The problems of tactical litigation in the European Union: A case for a hybrid *forum non conveniens* & *lis pendens* model

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Mohammed Munna

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Abstract

In transnational commercial litigation involving state parties from multiple jurisdictions, disputes over jurisdiction often arise due to strategic manoeuvres by one party or state aimed at causing delays and disrupting the other party's case.[1] This practice is known as 'tactical litigation'.[2] Common law countries have come up with the forum non conveniens doctrine, whereas civil law countries have adopted the lis pendens rule as solutions to tackle this problem. Furthermore, the Recast Brussels Regulation of 2012 endeavours to counter tactical litigation by reinforcing the use of choice of court agreements and encouraging party autonomy.

Despite the existing mechanisms and regulations, some litigants have managed to exploit loopholes in the Recast Brussels Regulation and engage in abusive tactical litigation. Hence, the objective of this thesis is to propose a solution that combines the advantages of both the common law forum non conveniens doctrine and the civil law *lis pendens* rule to counter such abusive tactics. This harmonization will enhance flexibility, predictability, and certainty. The thesis will employ comparative, doctrinal, and case study approaches. The analysis of the European Court of Justice's ruling in the *Gasser* case will be used to examine the strict enforcement of the *lis pendens* rule, while the decision of the House of Lords in the *Spiliada* case will be used to illustrate the strict application of the *forum non conveniens* doctrine by the English courts. The strict interpretation of the *lis pendens rule* and the *forum non conveniens* doctrine has created opportunities for the use of tactical litigation in transnational commercial litigation.

[1] Marcus Quitanilla and Christopher Whytock, "The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law', [2012] 18 Sw. J. Int'l Law, 31
[2] Christopher, [n.2]; Julia Eisengraeber, "Lis alibi pendens under the Brussels I Regulation – How to minimise 'Torpedo Litigation' and other unwanted effects of the "first-come, first-served" rule" [2004], CELS, External Papers in European Law, No. 16

Statement of Originality

I, Mohammad Munna, confirm that the research included within this thesis is my own work or that where it has been carried out in collaboration with, or supported by, others that this is duly acknowledged below and my contribution indicated. Previously published material is also acknowledged below.

I attest that I have exercised reasonable care to ensure that the work is original and does not to the best of my knowledge break any UK law, infringe any third party's copyright or other Intellectual Property Right, or contain any confidential material.

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CHAPTER ONE – Background to the research study

1.1 Introduction

In international commercial matters, disputes are bound to occur, especially when it comes to violations of the terms in the agreement.[3] This is hold true in transnational commercial litigation where agreements involve parties from multiple jurisdictions.[4] An issue that frequently emerges in transnational commercial litigation is when parties or litigants in agreements employ abusive tactics to stall proceedings and undermine the opposing party's case.[5] The use of delay tactics in transnational commercial litigation has been branded "tactical litigation".[6] Tactical litigation is often utilized by unscrupulous litigation in transnational litigation, with the aim of causing frustration to the plaintiff who is innocent.[7]

On the other hand, torpedo action is also identified as a means of promoting tactical litigation. Torpedo action occurs where some parties opt for the jurisdiction of a slow-moving court as part of a tactical manoeuvre, thereby creating undue delays that prejudice the interests of the parties before the court. To stop abusive tactical litigation, common law countries developed the *forum non conveniens* doctrine and the civil law countries established the *lis pendens* rule.

[3] Michael Bonell, "The UNIDROIT Principles of International Contracts: Why? What? How?" [1995] 69 TUL L., Rev. 1121, 1123.
[4] Marcus Quitanilla and Christopher Whytock, "The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgements, and Foreign Law', [2012] 18 Sw. J. Int'l Law, 31.
[5] Christopher, [n.2]; Julia Eisengraeber, "Lis alibi pendens under the Brussels I Regulation – How to minimise 'Torpedo Litigation' and other unwanted effects of the "first-come, first-served" rule" [2004], CELS, External Papers in European Law, No. 16.
[6] Mario Franzosi, "Worldwide Patent Litigation and the Italian Torpedo" (1997), EIP Review, p. 382 at 384; Elsengraeber, (n.5).
[7] Ibid.

While the civil law *lis pendens* rule aimed to prevent multiplicity of actions, that is actions involving the same parties and cause of action,[8] the *forum non conveniens* doctrine, on the other hand, gives discretionary power to courts to determine whether there is an available forum that is adequate and convenient for parties in the proceedings.[9] Other potential solutions to address the problems of abusive tactical litigation involve the establishment of legal frameworks such as the Brussels I Regulation of 2001 and the Recast Brussels Regulation in January 2015. However, unscrupulous litigants have exploited loopholes in the civil law *lis pendens* rule and common law *forum non conveniens* doctrine, as tactics to delay proceedings in transnational litigation.[10] On other hand, even though legal frameworks were construed to stop abusive tactical litigation, non-compliance with exclusive jurisdiction clauses, strict interpretation of the *lis pendens* rule and non-compliance with choice of court agreements were identified as problems surrounding the legal frameworks which in turn promotes abusive tactical litigation.

Accordingly, this thesis seeks to propose a solution to remedy abusive practice of so-called tactical litigation in transnational commercial litigation. This solution is based on the harmonisation of benefits in the common law *forum non conveniens* doctrine and the civil law *lis pendens* rule. This is a hybrid model solution that focuses on resolving abusive tactical litigation in two stages: the jurisdictional stage and the enforcement stage. This thesis argues that harmonizing benefits in the *forum non conveniens* doctrine and the *lis pendens* rule will help to stop abusive tactical litigation and, in turn, promote party autonomy and choice of court agreements in transnational litigation. While other scholars have identified problems associated with tactical litigation and proposed the elimination of the *lis pendens* rule, no researcher has ever suggested the hybrid model. This argument is further discussed in chapters 1, 2, 6 and 7 in this thesis.

[8] Fabrizio Marongiu Buonaiuti, "Lis Alibi Pendens and Related Actions in Civil & Commercial Matters Within the European Judicial Area", [2009], Yearbook of Private Int'l Law, Vol. 11, pp. 511-564.
[9] Christopher Whytock, Roberson, and Cassandra Burke, "Forum Non Conveniens and Enforcement of Foreign Judgements" (2011), Faculty Publications, 40.
[10] Ibid, n.3.

This chapter provides an overview of the problems surrounding abusive tactical litigation, research questions and main arguments in this thesis. The problem associated with tactical litigation is outlined in subsection 1.2.1 and 1.2.2. It then discusses the question that needs to be considered as a response to these identified problems in section 1.3 and the rationale for asking this question and undertaking research into that area is discussed in section 1.5. It also provides a chapter outline for this entire work in section 1.6. Section 1.7 is a road map as to how the discussion of the research question is undertaken and provides an overview as to how the argument of this thesis will be undertaken.

The loopholes in the existing legal framework in the Brussels Regulation that promote abusive tactical litigation is discussed in section 1.2. This section also discusses mechanisms developed under the Brussels I Regulation to stop abusive tactical litigation in transnational commercial litigation are also discussed.

1.2 Background to the Research Study

There are several loopholes in the existing legal framework in the Brussels I Regulation that promote tactical litigation in transnational litigation. For instance, the strict interpretation of lis pendens rule provisions, and non-compliance with exclusive jurisdiction clauses, has strengthened the abusive use of tactical litigation to frustrate the adversary party in transnational litigation especially in relation to negation of party autonomy and choice of court agreement. These problems are further discussed under subsections 1.2.1, and 1.2.2 in this chapter.

Prior to the declaration of the Recast Brussels Regulations in January 2015[11], the coordination of jurisdiction, enforcement, and recognition of judgment in civil and commercial matters within the European Union (EU) and non-EU Member States was carried out under the Brussels I Regulation.[12] The Brussels I Regulation made provision for the lis pendens rule to support the coordination of judgments and to prevent the multiplicity of legal action by parties in commercial matters.[13] The scope and purpose

[11] Regulation (EU) No. 1215/2012 on Jurisdiction and recognition and enforcement of Judgements in civil and commercial matters (Recast).
[12] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
[13] Ibid.

of the *lis pendens* rule is aimed at preventing litigants from instituting two court proceedings and demanding that the court second seised should stay proceeding until the court first seised determines its jurisdiction particularly in a situation where proceedings involve the same parties and the same cause of action.[14]

In essence, the *lis pendens* rule is a mechanism developed by the European Commission (EC) to coordinate, control jurisdiction and enforce judgments within the EU Member States with a particular aim of preventing tactical litigation.[15] The *lis pendens* rule also deals with conflict of jurisdiction in which proceedings involving the same cause of action between the same parties is pending before courts of different Member states, by requiring that the court second seised should stay proceedings pending the court first seised determining its jurisdiction in the same matter.

Although the lis pendens rule seems to prevent the same cause of action from being litigated twice by ensuring the coordination of judgments within the EU , the rule has come under immense scrutiny for its role in facilitating tactical litigation.[16] Tactical litigation is a common phenomenon used within intra-EU commercial litigation to frustrate an innocent party from enforcing the judgment.[17] This occurs when a party in default (normally a defendant) chooses a court that is different from the court chosen in the choice of court agreement between the parties to become the court first seised in the matter.[18]

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[14] Fabrizio Marongiu Buonaiuti, 'Lis Alibi Pendens and Related Actions in Civil & Commercial Matters Within the European Judicial Area' (2009), Yearbook of Private International Law, Vol. 11, pp. 511-

[15] Huang Zhang, "The New *Lis Pendens* Regime in the Regulation Brussels I *BIS* and the Challenge Met by Chinese Jurisdiction", (2014) Revista Electronica De Estudios Internacionales (Zhang's view on *Lis pendens* rule "*Lis pendens* deal with the conflict of jurisdiction in which several proceedings involving the same actions between the same parties are brought before different state. To provide more safety to the parties and the judicial systems and avoid irreconcilable judgment, Regulation Brussels I established its own system trying to coordinate the judicial relations between the Member states").

[17] *Goshwk Dedicated v Life Receivables Ireland* [2008] IEHC 90; *Catalyst Investment Group v Lewisohn* [2010] Ch 218.

[16] Chrispas Nyombi, "Replacing *Lis pendens* with *forum non conveniens*: A viable solution to tactical litigation in the EU?" (2017) European Competition Law Review, Vol 38(11), pp. 491-500

[17] Case C-159/97 *Trasporti Castelletti v Hugo Trumpy* (1999) ECR I-1597.

[18] Isabella Betti, "The Italian torpedo is dead: long live the Italian torpedo", (2008) 3 JIPLP, pp 6-7 (Betti explains that "The potential infringer commences proceedings in an EU member state with a notoriously slow court system, seeking a declaration of non-infringement and invalidity in respect of the part of the European patent granted in that member state and, also a declaration of non-infringement of the counterparts in other member states. While the action is pending, the patentee is prevented from pursuing

Similarly, the use of tactical litigation also occurs before a claimant files a matter before the pre-agreed court in the contract agreement, thereby constituting not only breach of contract but also creating an opportunity to delay proceedings that would have taken place in the court with exclusive jurisdiction in accordance with the choice of court agreement.[19] Consequently, action brought by the claimant over the breach of terms in the agreement would be barred by the prior action in the court first seised according to provision in Article 27 of the Brussels I Regulation.[20] Article 27 of Brussels I Regulation provides as follows:

> …[w]hen a court of Member State has been first seised in a matter; any other courts seised in the same matter must on its own motion stay proceedings until the court first seised determines its own jurisdiction in the matter...[21]

This provision raised questions as to the effectiveness of the lis pendens rule as a mechanism put in place to coordinate, control jurisdiction and enforce judgment within the EU Member States. Although the Recast Brussels Regulation has been constructed in a manner to prevent the abusive use of tactical litigation, the Recast Brussels Regulation left out some other vital topics, for instance related matters.[22]

Sarah Garvey[23] noted that the provision for deferring to the jurisdiction of third states in the Recast depicted probable incompatibility in the *lis pendens* rule and *forum non conveniens* doctrine particularly in related matters. According to Garvey, the provision for deferring to the jurisdiction of third state in the Recast Regulation suggests that where litigation is pending before a more appropriate forum that is outside of the EU,

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any claim in other member states for infringement of the counterparts of the patent." Such dilatory tactics has over time expanded into the realm of other civil and commercial disputes. These ploys have been first used in Italy, known for particularly slow court system, thus it soon became known as "Italian torpedo") pg. 6.

[19] Delia Ferri, "An End to Abusive Litigation Tactics within the EU? New Perspectives under Brussels I Recast", [2013-2014], 1 Irish Bus. L. Rev. 21.

[20] Ibid, (n.11); Case C - 116/02 *Erich Gasser GMbH* v. *MISAT Srl* (2002).

[21] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal L 0-12, 16/01/2001 P. 0001 - 002, art 27.

[22] Sarah Garvey, "Reform of the Brussels Regulation: are we nearly there yet?" Allen and Overy, available at http://www.allenovery.com/publications/en-gb/Pages/Reform-of-the-Brussels-Regulationare-wenearly-there-yet.aspx; *Goshawk Dedicated v Life Receivables Ireland* [2008] IEHC 90; *Catalyst Investment Group v Lewisohn [2010] Ch 218*.

[23] Ibid

the third state courts must accept jurisdiction to hear identical cases. This provision does not give regard to the courts of a non-Member State. Even though the abolition of this requirement was considered in the Brussels Recast Regulation, it was not adopted. Accordingly, Garvey stated that this provision would produce conflicting judgments in transnational litigation particularly in a situation where there are identical or related matters.

However, when a court is presented with a case that is closely related to another case that is already being considered by a court in another Member State, and a ruling in that case could have an impact on the parties involved, it is uncertain what actions the court should take. Also, there was no provision on what a court should do when the matter is involving a non-Member State. An example of such a situation is the uncertainty surrounding the enforcement of judgments in courts of different Member States and whether the courts of other EU countries would accord mutual respect to judgments made by the courts of the UK, considering that the UK is no longer a member of the European Union. This situation would give opportunities for the use of tactical litigation in transnational litigation.

The next subsection discusses how the *lis pendens* rule under the Brussels I Regulation promotes tactical litigation, particularly the strict interpretation of Article 27 of Brussels I Regulation (now Article 29 under Recast Brussels Regulation). Other problems associated with the *lis pendens* rule discussed in this subsection include the use of torpedo action as a delay tactic in transnational litigation. By using case study methodology, the decision of the Court of Justice of the European Union (CJEU) in the case of Gasser is used to illustrate how the strict interpretation of the *lis pendens* rule provisions promoted tactical litigation and encouraged the use of torpedo actions to delay court proceedings in transnational commercial litigation.

1.2.1 The *Lis pendens* rule promoting tactical litigation.

As earlier noted, there were several attempts under the Brussels I Regulation to tackle the abusive use of tactical litigation through the *Lis pendens* rule provisions. However, this rule has further promoted tactical litigation particularly due to the strict interpretation of Article 27 of the Brussels I Regulation by the courts of the Member States (MSs). Strict interpretation of article 27 is used by the courts of the MSs to place the *Lis pendens* rule over the choice of court agreement and party autonomy.[24] As a result of the strict interpretation of the *Lis pendens* rule provisions, this has given rise to the use of torpedo action[25] to delay proceedings in transnational litigation. The term torpedo action relates to a common practice where litigants institute an action in a court that is known for slow proceedings.[26]

The unanimous decision of the CJEU in the *Gasser's* case[27] illustrated the strict interpretation of the *Lis pendens* rule. The case involved an Italian buyer (MISAT) and Austrian seller (Gasser).[28] In this case, the parties already agreed through the choice of court agreement to give exclusive jurisdiction to the Austrian court to decide a dispute arising between the parties in accordance with the provision of article 17 of the Brussels convention. However, the Italian buyer (MISAT) brought proceedings in the Italian court (a court different from the one in the choice of court agreement) for a court ruling declaring that the contract between the parties had terminated *ipso jure* and, alternatively, that the contract had terminated due to breaches of contractual terms[29] in the agreement between the parties.

The Austrian seller (Gasser) on the other hand, brought action against MISAT before the Austrian national court (the court chosen by the party in the choice of court agreement)[30] demanding payment of an outstanding invoice. In addition, *Gasser* also

[24] Chrispas Nyombi (n.16).
[25] Mario Franzosi, 'Worldwide Patent Litigation and the Italian Torpedo', (1997) E.I.P.R, 382.
[26] Ibid.
[27] Case C - 116/02 *Erich Gasser GMbH* v. *MISAT Srl* (2002)
[28] The fact in the *Gasser's* case is further discussed in the chapter five in this thesis.
[29] A breach of contractual terms is a material non-compliance with terms in a contract agreement between parties.
[30] Landesgericht, a regional court, Feldkirch, Austria.

contended that by virtue of the choice of court agreement between the parties, the court with an exclusive jurisdiction is the Austrian national court. The Austrian national court (Landesgericht) affirmed its own jurisdiction in the case on the ground of place of performance in the contract. However, it went to stay proceedings in the matter pending when the *Tribunale Civile e Penale di Roman* (an Italian court first seised in the matter) determined its jurisdiction in accordance with the provision in Article 21 of the Brussels Convention.

In intra-European civil and commercial matters, the term jurisdiction refers to the right conferred on a court of a Member State to hear a matter arising between parties to the agreement.[31] As a general term, jurisdiction simply refers to the right of a court to decide on a matter brought before it.[32] Jurisdiction can be classified into two (2) categories. That is, jurisdiction in *personam* and jurisdiction in *rem*.[33] Jurisdiction in *personam* refers to the power of the court over a person or legal entity, such as corporations. Jurisdiction in *rem* on the other hand refers to the power of a court over immovables, property and/or chattels. A court needs to have jurisdiction over a matter for a party to be bound by an order of that court.

On the other hand, the *lis pendens* rule have been criticised on the ground that the strict application of the rule under the Brussels I regulation promoted abusive use of tactical litigation.[34] Mario Franzosi argued that the *lis pendens* rule gave rise to the uses of torpedo actions as a tactic to delay proceedings in transnational litigation.[35]In addition, the *lis pendens* rule is also criticised for the creation of jurisdictional conflicts in commercial matters.[36] Adrian Briggs argued that, "the Brussels I Regulation was organised on the grounds of a high degree of uniformity, and a low degree of judicial discretion, in its application, also, the principle of legal certainty does not seem to

[31] Morris Cohn, 'Jurisdiction in Actions in Rem and in Personam', (1929), WULR Vol. 14, Issue 2.
[32] Ibid.
[33] Ibid.
[34] Cachia P, "Recent Developments in the Sphere of Jurisdiction in Civil and Commercial Matters" (2011) Elsa Malta Law Review 69, 77.
[35] Frazonzi, (n 24).
[36] Steinle and Vasiliades E., "The Enforcement of Jurisdiction Agreements under the Brussels I Regulation: Reconsidering the Principle of Party Autonomy", (2010) JPIL, 565, 587.

encourage jurisdictional discretion".[37] Adrian Briggs added that under the Chapter II of the Brussels I Regulation, the English courts have no discretionary power to determine their jurisdiction over a matter brought before the courts. For instance, where a court is first seised by virtue of claimants instituting a claim, the judge must hear the matter without exercising its discretionary power over the matter.

However, under the common law, a court of a member state has inherent power to stay proceedings on the grounds of *forum non conveniens.* The inherent power is different from the inherent jurisdiction of the High Court, although the two inherent powers to adjudicate or not to adjudicate are somewhat related.[38] According to Adrian Briggs, it is stated that where jurisdiction is imposed by legislation which gives effect to an international agreement, such jurisdiction is often a different kind. This raised the question as to whether the international agreement or the implementing legislation allows or accommodates the exercise of a jurisdictional discretion.[39]

On the other hand, while analysing the nature of jurisdictional rules made under the Brussels I Regulation, Adrian Briggs stated that the Brussels I Regulation made no provision for cases where the proceedings involve rights in *rem* over a land in a non-Member State. In addition, there was no provision in the Brussels I Regulation where a court seised can use discretionary power to make decisions for a matter that is not expressly stated in the Regulation. The fact that no provision was made in the Brussels I Regulation as to the use of discretionary power, therefore, calls for interpretation by the ECJ.[40] Adrian Briggs noted that the provision in the Brussels I Regulation on discretionary power did not refer to a non-Member state court.

[37] Adrian Briggs, *Civil Jurisdiction and Judgments*, (2015), Informal Law from Routledge, 6th ed, ppg 349.
[38] Ibid.
[39] Adrian Briggs, "Civil Jurisdiction and Judgments", (2015), Informal Law from Routledge, 6th ed, CRC Press, p. 349.
[40] Ibid.

Another problem associated with the *lis pendens* rule is in relation to the use of "Italian torpedo".[41] Italian Torpedo is a procedural tactic that is commonly used in intra-European commercial litigation[42] by litigants in transnational litigation (often in breach of a choice of court agreement) to delay court proceedings.[43] In transnational litigation, Italian torpedoes do not seem to be a new trend. Chrispas Nyombi stated that the use of tactical litigation within intra-European civil/commercial litigation has been a source of academic concern for decades.[44] In practice, legal practitioners often used the Italian torpedo while relying on the provision in Article 27 of the Brussels I Regulation, which conferred jurisdiction on the court that is first seised. On the other hand, in international commercial matters, parties prefer to institute an action in the court of a Member State whose legal system is known to be slow, for example, Italy and Greece. This is known as "Italian torpedo".[45]

The term "torpedo" was first recognised by Mario Franzosi, in a paper titled "Worldwide Patent Litigation and the Italian Torpedo".[46] In the paper, Mario Franzosi coined the word "torpedo" under intellectual property disputes where a party that is infringing a patent commences proceedings for a declaration before a slow court. He stated that Article 18(1) of the Brussels Regulation provides that proceedings may be brought against the other party to a contract with a consumer in a Member States court where the party is domiciled or the court where the consumer is domiciled. Actions can only be brought against the consumer where he is domiciled. Franzosi stated that, for justice to be served, the regulation adopted a rule that when the jurisdiction of a court first seised has been established in commercial matters, other courts are required to stay proceedings in the matter.[47]

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[41] Mario Franzosi, 'Worldwide Patent Litigation and the Italian Torpedo' [1997] E.I.P.R. 382

[42] Franzosi, (n 24) (The scholar observed that Italian proceedings are more likely to create "outrageous" waste of time).

[43] Ibid.

[44] Chrispas Nyombi, "Replacing *Lis pendens* with *forum non conveniens*: A viable solution to tactical litigation in the EU?" (2017) European Competition Law Review, Vol 38(11), pp. 491-500.

[45] The term "Italian torpedo" was coined by Mario Franzosi. For more detailed discussion, see Franzosi, "Worldwide Patent Litigation and the Italian Torpedo", [1997] 19 European Intellectual Property Review 382.

[46] Franzosi, M. 'Worldwide Patent Litigation and the Italian Torpedo' [1997] 7 European Intellectual Property Review.

[47] Recast Brussels Regulation 2012, Article 18(1).

In addition, Franzosi also provide an analogy between the *lis pendens* rule and a convoy of ships. Accordingly, it was stated that a convoy goes at the same speed as the slowest ship even though it can go faster. And, where a ship has technical problems, other ships should stay and wait until it is fixed. This analogy was used as a justification for the delay and abusive practices embedded in Italian torpedo. In a similar view, Andrej Stanko[48] observed that some techniques could amount to the abuse of the *lis pendens* rule. For instance, the Brussels regime stated that claimants may sometimes choose to sue the infringing party before different national courts. This suggests that the claimants can choose to sue where the defendant is domiciled or where the harmful event occurred. This sometimes leads to forum shopping by the infringed party. According to Stanko, the infringed party often used Italian torpedo as a way of seeking a favourable outcome or to slow the process of the proceedings.[49]

However, due to the rigidity of the *lis pendens* rule, claimants cannot file a concurrent proceeding in any other court covered by the Brussels Regime. As a result, the claimant is advised under the Regulation to file an action as soon as possible to prevent parallel defensive proceedings. Other scholars, such as David Kenny and Rosemary Hennigan, also analysed the problems associated with Italian torpedoes especially on how it affects litigation processes. [50] Kenny and Hennigan observed that notwithstanding the existence of a valid agreement between the parties, when an action is filed in Italy, other courts seised of the same matter would stay proceedings pending when the Italian court established jurisdiction in the matter.[51]

The Italian court with their slow litigation processes, often takes a longer time to determine its jurisdiction to hear the matter. According to Kenny and Hennigan, the implication of such delay is that it would create significant advantage to one party while causing significant unfairness to the other. However, Advocate General P. Léger held that the Convention contains no provision where a Court may derogate from the

[48] Andrej Stanko, "Cross-border "torpedo" litigation", (2011), The common law review.
[49] Stanko (n. 47).
[50] David Kenny and Rosemary Hennigan: "Choice-Of-Court Agreements, The Italian Torpedo and The Recast of The Brussels I Regulation", (2015) ICLQ Vol 64, pp 197-209.
[51] Ibid.

proceedings before the courts in Contracting States where a court first seised is established because of the length of proceedings. It was held that an interpretation of Article 21 of the Brussels Convention to read that a court may derogate from the proceedings in the court first seised largely due to delay in the court procedure would be manifestly contrary both to the letter and spirit and to the aim of the Convention.[52]

Aside from the delay tactic in the use of torpedo action, non-compliance with the exclusive jurisdiction clause is another problem which promotes tactical litigation in transnational litigation. The next subsection discusses how non-compliance with the exclusive jurisdiction clause promotes tactical litigation in civil and commercial litigation.

1.2.2 Non-compliance with the exclusive jurisdiction clause

The *lis pendens* rule under the Brussels Regulation has led to noncompliance with the exclusivity of jurisdiction clauses in civil and commercial contracts particularly with the provision under Article 27 of Brussels I Regulation, which gives power to courts and litigants to neglect the exclusive jurisdiction of courts selected in the choice of court. The Brussels I Regulations were designed to address the problem of multiple court actions and support the principle of *res judicata*[53] through the *lis pendens* rule. However, in practice, some parties have misused Article 27 as a tactic to deprive a court with exclusive jurisdiction designated in an agreement.

As a result, the provision has been used for strategic litigation, which contradicts the original purpose of reducing the number of court cases. In summary, the provision's actual use diverges from its intended purpose, leading to tactical litigation instead of reducing multiple court cases.[54] According to Nyombi, even though parties may agree to confer exclusive jurisdiction on a specific court, which is the essence of choice of court agreements, Article 27 of the Brussels I Regulation allows litigants and courts of

[52] Case C - 116/02 *Erich Gasser GMbH* v. *MISAT Srl* (2002)
[53] Compare Ernst Schopflocher, "What is a Single Cause of Action for The Purpose of The Doctrine of Res Judicata?" (1942) 31 Or. L. Rev. 319; Allan Vestal, "Res Judicata/Claim Preclusion: Judgment for The Claimant", (1967) 62 Nw. U. L. Rev. 357.
[54] Chrispas Nyombi, Tom Mortimer & Rhidian Lewis, "Italian torpedoes in the shadow of the Recast Brussels Regulation 2012" (2015) ECLR 36 (6) 263, 264.

Member States to override these agreements. As a result, the provision effectively undermines the purpose of choice of court agreements.

In *Websense International Technology v Itway SpA*,[55] the court held that the court first seised had jurisdiction over any court. In the *Websense* case, the parties had agreed to confer exclusive jurisdiction on an Irish court to resolve any disputes arising from their agreement, as specified in their choice of court agreement. However, when a dispute did arise, one of the parties initiated legal proceedings in the Italian Court, which then became the first court to hear the case. In summary, despite the parties' choice of court agreement, one of the parties chose to initiate proceedings in a different court, resulting in the Italian Court becoming the first court to handle the dispute, rather than the Irish court that was initially designated in the choice of court agreement.[56]

The court held that the court that was first seised to hear the case had jurisdiction.[57] The Irish court's proceedings were stayed until the Italian court determined its jurisdiction in the matter. Judge McGovern explained that the Italian court was the first to hear the case, despite the parties' choice of court agreement designating the Irish court, indicating that the court did not consider the parties' autonomy or the importance of their agreement. In summary, the court's decision suggests that the court is not bound by the parties' choice of court agreement and does not recognize their autonomy to select a court for dispute resolution.

Overriding the choice of court agreements through Article 27 of the Brussels I Regulations defeats the purpose of the *lis pendens* rule and makes parties insecure. This also raises fundamental question, such as the possibility of the first court seised losing jurisdiction, which would lead to a waste of time and resources. For any legal system to provide justice, courts should consider factors such as parties' agreements and their domicile when determining jurisdiction. However, the Brussels I Regulation does not

[55] *Websense International Technology Limited v Itway Spa* [2014] IESC 5, 1 Irish Bus. L. Rev. 71 (2013-2014).
[56] Ibid.
[57] *Websense International Technology Ltd v. Itway SPA* [2014] SC (Appeal No. 38/2013).

seem to consider all these conditions.[58] The EU has taken note of the problems caused by tactical litigation and the shortcomings of the Brussels I Regulation. As a result, they have introduced the Recast Brussels Regulation,[59] which has several consequential amendments to address these issues. For example, the new regulation recognises choice of court agreements through Article 31,[60] indicating that parties' agreements on jurisdiction are now given more weight. This new development shows the EU's commitment to resolving jurisdictional issues and ensuring that parties have a more predictable and certain legal environment when resolving disputes.

Article 31 in the new Recast Brussels Regulation provides that:

> …Without prejudice to Article 26, where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised declares that it has no jurisdiction under the agreement… [61]

While recognizing the choice of court agreement is a positive step in the Recast Brussels Regulation, it is crucial to acknowledge that other factors should be considered when determining jurisdiction. The principle of *forum non conveniens* which is still used in the United Kingdom and the United States, highlights this fact. This principle suggests that courts should consider the forum with the most connection to the subject matter of the dispute between the parties. In other words, courts should not rely solely on the choice of court agreement, but also consider other factors such as the location of the evidence and witnesses, applicable law, and the convenience of the parties. By adopting this principle, courts can ensure that the most appropriate forum hears the dispute, providing a fair and just resolution for all parties involved.

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[58] Sarah Garvey and Karen Birch, "Brussels Regulation (recast): an update"18 March (2018) [64] Regulation (EU) No. 1215/2012 on Jurisdiction and recognition and enforcement of Judgements in civil and commercial matters (Recast), art 31.

[59] Regulation (EU) No. 1215/2012 on Jurisdiction and recognition and enforcement of Judgements in civil and commercial matters (Recast), art 31.

[60] Ibid

[61] Regulation (EU) No. 1215/2012 on Jurisdiction and recognition and enforcement of Judgements in civil and commercial matters (Recast), art 31.

However, the EU court has criticized the use of *forum non conveniens* in the *Owusu v Jackson*[62] case and has placed greater importance on the principle of comity and respect over the principle of justice. This means that the court prioritizes showing respect to other countries and their legal systems over ensuring justice in individual cases. *Lis pendens*, which gives exclusive jurisdiction to a particular court and overrides a valid choice of court agreement, can be seen as a first-come, first-served regime that undermines contractual agreements. [63] In contrast, while the *lis pendens* rule seems to be eliminated under the Recast Brussels Regulation, this thesis examined whether Article 31 (2) of the Recast Brussels Regulation applies to a hybrid or asymmetric jurisdiction clause.

On the other hand, it is uncertain whether civil law countries will adopt the *forum non conveniens* doctrine. The EU appears to believe that this doctrine could lead to inconsistent decisions due to its discretionary nature. [64] However, failure to comply with exclusive jurisdiction clauses has created opportunities for strategic litigation that ignores the terms of jurisdictional clauses negotiated in good faith as part of existing contracts. The notion of exclusive jurisdiction is well established in EU law. Article 17 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 "the Brussels Convention", the forerunner of Article 25 of Brussels 1 Recast, provides in its opening words, as amended:

> …[I]f the parties, one or more of whom is domiciled in a Contracting State, have agreed that a court or the courts of a Contracting 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 exclusive jurisdiction. Such an agreement conferring jurisdiction shall be either: (a) in writing or evidenced in writing…[65]

[62] C-281/02 [2005] ECR I-1383.
[63] Andre Stanko, "Cross-Border Torpedo Litigation" (2014) Common Law Journal, 34(4) 21.
[64] Nyombi (n. 42).
[65] Article 17 Brussels Convention.

Other provisions of the Brussels Convention regarding *lis pendens* rule was Article 21, which stated that:

> …[W]here proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court…[66]

The approach of the Brussels Convention in Articles 17 and 21 was carried through to Articles 23 and 27 respectively of the Council Regulation (EC) 44/2012 of 22 December 2000, also known as Brussels 1 Regulation. Jurisprudence on exclusive jurisdiction can be traced back to the decision of the English courts in *Continental Bank NA v. Aeakos Compania Naviera SA*[67], where it was held that that under the Brussels Convention, the court designated under a clause agreed by contracting parties as having jurisdiction should have priority and that the question of a stay on its part did not arise.

In contrast, Article 27 of the Brussels I Regulation did not prioritise binding contracts or choice of court agreements between parties. This went against the idea of party autonomy and the importance of contracts. Although the *lis pendens* approach in Article 27 was meant to preserve mutual trust and respect among courts in Member States, it ultimately undermined the principles of fairness and justice that form the basis of the law. In 2012, the European Commission proposed improving the effectiveness of choice of court agreements, as many stakeholders supported this approach. This would align with the system established by The Hague Convention on Choice of Court Agreements.

[66] Article 21 Brussels Regulation.
[67] *Continental Bank NA v. Aeakos Compania Naviera SA* (1994) QB, 588

The EU has adopted The Hague Convention through the Council Decision 2014/887/EU. The Recitals to the Decision state that the adoption of Brussels 1 Recast paved the way for the approval of The Hague Convention, as it ensured coherence between the rules of the EU and the Convention. This made it important to strengthen the choice of court agreement in subsequent reforms, in order to respect the sanctity of contracts. As a result, in the early 2010, the European Commission drafted a proposal to recast the Brussels I Regulation in order to achieve this goal.

The European Commission drafted proposal stated as follows:

> …[T]he efficiency of choice of court agreements needs to be improved. Currently, the Regulation obliges the court designated by the parties in a choice of court agreement to stay proceedings if another court has been seised first. This rule enables litigants acting in bad faith to delay the resolution of the dispute in the agreed forum by first seizing a non-competent court. This possibility creates additional costs and delays and undermines the legal certainty and predictability of dispute resolution which choice of court agreements should bring about….

1.3 The solutions offered under the Recast Brussels Regulation

The Recast Brussels Regulation of 2012[68] was created to replace the 2001 Brussels I Regulation and improve the operation of choice of court agreements within the EU. It also aimed to strengthen the *lis pendens* rule to reduce the possibility of tactical litigation. Recital 19 of the Regulation provides that party autonomy should be respected if it does not conflict with the exclusive grounds of jurisdiction established by the Regulation. [69] Recital 21 mentions the importance of harmonious administration of justice and the need to prevent concurrent proceedings and conflicting judgments in different Member States. [70]

[68] Regulation (EU) No. 1215/2012 on Jurisdiction and recognition and enforcement of Judgements in civil and commercial matters (Recast) (Hereinafter known as the Recast Regulation).
[69] Regulation (EU) No. 1215/2012 on Jurisdiction and recognition and enforcement of Judgements in civil and commercial matters (Recast), Recital 19.
[70] Article 21, Recast Brussels Regulation.

The purpose of these provisions on exclusive jurisdiction clauses is set out in Recital 22. Recital 22 provides that in order to improve the effectiveness of exclusive choice of court agreements and prevent abusive litigation tactics, an exception to the general *lis pendens* rule must be provided. This exception applies when a court that is not designated in an exclusive choice of court agreement has already started proceedings, and the designated court is subsequently seised of proceedings involving the same cause of action and between the same parties. In this situation, the court that was first seised should be required to suspend its proceedings as soon as the designated court is seised and until the designated court declares that it has no jurisdiction under the exclusive choice of court agreement. This exception helps to deal with concurrent proceedings and ensures that the designated court could declare its jurisdiction under the exclusive choice of court agreement.

The purpose of the exception to the *lis pendens* rule is to give priority to the designated court to decide on the validity of the exclusive choice of court agreement and its application to the dispute at hand. The designated court can proceed with the case regardless of whether the non-designated court has already ordered a stay of proceedings. However, this exception does not apply to situations where there is conflicting exclusive choice of court agreements or where the designated court has been seised after a non-designated court. In these cases, the general *lis pendens* rule of the Regulation should be followed. [71]

Further to the statement above, substantive provisions in Brussels 1 Recast are found in part, in the opening words of Article 29 "without prejudice to Article 31(2)", as well as in the new Articles 31(2) and (3) respectively. These Articles fall within Section 9 of the Regulation, entitled "*Lis Pendens*-related actions".

[71] Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (Recast Brussels Regulation) regulates jurisdiction and the recognition and enforcement of judgments between EU Member States.

Article 29(1) provides:

> …[W]ithout prejudice to Article 31(2), where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established...[72]

Reform to the operation of the *lis pendens* rule and choice of court agreement was achieved under article 31(2).

Article 31(2) states that:

> …[W]ithout prejudice to Article 26, where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on basis of the agreement, and declares that it has no jurisdiction under the agreement…[73]

The Recast Regulation strengthened the choice of court agreement by rendering the "first in time rule" subject to the conditions laid out in agreement. This meant that the presence of a valid choice of court agreement, even if a Member State court is first seised, the court second seised can still hear the matter.[84] From the outset, such reform would reduce the race to court and therefore reduce scope for triggering the delay.

Equally, Article 31(3) states that:

> "Where the court designated in the agreement has established jurisdiction in accordance with the agreement, any court of another Member State shall decline jurisdiction in favour of that court."[74]

[72] Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), article 29 (1).
[73] Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), article 31 (2).
[74] Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), article 31 (3).

Section 7 under the Brussels 1 Recast provides for "Prorogation of jurisdiction". Another provision within section 7 is Article 25, which is essentially identical to Article 23 of Brussels 1 Recast. Article 25 only made provision as to the effect that it is the law of the chosen court which should determine the substantive validity of the jurisdiction agreement.

Article 25(1) provides:

> …[I]f 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…[75]

Furthermore, it was also provided that: The agreement conferring jurisdiction shall be either: (a) in writing or evidenced in writing;[76] (b) in a form which accords with practices which the parties have established between themselves; [77] or (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts.[78]

On the face of these provisions, they appear to limit tactical litigation. However, despite the reform, there remains scope for tactical litigation. A reform was made and enforced in January 2015. There is significant change in the Recast Regulation aimed to resolve cases where the Italian *torpedo* is used to frustrate a choice of court agreement. Article 31 (2)[79] made provision for an asymmetric jurisdiction clause which gives one party,

[75] Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), art 25 (1).
[76] Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), art 25 (1) (a)
[77] Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), art 25 (1) (b)
[78] Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), art 25 (1) (c)
[79] Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), art 31 (2)

usually a bank, the right to sue the other party, generally a borrower, in any jurisdiction but, on the other hand, prevents the borrower from taking proceedings in other jurisdiction other than the court with an exclusive jurisdiction.

There are some concerns with the solution adopted in the Recast Brussels Regulation for dealing with tactical litigation. One potential problem is that the exception to the *lis pendens* rule only applies when the designated court has been seised subsequently to a non-designated court. This means that if a party wants to engage in tactical litigation, they can do so simply by bringing their claim in a non-designated court before the designated court has been seised. Additionally, the exception only applies to exclusive choice of court agreements, which means that non-exclusive agreements are not covered. This could create a situation where a party with a non-exclusive agreement could still engage in tactical litigation by bringing their claim in a non-designated court and then arguing that the agreement does not apply.

Furthermore, the designated court is not required to consider the question of whether there is an exclusive choice of court agreement until after it has been seised, which means that there could still be a delay in the resolution of the dispute. This could be particularly problematic in cases where time is of the essence. In addition, the *lis pendens* rule could also promotes torpedo action, which would frustrate the choice of court agreements or allows troublesome and pointless delays to litigation processes taking place in the appropriate forum.[80]

These problems are illustrated in the case of *Websense International Technology v Itway SpA*.[81] The position of the ECJ in the case was based on cooperation, mutual trust, and respect between courts of Member States.[82] Recital 26 of Recast Brussels Regulation provides that mutual trust must be guaranteed amongst the Member States

[80] (Recast Brussels Regulation) regulates jurisdiction and the recognition and enforcement of judgments between EU Member States.

[81] *Websense v. Itway Spa* [2014] IESC 5.

[82] Recital 26 of the Recast Brussels Regulation. Recital 26 provides that: …[M]utual trust in the administration of justice in the Union justifies the principle of mutual that judgements given in a Member State should be recognised in all Member States without the need for any special procedure. In addition, the main aim of making cross-border litigation less time-consuming and costly justifies the abolition of enforceability prior to enforcement in the Member State addressed. As a result, a judgement given by the courts of a Member State should be treated as if it had been given in the Member State addressed…

in the administration of justice without recourse or the need for any special procedures.[83] Anything short of that would amount to being incompatible with the general scheme of the Regulation. However, the courts tolerance for Italian *torpedo* was very problematic. Italian torpedo allows parties to frustrate the choice of court agreement and to exploit the mechanisms put in place by the Regulation for litigious advantage.[84] The Recast Brussels was created to give parties the right to choose for themselves what jurisdiction was to govern their dispute and this choice is respected. As stated by Hartley, the decision of the ECJ in the *Gasser* case has seriously jeopardized the effectiveness of choice of court agreements in the European Union.[85]

It can be argued that the Recast Brussels Regulation was a necessary response to the problem of Italian torpedo action, as it sought to strengthen choice of court agreements and the *lis pendens* rule. Under Article 25, parties are now able to choose and respect the jurisdiction of courts of Member States. However, some issues such as the choice of a non-Member state forum and unilateral jurisdiction clauses remain unresolved. Despite these controversies, the Recast Regulation represents a significant improvement in the way it regulates and deals with *lis pendens* and is a step towards greater respect for choice of court agreements.

Article 30 of Brussels 1 Recast provides as follows:

> …[1] Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings; and, (2) where the action in the court first seised is pending at first instance, any other court may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof. (3). For the purposes of this Article, actions are deemed to be related where they are so closely related that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings…[86]

[83] Ibid.

[84] Andrej Stanko, 'Cross-border "torpedo" litigation', (2011), The common law review.

[85] Case C-159/97 *Trasporti Castelletti v Hugo Trumpy* [1999] ECR I-1597,

[86] Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), art 30.

In the *Owens Bank v Bracco* case[87] Advocate General Lenz identified three non-exhaustive factors bearing on the exercise of discretion under the forerunner of Article 30: "(1) the extent of the relatedness and the risk of mutually irreconcilable decisions; (2) the stage reached in each set of proceedings, and (3) the proximity of the courts to the subject matter of the case."[88] The decision reiterated the discretionary power of the courts. According to Advocate General Lenz, it was added that it went without saying that in the exercise of discretion regard could be hard to established especially in relation to which court was in the best position to decide a particular question in a matter.[89]

Earlier in his Opinion, Advocate General Lenz indicated that there is a strong presumption in favour of allowing an application for a stay, an approach which would reflect the Jenard Report [1979] OJ C59/1.[90] The European Court of Justice itself considered what is now Article 30(3) in *The Tatry* case.[91] It said that the purpose of the article was avoiding conflicting judgments in the EU, and that consequently the interpretation of "related actions" must be given a broad interpretation.[92]

Lord Clarke in *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs*[93] referred to Advocate General Lenz's analysis and Cooke J in *JP Morgan Europe Ltd v Primacom* AG, [94] and adopted the view that the court first seised should have the power to grant an anti-suit injunction, where a party has breached an exclusive jurisdiction clause in favour of the courts of another country. However, his statement was obiter dictum, and not binding. In the Paragraph (95), Lord Clark stated that:

> …I can see no reason why, in exercising that discretion under article [30], the court second seised should have cognisance of the fact that the parties had previously agreed (or arguably agreed) an exclusive jurisdiction clause in favour of that court. On the contrary, depending on the circumstances of

[87] Case C-129/92 *Owens Bank v Bracco* [1994] QB 509.
[88] Ibid
[89] Ibid
[90] Case C-129/92 *Owens Bank v Bracco* [1994] QB 509; (commentary on the Brussels Convention).
[91] *The Tatry* Case C406/92 [1999] QB 515.
[92] Ibid.
[93] AC [2013] UKSC 70; [2014] Bus LR 873.
[94] [2005] EWHC 508 (Comm); [2005] 2 All ER (Comm) 764.

> the case, that seems to me to be likely to be a powerful factor in support of refusal of a stay…[95]

Article 31(3) provides that, once the court designated in a choice of court agreement has established its jurisdiction, other courts must decline their jurisdiction completely. [96] Therefore, even if the defendant consents to another jurisdiction, the court designated in the agreement has priority and decides on the validity of the agreement. Recital 22 clarifies that designated courts do not have to wait for other jurisdictions to stay their proceedings. [97] This provision is a comprehensive solution to the problem of the Italian torpedo in transnational litigation, as it ensures that litigation solely aimed at delaying or disrupting a choice of court agreement is not allowed under EU law. However, there may still be some controversial issues surrounding choices of non-Member State forums and unilateral jurisdiction clauses that are not addressed by the Regulation. Nonetheless, the Recast Brussels Regulation is a significant improvement in regulating and addressing the *lis pendens* issue and in respecting choice of court agreements.

In contrast, the *Websense v ITWAY*[98] case raised the issue of whether courts should hear related cases together to avoid the possibility of inconsistent judgments from separate proceedings. If cases are closely related, courts should expediently hear and determine them together to avoid this risk.[99] In the case of *Websense v ITWAY*, MacMenamin J ruled that the Italian and Irish proceedings were related actions due to the existence of a sufficiently close connection between them.[100] To determine the question of whether a stay was appropriate, the court cited the *Gasser* case to demonstrate that a court that is second to receive proceedings must take into account any other ongoing proceedings between the same parties, even in the presence of an exclusive jurisdiction clause

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[95] Ibid.
[96] Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), art 31 (3).
[97] Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), art 31, Recital 22.

[98] *Websense v Itway Spa* [2014] IESC 5.
[99] Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), art 29.
[100] *Websense v Itway Spa* [2014] IESC 5.

designating a specific forum. The court that is first to receive the proceedings must decide whether that forum is the appropriate one.[101]

Article 31 was added to put an end to a situation where litigants file identical claims in a court that is not selected in the exclusive jurisdiction clause for the sole purpose of delaying the proceedings. The purpose of Article 31 is to ensure that if a choice of court agreement is in place, other courts must decline jurisdiction if the designated court has already established that it has jurisdiction. This means that litigation aimed at disrupting the choice of court agreement will no longer be allowed under EU law.

However, even if identical matters have been resolved, the Recast Regulation does not provide a solution to the problem of related matters, which is a bigger issue than identical matters. One argument for this exclusion is that the relevant recital did not consider related matters when Article 31 was constructed. For instance, the Recital 22 looks only at proceedings involving the same parties and the same cause of action. On the other hand, Article 29 (1) provided for the application of *lis pendens* in a situation where there are identical cases.[102]

Buonaiuti pointed out that the rules for such cases are subject to exceptions under Article 31 (2). In addition, Buonaiuti highlighted possible solution to address the cases of related matters.[103] According to the scholar, Buonaiuti, it was stated that the courts must clearly interpret Article 31 to also apply to closely related matters, so that a court can stay its proceedings when there is related matter pending in other courts which is protected by a choice of court agreement clause.[104] However, it cannot be foretold if this interpretation would be adopted. While the Article 31 aimed to end the delay of litigation and strengthened the choice of court agreements, the wordings of the Recital and Article 29 contravened the Article 31.[105]

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[101] Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), art 31 (1)
[102] *Websense v. Itway Spa* [2014] IESC 5
[103] Fabrizio Marongiu Buonaiuti, "*Lis* alibi pendens and related actions in civil and commercial matters within the European Judicial area", (2009) Yearbook of Private International law, vol 11, pp. 511-564; Chrispas (n 42).
[104] ibid.
[105] Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), art 31

Buonaiuti also examined the EU rules on the *lis pendens* rule and related actions contained in the Brussels I Regulation. According to Buoaniuti, there are three fundamental conditions for the application of the *lis pendens* rule.[106] First, there must be two ongoing proceedings that relate to the same cause of action. Second, both proceedings must involve the same parties. And third, one of the proceedings must have been initiated before the other.[107] On the other hand, Buonaiuti noted that the Recast Regulation did not consider the relevance of the defendant's domicile in certain proceedings, which can be in different Member States or third countries, and how it may impact the application of the *lis pendens* rule.

Buonaiuti also highlighted the related actions as contained in Article 28 of the Brussels I Regulation, which defines related actions, and explains the different modifications made from Article 22 of Brussels Convention, stating that the requirement of concurrent actions pending at first instance, which the former provision contemplated for the mere suspension of proceedings by the judge second seised, is now foreseen only in respect of the decision to decline jurisdiction under paragraph 2 of the rule. This modification substantially extends the applicability of the rule insofar as the mere suspension of proceedings is concerned. Buonaiuti added that this solution attracts much debate in the legal literature of various Member States.

It was also stated that the court has deviated from the traditional conceptions especially in civil law countries regarding the objective limits of *res judicata* and the risk that it may open the way to improper attempts at forum shopping.[108] It was observed that the solution adopted by the court has encouraged the use of actions for a negative declaration,[109] triggering the rule of *lis alibi pendens*. The scholar, Fabrizio, also added that the risk of an abuse of actions for a negative declaration as an instrument of forum shopping remains alive. The rigid nature of the rules of *lis pendens* prevents the judge second seised from performing a discretionary evaluation of the cases.

