

A Comparative Study of the Fundamental Juridical Nature, Classification and Private Law Enforcement of Jurisdiction and Choice of Law Agreements in the English Common Law of Conflict of Laws, the European Union Private International Law Regime and the Hague Convention on Choice of Court Agreements

A thesis presented for the degree of Doctor of Philosophy in Law at the University of Aberdeen



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2015

Declaration

This thesis has been composed solely by the candidate, Mukarrum Ahmed.

It has not been accepted in any previous application for a degree.

The work has been carried out solely by the candidate.

All quotations have been distinguished clearly and the sources of information specifically acknowledged.

Signed:

Mukarrum Ahmed

16 December 2015

Hypotheses are nets: only he who casts will catch.

Georg Philipp Friedrich Freiherr von Hardenberg, *Novalis Schriften* (Friedrich Schlegel and Ludwig Tieck ed, 1802) Dialogue 5, 429.

*There is nothing more necessary to the man of science
than its history,
and the logic of discovery . . . : the way error is
detected, the use of
hypothesis, of imagination, the mode of testing.*

Lord Acton cited in Karl Popper, *The Logic of Scientific Discovery* (Routledge Classics, Routledge 2005) xvii.

ACKNOWLEDGEMENTS

I am grateful to my doctoral supervisor, Dr Jonathan Fitchen, whose encouragement and guidance were at all times generous and cheerfully administered. I am indebted to Professor Paul R Beaumont, the internal examiner of my PhD thesis and a mentor at the Centre for Private International Law, University of Aberdeen. The monthly meetings of the Centre for Private International Law under Professor Beaumont's dynamic leadership will be cherished as a valuable source of inspiration on the long and arduous path to the PhD. I would like to thank the College of Arts and Social Sciences and the School of Law, University of Aberdeen for facilitating my research project with a fully funded doctoral scholarship. The Principal's Excellence Fund Award deserves credit for funding my participation in the 10th Anniversary of the *Journal of Private International Law* Conference at the Faculty of Law, University of Cambridge. Both Professor Robin Evans-Jones and Dr Christa Roodt played a significant role as second supervisors during the latter part and the formative stages of my PhD respectively at the School of Law, University of Aberdeen. Dr Veronica Ruiz Abou-Nigm of Edinburgh Law School, University of Edinburgh deserves special mention for acting as the external examiner of my PhD thesis.

At a more personal level, a full time commitment such as the PhD could not have been possible without the unflinching support and encouragement of my wife, Nau'ma and the endearing yet momentary lapses of focus on the intellectual juggernaut of the PhD stimulated by my daughter, Nurayn. My parents have been a very strong pillar of support all along and I cannot fathom the culmination of my academic endeavours save for the indelible impact that they have had on my life.

Mukarrum Ahmed

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December 2015

Contents

1. Introduction	10
Point of Departure	10
Thesis Statement	11
Methodology	12
Contribution to Knowledge	22
2. Private International Law, Party Autonomy and the English ‘Dispute Resolution’ Paradigm	25
The ‘Public’ Role and Function of Private International Law	25
Private International Law Norms as Secondary Rules for the Allocation of Regulatory Authority and the Separation of Functions within Jurisdiction and Choice of Law Agreements	32
The Emerging Third Paradigm of Jurisdiction and the Quest for a More Comprehensive Understanding of Party Autonomy	37
The Emerging Paradigm of Party Autonomy and the Continued Viability of Private Law Remedies for Breach of Jurisdiction and Choice of Law Agreements	41
The Emerging Paradigm of Party Autonomy and the Proposed Reorganization of Private International Law Rules on the Basis of a Systematic Distinction between Agreements and Non Agreements	47
Conclusion	49
3. The Analogy between Arbitration Agreements and Jurisdiction Agreements: The Technique of Severability and Whether the Contractualization Phenomena Distorts the Fundamental Nature and Effects of Jurisdiction Agreements?	51
Introduction	51
Severability in Dispute Resolution Agreements	52
Interim Conclusion	55
Deconstructing the Arbitration Agreement Analogy	56
Conclusion	67
4. Private Law or Public Law?: An Assessment of the Fundamental Juridical Nature and Classification of Jurisdiction Agreements	70
Fundamental Juridical Nature and Classification of Choice of Court Agreements	70
Can a Non-Exclusive Jurisdiction Agreement be Breached?	73
Interim Conclusion	76
Hybrid Jurisdiction-Arbitration Agreements	76
Asymmetric or Unilateral Choice of Court Agreements	78
Effectiveness of Asymmetric Jurisdiction Agreements and Article 25 of the Recast Regulation	82

Validity	83
Certainty.....	85
Form	86
Fairness	88
Interim Conclusion	89
Effectiveness of Asymmetric Jurisdiction Agreements and Article 23 of the Brussels I Regulation	90
Asymmetric Agreements Subject to National Law	91
Fundamental Juridical Nature and Classification of Choice of Court Agreements under the Brussels I Regulation (Recast)	92
Conclusion	97
5. ‘Dispute Resolution’ Epitomized: An Assessment of the Damages Remedy for Breach of Jurisdiction Agreements	99
Preliminary Issue: Practical Solutions for Enforcing English Exclusive Choice of Court Agreements by Drafting Clauses to Guarantee the Secondary Enforcement of Jurisdiction Agreements.....	99
Undertakings Not to Breach the Choice of Court Agreement	100
Indemnity Clauses and Liquidated Damages Clauses Enforcing the Breach of a Choice of Court Agreement	101
Undertakings and Indemnity Clauses Enforcing the Breach of the Choice of Law Agreement	105
The Legal Basis of the Claim for Damages for Breach of a Choice of Court Agreement.....	107
Introduction	107
Jurisdiction to Enforce Breach of a Choice of Court Agreement: Can an Anti-Suit Injunction or Damages Remedy be Awarded for Breach of a Foreign (Non-English) Choice of Court Agreement?.....	109
Contract.....	117
Applicable Law of the Contractual Claim for Damages.....	121
Tort.....	124
Applicable Law of the Tortious Claim for Damages	131
Restitution.....	137
Applicable Law of the Restitutionary Claim for Damages.....	140
Damages in Equity.....	144
Does a Substantive Equitable Right not to be Sued Abroad Vexatiously Exist?	144
Choice of Law and Equity	146

Equitable Damages	147
Damages in Lieu of an Injunction: Section 50 of the Senior Courts Act 1981	151
Recognition and Enforcement of the Judgment Awarding the Damages Remedy	154
6. An Overview of the Case Law on the Damages Remedy for Breach of Exclusive Jurisdiction Agreements: Firmly Entrenched or a Nascent Remedy in Need of Development?	160
The English Court of Appeal Validates the Damages Remedy for Breach of English Exclusive Jurisdiction Agreements: Mutual Trust and Interference with the Effectiveness of the Multilateral Jurisdiction and Judgments Order of the Brussels I Regulation?	169
Damages for the Tort of Inducing Breach of a Choice of Court Agreement against a Claimant's Legal Advisers: Whether England is the Place Where the Economic Loss has occurred under Article 5(3) of the Brussels I Regulation?	179
7. Assessing the Damages Remedy for Breach of Choice of Court Agreements	186
Arguments in Favour of the Damages Remedy for Breach of Choice of Court Agreements..	186
Arguments Against the Damages Remedy for Breach of Choice of Court Agreements	193
The Principle of Comity and the Damages Remedy	200
Introduction	200
Two Conceptions of Comity	200
Comity and the Enforcement of Exclusive Choice of Court Agreements by the English Courts	201
Two Fundamental Confusions.....	204
Conclusions	207
A Comparison of the Damages Remedy with Contractual Anti-suit Injunctions: Implications for Comity and the Relative Effectiveness of Each Remedy	210
8. An In Depth Examination of the Damages Remedy for Breach of English Exclusive Jurisdiction Agreements under the English Common Law Jurisdictional Regime	213
9. The Damages Remedy and the Brussels I Regulation	230
The Viability of the Damages Remedy under the Brussels I Regulation: Will the Backdoor Approach of the English Common Law be Permitted?	230
Choice of Court agreements and the Brussels I Regulation (Recast).....	239

The Scope For Pre-emptive Proceedings and the Damages Remedy for Breach of Choice of Court Agreements in the Brussels I Regulation (Recast): Rendered Redundant or Bequeathed a New Lease of Life?.....	257
10. The Hague Convention on Choice of Court Agreements: Qualified Mutual Trust and the Scope for Private Law Remedies for Breach of Exclusive Choice of Court Agreements	269
11. Damages for Breach of Choice of Law Agreements	285
The Primacy of Jurisdictional Disputes in Private International Law	285
Fundamental Juridical Nature and Classification of Choice of Law Agreements.....	288
Private Law Enforcement of Choice of Law Agreements.....	303
12. Conclusions and Contributions to Knowledge	310
Table of Cases, Table of Legislation and Bibliography.....	320

*Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfilment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion. The obligation of a contract "is the law which binds the parties to perform their agreement."*¹

*'the convention is necessarily based on the trust which the Contracting States accord to one another's legal systems and judicial institutions' and 'a prohibition imposed by a court, backed by a penalty, restraining a party from commencing or continuing proceedings before a foreign court undermines the latter court's jurisdiction to determine the dispute'*²

¹ Justice Swayne in *Von Hoffman v. City of Quincy*, 71 U.S. 535, 552 (1867).

² Case C 159/02 *Turner v Grovit* [2004] ECR I-3565 [24] and [27].

Chapter 1 - Introduction

Point of Departure

English commercial private international law in general and jurisdiction and choice of law agreements in particular have been characterized as private law matters, where the growing influence of general common law contract and commercial law principles is increasingly evident.³ This is supported by the relative effect of an exclusive choice of court agreement in English law as giving rise to an independently enforceable *inter partes* contractual obligation to sue only in the elected forum, over and above their more traditional international procedural and allocative role of prorogating and derogating the jurisdiction of courts. Similarly, Briggs argues by analogy with arbitration and jurisdiction agreements, that the choice of law agreement also gives rise to an independently enforceable *inter partes* contractual obligation to abide by the applicable law specified by the clause and not to act in a way that will undermine or subvert that chosen law or otherwise make it impossible for that chosen law to operate. This contractual aspect of the choice of law agreement is in addition to its orthodox international allocative role of specifying the law applicable to the contract. For Briggs, the obligations contained within a comprehensive dispute resolution agreement are capable of being breached and where breached will like any ordinary contractual breach lead to both primary and secondary remedies. Briggs is never shy of advancing the *pacta sunt servanda*⁴ (Latin for 'agreements must be kept'⁵) principle as the

³ See Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford Private International Law Series, OUP 2008) 5; Edwin Peel, 'Introduction' in Pascal de Vareilles-Sommieres (ed.), *Forum Shopping in the European Judicial Area* (Hart Publishing, Oxford 2007) 1, 2-4.

⁴ Briggs, *Agreements* (n 3) Preface ix, 22, 195; Trevor C Hartley, 'The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws' (2005) 54 *ICLQ* 813, 821; Alex Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (CUP 2009) Chapter 3, 78; cf Briggs, *Agreements* (n 3) 13, notes that the principle of *pacta sunt servanda* cannot coexist with a view that rules of conflict of laws are rules of a public law character; Jürgen Basedow, *The Law of Open Societies: Private Ordering and Public Regulation in the Conflict of Laws* (Brill Nijhoff, Leiden 2015) 135-136, 145-146, notes that the binding effect of choice of law agreements flows from the universal legal principle of *pacta sunt servanda*. However, this does not mean that the agreement regulates or proscribes the conduct of the parties because a choice of law agreement is properly conceived of as a 'self-fulfilling (dispositional) contract'; HLA Hart when discussing the nature of international law and the possible formulation of a 'basic norm' of international law has discussed the principle of *pacta sunt servanda* as a potential candidate. However, he reasoned that the view has been abandoned by many theorists and it is incompatible with the fact that not all obligations under international law arise from '*pacta*', however widely that term is construed. It should be noted that Hart is recognizing that regulatory constraints played at least some role within an emerging international legal order. Therefore, the principle of *pacta sunt servanda* does not even offer a satisfactory and comprehensive justification of the customary behaviour of states in public international law: See HLA Hart, *The Concept of Law* (OUP 1961) 228; For the relevance of the general principle of *pacta sunt servanda* in relation to the law of treaties in public international law, see, the Preamble and Article 26 of the Vienna Convention on the Law of Treaties, signed at Vienna on May 23, 1969, entered into force on January 27, 1980, (1980) UNTS 332, 339; See also, Hans Wehberg, '*Pacta Sunt Servanda*' (1959) 53 *American Journal of International Law* 775.

basis for the enforcement of such agreements by stays⁶ and anti-suit injunctions.⁷ In *Agreements on Jurisdiction and Choice of Law* (hereinafter referred to as “Agreements”), Briggs carefully develops a series of powerful interconnected arguments to support probably the most significant and novel contribution of the monograph to English legal practice; the central argument that a claim for damages for breach of a jurisdiction or choice of law agreement is sustainable in principle because it is derived from the orthodox understanding of such clauses as contractual obligations.⁸ The damages remedy for breach of jurisdiction and choice of law agreements has also been enticing enough to garner the attention of this author and is the subject of this PhD thesis. Seeking to derive secondary obligations from the breach of the primary obligations of a comprehensive dispute resolution agreement, Briggs argues that:⁹

There is no reason to suppose.....that the bargain for the resolution of disputes was itself incapable of giving rise to secondary as well as to primary obligations. Unless there is something distinctive about the nature of an agreement for the resolution of disputes, it shares with other contracts a framework of promises limiting the freedom the parties would otherwise have.....If it shares this much, it is reasonable to suppose that it shares the capacity to generate secondary obligations, which arise on the breach of primary obligations, which are designed to encourage observance of the duties undertaken, and where this fails, to provide compensation for breach.

Thesis Statement

During the course of this doctoral thesis, it will be argued that it is misconceived to think of jurisdiction and choice of law agreements as unilaterally enforced domestic *private law* obligations within an English ‘dispute resolution’ paradigm because multilateral private *international law* rules are essentially secondary rules for the allocation or public ordering of regulatory authority which may not permit a separation of functions or the relative effect of such agreements.

⁵ Bryan A Garner (ed), *Black's Law Dictionary* (8th ed. West Group 2004); cf. ‘Agreements are to be kept’: Jonathan Law and Elizabeth A Martin (ed.), *Oxford Dictionary of Law* (7th Edition, OUP 2009).

⁶ See *The Eleftheria* [1970] P 94; *The El Amria* [1981] 2 Lloyd’s Rep 119; *The Sennar (No 2)* [1985] 1 WLR 490

⁷ See *Continental Bank NA v Aeakos SA* [1994] 1 WLR 588, 598 (CA); *The Jay Bola* [1997] 2 Lloyd’s Rep 79; *OT Africa Line Ltd v Magic Sportswear Corp* [2005] EWCA Civ 710 [33].

⁸ Briggs, *Agreements* (n 3) Chapter 8 (Damages for breach of jurisdiction agreements), Chapter 11 (Damages for breach of choice of law agreements); For the development of the idea of the damages remedy in the writings of the pre-eminent English common law proponent, see, Adrian Briggs, ‘Decisions of British Courts during 2001 involving Questions of Private International Law’ (2001) 72 *British Yearbook of International Law* 437, 446-452; Adrian Briggs, ‘Anti-suit Injunctions and Utopian Ideals’ (2004) 120 *LQR* 529, 532; Adrian Briggs, ‘The Principle of Comity in Private International Law’ (2012) 354 *Recueil des Cours* 65, 132-133; Adrian Briggs, *Private International Law in English Courts* (OUP 2014) 345-347.

