Forum non Conveniens and the EU rules on Conflicts of Jurisdiction: A Possible Global Solution

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The Brussels Convention was concluded in 1968 between the original six Member States of what is now the European Union (EU). France, Germany, Italy and the Benelux countries did not have the doctrine of *forum non conveniens* as part of their private international law systems and therefore it is not surprising that the Brussels Convention[1] did not adopt *forum non conveniens*. Instead, for conflicts of jurisdiction between courts in different Contracting States to the Convention the drafters adopted a *lis pendens* rule in Article 21:

"Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion decline jurisdiction in favour of that court.

A court which would be required to decline jurisdiction may stay its proceedings if the jurisdiction of the other court is contested."

This was a strict first come first served approach when the litigation in both countries involved the same parties and the same cause of action. One of the main aims of the drafters of the original Brussels Convention was to avoid irreconcilable judgments in different Member States of the EU. However, this risk does not just arise where there is complete identity of parties and cause of action as covered by the *lis pendens* rule. Therefore, even the original Brussels Convention, agreed by the six civil law founding members, sacrificed some legal certainty in the conflicts of jurisdiction rules to further reduce the risk of irreconcilable judgments. They did so by giving courts, other than the court first seised, a discretion to decline jurisdiction for related actions in Article 22 (where there was a risk of irreconcilable judgments) even though the parties or the cause of action were not identical :

"Where related actions are brought in the courts of different Contracting States, any court other than the court first seised may, while the actions are pending at first instance, stay its proceedings.

A court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the law of that court permits the consolidation of related actions and the court first seised has jurisdiction over both actions.

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[1] Available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:41968A0927(01)&from=EN accessed 23 June 2018.

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."

In that context there was some room for considering whether another court was better placed to deal with a case but only the court second seised could voluntarily give way to the court first seised. The court first seised had to exercise jurisdiction unless it did not have jurisdiction under the rules of the Convention.

The original Brussels Convention was silent on the question of what to do in a case where an EU court has jurisdiction under that Convention (whether on the basis of the harmonised rules of jurisdiction or on the basis of the national grounds of jurisdiction preserved for certain cases where the defendant is not domiciled in a Contracting State) and the defendant requests that court to decline jurisdiction in favour of a non-EU court.[2] The reason for this silence may partially be explained by the original emphasis of the drafters of the Brussels Convention on simplifying recognition and enforcement of judgments between Member States (see Article 220(4) of the EEC Treaty) and avoiding irreconcilable judgments in different Member States rather than thinking about conflicts of jurisdiction and conflicts of judgments between one Member State and a non-Member State.

The issue of whether a court first seised should have some discretion to decline to exercise jurisdiction was raised in the Working Party negotiating the Accession Convention for Denmark, Ireland and UK to the Brussels Convention. The rapporteur for the Accession Convention, Professor Peter Schlosser from Germany, recorded the outcome of those negotiations in his Report as follows:

"Article 21 expressly prohibits a court from disregarding the fact that proceedings are already pending abroad. For the rest the view was expressed that under the 1968 Convention the Contracting States are not only entitled to exercise jurisdiction in accordance with the provisions laid down in Title 2; they are also obliged to do so. A plaintiff must be sure which court has jurisdiction. He should not have to waste his time and money risking that the court concerned may consider itself less competent than another. In particular, in accordance with the general spirit of the 1968 Convention, the fact that foreign law has to be applied, either generally or in a particular case, should not constitute a sufficient reason for a court to decline jurisdiction. Where the courts of several States have jurisdiction, the plaintiff has deliberately been given a right of choice, which should not be weakened by application of the doctrine of *forum conveniens.* The plaintiff may have chosen another apparently 'inappropriate' court from among the competent courts in order to obtain a judgment in the State in which he also wishes to enforce it. Furthermore, the risk of a negative conflict of jurisdiction should not be disregarded: despite the United Kingdom court's decision, the judge on the Continent could likewise decline jurisdiction. The practical reasons in