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[106] Fabrizio Marongiu Buonaiuti, "*Lis* alibi pendens and related actions in civil and commercial matters within the European Judicial area", (2009) Yearbook of Private International law, vol 11, pp. 511-564.
[107] Ibid
[108] Buonaiuti, (n 105)
[109] Ibid.

Other scholars, such as Chrispas Nyombi, Tom Mortimer and Rhidian Lewis,[110] discussed the unfairness and injustice brought under the *lis pendens* rule due to the first in time rule. The *lis pendens* rule was criticised by the scholars, stating that *lis pendens* brought about the issues of torpedoes. The authors argued that although, in theory, the reform could solve the problem of torpedoes, in some cases, pointless litigation in the appropriate forum could frustrate choice of court agreements, thus bringing back the harmful torpedoes. Although some effort has been made in the Brussels framework to address the problems associated with tactical litigation the reform has not been effective as there are key aspects of the reform that nevertheless leave scope for tactical litigation, for instance, the introduction of non-designated court provision under Art. 31(2) of the Recast Brussels Regulation. All these are discussed in the next subsections.

1.3.1 Forum shopping through the introduction of non-designated court

The Recast Brussels Regulation makes a provision that a party must commence proceedings in the designated court to trigger a stay of existing proceedings in a non-designated court under art 31(2).[111] This leaves scope for tactical litigation because proceedings in the non-designated court must be progressed to the stage where it is able to issue a stay of its proceedings. This means that the innocent defendant would incur time delays while waiting for the designated court to formally start the proceedings and order the non-designated court to stay proceedings, or delays when waiting for the non-designated court to reach a stage where it can make decision on whether it has no jurisdiction. This also means that the innocent defendant would have unexpected costs before the non-designated court finds absence of jurisdiction. This is buttressed by the omission of a time limit of determining jurisdiction, largely to reflect the different judicial processes in each Member State.

Furthermore, it is unclear how a non-designated court should approach its obligations under art 31(2). For example, how should the court determine whether an 'exclusive jurisdiction clause' exists in the circumstances? There is a possibility that the non-

[110] Chrispas Nyombi, Tom Mortimer and Rhidian Lewis, "Italian torpedoes in the shadow of the Recast Brussels Regulation 2012", (2015) European Competition Law Review.
[111] Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), article 31 (2).

designated court's determination could differ from the designated court's determination in relation to that issue, which could cause problems. Recital 22 of Brussels I (Recast)[112] provides that Article 31[113] will not apply where parties have entered conflicting jurisdiction clauses. However, in certain cases it may be difficult to determine whether jurisdiction clauses conflict, or whether they simply apply to different disputes. Forum shopping might still be possible in situations where there are multiple contracts between multiple parties with different jurisdiction clauses.

1.3.2 Asymmetric jurisdiction clause conflicts with choice of court provisions

It is unclear whether Article 31[114] can be relied upon by parties with the benefit of a hybrid or asymmetric jurisdiction clause as it might not be clear whether such clauses can be considered as 'exclusive' jurisdiction clauses. Under a hybrid jurisdiction clause, one or both of the parties have the right to choose between arbitration and litigation. Under a typical asymmetric jurisdiction clause X (say a bank) and Y (say a borrower) agree that Y may sue X in the courts of jurisdiction A only, but that X may bring proceedings against Y elsewhere. If such a clause is an exclusive jurisdiction agreement under Brussels 1 Recast, Article 31(2) provides that if Y sues in the courts of jurisdiction B in the above example, those courts must stay proceedings in favour of the courts of jurisdiction A, even if they and not the courts of jurisdiction A were first seised of the matter.

Under an asymmetric jurisdiction clause, one party is bound to bring proceedings in a particular jurisdiction, but the other party is not. The only EU jurisprudence on the issue is *Commerzbank Aktiengesellschaft v Pauline Shipping and Liquimar Tankers.*[115] In the instant case, Mr Justice Cranston held that by virtue of the asymmetric jurisdiction clause, a court of a Member State (England) has exclusive jurisdiction in accordance with the terms of the Brussels Regulation Recast.[116] Mr. Justice Cranston also added that a court of a Member State in the instant case did not have to stay its proceedings

[112] Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), Recital 22.
[113] Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), art. 31
[114] Ibid.
[115] *Commerzank Attiengesellschaft v Pauline Shipping and Liquimar Tankers* [2017] EWHC 161.
[116] Ibid.

even though there was a pending proceeding in the Greek Courts.[117] Mr Justice Cranston considered an asymmetric jurisdiction clause as an exclusive jurisdiction clause. However, Mr Justice Cranston's view was at odds with the Explanatory Report to the Hague Convention. In the Explanatory Report, it is expressly stated that asymmetric clauses were not exclusive choice of court agreements for the purpose of the Hague Convention.

As a result of these manifold problems and the lack of the current reforms to address these problems, two different alternative mechanisms to coordinate court processes within the EU Member States and non-Member States have been considered in the context of common law countries such as Cyprus, Malta, and the United Kingdom. These mechanisms are *forum non conveniens* and anti-suit injunction. The next subsection discussed the doctrine of *forum non conveniens* as an alternative mechanism developed by the common law countries.

1.3.3 The *forum non conveniens* doctrine

The *forum non conveniens* doctrine is a common law doctrine that allows a court to dismiss a case where an appropriate and more convenient alternative forum exists in which the action can be tried. Under the English law, an alternative forum is one where the case may be suitably tried in the interest of all the parties and the ends of justice.[118] The *forum non conveniens* doctrine was originally acknowledged in Scotland in the seventeenth century.[119] It was first known as *forum non competens*[120] and used where a party is not national to Scotland, and where there is a pending litigation, Scotland was deemed not *conveniens*.[121]

[117] Ibid.
[118] Ronald A. Brand, "Comparative *Forum Non Conveniens* and the Hague Convention on Jurisdiction and Judgments", (2002) 37 Tex. Int'l L.J. 467
[119] Campbell McLachlan, *Lis Pendens* in International Litigation, Hague Academy of International Law, (2009)
[120] Ibid.
[121] Ibid.

In the late nineteenth century, the doctrine was adopted in the United Kingdom. Subsequently, the doctrine was changed to *forum non conveniens* and later embedded in the jurisprudence of both the U.K. and U.S..[122] The purpose of the doctrine of *forum non conveniens* is that litigation should be conducted in the forum that is more connected to the dispute and likely to get a just result.[123] There are two (2) conditions that the court considers while applying the doctrine of *forum non conveniens:* (1) there must be an alternative forum having jurisdiction, and (2) that the lawsuit in the forum state would create an unfair advantage to the plaintiff and result in a denial of justice to the defendant.[124] So, therefore, under the general rule, the court second seised with general jurisdiction is the proper forum for settlement of the case.

The *forum non conveniens* doctrine also strengthens the principle of international comity.[125] In international commercial litigation, comity has been recognised by the Member States whereby they enforce and acknowledge the judgment of a foreign court of another state.[126] International comity is a non-binding legal principle that is used to resolve international disputes among Member states. This principle was adopted by the common law countries over 200 years ago to provide a theoretical justification for permitting courts to defer their legislative, judicial, and executive actions for a foreign sovereign, in order to be fair in an individual case.[127]

In essence, the historical and theoretical purpose of *forum non conveniens* was to bring about flexibility into a rigid territorial foundation of jurisdiction. Justice Joseph Story stated that the rationale of the doctrine *forum non conveniens* is that where a particular court cannot preside over a matter in transnational litigation, another court that has more connection to the fact in the case should have assumed jurisdiction in the matter, and any judgment obtained in the matter should be recognised and enforced other courts

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[122] Ibid.

[123] Whytock, Christopher A., and Roberson, Cassandra Burke, "Forum Non Conveniens and Enforcement of Foreign Judgements", (2011) Faculty Publications.

[124] Ibid

[125] Edward Flanders, Rannah L, "A tale of Two Doctrines" (2013) The New York Law Journal; *DiRienzo v Philip Services,* (2002) 2d Cir. 294 F 3d, 21, 29-31.

[126] *Hilton v Guyot* (1895) 159 US 113, 203-03.

[127] *Ronald Brand* (n 117); Whytock, Christopher A., and Roberson, Cassandra Burke, "Forum Non Conveniens and Enforcement of Foreign Judgements", (2011) Faculty Publications.

for the purpose of achieving the aim of the doctrine of *forum non conveniens* which is to ensure that justice is done.[128]

However, the doctrine does not play any role under the Brussels I Regulation. The advantage of the doctrine is clarity and predictability of the legal rules. While the disadvantage is lack of flexibility for courts faced with unanticipated legal questions. The court decision in the *Owusu* case is misleading, as the doctrine of *forum non conveniens* lacks the power to destabilise the rules of the Regulation, and the latter, despite statements to the contrary, is riddled with confusing questions of which court has appropriate jurisdiction.

In contrast, the doctrine of *forum non conveniens* has been criticized by many scholars and practitioners especially in relation to the discretionary power that the doctrine gives to a court to transfer its jurisdiction to another alternative forum which is seen to be a more favourable court which can hear the matter and provide justice for the parties involved.[129] For instance, Ivanova[130] stated that some national legal systems made provisions that sanctions starting parallel proceedings and some other legal system introduces punishment structure for the abuse of the Regulation.[131] Some of the ways introduced to sanction this abuse were by way of anti-suit injunctions and the *forum non conveniens* doctrine from the court's point of view and also claims for damages for breach of choice of courts clauses on the part of the parties involved.

The decision of the ECJ in the *Owusu v Jackson* case[132] was examined by John Burke.[133] The scholar, John Burke, stated that the decision of the ECJ in the *Owusu* case foreclosed the use of the doctrine of *forum non conveniens* in United Kingdom courts.[134] This case has an advantage which is its resolution for the issue of *forum non conveniens* not been validated under the Brussels convention. John Burke pointed out

[128] Ibid (n 124)
[129] Ronald Brand, (n 117).
[130] Ekaterina Ivanova, "Choice of Court Clauses and *Lis Pendens* under Brussels I Regulation", (2010) Utrecht Journal of International and European Law.
[131] Ibid.
[132] Case C-281/02 *Owusu v Jackson* [2005] ECR I-1383.
[133] John Burke, "Foreclosure of the doctrine of forum non conveniens under the Brussels I Regulation: advantages and disadvantages", (2008), The European Legal Forum, pp 121-126
[134] Ibid.

that another disadvantage of the decision of the ECJ in the *Owusu* case is that it pursues a policy of doctrinal purity in shaping rules of jurisdiction.[135] According to Burke, foreclosing a court's discretion may lead to waste of resources and prohibits legal economy.[136]

Accordingly, John Burke suggested that the Brussels I Regulation should be modified. In addition, duration and deadline should be introduced, which a court first seised can determine its jurisdiction or leave it for the chosen court to determine if there is an exclusive choice of forum in the contract.[137] The ECJ refused an anti-suit injunction, stating that a court does not have the legal grounds under the Regulation to sanction another court. So, therefore, antisuit injunction was seen as incompatible with the provisions of the *lis pendens* rule. Also, *forum non conveniens* is not applicable, although under the Regulation refusal of competence by a court first seised could be considered a '*deni de justice'*. Due to the mutual trust between the Member States, the doctrine of *forum non conveniens* could not be integrated into the Regulation.

On the other hand, Edward Barrett[138] stated that there is always a conflict in civil action between both parties in a trial. Usually, a defendant prefers to sue where he resides for obvious reasons, but in a situation where a rule limiting the place of action exists, the defendant is permitted to avoid his obligations by removing himself and property from where the venue is laid. The common law courts have been able to assist plaintiffs by devising venue rules in the plaintiff's pursuit of an abstract defendant.[139] In contrast, the plaintiff's right to choose a jurisdiction to sue often inflicts a severe burden on defendant who is not making any effort to avoid his responsibilities. It becomes very difficult to commence an action at a venue different from where the defendant resides or the actual place the cause of action arose. Barrett's contribution to literature was his explanatory nature to *forum non conveniens* and showing its origin and its effect in America.

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[135] John Burke, (n 132).
[136] Ibid.
[137] Ibid.
[138] Edward L. Barrett Jr., "The doctrine of forum non conveniens", (1947) 35 CAL. L. Rev. vol. 35, 380.
[139] Ibid

Petsche[140] discussed the scope and purposes of the doctrine of *forum non conveniens* in transnational commercial litigation. The scholar, Petsche, explained the jurisdictional nature and the impact of its objectives of the doctrine. Petsche observed that the *forum non conveniens* doctrine is applied exclusively in the common law countries such as the United States, the United Kingdom, Australia, and Canada.[141] However, the *forum non conveniens* doctrine is not recognised and it is even frowned upon in most civil law jurisdictions.[142] The scholar, Petsche, added that the *forum non conveniens* doctrine has been the subject of interesting criticism from common lawyers. Petsche also noted that the *forum non conveniens* doctrine leads to inconsistent results, and that courts occasionally rely on it to pursue inappropriate objectives. For example, the protection of domestic corporations.

Petsche and Ronald Brand have questioned the legitimacy of the judicial discretion in the application of the *forum non conveniens* doctrine.[143] Petsche pointed out that other scholars have highlighted the nature of the *forum non conveniens* test, particularly, with the distinction and respective weight attributed to public and private interests.[144] The author, Petsche, noted that other scholars have only highlighted flaws and problems of the *forum non conveniens* without critically examining the theoretical foundations of the doctrine. Petsche acknowledged that Zhenjie was the only scholar who has offered a comprehensive and compelling critical analysis of *forum non conveniens*, focusing on issues arising from the actual application of this doctrine by the courts e.g., delay, manipulation, and discrimination. Petsche pointed out the objectives of *forum non conveniens*, that this doctrine is based on the specific application of judicial discretion helps to ensure fairness in individual cases.[145]

[140] Markus A Petsche, "A critique of the doctrine of forum non conveniens", (2012) 24 Fla. J. Int'l L. pp 546.
[141] Markus Petsche, (n 139).
[142] Ibid.
[143] Ibid.
[144] Ibid 565.
[145] Ibid 567.

Ronald Brand in his article described the challenges *forum non conveniens* is facing,[146] stating that the doctrine is a response to the issue of parallel litigation. Most common law legal systems allow parallel litigation, and these create a race to judgment with one forum being obliged to recognise and enforce the judgment given and thereby terminate all other litigation. In this situation, courts usually employ the *forum non conveniens* doctrine to exit this race to judgment. Civil law jurisdictions on the other hand use the *lis pendens* doctrine to prevent parallel litigation.[147] Under civil law jurisdiction, little discretion is given to judges. The idea of the *forum non conveniens* approach that a judge would stay its proceedings or give jurisdiction to a foreign court is inconsistent with the role of the judge. Such action is also seen as being inconsistent with the parties' right of access to the court.

However, Brand observed that while the *forum non conveniens* doctrine has its problems, the *lis pendens* rule is far from perfect, as a comparison between the two doctrines highlights the differences between the general common law quest for equity, and fairness, and the civil law quest for efficiency. Ronald Brand concluded that the doctrine has been subjected to several challenges. For instance, in Europe, it has been largely obscured by the civil law approach of the European Court of Justice in its interpretation of the Brussels Convention and Brussels I Regulation.

Brand's view is supported by Christopher Bougen who analyses the conflicting approaches of jurisdiction within *forum non conveniens* and the Brussels Convention. According to Bougen[148] it was stated that the Brussels Convention provides a rule that the courts of the defendant's domicile are to have jurisdiction. This rule is based on the maxim *actor sequitur forum rei,* the reason being that it is easier for defendants to defend themselves in courts of their own domicile. An exception to this can be seen where a defendant is sued in a place of the performance of the contractual obligation or where the harmful act occurred. It was stated that where one of the parties is domiciled in a Contracting State and the parties have agreed themselves that a court of a

[146] Ronald A. Brand, "Comparative Forum Non Conveniens and the Hague Convention on Jurisdiction and Judgments" (2002) Texas International Law Journal, Vol. 37, pp 467.
[147] Ibid 469.
[148] Christopher Bougen, "Conflicting approaches to conflicts of jurisdiction: the Brussels Convention and *Forum non Conveniens*" (2002) Victoria University Wellington Law Review, 33. Pp 261

Contracting State are to have exclusive jurisdiction where a dispute arises, then that court shall have exclusive jurisdiction.[149]

In *Group Josi Reinsurance Company SA v Universal General Insurance Company*, the ECJ held that the general rule of jurisdiction based on domicile are to be construed strictly and cannot give rise to an interpretation going beyond the cases expressly envisioned by the Brussels Convention.[150] The Brussels Convention also provided rules that involve two courts in conflict of jurisdiction. Where there is a proceeding before two or more courts involving the same cause of action and the same parties, Article 21 of the Brussels Convention (later known as Article 27 of the Brussels I Regulation 2001) requires any court other than the court first seised to stay proceedings until the jurisdiction of the court first seised is established. When that has been established other courts have to decline jurisdiction. There is no element of discretion involved or consideration of factors relevant to an inquiry pursuant to a *forum non conveniens* claim. The sole consideration is whether the requisite elements of the mandatory rules of the Brussels Convention, or their limited exceptions, have been satisfied.[151]

In disputes involving related matters, the court first seised has priority to hear the matter, as provided in Article 22 of the Brussels Convention. But the court second seised has a limited amount of discretion in determining whether the actions are related. Pursuant to the Article 22, actions are related when they are closely connected. Therefore, it is expedient to hear and determine the related matters together to avoid the risk of irreconcilable judgments resulting from separate proceedings. From this point of view, it was obvious that there are limitations to the rules in determining jurisdiction where two courts are seised of a related matter.[152] The U.K. courts have jurisdiction *in personam*, and relied on traditional approach to resolving matters where the defendant is successfully served notice within the U.K. The U.K courts would grant

[149] Ibid 263.
[150] *Reunion Europeenne SA v Spliethoff's Bevrachtingskantoor BV* [1998] ECR I-6511 (ECJ); *Group Josi Reinsurance Company SA v Universal General Insurance Company* [2000] ILPR 549; [2001] QB 68, para 49 (ECJ).
[151] Christopher D Bougen, "Conflicting approaches to conflicts of jurisdiction: the Brussels Convention and forum non conveniens" (2002), Victoria University Wellington Law Review., 33. Pp 264.
[152] Ibid.

a leave to serve the defendant outside of its jurisdiction, if the court is satisfied that the case is a proper one for service outside its jurisdiction.

However, following the enactment of the Civil Jurisdiction and Judgment Act 1982, the legislation gave effect to the Brussels Convention in the United Kingdom. Therefore, when there is a matter within the jurisdiction of the U.K. court to entertain matters *in personam*, this will be done solely in accordance with the provisions of the Convention.[153] The *forum non conveniens* doctrine has long been an issue of debate in the United Kingdom over the last decade. After ratifying the Brussels Convention, it was clear that the United Kingdom would adopt the mandatory rules in the Brussels Convention, while departing the use of discretionary power under the *forum non conveniens.* Upon their accession to the Brussels Convention in 1979, the United Kingdom attempted to introduce the *forum non conveniens* doctrine, allowing the United Kingdom to retain the discretionary power to stay on the grounds of *forum non conveniens*. However, this was rejected by other Member States that believed that the Convention had already made provision for a *conveniens* forum. Although the power to grant a stay was preserved in section 49 of the Civil Jurisdiction and Judgment Act 1982 which incorporated the Brussels Convention into the United Kingdom law.

Presently, the United Kingdom courts undoubtedly still regard Harrods's case as the leading case and binding judicial statement on the relationship between the Brussels Convention and the doctrine of *forum non conveniens*. In the case of *Ace Insurance,*[154] the Court of Appeal applied decision in *Harrods's* case and upheld a lower court ruling that there was still discretion to grant a stay of proceedings on the grounds of *forum non conveniens* where the English court had jurisdiction by virtue of the Lugano Convention, a convention complementary to the Brussels Convention.[155]

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[153] Ibid 266.

[154] *Ace Insurance SA-NV v Zurich Insurance Company and Zurich America Insurance Company* [2001] EWCA CIV 173 (CA).

[155] The Lugano Convention is an agreement between the European Union members and the members of EFTA (European Free Trade Area). It is almost identical to the Brussels Convention and functionally it extends the jurisdictional rules of the Brussels Convention beyond the European Union to the EFTA states.

Commentators have long pointed out that the lack of explicit reference within the Brussels Convention about the precise limits of its international operation has always been problematic and has contributed in large part to the uncertainty in the law regarding the Convention. Given the fact that there is infinite possibility that there are some situations with cross-border disputes, it is imperative to be flexible in order to hear a case in the most suitable forum, rather than jurisdiction being decided by a mechanical application of specific criteria. Therefore, in re-examining the doctrine of *forum non conveniens* and its relationship to the Brussels Convention, alternative approaches might also be considered. It is important to note that the United Kingdom doctrine of *forum non conveniens* has not been adopted by all common law countries. For example, Australia has rejected the *Spiliada* approach.

The *Spiliada* test is a two-step analysis involving first a requirement that the defendant show that there is a more appropriate forum, that is, one in which the case could be tried more suitably for the interests of all parties and for the ends of justice, and, secondly, once the defendant has established a prima facie case for a stay, the plaintiff has the burden of proof to show that there are circumstances by reason of which justice requires that the United Kingdom court exercise its jurisdiction.[156]

The Australian courts, on the other hand, adopt a different narrow test. Instead of looking to whether there is a more appropriate forum abroad, the Australian doctrine examines whether the Australian forum is "clearly inappropriate", that is, seriously and unfairly burdensome, prejudicial, or damaging to the defendant. Justice Deane, in supporting this approach, stated that "it is a basic tenet of our jurisprudence that, jurisdiction exists, where access to the courts is a right. It is not a privilege which can be withdrawn otherwise than in clearly defined circumstances".[157]

A further alternative approach is offered by the Special Commission of the Hague Conference on Private International Law charged with the task of authoring a draft international convention on jurisdiction and enforcement of foreign judgments in civil and commercial matters. One of the more argumentative matters during the drafting

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[156] Christopher D Bougen, "conflicting approaches to conflicts of jurisdiction: the Brussels Convention and *forum non conveniens,* (2002) Victoria University Wellington Law Review. 33. Pp

[157] *Ocean Sun Line Special Shipping Co Inc v Fay* [1988] 165 CLR 197, 252, (see the view of Deane J).

process was the question of the adoption of a *forum non conveniens* clause and a *lis pendens* clause. The draft convention provides for a limited *forum non conveniens* test which represents a compromise between the competing philosophies of common law and civil law countries. The draft convention allows the suspension of a case, in exceptional circumstances, if the court seised is clearly inappropriate to decide the case and if a court of another State has jurisdiction and is clearly more appropriate to resolve the dispute.[158]

This method can be likened to the Australian approach, in that more emphasis is placed on the unsuitability of the forum seised and could be seen as moving away from the wider United Kingdom approach. The draft provides an illustrative list of factors to be considered by the court in coming to its decision, including the parties' domicile residence, the nature and location of the evidence and procedures for obtaining such evidence, time limitations, and the possibility of recognition and enforcement of a judgment on its merits.

Furthermore, during the draft process and regime, the court granting the stay makes provision of duration of time during which proceedings must be brought in the alternative forum. If this time frame is not adhered to or the alternative forum declines to exercise jurisdiction, then the original court shall exercise jurisdiction. While both the Australian approach and the draft convention appear to limit the instances in which a stay of proceedings for reasons of *forum non conveniens* would be granted, the proposed scheme does not in any real sense move away from the discretionary regime provided for in United Kingdom law.[159]

The mere fact that the court has the discretion to grant a stay creates uncertainty and the potential for additional costs in cross-border litigation. While the Australian and draft convention approaches may reduce the number of successful applications for a stay, they arguably will not stop defendants from trying. That is ultimately the weakness of the discretionary era. It was suggested that the retention of a discretion based on *forum non conveniens* is a way of avoiding the devotion of scarce judicial resources to

[158] Bougen, (n 155)
[159] Ibid

cases that have only little connection to the United Kingdom. Although, *forum non conveniens* litigation can be time consuming and costly as much as a substantive hearing, nullifying any gain in judicial economy.

In *Milor*, Lord Justice Phillips observed that:[160]

> …[W]here, as so often, substantial costs are incurred in interlocutory battles in relation to jurisdiction, I have a suspicion that the object of the exercise is frequently not to ensure that the trial takes place in the appropriate forum, but to achieve a better negotiating stance in the action which neither side expects to get to trial. There is something to be said for a regime which restricts the choice of forum in a manner which excludes those which are likely to be inappropriate, but which does not otherwise permit the plaintiff's choice to be challenged...[161]

The next section examines the anti-suit injunction, an alternative regime developed by the common law countries to stop the abuse of tactical litigation. An anti-suit injunction is a mechanism developed to stop a litigant from commencing proceedings before another court where the same matter is pending before another court.

1.3.4 Alternative regime: Anti-Suit Injunction

Anti-suit injunction is a court order rendered against a private party to prevent them from raising an action in another forum and, in some instance, forcing a litigant to discontinue an action if already started.[162] In addition, anti-suit injunction also referred to a court order restraining a person or company from pursuing proceedings outside England.[163] More importantly, anti-suit injunction is often directed against a person or company rather than foreign court, and a breach of an anti-suit injunction amounts to contempt of court which may result in fine or an arrest.[164]

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[160] *Milor Srl v British Airways Plc* [1996] QB 702, 710 (CA) Phillips LJ.
[161] Ibid
[162] John J. Barceló III, `Anti-Foreign-Suit Injunctions to Enforce Arbitration Agreements' (2007) Contemporary Issues in International Arbitration and Mediation, 107, 108.
[163] Paul Friedman, "Anti-suit injunctions from the English courts", (5 October 2010), Clyde & Co.
[164] *Dell Emerging Markets (EMEA) Ltd v. Systems Equipment Service SARL* [2020] EWHC 561 (Mr Justice Henshaw fined both SETS and each of the directors for contempt of court order).

The history underlying anti-suit injunctions can be traced back to the English Court of Chancery use of a grant of a common injunction to refrain the commencement of proceedings in the English courts of common law, thereby espousing the principle of superiority of equity over the common law.[165] At the turn of nineteenth century, the injunction was applied to stop the commencement of proceedings in the United States, and other jurisdictions overseas.[166]

Paul Friedman explored the use of the anti-suit injunction by the English courts. According to Friedman, it is stated that there can be significant tactical advantages in ensuring that cross-border litigation takes place in the country of one's choice. Paul Friedman defined an anti-suit injunction as an order of court restraining a person or company from pursuing proceedings outside England.[167] According to Friedman, the injunction is often directed against the person or company rather than the foreign court. A breach of an anti-suit injunction amounts to contempt of court and could lead to a fine or an arrest of the individual. In addition, Paul Friedman noted the injunction is a discretionary remedy, exercised with great caution by the English courts, for reasons of international comity.

Anti-suit injunctions will only be granted if the English court already has personal jurisdiction over the respondent. The scholar observed that this injunction can only be granted under common law where the foreign proceeding is vexatious or oppressive and England is the natural forum. Friedman highlighted the position of Brussels I Regulations on the "first seised rule" and some cases where anti-suit injunction was refused.[168] Having explored the history underpinning the development of the anti-suit injunction, Paul Friedman provides an answer to the long-standing question on whether the principle of comity can be used to determine the appropriateness of an anti-suit injunction. According to Paul Friedman, it is suggested that the courts should apply caution while presiding on the issue involving the injunction and the principle of comity

[165] Campbell McLachlan, *Lis Pendens in International Litigation*, (2009) Hague Academy of International Law.
[166] *Airbus Industrie G.I.E v Patel* [1999] 1 AC 119, 132-33 (HL), Lord Goff.
[167] Paul Friedman, 'Anti-suit injunctions from the English courts', (5 October 2010), Clyder & Co,
[168] *Erich Gasser GmbH v Misat Srll; Turner v Grovit* (English courts are precluded from granting antisuit injunctions where the court of a contracting state is first seised and the English proceedings must be stayed. This is the case even if the foreign proceedings have been commenced in bad faith and with the sole purpose of preventing "legitimate" proceedings being brought pursuant to the jurisdiction clause).

in international law. The courts should device a guideline on their discretion to issue the anti-suit injunction.

However, the concept of an anti-suit injunction in transnational litigation has been criticised on the grounds that it gives courts an uncontrolled power to instruct another court on what matter it can or cannot hear. It was also argued that the uncontrolled court power defeats the purpose of mutual respect among Member State courts, which is the rationale surrounding the development of the Brussels I Regulation 2001.[169] Daniel Tan[170] examined challenges that the courts often faced while deciding on the issue of anti-suit injunctions especially where it involved two different member States. While there has been an attempt to use comity as a solution to the problem of anti-suit injunction, however, the author opined that not only would such an approach be difficult to apply, but also it would impede on the courts discretionary power to develop the policies underpinning such injunctions. Tan also gave a brief history underlying the development of anti-suit injunctions.

On the other hand, Tan stated that due to the international nature of litigation, anti-suit injunctions are becoming a common practice, as litigants now enjoin foreign proceedings.[171] Since parties in litigations are using different technicalities, such as a forum shopping, to interfere on a court jurisdiction, it is more likely for litigants to also use an anti-suit injunction to stop proceedings. In addition, Tan stated that litigants often used anti-suit injunction as pre-emptive remedies by instituting an action in domestic courts where they feel dissatisfied with the outcome of any proceedings in foreign courts.[172]

In contrast, to resolve the problem relating to forum shopping and anti-suit injunction, Freedman stated that it will be pertinent to adopt the remedy functions in other jurisdictions to address the problem.[173] For example, the United Kingdom, where the

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[169] Daniel Tan, "Anti – suit injunctions and the Vexing Problem of Comity", (2004) Virginia Journal of International Law, Vol 4:2, p. 286-354.
[170] Ibid.
[171] Ibid, (n.148); George Bermann, "The Use of Anti – Suit Injunction in international Litigation", (1990) 28 COLUM. J. Transnat'l L. 589. (Berman noted that a court should generally be more cautious in granting an international anti-suit injunction, as opposed to a domestic one).
[172] Paul Freeman, (n 166).
[173] *Bank of Tokyo Ltd. V. Karoon,* (1987) A.C. 45, 59 (Eng. C.A).

law had developed significantly in several aspects.[174] Freedman's view is also supported by Andrew Bell.

According to Andrew Bell it is stated that:

> …[a] litigant may prefer to seek an anti-suit injunction in a domestic court, rather than a stay of proceedings in a foreign court: (1) where he will find it difficult to obtain a stay of proceedings in the foreign court because that court has extremely wide jurisdictional rules or a lack of a *forum non conveniens* doctrine; (2) where the foreign court may look upon a stay application made by the litigant as submission to it jurisdiction, which gives the foreign court the ability to render an internationally enforceable judgment)…[175]

In essence, courts have often used case law originating from other jurisdictions to resolve the issues of anti-suit injunction on one hand, and how to control international litigation through such injunction. While acknowledging the discretionary power of the court to address an anti-suit injunction involving any party, however, the author argued that there is challenge surrounding how the courts exercise such discretionary power.[176] Andrew Bell highlighted the uncertainty in relying on the principle of international comity to provide the solution to judicial restraint (anti-suit injunction), according to the Andrew Bell, the use of comity creates difficulties in anti-suit jurisprudence.[177]

In another development, Chan Ho,[178] explored anti-suit injunction far beyond international commercial litigation, as his work considers anti-suit injunction in matters involving insolvency. The author, Chan Ho, examined the jurisprudence of anti-suit injunction in relations to non-bankruptcy, and its function in international insolvency litigation. According to Chan Ho, creditors in insolvency often used anti-suit injunction unjustly without considering other parties elsewhere. Apart from issues underlying

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[174] The court in *Bank of Tokyo* noted that both the United States and England adopt the same common fundamental principles. Ibid 288.

[175] Andrew Bell & Justin Gleeson, "The Anti-Suit Injunction" (1997) The Australian Law Journal, Vol. 71.

[176] See Paramedics Electromedicina Commercial, Ltda v GE Med. Sys. Info. Techs. Inc. (2d Cir 2004).

[177] F. 3d 652, The Second Circuit observed that it was "beyond question that a federal court may enjoin a party before it from pursuing litigation in a foreign forum". Ibid 289.

[178] Look Chan Ho, 'Anti – Suit Injunctions in Cross – Border Insolvency: A Restatement', 2003.

insolvency, Chan Ho also noted that forum shopping is considered a popular and expensive "legal pastime".[179] According to Chan Ho, forum shopping often leads to clashes of jurisdiction and inconsistent judgment. Therefore, anti-suit injunction was suggested as a means of resolving the issue involving the parallel proceedings and forum shopping.

Chan Ho further states that, although anti-suit injunction in practice is aimed at restraining an individual person, and the court imposing such restraint may argue that the purpose of the anti-suit injunction is not to restrain the foreign court, but however, in practice, restraining a person in a foreign court would affect the foreign process. The author went further to explore the on-going issue on anti-suit injunction and the principle of international comity. Chan Ho argued that using the principle of international comity to provide solutions to the issue of anti-suit injunction is unsound. Using the US experience, including 304 of the US Bankruptcy Code, the author draws a conclusion on the impacts of anti-suit injunction on insolvency. Finally, Chan Ho concluded his study by stating that the inability to ensure or rationalise the law that governs anti-suit injunctions in both the bankruptcy and non-bankruptcy field of study would create conflicts in English law of equity. As aforementioned, anti-suit injunctions were unsuccessfully considered as an option.[180]

1.4 The limitations of the *forum non conveniens* doctrine

The limitation of the *forum non conveniens* doctrine to resolving the problem of tactical litigation is due to the limited scope in the application of the doctrine. This is so because, the doctrine can only be applied in common law countries that relied on the application of the doctrine in jurisdiction and enforcement of judgment in transnational litigation matters. For example, the U.K, U.S, Canada, and Australia. Furthermore, non-uniformity in the application of the doctrine of *forum non conveniens* amongst the

[179] Skelly Wright, "The Federal Courts and the Nature and Quality of State Law" 13 Wayne L. Rev. 317, 333 (1967)

[180] Look Chan Ho, 'Anti – Suit Injunctions in Cross – Border Insolvency: A Restatement', (2003).

common law countries is a major problem underlying the effectiveness of the doctrine in resolving the abusive use of tactical litigation in transnational litigation.

1.4.1 The limitations of anti-suit injunction

The limitation of the anti-suit injunction is that the injunction can only work effectively in the post-Brexit era and in common law countries that have a developed legal tradition and general principles of equity law. Both the *forum non conveniens* and anti-suit injunction have limited application under the civil law systems. As a result, a more innovative solution is needed. To address the limitations in the application of the *forum non conveniens* doctrine and the *lis pendens* rule, this thesis proposed a hybrid model that combines the benefits in the common law and civil law legal systems. The solution proposed in this hybrid model is discussed in the chapter six of this thesis.

1.5 The impacts of BREXIT on extra-EU jurisdiction

For decades, the U.K. has been a haven for litigation processes because of the efficiency and expertise in the U.K. legal system. In addition, the English High Court also attracted a few plaintiffs from all over the EU Member States. However, the U.K.'s exit from the EU undermines the goals of the Brussels Regulation, which aims to promote mutual trust and respect among Member States, and recognition of each other's judgments.[181] As a result, there is uncertainty about what will replace the Brussels Regulation, as it may revert to previous international arrangements that were in place before the Regulation was implemented. Will the U.K. still be a part of the Regulation? If not, then can the benefits of the Regulation be applicable in the U.K., or will the U.K. introduce a legislation that would replicate the features contained in the Regulation? Also, would it be the old domestic law that was set aside as it was not compatible with the EU law, and with what consequences?

[181] Arianna Andreangeli, 'The Consequence of Brexit for Competition Litigation: An End to a Success Story', (2007) European Competition Law Review.

This thesis has genuine concerns as to the outcome and effect of Brexit from the EU. This thesis posits that due to Brexit, the right of access to justice of those competition claimants who wish to file a case in the U.K. courts will be significantly affected as it may become too complex to establish jurisdiction. The U.K has been attractive to litigants as the reputation of the courts and the legal system plays a vital role for choice of court. This is because English courts are perceived to be comparatively certain, stable, and predictable, independent and have good expertise in decision making. This thesis analyses the reasons why litigants would choose an available forum in the developed countries, such as U.K. and U.S. For instance, while the Brussels Regulation tries to prevent parallel proceedings in multiple fora, however, Article 4 of the Regulation protects the general rule that an action should be brought where the defendant has its domicile.

The immediate consequence of the U.K. leaving the EU is that the Brussels Regulation would no longer be applicable in the U.K. and the issue of determining a competent court and avoiding parallel judgments would be a major challenge. Likewise, judgments from English courts would no longer enjoy the benefit of the principles of recognition and from the rules on enforcement under the Brussels Regulation. There is legal uncertainty as regards recognition and enforcement of judgments as this is likely to suffer. There have been suggestions that courts in other Member States may likely continue to recognise and enforce U.K. judgments, although there are foreseeable issues on the application of the Brussels Regulation. Therefore, disputes would be governed by the law of that Member State where a party seeks to enforce these judicial decisions, adding complexity, length, and cost.[182]

Brexit and the continued filing of disputes under the much-trusted U.K. courts is likely to lead to increased scrutiny of the extra-EU jurisdictional rules. It makes it even more imperative that a hybrid model that combines the merits of the two competing systems namely *forum non conveniens* and *lis pendens* is considered. As aforementioned, tactical litigations remain a vibrant part of EU commercial and civil litigation despite attempts made under the Recast Brussels Regulation to reduce the delaying tactics. Nonetheless, the background provided in this chapter has shown that while *lis pendens*

[182] Ibid.

remain the main approach to jurisdiction in these matters, it suffers from many procedural shortfalls that could hamper commercial activity in the EU.

Similarly, *forum non conveniens* is unlikely to create the same speed and trust sought under *lis pendens* but to lean more on the side of justice but ensuring that only the more *conveniens* forum hears the matter. This thesis is proposing a hybrid that considers the challenges faced within the EU and tries to solve them through a system that harnesses the benefits in the common law doctrine of *forum non conveniens* and the civil law *lis pendens* rule. This hybrid model is discussed in the chapter six in this thesis.

1.6 The Research Question and rationale of this research

The research question in this thesis aims to investigate the effectiveness of the hybrid model, which combines *forum non conveniens* and *lis pendens*, in addressing the issues related to tactical litigation in the European Union. The goal is to evaluate the extent that this model can resolve the problems of tactical litigation identified in this thesis. The research question in this thesis is, (1) to what extent would a hybrid of *forum non conveniens* and *lis pendens* mitigate the problems associated with tactical litigation within the EU?

This question seeks to achieve three main research objectives: firstly, to investigate if the Recast Brussels Regulation has successfully eliminated the use of tactical litigation and *lis pendens*. Secondly, it aims to explore the application of Article 31(2) in cases where there is no jurisdiction test for unselected courts. Finally, the research will assess whether Article 31 applies to related matters in addition to identical proceedings. The outcomes of this research will have practical implications and contribute to the reduction of tactical litigation in transnational disputes.

1.7 Overview of Structure

This thesis consists of six chapters that explore the research question and problem outlined in the introductory chapter. Chapter two focuses on the review of literature that contributes to knowledge on the problem of tactical litigation in both civil and common law systems. The literature review is organized thematically and examines the problem identified in both civil and common law regimes through existing literature.

The chapter also examines the evolution of the *lis pendens* rule in the civil law through existing literature. In its examination of the *lis pendens* rule, this thesis also identifies gaps in the literature left by previous scholars.

Chapter three sets out, defines and discusses different methodologies used to conduct the research of this thesis. Chapter three explores and explains the various research methodologies employed in the thesis, and how they contribute to the construction of the proposed hybrid model. The comparative methodology helps to compare the twolong-established doctrines that are in operation and to assess how they have failed to effectively address tactical litigation and are being used in a vexatious way. On the other hand, the doctrinal methodology explains how the black letter methodology is important to understand the existing legal terms and operation. Additionally, the case study methodology is employed to analyse how courts have applied the *lis pendens* rule and the *forum non conveniens* doctrine in various cases. The conceptualization methodology is also employed in this thesis to develop a new concept, known as the hybrid model.

Chapter four discusses jurisprudence surrounding the development of the *lis pendens* rule and the *forum non conveniens*. This chapter examines the *lis pendens* clause in civil law under the Brussels Convention, Brussels Regulation, and the Recast Brussels Regulation. It identifies areas where there is still scope for tactical litigation and demonstrates that the Recast Brussels Regulation (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 (recast) has not fully resolved the issue of tactical litigation.

This chapter also examines the historical background of the *forum non conveniens* rule in different countries such as the U.K. and the U.S. It also examines the historical evolution of the *lis pendens* rule. This chapter also analyses the provisions in the Recast Brussels Regulation that may leave room for tactical litigation. This chapter identifies those provisions and argues that, despite the introduction of choice of court agreements to strengthen party autonomy, due to Article 29(1), Article 31 and the Article 32 of the Recast Brussels Regulation, it is still possible for unscrupulous litigants to engage in abusive tactical litigation. This chapter also conducts a critical analysis of all the provisions related to the *lis pendens* clause, identifying how the recast Brussels

Regulation left open the possibility for abusive tactical litigation. It also argues that the *forum non conveniens* doctrine has its own drawbacks, such as its lack of uniformity and the potential for the abusive use of discretionary power, which is not accepted by civil law countries.

Chapter five examines the challenges in the application of the *forum non conveniens* and the *lis pendens* rule through case studies. This chapter analyses two leading cases, starting with the case of *Erich Gasser BmbH v Misat*, where the European Court of Justice took a strict stance on interpreting the *lis pendens* clause. The court ruled that the first court seised should decide jurisdiction, even if there was a choice of court agreement stating that a different court should hear the matter. However, due to the strict interpretation of the *lis pendens* clause by the ECJ, the non-chosen first seised court continued the proceedings, and the court selected in the choice of court agreement became the second seised court. This chapter gives the factual background of the case, including the decision of the court of first instance and the court of appeal. It then evaluates the impact of the case on the promotion of tactical litigation and the rejection of the *forum non conveniens* doctrine in EU Member States. The second section of this chapter analyses the case of *Spiliada Maritime Corporation v Cansulex Ltd*, a significant case on the *forum non conveniens* doctrine. This chapter provides the factual background of the case, including the decision of the court of first instance, the decision of the trial court, and the decision of the court of appeal. This chapter also covers the guidance provided by the House of Lords while applying the discretionary power under the *forum non conveniens* doctrine.

Chapter six discusses the proposed solution to the problem of abusive tactical litigation identified in this thesis. The proposed solution aims to combine the benefits of both the *lis pendens* rule (a legal principle in civil law) and the *forum non conveniens* doctrine (a common law principle) in order to create a more harmonious approach. This solution involves a two-stage process. The two-step approach includes negotiations and enforcement stages, which involve the use of strategies such as a declining jurisdiction clause, a *lis pendens* clause, the consolidation of related matters, and the application of a "clearly inappropriate" test. This chapter examines the various elements of the solutions proposed in the hybrid model to resolve the problems of tactical litigation

both at the negotiation and enforcement stage. This chapter also highlights the potential and limitations of these solutions proposed in the hybrid model.

Chapter seven is the conclusion chapter of the thesis. This chapter summarizes the problems of tactical litigation identified in this thesis and the solution proposed in the hybrid model. It also evaluates the overall potential and limitations of the hybrid model proposal and identifies areas for further research that are open to discussion and criticism. The next chapter in this thesis will focuses on reviewing literature that has contributed to the discussion on the development of the *lis pendens* rule and the doctrine of *forum non conveniens* in transnational civil litigation are reviewed. The chapter also looks at scholarly works that have identified challenges associated with the *forum non conveniens* doctrine and the *lis pendens* rule.

CHAPTER 2: Literature Review

2.0 Introduction

This chapter presents a review of scholarly literature that has contributed to understanding on the application of the *lis pendens* rule and the *forum non conveniens* doctrine in resolving jurisdictional conflicts in transnational civil litigation. This literature review also evaluates scholarly contributions related to proposed solutions for resolving jurisdictional conflicts. This literature review examines the problems associated with tactical litigation as well as the suggested solutions for resolving jurisdictional conflicts in transnational commercial litigation. This chapter situates and outlines the contribution of this work within the existing literature. This work addresses gaps in the existing literature and in turn expands understanding on the issues of tactical litigation in transnational litigation. This literature review supports the theoretical foundation of the solution proposed in this thesis.

The literature review is presented thematically. This chapter analyses the themes identified in scholarly discussions about the civil law *lis pendens* rule and the common law *forum non conveniens* doctrine, as well as potential solutions for resolving tactical litigation in transnational litigation. The contributions of various authors on each theme are evaluated and critically examined to provide a comprehensive review of the key areas related to this thesis.

This chapter is divided into five parts. The first part presents literature that contributes to understanding on the development of *lis pendens* in international commercial litigation, particularly scholarly works that studied the growth of the *lis pendens* rules in the Brussels Regulations and how these regulations lead to more calculated tactical litigation. Part two presents significant literature on the development of *forum non conveniens* in transnational commercial litigation. Part three presents significant research on challenges faced in both *lis pendens* and *forum non conveniens* regarding resolution of the conflict of jurisdiction in transnational commercial litigation. The second part reviewed literature on the concept of *forum non conveniens* in transnational

commercial litigation. The third part examines significant literature on the difficulties encountered in both the *lis pendens* rule and the *forum non conveniens* when it comes to resolving conflicts of jurisdiction in transnational commercial litigation. This thesis looks at how the use of the *lis pendens* rule can be used as a tactic to delay legal proceedings, and how courts respond to this when making decisions on breaches of choice of court agreements and the *lis pendens* in the Brussels Regulation.

The part four presents literature that discusses the proposed solutions to resolve the problems of the *lis pendens* rules and the *forum non conveniens,* particularly in relation to conflicts of jurisdiction in transnational commercial litigation. The part four presents literature that suggests the harmonisation of both the *lis pendens* rule and *forum non conveniens,* by capitalizing on the advantages they have to offer. Lastly, this chapter highlights the originality of this work and its contribution to existing literature. The next section examines scholarly works that have contributed to the discourse on the development of the *lis pendens* rule in transnational commercial litigation.

The next section focuses on the review of literature that discusses the development of the *lis pendens* rule and its application in transnational litigation. The next section examines key scholarly works that have contributed to the development of this legal principle, the *lis pendens* rule which seeks to avoid conflicting decisions in multiple jurisdictions. The scholarly works of Campbell McLachlan, Fabrizio Marongiu Buonaiuti, Delia Ferri and other notable commentators on the development of the remedy of *lis pendens* are presented in the next section.

2.1 Literature that discusses the development of the *lis pendens* rule.

This section provides a review of significant scholarly literature that has contributed to knowledge on the development of the lis pendens rule in the context of transnational commercial litigation. There are notable scholars who have written prolifically on the historical development of the remedy of the lis pendens rule in transnational commercial litigation. Scholarly works of Campbell McLachlan, Fabrizio Marongiu Buonaiuti, Delia Ferri and other notable commentators on the development of the remedy of lis pendens are presented in this chapter. The scholarly work of Campbell McLachlan will be examined.

In his book titled, '*Lis Pendens in International Law'*,[183] Campbell McLachlan explored the intellectual origins of the *lis pendens* rule. Campbell noted that the modern studies of the *lis pendens* rule can be linked to the rule that gives priority to the court first seised of the same matter in the European civil procedure codes. This rule is closely related to the requirements for a judgment to have res judicata effect, which includes the same parties, subject matter, and cause.[184] Campbell McLachlan argues that there is a close relationship between the *lis pendens* rule and the principle of res judicata, and that both concepts may have a shared origin. Res judicata is a well-established principle of law recognized by civilized nations,[185] which is rooted in the fundamental principles of Roman Law.

However, the *lis pendens* rule was not treated as a separate concept by classical Roman jurists, possibly due to the highly centralized and imperial nature of Roman Law. Campbell McLachlan notes that Roman litigation had a clear understanding of the concept of consolidation through the principle of *litis contestatio*. This principle operated as a limitation on all other personal claims related to the same cause of action, starting from the beginning of the proceeding and during the enforcement of the judgement. The goal of this principle was to ensure that the entire liability of the defendant was concentrated in a single lawsuit, rather than being subject to multiple liabilities in other lawsuits with the same cause of action.

In contrast to its origins in Roman Law, Campbell McLachlan traces the origin of *lis pendens* under Common Law to the era of the legacy of equity's struggle for supremacy in England. McLachlan explains that within the English legal system, the idea of dealing with parallel proceedings reflected the history of the struggle for supremacy between courts, which had no inherent hierarchy. For example, there was a struggle between the Court of Chancery and Common Law courts when dealing with matters involving equitable relief. The Court of Chancery,[186] for example, had jurisdiction to entertain a claim for equitable relief even when the Common Law court was already

[183] Campbell McLachlan, *Lis Pendens* in International Litigation, (2009), Hague Academy of International Law
[184] McLanchlan (n 182).
[185] *Chorzow Factory* case (1927), *PCIJ Rep. Ser. A*, No. 9, 27 per Judge Anzilotti.
[186] (a court which had originally developed in mediaeval times as an appeal to the discretion of the King's Chancellor).

the first court seised in the dispute,[187] reflecting the struggle for supremacy in the English legal system.

