

# Forum Non Conveniens doctrine – post Brexit applicability in transnational litigation\*

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## ABSTRACT

The article follows the birth of the judicial development of English *forum non conveniens* doctrine in stay proceedings, its alterations, and applicable tests leading to CJEU's decision in *Owusu*. *Owusu* ultimately forbade English courts to stay its proceedings and allow a "more convenient" forum to decide on the dispute merits, in case where the jurisdiction was conferred by Brussels regime – not only concerning other EU courts but worldwide. With the UK's withdrawal from the EU, a question appears whether English courts might again exercise their doctrinal power. If affirmative, the paper proceeds to assess various applicable, or presumably fitting, instruments, both for allocation of jurisdiction and recognition, and enforcement of judgments – Lugano Convention, Hague Convention 2005, and Hague Convention 2019. The paper also assesses how these instruments might interact with the use of *forum non conveniens* doctrine.

## KEYWORDS

Forum non conveniens, jurisdiction, enforcement, recognition, Lugano Convention, Hague Convention 2005, Hague Convention 2019, Brexit

## 1 Introduction

The almost never-ending negotiation between the United Kingdom ("UK") and European Union ("EU") had reached its peak on 31 January 2021 when the UK ultimately left the EU. This marks a soon-to-expire transitional period in which the UK is subjected to "*regulation without representation*" in the EU bodies. The so-called Brexit may or may not bring the national self-determination proclaimed in the Brexit negotiations<sup>1</sup>. However, it will bring many private international law questions. As borders, citizenships and workforce may already be fully negotiated, circulation of judgments and their recognition and enforcement are not.

This paper forms a part of a series of articles, each reflecting fragment of English private international law doctrines and their respective formation, the stance of EU law or CJEU case law towards those doctrines, and their possible and feasible application after Brexit in regard to EU domiciled persons. This article focuses on *forum non conveniens* doctrine in stay proceedings, as a situation in which the court

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<sup>1</sup> MAY, Theresa. Prime Minister's letter to Donald Tusk triggering Article 50. *gov.uk* [online]. 29. 3. 2017 [cit. 30. 8. 2021]. Available at: <https://www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50>

recognizes another forum to be more appropriate to hear the case and, therefore, stays the proceedings in favour of such forum, should the defendant agree to be subjected to other forum's jurisdiction.

This paper does not address the implications of Brexit as is nor deals with the whole post-transition setup in the mutual relationship between the UK and the EU per se unless explicitly specified otherwise. The paper also does not cover transitional cases ongoing at the end of the transition period or commenced after the transition period in Scotland, Wales, and Northern Ireland.

The introductory part of this paper shall introduce the central thesis to which concurring arguments are ought to be present in the following chapters. The introductory part also institutes the framework of reference used hereto.

The second chapter presents the core of modern *forum non conveniens* doctrine in stay proceedings as exercised in England. For proper understanding, one needs to be acquainted with elementary doctrinal evolution. At the outset, adoption of the doctrine in England is assessed, primarily concerning the creeping undertaking of its Scottish counterpart. Once established, the emerging test(s) in granting the stay proceedings are evaluated and reflected via relevant case law. This chapter forms a basic understanding of *forum non conveniens*, on which later chapters build.

The third chapter discusses the position taken by the Court of Justice of the European Union ("CJEU") in the *Owusu* case in stay proceedings in matters where the jurisdiction was conferred by the Brussels Convention. This chapter also deliberates on the effect and impact of the *Owusu* case on EU and non-EU courts. Consequently, the English stance on the *Owusu* case and its interpretation is shown.

Czech doctrinal attitude will not be discussed following the reasoning that to the full extent applicable, the Czech Republic jurisprudence follows the CJEU case-law and EU law, and as civil law country, itself has no analogy to such doctrine.

The fourth chapter presents the optional possibility to refrain from the CJEU's case law. Marking it to be a path to open the English judicial market to greater favourability and possibility to exercise powers ultimately banned by the CJEU.

The fifth chapter then evaluates possible judicial cooperation frameworks between UK and EU. Each presented option is given objective likelihood, and most feasible frameworks are accompanied by an assessment of the possibility to exercise *forum non conveniens* doctrine by English courts. If allowed, then a reflection toward jurisdiction allocation, and recognition and enforcement considered, as well as practical benefits and pitfalls.

For the purpose of this paper, as seen to be of most interest to the upcoming legal challenges, only *forum non conveniens* doctrine in litigation is evaluated (stay proceedings). This paper does not concern with the *forum conveniens* doctrine, which allows English courts to serve proceedings on foreign defendants (service-out proceedings).<sup>2</sup> Different positions taken to service-out proceedings and stay

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<sup>2</sup> ARZANDEH, Ardavan. *Forum (non) conveniens in England: past, present, and future*. Oxford: Hart, 2019, pp. 8, 28–29, 79–83. Studies in private international law. ISBN 978-1-78225-640-3.; BRIGGS, Adrian. *Civil jurisdiction and judgments*. Seventh edition. Abingdon, Oxon: Informa law from Routledge, 2021, pp. 480–540. ISBN 9780367415327.

proceedings in case law are for the purpose of this paper diminished as they are ultimately unified in the *Spiliada*<sup>3</sup> case.

In the words of simplicity, the *forum conveniens* doctrine allows English courts to serve out actions and decide disputes even though they do not have *per se* jurisdiction. The jurisdiction is then conferred on English courts because they are convenient to decide on merits and where English forum is the one in which the case may most suitably be tried for the interests of all the parties and the ends of justice. On the other hand, *forum non conveniens* doctrine allows English courts to refuse to exercise their rightfully invoked jurisdiction because there is a more convenient (more suitable) forum in which the case may most suitably be tried for the interests of all the parties and the ends of justice and defendant can present such forum as well as its intention to be subjected to its jurisdiction.

Hypotheses in this paper considered are that (a) modern *forum non conveniens* doctrine is only feasible in cases where domestic law applies, (b) Lugano Convention framework retains the same approach to *forum non conveniens* as presently under Brussels regime, and (c) Hague conventions frameworks are deemed to be the most feasible framework for the UK to retain some degree of international judicial cooperation, however, neither allows for direct applicability of *forum non conveniens*.

## 2 Formation of modern Forum Non Conveniens doctrine England

“[...] where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice”<sup>4</sup>. Fully comprehensive and concurrently utmost foreign to civil law, which does not allow for review of the appropriateness of conferred proper jurisdiction<sup>5</sup>.

Parties may either agree to adjudicate their dispute in England, or the plaintiff can unilaterally elect England to be the seat of adjudication by bringing the claim to England courts. The election may or may not be based on proper assessment of applicable law. If the jurisdiction of chosen English court is proper, the defendant may object to the jurisdiction or dispute its appropriateness.

The defendant hence may demonstrate that the English forum is *forum non conveniens* because the natural forum of the dispute in matter is elsewhere.<sup>6</sup> As much as English courts deem themselves to be professional and effective, they do find other courts to prove to be on the same footing.<sup>7</sup> Among the most important, where there is a foreign substantive law to be applied, the English court is likely to refuse to

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<sup>3</sup> *Spiliada Maritime Corp. v Cansulex Ltd.* [1987] A.C. 460 (H.L.); [1986] 3 All ER 843, [1987] AC 460, [1987] 1 Lloyd's Rep 1, [1987] ECC 168, [1987] 1 FTLR 103, [1986] UKHL 10, [1986] 3 WLR 972.

<sup>4</sup> *Spiliada*

<sup>5</sup> Scotland and Quebec to name an exception to the general rule.