[2] The issue was eventually partially resolved by the CJEU in Case C-281/02 *Owusu v Jackson* [2005] ECR I-1383. The Court said: "Application of the *forum non conveniens* doctrine, which allows the court seised a wide discretion as regards the question whether a foreign court would be a more appropriate forum for the trial of an action, is liable to undermine the predictability of the rules of jurisdiction laid down by the Brussels Convention, in particular that of Article 2, and consequently to undermine the principle of legal certainty, which is the basis of the Convention." (para 41) The Grand Chamber did not give a hypothetical ruling on "cases where there were identical or related proceedings pending before a court of a non-Contracting State, a convention granting jurisdiction to such a court or a connection with that State of the same type as those referred to in Article 16 of the Brussels Convention" (para 48) so these issues remained open along with cases where the EU court based its jurisdiction on the grounds of national law preserved by Article 4 of the Convention.

favour of the doctrine of *forum conveniens* will lose considerably in significance, as soon as the 1968 Convention becomes applicable in the United Kingdom and Ireland. The implementing legislation will necessitate not inconsiderable changes in the laws of those States, both in respect of the definition of the concept of domicile (see paragraph 73) and on account of the abolition of jurisdictional competence based merely on service of a writ within the area of the court (see paragraph 86). To correct rules of jurisdiction in a particular case by means of the concept of *forum conveniens* will then be largely unnecessary. After considering these arguments the United Kingdom and Irish delegations did not press for a formal adjustment of the 1968 Convention on this point."[3]

This last sentence is hugely significant. The Working Party that negotiated the 1978 Accession Convention met initially on 16 November 1972, before Denmark, Ireland and the UK joined the EU on 1 January 1973. It was chaired by Mr Jenard (Belgium) who had written the report on the original 1968 Brussels Convention. The date of the conclusion of the Accession Convention was 9 October 1978. Even by that date England and Wales had not adopted the modern doctrine of *forum non conveniens* from Scots law into English law. This only definitively took place by the House of Lords' decision in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 after some moves had been made towards the Scottish doctrine of *forum non conveniens* in *The Abidin Daver* [1984] AC 398. Indeed the House of Lords had previously declined to incorporate the Scottish doctrine of *forum non conveniens* into English law when the Working Party was negotiating the 1978 Accession Convention – see *The Atlantic Star* [1974] AC 436 and *MacShannon v Rockware Glass* [1978] AC 795 - at that time the English courts would only decline to exercise jurisdiction if the bringing of proceedings in England was regarded as oppressive.[4] Irish and Northern Irish law had not developed the Scottish style concept of *forum non conveniens* by the time of the Working Party negotiations either. Therefore it is little wonder that the negotiators in the Working Party did not press for a *forum non conveniens* solution in the Brussels Convention (even as an exceptional provision) given that only Scots law had it as a developed concept at the time the negotiations were taking place. It can be noted that the Working Party acknowledged that *forum non conveniens* could continue to be applied for intra-UK conflicts of jurisdiction. However the Working Party noted that:

"such discretionary powers should, of course, only be used in the spirit of the 1968 Convention, if the latter has determined, not only international but also local jurisdiction. A transfer merely on account of the cost of the proceedings or in order to facilitate the taking of evidence would be possible only with the consent of the plaintiff, who had the choice of jurisdiction."[5]

It is evident from the Schlosser Report that no particular consideration was given to the scenario where the defendant is asking an EU court to decline jurisdiction in favour of a non-EU court. Indeed some of the reasoning given in the Report as quoted above does not apply in a situation where the EU court is exercising its jurisdiction based on national law exorbitant grounds in relation to a non-EU domiciliary.