Campbell McLachlan argues that the use of injunctions to prevent a litigant from pursuing a claim in Common Law courts while the same cause of action is pending before the Court of Chancery can be considered as the foundation of the classic application of injunctive relief in international commercial litigation. The scholar, McLachlan, stated that in the 19th century, one of the challenges faced by the English courts in relation to *lis pendens* was dealing with parallel proceedings in courts outside of the English legal system. To address this issue, McLachlan posits that the English courts would have to resort to the same remedies that had been in place for centuries to control a litigant's lawsuit in the Common Law courts. The fundamental question, according to McLachlan, is whether the proceeding was brought in a "vexatious manner" or whether the respondent's proceeding abroad was brought in a manner that was contrary to the principle of equity and good conscience.[188]

McLachlan's work provides valuable insights into the historical and legal context that underlies the use of injunctive relief in international commercial litigation and the ongoing challenges faced by courts in dealing with parallel proceedings. McLachlan also examined the use of anti-suit injunction in foreign proceedings. Campbell McLachlan argues that the expansion of the British empire, from Scotland and Ireland to the colonies and beyond, led to the expansion of the use of anti-suit injunctions in foreign proceedings.

However, courts were initially hesitant to stay proceedings in the same cause of action before courts abroad. It wasn't until later in the 19th century that courts reluctantly accepted to stay an English action whilst there were pending proceedings abroad. In the 1882 case of *McHenry v. Lewis*,[189] the court accepted to stay proceedings where the same plaintiff was involved in a lawsuit in two different courts at the same time.[190]

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[187] Raac, 'A History of Injunction in England before 1700' [1985-1986] 61 *Ind. L.J* 539.
[188] *Carron Iron Co. v Maclaren* (1855) 5 HL Cas 415, 436-437 (per Lord Cranworth LC); Kerr, *Injunction in Equity* (1867) 134, (cited in *Masri v Consolidated Contractors Int'l Co., SAL,* [2008] EWCA Civ. 625, (39) per Lawrence Collins LJ).
[189] (1883) LR 22 Ch 397, 400.
[190] A principle recognized in domestic cases by Sir Robert Phillimore in *Walsh v Bishop of Lincoln* (1874) LR 4 A & E 242 (Arches Court).

McLachlan notes that while it may be desirable to stay proceedings in favour of proceedings in foreign courts, it is important to exercise extreme caution as differences in the legal systems of foreign courts and the remedies available may justify the continuation of both actions in the court second seised.

McLachlan states that it is important to consider the nuances and specificities of the foreign legal system before deciding to stay proceedings in favour of proceedings in foreign courts. Campbell McLachlan's book raises several questions about the challenges faced in resolving conflicts of jurisdiction and enforcing judgments in international commercial litigation in relation to the *lis pendens* rule and the *forum non conveniens* doctrine. McLachlan believed that in the context of choice of court agreements, the preferred approach is to adopt the principle of positive *Kompetenz-Kompetenz*, rather than the blanket rule of negative principle of *Kompetenz-Kompetenz*, which often requires the court first seised to decline jurisdiction. He also proposes consolidation of lawsuits to ensure fairness in the legal system surrounding parallel litigation. However, McLachlan's focus seems to be more on finding solutions to the problem of *lis pendens* and the *forum non conveniens* at the negotiation stage. But he does not address solutions at the enforcement stage, which has been a growing concern among legal researchers and practitioners in the field of international investment arbitration.

Campbell McLachlan has made a significant contribution to the literature on international investment arbitration, particularly in relation to the *lis pendens* rule and parallel litigation. McLachlan's scholarly work provides important insights into the history and development of *lis pendens* in international litigation, critically evaluating its origins in both Roman and Common Law. Campbell McLachlan also makes a notable contribution by proposing the principle of consolidation to resolve related matters in transnational commercial litigation. There is an increasing trend among states to incorporate this principle into investment treaties, such as through the establishment of a Consolidation Tribunal with discretionary power to consolidate claims with similar facts and questions of law. [191] The research work of Fabrizio Marongiu on the *lis pendens* rule and related actions is discussed next.

[191] For example, Art. 1126 (2) of NAFTA.

In transnational commercial litigation, the *lis alibi pendens* rule and related actions share a common feature of promoting the recognition and enforcement of foreign judgements issue by a court that was first seised in related matters involving the same parties. Fabrizio Marongiu Buonaiuti**[192]** examined the legal framework underlying *lis pendens* and related actions in civil and commercial matters in the context of the Brussels Convention, with a specific focus on *lis alibi pendens*. He argues that the use of the *lis pendens* rules in international civil and commercial litigation can lead to tactical litigation, and that the *lis pendens* rule has been used by litigants to deprive the other party of the benefits of a fair outcome.[193]

Buonaiuti points out that the rules on the *lis alibi pendens* and related actions, which were previously contained in the Brussels Convention of 1968, are now found in the EC Regulation No. 44/2001 of 2000, known as the "Brussels I" Regulation. This regulation, which came into effect on 1 March 2002, replaces the Brussels Convention and provides rules for jurisdiction and recognition and enforcement of judgments in civil and commercial matters. He also notes that these rules on *lis pendens* are replicated, with some modifications, in the EC Regulation No. 2201/2003, known as the "Brussels II-bis" Regulation, [194] which deals with jurisdiction and recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility.

According to Fabrizio Marongiu Buonaiuti, under the "Brussels I" Regulation, there are three essential requirements that must be established for the *lis pendens* rule to apply. Firstly, there must be two concurrent proceedings with the same cause of actions; secondly, those proceedings must involve the same parties; and thirdly, one of the concurrent proceedings must have been initiated before another court. The scholar states that the *lis alibi pendens* rule under the "Brussels I" regulation is applicable in matters where two sets of proceedings[195] are pending before courts of different Member

[192] Fabrizio Marongiu Buonaiuti, 'Lis Alibi Pendens and Related Actions in Civil And Commercial Matters Within The European Judicial Area' (2009), Yearbook of Private International Law, Vol. 11, pp. 511-564.
[193] Fabrizio Marongiu, (n 191).
[194] Ibid.
[195] (Such proceedings must fall within the scope of application *ratione materiae* and *ratione temporis* of the relevant Regulation). [213] Regulation No. 44/2001.

States. [213] He also notes that under the "Brussels I" regulation, the domicile of the defendants is not relevant. Fabrizio Buonaiuti notes that in contrast to other provisions in the "Brussels I" regulation concerning jurisdiction, no relevance is given to the domicile of the defendants in the proceedings, whether they domiciled in different Member States, or in third countries.[196]

Supporting the view of Fabrizio Marongiu Buonaiuti on the scope of the *lis pendens* rule in international commercial litigation, Gilles Cuniberti, [197] states that the *lis pendens* rule requires three criteria to define a dispute in international commercial litigation: the parties to the action, the cause of the action, and the object of the action. However, Buonaiuti highlights the ambiguities in the 'Brussels I' Regulation. He states that the unchecked power of the judge of the court first seised poses challenges on the principle of reciprocal faith among the judicial system of the EU Member States.

According to Buonaiuti, the exclusion of a review of the jurisdiction of the court first seised suggests that the court second seised must suspend or stay proceedings until the court first seised has determined jurisdiction, even in a situation where the court second seised has exclusive jurisdiction in the matter.[198] However, Buonaiuti points out that the rule was modified by the 1989 Donostia-Sabastian Convention, which provided that the court first seised may determine that it has no jurisdiction in the matter only after the court second seised has dismissed the action.[199]

Secondly, it was stated that the exclusion of choice of court agreements in the Regulation raised a major concern on the effectiveness in the *lis pendens* rule to resolving conflicts of jurisdiction between parties in international commercial litigation. According to the scholar, the *lis pendens* rule under the Brussels Convention did not allow the court second seised (designated court in a choice of court of agreement) to review the jurisdiction of the court first seised. It was added that the jurisdiction of the court first seised can only be reviewed where exclusive jurisdiction

[196] Ibid, (n.174), p.520.
[197] Gilles C., 'Parallel Litigation and Foreign Investment Dispute Settlement', (2006) 21 ICSID Review – Foreign Investment L.J, 381.
[198] Ibid (n.174).
[199] Article Convention for the accession of Spain and Portugal to the Brussels Convention, signed at Donostia-San Sebastian on 26 May 1989, has amended the text of Article 21. [219] Ibid (n. 174).

is vested on the court second seised.[219] The scholar added that in a situation involving choice of court agreements, it is within the discretional power of the court first seised to assess the validity and enforcement of the agreement and, in such instance, the court first seised may choose to decline jurisdiction.[200]

Thirdly, the lack of average length of court proceedings in the Member States was identified as another problem surrounding the rule of *lis alibi pendens* in the 'Brussels I' Regulation. According to Buonaiuti, due to lack of timeframe in the Regulation, various courts have continued to develop different principles on the application of the *lis pendens* rule provisions. For instance, in *Gasser* case[201], it was held that there is no exception to the duty of the court second seised to stay or suspend proceedings in the matter on a mere ground that the legal system in the court first seised is known to be very slow and/or has excessively long court proceedings. According to ECJ in *Gasser's* case, the judicial systems of the Member states are considered equal.[202] The implication here is that the lack of average length of court proceedings would give litigants the opportunity to institute proceedings in a court that is known to have a slow judicial process for the purpose of frustrating the adversary party in the proceedings.

Gilles Cuniberti went further to highlight solutions by the Commission to resolve the problems of conflict of jurisdiction in the *lis pendens* rule. According to Cuniberti, the Commission required that the courts should not focus narrowly on the strict exclusive jurisdiction while determining jurisdiction between parties in transnational litigation, rather the courts should focus on the choice of court agreements between the parties. This solution would help to strengthen the party autonomy which was an issue under the 'Brussel I' Regulation.

The Commission also suggested that the defendant's domicile should be put into consideration where an action involves the infringement of certain intellectual property rights committed by different subjects. This would pursue the aim of avoiding multiplicity of actions in infringement of a given intellectual property. In addition, the

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[200] Case C-116/02. ECJ decision in *Overseas Union Insurance,* (9 December 2003), Also see, Case - C116/02 *Eric Gasser GmbH v MISAT Srl.* (2003) I-141693 *et. seq.*
[201] Ibid
[202] *Eric Gasser GmbH, (*n. 183)

Member States with which infringement is most connected[203] can also have jurisdiction in the matter, where there is lack of responsible coordination of activities constituting the infringement in the country where the defendant is domiciled.

However, Cuniberti has failed to address the issue of guaranteeing certainty and predictability while determining jurisdiction in cases of infringement. This is a significant gap in the literature, considering the importance placed on these factors by the European Court of Justice. The ECJ has emphasized that certainty and predictability are essential in the development of the *lis pendens* rule. On the other hand, Cuniberti has focused on highlighting the weaknesses of the "Brussels I" Regulation and neglected to acknowledge its strengths. This narrow perspective may limit the value of Cuniberti's analysis and could lead to an incomplete understanding of the regulation.

In contrast, Gilles Cuniberti made a valuable contribution to literature by critically evaluating the *lis pendens* rule and related action under the 'Brussels I' Regulation. Cuniberti's analysis of the Court's attitude towards the length of average proceedings shows the difficulty of the rule of *lis alibi pendens*. Furthermore, Cuniberti's proposed solution to the issue of exclusive jurisdiction and choice of court agreements is also a significant contribution to the literature. In essence, Giles Cuniberti's work provides valuable insights and a deeper understanding of the complexities surrounding the *lis pendens* rule.

The scholarly work of Delia Ferri[204] on the development of the *lis pendens* rule under the 'Brussels I' Recast Regulation is reviewed in this thesis. While the Brussels I Regulation may seem to have been one of the relevant legislations in the European Union (EU) particularly with the establishment of uniform rules on jurisdiction, recognition and enforcement of civil judgements, Delia Ferri noted that there are salient issues surrounding the Brussels I Regulation. For instance, the strict interpretation of the *lis pendens* rule by the Court of Justice (CJEU) which often deprived the court second seised the opportunity to determine jurisdiction in the same proceedings before

[203] See the Commission Green Paper (note 104), point 4, fourth indent, p. 6 *et. seq*.
[204] Delia Ferri, 'An End of Abusive Litigation Tactics within the EU? New Perspective under Brussels I Recast', (2014) 1 Irish Bus. L. Rev. 21.

a court first seised even in a situation where the court second seised has exclusive jurisdiction and or close connection in the matter.

As a result of the strict interpretation of the *lis pendens* rule, litigants are often vested with the rights to bypass the choice of court agreements between parties to the proceedings and, in turn, delay the outcome of the final enforceable decision (this is often known as a torpedo action). Delia Ferri highlighted the problem of the abusive tactical litigation under the "Brussels I" Regulation. Delia Ferri noted that the "Brussels I Recast Regulation" was introduced in December 2012 and became effective in January 2015[205] with the scope to resolve the problem of tactical litigation. However, Delia Ferri argues that the changes and provisions made in the "Brussels I Recast" do not effectively address the issue of tactical litigation.

According to Delia Ferri, the use of the *lis pendens* rule to bypass the 'choice of court' agreement between parties is the major problem of tactical litigation under the Brussels I Regulation. Delia Ferri argued that the strict interpretation of Article 27 by the CJEU to some extent allowed the surge in the abuse of the *lis pendens* rule. Delia Ferri used the decision of the CJEU in *Gasser's* case as an example to buttress the strict interpretation of the Article 27 of the Brussels I Regulation. Delia Ferri argued that despite the "choice of court" agreements designating a court second seised as having exclusive jurisdiction, the CJEU (Court of Justice of the European Union) ruled that the *lis pendens* rule requires the court second seised (a national court) to stay or suspend proceedings until the court first seised determines its jurisdiction in the matter.

This decision was made even though the second seised court was the court designated in the "choice of court" agreements, which are recognized under Article 23. Deli Ferri's argument articulates the potential for the *lis pendens* rule to override the provisions of "choice of court" agreements and create confusion and uncertainty for parties involved in legal proceedings. While the decision of the CJEU in the *Gasser* case may be applauded as a product of a very formal approach which placed the focus on logical reasoning rather than practical outcomes and on theoretical considerations rather than

[205] Regulation (EU) No. 1215/2012 [2012] OJ L351/1.

practical applications,[206] Delia Ferri argues that the implication of the decision is that the strict interpretation of Article 27 has led to opportunities for "torpedo" claims, particularly in regards to declaratory relief in courts that are not nominated in the choice of court agreements. Furthermore, Delia Ferri argues that the strict interpretation of the *lis pendens* rule also gives unscrupulous litigants the opportunity to circumvent the choice of court agreements.

Steinle, Vasiliades, and Bodgan were legal scholars who supported Delia Ferri's arguments on the decision of the CJEU in the *Gasser* case. Steinle and Vasiliades stated that it was deemed necessary and appropriate to maintain the principle surrounding the *lis pendens* rule, as the rule does not offer any exceptions, making it impossible for a court to find one.[207] Bogdan, on the other hand, argued that if the national courts in a Member State are allowed to examine the jurisdiction of courts in other Member States, it would result in jurisdictional problems and weaken the principles governing recognition and enforcement of judgments in international commercial litigation.[208]

However, Marinelli did not share the criticisms on the CJEU's decision in the *Gasser* case. Marinelli argued that the CJEU's decision in the *G*asser case was a proper interpretation of Article 27 of the Brussels I Regulation. Marinelli believed that the interpretation of Article 27 by the CJEU would ensure legal certainty and mutual trust among the Member States.[209] Delia Ferri however stated that Marinelli's view was based on the idea that the Court could not have interpreted the *lis pendens* rule in any way other than the CJEU's reasoning in the *Gasser* case. Delia Ferri noted that the new *lis pendens rules* in the Brussels I Recast tackle the problem of abuse of tactical litigation by virtue of provision in the Article 31 paragraph (1) of the Brussels I Recast.

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[206] Richard Fentiman, "Case note on *Gasser"* (2005) Common Market Law Review, 241, 251.
[207] Jonas Steinle & Evan Vasiliades, "The enforcement of jurisdiction agreements under the Brussels I Regulation: reconsidering the principle of party autonomy" (2010) Journal of Private Int'l Law 565, 571.
[208] Michael Bogdan, 'The Brussels/Lugano *Lis Pendens Rule* and the "Italian Torpedo' (2012), Scandinavian Studies in Law; Blobel and Patrick Spath, ""The tale of multilateral trust and the European Law of Civil Procedure" (2005) E.L.R, 528, 532.
[209] Marino Marinelli, "Litispendenza Comunitaria, Clausula di Proroga Esclusiva e Durata Irragionevole Del Processo Preveniente" (2004) Giurisprudenza, Italiana 69, 73.

Article 31 para. (1) provides that:

> … [W]here proceedings involving same parties and same cause of actions are pending before several courts of different Member States, the court with the exclusive jurisdiction in the contract agreement shall be respected and the court first seised shall decline jurisdiction in favour of that court (i.e., court with exclusive jurisdiction) …[210]

Delia Ferri believes that Art. 31 of the Recast Brussels Regulation can help to resolve issues related to the exclusive jurisdiction rules and in in turn prevent the use of a *'torpedo'* action as tactics to delay proceedings.[211] Delia Ferri further stated that the Brussels I Recast strengthens the validity choice of court agreements through the provision in Article 25.[212] Article 25 gives precedence to party autonomy by giving the court nominated in the agreement exclusive jurisdiction, unless the agreement is null and void or the parties agreed otherwise.

Despite significant reforms in the Brussels, I Recast particularly in relation to the choice of court agreements, Delia Ferri argued that it is too early to determine the effectiveness of the new Recast or how it will operate.[213] Delia Ferri concluded that the Brussels I Recast aims to provide trust and co-operation among Member States rather than intervene in their agreements. While the reforms in the Brussels I Recast tackle abuse of tactical litigation, Delia Ferri believes that aggressive litigation tactics are not likely to be completely removed in transnational litigation.[214] According to Delia Ferri, parties may use tactical planning in jurisdiction selection based on factors such as length of proceedings, legal costs, judges' skills, and likelihood of a favourable verdict. These differences and the requirement for a strong defence strategy in international

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[210] Regulation (EU) No. 121/2012 of the European Parliament and of the Council of Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), [2012] L 35/1, article 31.
[211] Delia (n 203).
[212] Regulation (EU) No. 121/2012 of the European Parliament and of the Council of Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), [2012] L 35/1, art. 25.

[213] Delia, (n 203).
[214] Delia (n 203).

commercial litigation will lead to increased use of aggressive litigation tactics.[215] Delia Ferri's scholarly work contributes to the literature by providing insight into the issue of abuse of tactical litigation in the Brussels I Recast. Furthermore, Delia Ferri's work also gives insight on the implication of the decision of the CJEU in the *Gasser* case. Delia Ferri's work also provides insight into the likely resurgence of aggressive litigation tactics through differences, such as length of time in proceedings and/or legal cost. This paper by Delia Ferri will be utilized in the thesis to facilitate a discussion on the problems of tactical litigation and its impact on the strict interpretation of the *lis pendens* rule, particularly regarding bypassing the choice of court agreement between parties in transnational commercial litigation.

The next literature review focused on the scholarly work of Chrispas Nyombi and Dickson Moses on "tactical litigation in the Post Recast Brussels Regulation Era".[216] Chrispas Nyombi and Dickson Moses studied the Recast Brussels Regulation, focusing on tactical litigation, which has been a major issue in transnational litigation. Leading cases and other legal practitioners' opinions on the amendments in the Recast Brussels I Regulation were evaluated by Chrispas Nyombi and Dickson Moses. The scholars, Chripas Nyombi and Dickson Moses, stated that the Recast Regulation aims to put in place mechanisms to prevent the abuse of tactical litigation in transnational litigation.[217] Chripas Nyombi and Dickson Moses stated that, despite the provisions in the Brussels I Regulations aimed at strengthening choice of court agreements and protecting litigants from abuse of tactical litigation, the new recast Regulation still leaves room for unscrupulous litigants to use tactical litigation to frustrate innocent litigants.[218]

On the other hand, Nyombi and Dickson examined the development of the *lis pendens* rule in the civil law jurisdiction. According to Nyombi, the origin of the *lis pendens* rule was traced back to the 1823 era in the *Tongue v Morton* case.[219] Furthermore, Nyombi stated that the *lis pendens* rule was established to promote cooperation and the

[215] Ibid.
[216] Nyombi, C and Oruaze Dickson, M, "Tactical Litigation in the Post Recast Brussels era" (2017), E. C L.R 38 (10), pp. 457-469.
[217] Ibid.; David Kenny and Rosemary Hennigan, 'Choice-of-Court Agreements, The Italian Torpedo, And the Recast Brussels I Regulation' (2015) Int'l & Comp. L.Q, 64(3)198, 203.
[218] Nyombi (n 215); Trevor Hartley, "liberal tourism and conflict of laws" (2010) 59 (1) Int'l & Comparative Law Quarterly, 36.
[219] Ibid.; *Tongue v Morton* (1823) 6 H&J 21, 23-24.

recognition of the judgments and jurisdiction of courts of a Member States. [220] The *lis pendens* rule aimed to prevent the multiplicity of courts action[221] and in turn to enhance the harmonization and the principle of comity among the Member States.

In contrast, Chrispas Nyombi and Dickson Moses pointed out that before the implementation of the Brussels I Regulation, the *lis pendens* rule was not universally recognized due to a lack of harmonization. [222] This highlights the role of the regulation in promoting uniformity in legal procedures. Nyombi added that the *lis pendens* rule under the Brussels I Regulation faced numerous obstacles, both from parties and from its equivalent in the common law *forum non conveniens* (FnC) doctrine. Nyombi and Dickson noted that the *forum non conveniens* doctrine was relevant in intra-European civil and commercial litigation. Prior to Brexit, the UK was obligated to adhere to the EU *lis pendens* rule, which contradicts the *forum non conveniens* doctrine.

Chrispas Nyombi and Dickson Moses pointed out that the *lis pendens* rule has been criticised for promoting abusive tactical litigation. It was argued that the *lis pendens* rule contravened the fundamental legal principles.[223] Accordingly, there was a crusade for the new Brussels I Recast, which promised hope and change, specifically in addressing the widespread problem of abusive tactical litigation under the Brussels I Regulation.[249] On the other hand, Chrispas Nyombi and Dickson Moses analysed the existence of tactical litigation under the Recast Brussels Regulation through court cases. Accordingly, it was stated that while some measures were taken by slow-moving jurisdictions to compensate parties, these steps were not sufficient in preventing the use of tactical litigation.[224] This is so because despite compensation being provided for parties, Member States were given the power to pursue cases from third states in breach of the choice of court agreements under the Recast Brussels Regulation.

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[220] Ibid.

[221] Nyombi, (215); Paul Beaumont and Peter McLeay, *Anton's private international law,* (3rd Ed, w Green 2011).

[222] Ibid.

[223] Albert Dicey, *Introduction to the study of the law of the constitution*, (8th Edn., Liberty Fund Inc., 1982); Aristotle, *The Nicomachean Ethics*, (Lesley Brown Ed, David Ross tr, Oup (2009) 80. [249] Regulation (EU) No. 121/2012 of the European Parliament and of the Council of Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), [2012] L 35/1.

[224] Ibid.

On the contrary, Nyombi argued that the CJEU hindered the progress made by other Member States in finding a solution to the problem of tactical litigation through its actions.[225] Nyombi and Dickson also highlighted mechanisms adopted by the different legal systems to address the problem of conflict of jurisdiction and same cause of action in transnational litigation. It was stated that while the common law countries considered the choice of court agreements between the parties to determine which court has jurisdiction, the civil law countries gave priority to the *lis pendens* rule in the Brussels I Regulation.[226] Nyombi and Dickson analysed the ECJ's decision in the case of *Continental Bank Na v Aeakos Compania Naviera Sa and others*.[227]

In the *Continental Bank Na* case, there was a valid contract agreement between the parties that gave each party the rights to issue an anti-suit injunction. However, the ECJ questioned the validity of the agreement and instead ruled that the procedures outlined in the Regulation should be followed.[228] Chrispas Nyombi and Dickson Moses argued that legal conflicts involving the choice of court agreements raise profound questions about the effectiveness of party autonomy and judicial cooperation. Accordingly, it was stated that judicial cooperation requires trust and cooperation between Member States, rather than intervention.

Chrispas Nyombi and Dickson Moses also added that while effective protection of party autonomy may require an intervention, the growing role of regional rules is making party autonomy a challenging issue.[229] It was added that, in theory, judicial cooperation exists only within the region, and it is impossible to use the regional rules governing external relations in practice. This is so because the internal market of the judicial cooperation system is an integrated part of the international market, and it is difficult to use a legal instrument to artificially fragment the market.

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[225] Ibid.

[226] Fentiman R, 'Jurisdiction agreements and forum shopping in Europe', (2006), JIBFL, para 304 at p.304.

[227] *Continental Bank Na v. Aeakos Compania Naviera Sa and others*, [1994] 1 WLR 588; (the decision of the court is also followed by the court in *Ot Africa Line Limited v. Fayad Hijazy*, [2002] ILPR 18).

[228] Ibid

[229] Nyombi (n 208).

On the other hand, Chrispas Nyombi and Dickson Moses argued that the current Brussels regime is problematic and impractical in dealing with conflicts of competence and choosing court arrangements. The scholars, Chrispas Nyombi and Dickson Moses, identified three (3) weaknesses under the current Brussels Regimes, such as (1) procedural certainty over party autonomy; (2) Mutual trust and comity exceed equity on a case-by-case basis; and (3) artificial fragmentation of the internal market and the international market. However, there is potential for improvement in the Brussels Regime after the adoption of the proposed amendment. This amendment provides for a harmonised selection of legal norms that govern the substantive validity of jurisdiction clause and the competency legal rule, as well as the provisional issuance of an exclusive jurisdiction clause.

Although the recent amendment and the Presidency's amendment do not accept the common law *forum non conveniens* doctrine for addressing conflicts of jurisdiction in cases involving an exclusive jurisdiction clause, however, Chrispas Nyombi argued that it is not necessary to adopt the *forum non conveniens* and anti-suit injunction if there is an appropriate approach in place to ensure the effectiveness of an exclusive jurisdiction clause. In contrast, Chrispas Nyombi and Dickson Moses stated that the elimination of the *forum non conveniens* doctrine and the anti-suit injunction would provide opportunities for unscrupulous litigants to use "*torpedo*" action as delay tactics to prolong the length of proceedings.

Accordingly, it was added that if the negative competence falsified doctrine is adopted in the Brussels regime, all unelected courts must continue the proceedings until the elected court decides. The scholars, Chrispas Nyombi and Dickson Moses, concluded that the Brussels Convention[230] was developed to simplify the formalities governing the reciprocal recognition and enforcement of judgments in the contracting states, and to promote economic efficiency and the internal market. Chrispas Nyombi and Dickson Moses also noted that the 1968 Brussels Convention underwent several reforms over

[230] The Brussels Convention on Jurisdiction and the enforcement of judgment in Civil and Commercial Matters, (27 September 1968) OJ 1978 1 304/6 (The Brussels Convention was signed in 1968 and concluded by the original six Contracting States of the EEC).

time, the most significant of which was the 1978 revision following the accession of the UK, Ireland, and Denmark. The term "Brussels Convention" generally refers to the 1978 accession.

The scholarly work of Chrispas Nyombi and Dickson Moses contributes to the literature on how to make the current Brussels Regime more effective and acceptable to both common law and civil law countries. The scholarly work also gives insights on the *lis pendens* rule and the *forum non conveniens* doctrine. The scholarly work of Chrispas Nyobmi and Dickson Moses also emphasizes the importance of using the *forum non conveniens* doctrine to prevent tactical litigation.

The next subsection presents scholarly works that examine the *lis pendens* rule after the Brussels Recast. This section reviews the scholarly works of notable scholars, such as Alexandru Soptica and Vesna Lazic, who have made significant contributions to the study of the *lis pendens* rule in transnational commercial litigation. Their works are analysed and discussed in this review, providing insights into the evolution and practical applications of the *lis pendens* rule in this legal context.

2.2 Literature on the *lis pendens* rule after the Recast Brussels Regulation

The scholar Alexandru Soptica[231] studied the changes to the *lis pendens* rule under the Brussels Convention[232] and the Brussels Recast.[233] According to Soptica, the *lis pendens* rule under the Brussels Recast Regulation has been modified in several ways. For instance, some modifications to the Brussels Recast Regulation have been made to strengthen the exclusive choice of court agreements and protect party autonomy in transnational litigation.[234] On the other hand, some changes under the Recast Brussels have been made to clarify the uncertainty regarding the application of the *lis pendens* rule, particularly in cases involving courts of third states.[235]

[231] Alexandru Soptica, “Lis Pendens after Brussels Recast”, [2015] R.B.LR, 86.
[232] Ibid.
[233] Ibid
[234] Brussels Recital 15 & 19; Article 29 (1); Article 31(2)(3) and (4).
[235] Recast Brussels, art. 33 and 34.

While comparing the old Brussels Convention and the new Recast Brussels Regulation, Soptica found that both the Brussels Convention and the new Recast Brussels Regulation contain a *lis pendens* rule that helps to prevent parallel litigation and promote judgment enforcement within the courts of the Member States.[236] However, Alexandru Soptica highlighted two important changes under the new Recast Brussels Regulation, specifically in relation to the provision in Article 31 (2).[237] According to Soptica, there are significant changes in the new Recast Brussels Regulation in relation to choice of court agreements in Section 9 of the new Recast Brussels Regulation. [238] On the other hand, Alexandru Soptica pointed out that there is significant change in the language of Article 31(2) under the Recast Brussels Regulation, by adding the words "without prejudice to Article 31 (2)". According to Alexandru Soptica, this change is expected to resolve the controversial issue surrounding the decision of the Court of Justice of the European Union (CJEU) in the *Gasser* case.[239]

However, Soptica argued that the 'first-come, first-served' rule in Article 29[240] will not be applicable, where courts of the Member States are granted jurisdiction by virtue of an exclusive jurisdiction agreement.[241] The scholar, Soptica further explained that while the Council may have selected the six-months term as proposed by the Commission[242] for a court first seised to determine its jurisdiction in a matter that is pending before another court of a Member States, provision under article 29 (2) of the Recast Brussels Regulation requires that a court first seised shall inform *without delay* upon the application by the court second seised in accordance with Article 32.[243]

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[236] Ibid (n. 230).
[237] Recast Brussels Regulation.
[238] Recast Brussels Regulation, article. 29.
[239] *Erich Gasser MbH v. Misat Sri* [2003] ECR 1-14693.
[240] Recast Brussels Regulation, article 29.
[241] Alexandra Soptica (n 198); Tena Ratkovic, Dora Rotar, "Choice-of-court Agreements under the Brussels I Regulation (Recast), [2013] 9 Journal of Private International Law, 245, 261.
[242] Commission, 'Proposal for a regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement m of Judgment in Civil and Commercial Matters, (Recast)' [2010] COM, 748.
[243] Recast Brussels regulation, Article 32.

Article 32 provides guidelines for courts and litigants to determine when a court is first seised. According to Soptica, these guidelines will help to achieve the scope of the provision in Article 29 (2).[244] Article 29(2) aimed to strengthen the choice of court and exclusive jurisdiction agreement between parties in transnational litigation. In addition, Soptica noted that the guidelines will help to enhance communication and comity among the courts seised. However, Soptica argued that it is unlikely that Article 29(2) and Article 32 in the new Recast would achieve the overall objective of the proposal.

In contrast, Soptica argued that the decision of the CJEU in the *Gasser* case [245] created a setback on the application of choice of court agreements in transnational proceedings.[246] Soptica argued that the decision of the CJEU in the *Gasser* case placed more priority on procedural rules rather than party autonomy and choice of court agreements.[247] The decision of the CJEU in the *Gasser* case focused more on promoting certainty and procedural justice for the parties within the EU jurisdiction.[248] Soptica argues that the failure to treat exclusive jurisdiction agreements in a manner consistent with other exclusive jurisdiction provisions in EU law has led to increased forum shopping and abusive litigation tactics. The exclusive jurisdiction agreements are not being effectively enforced, which undermines the fairness of the EU legal system. [249]

However, Alexandra Soptica acknowledges the efforts made by the Commission to review the provisions in the Brussels Convention regarding exclusive jurisdiction agreements. It is believed that the solution proposed by the Commission, as outlined in Article 31 (2) of the Recast, will help to prevent abusive tactical litigation and ensure that the court chosen in the choice of court agreement is not deprived of its jurisdiction.[250]

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[244] Recast Brussels Regulation, Art. 29.
[245] Ibid (n. 206).
[246] The problem created by ECJ in the *Gasser* judgement is further discussed in chapter five in this thesis.
[247] Jonas Steinle, Evans Vasiliades, 'The Enforcement of Jurisdiction Agreements under the Brussels I Regulation: Reconsidering the Principle of Party Autonomy' [2010] 6 JPIL, 565, 571-572.
[248] Richard Fentiman, "*Lis Pendens* – related actions in Brussels I Regulation", [2012] European Commentaries on Private International Law, 560.
[249] Ibid (n.198); Iloma Nurmela, "Sanctity of Dispute Resolution Clauses: Strategic Coherence of the Brussels System", [2005] 1 JPIL, 115, 134.
[250] Ibid (n. 198); Trevor Hartley, "Choice-of-court agreements and the new Brussels I Regulation" [2013] 129 Law Quarterly Review, 309.

Article 31(2) provides as follows:

> …In cases where there is a choice-of-court agreement and the same parties are involved in proceedings with the same cause of action, any court in a member state must suspend its proceedings until the court designated in the agreement determine its jurisdiction...[251]

This provision reverses the strict application of the *lis pendens* rule and in turn gives power to the designated court to determine jurisdiction in relation to the choice of court agreements.[252] Soptica stated that to address the problem of tactical litigation, precautions should be taken under the Article 35 of the Recast. In addition, Soptica suggests that specific Member States could grant a provisional protective measure until the designated court determines its jurisdiction in a matter.

However, it remains to be seen whether this solution will effectively address the problem of forum shopping and abusive litigation tactics. The effectiveness of the solution will depend on various factors, including the implementation of the provisions and the willingness of EU member states to cooperate in ensuring that the provisions are followed. Moreover, it is important to consider other factors that may contribute to the problem of forum shopping and abusive litigation, such as differences in the legal systems and procedures between EU Member States, and the need for further harmonization of EU law. The Commission's solution may only be one step towards addressing these broader issues and achieving a more uniform and fair EU legal system.

Vesna Lazic's scholarly work on the "The Revised Lis Pendens rule in the Brussels Jurisdiction Regulation"[253] is reviewed in this thesis. Vesna Lazic reviewed the Brussels Regulations, a set of rules that governs jurisdiction and the recognition and enforcement of judgements in civil and commercial matters in the European Union. The Commission has proposed changes to the Regulations to increase effectiveness, with a

[251] Recast Brussels Regulation, article 31(2).
[252] Trevor Hartley, 'Choice-of-court agreements and the new Brussels I Regulation' [2013] 129 L.Q Review, 309.
[253] Vesna Lazic, 'The Revised Lis Pendens-Rule in the Brussels Jurisdiction Regulation' [2013], Rev. Eur. L., 5

focus on promoting the use of choice of court agreements, to prevent "torpedo actions", which refer to a defendant intentionally creating jurisdiction issues to avoid being sued in a particular court, and to increase predictability and certainty in the legal process.

However, Lazic argues that the Commission's proposal for changes to the Brussels Regulations creates additional judicial costs for litigants and delay to proceedings. [254] Furthermore, Vesna Lazic argues that the final Recast proposal did not address the *lis pendens* rule, [255] a principle that governs the relationship between parallel proceedings in different Member States. Lazic believes that the Recast Regulation has not done enough to make the Regulations a universal rule, as they are only applicable within the EU.

Vesna Lazic's argument highlights the importance of clear and concise regulation in the European Union to facilitate the effective interpretation of the *lis pendens* rule by national courts. According to Vesna Lazic, it is believed that the *lis pendens* rule should be reformed in order to increase efficiency among the courts of the Member States. However, Vesna Lazic does not provide a concrete solution for the revision, only expressing a desire for a list of grounds for non-referral to the chosen court. This lack of specificity highlights the need for further analysis and development of the regulation to ensure its effectiveness.

The next section presents significant literature that discusses the development of the *forum non conveniens* doctrine in transnational litigation. The scholarly works of Whytock and Cassandra Burke are examined. Also, the scholarly work of commentators such as Markus Petsche, Martine Stuckelberg, Alexander Moss, Louise Weinberg, Ronald Brand, Burke Roberton, Edward Flanders and Ranah are also reviewed.

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[254] Ibid

[255] the proposal only suggested deleting in paragraph two the reference to consolidation in national laws. [296] for detailed comments on the proposal for universal jurisdiction, see Weber, 'Universal Jurisdiction in third states in the reform of the Brussels I Regulation', (2001) Babels Zeitschrift, 75. pp. 620. [297] the impact assessment - accompanying the proposal of 14 December 2010 for a regulation of the European parliament and of the council on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, com(2010)748 final 2010/ 0383(cod) (commission staff working paper) 18101/ 10 addl justcn 239 of 17 December 2010; commission stuff working paper impact assessment, brussels 14.12.2010 sec(2010)1547, (com[2010] 748 final) (sec[2010] 1548 final), p. 29, under 2.3. (Hereinafter: impact assessment.

2.3 Literature that discusses the development of the *fnc* doctrine.

Whytock and Cassandra Burke[256] highlighted the scope of the *forum non conveniens (*FnC) doctrine in transnational commercial litigation. Whytock and Burke stated that the *forum non conveniens* doctrine gives discretionary power to courts in common law countries to dismiss a transnational suit in favour of a litigant who chooses a preferred foreign court particularly if the foreign court is the most suitable and convenient forum to adjudicate the matter between the parties to the agreement. On the other hand, Martine Stuckelberg traced the origin of the *forum non convenien*s doctrine to the Scottish legal system. Martine Stuckelberg stated that although the doctrine was not widely accepted at the beginning, it was later popularised and adopted by most of the common law countries who rely on the doctrine to decline jurisdiction.[257]

Alexander Moss also traced the historical development of the *forum non conveniens* doctrine to the era of the equitable doctrine of *forum non competences* in Scottish Law. The scholar, Alexander Moss, highlighted that in the eighteenth century, an equitable doctrine of *forum non competens* was developed within the Scottish Law[258] to dismiss cases or suits filed in a jurisdiction posing undue hardship to the defendant when a more suitable alternative forum was available. According to the scholar, the decision of the U.S. Supreme Court in federal courts cases *Gulf Oil Corp. v. Gilbert389* and *Koster v (American) Lumbermens Mutual Casualty Co.* [259] marked the beginning of the recognition of the applicability of the doctrine of *forum non conveniens.* These two cases involved disputes as to which court has more the appropriate forum to determine a suit brought under the U.S. federal courts' diversity jurisdiction.

[256] Christopher Whytock, and Roberson, Cassandra Burke, 'Forum Non Conveniens and Enforcement of Foreign Judgements', (2011), Faculty Publications, 40.
[257] James j. Fawce'it, "Declining jurisdiction in private international law", (1994), International academy of Comparative Law.
[258] Alexander Moss, 'Bridging the Gap: Addressing the Doctrinal Disparity Between *Forum Non Conveniens* and Judgement Recognition and Enforcement in Transnational Litigation', (2017) The Georgetown Law Journal, Vol. 106:209
[259] *Gulf Oil Corp. v Gilbert* (1947) 330 US 501, 507-08; SEE ALSO *Am. Dredging Co.* 510 US, at 450 (Giving dissenting judgement, Kennedy J, describing *forum non conveniens* doctrine as judicial response to "problem of plaintiffs' misusing venue" to inconvenience defendants) Christopher, (n 255).

On the other hand, Whytock and Burke highlighted that the discretionary power of the national courts in relation to the *forum non conveniens* doctrine is based on whether the foreign court is an available and adequate alternative forum to litigants in the matter. Ronald Brand supports the view of Whytock and Cassandra Burke regarding the scope of the *forum non conveniens* doctrine in the common law judicial system. According to Brand, the *forum non conveniens* doctrine gives courts the power to stay or dismiss a case, where there is a more appropriate and adequate forum to hear the case.[260] This power is based on either a choice of court agreement or an exclusive jurisdiction clause in the contract agreement between the parties. Whytock and Burke further added that the *forum non conveniens* doctrine is intended to prevent a party from commencing proceedings in a forum that is inconvenient to the other party, particularly where the forum may lead to a trial that is vexatious or oppressive for the adversary party.[261]

Whytock and Burke noted that the later statements depicted the fundamental purpose which is to ensure proceedings or trials are convenient to the parties in the proceeding. Whytock and Burke argued that while the *forum non conveniens* doctrine is commonly referred to in term of 'convenience', the doctrine's primary goal is to prevent undue burden on courts and litigants in transnational litigation. The *forum non conveniens* doctrine gives judges discretionary power to make adjustment to jurisdiction in specific cases.[262] Whytock and Burke stated that the *forum non conveniens* doctrine should not be viewed from the perspective of a 'convenience', rather the doctrine should be viewed as a measure for promoting justice.

By ensuring that cases are heard in the most appropriate forum, the doctrine helps to ensure that justice is served in the most effective and efficient manner possible. Whytock and Burke acknowledged that the *forum non conveniens* doctrine has been criticised for denying litigants access to justice.[263] But while a *forum non conveniens* dismissal is often used by courts in the U.S. to deny a plaintiff court access in transnational suits, Whytock and Cassandra argued that the *forum non conveniens* doctrine does not entirely deny the plaintiff access to justice. In the U.S., courts are not allowed to dismiss a transnational suit on the grounds of *forum non conveniens* unless

[260] Ronald Brand, 'Challenges to Forum Non Conveniens', (2013) International Law and Politics, Vol.
[261] Ibid (n 258)
[262] Ralf Michaels, "Two Paradigms of Jurisdiction", (2006), 27 Mich. J, Int'l L., 1003, 1008.
[263] Ibid

there is an available forum or access to justice – even if the dismissal appears to be a complete dismissal of the matter.[264]

On the other hand, Ronald Brand stated that in the U.S. the *forum non conveniens* doctrine is used in two stages. First, at the early stage, the doctrine is used to determine whether the U.S. court or the court of other countries has jurisdiction to decide the matter between the parties to the agreement. Second, at the judgment enforcement stage, the doctrine is used to determine whether a U.S. court should enforce a judgement obtained from a foreign court. Ronald Brand noted that while the U.S. Constitution requires U.S. courts to give full faith and credit to judgments obtained within the U.S,[265] there is no such requirement in the U.S. constitution that requires the U.S. courts to acknowledge the judgment obtained from the foreign court.[266]

Although there is no constitutional rule in the U.S. to guide courts on the recognition and enforcement of judgments obtained from a foreign court, Ronald Brand stated that federal principles are used by U.S. federal courts to make such decisions. Ronald Brand also added that the primary purpose of the *forum non conveniens* doctrine at the judgment enforcement stage is to prevent re-litigation and duplication of cases in the U.S. courts, particularly when a judgment has already been obtained in another jurisdiction in the same matter. At the judgment and enforcement stage, the *forum non conveniens* doctrine helps to prevent wasteful duplication of proceedings.[267] The *forum non conveniens* doctrine at the judgment enforcement stage helps to avoid redundant and unnecessary court proceedings. It also helps to prevent defendants from using evasive tactics to avoid being held liable for a judgment made in a transnational lawsuit.[268] In addition, the doctrine of *forum non conveniens* at the judgment and enforcement stage also helps to avoid conflicting court decisions.[269]

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[264] Christopher, (n 255).
[265] U.S Const. art. IV (article IV, Section 1 Full Faith and Credit Clause requires state courts to recognise any valid final judgement rendered by another U.S. state).
[266] Ronald Brand, 'Enforcement of Foreign Money-Judgements in the United States: In Search of Uniformity and International Acceptance', (1991) 67 Nortre Dame L., Rev., 253, 255.
[267] Aurthur T, von Mehren & Donald Trauman, 'Recognition of Foreign Adjudications: A Survey and a Suggested Approach' (1968) 81 Harv. L. Rev., 1601, 1603.
[268] Mehren & Trautman, note. 195.
[269] Ibid.

Ronald Brand added that the *forum non conveniens* doctrine at the judgment and enforcement stage serves a purpose of promoting the principle of international comity. According to Ronald Brand, the justification for the enforcement of a foreign judgment is based on the idea of comity, which refers to the recognition and respect that one nation gives to the laws and legal systems of another. Additionally, it is believed that a foreign judgment creates a binding legal obligation on the defendant that should be treated the same way as any other obligation by domestic courts.[270]

Ronald Brand cited the U.S. Supreme Court judgment in the *Hilton v Guyot* case.[271] According to Ronald Brand, a U.S. court will enforce a foreign judgment as a matter of comity where certain conditions are satisfied:

> …If a foreign court has provided a fair and impartial trial with proper jurisdiction and procedure, and there is no evidence of bias, fraud, or any other valid reason to challenge the judgment, then it should be recognized and enforced in the domestic courts without re-examination of the case's merits. The defendant cannot simply assert that the foreign judgment was incorrect in law or fact to avoid enforcement…[272]

However, Ronald Brand argued that the principle of international comity is based on reciprocity, meaning that a court will only enforce a foreign judgment if the foreign court in question would also enforce a judgment obtained by the domestic court. In other words, a court will only recognize and enforce a foreign judgment if there is mutual recognition and enforcement between the domestic courts and the foreign court. In *Gau Shan Co. v Bankers Trust Co.,* [273] it was held that the principle of international comity weighed in favour of deferring to foreign forums.[274] Also in *Bigio v Coca-Cola*

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[270] Hans Smit, 'International Res Judicata and Collateral Estoppel in the United States' (1962) 9 UCLA L. Rev 44, 56, 58 (noting policy that "there must be an end to litigation and that nobody should be allowed to vex his opponent twice" and arguing that basic rationale is "to prevent duplication of litigation that is unfair and harassing to the individual litigants"); also see, *Hilton v Guyot* (1895) 159 US 113, 203.
[271] (1895) US 113, 203-03.
[272] Ibid
[273] (1992), Cir. 956, F2d, 1349, 1355.
[274] Ibid.

Co.,[275] it was held that the *forum non conveniens* doctrine on enforcement of judgments is based on "whether adjudication of [the] case by a United States court would offend 'amicable working relationships'"[276] established between other foreign countries. In the *Gau Shan Co.,*[277] case, the court demonstrated respect for the jurisdiction and competence of foreign courts, but with the condition of reciprocity and cooperation.[278]

Other commentors such as Louise Weinberg, Burke Roberton, Edward Flanders, and Ranna also support the view that the doctrine of *forum non conveniens* is based on the principle of international comity. Louise Weinberg[279] stated that the principle of international comity gives courts in the U.S. the jurisdiction to hear tort cases, particularly where the substantive law between the countries involved is similar.[280] Similarly, Burke Robertson stated that the *forum non conveniens* doctrine strengthens the principle of international comity, particularly in tort cases where the claimants are foreign, and the defendants are U.S. corporations.[281]

In transnational litigation, principle of international comity has been recognised by courts of Member States. The courts of the Member States would recognize and enforced the judgment of a foreign court.[282] The principle of international comity is a non-binding legal principle that is widely recognised among nations as a means of resolving international disputes. This doctrine was adopted by the common law over 200 years ago and serves a theoretical justification for permitting courts to defer their legislative, judicial, and executive actions for a foreign sovereign in order to be fair in individual cases.[283]

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[275] *Bigio v Coca-Cola Co.* (2006) 2d Cir448 F 3d 176, 178.
[276] Ibid, (n.274).
[277] Ibid, (n.272).
[278] *Gau Shan* Co. 956 F 2d at 1355 (criticizing antisuit injunction as "convey[ing] the message, intended or not, that the issuing court has so little confidence in the foreign courts ability to adjudicate a given dispute fairly and efficiently that it is unwilling even to allow the possibility").
[279] Louise Weinberg, 'Insights and Itornies: The American Bhopal Cases', (1985) Int'l L.J, 307.
[280] Ibid, (n.278) ("Maintaining the Bhopas cases in [U.S.] courts would not violate principles of international comity… [but in fact] granting access would be an exercise in comity.").
[281] Cassandra Burke Robertson, "Transnational Litigation and Institutional Choice", (2010), 51 B.C L. Rev. 1081, 1130.
[282] *Hilton v Guyot* (1895) 159 US 113, 203-03.
[283] Ibid

Whytock and Burke explained that the term transnational litigation refers to legal suits that have connections to multiple countries, particularly because the parties involved in the suits are domiciled in different countries. In transnational litigation, when a dispute arises from contract agreements between the parties, multiple courts from different countries may have jurisdiction to preside over the matter. This can lead to a situation where different courts may have conflicting decisions, creating confusion and uncertainty for the parties involved.

These dual or multiple jurisdictions create a challenge for the parties involved in the litigation, as they must navigate different legal systems, cultures, and languages. Furthermore, the process of enforcement of a court's decision in another country may be difficult, as it may not be recognized or enforceable in the other jurisdiction. In order to resolve this issue, parties involved in transnational litigation may choose to agree on a specific jurisdiction for the dispute, or they may rely on international treaties and conventions that provide for the recognition and enforcement of foreign court decisions. However, despite these efforts, transnational litigation remains a complex and challenging area of the law. It is important for parties involved in transnational litigation to seek legal advice from experienced practitioners to navigate the complex legal landscape and reach a resolution to their dispute.

