Article 31. However, using the defendant's domicile does not have much sense in this scenario. Often it is not yet known who the defendant will be and the defendant has in fact given up his right to be sued at home by concluding the arbitration clause.

The second possible test for the application of the Regulation's provisional measures is an analogy to choice of court clauses. This point was left open by the Advocate General in his opinion to the *Van Uden* case.[83] The first part of the analogy is simple: it concerns the domicile of either of the parties in the EU. The second part is not so easily transposable: an arbitrator or arbitral tribunal in the EU is appointed. The seat of the arbitrator does not have the same direct link to the procedural law system or European judicial area as does a court. The seat cannot be granted the same weight as a court in the EU.

A third possibility for the application of the provisional measures of the Brussels I Regulation is looking at domicile, but to consider both parties. This rule does not exist elsewhere in the Regulation. Considering the domiciles of both parties seems to create more legal certainty than referring only to the domicile of the defendant: parties domiciled in the EU know that they need to take the Brussels I Regulation into account. A party domiciled in a third State should not be presumed to know the relevance of the Brussels I Regulation.

A fourth possibility for the Regulation's provisional measures to apply is to look only at the seat of the arbitration. Parties know that the seat has a limited importance since that determines the place where interim measures can be requested from the courts. If that seat is within the EU, the parties have by implication chosen the EU's civil jurisdiction rules. Therefore provisional measures fall within the scope of the Brussels I Regulation as legislative instrument of the entire EU.

Some authors are of the opinion that when a judge resorts to Article 31 in spite of the existence of a forum clause, the requirements of the real connecting link and speed are more stringent.[84] This seems a plausible argument, but might be difficult to apply to the correct extent in practice. It goes in against the idea of strict rules of the EU civil jurisdiction Regulations.

6. *Lis pendens* and provisional measures

The Brussels I Regulation contains a simple and clear rule to solve the problem of *lis pendens*: the court at which the action had been instituted second, stays the proceedings until the first court has ruled on its own jurisdiction. If the first court has jurisdiction, the second court declares that it lacks jurisdiction. Only if the first court

[83] Para 37.
[84] XE Kramer, *op cit* (fn 75) p 143.

does not have jurisdiction, may the second court proceed.[85] This rule is rigid and elements such as the existence of a forum clause or the fact that proceedings take considerably longer in some countries than in others, are not taken into consideration.[86]

In the case of provisional measures, there might be proceedings regarding the substance of a dispute pending in one court and a request for provisional measures in another. However, what is asked for in the two courts will not be exactly the same. Therefore the provision on *lis pendens* is not applicable.[87]

It is also possible that a party tries in various courts to obtain interim relief. The cause of action will seldom be exactly the same since there are as many different provisional measures as legal systems. The nature of provisional measures is such that one usually requests measures relating to property situated in an EU Member State in the courts of that particular State in order to quickly remedy a situation or avoid irreversible damage. Therefore, the occurrence of *lis pendens* becomes rarer.[88] However, if parallel proceedings do exist, some argue that it can only be solved at the time of recognition or enforcement and that there should be a strict hierarchy in favour of the court that has jurisdiction in the main action.[89]

The Brussels I Regulation rule on *lis pendens* is a matter between EU Member States. Where parties are from, is irrelevant.

7. The reflexive effect and provisional measures

The theory of the reflexive effect has been discussed in earlier Chapters.[90] This useful solution to the problems of the impact of jurisdictional rules on third States, also has a role with regard to provisional measures.

For example, a French proprietor applies for provisional measures against his tenant domiciled in Germany before a German court. The property which the suit concerns is situated in Chile. If the main action had been based on the domicile of the defendant, the theory of the reflexive effect would have suggested that the German court lacked jurisdiction; the courts of the place where the immovable property is situated would have jurisdiction. Consequently, jurisdiction lies with a court outside the EU. The EU jurisdiction being removed, the possibility to grant provisional or protective measures on the basis of the Regulation also falls away. Provisional Measures would then only be possible on the basis of national rules, without the limitations posed by EU law.

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[85] See Art 27 Brussels I Regulation.
[86] ECJ case C-116/02, judgment of 9 December 2003, *Gasser GmbH v MISAT Srl*, not yet reported in *ECR*, see http://www.curia.eu.int.
[87] See XE Kramer, *op cit* (fn 75) p 145.
[88] See XE Kramer, *op cit* (fn 75) p 147 on the different views that exist on this point.
[89] C Wolf & S Lange, "Das Europäisches System des einstweiligen Rechtsschutzes – doch noch kein System?" (case note on *Italian Leather*) (2003) *RIW* p 55-63 at p 56.
[90] See *supra*, Chapter 3, p 2 *et seq* and Chapter 4, p 2 *et seq*.

This conclusion is in line with the construction that the rule in the Brussels I Regulation does not grant jurisdiction, but merely permits national law measures, and places limitations on them. If the Regulation is not applicable (because of the theory of the reflexive effect, or because of some other reason), procedural measures on the basis of national law can still be reverted to, but then without the limitations imposed by the Regulation and the case law of the European Court of Justice.

The same argument applies with regard to forum clauses. If the court of a third State is prorogated, while a court in an EU Member State has jurisdiction on the basis of the domicile of the defendant, the theory of the reflexive effect prescribes that it decline jurisdiction. If provisional measures are requested in another court in the EU, that court cannot use the Regulation to grant such measures. In other words, provisional measures can only be granted on the basis of national law, without the limitations of EU law.

8. Enforcement of provisional measures

General

Provisional measures granted before or at the time of the main proceedings can probably be enforced in accordance with the simplified enforcement procedure of the Brussels I Regulation.[91] The European Court of Justice seems to have accepted the possibility of enforcement in principle in the *Denilauler* case, although enforcement in that case was not allowed because of the infringement of the procedural rights of the defendant.[92] If enforcement is possible, it is according to the rules provided in the Regulation. The exceptions, such as public policy and non-service of the defendant, will apply.[93]

In the *Italian Leather* case a party requested provisional measures (an order restraining the other party from using a certain brand name) from a court in Bari (Italy).[94] That court had jurisdiction based on a forum clause. No proceedings had yet been instituted as to the substance of the dispute, but Italian Leather requested enforcement of the order in Koblenz (Germany), the seat of the defendant. A problem arose with a prior contradictory judgment of the *Landgericht* (Regional Court) Koblenz, but the principle of

[91] On the recognition and enforcement of provisional measures, see, in general, G Cuniberti, *op cit* (fn 51) esp p 189-195.
[92] ECJ case 125/79, judgment of 21 May 1980, *Bernhard Denilauler v SNC Couchet Frères* [1980] *ECR* 1553. See also case notes by A Huet, (1980) *JDI* p 939-948; T Hartley, (1981) *ELR* p 59-61; R Hausmann, (1981) *IPRax* p 79-82, all agreeing that enforcement is possible. See also the Opinion of Advocate General Léger in the *Van Uden* case, para 138.
[93] now contained in Art 34.
[94] ECJ case C-80/00, *Italian Leather SpA v WECO Polstermöbel GmbH & Co*; see also K Vandekerckhove, "Voorlopige en bewarende maatregelen in de EEX-Verordening, in EEX-II en in de Insolventieverordening" in M Storme & G de Leval (eds), *op cit* (fn 5) p 124-128.

enforcement of the provisional measures was not contested. Of course Article 31 jurisdiction is weaker than jurisdiction as to the substance, but enforcement would probably be allowed. The granting of a provisional measure is, in fact, a judgment that should be able to move freely throughout the European judicial area.

The rule of the Brussels II*bis* Regulation seems to exclude recognition and enforcement; the measures have to be requested where the relevant persons or assets are.[95] However, it is possible that the interpretation of provisional measures under the Brussels II*bis* Regulation would follow the judgment in the *Italian Leather* case. Thus, by extension, a similar restraining order might be available under the Brussels II*bis* Regulation to prevent a party from dispensing of or moving assets situated in a third State.

Provisional measures and procedural guarantees

The *Denilauler* case concerned the enforcement of provisional measures granted without the defendant being heard.[96] The *Tribunal de grande instance* (Regional Court of Appeal) of Montbrison (France) gave a *saisie conservatoire* (order for the freezing of assets) against Denilauler without prior service of the order to him. This *saisie conservatoire* concerned a bank account in Frankfurt am Main. This procedure is based on Article 48 of the French *code de procedure civil* (Code of Civil Procedure) and is used for surprise effect. The order was declared provisionally enforceable. The *Landgericht* (Regional Court) of Wiesbaden granted enforcement and a *pfandungsbeschluss* (attachment order) and the funds were seised. All of this happened without Denilauler being party to the proceedings. Denilauler then appealed to the *Oberlandesgericht* (District Court of Appeal) Frankfurt am Main, which referred a preliminary question to the European Court of Justice on the enforcement of provisional measures if the defendant was not notified. The recognition and enforcement of judgments where the defendant has not been served were barred by the Brussels Convention (also by the Brussels I Regulation).[97]

The Court stated as follows:

"*All the provisions of the Convention, both those contained in Title II on jurisdiction and those contained in Title III on recognition and enforcement express the intention to ensure that, within*

[95] N Watté & H Boularbah, "Les nouvelles règles de conflits de juridictions en matière de désunion des époux. Le règlement communautaire «Bruxelles II»" (2001) *JT* p 369-378, at p 376 state that the rule should be interpreted reasonably, and must for instance allow the enforcement of provisional measures if the person or assets have (been) moved to another Member State.

[96] ECJ case 125/79, judgment of 21 May 1980, *Bernhard Denilauler v SNC Couchet Frères* [1980] *ECR* 1553.

[97] See A Briggs & P Rees, *op cit* (fn 1) p 403, making the practical remark that a Mareva injunction is likely to be effective only if applied for without notice. For criticism on the *Denilauler* case, mostly because of the loss of the surprise effect, see G Cuniberti, *op cit* (fn 51) p 190-195.

the scope of the objectives of the Convention, proceedings leading to the delivery of judicial decisions take place in such a way that the rights of the defendant be observed. It is because of the guarantees given to the defendant in the original proceedings that the Convention, in Title III, is very liberal in regard to the recognition and enforcement."[98]

This case is of importance to parties from outside the EU. If provisional measures are granted against them, presuming that a court in the EU has or will have jurisdiction as to the substance of the matter, the measures will not be given effect in other EU Member States if the procedural guarantees were not respected. This will be the case even if jurisdiction was not based on the Brussels I Regulation, but enforcement is sought according to the Regulation. In other words, any provisional measures granted in one EU Member State that need to be enforced in another Member State, will have to respect the procedural guarantees. The fact that fundamental rights are guaranteed provides some security for parties from third States.

These guarantees also exist for proceedings on substance. Their importance here is, however, different: like the other rules set down by the European Court of Justice, they limit provisional measures so that not all measures available under domestic law will also be available in the scheme of the Brussels I Regulation.