The Brussels Convention was implemented into UK law by the Civil Jurisdiction and Judgments Act 1982 which entered into force on 1 October 1987.[6] The UK legislature expressly preserved the doctrine of *forum non conveniens* for Scottish courts where the harmonised rules of jurisdiction in

[3] Schlosser Report [1979] OJ C59/71, para 78.
[4] See Paul Beaumont and Peter McEleavy, *Anton's Private International Law* (2011, 3rd edn, SULI/W Green) 361.
[5] *Supra* n 3 at para 81.
[6] See Paul Beaumont, *Anton & Beaumont's Civil Jurisdiction in Scotland* (1995, 2nd edn, W Green) 1.

the Brussels and Lugano Conventions and the intra-UK rules do not apply,[7] and, for all UK courts by virtue of section 49 of the 1982 Act to stay, sist, strike out or dismiss proceedings on the "ground of *forum non conveniens*… where to do so is not inconsistent with" the Brussels or Lugano Convention.[8] Thus *forum non conveniens* is applied throughout the UK in intra-UK cases and in relation to cases where the Brussels and Lugano Conventions have not harmonised the rules of jurisdiction, generally where the defendant is not domiciled in an EU State.[9]

Global solution in The Hague Judgments Project

In the global context in the 1990's negotiations on the Judgments Project a different balance was at play. By then the Scottish doctrine of *forum non conveniens* or a variant of it had been exported to the United States, England and Wales and most of the rest of the common law world.[10] Therefore a compromise was struck between the first come first served approach of *lis pendens* (the sacred principle of the Brussels Convention) and the discretionary approach of *forum non conveniens* which allows either the court first or second seised to decline jurisdiction. Could it therefore be the basis for a global solution to the problem of conflicts of jurisdiction?

The compromise was contained in Articles 21 and 22 of the interim text that emerged from the first part of the Diplomatic Conference held from 6-20 June 2001 in The Hague.[11] Article 21 states:

"Article 21 Lis pendens

1. When the same parties are engaged in proceedings in courts of different Contracting States and when such proceedings are based on the same causes of action, irrespective of the relief sought, the court second seised shall suspend the proceedings if the court first seised has jurisdiction under Articles [white list]*128* [or under a rule of national law which is consistent with these articles]*129* and is expected to render a judgment capable of being recognised under the Convention in the State of the court second seised, unless the latter has exclusive jurisdiction under Article 4 [, 11]*130* or 12.

2. The court second seised shall decline jurisdiction as soon as it is presented with a judgment rendered by the court first seised that complies with the requirements for recognition or enforcement under the Convention.

3. Upon application of a party, the court second seised may proceed with the case if the plaintiff in the court first seised has failed to take the necessary steps to bring the proceedings to a decision on the merits or if that court has not rendered such a decision within a reasonable time.

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[7] See section 22(1) of the 1982 Act and Beaumont, *ibid* at 243 and 250, whereby a court hearing a case falling within the Scottish rules of jurisdiction in Schedule 8 to the 1982 Act was not prevented from "declining jurisdiction on the ground of *forum non conveniens*."

[8] See Beaumont, *ibid* at 219, 234-235 and 302.

[9] See *Anton's Private International Law*, *supra* n 4, at 359-367. See also *Cook v Virgin Media Ltd* [2015] EWCA Civ 1287.

[10] See J Fawcett (ed), *Declining Jurisdiction in Private International Law* (Clarendon Press, 1995). In particular see Paul Beaumont, "Great Britain" at 207-233.

[11] See *Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6 – 20 June 2001 Interim Text Prepared by the Permanent Bureau and the Co-reporters* available at https://assets.hcch.net/docs/e172ab52-e2de-4e40-9051-11aee7c7be67.pdf accessed 23 June 2018. The original footnotes are preserved and quoted in the text just below the relevant draft Article.

4. The provisions of the preceding paragraphs apply to the court second seised even in a case where the jurisdiction of that court is based on the national law of that State in accordance with Article 17.

5. For the purpose of this Article, a court shall be deemed to be seised –

> *a)* when the document instituting the proceedings or an equivalent document is lodged with the court; or
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> *b)* if such document has to be served before being lodged with the court, when it is received by the authority responsible for service or served on the defendant.

[As appropriate, universal time is applicable.]

6. If in the action before the court first seised the plaintiff seeks a determination that it has no obligation to the defendant, and if an action seeking substantive relief is brought in the court second seised –

> *a)* the provisions of paragraphs 1 to 5 above shall not apply to the court second seised; and
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> *b)* the court first seised shall suspend the proceedings at the request of a party if the court second seised is expected to render a decision capable of being recognised under the Convention.

