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Declining Jurisdiction

Forum Non Conveniens and Lis Pendens in the United States and
the European Union

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Table of Contents

| | |
|--|----|
| Summary..... | 3 |
| Sammanfattning..... | 4 |
| Abbreviations..... | 5 |
| 1Introduction..... | 6 |
| 1.1Purpose..... | 6 |
| 1.2Methodology and material..... | 6 |
| 1.3Delimitations..... | 7 |
| 1.4Disposition..... | 7 |
| 2Basic concepts..... | 7 |
| 2.1Common law and civil law legal traditions..... | 7 |
| 2.2US law..... | 8 |
| 2.2.1A mixed legal system..... | 8 |
| 2.2.1.1Case law..... | 8 |
| 2.2.1.2State Courts and Federal Courts..... | 9 |
| 2.2.2Jurisdiction..... | 9 |
| 2.2.2.1Subject Matter Jurisdiction..... | 9 |
| 2.2.2.2Personal Jurisdiction..... | 10 |
| 2.3EU law..... | 10 |
| 2.3.1Primary and Secondary sources of law..... | 10 |
| 2.3.2ECJ and Preliminary Rulings..... | 11 |
| 2.3.3EU law on jurisdiction..... | 11 |
| 2.3.3.1From the Brussels Convention to Brussels I bis..... | 11 |
| 2.3.3.2Article 4 Brussels I bis (Article 2 Brussels I)..... | 12 |
| 3Forum Non Conveniens..... | 12 |
| 3.1General concept: what problems do the doctrine seek to solve?..... | 12 |
| 3.2US law..... | 13 |
| 3.2.1History and early development..... | 13 |
| 3.2.2Modern development of forum non conveniens: Three core cases of analysis..... | 13 |
| 3.2.2.1Gulf Oil v Gilbert..... | 13 |
| 3.2.2.2Koster v Lumbermens Mutual Casualty Co..... | 15 |
| 3.2.2.3Piper v Aircraft Co v. Reyno..... | 16 |
| 3.2.3The Supreme Court's Two Step analysis..... | 18 |
| 3.2.3.1Adequate alternative forum..... | 18 |
| 3.2.3.2Private and public interest factors..... | 20 |
| 3.2.4National Cases: transfer rules..... | 22 |
| 3.3EU law..... | 22 |
| 3.3.1Is Forum Non Conveniens compatible with Brussels I bis?: The Owusu Case..... | 22 |
| 3.3.2Critique against the ECJ decision in Owusu..... | 24 |
| 3.3.3Brussels II: an opening towards forum non conveniens..... | 26 |
| 3.3.3.1Article 15..... | 26 |
| 3.3.3.2Reflection on article 15..... | 26 |
| 4Lis Pendens..... | 27 |

| | | |
|---------|---|----|
| 4.1 | General concept: what problems do the doctrine seek to solve?..... | 27 |
| 4.2 | EU law..... | 27 |
| 4.2.1 | Article 29 Brussels I bis (Article 27 Brussels I) Lis Pendens..... | 27 |
| 4.2.2 | Gasser Case: Italian Torpedo..... | 28 |
| 4.2.3 | Recast of Brussels I Regulation..... | 30 |
| 4.2.3.1 | Article 25 Brussels I bis..... | 30 |
| 4.2.3.2 | Article 31(2) Brussels I bis..... | 30 |
| 4.2.3.3 | Recital 19, 20 and 22 Brussels I bis..... | 31 |
| 4.2.3.4 | Article 33 Brussels I bis..... | 31 |
| 4.2.3.5 | Recital 24 Brussels I bis..... | 32 |
| 4.2.3.6 | Reflections on Brussels I bis..... | 32 |
| 4.3 | US law..... | 33 |
| 4.3.1 | Landis Case: Parallel Proceedings in two Federal Courts..... | 33 |
| 4.3.2 | Colorado River Case: Parallel Proceedings in Federal Court and State Court..... | 34 |
| 4.3.3 | Cone Case: reaffirming Colorado River..... | 34 |
| 5 | Conclusions..... | 35 |
| | Bibliography..... | 38 |
| | Table of Cases..... | 39 |

Summary

Even if a court has jurisdiction over a case there might be some situations when that court will decline to exercise this jurisdiction. The reasons for declining jurisdiction will be different in different legal systems. A court might decline jurisdiction because it deems the case to be inconvenient for the parties or the court or it might decline jurisdiction because the case is already pending in another court.

Different legal traditions look at jurisdiction differently and will as a result of this deal with the declining of jurisdiction differently. The different approaches of declining jurisdiction in the United States and in the European Union have been examined in this thesis.

This thesis first provides the reader with an introduction to the legal system in the United States and European Union with an emphasis on the jurisdictional rules in each system. The U.S. rules on jurisdiction are based on case law from the Supreme Court, and the EU-rules are to be found in Brussels I bis and Brussels II. The thesis then continues with an examination of two different legal doctrines applied when declining jurisdiction within the two different systems, *forum non conveniens* and *lis pendens*. The doctrine of *forum non conveniens* gives a court the discretionary power to dismiss a case, which it has jurisdiction over, based on private and public interest factors. The doctrine will be applied on the request of the defendant and the request will be granted if the weighing of private and public interest factors show a clear overweight towards dismissal. The flexible and discretionary doctrine of *forum non conveniens* is applied in the United States but have been deemed not applicable under Brussels I bis by the ECJ. The doctrine of *forum non conveniens* has been developed through the case law of the Supreme Court, this development will be examined in this thesis. The decision to not apply *forum non conveniens* within the EU legal system was given in the *Owusu* case, delivered by the ECJ.

The mechanical *lis pendens* rule applied within the EU legal system which states that a court has to stay a proceeding if the same proceeding is already pending in another court is not applied within the U.S. legal system. The ECJ has been very rigid in its application of *lis pendens* which is shown in its ruling in *Gasser*. The approach towards parallel proceedings in the U.S. is briefly discussed through three cases decided by the U.S. Supreme Court. With the new provisions in Brussels I bis the *lis pendens* doctrine is applied with a less mechanical approach when it comes to choice-of-court agreements and parallel proceedings in third states.

The different approaches towards *forum non conveniens* and *lis pendens* has their roots in the different legal thinking in the United States and the European Union. The leading word in legal thinking in the United States is flexibility whereas the EU approach towards the law is predictability and legal certainty. The different doctrines used when declining jurisdiction makes a perfect example of these different ways of thinking about law and what “the law” is.

Sammanfattning

Även om en domstol har behörighet ta upp ett mål till prövning så kan det finnas skäl som gör att domstolen avstår från att utöva sin behörighet. Vilka skäl som gör att en domstol avstår sin behörighet är olika från rättssystem till rättssystem. En domstol kan avstå sin behörighet eftersom den anser att målet har alltför lite anknytning till domstolen eller eftersom det redan finns ett liknande mål som är pågående hos en annan domstol.

Olika rättssystem har olika syn på domstolars behörighet och som ett resultat av detta kommer de behandla avstående av behörighet på olika sätt. De olika synsätten mellan EU-rätt och amerikansk rätt kommer att behandlas här.

Den här uppsatsen börjar med en introduktion till det amerikanska rättssystemet samt EU-rätt. Tonvikten på framställningen läggs vid reglerna som rör domstolars behörighet. Domstols behörighet regleras av praxis från the Supreme Court i USA och i Bryssel I bis och Bryssel II inom EU-rätten. Därefter fortsätter uppsatsen med en genomgång av två rättsliga principer som används av domstolar för att avstå att använda sin behörighet, *forum non conveniens* och *lis pendens*. *Forum non conveniens* innebär att en domstol, trots behörighet att avgöra målet, kan avvisa talan till förmån för en annan domstol baserat på "private" och "public interest factors". Principen tillämpas efter åberopande av svaranden och domstolen kommer avstå sin domsrätt om bedömningen av "private" och "public interest factors" leder till en stark övervikt mot att avvisa talan. Den mer flexibla och skönsmässiga bedömningen enligt *forum non conveniens* används i det amerikanska rättssystemet medan samma princip har ansetts icke-kompatibel med Bryssel I bis enligt EU-domstolen. Utvecklingen av *forum non conveniens* har i USA skett genom ett antal mål i the Supreme Court, vilka behandlas i uppsatsen. Domen från EU-domstolen där *forum non conveniens* bedömdes strida mot EU-rätt gavs i målet *Owusu*.

Den mekaniska principen *lis pendens* som tillämpas inom EU-rätt innebär att en domstol alltid måste förklara ett mål vilande om talan redan har väckts i en annan medlemsstat. Denna princip tillämpas inte inom amerikansk rätt. EU-domstolen har varit väldigt strikt i sin tillämpning av *lis pendens*, vilket kommer till uttryck i fallet *Gasser*. Det amerikanska sättet att behandla parallella mål belyses kort genom några mål från the Supreme Court. Det har införlivats några nya *lis pendens*-regler i Bryssel I bis vilka har en lite mindre mekanisk karaktär när det kommer till prorogationsklausuler och parallella mål i icke medlemsstater.

De olika inställningarna till *forum non conveniens* och *lis pendens* härstammar från de olika sätt på vilket man ser juridik inom den amerikanska rätten och EU-rätten. Flexibilitet är den princip som genomsyrar det amerikanska rättsmedvetandet medan jurister i de kontinentala europeiska rättssystemen värderar förutsägbarhet och rättssäkerhet högst. De två olika sätt som domstolarna behandlar avstående från att utnyttja sin behörighet på är ett perfekt exempel på denna skillnad i inställning till rätten och vad rätten är.

Abbreviations

| | |
|------|---|
| ECJ | European Court of Justice |
| EU | European Union |
| ICLQ | International and Comparative Law Quarterly |
| TEU | Treaty on the European Union |
| TFEU | Treaty of the Functioning of the European Union |
| U.S. | United States of America |

1 Introduction

1.1 Purpose

The purpose of this thesis is to provide the reader with an overview of two of the doctrines used when declining jurisdiction, *forum non conveniens* and *lis pendens*. These two doctrines will be examined from both a U.S. legal perspective and an EU legal perspective. The question aimed to be answered is how the differences in legal systems is reflected in the approach of the two doctrines.

It was during a course on International Comparative Law that I first came across the doctrine of *forum non conveniens*. It was an interesting doctrine, wildly different from the mechanical EU approach I had been used to. As I was deciding what subject I should write my thesis on, the doctrine of *forum non conveniens* came to mind. Another reason why I believe this is a good time to write this thesis is the recent recast of the Brussels I Regulation (Brussels I bis) which was enacted in 2012. This new Brussels I bis Regulation has some new provisions which are less mechanical in their approach towards jurisdiction and in particular in the application of *lis pendens*. This change has made an examination of *forum non conveniens* in the United States even more interesting since the U.S. legal system has a more flexible approach towards jurisdiction and this would be interesting to compare to the new Brussels I bis provisions.