<sup>6</sup> BRIGGS 2021, op. cit., p. 410.

<sup>7</sup> Ibid.

adjudicate on the subject matter of the dispute and instead leaves the plaintiff to sue in courts of such law.<sup>8</sup>

## 2.1 Early 1900s formation of Forum Non Conveniens doctrine in stay proceedings

Deriving its roots from 17th-century Scottish doctrine *forum non competens* in decisions<sup>9</sup> assessing the power of the court to decline its proper jurisdiction to hear brought case in the “*interest of justice*”<sup>10</sup> and its later transformation to *forum non conveniens* in *Macadam v Macadam*<sup>11</sup> found its way<sup>12</sup> into existence of the “modern” English *forum non conveniens* doctrine at the beginning of 20<sup>th</sup> century. Threefold of decisions in early 1900 paved the way to discretionary refusal to exercise otherwise sound jurisdiction in cases not involving *lis alibi pendens*<sup>13</sup> as an as-of-right cases – *Logan v Bank of Scotland*<sup>14</sup>, *Egbert v Short*<sup>15</sup>, and *In re Norton’s Settlement*<sup>16</sup>.

In *Logan v Bank of Scotland*, a case concerning misinterpretation of a prospectus of share allotment of Scottish company, and subsequent action brought by the plaintiff in England, a stay of proceeding has been granted, and jurisdiction of English courts has not been exercised on the basis that the “*claim had been brought to vex them [defendant] and/or abuse the court’s practice*”<sup>17</sup>. A court thus had to balance the as of right to initiate a proceeding in England<sup>18</sup> against the objective of non-abuse of English courts’ hospitality.<sup>19</sup> Since the claim took place in Scotland and all evidence ought to be obtained in Scotland, the court assessed the impendent inconvenience of trying the case in England, which might inflict injustice on the defendant, therefore rendering the proceeding vexatious and oppressive.<sup>20</sup>

In *Egbert v Short* and *In re Norton’s Settlement*, the cases involved a short period of defendants’ presence in England, in which the actions were initiated. The courts stressed that caution in the exercise of stay of proceeding must be exercised.<sup>21</sup> In addition, in *In re Norton’s Settlement*, the court had established that a stay could not

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<sup>8</sup> Ibid.

<sup>9</sup> E.g. *Vernor v Elvies*, 6 Dict. of Dec. 4788 (1610) and consequently *M’Moline v Cowie*, 7 D 270 IH (1845).

<sup>10</sup> BRAND, Ronald A. and Scott R. JABLONSKI. *Forum non conveniens: history, global practice, and future under the Hague convention on choice of court agreements*. New York: Oxford University Press, 2007, p. 7. CILE studies. ISBN 978-0-19-532927-8.

<sup>11</sup> *Macadam v Macadam*, 11 M 860 (1873).

<sup>12</sup> On the transformation of Scottish *forum non competens* to early 1900 English *forum non conveniens* see ARZANDEH, op. cit., pp. 24–34.; BRAND, JABLONSKI, op. cit., pp. 7–10.

<sup>13</sup> ARZANDEH, op. cit., p. 35.

<sup>14</sup> *Logan v Bank of Scotland* [1906] 1 KB 141 (CA 1905).

<sup>15</sup> *Egbert v Short* [1907] 2 Ch 205.

<sup>16</sup> *In re Norton’s Settlement* [1908] 1 Ch 471 (CA).

<sup>17</sup> ARZANDEH, op. cit., p. 36.

<sup>18</sup> *Logan v Bank of Scotland*, para. 150.

<sup>19</sup> ARZANDEH, op. cit., p. 36 with reference to *Logan v Bank of Scotland*, para. 150.

<sup>20</sup> Ibid., p. 37.

<sup>21</sup> *Egbert v Short*, para. 212; *In re Norton’s Settlement*, para. 479.

be granted based merely on convenience, rather based on proof of difficulty or practical impossibility to get justice in England<sup>22</sup>.

## 2.2 Two limb test in *St. Pierre*

In 1935, ruling in *lis alibi pendens* case *St. Pierre*<sup>23</sup>, albeit applicable to stay the case as well, ceased the progress made by *Logan v Bank of Scotland*, *Egbert v Short* and *In re Norton's Settlement*. The following test has been formulated under *St. Pierre* ruling “The true rule about a stay [...] may I think be stated thus: (1.) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English Court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused. (2.) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way; and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant.”<sup>24</sup> Consisting of two limbs, the first one endorses *In re Norton's Settlement* that balance of convenience on its own is insufficient to grant a stay and concurrently protects the plaintiffs right to commence proper proceedings in England. The second one confirms the position of *Logan v Bank of Scotland* on conduct of balancing exercise.

The decision in *St. Pierre* then served as a plaintiff-oriented approach to a dismissal of plea for stay<sup>25</sup> becoming a “state of affairs is chiefly a by-product of judicial doctrinal development at common law being as much the result of how a landmark decision has been understood in succeeding cases and commentary as what was actually stated in that decision.”<sup>26</sup> Therefore, the discretionary stay of proceedings became non-existing. This implication, altogether with the slowness of English courts, became a cornerstone for the rise of forum shopping in England.<sup>27</sup>

## 2.3 *Atlantic Star* and post-*Atlantic Star* rulings

Nearly 40 years after *St. Pierre*, a relaxation and liberalization of narrowly interpreted *St. Pierre* test was exercised in *Atlantic Star*<sup>28</sup>, a case involving a claim of a Dutch ship against a Dutch owner of a container vessel for damages caused by a

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<sup>22</sup> *In re Norton's Settlement*, para. 479, 486.

<sup>23</sup> *St. Pierre v South American Stores (Gath & Chaves), Ltd.* [1936] 1. K.B. 382 (C.A.).

<sup>24</sup> *St. Pierre*, para. 398.

<sup>25</sup> For further development of plaintiff-oriented approach to *St. Pierre* test, mainly its second part of first limb see ARZANDEH, op. cit., pp. 44–46.

<sup>26</sup> *Ibid.*, pp. 45–46.

<sup>27</sup> BELL, Andrew S. *Forum shopping and venue in transnational litigation*. Oxford: Oxford University Press, 2003, para. 3.78. Oxford private international law series. ISBN 0-19-924818-4. See also *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197. Interestingly, some view forum shopping as a good thing stating “[...] but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of service”, see *The Atlantic Star* [1973] QB 364 (CA) 381G and 382C (“*Atlantic Star*”).

<sup>28</sup> BRAND, JABLONSKI, op. cit., pp. 14–15.

collision of the ships at Belgian sea<sup>29</sup>. Lord Wilberforce assessed that “*close and rigid an application may defeat the spirit which lies behind it*”<sup>30</sup>.

This approach was undertaken in 13 years of analysis pursued by the House of Lord on undesirability to apply the vexatious and oppressive test narrowly<sup>31</sup>, which started with *Atlantic Star* and led to the adoption of English *forum non conveniens* doctrine.

Following *Atlantic Star*, *MacShannon*<sup>32</sup> case marks the reforming step forward incorporation of *forum non conveniens* doctrine through the factor of forum “appropriateness”. A case where plaintiffs sued in England based on an expectation of speedier process and greater damages. The ruling in *MacShannon* presented a revised test and transferred the burden of proof in the second limb of the test from the defendant to the plaintiff, who thus must prove a stay of proceeding would create an injustice<sup>33</sup>, while it was still the defendant’s burden to provide the court with an alternative forum being the dispute’s centre of gravity<sup>34</sup> “[...] *in order to justify a stay, two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court.*”

While liberalizing the test for granting a stay, it is argued that itself did not prevent forum shopping of England forum.<sup>35</sup> Although the second limb of the *MacShannon* test ought to be objective, the courts were able to refuse the grant of stay even when a more appropriate forum was presented based on the plaintiff’s juridical advantage in England.<sup>36</sup> A similar approach to still pro-plaintiff behaviour is observed in *Astro Exito*<sup>37</sup>.