9. Provisional Measures under the Insolvency Regulation

The nature of provisional and protective measures under the Insolvency Regulation

Provisional, or protective, measures have a different nature under the Insolvency Regulation than under the other two civil jurisdiction Regulations. The Insolvency Regulation deals only with one branch of law, and a very specific branch on the borderline between procedure and substantive law. Therefore there are not numerous possible provisional and protective measures that can differ widely between different legal systems. Actually, as K Vandekerckhove states, the opening of an insolvency proceeding is in fact one huge protective measure.[99] This measure aims at protecting the insolvent debtor's assets in order to safeguard the orderly completion of the distribution of the remaining assets.

As is the case under the Brussels I Regulation, a court that has jurisdiction as to the substance of the matter, also has jurisdiction to grant provisional or protective measures. Translated to insolvency proceedings, that means that measures taken during the insolvency period fall in the jurisdiction of the court that has opened the insolvency proceedings. That fits into that court's universal jurisdiction, which is the

[98] At rec 13.
[99] K Vandekerckhove, "Voorlopige en bewarende maatregelen in de EEX-Verordening, in EEX-II en in de Insolventieverordening", in M Storme & G de Leval (eds), *op cit* (fn 5) p 141.

object of the Insolvency Regulation, at least for main insolvency proceedings.[100] All measures taken by that court will be immediately and automatically recognisable in all other EU Member States.[101]

Provisional and protective measures during the insolvency proceedings

Article 25 explicitly states that also protective measures taken by that court will be recognised without formality, as all other judgments. The position is different to that of the Brussels I and II*bis* Regulations where separate grounds for jurisdiction exist for provisional and protective measures. Article 25 is merely a confirmation of the fact that the judge which has jurisdiction, may also grant provisional measures.

The possible influence on third States is therefore the same as for other judgments. This influence depends, to a large extent, on the interpretation of the words of the Virgos/Schmit Report:
"Main insolvency proceedings have universal scope. They aim at encompassing all the debtor's assets on a world-wide basis and at affecting all creditors, wherever located."[102]

According to some authors the word "world-wide" implies that also assets in third States can be subjected to insolvency proceedings in an EU Member State.[103] Therefore assets in third States could also be subjected to provisional measures, such as freezing injunctions, that a Member State judge grants. Of course these measures would not be automatically recognised in third States, by lack of legal basis for such recognition. Recognition or enforcement proceedings would have to be started. And whether a judgment would be recognised or enforced, would depend on the views the third State has on universality and territoriality of insolvencies, *ie* if insolvency

[100] See, *ia* P Wautelet, "De Europese Insolventieverordening" in H van Houtte & M Pertegás Sender (eds) (2001), *op cit* (fn 27) p 136-140; H-C Duursma-Kepplinger, D Duursma & E Chalupsky, *Europäische Insolvenzverordnung: Kommentar* (Vienna: Springer-Verlag, 2002) p 137; PLC Torremans, *Cross Border Insolvencies in EU, English and Belgian Law* (The Hague: Kluwer Law International, 2002) p 150-155; P Hameau & M Raimon, "Les Faillites internationales. Approche européenne" (2003) *Int Bus LJ* p 645-665 at p 655-656; E Dirix & V Sagaert, "Verhaalsrechten en zekerheidsposities van schuldeisers onder de Europese Insolventieverordening" (2001) *TBH* p 580-600 at p 582; SCJJ Kortmann & PM Veder, "De Europese Insolventieverordening" (2000) *WPNR* p 764-774 at p 765; N Watté & V Marquette, "Le règlement communautaire, du 29 mai 2000, relatif aux procédures d'insolvabilité" (2001) *TBH* p 565-579 at p 572; T Bosly, "La faillite internationale. Une ére nouvelle s'est-elle ouverte avec le règlement du Conseil du 29 mai 2000?" (2001) *JT* p 689-696, at p 690-691.
[101] With the exception of Denmark, of course.
[102] Virgos/Schmit Report, no 73.
[103] See P Wautelet, "De Europese Insolventieverordening" in H van Houtte & M Pertegás Sender (eds) (2001), *op cit* (fn 27) p 136.

proceedings in one State regulate only the assets in that State, or all the assets of the debtor, wherever they are.[104]

It seems more plausible to admit that the European Union simply cannot govern all assets of a debtor *world-wide.*[105] The principle of subsidiarity seems important enough to warrant the limitation to the EU; the assets in third States should be left out of reach of the Insolvency Regulation.[106] Whether or not those assets form part of the insolvent estate should be left to the national private international law of the EU Member State where the insolvency proceeding has been opened.

Let us now turn to territorial or secondary proceedings, which can be instituted in an EU Member State where the insolvent debtor has an establishment.[107] These proceedings only regard assets situated within the Member State of the territorial or secondary proceeding. The principal of these proceedings is territoriality.[108] Therefore even provisional measures in a third State would fall out of their reach. If anyone were to tread that path, it would be the Member State Court of the main insolvency proceeding.

What about territorial proceedings in the absence of insolvency proceedings? These proceedings are still by definition territorial[109] and should not be concerned with granting provisional measures in other Member States or in third States.

[104] See, on this distinction, P Wautelet, "De Europese Insolventieverordening" in H Van Houtte & M Pertegás Sender (eds) (2001), *op cit* (fn 27) p 103-110.
[105] See, for support of this view, N Watté & V Marquette, "Le règlement communautaire, du 29 mai 2000, relatif aux procédures d'insolvabilité" (2001) *TBH* p 565-579 at p 572; SCJJ Kortmann & PM Veder, "De Europese Insolventieverordening" (2000) *WPNR* p 764-774 at p 765.
[106] PLC Torremans, *op cit* (fn 100), however, does not agree. He states at p 172-173: "*This limitation may make sense for those that see subsidiarity as a sacred cow of EU law, but it is unfortunate from both an insolvency law and a private international law point of view. From a private international law point of view the co-existence of two divergent regimes is undesirable…*"
[107] Art 3(2).
[108] See, *ia* P Wautelet, "De Europese Insolventieverordening" in H van Houtte & M Pertegás Sender (eds) (2001), *op cit* (fn 27) p 140; PLC Torremans, *op cit* (fn 100) p 155; P Hameau & M Raimon, "Les Faillites internationales. Approche européenne" (2003) *Int Bus LJ* p 645-665 at p 656; E Dirix & V Sagaert, "Verhaalsrechten en zekerheidsposities van schuldeisers onder de Europese Insolventieverordening" (2001) *TBH* p 580-600 at p 582; SCJJ Kortmann & PM Veder, "De Europese Insolventieverordening" (2000) *WPNR* p 764-774 at p 765-766; N Watté & V Marquette, "Le règlement communautaire, du 29 mai 2000, relatif aux procédures d'insolvabilité" (2001) *RCDB* p 565-579 at p 573; T Bosly, "La faillite internationale. Une ére nouvelle s'est-elle ouverte avec le règlement du Conseil du 29 mai 2000?" (2001) *JT* p 689-696 at p 691.
[109] Arts 3(2) and (4).

Provisional and protective measures before the insolvency proceedings

The measures regarded thus far are measures taken after the opening of the insolvency proceedings. May a court grant provisional measures before the opening of the insolvency proceedings in accordance with the Insolvency Regulation? The Regulation foresees in the possibility of appointing a temporary administrator in order to preserve the debtor's assets.[110] He may request any measures to secure and preserve any of the debtor's assets situated in another EU Member State, according to that Member State's law. This provision provides a bridge for the period between the request and the opening of the insolvency proceedings. It differs from the Brussels I and Brussels II*bis* Regulations in that not any court can grant them; they have to be linked to the court that has jurisdiction to open the main insolvency proceeding. They are also limited to the time after the request for the opening of the proceeding. This provision does not go very far and it is hard to imagine that it could be applicable with regard to assets in third States. To reach those assets, national rules of private international law would have to be applied.

10. Conclusion

Provisional and protective measures are a necessary evil. International trade needs this mechanism to prevent a denial of justice in some instances, either by maintaining the *status quo*, or by providing satisfaction in anticipation. The reach of the rules in the civil jurisdiction Regulations is unclear and formulated vaguely, which has led to much uncertainty, especially regarding the personal scope of the provisions.

It is submitted that the rules on provisional measures do not create extra bases of jurisdiction to exist alongside those already discussed in Chapters 2, 3 and 4. They are not independent in nature. Quite to the contrary, they are merely a confirmation that provisional measures may still be based on national law, even if the court does not have jurisdiction according to the rules of the Regulation. These national rules are, however, limited for the European judicial area – the *Van Uden* judgment has indicated that there has to be a real connecting link between the case and the court granting the measures. These limitations that have been put on the confirmation that the provisional measures exist, are only triggered once the jurisdictional rules have attributed jurisdiction to an EU Member State court.

[110] Art 38.

Chapter 7: The European Union and beyond: external relations

1. Introduction

In some areas the European Community has external competence, in other words competence to act on the international stage. The EC then speaks in its own right (sometimes alongside the Member States) towards the outside world.[1]

In this Chapter, the sources and types of external competence will be discussed first and then exclusive and shared external competence. The next issue will be the specific problems relating to judicial co-operation in civil matters. Denmark deserves a separate discussion. Thereafter the general transparency for third States and the practical approach to the matter will be considered. There will be no detailed analysis of procedures of concluding agreements and the required majorities to do so.[2]

[1] See, in general, PJG Kapteyn, "Het advise 1/76 van het Europese Hof van Justitie, de externe bevoegdheid van de Gemeenschap en haar deelneming aan een Europees oplegfonds voor de binnenscheepvaart" (1978) *SEW* p 276-288; JHJ Bourgeois, "External relations powers of the European Community 51998-1999 *Fordham Int LJ* p S149-S173; A Dashwood, "External relations provisions of the Amsterdam Treaty" (1998) *CMLR* p 1019-1045; RA Wessel, "The inside looking out: consistency and delimitation in EU external relations" (2000) *CMLR* p 1135-1171; A Mignolli, "The EU's Powers of External Relations" (2002) *Int Spect* p 101-114; F Dehousse & C Maczkovics, "Les arrêts *open skies* de la Cour de justice: l'abandon de la competence externe implicite de la Communauté?" (2003) *JT* p 225-236; K Takahashi, "External competence implications of the EC Regulations on jurisdiction and judgments" (2003) *ICLQ* p 529-534; CA Joustra, "Naar een communautair internationaal privaatrecht!" in CJ Joustra & MV Pollak, *Internationaal, communautair en nationaal IPR* (The Hague: TMC Asser Press, 2002) p 35-47; M Wilderspin & A-M Rouchaud Joët, "La compétence externe de la Communauté européenne en droit international privé" (2004) *RCDIP* p 3-48; A Borrás, "The effect of the adoption of Brussels I and Rome I on the external competences of the EC and the Member States" in J Meeusen, M Pertegás Sender & G Straetmans (eds), *Enforcement of International Contracts in the European Union. Convergence and Divergence between Brussels I and Rome I* (Antwerp: Intersentia, 2004); A Borrás, "The frontiers and the institutional constitutional questions" in A Nuyts & N Watté, *International civil litigation in Europe and relations with third States* (Brussels: Bruylant, 2005) p 27-54; C Gonzalez Beilfuss, "EC legislation in matters of parental responsibility and third States" in the same book, p 493-507; P Eeckhout, *External Relations of the European Union* (Oxford: Oxford University Press, 2004) p 58-100 & 135; TC Hartley, *The Foundations of European Community Law* (5th edn, Oxford: Oxford University Press, 2003) p 160-193; K Lenaerts & P Van Nuffel, *Constitutional Law of the European Union* (2nd edn, London: Sweet & Maxwell, 2005) p 828-895; P Pustorino, "Observation sur les principes généraux opérant dans le droit international privé et procédural communautaire" (2005) *RMUE* p 113-158 at p 142-148.