7. This Article shall not apply if the court first seised, on application by a party, determines that the court second seised is clearly more appropriate to resolve the dispute, under the conditions specified in Article 22.

128 It was agreed to add the words within brackets in order to make it clear that the *lis pendens* rule only applies when the court first seised exercises jurisdiction under the Convention: see the Report of the co-reporters, Preliminary Document 11, at p. 86.

129 This proposal sought to make it clear that the *lis pendens* rule will not only apply where the court first seised is exercising 'white list' jurisdiction as such, but also in the case where that court exercises a jurisdiction under national law in a situation that is consistent with 'white list' jurisdiction, such as proceedings against a defendant who is habitually resident in that State: see Report of co-reporters, Preliminary Document 11, at p. 86. There was no consensus on this point.

130 There was no consensus on the insertion of a reference to Article 11 (trusts)."

It is very important to note that the lis pendens rule is the norm and that therefore the court second seised will have to give way to the court first seised. The court first seised must exercise jurisdiction (apart from cases where it has been seised for a purely negative declaratory action) unless it believes that in accordance with the exceptional circumstances set out in Article 22 the court second seised is "clearly more appropriate to resolve the dispute". Article 22 states:

"Article 22 Exceptional circumstances for declining jurisdiction

1. In exceptional circumstances, when the jurisdiction of the court seised is not founded on an exclusive choice of court agreement valid under Article 4, or on Article 7, 8 or 12, the court may, on application by a party, suspend its proceedings if in that case it is clearly inappropriate for that court to exercise jurisdiction and if a court of another State has jurisdiction and is clearly more appropriate to resolve the dispute. Such application must be made no later than at the time of the first defence on the merits.

2. The court shall take into account, in particular –

a) any inconvenience to the parties in view of their habitual residence;

b) the nature and location of the evidence, including documents and witnesses, and the procedures for obtaining such evidence;

c) applicable limitation or prescription periods;

d) the possibility of obtaining recognition and enforcement of any decision on the merits.

3. In deciding whether to suspend the proceedings, a court shall not discriminate on the basis of the nationality or habitual residence of the parties.

4. If the court decides to suspend its proceedings under paragraph 1, it may order the defendant to provide security sufficient to satisfy any decision of the other court on the merits.

However, it shall make such an order if the other court has jurisdiction only under Article 17, or if it is in a non-Contracting State,*131* unless the defendant establishes that [the plaintiff's ability to enforce the judgment will not be materially prejudiced if such an order is not made]*132* [sufficient assets exist in the State of that other court or in another State where the court's decision could be enforced]*133*.

5. When the court has suspended its proceedings under paragraph 1,

a) it shall decline to exercise jurisdiction if the court of the other State exercises jurisdiction, or if the plaintiff does not bring the proceedings in that State within the time specified by the court; or

b) it shall proceed with the case if the court of the other State decides not to exercise jurisdiction.

6. This Article shall not apply where the court has jurisdiction only under Article 17 [which is not consistent with Articles [white list]].*134* In such a case, national law shall govern the question of declining jurisdiction.*135*

[7. The court seised and having jurisdiction under Articles 3 to 15 shall not apply the doctrine of *forum non conveniens* or any similar rule for declining jurisdiction.] *136*

131 It was agreed to insert the words "or if it is in a non-Contracting State" in order to fill a gap in the provision, see the Report of the co-reporters, Preliminary Document 11, at pp. 92-93.

132 The words in the preceding brackets were proposed in substitution of the existing text which were thought to set too high a standard for the defendant to be able to meet on the one hand and still not give the plaintiff the security needed on the other: see the Report of the co-reporters, Preliminary Document 11 at p. 93. There was no consensus on this point.

133 This is the text of the preliminary draft Convention of October 1999.

134 This proposal sought to ensure that the preservation of national rules of *forum non conveniens* will not apply both where the court seised is exercising 'white list' jurisdiction as such, and also in the case where that court exercises a jurisdiction under national law in a situation that is consistent

with 'white list' jurisdiction, such as proceedings against a defendant who is habitually resident in that State. There was no consensus on this point.