When writing this thesis I have assumed that the reader is educated in one of the European legal systems and the explanations of EU law are made with this in mind. The reader is not assumed to have much knowledge of the U.S. legal system and therefore I have included an explanation of some of the elementary parts of this legal system.

1.2 Methodology and material

This thesis takes its basis in the Brussels I bis Regulation and the applicable case law of the United States' Supreme Court. In examining the Brussels I bis Regulation I have looked at relevant ECJ preliminary rulings and literature, articles and EU documents. When examining U.S. law I have also used the available literature and articles on the subject.

The cases examined in this thesis are the "leading" cases within each legal system. The purpose has been to examine the doctrines as they have been developed and applied by the highest courts in both the United States and the European Union. As my intent has been to explain what the principles are according to the highest interpreters within each legal system I haven't looked at how these principle have been applied in lower courts. That means that lower federal court decisions, state court decisions in the U.S. and national court decisions within the EU hasn't been examined. The question of how the principles are applied in lower courts is one that is interesting and could be an idea for another paper or thesis to look into.

When it comes to the new Brussels I bis Regulation the ECJ hasn't yet given any rulings on the application of the new provisions. At the time of writing this thesis there hadn't been almost any articles or literature written on the new Regulation. Therefore, the examining of the new Brussels I bis have been done mainly by reading and reflecting on the actual text of the Regulation.

1.3 Delimitations

The scope of this thesis includes only civil and commercial matters and to some extent matrimonial and parental matters. My wish has been to give a general description of the two principles and therefore I haven't included more specific questions such as how the principles apply to consumer contracts and other “weak-party” disputes. This thesis deal with two of the doctrines used when declining jurisdiction, *forum non conveniens* and *lis pendens*. With regards to the limited time and space available for this work other doctrines, also used to decline jurisdiction, such as arbitration and anti-suit injunctions are not included in this exposition. When it comes to U.S. law, this thesis is mainly limited to Supreme Court decisions and federal law.

1.4 Disposition

The opening chapter of this thesis will give the reader an introduction and overview of the legal systems of the United States and the European Union. This chapter has the purpose of educating and aiding the reader in the understanding of the thesis. The following chapter deals with the doctrine of *forum non conveniens* and its application in the two legal systems. The chapter first explains the doctrine from a U.S. perspective, this is because *forum non conveniens* is the U.S. principle. The approach towards *forum non conveniens* within EU law is then be explained. The next chapter examines *lis pendens* within both EU and the U.S. This chapter starts with the EU approach because *lis pendens* is the doctrine which is used in EU law. A short examination of the U.S. approach towards parallel proceedings ends that chapter. The order in which the legal systems are presented in each chapter has been decided based on which legal system is the “owner” of the legal doctrine discussed in each chapter. In the final chapter the conclusions derived from the thesis are presented.

2 Basic concepts

2.1 Common law and civil law legal traditions

When making a comparison between legal systems and the principles and doctrines within these, one of the first tasks at hand is to look at what the grounds for these different legal systems are and how these will form the rules in each system. When it comes to civil and common law there is a difference in the way lawyers within each system look at and think about law. “[C]ivil lawyers are more concerned with the structure of the law, common lawyers with its operation”. “One could say that the civilian approach is theory-driven, while the common-law approach is practice-driven.”¹

1 Hartley, p 814.

The difference in approaching law must be kept in mind when examining these legal systems.

2.2 US law

2.2.1 A mixed legal system

The U.S. legal system is a mixture of common law and civil law. In a traditional common law system the law is developing as the courts decide each issue at hand, while the civil law tradition is one which heavily relies on code to determine what the law is.

In the United States, legislative authority has been given to the Congress. Congress writes and enacts statutes and codes. In addition, the courts in the U.S. are interpreting and defining the law when deciding cases and the combination of a few similar court opinions constitute “case law”. In order to know what “the law” says about an issue, one has to rely on a combination of case law and written code law. This way of lawmaking is the result of the mixed legal system.²

2.2.1.1 Case law

Knowing how to read and understand a court opinion is the key to discovering what the law is in any legal area within the U.S. legal system.

An opinion by a court first states what the law is by referring to codes and cases. The court will then explain how the law shall be applied to the issues and facts at hand. The court will then apply the statement of the law to the relevant issue, this is called “the holding”. The holding in a case is binding on all lower courts with regard to the same issue in the future, this is called “precedent”. When a court follows precedent it will distinguish the precedent, this is done by explaining how the precedent fits with the present issue and also if there are any differences that might lead the court to not follow the precedent.³

There is a wide understanding in the U.S. legal system that an interpretation made by a court should not be overruled without weighty reasons. This continuity of interpretation is referred to as stare decisis, and the question is not whether the first case was correctly decided but if there is reason enough to overrule it.⁴

If the legislator decides to enact a new statute the case law regarding this issue is no longer “good law”, meaning that it cannot be referred to anymore. The courts then have to interpret the new statute and create new case law based on the new written law.⁵ This is how the law is developed within the U.S. legal system.

2 Abernathy, Law in the United States, p 7.

3 Abernathy, Law in the United States, p 10-11.

4 Abernathy, Law in the United States, p 28.

5 Abernathy, Law in the United States, p 12.

2.2.1.2 State Courts and Federal Courts

The court system in the United States is constituted by federal and states courts. These two parts of the court system each have three layers of courts. Cases in federal court starts in U.S District Court. An appeal from a U.S. District Court will be heard in U.S. Court of Appeals and finally the case might reach the U.S. Supreme Court. If a case is heard in state court the first instance is Trial Court, appeals are made to an Intermediate Appellate Court and finally there is a Highest Court of each state. Each level of state courts will have different names in different states. The U.S. Supreme Court is the highest court of appeals and may try appeals from both state and federal courts.⁶

Except for the fact that the U.S. Supreme Court is appellate court to the highest state courts the two court systems are separate and there cannot be any cross-appeals between state and federal courts.⁷ When a case is appealed to the Supreme Court the Court has to grant certiorari for the case to be tried.

Each court system has its own procedural rules. Since the jurisdiction is rather broad this will lead to situations where the applicable substantive law is state law while the applicable procedural law is federal and the other way around.⁸

2.2.2 Jurisdiction

“Jurisdiction and venue requirements are often easily satisfied. As a result, many plaintiffs are able to choose from among several forums.”⁹

A court in the United States may hear a case based on “subject-matter” or “personal” jurisdiction. These two grounds for jurisdiction will be presented in a simplified manner below.

2.2.2.1 Subject Matter Jurisdiction

If a court has subject-matter jurisdiction it means that the court has the power to hear the “type” of case which is before it. State courts have general jurisdiction, meaning that they may hear any type of judicial dispute, whereas jurisdiction in federal courts is limited to the judicial disputes stated in Article III of the Constitution.

Federal subject-matter jurisdiction applies only in the following situations:

- (i) cases “arising under” federal law;*
- (ii) cases affecting ambassadors and other foreign diplomats;*
- (iii) cases of admiralty or maritime law;*
- (iv) cases in which the federal government is a party;*
- (v) cases between individual American states;*

6 Abernathy, Law in the United States, p 92-93.

7 Abernathy, Law in the United States, p 96.

8 Abernathy, Law in the United States, p 105.

9 Piper Aircraft, p 250.

(vi) cases between citizens of different states, including American and foreign states

The two situations most often used as a basis for federal jurisdiction is (i) questions under federal law and (vi) cases between citizens of different states. The first situation is called “federal question” cases and the second is called “diversity” cases.¹⁰

Article III of the Constitution does not say anything about how jurisdiction shall be divided between federal and state courts, it merely limits the jurisdiction of federal courts. As a result of this, there will be situations where state courts have “concurrent jurisdiction” over the situations listed in Article III.¹¹ This might lead to a situation where a case is brought both in state court and in federal court at the same time.

2.2.2.2 Personal Jurisdiction

When a court has personal jurisdiction it means that the court has the power to hear a case over the defendant in a case. The modern limits of personal jurisdiction, which are used by the courts today, were set by the Supreme Court in *International Shoe Co v. Washington*¹², in 1945. In *International Shoe* the Supreme Court established that the defendant has to have “minimum contacts” with a state for the courts of that state to have jurisdiction over the case. Minimum contacts with the state are established if the defendant have conducted “systematic and continuous” activities directed towards the forum state. The activities should also be such as to give rise to “benefits and protection of the laws of that state”.¹³ The process of determining whether a court has personal jurisdiction over a defendant isn't a mechanical one, rather it gives the court discretion to make its own assessment in each situation based on the guidelines set by the Supreme Court.

2.3 EU law

2.3.1 Primary and Secondary sources of law

EU law is comprised of a hierarchy of norms with the primary sources, the treaties, on top. The treaties, TEU and TFEU, are directly applicable in all Member States, meaning that they without any further enactment can be relied on as law by individuals, before national courts and authorities in the Member States. The secondary sources consist mainly of regulations and directives. Regulations are, like the treaties, directly applicable in the Member States. Directives on the other hand are binding only in the way that the Member States have to reach the results determined by the directives, but the Member States are free to chose their preferred method of implementation. All EU law takes precedence over national law of the Member States and hence, when national law is incompatible with EU law, the latter always prevails.¹⁴

10 Abernathy, Law in the United States, p 94.

11 Abernathy, Law in the United States, p 96.

12 *International Shoe co v. Washington*, 326 U.S. 310 (1945).

13 *International Shoe co v. Washington*, 326 U.S. 310 (1945).

14 Bogdan, Concise Introduction to EU Private International Law, pp 14-15.

2.3.2 ECJ and Preliminary Rulings

The ECJ is the interpreter of both primary and secondary EU law. Whenever a judge in a Member State is unsure of the application of EU law he or she may refer the question to the ECJ for a preliminary ruling according to the Article 267 of TFEU. The ECJ will then interpret the EU rule in question and its answer, although formally merely binding on the court asking the question, will be followed by all Member States as the correct interpretation of that specific piece of EU law. Therefore, the preliminary rulings of the ECJ has had a critical impact on the development of EU law.¹⁵

2.3.3 EU law on jurisdiction

Within the EU legal system there are two main instruments regulating jurisdiction, Regulation No 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial matters (Brussels I bis) and Regulation No 2201/2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in matrimonial matters and the matters of parental responsibility (Brussels II). These two instruments operate in different legal spheres within the EU and are both a part of the EU ambition to create a smooth working internal market for goods and people.