[2] For these details, see TC Hartley, *op cit* (fn 1) p 160-162; K Lenaerts & P Van Nuffel, *op cit* (fn 1) p 882-897.

2. Where does external competence come from?

The starting point is that the European Community has legal personality.[3] This means that when a matter is in the scope of EU law, the EC may act both internally and externally.

At this stage of EU integration, external powers are a reality that can no longer be contested. Regarding private international law, the EC's external competence came about when, with the Amsterdam version of the EC Treaty, the matter was transposed from the third to the first pillar, *ie* into Community competence generally.[4] Seeing that private international law is now an EC matter (the EC can legislate on it), and seeing that the EC has legal personality, it can act externally regarding this field.

3. Exclusive vs shared external competence

What is heavily contested, though, is the extent of these powers: how far have the Member States' powers to act towards the outside world been pushed back? The Member States, as sovereign States, have legal personality as well and can in principle also act on the international stage. It is the co-existence between these powers of the EC on the one hand and the Member States on the other that gives rise to confusion.

If the competence is shared, both the EC and the Member States may act towards the outside world. This means that the EC has competence in a field, but that competence has not (yet) become exclusive, while the Member States have not (yet) lost their external competence. When the EC alone may act internationally and the Member States have lost that competence, one refers to exclusive external competence of the EC.

In order to find the border between exclusive and shared external competence, one has to look at how and when external competence arises. Where the EC has competence, and thus external competence, and that external competence is not (yet) exclusive, it remains shared.

The arising of exclusive external competence

Exclusive competence can arise in three ways: explicitly, by necessity and implicitly.

Firstly, the EC Treaty explicitly grants exclusive external competence for a number of matters, for instance certain agreements to implement the EC's commercial policy

[3] Art 266 EC Treaty (Nice version). Art I-7 Constitution would grant the EU legal personality.
[4] See Art 65 AC Treaty (which is the same in the Amsterdam and Nice versions); see the discussion *supra*, p 2 *et seq*.

world-wide (such as tariff and trade agreements) and association agreements.[5] This field of expressly granted external competence is quite limited. It does not include private international law.

Secondly, exclusive external competence can arise because the external actions are necessary for the proper functioning of the internal market.[6] For example, in the inland waterway navigation case, the EC had to negotiate with Switzerland in order to exercise its internal competence, because the Swiss vessels used the same rivers and were part of the same navigational network.[7] This basis of exclusive external competence is very limited. Even from the example of the inland waterway case, one can see that this kind of situation will not occur frequently. Regarding private international law, and civil jurisdiction more particularly, it does not seem at the moment that this source of exclusive external competence would be relevant.[8] However, the possibility in a union that keeps becoming more integrated, cannot be excluded totally for the future.

It is the third occurrence of exclusive external competence that is important for the subject of civil jurisdiction: the EC can implicitly obtain exclusive external competences by reason of its internal actions. Reference is sometimes made to the "pre-emption" of exclusive external competence. In other words, by acting internally, the EC triggers its exclusive external competence. For implicit exclusive external competence to arise, the EC must have exhaustively exercised its internal competence. In other words, the EC must completely have harmonised a specific part of the law, so as to absorb it, and included rules relating to nationals of third States.[9]

This doctrine has been developed, and is still being refined, by the case law of the European Court of Justice, starting with the *ERTA* case:[10]

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[5] Arts 133 & 310 EC Treaty (Nice version); Art III-315 Constitution. The Euratom Treaty, dealing with nuclear energy, also gave such explicit external powers; see Ruling 1/78 of 14 November 1978, *ECR*, 1978, 2151.

[6] See Art I-13(2) of the Constitution, codifying the rule that had already existed.

[7] See ECJ Opinion 1/76 of 26 April 1977 [1977] *ECR* 741, especially rec 4. This opinion concerned inland waterway transport, a matter in which the relations with Switzerland were concerned. In that case, there had not yet been internal action, as the negotiations with Switzerland were necessary in order to take the internal measures. Whether or not the factor of necessity can be invoked even if no internal measure has been taken, will not be discussed here; for our topic of civil jurisdiction, regulations have been enacted, as I have indicated, so that the point becomes irrelevant for this study. For more information, see TC Hartley, *op cit* (fn 1) p 167-173.

[8] See also M Wilderspin & AM Rouchaud Joët, *op cit* (fn 1), p 61.

[9] See ECJ Opinion 1/94 of 15 November 1994 [1994] *ECR* I-5267, esp rec 77. See also K Lenaerts & P Van Nuffel, *op cit* (fn 1) p 862.

[10] ECJ case 22/70, judgment of 31 March 1971, *Commission v Council* [1971] *ECR* 263. ERTA stands for the European Agreement on Road Transport, with which the case was concerned. The French abbreviation, AETR ("Accord européen sur les transport routiers") is sometimes used to refer to this case. See also F Dehousse & C Maczkovics, "Les arrêts *open skies* de la Cour de justice: l'abandon de la competence externe implicite de la Communauté?" (2003) *JT* p 225-236 at p 226; TC Hartley, *op cit* (fn 1) p 162.

"*In particular, each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third States which affect those rules*."[11]

The theory is based on parallelism of internal and external competence.[12] The Member States try to limit this source of EC power, because it raises sovereignty concerns.[13]

In the field of civil jurisdiction, the EC has enacted a number of regulations.[14] Whether or not these enactments have led to the EC obtaining exclusive external competence, depends on whether the internal power has been exercised exhaustively. To find the answer to this question, one has to scrutinise the rules of the envisaged convention with third States and the regulation in question, which will be done later in this Chapter.[15]

How far does exclusive external competence go?

If exclusive competence arises implicitly, *ie* through the complete harmonisation of the specific field of the law, one might wonder what the situation is before such harmonisation takes place. The answer is that the competence remains shared for that time.[16] Exclusive external competence cannot be triggered unless there has been complete harmonisation of the field. In other words, in the period when the EC has power to legislate in a particular domain, and thus also has external powers, but has not yet legislated, those external powers remain shared with the Member States. This shared competence is only temporary in nature and disappears when the EC adopts a Community instrument.[17] This might have the result that the Member States start negotiating with third States and subsequently lose their capacity to continue the negotiations or to conclude the envisaged treaty.

This division of powers causes confusion, especially for third States. Negotiators might have grave difficulty to try to figure out with whom they are in fact talking and with whom they will be concluding a treaty. If there is a dispute between the EC and its Member States on who has competence, or on whether competence is shared or exclusively belongs to the EC, that makes matters worse for third States. That is the situation for civil jurisdiction, as will be explained in the following paragraphs.

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[11] At rec 17.
[12] See PJG Kapteyn, "Het advise 1/76 van het Europese Hof van Justitie, de externe bevoegdheid van de Gemeenschap en haar deelneming aan een Europees oplegfonds voor de binnenscheepvaart" (1978) *SEW* p 276-288 at p 284.
[13] See TC Hartley, *op cit* (fn 1) p 162.
[14] See *supra*, p 2 *et seq.*
[15] See *infra*, p 2 *et seq.*
[16] See ECJ Opinion 2/00 of 6 December 2001 [2001] *ECR* I-9713, esp rec 46-47.
[17] F Dehousse & C Maczkovics, "Les arrêts *open skies* de la Cour de justice: l'abandon de la competence externe implicite de la Communauté?" (2003) *JT* p 225-236 at p 226 & 227.

When the EC has obtained exclusive external competence on a matter, the legal personality of the EU Member States is set aside, or cancelled out for the particular matter. This is a peculiar situation in which sovereign States, with full legal personality, may not exercise that legal personality because of their association to the EC.[18] If the Member States in any event, despite the fact that they are not permitted to do so, exercise that legal personality to negotiate and conclude treaties with third States, trouble arises. This has happened in the facts leading to the *Open Skies* judgments.[19]

Moreover, whether competence is shared or exclusive, Member States can no longer have the authority to adversely affect the harmonisation by contracting with third States. Affecting the internal harmonisation is interpreted extensively, and one does not look merely at formal conflicts.[20] The Member States have to act in good faith and always with the interests of the European Community at heart.

Exclusive external competence in practice

With regard to implicit exclusive external competence, the first practical concern is the exact moment at which it arises. The relevant moment is that of the adoption of the instrument, and not of its entry into force.[21] It is of course difficult for third States to be aware of an instrument from the moment of its adoption, in other words even before its publication.

A next practical difficulty arises when an international organisation does not permit the EC to negotiate or sign an international agreement. In that case the Member States have to participate, but as representatives of the Community.[22] The structure and rules of the international organisation do not influence the division of competences within the EU.[23]

If it is known at the time of negotiation of an international agreement that the EC would sign and ratify it, a so-called REIO clause may be inserted. Such clause states that

[18] This is different to federal States, where the component units can only act internationally to the extent that they are authorised to do so by the constitution of the federal State in question; see I Brownlie, *Principles of Public International Law* (6th edn, Oxford: Oxford University Press, 2003) p 58-59.
[19] See *infra*, p 2 *et seq.*
[20] See See G Middeldrop & RH van Ooik, "Van verdeelde *Open Skies* naar een uniform Europees extern luchtvaartbeleid" (2003) *NTER* p 1-10 at 5.
[21] M Wilderspin & A-M Rouchaud Joët, "La compétence externe de la Communauté européenne en droit international privé" (2004) *RCDIP* p 3-48 at p 9. Rec 17 and 28 of the ERTA judgment also refers to the adoption of the instrument.
[22] This is the case at the Hague Conference on Private International Law, but the situation will change with the entry into force of the new (2005) Statute, which will allow the EC to become Member of the Conference; see *supra*, Chapter 1, p 2.
[23] M Wilderspin & A-M Rouchaud Joët, "La compétence externe de la Communauté européenne en droit international privé" (2004) *RCDIP* p 3-48 at p 9.