⁹ Briggs, *Agreements* (n 3) 143-144.

Methodology

It may be observed that if jurisdiction and choice of law agreements are deemed to be private law issues then they are more in the nature of primary conduct regulating rules as opposed to secondary power conferring rules. A paradigm focused primarily on unilaterally regulating the domestic private law rights of the parties to the litigation and with little regard for the international allocative or distributive function of private international law rules is susceptible to venture too far in that direction and devise private law remedies to enforce private law agreements. These remedies are intended to achieve substantive justice for the litigants in the individual case but they may also end up compromising a broader notion of justice in private international law, encompassing both the requirements of international structural order and substantive fairness. Structural order is compromised in the unilateral private law enforcement of jurisdiction and choice of law agreements as such enforcement gives rise to a clash of sovereign legal orders and also the possibility of 'regime collision'¹⁰ by interfering with the jurisdiction and judgments apparatus of foreign courts which a multilateral conception of private international law is supposed to prevent in the first place.

It is envisaged that an enquiry into the damages remedy for breach of jurisdiction and choice of law agreements will constitute a major flank of this research project's central argument and will serve two primary purposes. First, the damages remedy is a necessary consequence of an enquiry concerning the fundamental juridical nature and classification of jurisdiction and choice of law agreements.¹¹ An in depth examination of the fundamental juridical nature of these agreements may offer insights into whether the contractual private law characterization attributed to them under orthodox English common law thinking is the best method of conceptualizing their classification and ramifications. Significantly, the question of the appropriate characterization of choice of court agreements lies at the very root of the legal basis of the damages remedy. If a procedural or public law classification of choice of

¹⁰ See Andreas Fischer-Lescano and Gunther Teubner, 'Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999, 1000, referring to the emergence of 'inter-systemic conflicts law' which may for our purposes be understood not as collisions between the conflicts rules of nation states, but as collisions between the conflicts rules of distinct multilateral private international law regimes; Nikitas Hatzimihail, 'General Report: Transnational Civil Litigation Between European Integration and Global Aspirations' in Arnaud Nuyts and Nadine Watté (eds.), *International Civil Litigation in Europe and Relations with Third States* (Bruylant 2005) 595, 654 employs the term 'conflict of conventions' to describe the interaction of different international instruments, especially those dealing with private law matters.

¹¹ See Chapter 4 below.

court agreements is preferred the argument of the contractual damages remedy for breach of such agreements becomes significantly weaker.¹² Under the ‘procedural contract’ classification, choice of court agreements are merely “statements of consent” to the jurisdiction of the selected court which may or may not be conclusive in determining the question of jurisdiction. Unlike a substantive characterization, there is no independently enforceable promissory private law element embodied in the jurisdiction agreement under the procedural classification. The function of the choice of court agreement is solely to prorogate or derogate the jurisdiction of a court. In Chapter 7 of *Agreements*, Briggs classifies Article 23 of the Brussels I Regulation as a sort of a unilateral contract between each of the parties individually and the court with no room for a contractual analysis in the language of substantive rights and obligations.¹³ Under such a conception, party autonomy under the Brussels I Regulation is part of a hierarchical framework of jurisdictional rules which operate by the ‘formal waiver of jurisdictional privilege’ by both the parties in a formally valid choice of court agreement.¹⁴

The second purpose of our enquiry is that an examination of the viability of the damages remedy will raise the broader issue of the proper and legitimate role of private law remedies for enforcing jurisdiction and choice of law agreements in private international law.¹⁵ The identification, articulation and development of the complex issues surrounding the damages remedy will require a measured approach that is cognizant to the demands of the principle of mutual trust and the *effet utile* of EU law, the variable nature of the constraints imposed by the notion of comity, the *res judicata* effect of a foreign judgment and the principle of finality in international dispute resolution. The range of issues invoked by the damages remedy include *inter alia* those related to procedure, substance, public law, private law,

¹² For a discussion of the procedural or ‘public law’ classification of jurisdiction agreements, see LC Ho, ‘Anti-suit Injunctions in Cross Border Insolvency: A Restatement’ [2003] *ICLQ* 697, 707-709; CJS Knight, ‘The Damage of Damages: *Agreements on Jurisdiction and Choice of Law*’ [2008] *Journal of Private International Law* 501; Andreas F Lowenfeld, *Conflict of Laws: Federal, State and International Perspectives* (2nd Edition New York: Matthew Bender 1998) 308; F Sparka, ‘Classification of Choice of Forum Clauses and their Separability from the Main Contract’ in *Jurisdiction and Arbitration Clauses in Maritime Transport Documents: A Comparative Analysis* (Hamburg Studies on Maritime Affairs 19, Springer-Verlag Berlin Heidelberg 2010) 81; Jonas Steinle and Evan Vasiliades, ‘The Enforcement of Jurisdiction Agreements under the Brussels I Regulation: Reconsidering the Principle of Party Autonomy’ [2010] *Journal of Private International Law* 565.

¹³ Briggs, *Agreements* (n 3) Chapter 7.

¹⁴ *ibid* 524.

¹⁵ Alexander Layton, ‘The Prohibition on Anti-Suit Injunctions and the Relationship Between European Rules on Jurisdiction and Domestic Rules on Procedure’ in Pascal de Vareilles-Sommieres (ed.), *Forum Shopping in the European Judicial Area* (Hart Publishing, Oxford 2007) 91, 96, notes that remedies are concerned with the substantive private law regime of a Member State and as a result they should be beyond the scope of the Brussels Convention as interpreted by the European Court.

national law, international law, European Union law and comparative law. In view of both the European ‘procedural contract’ conception of a jurisdiction agreement and the primacy accorded to the principles of mutual trust and the *effet utile* of EU law, it will be argued that the prospects of the damages remedy taking root and making much headway before the CJEU interpreting the Brussels I Regulation are substantially reduced. The dynamics of the damages remedy in the context of the European Judicial Area are examined in Chapter 9 below.

It has been argued that the ‘great divide’¹⁶ between the English common law and continental civil law on matters of jurisdiction and the enforcement of jurisdiction agreements in particular has led to ‘mutual incomprehension’¹⁷ on both sides.¹⁸ Indeed, the prevalence of a ‘fundamentally’¹⁹ or ‘paradigmatically’²⁰ different jurisdictional regime has been a source of an uneasy friction which has at times surfaced with the principles of the common law conflict of laws being on “trial” at the Court of Justice of the European Union.²¹ On the one hand, a ‘theory driven’²² legislative and territorial ‘conception’²³ of civil

¹⁶ Aude Fiorini, ‘The Codification of Private International Law in Europe - Could the Community Learn from the Experience of Mixed Jurisdictions’ (2008) 23 *Tulane European and Civil Law Forum* 89, 100.

¹⁷ Briggs, *Agreements* (n 3) 201.

¹⁸ *ibid* 8: When referring to the common law conception of jurisdiction agreements as contracts, Briggs refers to a ‘clash of legal cultures’ precipitated by the fact that: ‘the intellectual tradition of private international law has been to be more wary of appeals to plain contractual reasoning, on the footing that the international element in conflicts cases calls for special attention and different sensitivity’; Jan-Jaap Kuipers, ‘Party Autonomy in the Brussels I Regulation and Rome I Regulation and the European Court of Justice’ (2009) 10 *German Law Journal* 1505, 1517 <<http://www.germanlawjournal.com/index.php?pageID=11&artID=1224>> accessed 1 January 2013, notes that ‘prorogation of jurisdiction was considered to be a *public law* matter on the continent, but was classified as a *contract* by common law’ (Emphasis added).

¹⁹ Jonathan Harris, ‘Understanding the English Response to the Europeanisation of Private International Law’ (2008) 4 *Journal of Private International Law* 347, 352-353; See Anna Gardella & Luca G Radicati Di Brozolo, ‘Civil Law, Common Law and Market Integration: The EC Approach to Conflicts of Jurisdiction’ (2003) 51 *American Journal of Comparative Law* 611; See also, Peter F Schlosser, ‘Lectures on Civil-Law Litigation Systems and American Cooperation With Those Systems’ (1996-1997) 45 *University of Kansas Law Review* 9, 37-38; Friedrich Juenger, ‘Judicial Jurisdiction in the United States and in the European Communities: A Comparison’ (1984) 82 *Michigan Law Review* 1195, 1210-1212.

²⁰ See Ralf Michaels, ‘Two Paradigms of Jurisdiction’ [2006] *Michigan Journal of International Law* 1003; cf Giesela Ruhl, ‘Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency’ in Eckart Gottschalk and others (eds.), *Conflict of Laws in a Globalized World* (CUP 2007) 153, conducts a comparative analysis of party autonomy in the private international law of contracts and argues that American and European law demonstrate a high degree of convergence in relation to the grant and design of party autonomy and its limitations as opposed to choice of law in general.

²¹ The triumvirate of decisions in *Gasser*, *Turner* and *Owusu* have been referred to as ‘fifteen months of infamy’ in: Adrian Briggs, ‘The Impact of Recent Judgments of the European Court on English Procedural Law and Practice’ (2005) Vol. II, No. 124 *Zeitschrift für Schweizerisches Recht* 231, 232; Oxford Legal Studies Research Paper No. 11/2006 <Available at SSRN: <http://ssrn.com/abstract=899689>> accessed 5 February 2014

²² Hartley, *The EU and the Common Law of Conflict of Laws* (n 4) 814.

²³ A distinction between the terms ‘concepts’ and ‘conceptions’ is drawn by the author in the sense frequently employed by Dworkin in Ronald Dworkin, *Law’s Empire* (Harvard University Press 1986) 71-72; See Stephen Guest, *Ronald Dworkin* (Edinburgh University Press 1992) 34-37; The distinction was openly adopted by Rawls in John Rawls, *A Theory of Justice* (Harvard University Press 1971) Chapter 5.

jurisdiction does not empower a judge in one state to rule on the jurisdiction of another state. On the other, a practice driven conception of civil jurisdiction which accords primacy to the principle of *pacta sunt servanda* will not refrain from enforcing the private law rights and obligations of the parties in relation to a jurisdiction agreement.²⁴ The lack of subject matter jurisdiction will not deter the English court with jurisdiction *in personam* from enforcing a jurisdiction agreement through anti-suit injunctions and the damages remedy. Briggs has compared the communication between these disparate approaches to private international law across the common law and civil law divide with the Chinese metaphor of 'a chicken talking to a duck'.²⁵

This doctoral research project includes amongst its foremost aims, the removal of any subsisting doubts amongst English common lawyers that there are no viable alternatives to a contractual private law paradigm for jurisdiction and choice of law agreements and their enforcement. Indeed, a greater appreciation of the international procedural or public law dimension of jurisdiction and choice of law agreements and their enforcement in the English common law will pave the way for a possible reconciliation between the seemingly disparate and opposed positions of the English common law and civil law Member States of the EU with respect to these clauses and private international law in general. At the same time, the impact of the English common law's pragmatic, 'practice driven'²⁶, pro-enforcement approach on the continental civil law conception of jurisdiction and choice of law agreements and private international law as a whole warrants a careful and nuanced assessment. It would be grossly unfair to cast aside the English common law's very significant original contribution on the developing path towards an eventual reconciliation of the fundamental nature and consequences of jurisdiction and choice of law agreements - the fruits of the common law's labour will be examined and accorded perspective.

²⁴ Peter Nygh, 'The Preliminary Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters' in P Borchers & J Zekoll (eds.), *International Conflict of Laws for the Third Millennium: Essays in Honor of Friedrich K Juenger* (Transnational Publishers, Ardley 2001) 264, notes that traditionally common law judges have been guided by pragmatism and a strong commercial sense and these concerns have been 'placed on a pedestal'; Hartley, *The EU and the Common Law of Conflict of Laws* (n 4) 814-815, observes that the civilian systems focus on the *structure* (and logic) of the law while common law systems are based on the *operation* (and experience) of the law. He also highlights the existence of a conflict between common law systems and civilian systems in relation to the interests of the parties assuming priority in the former and the interests of the States involved taking priority in the latter; TC Hartley's understanding of the common law in general reflects the famous aphorism: 'The life of the law has not been logic; it has been experience.' in OW Holmes, *The Common Law* (1st Edition, Macmillan, London 1882) 1; cf Edward Coke, *The First Part of the Institutes of the Laws of England, or, A Commentary on Littleton* (first published 1628, F Hargrave and C Butler eds, 19th Edition, London 1832) 97b: 'Reason is the life of the law'.

²⁵ Briggs, *Agreements* (n 3) 201.

²⁶ Hartley, *The EU and the Common Law of Conflict of Laws* (n 4) 814.

This is an area of the law where the chances of cross fertilization of legal concepts from one legal tradition to another in the form of methodological pluralism (eclecticism) or as a catalyst for the synthetization or integration of legal concepts is multiplied manifold due to the interface created between the European Union's harmonized private international law rules and an ever resilient English common law tradition with its own sophisticated and indigenous conflict of laws regime.²⁷ Indeed, it would be trite to comment that the successive waves of EU private international law regulations emanating from Brussels and the efforts of the Hague Conference on Private International Law in securing the design, ratification and implementation of multilateral conventions interact with the procedural, substantive and choice of law rules of the legal systems of Member States and Contracting States and thus provide a unique example of private international law as comparative law in action.²⁸

A number of the issues relating to the legal basis, jurisdiction, choice of law and recognition and enforcement of the damages remedy overlap with anti-suit injunctions issued by English courts to enforce jurisdiction agreements. Therefore, the more developed jurisprudence on anti-suit injunctions will serve as a guide to the exploration of issues relating to the damages remedy.

The primacy of jurisdictional disputes in international commercial litigation is a consequence of the fact that the selection of an appropriate forum is usually outcome determinative.²⁹ The emphasis on jurisdictional disputes vis-à-vis questions of choice of law in private international law justifies the difference in the depth of analysis devoted to choice of court agreements as compared to choice of law agreements in this doctoral thesis. The analysis of the fundamental juridical nature, classification and private law enforcement of choice of court agreements constitutes the primary focus and a discussion of the classification and enforcement of choice of law agreements is mostly confined to Chapter 11. At the outset, it should be noted that the attribution of a contractual obligation not to sue in a forum that will not give full effect to the choice of law agreement does not reflect the conventional understanding of such clauses as merely declaratory of the parties' intentions as to the

²⁷ See Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (OUP 2006) 339.

²⁸ See Mathias Reimann, 'Comparative Law and Private International Law' in Mathias Reimann and Reinhard Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (OUP 2006) 1363.

²⁹ See AS Bell, *Forum Shopping and Venue in Transnational Litigation* (OUP 2003) 14-19, 23-48; R Fentiman, *International Commercial Litigation* (2nd Edition, OUP 2015) 9-12; Briggs, *Agreements* (n 3) Preface, vii.

applicable law.³⁰ Therefore, it will be argued that a 'promissory' conception of a choice of law agreement is not obvious as in the paradigm case of an English exclusive jurisdiction agreement which gives rise to a mutual contractual obligation not to sue in a non-elected forum.

The discipline of private international law, the concept of party autonomy, the classification and enforcement of jurisdiction and choice of law agreements both traverse and are informed by the fundamental categories of 'public law'/'private law', 'international law'/'national law' and 'procedural law'/'substantive law'. In this thesis, these categories will be employed to help us further our understanding of private international law and the place occupied by jurisdiction and choice of law agreements within this multifaceted and increasingly relevant field of law. It will be argued that jurisdiction and choice of law agreements are complex 'hybrids' possessing both procedural and substantive components.³¹ A simple 'binary' classification is reductive and may not be conducive for analytical purposes as the various conceptions of such agreements tend to lie in the broad continuum between a purely 'procedural' or purely 'substantive' classification.