The Brussels I bis Regulation has been in place since 2012 and will be applied from January 2015. In this work the numbering of the articles will be indicated both for Brussels I and Brussels I bis, when applicable.

2.3.3.1 From the Brussels Convention to Brussels I bis

As a part of the wish to make transfer of goods and people as smooth as possible the Brussels Convention was created in the late 1960s. The Contracting States realized that the regional trading union also needed conformity regarding jurisdiction and enforcement of legal disputes and decisions, if the corporation was to be as successful as possible.

The Brussels Convention entered into force the 27th of September, 1968. The Convention regulated both recognition and enforcement and also jurisdiction, it was a “double instrument”.¹⁶

In March 2002 the Brussels Convention was replaced by Regulation No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the Brussels I Regulation). When the Brussels Convention was replaced by Brussels I the numbering of the articles had to be changed, due to the many changes in details. Although the numbering has changed, the actual rules didn't change that much and most reports, legal writing and ECJ cases are still relevant in the interpretation of the Regulation.¹⁷ The continuity between the Brussels Convention and the Brussels I bis Regulation as well as the ECJ's interpretation of the Brussels Convention is stated in recital number 34 of Brussels I bis Regulation (recital 19 Brussels I).

15 Bogdan, Concise Introduction to EU Private International Law, p 15.

16 Bogdan, Concise Introduction to EU Private International Law, p 31.

17 Bogdan, Concise Introduction to EU Private International Law, p 33.

The Brussels Convention was concluded based on article 220 of the EC Treaty. And further, as stated in its Recital 3 the Brussels I Regulation derived its validity from Article 65 of the Treaty Establishing the European Community, which provides for “measures in the field of judicial cooperation in civil matters having cross-border implications”.

In 2010 the Commission presented a proposal for reform of the Brussels I Regulation.¹⁸ “The European Commission’s legislative proposal invited another round of consultations, which resulted in further draft amendments to the Brussels Regulation. Eventually, on 20 November 2012, the European Parliament approved revisions to the Brussels Regulation at first reading.”¹⁹

Recital 5 of Brussels I bis provides that the regulation derives its validity from Article 81 of the Treaty on the Functioning of the European Union (TFEU). Article 81 holds that “[t]he Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments”.

There was a proposal for an abolishment of all national rules of jurisdiction in the recast proposal to Brussels I bis, but this was abandoned in the later drafts.²⁰ This means that national rules still apply in the situations where the Brussels I bis Regulation isn’t applicable.

2.3.3.2 Article 4 Brussels I bis (Article 2 Brussels I)

The general rule of jurisdiction is stated in Article 4 Brussels I bis (Article 2 Brussels I) and holds that the defendant shall be sued in the Member State where he is domiciled, regardless of nationality.

Article 4 Brussels I bis (Article 2 Brussels I) is mandatory even when the plaintiff is domiciled in a non-Member State.

The jurisdictional rules in Brussels I bis is not applicable to defendants domiciled in a third State. Article 6 of Brussels I bis (Article 4 Brussels I) states that defendants not domiciled in a Member State shall be subject to the national rules on jurisdiction applicable in the Member State in which the suit is brought.

3 Forum Non Conveniens

3.1 General concept: what problems do the doctrine seek to solve?

In very general terms, the doctrine of *forum non conveniens* gives a court that has jurisdiction over a suit the possibility to dismiss or stay the proceedings if there is another more

18 COM/2010/0748 final – COD 2010/0383.

19 Clifford, Browne, Latham & Watkins, p 2.

20 Franzina, Letters Blogatory, pp 5-6.

appropriate forum for the litigation. The doctrine has its origin in seventeenth century Scottish cases. Traditionally, *forum non conveniens* is not recognized in legal systems defined as continental civil law.²¹

3.2 US law

3.2.1 History and early development

The early development of *forum non conveniens* in the U.S. legal system can be found in the case law of some of the lower federal courts.²² Criteria for applying *forum non conveniens* developed in the common law of some states, but there wasn't any federal criteria for the application of the doctrine until the Supreme Court's opinion in *Gulf Oil*, 1947.²³

3.2.2 Modern development of *forum non conveniens*: Three core cases of analysis

The doctrine of *forum non conveniens* that is applied in U.S. courts today is derived from three cases decided by the Supreme Court. The first two decisions were both given in 1947 and the third case was decided in 1981. The criteria established for dismissal on grounds of *forum non conveniens* are still good law and are used in courts today when making an analysis for motions to dismiss on *forum non conveniens*. When the Supreme Court establishes principles of law it does this as a guidance to the lower courts on how they should handle the same issues.

The following text aims at providing the reader with an overview of, and explaining *forum non conveniens* as it has been developed and applied by the Supreme Court since 1947.

3.2.2.1 Gulf Oil v Gilbert

*Gulf Oil*²⁴ was decided in 1947 and this was the first case where the Supreme Court directly addressed the question of whether it had an inherent power to dismiss a suit based on the doctrine of *forum non conveniens*.

The background to the suit was a fire in a warehouse building in Virginia. The plaintiff in *Gulf Oil*, a Virginia resident, brought a tort action in a New York District Court, against a Pennsylvania corporation. The corporation was qualified to do business in both Virginia and New York and the connection with New York gave rise to personal jurisdiction in New York court. Further, the case was brought in federal court based on diversity. In his suit, the plaintiff claimed that the defendant, due to negligence, had caused a fire which destroyed the plaintiff's warehouse building in Virginia.

The defendant invoked the doctrine of *forum non conveniens* and claimed that Virginia was, in fact, the appropriate place of trial. The District Court agreed with the defendant and dismissed

21 R A Brand, Tex Int L. J. 2002, p 468.

22 R A Brand, Tex Int L. J. 2002, pp 474-475.

23 Abbot, 18 Vand J Transnatl L 111, p 136; *Gulf Oil v Gilbert*, 330 U.S. 501 (1947).

24 *Gulf Oil Corp. v Gilbert*, 330 U.S. 501 (1947).

the case on *forum non conveniens*. The decision was appealed in the Court of Appeals, which reversed. After a decision to reverse was made by the Court of Appeals the case was brought on certiorari to the Supreme Court.

The first question for the Supreme Court to decide was whether it had an inherent power to dismiss a case based on *forum non conveniens*. In search for an answer to this question the Court discussed its previous case law on the power to decline jurisdiction, and reached the conclusion that the principles applied in *forum non conveniens* had been recognized by the Court in its earlier case law.²⁵ The Court found that it had an inherent power to dismiss on *forum non conveniens*. After establishing this, the Supreme Court could then continue with the question of how the doctrine of *forum non conveniens* was to be applied.

The Supreme Court discussed what the doctrine really meant and some reasons why this doctrine might be needed. The Court held that “[t]he principle of forum non conveniens is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute.”²⁶ The Court further discussed that the criteria in general venue statutes are often easily met and give plaintiffs an open door to have their case tried in the court of their choice. The Court then added that this “open door may admit those who seek not simply justice, but perhaps justice blended with some harassment.”²⁷

The Supreme Court discussed that “[i]t is often said that the plaintiff may not, by choice of an inconvenient forum, “vex,” “harass,” or “oppress” the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy.” With this said, the Court should use its discretion with great care and “unless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed.”²⁸

In *Gulf Oil* the Supreme Court established that the doctrine of *forum non conveniens* gives courts a substantial discretion to dismiss a case if another forum is available.²⁹ From this follows that the first step of the *forum non conveniens* analysis is to establish if there is another forum that is able to try the case. If there is no other forum available the case cannot be dismissed on *forum non conveniens* grounds.

Some of the factors to be considered and balanced were established by the Supreme Court in *Gulf Oil*. The Court held that private and public interest factors, established by the Court, shall be weighed against each other using the court's discretion, although it noted that the factors to be considered cannot be defined exactly.³⁰

25 *Gulf Oil*, pp 504-507.

26 *Gulf Oil*, p 507.

27 *Gulf Oil*, p 507.

28 *Gulf Oil v Gilbert*, p 508.

29 *R A Brand*, *Tex Int L. J.* 2002, p 475.

30 *Gulf Oil v Gilbert*, pp 508-509.

*An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are 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.*³¹

*Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach, rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.*³²

The Supreme Court stressed that the private and public factors used in *Gulf Oil* wasn't a comprehensive list of the factors to be considered when analyzing a motion for dismissal on grounds of *forum non conveniens*. Or as put in the words of Justice Jackson, who wrote the opinion for the Court: "Wisely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy."³³

The *Gulf Oil* opinion gave the courts two parts to consider when trying a motion on dismissal on *forum non conveniens*. First, is there an alternative forum available and second, if the answer is yes, will the balancing of private and public factors give the court enough reason to dismiss in favor of the alternative forum.

3.2.2.2 *Koster v Lumbermens Mutual Casualty Co*

On the same day as *Gulf Oil* was decided the Supreme Court also decided *Koster v Lumbermens*³⁴. In that case the Court addressed the question of what weight should be given to the relationship between the parties and the forum, when applying the doctrine of *forum non conveniens*.

In *Koster*, a policyholder brought a claim against James S. Kemper, the president and management of Lumbermens Mutual Casualty Company, and an Illinois company, James S. Kemper & Co, alleging that mr Kemper had been guilty of breaches of trust by which he, his family corporation and his friends had profited.

The plaintiff was a citizen of New York and the suit was brought in a New York Federal District Court. The defendant was citizen of Illinois and filed a motion to dismiss the case on *forum*

31 *Gulf Oil*, p 508.

32 *Gulf Oil*, pp 508-509.

33 *Gulf Oil*, p 508.

34 *Koster v Lumbermens Mutual Casualty Co*, 330 U.S. 528 (1947).

non conveniens. The case was brought in federal court based on diversity of citizenship. After appeal, the case was brought in the Supreme Court on certiorari.

In *Koster*, the Supreme Court discussed the plaintiff's relationship to the chosen forum as a part of the examination of *forum non conveniens*.

*Where there are only two parties to a dispute, there is good reason why it should be tried in the plaintiff's home forum if that has been his choice. He should not be deprived of the presumed advantages of his home jurisdiction except upon a clear showing of facts which either (1) establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience, which may be shown to be slight or nonexistent, or (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems. In any balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown.*³⁵

This holding from the Court shows that if the plaintiff has chosen his home forum, the defendant will have a very tough time getting the case dismissed on the grounds of *forum non conveniens*. If the plaintiff has chosen his home forum and he can show that this is in fact convenient to him, the defendant will most likely not be able to show enough inconvenience as to make the scale tip over to his advantage and get the suit dismissed on *forum non conveniens*.