Regional Economic Integration Organisations may sign the agreement if they are competent for all or some of the matters regulated in the convention. The REIO is then a single Contracting State for purposes of certain parts of the convention, or, in the absence of specification, where the context so requires.[24] Often such a clause is inserted to accommodate the EC, and some agreements refer explicitly to the EC.[25] The advantage for third States of more general clauses is that other international organisations that might in the future have external competences, will be able to use them.[26] On the other hand, if a Convention contains no REIO clause, while the EC has external competence over the matter dealt with in the Convention, the Member States may be authorised to sign the Convention on behalf of the EC.[27]

If a Member State is responsible for the external relations of a territory that is not part of the EU, that Member State may negotiate and sign the treaty, but only as a representative.[28] This is not influenced by the existence of the EC's external competence.

Shared external competence in practice and mixed agreements

As has been stated above, if the EC has external competence, that remains shared until it becomes exclusive by the complete harmonisation of law in the field. The exact point of complete harmonisation, is unclear.

As for the outside world, bilateral or multilateral agreements often concern several issues. It may happen that some of the issues have been regulated within the

[24] See, for example, Art 29 of the Hague Convention on Choice of Court Agreements, adopted on 30 June 2005; Art 18 of the Hague Securities Convention, http://www.hcch.net; Art 48 of the Convention on International Interests in Mobile Equipment (Cape Town, 2001), http://unidroit.org; Art 53(2) of the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal, 1999), http://www.lexmercatoria.org.

[25] See, for example, Art 22(1) of the Convention on Contact concerning Children (Strasbourg, 2003).

[26] See the discussion on the Hague Conference for Private International Law in Chapter 1, *supra*, p 2 *et seq*.

[27] See, for example, Council Decision 2002/762/EC of 19 September 2002 authorising the Member States, in the interest of the Community, to sign, ratify or accede to the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (the Bunkers Convention), *OJ L* 256, 25 September 2002, p 7; Council Decision 2002/971/EC of 18 November 2002 authorising the Member States, in the interest of the Community, to ratify or accede to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (the HNS Convention), *OJ L* 337, 13 December 2002, p 55; Council Decision 2003/93/EC of 19 December 2002 authorising the Member States in the interest of the European Community, to sign the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children, *OJ L* 48, 21 February 20003, p 1; see also C Gonzales Beilfuss, "EC Legislation in matters of parental responsibility and third States" in A Nuyts & N Watté (eds), *op cit* (fn 1) p 493-507 at p 495.

[28] See M Wilderspin & A-M Rouchaud Joët, "La compétence externe de la Communauté européenne en droit international privé" (2004) *RCDIP* p 3-48 at p 8-9 & 12.

Community. For those issues the Community has, according to the ERTA doctrine, obtained exclusive external competence. For the other issues, the Community may not have exclusive external competence, because it had simply never adopted internal measures on the topic. Competence is therefore shared on those topics. In other words, the EC is competent for a part of the issues and the Member States are competent for another part. The EC and the Member States have to co-operate closely in these matters, so as to prevent contradictions. This requirement is even stricter if the negotiations take place in a forum of which the EC as such is not a Member.[29]

This can give rise to mixed agreements. They are mixed because neither the Community nor the Member States can conclude them independently. They are a mixture of two types of external agreements (those that the Member States conclude with third States and those that the EC conclude with third States).

In practice the Member States and the EC all have a place at the negotiation table. The Commission usually negotiates for the EC. At the end of the negotiations both the EC and the Member States sign the agreement. For third States it might seem strange that the EU Member States are in fact twice Party to the Convention: once because of their own signatures and once by virtue of the EC's signature which binds them. A further practical implication is that the entire EU will become party to a treaty, or no EU Member State at all. It is not possible for some Member States to sign a treaty without the EC and without the sister Member States. This, despite the initial confusion, might be positive for third States: all EU Member States being party to a treaty already gives it a large scope. On the other hand, if there is a problem in some of the Member States, or a political problem within the EU, the signing or ratification of the treaty might be delayed for all the Member States. That has been the case for the Hague Convention for the Protection of Children.[30]

In theory the Member States are signing for the specific provisions for which they have competence and the EC is signing for the specific provisions for which it has exclusive external competence. However, it is often extremely difficult to draw the exact line. No provision indicates to the outside world which parts the Member States are signing for and which parts the EC (if even the experts of EC law know where that border lies). On face value the border does not seem important: the Member States are bound to the entire treaty. However, for the EC competences, the European Court of Justice will have competence as well. Furthermore, where a dispute arises with third States as to the non-fulfilling of treaty obligations, a third State will have difficulty to know whether the particular Member State or the EC is the violator in law.

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[29] See ECJ Opinion 2/91 of 19 March 1993 [1993] *ECR* I-1061, esp rec 12 & 37. This case dealt with negotiations at the International Labour Organisation, where the EC had observer status.

[30] Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (The Hague, 1996). That Convention has been signed or acceded to by all EU Member States except Malta, but has not been ratified by any of the 15 old Member States; see http://www.hcch.net.

A further problem arises with respect to the definition of "Contracting State" in treaties: sometimes "Contracting State" refers to the EC and sometimes to every Member State, depending on whether the EC or the Member States had competence over the matter. This issue gave rise to many discussions at the negotiations of the Hague Convention on Choice of Court Agreements. It was deemed impossible to provide a precise indication of when the EC and when Member States are meant every time there is reference in the convention to a "Contracting State". The provision finally states that a reference to "Contracting State" applies equally to a REIO, "where appropriate".[31]

In mixed conventions, the EC may be required to notify the Depositary of the exact division of competence between the EC and the Member States. This obligation may also entail the notification of changes in the competence.[32]

4. The dispute between the EC and the Member States regarding civil jurisdiction

The fact that the EC has acquired external competence in the matters covered by the Brussels I Regulation has far-reaching consequences. Many conventions on specific matters include some rule on civil jurisdiction, for instance that private parties can or cannot conclude forum clauses or that exclusive or non-exclusive jurisdiction exists in a particular matter.[33] Instead of investigating each of these convention provisions separately, a thorough analysis of the dispute that has arisen between the European Commission and the Member States concerning the negotiation of the new Lugano Convention will point out the issues.

During the negotiations to update the Lugano Convention in order to bring it in line with the changes to the Brussels I Regulation, a dispute soon arose as to who had the power to negotiate with third States Iceland, Norway and Switzerland. The Community has external competence in the field of jurisdiction and the recognition and enforcement of judgments. The dispute only concerns the question whether this competence is exclusive or shared with the Member States. The Commission stated that the EC had exclusive competence to negotiate the Convention. The Member

[31] See Art 29(4).

[32] See, for instance, Art 18 of the Hague Convention on the Law Applicable to Certain Rights held with an Intermediary (not yet in force); see also the explanatory report by R Goode, H Kanda & K Kreuzer (with the assistance of C Bernasconi, p 149-150; http://www.hcch.net. Another (very similar) example is found in Art 48 of the Convention on International Interests in Mobile Equipment (Cape Town, 2001); http://unidroit.org.

[33] See, for example, Arts 38-40 of the International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea (London, 1996); Arts 9 and 10 of the International Convention on Civil Liability for Bunker Oil Pollution Damage (London, 2001). See also M Wilderspin & A-M Rouchaud Joët, "La compétence externe de la Communauté européenne en droit international privé" (2004) *RCDIP* p 3-48 at p 28-32 and A Borrás, "The Frontiers and the Institutional Constitutional Question" in A Nuyts & N Watté, *op cit* (fn 1) at 41-48, discussing various conventions.

States were of the opinion that the competence was shared between the EC and themselves so that they were permitted to negotiate with the third States alongside the Commission.

Therefore the Council requested the European Court of Justice for an opinion:
Does conclusion of the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters… fall entirely within the Community's exclusive competence or is competence shared between the Community and the Member States?[34]

The hearing in this case took place on 19 October 2004 under the auspices of a full bench and all the Advocates General.

The rules on external relations that have been developed in the sphere of economic law cannot merely be transposed to private international law.[35] At the same time, the *Open skies* judgments (in the economic sector)[36] have indicated the approach that is also relevant for the Lugano dispute: one has to regard the future convention's provisions one by one and examine whether they affect the European Community law (in the case under discussion the Brussels I Regulation). In the *Open skies* cases a dispute also arose between the Council and Commission regarding the EC's external competence and whether the EC or the Member States had the power to update old bilateral agreements (facilitating alliances between US and European airlines, free access to routes, route and traffic rights, code sharing possibilities ***etc***[37]) and conclude new ones with third State United States of America. In that case the European Court of Justice found that some aspects had been regulated exhaustively (such as the use of computerised reservation systems). Therefore the EC had exclusive external competence in that domain and the EU Member States could no longer conclude agreements with third States. That was not so for every aspect of the bilateral agreement. In this sense, the operating licences of air carriers of third States were not regulated by the EC so that the Member States retained their competence to conclude agreements on that aspect with third States. The judgments have clarified that external competence arises only where the EC has completely regulated the specific aspect. Some authors criticise this tentative approach, stating that it would lead to legal

[34] Opinion 1/03, Request by the Council of the European Union for an Opinion pursuant to Article 300(6) EC, *OJ C* 101, 26 April 2003, p 1.
[35] See A Borrás, "The Frontiers and the Institutional Constitutional Question" in A Nuyts & N Watté, *op cit* (fn 1) at p 33.
[36] See *supra*, fn 36. ECJ judgments of 5 November 2002: case C-466/98, *Commission v The United Kingdom* [2002] *ECR* I-9427; ECJ case C-467/98, *Commission v Denmark* [2002] *ECR*, I-9519; C-468/98, *Commission v Sweden* [2002] *ECR* I-9575; C-469/98, *Commission v Finland* [2002] *ECR* I-9627; C-471/98, *Commission v Belgium* [2002] *ECR* I-9681; C-472/98, *Commission v Luxembourg* [2002] *ECR* I-9741; C-475/98, *Commission v Austria* [2002] *ECR* I-9797; C-476/97, *Commission v Germany* [2002] *ECR* I-9855. Note that these cases were not opinions by the European Court of Justice as the Lugano case is, but proceedings in which the Member States were found to have failed to fulfil its obligations under EU law.
[37] See rec 24 of case C-467/98.

uncertainty.[38] Quite to the contrary, it seems correct to interpret the acquisition of external competence strictly so as not to create uncertainty for third States: only where the EC has regulated can there be external competence.

Therefore, a detailed analysis of the provisions of the future Lugano Convention must be made. The most logical structure is to follow the order of the four cornerstones discussed in the previous chapters and then refer briefly to provisional measures and the enforcement of judgments. In the last instance the provisions in the Brussels I Regulation itself on bilateral conventions with third States should be examined.

Defendants domiciled in third States

Firstly the Lugano Convention would provide jurisdiction rules for defendants domiciled in third States Iceland, Norway and Switzerland. To examine whether or not such rules will affect the Brussels I Regulation, one has to turn to the Regulation itself, in particular its Article 4:
If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State...