The methodologies employed to analyse the classification and private law enforcement of jurisdiction and choice of law agreements will be a melange of comparative legal analysis, doctrinal analysis and jurisprudential argumentation drawn from legal theory. Recent developments in legal theory in relation to private international law and the concept of party autonomy will enrich the discussion of the fundamental juridical nature, classification and private law enforcement of jurisdiction and choice of law agreements in Chapter 2 and at various points throughout the thesis. The traditional English common law of conflict of laws will serve as the reference point for the comparative legal analysis. A comparative legal analysis is utilised here in three senses. First, the differences in the common law and civil law approaches to private international law in the EU and at the Hague Conference on Private International Law provide a fertile environment in which comparative legal analysis may be effectively employed. Secondly, the English conflict of laws is compared to the European Union private international law regime and the Hague Convention on Choice of Court Agreements in relation to the classification and private law enforcement of jurisdiction and choice of law agreements. Thirdly, the Brussels I Regulation is compared to the Hague

³⁰ See *Ace Insurance v Moose Enterprise Pty Ltd* [2009] NSWSC 724 (Brereton J); *Navig8 Pte Ltd v Al-Riyadh Co for Vegetable Oil Industry (The Lucky Lady)* [2013] EWHC 328 (Comm), [2013] 2 Lloyd's Rep 104, [2013] 2 CLC 461 (Andrew Smith J).

³¹ See Chapter 4 below.

Convention on Choice of Court Agreements in relation to the classification and private law enforcement of jurisdiction agreements. A doctrinal legal analysis is consistently employed throughout the thesis to analyse *travaux préparatoires*, legislative text, judicial pronouncements and academic deliberations within a national legal system or within a European or international legal instrument.

The primary emphasis is on English language legal sources supplemented by some French language legal sources from the EU. The German language legal sources cited were used after either the procurement of an English translation by the author or they were cited on the basis of an official English language abstract. Relevant commonwealth legal sources are referred to where there is lack of authority on the issue in English law or where these sources provide a unique perspective that would materially enrich the quality of the debate. Some references from Scots private law and private international law are also cited but they are not meant to be exhaustive.

The next chapter (Chapter 2) will examine the conventional English private international law classification of the nature of jurisdiction and choice of law agreements and whether this understanding of their fundamental character is defensible from the perspective of multilateral private international law rules, the recent jurisprudential discourse on the inherent global governance function of private international law rules³² and the quest for a deeper rationalization of the concept of party autonomy and private international law in general as part of the emerging 'third paradigm of jurisdiction'.³³

The analogy with arbitration agreements is often invoked to justify a unified 'dispute resolution agreement' approach to arbitration agreements and jurisdiction agreements in the English common law of conflict of laws. Chapter 3 attempts to deconstruct this pervasive yet largely unquestioned analogy on an issue by issue basis, whilst highlighting that the significant public procedural imperatives at play in the context of jurisdiction agreements may merit a differentiated treatment from arbitration agreements which are premised solely on the contractual agreement between the parties.

³² See H Muir Watt and Diego P Fernandez Arroyo (eds.), *Private International Law and Global Governance* (Law and Global Governance Series, OUP 2014); J Bomhoff and A Meuwese, 'The Meta-regulation of Transnational Private Regulation' (2011) 38 *Journal of Law and Society* 138.

³³ See A Mills, 'Rethinking Jurisdiction in International Law' (2014) 84 *British Yearbook of International Law* 187, 237; Michaels, *Two Paradigms of Jurisdiction* (n 20) 1069; C McLachlan, *Lis Pendens in International Litigation* (Pocketbooks of the Hague Academy of International Law, Martinus Nijhoff Publishers 2009) 438-439.

Chapter 4 compares the classification of jurisdiction and choice of law agreements in English private international law with the ‘procedural contract’ conception of such agreements under the Brussels I Regulation and the continental European legal systems. It is significant to note that there exists at least some support within the English common law tradition for a conception of jurisdiction agreements which bears a very close resemblance to the ‘procedural contract’ conception in terms of both nature and effects. This will be followed by an evaluation of the juridical nature of choice of court agreements and whether non-exclusive jurisdiction agreements are capable of being breached.

The rest of the thesis critically examines the English common law’s creative damages remedy for breach of jurisdiction and choice of law agreements from the perspective of the traditional English common law of conflict of laws, the increasingly important and ever burgeoning EU private international law regime³⁴ and global efforts at regulation in the form of the Hague Convention on Choice of Court Agreements.³⁵ Before embarking on the examination the private law enforcement of jurisdiction agreements, Chapter 5 will take a short detour by highlighting the significance of drafting and inserting undertakings not to breach the choice of court agreement and inserting an indemnity clause to compensate for the breach of the choice of court agreement as best practice in international commercial contracts. The issue of jurisdiction to enforce the choice of court agreement is considered next. An examination of the most appropriate legal basis of the claim of damages in the law of contract, tort, restitution and equity respectively will be carried out. The crucial issue of the applicable law of the claim for damages under the contractual, tortious, restitutionary and equitable legal bases will also be analysed. The inherent power of the English courts to award damages *in lieu* or in addition to injunctions or specific performance is also assessed.³⁶ Towards the end of the chapter the recognition and enforcement of the judgment awarding the damages remedy is considered.

³⁴ Council Regulation (EU) 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) [2012] OJ L351/1 [‘Recast Regulation’ or ‘Brussels I Regulation (Recast)’]; See also, Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) [2001] OJ L12/1 (‘Brussels I Regulation’).

³⁵ Adopted at the 20th Session of the Hague Conference on Private International Law, The Hague, 30th June 2005; On 1 October 2015, the Hague Convention on Choice of Court Agreements entered into force in 28 States (Mexico and all Member States of the EU, except Denmark). The Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) Regulations 2015, SI 2015/1644, have brought the Hague Convention into force in the UK.

³⁶ Section 50 of the Senior Courts Act 1981 (England and Wales); The Supreme Court Act 1981 (c. 54) was renamed as the Senior Courts Act 1981 (1.10.2009) by virtue of the Constitutional Reform Act 2005 (c. 4), ss.

Chapter 6 surveys the state of the judicial authorities on the damages remedy and these will hopefully point towards the unanswered questions that stand in need of determination. In particular, two very significant recent decisions of the English Court of Appeal in *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG (The Alexandros T)*³⁷ and *Marzillier, Dr Meier & Dr Guntner Rechtsanwaltsgesellschaft MbH v AMT Futures Ltd*³⁸ will be examined in depth.

Chapter 7 will examine the arguments of principle for and against the damages remedy. The concept of comity is dealt with in depth to reveal the tension created by a strong and weak conception of comity. The English common law conception of comity relies on its ambiguity and the notion plays a negligible role in the context of the private law enforcement of jurisdiction agreements. This discussion is followed by a comparison of the damages remedy with the anti-suit injunction in terms of impact on the notion of comity and the relative effectiveness of each remedy.

Chapter 8 considers the potential dynamics of the damages remedy under several hypothetical scenarios under the increasingly less relevant English common law jurisdictional regime. It will be proposed that a wider conception of *res judicata* in the form of constructive *res judicata* or the extended doctrine of *res judicata* based on the abuse of process may be employed to limit the claim of damages to the court first seised unless the remedy is unavailable in the first forum. This should help limit claims for damages in the English courts and serve as an example of methodological pluralism (eclecticism) in the conflicts of jurisdictions. It will be argued that the proposed development in English law will be a step in the right direction towards the emerging third paradigm of jurisdiction.

Chapter 9 assesses the damages remedy in the context of the European Union's Brussels I Regulation. The Brussels I Regulation (Recast) and its amendments in relation to choice of court agreements and the role played by the damages remedy in the reform process are then considered. The scope for pre-emptive proceedings and the potential role of the damages remedy (post *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG*

59, 148, Sch. 11 para. 1(1); SI 2009/1604, art. 2(d); There is no statutory equivalent to this provision in Scots law.

³⁷ [2014] EWCA Civ 1010 (Longmore LJ).

³⁸ [2015] EWCA Civ 143 (Christopher Clarke LJ).

(*The Alexandros T*)³⁹) as a complementary enforcement mechanism addressing the lacunas in the legal regulation of choice of court agreements in the Recast Regulation are examined.

Chapter 10 analyses the compatibility of contractual remedies for breach of exclusive jurisdiction agreements with the system of qualified or partial mutual trust enshrined in the Hague Convention on Choice of Court Agreements. It will be argued that although the text of the Convention and the Hartley-Dogauchi Report do not explicitly sanction the use of anti-suit injunctions, the damages remedy and anti-enforcement injunctions, the design of the Convention may allow the use of these measures to achieve the objective of the Convention by enforcing of exclusive choice of court agreements.

Chapter 11 will be followed by an analysis of the fundamental juridical nature of choice of law agreements, whether they can be breached and the remedial consequences. The issue of breach and the availability of primary and secondary remedies for breach of choice of law agreements is largely uncharted territory.

Chapter 12 will summarize the key findings, contributions to knowledge and conclusions arrived at from a comparative study of the juridical nature and private law enforcement of jurisdiction and choice of law agreements. Arguably, the inherent tension between the *in personam* contractual nature of jurisdiction and choice of law agreements and the *in rem* effect of such agreements⁴⁰ will render the separation of functions incompatible with a multilateral jurisdiction and judgments order. Moreover, a deeper understanding of private international law and party autonomy in the form of the emerging third paradigm may also call into question the utility of a unilateral private law remedy for enforcing such agreements.

³⁹ [2014] EWCA Civ 1010 (Longmore LJ).

⁴⁰ In this PhD thesis, the *in rem* effect of jurisdiction and choice of law agreements refers to the international allocative or international procedural function of such agreements which may override any subsisting *in personam* contractual obligation attributed to these agreements within a multilateral private international law regime. As such, any attempt by the English courts to enforce the *in personam* contractual obligation attributed to a jurisdiction or choice of law agreement by second guessing the findings of the courts of another Member State will necessarily run counter to the international allocative *ethos* of the Brussels I Regulation. The usage here is consistent with Muir Watt's employment of the terms *in personam* and *in rem* effects of choice of court agreements in H Muir Watt, 'Party Autonomy' in International Contracts: From the Makings of a Myth to the Requirements of Global Governance' (2010) 6 *European Review of Contract Law* 1, 30; cf The employment of the terminology *in personam* and *in rem* effects of a jurisdiction and choice of law agreement should not be conflated with the concepts of jurisdiction *in personam* and jurisdiction *in rem* which are two categories of adjudicatory authority exercised by the English courts. See TC Hartley, *International Commercial Litigation* (2nd Edition, CUP 2015) 12-13.

Contribution to Knowledge

This doctoral thesis will advance the idea that it is misconceived to think of jurisdiction and choice of law agreements as unilaterally enforced domestic *private law* obligations within an English ‘dispute resolution’ paradigm because multilateral private *international law* rules are essentially secondary rules for the allocation or public ordering of regulatory authority which may not permit a separation of functions or the relative effect of such agreements. The author has endeavoured to subject the private law classification and enforcement of jurisdiction and choice of law agreements in the English common law of conflict of laws, the EU private international law regime and the Hague Convention on Choice of Court Agreements to a rigorous analysis and in the process made an original and significant contribution to knowledge in the field. As a matter of fact, this is the first full length analysis of the impact of a multilateral and regulatory conception of private international law on the private law enforcement of jurisdiction and choice of law agreements before the English courts. In this regard, the thesis seeks to both pre-empt and offer innovative solutions to issues that may arise under the jurisprudence of the emergent Brussels I Regulation (Recast) and the Hague Convention. Briggs’ common law idea of the separation of functions or the relative effect of jurisdiction and choice of law agreements in *Agreements* may be considered to be the pre-eminent scholarly invocation and possibly the academic high water mark advancing the unilateral private law enforcement of such agreements before the English courts.

The increasingly less relevant English common law jurisdictional regime in relation to choice of court agreements is a result of an ever burgeoning EU private international law regime and global efforts at regulation by the Hague Conference on Private International Law. Therefore, the need to understand the fundamental juridical nature, classification and private law enforcement of jurisdiction and choice of law agreements before the English courts from the perspective of the EU private international law regime and the Hague Convention is greater than ever. This doctoral thesis aims to fill an existing gap in the literature in relation to an account of jurisdiction and choice of law agreements which explores and reconnects arguments drawn from international legal theory with legal practice. However, the scope of the work remains most relevant for cross border commercial litigators and transactional lawyers interested in crafting pragmatic solutions to the conflicts of jurisdictions and conflict of laws. It is hoped that an awareness of the

concept of a more reconciled international legal order in the form of multilateral private international law rules will not blind us to the complex reality of international litigation where the distribution of regulatory authority by national private international law rules is often overlapping and may encourage competing jurisdictional claims.

The author will draw upon the significant recent jurisprudential deliberations on the global governance function of private international law as a multilateral structural coordinating framework for the allocation of regulatory authority to enhance the contours of the contrast with the English 'dispute resolution' paradigm. In particular, the conception of private international law norms as higher level secondary rules for the allocation of regulatory authority focused primarily on conflicts justice or an allocative distributive justice may limit the significance of the separation of functions within jurisdiction agreements. This thesis will argue that the separation of functions within a jurisdiction agreement is in itself incompatible with an internationalist or multilateral conception of private international law. In other words, a system for the public ordering of private law assumes priority over or trumps the existence of the private law rights and obligations of the parties to the jurisdiction and choice of law agreements and their unilateral enforcement by the English courts. Otherwise, the private law enforcement of the mutual contractual obligation not to sue in a non-contractual forum attributed to an exclusive jurisdiction agreement may operate as a 'unilateral private international law rule' with a controversial and confrontational allocative function of its own. It may lead to the 'privatization of court access' by dubiously perpetuating and prioritizing the unilateral private ordering of private law over the multilateral public ordering of private law. Moreover, the enforcement of jurisdiction agreements by private law remedies within a multilateral system will necessarily distort the allocative or distributive function of private international law rules by giving precedence to the redistributive will of the parties premised on principles of corrective justice *inter partes* of questionable applicability. International structural order is compromised in the unilateral private law enforcement of jurisdiction and choice of law agreements as such enforcement gives rise to a clash of sovereign legal orders and also the possibility of 'regime collision' by interfering with the jurisdiction, judgments and choice of law apparatus of foreign courts which a multilateral conception of private international law is supposed to prevent in the first place. However, this thesis will argue that outside the confines of the European Union private international law regime, the variable geometry that is characteristic of the international civil and commercial litigation sphere may not impede

the separation of functions within such agreements. Whether an English court *ought* to grant a private law remedy enforcing such agreements is of course another matter.

The collective implications of the global governance function of the conflict of laws,⁴¹ the design of multilateral private international law norms as universal higher level secondary rules for the allocation of regulatory authority and the wider notion of justice in private international law for the separation of functions within and the relative effect of jurisdiction and choice of law agreements is considered in Chapter 2. Moreover, the recent jurisprudential discourse on the emerging third paradigm and the quest for a more comprehensive understanding of party autonomy may also offer significant insights into the place occupied by the damages remedy for breach of a choice of court agreement within the spectrum of techniques for enforcing jurisdictional party autonomy and managing the incidence of parallel proceedings. The existing state of tension between the *substantive law* paradigm and the *internationalist* paradigm of party autonomy highlighted in Chapter 2 may also help identify the contours of the dialectically opposed categories and provide the necessary framework for examining the continued viability of private law remedies for breach of jurisdiction and choice of law agreements.