However, arguably, dissenting opinion in *MacShannon* shows the need of English law to start paying due respect to other legal systems “*Time and time again we said that when a plaintiff validly invoked the jurisdiction of these courts [...] he is prima facie entitled to pursue it to the end. [...] The good old days are gone. Our entry into the Common Market has brought many changes. One of them is the recognition that the legal systems of other countries have their merits*”<sup>38</sup>. The prominence of the *MacShannon* test is best illustrated in its application to other areas of English private

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<sup>29</sup> The collision consequently caused another Belgian vessel to sink.

<sup>30</sup> *Atlantic Star*.

<sup>31</sup> ARZANDEH, op. cit., p. 53.

<sup>32</sup> *MacShannon v Rockware Glass Ltd.* [1978] A.C. 795 (H.L.).

<sup>33</sup> BRAND, JABLONSKI, op. cit., pp. 16 with reference to *MacShannon*.

<sup>34</sup> *European Asian Bank v Punjab and Sind Bank* [1981] 2 Lloyd’s Rep 651.

<sup>35</sup> SCHUZ, Rhona. Controlling Forum-Shopping: The Impact of *MacShannon v. Rockware Glass Ltd.* *International & Comparative Law Quarterly*. Cambridge: Cambridge University Press, 1986, Vol. 35, no. 2, p. 374, 408.

<sup>36</sup> BRAND, JABLONSKI, op. cit., pp. 17.

<sup>37</sup> *Astro Exito Navegacion S.A. v W.T. Hsu* [1983] 1 Lloyd’s Rep. 666 (Q.B. Comm Ct.)

<sup>38</sup> *MacShannon*, para. 380.

international law – decisive test whether an anti-suit injunction<sup>39</sup> should be issued – both carrying similarity as to upholding English jurisdiction.

In 1984 the House of Lords moved even further in the *Abidin Daver*<sup>40</sup> and incorporated comity principles into the test rationale while refusing to exercise the pro-plaintiff behaviour further.<sup>41</sup> Among others, the need to present evidence to support injustice on the plaintiff side must be based on cogent evidence<sup>42</sup>, as well as it pronounced that “[...] *judicial chauvinism has been replaced by judicial comity to an extent which [...] is now ripe to acknowledgement*”<sup>43</sup> and that current English law “is indistinguishable from the Scottish legal doctrine of *forum non conveniens*”<sup>44</sup>.

#### 2.4 Spiliada case as adoption of the modern English form of Forum Non Conveniens doctrine

The contemporary scope of forum non conveniens doctrine was established in 1986 in the *Spiliada* case by express recognition of its existence as as-of-right<sup>45</sup>. The modern English *forum non conveniens* test consists of a twofold procedure<sup>46</sup>. The defendant's part of the procedure consists of 3 steps – (1) showing the availability of competent jurisdiction outside England<sup>47</sup>, which is the appropriate forum for the present dispute and that such forum will assume jurisdiction over the claim<sup>48</sup>, (2) persuading the court to grant a stay of proceedings<sup>49</sup>, for which the defendant and court shall assess (3) whether the presented forum is the “*natural*” forum of the dispute, taking into consideration (i) availability of witnesses, (ii) governing law, and (iii) habitual residence of the parties. Should the court be satisfied to grant a stay, the procedure shifts to the plaintiff who may prove “*circumstances by reason of which justice requires that a stay should nevertheless not be granted*”<sup>50</sup>. However, the court will not refuse to grant a stay if substantial justice<sup>51</sup> is to be done in the natural forum. Hence comity plays an important role, a role that could not be found prior to *Abidin Daver*.<sup>52</sup>

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<sup>40</sup> The *Abidin Daver* [1984] AC 398 (HL), para. 410.

<sup>41</sup> *Ibid.*, para. 411.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> ARZANDEH, *op. cit.*, p. 66.

<sup>46</sup> As opposed to Scottish doctrine applied in one-stage test. See ANTON, A. *Private International Law*. Edinburgh: W Green & Son Ltd. 1967, p. 148–154. ISBN: 0414000021.

<sup>47</sup> Resting on Scottish case *Sim v Robinow* (1892) 19 R 665 (IH).

<sup>48</sup> BRIGGS, Adrian. *Civil jurisdiction and judgments*. Sixth edition. Abingdon, Oxon: Informa law from Routledge, 2015, p. 685. ISBN 9781138825604.

<sup>49</sup> Should the connection of defendant to England be frail (e.g., the suit was served while visiting England) it should be all the easier to prove appropriateness of another forum. See *Spiliada*.

<sup>50</sup> *Spiliada*, para. 478.

<sup>51</sup> E.g. *De Dampier v De Dampier* [1988] 1. A.C. 92 (H.L.).

<sup>52</sup> FELDMAN, Kathryn N. and Susan M. VELLA. The Evolution of “Forum Conveniens”: Its Application to stay of proceedings and Service Ex juris. *Advocates’ Quarterly*. Ontario: Agincourt, 1989, Vol. 10, no. 2, p. 174.

The stay thus will be refused either if England is the centre of gravity for the presented dispute<sup>53</sup> or should not the foreign forum justly entertain the claim, thus proclaiming the convenience of the English forum<sup>54</sup>.

Merely only one part of the *Spiliata* test underwent tendencies to judicial change. The first stage is the burden to present an available forum with competent jurisdiction outside England.<sup>55</sup> However, in the *Bank of Kuwait*<sup>56</sup> case, the court refrained from ascertaining of availability of a foreign forum in the first stage of the *Spiliada* test since substantial justice would not be obtained in such forum<sup>57</sup>, a factor which ought to be assessed in the second limb of *Spiliada* test. This departure was remedied in the *Connelly* case<sup>58</sup>, and availability remained even when the plaintiff would experience difficulties in bringing the claim.<sup>59</sup> Therefore any difficulties or injustices on the plaintiff's part was to be assessed only in the second limb of the *Spiliada* test.<sup>60</sup>

It is hence argued that the current *forum non conveniens* doctrine remains the same as was established in *Spiliada*.<sup>61</sup>

### 3 Applicability of Forum Non Conveniens doctrine within the EU (pre-Brexit)

The matter of *forum non conveniens* doctrine and its interoperability with EU law could have been resolved in the early 1990s in the case *Re Harrods*<sup>62</sup>. Case concerning English corporation accused of unfair prejudice of minority shareholder. Since all business was carried by said company in Argentina, the Court of Appeal ruled that proceedings should be stayed in the forum of incorporation as the forum has no meaningful connection to the dispute itself, and the natural forum is Argentina. The court also assessed that it is not obliged to exercise its jurisdiction as Brussels Convention is not applicable since no other Contracting State is involved. Hence paying due concern to its character of regulation of jurisdiction between the Contracting States.<sup>63</sup> The Court of Appeal, therefore, did not see grounds to apply Brussels Convention to a case where no other Contracting State was concerned. House of Lords reference to the CJEU for preliminary ruling might have provided some answers. However, the case was settled before the CJEU could reach its decision.<sup>64</sup>

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<sup>53</sup> COLLINS, L. et al. *Dicey, Morris & Collins on the Conflict of Laws*. London: Sweet & Maxwell, 2012, para. 11–143. ISBN: 978-0414024533.