It has been pointed out in Chapter 1 that there are two possible interpretations of this provision.[39] Firstly, one might say that the national rules on jurisdiction only apply because they are permitted by Article 4 of the Brussels I Regulation. Secondly, one might see Article 4 as doing no more than admitting the fact that the Brussels I Regulation does not regulate cases where the defendant is domiciled in a third State (except in cases of exclusive jurisdiction or forum clauses). It is argued in this thesis that the second point of view is the better one.

According to the second viewpoint, it is clear that this Article indicates that the Regulation does not exhaustively deal with the issue of jurisdiction. Even under the first viewpoint, one would have to admit that the Brussels I Regulation did not harmonise civil jurisdiction for all defendants. Article 4 in fact acknowledges that, whichever way one reads it. Thus the provision confirms that the Member States have retained external competence.

The national rules are retained with regard to defendants from outside the EU. If a Member State has a rule in its domestic civil procedure that a defendant that has property on its territory is subjected to the jurisdiction of its courts,[40] that rule will be valid with regard to defendants from outside the EU. A Member State may also change

[38] F Dehousse & C Maczkovics, "Les arrêts *open skies* de la Cour de justice: l'abandon de la competence externe implicite de la Communauté?" (2003) *JT* p 225-236 at p 231-232.
[39] See Chapter 1, *supra*, p 2 *et seq.*
[40] For example §23 of the German *Zivilprozessordnung* (Code of Civil Procedure); see Annex I of the Brussels I Regulation.

its code of civil procedure, including the provisions that refer to international jurisdiction and are applied to defendants from third States. The Netherlands, for example, changed some of its rules. This resulted in the amendment of the Brussels I Regulation regarding the reference to Dutch law.[41] Similarly, Belgium, when adopting its new *Code de droit international privé* (Private International Law Code), deleted the provision in the *code civil* (civil code) granting jurisdiction on the basis of the Belgian nationality of the defendant. That provision was listed in the Brussels I Regulation as outlawed for defendants domiciled in EU Member States.

These changes of domestic law are accepted even though a change in the code of civil procedure of The Netherlands or of the civil code of Belgium may have consequences in other Member States: no matter where the defendant is from, Member States have committed themselves to recognise and enforce a judgment coming from another Member State.

The German rule regarded by the Brussels I Regulation as exorbitant still exists (jurisdiction on the basis of property of the defendant within Germany[42]), but the *Bundesgerichtshof* (Federal Supreme Court) has stated that that rule must be interpreted restrictively.[43] It added that the reference to the rule in the Brussels I Regulation (with regard to defendants domiciled in third States) cannot bring about a general application of that rule without the considerations that the Court made in that case (*eg* the compatibility with international law).[44]

If The Netherlands and Belgium are permitted to change their codes, and Germany is permitted to change the interpretation of the rules, they may as well decide to write into that code a specific rule relating to domiciliaries of third State X. Therefore, if one looks at the substance, there is no objection to a rule dealing with jurisdiction over defendants from third States. If The Netherlands or Belgium can make a new rule regarding defendants from third States, it seems that they can also conclude a bilateral treaty with third State X to the same effect. The same applies to Germany and its ability to change or interpret its rule in a specific way. If the Member States have the right to change the rules relating to defendants from outside the EU, the competence must be shared, it would appear.

It is submitted that the Commission's position would not be stronger if Article 4 were deleted at the next amendment or update of the Regulation. Article 4 does not really create a rule, but merely clarifies the situation under the Regulation. Without Article 4, it

[41] Commission Regulation (EC) No 1496/2002 of 21 August 2002 amending Annex I (the rules of jurisdiction referred to in Article 3(2) and Article 4(2)) and Annex II (the list of competent courts and authorities) to Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ L* 225, 22 August 2002, p 13.
[42] §23 *Zivilprozessordnung* (Code of Civil Procedure).
[43] Judgment of 2 July 1991; (115) (1992) *BGHZ* p 90-99
[44] At p 96.

would still be clear that the Brussels I Regulation contains no civil jurisdiction rules for defendants domiciled in third States (except in the cases of exclusive jurisdiction or forum clauses). It is not by deleting a provision stating that an instrument contains no rules on a specific matter that that becomes untrue; the instrument would still not regulate the matter. Therefore, even without Article 4, the Member States retain the competence to legislate and conclude conventions on defendants from third States.

Moreover, the Brussels II*bis* Regulation does not contain a provision similar to that of Article 4. All the same, it seems that the same dispute between the Commission and the Member States could arise in regard to the Brussels II*bis* Regulation: does the Commission have exclusive competence to negotiate a similar convention with third States? The fact that there is no Article 4 does not mean that that competence is automatically exclusive. Member States have retained the right to regulate the rules pertaining to at least certain defendants.

Exclusive jurisdiction

It has been pointed out in Chapter 3 that the Brussels I Regulation contains no rules granting exclusive jurisdiction to third State courts. The Lugano Convention would import such rules. The courts of Iceland, Norway and Switzerland would have exclusive jurisdiction over immovable property situated there, over companies registered there and over intellectual property rights registered there (if the dispute concerns the validity of the company or the intellectual property right). In some of these cases an EU Member State court would have had jurisdiction, for instance on the basis of the domicile of the defendant (Brussels I Regulation Art 2) or on the basis of the place of the performance of the contract (Brussels I Regulation Art 5(1)). Such jurisdiction would in future be removed by the Lugano Convention.

However, the analysis does not end there. An important ingredient of the examination of exclusive jurisdiction and third States is the theory of the reflexive effect. It has been argued in this thesis that in the case where a third State court has exclusive jurisdiction, an EU Member State court that has jurisdiction (for instance on the basis of the domicile of the defendant), should decline its jurisdiction. It has also been pointed out that this declining of jurisdiction cannot be based on the Brussels I Regulation itself. The power to decline must be found in national law. Therefore, the EC has not exhaustively regulated this matter. The declining of jurisdiction that will now be imposed by the Lugano Convention will therefore not influence the Brussels I Regulation, but rather national law.

Thus one comes again to the same conclusion: the EC has not exhaustively dealt with every possible aspect of exclusive jurisdiction and therefore the external competence remains shared between the EC and the Member States.

Forum clauses

The investigation of this provision is similar to that of exclusive jurisdiction of third State courts. The Lugano Convention would give effect to forum clauses in favour of third State courts. In the absence of this provision of the Lugano Convention, the rules of the Brussels I Regulation might have led to an EU Member State court having jurisdiction, for instance because the defendant was domiciled there.

It is again the theory of the reflexive effect and its reference to national law that leads to the answer: no, the Brussels I Regulation did not regulate the matter exhaustively.

This conclusion can be supported by a reference to the new Belgian *Code de droit international privé* (Private International Law Code). The new code, enacted after the Brussels I Regulation, permits contracting parties to conclude a forum clause and stipulates that that will be respected by the Belgian courts.[45] One could imagine a Canadian party and Belgian party concluding a contract to the effect that a judge in Ontario has jurisdiction. The parties, knowing both Ontarian and Belgian law, might feel confident that their forum clause will be respected. If in a later dispute the party from Ontario is the claimant and the Belgian party the defendant, the Brussels I Regulation in fact provides that the Belgian court has jurisdiction. The Belgian court would decline this jurisdiction. In the analysis supported in this thesis, that would be an occurrence of the reflexive effect. If the example is slightly changed so as to replace the party from Ontario by one from Switzerland, one will now find the Lugano Convention. Therefore, the Lugano Convention will operate in the field of the reflexive effect and national law; not in the field of the Brussels I Regulation.

In this examination, it is also relevant to refer to the Hague Convention on Choice of Court Agreements, adopted in June 2005. While negotiating that Convention, the EC and the Member States co-ordinated their viewpoints, but all sat at the negotiation table. However, whether only the EC or both the EC and the Member States will sign the Convention, is still unclear and might be dictated by the outcome of the Lugano case.

Two situations treated by the Hague Convention have to be distinguished. To explain this, the example of the Belgian and Canadian parties will again be taken, on the assumption that both those States will be bound by the Hague Convention. Firstly, those two parties can conclude a choice of court agreement in favour of a Canadian court. That is the situation that would not have been covered by the Brussels I Regulation, but by the reflexive effect. Jurisdiction would then have been declined on the basis of the Belgian code. Therefore that new rule of the Hague Convention affects national law and not the Brussels I Regulation. Secondly, those two parties can conclude their choice of forum agreement in favour of the Belgian rather than the Canadian courts. That situation would presently be covered by the Brussels I

[45] Art 7.

Regulation. However, the Hague Convention will in that instance replace the Brussels I Regulation.[46] This is in the interest of all involved so that not only other EU Member State courts, but all States bound by the Hague Convention would decline jurisdiction. This example clearly illustrates a situation in which the EC does not have exclusive external competence, but that competence remains shared with the EU Member States (the first) and a situation where the EC does have exclusive external competence (the second). These two situations may occur in one treaty, such as the Hague Convention, which will therefore probably have to be a mixed agreement.

The future Lugano Convention seems different in this respect. An analogy of the second situation would be as follows: a party domiciled in Belgium and one domiciled in Switzerland conclude a forum clause in favour of the courts of Belgium. That situation would remain under the Brussels I Regulation and would not fall under the Lugano Convention.[47] Thus, only the first situation is at stake and the EC does not have exclusive external competence, but external competence is shared with the Member States.

Parallel proceedings

The Brussels I Regulation contains rules on parallel proceedings only for the situation where the same case is pending in the courts of two EU Member State courts. Whether or not an EU Member State court that has jurisdiction, may decline that jurisdiction in favour of a third State court first seised, is somewhat unclear. As has been discussed in Chapter 5 of the thesis,[48] the effect of the *Owusu* judgment on this situation, is uncertain. If the result of the *Owusu* judgment is that the jurisdiction in the EU based on the domicile of the defendant is compulsory, even if the same action had first been brought in a court of a third State, then the EU rules are all-encompassing in this domain and the EC has exclusive external competence to negotiate the provision in the Lugano Convention on parallel proceedings. If, on the other hand, the EU Member State courts can use their national law to decline jurisdiction because an action had previously been brought in a third State court, then the Brussels I Regulation does not contain all the rules in this area. Then the external competence to negotiate this provision remains shared between the EC and the Member States.

Provisional Measures

The Lugano Convention will contain rules permitting third State courts to grant provisional measures when EU Member State courts have jurisdiction as to the substance of a case. However, these provisional measures will in no way influence the jurisdiction of the EU Member State court. That court will maintain its jurisdiction over

[46] Art 26(6) of the Hague Convention on Choice of Court Agreements.
[47] This is the situation under the current version of the Lugano Convention, see its Art 54B.
[48] See Chapter 5, Part B, p 2 *et seq.*

the substance of the matter. As has been pointed out, the Brussels I Regulation in any event refers to national law on this matter, but curtails the national rules. The Member States thus remain competent over this matter, even if such competence is not unfettered.