The scholarly work of Markus Petsche[284] also contributed to literature on the scope and purpose of the doctrine of *forum non conveniens* in transnational commercial litigation. Petsche highlighted that the *forum non conveniens* doctrine is used in the common law countries such as the United States (U.S.), the United Kingdom (U.K.), Australia and Canada amongst others.[285] Petsche pointed out that the *forum non conveniens* doctrine gives discretionary power to courts to ensure flexibility and fairness among parties involve in transnational proceedings. In essence, the doctrine allows courts to exercise their discretion in deciding whether a case should be heard in the court where it was originally filed or in a different forum, in order to ensure a fair and appropriate outcome for all parties involved in the case.

[284] Markus P, 'A critique of the doctrine of forum non conveniens', (2012) J. Int'l L. pp 546
[285] Ibid 550

However, the exercise of discretion by the courts may not always result in a fair and just outcome, as the courts may be influenced by local interests and biases. Additionally, the use of discretion in determining the appropriate forum may create uncertainty and unpredictability in transnational litigation, as parties may not know where their case will ultimately be heard. Furthermore, the doctrine may be used to frustrate the legitimate expectations of litigants, who may have relied on the original jurisdiction when bringing their case. This can result in unnecessary delay and expense, as the case may need to be re-filed in another jurisdiction.

On the contrary, Petsche highlighted five solutions to ensure the effectiveness of the *forum non conveniens* doctrine at the negotiation stage in transnational litigation. The five solutions are: a) uniform foreign judicial adequacy standard, b) adequacy for both plaintiffs and defendants, c) rigorous application of the enforceability factor, d) certification by defendant, and e) return Jurisdiction Clause. Scholars added that it is important that the courts should consider these five related solutions at the negotiation stage to tackle the problem of tactical litigation in transnational commercial litigation in relation to the doctrine of *forum non conveniens.*

Petsche also highlighted solutions that should be considered at judgment enforcement stage while applying the *forum non conveniens* doctrine. At the judgment enforcement stage, Petsche highlighted the following solutions, which are: a) estoppel, b) rejection of case specific defences against enforcement, c) mitigating the ex-ante/ex post problem: allocating the risk of post dismissal changes in foreign judicial adequacy, d) conditional consent to enforcement, and e) expedited review.

The scholars, Brand and Petsche, contribute to literature, particularly on the scope and purpose of the *forum non conveniens* doctrine in transnational litigation. The scholarly work of Mark Petsche gives a clear understanding on how the *forum non conveniens* doctrine helps to resolve the problem of jurisdiction and judgment enforcement in transnational litigation matters. Ronald Brand's scholarly work provides valuable insights into solutions and guidance for courts when applying the *forum non conveniens* doctrine, both in the negotiation stage and in the judgment enforcement stage. Ronald Brand's proposed solutions shall be further discussed in the chapter 6 of the thesis.

Petsche's scholarly work focuses primarily on the scope and purpose of the *forum non conveniens* doctrine, Petsche did not address the challenges faced by the doctrine. This is a significant limitation, as exploring these challenges is crucial in determining the effectiveness of the solutions proposed in the thesis to prevent the use of tactical litigation in transnational commercial litigation. It is important to consider these challenges in order to ensure that the proposed solutions are robust and capable of effectively addressing the issue.

The next section in this chapter presents literature that discusses the challenges facing the *forum non conveniens* doctrine in transnational litigation. Ronald Brand's scholarly work on the challenges of the *forum non conveniens* doctrine is reviewed. The scholarly works of commentators such as Edward Barrett, Whytock and Cassandra Burke, Anthony Grey and Martine Stuckelberg are also reviewed.

2.4 Literature that discusses the challenges faced by the *fnc* doctrine.

Despite the development of the *forum non conveniens* doctrine in transnational litigation as a possibility to address the problem of parallel litigation, Ronald Brand[286] acknowledged that the *forum non conveniens* doctrine faced challenges on a number of fronts, challenges such as the supremacy of the civil law *lis pendens* rule over the common law *forum non conveniens* doctrine, discrepancies in tests applied in the use of *forum non conveniens* by the common law countries, and statutes designed to curtail the effect of *forum non conveniens* dismissals in transnational commercial litigation.

Ronald Brand explained that under the civil law jurisdiction, little credibility is given to the common law discretionary power of judges. This is due to the idea that the exercise of discretionary power given to court to stay or dismiss a case is inconsistent with the basic understanding of a judge's role in the civil law countries. The scholar further explained that the decision of the European Court of Justice (ECJ) in the *Gasser*[287] and *Owusu* cases shows the attitude of courts in Europe on the civil law *lis pendens* approach and the common law *forum non conveniens* approach to forum shopping and parallel litigation.[288]

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[286] Ronald *Brand*, (note.265).
[287] *Erich Gasser GmbH v. MISAT Srl*. [2003] ECR I-14721.
[288] Case C-281/02 *Owusu v Jackson* [2005] ECR I-1445.

Ronald Brand illustrated the challenges confronting the *forum non conveniens* doctrine following the decision of the ECJ in the *Gasser* case. Ronald Brand argued that rigid interpretation of the *lis pendens* rule under the Brussels jurisdictional regime was adopted by the ECJ to deny the defendant (Austrian seller) the right to stay proceedings in the matter despite overwhelming evidence in the contract agreement which gives jurisdiction to the Austrian court (choice of court). The Austrian seller relied on Article 17 of the Brussels Convention which supported exclusive jurisdiction. On the other hand, the Italian buyer argued that Article 21 required that other courts seised should stay proceedings until a court first seised determined its jurisdiction.

The Austrian seller (Gasser) also relied on Article 5 (1)[289] which provides for the place of performance of the contract as a condition that courts should consider in order to assume jurisdiction in matters involving parties in transnational commercial litigation.Accordingly, the seller argued that even if the choice of court agreement is invalid for any reason, the Article 2[290] & Article 5(1) should be used by the court to assume jurisdiction in the matter. Article 2 of the Brussels Convention makes provision for the domicile of the defendant as a prerequisite for determining jurisdiction in transnational commercial litigation.[291]

The European Court of Justice, led by President Skouris, issued a unanimous decision stating that under Article 21 of the Brussels Convention, the jurisdiction of the court first approached takes precedence over the choice of court agreement provided for in Article 17. Consequently, the Austrian national court, which had exclusive jurisdiction over the dispute as per the agreement, must dismiss the case in favour of the buyer. [292] This ruling clarifies that the first court approached in a legal dispute should have jurisdiction over the matter, regardless of any prior agreements made between the parties.

[289] Article 5 of Brussels Convention of 1968.
[290] Article 2 of the Brussels Convention of 1968 make provision for domicile of the defendant as precondition to determining jurisdiction in transnational commercial litigation.
[291] Ibid.
[292] This case is further discussed in chapter five in this thesis. In the chapter five, the reasoning behind the CJEU judgement in the *Gassers* case is evaluated.

Ronald Brand stated that the rigid interpretation of the *lis pendens* rule laid down by the ECJ in *Gasser's* case has been followed by other courts in some cases, for example in the *Owusu* case. Ronald Brand argued that while the court in the *Owusu* case[293] may have justified its decision in the case based on "the predictability of the rules of jurisdiction laid down by the Brussels Convention",[294] the outcome of the decision shows the rigid interpretation of the *lis pendens* rule over the common law *forum non conveniens* doctrine. This rigid approach undermines the principles of party autonomy and efficient resolution of disputes, as it restricts the parties' ability to choose a jurisdiction that is most convenient or appropriate for them.

Judgments in the two cases of *Gasser* and *Owusu* produced the same result which gives litigants the opportunity to rush to the courthouse to deprive the jurisdiction of the court designated with exclusive jurisdiction in the choice of court agreement and to allow a party other than the natural plaintiff to take advantage of the *lis pendens* rule to frustrate and vex the adversary party in the proceeding.[295] Be that as it may, while the civil law race to the courthouse may strengthen predictability in the legal system, the scholar emphasised that the rush to the courthouse deprives courts the opportunity to exercise discretionary power to resolve disputes between the parties in a natural manner. The scholar, Ronald Brand explained that the rigid interpretation of the jurisdiction principle and the rush to the courthouse simply suggests that only the court first seised will always be a suitable forum to decide the disputes arising between parties in the proceedings and, as a result, any judicial discretion of any other court seised that may likely be the most appropriate forum is foreclosed.

In contrast, Ronald Brand acknowledged that issues highlighted in *Gasser* and *Owusu* case have been resolved through Article 31 (2) in the new Brussels I Recast Regulation.[296] Accordingly, if a dispute arises, the court selected in the choice of court agreement will have exclusive jurisdiction over the case, even if other courts have jurisdiction under the rules of international or national law. The court first seised must decline jurisdiction in favour of the courts selected in the choice of court agreement.

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[293] *Owusu v Jackson* [2005] ECR I-1445.
[294] Ibid, paragraph 46.
[295] Ibid.
[296] Article 31(2) of the new Brussels I Recast Regulation make provision for choice of court agreement.

The principle of exclusive jurisdiction means that only the chosen court can hear the case, and any other court that is seized of the matter must decline jurisdiction in favour of the chosen court. This arrangement provides the parties with certainty and predictability regarding the forum in which their dispute will be heard, which can be important for the resolution of cross-border disputes.

Article 31 (2) provided that:

> ….Without prejudice to Article 26, where a court of Member States on which an agreement as referred to in Article 25 (choice of court agreements) is seised over a matter, any other courts shall stay the proceedings until when the court first seised declares that it has no jurisdiction under the agreement…[297]

Ronald Brand also noted that paragraph (2) of Article 31 in the new Brussels I Recast strengthens party autonomy and choice of court agreements. According to Ronald Brand, the spirit and ethos governing Article 31(2) was based on rules that the EU itself agreed to in the negotiation of the 2005 Hague Convention in relation to choice of court agreements.[298] However, while Article 31(2) may seem to address the problem in the *Gasser* case, Ronald Brand argued that the changes in the new Brussels I Recast does not seem to address the problem in the *Owusu* case, particularly the problem of a more direct relationship between the doctrines of *forum non conveniens* and *lis pendens*, but instead it was stated that the changes in the new Recast leaves intact the strong preference for the civil law *lis pendens* rule and its dominance over the common law doctrine of *forum non conveniens*, particularly in a situation where the defendant is from a European Union Member State.

With the UK's exit from the European Union, it is uncertain how these principles will be applied in cross-border disputes involving the U.K. and EU. Before Brexit, the EU's Recast Brussels Regulation provided a framework for the resolution of cross-border disputes in the EU, including the recognition of choice of court agreements and the *lis*

[297] Recast Regulation.

[298] Hague Convention on Choice of Court Agreements, (2005), article 5(2) of the Hague Convention makes provision for choice of court agreements in transnational litigation.

pendens rule. However, the U.K. is no longer bound by the Recast Brussels Regulation and may adopt its own approach to cross-border disputes.

On the other hand, Ronald Brand added that the non-conformity in the application of the *forum non conveniens* doctrine among common law countries is a significant challenge facing the doctrine. According to Brand, a doctrine is weakest when there is no uniformity in its application among the Member States.[299] The exact application of the doctrine can vary significantly among common law countries, leading to inconsistencies in its application and potentially affecting the predictability and fairness of the legal process. For instance, in common law countries, such as the United Kingdom, United States and Canada, "convenience-suitability"[300] and "appropriate forum" test approaches are adopted in the application of the *forum non conveniens* doctrine.

These approaches provided guidelines that courts should consider when exercising discretionary power in the application of the *forum non conveniens* doctrines. Firstly, it suggests that the courts should consider whether the forum selected to hear the matter between the parties is convenient and suitable.[301] To determine whether the forum is convenient and suitable, the following factors are considered by the courts, factors such as the domicile of the parties, place of the contract, access to available resources and evidence to be used in the case. Secondly, whether the forum selected is the appropriate forum that has jurisdiction to decide the matter between the parties in the proceedings particularly by looking into the choice of court agreement and other terms in the contract between the parties.

In contrast, the "convenience-suitability" approach was rejected by the courts in Australia. Instead, the "abuse-of-court"[302] and "clearly inappropriate forum"[303] test approaches were adopted by Australia when applying the *forum non conveniens* doctrine. The Australian "inappropriate forum" test required a defendant to

[299] Ronald Brand, (n 265)
[300] Aurthur Taylor Von Mehren, "Theory and Practice of Adjudicatory Authority in Private International Law: A Comparative Study of the Doctrine, Policies and Practices of Common and Civil-Law Systems", (2002) RECUEIL DES COURS, ACADEMIE DE DROIT INTERNATIONAL DE LA HAVE, 9, 326.
[301] Ibid.
[302] Ibid.
[303] *Voth v Manildra Flour Mills Proprietary Ltd* (1990) 171 CLR at 554.

demonstrate that the plaintiff has brought proceedings in the selected forum in a vexatious and oppressive manner.[304] Ronald Brand noted that the Australia's "inappropriate" test is based on the idea that "a plaintiff who has regularly invoked the jurisdiction of a court has prima facie right to insist upon its exercise."[305]

Other scholars, such as Anthony Grey[306] and Edward Barrett,[307] argued that other common law countries should be careful in the application of the Australian "clearly inappropriate forum" test, particularly due to the inconsistency of the Australian test with the principle of international comity and other goals of the rules of private international law.[308] Grey further argued that even though the Australian courts have rejected the "appropriate forum" test, but some of the factors mentioned in the test still apply by the Australian courts.

Edward Barrett[309] stated that the Australian test assists the plaintiff by selecting a forum that is more suitable to the plaintiff's pursuit and which is often inconvenient to the defendant.[310] It was also added that, the right given to the plaintiff to choose a jurisdiction to sue often inflicted a severe burden on the defendant who is not making any effort to avoid his responsibilities.[311] In contrast, Martine Stuckelberg argued that the Australian approach on the application of the *forum non conveniens* doctrine is widely accepted. Martine Stuckelberg believes that while the UK and US focus on whether a forum is more appropriate, the Australian approach focuses on whether the forum is inappropriate, that is, whether the forum would be unfairly burdensome, prejudicial, or damaging to defendants.[312]

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[304] Ibid.

[305] Ibid.

[306] Anthony Grey, 'Forum Non Conveniens in Australia: A comparative analysis', (2009) C.L.W.R,

[307] Edward Barrett, 'The doctrine of forum non conveniens', (1947) 35 CAL. L. Rev. vol. 35, 38.

[308] Ibid

[309] Ibid.

[310] Ibid 384.

[311] Ibid.

[312] *Oceanic Sun Line Special Shipping Co. inc. v Fay* (1988) 165 CLR 197 (confirmed and clarified in *Voth v Manildra Flower Mill Pty*. (1990) 171 CLR 538).

However, these disparities in the application of the *forum non conveniens* doctrine among common law countries can lead to confusion and unpredictability for parties involved in cross-border disputes. This can result in significant costs and delays in the resolution of disputes and may also discourage parties from agreeing to resolve disputes in common law jurisdictions. In contrast, Ronald Brand argued that while there are disparities among the common law countries in the application of the *forum non conveniens* doctrine, the civil law *lis pendens* also has its problems. Accordingly, Ronald Brand suggests that the best way forward to resolving these disparities would be through the development of clear guidelines or the harmonization of laws and policies across common law countries.

Other scholars such as Whytock and Cassandra Burke also supported harmonisation of the doctrines of *forum non conveniens* and the recognition of foreign judgments. Whytock and Cassandra Burke argue that "boomerang litigation"[313] requires that the court should harmonise the test applicable in judging the adequacy of foreign courts both in the negotiation stage (*forum non conveniens*) and enforcement stage (recognition and enforcement of foreign judgments).[314] Whytock and Cassandra Burke also argued that, "cases should only be dismissed from U.S. courts when the alternative forum is adequate both to hear the case and to allow enforcement of the resulting judgment in the United States".[315] This argument aims to ensure that the parties' rights are protected and that the legal process is fair and effective.[316]

The scholar, Ronald Brand, concluded that the doctrine of *forum non conveniens* faced several challenges. Firstly, there are challenges in relation to the strict interpretation of the principle of jurisdiction by the European courts which gives priority to the *lis pendens* rule over the common law *forum non conveniens* doctrine.[317] Secondly, nonconformity challenge was identified as a problem that the doctrines of *forum non conveniens* faced in transnational litigations particularly due to the distinctions in the

[313] Ronald A. Brand, 'Access-to-Justice Analysis on a Due Process Platform: Response to Christopher A. Whytock & Cassandra Burke Robertson, Forum Non Conveniens and the Enforcement of Foreign Judgement' (2012), 112 COLUM. L. REV, 76.
[314] *Whytock (*note 102).
[315] Whytock & Roberson, (note 270).
[316] Brand, (n. 271).
[317] *Erich Gasser GmbH v MISAT Srl.* [2003] ECR I-1472; Brussels Conventions of 1968, art. 21.

approaches used by common law countries on the applications of the *forum non conveniens* doctrine.[318]

It was added that both doctrines of *forum non conveniens* and *Llis pendens* should be harmonised by harnessing the benefits in each doctrine to stop parallel litigation. It was also added that harmonization of both doctrines is important because it is "unlikely that either the common law world or the civil law world will entirely capitulate to the traditional approach of the other".[319] On that background, it was concluded that a global compromise proposed in the 2001 Hague Draft Convention[320] would help in the development of both doctrines of *forum non conveniens* and the civil law *lis pendens.*[321] Under the Hague Convention, Article 21 provided for *lis pendens,* and Article 22 made provision for *forum non conveniens.* The Hague convention proposed compromises on issues of declining jurisdiction (choice of court agreement). [322]

Ronald Brand's scholarly work contributes to literature. Ronald Brand's scholarly work provides valuable insight on the challenges facing the *forum non conveniens* doctrine, particularly in relation to the strict interpretation of the *lis pendens rule* by the European Courts. Ronald Brand's scholarly work also offers clear understanding on how the non-conformity in the application of the doctrine among the common law countries leads to unpredictability for parties involved in cross-border disputes. In addition, Ronald Brand and other commentators, such as Whytock, Cassandra Burke, and Anthony, provide valuable insight into potential solutions that could be used to ensure effectiveness in the application of the *forum non conveniens* doctrine and the *lis pendens* rule in transnational litigation.

The next section presents literature that discusses potential solutions to resolve the problem of tactical litigation in transnational litigation, particularly literature that focuses on the harmonization of the civil law *lis pendens* rule and the common law

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[318] Ibid.

[319] Brand, (n. 271) (Brand argued that "*Lis pendens* also serves to prevent parallel litigation, but with very different result") pp 1034.

[320] Draft Convention on Jurisdiction and Recognition of Judgements in Intellectual Property Matters, art 21 of the Convention deals with *lis pendens,* and article 22 deals with *forum non conveniens.*

[321] Permanent Bureau, 'Interim Text – Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference' (2001) HCCH; http://www.hcch.net/index_en.php?act=publications.details&pid=3499&dtid=35, (last accessed on 15 February 2020).

[322] Ibid.

forum non conveniens doctrine. The scholarly work of Martine Stuckelberg and Adam Moss is reviewed.

2.5 Literature that discusses potential solutions to resolve tactical litigation.

Martine Stuckelberg[323] highlighted the challenges and complexities that arise in the recognition of jurisdiction and enforcement of judgment in transnational litigation. Martine Stuckelberg discussed the *forum non conveniens* doctrine from the perspective of the private international tool in the Hague conference (a form of government delegates set up to make a uniform convention for the Member State on the civil and commercial matter).[324] Stuckelberg observed that the *forum non conveniens* doctrine gains attention in the common law countries, but the discretionary power given to courts to preside over a matter which is before another court first seised raised concerns in the application of the *forum non conveniens* doctrine.

On the other hand, Martine Stuckelberg stated that the *lis pendens* rule was used in the civil law countries to prevent parallel litigation, coordinate jurisdiction and enforce judgment. Stuckelberg's observation highlights the different approaches to resolving transnational disputes in common law and civil law countries. The *forum non conveniens* doctrine is a common law approach that allows a court to decline jurisdiction if there is another court that is more appropriate to hear the case. Martine Stuckelberg added that the *forum non conveniens* and the *lis pendens* rules are important for ensuring the suppleness and certainty on the recognition of jurisdiction and the enforcement of judgment in transnational litigation. According to Stuckelberg, while the enforcement of arbitral decision is guaranteed under the New York convention,[325] the enforcement of judgment in transnational litigation is guaranteed under the Hague convention.

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[323] Martine Stuckelberg, 'Lis Pendens and Forum Non Conveniens at the Hague Conference: The Preliminary Draft Convention on Jurisdiction and Foreign Judgements in Civil and Commercial Matters', (2001) BJIL, Volume 26, Issue 3, Article 34.

[324] Ibid, Lipstein K, 'One hundred years of Hague conferences on private international law', (1993) 42 int'l & Comp. L.Q. 553, 557. [369] Brussels Convention.

[325] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 [hereinafter New York Convention].

However, Martine Stuckelberg argued that the enforcement and recognition of judgment is impacted by conflicts between the *lis pendens* rule and the *forum non conveniens* doctrine. [326] According to Stuckelberg, conflicts between the *lis pendens* rule and *forum non conveniens* doctrine can lead to uncertainty in the recognition and enforcement of jurisdiction in transnational litigation. As a result, it is important for legal systems to provide clear guidance on the application of these principles in order to promote predictability and consistency in the recognition and enforcement of jurisdiction in transnational litigation.

Martine Stuckelberg noted that the *forum non conveniens* doctrine and the *lis pendens* rule are closely related. Stuckelberg stated that the *lis pendens* rule offered flexibility to litigants, while the *forum non conveniens* doctrine offered predictability. However, Martine Stuckelberg argued that "the flexibility of the former and the predictability of the latter had to be combined to find potential solution to resolve tactical litigation".[327] Martine Stuckelberg also observed that there are discrepancies in the application of the *forum non conveniens* doctrine across the common law countries' legal systems, but the use of judicial discretion is a common feature in both civil law and common law systems.[328] This means that judges have the ability to make decisions based on the specific circumstances of a case, taking into account factors such as the location of relevant evidence or parties, and the convenience of the parties involved.

The scholarly work of Alexandar Moss on how to bridge the gap between the doctrine of *forum non conveniens* and judgment recognition and enforcement in transnational litigation is reviewed next. Alexander Moss [329] addresses the doctrinal disparity between the *forum non conveniens* doctrine and judgment recognition and enforcement in transnational litigation. According to Alexander Moss, the *forum non conveniens* doctrine is used in the United States legal system to resolve issues related to recognition of jurisdiction and enforcement of judgment in transnational matters. Alexander Moss

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[326] James j. Fawce'it, "Declining jurisdiction in private international law", (1994), Int'l ACL; (Several different proposals for forum non conveniens or declining jurisdiction clauses have been made mainly by common law countries, while most civil law countries expressed their opposition to a discretionary power to dismiss).
[327] Martine, (n. 271).
[328] James Fawce'it,'Declining Jurisdiction in Private International Law' (1994) Int'l ACL,
[329] Alexander Moss, 'Bridging the Gap: Addressing the Doctrinal Disparity Between *Forum Non Conveniens* and Judgement Recognition and Enforcement in Transnational Litigation', (2017) The Georgetown Law Journal, Vol. 106:209.

described the *forum non conveniens* as a judge-made doctrine used for allocation of judicial resources in a sustainable manner. Alexander Moss added that when deciding to dismiss a case based on the *forum non conveniens* doctrine, courts often consider several factors, such as the interests of the parties involved and the adequacy of the forums with jurisdiction. These factors are based on the procedural and substantive adequacy of the forums that are available to preside over the matter.

On the other hand, Alexander Moss pointed out that when deciding whether to recognize and enforce a foreign judgment, the *forum non conveniens* doctrine is often applied by courts with a focus on the principle of natural justice and compliance with public policy. This means that courts consider the fairness and equity of the outcome of the case, as well as any relevant laws or policies that may impact the recognition and enforcement of the judgment. In contrast, Alexander Moss observed that the *forum non conveniens* doctrine in relation to judgment recognition and enforcement is aimed at ensuring procedural efficiency, fairness, and international comity within transnational commercial litigation.

However, Alexander Moss argued that despite the importance of the *forum non conveniens* doctrine in resolving recognition of jurisdiction and enforcement of judgment issues in transnational matters, disparities between courts in its application can undermine the purpose behind the development of the doctrine.[330] This can result in uncertainty and inconsistency in the application of the doctrine, which can have a negative impact on the recognition and enforcement of jurisdiction in transnational matters. Alexander Moss justified his argument that disparities in the application of the *forum non conveniens* doctrine defeats the purpose of the doctrine. Moss pointed out that since different types of factual judgments and scrutiny are often applied by courts in the application of the doctrine, this can lead to a "gap" or disparities between the doctrine and recognition and enforcement of judgment in transnational litigation.

As an example, Alexander Moss noted that in the United States, when a defendant successfully argues for dismissal of a case based on the *forum non conveniens* doctrine, if a foreign judgment is issued in the same matter, it may not be recognized by the U.S. courts, even if the foreign court is an "adequate" forum. This inconsistency in the

[330] Ibid.

recognition and enforcement of jurisdiction can create uncertainty and difficulties for parties involved in transnational litigation. This example highlights the challenges that can arise in the application of the *forum non conveniens* doctrine and the recognition and enforcement of foreign judgments. It demonstrates the need for clear guidance and consistent application of these legal principles in order to ensure that transnational disputes are resolved fairly and efficiently.

However, Alexander Moss noted that the passage of the federal venue transfer statute rendered the *forum non conveniens* doctrine inapplicable to interstate disputes in the U.S. Instead, Alexander Moss noted that at the federal level, the *forum non conveniens* doctrine is applicable to transnational cases (where disputes involved party who are outside jurisdiction of the U.S. courts).[331] However, the adequate alternative forum laid down by the court in the *Gilbert* case still subsists notwithstanding that the *forum non conveniens* doctrine is only applicable in transnational commercial litigation. The scholar, Alexander Moss, argued that although the decision of the U.S. court in the *Gilbert* case is relatively old,[332] the established *forum non conveniens* doctrine inquiry remained unchanged despite academic debates. There has been criticism that the principle of adequate alternative forum should reflect the current practice of modern transnational litigation. For instance, Martin Davies argued that the factors used by courts in the application of the *forum non conveniens* doctrine are "anachronistic" and the standard "imprecise and incoherent".[333]

In the *Gilbert* case, the court laid out factors which courts should consider in the application of the *forum non conveniens* doctrine. First, a court must establish that an adequate forum is available to resolve the disputes between parties. Second, the court must consider other private[334] and public[335] interest factors which are likely to

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[331] *Am. Dredging Co. v Miller* (1994) 510 US 443.

[332] Alexander Moss, (n 328), (Alexander Moss stated that …although the doctrine outlined in *Gilbert* is now nearly seventy years old …).

[333] Martin Davies, 'Time to Change the Federal *Forum Non Conveniens Analysis'* (2002), 77 TUL. L. REV. 309, 311-13.

[334] Alexander Moss, (n 176); scholar stated that court must consider the following private factors such as …[a] the relative ease of access to relative evidence; (b) the availability of compulsory process for obtaining witnesses and cost of procuring such witnesses; (c) the possibility of examining any premises for on-site evidence (if necessary); (d) the enforceability of a potential judgment; and (e) all other practical problems that make trial of a case easy, expeditious and inexpensive.

[335] Alexander Moss, (n 176); according to Moss, it was stated the court in *Gilbert* case directed that lower court should consider public factors such as, …[1] the administrative problems created by

undermine the outcome of the proceeding. The court also consider other private factors such as, access to evidence, availability of witnesses and enforceability of a potential judgment.[336] These private factors are likely to affect the outcome of proceedings, particularly where a litigant is likely to be denied access to evidence or the ability to produce relevant witnesses in a proceeding.[337]

Alexander Moss argued that the decision of the court in the *Gilbert* case shows preference for the plaintiff's choice of forum. In the *Gilbert* case, it was held that "unless the balance is strongly in favour of the defendant, the plaintiff's choice of forum should rarely be disturbed."[338]However, courts have shown much less deference to the plaintiff's choice of forum in other court cases, such as *Piper Aircraft Co. v Reyno; Iragorri v. United Techs. Corp.*[339]*; Heffemn v Ethicon Endo Surgery Inc.,*[340] *Ranza v Nike, Inc.;*[341] and *Kisana Trade & Invest Ltd. v Lemster.*[342]

On the other hand, Alexander Moss noted that the *forum non conveniens* doctrine is used in two stages of transnational litigation. According to Alexander Moss, at the early stage of transnational litigation, the *forum non conveniens* doctrine aimed to ensure proper allocation of adjudicatory power between forums. On the other hand, at the judgment recognition and enforcement stage, the doctrine focuses more on the question of whether legal effect should be accorded to a judgment rendered by foreign courts. At this stage, adequacy and fairness in the legal system of the court that rendered the judgment is often considered. Alexander Moss further differentiated between judgment recognition and enforcement in transnational litigation. According to Alexander Moss, judgment recognition suggests that where an issue or matter involving the same parties has been litigated in any court, parties are precluded from bringing the same issue or matter before another court. But enforcement, on the other hand, is concerned with the

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congested dockets, (2) the burden imposed by jury duty on members of the local community relative to the relationship of the matter to the forum, and (3) the level of local interest in having the particular case adjudicated in the forum in which it was filed… see *Gilbert* case, 508-09.

[336] Ibid.

[337] Ibid.

[338] *Gilbert* 330 US, at 508.

[339] (2001) 2d Cir 274 F 3d 65.

[340] (2016) 6th Cir 823 F 3d 488.

[341] (2015) 9th Cir 793, F 3d 1059.

[342] (2013) 3d Cir 737 F 3d 869, 875-76.

question of whether the court should exercise its power to compel a defendant to comply with the judgment rendered.[343]

Alexander Moss also stated that in the case of *Hilton v. Guyot,*[344] the U.S. Supreme Court established guidance which a court must consider on the recognition and enforcement of foreign judgment. The guidance includes a flexible framework based on the principle of international comity,[345] adherence to the conception of due process and compliance with the public policy.[346] In essence, the outcome of the *Hilton* case means that where a court established its jurisdiction and demonstrated that due process has been followed, then such judgment must be recognised and enforceable. However, judgment rendered may be challenged on the grounds of fraud, violation of the principle of international comity, and public policy.[347] For instance, in *Hilton v Guyot,* the Court held that the judgment rendered cannot be enforceable, as French law did not give recognition to judgment rendered by American courts thus. This decision raised the issue of reciprocity.[348]

In contrast, Alexander Moss observed that other courts in the U.S. had refused to follow the decision in the *Hilton* case. According to Alexander Moss, the justification for the refusal is based on the ground that judgment recognition and enforcement should be decided in accordance with the substantive law of the State rather than federal law.[349] For instance, in *Erie Railroad Co. v Tompkins*[350] it was held that a federal court deciding on a diversity case must apply the substantive law of the state.[351] Also in

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[343] Alexander Moss, (n 176); Cedric Chao & Christine Neuhoff, 'Enforcement and Recognition of Foreign Judgment in United States Courts: A practical Perspective', (2001), 29 Pepp. L. Rev., 147-48

[344] *Hilton v Guyot* (1895) 150 US 113.

[345] Ibid; (In *Hilton v Guyot,* the term comity is defined as "the recognition which one nation allows within its territory to then legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its law"), 164.

[346] Ibid.

[347] Ibid.

[348] Ibid.

[349] *Hilton v Guyot* (1895) 150 US 113; Alexander Moss, (n 176).

[350] *Erie Railroad Co. v Tompkins* (1938) 304 US 64.

[351] Ibid, *Toronto-Dominion Bank v Hall* (1973) 367 F Supp 1009.

Toronto-Dominion Bank v Hall[352]it was held that the substantive law of a state should be adopted on judgment recognition and enforcement rather than a federal law.

Alexander Moss also highlighted the developments in the Uniform Foreign Money-Judgments Recognition Act (UFMJRA). The UFMJRA was established in 1962 by the Uniform Law Commission ("the Commission") to codify prevailing common law rules on judgment recognition and enforcement. In 2005, a Uniform Foreign-Country Money Judgments Recognition Act (UFCMJRA) was adopted by the Commission as a new updated version of the UFMJRA. The development of the UFMJRA and UFCMJRA aimed to harmonise laws and enhance courts willingness to recognise judgments rendered by foreign courts. Alexander Moss noted that despite differences in each system of UFMJRA and UFCMJRA, both systems echoed the general principle established by the court in the *Hilton* case, that unless there are issues raised as to the violation of due process, public policy or lack of subject-matter jurisdiction,[353] the judgments rendered by foreign courts are to be recognised and enforced.[354]

Alexander Moss highlighted the three mandatory grounds for non-recognition of judgment rendered by foreign courts in the UFMJRA and UFCMJRA. The three mandatory grounds include: (1) if "the judgment was rendered under a system which does not provide impartial tribunal or procedures compatible with the requirements of due process of law," (2) if the rendering court lacked jurisdiction over the party, and (3) lacked jurisdiction over subject-matter in the proceeding.

The three mandatory grounds for non-recognition of foreign judgments provided in the UFMJRA and UFCMJRA are aimed at ensuring that foreign judgments are not enforced if the judgment was not rendered through a fair process, lacked jurisdiction over the party or lacked jurisdiction over the subject matter. These mandatory grounds are important in promoting procedural fairness and protecting parties from judgments that do not meet basic standards of justice.

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[352] Ibid.
[353] UFMJRA, 1962, s.4(a); UFCMJRA, 2005, s.4(b).
[354] UFMJRA, 1962, s.2.

However, there have been criticisms that these mandatory grounds for non-recognition may be too narrow and do not account for other important considerations such as public policy, fraud or procedural irregularities. In some cases, foreign judgments that are fundamentally at odds with the public policy of the enforcing state may still be recognized even if they meet the three mandatory grounds. Furthermore, there may be challenges in applying these mandatory grounds consistently and fairly across different jurisdictions, particularly where there are differences in legal systems and approaches to procedural fairness. Nevertheless, the inclusion of these mandatory grounds in the UFMJRA and UFCMJRA is an important step towards promoting transparency and fairness in the recognition and enforcement of foreign judgments.

Aside from these mandatory grounds, Alexander Moss pointed out six permissive grounds for non-recognition of judgment under the UFMJRA. According to Alexander Moss, the six permissive grounds are: (1) insufficient notice to defendant, (2) judgment obtained by fraud, (3) cause of action repugnant to the public policy of the state in which the judgment is sought to be enforced, (4) judgment in conflict with another final and conclusive judgment, (5) proceedings contrary to an agreement between the parties (for example, choice of court agreements), and (6) the issue as to the inconvenience in the forum that rendered the judgment.[355]

The scholarly work of Alexander Moss contributes to literature. Alexander Moss provides valuable insights on the approaches used by courts in the application of the *forum non conveniens* doctrine when deciding on issues relating to judgment recognition and enforcement in transnational litigation. The scholarly work of Alexandra Moss also gives valuable insight into the deficiencies and disparities on the standards that are applied by the courts. According to Alexander Moss, these standards would give the defendants the opportunity to escape a "heavy burden" which is required while seeking a dismissal for *forum non conveniens* doctrine. This is so because courts often conduct a cursory, superficial analysis at the *forum non conveniens* stage before consigning litigants to a foreign forum, and in some instance, engage in the practice of second guessing the procedure.

[355] UFCMJRA, 2005, s. 4(b).

2.6 Situation of this thesis within the existing literature

Drawing from the literature reviewed in this thesis, it is observed that while the Recast Brussels Regulation aimed to prevent tactical litigation and ensure jurisdiction coordination, the strict interpretation of the *lis pendens* rule over the choice of court agreement is likely to promote tactical litigation in transnational commercial litigation. As a result, this thesis proposed a hybrid model solution which draws ideas from existing scholarly works that recommended the harmonization of the *forum non conveniens* doctrine and the *lis pendens* rule. This hybrid model needs cooperation between the common law and the civil law to combine the benefits available in each other's legal systems.

The common law *forum non conveniens* doctrine and the civil law *lis pendens* rule aimed to prevent parallel litigation in transnational commercial litigation. The *forum non conveniens* doctrine prevented parallel litigation by giving discretionary power to the court to stay proceedings in a situation where another forum is more appropriate to determine the matter between the parties. On the other hand, the *lis pendens* rule prevented parallel litigation by stating that where proceedings involving the same cause of action and between the same parties are pending before different courts of the Member States, aside from the court first seised, any other court seised must stay proceedings, until the court first seised has established its jurisdiction. As earlier discussed in the preceding sections, different scholars have identified solutions that can be used to address the problem of tactical litigation. Some scholars have also suggested the harmonization of both doctrines of *forum non conveniens* and *lis pendens* as a way forward on how to resolve the problem of tactical litigation.

The scholarly works of Martine Stuckelberg[356] and Gregoire Andreux[357] supported the idea of a hybrid model solution to address the problem of tactical litigation. Stuckelberg stated that both the doctrine of *forum non conveniens* and the *lis pendens* rule are closely related. According to Martine Stuckelberg, through flexibility, parties can make an application for a stay of proceedings on the grounds of the *forum non conveniens* doctrine where it is believed that the other court is more appropriate to determine the matter; on the other hand, the *lis pendens* rule promotes predictability and certainty by requiring a court second seised to stay proceedings, where there is a pending suit before a court first seised. According to Martine, the scope of the *forum non conveniens* and the *lis pendens* rules are linked together under the Hague Convention.[358] On that background, Stuckelberg stated that "the flexibility of the former and the predictability of the latter had to be combined to find a solution agreeable to both legal traditions".[359] Andreux, on the other hand, proposed the harmonization of the benefits in both the doctrine of *forum non conveniens* and the *lis pendens* rule. According to Andreux, the incorporation of a declining jurisdiction clause and *lis pendens* is a good compromise of both doctrines.[360]

Moving forwards are the proposal for consolidation of related matters suggested by Campbell.[361] Campbell McLachlan stated that it is important to consolidate all related matters where proceedings involving the same cause of action and between the same parties are pending before courts of different Member States. He added that the principle of consolidation would operate as limitation on all other personal claims relating to the same cause of action starting from the commencement of the proceeding and during the enforcement of the judgment.

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[356] Martine Stuckelberg, 'Lis Pendens and Forum Non Conveniens at the Hague Conference: The Preliminary Draft Convention on Jurisdiction and Foreign Judgements in Civil and Commercial Matters', (2001) Brooklyn Journal of International Law, Volume 26, Issue 3, Article 34.

[357] Gregoire Andreux, 'Declining Jurisdiction in a Future International Convention on Jurisdiction and Judgments – How can we benefit from Past Experiences in Conciliating the Two Doctrines of *Forum Non Conveniens* and *Lis Pendens?'* (2005) 27 Loy, L.A, Int'l & Comp. Law Review.

[358] The preliminary Draft Convention on jurisdiction and foreign judgments in civil and commercial matters.

[359] Martine, (n. 271).

[360] Andreux (n 356)

[361] Campbell McLachlan, *Lis Pendens* in International Litigation, (2009), Hague Academy of International Law.

This solution is envisaged under Article 29 of the Recast Brussels Regulation. According to Campbell McLachlan, the principle of consolidation is aimed at ensuring that the entire liability of the defendant in the proceeding was concentrated in a single lawsuit rather than being subjected to multiple liability in other lawsuits having the same cause of action.

Moving along the continuum, the proposals from Markus Petsche[362] suggest five related solutions that can be used to address the problem of *forum non conveniens* at the negotiation stage and at the judgment enforcement. Markus Petsche's scholarly work is more focused on addressing the problem of the *forum non conveniens* doctrine. However, solutions suggested by Markus Petsche can be used by both common law and the civil law countries to resolve the problems of tactical litigation at the enforcement stage. According to Markus Petsche, the estoppel doctrine will help to prevent a litigant who has submitted to the jurisdiction of a foreign court from opposing the outcome judgment of the foreign court. In essence, the doctrine of estoppel will apply where a litigant has made an application to stay proceedings in favour of a foreign court. Accordingly, the litigant will be bound by the judgment of the foreign court except in a situation where the judgment is contrary to public policy in accordance with the provision in Article 45 of the Brussels Recast Regulation.

Moving further ahead, there is the proposal for a "clearly inappropriate" test. Here, it is suggested that to stay proceedings of a court both parties to the proceedings have a burden of proof to demonstrate why the court should stay proceeding and why the court should continue to determine the proceeding. This proposal is based on the scholarly work of Ronald Brand.[363] According to Brand, a "clearly inappropriate forum" test approach is a model adopted by Australia on the application of the *forum non conveniens* doctrine. According to Brand, a "clearly inappropriate" test will also help to prevent multinational corporations from engaging in forum shopping.

[362] Marku P, 'A critique of the doctrine of forum non conveniens', (2012) J. Int'l Law.
[363] Ronald Brand, 'Challenges to Forum Non Conveniens' (2013) Int'l L. & Politics, Vol. 45; 1003.

It is at this point along the continuum that this thesis is situated. A "clearly inappropriate" test should be adopted, so that the parties to proceedings in transnational litigation would not just stay proceedings of a court as means to favour a court of their choice or to escape from liability. A hybrid model that harnesses the benefits in both the doctrine of *forum non conveniens* and the *lis pendens* rule is important, so that it will help to promote flexibility, predictability, and certainty of the legal system. In addition, this will also help to prevent multiplicity of court actions and, lastly, it will help to prevent tactical litigation. There has been no rigorous examination as to what harmonization of the doctrine of *forum non conveniens* and the *lis pendens* rule should involve, what elements it should incorporate or what doctrines it could draw on, and, in addition, whether there is a common rationale as to whether the common law countries and the civil law countries would be willing to embrace each other's legal system.

The objective of the thesis is to initiate an investigation into the harmonisation of the *forum non conveniens* doctrine and the *lis pendens rule*. Future researchers can scrutinize the discoveries of this thesis, allowing for constructive discussions and proposals on the harmonization of the forum non conveniens doctrine and the lis pendens rule to become part of the established legal practices. The next chapter presents research methodologies that are used to provide an answer to the research question in this thesis.

CHAPTER THREE – METHODOLOGY

3.0 Introduction

This chapter highlights the research methodologies used in the thesis and the justification for their selection. Research methodologies are selected based on the research questions and objectives in this thesis. The role of research methodology in a research study cannot be overemphasized. A well-designed and well-executed research methodology is crucial in guiding the way a research study is conducted, and it also helps in providing answers to the research problem.[364] In addition, a clear and effective research methodology will help to ensure that the research is conducted in a systematic and organized manner, with a focus on the research questions and objectives. It helps to guide the selection of appropriate data collection methods and data analysis techniques, which are vital in ensuring that the data collected is relevant, valid, and reliable. Furthermore, research methodology also guides the selection of research design, sample size, data collection tools, data analysis techniques, and the presentation of results. A well-designed methodology helps to ensure that the research is conducted with precision and accuracy, thereby enhancing the credibility and validity of the research findings.

This chapter is divided into two parts. The first part of the chapter outlines the research methodologies used in the thesis which includes, comparative, historical, doctrinal, conceptualisation, case studies, and documentary analysis, and explains their justifications. The second part discusses other relevant research methodologies that are not used due to the research questions in the thesis. These methodologies include empirical legal methodology, socio-legal methodology, law and economics methodologies, critical race theory, and legal realism.

The next section in this chapter discusses the use of comparative research methodology in this thesis, including its justification and relevance to the research questions. The section also explains how this methodology will be applied and identifies potential challenges in the use of the methodology.

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[364] Trochim William M.K, *Research Methods Knowledge Base,* 2006; Paul, Dianna Gardner and Lynne, *when to use What Research Design,* New York: Guilford, 2012.

3.1 Comparative methodology

Historically, comparative legal methodology has been traced to ancient Greece, but recent empirical evidence suggests that Aristotle's study on the documentation of the constitution of 158 city-states during the 4th century [365] is a more significant contribution to the use of the comparative legal methodology. Aristotle believed that in order to understand what factors allow constitutions to endure, it is necessary to use comparative methodology to analyse and compare the constitutions of different states. He described comparative law as an intellectual pursuit that focuses on the study of law and uses comparison as its primary tool. In essence, comparative law involves the comparative analysis of legal systems and their components.[366] In practice, legal practitioners often engaged in comparison of legal systems of different States either on a small or large scale.[367] Comparative studies typically involve analysing legal concepts and institutions in civil law, common law, and Soviet law jurisdictions. However, following the collapse of the Soviet Union, the focus of comparative analysis has shifted to a comparison between civil law and common law jurisdictions.[368]

This thesis uses a comparative research methodology to examine how common law countries apply the doctrine of *forum non conveniens* and the *lis pendens* rule in transnational litigation. Specifically, the thesis compares the approaches of the United States and the United Kingdom, both of which have a legal system based on the common law tradition. On the other hand, to address the issue of legal proceedings related to the *lis pendens* rule, this thesis considers a comparative methodology as appropriate for examining how courts in both common law and civil law jurisdictions approach this issue. The purpose of this comparative analysis is to find potential solutions to the problems associated with the application of the *lis pendens* rule in transnational litigation. The thesis also utilizes a comparative methodology to conduct a more critical analysis of the challenges posed by the *forum non conveniens* doctrine

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[365] Anthony JP Kenny, 'Aristotle' *Encyclopaedia Britannica Online (*2015) <http://www.britannica.com/EBchecked/topic/34560/Aristotle> accessed 10 May 2015.

[366] Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998), 2.

[367] Ibid

[368] A typical example is a comparison of the German and United States style of scholarship. See Kristoffel Grechenig and Martin Gelter, 'The Transatlantic Divergence in Legal Thought: American Law and Economics vs German Doctrinalism' (2008) 31 Hastings International and Comparative Law Review, 295-360.

and the *lis pendens* rule in the context of conflicting jurisdictions in civil and common law jurisdictions. By comparing the laws and legal systems of different jurisdictions, the thesis aims to identify similarities and differences in the power of the courts to address parallel litigation that may violate exclusive jurisdiction clauses. In summary, the comparative methodology used in the thesis facilitates a more thorough examination of the legal issues surrounding the *forum non conveniens* doctrine and the *lis pendens* rule, as well as their potential impact on the resolution of transnational legal disputes.

Comparative study has become increasingly important in various fields, including law, as a means of advancing human intellect and decision-making, especially in the context of economic globalization. [369] While the French philosopher and lawyer Baron Montesquieu,[370] one of the early proponents of comparative legal methodology, warned against transplanting legal ideas from one jurisdiction to a dissimilar one, it is important to note that much has changed since his time. Today, people move around the world more freely, there is greater information sharing, and countries collaborate more closely on global issues. As a result, the contextual and political differences that once made comparative study more challenging are now less significant, and it is easier to compare legal systems that may have institutional, legal, and political differences.

However, to address Montesquieu's caution against transplanting legal ideas from dissimilar jurisdictions, this thesis focuses on a comparative analysis between countries with similar legal systems, namely the United States and England. Both countries operate under a non-codification system where legal rules are not comprehensively compiled in legal codes or statutes but rather based on judicial precedent developed over time and contained in legal documents such as law reports and yearbooks. These legal systems seek to resolve conflicts of jurisdiction and enforce jurisdiction agreements. Both the U.S. and U.K. legal systems face similar challenges in this regard, and while they may have different approaches to solving these challenges, they often

[369] Hiram Chodosh, 'Comparing Comparisons' (1999) 84 Iowa L. Rev. 1025, 1033-34.. [432] Ibid.
[370] Baron De Montesquieu, *The Spirit of the Laws* (New York: Hafner 1949). See also Baron Montesquieu, *De l'esprit des lois* (1748; first translated by Thomas Nugent, 1750), XIII

lead to similar results: the determination of legal rights and liabilities of the parties involved by an arbiter.[371]

In the field of comparative law, there have been various approaches to the subject over the years, but one method that has gained prominence in recent times is the functionalist approach. This approach focuses on the practical function and purpose of legal rules, rather than their historical or cultural origins. It seeks to identify and compare how legal systems serve similar functions, such as regulating human behaviour and resolving disputes, despite their differences in form and structure. The functionalist approach has proven to be an effective method for understanding and comparing legal systems and has contributed significantly to the development of comparative law as a field of study.

Zweigert and Kötz, two prominent comparative law scholars, argued that the primary methodological principle in comparative law is functionality.[372] According to Zweigert and Koiz, it is believed that legal systems should be compared based on the functions they perform, rather than just comparing the rules and structures of different legal systems. Zweigert and Koiz added that comparing legal systems that perform similar functions allows for a more accurate and effective comparison. Their argument is based on the notion that only legal concepts that serve the same function can be meaningfully compared. This approach has been influential in the development of comparative law and has been widely adopted by scholars in the field.

In 1974, Professor Kamba proposed a three-phase approach for conducting comparative analysis in law. The first phase involves describing the norms, institutions, and concepts present in different countries or jurisdictions. The second phase involves identifying the similarities and differences in these legal systems. In the third phase, the researcher must explain how these differences can be reconciled and how legal ideas and institutions can be transplanted from one jurisdiction to another.[373]

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[371] Ibid

[372] Zweigert and Kotz, *Introduction to Comparative Law* (1998) 3rd ed, OUP 34, 68.

[373] W J Kamba 'Comparative Law: A Theoretical Framework' (1974) 23 ICLQ 485.