<sup>54</sup> *Ibid.*, para. 11–144.

<sup>55</sup> *MacShannon*, para. 812; *Spiliada*, para. 476.

<sup>56</sup> *Mohammed v Bank of Kuwait and the Middle East KSC* [1996] 1 WLR 1483 (CA).

<sup>57</sup> See also BRIGGS, Adrian. *Private International Law. British Yearbook of International Law*. Oxford: Oxford University Press, 1996, Vol. 67, no. 1, p. 587.

<sup>58</sup> *Connelly v RTZ Corporation* [1996] QB 361 (CA).

<sup>59</sup> *New Hampshire Insurance Co v Strabag Bau AG* [1992] 1 Lloyd's Rep 361 (CA).

<sup>60</sup> *Connelly*.

<sup>61</sup> ARZANDEH, op. cit., pp. 79, 105.

<sup>62</sup> *Re Harrods (Buenos Aires) Ltd (No. 2)* [1992] Ch 72 (CA), para. 101.; BRIGGS 2021, op. cit., pp. 358–360.

<sup>63</sup> *Re Harrods*, para. 98, 103.

<sup>64</sup> Case C-314/92: Reference for a preliminary ruling made by the House of Lords, by order of that court dated 13 July 1992, in the case of *Ladenimor SA* against *Intercomfinanz SA*.



Therefore, it was not until 2005 when the *forum non conveniens* doctrine came under the purview of CJEU in the *Owusu*<sup>65</sup> case. A claim brought in the UK, by UK plaintiff, against UK and Jamaica defendants for injuries sustained in Jamaica, the court found that the action could not be stayed based on Art. 2<sup>66</sup> of Brussels Convention<sup>67</sup>. The appellate court then referred the matter with the preliminary question to the CJEU. The preliminary question asked was *inter alia*<sup>68</sup> whether it is inconsistent with Brussels Convention if a contracting state to Brussels Convention would stay its proceedings, based on rules of national law, brought against a person domiciled in that contracting state in favour of non-contracting state court should the jurisdiction be based on the general rule of jurisdiction vested to art. 2 of Brussels Convention (a) if the jurisdiction of no other contracting state was in issue, and (b) if the proceedings had no connecting factors to any other contracting state.<sup>69</sup>

CJEU stated that the application of the Brussels Convention requires some international element<sup>70</sup>; conversely, it does not predominantly require legal relationship to more than one contracting state<sup>71</sup>. Hence an internalization may be produced by the presence of a non-contracting state domiciled person<sup>72</sup>. Thus, art. 2 being of mandatory nature, no derogation is permitted unless Brussels Conventions explicitly allows it.<sup>73</sup> The discretion to stay proceedings based on *forum non conveniens* is not available under Brussels Convention<sup>74</sup> as “*plaintiff must be sure which court has jurisdiction. He should not have to waste his time and money risking that the court concerned may consider itself less competent than another*”<sup>75</sup>. Therefore, the *forum non conveniens* doctrine would infringe on the principle of legal certainty<sup>76</sup>, being the cornerstone of the Brussels Convention<sup>77</sup>. On such consideration, the CJEU ruled that the applicability of *forum non conveniens* doctrine is precluded on jurisdiction conferred by art. 2 of the Brussels Convention.<sup>78</sup> The *Owusu* case thus holds in substance that

<sup>65</sup> Judgment of the Court (Grand Chamber) of 1 March 2005. *Andrew Owusu v N. B. Jackson, trading as "Villa Holidays Bal-Inn Villas" and Others*, Case C-281/02.

<sup>66</sup> Art. 4 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (“*Brussels Ibis Regulation*”).

<sup>67</sup> 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.

<sup>68</sup> Second preliminary question was not discussed as the first question was answered affirmatively. See *Owusu*, para. 47 et seq.

<sup>69</sup> *Owusu*, para. 22.

<sup>70</sup> Report by Mr P. Jenard on the Protocols of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 29 February 1968 on the mutual recognition of companies and legal persons and of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (“*Jenard Report*”), OJ 1979 C 59, p. 8.; *Owusu*, para. 25.

<sup>71</sup> *Owusu*, para. 24.

<sup>72</sup> *Ibid.*, para. 26.

<sup>73</sup> *Ibid.*, para. 37.

<sup>74</sup> *Ibid.*, para. 37.; Report by Professor Dr Peter Schlosser on the Convention of 9 October 1978 on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice („*Schlosser Report*”), para. 77–78.

<sup>75</sup> *Schlosser Report*, para. 78.

<sup>76</sup> *Owusu*, para. 38, 41.

<sup>77</sup> Judgment of the Court of 28 September 1999. Case C-440/97, para. 23.; Judgment of the Court of 19 February 2002. Case C-256/00, para. 24.

<sup>78</sup> *Owusu*, para. 46.

jurisdiction of Member State court is mandatory the courts cannot decline jurisdiction even in favour of third-State courts.<sup>79</sup>

The CJEU thus “*significantly restricted the ability of the English courts to refuse jurisdiction over an English-domiciled defendant, even where there is clearly a more appropriate jurisdiction in which to hear the case*”<sup>80</sup>. European rules of jurisdiction are thus “*based on the principles of legal certainty and predictability, refusing any flexibility from considerations of convenience, fairness and justice*”.<sup>81</sup> It was however argued that the CJEU interpreted the rights “*as though it gave rights to a claimant rather than defendant, inverting the usual understanding*.”<sup>82</sup>

English courts nevertheless remained firm in their position not to follow *Owusu* and affirmed their authority to stay proceedings in favour of non-contracting state’s courts and “*continued to limit Owusu’s influence and applicability*”<sup>83</sup> unless the case has a relationship to another EU Member state.<sup>84</sup> English court hence followed the position taken in *Re Harrods* as not to apply *Owusu* in cases where jurisdiction was conferred by the Brussels regime, yet no other Member state was concerned with the proceedings.

Consequently, limited *forum non conveniens* doctrine is arguably present in Brussels Ibis Regulation.<sup>85</sup> Art. 33(1)(b) stipulates the right of the seized court to stay its proceedings should *lis pendens* requirements be met in relation to non-EU Member State court, and the seized EU court is satisfied that a stay is “*necessary for the proper administration of justice*”<sup>86</sup>. Assessment of the necessity is to be made in accordance with recital 24 of the Brussels Ibis Regulation.

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<sup>79</sup> NYUTS, Arnaud. Chapter 13: *Owusu*, Gasser, Turner and West Tankers – Is the Hague Convention on Choice-of-Court Agreements the Solution? In: AFFAKI, Bachir Georges and Horacio Alberto Grigera NAÓN (eds). *Jurisdictional Choices in Times of Trouble, Dossiers of the ICC Institute of World Business Law*. Paris: Kluwer Law International; International Chamber of Commerce. 2015, Vol. 12, p. 191.; See also VLAS, Paul. Chapter II: Jurisdiction. In: MAGNUS Ulrich and Peter MANKOWSKI. *Volume 1 Brussels Ibis Regulation – Commentary*. Cologne: Verlag Dr. Otto Schmidt, 2015, pp. 109–111.

<sup>80</sup> WATERS, Andrew. “Forum Shopping” in Fraud Actions Following *Owusu v. Jackson*. *Journal of International Banking and Financial Law*. London: Butterworth & Co., 2010, Vol. 25, p. 359.