Enforcement of judgments

The argument is made by some that rules on the recognition and enforcement of third State judgments would affect the EU rules.[49] Of course the rationale behind the Lugano Convention is that the judgments of third States Iceland, Norway and Switzerland could be easily recognised and enforced in the EU Member States. However, that purpose of the Convention with the third States does not strictly speaking "affect"[50] the EU rules. Whether or not a Convention exists with the outside world, a request might be made to have a third State judgment enforced in an EU Member State. That EU Member State will either apply its national law or a Convention (*eg* the Lugano Convention). The enforcement will only be effective in the EU Member State where it had been granted. An enforcement order cannot be given in another EU Member State on the first enforcement order (*exequatur sur exequatur ne vaut*).[51] If enforcement were sought in another EU Member State, that Member State would have to apply its national law or a convention. Therefore it seems that competence also on these provisions remains shared between the EC and the Member States.

Other provisions in the Brussels I Regulation on conventions with third States

The other place where one might seek an answer is Articles 71 and 72 of the Brussels I Regulation itself. These provisions replace respectively Articles 57 and 59 of the Brussels Convention, but have been modified. Examining the provisions, it will be indicated that their changes are not decisive for the external competence of the EC.

Article 57 of the Brussels Convention and Article 71 of the Brussels I Regulation deal with conventions on particular matters. As has been pointed out in Chapter 1, jurisdiction provisions are often taken up in such conventions on particular matters, for instance transport. Article 57(1) of the Brussels Convention provides:

*This Convention shall not affect any conventions to which the Contracting States **are or will be** parties and which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments.*

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[49] See, for instance, F Pocar, "The Drafting of a world-wide convention on jurisdiction and the enforcement of judgments: which format for the negotiations in The Hague?" in JAR Nafziger & SC Symeonides (eds), *Law and Justice in a Multistate World. Essays in Honour of Arthur T von Mehren* (Ardsley: Transnational Publishers Inc, 2002) p 191-197 at p 195-196.

[50] In the words of the *ERTA*-case; see *supra*, p 2.

[51] See ECJ case C-129/92, judgment of 20 January 1994, *Owens Bank Ltd v Fulvio Bracco and Bracco Industria Chemica SpA* [1994] *ECR* I-117; Chapter 5, Part B, p 2.

Article 71(1) of the Brussels I Regulation provides:
This Regulation shall not affect any conventions to which the Member States ***are*** *parties and which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments.* (emphasis added)

Article 59 of the Brussels Convention and Article 72 of the Brussels I Regulation deal with recognition and enforcement conventions. Article 59 of the Brussels Convention provides:
This Convention shall not prevent a Contracting State from assuming, in a convention on the recognition and enforcement of judgments, an obligation towards a third State not to recognize judgments given in other Contracting States against defendants domiciled or habitually resident in the third State where, in cases provided for in Article 4, the judgment could only be founded on a ground of jurisdiction specified in the second paragraph of Article 3...

Article 72 of the Brussels I Regulation provides:
This Regulation shall not affect agreements by which Member States undertook, prior to the entry into force of this Regulation pursuant to Article 59 of the Brussels Convention, not to recognise judgments given, in particular in other Contracting States to that Convention, against defendants domiciled or habitually resident in a third country where, in cases provided for in Article 4 of that Convention, the judgment could only be founded on a ground of jurisdiction specified in the second paragraph of Article 3 of that Convention.

While Article 57 of the Brussels Convention referred to existing and future instruments, Article 71 of the Brussels I Regulation refers only to existing instruments. Similarly, while Article 59 of the Brussels Convention retained the possibility of the Member States to conclude recognition and enforcement conventions with third States, Article 72 of the Brussels I Regulation merely permits EU Member States to respect international law obligations under already existing recognition and enforcement conventions with third States.

These textual amendments seem to support the Commission's point of view that the authority to conclude any jurisdiction provision in a convention is now vested exclusively in the EC and that the Member States no longer have the authority to do so.[52]

However, the silence on future instruments should not be interpreted as taking away Member States' powers that they have under international law as sovereign States. External competence is not conferred on the EC by such a silence in the specific EU legislation, but only by one of the ways discussed.[53]

[52] See, in support of this argument, Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (including an explanatory memorandum); *OJ C* 376E of 28 December 1999, p 1; M Traest, *De Europese Gemeenschap en de Haagse Conferentie voor het Internationaal Privaatrecht* (Antwerp: Maklu, 2003) p 260-261.
[53] See *supra*, p 2 *et seq.*

One also has to take into account that Article 59 of the Brussels Convention had been inserted to pacify criticism of EEC chauvinism because of the bad situation that defendants domiciled in third States would be in: an EEC judgment based on an exorbitant basis of jurisdiction could be recognised and enforced against them throughout the EEC.[54] It merely confirmed in an explicit way the situation under international law that the Member States could conclude conventions with third States. At the stage of the conclusion of the first version of the Brussels Convention, a convention on the recognition and enforcement of civil judgments was being negotiated at the Hague Conference on Private International Law. The message of Article 59 was that those negotiations would continue and the possibility of other conventions would remain open. Although the deletion of the message can be criticised as unfriendly towards third States,[55] it does not mean that the Member States have lost their external competence.

These provisions can in fact be compared to Article 307 of the EC Treaty, which states that agreements with third States dating from before the establishment of the European Community, or before a specific Member State's accession, will remain valid. Such rule seems inevitable under international law: prior international obligations must be respected.[56]

Furthermore, Article 67 of the Regulation states that the Regulation shall not prejudice the application of relevant provisions of Community instruments. That provision does not explicitly refer to future Community instruments, but one can hardly imagine that it was the intention of the drafters to freeze Community law at the phase where it was at the time of the adoption of the Regulation.[57]

[54] See, *supra*, Chapter 2, p 2, fn 71.
[55] See, *ia* the reaction of GAL Droz & H Gaudemet-Tallon, "La transformation de la convention de Bruxelles du 27 septembre 1968 en Règlement du Conseil concernant la competence judiciaire, la reconnaissance et l'exécution des decisions en matière civile et commerciale" (2001) *RCDIP* p 602-652 at p 621-625.
[56] Arts 26, 27, 30 and 46 of the Vienna Convention on the Law of Treaties (Vienna, 1969). See also G Middeldrop & RH van Ooik, "Van verdeelde *Open Skies* naar een uniform Europees extern luchtvaartbeleid" (2003) *NTER* p 1-10 at p 8, where they discuss the consequences of the *Open Skies* judgments, stating that these judgments cannot negate the obligations that the Member States have taken up towards third States. See also The Hague Conference's Preliminary Document No 24 of the Judgments Project, "The relationship between the judgments project and other international instruments", prepared by A Schulz.
[57] See A Nuyts, "La communautarisation de la convention de Bruxelles. Le règlement 44/2001 sur la compétence judiciaire et l'effet des decisions en matière civile et commerciale", (2001) *JT* p 913-922 at p 912.

Specific interests of Member States

Moreover, some Member States may have specific reasons to conclude bilateral conventions with specific third States, for instance their neighbours, or a State of which many nationals live in the Member State.

The entire European Community may not have the same concern. It seems absurd that these bilateral conventions are no longer possible and that the Community must now negotiate conventions for the entire EC, when only one Member State is really interested. Some third States would not be interested in a convention with the entire EU, since they might have friends and foes in the same European club.

Furthermore, an enforcement convention with one Member State does not affect the Brussels I Regulation, as has been explained above.[58] A bilateral convention would facilitate enforcement in one Member State. Apart from that Member State the judgment from the particular third State would not have easy access to the entire EU. Judgments given by the EU Member State in question against a defendant domiciled in the third State, would be enforceable in the other EU Member States, but that would have been the case no matter what the basis of jurisdiction was; even if jurisdiction were based on a (exorbitant) national ground. Thus, there should be no objection against such bilateral convention.

In practice Member States still conclude this type of conventions. A Borrás refers to bilateral agreements Spain has recently concluded with El Salvador and Tunisia and then comes to the conclusion that one has to admit that the conclusion of these conventions is still possible, although one might imagine that there is a duty on Member States to inform the Community, on the basis of the principle of loyalty.[59] This might be compared to the situation where an EU Member State informs the Community that one of its bases of exorbitant jurisdiction (in national law) has been altered.

Conclusion

After an analysis of the various provisions of the to-be-concluded Lugano Convention, one has to admit that the EC does not have exclusive external competence to negotiate it. The discussion has shown that the Member States still have competence in this area. Therefore, both the EC and the Member States will have to negotiate, sign and ratify this Convention.

The conclusions can be used for the similar questions that arise with regard to bilateral conventions and the Hague Convention on Choice of Court Agreements.

[58] See *supra*, p 2.
[59] A Borrás, “The effect of the adoption of Brussels I and Rome I on the external competences of the EC and the Member States” in J Meeusen, M Pertegás Sender & G Straetmans (eds), *op cit* (fn 1) p 99-125 at p 117.

5. Denmark

As has been explained, Denmark does not participate in the EU's Regulations on civil jurisdiction. The United Kingdom and Ireland only participate in the private international law regulations if they explicitly opt in.[60]

It seems that the only way to solve the relations with Denmark is to liken it to a third State for civil jurisdiction (and all private international law) instruments.[61] The same will hold true for the United Kingdom and Ireland regarding instruments to which they have not opted in.[62] The European Union must then be seen as if composed of all the Member States except them. Therefore the Commission, in matters over which the EC has competence, speaks for everyone except them. This line of reasoning is supported by the Council Decision that authorised the EU Member States to sign the 1996 Hague Child Protection Convention, stating that it does not bind Denmark, and that "Member State" in the decision means all Member States except Denmark.[63]

If the above analyses were not followed, the EU would find itself tied in a Gordian knot: the EU and the Member States want to conclude a new convention with Denmark, as successor to the Brussels Convention but updated in line with the Brussels I Regulation. But if the fiction of non-Membership were not applied, Denmark would be concluding a convention with itself: once as part of the EU and once as counter-party. This is a legal and factual impossibility.

If the competence is shared, as has been argued above,[64] it seems that both the EC and every Member State, except Denmark, will have to sign the agreement on the one side, while Denmark will sign it on the other side. The "EC" then means the EC minus Denmark. To avoid any ambiguity, the EC signature should state that it does not include Denmark.