3.2.2.3 Piper v Aircraft Co v. Reyno

The final case in the establishing of the *forum non conveniens* doctrine was decided in 1981, when the Supreme Court delivered its judgment in *Piper Aircraft*³⁶. The Court's opinion in *Piper Aircraft* further developed the modern U.S. doctrine of *forum non conveniens* by answering two more questions regarding its application. These questions dealt with the place of residence of the plaintiff and the relevance of a change in substantive law when deciding if another forum is available.

The background to *Piper Aircraft* was an airplane crash, located in Scotland. The estates of several Scottish citizens, who had been killed in the crash, brought a wrongful-death action in a California state court. The action was brought against the manufacturers of the plane and the plane's propellers. After removing the case from state to federal court and then transferring the case between federal courts the defendants asked the court to dismiss the case based on the doctrine of *forum non conveniens*.

The only connection to the U.S. in *Piper Aircraft* was the companies which had manufactured the plane and the plane's propellers. Besides the manufacturers, everything and everyone else was located in the United Kingdom. The reason for bringing the suit in the U.S. was because the plaintiff sought to recover from the defendants based on negligence and strict liability,

³⁵ *Koster v Lumbermens*, p 524.

³⁶ *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

which are not recognized by Scottish law, this was even admitted by the plaintiff.³⁷

When the case was brought to the Supreme Court, the Supreme Court granted certiorari “to consider the questions [that the cases] raise concerning the proper application of the doctrine of *forum non conveniens*”.³⁸ The first question was whether a difference in substantive law could prevent a dismissal of a suit on *forum non conveniens* grounds and the second question was what relevance the residence of the plaintiff had to a *forum non conveniens* analysis.³⁹

In *Piper Aircraft* the Court once again confirmed that a *forum non conveniens* analysis starts with an examination of whether there is an adequate alternative forum available.⁴⁰ If there is such a forum the court shall then consider the private and public interest factors, established in *Gulf Oil*. The Supreme Court also stressed the importance of flexibility inherent in the *forum non conveniens* analysis. “If central emphasis were placed on any one factor, the *forum non conveniens* doctrine would lose much of the very flexibility that makes it so valuable.”⁴¹ So far, nothing new in the *forum non conveniens* application. The Supreme Court then moved on to consider the new questions concerning the application of the doctrine.

In examining the question of what relevance a change in substantive law should be given, in the application of *forum non conveniens*, the Supreme Court held that “[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry.”⁴² It further developed its reasoning by stating that “[i]f substantial weight were given to the possibility of an unfavorable change in law, [...], dismissal might be barred even where trial in the chosen forum was plainly inconvenient.”⁴³

The Court did, however, note that a difference in substantive law might, in some cases, be a factor to consider to not dismiss a case on *forum non conveniens* grounds. The court held that “if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight”⁴⁴

The Supreme Court further explained its decision by stating that “[i]f the possibility of a change in law were given substantial weight, deciding motions to dismiss on the ground of *forum non conveniens* would become quite difficult. Choice of law analysis would become extremely important, and the courts would frequently be required to interpret the law of foreign jurisdictions.”⁴⁵

These statements together makes the doctrine hard to use for lower courts as they do not give

37 *Piper Aircraft*, p 240.

38 *Piper Aircraft*, p 246.

39 *Bies*, p 499.

40 *Piper Aircraft*, p 254 n.22.

41 *Piper Aircraft*, pp 249-250.

42 *Piper Aircraft*, p 247.

43 *Piper Aircraft*, p 249.

44 *Piper Aircraft*, p 254.

45 *Piper Aircraft*, p 251.

any clear advice on how to apply the principles of the doctrine.⁴⁶ It is very arbitrary when a change in law is in fact so “inadequate or unsatisfactory” as to reach the bar set by the Supreme Court. And this becomes even more difficult after the Supreme Court added that the courts should not “be required to interpret the law of foreign jurisdictions”. How can a court decide the impact of a change in substantive law if it isn't allowed to look at the foreign law in question?

The second question, which the Supreme Court wished to develop, in *Piper Aircraft* was what relevance the residence of the plaintiff had in the *forum non conveniens* analysis. The Court held that “[w]hen the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.”⁴⁷ This holding is taking the statement in *Koster*⁴⁸ one step further. This statement by the Court gives weight to the policy that greater deference should be given to the forum choice of a United States' citizen than to a foreign plaintiff's choice.⁴⁹ Following *Piper Aircraft*, a foreign plaintiff will carry a bigger burden, and the chances of getting a case dismissed based on *forum non conveniens* are much better if the plaintiff is foreign, as the courts will put less weight on the choice of forum made by a foreign plaintiff.

3.2.3 The Supreme Court's Two Step analysis

The case law from the Supreme Court has established that each *forum non conveniens* analysis has two steps. In the first step the court is to establish whether there is another forum that is adequate and available to handle the case at hand. When the question of an alternative forum is settled, the court moves on to the second step where it shall weigh the private and public factors, established in *Gulf Oil*, to determine whether the case should be dismissed in favor of the alternative forum.

The first step of the analysis determines whether a dismissal is possible and the second step of the analysis then determines whether the dismissal should be made.⁵⁰

3.2.3.1 Adequate alternative forum

When a motion for dismissal on *forum non conveniens* is filed, the first step of the analysis is for the court to establish whether the suggested forum is both available and adequate to handle the case. This first step has two parts: (1) is the forum available, and (2) is it adequate?⁵¹

In both *Gulf Oil* and *Piper Aircraft* the Court held that an available alternative forum is a

46 Joel H. Samuels, 85 Ind L. J. 1059, p 1069.

47 *Piper Aircraft*, pp 255–256.

48 *Koster*, p 524.

49 *Abbot*, 18 Vand J Transnatl L 111, p 144.

50 Samuels, pp 1060-1061.

51 *Davies*, p 316.

prerequisite for a dismissal on *forum non conveniens*. In *Gulf Oil* the Supreme Court held that “[i]n all cases in which the doctrine of forum non conveniens comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them.”⁵² Further, in *Piper Aircraft* the Court held that “[a]t the outset of any forum non conveniens inquiry, the court must determine whether there exists an alternative forum. Ordinarily, this requirement will be satisfied when the defendant is “amenable to process” in the other jurisdiction.”⁵³

To be sure that the alternative forum is in fact available the court dismissing on *forum non conveniens* can condition the dismissal with a requirement that the defendant has to waive any jurisdictional defenses that might be brought in the other court and to accept jurisdiction by the foreign court. If these conditions aren't met, the case may be refiled in the first court. By adding these conditions the court protects the plaintiff from the unwanted situation of standing without any remedy at all after a dismissal has been granted and the alternative forum is after all not available due to some procedural rule.⁵⁴

The second part of the first step is to determine whether the available forum is also adequate. In *Piper Aircraft* the Court set the standard for adequacy by deeming an alternative court as not adequate if it is so “clearly inadequate or unsatisfactory that it is no remedy at all”. In the same case the Court then held that the Scottish court was in fact adequate because “there is no danger that [the defendants] will be deprived of any remedy or treated unfairly” if the case would be tried in Scottish court.⁵⁵

The standard on what an “adequate” court is isn't exactly clear after *Piper Aircraft* and leaves the courts with a large room of discretion when deciding whether the alternative court is an adequate remedy for the plaintiff. The uncertainty left by *Piper Aircraft* has been criticized by commentators. In the words of Waples: “Piper left the lower courts with a muddled and incomplete standard. Although the case affirmed that an alternative forum must exist, and that it must be adequate, it gave contradictory guidance on assessing the adequacy of such a forum.”⁵⁶

Neither *Gulf Oil* nor *Piper Aircraft* give any clear guidance on how to establish whether the alternative forum is in fact adequate. Hence, the lower courts are left to their discretion and this may lead to inconsistent application of the doctrine.

Another problem, which arises when the alternative forum is in a foreign country, is that the U.S. court has to put itself “above” the foreign court when determining whether the foreign court is an adequate remedy or not. This is problematic because all sovereign states are equals and when evaluating the courts of another country as adequate or not, one is inevitability

52 *Gulf Oil*, pp 507-508.

53 *Piper Aircraft*, p 254, n.22.

54 Davies, pp 317-318.

55 *Piper Aircraft*, at 255.

56 Waples, p 1484.

putting the court system of one's home country higher than the other country. It appears as if the court asks: "Do we approve with their court system enough to accept their courts as adequate enough to decide this case?"

3.2.3.2 Private and public interest factors

When it is established that there is in fact another forum which is both available and adequate, the *forum non conveniens* analysis continues into its main part, determining whether the suit should be dismissed and brought in another court, or if the court should deny dismissal and try the case on the merits. When determining this the court shall look at the private and public factors established in *Gulf Oil*.

The private interest factors concern factors that make litigation "easy, expeditious and inexpensive".⁵⁷ These factors are mostly focused on the access to sources of proof, such as witnesses, documents and view of premises. If trial is held in a place far away, these factors can make litigation inconvenient for the parties

One of the factors, which makes litigating in a remote court inappropriate, is the cost of bringing witnesses to the court. The cost of bringing witnesses to court was indeed a huge problem at the time of *Gulf Oil* in 1947, but its relevance should perhaps be reduced today when communications and technology drastically have lowered these costs. Today, testimonies can even be made by witnesses not even present in the courthouse.⁵⁸

Another private factor to be considered is how easily other sources of proof, besides witnesses, can be accessed. This factor is especially interesting when the proof in question are physical objects that are located in one place and which are hard to transport, such as the remains of a warehouse building. This should be a less convincing factor when it comes to documents. Today, documents are easily sent across the world and can hardly be deemed as an obstacle that makes trial inconvenient to the parties.⁵⁹

The fact that some cases require view of the premises is also one of the private factors that is seen as an obstacle to a convenient trial and one of the factors to be considered when deciding whether the case should be dismissed on *forum non conveniens*.

The last private factor mentioned by the Court in *Gulf Oil* was "all other practical problems". This factor is the most broadly held and gives the courts a very wide discretion in their assessment of the private interest factors.

When it comes to the public interest factors, these factors are such that make trial burdensome for the court and the community where the court is located. These factors include; administrative difficulties, congestion of the courts, jury duty, local interest in the trial

⁵⁷ *Gulf Oil*, p 508.

⁵⁸ Davies, p 326.