<sup>81</sup> HESS, Burkhard and Martina MANTOVANI. Current developments in forum access: Comments on jurisdiction and forum non conveniens – European perspectives on human rights litigation. *MPILux Research Paper Series 2019*, Luxembourg: Max Planck Institute. 2019, no. 1, p. 2.

<sup>82</sup> BRIGGS, Adrian. The Death of Harrods: Forum Non Conveniens and the European Court. *Law Quarterly Review*, London: Sweet & Maxwell, 2005, Vol. 121, p. 535.

<sup>83</sup> HAM, Jared. (Br)exit Strategy: The Future of the Forum Non Conveniens Doctrine in the United Kingdom After ‘Brexit’. *Cornell International Law Journal*. Ithaca: Cornell Law School, 2020, Vol. 52, p. 730.

<sup>84</sup> *Gomez v Gomez-Monche Vives* [2008] EWHC 259 (Ch), [2008] 3 WLR 309.

<sup>85</sup> MITCHENSON Jason and Thomas SCHULTZ. Rediscovering the Principle of Comity in English Private International Law. *European Review of Private Law*, Alphen aan den Rijn: Kluwer Law International Issue, 2018, Vol. 26, no. 3, p. 330.

<sup>86</sup> Art. 33(1)(b) Brussels Ibis Regulation.

#### 4 Brexit and established CJEU case law

All England courts but the Supreme Court and High Court of Justiciary<sup>87</sup> are bound by retained CJEU case law forming part of EU law before the Brexit took place<sup>88</sup>. However, both courts have the inherent right to depart from such law, the same fashion as it may be departed from previous domestic law.<sup>89</sup>

Considering the return to the position taken in *Re Harrods* regarding the refusal of proper jurisdiction conferred by the Brussels or Lugano regime. Even after *Owusu* ruling, “For the English court to refuse jurisdiction, in a case against a person domiciled in England, on the ground that the court of some non-contracting state is the more appropriate court to decide the matters in issue does not in any way impair the object of the Convention of establishing an expeditious, harmonious, and, I would add, certain, procedure for securing the enforcement of judgments, since *ex hypothesi* if the English court refuses jurisdiction there will be no judgment of the English court to be enforced in the other contracting states. Equally and for the same reason such a refusal of jurisdiction would not impair the object of the Convention that there should, subject to the very large exception of article 4, be a uniform international jurisdiction for obtaining the judgments which are to be so enforced.”<sup>90</sup>, one might argue the English courts will want to make the as-of-right to stay proceedings again available.<sup>91</sup>

#### 5 Future of the English judicial model and applicability of Forum Non Conveniens doctrine

The UK is currently presented with multiple hypothetical options, part of which is already known not to be currently feasible. Concerning the jurisdiction allocation, the UK may either (a) join the Lugano Convention<sup>92</sup>, (b) apply the Hague convention regimes, (c) negotiate a new treaty with the EU, or (d) refrain from all and resort to national law. However, allocation of jurisdiction is not the whole picture of private international law. The underlying question is not whether to rely on national law being the general option for civil disputes where no international treaty (or EU law) is applicable (hence no unified promulgation on jurisdiction allocation exists), however, question of enforcement and recognition of judgments is equally essential.

Thinking beyond mere jurisdiction allocation, but from the outset primarily with the enforcement of the judgment, the least attractive to private international law is option (d), as the only relevant question would be whether the UK retains the CJEU ruling in *Owusu* or not. Consequently, this option seems inapplicable in its merits as the UK already acceded to the Hague Convention 2005 framework in its own

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<sup>87</sup> Sec. 6(4)(a) and (b) of Chapter 16, European Union (Withdrawal) Act 2018 in line with 2020 Chapter 1, European Union (Withdrawal) Act 2020 (“*Withdrawal Act*”).

<sup>88</sup> *Withdrawal Act*, sec. 6.

<sup>89</sup> *Ibid.*, sec. 6(5).

<sup>90</sup> *Re Harrods*, p. 97

<sup>91</sup> Subject to part 5.1 below.

<sup>92</sup> Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

right<sup>93</sup>. It may, however, be of interest regarding judgment recognition and enforcement.

Second, to last, option (c) seems, in light of the difficulties alongside Brexit and political unfriendliness between UK and EU, hardly feasible. And if applicable, any presumption of its content and scope would be hard to foresee, as no one expected the “hard Brexit” to occur anyway. Therefore, we are left with options (a) and (b) to discuss.

### 5.1 Lugano Convention and Forum Non Conveniens doctrine

As mentioned, the UK may depart from any retained EU law unless accession to Lugano Convention is made.<sup>94</sup> Pursuant art. 72(3) of the Lugano Convention, the accession of a new contracting party requires unanimous agreement. Alternatively, the UK might have opted to join EFTA, in which case the art. 71 of the Lugano Convention would supersede art. 72.<sup>95</sup> EFTA membership yet seems unlikely.<sup>96</sup>

Should the UK accede to the Lugano Convention, the position of the English court regarding the as-of-right stay of proceedings would remain unchanged based on two paradigms. Brussels instruments<sup>97</sup> and the Lugano convention form a “closed system”<sup>98</sup> of the Brussels-Lugano zone.

Protocol 2 to Lugano Convention promulgates a substantial link to Brussels I Regulation, making both identical in different spheres of territorial application.<sup>99</sup> Alterations to the 1998 Lugano Convention<sup>100</sup> were made to reflect changes done in respect to Brussels Convention and Brussels I Regulation as well as to reflect established CJEU case-law.<sup>101</sup> The material scope has therefore aligned between Lugano

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<sup>93</sup> BRIGGS 2021, op. cit. pp. 559–560.

<sup>94</sup> UK deposited an application to accede to the Lugano Convention on 8 April 2020. See Notification to the Parties of the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, concluded at Lugano on 30 October 2007. *Federal Department of Foreign Affairs FDFA* [online]. 14. 4. 2020 [accessed on 2020-05-24]. Available at: [https://www.eda.admin.ch/dam/eda/fr/documents/aussenpolitik/voelkerrecht/autres-conventions/Lugano2/200414-LUG\\_en.pdf](https://www.eda.admin.ch/dam/eda/fr/documents/aussenpolitik/voelkerrecht/autres-conventions/Lugano2/200414-LUG_en.pdf)

<sup>95</sup> Possibility of UK re-joining the EFTA then lays solely on the EFTA members in accordance with Art. 56 of the Convention of 4 January 1960 on establishing the European Free Trade Association, as amended.

<sup>96</sup> “They might like to welcome the UK into their organization, although this British “swing-back” might not amuse the EU, whose sympathy could be more important to the EFTA States in the long term.” UNGERER, Johannes. *Consequences of Brexit for European Private International Law*. European Papers. 2019, Vol. 4, No. 1, p. 400.

<sup>97</sup> Brussels Convention, Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

<sup>98</sup> RAPHAEL, Thomas. *The Anti-Suit Injunction*. Oxford: Oxford University Press, 2008, p. 272. ISBN 978-0-19-928732-1.

<sup>99</sup> Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 30 October 2007 — Explanatory report by Professor Fausto Pocar (Holder of the Chair of International Law at the University of Milan) (“Pocar Report”), OJ C 319, para. 197, 198.; JOSEPH, David. *Jurisdiction and Arbitration agreements and their enforcement*. London: Sweet & Maxwell, 2010, p.369. ISBN 978-1-84703-897-5.

<sup>100</sup> Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters.