In contrast, Peter de Cruz's eight-step approach is considered more appropriate for the subject matter of this thesis. The steps include identifying the problem, identifying the parent legal taxonomy, resolving the most significant source of the law, gathering relevant resources, organizing materials with respective titles, mapping out likely answers, analysing the legal principles based on their fundamental meaning, and setting out the conclusions in a comparative context.[374] These steps highlighted by Kamba and Peter de Cruz are relevant, but the steps recommended by Peter de Cruz will be more useful in this thesis, based on the research questions.

In essence, comparative research methodology typically involves comparing two or more things to discover something new, using methods that are similar to everyday comparison practices. It often focuses on middle-range theories that explore subsets of a larger problem rather than grand theories. Comparative research frequently involves secondary analysis of quantitative data and may investigate differences between social systems and their relationship to other variables. However, comparative research typically focuses on middle-range theories rather than grand theories, as it examines a specific subset of a larger problem. For example, a common research approach is to identify differences between two or more social systems and then examine how these differences relate to other variables.

Comparative research can take various forms and be based on different factors such as space and time. Cross-national comparisons are the most used approach, but comparisons within a country are also valuable, especially in a country like New Zealand where policies may vary depending on the race they affect. Other common types of comparative studies include analysing similarities and differences between different countries or groups of countries, as well as comparing one's own country to others.

On the other hand, Martha Minow has described "comparative and historical inquiries" as an important intellectual contribution to legal knowledge.[375] This approach involves examining an earlier era or contrasting legal regime and placing it in context using social sciences such as anthropology or history. By comparing it with contemporary domestic practice, this method can help illuminate differences, choices, or continuities

[374] Cruz de Peter, *Comparative Law in a Changing World*, (1999), 235-239.
[375] M. Minow, 'Archetypal Legal Scholarship – A Field Guide', (2013) 63(1) JLE 65-69, at 65

over time. This type of comparative research has been recognized in earlier taxonomies, which emphasized the need for lawyers to stay abreast of legal and relevant literature from common law jurisdictions, including England, New Zealand, Canada, and the United States.[376]

3.2 Historical methodology

Harter and Busha define historical methodology as the systematic analysis of past events related to the creation, maintenance, and use of organized collections of recorded information or knowledge. [377] This approach can provide valuable insights into current and future trends by examining historical events. Historical research allows researchers to better understand the origins, growth, and crises related to past events. This research approach utilizes both qualitative and quantitative data, which can be obtained from primary and secondary sources. However, in the context of this thesis, secondary sources will be used to gather information on the historical development of the doctrines of *lis pendens* and *forum non conveniens*.

This thesis aimed to examine the historical development of the *forum non conveniens* doctrine and the *lis pendens* rule in transnational commercial litigation. To achieve this goal, the thesis considers that historical methodology is a suitable research approach for providing a clear understanding of the topic. This methodology involves the systematic analysis of past events related to the establishment, maintenance, and utilization of recorded information or knowledge. By employing this approach, the thesis seeks to shed light on the origins, growth, and crises associated with the development of these legal doctrines over time. It is important to have a clear understanding on the historical development of the subject matter and the policy that informs the process of reforming the law regarding the subject, the treatment of the issue by the courts in the different jurisdictions and the social-legal and policy considerations that influence the opinion of those who interpret the law in these jurisdictions.

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[376] Pearce, Campbell & Harding, above n. 5, 3, app. 3 at 17 [53].
[377] Charles H Busha and Stephen Harter, *Research Methods in Librarianship: techniques and Interpretations*, (1980) 93.

In contrast, it is important to note that historical research relies on empirical data that is only available from the time an event occurs until its conclusion. Beyond that point, this approach relies on speculation and prediction to determine how the event may have affected certain variables. Additionally, historical data can only inform our present understanding of a phenomenon and potentially influence future events. However, the understanding of events beyond their conclusion is not based on empirical data. Despite this limitation, the historical methodology is a valuable tool for understanding the development of legal doctrines such as the *forum non conveniens* and *lis pendens* rules and the Italian torpedo action in international matters.

3.3 Doctrinal methodology

In the common law world, the doctrinal methodology has traditionally been the primary legal research method, although other approaches are becoming increasingly important. The success of legal research has long been dependent on the doctrinal methodology, which involves tracking legal precedents and interpreting legislation. Key features of this methodology include critical analysis of related law and case law, and ultimately arriving at an accepted decision. The Council of Australian Law Deans has expanded on this, defining doctrinal research as a process that involves rigorous analysis and creative synthesis, making connections between seemingly disparate strands of doctrine, and the challenge of extracting general principles from a mass of primary materials.

The doctrinal methodology is considered relevant in this thesis, particularly in relation to the analysis of the strict interpretation of the *lis pendens* rule by the European Courts in the *Gasser* case. The strict interpretation of the provisions under Articles 17 and 21 of the Brussels Convention by the ECJ gave primacy to the *lis pendens* rule over the doctrine of *forum non conveniens* and in turn promoted the use of tactical litigation to override party autonomy and choice of court agreements. This methodology is commonly used to scrutinize the loopholes in established rules and standards in a legal regime. Rules are strict requirements that provide answers to a dispute, while standards provide guidance on resolving disputes. Rules are typically more concrete and difficult to assess, while standards allow for more ideological judgment due to their interpretive nature.

In contrast, while the doctrinal methodology has traditionally been the leading legal research method in the common law world, it has been criticised for focusing too narrowly on the semantics of written law regarding jurisdiction.[378] However, Martha Minow recognises "doctrinal interpretation" as one of the major contributions legal scholars make to their research, and Susan Bartie describes "doctrinarism" as a "unifying element in legal knowledge" in England and Australia. Similarly, Rob van Gestel and H.-W. Micklitz explain that in doctrinal work, arguments are derived from authoritative sources such as existing rules, principles, precedents, and scholarly publications.

In addition to focusing on the semantics of written law, doctrinal analysis also involves balancing opinions and exploring decisions from various cases and policy documents. According to Posner, doctrinal analysis entails carefully reading and comparing appellate opinions to identify ambiguities, inconsistencies among cases, distinctions, and reconciling holdings.[379] This thesis also engages in such legal analysis by critically examining policy documents, case law, and statutory provisions, as well as considering the opinions of legal practitioners and scholars to identify inconsistencies and patterns.

Tiller and Cross stated that doctrinal analysis involves examining legal opinions to determine their reasoning effectiveness and implications for future cases. This approach is more descriptive and suitable for conducting a descriptive analysis of court decisions to determine their impact on future cases.[380] In contrast, Posner's approach to doctrinal analysis involves critically analysing judgments and requires a deeper understanding of the origins and implications of cases, as well as developing distinctions between opinions and different outcomes. In this thesis, this methodology is more appropriate for assessing the consequences of the Gasser case ruling by the European Court of Justice, and the impacts of the *Spiliada* judgment by the House of Lords.

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[378] Michael Salter and Julie Mason, *Writing law dissertations: an introduction and guide to the conduct of legal research* (2007) 180, 189.
[379] Richard A Posner, The Present Situation of Legal Scholarship (1980) 90 (5) Yale Law Journal 1113, 1113.
[380] Emerson *Tiller* and Frank B. *Cross*, 'What is Legal Doctrine' (2006) 100 (1) North-Western University Law Review 517, 517-518.

3.4 Conceptualisation

The theoretical conceptualisation approach is also employed in this thesis to investigate various legal phenomena, such as conflict of jurisdiction, *forum non conveniens*, *lis pendens*, choice of court agreements, and torpedo actions.[381] This approach aims to establish a comprehensive framework for in-depth analysis and to draw well-supported conclusions. [382] Leshem and Trafford suggest that adopting a conceptualisation approach in research can provide a theoretical foundation and coherence to evidence and conclusions obtained through theory-building research.[383448]

The process of contextualizing concepts is crucial in gaining a deeper understanding of their meaning and implications. In this thesis, a conceptualization approach is deemed appropriate to guide the understanding of the issues surrounding the operation of the *lis pendens* and *forum non conveniens* rules, particularly why these doctrines have been inadequate in addressing parallel and tactical litigation. The various concepts and phenomena discussed in the thesis, such as conflict of jurisdiction, choice of court agreements, torpedo actions, and more, are thoroughly examined in chapter four to provide a comprehensive analysis.

3.5 Case Study Approach

In this thesis, a case study approach was employed to investigate leading court cases that encourage the misuse of tactical litigation. The decision of the Court of Justice of the European Union (CJEU) in *Erich Gasser BmbH v. MISAT Srl* and the decision of the House of Lords in *Spiliada Maritime Corporation v Cansulex Ltd* will be evaluated. These two cases are significant on the discussion of the problem of tactical litigation in transnational commercial litigation. The decision of the ECJ in the *Gasser* case has been criticised for its strict application of the *lis pendens* rule and rejection of the doctrine of *forum non conveniens* in favour of the civil law *lis pendens*. On the other hand, the decision of the House of Lords in the *Spiliada* case shows the attitude of the

[381] Barney G Glaser, Conceptualization: On theory and theorizing using grounded theory (2002) 1 (2) International Journal of Qualitative Methods 1, 8-9.
[382] Vincent Anfara and Norma Mertz, *Theoretical framework in qualitative research* (2006), 23- 35
[383] Shosh Leshem and Vernon Traford, 'Overlooking the conceptual framework' (2007) 44 (1) Innovations in Education and Teaching International 93, 100.

common law courts towards the rejection of the *lis pendens* rule in favour of the doctrines of *forum non conveniens*.

Yin's research suggests that a case study design is best suited for addressing "how" and "why" questions.[384] In this study, the aim is to determine how tactical litigation is promoted in transnational litigation and how the courts contributed to the problem of tactical litigation, particularly as a result of the strict application of the *lis pendens* rule, and why litigants prefer to bring a lawsuit in courts that are known for the delay of legal proceedings. There is agreement among academics regarding the definition of case studies, which Yin describes as "an empirical investigation that examines a current phenomenon in its real-life context, particularly when the boundaries between the phenomenon and context are unclear".[385] Bromley and Yin's definitions of case studies are similar, both stressing the need for a systematic and empirical inquiry into a contemporary phenomenon to explain its evolution and interconnection with other variables.[386] Case studies are an effective methodology for investigating complex issues, and the emphasis is on understanding and explaining a phenomenon through a deep exploration of its context and related events.

Case studies can be classified into three types: explanatory, descriptive, and exploratory.[387] Explanatory case studies aim to validate a phenomenon that has already been established, while descriptive case studies provide a detailed account of a phenomenon. On the other hand, exploratory case studies are conducted to investigate the existence of a phenomenon, such as analysing the problem of tactical litigation in transnational litigation and how the strict interpretation of the *lis pendens* rule encourages tactical litigation. These studies require an approach that facilitates the exploration and discovery of new data and information. In summary, explanatory and descriptive case studies seek to confirm or describe a known phenomenon, while exploratory case studies aim to uncover new insights and knowledge.

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[384] Robert K Yin, *Case study research, design, and methods* (3rd edn, SAGE Publications, Thousand Oaks 2003) 13.
[385] *Ibid*, p.13; see Donna M *Zucker, '*How to Do Case Study Research*',* (2009) *University of Massachusetts*- Amherst, 2.
[386] Dennis B Bromley, Academic contributions to psychological counselling: I. A philosophy of science for the study of individual cases (1990) 3 (1) Counselling Psychology Quarterly 229, 302.
[387] Gary Thomas, A typology for the case study in social science following a review of definition, discourse and structure, (2011) 17 Qualitative Inquiry 511, 515-518.

This thesis aims to harmonize the *forum non conveniens* doctrine and the *Lis pendens* rule to provide a viable solution to jurisdiction issues within the European Union. The evaluation of the decision of the ECJ in *Gasser,* and the House of Lord's decision in *Spiliada* case will help to achieve this objective. Chapter 5 will critically evaluate these two prominent cases on how they promote tactical litigation.

3.6 Research methodologies that are not used in this thesis.

This section identifies other research methodologies that are not used in this thesis due to the nature of the research questions. Research methodologies that are not used in this thesis include, but are not limited to, feminist legal theory, law and economics, socio-legal research, and empirical research methodology. Although these methodologies are relevant in other areas of research study, they are not applicable to the subject area of this thesis.

3.6.1 Feminist legal theory

Feminist legal theory is a legal analysis that focuses on the experiences of women. This methodology is particularly relevant to legal issues that affect women more than men, such as sexual violence, sex discrimination, and reproductive rights. However, it can be applied to any area of law. Feminist legal theory encompasses various perspectives found within feminism, such as liberal feminism, black feminism, and Marxist feminism, among others. These schools of thought examine the concepts of gender, equality, dominance, and power, and how they are expressed and understood through the law and legal practice. The feminist legal analysis involves distinctive methods, such as narrative or "storytelling" to ensure women's voices are heard and "asking the woman question" to expose areas of the law that exclude queer women. However, this methodology was not applicable to the subject matter of this thesis. The thesis's focus is not on gender issues or women-related matters but rather on how to resolve the issue of tactical litigation in transnational commercial matters. However, this methodology will be relevant for research in the field of equality and women's rights.

3.6.2 Law and Economics

The law and economics movement, also referred to as the economic analysis of law, is both a perspective and technique that can be traced back to the legal realists' emphasis on non-legal factors to explain and analyse the law. This methodology employs economic analysis tools to the law, emphasizing the free market's objectives of economic efficiency and wealth and/or utility maximization, and asserts that the law simply reflects the economic system in which it is embedded. Additionally, law and economics analysis can be utilized to explain the behaviour of actors in the legal system, such as why judges make specific rulings or why legislators pursue certain statutes. This methodology is relevant to research in the field of takeover, mergers and acquisition. However, this methodology was not applicable, due to the research question to this thesis.

3.6.3 Socio-Legal Research

The socio-legal approach considers law not only as a set of legal rules but also as a social phenomenon or a type of social experience. It distinguishes between "law in books" and "law in action" to understand the impact of law on society. Initially, socio-legal research was mainly conducted in criminal justice, but now it encompasses all areas of law. This methodology can reveal the political nature of laws, evaluate their effectiveness, assist in law reform proposals, and shed light on how law operates in practice by examining the experiences of various groups that interact with the legal system. This methodology is more relevant in research that involves the evaluation of the law on the society or human behaviour.

The next section focuses on the analysis of relevant data that is used in this thesis while providing answers to the research questions.

3.7 Data Required

This thesis will collect information from various sources, including primary and secondary sources, but the most relevant will be archival data. This includes published and unpublished material on the *lis pendens* rule and the *forum non conveniens* doctrine. In addition, government reports and publicly available documents will also be used. After collecting the data, court cases will be analysed, compared, and

contrasted to establish existing relationships. From the analysis of the findings made from the cases and literature review, recommendations for legal reform will be derived. In this chapter, the next section examines the validity of findings in this thesis.

3.8 Validity

In qualitative research, various factors like the researcher's experience, skills, and time of research can impact data validity. [388] However, researcher bias is a more significant threat to validity, especially in smaller studies, where researchers may select data that aligns with their interests, which can distort results and compromise conclusions. Nonetheless, since this study was conducted over a three-year period, with validity issues fully acknowledged, the risk of bias is reduced. Another concern pertains to the generalizability of findings beyond a single case study. Qualitative studies based on a single case may produce results that differ from other cases, and generalization is generally not accepted. However, studies based on multiple cases provide a stronger basis for applying conclusions generally. In this study, since the findings are not confined to one case or jurisdiction, applying generalization is more valid.

3.9 Research Design

This legal study proposes a novel legal idea that aims to improve the effectiveness of the *forum non conveniens* and *lis pendens* rules in transnational commercial litigation. The theoretical and methodological approach used in this study is based on social science, with a comparative and doctrinal methodology chosen to explore two different legal systems. By analysing the effectiveness of these approaches, the study identifies the need for a new model that combines the benefits of both doctrines to address the problem of tactical litigation. The proposed hybrid model is intended to operate across multiple legal systems and have a positive impact on resolving cross-borders disputes. The next chapter in this thesis discusses jurisprudence and concepts that are related to the topic of this thesis.

[388] Beloo Mehra, Research or personal quest: *Dilemmas in studying my own kind,* (2001) Willis (eds), NH 69-82.

Chapter FOUR – Evaluation of jurisprudence and concepts

4.1 Introduction

This chapter examines the legal theories and principles related to the topic of the thesis, specifically focusing on the historical evolution of the *forum non conveniens* doctrine, choice of court agreements, and the *lis pendens rule*. In transnational litigation, conflict of jurisdiction has been a major concern. Beale suggests that the place of the contract and the applicable national law should serve as the basis for determining jurisdiction in cross-border legal disputes. Beale asserts that the selection of the national law of the place where the contract was executed should not be viewed as a sign of inferiority of foreign law, but rather as a recognition that such national law is the most suitable to determine the law governing the contract.[389] In addition, Beale highlighted that in situations where there is a conflict between national law and foreign law, the dominant foreign law would prevail. This is because national law often includes provisions that align with specific provisions of foreign law.[390]

On the other hand, the common law *forum non conveniens* doctrine and the civil law *lis pendens* rule are mechanisms used to resolve conflict of jurisdiction in transnational litigation. The *forum non conveniens* doctrine provides discretionary power to a court to decline jurisdiction in favour of a more suitable forum, while the *lis pendens* rule requires a court to stay its proceedings when another court of competent jurisdiction has already taken jurisdiction over the same matter. Both mechanisms serve the purpose of avoiding duplicative or conflicting proceedings and ensuring that the most appropriate forum hears a case. However, the application and interpretation of these mechanisms varies between common law and civil law systems, and it is important to explore jurisprudence surrounding the application of these mechanisms among different jurisdictions.

[389] Beale, *Treaties on the Conflict of Laws*, (1916), pg. 106.
[390] Ibid.

The jurisprudence on the *forum non conveniens* highlights the historical antecedent of the doctrine, interpretation and application of the doctrine by courts and tribunals in various jurisdictions. The jurisprudence includes decisions that establish the criteria for determining the most appropriate forum, the considerations that must be considered when applying the doctrine, and the limitations and exceptions to the doctrine's application. On the other hand, the jurisprudence on the *lis pendens* rule focuses on the interpretation of the rule and its application in specific cases. The jurisprudence also covers questions about the scope of the rule, the condition for its application, and the implication of strict interpretation of the rule, particularly in relation to tactical litigation in transnational litigation.

This chapter is divided into section and subsections. Section 4.2 focused on the jurisprudence on the *forum non conveniens* doctrine. This section examines jurisprudence on the scope of the doctrine in transnational litigation, as well as the significance of the doctrine in a concurrent proceeding. Subsection 4.2.1 focuses on jurisprudence on the historical antecedent of the *forum non conveniens* doctrine in the eighteenth century. Subsection 4.2.2 presents jurisprudence on the application of the *fnc* doctrine pre-1947, while the subsection 4.2.3 presents jurisprudence on the application of the *fnc* doctrine post-1947.

Section 4.2 highlights jurisprudence on the development of the *fnc* doctrine in the UK. The subsection 4.2.1 examines jurisprudence on the development of doctrine in post 1947. The decision of the House of Lords' in *Spiliada Maritime Corp. v Cansulex Ltd* is discussed in the subsection. The next section examines jurisprudence on the concepts of choice of court agreements in transnational litigation, and the approaches of the European Courts, the U.K. courts, and courts in the U.S. are discussed.

4.2 Jurisprudence on the development of the *fnc* doctrine

The *forum non conveniens* doctrine is widely used among common law countries such as the United States (U.S.), the United Kingdom (U.K.), and Australia. The *forum non conveniens* doctrine gives courts discretionary power to decline jurisdiction in favour

a forum that is more suitable to hear the matter.[391] The scope of the doctrine is based on the convenience of the parties and the outcome of the proceeding.[392] Accordingly, even if a court has exclusive jurisdiction to hear a case, a judge may decline its existing jurisdiction where an alternative forum is suitable to hear the matter between the parties in the proceeding.[393] On the other hand, a judge can also decline jurisdiction, where the interest of justice is unlikely to be served by the court with an exclusive jurisdiction in the matter.[394] The *forum non conveniens* doctrine also gives the court an unfettered power decline jurisdiction and not hear the case, or choose to decide the case on the merits.[395]

The *forum non conveniens* doctrine plays a significant role in cases involving concurrent jurisdiction. In such cases, the application of the doctrine serves two major purposes. First, the doctrine requires a court to decline jurisdiction and transfer the case to another court that may be more convenient for the parties involved. This helps to ensure that cases are heard in a location that is appropriate and fair for all parties involved, rather than just being heard in the court first seised or subject to the strict interpretation of the *lis pendens* rule.[396] Second, the doctrine protects the plaintiff's rights to file a legal claim in a more suitable forum. This ensures that the plaintiff is not prevented from pursuing their claim due to legal technicalities.[397] Examples of legal technicalities include service of process and statutes of limitations. These are technicalities bars that are used to deprive the plaintiff rights to bring a legal claim. However, in situations where there is no alternative forum available or there are technical barriers that prevent the plaintiff from pursuing their legal claim, the *forum non conveniens* doctrine requires that judges should be cautious in dismissing the

[391] Alexander Reus, 'Judicial Discretion: A Comparative View of the Doctrine of Forum Non Conveniens in the United States, the United Kingdom, and Germany', (1994) Int'l & Comp. L. Rev.
Gulf Oil Corp. v Gilbert (1974) 330 US 501, 507.
[392] Foster S, 'Place of Trial – Interactive Application of Intrastate Methods of Adjustment', (1986) Harv. L. Rev. 41, 47, 62.
[393] Berger, 'Zustandigkeit und Forum Non Conveniens im Amerikanischen Zivilprozess', (1977) 41 RABELSZ.
[394] Ibid.
[395] *Piper Aircraft Co. v Reyno* (1981) 454 US 235, 257; Ibid (n 370).
[396] Ibid, (n 370); *Piper Aircraft (*note 373).
[397] *Hughes v Fetter* (1951) 341 US 609.

proceedings. In these cases, dismissing the proceedings would not be a suitable solution as it would prevent the plaintiff from exercising their right to bring a legal claim. [398]

The next subsection examines jurisprudence on the historical antecedents of the *forum non conveniens* doctrine. The jurisprudence covers the historical antecedent of the doctrine from the early nineteenth century. This is an era in the Scottish Legal system, where dismissal of actions was often used under the *forum non competence* to dismiss proceedings.

4.2.1 Historical antecedent of the *fnc* doctrine in the 18th century

The *forum non conveniens* doctrine was traced to the early eighteenth century, an era in the Scottish Legal system[399] where dismissal of actions was commonly used by judges to dismiss suits to decline an existing jurisdiction.[400] Although there were implications in the application of the doctrine, judges continued to rely on the doctrine to dismiss and decline existing jurisdiction where another forum would be more appropriate to determine the matter. However, the doctrine has several implications, which include lack of 'competence' and jurisdiction.[401] For instance, if a court declines jurisdiction in favour of the most appropriate forum, the implication is that it can result in a lack of competence, as the court may not have the necessary expertise to hear and decide the case. On the other hand, where a case is transferred to another forum that is considered more appropriate to hear and decide the matter, this may result in lack of jurisdiction. For example, where the court does not have the authority to hear the case and cannot provide a binding ruling.

By the end of nineteenth century, the doctrine was renamed from *forum non 'competens'* to *forum non 'conveniens'*.[402] The *fnc* doctrine was created under the Scottish legal system to resolve the problem of *arrestment ad fundandam* jurisdiction.[403] *Arrestment ad fundandam* jurisdiction was a common practice in the

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[398] *Piper,* (note 373).
[399] Alan Dashwood, *A guide to the civil jurisdiction and judgments convention,* (1987) 425
[400] Robert Braucher, 'The Inconveniens Federal Forum', (1946) 60 Harv. L. Rev. 908; Wahl, *de verfehlte internationale zustandigerr* (1974) 46
[401] Ibid
[402] Alexander *(*n 390); Edward Barrett, 'The Doctrine of *Forum Non Conveniens*', (1947) CAL. L. Rev, 380,389.
[403] Gibb, *The International Law of Jurisdiction in England, and Scotland,* (1926), 212-13.

nineteenth century, where Scotland attached and seized foreign assets as a tactic to force foreigners to subject to the legal system of the Scottish court.[404] In the case of *Sim v Rabinow*,[405] Lord Kinnear established the condition that courts should follow in the application of the doctrine under the Scottish legal system.

Lord Kinnear stated that:

> To dismiss a case through the application of the forum non conveniens doctrine, the courts must ensure that there is another court or tribunal with the authority and capability to handle the matter. The alternative forum must also be practical for the parties involved, offering access to witnesses and evidence, and promoting fairness for all parties and the administration of justice…[406]

However, there are some potential issues with the application of the *forum non conveniens* doctrine. For example, there may be questions about whether the alternative forum is truly capable of hearing the case, or whether it would be more appropriate for the case to be heard in the forum where it was originally brought. Additionally, there may be concerns about the potential for bias or other factors that could impact the fairness of the alternative forum.

Furthermore, the most suitable approach was criticised on the grounds of lack of uniformity, unpredictable and inconsistency in the exercise of the discretionary power of the courts.[407] The criticism regarding the lack of uniformity, unpredictability, and inconsistency in the exercise of the discretionary power of courts when applying the most suitable approach for *forum non conveniens* is a valid concern. Discretionary power in legal decision-making can often lead to subjective judgments and outcomes that may vary between different judges or jurisdictions. This can result in a lack of predictability and consistency in the application of the law. On the other hand, the discretionary power of the courts to apply the most suitable approach for *forum non conveniens* should be exercised carefully, considering all relevant factors and the interests of all parties involved. However, the lack of uniformity and predictability in

[404] Ibid (n 370); Gibb A, *The international law of jurisdiction in England and Scotland* (1926), 21213; *Berger*, (n 372).
[405] *Sim v Robinow* (1892) 14 R 665, 668.
[406] *Sim v Robinow* (1892) 14 R 665, 668.
[407] *Gibb*, (n 457).

its application can undermine the principle of legal certainty, which is a cornerstone of the rule of law. However, drawing from the decision of Lord Kinnear in *Sim v. Robinow*[408] which was also supported in *Les Armateurs Franvais*[409] it seemed that the 'most suitable' forum approach trumps the 'abuse of process' standard.[410]

Before 1892, the application of the *forum non conveniens* doctrine was based on the "most suitable forum" approach. [411] This approach suggests that courts should consider the forum that was best suited to hear the case, considering factors such as the convenience of the parties, the availability of witnesses and evidence, and the interests of justice. This approach reflected a more flexible and pragmatic approach to jurisdiction, allowing courts to adapt to the changing needs of parties and the legal system. However, this approach was criticised for lack of uniformity, unpredictability and inconsistency in the exercise of discretionary power of the courts. Gibb[412] argued that the inconsistency in the exercise of the discretionary power of the court often resulted in the 'abuse of process',[413] as courts were reluctant to apply the doctrine in domestic cases.[414] As a result, the "most suitable forum" approach was replaced by a more restrictive "alternative forum" test, which requires that an alternative forum be available and suitable before jurisdiction can be declined.

The next subsection discusses jurisprudence on the application of the *forum non conveniens* doctrine in the pre-1947 period. The jurisprudence includes the analysis of legal precedents and case law that established the application of the doctrine in the U.S.

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[408] *Sim v Robinow* (1892) 14 R 665, 668; Wahl, *de verfehlte internationale zustandigerr* (1974) at 48
[409] Ronald Brand & Scott R, *Forum Non Conveniens: History, Global Practice, and Future under The Hague*, (2007).
[410] David W. Robertson, 'Forum Non Conveniens in America and England: A Rather Fantastic Fiction', (1987) 103 Law Q. Rnv. 398, 412.
[411] Edward Barrett, 'The Doctrine of *Forum Non Conveniens*', (1947) CAL. L. Rev, 380,389.
[412] Ibid.
[413] Ibid
[414] Prof. Dr. Markus Müller-Chen and Prof. J.D. Gary Born, 'Jurisdictional Disputes in Parallel Proceedings: A Comparative European Perspective on Parallel Proceedings Before National Courts and Arbitral Tribunals'.

4.2.2 The application of the *fnc* doctrine: pre-1947 period

At the beginning of 1927, a general clause was introduced to give the U.S. courts judicial discretionary power to decline jurisdiction in matters involving "non-resident".[415] This general clause was adopted by some states, such as Maine, New Hampshire, and Massachusetts.[416] The use of judicial discretion in determining jurisdiction in the U.S. was traced to the American "conflict of laws" system.[417] Previously, courts followed the European legal system's use of discretionary power rather than the English legal system.[418] The switch from the English legal system to the European legal system in the use of discretionary power signified a shift away from a legal system based on natural law and public interest to one based on the principle of stability. The principle of stability is a principle that forms the foundation of the civil law systems.[419] The cases of *Gardner v Thomas,*[420] 484 and *Collard v Beach*[421] established the application of the doctrine in U.S. courts. Although it was evident that the courts exercised judicial discretion in these cases, they never mentioned the doctrine of *forum non conveniens*.

At the turn of 1929, several cases were dismissed by judges on grounds of the *forum non conveniens* doctrine. For example, in admiralty cases the use of discretionary power and international comity by courts to determine jurisdiction strengthens the *forum non conveniens* doctrine. However, at the turn of 1932, the doctrine was reformed by Paxton Blair after the established Scottish model of *forum non conveniens*.[422] Paxton's formulation of the doctrine made a significant contribution in the evolution of the doctrine in the U.S legal system.

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[415] Alexandra, (n. 390); Wahl, *DIE VERFEHLTE INTERNATIONALE ZUSTANDIGKEIT*, (1974) 46

[416] (New Hampshire adopted the general clause in 1930, Massachusetts adopted the general clause in 1972)

[417] Ibid (n 370).

[418] *Berger*, (n 372).

[419] Alexandra, (n 390); Joseph story, *Commentaries on the conflict of Laws,* (1935); Joseph Beale, *Treatise on the conflict of Laws*, (1935).

[420] *Gardner v. Thomas* (1817) NYSupCt 134.

[421] *Collard v Beach*, (1904) 87 NYS 884.

[422] Paxton Blair, The Doctrine of Forum Non Conveniens in Anglo-American Law, 29 COLUM. L. REv. 1, 21 (1929).

As a result of the reform, in *Canada Maiting Co. v Paterson, S.S,*[423] the U.S. Supreme court held that the discretionary power of courts to decline jurisdiction should not be restricted to admiralty cases.[424] This decision was later followed in the *Baltimore & Ohio R.R. Co. v Kepner* case.[425] In the *Baltimore* case, Justice Frankfurter explained that the doctrine of *forum non conveniens* is a "manifestation of a civilized judicial system firmly embedded in our law".[426] Justice Frankfurter provided a clear illustration of the position of the U.S. judiciary on the application of the doctrine of *forum non conveniens.*[427] The next subsection discusses jurisprudence on the application of the *forum non conveniens* doctrine in the post-1947 period.

4.2.3 The application of the *fnc* doctrine in the post-1947 period

Between 1947 and 1981, the *forum non conveniens* doctrine was widely accepted by U.S. courts[428] as part of the American legal system.[429] However, the lack of uniformity in the application of the doctrine led to the rejection of the doctrine by some State courts. For example, in Texas, the national court rejected the application of the doctrine in *Dow Chem. Co., v Castro Alfaro* case.[430] The case involved wrongful death and personal injury actions. Referring to provisions in section 71.031 of the Texas Civil Practice and Remedies Code[431], the court held that the application of the *forum non conveniens* doctrine had been statutorily abolished, therefore, the doctrine was not applicable under Texas law.[432] The court of Texas in *Dow Chem.*, dismissed the actions of the plaintiffs[433] for procedural "run". The court of Texas stated that the Plaintiff's claim filed before the Florida and California courts had already been dismissed on the

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[423] *Canada Malting Co. v Paterson S.S.* (1932) 285 US 413.
[424]Ibid
[425] (1941) 314 U.S 44
[426] Ibid
[427] Michael Manzi, '*Dow Chemical v. Castro Alfaro:* The Demise of *Forum Non Conveniens in* Texas and One Less Barrier to International Tort Litigation' (1991) Fordharm Int'l L.J, 819.
[428] *Koster v Lumbermen's Mut. Casualty Co.* (1947) US 330, 518.
[429] *Gulf Oil Corp. v Gilbert,* (1947) 330 US 501.
[430] *Dow Chem. Co. v Castro Alfaro* (1990) 786 SW 2d 674.
[431] Ibid.
[432] *Dow Chem. Co. v Castro Alfaro* (1990) 786 SW 2d at 679 (The court opined that there was no logical reason to create an unnecessary burden on the courts of Texas to carry the burden of court in another states).
[433] *Dow Chem. Co., v Castro Alfaro,* (1990) 786 S.W. 2d 674 (The plaintiffs in the case were eighty-two Costa Rican residents).

ground of the *forum non conveniens* doctrine. Therefore, there was no good reason for the court to carry the burden of other courts.

However, in the case of *Gulf Oil Corp. v Gilbert,*[434] the Supreme Court established a set of factors that courts should consider when determining the most suitable 'forum'. These factors include the ease of access to evidence, the availability of compulsory procedures for forcing attendance of unwilling witnesses, the cost of obtaining attendance of willing witnesses, the possibility of viewing premises, the enforceability of judgments abroad, and how to promote an easy, expeditious, and inexpensive trial.[435] Additionally, courts must take into consideration other factors such as the administrative difficulties caused by court congestion (also known as, crowded dockets)[436], the public interest, the difficulties in the applying foreign laws, the avoidance of excessive forum shopping, and the unfairness of an undue burden on citizens in unrelated forums with jury and tax duties.[437]

At the turn of 1948, the judgment of the U.S. Supreme courts in *Gilbert* was challenged on the grounds of the legislative change and procedural law. The change in the procedural law displaced the application of the *forum non conveniens* doctrine in favour of venue transferred.[438] S.1404 in the 28 U.S.C provides that where an inconvenient claim is brought before a Federal court, the court has statutory power to transfer the claim to other courts that have a more appropriate forum to determine the claims. In addition, the courts should be given immediate jurisdiction.[439] The venue transfer in the 28 U.S.C was widely accepted by courts.

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[434] Ibid.

[435] *Gilbert* 330,US at 501, 508.

[436] Alexandra, (n 370).

[437] Ibid

[438] 28 U.S.C (1948), code on change of venue

[439] S.1404 of U.S.C provides "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district division where it might have been brought."; David Robertson, '*Forum Non Conveniens in* America and England: A Rather Fantastic Fiction', (1987) 103 Law Q. Rev. 398, 412.

For example, in *Ferens v John Deere Co.,*[440]it was held that regardless of the parties that initiated the venue transfer, the intent of the Congress and policies behind Section 1404(a) in 28 U.S.C must be considered when applying the venue transfer. [441] It was further held that the section 1404(a)[442]should not be applied to "deprive parties of state law advantages that exist absent diversity, nor provide opportunities for forum shopping". [443] Instead, courts should consider the convenience to parties and the interests of justice rather than possible prejudicial change in the applicable law.[444]

The Section 1404(a) rendered the doctrine of *forum non conveniens* ineffective in the domestic law in the U.S. The application of the *forum non conveniens* doctrine is only applicable in international cases. [445] Alexandra acknowledged that based on the judgment of the U.S. Supreme Court in *Gilbert*, "the application of the doctrine of *forum non conveniens* to international cases had not been contemplated when the doctrine was originally adopted."[446]

However, it is important to state that the judgment of the U.S. Supreme court in *Gilbert* established foundations for the power of Federal courts to dismiss suits on the grounds of the *forum non conveniens* doctrine, regardless of the nature of the case.[447] Barret argued that while the *forum non conveniens* doctrine was developed domestically to prevent forum shopping by plaintiffs seeking higher damage awards, the domestically-originated doctrine has been recognised as a doctrine of international application by various courts in the U.S.[448] In the *Gilbert* case, the U.S. Supreme Court[449] abandoned the "convenience" test approach, and instead the "specific factors" test was adopted as a condition that courts should consider when dismissing a suit on the ground of the *forum non conveniens* doctrine. The 'specific factors' test required that courts should

[440] *Ferens v John Deere Co.* (1990) 494 US 516.
[441] Ibid (n.444).
[442] Ibid.
[443] *Ferrens v John Deere Co.* (n 445); Alexandra, (n 370).
[444] Ibid.
[445] Ibid. Manzi, (n 427).
[446] Ibid, *Gulf Oil v Gilbert* (1947) 330 US 501, 507.
[447] Ibid.
[448] Barrett, (n 380) at 380, 389.
[449] *Gulf Oil v Gilbert* (1947) 330 US 501, 507.

engage in a general weighing and balancing of private and public factors while exercising their discretionary power to determine a forum that is 'most suitable'.[450]

On the other hand, there was an attempt to codify the application of the doctrine under Section 1.05 of the Uniform Interstate and International Procedure Act of 1962.[451] However, only states such as Alabama,[452] California,[453] Los Angeles,[454] North California,[455] and Wisconsin[456] followed the recommendations and codified the doctrine in the statutes.[457] Other states[458] such as Arizona, Arkansas, Delaware, Florida, Washington, and Michigan have solely "recognized" the doctrine but not yet ratified or codify it in any of their statutes.[459] On the other hand, states such as Georgia, Idaho, South Dakota, Texas, and Wyoming have explicitly refused to recognised or codify the doctrine.[460]

Notwithstanding the lack of uniformity in application of the doctrine, there are numbers of U.S. state courts that have continued to apply the doctrine of *forum non conveniens* to dismiss jurisdiction in transnational legal suits.[461] For instance, in *Holmes v Syntex Lab., Inc.,*[462] the California appellate court held that while the doctrine of *forum non conveniens* has been statutorily abolished and was no longer applicable to California

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[450] Alexandra (n 370); Manzi, (n 407).
[511] Ibid.
[451] *Uniform Interstate and International Procedure Act.,* (1962).
[452] Ala. Code, (1990), s.6-5-430.
[453] Cal. Civ. Pro. Code, (1973), s. 410.30.
[454] LA. Code Civ. Proc. Ann. (1990), art. 123(B) – (C).
[455] N.C. Gen. Stat. (1990), s. 1-75.12.
[456] Wis. Stat. Ann. (1990), s. 801.52, 801.63.
[457] Ibid

[458] Alexandra, (n 390) (There are about thirty-three states in the U.S. that "recognised" the doctrine of *forum non conveniens.* These states are, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Washington, and West Virginia); Manzi, (n 407).
[459] Alexandra (n 370).
[460] Manzi, (n 407); Alexandra, (n 370).
[461] *Holmes v Syntex Lab. Inc.* (1984) 156 Cal App 3d 372, 202 Cal Rptr 773.
[462] Ibid.

state courts,[463] Section 84 of the Second Restatement of Conflict of Laws[464] made provision for the application of the doctrine of *forum non conveniens.* Section 84[465] stated that the "court may not exercise its jurisdiction if it is clearly and distinctly not the appropriate or *conveniens* forum"[466]

Having discussed jurisprudence on the application of *forum non conveniens* in the U.S. in the post-1947 period, the next subsection discusses jurisprudence on the historical antecedents of the *forum non conveniens* doctrine in the United Kingdom (U.K.). The jurisprudence covers the application of the *fnc* doctrine in the pre-1947. This was an era when U.K. courts were granted discretionary dismissal power under the *lis alis pendens* doctrine to dismiss claims that are pending before courts in the UK and foreign courts, especially where the claims involved the same parties and the same causes of action.

4.2.4 The application of the *fnc* doctrine in the U.K: pre-1947

Before 1947, the *lis alibi pendens* doctrine was used in the U.K. This doctrine gives courts the discretionary power to dismiss claims that are pending before courts in the U.K. and other foreign courts,[467]especially when such claims involved the same parties and the same cause of action. On the other hand, at the turn of 1906, "stay of proceedings" was adopted by courts to stay proceedings, where there is a court with the most suitable forum to determine the proceedings. The "stay of proceedings" was applicable based on the *forum non conveniens* doctrine criteria established by the Supreme Court in the *Gilbert* case.

On the other hand, when applying the stay of proceedings, courts must consider the motives of the parties. This condition was set out in *Logan v Bank of Scot,[468]* where it was held that the decision of the court was based on the "vexatious" and "oppressive"

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[463] *Holmes v Syntex Lab. Inc.* (1984) 156 Cal App 3d 372, 202 Cal Rptr 773; In *Erie R.R.* v *Tompkins* (1938) 304 US 64 (The court held that "although there is often just a slight difference, if at all, between the state and federal doctrine of *forum non conveniens,* this presents the *Erie* conflicts of law questions of which law to apply in a diversity case in front of court"); Alexandra, (n 370). [522] Ibid.
[464] Restatement (Second) of Conflict of Laws, (1969), s. 84.
[465] Restatement (Second) of Conflict of Laws, (1969), s. 84.
[466] Restatement (Second) of Conflict of Laws, (1969), s. 84; Alexandra, (n 390).
[467] Dicey & Morris, *Dicey and Morris on the Conflict of Law,* (1987), 396; Cheshire & North, (n 452).
[468] *Logan v Bank of Scot.* [1906] 1 KB 141.

motives of the plaintiff. In addition, it was held that where an applicant's motives for applying for a stay of proceedings is vexatious and oppressive, the court must refuse to stay the proceedings, as this would amount to "abuse of court process".[469] There is a significant change in the application of the *forum non conveniens* doctrine in the 1974.[470] This change led to the adoption of a more restrictive approach in the application of the doctrine. This restrictive approach was based on the "abuse of process" established in the *Atl. Star* case.[471] The "abuse of process" is a restrictive legal approach in the common law system used to dismiss a case if the court finds that the process of bringing the case was used for an ulterior purpose or to harass the defendant.

In contrast, in 1978, the "abuse of process" approach was rejected, and instead the application of the *forum non conveniens* doctrine was introduced into the English legal system. On the other hand, in the case of *MacShannon v Rockware Glass, Ltd*.,[472] the English court established the burden of proof that litigants must show to successfully apply for a stay of proceedings on the ground of the *fnc* doctrine.[473] In this case, it was held that the plaintiff must demonstrate why the selected forum is appropriate to hear the matter, while the defendant must prove that the selected forum is clearly inappropriate and that the plaintiff's actions in bringing the case are vexatious and oppressive and aimed to frustrate the defendant. The decision of the English court in *MacShannon v Rockware Glass, Ltd* was later followed in other court cases such as *Amin Rasheed Corp. v Kuwait Ins. Co*. and *Spiliada Maritime Corp. v Cansulex Ltd*.

The English court[474]also established factors that courts should consider for a stay of proceedings on the grounds of the *forum non conveniens* doctrine. In *Abidin Daver,*[475] the court held that "balancing of all the relevant factors, private and public, those in favour of a stay and those against it"[476]should be established for a discretionary stay of

[469] *Logan,* (n 467); Alexandra, (n 370) According to Alexandra, ("the language of 'a' doctrine of *forum non conveniens* is deliberately chosen, as it demonstrates that the doctrine is far from experiencing either uniform application or even uniform criteria for its application") at p 477.
[470] Alexandra, (n 390)
[471] *The Atlantic Star* [1974] AC 436.
[472]1978 App. Cas. 795 (The appeal in the case was taken from the Queen's Bench Division)
[473] Ibid, *The Atlantic Star* [1974] AC 436.
[474] Ibid.
[475] Ibid.
[476] *The Abidin Daver* [1984] AC at 419.

proceedings. Lord Diplock, however, stated that the stay of proceedings under the English courts cannot be differentiated from the application of the *forum non conveniens* doctrine under the Scottish Law. Lord Diplock noted that the application of the doctrine and the use of the "most suitable forum" approach aimed to promote the principle of "judicial comity".[477]

The next subsection presents jurisprudence on the application of the *forum non conveniens* doctrine in the post-1947 period. Jurisprudence covers discussion on the decision of the English court in the *Spiliada* case.

4.2.5 The application of the *fnc* doctrine in the U.K: post-1947

In the United Kingdom, the application of the doctrine of *forum non conveniens* existed through the discretionary power of the English courts to establish "assumed jurisdiction"[478] over defendants in a matter that is outside the English court jurisdiction while relying on Rule 1(1) of the Rule of the Supreme Court (R.S.C) Order XI. Rule 1(1) of the R.S.C. Order XI gives discretionary power to the English courts to extend jurisdiction abroad.[479] Rule (1) of the R.S.C provided that the *forum non conveniens* doctrine can be applied by the courts to established jurisdiction over defendants by serving process out of the court's jurisdiction.[480] There are also certain criteria that the English courts consider when applying the *forum non conveniens* doctrine. These criteria were established in the case of *St. Pierre v South Am. Stores Ltd.,*[481]

These criteria include:

> (1) the nature of the dispute, (2) the legal and practical issues involved, (3) the local knowledge, (4) the availability of witnesses, the evidence expected from them, and the expense of producing them, (5) the applicable law and, (6) the inconvenience and expenses of a foreign defendant being sued in a foreign forum...[482]

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[477] *The Abidin Daver* [1984] AC at 411.
[478] Cheshire G., and North P., *Private International Law*, (1987), 205.
[479] R.S.C Order XI, r.1(1).
[480] Ibid.
[481] *St. Pierre v South Am. Stores Ltd.* (1936) 1 IJKB 382.
[482] *St. Pierre v South Am. Stores Ltd.* (1936) 1 IJKB 382; Alexandra, (n 390).

After 1947, the English courts acknowledged the application of the *forum non conveniens* doctrine into the English law system. The case of *Spiliada Maritime Corp. v Cansulex Ltd.*[483] was a landmark case on the application of the *fnc* doctrine after 1947. The case[484] involved Liberian plaintiffs, *Spiliada*, and the defendants, Cansulex Ltd, sulphur exporters from British Columbia. The plaintiffs, Spiliada, owned a ship registered under the trade name *"Spiliada".* In 1984, the plaintiffs brought an action before an English Court against the defendants. The claim was based on the damage to the plaintiff's ship and the corrosion caused by the defendant's actions during the loading of wet sulphur cargo in British Columbia.[485] The plaintiffs obtained leave of the court to serve the defendants outside of the jurisdiction under Order XI of the Rules of the Supreme Court.[486] However, the defendants, (Cansulex Ltd.) contested the court's jurisdiction and argued that another forum would be more appropriate to hear the matter. Despite this, the argument put forward by the defendants was rejected, and the English court declared itself to be the convenient forum for the case.[487]

On the contrary, the House of Lords acknowledged that in the application of the *forum non conveniens* doctrine, the "most-suitable forum" approach guarantees a higher degree of objectiveness unlike the restrictive approach in the "abuse of court process". The adoption of the "most suitable forum" approach by the court in the *Spiliada* case deviated from the traditional "convenience" test and focused more on the actual appropriateness of the forum. The "appropriateness" standard has potential to prevent the use of the convenience test to deprive the jurisdiction of the selected forum. However, since the "most-suitable forum" approach is based on the American model of *forum non conveniens,* the English courts should be cautious in the use of the approach, so that the deficiencies and misapplications of the American model are not transplanted into the English legal system. For instance, ambiguous legal terms such as

[483] *Spiliada Maritime Corp. v Cansulex* Ltd. [1987] AC 460.
[484] Facts in the *Spiliada* case is further discussed in chapter five in the thesis.
[485] Ibid; (The defendants, *Cansulex Ltd* have engaged in the loading of wet sulphur cargo in the British Columbia in November 1980).
[486] ORDER 11 under the Rule of the Supreme Court makes provision for the service of process, etc., out of the jurisdiction.
[487] *Spiliada Maritime Corp. v Cansulex* Ltd. [1987] AC at 460-61.

the "clearly" or "distinctly" appropriate forum may further create controversies in the application of the doctrine.

The House of Lords also placed a burden on litigants to establish certain factors in order to obtain a stay of proceedings based on the application of the *forum non conveniens* doctrine. These factors include, (a) the presence of an identical case pending before in an English court, and (b) the lack of an alternative forum. For instance, in the case of *Spiliada*, both ships had the same insurance company, the same counsel, and the same facts. On the other hand, the statute of limitations had made the alternative forum impossible.[488] The burden of proof for a stay of proceedings and leave under Order XI cannot be stretched beyond the point of equal criteria. For instance, while the burden of proof to stay proceedings required both parties to prove whether the selected forum is convenient or inconvenient, the defendant seems to have more burden to establish that the selected forum is convenient.[489] The burden of proof placed on the parties would help to ensure effectiveness in the application for a stay of proceedings based on the *forum non conveniens* doctrine. On the contrary, the burden of proof under Order XI remains solely with the plaintiff seeking the leave of the court to serve proceedings outside the court jurisdiction.[490]

In addition, conditions imposed by the courts before granting a stay of proceedings[491] seem to provide a legitimate advantage for the plaintiff. [492] These conditions include, the payment of additional expenses, the placement of guaranteed deposits and other securities in the alternative forum, the waiver of statute of limitation, and the condition to recognise and enforced judgment obtained in the alternative forum. The next section examines jurisprudence on the concept of choice of court agreements in transnational litigation. The jurisprudence covers the legal opinions and interpretations given by courts and legal scholars on the use and enforcement of the choice of court agreement. Jurisprudence on the concept of the choice of court agreement seeks to clarify the rules

[488] Ibid at 486-87.
[489] *The Atlantic Star* [1974] AC 436.
[490] Cheshire and North, *Private International Law,* (1987), at 207.
[491] Rhona Shuz, 'Controlling Forum-shopping: The impact of *MacShannon v Rockware Glass, Ltd*', (1986), 35 Int'l & Comp. L.Q, 374, 389-93.
[492] Ibid.

and principles governing these agreements in various jurisdictions such as European countries, the U.K., and the United States of America.