⁴¹ See FN 32 above.

Chapter 2 - Private International Law, Party Autonomy and the English 'Dispute Resolution' Paradigm

The 'Public' Role and Function of Private International Law

It has been argued that the usual sharp distinction drawn between public and private international law obfuscates the significant 'public', 'international' and 'systemic' function of private international law in ordering the regulation of transnational disputes.⁴² The 'domestication'⁴³ of private international law coupled with the prevalence of an

⁴² Alex Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (CUP 2009) Chapter 1, 88-99; Horatia Muir Watt, 'Private International Law Beyond the Schism' (2011) 2 *Transnational Legal Theory* 347 (HAL Archive, 3 April 2014). <<https://hal-sciencespo.archives-ouvertes.fr/hal-00973084>> accessed 1 May 2015, 15-17, argues that the domestication of private international law and the loss of its regulatory function occurred when modern public international law emerged separately during the course of the nineteenth century; Campbell McLachlan, *Lis Pendens in International Litigation* (Pocketbooks of the Hague Academy of International Law, Martinus Nijhoff Publishers, 2009) 453-454, 460, notes that private international law facilitates choices between parallel exercises of adjudicatory authority in two different states where the same parties and the same cause of action are involved; FA Mann, *Studies in International Law* (OUP 1972) 15, highlighted that the doctrine of international jurisdiction was one of those subjects which touched upon both public international law and the conflict of laws, stood somewhere on the borderline between international and municipal law, and could not be treated in isolation from either; Lord Mance, 'The Future of Private International Law' [2005] *Journal of Private International Law* 185, 185: 'Since the purpose of private international law is to ensure the smooth interaction of different legal systems, the appropriateness of its principles in any national system requires review for consistency with the corresponding principles of other legal systems.'; Andreas F Lowenfeld, *International Litigation and the Quest for Reasonableness: Essays in Private International Law* (Clarendon Press, OUP 1996) 1-2, rejects what he terms the 'unconvincing separation' between public international law and private international law; The great nineteenth century American jurist and Justice of the Supreme Court, Joseph Story termed private international law 'a most interesting and important branch of public law' and considered it to be a constituent part of the 'law of nations': Joseph Story, *Commentaries on the Conflict of Laws* (1st Edition, Hilliard, Gray and Company, Boston 1834) 9; cf. Symeon C Symeonides, *Codifying Choice of Law Around the World: An International Comparative Analysis* (OUP 2014) 348, addresses the question 'whether PIL [private international law] is really "private law" in the sense of involving only the private interests of the disputing parties, or whether it also implicates the interests of the states connected to the dispute' and concludes that 'PIL may still be viewed as "private law", but as one that often implicates important public interests.'; Michael Akehurst, 'Jurisdiction in International Law' (1972-1973) 46 *British Yearbook of International Law* 145, 170-177, considers that public international law is irrelevant to private international law; Arthur T von Mehren and Eckart Gottschalk, *Adjudicatory Authority in Private International Law: A Comparative Study* (Martinus Nijhoff Publishers, 2007) 265-266, conclude that public international law only yields abstract principles which need to be concretised into specific norms for application in transnational dispute resolution; Ralf Michaels, 'Public and Private International Law: German Views on Global Issues' (2008) 4 *Journal of Private International Law* 121, 138, argues that the thesis that public and private international law are necessarily merging is not substantiated. However, he does recognise that private international law will have to learn from public international law in order to adapt to the changing realities of the international legal order; Neil Walker, *Intimations of Global Law* (CUP 2015) 109, suggests that the 'schism' between private international law and public international law has begun to be challenged by a more integrated understanding of private and public domains in a less state-centred age.

⁴³ Muir Watt, *Private International Law Beyond the Schism* (n 42) 15; For a discussion of the public-private distinction in law from its heyday as a facilitator of an unfettered *laissez faire* economic liberalism in the nineteenth century to its demise at the hands of legal realists and critical legal scholars, see, Morton J Horwitz, 'The History of the Public/Private Distinction' (1982) 130 *University of Pennsylvania Law Review* 1423; Duncan Kennedy, 'The Stages of the Decline of the Public/Private Distinction' (1982) 130 *University of Pennsylvania Law Review* 1349.

'epistemological tunnel vision'⁴⁴ and a lack of awareness or interest in the discipline's inherent global governance potential have lent support to a conception of private international law as purely national law,⁴⁵ which is and should be focused on resolving transnational disputes based on domestic conceptions of substantive justice or fairness in the individual case.⁴⁶ Indeed, the emphasis on substantive justice or party expectations in private international law has aided in the characterisation of the discipline as a matter of substantive private law and *vice versa*. However, it will be argued that it is very difficult to evaluate the true nature and function of private international law rules based on the concepts of substantive justice or party expectations in the individual instance.

The move towards the classification of private international law as purely national law and the consequent emphasis on its private law rather than inherent public law nature has been described as a product of two late nineteenth century developments.⁴⁷ First, it was a result of the increased diversity in national legal systems and national private international law rules expressed in the codification movements.⁴⁸ Second, it is a product of the emphasis on the concept of 'sovereignty'⁴⁹ in positivist international legal theory which classified the decision of states with respect to private international law disputes as a matter of discretionary comity.⁵⁰

The effects of this limited conception of private international law as purely national law include the diversity and complexity of modern rules of private international law, the understanding of private international law as a mechanism for the enforcement of national private rights, and hence the problematic focus in modern private international law theory on 'justice' and 'fairness'.⁵¹ Under this restricted paradigm, private international law does not contribute much to the ordering or structuring of international private relations. In fact,

⁴⁴ Muir Watt, *Private International Law Beyond the Schism* (n 42) 31.

⁴⁵ See Peter North, 'Private International Law in Twentieth Century England' in Jack Beatson and Reinhard Zimmermann, *Jurists Uprooted: German-Speaking Émigré Lawyers in Twentieth Century Britain* (OUP 2004) 483, 508; Sir Peter North notes that in the early decades of the twentieth century public and private international law were considered to be fundamentally different in England: See AV Dicey, *Conflict of Laws* (3rd Edition, 1922) 14, when referring to public and private international law stated that the 'two classes of rules which are generically different from each other'; GC Cheshire, *Private International Law* (1935) 20, stated that 'there is, of course, no affinity between Private and Public International Law'.

⁴⁶ Mills, *The Confluence* (n 42) 1.

⁴⁷ *ibid* 71.

⁴⁸ Walker (n 42) 108.

⁴⁹ Mills, *The Confluence* (n 42) 40-52.

⁵⁰ *ibid* 224; Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford Private International Law Series, OUP 2008) 538; See AV Dicey, *Digest of the Law of England with Reference to the Conflict of Laws* (Stevens & Sons, London 1896) 10.

⁵¹ Mills, *The Confluence* (n 42) 72.

it frequently adds to the complexity of international disputes. In subjecting transnational disputes to a wide range of rules (often operating with broad and flexible exceptions) it creates uncertainty and expense, and in so doing it may even reduce the effectiveness of both national and international systems of regulation. It bears neither the nature nor the function which was envisaged for private international law by the 13th Century Italian *statutists* or by Friedrich Carl von Savigny.⁵²

As a consequence of the positivist emphasis on traditional notion of state sovereignty and the divergent codified conflicts rules in the late nineteenth century, the foundations of private international law were instead located in the problematic concept of private ‘vested rights’. The vested rights theory explains private international law as a discipline concerned with ensuring the protection of private rights acquired under foreign law. However, this theory misses the point that it is the rules of private international law which determine when such rights are or are not acquired. A commentator has noted that: ‘Although the theory of vested rights has since been rejected, it has had a strong continuing influence, cementing the common law focus on private international law as concerned with private rights.’⁵³

The proliferation of diverging national private international law approaches in the late nineteenth century continued in Europe until the establishment of the EU and its private international law regime.⁵⁴ EU private international law rejects the conceptualization of the subject as part of the substantive national private law of each Member State. Instead, European private international law rules perform an essentially public function of allocating or mapping the regulatory authority of Member States with diverse national private law systems.⁵⁵ In effect, the original conception of private international law as a truly international system of global ordering and coordinating legal diversity is revived within a

⁵² See Alex Mills, ‘The Private History of International Law’ (2006) 55 *ICLQ* 1; Mills, *The Confluence* (n 42) 26-73; See also, Walker (n 42) 108.

⁵³ Mills, *The Confluence* (n 42) 53; See Dicey, *Digest of the Law of England with Reference to the Conflict of Laws* (n 50).

⁵⁴ Mills, *The Confluence* (n 42) 175-205; The international perspective of private international law is also echoed in the foundation of the *Hague Conference of Private International Law* in 1893, ‘to work for the progressive unification of the rules of private international law’: Article 1 of the Statute of Hague Conference of Private International Law; See also, Walker (n 42) 109-110.

⁵⁵ With reference to the Brussels Convention [now Brussels I Regulation (Recast)], Gardella and Radicati Di Brozolo note that the Convention creates a system for ‘the distribution of adjudicatory power among the member states’: Anna Gardella & Luca G Radicati Di Brozolo, “Civil Law, Common Law and Market Integration: The EC Approach to Conflicts of Jurisdiction” (2003) 51 *American Journal of Comparative Law* 611, 614.

supranational EU.⁵⁶ This is achieved through an ever burgeoning regime of harmonized private international law rules which function as higher level universal secondary legal norms.⁵⁷ In contrast, explicit references to a systemic perspective in the English common law are rare and the courts typically display the same reliance on the ambiguity of comity exhibited in other common law systems.⁵⁸

The overall success of the EU private international law regime has also lent itself as an alternative to substantive harmonization of the national private laws of the Member States.⁵⁹ The existence and possible conflict or overlap of a very large number of diverse national primary norms should not be perceived as an obstruction to the fulfillment of European ideals and goals. The community principle of subsidiarity⁶⁰ and its practical manifestation in the ability of private international law to structure the regulatory authority of Member States can effectively manage and coordinate this diversity of national primary norms. From this perspective, private international law rules provide a structural coordinating framework where the term “European integration” is given effect in a new sense. By limiting the harmonization efforts to the public rules of private international law, the legal and cultural heritage of the Member States is thereby preserved.

Returning to the search for an appropriate theory of justice in private international law we may find that: ‘references to ‘justice’ only make sense as indicating an underlying concern with the appropriateness of an allocation of regulatory authority.’⁶¹ From this perspective, the determination of the applicable law in a private international law dispute should not focus on parochial and insular considerations of a private law inspired substantive justice. Rather, the choice of law process should involve a multilateral consideration of the appropriateness of the applicable law to the resolution of the type of dispute based on connecting factors or localising elements. This suggests that it may be better to understand the rules of private international law as higher level ‘secondary norms’ or ‘second order choices of law’ which act as signposts pointing towards the applicable substantive law. The

⁵⁶ See Mills, *The Confluence* (n 42) 157-174, for a discussion of private international law rules serving a constitutional function in the federal systems of Canada and Australia.

⁵⁷ See FN 62 below.

⁵⁸ Mills, *The Confluence* (n 42) 224; Briggs, *Agreements* (n 50) 538; Adrian Briggs, ‘The Principle of Comity in Private International Law’ (2012) 354 *Recueil des Cours* 65, 181-182; See also, Walker (n 42) 109, who attributes the ‘thin’ inter systemic accommodations of private international law to the ‘schism’ between private international law and public international law.

⁵⁹ Mills, *The Confluence* (n 42) 185-187; Horatia Muir Watt, ‘European integration, legal diversity and the conflict of laws’ (2005) 9 *Edinburgh Law Review* 6, 16-21.

⁶⁰ Consolidated Version of the Treaty on European Union [2012] OJ C 326/18, art 5(3).

⁶¹ Mills, *The Confluence* (n 42) 11.

conception of private international rules as higher level secondary norms lends further credence to private international law's inherent yet latent untapped potential as a 'public', 'international' and 'systemic' structural coordinating framework for the allocation of regulatory authority.

The 'public' perspective of private international law may be further developed by drawing on the distinction between primary and secondary legal norms in a municipal legal system, popularized by H.L.A. Hart in *The Concept of Law*.⁶² In Hart's terminology, primary rules are duty imposing, whereas secondary rules are power conferring in nature. Primary rules are conduct regulating and require individuals to do or abstain from certain actions. Under secondary rules, 'human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations'.⁶³ While primary rules are about the actions that individuals must do or abstain from doing, secondary rules are about primary rules themselves.

For illustrative purposes, Hart's distinction between primary and secondary rules in a municipal legal system may be applied to the determination of jurisdiction and choice of law in an international civil and commercial dispute. In a dispute over title to property, the law of country X would accord title to one party and the law of country Y would grant title to the other. The decision of the law of country X to give title to the first party is a primary legal norm. The decision whether it is the law of country X or the law of country Y which should determine title is a secondary legal norm or a second order choice of law. In the words of

⁶² HLA Hart, *The Concept of Law* (2nd Ed, Clarendon Press, OUP 1994) 79-81; For the application of HLA Hart's distinction between primary and secondary rules to the distinction between rules of substantive private law and private international law rules respectively, see, Mills, *The Confluence* (n 42) 19; Michael J Whincop and Mary Keyes, *Policy and Pragmatism in the Conflict of Laws* (Aldershot: Ashgate, 2001) 11-13, have employed the term 'secondary rule' as referring to 'second order choices of law' as opposed to 'first order choices of law'; A similar distinction between first order and second order views is discussed in the context of private international law by Perry Dane, 'Whereof One Cannot Speak: Legal Diversity and the Limits of a Restatement of Conflict of Laws' (2000) 75 *Indiana Law Journal* 511; Mathias Reimann, 'Comparative Law and Private International Law' in Mathias Reimann and Reinhard Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (OUP 2006) 1363, 1364, submits that private international law 'principles and rules are not 'private law', at least in the traditional sense of directly regulating private relationships and entitlements; instead, they are *secondary law* telling decision-makers how to proceed, eg, what law to apply in transboundary cases.' (Emphasis added); Mance, *The Future of Private International Law* (n 42) 186 describes the higher level secondary norms of private international law as 'the infrastructure signposting parties towards the destination to determine substantive issues.'; John G Collier, *Conflict of Laws* (CUP 2001) Chapter 1, 6, notes that 'Private international law is not substantive law' in the sense of the law of contract or tort; Kurt Lipstein, 'General Principles of Private International Law' [1972] I *Hague Recueil des Cours* 97, 104ff asserts that private international law is 'a technique and not a system of substantive rules..... [and therefore] it has been particularly susceptible to influence from abroad'.

⁶³ Hart, *The Concept of Law* (n 62) 81.

Mills, 'It is concerned with the scope of authority of the law, not the outcome in the specific case.'⁶⁴ The same distinction between primary and secondary rules may be applied in the context of civil jurisdiction. Whether a court in country X will hear the dispute does not have an impact on the substantive outcome of the case in terms of conduct regulating primary rules as it is concerned only with whether the state will exercise adjudicatory authority over the dispute.