<sup>101</sup> Pocar Report, para. 197, 198.

Convention and Brussels I Regulation, both in regard to contracting and non-contracting states.<sup>102</sup>

Consequently, Lugano Convention itself promulgates an obligation of contracting parties “pay due account to the principles laid down by any relevant decision [...] by the courts of the States bound by this Convention and by the Court of Justice of the European Communities”<sup>103</sup> aimed to prevent different interpretation of corresponding provisions of Brussels Regulations and Lugano Convention.<sup>104</sup> This approach seeks “to arrive at as uniform an interpretation as possible”<sup>105</sup>. CJEU is therefore endowed with the interpretation power to Lugano Convention. Hence CJEU case law is precedential to Lugano Convention even when rendered based on corresponding Brussels regime articles.<sup>106</sup> However, CJEU ought to note non-EU member states when issuing a decision relating to the Lugano Convention.<sup>107</sup> Even considering such, it is highly improbable that the CJEU would revert its previous decisions in *Owusu*; thus, the *forum non conveniens* doctrine would remain inapplicable in the Contracting States.<sup>108</sup>

While this scenario has been assessed by English commentators to be the most feasible one, no one counted on the firm dissenting stance of the EU. In May 2021, the EU Commission issued its communication to the EP and EC<sup>109</sup> assessing the application of the UK to accede to the Lugano Convention and stating *inter alia* “EU should not give its consent to the accession of the United Kingdom to the Lugano Convention”<sup>110</sup>. In relatively short reasoning, the Commission stated that “current Contracting Parties [...] participate, at least partly, in the EU’s internal market, comprising of the free movement of goods, services, capital and persons”<sup>111</sup> and “Lugano Convention supports the EU’s relationship with third countries which have a particularly close regulatory integration with the EU”<sup>112</sup>. EU Commission further stated that the UK is (from the time of Brexit) an ordinary third country without a high level of mutual trust between Contracting parties and the UK since no economic interconnection based on the applicability of four freedoms is present.<sup>113</sup> Hence, the stance of the EU ought to be that any regulation for judicial cooperation between the UK and the EU is to be done via multilateral Hague Conventions.<sup>114</sup>

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<sup>102</sup> Art. 1 (1) and (2) Lugano Convention; *Pocar Report*, para. 14.

<sup>103</sup> Protocol 2, art. 1 Lugano Convention.

<sup>104</sup> Preamble and Protocol 2 of the Lugano Convention.

<sup>105</sup> *Pocar Report*, para. 77.

<sup>106</sup> *Ibid.*, para. 196, 197.

<sup>107</sup> *Ibid.*, para. 198.

<sup>108</sup> BRIGGS 2021, *op. cit.*, pp. 379.

<sup>109</sup> COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL EMPTY, Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention, COM(2021) 222 final (“*Communication*”).

<sup>110</sup> *Communication*, p. 2.

<sup>111</sup> *Ibid.*

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*, p. 3.

<sup>114</sup> *Ibid.*

It is consequently apparent that Lugano Convention will not be the applicable framework for EU-UK judicial matters. Hence Hague Conventions might remain as the most feasible solution.

## 5.2 Hague Convention 2005 and Forum Non Conveniens doctrine

Insofar as the international jurisdiction arising out of an exclusive choice of court clause<sup>115</sup>, however not to asymmetric<sup>116</sup> or non-exclusive clauses<sup>117</sup>, the Hague Convention 2005<sup>118</sup> applies. The UK has been a party to the Hague Convention 2005 through its membership in the EU, though, after the withdrawal from the EU, the UK has acceded to the Hague Convention 2005 in its own right on 28 September 2020. Hague Convention 2005 then entered into force on 1 January 2021.<sup>119</sup> Consequently, Hague Convention 2005 applies solely where an exclusive jurisdiction clause has been entered after the convention's entry into force in relation to the state granted exclusive jurisdiction.<sup>120</sup> However, the UK government believes otherwise, and the judicial outcome is uncertain.<sup>121</sup>

While Hague Convention 2005 framework might be of use to regain the power to issue injunctive measures, the same could not be said about staying jurisdiction of chosen court. Art. 5 (2) of the Hague Convention 2005 clearly states that “A court that has jurisdiction under paragraph 1 shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State.”<sup>122</sup> Any other Contracting state court must suspend or dismiss the proceedings.<sup>123</sup> Hague Convention 2005 thus employs a clear set of rules to prevent the frustration of litigation<sup>124</sup> in the chosen court by *forum non conveniens* doctrine<sup>125</sup>, and the court must

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<sup>115</sup> Much the same as The Convention on the Recognition and Enforcement of Foreign Arbitral Awards requires explicit consent to arbitration.; On further analysis of exclusivity see ZABLOUDILOVÁ, Kateřina. Choice of Court Agreements after Brexit. In ROZEHNALOVÁ, Naděžda. *Universal, Regional, National – Ways of the Development of Private International Law in 21st Century*. Brno: Masaryk University, 2020, pp. 287–288. ISBN 978-80-210-9496-3.

<sup>116</sup> For asymmetric choice of court clauses see further MALACHTA, Radovan. Prorogace soudu a asymetrické doložky v 21. století. In KORONCZIOVÁ, Andrea and Tibor HLINKA. *Mílniky práva v stredoEurópskom priestore 2019*. Bratislava: Univerzita Komenského v Bratislave, 2019, pp. 69–78. ISBN 978-80-7160-517-1.

<sup>117</sup> See exceptions to the general rule on exclusivity at art. 22 Hague Convention 2005.

<sup>118</sup> Convention of 30 June 2005 on Choice of Court Agreements.

<sup>119</sup> Art. 31 (2) of the Hague Convention 2005.; *Communication*, p. 3.; For the gap between accession and entering into effect see LEIN, Eva. Unchartered territory? A few thoughts on private international law post Brexit. In: A. Bonimi – G. P. Romano (eds.). *Yearbook of Private International Law*, Volume 17 (2015/2016). Lausanne: Swiss Institute of Comparative Law, 2017, p. 35 *et seq.*

<sup>120</sup> FITZGERALD, McCann. UK Application to Join Lugano Convention following Brexit: An Update. *Lexology* [online]. 2021 [cit. 19. 8. 2021]. Available at: <https://www.lexology.com/library/detail.aspx?g=82d63f4b-f470-4c7a-acf4-9bec870a8140>

<sup>121</sup> “Whilst acknowledging that the Instrument of Accession takes effect at 00:00 CET on 1 January 2021, the United Kingdom considers that the 2005 Hague Convention entered into force for the United Kingdom on 1 October 2015 and that the United Kingdom is a Contracting State without interruption from that date.” Declarations, Reservations, Depositary communications. *HCCH* [online]- 2020, [cit. 10. 8. 2021]. Available at: <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1318&disp=resdn>

<sup>122</sup> With an exception to internal allocation of judicial power. Art. 5 (3) (b) Hague Convention 2005.

<sup>123</sup> Art. 6 Hague Convention 2005.

<sup>124</sup> BRAND, JABLONSKI. *Op. cit.*, p. 208. CILE studies.

<sup>125</sup> Hague Conference on Private International Law. *Prel. Doc. No 26 of December 2004 - Explanatory Report on the preliminary draft Convention on exclusive choice of court agreements, drawn up by Trevor C. Hartley and Masato Doguchi*, 2004, para. 100.; KAMEL, Alexander. Cooperative Federalism: A Viable Option for Implementing the Hague Convention on Choice of Court Agreements. *The Georgetown Law Journal*, Georgetown: Georgetown

adjudicate the matter, no matter how sensible it could be to grant relief of its jurisdiction<sup>126</sup>. Consequently, public policy ground for refusal to recognize and enforce judgment<sup>127</sup> does not include invoking *forum non conveniens* defence<sup>128</sup>.