135 This paragraph makes it clear that Article 22 does not apply where the court is only exercising jurisdiction under national law. In that case, the court can apply its own rules of *forum non conveniens* or similar (if any). This resolves the question raised by the co-reporters in Preliminary Document 11, at p. 89. It was agreed to insert this paragraph.

136 This paragraph was proposed to ensure that national rules of *forum non conveniens* or similar rules would not be used in relation to 'white list' jurisdiction as a means of declining jurisdiction. There was no consensus on this point."

Professors Nygh and Pocar, the rapporteurs for the Judgments Project at that time, very helpfully stated the context of these Articles when reporting on the 1999 draft Convention agreed by the final meeting of the Special Commission:

"The preliminary draft Convention will offer the plaintiff a choice of fora. For instance, as an alternative to the specific jurisdictions in Articles 6 (contract) and 10 (tort), there will be a general jurisdiction based on Article 3. As regards corporate defendants, there may be four alternative fora available under the definition given in Article 3(2). It is obvious that this may lead in some cases to a conflict of jurisdictions and in others to situations where a defendant may be sued in an inappropriate forum. Both the civil law and the common law have developed mechanisms to deal with this problem. In the civil law the mechanism is that of *lis pendens* which is based on the priority of the first action commenced.[133] It has the advantage of certainty, but the disadvantage of rigidity. It also can be abused by a defendant taking pre-emptive action in seeking a so-called "negative declaration" as to its liability. In the common law the mechanism is that of *forum non conveniens* which prefers the "natural" or "more appropriate" forum which need not be the forum which was seised first. It has the advantage of flexibility and adaptability to the circumstances of each case, but it lacks certainty and predictability. Needless to say, each side looked with some suspicion at a system with which it was unfamiliar.

After long debate the Special Commission has adopted a compromise solution whereby provision is made for both *lis pendens* and for declining jurisdiction in certain circumstances. However, the *lis pendens* provision in Article 21 is made more flexible and priority is denied to the "negative declaration". In return the power to decline jurisdiction in Article 22 is subjected to stringent conditions which emphasise its exceptional character. "[12]

The rapporteurs went on to point out that Article 22 is not the same as *forum non conveniens*:

"The provisions of Article 22 must not be confused, however, with the doctrine of *forum non conveniens* as it has operated in common law countries. Article 22 is a provision whereby the forum may defer its jurisdiction in favour of that of a court of another State, but, with one exception, only if that other court actually assumes jurisdiction. It must also be noted that Article 22 applies to all Contracting States. Earlier proposals whereby acceptance of the provision for declining jurisdiction would be optional were not accepted by the Special Commission.

[12] See the Nygh/Pocar Report, available at https://assets.hcch.net/docs/638883f3-0c0a-46c6-b646-7a099d9bd95e.pdf accessed 23 June 2018, at page 89.

However, the Special Commission accepted the proposition that jurisdiction can be declined in favour of a court of a non-Contracting State under the same conditions as apply to a Contracting State."[13]

It is worth highlighting some of the key principles in Article 22 as explained by the Nygh/Pocar report as these could form the basis of certain key principles in any new global Convention that might regulate conflicts of jurisdiction:

"The [Article] commences by making it clear that the power to decline jurisdiction can only be exercised in exceptional circumstances. The normal rule is that the plaintiff is entitled to be heard in the forum which the plaintiff has selected and which has [white list] jurisdiction. Before that basic rule can be departed from a number of conditions must be satisfied.

Firstly, the jurisdiction of the court must not be based on certain grounds. If the forum has been selected as the exclusive forum under a valid choice of jurisdiction clause…, it cannot decline to accept that jurisdiction as is currently possible under the laws of certain States. Nor can a court which is asked to exercise jurisdiction by a plaintiff under the protective provisions [consumer and employment contracts] decline to do so. Finally, the exclusive jurisdictions [rights *in rem* in immoveable property, etc] by reason of the issues of public interest they seek to protect, cannot be declined. …[A] court which has jurisdiction… based on the appearance of the defendant without contesting the jurisdiction must also accept that jurisdiction since by definition by the time the court gains [such] jurisdiction…, the time for making a request to decline jurisdiction will have passed…

Secondly, the application that the court seised decline jurisdiction must be made by a party to the proceedings, almost always the defendant. The court cannot decline to exercise its jurisdiction on its own motion. The application must be made timely: not later than the time of the first defence on the merits…

Thirdly the court must be satisfied that in the circumstances of that particular case:

1 it is clearly inappropriate for that court to exercise jurisdiction;

2 a court of another State has jurisdiction; and

3 that court is clearly more appropriate to resolve the dispute.