When private international law rules are evaluated based on considerations of substantive justice in the individual case; they are akin to primary conduct regulating rules. However, such a characterisation is misconceived and that private international law rules should be conceptualised, from a 'systemic perspective', as secondary legal norms concerned with the allocation of regulatory authority between states. Mills notes that, 'Private international law rules, from this perspective, are not concerned with private rights, but with public powers.'⁶⁵

Significant lessons may also be learnt from contrasting two different concepts of justice in the context of private international law rules. 'Corrective justice' is the pattern of justificatory coherence latent in the bilateral private law relationship of claimant and defendant whereas 'distributive justice' is mathematically conceived as a proportion in which each participant's share is relative to whatever criterion governs the distribution.⁶⁶ Arguably, national private law is structured by principles of corrective justice that may be complemented by considerations of distributive justice.⁶⁷ However, in contrast to private

⁶⁴ Mills, *The Confluence* (n 42) 19.

⁶⁵ *ibid* 20.

⁶⁶ See Ernest J Weinrib, *The Idea of Private Law* (Revised Edition, OUP 2012) 210-214; Ernest J Weinrib, *Corrective Justice* (Oxford Legal Philosophy, OUP 2012) 269; For the origins of the concept of 'corrective justice', see, Aristotle, *Nicomachean Ethics*, V, 4 (Martin Ostwald, trans., 1962); A conception of distributive justice is applied by a legitimate government when it treats every person under the eyes of the law with equal concern and respects fully the responsibility and right of each person to decide for himself how to make something valuable of his life by introducing law and policy to reflect these 'two reigning principles': See Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011) 2-4; John Rawls, *A Theory of Justice* (Harvard University Press 1971) 53, introduces 'two principles of justice' including the 'equality principle' which regulates 'the distribution of social and economic advantages' that would be agreed by participants in the original position behind a veil of ignorance; HLA Hart, 'Are there any Natural Rights?' (1955) 64 *The Philosophical Review* 175, 186, submits that traditional social contractarians are mistaken in identifying the social contract as a right creating situation of mutual restrictions with the paradigm case of promising. The logical consequences of a 'general right' (such as the right to freedom of expression) are not limited to those of 'special rights' arising out of a promise, as they relate to the character of the action to be done or its effects in general; John Rawls, 'Two Concepts of Rules' (1955) 64 *The Philosophical Review* 3, 29-32, argues that a utilitarian (or distributive) attitude may justify a 'practice conception' of rules but not the particular rules within the system, such as, the rules within the practice of 'promising'.

⁶⁷ Ralf Michaels and Nils Jansen, 'Private Law Beyond the State? Europeanization, Globalization, Privatization' (2006) 54 *American Journal of Comparative Law* 843, 848; See PS Atiyah, *The Rise and Fall of Freedom of Contract* (OUP 1985) 716ff, for the impact of the rise of the regulatory state and public law on *laissez faire* English contract law which incorporated a significant risk allocation function of its own.

law, the rules of private international law are primarily and essentially driven by principles of distributive justice that may be complemented by considerations of corrective justice *inter partes* as an exception. As a consequence, private international law rules are generically closer to rules of public law dispensing systemic justice in the abstract (*ex ante*) than conduct regulating private law rules of tort/delict apportioning liability between the doer (defendant) and sufferer (claimant) of harm on the basis of fault in the individual case (*ex post*). The discipline of private international law is best envisaged as comprising of secondary rules functioning as part of a structural coordinating framework for the distribution or allocation of regulatory authority in transnational disputes.

The jurisprudential orientation and goals of private international law rules may also be illustrated by probing into whether choice of law norms aim at ‘conflicts justice’ or try to dispense ‘material justice’?⁶⁸ Is the objective of the choice of law process to decide *which set of domestic rules has the better claim to application* (in the abstract and regardless of their content)? Or should choice of law norms *directly aim at doing justice between the parties*? The more traditional *Savigny* inspired multilateral approach to the choice of law process which continues to prevail in Europe and most other parts of the world leans towards the goal of multilateral ‘conflicts justice’, but has made concessions to ‘material justice’ with the inclusion of unilateral choice of law rules.⁶⁹ Symeonides does not perceive the ‘dichotomy’ between ‘conflicts justice’ and ‘material justice’ as a dilemma and instead focusses on the question of *when, how, and how much* considerations of material justice should temper the search for conflicts justice.⁷⁰ Indeed, the dominant feature of contemporary choice of law codifications worldwide has been defined as ‘eclecticism’⁷¹ or a ‘*pluralisme des méthodes*’,⁷²

⁶⁸ Gerhard Kegel and Klaus Schurig, *Internationales Privatrecht* (8th Edition, Verlag CH Beck, Munich 2000) 114 (‘*materiellprivatrechtliche Gerechtigkeit*’ versus ‘*internationalprivatrechtliche Gerechtigkeit*’); Symeon C Symeonides, *The American Choice-of-Law Revolution: Past, Present and Future* (Martinus Nijhoff Publishers, 2006) 404-411; Reimann, *Comparative Law and Private International Law* (n 62) 1375; Mills, *The Confluence* (n 42) 16-17; Von Mehren and Gottschalk, *Adjudicatory Authority* (n 42) 29.

⁶⁹ Patrick J Borchers, ‘Categorical Exceptions to Party Autonomy in Private International Law’ (2008) 82 *Tulane Law Review* 1645, 1655, notes that ‘The European notion of mandatory rules is an intellectual cousin of Currie’s interest analysis.’; Ralf Michaels, ‘Post-critical Private International Law: From Politics to Technique’ in Horatia Muir Watt and Diego P Fernandez Arroyo (eds.), *Private International Law and Global Governance* (Law and Global Governance Series, OUP 2014) 54, favours the traditional continental private international rules and concludes that the next step for the existing European rules would be to show the extent to which they are already capable of integrating and formulating the political concerns that underlie the US conflict of laws revolution.

⁷⁰ Symeonides, *The American Choice-of-Law Revolution* (n 68) 410; Symeonides, *Codifying Choice of Law Around the World* (n 42) 347-348.

⁷¹ Symeonides, *Codifying Choice of Law Around the World* (n 42) 348-349.

⁷² Henri Batiffol, *Le pluralisme des méthodes en droit international privé* 139 *Recueil des Cours* 75, 106 (1973); Bernard Audit, *Rapport Français* in S Symeonides (ed.), *Private International Law at the End of the 20th Century*:

where the drafters have had no qualms about combining ideas such as multilateralism with unilateralism and conflicts justice with material justice.

The significance of multilateral conflicts justice and an allocative distributive justice theory for the conflict of laws further confirm that the suppressed regulatory and international foundations of private international law are being held captive within a 'closeted'⁷³ or *procrustean* national private law conception of the discipline. The inherent regulatory function, design of multilateral secondary rules and the broader concept of justice in private international law encompassing the requirements of international structural order supplemented by considerations of substantive justice attest to the fact that the epistemological framework of the subject simultaneously traverses across and is enriched by the procedure/substance, public law/private law and international law/national law divides.⁷⁴

The next section questions whether the conventional English law classification of jurisdiction and choice of law agreements as giving rise to a subsisting and independent private law obligation is defensible in light of the regulatory function of multilateral private international law rules.

Private International Law Norms as Secondary Rules for the Allocation of Regulatory Authority and the Separation of Functions within Jurisdiction and Choice of Law Agreements

This section will examine whether the classification of jurisdiction and choice of law agreements as giving rise to a private law obligation is tenable in principle and whether a better justificatory and normative alternative to the common law formulation exists. Prima facie, it may be argued that it is misconceived to think of jurisdiction and choice of law agreements as private law issues within a 'dispute resolution' paradigm because private international law rules are essentially and primarily secondary rules for the allocation of regulatory authority. If jurisdiction and choice of law agreements are deemed to be private law issues then they are more in the nature of primary conduct regulating rules as opposed

Progress or Regress? (Kluwer Law International 1999) 191, 210; Andreas Bucher, *La dimension sociale du droit international privé* (Cours general), *Recueil des Cours* 341 (2009); Christa Roodt, 'Reflections on Theory, Doctrine and Method in Choice of Law' (2007) 40 *Comparative and International Law Journal of Southern Africa* 76.

⁷³ Muir Watt, *Private International Law Beyond the Schism* (n 42) 30.

⁷⁴ Ralf Michaels, 'Globalization and Law: Law Beyond the State' in Reza Banakar and Max Travers (eds.), *Law and Social Theory* (2nd Revised Edition, Hart Publishing 2013) 289, 299-303.

to secondary power conferring rules. It is submitted that, the obligation not to sue in a non-contractual forum and the correlative right to be sued in the contractual forum in an exclusive jurisdiction agreement is a primary rule intended to regulate the conduct of the litigating parties. Similarly, the obligation not to sue in a forum that will disregard or not apply the applicable law as per the choice of law agreement and the correlative right to be sued in a forum that will apply the applicable law specified in the choice of law agreement is also a primary rule intended to proscribe the conduct of the litigating parties.

It has been observed that primary rules and secondary rules are fundamentally different in terms of their character, design and effects. Therefore, a simultaneous conception of jurisdiction and choice of law agreements as private law contracts and as procedural bases for asserting jurisdiction or determining the applicable law may also to an extent be divergent, mutually exclusive in effect and even a contradiction in terms. The bifurcated conception of jurisdiction and choice of law agreements in the English common law of conflict of laws as both private law contracts between the parties and as bases for the invocation of jurisdiction or determination of the applicable law is a paradigm example of this *duality* where the contractual agreement on jurisdiction and choice of law may survive as an independent source of legal obligation even though it was unsuccessful in prorogating jurisdiction or determining the applicable law as a matter of public procedural law.⁷⁵ From the perspective of the English common law of conflict of laws, the dual nature and function of jurisdiction and choice of law agreements may be symbolised as a sophisticated and pragmatic attempt to separate the *in personam* private law contract between the parties from the *in rem* procedural effects of such agreements as a basis for the invocation of jurisdiction or determining the applicable law.⁷⁶ However, from another standpoint the separation of functions may be criticised for having no legal basis as where the jurisdiction or choice of law agreement is declared procedurally invalid or ineffective by a foreign court its validity as a private law agreement may also be directly impeached. An invalid contract can hardly be the source of any legal obligation, let alone an enforceable obligation which is

⁷⁵ Briggs, *Agreements* (n 50) 526, refers to the separation of functions as ‘the principle of relative effect’; See *Penn v Lord Baltimore* (1750) 1 Ves Sen 444, on the separation of an enforceable *in personam* obligation from the *erga omnes* right to property abroad over which the English courts have no jurisdiction.

⁷⁶ The *in rem* effect of jurisdiction and choice of law agreements in this context refers to the international allocative or international procedural function of such agreements which may override any subsisting *in personam* contractual obligation attributed to these agreements within a multilateral private international law regime. As such, any attempt by the English courts to enforce the *in personam* contractual obligation attributed to a jurisdiction or choice of law agreement by second guessing the findings of the courts of another Member State will necessarily run counter to the international procedural *ethos* of the Brussels I Regulation.

capable of being breached and gives rise to primary and secondary remedies in its own right. Moreover, as a direct result of its procedural invalidity, the validity of the subsisting obligation is unprincipled and clearly lacks symmetry and congruence with the primary procedural function in terms of the requirements of internal coherence and internal consistency. Under the Brussels I Regulation (Recast), the protective cover of Article 31(2) will substantially reduce the chances of a non-chosen court ruling on the validity and applicability of an exclusive jurisdiction agreement if the chosen court has been seised. As a consequence of the new regime, the utility of an analysis separating the functions within an exclusive jurisdiction agreement in the context of the Recast Regulation may be questioned as the augmentation of jurisdictional party autonomy affected by the reverse *lis pendens* rule will ensure to a large extent that both the procedural and the substantive law aspects of an exclusive jurisdiction agreement will be adjudicated upon by the same chosen court. The anticipated decline in the incidence of pre-emptive torpedo proceedings adjudicating on the procedural invalidity of jurisdiction agreements will lead to a lower number of claims in the English courts enforcing the *in personam* contractual obligation not to sue in the courts of another Member State.

In relation to ramifications, the private law enforcement of the procedurally ineffective yet independent and subsisting agreement on jurisdiction and choice of law will have little or no regard for the allocative or distributive function of multilateral private international law rules. In fact, the private law enforcement of jurisdiction and choice of law agreements will distort the systemic effects of the predominantly public ordering of private law. Walker describes both private international law and the new legal pluralism as 'laterally co-ordinate approaches' which provide a means of reconciling difference and resolving disputes between diverse but overlapping and interdependent legal regimes.⁷⁷ He refers to the concept of 'radical pluralism'⁷⁸ where the relationship between different legal orders neither stems from nor contributes to a general set of pluralist norms but is merely a product of relations of power and strategic considerations.⁷⁹ The unilateral private law enforcement of an exclusive jurisdiction agreement via an anti-suit injunction or the damages remedy by the English courts may be considered to be a concrete example of such 'radical pluralism'. At the opposite end of the legal pluralism spectrum is the norm based notion of 'constitutional

⁷⁷ Walker (n 42) 106.

⁷⁸ N MacCormick, 'Beyond the Sovereign State' (1993) 56 *Modern Law Review* 1; See also, N MacCormick, 'Risking Constitutional Collision in Europe?' (1998) 18 *Oxford Journal of Legal Studies* 517, 528-532, in which he moves away from an unqualified radical pluralism to 'pluralism under international law'.

⁷⁹ Walker (n 42) 115-116.

pluralism'.⁸⁰ As EU private international law rules are secondary norms which distribute regulatory authority between different Member States they may be subsumed under the category of 'constitutional pluralism'. The problem posed by the incompatibility of a unilateral private law remedy with the EU multilateral private international regime can be effectively compared to and illustrated by the intractable difficulty encountered when seeking to accommodate the notion of 'radical pluralism' within the idea of 'constitutional pluralism'.

A preferable and simpler approach to jurisdiction and choice of law agreements would be the realisation that the obligational content of a contract (its effects *in personam*) cannot be dissociated from the effects it can produce under a public law rule (effects *in rem*). This reflects the stance of the CJEU in the context of the Brussels I Regulation and more largely the courts of the continental civil law tradition. Under the 'procedural contract' conception, the contractual and procedural effects of the jurisdiction and choice of law agreement are fully convergent, mutually inclusive in effect and reconcilable. The parties may not enforce the subsisting private law contract (if there is any) if the clause cannot serve its primary procedural function of prorogating or derogating the jurisdiction of courts or determining the applicable law. In other words, the parties may not exercise their contractual autonomy (if there is any) and redistributive will derived from principles of private law corrective justice to alter the distributive and allocative function of private *international* law rules.

In similar vein, the utilisation of private law remedies in private international law disputes are intended to achieve substantive justice for the litigants in the individual case but they may also end up compromising a broader notion of justice in private international law, encompassing both the requirements of international structural order and complemented by considerations of substantive fairness. Structural order is compromised in the unilateral private law enforcement of jurisdiction and choice of law agreements as such enforcement gives rise to a clash of sovereign legal orders and also the possibility of 'regime collision'⁸¹ by interfering with the jurisdiction and judgments apparatus of foreign courts which a multilateral conception of private international law is supposed to prevent in the first place.

⁸⁰ Ibid 118.

⁸¹ See Andreas Fischer-Lescano and Gunther Teubner, 'Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999, 1000, referring to the emergence of 'inter-systemic conflicts law' which may for our purposes be understood not as collisions between the conflicts rules of nation states, but as collisions between the conflicts rules of distinct multilateral private international law regimes. See also, Walker (n 42) 117 for a discussion of the related ideas of 'interface norms' and 'contrapunctual law' attributed to Nico Krisch and Miguel Maduro respectively.