However, the Council of the European Union has authorised the Commission to negotiate with Denmark for the extension of the rules of the Brussels I Regulation to Denmark. Thereafter, in September 2005, the Council adopted a decision on the

[60] See *supra*, p 2 *et seq*.
[61] *Contra:* A Borrás, "The effect of the adoption of Brussels I and Rome I on the external competences of the EC and the Member States" in J Meeusen, M Pertegás Sender & G Straetmans (eds), *op cit* (fn 1) p 99-125 at p 108 states that the situation with Denmark is not one of external competence, but of necessarily concluding an international agreement, which will have the same content as a Community instrument.
[62] There are as yet no instruments to which Ireland and the United Kingdom have not opted in, but the possibility exists that there might be such instruments in future.
[63] Council Decision of 19 December 2002, *OJ L* 48 of 21 February 2003, p 1-2. See specifically rec 9 and Art 1(3).
[64] See *supra* p 2 *et seq*.

signing of an Agreement between the European Community and Denmark and that Agreement was signed in October 2005.[65]

The Agreement with Denmark contains rules on the interpretation powers of the European Court of Justice.[66] Furthermore, it unambiguously states that international agreements entered into by the EC will not bind Denmark. However, Denmark will have to abstain from entering into international conventions that may affect or alter the scope of the Brussels I Regulation, unless the EC has been consulted and arrangements are made with respect to the relationship between the convention and the Brussels I Regulation rules. In negotiating international agreements Denmark will have to co-ordinate its position with the EC.[67]

This way of proceeding seems rather strange. The Council and the Member States seem to be contradicting themselves. On the one hand they wait for more than two years for an opinion from the European Court of Justice on the external competence of the Community to negotiate and conclude a convention in this field with Iceland, Norway and Switzerland. On the other hand, shortly before receiving that opinion, they let the European Community conclude an agreement with Denmark without even signing it alongside the Community. Authorising the Commission to negotiate this Agreement might have been the most practical way to proceed, especially since the Agreement is short and only contains technical issues, while the substance lies in the annexed Brussels I Regulation. However, signing the Agreement is not a mere practical issue. It is now the Community that is the international contracting party and not the Member States. By that fact, it seems that the Member States acknowledge that they do not have external competence in this matter. Probably that was not their intention and their vision might have been blurred by the fact that Denmark is in principle an EU Member State. However, as has been explained, Denmark should with respect to this chapter of EU law be seen as a third State. This point of view is, ironically, confirmed by Council Decision itself, where the considerations state that Denmark is not taking part in the adoption of the decision.[68] It is thus not part of the EC for this matter.

The next concern is the consequences for the validity of this Agreement if the European Court of Justice finds in the Lugano Opinion that competence is shared on at least one of the provisions. If the Member States did have competence over at least

[65] Council Decision 2005/790/EC of 20 September 2005 on the signing, on behalf of the Community, of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ L* 299, p 61 and Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels, 19 October 2005), *OJ L* 299, p 62-70.
[66] Art 6.
[67] Art 5.
[68] Rec 5.

some of the provisions, and they did not sign the Agreement, is it a valid international convention?

6. The difficulties for third States

It appears to be an impossible task for third States to determine when the conclusion of an international agreement will *affect* or *alter the scope of* internal rules of the EU. Furthermore, as European Union law is in constant evolution and the position is not always clear, the EU and the Member States might differ as to the external competence of the EU in certain cases. External competence might even arise in a way that was unintended by some actions of the EU institutions.[69]

If negotiations are already underway and external competence then arises, it is not fair towards third States to change the negotiator. The Commission and Council should in such instances attempt to find a political solution.[70] This was the case in The Hague. While an international jurisdiction convention was being negotiated, the European Community obtained external powers by the advent of the Treaty of Amsterdam. It would not have been fair to tell the other States that the Member States would no longer be negotiating, but only the European Community.

A simple way of creating clarity is by a disconnection clause.[71] Such a clause indicates that another instrument exists for the internal relations in the EU. By virtue of the principles of EU law, international law and the Vienna Convention, one might be able to find the solution as to which convention takes precedence. However, disconnection clauses have two functions: they indicate prevalence of older instruments (such as the Lugano Convention, or the old Brussels Convention, which still applies for Denmark), which would not have such prevalence in the absence of an explicit rule in the treaty, and they make life much easier for all involved. In this second sense a disconnection clause can be seen as a lesson in international and European Union law. It explains when the Convention has to defer to European Union law, without in itself establishing that result. This means that in some cases a disconnection clause is strictly legally speaking unnecessary, since it might achieve the same result as would have been the case if no clause were inserted. The problem with these disconnection clauses is that it seems very difficult to explain the situation in a simple, straightforward way. There are always exceptions. The disconnection for jurisdictional rules is different to that for rules on recognition and enforcement.

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[69] See G Middeldrop & RH van Ooik, "Van verdeelde *Open Skies* naar een uniform Europees extern luchtvaartbeleid" (2003) *NTER* p 1-10 at p 4.
[70] TC Hartley, *op cit* (fn 1) 2003) p 166.
[71] On disconnection clauses in general, see A Borrás, "Les clauses de déconnexion et le droit international privé communautaire" in H-P Mansel, T Pfeiffer, H Kronke, C Kohler & R Hausmann, *Festschrift für Erik Jayme (Band I)* (Munich: Sellier. Europa Law Publishers, 2004) p 57-72; See A Schulz, "The relationship between the judgments project and other international instruments", Preliminary Document No 24 of the Hague Conference of Private International Law's Judgments Project, http://www.hcch.net.

Furthermore, as has been indicated, the EC and the Member States might be in dispute, or not be sure of the situation themselves.

7. A practical interim approach: the example of the Hague Conference on Private International Law

In 1992 negotiations started at the Hague Conference on Private International Law in order to attempt to establish a world-wide convention on jurisdiction and foreign judgments in civil and commercial matters.[72] In 1999 came the Amsterdam Treaty and in 2001 the European Community enacted the Brussels I Regulation, a community instrument on the same subject matter. Uncertainty arose as to the external competences. In 2003 an opinion on the matter was asked of the European Court of Justice on the Lugano Convention. The problem of the competence with regard to the Lugano Convention is largely the same as that of the Hague Convention and the judgment would probably also be relevant for the Hague negotiations.

While waiting for the judgment, negotiations went ahead and the Member States and European Commission had to find a way of continuing their participation. According to the old Statute of the Hague Conference only States could be members and had a right to vote during negotiations.[73] It was however possible for organisations to attend the negotiations as observers.[74] In that sense the representatives from the European Commission, the Council and the Parliament could attend the negotiations. The voice of these institutions, especially that of the Commission, became more and more important, although the EC could not vote formally.

In the meantime, negotiations on the jurisdiction convention carried on, but no voting took place. The Member States negotiated as members and the Commission as observer. That made the negotiations very difficult because quasi-consensus had to be reached on every point. The Commission and Member States also had so-called co-ordination meetings before every session. At those meetings they aligned their viewpoints so that they would negotiate from the same position. This action was not only to help the negotiations, but it encompasses an obligation on EU Member States in fields where competence is shared. If every EU Member State were permitted to take its own stance at the negotiations, that would jeopardise the EC's part of the competence.[75] When well-co-ordinated these efforts helped the negotiations. Quite a number of States had the same stance already. On the other hand, some negotiating

[72] For a detailed discussion of the EU's relationship with the Hague Conference, see M Traest, *op cit* (fn 52).
[73] That Statute has been amended in June 2005 in order to permit the EC to become a member of the Hague Conference on Private International Law and to set up a new voting mechanism.
[74] For a similar situation, see ECJ Opinion 2/91 of 19 March 1993 [1993] *ECR* I-1061, dealing with negotiations at the International Labour Organisation, where the EC likewise had observer status.
[75] See ECJ Opinion 2/91 of 19 March 1993 [1993] *ECR* I-1061, esp rec 12 & 37-38.

States experienced these efforts as a block-vote against which it was very difficult to raise one's own concerns. The only State that really had an equal bargaining power, was the USA. If compromises could be struck between these two fronts, it became very difficult for other States to intervene. That has at a certain point seriously threatened the work at the Hague Conference.[76]

At the time of negotiating the Hague Convention on Choice of Court Agreements,[77] the EC and the Member States were still in dispute as to whether that Convention was within the exclusive external competence of the EC or entailed shared competence between the EC and the Member States. The case on the similar Lugano dispute was pending at the European Court of Justice. The EC and the Member States then wanted to leave both options open; both had to be written into the text of the Convention. The EC tried to justify this by saying that the clause will not only apply to the EC, but to all REIOs which might exist and have extended powers in the future. At the time of the negotiations, however, it was clear that the EC was the only REIO that would at that moment, and for the near future, need the option. And they were the only ones that needed two options. Of course that was not only confusing for third States, but it also seemed that the EC and the Member States wanted to have their cake and eat it.

In the end the Convention contains both a disconnection clause, attempting to explain when the EU instruments will enjoy precedence[78] and a clause stating that a Regional Economic Integration Organisation (REIO) may sign the Convention if it has competence over all or some of the matters governed by the Convention.[79] The wording "some or all" leaves open the question of whether the EC is exclusively competent or competence is shared with the Member States. At the time of signature, the REIO must inform the depository of the exact scope of its competence. If this competence changes in future, the REIO is also under an obligation to notify the depository.

8. International co-operation instead of hierarchy?

It would have been noted that these discussions concerned primarily the Brussels I Regulation. That does not mean that the same problems do not arise with respect to

[76] See F Pocar, "The Drafting of a World-Wide Convention on Jurisdiction and the Enforcement of Judgments: Which Format for the Negotiations in The Hague?" in in JAR Nafziger & SC Symeonides (eds), *Law and Justice in a Multistate World. Essays in Honor of Arthur T von Mehren* (Ardsley: Transnational Publishers, 2002) p 191-197 at p 191: "*Should the negotiations be regarded by States as unduly unbalanced, their outcome would have little chance of success*." AVM Struycken, "Het Verdrag van Amsterdam en de Haagse Conferentie voor international privaatrecht. Brusselse schaduwen over Den Haag" (2000) *WPNR* p 735-745.

[77] Adopted on 30 June 2005.

[78] Art 26; see also the Draft Report by TC Hartley and M Dogauchi at p 46-47, http://www.hcch.net.

[79] Art 29; see also the Draft Report by TC Hartley and M Dogauchi at p 51-52, http://www.hcch.net. This clause has been inspired by Art 18 of the Hague Securities Convention; see fn 32.

the Brussels II*bis* Regulation. An interesting interaction took place between the Brussels II Convention, predecessor of the Brussels II*bis* Regulation, and the 1996 Hague Convention on parental responsibility. Even though this interaction came first chronologically, its different approach merits a short discussion at this point, by way of comparison and to indicate another possibility of dealing with third States.

The Hague Conference and the European Union seemed to have been entwined in a love-hate relationship. They wanted to work together, but the EU also wanted to create a closer collaboration than the Hague Conference was able to establish.

The 1996 Hague Convention does not contain a so-called Regional Economic Integration Organisation (REIO) clause. This can be explained by the fact that that Hague Convention was signed before the great changes of the Treaty of Amsterdam came. Only after the completion of the Hague Convention did family law become an EU matter. The solution was that all the EU Member States signed the Hague Convention in two capacities: firstly for themselves and secondly on behalf of the European Community. Before signing, there was a Council Decision to authorise the Member States (except Denmark) to sign on the EC's behalf.[80] This way the European Community, who is now partially the boss in this material, became involved in the Hague Convention.