Notwithstanding the previous, limited applicability of *forum non conveniens* is conceivable through the negative scope. A state may refuse its jurisdiction should all parties to an international case be resident of the same Contracting State and “*the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State*”<sup>129</sup>. In such specific cases, the *forum non conveniens* doctrine may be applicable despite the art. 5(2) promulgation.<sup>130</sup> However, this hardly seems to be a proper use of *forum non conveniens* as it is not exercised against jurisdiction conferred by Hague Convention 2005 since the dispute does not fall within the positive scope. Hence the court applies *forum non conveniens* to otherwise conferred jurisdiction, should no other instrument prohibit so.

Additionally, Contracting State may declare limiting jurisdiction and refuse to exercise jurisdiction over disputes to which an exclusive choice of court agreement applies if “*except for the location of the chosen court, there is no connection between that State and the parties or the dispute*”<sup>131</sup>. Should such declaration be made, the neutrality of the Hague Convention 2005 and its purpose of predictability and certainty could be severely undermined.<sup>132</sup> However, the UK has not made any declarations pursuant to art. 19.<sup>133</sup> Hence it seems only a limited number of cases are eligible for stay of proceedings as being out of scope pursuant art. 1(2).

About the recognition and enforcement of judgments, there is very little to discuss. Should a judgment be given pursuant to Hague Convention 2005, other Contracting States are bound to recognize and enforce such judgment, which is in effect and enforceable in the state of origin<sup>134</sup> unless an exception can be found<sup>135</sup>. The Hague Convention 2005 stipulates 7 exceptions to the default rule of recognition and

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University Law Center, 2014, Vol. 102, p. 1827.; LANDBRECHT, Johannes. The Hague Conference on Private International Law: Shaping a Global Framework for Party Autonomy. *International Business Law Journal*. London: Thomson Reuters, 2017, Vol. 1/2017, p. 38.

<sup>126</sup> BRIGGS 2021, op. cit., p. 556.

<sup>127</sup> Art. 9(e) Hague Convention 2005.

<sup>128</sup> BRAND, JABLONSKI, op. cit., p. 209.

<sup>129</sup> Art. 1(2) Hague Convention 2005.

<sup>130</sup> PALERMO, Giulio. The Future of Cross-Border Disputes Settlement: Back to Litigation?. In: GONZÁLEZ-BUENO, Carlos. *40 under 40 International Arbitration*. Madrid: Dykinson, 2018, p. 364.

<sup>131</sup> Art. 19 Hague Convention 2005.

<sup>132</sup> PALERMO, op. cit., p. 367.; BERARD, Marie. Chapter 6: The Limits to the Parties' Free Choice of Jurisdiction – Is an Objective Link between the Parties' Selected Jurisdiction and their Dispute Required? A Review of the Approach of International Instruments and National Courts. In: AFFAKI, Bachir Georges and Horacio Alberto Grigera NAÓN (eds). *Jurisdictional Choices in Times of Trouble, Dossiers of the ICC Institute of World Business Law*. Paris: Kluwer Law International; International Chamber of Commerce. 2015, Vol. 12, p. 88.

<sup>133</sup> Declarations, Reservations, Depositary communications. *HCCH* [online]. 2020, [cit. 10. 8. 2021]. Available at: <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1318&disp=resdn>

<sup>134</sup> Art. 8 Hague Convention 2005.

<sup>135</sup> Ibid., Art. 9; For detailed comparison of refusal grounds to Brussels regime see MALACHTA, Radovan. Mutual Trust between the Member States of the European Union and the United Kingdom after Brexit: Overview. In VALDHANS, Jiří. *Brexit and its Consequences. COFOLA International 2020*. Brno: Masaryk University, 2020, p. 43–47. ISBN 978-80-210-9800-8.

enforcement to which all the court has facultative power to refuse recognition and enforcement.<sup>136</sup>

Considering the above, there exist only two possibilities to exercise *forum non conveniens* doctrine. One would require a declaration pursuant to art. 19 – something which has not been done. The second one requires a finding of the court that art. 1(2) is applicable. If so, the court would need to refuse jurisdiction conferred by the Hague Convention 2005 and consequently found otherwise applicable own jurisdiction, which would be stayed per *forum non conveniens* doctrine. The “*more convenient*” court would not then be able to confer its jurisdiction by Hague Convention 2005 since its jurisdiction is not based on an exclusive choice of court<sup>137</sup> made by the parties to the dispute.<sup>138</sup> Hence, recognition and enforcement of the given judgment of other state courts would have to be sought through different means.

### 5.3 Hague Convention 2019 and Forum Non Conveniens doctrine

While Hague Convention 2005 is a mixed convention, Hague Convention 2019<sup>139</sup> merely “*facilitates the effective international circulation of judgments in civil or commercial matters*”<sup>140</sup> Notwithstanding only 3 contracting parties to the Hague Convention 2019 to this date, the widely used Hague Convention 2005 has not come into force for mere 10 years either. The process of ratifications is rather slow, and this instrument cannot be dismissed simply due to the UK not being a party to it yet. Therefore, this section does assume the UK accedes to the Hague Convention 2019.<sup>141</sup>

Many problems regarding the applicability of *forum non conveniens* doctrine vanish since Hague Convention 2019 does not cover the allocation of international jurisdiction. However, would it be possible to allocate discrepancies related to *forum non conveniens* doctrine in recognition and enforcement of judgments?

In relation to the eligibility of judgment for recognition and enforcement<sup>142</sup>, any judgment given in dispute where the defendant “*argued on the merits before the court of origin without contesting jurisdiction*”<sup>143</sup> is eligible. Subparagraph (f) does not only contain objection to jurisdiction but also to its discretionary non-exercise.<sup>144</sup> Therefore, there seems to be no arising problem. Should the defendant fail to challenge jurisdiction or request to decline the exercise of jurisdiction, the defendant conceded to the court’s jurisdiction and consequently to recognition and

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<sup>136</sup> HARTLEY, Trevor and Masato DOGAUCHI. *Explanatory Report on the 2005 HCCH Choice of Court Agreements Convention*. The Hague: Permanent Bureau of the Conference, 2005, p. 69. ISBN: 978-1-78068-209-9.

<sup>137</sup> Art. 3(a) Hague Convention 2005.

<sup>138</sup> HARTLEY, DOGAUCHI, op. cit., pp. 49–52.

<sup>139</sup> Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.

<sup>140</sup> Judgment Selections. *HCCH* [online]. 2019 [cit. 23. 8. 2021]. Available at: <https://www.hcch.net/en/instruments/conventions/specialised-sections/judgments>

<sup>141</sup> Similar opinion is reflected in MALACHTA 2020, op. cit., p. 49.

<sup>142</sup> Art. 5(1) Hague Convention 2019.

<sup>143</sup> *Ibid.*, Art. 5(1)(f).

<sup>144</sup> GARCIMARTÍN, Francisco and Geneviève SAUMIER. *Explanatory Report on the 2019 HCCH Judgments Convention*. The Hague: Permanent Bureau of the Conference, 2020, p. 97. ISBN: 978-90-83063-32-4.



enforcement in the other Contracting States.<sup>145</sup> However, should either of the objections – jurisdiction *per se* or request to stay proceedings based on *forum non conveniens* doctrine – be successful, it will be until the other forum renders its judgment, which might need recognition and enforcement. In this case, an assessment to jurisdiction basis and relevant instrument for recognition and enforcement must be given.