⁵⁹ Davies, pp 336-338.

and conflict of laws that might lead to the application of foreign law in the courts.⁶⁰

The public factors determine, how much of a burden the trial will be for the community and the court at hand. These factors don't make trial any more inconvenient for the parties but rather serve as a protection against courts being congested with cases, which aren't in any meaningful way, related to their judicial district. The Court also listed the interests of the community as factors to be considered, such as the interest for the community in having cases related to the community litigated in the area and also for the citizens to not be burdened with jury duty in cases which isn't of much interest to their community.

One public factor to be considered is if a U.S. court has to apply foreign law. The problem with having to apply foreign law is discussed by the Court in *Piper Aircraft*.⁶¹ This is a problem that all courts face when their rules on conflict of laws point at the application of foreign law. Since judges in national courts are experts on the application of their national law and not the laws of other countries, the quality of legal reasoning and application will inevitably be lower when they have to apply foreign law.

When looking at the private and public interest factors, there are no factors that are more important or that should be given more weight than the other factors. The Court in *Gulf Oil* simply listed the factors of private and public interests to be considered, but didn't give any guidance on how the factors were to be weighed against each other.⁶² In *Piper Aircraft* the Court indicated that all factors shall be considered in all assessments of *forum non conveniens*.⁶³ The Court also emphasized that the flexibility of the doctrine of *forum non conveniens* is what makes it so valuable, and therefore the Court didn't want to give any of the factors more or less weight compared to the others.⁶⁴

In its case law the Supreme Court doesn't give any guidance on how the weighing of factors shall be conducted. The only statement made by the Court on this was that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed". From this holding by the Court it can be derived that the weighing at hand is not one between the appropriateness of the two courts in question, but rather if the court chosen by the plaintiff is so inappropriate that the suit should be dismissed. This view was also confirmed by the Court in *Koster*.⁶⁵

When all the relevant interest factors have been accounted for, the statement made by the Court in *Piper Aircraft* about giving less deference to the choice of court by a foreign plaintiff, comes into play when deciding if a dismissal is appropriate or not. This means that a foreign plaintiff's choice of court will be examined based on the same factors, but less weight will be

60 *Gulf Oil*, pp 508-509.

61 See section 3.2.2.3. *supra*.

62 Davies, p 351.

63 *Piper Aircraft*, p 257, Davies p 351.

64 *Piper Aircraft*, pp 249-250.

65 Davies, p 365, *Koster* p 524.

given to the choice of the plaintiff and this in turn means that it will be easier for a defendant to get the case dismissed on grounds of *forum non conveniens* when the plaintiff is foreign.

One can question how relevant it really is what nationality the plaintiff has when it comes to the appropriateness of litigating in U.S. courts. If one is looking at this from a public interest standpoint it might seem reasonable, the national courts shouldn't be congested with foreign claims. From a private interest view is it hard to see why a foreign plaintiff would be given less deference than an American plaintiff from another state. Furthermore, if an accident has happened in the U.S. or if the companies, giving rise to an accident in a foreign country, are located in the U.S., shouldn't the appropriateness of trying the case in U.S. courts be assessed in the same way, no matter the citizenship of the plaintiff?⁶⁶

3.2.4 National Cases: transfer rules

The doctrine of *forum non conveniens* set out in *Gilbert* and *Koster* is now only applicable when the alternative forum is in a foreign country or when the alternative forum is a state court.⁶⁷ Shortly after *Gulf Oil* and *Koster* had been decided Congress enacted Section 1404(a) U.S. Code. This statute states that a federal court may transfer a case to another federal court, and hence, when the alternative forum for trial is a federal court the transfer rule in 28 U.S.C §1404(a) applies.

As an example, if section 1404(a) had been enacted at the time, it would have applied to the situation in *Gulf Oil*. The court would simply have transferred the case from New York federal court to Virginia federal court without even considering the doctrine of *forum non conveniens*.⁶⁸ Since section 1404(a) only applies when the alternative forum is a federal court, the doctrine of *forum non conveniens* is still in force when the alternative forum is a state court.

3.3 EU law

Most of the Member States of the European Union follow a civil law legal tradition, in which the doctrine of *forum non conveniens* is normally not recognized. However, one of the Member States, the United Kingdom, follows a common law legal tradition where the doctrine of *forum non conveniens* is present in national law. When a single body of rules on jurisdiction was enacted the doctrine of *forum non conveniens* was not included in the text.⁶⁹ One of the questions regarding the Brussels Convention (and later the Brussels I Regulation) was whether it banned all application of *forum non conveniens*.⁷⁰

3.3.1 Is Forum Non Conveniens compatible with Brussels I bis?: The Owusu Case

In March 2005 the question of the applicability of *forum non conveniens* within EU law was

66 Davies, p 372ff.

67 Davies, p 313.

68 Joel H. Samuels, 85 Ind. L. J. 1059 2010, pp 1065-1066.

69 See Brussels Convention, Brussels I and Brussels I bis, none of the texts mentions *forum non conveniens*.

70 Rodger, p 72.

referred to the ECJ in the *Owusu* case⁷¹. The ECJ's preliminary ruling in *Owusu* was based on the Brussels Convention but the decision is still valid when interpreting the Brussels I bis Regulation.⁷²

The *Owusu* case was based on a suit brought in the United Kingdom by Mr Owusu against Mr Jackson and several companies governed by Jamaican law, following an accident suffered by Mr Owusu in Jamaica. Mr Owusu rented a villa from Mr Jackson and Mr Owusu was injured when he dived on the beach connected with the villa. The defendants in the U.K. case argued that Jamaican court was the more appropriate place for trial. Not sure whether *forum non conveniens* could be applied within the jurisdictional rules under the Brussels Convention, the Court of Appeals in the U.K. decided to refer the following two questions to the ECJ for a preliminary ruling.

"1. Is it inconsistent with the Brussels Convention..., 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 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 to all circumstances or only in some and if so which?"

In answering the first question the ECJ had to determine whether Article 2 of the Brussels Convention (Article 4 Brussels I bis/Article 2 Brussels I) was applicable in a situation such as the one in question. The situation at hand was one "where the claimant and one of the defendants are domiciled in the same Contracting State and the case between them before the courts of that State has certain connecting factors with a non-Contracting State, but not with another Contracting State"⁷³.

The ECJ concluded in paragraph 35 of the decision that Article 2 (Article 4 Brussels I bis/Article 2 Brussels I) of the Brussels Convention does apply "to circumstances such as those in the main proceedings, involving relationships between the courts of a single Contracting State and those of a non-Contracting State rather than between the courts of a number of Contracting States." The ECJ reached this conclusion through a discussion of the smooth working of the internal market, which is one of the objectives of the Brussels Convention, and held that the jurisdictional rules of the Brussels Convention wasn't supposed to be applied only where "a real and sufficient link to the working of the internal market" existed, by definition involving a number of Member States, but rather when an "international element" was present.⁷⁴

⁷¹Owusu v. Jackson, case C-281/02, [2005]ECR I-1383.

⁷² See section 2.3.4.1. supra.

⁷³ Owusu, para 23.

⁷⁴ Owusu, para 33-34.

After determining that the situation at hand did fall within the application of Article 2 (Article 4 Brussels I bis/Article 2 Brussels I) of the Brussels Convention the ECJ continued to examine the question of whether the doctrine of *forum non conveniens* was compatible with the Brussels Convention or not.

The ECJ started its inquiry by noting that Article 2 (Article 4 Brussels bis/Article 2 Brussels I) of the Brussels Convention is a mandatory provision and therefore cannot be derogated from other than when expressly provided for by the Brussels Convention. The ECJ then referred to the fact that the *forum non conveniens* doctrine was not provided for as an exception from Article 2 (Article 4 Brussels bis/Article 2 Brussels I) by the the authors of the Brussels Convention and therefore the doctrine is not compatible with the Brussels Convention.⁷⁵

The ECJ then held that the principle of legal certainty, which the court deems as one of the main objectives of the Brussels Convention cannot be upheld if the *forum non conveniens* doctrine would be allowed within the EU legal system.⁷⁶ The ECJ said that the principle of legal certainty requires that a well-informed defendant should be able to foresee in which courts he may be sued.⁷⁷ Further, the ECJ held that if it were to allow the application of the *forum non conveniens* doctrine, which gives the national courts a wide discretion to determine a foreign court as more applicable to hear the case, the principle of legal certainty would be undermined. The ECJ then said that the principle of legal certainty is the basis of the Brussels Convention.⁷⁸

Further, the ECJ held that since the doctrine of *forum non conveniens* is only recognized in a few of the Contracting States, allowing its application would undermine a uniform application of jurisdictional rules. This would go against one of the main objectives of the Brussels Convention, which is to “lay down common rules to the exclusion of derogating national rules”.⁷⁹

The ECJ then held that the second question referred to the Court couldn't be answered, since a preliminary ruling cannot be given on “general or hypothetical questions” and the facts of the main proceedings didn't provide for the question referred to the Court, and therefore the Court didn't see a need to answer that question.

3.3.2 Critique against the ECJ decision in *Owusu*

Critical voices has been raised against the ECJ's decision in *Owusu*. In its judgment in *Owusu*, the ECJ argues for the protection of the defendant. Cuniberti finds this argument to be less than satisfactory since dismissal based on the doctrine of *forum non conveniens* is an issue raised by the defendant, not the claimant. The doctrine is used by defendants in common law

75 *Owusu*, para 37.

76 *Owusu*, para 38.

77 *Owusu*, para 40.

78 *Owusu*, para 41.

79 *Owusu*, para 43.

countries when the defendant is unhappy with the court chosen by the claimant.⁸⁰ With that in mind it seems a little odd to deem *forum non conveniens* incompatible with the Brussels Convention, based on the protection of defendants.