It is only natural in a 'dispute resolution' paradigm focussed primarily on unilaterally regulating the domestic private law rights of the parties to the litigation to have little regard for the international allocative function of private international law rules and to stray too far in that direction and devise private law remedies to enforce private law agreements. Moreover, it is also relatively easy to succumb to the pragmatic attractions of the arbitration agreement analogy and apply concepts which flow *exclusively* from the agreement of the parties *verbatim* to the international litigation sphere where, arguably, other significant public procedural imperatives prevail.⁸²

The fundamentally or paradigmatically different jurisdictional regimes of the English common law of conflict of laws and European Union's Brussels I Regulation may be attributed to the conception of jurisdiction as enforcing the private law rights of the litigating parties in the former and a conception which inverts the lens and views jurisdiction as rules of public law inviting the court to exercise jurisdiction in the latter.

The English common law's dispute resolution framework may work well where its unilateral private law remedies for breaches of jurisdiction agreements are not inhibited by the principle of mutual trust and the *effet utile* of EU law within a paradigmatic 'double convention'⁸³ multilateral jurisdiction and judgments order such as the Brussels-Lugano regime. Mutual trust in this particular context refers to the reposition of trust and non-interference (directly or indirectly) with the allocation of jurisdiction between Member States and the recognition and enforcement of judgments of other Member State as per the Brussels I Regulation and the allocation of the applicable law in accordance with the Rome I Regulation.⁸⁴ 'A jungle of separate, broadly based, jurisdictions'⁸⁵ represents the existing state of variable geometry in the world of international civil and commercial litigation outside the strictures of the EU private international law regime. So for the foreseeable future, the 'jungle' will provide fertile ground for English courts to unilaterally enforce the

⁸² The differences between arbitration agreements and jurisdiction agreements are analysed in Chapter 3 of this thesis.

⁸³ '[c]onventions that regulate jurisdiction both at the decision stage and at the recognition stage': R Michaels, 'Some Fundamental Jurisdictional Conceptions as Applied in Judgment Conventions' in E Gottschalk, R Michaels, G Ruhl and J von Hein (eds), *Conflict of Laws in a Globalized World* (Cambridge University Press, 2007) 29-30.

⁸⁴ It should be noted that Article 1(2)(d) of the Rome Convention and Article 1(2)(e) of the Rome I Regulation exclude from their scope: 'agreements on the choice of court.'; See PR Beaumont and PE McElevy, *Anton's Private International Law* (SULI, 3rd Edition, W Green 2011) 434-435.

⁸⁵ *Airbus Industrie GIE v Patel* [1999] 1 AC 119 (Lord Goff).

separate *in personam* obligation in the jurisdiction and choice of law agreement without hindrance.⁸⁶

The Emerging Third Paradigm of Jurisdiction and the Quest for a More Comprehensive Understanding of Party Autonomy

Having examined the inherent global governance function of private international law and its impact on the viability of the *dual* nature and function of jurisdiction and choice of law agreements, it is now time to evaluate the concept of party autonomy and its significance for the classification of such agreements and their private law enforcement. At the outset, it may be observed that the principle of party autonomy presents itself as a ‘theoretically unresolved’⁸⁷ ‘*Gordian knot*’⁸⁸ of the conflict of laws at the very crux of the procedure/substance, public law/private law and international law/national law divides. As a result, a deeper understanding and rationalization of the concept will further our understanding of private international law as a discipline and will also act as a very significant driving force behind the emerging third paradigm of jurisdiction.

Indeed, a lot may be learned from the quest for a sounder and more comprehensive theoretical foundation for the principle of party autonomy in private international law. First, it may be asked that if private international law ought to be regarded as essentially and primarily public, systemic and international in character, whether the concept of party autonomy can be satisfactorily reconciled let alone accommodated within this regulatory conception of the discipline.⁸⁹ In other words, if the ‘public’ rules of private international law are about the allocation of state power, how can individuals grant (prorogate) or take away

⁸⁶ cf Alex Mills, ‘Variable Geometry, Peer Governance, and the Public International Perspective on Private International Law’ in Horatia Muir Watt and Diego P Fernandez Arroyo (eds.), *Private International Law and Global Governance* (Law and Global Governance Series, OUP 2014) 245, 252-260, pursues a federal analogy in the internationalization of global private international law by identifying and examining the ideas of ‘variable geometry’ and ‘peer governance’ as responses to the problems of hierarchy and heterarchy respectively.

⁸⁷ Jürgen Basedow, *The Law of Open Societies: Private Ordering and Public Regulation in the Conflict of Laws* (Brill Nijhoff, Leiden 2015) 115.

⁸⁸ Symeon C Symeonides, ‘General Report’ in *Private International Law at the End of the 20th Century: Progress or Regress?* 1, 38–40 (Kluwer Law International 1999); Matthias Lehmann, ‘Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Laws’ (2008) 41 *Vanderbilt Journal of Transnational Law* 381, 385.

⁸⁹ Mills, *The Confluence* (n 42) 291-295; Alex Mills, ‘Rethinking Jurisdiction In International Law’ (2014) 84 *British Yearbook of International Law* 187, 230-235; For a brief overview of the two contrasting approaches to the fundamental jurisdictional issues underpinning arbitral autonomy, see, *ibid* 234-235.

(derogate) the power that properly belongs to states?⁹⁰ Apart from the incompatibility with the multilateral method of closest relationship in private international law, party autonomy also does not fit well other traditional methods.⁹¹ This incompatibility may be attributed to traditional conflicts methods being built around the state and its relations.⁹² The concept cannot be justified in a statist theory because party autonomy is not concerned with a law's own intended scope of application. A theory of acquired or vested rights cannot accommodate party autonomy because when and whether rights are acquired is determined by states and not by parties. It is also incompatible with a focus on governmental interests because governmental interests cannot be determined by private parties. As a consequence, Ralf Michaels describes party autonomy as a new paradigm of private international law.⁹³

Some private international lawyers have traditionally viewed party autonomy as indicating that the only limits on the national regulation of private international law are those concerned with private justice and fairness⁹⁴ – concerns which are met if the defendant has freely agreed in advance to the jurisdiction or law, even if there are no other objective connections.⁹⁵ If a state exercises jurisdiction or applies law in civil proceedings based purely on consent by the parties, this is difficult to reconcile with the traditional public international law requirement that jurisdiction must be justified by a substantial objective connection, typically territoriality or nationality.⁹⁶ Faced with this argument, it might seem that there are two alternatives: first, rejecting the idea that private international law is about the allocation of regulatory authority between states (denying any connection between public and private international law, thus rejecting the application of public international law jurisdictional

⁹⁰ Cf 'How can individuals have a say in the international distribution of legislative competencies?': Lehmann, *Liberating the Individual from Battles between States* (n 88) 412.

⁹¹ See Ralf Michaels, 'Party Autonomy in Private International Law--A New Paradigm Without a Solid Foundation?' (126th Conference of the Private International Law Association of Japan, 2 June 2013) 2 <http://www.pilaj.jp/data/2013_0602_Party_Autonomy.pdf> accessed 1 April 2015; Ralf Michaels, 'Party Autonomy in Private International Law--A New Paradigm without a Solid Foundation?' (2014) 15 *Japanese Yearbook of International Law* (forthcoming).

⁹² Lehmann, *Liberating the Individual from Battles between States* (n 88) 412.

⁹³ Michaels, *Party Autonomy in Private International Law--A New Paradigm Without a Solid Foundation?* (n 91) 3.

⁹⁴ Alex Mills, 'Normative Individualism and Jurisdiction in Public and Private International Law: Towards a Cosmopolitan Sovereignty' (Inaugural Cambridge Journal of International and Comparative Law Conference: *Agents of Change: The Individual as a Participant in the Legal Process*, Cambridge, 19 May 2012) 19.

⁹⁵ Michaels, *Party Autonomy in Private International Law--A New Paradigm Without a Solid Foundation?* (n 91) 3, refers to the national private law conception of private international law as the 'substantive law' paradigm.

⁹⁶ *Ibid*, refers to international public law conception of private international law as the 'internationalist' paradigm.

rules to civil disputes, leaving them unrestrained except under national law), or second, making unrealistic arguments against party autonomy based on state interests.⁹⁷

The synthesis of the clash between a ‘substantive law’ conception of party autonomy with no regard for the international allocative function of private international law and an ‘internationalist’ conception of party autonomy which is subordinate to state interests has been described as a ‘paradigm shift’⁹⁸ leading to the emergence of a ‘third paradigm of jurisdiction’ which will replace the basic assumptions of existing paradigms with a new set of foundational principles.⁹⁹ Ralf Michaels has with the following prescient interpretive statement set the agenda for the development of a more reconciled international legal order including the place of party autonomy within it:¹⁰⁰ ‘If this traditional image of sovereignty is inadequate under conditions of globalization, as is frequently claimed, then both paradigms are inadequate as well, and both sides must come together to create a new, *third paradigm of jurisdiction*.’¹⁰¹

⁹⁷ Mills, *Rethinking Jurisdiction In International Law* (n 89) 233; Under Beale’s *First Restatement of Conflict of Laws* (1934), party autonomy was rejected because individuals were acting as ‘legislators’. This was an early direct rejection of ‘individual sovereignty’ which encouraged skepticism about rigid private international law rules more generally, contributing to the American ‘realist’ challenge to private international law.

⁹⁸ See Thomas Kuhn, *The Structure of Scientific Revolutions* (University of Chicago Press 1962); Mark Van Hoecke and Mark Warrington, ‘Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law’ (1998) 47 *ICLQ* 495, 513; For the application of the idea of ‘legal paradigms’ to adjudicatory authority in private international law and how paradigms differ from ‘principles’, ‘concepts’ and ‘theories’, see, Ralf Michaels, ‘Two Paradigms of Jurisdiction’ (2006) 27 *Michigan Journal of International Law* 1003, 1022-1027; For a more preliminary distinction between the categories of ‘rules’, ‘principles’ and ‘policies’, see, Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 22-28.

⁹⁹ Mills, *Rethinking Jurisdiction In International Law* (n 89) 237; Michaels, *Two Paradigms of Jurisdiction* (n 98) 1069; McLachlan, *Lis Pendens in International Litigation* (n 42) 438-439, suggests that the contours of a new solution to *lis pendens* developed as a result of cooperative law reform and driven by the imperatives of globalization which synthesizes the civilian and common law solutions is already upon us. He cites the Leuven/London Principles on Declining and Referring Jurisdiction in Civil and Commercial Litigation (2000), Articles 21 and 22 of the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (30 October 1999), Article 15 of the Brussels IIbis Regulation and judicial cooperation and communication in matters of insolvency and international child abduction as examples of this development; See also, Ronald A Brand, ‘Balancing Sovereignty and Party Autonomy in Private International Law: Regression at the European Court of Justice’ in Johan Erauw, Vesna Tomljenovic and Paul Volken (eds.), *Universalism, Tradition and the Individual, Liber Memorialis Petar Šarèviè* (Sellier European Law Publishers, Munich 2006) 35, discusses traditional concepts of state sovereignty and how those notions fail to account for ‘the new world of sovereign authority’ in private international law where the allocations of authority in multilateral private international law rules have to integrate the expanded recognition of party autonomy; cf Lehmann, *Liberating the Individual from Battles between States* (n 88) 415, refers to the need for a ‘major paradigm shift’ where party autonomy is justified by the individual at the centre of the conflicts problem and state relations that have so far been the focus of the classical theory are ignored.

¹⁰⁰ Michaels, *Two Paradigms of Jurisdiction* (n 98) 1069 (Emphasis added); See also, McLachlan, *Lis Pendens in International Litigation* (n 42) 432, 438, discussing the move ‘from a Westphalian to a cosmopolitan paradigm’ of jurisdiction and *lis pendens*; For a discussion of the ‘traditional image of sovereignty’, see FN 103 below.

¹⁰¹ The reference to paradigms in this statement refers to the ‘domestic’ and ‘international’ paradigms which are equivalent to the ‘substantive law’ and ‘internationalist’ paradigms employed here.

It has been argued that the acceptance of the ‘sovereignty of the individual’ in international law may best explain the principle of party autonomy in private international law.¹⁰² On that view, the freedom to choose the applicable law is not merely a connecting factor; it is the parties who insert their agreement in to the legal system they have freely chosen. Thus the ‘sovereignty of the individual’ is recognised in an increasingly pluralistic and cosmopolitan international legal order which balances the interests of states against those of individuals. It is submitted that such a stance is compatible with the view that the foundations of private international law lie in broader international norms. Moreover, this conception of party autonomy provides a more systemic and balanced explanation of the principle than justifications based exclusively on substantive justice or party expectations. However, the existing concept of state sovereignty and the methodological nationalism that defines, in general, the dualism of the *internationalist* paradigm and the *substantive law* paradigm fails to adequately account for the ‘sovereignty of the individual’ within a *transnationalist* paradigm.¹⁰³

¹⁰² Mills, *The Confluence* (n 42) 292; Deference to party autonomy in private international law was described as reflecting ‘the sovereign will of the parties’ by Judge Bustamante in his Separate Opinion in the *Serbian and Brazilian Loans cases, France v. Yugoslavia; France v. Brazil* (1929) PCIJ Ser A, Nos 20-21, Judgments 14-15, p.53; Mills, *Normative Individualism* (n 94) 20; Basedow, *The Law of Open Societies* (n 87) 146-149, describes party autonomy in choice of law as pre-governmental right derived from human rights; Professor Nygh also recognised that the right of the parties to choose the applicable law represented a rule of international customary law: See PE Nygh, *Autonomy in International Contracts* (Clarendon Press, OUP 1999) 45; Professor Lowenfeld has also stated that ‘it is fair to say....that party autonomy- both for choice of law and for choice of forum, including an arbitral forum- is now part of an international customary law of dispute settlement’: See Lowenfeld, *International Litigation and the Quest for Reasonableness* (n 42) 208-209; Michaels, *Public and Private International Law* (n 42) 132, cites a 1991 resolution of the Institute of International Law as supporting the contention that party autonomy should be based on the notion of human rights; A resolution of the Institute of International Law also recognises the affinity between international norms and private international law rules on party autonomy: International Law Institute, ‘Autonomy of the Parties in International Contracts Between Private Persons or Entities’ (1991) (Rapporteur: Eric Jayme) <http://www.idi-il.org/idiE/resolutionsE/1991_bal_02_en.PDF> accessed 15 August 2014; See also, V van den Eckhout, ‘Promoting Human Rights within the Union: The Role of European Private International Law’ (2008) 14 *European Law Journal* 105.