Each of these three conditions must be fulfilled. The Convention does not address the question of onus, but it would be logical for the party requesting that the court decline jurisdiction to bring forward the facts and reasons for such a decision. The three conditions must also be looked at separately. Thus, the fact that another forum may be "clearly more appropriate" does not necessarily mean that the forum seised is itself "clearly inappropriate". For example, a plaintiff may bring suit against a corporate defendant at its principal place of business in respect of injuries the plaintiff received while employed by that corporation in another country where the plaintiff was resident and was hired. It may be that the second country is the "clearly more appropriate" forum, but, if the major decisions, including those affecting safety of employees throughout its operations, were made at the principal place of business, it cannot be said that this place is a "clearly inappropriate" forum. On the other hand, if the only connection with the forum seised is the incorporation of the company within the jurisdiction, but the principal place of business as well as the residence of the plaintiffs and the subject matter of the dispute are all more closely connected with another country, it could be said that the forum seised is clearly inappropriate and the other

[13] *Ibid* at page 93.

forum clearly more appropriate. In each case it will depend on the facts and circumstances of the case. Finally, as the words "may" and "peut" indicate, the power is discretionary. Even if the conditions are satisfied, the court originally seised is not obliged to decline jurisdiction.

The court seised must also be satisfied that a court of another State has jurisdiction."[14]

Of course a significant change took place in the way the Hague Conference did its business between the Special Commission in 1999 and the Diplomatic Conference in 2001. The former was based on majority voting whereas the latter was based on consensus. Hence the Diplomatic Conference text developed some square brackets that were not in the Special Commission text indicating where consensus had not yet been arrived at. Unfortunately so much of the 2001 text was in square brackets that the Judgments project could not proceed at that time with a comprehensive mixed Convention. Instead the Conference moved forward initially with what became the Hague Choice of Court Agreements Convention 2005. That Convention has an express prohibition on *forum non conveniens* in Article 5(2) reflecting the consensus that had already been reached on that point in Article 22(1) of the interim text of the Diplomatic Conference in 2001, quoted in full above, which only allowed for exceptional declining of jurisdiction "when the jurisdiction of the court seised is not founded on an exclusive choice of court agreement". Article 5(1) and (2) of the Hague Choice of Court Agreements Convention 2005 says:

"(1) The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State.

(2) A court that has jurisdiction under paragraph 1 shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State."[15]

The EU has approved the Hague Choice of Court Agreements Convention and recently Denmark has acceded to the Convention so that it is binding in all EU Member States.[16] This outward looking approach by the EU was part of the plan for the revision of the Brussels I Regulation (Regulation 44/2001 which had retained similar rules to the Brussels Convention on lis pendens and related actions) that included adopting some of the ideas of the Hague Convention into its internal provisions on choice of court. Furthermore, the *lis pendens* and related actions provisions in Articles 21 and 22 of the Brussels Convention have been adapted to become discretionary provisions in relation to cases where a dispute is pending in an EU court and in a non-EU court. Articles 33 and 34 of the Brussels Ia Regulation (Regulation 1215/2012) allow a kind of *forum non conveniens* within EU law where the EU court is second seised and a non-EU court is first seised.[17]

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[14] *Ibid* at pages 93-94 (footnotes omitted).

[15] One of the reasons for limiting the core scope of the Hague Choice of Court Agreements Convention 2005 to exclusive choice of court agreements was to "avoid problems with *lis pendens* and eliminate the need for *forum non conveniens*", see Paul Beaumont, "Hague Choice of Court Agreements Convention 2005: Background, Negotiations, Analysis and Current Status" (2009) 5 *Journal of Private International Law* 129 at 134.