The rigid protection by the defendants by ECJ in this decision “is paternalistic” according to Cuniberti. She says that the ECJ with its reasoning is telling defendants that they are not capable of deciding if the forum pointed out by the Convention, in the eyes of the defendant, is convenient or not. Cuniberti further says that the ECJ does not need to tell defendants in which court they should litigate. Further, Cuniberti argues that when the ECJ argues that a defendant can be sure that he will be sued in his home court the court is plainly wrong, because the plaintiff has the opportunity, in most cases, to bring his claim in another court, based on Article 5 of the Brussels Convention (Article 7 Brussels I bis/Article 5 Brussels I).⁸¹ If the principle of legal certainty is to have any meaning within the *Owusu* case it has to apply also to the claimant, according to Cuniberti, since the doctrine of *forum non conveniens* can deprive plaintiffs of one of the forums that are available under the Convention.⁸²

Burke has also expressed his dislike of the decision. “The ECJ is disingenuous when it insinuates that the Brussels I Regulation provides a paradigm of jurisdictional certainty, contrary to alternative legal orders such as the jurisdictional laws of the United States. When the surface of Brussels I is penetrated and its rules subject to scrutiny, recognition of the doctrine of 'forum non conveniens' would not turn Brussels I on its head.”⁸³

Also Harris has questioned the reasoning in *Owusu*. “Unfortunately, the Court of Justice failed to appreciate the wholly disingenuous nature of this reason: for English courts only grant a stay if the defendant himself asks for it.” The defendant can hardly be harmed by a doctrine which he has invoked. “Nevertheless, it is undeniable that cogent arguments based upon legal certainty can be made against the use of *forum non conveniens* under the Brussels Convention. First, there would clearly be uncertainty for the claimant if he did not know whether a court would definitely take jurisdiction at the time that he commenced an action in the English courts. Curiously, the interests of the claimant in this respect are not expressly mentioned by the Court of Justice. Second, there may be considerable cost and expense involved in fighting battles on the issue of *forum non conveniens* in the courts of a Contracting State. The Court of Justice surprisingly did not mention this reason either.”⁸⁴

Furthermore, Hartley has reacted to the ECJ’s argument that they are protecting the defendant. “The glaring fallacy of this argument is that it is the defendant who applies for a stay”⁸⁵

80 Cuniberti, p 977.

81 Cuniberti, p 977.

82 Cuniberti, p 977.

83 John JA Burke, p 7.

84 Harris, p 939.

85 Hartley, p 827.

The critique against the ECJ decision in *Owusu* is mainly pointed at the ECJ's reasoning on the protection of the defendant. When looking at the doctrine of *forum non conveniens*, a doctrine invoked by the defendant as a protection against having to defend oneself in a court that is very inconvenient for the defendant, it seems strange to argue, as the ECJ does, that not using the doctrine would protect the defendant.

3.3.3 Brussels II: an opening towards *forum non conveniens*

Brussels II regulates jurisdiction when it comes to disputes related to "divorce, legal separation or marriage annulment" as well as "the attribution, exercise, delegation, restriction or termination of parental responsibility".⁸⁶ The Brussels II Regulation fills some of the jurisdictional gaps created when limiting the scope of Brussels I bis.

Brussels II contains a provision that has similarities with the doctrine of *forum non conveniens*. This is interesting since the ECJ, as stated above, has specifically not accepted *forum non conveniens* in the context of Brussels I bis.

3.3.3.1 Article 15

Article 15 of the Brussels II Regulation makes it possible for a Member State court to transfer a dispute over parental responsibilities to a court in another Member State. This may only be done by way of exception, when the child has a particular connection with the other Member State and the transfer is in the best interests of the child. The particular connection requirement is considered to be met if the Member State is the child's present or former habitual residence, the country of the child's nationality, habitual residence of the person with parental responsibilities or, when the case concerns property, the place of that property's location.⁸⁷

This transfer can only be made between Member State, meaning that transfer to third States are precluded.

3.3.3.2 Reflection on article 15

It is hard to know why Brussels II contains a provision which seems to be at odds with the interpretation of Brussels I bis made by ECJ.

In recital 13 of Brussels II it is stated that the provisions are "shaped in the light of the best interests of the child" The interests of the child should be protected and this might require more flexible rules on jurisdiction. A set of rules that have no flexibility in their application could easily be abused by a plaintiff and the interests of the child might be set aside.

⁸⁶ Article 1 Brussels II.

⁸⁷ Bogdan, Concise Introduction to EU Private International Law, p 99.

4 Lis Pendens

4.1 General concept: what problems do the doctrine seek to solve?

The term *lis pendens* is short for *lis alibi pendens*, a latin phrase meaning “dispute elsewhere pending”. The short *lis pendens* is used in the EU legal system and will be the term used throughout this text.

In the situation where two parallel proceedings, involving the same parties and the same cause of action, are pending in two different courts, problems will arise if both proceedings are allowed to continue. First, problems might arise for the parties, and others related to the proceedings, such as witnesses and legal counsel who will have to attend the same proceedings in different places and arguing for the same case twice. The proceedings will also be burdened by the fact that court has keep an eye on the other proceeding to see if any decisions on legal questions have been made there, which the court will have to follow. When the cases have been decided, the problem of possibly irreconcilable judgments arises. There is also the problem of *res judicata* if one of the proceedings leads to a judgment before the other.⁸⁸

There is a difference in the approach towards parallel proceedings between common law and civil law jurisdictions. As noted by George, “[c]ommon law jurisdictions use parallel litigation remedies that favor a multi-factor test and measure detail and nuance, but lack consistency and predictability. Civil law jurisdictions use code-based remedies with more rigid rules and less recognition of special circumstances. Both seem to allow local plaintiffs to manipulate the litigation to a degree that undermines fairness.”⁸⁹

4.2 EU law

4.2.1 Article 29 Brussels I bis (Article 27 Brussels I) Lis Pendens

When a court in a Member State, was the first seised, and rules that it has jurisdiction, this decision has to be respected by all other Member State courts and they must decline to deal with the case. Other Member State courts have to accept the decision made by the court first seised, even if they are of the opinion that the first court made an incorrect judgment of whether it had jurisdiction or not.⁹⁰

Even if there is no doubt about the fact that the court first seised doesn’t have jurisdiction over the case, all other courts must wait for the first court to give its ruling on this. The court second seised will stay its proceedings until the court first seised has decided whether it has jurisdiction or not. If the first court decides that it has jurisdiction, the court second seised must decline jurisdiction and dismiss the case.

88 Fawcett, General Report, pp 27-28.

89 George, p 501.

90 Bogdan, Italian Torpedo, 2007, pp 91-92.

The question of when a court is deemed to be “seised” is answered in Article 32(1) points a and b of Brussels I bis (Article 30 Brussels I). A court is deemed to be seised either “at the time when the document instituting the proceedings or an equivalent document is lodged with the court” or if the document has to be served before it is lodged with the court “at the time when it is received by the authority responsible for service”.

Article 29 of Brussels I bis (Article 27 Brussels I) only applies when cases are “brought in the courts of two different Member States”. The Brussels I Regulation didn't have any provisions regarding the situation of parallel proceedings in a third State. In the Brussels I bis Regulation rules dealing with parallel proceedings in third States have been included in Article 33 and 34.

4.2.2 Gasser Case: Italian Torpedo

The ECJ opinion in *Gasser v MISAT*⁹¹ was given when the Brussels Convention was the applicable body of rules on jurisdiction, but the principles derived from the case is still valid in the interpretation of the corresponding provisions of Brussels I bis⁹².

The *Gasser* case had its origin in a dispute between an Austrian company, Erich Gasser GmbH and an Italian company, MISAT srl. The two companies had had a business relationship for several years based on Gasser selling children's clothes to MISAT. The dispute was about the breakdown of their business relations.

On 19 April 2000 MISAT brought suit in Italian court asking the Tribunale Civile e Penale di Roma for a ruling establishing that the contract between them had terminated, that MISAT had not failed to perform the contract and to order Gasser to pay damages. Gasser in turn brought proceedings against MISAT in Austria on 4 December 2000, asking for a judgment against MISAT to pay outstanding invoices. Gasser also claimed that the parties had agreed on Austrian Court to be the competent court in a dispute between the two, and hence under Article 17 of the Brussels Convention, the Austrian Court should be deemed to have jurisdiction. MISAT contended that since they had already brought action in an Italian court regarding the same business relationship the Austrian court must stay the proceedings according to the *lis pendens* rule in Article 21 of the Brussels Convention (Article 29 Brussels I bis/Article 27 Brussels I).

The first instance in Austria, Landesgericht Feldkirch, ruled that this was a case of *lis pendens* and stayed its proceedings. Gasser appealed against this decision to the Oberlandsgericht Innsbruck. The Oberlandsgericht referred some questions to the ECJ for a preliminary ruling.

Questions 2 and 3 are of interest for this thesis. The questions were as follows:

2. May a court other than the court first seised, within the meaning of the first paragraph of Article 21 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil

91 Erich Gasser BmbH v. MISAT Srl Case C-116/02, [2003] ECR I-14693.

92 See section 2.3.3.1. supra.

and Commercial Matters [“the Brussels Convention”], review the jurisdiction of the court first seised if the second court has exclusive jurisdiction pursuant to an agreement conferring jurisdiction under Article 17 of the Brussels Conventions, or must the agreed second court proceed in accordance with Article 21 of the Brussels Convention notwithstanding the agreement conferring jurisdiction?

3. Can the fact that court proceedings in a Contracting State take an unjustifiably long time (for reasons largely unconnected with the conduct of the parties), so that material detriment may be caused to one party, have the consequence that the court other than the court first seised, within the meaning of Article 21, is not allowed to proceed in accordance with that provision?

In answering the second question the ECJ started with declaring that the purpose of Article 21 (Article 29 Brussels I bis/Article 27 Brussels I), together with Article 22 (Article 30 Brussels I bis/Article 28 Brussels I) on related actions, of the Convention is to avoid conflicts between decisions. “Those rules are therefore designed to preclude, so far as possible from the outset, the possibility of a situation arising such as that referred to in Article 27(3) of the Convention, that is to say the non-recognition of a judgment on account of its irreconcilability with a judgment given in proceedings between the same parties in the State in which recognition is sought.”⁹³ The ECJ then held that for these goals to be met “Article 21 must be interpreted broadly so as to cover, in principle, all situations of *lis pendens* before courts of Contracting States”⁹⁴.

The fact that the court second seised has jurisdiction under Article 17 “is not such as to call in question the application of the procedural rule contained in Article 21 of the Convention, which is based clearly and solely on the chronological order in which the courts involved are seised.”⁹⁵ “[T]he court second seised is never in a better position than the court first seised to determine whether the latter has jurisdiction.”⁹⁶

The ECJ further held that “it is conducive to the legal certainty sought by the Convention that, in cases of *lis pendens*, it should be determined clearly and precisely which of the two national courts is to establish whether it has jurisdiction under the rules of the Convention. It is clear from the wording of Article 21 of the Convention that it is for the court first seised to pronounce as to its jurisdiction”⁹⁷.

The United Kingdom Government brought a concern about plaintiffs commencing proceedings before courts they knew not to have jurisdiction merely to delay settlement of the dispute. The ECJ answered that this concern was “not such as to call in question the interpretation of any provision of the Brussels Convention, as deduced from its wording and purpose”⁹⁸.