¹⁰³ See Michaels, *Party Autonomy in Private International Law--A New Paradigm Without a Solid Foundation?* (n 91) 7-8; The Westphalian model of sovereignty characterized by positivist international law theory conceives ‘state sovereignty’ as states possessing some unrestricted freedoms as an *a priori* consequence of their statehood. This freedom is said to exist prior to law, thus positivists argue that international law can only exist as an expression of state sovereign will. States are viewed as the key actors in the formation of international law and both private and private international law are excluded from the domain of international law; John Austin excluded international law from the province of jurisprudence and positive law by referring to it as ‘positive morality’: See WL Morison, *John Austin* (Edward Arnold, London 1982) 64; Similarly, Holland famously remarked that international law ‘is the vanishing point of jurisprudence’: TE Holland, *The Elements of Jurisprudence* (12th Edition, Clarendon Press, Oxford 1916) 392; Bentham invented the term ‘international law’ and defended it by saying that it was ‘sufficiently analogous’ to municipal law but found that a sovereign’s involvement in it through treaties is *different* from that in relation to ordinary mandates addressed to his own subjects: Morison, *John Austin* (n 103) 67; Jeremy Bentham, *An Introduction to the Principles and Morals of Legislation* (1781, Reprinted by Batoche Books, Kitchener 2000) Preface 10, Chapter XVII, 236; Hart, *The Concept of Law* (n 62) 231; Hart rejected the ‘positivist’ account of international law because of the

The individual as a sovereign implies that the relationship with the state is one of equality and not of subordination. As a result, a contract entered into by a sovereign individual will be truly transnationalized and will exist detached from the state. Both the substantive contract and the dispute resolution agreement will be detached from national legal orders. However, in order to achieve meaning and enforceability, the contract will require linking to one state order. The linking should not be understood as a relation of subordination, however: neither is the state subordinate to the parties, nor *vice versa* are the parties subordinate to the state.¹⁰⁴ The party and the state are both simultaneously, dominant and subordinate. It is submitted that a more cosmopolitan concept of sovereignty where the relationship between individuals and the state is one of co-equality and is premised on the existence of a more dynamic and balanced interplay between the demands of individual freedom and collective state interests should represent the future of private international law and party autonomy.¹⁰⁵

The Emerging Paradigm of Party Autonomy and the Continued Viability of Private Law Remedies for Breach of Jurisdiction and Choice of Law Agreements

The argument from legal paradigms of jurisdiction and the emergence of the third paradigm of jurisdiction provide a sounder justification for party autonomy and may have significant implications for the continued viability of private law remedies for the enforcement of

dependence on the problematic concept of sovereignty. He argued that international law is simply a set of primary rules which creates obligations, rejecting the idea that *a priori* norms such as sovereignty operate as a rule of recognition or as a justification of those rules: See *ibid* Chapter 10 cf Kelsen's monist theory of law regarded as logically defensible both the hypothesis that international law derives its status as law through recognition by the individual municipal system and the distinct universal hypothesis of recognition as a basic norm of the entire international system: See Francois Rigaux, 'Hans Kelsen on International Law' (1998) 9 *European Journal of International Law* 325; In the domestic sphere, AV Dicey's Victorian notion of parliamentary sovereignty as 'unlimited legislative authority of parliament' is similarly problematic, inconsistent with the modern concept of the separation of powers, the rule of law and the legal and political constraints of European Union law and the European Convention of Human Rights: See AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th Edition, Macmillan, London 1915) Chapter 1; Interestingly, the prevalence of the problematic concept of sovereignty existing prior to law in both positivist international law theory and in the domestic constitutional sphere may have helped shape Dicey's avowed rejection of comity as the foundation of private international law: AV Dicey, *Digest of the Law of England with Reference to the Conflict of Laws* (n 50) 10; For a sustained critique of positivist international law theory's traditional image of sovereignty and a reconsideration of the concept as 'a contested space' existing as a consequence of law in which 'sovereignty of the individual must also be given meaning', see, Mills, *The Confluence* (n 42) 75-88; Michaels, *Two Paradigms of Jurisdiction* (n 98) 1069; See also, Declaration of Judge Simma in the Kosovo Unilateral Declaration of Independence Advisory Opinion of 22 July 2010 criticising *The Case of the S.S. "Lotus", France v. Turkey* (1927) PCIJ (Ser A) No. 10, on the basis that the PCIJ decision reflects an outdated view of international law which is now strongly influenced by ideas of public law and an emerging international legal order.

¹⁰⁴ Michaels, *Party Autonomy in Private International Law--A New Paradigm Without a Solid Foundation?* (n 91) 9.

¹⁰⁵ *Ibid* 15.

jurisdiction and choice of law agreements in the ‘dispute resolution’ focussed English private international law. The ramifications of party autonomy as ‘sovereignty of the individual’ and a more cosmopolitan emerging third paradigm of jurisdiction in relation to the need to limit party autonomy in cases of ‘regulatory escape’¹⁰⁶ or ‘transnational lift off’¹⁰⁷ has already been highlighted by leading scholars in the field. It is submitted that the recognition of individual autonomy and its dynamic state of tension with state interests may also act as a balanced corrective to the ‘privatization of court access’ encouraged by the ‘dispute resolution’ paradigm which may have gone too far by devising purely private law remedies for the enforcement of jurisdiction and choice of law agreements. Occam’s razor may thus challenge the necessity of a purely private law remedy in a multifaceted international litigation arena where, arguably as a matter of principle, the international *public ordering of private law* should be balanced against the demands of the national *private ordering of private law*. At the same time, such developments should also help abate the negative repercussions of a conception of party autonomy which prioritizes the public ordering of private law without effectively integrating the concerns of the substantive law paradigm.

In order to demonstrate the practical application of these broad brush theoretical arguments in international commercial disputes before the English courts, it is necessary to

¹⁰⁶ Mills, *Rethinking Jurisdiction in International Law* (n 89) 237-238: The empowerment of some private actors, particularly corporations may put at risk the right of others, or the collective goods traditionally protected by the normative authority of states; The benefits of economic efficiency (including both Pareto efficiency and Kaldor-Hicks efficiency) and healthy jurisdictional competition are encouraged by party autonomy: See Giesela Ruhl, ‘Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency’ in Eckart Gottschalk and others (eds.), *Conflict of Laws in a Globalized World* (CUP 2007) 153, 176-182; However, these benefits should be balanced against the prospects of individuals or markets evading the regulatory influence of states and the protection of national public interests. These concerns are particularly prevalent in the rights granted to foreign investors in the context of investor state dispute settlement (whose complaints are heard by international arbitral tribunals, largely applying international not national law) and in the scope of recognition of party autonomy.

¹⁰⁷ Many scholars have expressed concern that party autonomy may enable private parties to evade the regulatory power of states interested in the dispute and its consequences: See Horatia Muir Watt, ‘Party Autonomy in International Contracts: From the Makings of a Myth to the Requirements of Global Governance’ (2010) 3 *European Review of Contract Law* 1; Muir Watt, *Private International Law Beyond the Schism* (n 42) 40; Robert Wai, ‘Private v Private: Transnational Private Law and Contestation in Global Economic Governance’ in Horatia Muir Watt and Diego P Fernandez Arroyo (eds.), *Private International Law and Global Governance* (OUP 2014) 34, 50-52, highlights the existence of a broader range of regulatory concerns behind the ‘smooth’ market for international dispute resolution – the distributional consequences of international dispute resolution agreements for third parties and weaker contracting parties may be neglected by national courts pro-actively seeking to enforce choice of forum and choice of law agreements; Robert Wai, ‘Transnational Liff-off and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization’ (2001-02) 40 *Columbia Journal of Transnational Law* 209, 218; cf Lehmann, *Liberating the Individual from Battles between States* (n 88) 419-421; Briggs, *Agreements* (n 50) 7; See also, Gilles Cuniberti, ‘The Merchant Who Would Not be King: Unreasoned Fears About Private Lawmaking’ in Horatia Muir Watt and Diego P Fernandez Arroyo (eds.), *Private International Law and Global Governance* (OUP 2014) 142; Erin A. O’Hara and Larry E. Ribstein, *The Law Market* (OUP 2009); J Dammann and H Hansmann, ‘Globalizing Commercial Litigation’ (2002) 94 *Cornell Law Review* 1.

examine the range of approaches to *lis pendens*¹⁰⁸ and the enforcement of jurisdiction agreements from both the perspectives of the 'substantive law' paradigm and the 'internationalist' paradigm. The techniques which predominantly support one paradigm largely to the exclusion of the other paradigm are most at risk of being rendered superfluous in the complex process of integration as they represent an approach whose legal basis may not be tenable under the third paradigm of jurisdiction.

The award of damages for breach of a jurisdiction agreement is a national private law remedy developed by the English courts for the enforcement of such agreements.¹⁰⁹ Most recently, the damages remedy has been successfully deployed by the English courts as an alternative to the now defunct anti-suit injunctions within the European judicial area.¹¹⁰ As a national private law remedy it falls squarely within the substantive law paradigm and is premised on the notions of freedom of contract and *pacta sunt servanda*. The attribution and private enforcement of an obligation not to be sued in a non-contractual forum and the correlative right to be sued in the contractual forum in an exclusive jurisdiction agreement by the English courts constitutes the enforcement of a primary norm, arguably, serving as a unilateral private international law rule with a confrontational and controversial international allocative function. Therefore, from an internationalist paradigm, the English conception of private international law as the unilateral enforcement of the private law rights of the litigating parties may seem unprincipled within a multilateral legal order. The argument that the damages award is not directed against the other court but against the party and as a consequence the remedy does not interfere with another court's autonomy is only defensible from the substantive law paradigm. Arguably, the interference with the international allocation of jurisdiction between Member States and the recognition and enforcement of the resulting Member State judgment is objectionable both as an infringement of the principles of mutual trust and the effectiveness of European Union law (*effet utile*) and as an infringement of national sovereignty. It may also be argued that the damages award has a redistributive allocative function of its own which protects jurisdictional autonomy under Article 25 of the Recast Regulation. Again, a similar counter

¹⁰⁸ *Lis pendens* in this context refers to the *factual situation* of parallel pending legal proceedings and not to the normative approaches which seek to resolve the factual problem: See McLachlan, *Lis Pendens in International Litigation* (n 42) 59.

¹⁰⁹ See Michaels, *Two Paradigms of Jurisdiction* (n 98) 1063-1064, examining anti-suit injunctions from both sides of the paradigmatic divide.

¹¹⁰ *Starlight Shipping Co v Allianz Marine and Aviation* [2014] EWCA Civ 1010 (Longmore LJ); Cited with approval by Christopher Clarke LJ in *AMT Futures Ltd v Marzillier, Dr Meier & Dr Gunter Rechtswaltsgesellschaft mbH* [2015] EWCA Civ 143.

argument may be employed to discredit the private law redistribution of the effects of the public ordering of private law.

The emphasis on private ordering and the focus on the dispute resolution needs of the contracting parties has led to an overall lack of awareness and interest in the systemic perspective of private international law and reliance on a weaker notion of comity.¹¹¹ Section 32 of the Civil Jurisdiction and Judgments Act 1982 has been referred to as ‘the ultimate source of the principle’ as judgments obtained in breach of a dispute resolution agreement may not be recognised and enforced in England and Wales.¹¹² This clears the way for the private law enforcement of the dispute resolution agreement by neutralising the potential danger of the enforcement of a contradictory foreign judgment which may itself challenge the judgment of the English court awarding damages for breach of such agreements. The unilateral non-recognition and enforcement under Section 32 may thus serve to both perpetuate and insulate the substantive law paradigm from the influence of the internationalist paradigm. On the other hand, it should be noted that the trials and tribulations of the English conflict of laws before what was perceived to be the CJEU’s regressive and commercially inept approach to private international law by orthodox English scholars was justifiable from a purely internationalist or at least European perspective.¹¹³

In contrast to the private law enforcement of private law agreements in English private international law, the unreformed *lis pendens* rule and its relationship to Article 23 of the Brussels I Regulation as symbolised by the infamous CJEU decision in *Gasser* represents the other end of the continuum of techniques. The approach in *Gasser* falls firmly within the rubric of the internationalist paradigm. International allocative concerns within the multilateral jurisdiction and judgments order warranted that the court first seised alone must assess the issue of jurisdiction regardless of the jurisdiction agreement. This could result in endemic delay and costs for the defendant and effectively block proceedings in the chosen forum until the court first seised has eventually declined proceedings. The substantive law paradigm with its emphasis on enforcing private law obligations and the prevalence of the concept of *pacta sunt servanda* play no role within the multilateral and international public ordering of private law.

¹¹¹ Mills, *The Confluence* (n 42) 224; Briggs, *Agreements* (n 50) 537.

¹¹² Briggs, *Agreements* (n 50) 321.

¹¹³ The triumvirate of decisions in *Gasser*, *Turner* and *Owusu* have been referred to as ‘fifteen months of infamy’ in: Adrian Briggs, ‘The Impact of Recent Judgments of the European Court on English Procedural Law and Practice’ (2005) Vol. II, No. 124 *Zeitschrift für Schweizerisches Recht* 231, 232; Oxford Legal Studies Research Paper No. 11/2006 <Available at SSRN: <http://ssrn.com/abstract=899689>> accessed 5 February 2014.

Four intermediate techniques represent approaches which occupy positions in the continuum between the purely private law enforcement of jurisdiction agreements in the English common law of conflict of laws and the system of the public ordering of private law in the EU coordinated by the *lis pendens* mechanism. Advocate General Leger's opinion that Article 21 of the Brussels Convention must be interpreted as meaning that a court second seised which has exclusive jurisdiction under an agreement conferring jurisdiction may, by way of derogation from that article, give judgment in the case without waiting for a declaration from the court first seised that it has no jurisdiction where there is no room for any doubt as to the jurisdiction of the court second seised is one such technique.¹¹⁴ Another technique is the Court of Appeal's finding in *Masri v Consolidated Contractors International Company SAL & Another* that seeking an anti-suit injunction does not require a legal or equitable right, and may be based upon the desire to protect the jurisdiction of the English court,¹¹⁵ provides a possible solution to marrying the public law analysis with the retention of anti-suit injunctions in international commercial litigation.¹¹⁶ The idea that recovering damages for breach of a foreign jurisdiction clause in the English courts itself represents a suitable compromise which balances the overriding public interest that the conduct of the litigation should take place in England with the private law rights of the parties has also been advanced.¹¹⁷ During the course of this thesis it will be suggested that the extended doctrine of *res judicata* based on abuse of process or the notion of constructive *res judicata* may be employed to limit claims for damages for breach of jurisdiction agreements in the English courts by requiring the claimant to have exhausted all remedies in the foreign court and only permitting claims that could not have been raised in the foreign court under any circumstances.¹¹⁸ These intermediate techniques also serve as examples of the pervasive influence of comparative law and the adaptation or synthezation of legal concepts in the conflicts of jurisdiction. The techniques are both shaped by and respond to the needs of the changing realities of the international commercial litigation sphere in the wake of the onset

¹¹⁴ Case C-116/02 *Erich Gasser GmbH v MISAT Srl* ECLI:EU:C:2003:436.

¹¹⁵ [2008] EWCA Civ 625.

¹¹⁶ See CJS Knight, 'The Damage of Damages: *Agreements on Jurisdiction and Choice of Law*' (2008) 4 *Journal of Private International Law* 501.

¹¹⁷ See Edwin Peel, 'Exclusive Jurisdiction Agreements: Purity and Pragmatism in the Conflict of Laws' [1998] *Lloyd's Maritime and Commercial Law Quarterly* 182, 225; cf Nicholas S Shantar, 'Forum Selection Clauses: Damages in Lieu of Dismissal?' (2002) 82 *Boston University Law Review* 1063, 1078-1088, argues that in relation to forum selection clauses in consumer adhesion contracts, a court should allow a consumer to pay damages in lieu of dismissal. In doing so he seeks to reconcile the interests of consumers by avoiding the unnecessary harshness of specific enforcement and sophisticated parties who are allowed to recover the costs of litigating in the consumer's home forum as damages for breach of the jurisdiction agreement.

¹¹⁸ See Chapter 8 below.

of globalization and the communitarization of private international law in the EU. As a consequence, the solutions proffered by the techniques are eclectic and borrow ideas from across the legal traditions.