[16] See https://www.hcch.net/en/instruments/conventions/status-table/?cid=98 accessed 25 June 2018. For some recent analysis of the relationship between the Brussels Ia Regulation and the Hague Choice of Court Agreements Convention see Mukarrum Ahmed and Paul Beaumont, "Exclusive choice of court agreements: some issues on the Hague Convention on Choice of Court Agreements and its relationship with the Brussels Ia Regulation especially anti-suit injunctions, concurrent proceedings and the implications of Brexit" (2017) 13 *Journal of Private International Law* 386-410.

[17] It is clear from recitals 23 and 24 to Brussels Ia that these Articles create a "flexible mechanism" in which the "court of the Member State concerned should assess all the circumstances of the case before it." Use of these

In the revived Judgments Project since 2012 the focus of the first stage of the negotiations has been on achieving a single Convention dealing only with recognition and enforcement of judgments in civil and commercial matters. In this context the only possible relevance of *forum non conveniens* has been in the context of whether that plea is ever an appropriate reason for refusing the recognition and enforcement of a foreign judgment. In the draft Convention, agreed by the Special Commission in May 2018, such use of *forum non conveniens* has been prohibited in relation to recognition and enforcement of a foreign judgment under the Convention. Article 14(2) says:

"2. The court of the requested State shall not refuse the recognition or enforcement of a judgment under this Convention on the ground that recognition or enforcement should be sought in another State."[18]

The framework established in draft Articles 21 and 22 of the interim text of the Judgments Convention 2001 was based on the idea that the Members of the Hague Conference would ultimately be able by consensus to agree on at least some minimum harmonisation of jurisdiction rules (a white list). The careful balance between *lis pendens* and *forum non conveniens* reflected in the compromise solution provided for by those Articles was only designed to operate when the courts were exercising white list [required] jurisdiction or, perhaps, national jurisdiction equivalent to a white list jurisdiction.

The Experts' Group is to reconvene shortly after the Diplomatic Session finalises the Hague Recognition and Enforcement of Judgments Convention, hopefully the Convention will be finalised in June/July 2019.[19] That Experts' Group should identify whether it might be possible for a significant number of Hague Members to agree on a minimum harmonisation of jurisdiction rules and therefore be able to agree on regulating conflicts of jurisdiction along the lines of Articles 21 and 22 of the 2001 interim text of the Judgments Convention.[20]

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provisions by courts in EU Member States not familiar with *forum non conveniens* may help prepare the ground for a global Convention that the EU could approve which would contain flexible and discretionary elements even where the EU court is first seised.

[18] See https://assets.hcch.net/docs/23b6dac3-7900-49f3-9a94-aa0ffbe0d0dd.pdf accessed 23 June 2018. For a discussion of this provision see the Garcimartin Alferez and Saumier Report on the draft Convention when it becomes available in late 2018 or early 2019. See also Paul Beaumont, "Respecting Reverse Subsidiarity as an excellent strategy for the European Union at The Hague Conference on Private International Law – reflections in the context of the Judgments Project?" *Europejski Przegląd Sądowy*, 2016, issue 10 (the title means: European Judicial Review); Working Paper No. 2016/3-Respecting Reverse Subsidiarity is an excellent strategy for the European Union at The Hague Conference on Private International Law: currently being well deployed in the Judgments Project by Paul Beaumont; and Paul Beaumont, "The revived Judgments Project in The Hague" (2014) *Nederlands Internationaal Privaatrecht (NIPR)*, no. 4, 532-539.

[19] "The Permanent Bureau was also mandated to make arrangements for the preparation of a Diplomatic Session in mid-2019 and for a further meeting of the Experts' Group addressing matters relating to direct jurisdiction, shortly after the conclusion of the Diplomatic Session." See https://www.hcch.net/en/projects/legislative-projects/judgments accessed 23 June 2018.