4.3 Choice of Court Agreement

Choice of court agreements are agreements that allow litigants in cross-border disputes to choose the jurisdiction and court in which their case will be heard. This agreement is also known a as 'jurisdiction agreement'[493] or 'forum selection agreement'.[494] Choice of court agreements play a crucial role in resolving conflicts of jurisdiction and preserving the parties' autonomy in transnational matter. However, the validity of choice of court agreements is based on the approach of the courts in question, as the court may or may not honour the agreement made between the parties regarding jurisdiction. In contrast, the parties can choose multiple courts to decide their disputes.[495]This allows the parties to have a backup plan in case their preferred court does not honour the agreement regarding jurisdiction. However, it also raises the potential for conflicting decisions and adds complexity to the dispute resolution process. Furthermore, it can also increase costs and time involved in resolving the dispute as the parties may have to litigate the same matter in multiple courts.

On the other hand, choice of court agreements serve two functions, which are to either grant jurisdiction to a specific court or to restrict jurisdiction of a court. This allows parties to choose the court they believe will be best suited to hear their case and make a fair and impartial decision. However, this also means that parties may forego the opportunity to have their case heard in a more appropriate or favourable forum. However, while courts may acknowledge the choice of court agreements when they grant jurisdiction to the court, the courts often considered the agreement as an affront when the agreement is used to deprive the court of their jurisdiction.

Furthermore, choice of court agreements can be used as a tool to favour one over the other. This is known as an asymmetric choice of court agreement. This is commonly used by banks in transactions involving an international loan agreement between a

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[493] Yeo tion Min, 'The contractual Basis of the enforcement of the exclusive and non-exclusive choice of court Agreements' (2005)17 Sac LJ 306

[494] Kevin m. Cleromont, 'Governing Law on forum selection Agreements' (2014-15)66 hasting LJ 643

[495] Ronald Brand & Paul M HERRUP, 'The 2005 Hague convention on choice of court agreement commentary and document', (2008), Cambridge University press.

lender and the borrower. For example, in international loan agreements it is often provided that: in any proceedings by the lender against the borrower the lender shall have rights to bring an action in the court chosen or in any other court having jurisdiction under its law, but the borrower shall only be allowed to bring an action in a court selected in the agreement. This suggests that the choice of court agreement is exclusive where the proceeding is brought against the lender, but it becomes non-exclusive where the proceeding is brought against the borrower.

However, the existing contract between the parties must include a clause that refers to the choice of court agreements. For example, a clause such as 'In this contract, any breach of terms shall be brought under the exclusive jurisdiction of the English court.' In addition, this clause can be omnibus to cover other proceedings. For example, 'all proceedings under, or relating to, this contract shall be brought exclusively in the courts of England'. This denotes that all proceedings relating to the contract shall be heard by the English court.

Jurisprudence on the interpretation of choice of court agreements under the European legal system is discussed in the next subsection.

4.3.1 Choice of court agreements under the European legal system

Under the European legal system, choice of court agreements is construed to protect litigants who may have unknowingly consented to such agreements. Application of choice of court agreements in the European legal system is based on the 'overweening bargaining power' model from the U.S. legal system. The 'overweening bargaining power' model is a special provision in contracts to protect vulnerable individuals, including consumers, employees, and insured persons. Article 23 of the Brussels I Regulation[496] gives effect to the exclusive jurisdiction and sets out requirements that the choice of court agreements must adhere to.

[496] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal L 0-12, 16/01/2001 P. 0001 – 002

Article 23 provides:

> …If one or more parties involved in a legal relationship are based in a Member State of the European Union and they have agreed that a court in a Member State shall have the authority to resolve any disputes related to that relationship, then that court has jurisdiction and this jurisdiction is exclusive, unless otherwise specified by the parties involved...[497]

Article 23[498] also provides the requirements that choice of court agreements must meet. These requirements include, (a) the agreement must be writing, (b) the agreement must be incorporated in a form that is acceptable in practice, which the parties have established between themselves, or (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned. However, there are exceptions to the requirement that an agreement conferring jurisdiction must be writing, and accordingly any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'.

On the other hand, when parties who are not domiciled in a Member State have entered into an agreement, courts of the other Member State will not be authorised to preside over the matter unless the court that was chosen in the agreement had declined jurisdiction to hear the disputes in the matter.[4] For example, in a trust related matter, the court of a Member State that has been chosen in the agreement shall have exclusive jurisdiction and preside over a matter involving the settlor, trustee or beneficiary unless relations between these persons or their rights or obligations under the trust are involved.[499] Other exceptions when choice of court agreements shall have no legal

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[497] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal L 0-12, 16/01/2001 P. 0001 – 002, Article 23 Brussels I Regulation.

[498] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal L 0-12, 16/01/2001 P. 0001 – 002, article 23.

[499] Ibid.

binding include 1) where the agreement is contrary to the provisions in the Brussels I Regulation, particularly in relation to insurance,[500] consumers[501] or employment contracts,[502] or 2) where the court whose jurisdiction they purport to exclude has exclusive jurisdiction by virtue of Article 22 of the Regulation.[503]

In contrast, establishing whether the parties had consented to choice of court agreements has been a major challenge in transnational litigation. In the case of *Colzani v RÜWA*,[504] a contract agreement between the parties was incorporated in a business notepaper belonging to one of the parties. The front sheet of the notepaper contained certain terms while the back contains standard terms of the contract between both parties. In addition, the back of the sheet also contained a choice of court agreement. However, both the body of the contract and the front of the sheet did not refer to those standard terms and choice of court agreement at the back sheet of the agreement. The question before the court was whether the choice of court agreement contained in the agreement was binding? To answer the question, the court determined whether the parties had consented to what was written at the back sheet of the agreement and, if not, it should be referred to the national law. However, the European court held that such a clause in the agreement does not comply with the requirements under Article 23 of the Regulation.

Similarly, in *Segoura v Bonakdarian,*[505] the parties entered into an oral agreement for the sale of goods. The parties did not mention a choice of court agreement, but upon the delivery of the goods, a delivery document handed over to the buyer contained statements that the sale and delivery took place subject to terms and condition at the back of the delivery document. At the back of the delivery document was a choice of court and other conditions. The European Court held that unless otherwise agreed

[500] Ibid.
[501] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal L 0-12, 16/01/2001 P. 0001 – 002, article 22.
[502] Ibid.
[503] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal L 0-12, 16/01/2001 P. 0001 – 002, article 22.
[504] Ibid.
[505] German Supreme Court, Bundesgerichtshof.

between the parties, the delivery document did not satisfy the requirements laid down in article 23 (paragraph a). In contrast, in *European Community Berghoefer v ASA Court of Justice of the European Communities,*[506] the parties had selected a French court in the choice of court agreement. Subsequently, the parties entered an oral agreement to transfer jurisdiction to a German court, with the condition that the German company would bear some costs in the contract.

However, the claimant later wrote to the defendant confirming that they had agreed. The defendant received a confirmation letter but never replied. The question for determination at the German Supreme Court[507] was whether the choice of court agreement was valid, and whether the confirmation of the oral agreement could be made by Berghoefer.[508] The court held that the claimant could not rely on the choice of court agreement, as the agreement was reached after the parties had entered the contract.

On the other hand, the European Court held in *Powell Duffryn v Petereit*,[509] that choice of court agreements in the constitution of a company (articles of association, etc.) are to be regarded as contractual. Although it was argued that the *Powell Duffryn* case should be decided under relevant national law, the European Court stated that irrespective of the relevant national law, a choice of court agreement in the constitution must be considered as contractual. In addition, the choice of court agreements must comply with the Article 23. Furthermore, the validity of the choice of court agreements was put to the test in the case of *European Community Elefanten Schuh v Jacqmain.*[510] This case concerned an employment contract between a German employer and a Belgian employee. The contract agreement was written in German. In the agreement, a German court was selected as the court with exclusive jurisdiction to hear the disputes between the parties. However, the employee instituted proceedings before a Belgian court on the ground that the whole contract was void under the Belgian law. The employee argued that there was a mandatory requirement that all employment contracts

[506] Case 221/84 [1985] ECR 2699.
[507] Ibid.
[508] Ibid.
[509] C-214/89 *Powell Duffryn plc v Wolfgang Petereit* [1992] I-01745.
[510] Case 150/80, [1981] ECR 1671.

had to be in the official language of Belgium being a country where part of the contract was to be performed. The Belgian court assumed jurisdiction in the matter and denied the exclusive jurisdiction of the German court. Since the defendant had not raised the issue of jurisdiction under the choice of court agreement, the Belgian court was said to have jurisdiction under the Article 18 of the Convention (now Article 24 of the Regulation).

However, in the *Coreck Maritime v Handelsveem* case,[511] the European court determined the substantive validity of a choice of court agreement. The court held that the domestic law in the forum selected[512] should be used to determine the validity of a choice of court agreement where jurisdiction is conferred on courts of a non-contracting State. This approach was also adopted under the 2005 Hague Convention on Choice of Court Agreements.[513] On the contrary, while a choice of court agreement binds the parties to the contract, a third party can also rely on the choice of court agreement even though they are not a party to the main contract agreement. However, where a party that is not mentioned in the contract containing a choice of court agreement relied on it, the party shall be entitled to the rights and obligations in the contract.[514] In *Tilly Russ v Nova*,[515] the European Court held that, "if a choice-of-court agreement in the bill of lading meets the requirements of Community law as between the original parties to it, and if, under the relevant law, the consignee is regarded as having succeeded to the shipper's rights and obligations under the contract of carriage, the choice-of-court agreement will be binding on the consignee".[516]

The next subsection presents jurisprudence on the application of choice of court agreements in the U.K.

[511] Case c-387/98 *Coreck Maritime GmbH v Handelsveem BV*. (2000)
[512] Ibid.
[513] The Hague Convention was signed by the European Unions in 2009.
[514] Ibid.
[515] *Tilly Russ and Ernest Russ v NV Haven* (1984) C 217 - 02417 ECLI:EU.
[516] Ibid.

4.3.2 Choice of court agreements under the U.K. legal system

The English courts were reluctant to allow the choice of court agreements to be used as a tool to deprive the English courts of their jurisdiction. It is believed that the jurisdiction of the English courts should be determined by the national law and not a private agreement. In addition, the English courts have a discretionary power to deny the choice of court agreement. However, there has been change in policy in the case of England, in *The Fehmarn* in the Court of Appeal.[517] This case involved a German shipper and an English buyer. The German ship, the *Fehmarn*, agreed to carry a cargo of turpentine from a Baltic port to a port in England. The shippers in the contract were from the Soviet Union (as it then was). The bills of lading between the parties contained a choice of court agreement conferring jurisdiction on the Soviet Union. However, the English buyers as holders of the bills of lading brought proceedings in England over a claim that there was a contamination and short delivery by the shipowners. Relying on the choice of court agreement the shipowners challenged the jurisdiction of the English court. The trial court dismissed the argument of the shipowner.

Lord Denning, on appeal, had a different view on the provisions in the bills of lading requiring that disputes be heard in Russian courts. Lord Denning believed that while these provisions should be given due consideration, they could not restrict the jurisdiction of English courts in matters that properly belong to them. Lord Denning also considered the dispute at hand, which involved English importers claiming against German shipowners for contaminated goods, to be a matter properly belonging to the English courts as the goods were delivered and surveyed in England and the vessel was a frequent visitor to the country. Lord Denning argued that the English importers had the right to arrest the ship, under the jurisdiction of the English Courts of Admiralty, if their claims were substantiated. Lord Denning added that the dispute was one that properly belonged to the English courts. However, the contract was governed by Russian law and witnesses in Russia may need to be interviewed regarding the condition of the goods at the time of shipment.[518]

[517] [1958] 1 WLR 159; [1958] 1 All ER 333; [1957] Lloyd's Rep 551.
[518] Ibid.

In contrast, the English courts are reluctant to assume jurisdiction if neither party is domiciled in a Member State of the European Union. This means that even if the requirements set by the Brussels Regulation have been met, the English courts still must decide about whether to take up jurisdiction or not. However, where one of the parties is domiciled in a Member State, the English courts will assume jurisdiction over the matter in compliance with the requirements under the Brussels Regulation. Accordingly, the English courts are not allowed to assume jurisdiction if the requirements under the Brussels Regulation are not met.[519]

On the other hand, the English court will not be obliged to decline jurisdiction where choice of court agreement concerns a non-Member State. In the 1979 Schlosser Report[520] it was expressed that if the choice of court agreement confers jurisdiction on the courts of a non-Member State, but proceedings were brought in the courts of a Member State, the national law of the latter must be used to determine the validity of the choice of court agreement. The Schlosser Report went further and states that the English courts still have rights to decline jurisdiction if they find it appropriate to do so having complied with the national law. The next subsection presents jurisprudence on the application of the choice of court agreements in the U.S. legal system.

4.3.3 Choice of court agreement in the U.S. legal system

The courts in the U.S. are reluctant to apply the choice of court agreements clause, where the agreement favours foreign courts. The U.S. courts have continued to rely on the *forum non conveniens* doctrine. The decision of the court in the case of *United States M/S Bremen v Zapata Off-Shore Company*[521] was a landmark case that shows the attitude of the courts in the US on the application of choice of court agreement, particularly when the agreement gives jurisdiction to foreign courts.

[519] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal L 0-12, 16/01/2001 P. 0001 – 002.

[520] Report 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

[521] US Supreme Court 40 US 1; 32 L Ed 2d 513; 92 S Ct 1907 (1972).

The United States *M/S Bremen* case involved a German company (Unterweser Reederei) and a Texas company (Zapata Offshore) who entered a contract for the towing of an oil rig. The contract contained a choice of court agreement clause that stated that the English courts would have exclusive jurisdiction to resolve any disputes. The contract also included two clauses that limited Untermeyer's liability in the event of damage to the oil rig. However, due to an unexpected severe storm in the Gulf of Mexico, the oil rig was damaged, and Zapata instructed the Bremen to proceed to the nearest port of refuge, which was in Tampa, Florida. However, Zapata filed a lawsuit for damages from the negligent towage against Unterweser and Bremen in a Federal District Court in Texas, despite the two clauses limiting Unterweser's liabilities for any damage to the oil rig. Meanwhile, Unterweser requested a halt to the proceedings in the Federal District Court, citing the jurisdiction of the English courts as designated in the choice of court agreement. Unterweser also took legal action against Zapata in the English court.

The trial court in the United States M/S Bremen case ruled that choice of court agreements are not binding on U.S. courts and may only be honoured if there is a valid reason. The court also rejected Unterweser's request for a stay of proceedings, because the choice of court agreement between the parties was seen as contrary to public policy hence it was *void ab initio*. The court held that Unterweser's argument for a stay in favour of the English court was insufficient. Accordingly, the decision of the trial court was upheld on appeal.[522]

However, the Hague Convention on Choice of Court Agreements Act has brought significant changes to the recognition of choice of court agreements in the United States. Article 3(b) of the Act gives exclusivity of jurisdiction to the designated court in the choice of court agreement, unless otherwise agreed by the parties. Also, Article 5(2) of the Convention prohibits the designated court from declining jurisdiction on the grounds of *forum non conveniens*. However, there is a caveat to this as the chosen court has no mandate to dismiss claims for *forum non conveniens* in certain circumstances

[522] Ibid.

specified under Article 5(3) of the Convention.[523] These changes are expected to strengthen the choice of court agreements and increase the enforceability of jurisdiction and law clauses. According to Article 5(3) of the Hague Convention on Choice of Court Agreements, the chosen court in a choice of court agreement cannot decline jurisdiction for two reasons: (a) regarding jurisdiction over the subject matter or the value of the claim and (b) regarding internal allocation of jurisdiction among the courts of a Contracting State.[524] The next section presents jurisprudence on the development of the civil law *lis pendens* rule. Legal decisions and precedents on the evolution of the *lis pendens* rule are also discussed.

4.4 Jurisprudence on the development of the *lis pendens* rule

The *lis pendens* rule was developed to address the issues of conflicting jurisdiction and to prevent multiplicity of actions in transnational litigation.[525] The *lis pendens* rule aims to prevent duplicity of legal proceedings by suggesting that when the same parties and cause of action are involved, the court second seised in the matter should consider staying or declining jurisdiction in favour of the court first seised. [526] This rule applies across borders, meaning that if the same action is brought before the courts of different Member States, the second court seised must stay its proceedings in favour of the jurisdiction of the first court seised in the matter. [527]

The *lis pendens* rule was also incorporated into the civil law legal systems and codified under the Brussels Regime.[528] The Brussels Regime lays down the guidelines for determining the jurisdiction of national courts within the European Union in civil and commercial affairs. It establishes a clear framework for resolving legal disputes in these areas across borders within the EU.[529] The Brussels Convention of 1968 marked the

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[523] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal L 0-12, 16/01/2001 P. 0001 – 002.
[524] Ibid
[525] *Campbell*, (n 198).
[526] Convention of 27 September 1968 on jurisdiction and enforcement of judgment in civil and commercial matters, article 21.
[527] Ibid, article 22.
[528] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal L 0-12, 16/01/2001 P. 0001 – 002; Regulation (EU) No. 1215/2012 on Jurisdiction and recognition and enforcement of Judgements in civil and commercial matters (Recast).
[529] Ibid.

first Brussels regime.[530] This convention aimed to promote cooperation in civil matters among non-EU countries, particularly in the case of conflicting decisions. However, with the creation of the European Union, a new solution for resolving legal disputes between Member States was developed, based on the shared principles of the common market.

The *lis pendens* rule was also codified under the Illinois statutes in 1917.[531] The Illinois statutes provides that "any person who purchase or acquire an interest in a property that is undergoing litigation trials, took such interest subject to the outcome of the litigation as if he had been a party from the start."[532] Therefore, where a party involved in a real property transaction gave a constructive notice or complained to subsequent buyer that the property in question is subject to a pending lawsuit, it is not necessary to establish whether the other party have actual knowledge of the pending suit. Regardless of whether the other party has actual knowledge of the pending lawsuit,[533]the courts are more likely to favour the party who has given constructive notice of the pending lawsuit.

Article 27 provides as follows:

> When legal proceedings involving the same parties and actions are initiated in different courts across different member states, the jurisdiction of the court that was first must be respected. Any other courts involved must stay proceedings until the court that was first seised determines its own jurisdiction. [534]

[530] Convention of 27 September 1968 on jurisdiction and enforcement of judgment in civil and commercial matters; (This is an international treaty that was concluded by Member States of the European Communities). [618] Ibid.
[531] Ibid (n 623).
[532] Ibid.
[533] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal L 0-12, 16/01/2001 P. 0001 – 002, article 27.
[534] Ibid, art. 27.

On the other hand, in *Gubisch v Palumbo* case,[535] the ECJ explained that, to determine whether a contract is binding in a transnational lawsuit, courts should consider whether the contract is derived from the same cause of action. In addition, in *Tatry v Maciej Rataj* case, [536] the ECJ held that terms such as the "same cause of action" and the "same parties" must be interpreted in accordance with provisions in Article 27 of the Brussels I Regulation.[537] Contrarily, the domestic laws applicable in the Member State regarding actions *in personam* and actions *in rem* are not relevant for the purpose of Article 27 of the Brussels I Regulation. [538] This means that the jurisdiction established in the regulation takes precedence over any conflicting national laws.

However, in order to implement the provisions of Article 27,[539] certain criteria must be established by the parties involved. These criteria include the presence of the same cause of action and the same parties involved in the proceedings. If these criteria are established, the Brussels I Regulation requires the court that was second seised to stay proceedings until the court that was first seised determines its jurisdiction in the matter. The interpretation of Article 27 of the Brussels I Regulation suggests that the *lis pendens* rule can be implemented even where a choice of court agreement has conferred exclusive jurisdiction in another court.[540]

On the contrary, where the parties involved have different nationalities[541] but are both domiciled in a Member State, Article 26 of the Brussels I Regulation provides that the parties can sue and be sued in courts in that Member State based on the jurisdiction rules applicable to the nationals of that state. [542]For instance, if a Member State chooses to adopt the Brussels Regulation as the governing law for jurisdiction, such law will also apply to parties domiciled in that Member State, notwithstanding their

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[535] Case C-144/86 *Gubish Maschinenfabrik KG v Giulio Palumbo* (1987) ECR 4861.
[536] Case C-406/92 *Tatry v Maciej Rataj* (1994) ECR I-05439.
[537] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal L 0-12, 16/01/2001 P. 0001 – 002, art. 27.
[538] Ibid
[539] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal L 0-12, 16/01/2001 P. 0001 – 002, article 27.
[540] Ibid.
[541] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal L 0-12, 16/01/2001 P. 0001 – 002, article 26.
[542] Ibid.

nationalities. However, if proceedings involve a legal person or firm, the court will consider the statutory seat, central administration, and the principal place of business as criteria to determine the domicile of the legal person or firm. Article 16 in the Brussels Convention[543] makes provision for the *lis pendens* rule in relation to an exclusive jurisdiction.

Article 16 provides that:

> Where a property is situated within the exclusive jurisdiction of a court of a Member State, the court of that Member State shall have exclusive right in the proceedings concerning the rights *in rem* in the immovable property, and neither the nationality nor the domicile of parties in the proceedings could deprive the court of its exclusive right…[544]

For example, in a contract lawsuit, the court within the place of performance of the obligation would have the exclusive rights to determine proceedings. Contrarily, in cases of wrongful acts – tort and delict or quasi-delict – the court within the place where the harm occurred or could have occurred would have exclusive jurisdiction. The Brussels I Regulation[545] has brought about significant reforms to the *lis pendens* rule, particularly with regards to the strict interpretation of the rule.[546] The Brussels I Regulation aimed to facilitate the growth of a single market by promoting the free movement of goods and services, as well as to coordinate jurisdiction and recognition of court decisions and enforcement procedures among the EU Member States in cross-border litigation cases. However, the strict interpretation of the application of the *lis pendens* rule Article 27 has led to the criticism of the Brussels I Regulation. In addition,

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[543] Convention of 27 September 1968 on jurisdiction and enforcement of judgment in civil and commercial matters, article 16.
[544] Ibid, article 16.
[545] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal L 0-12, 16/01/2001 P. 0001 – 002.
[546] The hierarchy rules of jurisdiction imply that the court first seised shall have priority to determine jurisdiction where proceedings involving the same parties and the same cause of action are brought before courts of different Member States; Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal L 0-12, 16/01/2001 P. 0001 – 002, article 28.

the first-come, first-served rule under the Brussels I Regulation also generated criticism.[547]

The "first-come, first-served" rule is a principle used in determining which court has jurisdiction in proceedings. The rule suggests that a court which is first seised has priority, even if it may result in some unfavourable consequences. For instance, in the *Gasser* case, the ECJ refused to respect the jurisdiction of court that was chosen in the choice of court agreement. The ECJ stated that the court first seised has priority by virtue of Article 27 of the Brussels I Regulation. In contrast, Article 31 (2) and (3) under the Recast Brussels Regulation strengthened the choice of court agreements and prevents the abusive tactical litigation in the use of the "first-come, first served" rule.

Article 31(2) provides as follows:

> …If the parties involved in a lawsuit have chosen a court in a Member State through a choice-of-court agreement, then that court shall have exclusive jurisdiction. Any other court in another Member State must halt proceedings until the selected court determines if it has jurisdiction...[548]

Article 31(3) provides that:

> …If the court selected through the choice-of-court agreement determines that it has jurisdiction, any other courts in the Member State must decline jurisdiction in the matter...[549]

These provisions replaced the "first-come, first-served" rule with the choice of court agreements. These provisions require that the court first seised should stay proceedings, either on its own motion or through the application of the parties. The idea is to allow the court chosen in the choice of court agreement to establish its jurisdiction. Until then, the court first seised shall continue to stay its proceedings.

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[547] Chrispas Nyombi, (n 57).

[548] Regulation (EU) No. 1215/2012 on Jurisdiction and recognition and enforcement of Judgements in civil and commercial matters (Recast), article 31(2).

[549] Regulation (EU) No. 1215/2012 on Jurisdiction and recognition and enforcement of Judgements in civil and commercial matters (Recast), article 31(3). [649] Ibid, recital 22.

In addition, Recital 22[649] in the Recast Brussels Regulation also strengthened the choice of court agreement. Recital 22 provides that the chosen court has discretionary power to commence proceedings, when the court first seised is yet to stay proceedings. However, it is important to note that the general principle of *lis pendens* remains unchanged despite the introduction of choice of court agreements in the Recast Brussels Regulation.

For instance, Article 29 (1) of the Recast Brussels Regulation provides that:

> Where proceedings involving the same cause of action and the same parties are brought before courts of different Member State, the court first seised in the proceeding shall have jurisdiction. Any other courts shall stay proceedings until when the court first determine otherwise.[550]

This provision applies where the court chosen by the parties in the agreement has established that it has no jurisdiction in the proceeding.[551] Any other courts of the Member States shall stay proceedings pending when the jurisdiction of the court first seised is established.[552] As a result, the general principle of *lis pendens* rule will be applied and the court first seised court can continue with the proceeding. On the contrary, Article 31 of the Recast Brussels Regulation is subject to hierarchy.[553] For instance, where the parties in a proceeding submitted to the jurisdiction of a non-chosen court, Article 29 of the Recast will take priority over the Article 31(2). However, Article 31(4) makes provision for the protection of a party (claimant) that may institute proceedings before a non-chosen court.[554]

[550] Regulation (EU) No. 1215/2012 on Jurisdiction and recognition and enforcement of Judgements in civil and commercial matters (Recast), article 29(1).
[551] Ibid.
[552] Ibid, article 29(1).
[553] Chrispas Nyombi, (n. 57).
[554] Regulation (EU) No. 1215/2012 on Jurisdiction and recognition and enforcement of Judgements in civil and commercial matters (Recast), article 34(4).

Article 31(4) under the Recast provide as follows:

> If cases such as insurance contract, injury/torts, consumers, and employment are brought before a non-chosen court, the jurisdiction of the non-chosen court shall be respected notwithstanding the court designated in the agreement.[555]

This provision protects the interest of the weaker party that counts on the jurisdiction of the non-chosen court. Furthermore, Article 33 and 34 of the Recast Brussels Regulation make provisions for the recognition of the jurisdiction of the court of a third state. Article 33 gives the courts of a Member State discretionary power to stay the proceedings, where a matter involving the same parties and the same cause of action is pending before a court of a third state (non-Member State).

Article 33 of the Recast provide that:

> …The courts of the Member State 'may' stay proceeding, where proceedings involving the same cause of action and between the same parties are pending before the court of the third, and the court of the third state will likely give a valid judgment that is capable of recognition and enforcement in the Member State…[556]

This provision is based on several conditions. These conditions include the court of the third state must be the court first seised,[557]the judgment of the court of the third state must be capable of recognition and enforcement in the courts of a Member State, and the court of the Member State needs to satisfy that a stay of proceedings is necessary. For instance, a stay of proceedings will be granted when proper administration of justice is guaranteed. On the contrary, the inclusion of the word "may" in Article 33 of the Recast[558] also undermines discretionary power of the judge to stay proceedings in transnational litigation. The word "may" in this provision implies that the courts of the

[555] Regulation (EU) No. 1215/2012 on Jurisdiction and recognition and enforcement of Judgements in civil and commercial matters (Recast), article 31(4).
[556] Ibid, article 33.
[557] Ibid, article 33.
[558] Regulation (EU) No. 1215/2012 on Jurisdiction and recognition and enforcement of Judgements in civil and commercial matters (Recast), article 33.

member state are not mandated to stay proceedings. The courts of a member state 'may' decide to proceed with the proceedings, even where the matter pending before a court of a third state involve the same parties and the same cause of action.

This provision in Article 33 of the Recast[559] promotes the "first-come, first-served" rule by stating that the court of the third state needs to be first seised in the proceedings, for the court of the Member State to stay proceedings. The implication of this provision is that it will encourage litigants to run to courts that are not chosen in the agreement, especially where the non-chosen court is known to have a slow process. Thus, unscrupulous litigants are likely to run to a non-chosen court for the purpose of delaying proceedings and to frustrate the innocent party.

On the other hand, Recital 24 of the Recast Brussels Regulation[560] sets out criteria that courts should consider when deciding on a stay of proceedings in transnational matters. The criteria include the place of the contract, the access to witnesses, documents, the interest of the parties and most importantly the ends of justice. The criteria set out in Recital 24 provide a clear and comprehensive framework for courts to follow when deciding on a stay of proceedings. This helps to ensure that the decision-making process is transparent and predictable, and that the outcome of the case is determined in a fair and impartial manner. However, the application of the Recital 24 criteria may not always be straightforward, as the circumstances of each case may be unique and require a nuanced consideration. There may also be conflicting interests and factors that need to be weighed and balanced, which can make the decision-making process challenging.

Furthermore, the Hague Convention provides for the prorogation agreements in favour of a third state, as an attempt to address conflict of jurisdiction in non-Member States. However, the Convention[561] only applies to specific disputes involving exclusive choice of court agreements. This is means that it is unclear whether the jurisdiction of a court in a non-Member State will be respected where the court has not been selected in the choice of court agreements. The Convention[562] is only applicable between contracting states. This means that the provision for prorogation agreements will only

[559] Ibid.

[560] Regulation (EU) No. 1215/2012 on Jurisdiction and recognition and enforcement of Judgements in civil and commercial matters (Recast), Recital 24.

[561] The Hague Convention on Choice of Court Agreement.

[562] Ibid.

favour the court of a third state that is selected in the choice of court agreement.[563] In essence, while the Hague Convention provides a useful framework for addressing conflicts of jurisdiction in non-Member States, its limitations must also be considered. Its limited applicability means that it may not provide adequate protection for the parties involved in disputes in all cases, particularly in instances where the court of a non-Member State has jurisdiction but is not selected by the parties or is not a party to the Convention.

4.5 Summary

Drawing ideas from discussions in this chapter, conflict of jurisdiction in transnational litigation has been a widely discussed topic among scholars and practitioners. Both common law and civil law countries have come up with mechanisms to resolve this conflict. The common law countries have developed the "*forum non conveniens*" doctrine to address the conflict of jurisdiction, while civil law countries have adopted the "*lis pendens*" rule. The *lis pendens* rule suggests that if proceedings involving the same parties and cause of action are pending in courts of different Member States, other courts should stay proceedings and give priority to the court that was first seised to determine its jurisdiction. On the other hand, the *forum non conveniens* doctrine promotes flexibility and gives discretionary power to the courts to stay proceedings in favour of a forum that is more suitable. The focus of the *lis pendens* rule is to ensure predictability and prevent multiplicity of court cases.

The scope and development of the *forum non conveniens* doctrine focus on ensuring that the parties' interests are protected by giving judges the discretion to stay proceedings in favour of a forum that is more suitable and appropriate to hear the matter. Contrarily, jurisprudence shows that there are two common approaches used by courts in the application of the *forum non conveniens* doctrine: the 'abuse of process' approach and the 'most suitable' forum approach. The "abuse of process" approach requires the court to decline a stay of proceedings, where the application is brought in a vexatious and oppressive manner. On the other hand, the 'most suitable' forum approach requires that judges should look beyond the prejudicial issues such as vexatious and oppressive, and, accordingly, judges are required to stay proceedings

[563] Ibid.

where another forum is more suitable to determine the disputes between the parties. However, venue transfers have gained dominance over the doctrine of *forum non conveniens* in the U.S. Rather than staying proceedings under the application of the *fnc* doctrine, the application of the venue transfers requires the national courts in the U.S. to transfer suits to another court that is more appropriate to determine the suits.

In the United Kingdom, the 'most suitable' forum approach is often used by the courts when applying the *forum non conveniens* doctrine to stay proceedings. In *Abidin Daver,* Lord Diplock acknowledged that the adoption of the 'most suitable' forum approach aims to promotes the principle of "judicial comity".[564] This thesis argues that while the 'most suitable' forum approach may have gained more recognition over the 'abuse of process' approach, ambiguous legal terms in the approach are likely to undermine predictability of the doctrines. For instance, ambiguous terms such as "clearly" and "distinctly" appropriate forum may cause controversies in the application of the *forum non conveniens*.

The *lis pendens* rule is a mechanism developed by the civil law countries to resolve the conflict of jurisdiction in transnational commercial litigation. The *lis pendens* rule suggests that where proceedings involving the same cause of action and between the same parties are pending before different courts of the Member States, any other court seised must decline jurisdiction, until the court first seised establishes its jurisdiction in the proceedings. The scope of this rule is to ensure predictability and certainty in the legal system. In addition, the *lis pendens* rule also played an important role in relation to land matters. For example, the *lis pendens* rule can be used to inform a subsequent land purchaser about any pending lawsuit over the land. This will allow the purchaser to determine if the property of interest was subject to any ongoing litigation before making the purchase. The Brussels regime also makes provisions for the choice of court agreement and prevents the strict interpretation of the *lis pendens* rule.

[564] *The Abidin Daver* [1984]) AC at 411.

There were significant reforms under the Recast Regulation[565] to prevent the abusive tactical litigation and the strict interpretation of the *lis pendens* rule. First, article 31(2)[566] makes provisions for party autonomy and strengthens the choice of court agreement in transnational litigation. Due to the provision under the article 31(2) of the Recast, the selected court in the choice of court agreement can now have exclusive jurisdiction to continue with the proceedings where the proceedings pending before a court first seised in the Member State involves the same cause of action and the same parties. This provision under the article 31(2)[567] of the Recast addressed the problem of strict interpretation of the *lis pendens* rule in the *Gasser* case.[568]

However, notwithstanding reforms in the Recast Brussels Regulation, this thesis argues that there are provisions in the Recast that give room for litigants to override the choice of court agreements and party autonomy. For instance, Article 29(1) of the Recast provides that any other court seised must stay proceedings in favour of the court first seised, where proceedings involving the same cause of action and between the same parties are pending before courts of different Member States. On the other hand, Article 31(2) of the Recast Brussels placed a burden on the opposing party to establish that the court chosen in the choice of court agreement is the court first seised in the matter. This means that where the court selected in the choice of court agreement is not first seised, a non-chosen court that is first seised may continue to exercise jurisdiction.

The Brussels Regime has undergone significant reforms to enhance coordination of jurisdiction, recognition and enforcement of judgments from third states. [569] Articles 33 and 34 of the Recast Brussels I Regulation provide that when court proceedings involving the same cause of action and parties are pending in a third state, other courts of the Member State may decline jurisdiction if necessary for the proper administration of justice. Article 33 and 34 of the Recast Brussels Regulation will help to prevent excessive litigation tactics and reinforce the principle of international comity. On the

[565]Regulation (EU) No. 1215/2012 on Jurisdiction and recognition and enforcement of Judgements in civil and commercial matters (Recast)
[566]Regulation (EU) No. 1215/2012 on Jurisdiction and recognition and enforcement of Judgements in civil and commercial matters (Recast), article 31(2)
[567] Ibid
[568] Case C-116/02 [2002] *Erich Gasser GMbH v MISAT Srl*.
[569] Regulation (EU) No. 1215/2012 on Jurisdiction and recognition and enforcement of Judgements in civil and commercial matters (Recast), article 33 and 34.

other hand, Article 45 of the Recast Brussels Regulation gives the courts of a Member State the power to refuse the judgment of a third state court on the ground of public policy.

The next chapter evaluates landmark court cases that demonstrate the difficulties in the application of the *forum non conveniens doctrine* and the *lis pendens* rule. The leading case of *Erich Gasser BmbH v MISAT Srl*. is used to highlight the strict interpretation of the *lis pendens* rule, while the *Spiliada Maritime Corporation v. Cansulex Ltd* case illustrates the challenges in the application of the *forum non conveniens* doctrine.

CHAPTER FIVE – Case Study

5.1 INTRODUCTION

This chapter is based on the evaluation of important court cases that illustrate how the application of the *forum non conveniens* doctrine and the *lis pendens* rule promotes tactical litigation. This thesis evaluates the leading case of *Erich Gasser BmbH v MISAT Srl* to illustrate how the strict interpretation of the *lis pendens* rule by the European Court of Justice promotes tactical litigation. In this case, the strict interpretation of the *lis pendens* rule by the European Court of Justice creates an incentive for unscrupulous parties to engage in forum shopping and choose the most favourable forum for their case. This can result in the multiplicity of court actions in different forums, leading to conflicting decisions and uncertainty for the parties involved. In this case, the decision of the ECJ was based on the Brussels convention of 1968. However, the new Recast Brussels Regulation seems to have addressed the jurisdictional issues in the old Brussels Regulation.

On the other hand, the leading case of *Spiliada Maritime Corporation v Cansulex Ltd* is evaluated to illustrate how the application of the *forum non conveniens* doctrine by the House of Lords promotes tactical litigation. The discretion given to the courts in determining the appropriate forum based on the criteria outlined in the doctrine creates opportunities for parties to engage in strategic behaviour, which can lead to conflicting decisions and uncertainty for the parties involved. The findings in these two leading court cases will help to further discussion in this thesis on how to resolve the problem of tactical litigation and jurisdictional issues in cross-border cases. The next section provides insight into the background of the *Erich Gasser BmbH v MISAT Srl* case. [570]

[570] C - 116/02 *Erich Gasser BmbH v MISAT Srl* (2002).

5.2 The factual background in the *Gasser's* case

In this case, Erich Gasser GmbH, an Austrian company, and MISAT Srl, an Italian company entered a contract for the sale of children's clothing. Gasser was the seller, and MISAT was the buyer. The contract agreement between the two companies contained a choice of court agreement clause. This clause specified that in case of a breach of contract, the Austrian courts would have the exclusive jurisdiction to resolve the disputes between the two companies.

However, on 19 April 2000, MISAT, the buyer, initiated a legal proceeding against Gasser, the seller, in the Tribunale Civile e Penale, an Italian court, instead of the Austrian court in the choice of court agreement between the two companies.[571]MISAT requested a court ruling that the contract between the two companies had terminated ipso jure or, alternatively, that the contract had terminated due to breaches of contractual terms in the agreement between the two companies. MISAT also asked for a court order that Gasser should pay damages for failing to fulfil obligations of fairness, diligence, and good faith and to reimburse certain costs.

On 4 December 2000, Gasser initiated a legal proceeding against MISAT in the Landesgericht, the Austrian court that had exclusive jurisdiction according to the choice of court agreement between the two companies. In the legal proceeding initiated by Gasser, the company argued that the Landesgericht court, located within the place of performance, should have jurisdiction over the case according to Article 5(1) of the Convention.[572] Gasser also made two additional arguments in the legal proceeding. Firstly, the company claimed that the Landesgericht court had been listed on all invoices sent to MISAT, and that MISAT had never raised objections to these invoices. Secondly, Gasser argued that the choice of court agreement between the two companies was in accordance with the prevailing trade practices and usage between Austria and Italy, as outlined in Article 17 of the Brussels Convention.

[571] Ibid

[572] Brussels Convention on Jurisdiction and the Enforcement of Judgment inn Civil and Commercial Matters ["the Brussels I – 14730 Convention, article 5(1)

In contrast, MISAT argued that according to Article 21 of the Convention, [677] there was a requirement for the courts to defer to the court that was first approached or "first seised". In response to MISAT's argument about the "court first seised" rule, Gasser argued that even if the choice of court agreement was declared invalid, the Austrian court still had jurisdiction over the case based on Article 2 and Article 5(1) of the Convention. These articles give jurisdiction to the court within the domicile of the parties and the place of performance. In addition, Gasser argued that MISAT had initiated the proceeding in the Italian court to delay proper adjudication as the Italian courts were known for being slow in making decisions on jurisdictional issues.

The next subsection analyses the decision of the court of first instance in the Gasser case. The decision of the Landesgericht court in Austria is discussed in this subsection.

5.2.1 The decision of the court of first instance

On 21 December 2001, the Landesgericht court in Austria stayed the proceeding pending when the Tribunale Civile e Penale di Roma had determined jurisdiction in the mater in accordance with Article 21 of the Brussels Convention. On the other hand, the Landesgericht court affirmed that it had jurisdiction as the court in the place of performance. However, the court did not decide on the merits of the case or whether there was a choice of court agreement giving it jurisdiction. In its statement, the court noted that while the invoices issued by Gasser showed that Dornbirn was chosen as the competent court, the orders did not mention any choice of court in the invoices.

Being dissatisfied with the decision of the Landesgericht court, *Gasser* appealed the decision. The next subsection focuses on the analysis of the court of appeal decision in the case. The decision of the Austrian appeal court, Oberlandesgericht Innsbruck, is analysed in this subsection.

5.2.2 The decision of the court of appeal

The appellant, Gasser, argued that the court of first instance, Landesgericht, was the designated court in the choice of court agreement and was located within the place of performance of the contract, so it should have jurisdiction and not have stayed proceedings in the matter. However, the Austrian appeal court, Oberlandesgericht Innsbruck, disagreed and ruled that the *lis pendens* rule should apply because the claims

in the Austrian and Italian courts involved the same parties and had the same cause of action. The appeal court cited the case of *Gubisch Maschinenfabrik*[573] to support its decision.

On the other hand, the appeal court, Oberlandesgericht Innsbruck, raised a critical legal question about the existence of an agreement conferring jurisdiction on the Austrian court. The appeal court asked whether the conduct of the respondent, MISAT, in accepting invoices from the claimant, Gasser, without objection, could be considered as acceptance of a choice of court clause in the agreement under Article 17(1)(c) of the Brussels Convention. The court ruled that, in international and commercial trade, parties are bound by the terms of the legal instruments used in a contract, including an agreement conferring jurisdiction. Therefore, according to Article 17 of the Convention, the Landesgericht Feldkirch court had jurisdiction to handle the dispute. The appeals court then considered whether the stay of proceedings provided for under Article 21 should still apply.

The appeal court, Oberlandesgericht Innsbruck, also raised a significant legal question about the extent which the slowness in legal proceedings in the court first seised could undermine the purpose of Article 21 of the Convention. Based on this, the Oberlandesgericht Innsbruck stayed proceedings and referred the case to the European Court of Justice (ECJ) [574] for a preliminary ruling on the following questions:

(1) On what ground should questions be referred to the European Court of Justice for a preliminary ruling? For instance: can a question be referred to the ECJ on the ground of a party's (unrefuted) submissions. Whether the national court should clarify a question in relation to the facts in a case (for example, clarify appropriate evidence in the case).

(2) Can a court selected in the choice of court agreement review the jurisdiction of the court first seised based on the proviso in the first paragraph of Article 21 of the Convention[575] or in accordance with

[573] Case 144/86 *Gubish v Maschinenfabrik* [1987] ECR 4861.
[574] C - 116/02 *Erich Gasser BmbH v MISAT Srl* (2002), judgment of 9, 12, 2003
[575] Brussels Convention on Jurisdiction and the Enforcement of Judgment inn Civil and Commercial Matters ["the Brussels I – 14730 Convention"], article 21.

Article 17 of the Convention which gives priority to the court selected in the choice of court clause in the agreement. On the other hand, can a second seised court proceed with a case in accordance with Article 21 of the Convention without relying on the choice of court clause that confers exclusive jurisdiction?

(3) Can the excessive and generalised slowness of legal proceedings in a Contracting State be used as a basis to circumvent the jurisdiction of a court first seised?

(4) To what extent can the Italian legal system [576] provide a legal consequence that justifies the application of Article 21 of the Brussels Convention? To what extent can parties relied on the excessive length of proceedings to suggest that a court other than the court first seised should not determine jurisdiction in the matter in accordance with Article 21 of the Convention?

(5) What conditions must a court other than court first seised fulfil to refrain from provision in Article 21 of the Convention?

(6) What is the course of action that the court must follow where the circumstances highlighted in Question 3 is answered in the affirmative? Should the court proceed to hear the matter in accordance with Article 21 of the Convention, without providing an answer to the Questions 4, 5, and 6?

The ECJ[577] considered the arguments submitted by both parties[578] on May 13, 2003. The ECJ held that the protocols in the Convention laid down responsibilities that courts should follow in the preliminary-ruling procedure. The European Court of Justice stated that the protocols require that the national court should determine the subject matter of

[576] Italian Law No. 89 of 24 March 2001

[577] In the case, the Court (ECJ) composed of, V Skouris, President, P. Jann, C.W.A. Timmermans, C. Gulmann, J.N. Cunha Rodrigues and A. Rosas (Presidents of Chambers), D.A.O. Edward, A. La Pergola, J. – P Puissochet, R Schintgen (Rapporteur), F. Macken, N. Colneric and S. von Bahr, Judges.

[578] Erich Gasser was represented by K. Schelling, Rechtsanwalt; MISAT SrL represented by U.C Walter, Rechtsanwaltin; the Italian Government represented by I.M Braguglia, acting as Agent, assisted by O. Fiumara, Vice Avvocaato Generale dello Stato; the United Kingdom Government was represented by D Lloyd Jones QC, and K. Manji, acting as Agent; the Commission of the European Communities represented by A.-M. Rouchaud-Joët and S. Griinheid, acting as Agents.

the questions that are intended to be submitted for preliminary ruling before the ECJ. In contrast, the European Court of Justice (ECJ) held that national courts must show cooperation and respect towards the role assigned to the ECJ. National courts are not permitted to provide advisory opinions on hypothetical scenarios in a case. Instead, their role is limited to establishing the legal and factual context of the case, while the ECJ is responsible for providing the legal interpretations.[579]

The appellants, Gasser and the UK government, referenced the case of *Overseas Union Insurance* & *Others*[580] in their argument. In this case, the court held that if a court other than the first court seised has exclusive jurisdiction, the court must interpret Article 21 as requiring the second court seised to only suspend proceedings in the matter if the jurisdiction of the first court is disputed. The second court may not take on the responsibility of determining the jurisdiction of the first court. The appellants, Gasser and the U.K. government, also argued that the court should consider the relationship between Article 17 and Article 21 of the Brussels Convention, with a focus on the requirements of international trade. They maintained that the court should support the commercial practice of parties agreeing on a choice of court, as it promotes legal certainty and allows parties to determine which court will have jurisdiction over disputes in their contract agreements.

On the other hand, the U.K. government argued that the court's reasoning in the *Overseas Union Insurance & Others* case, which supported the literal interpretation of Article 21 of the Brussels Convention, was not absolute. The government noted that there are exceptions where a second court seised may have exclusive jurisdiction according to Article 17 of the Brussels Convention. However, the court in that case held that, in general, the second court is not in a better position than the first court to determine its jurisdiction. In contrast, the respondents, MISAT, the Italian government, and the Commission,[581] argued that the provisions in Article 21 of the Brussels Convention should be applied and the court second seised should stay proceedings.

[579] See *Gantner Electronic*, cited above, paragraphs 35, 37 and 38.
[580] Case C - 351/89 *Overseas Unions Insurance and Others* (1991) ECR I-3317
[581] See paragraph 35, Case C –116/02

The Commission further clarified that the exception under Article 16 of the Brussels Convention, allowing a second court to assume exclusive jurisdiction, cannot be extended to a court chosen in a choice of court agreement clause.[582] However, the European Court of Justice held that the purpose of Article 21 of the Brussels Convention, in conjunction with Article 22, is to ensure proper administration of justice and to avoid parallel proceedings and conflicting decisions between courts of different Contracting States. The court also stated that Article 21 was intended to prevent the scenario described in Article 27(3) of the Convention, where a judgment would not be recognized if it resulted from proceedings between the same parties in the state where recognition is sought.[583]

The European Court of Justice went further to declare that Article 21 of the Brussels Convention should be interpreted in a broad manner, meaning it covers situations of "*lis pendens*" before courts in countries that are part of the agreement, regardless of the domicile of the parties involved. [691] In cases of *lis pendens*, the court that is not first seised must hold off on proceedings until the jurisdiction of the first seised court has been determined. Once the jurisdiction of the first seised court has been established, the second seised court must relinquish jurisdiction in favour of the first court.

The European Court of Justice declined to prejudge the provisions of Article 21 of the Brussels Convention, even though the court second seised had exclusive jurisdiction under Article 17 of the Convention. However, the Court of Justice emphasized that the provision in Article 17 was not sufficient to dismiss the application of Article 21 of the Convention, which is based on the primacy and chronological order in which the courts were involved. The European Court of Justice ruled that the court second seised cannot have a better standing than the court first seised. This is so because, the jurisdiction of both courts is determined by the Brussels Convention, which is binding on all Contracting States, and must be interpreted and applied with the same level of authority.[584]

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[582] See paragraph 36, Case C – 116/02
[583] See paragraph 41, Case C – 116/02 (also see, *Gubisch Maschinenfabrik*, paragraph 8) [691]
See paragraph 16, *Overseas Onion Insurance*.
[584] See *Overseas Union Insurance*, paragraph 23.

However, the European Court of Justice held that when there is an agreement between parties that confers jurisdiction according to Article 17 of Brussels Convention,[585] the parties have the right to either make use of or not make use of the agreement. In addition, the parties may appear before the first seised court without challenging its exclusive jurisdiction, but the first seised court has the discretion to decide if there is an agreement granting exclusive jurisdiction. If so, the court can decline jurisdiction in accordance with Article 17 of the Convention if it is evident that the parties intended for the chosen court to have jurisdiction.