93 Gasser, para 41.

94 Gasser, para 41.

95 Gasser, para 47.

96 Gasser, para 48.

97 Gasser, para 51.

98 Gasser, para 53.

The third question was interpreted by the ECJ as asking whether Article 21 of the Brussels Convention (Article 29 Brussels I bis/Article 27 Brussels I) “must be interpreted as meaning that it may be derogated from where, in general, the duration of proceedings before the courts of the Contracting State in which the court first seised is established is excessively long”⁹⁹.

The ECJ gave two reasons for why Article 21 (Article 29 Brussels I bis/Article 27 Brussels I) cannot be derogated from based on excessively long waiting time in some courts. “First, the Convention contains no provision under which its articles, and in particular Article 21, cease to apply because of the length of proceedings before the courts of the Contracting State concerned.”¹⁰⁰

The second reason of the ECJ was that the Brussels Convention “is necessarily based on the trust which the Contracting States accord to each other’s legal systems and judicial institutions”¹⁰¹. The ECJ further held that “[i]t is also common ground that the Convention thereby seeks to ensure legal certainty by allowing individuals to foresee with sufficient certainty which court will have jurisdiction”¹⁰².

4.2.3 Recast of Brussels I Regulation

In the recast of Brussels I some new provisions were included which have effect on the application of *lis pendens*. The new provisions in Brussels I bis give more weight to choice-of-court agreements and also extends *lis pendens* to apply to cases pending in third State courts.

4.2.3.1 Article 25 Brussels I bis

“If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.”

This new provision separates the choice-of-court agreement from the rest of the agreement between the parties and makes it possible to try the forum selection under the national rules of the Member State selected in the agreement.

The provision deals only with situations where the chosen court is in a Member State. A forum selection clause that points to a court in a third State falls outside of the scope of Brussels I bis.

4.2.3.2 Article 31(2) Brussels I bis

The provision in Article 31(2) gives more weight to choice-of-court agreements by allowing the chosen court to decide whether it has jurisdiction or not, even if that court is not first

99 Gasser, para 55.

100 Gasser, para 71.

101 Gasser, para 72.

102 Gasser, para 72.

seised. The provision is only applicable when the parties has agreed on an *exclusive* jurisdiction clause.

This new rule means that a court other than the one first seised is allowed to determine whether it has jurisdiction based on a choice-of-court agreement between the parties. This is probably a response to the *Gasser* case in which the ECJ wouldn't allow for the Austrian court to decide on its jurisdiction under the choice-of-court agreement between the parties because the Italian court had been first seised.

Since the Brussels I bis Regulation only applies to forum selection clauses where a Member State court has been chosen, the provision in Article 31(2) doesn't apply when the chosen court is outside of the EU. In such a case the *lis pendens* rules of Article 33 and 34 in Brussels I bis is applicable.

4.2.3.3 Recital 19, 20 and 22 Brussels I bis

The reasoning behind the new rule in Article 31(2) of Brussels I bis is explained in its Recitals 19, 20, 22.

Recital 19 (Recital 14 Brussels I) states that “[t]he autonomy of the parties to a contract, [...], should be respected subject to the exclusive grounds of jurisdiction laid down in this Regulation”. This recital hasn't changed in the recast of Brussels I. The news in the recast is the addition of Recitals 20 and 22 which show a somewhat different attitude than previously shown towards more flexible ways of looking at rules of jurisdiction.

In Recital 22 of Brussels I bis it is shown that the problems which were dismissed in the *Gasser* case of abusive litigation has now been taken seriously.

“to enhance the effectiveness of exclusive choice-of-court agreements and to avoid abusive litigation tactics, it is necessary to provide for an exception to the general lis pendens rule in order to deal satisfactorily with a particular situation in which concurrent proceedings may arise. This is the situation where a court not designated in an exclusive choice-of-court agreement has been seised of proceedings and the designated court is seised subsequently of proceedings involving the same cause of action and between the same parties. In such a case, the court first seised should be required to stay its proceedings as soon as the designated court has been seised and until such time as the latter court declares that it has no jurisdiction under the exclusive choice-of-court agreement.”

4.2.3.4 Article 33 Brussels I bis

The provision in Article 33 of Brussels I bis extends *lis pendens* to apply also to cases pending in non-Member States. This article has no corresponding provision in Brussels I, which didn't regulate parallel proceedings in third States at all.

The *lis pendens* rule in Article 33 Brussels I bis gives the courts the discretion to stay a

proceeding in favor of a parallel proceeding in a third State. The provision isn't as mechanical as the one regarding parallel proceedings pending in two Member States, where a stay is mandatory for the court second seised.

Article 33 Brussels I bis provides a set of factors to be considered when deciding if a proceeding should be stayed based on a parallel proceeding in a third State court. The first factor to be considered is whether it is expected that the judgment of the court in the third State will be recognized and enforced within the EU, and the second factor is, if a stay is necessary for the proper administration of justice. After considering these two factors the Member State court may still continue its proceedings if: the third State proceedings are stayed or dismissed, it is unlikely that the proceedings will be continued in a reasonable time and if continuing the proceedings is required for the proper administration of justice.

Further, the Member State court shall dismiss its proceedings if a judgment is already given in a third state and this judgment is capable of recognition and enforcement. This is to prevent that a situation of *res judicata* will arise.

The court *may* stay proceedings, meaning that they don't have to. It's worth to note the difference between this provision and the *lis pendens* in Article 29 Brussels I bis (Article 27 Brussels I) between Member States which is mandatory, stating that the court *shall* stay its proceedings.

Article 33 Brussels I bis is to be applied on application by one the parties or on the courts own motion.

4.2.3.5 Recital 24 Brussels I bis

In its Recital 24 Brussels I bis provides an explanation for what is to be assessed when taking "the proper administration of justice" into account under Article 33 Brussels I bis. The Recital mentions "connections between the facts of the case and the parties and the third State concerned, the stage of which the proceedings in the third State have progressed by the time the proceedings are initiated in the court of the Member State and whether or not the court of the third State can be expected to give a judgment within a reasonable time" as circumstances of importance when making the assessment.

4.2.3.6 Reflections on Brussels I bis

The new provision of Article 31(2) Brussels I bis puts an end to some of the potential abuse of litigators running to the slowest courthouse, merely to prolong the process and harass the other party. However, the provision only applies in the situation where a choice-of-court agreement is in place between the parties and doesn't stop a party to act in that way when no such agreement is applicable. Even if the new provision only applies to the situations where a forum selection has been made, one should keep in mind that these situations are the most common when it comes to contracts and agreements other than "weak party contracts".

However, the problem is still in force when it comes to *lis pendens* between courts, in two Member States, where no forum selection has been made. In these cases there may still exist an incentive for a litigant to file a suit in a Member State court merely as a way of delaying proceedings.

4.3 US law

The mechanical *lis pendens* rule applied in the European legal systems, which automatically orders a court to stay its proceedings when the same case is already pending in another court, cannot be found in the U.S legal system.

When it comes to parallel proceedings, a court in the U.S. legal system might stay its proceedings in favor of another court, but this will only be done after careful and discretionary considerations by the court. These considerations are made based on the doctrine of abstention and the leading cases are *Colorado River*¹⁰³, *Landis*¹⁰⁴ and *Cone*¹⁰⁵, in which the Supreme Court established the factors to be considered. The fact that one court is first seised is not given any more weight than any other factor in the United States. “The traditional common-law view is that a court is not automatically barred from hearing a case just because it is already pending before a court in a foreign country.”¹⁰⁶

None of the cases dealt with the question of parallel proceedings in foreign courts. *Landis* dealt with a situation of parallel proceedings in two different states while *Colorado River* was about parallel proceedings between federal and state courts within the same state.¹⁰⁷

When it comes to parallel proceedings in foreign courts there is no Supreme Court decision to guide the lower courts. The question has to be solved based on the principles derived from *Landis* and *Colorado River*. Since parallel proceedings in foreign courts hasn't been addressed by the Supreme Court, there is no uniform approach when it comes to these situations. The case law on parallel proceedings in national, state-federal and federal-federal, situations has been used as a guidance when deciding if a stay or dismissal is appropriate when a substantially similar case has been brought in a foreign court and in a court in the U.S.¹⁰⁸

4.3.1 Landis Case: Parallel Proceedings in two Federal Courts

In *Landis* the question was whether a case should be stayed in a federal court in favor of a parallel proceeding regarding the same matter in another federal court.

In *Landis* the Court discussed whether it was constitutional to stay proceedings which had been submitted to a court and admitted under the rules of jurisdiction. The Court held that “the power to stay proceedings is incidental to the power inherent in every court to control

103 *Colorado River Water Conservation District v United States*, 424 US 800 (1976).

104 *Landis v North American Co.* 299 US 248 (1936).

105 *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* 460 U.S. 1 (1983).

106 Hartley, p 815.

107 George, pp 507-509.

108 Bush, p 132.

the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants”.¹⁰⁹

4.3.2 Colorado River Case: Parallel Proceedings in Federal Court and State Court

Colorado River is the leading case when it comes to parallel proceedings pending in a federal and a state court. The background to the case was a dispute over water rights in Colorado.

The Court made a distinction in *Colorado River* between federal-state situations and federal-federal when it comes to parallel proceedings. It held that “[g]enerally...the pendency of an action in the state court is no bar to proceedings concerning the same matter in the federal court having jurisdiction.” Whereas, “between federal district courts, however, though no precise rule has evolved, the general principle is to avoid duplicative litigation.” The Court explained that “[t]his difference in general approach between state-federal concurrent jurisdiction and wholly federal concurrent jurisdiction stems from the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them”.¹¹⁰

A dismissal in federal court based on a parallel proceeding in a state court should only be made under “exceptional circumstances”.¹¹¹

The *Colorado River* opinion gave some guidance on the factors to be considered when determining if the federal suit should be dismissed in favor of suit in state court. Factors to be considered were; “the inconvenience of the federal forum”, “the desirability of avoiding piecemeal litigation” and “the order in which jurisdiction was obtained by the concurrent forums”. The Court further stated that none of the factors were “necessarily determinative” in deciding whether to dismiss or not.¹¹²

It is interesting to note that the case being dismissed in *Colorado River* was actually the case first filed and not the one second filed. This can be compared to the mechanical *lis pendens* rule in the EU legal system, where the court second seised always has to stay its proceedings in favor of the court first seised.

4.3.3 Cone Case: reaffirming Colorado River

In 1983 the Court reaffirmed its holding in *Colorado River* and further developed the factors that a court should consider when dismissing a suit in federal court in favor of a suit in state court. The Court added two factors to be considered; whether federal law will govern the outcome of the case and whether state court proceedings would be adequate to protect the rights of the party that brought the proceedings in federal court.¹¹³

The Court once again held that “the decision whether to dismiss a federal action because of

109 Landis, p 254.

110 *Colorado River*; 817 (citation omitted).