[20] For earlier advocates of combining *forum non conveniens* and *lis pendens* along the lines of Articles 21 and 22 of the interim text of 2001 see Peter Nygh, "Declining Jurisdiction under the Brussels I Regulation 2001 and the Preliminary Draft Hague Judgments Convention: a comparison" in James Fawcett (ed) *Reform and Development of Private International Law, essays in honour of Sir Peter North* (2002, Oxford University Press) 303, especially 332-334 and George Bermann, "Parallel Litigation: Is Convergence Possible?" in C Boele-Woelki,

It may also be possible to reach agreement as a fall-back solution, along the lines of Articles 21 and 22 of the 2001 interim text of the Judgments Convention, that could bring on board Members of the Hague Conference that cannot agree to harmonise direct rules of jurisdiction. The fall-back solution could be that all Members of the Hague Conference agree that if the courts of a State (Contracting or non-Contracting) are exercising jurisdiction on a basis of jurisdiction consistent with an agreed non-binding white list of jurisdiction rules (eg the rules contained as indirect rules of jurisdiction in the Hague Recognition and Enforcement Convention)[21] then a Contracting State to the Convention could apply Articles 21 and 22 in relation to that action. The court first seised would normally exercise jurisdiction (perhaps not when the action is for a negative declaration) but exceptionally have the power to decline jurisdiction only in accordance with Article 22. If the court first seised is exercising a jurisdiction not on the indicative white list of jurisdiction rules then those courts can decline jurisdiction in the circumstances of Article 22 and, under relevant national law rules including *forum non conveniens*.

The new Hague Convention to be considered by the Experts' Group (whether in full or fall-back mode) could be structured on the basis that declining jurisdiction under the Convention in favour of the courts of another State will only take place in relation to States that have ratified the Hague Recognition and Enforcement Convention (hopefully of 2019). The reason for this last condition could be to show that the new Convention being considered by the Experts' Group is not designed to undermine the Recognition and Enforcement Convention that will be finalised in July 2019 but rather is intended to promote its ratification.

Conclusion

The original drafters of the Brussels Convention had a rather internal focus on solving problems within the then European Economic Community. They started with a mission to simplify the formalities governing the "reciprocal" recognition and enforcement of judgments between Member States (see Article 220(4) of the EEC Treaty) and to do so harmonised direct rules of jurisdiction and conflicts of jurisdiction with intra-EEC cases in mind. The Brussels Convention therefore lacked any rules on the interaction between EU cases and non-EU cases. This problem has been partially rectified by the EU approving the Hague Choice of Court Agreements Convention and by the EU unilaterally providing in Articles 33 and 34 of the Brussels Ia Regulation that an EU court seised after a non-EU court can in the interests of the proper administration of justice (in a discretionary way somewhat analogous to *forum non conveniens*) decline jurisdiction in favour of the non-EU court. However, this unilateral concession to the rest of the world is unlikely to be extended unilaterally by the EU to cases where an EU court is first seised (even on the basis of an exorbitant jurisdiction). This is only likely to happen in the context of global negotiations where the rest of the world can be asked to accept the general norm of *lis pendens* where the court first seised is seised on the basis of a globally acceptable ground of jurisdiction. In such cases that court should only decline jurisdiction on the basis of an exceptional and narrowly defined provision like Article 22 of the interim text of the Judgments Convention from 2001. The EU in its leadership role within the Hague Conference on Private International Law and thereby in the development of the progressive unification of global private international law may be able to help remove *forum non conveniens* from the field of recognition and enforcement of judgments by approving the new single Hague Recognition and Enforcement of Judgments Convention that will be finalised in July 2019 as soon as possible

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T Einhorn, D Girsberger and S Symeonides (eds) *Convergence and Divergence in private International Law* (2010, Schulthess) 579, especially 581-585.

[21] See Article 5 of the 2018 draft Convention available at https://assets.hcch.net/docs/23b6dac3-7900-49f3-9a94-aa0ffbe0d0dd.pdf accessed 23 June 2018.

thereafter. Such quick approval might also create the impetus for other States to accept *lis pendens* and a reduced, but appropriate, role for *forum non conveniens,* along the lines suggested above, in a subsequent Hague Convention on conflicts of jurisdiction.