Interestingly, notwithstanding art. 13(1) of the Hague Convention 2019 providing a fallback to *lex fori* of requested court in matters of recognition and enforcement (e.g., “*the law of the requested State determines whether recognition is automatic or requires a special procedure*”<sup>146</sup>), art. 13(2)<sup>147</sup> explicitly forbids the use of *lex fori forum non conveniens* doctrine in such recognition and enforcement proceedings<sup>148</sup>. Hence, *forum non conveniens* cannot be a ground for refusal to recognize and enforce judgment<sup>149</sup> satisfying at least one of the filters in art. 5 and general provisions of art. 4(3).<sup>150</sup>

No correlating provision is to be found in Hague Convention 2005, and one can only assume whether this might amount to the eligibility of the requested court under Hague Convention 2005 to refuse recognition and enforcement on the grounds that recognition or enforcement should be sought in another State. It is my belief that art. 13(2) Hague Convention 2019 is considering art. 4(1) second sentence of the Hague Convention 2019 redundant. If a judgment “*is eligible for recognition and enforcement within the scope of the Convention, and the criteria laid down in the following provisions of Chapter II are met, it is not open to a State to refuse recognition or enforcement on other grounds under national law*”<sup>151</sup>. Therefore, lack of similar provision within the Hague Convention 2005 as is embodied in art. 13(2) Hague Convention 2005 does not entail a right of requested Contracting state to refuse recognition and enforcement based on provisions of national law.

## 6 Conclusion

This paper aims to evaluate the feasibility of the *forum non conveniens* doctrine in light of Brexit. The question is not whether English courts might want to do so, as it is apparent there were times when those courts themselves were reluctant to exercise this power, however, whether they even have or would have the tools to do it.

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<sup>145</sup> ZHAO, Ning. Completing a long-awaited puzzle in the landscape of cross-border recognition and enforcement of judgments: An overview of the HCCH 2019 judgments convention. *Swiss Review of International and European Law*, Zürich: Swiss Association of International Law, 2020, Vol. 30, no. 3, p. 357.

<sup>146</sup> GARCIMARTÍN, SAUMIER, op. cit., p. 139.

<sup>147</sup> “*The court of the requested State shall not refuse the recognition or enforcement of a judgment under this Convention on the ground that recognition or enforcement should be sought in another State.*”

<sup>148</sup> GARCIMARTÍN, SAUMIER, op. cit., p. 142.

<sup>149</sup> ZHAO, op. cit., p. 350.; STEWART, David. The Hague Conference Adopts a New Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. *American Journal of International Law*, Cambridge: Cambridge University Press, 2019, Vol. 113, no. 4, p. 778.

<sup>150</sup> For specifics on acceptable bases of jurisdiction see NIELSEN, Peter Arnt. The Hague 2019 Judgments Convention - from failure to success? *Journal of Private International Law*, London: Taylor & Francis, 2020, Vol. 16, no. 2, pp. 205–246.

<sup>151</sup> GARCIMARTÍN, SAUMIER, op. cit., p. 79.

While doctrinal position regarding *forum non conveniens* is relatively coherent, EU law does not favour its applicability. Following its formation in *lis alibi pendens* cases *Logan v Bank of Scotland*, *Egbert v Short* and *In re Norton's Settlement*, the modern *forum non conveniens* doctrine and its test was established under another *lis alibi pendens* case *St. Pierre*. In conjuncture with anti-suit injunctions, both doctrines assessed their applicability on the vexatious and oppressive test. However, the judicial practice under *St. Pierre* was so radically plaintiff oriented that stay of proceeding on the ground of *forum non conveniens* became non-existent.

In 40 years following *St. Pierre*, the test for the grant of stay reformed from narrow interpretation to liberal use in *Atlantic Star* and from vexatious and oppressive factor to factor of appropriateness in *MacShannon*. Defendant argues for foreign dispute's centre of gravity. Plaintiff argues the injustice a stay would cause. The cause for injustice was then further specified in *Abidin Daver*.

Modern *forum non conveniens* was finally recognized as as-of-right in *Spiliada*, taking a position argued under *MacShannon* and *Abidin Daver*. The doctrine remains the same to this date.

The inherent power of English courts to stay proceeding on the grounds of *forum non conveniens* was exercised during UK's membership in the EU on multiple occasions until 2005 and CJEU's ruling in *Owusu*. CJEU went far and beyond to reject the application of *forum non conveniens*. CJEU held that while the international element is required under Brussels Convention, this does not have to be in the presence of more than one Contracting State (Member State under Brussels I and Brussels Ibis Regulation). Therefore, the Brussels regime applies if it is part of the *lex fori* of the court and the dispute is somehow international. Consequently, general jurisdiction conferred by the Brussels regime is mandatory and cannot be declined unless otherwise allowed by the Brussels regime, even when the other forum would be outside the EU.

English courts, nevertheless, refused to follow *Owusu* and followed *Re Harrods* to retain their authority to stay proceeding in favour of non-EU courts when no other Member State is involved.

The question is, then, what can be done with this situation. Speaking purely without any international cooperation in mind, should England want to be free to utilize *forum non conveniens*, they may do so by departing from established CJEU case-law and not concluding or acceding to any international convention. This approach is nowhere to be sound in the 21<sup>st</sup> century and does not promote transnational litigation. It is also something the UK does not want to do as a request for accession to Lugano Convention was deposited, and the UK became a contracting state of Hague Convention 2005 in its own right.

Lugano Convention framework, as part of the Brussels-Lugano zone, would ultimately ban the use of *forum non conveniens* in the same manner as adjudicated in *Owusu*. UK's accession to Lugano Convention also seems highly improbable since a unilateral agreement on new accessions is needed, and the EU refuses to allow UK to participate in the Lugano framework. This correspondingly answers hypothesis (b).

Being said that the UK has already acceded to Hague Convention 2005, what does that mean for *forum non conveniens*? Firstly, this applies solely to exclusive choice of court clauses, merely a part of how the jurisdiction can be conferred. In this narrow scope, the Hague Convention 2005 prohibits the use of *forum non conveniens*, neither in jurisdiction allocation nor in recognition and enforcement proceedings. The only exception to the general rule is a hypothetical declaration made by the contracting state regarding the link between the forum and parties of the dispute. The UK has not made such a declaration, which is deemed positively as this would undermine the purpose of the Hague Convention 2005.

Considering second of Hague instruments, Hague Convention 2019 does not regulate jurisdiction allocation, merely with recognition and enforcement of judgments. As *forum non conveniens* is mainly used to rebut the jurisdiction of the court, it is much less used in further proceedings. Presuming the UK accedes to Hague Convention 2019 since it is the most favourable instrument for recognition and enforcement available to date apart from the Brussels-Lugano zone, *forum non conveniens* cannot be a ground for refusal.

Following the expressed hypothesis, since accession to Lugano Convention seems to be ultimately off the table *forum non conveniens* may be exercised by English courts so long the suit was not brought to English courts pursuant exclusive prorogation clause. To retain some degree of international cooperation, at least recognition and enforcement of judgment wise, the UK must have confidence that the Hague Convention 2019 becomes a widely used instrument and accede to it as well. In regard to international jurisdiction, an exclusive prorogation is ultimately covered. However, an approach to the international allocation of the jurisdiction where jurisdiction was not exclusively prorogated still remains a mystery.