On the contrary, the European Court of Justice noted that the determination of jurisdiction under Article 17 of the Brussels Convention should be based on the actual consent of the parties, rather than solely on the reference to usage in international trade or commerce. [586] This is to protect the weaker party in a contract by ensuring that jurisdiction clauses are not overlooked or harmful. The Court emphasized that it is important to consider which of the two courts has the authority to establish jurisdiction under the rules of the Convention. However, according to Article 21 of the Convention, the court first seised appears to have the exclusive right to determine its own jurisdiction in the matter.[587]

On the other hand, the European Commission raised concerns about the third question, which was about whether a national court can deviate from the general rule that the court first seised must have jurisdiction. The Commission expressed doubt about the admissibility of the question and argued that the national court failed to provide evidence that the court first seised, the Tribunale Civile e Penale di Roma, had taken too long to reach a decision or violated Article 6 of the European Convention on Human Rights. [588]

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[585] Brussels Convention on Jurisdiction and the Enforcement of Judgment inn Civil and Commercial Matters ["the Brussels I – 14730 Convention"]
[586] See Case C-106/95 MSG [1997] ECR I-911, paragraph 17 and Castelletti, paragraph 19
[587] See Case C-214/89 *Powell Duffryn* [1992] ECR I -1745, paragraph 14.
[588] ECHR (signed in Rome on 4 November 1950)

The Commission's argument was rejected by the Advocate General, P. Léger. P. Léger emphasised the importance of the third question raised, as it was deemed relevant for the purpose of reaching a decision in the main proceedings. The advocate general then stated that the court second seised should provide information on the conduct of the procedure in the Tribunale Civile e Penale di Roma. The European Court of Justice also emphasised that the Brussels Convention does not allow for a court to depart from the proceedings in the court of the first Contracting State, even if the proceedings are taking a long time.

According to the European Court of Justice, any interpretation of Article 21 of the Convention to permit a court to deviate from the court first seised because of lengthy proceedings would go against the intent and purpose of the Convention. However, the European Court of Justice noted that the basis of the Brussels Convention is mutual trust among Contracting States in each other's legal systems and judicial institutions. This trust is reflected in the establishment of jurisdiction and the requirement for all courts in Contracting States to respect it, as well as the waiver of the right to apply their internal rules for recognition and enforcement of foreign judgments, with the aim of creating a simplified process for recognizing and enforcing judgments.

As a result, the European Court of Justice ruled that provisions in Article 21 of the Brussels Convention cannot be disregarded due to excessive delays in the proceedings of the court first seised. This ruling was based on the idea that the Convention is based on mutual trust between Contracting States and their legal systems and judicial institutions. However, the strict interpretation of the *lis pendens* rule has been criticized for potentially promoting tactical litigation, negating party autonomy and choice of court agreements, and weakening the *forum non conveniens* doctrine. The next subsection in this chapter discussed the problems created by the European Court judgment in the *Gasser* case.

5.3 Discussion

The European Court of Justice's decision in the *Gasser* case demonstrates a clear rejection of the "*forum non conveniens*" doctrine by courts of the EU Member States.[589] The ruling disregards the fact that some member states may have recognized the *forum non conveniens* doctrine. Michael Bogdan's perspective on the ECJ's decision in the *Gasser* case highlights the role of the principle of trust between Contracting States. According to Bogdan, [590] the ECJ's decision was based on the Convention that a court's jurisdiction in a Contracting State should not be reviewed by another court in another jurisdiction. However, Bogdan argued that this attitude of the ECJ can lead to certain types of abuse, especially as the principle of mutual trust between Member/Contracting States is given more weight than the need to address abuses in tactical litigation.

It is important to consider that the ECJ's decision was made to ensure legal certainty and consistency across the Contracting States. The principle of trust is essential for the proper functioning of the Brussels Convention, which provides for simplified mechanisms for the recognition and enforcement of judgments. However, it is also true that this strict interpretation of the *lis pendens* rule provisions in the case has been criticized for negating party autonomy and choice of court agreements and promoting tactical litigation. Therefore, it is crucial to strike a balance between ensuring mutual trust between Contracting States and protecting parties from abuses in the legal system. This requires a careful consideration of the specific circumstances of each case, considering the interests of both parties and the need to avoid abuses of the legal system.

On the other hand, Ekaterina Ivanova noted that the ECJ application of the Brussels I Regulation is based on the principle of mutual trust between the Member States, and thus, no sanction or common law doctrines such as *forum non conveniens* or choice of court agreements are allowed. Ekaterina Ivanova's statement on the application of the

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[589] Briggs, "The Impact of Recent Judgments of the European Court on English Procedural Law and Practice", (2006), Oxford Legal Studies Research Paper

[590] Michael Bogdan, "The Brussels/Lugano *Lis Pendens Rule* and the "Italian Torpedo" (2012), Scandinavian Studies in Law

Brussels I Regulation is accurate. The Brussels I Regulation (previously known as the Brussels I Regulation) is a key piece of EU legislation that governs jurisdiction and the recognition and enforcement of judgments in civil and commercial matters within the EU. The principle of mutual trust between Member States is indeed a key aspect of the ECJ's interpretation of the Brussels I Regulation. This principle is reflected in the ECJ's approach to questions of jurisdiction, which is based on the idea that the courts of each Member State should be able to rely on the judicial decisions of the courts of other Member States. As a result, the ECJ has generally been reluctant to allow sanctions or to introduce common law doctrines such as *forum non conveniens* or choice of court agreements, which could undermine the principle of mutual trust.

However, the recent reforms to the Brussels I Regulation, known as the Recast Brussels Regulation, [591] do seem to change the narrative somewhat. The Recast Brussels Regulation retains the civil law approach to parallel litigation embodied in the Brussels I Regulation, but it also introduces some new provisions that reflect the common law approach. For example, the Recast Regulation now contains provisions allowing for the application of the common law doctrine of *forum non conveniens* in certain circumstances, and it provides for the use of choice of court agreements.

The ECJ's strict interpretation of the *lis pendens* rule and its prioritization over the *forum non conveniens* doctrine can be seen as means to prevent parallel proceedings and conflicting judgments. This is in line with the intention of Articles 21 and 22 of the Brussels Convention.[592] However, on the other hand, this decision can also be criticized for negating party autonomy and the choice of court agreement, and for promoting the first-come, first-served rule. This may limit the ability of parties to choose a forum that is most suitable for their case and could result in an unfair advantage for the first party to initiate proceedings.

[591] Regulation (EU) No. 1215/2012 on Jurisdiction and recognition and enforcement of Judgements in civil and commercial matters (Recast)
[592] Brussels Convention on Jurisdiction and the Enforcement of Judgment inn Civil and Commercial Matters ["the Brussels I – 14730 Convention"]

Additionally, the ECJ's focus on promoting cooperation and comity among Member States may come at the expense of ensuring that the most suitable forum is selected for the resolution of a dispute. It may also ignore the reality that different legal systems have different strengths and weaknesses, and that some may be better suited to a particular case than others.

The English court judgment in *Spiliada Maritime Corporation v Cansulex Ltd*[593] is evaluated in the next section in this chapter. The judgment of the House of Lords in the case is significant for several reasons. Firstly, it underscores the importance of choice of court agreements in international commercial disputes, as it confirms the enforceability of such agreements and the binding nature of jurisdiction clauses contained in contracts. Secondly, it demonstrates the willingness of the English courts to give effect to such clauses, even where the parties are based in different countries.

5.4 The factual background in the *Spiliada* case

This section offers an insight into the facts involved in the *Spiliada* case. The *Spiliada* case involved a dispute between the shipowners, Spiliada Maritime Corporation, and the respondents, Cansulex Ltd. Spiliada Maritime Corporation was a Liberian corporation with managers in Greece and some management in England. The ship, with a deadweight of 20,000 tonnes, flew the Liberian flag. On the other hand, Cansulex Ltd carried out its business as sulphur exporters in British Columbia. The ship was chartered to the Minerals & Metals Trading Corporation of India Ltd for the transportation of sulphur from Vancouver to Indian ports under a voyage charter dated 6 November 1980. Both parties signed a charter that selected a London arbitration clause. Based on the charter between Spiliada Maritime Corporation and Minerals & Metals Trading Corporation of India Ltd, the vessel loaded a cargo of sulphur in Vancouver, ordered by Cansulex, who were the f.o.b.[594] setters of the sulphur to M.M.T.C. The bills of landing, which were shipped bills with Cansulex named as shippers, were issued to and accepted by Cansulex and were governed by English law as stated in Clause 21 on the reverse of the bills. The bills were signed by the agents of

[593] *Spiliada Maritime Corp. v Cansulex Ltd* [1987] 1 Lloyd's Rep 1
[594] Free on Board (F.O.B) is a shipment term used to indicate whether the seller or the buyer is liable for goods that are damaged or destroyed during shipping.

the Master and the cargo was discharged at ports in India between 29 December 1980 and 6 February 1981.

However, the shipowners later claimed that the cargo of sulphur loaded on the vessel was wet, which caused severe corrosion and pitting in the holds and tanks of the ship. As a result, the shipowners sought damages from Cansulex for the damage caused. The shipowners relied on the age of the ship[595] and the condition of the holds before and after the voyage to support their claim. The shipowners also advanced their claim against Cansulex, as shippers under the contract of carriage outlined in the bills of landing and based on Article 4 Rule 6 of the Hague Rules, which were incorporated into the bills, and a warranty implied by English Law that dangerous cargo will not be shipped without warning.

As a result, the shipowners-initiated arbitration proceedings against M.M.T.C in London under the arbitration clause in the voyage charter. M.M.T.C also had the option to bring arbitration proceedings in London against Cansulex under the sale contract between them, which also had a London arbitration clause. The shipowners obtained the court's permission to issue and serve a writ on Cansulex outside the jurisdiction based on a provision in the then R.S.C., Ord. 11, r. 1(1) (f) (iii), which stated that the action was brought to recover damages for a breach of a contract governed by English Law. However, Cansulex applied to have this permission and all subsequent proceedings set aside. The decision of the first instance court in this case is analysed in the next subsection in this chapter.

5.4.1 The decision at first instance

The application by the parties in the *Spiliada* case was heard by Staughton J at the court of first instance on 26 October 1984.[596] The main issue for the judge to determine was whether Cansulex and the shipowner were bound by a contract governed by English law and, if so, whether serving a writ outside of jurisdiction was appropriate and within the court's discretionary power. The judge relied on the House of Lords decision in *Amin Rasheed Shipping Corporation v Kuwait Insurance Co*[597] and decided that if the

[595] As at that time, the ship was three years old.
[596] *Spiliada Maritime Corp. v Cansulex Ltd* [1987] 1 Lloyd's Rep 1
[597] [1984] AC 50

evidence supports that the English court is the most suitable forum to resolve the disputes between the parties, then granting the request for service out of jurisdiction would not be inappropriate. The judge specifically relied on the views of Lord Diplock[598] and the remark of Lord Wilberforce in the *Amin Rasheed* case. [599]

Staughton J, the judge in the trial, evaluated the judge's discretionary power to allow service outside jurisdiction and pointed out that as Cansulex had previously been involved in a similar case with Cambridgeshire (the plaintiff), which had already been resolved, there was a chance that this current case could be resolved between the shipowner and Cansulex without going to court, due to the significant amount of resources, money, and time that had been spent on the previous trial. Despite this, the judge granted the request for service outside jurisdiction on the grounds that even if a settlement was reached, there could still be a trial, as trials often lead to settlements. The judge then evaluated the various factors that could influence the choice of court between England and British Columbia, Canada. These factors include, (1) the availability of witnesses, (2) the potential for multiple proceedings, and (3) the Cambridgeshire factor.

Regarding the availability of witnesses, the judge compared the facts in the Cambridgeshire case to those in the *Spiliada* case and concluded that Vancouver was not a more convenient location for the trial than England in terms of the accessibility of witnesses. The judge stated that "England is actually a better forum[600] if one assumes that the parties will want the same experts as in the Cambridgeshire case." The trial judge also noted that the *Spiliada* case was a complex one, with important witnesses located not only in Vancouver but also in other places, despite many of the events taking place in Vancouver. Additionally, Staughton J noted that although there was a substantial amount of evidence that pertained to events that did not occur in Vancouver, he was aware that all the expert witnesses were English, except for one. He stated that if the parties wanted to use the same expert witnesses from the Cambridgeshire case,

[598] Ibid. See the decision of Lord Wilberforce at p.65.
[599] Supra at P.72
[600] Staughton J in *Spiliada Maritime Corp. v Cansulex Ltd* [1987] 1 Lloyd's Rep 1

which was also heard by him, then filing the case in Vancouver would not be more convenient for the witnesses.

Regarding the multiplicity of proceedings, the judge noted that Cansulex wanted to add their insurer and others as third parties, which could only be done if the proceedings were held in British Columbia. On the other hand, the shipowner intended to include M.M.T.C. as co-defendants with Cansulex, which could create complex issues. Using the same reasoning as he did for the availability of witnesses, the judge deemed the shipowner's decision to join M.M.T.C. as co-defendants problematic and therefore gave it less weight. As for Cansulex's choice to add their insurer and others as parties, the judge used the same principles as in the Cambridgeshire case.

Staughton J considered the Cambridgeshire factor where Cansulex argued that since a lot of money, effort and time was spent in bringing witnesses from Canada, the new case should also be held in Canada. The plaintiff's counsel countered that Cansulex cannot have similar cases tried in different jurisdictions, one at home and one away. The judge concluded that the plaintiff's solicitors had initiated the proceedings, engaged English solicitors, educated them on various topics, engaged expert witnesses and procured a large number of documents, incurring all expenses for a trial in England.

The trial judge rejected the stay of proceedings filed by Cansulex and granted the order for service outside jurisdiction despite the fact that the relevant limitation period in British Columbia had already lapsed. This was because the judge found that the inconvenience and extra expense for the shipowner to have the case tried in England outweighed the burden that would fall on Cansulex in bringing their witnesses and expert to England for a second time. The judge considered that the shipowner had already made all the preparations and incurred all expenses for a trial in England, while Cansulex had only made similar preparations except for one expert witness in Canada.

Cansulex was unhappy with the trial court's decision and appealed, claiming that the judge had made a mistake by relying on the Cambridgeshire case when it was not relevant to the *Spiliada* case. They also argued that the judge's approach and conclusion regarding the availability of witnesses and the appropriate jurisdiction was incorrect. The ruling of the appellate court in the case is analysed in the next subsection.

5.4.2 The decision on appeal

The Court of Appeal, consisting of judges Neill L.J. and Oliver L.J., evaluated the decision of the trial court. The appeal court was guided by the decision in *Ilyssia Compania Naviera S. A. vs Bamaodah* to highlight the differences in the opinions of Lord Diplock and Lord Wilberforce on conflict of law, which was relevant to the present case. On the issue of witnesses, the appeal court's judge Neill L.J. stated that, after considering the trial judge's evaluation, it was evident that the balance of convenience and suitability for parties and witnesses favoured holding the trial in British Columbia rather than an English court, in order to best serve the ends of justice.

The Court of Appeal, composed of Neill L.J. and Oliver L.J., considered the submissions on the conflict of law, just as the trial judge did, based on the decision in *Ilyssia Compania Naviera S. A. v Bamaodah*.[601] The Court of Appeal agreed with the argument of Cansulex that the factor of multiplicity of proceedings was a neutral factor and did not significantly support the idea that the English court was the best forum for the *Spiliada* case. With regards to the Cambridgeshire factor, Neill L.J. rejected the argument that it was completely irrelevant but felt that the trial judge had placed too much emphasis on it.

The Court of Appeal noted that:

> …The fact that the London solicitors and their firms were well-known and had acquired detailed knowledge of the shipment of sulphur cargoes from Vancouver favoured having the trial in England. However, they stated that these factors should not be considered as decisive if other factors weigh in favour of another jurisdiction …[602]

[601] [1985] 1 Lloyds Rep. 107
[602] Ibid

The Court of Appeal, through Neill L.J., concluded that the weight of the evidence does not support the trial court's decision to hold the case in England, but rather, favours holding the case in British Columbia. He also found that the trial court had placed too much emphasis on the Cambridgeshire factor, which should not be regarded as of decisive importance. Neill L.J. ultimately set aside the trial court's decision and allowed Cansulex's appeal.

The shipowners were dissatisfied with the verdict of the appellate court, so they chose to take the case to the House of Lords for further review. The outcome of the House of Lords ruling will be discussed in the next subsection in this chapter.

5.4.3 The decision of the House of Lords

At the House of Lords, the counsel representing the shipowner argued that the Court of Appeal exceeded their authority in reviewing the trial court's decision. It was argued that the appellate court went beyond its limits due to the significance placed on the Cambridgeshire effect. However, the counsel representing Cansulex argued that the Court of Appeal was within its rights to review the trial court's decision. It was further argued that both the trial court and the Court of Appeal should have followed the guidelines established by Lord Diplock in his previous *Amin Rasheed* case.[603] The appeal of the shipowners was granted by the House of Lords in a unanimous ruling read by Lord Goff.

The House of Lord established that:

> …The trial judge based their decision on the principle that if the English court is a more appropriate venue for serving justice to both parties, then the case may be served outside of jurisdiction. Lord Goff concluded that the trial judge followed this principle correctly, and therefore rejected Cansulex's argument…

[603] Ibid

The House of Lords also considered whether the Court of Appeal was correct in interfering with the trial judge's decision regarding the Cambridgeshire case. It was held that the trial judge did not need to apply the overall test, but only needed to evaluate the specific factor in question. Since the trial judge had more experience with the Cambridgeshire case, they were in a better position to make this evaluation than the Court of Appeal. The House of Lords held that the Court of Appeal did not have sufficient justification for their statement that based on the trial judge's analysis, the convenience of the parties and witnesses probably favoured British Columbia as the venue, but it did not prove that an English court would be distinctly more suitable for the pursuit of justice. [604]

However, Lord Goff concluded that regarding the Cambridgeshire factor, the trial judge was an experienced judge in this type of litigation and was correct in taking that position and giving it such significance. This was because the factor was not just beneficial to the shipowners, but also carried an advantage that was not offset by an equal disadvantage for Cansulex. Therefore, the Court of Appeal was incorrect in interfering with the trial judge's discretion. The House of Lords approved the appeal and reinstated the order made by Staughton J and ordered that the shipowners be reimbursed for their costs.

5.5 DISCUSSION

The decision of the English Court in this case showcases the importance of the convenience of the parties and the end of justice as key considerations in determining whether a particular forum is suitable for the resolution of a dispute. The court's consideration of factors such as access to witnesses, documents, and other crucial evidence highlights the significance of these criteria in the determination of jurisdiction. The ability of parties to agree on the jurisdiction to hear their dispute is a positive aspect as it provides a level of certainty and stability in international commercial transactions. However, this is not always the case when dealing with complex multinational agreements, which can result in conflicting laws. This makes it necessary for courts to

[604] Ibid.

take a closer look at the issue of jurisdiction and apply the relevant laws in order to determine the most appropriate forum for the matter to be heard.

The ruling by Lord Goff in the House of Lords has had significant legal impacts on the application of the *forum non conveniens* doctrine in the United Kingdom. Prior to the ruling, there was a widespread belief that trial judges were obligated to transfer a case to a new forum if the defendant requested a stay of proceedings based on the argument that there was a more suitable and competent forum in another jurisdiction. The ruling in *Spiliada* firmly established that the trial judge has discretionary power to grant a stay of proceedings based on the application of the *forum non conveniens* doctrine. This means that the trial judge is not obligated to transfer the case to a new forum and has the discretion to consider factors such as the convenience of the parties and the end of justice in determining whether to grant a stay of proceedings.

In addition, the ruling in the *Spiliada* case provides greater flexibility for trial judges in considering whether a stay of proceedings is appropriate and reinforces the principle that the court must serve the end of justice in every matter brought before it. However, while the emphasis on the convenience of the parties and the end of justice is commendable, it raises questions about the balance between the rights of the parties and the principles of fairness and impartiality. For example, the decision could potentially lead to forum shopping, where parties seek to litigate in jurisdictions that are more favourable to their interests, rather than the one that is more closely connected to the dispute.

In contrast, in the decision in the *Spiliada* case, the English court adopted a "more suitable forum" approach, requiring both parties to demonstrate that another forum would be more appropriate for the case to be heard. This change in approach places greater responsibility on the parties to establish that another forum is more suitable, rather than simply relying on the argument that the current forum is not convenient. It also recognizes the importance of considering the convenience of the parties and the end of justice when determining the appropriate forum for a case. The shift from the "abusive process" approach to the "more suitable forum" approach also aligns the English court's approach with international trends, where the focus is on finding the

most appropriate forum to ensure a fair and just outcome for all parties involved. This approach also recognizes that transnational litigation often involves complex factual and legal issues, and it is important to have the right forum to handle such cases effectively.

In the United States, being a federal state, the practice is to the effect that the courts are reluctant to change the forum so established by the plaintiff except where the balance of factors strongly tilted in favour of the defendant.[605] Lord Goff also compared what the position of the law will be with respect to different types of litigation, for instance in commercial transactions and admiralty litigation. According to Lord Goff, where there are several pointers as to the existence of several jurisdictions and jurisdiction has been found as of right by the plaintiff, there is no reason why the English court cannot refuse to grant a stay of proceedings.[606] In a nutshell, what the defendant needs to prove (the evidential burden) according to Lord Goff, is not the fact that the English court is not a neutral or appropriate forum, but to establish that there is another distinct and more appropriate forum which can serve the end of justice for the parties.

What the *Spiliada* case brought to the legal parlance is no longer in the aspect of the trial judge looking at the convenience of the parties or the expenses that will be incurred if the case is transferred or tried in the English court alone. It broadens the concept of the factors to be considered by the judge in reaching his decision on whether to stay proceedings or not. It introduces the appropriate forum concept and the need to find natural connectors to the case such as the laws governing the transaction other than the *conveniens* factor.

[605] See Eugene F. Scoles, Patrick J. Borchers, Conflicts of Laws (1982) P.366

[606] See the case of *European Asian Bank A.G. v Punjab and Sind Bank* [1982] 2 Lloyd's Rep 356

5.6 SUMMARY

The ECJ's strict interpretation of the *lis pendens* rule in the *Gasser* case gave priority to the civil law *lis pendens* rule over the *forum non conveniens* doctrine. This decision also negated party autonomy and the choice of court agreement in favour of the "first-come, first-served" rule. While the ECJ acknowledged that it was within the sole jurisdiction of national courts to determine the matter in question, they appeared to prioritize promoting cooperation and comity among the Member States. The ECJ's decision in the *Gasser* case was based on interpreting Articles 21 and 22 of the Brussels Convention, [607] which aim to prevent parallel proceedings and conflicting judgments. According to the ECJ, the intention behind Article 21 of the Brussels Convention[608] is to prevent non-recognition of judgments in transnational litigation.[609]

In addition, the ECJ in *Gasser* also justified its decision on the grounds that Article 21 of the Brussels Convention was intended to protect the rights of parties who may be domiciled in a country different from their nationality.[610] Furthermore, even though the choice of court agreement may have conferred jurisdiction on a court in the agreement, the decision of the ECJ in the *Gasser* case gives the parties the ability to decline the jurisdiction of the chosen court, in favour of a court first seised. According to the ECJ, it is the right of the parties to the proceedings to decide the court that should resolve the disputes in the agreements, therefore, neither the court second seised nor the court first seised are better placed to determine which court has jurisdiction to determine the proceedings between the parties, since the issue of jurisdiction in transnational litigation is based on the rule of the Brussels Convention which is common to both courts.[611]

The decision of the ECJ in the *Gasser* case also shows that even where there is evidence of excessive delay in the proceedings of the court first seised, based on the principle of trust and comity, the parties in the proceedings are required to respect each other's legal systems and judicial institutions. This implies that the parties would need to comply

[607] Convention of 27 September 1968 on jurisdiction and enforcement of judgment in civil and commercial matters, article 21
[608] Ibid
[609] Ibid (n 601)
[610] Ibid
[611] Ibid (n 681)

with the jurisdiction of the court first seised even though it is a non-chosen court in the agreement and regardless of the length of proceedings in the court. Such interpretation of the *lis pendens* rule will further promote tactical litigation, as an unscrupulous party in the proceedings may choose to bring proceedings in the court of a Member State that is known for slow court process.

The decision of the English Court in the *Spiliada* case strengthens the application of the *forum non conveniens* doctrine in the UK. The decision of the English Court also shows that the convenience of the parties and the end of justice are important criteria used by the courts to decline jurisdiction in proceedings. For instance, access to witnesses, documents and other necessary material are considered by the English court in the *Spiliada* case as important factors that determine whether a forum is convenient for the interest of the parties and the end of justice. The decision of the English Court in the *Spiliada* case also shows a clear departure of the English court from the "abusive process" approach to a "more suitable" forum approach. This means that both the parties to the proceedings must establish that another forum is more suitable to hear the proceedings, rather than relying on the argument that the forum is not convenient. It is more likely that a court will stay proceedings where there is a more suitable forum.

In conclusion, both the ECJ and the English Court have made significant efforts to address the problem of conflict of jurisdiction in transnational litigation. The ECJ in the *Gasser* case focuses on preventing parallel proceedings and promoting predictability and certainty in the legal system by requiring that the jurisdiction of the court should be respected even though there is a chosen court in the choice of court agreement. On the other hand, the English Court in the *Spiliada* case focuses on ensuring flexibility and promote the discretionary power of the court to stay proceedings, where there is another forum that is more appropriate to determine the disputes between the parties.

The decisions of the ECJ and the English Court show that the problem of tactical litigation is not yet resolved in transnational litigation particularly in the aspect of recognition of jurisdiction, judgment and enforcement. Even though the Recast Brussels Regulation made significant attempts to resolve the problem of tactical

litigation and promote the choice of court agreement,[612] there are several loopholes in the Recast Brussels Regulation that give litigants the opportunity to rush to a court first seised. This first-come, first-served rule will promote tactical litigation. This rule can indeed lead to tactical litigation, as parties may try to be the first to file a case in a certain jurisdiction in order to take advantage of its laws or procedures, or to avoid unfavourable conditions in another jurisdiction. In such cases, parties may try to manipulate the legal process by filing a case in a jurisdiction that they believe will give them a strategic advantage, rather than filing the case in the jurisdiction where it took place. This can result in a waste of resources and time for the parties and the courts involved and can also undermine the principle of equal access to justice. The "first-come, first-served" rule can also lead to conflicting judgments if the same case is heard in multiple jurisdictions, creating uncertainty and confusion. The first court to render a judgment may be later disregarded or overruled by another court, causing further delays and expenses for the parties involved.

In order to address the problems of tactical litigation in transnational litigation, this thesis proposes a hybrid model solution that combines the benefits in both the doctrine of *forum non conveniens* and the *lis pendens* rule. By combining these two principles, the hybrid model seeks to create a harmonious balance between the need for a convenient forum and the need to prevent duplicative proceedings. This hybrid model is discussed in the next chapter in this thesis.

[612] See discussion in chapter four under section 4.8.

CHAPTER SIX – Proposed Hybrid Model Solution

6.0 INTRODUCTION

This chapter discusses the proposed hybrid model in this thesis. The proposed hybrid model solution seeks to mitigate the issues associated with tactical litigation by taking the best of both worlds. In this model, the first court to assume jurisdiction would hear the case, while also considering the principle of *forum non conveniens*. This way, the court would have the power to decline jurisdiction if another forum would be more appropriate for the resolution of the dispute. On the other hand, if the case has already been heard in another jurisdiction, the principle of *lis pendens* would come into play, preventing the parties from re-litigating the matter in another court.

The purpose of the *forum non conveniens* doctrine and the *lis pendens* rule is to promote flexibility,[613] establish mutual trust,[614] and provide predictability[615] in transnational commercial litigation, particularly in relation to jurisdiction and enforcement of judgments. The *forum non conveniens* doctrine aims to balance the interests of the parties involved by allowing the court to transfer the case to a more suitable forum where justice can be better served. This can prevent the burden of having to litigate in a foreign jurisdiction with unfamiliar laws and customs, and can also reduce the costs associated with transnational litigation. However, the doctrine can also be misused by defendants as a tactical tool to delay or evade jurisdiction in cases where the plaintiff has a legitimate claim. The *lis pendens* rule, on the other hand, seeks to avoid conflicting judgments by requiring that parallel proceedings in different countries be suspended until the first-seised court has made a decision on jurisdiction. This rule can promote legal certainty and reduce the risk of conflicting judgments, but it also raises concerns about the potential for abuse by plaintiffs who may initiate multiple proceedings in different countries in order to put pressure on the defendant.

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[613] Martine Stuckelberg, 'Lis Pendens and Forum Non Conveniens at the Hague Conference: The Preliminary Draft Convention on Jurisdiction and Foreign Judgements in Civil and Commercial Matters', (2001) Brooklyn Journal of International Law, Volume 26, Issue 3, Article 34.
[614] Gregoire Andreux, 'Declining Jurisdiction in a Future International Convention on Jurisdiction and Judgments – How can we benefit from Past Experiences in Conciliating the Two Doctrines of *Forum Non Conveniens* and *Lis Pendens?'* (2005) 27 Loy, L.A, Int'l & Comp. Law Review.
[615] Ibid.

This chapter is divided into two sections using key case studies to evidence the solutions proposed. Section one discusses the proposed solution on how harmonisation of both doctrines at the outset of litigation (negotiation stage) will help to resolve tactical litigation and in turn strengthen comity. There are also subsections under the section one: the first subsection provides analysis of the proposed solution, then the second subsection discusses the potential of the proposed solution to resolve the problem of tactical litigation in transnational commercial litigation. The third subsection discusses the limitation in the proposed solution, while the fourth subsection provides a critical evaluation of the proposed solution to the present problems of tactical litigation.

The second section focuses on the proposed solution to resolve the problems of tactical litigation at the enforcement stage (that is recognition of judgment). This section is further divided in four sections: the first section provides the analysis of the proposed solution for the enforcement stage, the second section discusses the potential of the proposed solution, the third section discusses the limitation of the proposed solution (i.e., setbacks that could undermine the proposed solution to resolving conflict of jurisdiction) and finally the fourth section evaluates the applicability of the proposed solution. The fourth section focuses on the application of the proposed solutions to the present problems on conflict of jurisdiction in transnational litigation. Such problems include non-compliance with exclusivity jurisdiction clauses and delay tactics are problems associated with tactical litigation, and negation of choice of court agreements in favour of the *lis pendens* rule.

6.1 Overview of the Hybrid Model

This hybrid model is based on the advantages in the *forum non conveniens* doctrine and the *lis pendens* rule. It is important to reach a compromise between two apparent conflicting positions for the purpose of harnessing the common interests in both doctrines.[616] Both the common law doctrine of *forum non conveniens* and the civil law *lis pendens* rules are developed to address the problem of conflict of jurisdiction, and to prevent parallel litigation.[617] The proposed hybrid model in this thesis offers a two-step approach to resolve the issue of tactical litigation in transnational litigation. The first step focuses on ways to prevent tactical litigation during the negotiation stage (jurisdictional stage), while the second step focuses on preventing tactical litigation during the enforcement stage (judgment and enforcement stage).

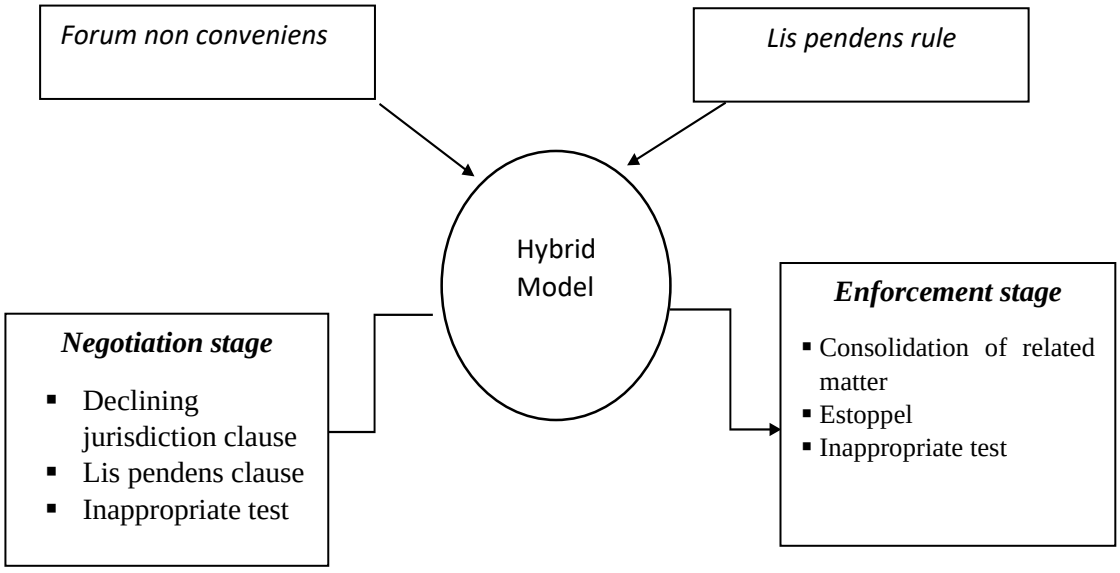

Figure 1 Proposed Hybrid-Model to address tactical litigation: Source: Developed by the researcher.

[616] Ibid.
[617] Ibid.

At the negotiation stage, the solution proposed includes the use of declining jurisdiction clauses and *lis pendens* clauses, and the adoption of a clear "inappropriate test".[618] On the other hand, at the enforcement stage, the solution proposed includes consolidation of related matters, using the principle of estoppel, and applying the "inappropriate" test.

The solution proposed on the use of a declining jurisdiction clause and *lis pendens* clause to prevent tactical litigation during the negotiation stage is discussed in the next section. The elements and scope of the solution proposed is examined, followed by the analysis of the solution and the limitations. A declining jurisdiction clause combined with a *lis pendens* clause provides a balance between the principles of *forum non conveniens*, which emphasizes flexibility in common law countries, and the requirement for legal certainty and predictability in civil law countries that rely on the *lis pendens* rule. This combination serves as a compromise that meets the expectations of both legal systems.

6.2 The declining jurisdiction and *lis pendens* clause

The declining jurisdiction clause is derived from the common law *forum non conveniens* doctrine. This clause is designed to ensure that the interest of the parties involved in transnational litigation are considered when deciding whether to decline or stay proceedings.[619] A declining jurisdiction clause requires the court to consider whether the selected forum is inappropriate before making its decision on whether to decline or stay proceedings.[620]

On the other hand, the *lis pendens* clause is derived from the civil law *lis pendens* rule. The *lis pendens* clause requires that where a matter involving the same parties and the same cause of action are pending before courts of different Member States, any other

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[618] Brand, (n 271); a clearly inappropriate test is developed by the Australian court in the *Voth* case. The inappropriate test suggests that while declining jurisdiction in a matter, national courts should focus more on whether the available forum is clearly inappropriate, for example, by establishing that a suit has been brought by the plaintiff in a vexatious and oppressive manner to frustrate the other party in the proceeding.

[619] George Andrieux, "Declining Jurisdiction in a Future International Convention on Jurisdiction and Judgments – How can we Benefit from Past Experiences in Conciliating the Two Doctrines of *Forum Non Conveniens* and *Lis Pendens", (*2005) Loy., L.A. Int'l & Comp. L. Review, 323.

[620] Ibid

court seised shall stay proceedings, until the court first seised has determined its jurisdiction in the proceeding. This clause is related to the provision under the article 29 of the Recast Brussels Regulation.[621] The next subsection analyses the elements and operation of the declining jurisdiction clause.

6.2.1 Elements and operation of the declining jurisdiction clause

The declining jurisdiction clause incorporates the principles of the *forum non conveniens* doctrine. This means that the declining jurisdiction clause incorporates key elements of the *forum non conveniens* rule in its design and application which include factors such as a) the inconvenience to the parties, b) the access to evidence, c) the potential recognition and enforcement of judgment, d) the requirements for defendants to provide security sufficient to satisfy any decision of the other court on merit, and e) the power to proceed with the case if the court of the other state does not exercise jurisdiction.

The operation of the declining jurisdiction clause is designed to ensure that courts establish that a chosen forum is inappropriate to hear the disputes before staying proceedings. This means that the court must consider factors such the ability of parties to access witnesses before deciding. The declining jurisdiction clause operates in accordance with the civil law *lis pendens* rule, which requires a court second seised to stay its proceedings if the same matter is pending before another court of a Member State,[622] and that court first seised must decline jurisdiction if it finds that a different forum would be more appropriate. However, by the operation of the declining jurisdiction clause, the court second seised may exercise its discretionary power to proceed with the case if the court first seised fails to exercise jurisdiction in the lawsuit. This will help to ensure that the matter is resolved in a timely and efficient manner.

The next subsection focuses on the analysis of the elements and operation of the *lis pendens* clause. The declining jurisdiction clause needs to restore the discretionary power of the judge to determine the fairness of the process and more importantly to determine the appropriateness of the forum.

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[621] Regulation (EU) No. 1215/2012 on Jurisdiction and recognition and enforcement of Judgements in civil and commercial matters (Recast)

[622] Regulation (EU) No. 1215/2012 on Jurisdiction and recognition and enforcement of Judgements in civil and commercial matters (Recast), art. 29.

6.2.2 The elements and operation of the *lis pendens* clause

The *lis pendens* clause incorporates the elements in the *lis pendens* rule, which include pending proceedings, the same parties and the same of cause of action must be pending before another court, stay of proceedings, the discretionary power of the court to decline jurisdiction, and recognition and enforcement of judgment. The operation of the *lis pendens* clause is intended to promote legal certainty and prevent conflicting decisions by ensuring that only one court handles a particular dispute. It also helps to avoid the risk of inconsistent or conflicting decisions and reduces the costs and delays associated with multiple proceedings.

The *lis pendens* clause operates as follows: if the proceedings in the second court involve the same parties and have the same cause of action as the proceedings in the first court, the second court seised must stay its proceedings in favour of the court first seised. However, if proceedings are pending before another court, the *lis pendens* clause requires that the court second seised shall stay proceedings in the matter regardless of the relief sought in the case. In addition, the *lis pendens* clause also operates when a judgment is rendered by the court first seised between the same parties and the same cause of action. The court second seised shall decline jurisdiction where such judgment also complies with the requirements for recognition or enforcement (this is an element of res judicata). In contrast, the operation of the *lis pendens* clause where the court first seised fails to determine jurisdiction suggests that the court that is second seised may, at its discretion, proceed with the matter. On the other hand, when the court first seised finds, on application by a party, that the court second seised is more appropriate to hear the matter, the *lis pendens* clause requires that the court first seised must decline jurisdiction in the matter.

In essence, the *lis pendens* clause operates where there are pending proceedings before a court first seised between the same parties and the same causes of action. The court second seised shall suspend the proceedings pending the court first seised determining its jurisdiction. However, the *lis pendens* clause operates as follows: where the court first seised has determined jurisdiction, and where a judgment rendered by the court is expected to be recognised by courts of another Member State, the court second seised must decline jurisdiction. In contrast, the clause will not be applicable where the court first seised fails to determine jurisdiction or rendered a decision in the proceedings

within a reasonable time. In addition, the *lis pendens* clause will not be applicable where the court first seised finds, *suo motu* or upon the application of parties in the proceedings, that the court second seised is a more appropriate forum to hear the case. For example, where there is the possibility to access witnesses in the court second seised.

6.2.3 Analysis of the potential solution of declining jurisdiction and *lis pendens* clause

The declining jurisdiction clause provides greater flexibility in cross-border disputes, where the interests of the parties and the location of relevant evidence may differ between the two courts. In these cases, the declining jurisdiction clause allows a court to decline jurisdiction if it determines that the other court would be a more appropriate forum, rather than simply staying the proceedings. In addition, the declining jurisdiction clause provides a stronger deterrent against forum shopping. By requiring that a court determine whether a forum is clearly inappropriate before declining or staying proceedings, the declining jurisdiction clause makes it more difficult for parties to engage in forum shopping in order to delay proceedings or secure a more favourable outcome.

The declining jurisdiction and the *lis pendens* clause would help to harmonise both doctrines rather than expunging one doctrine at the expense of the other, which will spur criticism amongst the common law countries and the civil law countries. Also, a declining jurisdiction clause will help to ensure flexibility and fairness in transnational litigation especially in the aspect of determining jurisdiction. In addition, a declining jurisdiction clause will further help to develop legal systems in common law countries that provide for plaintiff-friendly systems and the opportunity to regulate access to their courts. *The lis pendens* clause, on other hand, will help to prevent parallel litigation and to ensure legal certainty and predictability. The inclusion of the *lis pendens* clause has potential to help prevent multiplicity of court cases by fighting against the waste of judicial resources often caused by parallel litigation.

The combination of the declining jurisdiction clause and the *lis pendens* clause has the potential to ensure the *conveniens* of parties involved in the proceedings. For instance,

in *Gulf Oil Corp v Gilbert* case,[623] it was held that litigation could present several practical problems which include access to proof, availability of witnesses, and the possibility of viewing premises. A declining jurisdiction clause and a *lis pendens* clause has potential to resolve these practical problems. For example, through declining jurisdiction and *lis pendens* clauses, the courts would have the ability to consider whether there is an available forum that is more appropriate to determine the matter.

Both the common law countries and the civil law countries are likely to embrace the inclusion of declining jurisdiction and *lis pendens* clauses as means to resolving conflicts of jurisdiction in transnational commercial litigation. This is so because the concept of judicial discretionary power is not totally unknown to both the common law and civil law countries.[624] Even though the common law *forum non conveniens* doctrine has been rejected , the idea of judicial discretionary power of the court remains, as courts have the discretionary power to stay proceedings where related cases are pending before a court seised of another contracting state.[625] Therefore, it is important to harmonise both doctrines by adopting the underlying benefits in the doctrines.

6.2.4 Limitation of the declining jurisdiction & *lis pendens* clause

Despite its potential benefits, the declining jurisdiction clause also has its limitations. One of the main limitations is the potential for inconsistent interpretations of the "clearly inappropriate" standard. Different courts may have varying interpretations of what constitutes a clearly inappropriate forum, leading to inconsistent outcomes and confusion for parties involved in cross-border disputes. Another limitation of the declining jurisdiction clause is the potential for delays in the resolution of disputes. For a court to determine whether a forum is clearly inappropriate, it may need to conduct a detailed analysis of the relevant evidence and witnesses, leading to additional time and resources being expended on the proceedings.

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[623] *Gulf-Oil Corp., v Gilbert* (1947) 330 U.S at 309.
[624] Martine Stuckelberg, "*Lis pendens* and *Forum Non Conveniens* at the Hague Conference: The Preliminary Draft Convention on Jurisdiction and Foreign Judgements in Civil and Commercial Matters", (2001) 26 Brook. J. Int'l L.
[625] Article 17, Brussels Convention.

The declining jurisdiction clause may also lead to difficulties in the recognition and enforcement of decisions. If a court declines jurisdiction, the resulting decision may not be recognized or enforceable in other jurisdictions, particularly if the court that declines jurisdiction is not considered to be a neutral or impartial forum. The declining jurisdiction clause may lead to unequal treatment of parties involved in cross-border disputes. Depending on the jurisdiction in which the dispute is heard, some parties may have greater resources and access to evidence, leading to a more favourable outcome for those parties. On the other hand, the declining jurisdiction clause can create uncertainty for litigants, as the decision to decline jurisdiction may be subject to the discretion of the court and may not necessarily be based on clear, objective criteria.

Additionally, this clause may perpetuate forum shopping and a lack of accountability, as parties may seek to bring their cases to forums that they believe will be more favourable to them. In addition, the declining jurisdiction clause may be perceived as challenging the sovereignty of courts, as it allows courts to decline to hear cases that are brought before them. This can lead to questions about the efficacy of the legal system and the ability of courts to provide effective and efficient justice to litigants.

Another limitation in the declining jurisdiction clause and *lis pendens* clause is that the inclusion of both clauses may resuscitate tactical litigation in the convention. Therefore, it is important for courts to be careful in the application of these clauses. According to George Andrieux, the civil law *lis pendens* provisions often promote a 'race to the court' and endanger the fairness in the legal process.[626] However, by combing both a declining jurisdiction clause and a *lis pendens* clause, the parties to the proceedings will be prevented from the practice of 'race to the court', as the court second seised will have the opportunity to continue in the proceeding in a situation where the court first seised has failed to establish its jurisdiction within a reasonable time frame.

[626] George Andrieux, "Declining Jurisdiction in a Future International Convention on Jurisdiction and Judgments – How can we Benefit from Past Experiences in Conciliating the Two Doctrines of *Forum Non Conveniens* and *Lis Pendens", (*2005) Loy., L.A. Int'l & Comp. L. Review, 323; Peter Herzog, "Brussels and Lugano, should you race to the Courthouse or race for a Judgement?" (1995), AM. J Comp. L, 379.

The limitation of the *lis pendens* clause is that the clause operates under the assumption that the first court to be seised is the most appropriate forum. This may not always be the case, particularly in cross-border disputes where the interests of the parties and the location of relevant evidence may differ significantly between the two courts. Another limitation is that the *lis pendens* clause may not provide a sufficient deterrent against forum shopping. In some cases, parties may be motivated to commence proceedings in a second forum, even if the first forum is the more appropriate venue, in order to delay proceedings or to secure a more favourable outcome.

Another limitation of the declining jurisdiction clause is whether the clause would be accepted by the civil law countries. It is unlikely that this question would receive an affirmative answer. However, it is important to state that a ban of this doctrine would require an in-depth reform especially as many countries rely on the *forum non conveniens* doctrine to regulate the exercise of jurisdiction.[627]

The next section focuses on the analysis of the "clearly inappropriate" test in the hybrid model. The elements and operation of this test are analysed, followed by the analysis of the potential of the test. The limitation of the test is also discussed in this section.

6.3 Clearly inappropriate test

The "clearly inappropriate" test is an Australian model used to determine whether the chosen forum is "clearly inappropriate" to hear a matter. In the case of *Voth*[743] the court held that the defendant must demonstrate that they are likely to experience serious, unfair, prejudicial, or damaging consequences if the forum selected by the plaintiff is used. This test shows a clear departure[628] from the traditional "vexatious or oppressive" test used by the common law countries such as U.K., U.S. and Canada. The "clearly inappropriate" test places the burden on the defendant to establish the reason why a court is inappropriate. Where the defendant fails to establish that a court is inappropriate, the court will have the opportunity to continue with the proceeding and

[627] Martine Stuckelberg, "*Lis Pendens and Forum Non Conveniens* at the Hague Conference: The Preliminary Draft Convention on Jurisdiction and Foreign Judgements in Civil and Commercial Matters" (2001) Vol. 26, Issue 3.

[628] *Oceanic Sun Line Special Shipping CO. Inc. v Fay* (1998) 165 CLR 197; (In the case, the Australian court refused to follow the decision of the British doctrine of *forum non conveniens* established in the *Spiliada* case).

the application for the stay of proceedings will be rejected. The element and operations of this test is analysed in the next subsection.

6.3.1 Element and operation of inappropriate test

The "clearly inappropriate" test involves two key elements. The first element examines the situation where a party has repeatedly relied on the jurisdiction of a particular court. The second element considers the situation where the plaintiff has chosen a forum specifically to hinder the defendant's ability to defend themselves, such as when the proceedings are brought in a vexatious and oppressive manner.[746] The "clearly inappropriate" test operate as follows: where the defendant can demonstrate that the proceeding was brought by the plaintiff in a vexatious and oppressive manner to frustrate the defendant,[629] the court will decline to stay proceedings in the matter. For example, where the proceeding is brought by a plaintiff against a defendant in a selected forum with the sole purpose of preventing legitimate proceedings being brought pursuant to the jurisdiction clause. This is so because the rationale for the exercise of the power to stay proceedings is based on the avoidance of injustice between the parties in the case.

According to Mason C.J., Deane, Dawson and Gaudron JJ[*630*] the "inappropriate" test would operate where a plaintiff has repeatedly relied on the jurisdiction of a court, accordingly, the party autonomy should be respected.[631] In contrast, this test will not be applicable where a party rely on balance of convenience to favours another jurisdiction or argue that some other jurisdiction will provide a more appropriate forum.

[629] Brand, (n 271).; Ibid., (n 157).
[630] Ibid (n 323).
[631] Ibid.

6.3.2 Analysis of potential solution of a “clearly inappropriate” test

The adoption of a “clearly inappropriate” test can reduce the power of multinational corporations or parties acting in bad faith who may likely want to use venue resolution tactics to deprive an innocent party from enforcing judgment obtained in the proceeding. With a “clearly inappropriate” test, it is suggested that, while seeking a stay of proceedings the defendant would have to establish that the court that presided over the proceeding is clearly inappropriate (for example, establishing specific circumstances and burdens confronting the party in the proceedings may be pertinent).

A “clearly inappropriate” test is more effective than the “forum inconvenient” test. In the case of *Abdullahi v Pfizer, Inc,*[632] it was held that the defendant, Pfizer, a multinational corporation based in the U.S., could be sued in their home jurisdiction for the action of their U.S parent company that resulted in significant harm to the plaintiff in Nigeria during the experimental testing of a new antibiotic, Trovan. The court utilized the “clearly inappropriate” test to determine that the appropriate jurisdiction for the lawsuit against the pharmaceutical company was in their home country. In this case, the court found that it was not clearly inappropriate to bring the lawsuit in the defendant's home country, and thus it was deemed the appropriate jurisdiction for the case.