In this development the duality of the relationship between the EU and the Hague Conference can be felt. On the one hand, it is positive for the Hague Conference that the Convention is guaranteed of at least 24 States party.[81] Additionally, the Convention will benefit from the interpretation by the European Court of Justice of a similar instrument. The Brussels II*bis* Regulation furthermore gives a slight incentive to third States to become party to the Hague Convention by inserting presumptions of best interests of a child that is habitually resident in a third State that is not party to the Hague Convention and thus drawing the child into the sphere of application of the Brussels II*bis* Regulation.[82] While this approach of the EU might be criticised, if the children are going to be subjected to EU rules in any event, a third State might as well become party to the Hague Convention and at least have reciprocity.

On the other hand, working with the EU as a whole, can mean for the Hague Conference to be dragged into EU politics. Disputes about Gibraltar can delay the extension of the Convention.

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[80] Council Decision of 19 December 2002, *OJ L* 48 of 21 February 2003, p 1-2. At that stage The Netherlands had already signed the Convention. On the compromise needed for this Council act, see A Schulz, Die Zeichnung des Haager Kinderschutz-Übereinkommens von 1996 und der Kompromiss zur Brüssel IIa-Verordnung" (2003) *FamRZ* p 1351-1354 at p 1352.

[81] Denmark falls outside the EU's competence in this matter. However, a convention between Denmark and the rest of the EU will be created. In practice it can be established with near certainty that Denmark will also become party to the Hague Convention. With the other EU Member States.

[82] Art 12(4) Brussels II*bis* Regulation. See *supra*, p 2.

9. Conclusion

This Chapter has examined the external relations of the EU, currently a hot issue of European private international law. One has to await the judgment of the European Court of Justice in the Lugano case. Then it will be clearer who should be at the negotiation table with third States. In the mean time, creative and friendly solutions have to be found. It should be emphasised that other negotiation tables, such as that of the Hague Conference on Private International Law, should not be seen as a threat to the EU, but rather as an opportunity to work together with third States in a world of international trade and cross-border families.

Conclusion

1. Introduction

Coming to the end, one looks at a building constructed upon a crooked quadrangle. The building does not seem to have enough windows to the outside world.

In conclusion, it will be useful to shortly revert to the four cornerstones and the surrounding research of the thesis. After Chapter 1 gave the reader, especially the third State reader, some background as to the European Union, the following four Chapters contained the cornerstones. Chapter 6 dealt with provisional and protective measures. While it has been indicated that not all agree on this point, the view advocated in this thesis is that provisional and protective measures do not form a fifth cornerstone. Lastly, after the construction of the quadrangular building, the view and possible entries from the outside were considered in Chapter 7.

2. Domicile of the defendant

The first rule is that the EU civil jurisdiction Regulations apply if the defendant is domiciled in an EU Member State. The court of the domicile of the defendant has jurisdiction. The Brussels II*bis* Regulation places emphasis on habitual residence and nationality rather than domicile; the Insolvency Regulation uses the centre of the main interests. A plaintiff domiciled in a third State bringing proceedings against a defendant domiciled in the EU has to take account of the EU rules. These rules are mandatory, meaning that the EU court where the defendant is domiciled must take jurisdiction.

On the other hand, defendants domiciled outside the EU do not fall within the EU's civil jurisdiction rules. The domestic rules of jurisdiction of every EU Member State can be applied on them. This application comes to prejudice them at the time of recognition and enforcement. At that point, the identity of the parties is irrelevant and an EU judgment will be recognised and enforced throughout the EU. If jurisdiction had been based on the French nationality of the plaintiff and the defendant was from Senegal, that judgment will have effect not only in France, but in the entire EU.

The Brussels II*bis* Regulation's rules are based on habitual residence or nationality. Trying to determine the exact scope of the rules contained in this Regulation is frustrating, because of two directly opposing provisions. It has been argued that the Regulation should be limited to defendants who are habitually resident in the EU or who have an EU nationality. Extending the Regulation's sphere of application beyond that line would not be equitable and would not comply with the principle of subsidiarity.

The Insolvency Regulation applies if the centre of a debtor's main interests is situated in the EU. This is a new concept, which was the result of a compromise, and practice and case law will have to elaborate it further.

Additional defendants may also be brought before the same EU court as that of the domicile of the first defendant. For this rule of EU civil jurisdiction to come into play, the additional defendant has to be domiciled in the EU. As regards defendants domiciled in third States, the EU Member State courts would have to revert to their national rules on the joinder of parties.

A defendant appearing in an EU court voluntarily, *ie* without contesting jurisdiction, may be subjected to the jurisdiction of that court. The ambit of this rule of EU civil jurisdiction is not clear. Some see it as similar to a forum clause, in which case it would also apply to defendants domiciled in a third State if the plaintiff is domiciled in the EU. It has been argued that this analysis is not correct and that the provision can only come into play if the voluntarily appearing defendant is domiciled in the EU. That explains why the provision has been discussed in Chapter 2 on defendants, rather than in Chapter 4 on forum clauses.

The Brussels I Regulation's alternative bases of jurisdiction to the domicile of the defendant can be relied on if the defendant is domiciled in the EU. These alternative rules include specific bases of jurisdiction for contracts, maintenance claims, torts, civil proceedings based on criminal proceedings, operations of a branch, trusts and salvage of cargo or freight. Regarding defendants domiciled in third States, EU Member State courts again have to revert to domestic law.

The EU civil jurisdiction rules providing extra protection for certain weaker parties apply only to defendants domiciled in the EU. Insured parties, consumers and employees are considered weaker parties. Counter-parties contracting with weaker parties can be presumed to be domiciled in the EU if they have a branch in the EU.

3. Exclusive jurisdiction

The next cornerstone, discussed in Chapter 3, is that of exclusive jurisdiction. The Brussels I Regulation has granted exclusive jurisdiction to certain EU Member State courts in the case of strong links between the facts and the Member States. The most common example is that of immovable property. Other exclusive bases of jurisdiction is the validity of legal persons, the validity of entries in public registers, the validity of intellectual property rights and the enforcement of judgments. The mere existence of this link in an EU Member State is sufficient to make the Brussels I Regulation applicable. The domicile of the parties is irrelevant.

The Brussels I Regulation is silent on what seems to be the logical extension: what about immovable property *etc* in third States, even though one or both parties are

domiciled in the EU? Despite this silence, there is a strong case in favour of permitting EU Member State courts to refuse jurisdiction in these cases. The theory of the reflexive effect has been discussed. The fact that the jurisdiction based on the domicile of the defendant in the EU is mandatory, does not nullify the argument. Various ways of declining jurisdiction can be envisaged. The most simple is to allow EU Member State courts to apply national law in order to decline jurisdiction.

4. Forum clauses

When two parties domiciled in the EU or a party domiciled in the EU and one domiciled in a third State conclude a forum clause in favour of an EU Member State court, the EU's civil jurisdiction rules (specifically the Brussels I Regulation) apply. This is the third cornerstone, discussed in Chapter 4 of the thesis. The Brussels I Regulation contains rules on the validity of forum clauses.

Similarly to the rule on exclusive jurisdiction, no provision is found on forum clauses in favour of the courts of third States. One is confronted once again with the fact that jurisdiction based on the domicile in the EU is mandatory. However, the Hague Convention on Choice of Court Agreements does provide for the respect of forum clauses in favour of courts of third States that are Party to that Convention in the event that the EU Member States are also Party. In the absence of that Convention, the theory of the reflexive effect can be invoked regarding forum clauses in favour of third State courts.

5. Procedural rules related to jurisdiction

The fourth and last cornerstone of the sphere of application of the EU's civil jurisdiction rules regards procedural rules related to jurisdiction, discussed in Chapter 5. These rules are so closely related to jurisdiction that they have to be discussed in a thesis on jurisdiction. Some are included in the Brussels I and II*bis* Regulations, namely the rules on *lis pendens* and on related actions. In these Regulations the rules are only applicable if two EU Member State courts are concerned. The domiciles of the parties are irrelevant.

Two other procedural rules related to jurisdiction are *forum non conveniens* and the more aggressive anti-suit injunction. For these rules the question is whether they can still be applied in conjunction with the EU civil jurisdiction rules. One mainly looks at the courts concerned for this determination. However, specifically with regard to *forum non conveniens* it has been argued that the basis of jurisdiction may also play a role when one examines the possibility of its application. This rule might prove valuable when an EU Member State court has jurisdiction based on the domicile of the defendant while there is a forum clause in favour of a third State court. That would provide a way to get around the mandatory nature of the jurisdiction based on the domicile of the defendant.

Upon close examination, one has to conclude that the rule of *forum non conveniens* does not differ very much from the theory of the reflexive effect.

Chapter 5 concluded the discussion of the four cornerstones that determine the personal scope of the EU's civil jurisdiction rules.

6. Provisional and protective measures: no cornerstone

Although some aver that the rule on provisional and protective measures is autonomous in the sense that it applies regardless of the other jurisdictional rules, the contrary has been argued. According to the analysis supported in this thesis, one has to determine first whether jurisdiction lies within the EU. That has to be done on the basis of the first three cornerstones, discussed in Chapters 2 to 4. Only once that is clear can an EU Member State court grant provisional and protective measures founded on the EU rules. The EU rules in this sense means a reference to national law plus a limitation of the national rules that go too far. If the EU civil jurisdiction rules are not applicable on the basis of one of the mentioned cornerstones, domestic law applies without EU limitation.

7. External relations of the EU

After having considered the specific rules and their technicalities in Chapters 2 to 6, Chapter 7 dealt with a broader question. To which extent can the EU Member States still conclude bilateral or multilateral treaties with third States, specifically in the domain of civil jurisdiction? On the basis of EU law, one cannot deny that the EC now has external competence in this area and may therefore negotiate and contract with third States. It has been argued that this external power is not exclusive to the EC, but shared with the Member States.

The problems with the EC's external competence have arisen quite sharply at the Hague Conference on Private International Law. The substance of the projects of the Hague Conference on civil jurisdiction provides examples of international contacts, disillusionment and lack of coherence, but also of creative solutions.

8. Conclusion

Looking back, one has to admire what the EU has achieved in the area of civil jurisdiction. However, this admiration is tempered when one seeks the exact sphere of application of the rules. It would seem that the rules were drawn up from the inside and for the inside. It is a pity that the drafters had little attention for the outside world. In the case law on civil jurisdiction, one sometimes finds that the European Court of Justice attaches more weight to the functioning of the European judicial area than to

considerations of international trade more generally, which includes the interests of third States.

This thesis modestly hopes to have shed some light on the sphere of application of those EU civil jurisdiction rules for litigants and contracting parties from third States.

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