111 *Colorado River*; p 818.

112 *Colorado River*; p 818.

113 *Cone*, pp 24-27.

parallel state court litigation does not rest on a mechanical checklist, but on a careful balancing of the important factors as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction.”¹¹⁴

When it comes to the question of which court was first seised, the Court held that “priority should not be measured exclusively by which complaint was filed first, but rather in terms of how much progress has been made in the two actions”¹¹⁵

5 Conclusions

The U.S. legal system has a very broad approach towards jurisdiction. A plaintiff is often able to choose among many different forums when deciding where to litigate his case. This has led to a system where it may be possible to bring a case in court which doesn't, in any real meaning, have anything to do with the case. Such a system makes it easy for plaintiffs, who want to harass or vex the defendant to bring suit in a court that is very inconvenient to the defendant, and might even be inconvenient to the plaintiff as well. The intention with the litigation is perhaps to force the defendant into settlement, since settling might seem more appealing than spending lots of money on litigating a case across the country with all the costs of traveling, council, evidence and other things that can make a trial expensive for the parties.

The EU rules on jurisdiction are based on written code in the Brussels I bis and Brussels II Regulations. The rules can be accessed by anyone and a “well-informed” defendant can, according to the ECJ, predict where he can be sued.

The EU approach toward law is one based on “predictability”, “legal certainty” and “uniformity”, at least if one is to believe the ECJ. Whereas, the US legal system is guided by “flexibility”. The Supreme Court has emphasized the importance of flexibility inherent in its *forum non conveniens* analysis. These different approaches towards legal thinking can be found in the different doctrines used to decline jurisdiction.

The doctrine of *forum non conveniens* applied in the U.S. is one that gives the courts a large discretion in deciding whether they should dismiss a case based on the doctrine. The courts weigh both private and public interest factors, looking at the convenience of both the parties and the court when making the analysis. This is a doctrine that can be formed to fit the specific case at hand, with the risk of being too flexible and therefore making it hard for the parties to foresee the outcome of the application of the doctrine in each case.

When it comes to the application of *forum non conveniens* under Brussels I bis, the ECJ made a clear statement against the doctrine in *Owusu*. The ECJ's reasoning in *Owusu* has met critical voices, mostly regarding ECJ's argumentation against the application of *forum non conveniens* based on the protection of the defendant. This argument seems odd since the doctrine of *forum non conveniens* is one which is invoked by the defendant as a protection against trial in

114 Cone, p 15.

115 Cone, p 21.

remote and inconvenient places. When looking at the ECJ's argument in *Owusu* regarding legal certainty it is more appealing to view the reluctance against *forum non conveniens* as a reflection of the civil law, code based, systems which most of the judges in the ECJ come from. The doctrine of *forum non conveniens* is one that gives courts a wide discretion in its application, such a doctrine doesn't sit well with the mechanical approach which is preferred in the civil law legal tradition.

The mechanical approaches applied in the EU jurisdictional rules aim at making the system predictable and to protect the principle of "legal certainty". One might ask if such mechanical rules really are the best at serving these purposes. If a case has no connections with the defendant's Member State of domicile, is it really reasonable that the courts of that Member State has jurisdiction? Would a "well informed defendant" really assume that the courts in the Member State of his domicile should have jurisdiction if all other things point towards another state? And, is it reasonable?

When it comes to the *lis pendens* rule applied within the EU system, one might see a potential problem with plaintiffs running to the courthouse as fast as they can, to be sure to have their court being the first seised. This "race to the courthouse" will be done instead of negotiating outside of court, because the plaintiffs don't want to risk that the case is brought in the "wrong" court by the other party. This is hardly a good thing if one doesn't want the courts to be clogged with cases that very well could have been settled outside of court. Or even worse, a party might actually go to a court which doesn't even have jurisdiction over the case, merely because he knows that the court in question is very slow and that he then might be able to force the other party into settlement

This "race to the courthouse" has been stopped when it comes to, the obvious vexatious, situation where a party to an agreement which includes a choice-of-court agreement files a suit in the "wrong court". In these situations it is understandable that the Commission didn't find the otherwise stressed "mutual trust" to be threatened. When it comes to the situation where no forum selection has been made, the idea of mutual trust between the Member States' court systems is still in place, and the strict rule of *lis pendens* applies as defined in Article 29 Brussels I bis (Article 27 Brussels I) and in the ECJ decision in *Gasser*.

The doctrine of *lis pendens*, applicable within EU law, is a typical example of the mechanical approach preferred by the civil law legal system. The doctrine doesn't give the courts any discretion when it comes to staying proceedings in favor of the court first seised in a Member State. It isn't much of a surprise that such a rigid rule doesn't appeal to the U.S. court which has applied a much more flexible approach towards the problem of parallel proceedings.

The only provision which allows for some discretion in the EU *lis pendens* rules is the new Article 33 of Brussels I bis with regards to parallel proceedings pending in a third State. In the explanation in Recital 24 of Brussels I bis, it is discussed which circumstances can be considered when accounting for the "proper administration of justice". Some of the circumstances can be recognized from the U.S. rules on parallel proceedings and *forum non*

conveniens. The court can look at connections between facts of the case, the parties and the third State, and also at how far the proceedings have progressed in the third State.

The new provision in Article 31(2) Brussels I bis that allows a court, not first seised, to decide whether it has jurisdiction when it is the court of choice in a choice-of-court agreement, can be seen as a step towards less mechanical and more pragmatic jurisdictional rules within EU law.

With this in mind and also the fact the Article 15 of the Brussels II Regulation contains provisions similar to *forum non conveniens* one cannot completely rule out the possibility of a more flexible attitude towards jurisdiction developing in the EU.

There are advantages and disadvantages with both the flexible U.S. approach and the rigid EU approach. What is gained in flexibility is lost in predictability, and the other way around.

Bibliography

Articles and books

Abernathy, Charles F., *Law in the United States*, Thomson West (2006)

Bies, John, "Conditioning Forum Non Conveniens", *67 U. CHI. L. REV.* 498 (2000)

Bogdan, Michael, "Brussels/Lugano Lis Pendens Rule and the Italian Torpedo", *51 Scandinavian Stud. L.* 89 (2007)

Bogdan, Michael, *Concise Introduction to EU Private International Law (2nd edition)*, Europa Law Publishing (2012)

Brand, Ronald A., "Due Process, Jurisdiction and a Hague Judgments Convention", *60 U. PITT. L. REV.* 661 (1999)

Brand, Ronald A., "Comparative Forum Non Conveniens and the Hague Convention on Jurisdiction and Judgments", *TEX. INT. L. J.*, vol. 37:467 2002

Brand, Ronald A., "Access-to-Justice Analysis on a Due Process Plattform", *100 Colum. L. Rev.* __ (2011)

Bush, Jocelyn H., "To abstain or not abstain?: A new framework for application of the abstention doctrine in international parallel proceedings", *58 Am. U. L. Rev.* 127 (2008-2009)

Calamita, Jansen N., "Rethinking Comity, Towards a coherent treatment of international parallel proceedings", *27 U. Pa. J. Int'l Econ. L.* 601 (2006)

Cuniberti, Gilles, (ed Peter McEleavy), "Forum Non Conveniens and the Brussels Convention", *ICLQ vol 54, October 2005 pp 973-982*

Davies, Martin, "Time to Change the Federal Forum Non Conveniens Analysis", *77 Tul. L. Rev.* 309 (2002-2003)

Fawcett, JJ "General Report" in *JJ Fawcett, Declining Jurisdiction in Private International Law (Reports..1994)* (1995)

George, James P., "International Parallel Litigation - A Survey of Current Conventions and Model Laws", *TEX. INT. L. J.*, vol. 37:499 (2002)

Harris, Jonathan, "Stays of Proceedings and the Brussels Convention", *54 Int'l & Comp. L.Q.* 933 (2005)

Hartley, Trevor C., "The European Union and the Systematic Dismantling of the Common Law of Conflicts of Laws", *54 Int'l & Comp. L.Q.* 813 (2005)

Mariottini, Cristina M., "The Proposed Recast of Brussels I Regulation and Forum Non Conveniens in the European Judicial Area", *Recasting Brussels I, (ed Pocar, E, Viarengo I, Villata, I,E)*, Studi e Pubblicazioni della Rivista di Diritto Internazionale Privato e Processuale 76, (2012)

Rodger, Barry J., "Forum Non Conveniens Post-Owusu", *2 J. Priv. Int'l L.* 71 (2006)

Reynolds, William L., "The Proper Forum for a Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in the Federal Courts", *70 Tex. L. Rev.* 1663 (1991-1992)

Samuels, Joel H., "When Is an Alternative Forum Available? Rethinking the Forum Non Conveniens Analysis", *85 Ind. L.J.* 1059 (2010)

Waples, Megan, "The Adequate Alternative Forum Analysis in Forum Non Conveniens: A Case for Reform", *36 Conn. L. Rev.* 1475 (2003-2004)

EU documents

European Commission Proposal for recast of Brussels I Regulation, COM/2010/0748 final – COD 2010/0383

Internet sources

Franzina, Pietro, “The Recast of the Brussels I Regulation: Old and New Features of the European Regime on Jurisdiction and the Recognition of Judgments”
<http://lettersblogatory.com/2013/06/27/the-recast-of-the-brussels-i-regulation-old-and-new-features-of-the-european-regime-on-jurisdiction-and-the-recognition-of-judgments/>

Clifford, Philip, Browne, Oliver, “Reform of the Brussels Regulation- Latest Developments and the 'Arbitration Exception'”, *In Practice: The London Disputes Newsletter April 2013*, Latham & Watkins <https://www.lw.com/thoughtLeadership/Reform-of-the-Brussels-Regulation> (2013-12-28)

Table of Cases

ECJ

Owusu v. Jackson, case C-281/02, [2005] ECR I-1383
Erich Gasser BmbH v. MISAT Srl Case C-116/02, [2003] ECR I-14693

United States

Landis v North American Co. 299 US 248 (1936)
Gulf Oil Corp. v Gilbert, 330 U.S. 501 (1947)
Koster v Lumbermens Mutual Casualty Co, 330 U.S. 528 (1947)
Colorado River Water Conservation District v United States, 424 US 800 (1976)
Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981)
Moses H. Cone Memorial Hospital v. Mercury Construction Corp. 460 U.S. 1 (1983)