In the case of *Aguinda v Texaco,* Inc.[633] a U.S.-based oil company is being sued in New York for decisions and activities that caused environmental harm in Ecuador and Peru. In this case, it was determined that it was not clearly inappropriate for the lawsuit to be brought in New York, indicating that the jurisdiction was appropriate for the case. This decision is consistent with the "clearly inappropriate" test, which examines whether the choice of forum is vexatious or oppressive or if a party has repeatedly utilized a particular court's jurisdiction.

[632] 01 Civ. 8118 (WHP) (S.D.N.Y. Aug. 9, 2005)
[633] *Aguinda v Texaco, Inc.* 303 F 3d 470 (2002)

Alan Reed's [634] observation that multinational corporations use the "forum inconvenient" test to bypass internal regulatory laws is a valid concern. The use of tactical game-playing to evade legal proceedings is detrimental to the judicial system's efficiency and the enforcement of legal decisions. By using the "forum inconvenient" test to avoid facing charges in a foreign jurisdiction, corporations can limit their liability for actions that they would otherwise be held accountable for. Therefore, the need for a more effective standard, such as the "clearly inappropriate" test, is important. The "clearly inappropriate" test is more effective in curbing the use of tactical game-playing by multinational corporations and ensuring that parties are not deprived of the ability to enforce judgments obtained in foreign courts.

However, it should be noted that the "clearly inappropriate" test may have some limitations. For instance, it may not address situations where the choice of forum is not vexatious or oppressive, but the foreign court's judgment may not be enforceable due to practical difficulties. The limitation of the “clearly inappropriate” test is discussed in the next subsection in this chapter.

6.3.2 Limitations of a “clearly inappropriate” test

A “clearly inappropriate” test may not address situations where the choice of forum is not vexatious or oppressive, but the foreign court’s judgment may not be enforceable due to practical difficulties. This test placed a burden on a litigant to show that the chosen court is ‘clearly inappropriate’ than it is for a defendant to show that there is another ‘appropriate’ or ‘convenient’ forum. On the other hand, while the "clearly inappropriate" test provides a more effective standard that limits the use of the "*forum non conveniens*" test as a tool for evading legal proceedings, it does not address the practical difficulties that may arise in enforcing a foreign court's judgment.

The enforceability of foreign court judgments is often complicated by factors such as differences in legal systems, jurisdictional conflicts, and political considerations. Thus, even if a foreign court's judgment is valid, it may not be enforceable in the jurisdiction where the defendant is located. It is essential to consider other factors, such as the

[634] Reed, Alan, “Venue Resolution and Forum Non Conveniens: Four Models of Jurisdictional Propriety”, (2013), Journal of Transnational Law and Contemporary Problems, 22 (2), pp. 369-454.

possibility of enforcing a foreign court's judgment, when deciding whether to apply the "clearly inappropriate" test or the "*forum non conveniens*" test. It is crucial to strike a balance between providing an effective standard for limiting tactical game-playing by multinational corporations and ensuring that the judicial process is fair and practical

Another limitation of the "clearly inappropriate" test is that since the application of test adopts connecting factors that are included in the 'more appropriate' forum, factors such as vexatious, abusive, oppressive, and public interest factors, it is therefore unclear whether the 'inappropriate forum' test would produce a different result.[635] According to Justice Mason, the Australian 'clearly inappropriate forum' test is similar to factors established by the English court in the *Spiliada* case, and for that reason, the test is likely to yield the same result as the 'more appropriate' forum test in the majority of cases.[636]

Anthony Grey[637] and Edward Barrett[638] have suggested caution in applying the Australian "clearly inappropriate forum" test in the common law world, citing inconsistencies with the principle of international comity and other goals of private international law. While the Australian courts have rejected the "appropriate forum" test used in the English approach, some of the factors used in the English approach are still present in the Australian test. For example, the defendant must demonstrate that the plaintiff has brought the action in a vexatious and oppressive manner to persuade the court to stay the proceedings. This is like the "inconvenient" test used in the English approach for the application of the *forum non conveniens* doctrine. Edward Barrett[639] noted that the Australian "clearly inappropriate" test gives the plaintiff the choice to select a forum that is more suitable, even if the forum is inconvenient for the

[635] *McEvily v Sunbeam-Oster Co., Inc.* 878 F Supp 337 (DRI 1994); *Beigel & Sandler v Weinstein* 1993 WL 189920 (ND 11 1993); *Black & Decker, Inc. v Sunbeam Corp.* 1994 WL 865386 (ND III 1994).
[636] Ibid.
[637] Anthony Grey, "Forum Non Conveniens in Australia: A comparative analysis", (2009) C.L.W.R, 38, 207-244
[638] Edward Barrett, "The doctrine of forum non conveniens", (1947) 35 CAL. L. Rev. vol. 35, 38.
[759] Ibid.
[639] Ibid.

defendant.[640] This choice can impose a significant burden on the defendant who is not making any effort to avoid their responsibilities.[641]

The next section discusses the proposed solution in the hybrid model to resolve the problem of tactical litigation at the enforcement stage. These solutions include the consolidation of related matters, the inappropriate test, and the estoppel principle.

6.4 The proposed solutions in the hybrid model at the enforcement stage.

To resolve the problem of tactical litigation at the enforcement stage in transnational litigation, the hybrid model proposes solutions which include the consolidation of related matters, the adoption of a "clearly inappropriate" test and the estoppel doctrine. This section will highlight the elements and operation of the proposed solution; the potential and the limitation of these proposed solution is also analysed. The estoppel principle in the proposed hybrid model is discussed in the next subsection.

6.5 Estoppel

In the proposed hybrid model, it is recommended that the estoppel principle should be applied to prevent defendants who had obtained a *forum non conveniens* dismissal from contesting the recognition and enforcement of the foreign court's judgment. The estoppel principle was explained by the court in the case of *New Hampshire v Maine,*[642] as a legal doctrine which prohibits a party from taking a position contrary to one previously taken in an earlier proceeding. The estoppel is based on the principle of fairness and equity.

The court illustrated as follows:

> …[w]here a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him…[643]

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[640] Ibid 384.
[641] Ibid.
[642] *New Hampshire v Maine* (2001) US 742, 749.
[643] Ibid; (The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding.") .

This principle suggests that courts should prevent defendants who have invoked the application of the *forum non conveniens* doctrine to dismiss a suit in favour of another foreign court, if judgment is reached by the foreign court. In essence, the estoppel principle suggests that litigants should be prevented from changing position regarding the adequacy of the foreign court that gave the judgment.[644]

6.5.1 Elements and operation of the estoppel

The elements of the estoppel include, a) when a party successfully invokes the *forum non conveniens* doctrine to dismiss a lawsuit in favour of a foreign court, and b) when a judgment is obtained from the foreign court. The principle of estoppel applies where a party successfully used the *forum non conveniens* doctrine to dismiss a lawsuit to favour of a foreign court or obtains a judgment from a foreign court. Accordingly, the party will be bound by the judgement and cannot change their changing position or challenge it. The principle of estoppel will be applied to prevent a party from challenging a judgment obtained from a foreign court after invoking the application of the *forum non conveniens* doctrine to favour a foreign court in the proceeding. For example, when a party X has challenged the jurisdiction of a court on the ground of the *forum non conveniens* doctrine, if a court in country XX had decline jurisdiction to favour a court in country XY, party X will be prevented from changing position or challenging the judgment rendered by country XY.

6.5.2 Analysis of the potential solution of the estoppel

The estoppel principle will help to maintain the integrity of the judicial process[645] and prevent litigants from deliberately changing their positions in the proceedings due to the exigencies of the moment.[646] For instance, if a party invokes the *forum non conveniens* doctrine to dismiss a lawsuit in favour of a foreign court and later changes their position when a judgment is issued by that court, it would undermine the foreign

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[644] Christopher Whytock and Cassandra Burke Robertson, "Forum Non Conveniens and Enforcement of Foreign Judgments", (2011) Faculty Publications, 40.

[645] *New Hampshire v Maine* (2001) 532 US at 749; *Edward v Aetna Life Ins. Co.* (1982) 6th Cir, 595, 598.

[646] Ibid. *United States v McCaskey* (1993) 5th Cir, 368, 378.

court's judgment and the integrity of the legal process. Therefore, the estoppel principle prevents such changes in position and ensures the finality of court decisions.

The estoppel principle not only maintains the integrity of the judicial process, but also ensures predictability and strengthens the principle of mutual trust. If a defendant successfully invokes *forum non conveniens* and obtains a judgment in a foreign court, other courts are bound to enforce that judgment, even if there are changes in the foreign judiciary. This promotes predictability and mutual trust in the international legal system. However, a foreign judgment may still be challenged on the grounds of fraud or public policy. The estoppel principle supports predictability and mutual trust by requiring courts to enforce foreign judgments obtained through the proper legal process but allows for challenges to be made in exceptional cases where there are issues of fraud or public policy.

The estoppel principle is a useful tool for maintaining the integrity of the judicial process and promoting predictability and mutual trust in the international legal system. However, its limitations must be carefully considered and addressed in order to ensure that the principle is applied fairly and justly. The next subsection discusses the limitations of the estoppel principle.

6.5.3 Limitations of the proposed solution of the estoppel

The limitations of the estoppel doctrine are primarily related to the potential for disparities between *forum non conveniens* standards and the possibility of unjust outcomes. One limitation is that the implementation of the estoppel doctrine could create incentives for parties to engage in forum shopping, particularly if there are disparities in the *forum non conveniens* standards applied between different states or jurisdictions. This could lead to a situation where litigants select forums based on which jurisdiction is most likely to apply a favourable standard, rather than the jurisdiction that is most appropriate to hear the case.

Another limitation of the estoppel doctrine is the potential for unjust outcomes. In some cases, defendants who have been wronged in a foreign forum may not be able to invalidate a fraudulent or unfair judgment. This could occur if the defendant is unable

to provide sufficient evidence to prove that the judgment was obtained through fraud or unfair means. Conversely, some plaintiffs may have a judgment invalidated despite the essential fairness of the proceedings in which it was rendered, due to the application of the estoppel principle. In contrast, the fraud, public policy, and reciprocity exceptions represent important limitations on the enforceability of foreign judgments, even when the estoppel principle is otherwise applicable. These exceptions provide mechanisms for parties to challenge judgments obtained through fraudulent or unfair means, or which conflict with fundamental principles of public policy.

The *forum non conveniens* doctrine does not explicitly address these exceptions, which means that parties may still be able to challenge a foreign judgment even if they have previously invoked *forum non conveniens* to have the case heard in that jurisdiction. This is an important safeguard against the abuse of the legal system and helps to ensure that judgments are only enforced when they have been obtained through fair and lawful means. Regarding the issue of reciprocity, there appears to be little guidance from U.S. courts on whether a lack of reciprocity with the alternative forum would bar U.S. enforcement of a resulting judgment. This is an important issue to consider, as it raises questions about the balance between promoting predictability and mutual trust, on the one hand, and protecting the rights of litigants, on the other. It is possible that future cases will shed more light on this issue and provide greater clarity for parties seeking to challenge foreign judgments. The next section discusses the consolidation of related matters in the hybrid model's proposal to resolve the problem of tactical litigation at the enforcement stage.

6.6 Consolidation of related matters

The consolidation of related matters is a practice where courts combine proceedings that are related but not identical, in order to streamline the legal process and avoid waste of judicial resources or unnecessary multiplicity of court cases.[647] In intellectual property litigation,[648] the American Law Institute has recently proposed new sections

[647] OECD, "Improving the System of Investor-State Dispute Settlement: An Overview", (2006) Working Papers on International Investment; UNCTAD, "Investor-State Dispute Settlement and Impact on Investment Rule-making" (2007) UNCTAD/ITE/IIA/2007/3, 83-84.

[648] American Law Institute, *Intellectual Property Principles Governing Jurisdiction, Choice of Law, and Judgement in Transnational Disputes* (Dreyfus, Ginsburg and Dessemontet, Reporters) 2008

221-222 which provide for the coordination authority of the first court that receives a lawsuit related to a particular transaction or series of transactions. This means that if there are multiple lawsuits related to the same transaction or series of transactions,[649] the first court to receive a lawsuit will have the authority to coordinate and manage all related lawsuits in order to promote efficiency and reduce duplication of effort. The aim of sections 221-222 in intellectual property litigation is to either consolidate related actions or facilitate cooperation between the parties and the court, or both. This principle of consolidation is also present in other investment treaties such as NAFTA, which provides for the consolidation of related matters that share a common question of law or fact under Art. 1126 (2). The objective is to promote efficiency in the adjudication of related matters and to prevent the waste of judicial resources.

6.6.1 Elements and operation of the consolidation of related matters

Consolidation of related matters involves several elements, including the existence of related actions that are pending in multiple courts of a Member State, [650] a common question of law or fact among these actions, [651] and the potential for consolidation to promote fair and efficient resolution. Consolidation of related matters will operate when related actions are pending in the courts of more than one state. Either court may suspend or terminate its proceedings and refer the matter to the alternative court, provided that the actions are related, and the alternative court is likely to have power to consolidate the related actions.

However, in some cases, consolidation of related matters may not be appropriate or feasible due to factors such as confidentiality concerns or the need to protect sensitive information. For example, in cases involving trade secrets or confidential business information, parties may be reluctant to disclose such information to multiple courts or to have it disclosed to other parties in a consolidated proceeding. In such cases, it may be necessary to explore alternative approaches, such as the use of protective orders or other measures to limit the disclosure of sensitive information.

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[649] Ibid., sections 221 – 222.
[650] NAFTA, 1994, article 1126.2.
[651] Ibid.

In the cases of *Corn Products International, Inc. v Mexico*[652] and *Archer Daniels Midland Company & Tate & Lyle Ingredients Americas Inc. v Mexico,*[653] a party, Mexico, requested the consolidation of two disputes related to an excise tax on certain soft drinks. However, the tribunal declined the request on the grounds that the investors involved were in direct competition with each other.

The tribunal stated as follows:

"…[T]he direct and major competition between the claimants, and the consequent need for complex confidentiality measures throughout the arbitration process, would render consolidation in this case, in whole or in part, extremely difficult. The parties would not be able to work together and share information. The process, including essential confidentiality agreements, discovery, written submissions, and oral arguments would have to be carried out, in substantial measure, on separate tracks. The consolidation of the claims of direct and major competitors would necessarily result in complex and slow proceedings in order to protect the confidentiality of sensitive information. [...] Under such circumstances, a consolidation order cannot be in the interests of fair and efficient resolution of the claims. Two tribunals can handle two separate cases more fairly and efficiently than one tribunal where the two claimants are direct and major competitors, and the claims raise issues of competitive and commercial sensitivity. [...] [Furthermore] the Tribunal is persuaded that notwithstanding certain common questions of fact and law, the numerous distinct issues of state responsibility and quantum further confirm the need for separate proceedings…"[654]

The next subsection presents an analysis of the potential solution in the hybrid model for consolidation of related matters.

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[652] *Corn Products International, Inc. v Mexico* ICSID Case No ARB (AF) 04/01.
[653] *Archer Daniels Midland Company & Tate & Lyle Ingredients Americas Inc. v Mexico* ICSID Case No ARB (AF) 04/5.
[654] *Corn Products International, Inc., v. Mexico,* ICSID Case No. ARB (AF) 04/01; *Archer Daniels Midland Company & Tate & Lyle Ingredients Americas Inc. v. Mexico,* ICSID Case No. ARB (AF) 04/5

6.6.2 Analysis of the potential solution in the consolidation of related matters

By consolidating related matters in transnational litigation, parties can avoid the costs and delays associated with multiple proceedings and in turn avoid the risk of conflicting decisions. This can lead to a more efficient and cost-effective resolution of the dispute.[655] The consolidation of related matters can provide a more comprehensive and efficient resolution of the dispute, as all relevant parties and issues can be dealt with in a single proceeding. This can help to reduce the risk of conflicting decisions and ensure that all relevant parties are able to participate in the proceedings. The consolidation of related matters can provide a more streamlined and efficient legal process, as the court can deal with all aspects of the dispute in a single proceeding. This can help to reduce delays and increase the efficiency of the legal system. In addition, by consolidating related matters, courts can reduce the risk of tactical litigation at the enforcement stage, which is where parties may attempt to exploit procedural loopholes or otherwise engage in tactics that are designed to delay or frustrate the legal process. This can help to promote fairness and efficiency in the legal system and ensure that litigants are able to achieve timely and just outcomes.

In addition, consolidation of related matters can help to promote consistency and uniformity in the resolution of transnational disputes, as the court can consider the broader context of the dispute and the relevant legal principles that apply in multiple jurisdictions. The solution proposed on the consolidation of related matters will help to avoid multiplicity of court actions and prevent tactical litigation in transnational litigation. Accordingly, when proceedings involving the same parties and actions are brought before the courts of different Member States, the courts should consider consolidating all the related matters before any courts where the proceedings are pending. This proposed consolidation of related matters can prevent unnecessary delays in the proceedings, especially when the court first seised takes unreasonable time to establish its jurisdiction in the matter. In such a case, other courts with related matters pending can hear the case to avoid wasting time and delays in the proceedings.

6.6.3 Limitation in the proposed solution on the consolidation of related matters

One of the limitations of consolidating related matters in transnational litigation is the complexity of coordinating the proceedings across different jurisdictions. This can result in significant difficulties in ensuring that all relevant parties are able to participate in the proceedings and that the legal process is able to proceed smoothly and efficiently. Additionally, the consolidation of related matters can also be difficult to achieve in practice, particularly where the legal systems of different jurisdictions do not have the same procedures for consolidation. This can result in significant delays and added costs for parties and can also impact the efficiency and effectiveness of the legal system. The consolidation of related matters may also raise issues of fairness and justice, particularly if the legal system in one jurisdiction is perceived as being less fair or just than the legal system in another jurisdiction. This can create challenges for parties and can also impact the legitimacy of the legal system.

Another limitation of consolidating related matters involves seeking the consent of the parties in the proceedings. The United Kingdom's Arbitration Act 1996, specifically Section 23, provides that the consent of the parties is necessary before consolidating related matters. In the case of *Guidant LLC v Swiss Re International SE and Another*, the court also emphasised the parties' consent before consolidation can occur. The case involved two arbitrations that were initiated under insurance policies with identical arbitration clauses. The court examined the possibility of consolidation without the parties' consent. The court acknowledged the desirability of efficiency and consistency of results, but also considered other factors such as the party choice, privacy, and confidentiality in arbitration. The court held that consolidation of two arbitral proceedings cannot occur under the U.K. Arbitration Act without the consent of the parties involved.

The solutions proposed in the hybrid model present a promising approach to addressing the challenges of cross-border disputes in a manner that accommodates both the common law and civil law legal systems. The next section discusses the potential of the solution proposed in the hybrid model to resolve the problems of tactical litigation in cross-border disputes. This section also discusses the limitation and challenges in the solution proposed in the hybrid model.

6.7 The potential and limitations of the proposed hybrid model solutions

By drawing on the strengths of both common law and civil law legal systems, the hybrid model offers a more uniform and predictable approach for resolving cross-border disputes. Combining the *forum non conveniens* doctrine and the *lis pendens* rule in transnational litigation has the potential to improve the efficiency and consistency of dispute resolution by providing a clearer framework for determining the appropriate forum for a given case. This could lead to more predictable outcomes, reduced costs, and less time wasted in jurisdictional battles. According to Gregoire, "the compromise reached in the Hague negotiations establishes a good balance between common law and civil law positions on judicial discretion". Gregoire added that it is important to develop an efficient system which combines the need for legal predictability and the necessity to take into consideration the fairness of the process.

Additionally, the solution proposed in the hybrid model on the consolidation of related matters would increase the efficiency of the legal system by reducing the cost and time associated with resolving cross-border disputes. By providing a clear and concise framework for resolving these disputes, the hybrid model can reduce the need for parties to engage in lengthy and costly legal proceedings. The hybrid model can also increase the legitimacy of the legal system by providing fair and consistent outcomes for parties involved in cross-border disputes. This can encourage parties to use the legal system to resolve disputes, which can strengthen the rule of law and promote stability and peace in society.

Professor Whytock and Cassandra Burke acknowledged that the *forum non conveniens* and the *lis pendens* rule should be harmonised in order to prevent "boomerang litigation". Whytock and Cassandra Burke argue that harmonization is necessary to ensure consistency in decisions reached by judges both in the negotiation stage and enforcement stage. On the other hand, Brand highlights the importance of harmonizing these doctrines because it is unlikely that either the common law or civil law systems

will fully adopt the approach of the other.[656] Brand suggests that a global compromise, as proposed in the 2001 Hague Draft Convention,[657] could help in the development of the *forum non conveniens* doctrine and the *lis pendens* rule.[658]

In contrast, the limitation of the hybrid model involves the limited adoption. Jurisdictions that do not see the value in harmonizing these doctrines may not embrace the hybrid model. This could result in a fragmented legal landscape where different countries apply different approaches to these important legal concepts, creating difficulties for parties involved in cross-border disputes. This lack of adoption could also impede the development and improvement of these doctrines, which could have negative consequences for the global legal system.

Another limitation of the hybrid model is the risk of conflicting decisions in different jurisdictions. This can occur when different courts apply the hybrid model differently, resulting in inconsistent outcomes for parties involved in cross-border disputes. This can lead to confusion and uncertainty for parties, who may not know what to expect from the legal system. Conflicting decisions in different jurisdictions can undermine the legitimacy of the legal system and create a perception that the law is not fair or predictable. This can discourage parties from using the legal system to resolve disputes and could lead to a rise in alternative means of resolving disputes, such as arbitration or mediation. Additionally, conflicting decisions can put pressure on the legal system to find a solution to the issue, which could result in further changes to the hybrid model or other legal concepts.

The complexity of the hybrid model can have negative consequences for the legal system. It can increase the cost and time associated with resolving disputes, as parties may need to engage experts to help them understand and apply the model. Additionally, the complexity can create opportunities for parties to manipulate the system and achieve

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[656] Brand, (n. 271) (Brand argued that "*Lis pendens* also serves to prevent parallel litigation, but with very different result") pp 1034.

[657] Draft Convention on Jurisdiction and Recognition of Judgements in Intellectual Property Matters, art 21 of the Convention deals with *Lis pendens*, and article 22 deals with *forum non conveniens*.

[658] Permanent Bureau, "Interim Text – Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference" (2001) HCCH; http://www.hcch.net/index_en.php?act=publications.details&pid=3499&dtid=35, (last accessed on 15 February 2020).

outcomes that are not fair or just. This can further undermine the legitimacy of the legal system and discourage parties from using the legal system to resolve disputes. Furthermore, complexity can also make it difficult for courts to apply the hybrid model in a consistent and predictable manner, which can result in inconsistent outcomes for parties and further confusion and uncertainty.

The next section presents hypothetical examples on how the proposed solutions in this hybrid model can be used to resolve tactical litigation in a simulated case. The hybrid model is applied in a simulated case to determine the effectiveness of the proposed solution in the hybrid model to resolve the problem of tactical litigation at the negotiation and the enforcement stage.

6.8 A hypothetical case study on how the hybrid model can work in a simulated case.

In a hypothetical case study, a plane crash occurred during a TAM Airlines flight allegedly due to a malfunction of the thrust reverser manufactured by Northrop Grumman. The victims' families sued Northrop Grumman in a California state court, but Northrop Grumman moved to dismiss the case based on *forum non conveniens*, arguing that Brazil would be a better forum. The California court granted the dismissal, and the case was pursued in Brazil where Northrop Grumman faced a significant verdict. A Brazilian court awarded each family of the victims of a plane crash $1,111,111.11, along with 2/3 of the last annual salary earned by each deceased person until the age of 65. The court also imposed a 20% contempt of court penalty against Northrop Grumman for failing to post a bond required by the court, as well as a 20% attorney's fees penalty.

Northrop Grumman on the other hand, refused to enforce the Brazilian court's judgments in the United States. The plaintiffs argued that Northrop Grumman should be prevented from challenging the enforcement since it previously acknowledged the enforceability of the Brazilian judgment during the *forum non conveniens* stage. However, Northrop Grumman countered that its earlier position did not bind its subsequent challenges and that it was only acknowledging that a Brazilian judgment could be recognized by a California court if all legal requirements were met under California's Uniform Foreign Money-Judgment Recognition Act.

In addition, Northrop Grumman argued that the Brazilian judgment was unenforceable under California's recognition act because it did not specify a specific monetary amount, but instead required the court to calculate the lost salary of each deceased person from the time of the accident until they turned 65. Northrop Grumman objected to the Brazilian court's failure to complete the necessary calculations and provide a specific amount. However, there was no contingency remaining to be determined, and the necessary facts to complete the calculation, such as the deceased's final salary and date of birth, were likely to be documented facts that the US court could take judicial notice of. The defendant's argument that the judgment from the Brazilian court cannot be enforced due to the lack of a specific dollar amount is not likely to succeed. This is because the judgment still awards the recovery of a sum of money, making the amount clearly ascertainable, even if no specific number was assigned. This defence would likely fail whether the case was first filed in the United States or Brazil.

The solution proposed in the hybrid model in this thesis aims to modify the enforcement process for foreign judgments in two ways. Firstly, the enforcement motion would be put on an expedited docket to avoid further delays, even if the judgment is ultimately enforceable. Secondly, the interpretation of the Uniform Foreign Money-Judgments Recognition Act (UFMJRA) would favour the plaintiff in cases where the judgment was for a "sum of money" but returned to the US after being dismissed for *forum non conveniens*. This approach draws similarities to judgments that involve exchange rates and would improve the efficiency of the enforcement process.

Resolving the Ecuadorian environmental litigation is proving to be more challenging. The defendants are now claiming a complicated set of irregularities and changed circumstances, which they believe have compromised the judicial process. Chevron has raised concerns about corruption in the judicial process, political pressure on the judiciary, and unethical or illegal conduct by the plaintiffs' expert in his *ex parte* communications with the judge. These claims have been communicated through recent press releases. Chevron has maintained that its current objection to the Ecuadorian legal proceedings is not contradictory to its previous *forum non conveniens* motion, as the decline of the rule of law in Ecuador was not predictable 15 years ago.

Chevron's change in tactics is not necessarily a problem, as it is a normal part of advocacy, and the plaintiffs have also changed their tactics. However, the real issue is that Texaco's initial tactic of seeking to litigate in Ecuador, as it was common knowledge that the courts were not impartial, and there was always a risk that the political climate in Ecuador could shift unfavourably towards U.S. corporations. The decision of defendants to litigate in foreign countries known for corruption and incompetence should not come as a surprise to them. In the Chevron case, the plaintiffs had presented evidence during the original proceedings that the Ecuadorian courts were politicized and influenced by corruption. Chevron should have taken steps to investigate and ensure the adequacy of the Ecuadorian justice system. Moreover, Chevron's objections to *ex-parte* communications should be seen in the context of Ecuadorian legal practice, which is not unusual in that country, but would be considered unethical in the United States.

In this hypothetical scenario, if the proposed solution in the hybrid model had been applied during the negotiation stage, the district court would have conducted a more thorough analysis of the adequacy of the Ecuadorian justice system. Chevron would have been required to investigate the Ecuadorian justice system and confirm its adequacy for the application of the *forum non conveniens* doctrine and judgment enforcement purposes. If the district court had not used an inappropriate test, it is unlikely that the case would have been dismissed, as there was significant evidence of political pressure and a lack of judicial independence in the Ecuadorian courts. If the defendant had argued that the Ecuadorian system was adequate despite these issues, then any claims of inadequacy specific to the case would be left for the Ecuadorian appellate system to address.

However, judges handling current pending cases are advised to keep in mind the transnational access-to-justice gap. In the specific case of Chevron, since they have appealed the case in Ecuador, the Ecuadorian system should be allowed to address any case-specific issues of fraud and wrongdoing. If Chevron still objects to the judgment after the Ecuadorian process is completed, it should be given an opportunity to be heard on these issues during the enforcement stage. On the other hand, the national court should consider the time and complexity of proceedings and handle the case as efficiently as possible, while also addressing all objections to enforcement in a single

ruling to avoid the need for multiple appeals. However, if the proposed standards had been in place at the time of the dismissal stage, Chevron would not be allowed to object to the enforcement of the judgment unless there were significant, unforeseeable systemic changes to the Ecuadorian judiciary since the time of the *forum non conveniens* dismissal.

6.9 Conclusion

The proposed hybrid model is based on the harmonization of the benefits in both the *forum non conveniens* doctrine and the *lis pendens* rule. This hybrid model aimed to resolve the problem of tactical litigation both in the negotiation stage and the enforcement stage. At the negotiation stage, the solution proposed in the hybrid model includes the incorporation of a declining jurisdiction clause, the *lis pendens* clause, and the adoption of a "clearly inappropriate" test. The elements of the declining jurisdiction clause and *lis pendens* clause are drawn from the common law *forum non conveniens* doctrine and the civil law *lis pendens* rule. A declining jurisdiction clause requires a court seised to decline jurisdiction where it finds that it is clearly inappropriate or that there is another forum that is suitable to determine the proceeding.

However, to prevent abusive tactical litigation where a forum that is clearly appropriate has failed to determine its jurisdiction, the declining jurisdiction clause gives discretionary power to the court to continue with the proceeding. On other hand, the *lis pendens* clause requires that where proceedings involving same cause of action and between the same parties are pending before courts of different Member States, any other court seised should stay proceedings in favour of the court first seised. However, this clause also gives discretionary power to the court first seised to decline its own jurisdiction where it finds, either on its motion or by the application of the parties, that another forum is clearly appropriate to determine the proceeding. Such exceptions in this clause will help to prevent delay tactics in transnational litigation.

Furthermore, the adoption of an "inappropriate" test also requires a court to stay proceedings where the defendant established that proceedings before the forum is brought in a vexatious and oppressive manner to frustrate the defendant. This test is based on the Australian model used in the *Voth's* case. At the enforcement stage, this hybrid model proposed solutions that include consolidation of related matters, doctrine

of estoppel and inappropriate test. Consolidation of related matters will help to prevent duplicity of court cases and in turn prevent wastage of resources and cost. On other hand, the estoppel doctrine will help to bar a party from changing position in order to avoid the enforcement of the foreign judgment. Here, where a party has been successful in the application for stay of proceedings in favour of a foreign court, the estoppel doctrine then applies to stop the party from trying to avoid the outcome of the judgment from the foreign court.

The solution in the hybrid model can help to resolve the tactical litigation in the transnational litigation and strengthens the choice of court agreement. In addition, the hybrid model can also help to promote the principle of comity and in turn restore the discretionary power of the court. The solution proposed in the hybrid model will also stop multiplicity of court cases in transitional litigation, by consolidating all related matters. The next chapter provides a summary on the problems of tactical litigation identified in the thesis, and the current solutions proposed in the hybrid model is also summarised. The summary of the strength and the limitation of the hybrid model is covered in the chapter, followed by the summary of the impacts of the hybrid model in practice. The scope for further research is also discussed.

Chapter Seven - Summary, Conclusion & Recommendations

7.1 Introduction

This chapter provides a summary of the identified problems of tactical litigation in this thesis, and suggested solutions in the hybrid model proposed in this thesis. In addition, areas that will lead to further work to be developed in tactical litigation are also discussed in this chapter. The findings in this thesis will contribute to existing literature in transnational litigation particularly in relation to potential solutions to resolving tactical litigation in cross-border litigation. However, aside from the contribution of this thesis to literature, findings in this thesis will also springboard further areas for research thereby acting as a real tool for continued exploration and development of the law surrounding tactical litigation in transnational commercial litigation. It is also important to state that not only will solutions suggested in the hybrid model contribute to academia, but it will also have significant impacts in practice.

This chapter is divided into parts. A summary discussion of the problems of the tactical litigation identified is discussed in the first section, followed by summary discussion on the suggested solutions to address the problems of tactical litigation in this thesis. The third part provides a summary discussion of the strength of these suggestions to problems of tactical litigation and the fourth part evaluates the impacts of these solutions on the practice outside of academia, then the limitations of this thesis are also highlighted with the aim of recommending areas for further research study on issues of tactical litigation in the European Union.

7.2 The problems of tactical litigation discussed in this thesis.

Drawing from discussion in the chapter 1, 2, 4 and 5 in this thesis, the strict interpretation of *lis pendens* rule and non-compliance with the exclusive jurisdiction clause in the agreements are identified as problems of tactical litigation in transnational litigation. In addition, parallel litigation, conflicts of jurisdiction, the issues of related matters, and judicial discretion were also identified as problems of tactical litigation. The next subsections provide a summary of these identified problems of tactical litigation in transnational commercial litigation.

7.2.1 Strict interpretation of the *lis pendens rule*

The strict interpretation of the *lis pendens* rule under the Brussels regime is one of the problems of tactical litigation that is identified in this thesis. According to Delia Ferri[659] it was stated that the strict application of the provision of Article 21 provides opportunity for an unscrupulous party to deny a court selected in the choice of court agreements its jurisdiction, by relying on the Article 21 of the Brussels Convention. The lack of inconsistency in the provisions of Article 17[660] and Article 21[661] of the Brussels Convention contributed to the strict interpretation of the *lis pendens* rule to promote tactical litigation.

For example, Article 17 provides as follows:

> …[W]here a party has agreed[662] that a court or the courts of a Contracting State selected in the choice of court agreement should have exclusive jurisdiction to resolve the disputes that arise or may arise between the parties in the contract, such court or the Courts of a Contracting State shall have exclusive jurisdiction…[663]

[659] Ibid.
[660] Brussels Convention of 1968, art. 17.
[661] Brussels Convention of 1968, art. 21.
[662] Ibid, art 17 "…Parties can either agreeing in writing or by an oral agreement evidenced in writing…".
[663] Brussels Convention of 1968, art. 17.

On the other hand, Article 21 provides as follows:

> …Regardless of choice of court agreements between parties in the contract agreement, where proceedings involving same parties and same cause of actions, the named court on the agreement must stay its proceedings in the matter pending when the court first seised determined its jurisdiction in the matter…[664]

This strict interpretation of the *lis pendens* rule is illustrated in the ECJ decision in the case of *Erich Gasser GmbH v MISAT Srl,*[665]. The *Gasser* case involves an Austrian supplier (Gasser) and an Italian buyer (MISAT). Both parties had entered into an agreement that the Austrian national court should have jurisdiction to resolve any disputes that may arise from the breach of the agreement. But, instead of respecting the jurisdiction of the court selected in the agreement (that is, the Austrian court), the buyer (MISAT) brought actions against the Gasser (the supplier) in the Italian court.[666] As a result, the Italian became the court first seised while the Austrian court became the court second seised in the proceedings.[667]

But surprisingly, when Gasser raised the argument that the Austrian court should have jurisdiction in accordance with the provision in Article 17 of the Convention,[668] Gasser's argument was dismissed by the European Court of Justice. It was held that the court second seised of the matter which claimed jurisdiction under Article 17 of the Brussels Convention was obliged under Article 21 to stay proceedings until the court first seised had determined whether it had jurisdiction.[796] The decision of the ECJ clearly illustrates strict interpretation of Article 21 to make the *lis pendens* rule take priority over the choice of court agreement. The decision in *Erich Gasser* was criticised for facilitating what has been termed as *"*Italian torpedoes" due to a seven-year delay from the Italian court to decide on jurisdiction. In other words, even if the parties have chosen a specific court to handle any disputes, if there are proceedings involving the same parties and same cause of action in another court, the court named in the agreement must wait until the first court determines its jurisdiction in the matter before proceeding.

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[664] Brussels Convention of 1968, art. 21.
[665] Case C-116/02 [2005] QB 1.
[666] See chapter five of this thesis for full discussion.
[667] Ibid.
[668] Brussels Convention of 1968, art. 17.

7.2.2 Non-compliance with the exclusive jurisdiction clause

In this thesis, another problem identified in relation to tactical litigation is the non-compliance with the exclusive jurisdiction. The idea of overriding or denying the court of its exclusive jurisdiction in the proceedings has the implication to undermine the principle of party autonomy. Where party autonomy is cast into doubt, the parties to the proceedings are likely to feel unsafe. For instance, where the parties formed the opinion that a court selected in the choice of court agreements is likely to be denied its exclusive jurisdiction in favour of the first come-first-serve rule, the parties are more likely to withdraw from exercising their party's autonomy to choose a court in the agreement. In addition, where a court is denied of exclusive jurisdiction in favour of a court first seised, what happens is that the court selected in the choice of court agreement would have to wait for the court first seised to determine its jurisdiction in the case. This will further delay the length of proceedings and in turn lead to waste of time and cost.

This problem of non-compliance with the exclusivity of jurisdiction clause is illustrated in the case of *Websense International Technology v Itway SpA*[669]. In the case, the choice of court agreement gave exclusive jurisdiction to an Irish court in the eventuality of a legal dispute. However, when the dispute arose, the defendant brought proceedings before an Italian court thus making it the court first seised pursuant to the Brussels Convention. These prior proceedings in Italy forced the Irish court to stay proceedings pending a determination on jurisdiction in Italy. Although the court second seised would ultimately reclaim its exclusive jurisdiction, this might take a significantly long period of time thereby frustrating an innocent party to settle the matter out of court.

On the other hand, while the purpose of Article 27[670] of the Brussels I Regulations is aimed to prevent the issue of multiplicity of actions and support the doctrine of *res judicata*,[671] however, it has given opportunity for a litigant acting in bad faith to use the provision under the Article 27 as a tactical way to deprive innocent parties the autonomy to choose a court of their choice.[672] This is so because the Brussels I Regulations is

[669] [2014] IESC 5.
[670] Brussels I Regulations, art. 27.
[671] Ernst Schopflocher, (n 53).
[672] Ibid.

governed by the civil law *lis pendens* rule which suggests that a court second seised must stay proceedings in favour of a court first seised, even in a situation where the court second seised is the court that has exclusive jurisdiction to hear the disputes between the parties to the proceedings by virtue of the choice of court agreement.

While the provision in Article 21 of the Brussels Convention is construed towards preserving mutual respect among Member State Courts, however, the strict application of Article 21 of Brussels Convention promoted the problems of tactical litigation particularly by giving litigants acting in bad faith such opportunity to delay the resolution of the dispute in the agreed forum by first seizing a non-competent court. The next section in this chapter provides a summary of the proposed solution in the hybrid model to limit the scope of tactical litigation.

7.3 The solutions suggested in the proposed hybrid model.

To address the identified problem of tactical litigation, this thesis proposed hybrid model solutions that combine the benefits in both the doctrine of *forum non conveniens* and the *lis pendens* rule.[673] The hybrid model is a two-steps approach that focuses on how to resolve the problems of tactical litigation at both negotiation stage and enforcement stage. At the negotiation stage, proposed solutions under the hybrid model include incorporation of a declining jurisdiction and *lis pendens* clauses, and the adoption of a "clearly inappropriate" test. At the enforcement stage, proposed solutions include estoppel, consolidations of related matters and a "clearly inappropriate" test. The next subsection provides a summary discussion of the solutions suggested to address the problem of tactical litigation at the at the negotiation stage.

7.3.1 Summary of the hybrid model proposed solution at the negotiation stage.

In this thesis, the hybrid model proposes a solution to resolve the problem of tactical litigation at the negotiation stage which includes the incorporation of the declining jurisdiction and the *lis pendens* clause, and the adoption of a "clearly inappropriate" test. These solutions are derived from both the common law *forum non conveniens* and

[673] See discussion in chapter six.

civil law *lis pendens* rule. The declining jurisdiction and the *lis pendens* clause are aimed to prevent tactical litigation and strengthen the choice of court agreements. This clause also restores the discretionary power of courts to decline jurisdiction where there is a forum more appropriate to determine the case on merit. This clause is based on the elements of the *forum non conveniens* doctrine and the *lis pendens* rule.[674] For instance, any inconvenience to the parties involved in proceedings, as well as the nature and the possibility of getting access to evidence, are considered important in the application of this clause.

The declining jurisdiction clause also requires the court first seised to stay proceedings where it finds that it is clearly inappropriate, for example, where the party has selected a suitable forum in the choice of court agreement; or where it will be more practical for the parties to access witnesses or get justice in the court of another Member State. This will help to ensure flexibility. On other hand, the declining jurisdiction clause requires that the court second seised should stay its proceedings to allow the court first seised to establish its jurisdiction where proceedings involving same parties and same cause of action are pending before a court first seised. This is to ensure predictability and certainty in the judicial system. These are the principles underpinning the civil law *lis pendens* rule. The declining jurisdiction clause requires the court second seised to proceed with the proceeding using the discretionary power of the court, where the court first seised has failed to establish jurisdiction within a reasonable time. This is so important as it will help to avoid delay of proceedings and wastage of judicial resources.

The *lis pendens* clause is based on the civil law *lis pendens* rule.[675] This clause requires that the court second seised should stay its proceedings where proceedings involving same parties and same cause actions are pending before a court first seised. This is to prevent multiplicity of court cases and, in turn, ensure predictability and certainty in the judicial system. This clause is not applicable where the court first seised has failed to establish its jurisdiction in the matter within a reasonable time. In such instance, the court second seised will be allowed to proceed with the proceedings. On the other hand, the *lis pendens* clause will not be applicable where the court first seised finds, on the application of the parties in the proceedings, that the court of another Member State is

[674] As discussed in chapter six in this thesis.
[675] See discussion in chapter six in this thesis.

more clearly appropriate to determine the disputes between the parties. The declining jurisdiction and *lis pendens* clauses will help to meet the expectation of both the common law *forum non conveniens* and civil law *lis pendens* rules. A declining jurisdiction clause promotes fairness and flexibility, while the *lis pendens* clause, on the other hand, helps to avoid multiplicity of court actions, and in turn promotes certainty and predictability in the judicial system.

The solution proposed on the adoption of a "clearly inappropriate" test focuses on ensuring that a stay of proceedings is not used as a tool to deprive the right of a litigant to access justice or to frustrate an innocent party in the proceedings. A "clearly inappropriate" test is derived from the Australian model of the *forum non conveniens* doctrine. In essence, a "clearly inappropriate" test requires that the defendant should demonstrate that proceedings commenced by the plaintiff in the selected forum are brought in a vexatious and oppressive manner to frustrate the defendant. Where the defendant can establish that proceedings was brought in vexatious and oppressive manner to frustrate the defendant, then the court will be reluctant to grant a stay of proceedings in the matter. However, the "inappropriate" test will not be applicable where the party to proceedings merely raised the issue of convenience to favour the court of another jurisdiction. This "inappropriate" test will help to prevent the use of venue resolution tactics by requiring the defendant to establish that the selected forum is clearly inappropriate. The next subsection provides a summary discussion of the solutions suggested in this thesis to address the problem of tactical litigation at the enforcement stage.

7.3.2 Summary of the proposed hybrid model solution at the enforcement stage.

In this thesis, the solutions proposed in the hybrid model to resolve the problem of tactical litigation at the enforcement stage include the inclusion of an estoppel principle, and the consolidation of related matters. The estoppel principle suggests that defendants should be stopped from arguing against the recognition and enforcement of judgment obtained in a proceeding. The principle of estoppel suggests that defendants who had successfully dismissed a suit in favour of a foreign court should be prevented from arguing against any judgment reached by the foreign court. The principle of estoppel will help to protect the integrity of the judicial system by stopping defendants from

engaging in the practice of deliberately changing positions according to the exigencies of the moment or to favour self-interest. This principle of estoppel will also help to promote predictability and in turn strengthen international mutual trust.

This thesis also suggested consolidation of related matters at the enforcement stage to prevent multiplicity of court cases and in turn avoid waste of judicial resources. As discussed in chapter six in this thesis, the consolidation principle simply suggests that where proceedings are related, that is involving the same parties and the same cause of action, the court should consolidate all the related matters with the consent of the parties in the proceedings. Aside from preventing multiplicity of court action and waste of judicial resources, consolidation of related matters will help to ensure predictability.

Having provided a summary discussion of the suggested solutions the hybrid model, the next section assesses the strength of these solutions to determine whether the solutions in this hybrid model would have the capacity to forestall tactical litigation, practically and theoretically. This section discusses the strength of the solutions in the hybrid model and evaluates their benefits to resolve the problems of tactical litigation in this thesis. The potential strength of the solution proposed in the hybrid model in the negotiation stage is discussed.

7.4. The strength of solutions suggested at negotiation stage.

At the negotiation stage, suggested solutions include the incorporation of declining jurisdiction and *lis pendens* clauses, and the adoption a "clearly inappropriate" test. A declining jurisdiction clause has the potential to strengthen the choice of court agreement and promote the *forum non conveniens* doctrine. Buonauiti[676] stated that it is important that the courts should consider the choice of court agreement between parties to the proceedings when determining jurisdiction in transnational litigation. This is to ensure that the principle of party autonomy is respected and in turn the confidence of the parties in the legal system. The *lis pendens* clause on the other hand will help to forestall multiplicity of court cases by preventing an unscrupulous party from instituting a parallel litigation, particularly where the same matter is already pending before a Member State court. On the other hand, the adoption of a "clearly

[676] Ibid.

inappropriate" test has the potential to prevent multinational corporations from engaging in the practice of tactical game-playing to bypass internal regulatory laws. Alan Reed[677] stated that the traditional 'inconvenient' test provides a leeway for multinational corporations to escape liability for breach of internal regulatory laws. The inclusion of the "clearly inappropriate" test will help to prevent the use of venue resolution tactics to deprive the exclusive jurisdiction of a court selected in the choice of court agreement.

At the enforcement stage, the principle of estoppel has potential to strengthen the integrity of the judicial process and ensure predictability. In addition, the estoppel principle also has the potential to strengthen the principle of mutual trust by requiring that defendants should respect the outcome of the foreign court judgment particularly where the defendant had successfully dismissed a suit in favour of a foreign court. The principle of mutual trust and comity has been recognised by Member States whereby they enforce and acknowledge the judgment of a foreign court of another state.[678]

On the other hand, consolidation of related matters proceedings has the potential strength to stop multiplicity of court actions. In addition, consolidation of related matters also has potential to promote predictability in the judicial system. This is so because, where related matters are consolidated, there will be a consistent outcome unlike where related matters are decided by courts of different Member States.

The next section discusses the impacts of suggested solutions in practice, which is beyond academic debate, for instance, in the aspect of strengthening the principle of mutual trust and international comity, restoring judicial discretionary power to the court, preventing wastage of judicial resources and cost.

[677] Reed, Alan, "Venue Resolution and Forum Non Conveniens: Four Models of Jurisdictional Propriety", (2013), Journal of Transnational Law and Contemporary Problems, 22(2), pp. 369-454.
[678] *Hilton v Guyot* (1895) 159 US 113 203-03.

7.5 The impact of the proposed hybrid model solutions in practice

Beyond academia, the proposed hybrid model may have an impact to promote international comity and mutual trust among Member States. According to Michael Garner it is stated that: "[T]he willingness of Australian courts to stay proceedings brought before them on the grounds of *forum non conveniens* is the litmus test of the country's attitude towards the 'superiority' of its own courts and legal system, the respect of the courts and legal systems of other countries and the principle of international comity." [679]

The proposed hybrid model may have an impact on the court's discretionary power. According to Allan Reed, "the removal of a discretionary power to stay proceedings may produce, blatantly chauvinistic jurisdictional practices against the rest of the world".[680] However, the declining jurisdiction clause and the *lis pendens* clause would restore the court's discretion by allowing the court second seised to continue with proceedings if the first court fails to establish jurisdiction within a reasonable time. However, it is important to ensure that the court's discretion is used judiciously and in a manner that is fair to both parties. Additionally, the effectiveness of the hybrid model in preventing delay tactics and Italian torpedo action will depend on how it is implemented in practice. It is possible that some parties may find ways to circumvent the rules or use them to their advantage, which could undermine the efficacy of the model. In addition, consolidation of related matters would help to prevent wastage of resource and in turn reduced cost. Where related matters are consolidated, this helps both the parties and the courts to prevent wastage of cost and judicial resources.

7.6 The scope for further research in this area

Further research could explore how the harmonization of the *forum non conveniens* doctrine and the *lis pendens* rule can be applied to cases where the parties have selected a court in a third state. While the Recast Brussels Regulation includes provisions for

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[679] Michael Garner, "Towards an Australian Doctrine of Forum Non Conveniens" (1989) 38 International and Comparative Law Quarterly 361.
[680] Ibid. Also see: Kaye, "The EEC Judgments Convention and the Outer World: Goodbye to *Forum Non Conveniens"* (1991) Journal of Business Law, 47, at 50.

recognizing jurisdiction and enforcing judgments from third state courts under certain conditions, further study could examine how this process could be improved. This thesis does not address issues related to the jurisdiction of a third state court, but it would be interesting to conduct research in this area, especially considering the U.K.'s exit from the EU. This is because the recognition and enforcement of judgments obtained from a court of a third state under Article 33 and 34 of the Recast Brussels Regulation is subject to several conditions, such as the requirement that the court of the third state should be the first to be seised in the proceedings.

Further study can also be conducted to investigate the provision of an asymmetric jurisdiction clause in the Recast Brussels Regulation. This asymmetric jurisdiction clause allows one party to sue in a particular court of a specified jurisdiction, while the other party can sue in any jurisdiction. This clause may promote tactical litigation cross-border matters. On the other hand, it would be valuable to conduct further research to determine if the proposed hybrid model can effectively be integrated into the legal systems of both common law and civil law countries, considering the political and legal differences that exist between them.

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