In light of the foregoing, the emergence of a more benign *lis pendens* mechanism in the Recast Regulation may be judged to be a step in the right direction from the standpoint of paradigms of jurisdiction because Article 31(2) creates an exception to the operation of a strict *lis pendens* rule in Article 29 of the Recast Regulation.¹¹⁹ The substantive law paradigm is clearly not validated but more crucially a semblance of its *ethos* is retained as the initiation of proceedings in the chosen court will trigger the application of the protective cover of Article 31(2). As a reverse *lis pendens* mechanism which necessitates the commencement of proceedings in the chosen court in order to have effect, the architecture of the *lis pendens* technique is not fundamentally altered, indicating that we are still operating within an internationalist paradigm, albeit one that may not be blind to the concerns of the substantive law paradigm.

The damages remedy was not a viable option in the Recast Regulation and rightly so because in terms of the internationalist paradigm its unilateral national private law remedy status means that institutionalizing the remedy on a multilateral level will not reduce but frequently add to the complexity of jurisdiction and judgments issues between Member States in international commercial disputes within the EU. Moreover, an EC law remedy for ‘breach’ of choice of court agreements strays into the realm of substantive contract law and would appear outside the Community’s competence under Title IV of the Treaty.¹²⁰ A unilateral private law remedy for the enforcement of jurisdiction agreements may epitomise the substantive law paradigm but the incipient clash of competing priorities in the public regulation of international litigation in the EU may inhibit its future use.

The solution in the Recast Regulation may not be perfect in all respects but it represents a brave attempt at reconciling significant competing considerations from both the internationalist paradigm and the substantive law paradigm. Such a reconciliation is echoed in one of the perennial themes of private international law: ‘Rules of private international law strike a balance between facilitating internationally recognised individual autonomy and respect for state regulatory authority – between individual freedom and collective cultural

¹¹⁹ Cf Articles 5 and 6 of the Hague Convention on Choice of Court Agreements (30 June, 2005).

¹²⁰ Andrew Dickinson, ‘Brussels I Review – Choice of Court Agreements’ (Conflictflaws.net, 11 June 2009) <<http://conflictflaws.net/2009/brussels-i-review-choice-of-court-agreements/>> accessed 15 December 2014.

identity.’¹²¹ The rich experience of choice of law theory, where the once mutually antagonistic unilateral and multilateral choice of law rules have learned to co-exist with the rise of methodological pluralism, may also be invoked in support of a similar eclecticism of techniques in the conflicts of jurisdictions.¹²² The Recast Regulation has ventured forth in the direction of eclecticism of techniques by seeking to integrate the concerns of the substantive law paradigm into an internationalist regime for the public ordering of private law.

The Emerging Paradigm of Party Autonomy and the Proposed Reorganization of Private International Law Rules on the Basis of a Systematic Distinction between Agreements and Non Agreements

It has been argued that the rules of private international law should be reorganized in a manner that draws a more systematic distinction between agreements and no agreements.¹²³ It may be a worthwhile exercise to explore whether this proposal is justifiable in principle and crucially which paradigm of party autonomy would most satisfactorily accommodate such a position. This exercise should help us determine whether such a systematic distinction is defensible from the perspective of the quest for a sounder justification for the concept of party autonomy.

The call for a systematic distinction between agreements and non-agreements could lead to a number of normative consequences. It could mean that authors of texts on private international law and international commercial litigation should marshal their chapter outline in a manner that accords priority to the examination of the law on jurisdiction and choice of law agreements and then consider private international law rules in default of party choice.¹²⁴ Arguably, such an assertion is uncontroversial and is representative of the growing acceptance of the principle of party autonomy in the spheres of jurisdiction and choice of law. Acceding priority to jurisdiction and choice of law agreements may also help highlight the contribution of contract and commercial law reasoning to private international law.¹²⁵ A systematic distinction between agreements and non-agreements may also be contrasted with the unique contribution of the emerging third paradigm of jurisdiction and the conception of party autonomy as ‘sovereignty of the individual’. This too is a very logical

¹²¹ Mills, *The Confluence* (n 42) 294.

¹²² See FN 72 above.

¹²³ Lehmann, *Liberating the Individual from Battles between States* (n 88) 419-421; Briggs, *Agreements* (n 50) 6-7.

¹²⁴ See for instance, Richard Fentiman, *International Commercial Litigation* (OUP 2010) Chapters 2 and 3 and Richard Fentiman, *International Commercial Litigation* (2nd Edition, OUP 2015) Chapters 2 and 3.

¹²⁵ Briggs, *Agreements* (n 50) 7.

representation of the emerging paradigmatic shift. As discussed above, the radical nature of party autonomy and the quest for its rationalization has been variably described as a theoretically unresolved *Gordian knot*, as a ‘makeshift solution’¹²⁶ to an insoluble problem and as the ‘foundational myth of private economic law’.¹²⁷ Therefore, it would be only natural to highlight its significance.

However, if the reorganization suggests the application of a different set of principles and rules to agreements on jurisdiction and choice of law as compared to the determination of jurisdiction and choice of law based on traditional territorial connecting factors by the court in default of choice then this may be a cause for concern.¹²⁸ Arguably, both private international law rules by agreement and without agreement do not operate in a regulatory vacuum and are subject to limitations of both scope and substance within the multilateral jurisdictional and choice of law framework of the Brussels I Regulation and the Rome I and II Regulations respectively.¹²⁹ It is submitted that the strictures imposed by the European Union private international law rules will not permit the English courts to unilaterally treat private international law agreements differently from cases of non-agreements.

It is submitted that the linguistic distinction between the expressions ‘private international law *agreements*’ and ‘private international law *rules by agreement*’ may help clarify whether the proposed approach is sustainable in principle. Invoking the aid of the argument from the paradigms of party autonomy, the former expression may be said to properly belong to the *substantive law* paradigm premised on the domestic notion of ‘freedom of contract’ and a national private law conception of private international law. On the other hand, the latter expression may be said to properly belong to the *internationalist* paradigm seeking to limit private ordering within a multilateral conception of private international law. Arguably, from this perspective the issue is not one of ‘agreements or non-agreements’ within the substantive law paradigm but should rather be concerned with the more fundamental and abstract distinction between ‘private international law *agreements/non-agreements*’ within

¹²⁶ See Gerhard Kegel, *Internationales Privatrecht* (3rd Edition, Munich 1971) 255: ‘*Verlegenheitslösung*’.

¹²⁷ See Muir Watt, *Party Autonomy in International Contracts* (n 107) 7.

¹²⁸ Lehmann, *Liberating the Individual from Battles between States* (n 88) 419-421, operates within the ‘substantive law’ paradigm and proposes the new category of ‘relatively mandatory rules’ which cannot be deviated from in a national context but may be opted out of with regard to parties’ choice from an international perspective; Briggs, *Agreements* (n 50) 7: ‘[t]he instances in which the intention of the parties may be overridden should be few and.....should be taken less seriously when parties agree to bring their disputes before a court’.

¹²⁹ Jonathan Harris, ‘Agreements on Jurisdiction and Choice of Law: Where Next?’ [2009] *LMCLQ* 537, 537; Borchers, *Categorical Exceptions to Party Autonomy* (n 69) 1651ff.

the substantive law paradigm and 'private international law *rules by agreement/non agreement*' within the internationalist paradigm.

If preferential treatment is accorded to private international law *agreements* as compared to private international law *rules by agreement* then a biased stance towards the regulatory constraints of the internationalist paradigm is quite obvious. It is submitted that the tide of 'privatization' or 'contractualization' should be checked in relation to arguments which overtly favour the private ordering of private law without considering the global governance implications inherent in the public ordering of private law. The privatization of court access that results from the separation of functions within a jurisdiction agreement is another manifestation of the contractualization drive with potentially negative repercussions for the systemic perspective of private international law. This issue has already been dealt with in detail during the course of this chapter.

Conclusion

From the foregoing it is apparent that the inherent regulatory function of the conflict of laws, the design of multilateral private international law norms as universal higher level secondary rules for the allocation of regulatory authority and the broader notion of justice in private international law may not lend support to the idea of the separation of functions within and the relative effect of jurisdiction and choice of law agreements. The recent jurisprudential discourse on the emerging third paradigm and the quest for a more comprehensive understanding of party autonomy may also offer significant insights into both the existing *substantive law* paradigm and the *internationalist* paradigm of party autonomy. It has been argued that techniques which predominantly support one paradigm largely to the exclusion of the other paradigm are most at risk of being rendered superfluous in the complex process of integration as they represent an approach whose legal basis may not be tenable under the third paradigm of jurisdiction. The damages remedy for breach of a choice of court agreement may be considered to be a core example of the *substantive law* paradigm of party autonomy which by itself renders the private law remedy particularly unsuitable for use within a multilateral and *internationalist* jurisdiction and judgments order such as the Brussels I Regulation.

The next chapter attempts to deconstruct the pervasive analogy between arbitration and jurisdiction agreements with particular emphasis on the unified approach adopted by the English courts in the private law enforcement of arbitration and jurisdiction agreements. It

will be argued that the stronger public procedural imperatives at play in the context of international civil and commercial litigation may merit a differentiated treatment of such clauses.

Chapter 3 - The Analogy between Arbitration Agreements and Jurisdiction Agreements: The Technique of Severability and Whether the Contractualization Phenomena Distorts the Fundamental Nature and Effects of Jurisdiction Agreements?

Introduction

A significant component of my research project focusses on the fundamental nature and classification of a jurisdiction agreement. It has been argued that the procedural and substantive aspects of a jurisdiction agreement warrant the classification of a 'hybrid' contract.¹³⁰ Globalization and recent developments in private international law in the EU and the Hague Conference have meant that our fundamental understanding of the nature of jurisdiction agreements is simultaneously informed by and seeks to synthesize or eclectically choose the best characteristics in jurisdiction agreements from across the legal traditions.¹³¹

In the course of this particular section, it will be argued that the analogy drawn between arbitration agreements and jurisdiction agreements is premised on a 'functional equivalence' and they are not fully convergent or mutually inclusive in identity and effects. Indeed, it may be observed that the two are different but related forms of dispute resolution agreements. Our particular focus will be on whether the contractualization of arbitration agreements in relation to their enforcement can be transposed *verbatim* on to the enforcement of jurisdiction agreements in international commercial disputes before the English courts. The identification and rationalization of fundamental areas of divergence will mean that the functional equivalence attributed to such agreements should not be allowed to extend to the point where the relative autonomy of the two forms of dispute resolution agreements is at risk of being eclipsed.

The arbitration agreement analogy seeks to demonstrate that both arbitration agreements and jurisdiction agreements are premised on essentially contractual foundations or the

¹³⁰ Trevor C Hartley, *Choice of Court Agreements under the European and International Instruments: The Revised Brussels I Regulation, the Lugano Convention and the Hague Convention* (Oxford Private International Law Series, OUP 2013) 4-6, 129-130; Burkhard Hess, 'The Draft Hague Convention on Choice of Court Agreements, External Competencies of the European Union and Recent Case Law of the European Court of Justice' in Arnaud Nuyts and Nadine Watté (eds.), *International Civil Litigation in Europe and Relations with Third States* (Bruylant 2005) 263, 271.

¹³¹ See generally, Richard Garnett, *Substance and Procedure in Private International Law* (Oxford Private International Law Series, OUP 2012) 104-108.

notion of 'freedom of contract'.¹³² However, the specific public procedural characteristics of jurisdiction agreements and international litigation within multilateral private international law regimes may necessitate a differentiated stance towards the private law enforcement of both forms of dispute resolution agreements. The aim of this section is to deconstruct the analogy between the two types of forum selection agreements on an issue by issue basis in order to clarify and reach a better understanding of the true nature of choice of court agreements and how they differ from arbitration agreements. The principle of severability in choice of forum agreements is examined first before moving on towards analysing the fundamental points of divergence between such agreements.

Severability in Dispute Resolution Agreements

An arbitration agreement is a separate and distinct agreement from the substantive contract and is not ordinarily impeached or rendered void if the substantive contract is discharged, frustrated, repudiated, rescinded, avoided or found to be void.¹³³ This is so even where the substantive contract is void on the grounds of initial illegality.¹³⁴ The principle of severability is distinct from the concept of the arbitrator's jurisdiction to rule on its own jurisdiction which is referred to as *kompetenz-kompetenz*.¹³⁵

Section 7 of the English Arbitration Act 1996 sets down the position previously established in English common law and provides:¹³⁶

Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.

Prior to the Arbitration Act 1996, the principle of severability of arbitration agreements in England had been expressed clearly by the Court of Appeal in *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd*.¹³⁷ Severability was said to be an essential corollary to giving effect to the parties autonomy to provide for the resolution of disputes

¹³² PE Nygh, *Autonomy in International Contracts* (Oxford Private International Law Series, OUP 1999) Chapter 1, 2.

¹³³ Margaret L Moses, *The Principles and Practice of International Commercial Arbitration* (2nd Edition, Cambridge University Press 2012) 19; David Joseph QC, *Jurisdiction and Arbitration Agreements and their Enforcement* (2nd Edition, Sweet and Maxwell 2010) 123-128.

¹³⁴ Joseph (n 133) 123-128.

¹³⁵ See Section 30 of the Arbitration Act 1996 (England and Wales).

¹³⁶ See also Section 5(1) of the Arbitration (Scotland) Act 2010; PR Beaumont and PE McEleavy, *Anton's Private International Law* (SULI, 3rd Edition, W Green 2011) Chapter 11.

¹³⁷ [1993] 1 Lloyd's Rep 455.

and now has become part of the very alphabet of arbitration law. Lord Justice Hoffman observed in the course of his judgment in *Harbour v Kansa* that there will be cases where the allegations relevant to the impeachment of the substantive contract will directly impeach the separate arbitration agreement. The House of Lords in *Fiona Trust and Holding Corp v Privalov* has fully endorsed the principle of severability.¹³⁸

The same principle of severability applies at common law to choice of court agreements. The principle will in practice be given effect in the context of application of the jurisdiction rules under CPR r 6.20 and CPR r 11. In view of the refinement and development of the analysis in relation to arbitration agreements as expressed by the Court of Appeal in *Harbour v Kansa*, the material questions in each case remain the same as for an arbitration agreement, namely (a) whether the disputes fall within the four corners of the choice of court agreement and (b) whether the plea advanced directly impeaches the choice of court agreement. Both of these questions should be determined in accordance with the applicable law of the choice of court agreement. Under English law in cases of the plea of *non est factum*, fraud or duress it may be that both the substantive contract and the jurisdiction agreement are simultaneously impeached. As with arbitration agreements, where illegality is alleged, the nature of the illegality needs to be considered and whether it directly impeaches the jurisdiction agreement.

There has been consistent judicial support at first instance in favour of applying the principle of severability to jurisdiction agreements in the same manner as it is applied to arbitration agreements.¹³⁹ In *Credit Suisse First Boston (Europe) Ltd v Seagate Trading Co Ltd*¹⁴⁰ the issue of severability arose in the context of an application for an anti-suit injunction made by the claimant relying upon a jurisdiction agreement contained in a trading confirmation. The defendant averred that the trading confirmation had been procured by fraud. Rix, J referred to the principle of severability but concluded that the allegation of fraud impeached all the terms of the trading confirmation, including the choice of court agreement, and hence gave good reason for not granting an anti-suit injunction. More recently, the English Court of Appeal has endorsed the principle of severability as being equally applicable to jurisdiction

¹³⁸ *Premium Nafta Products Limited and others v. Fili Shipping Company Limited and others* [2007] UKHL 40; [2007] All ER (D) 233 (Oct).

¹³⁹ *Credit Suisse First Boston (Europe) Ltd v Seagate Trading Co Ltd* [1999] 1 Lloyd's Rep 784, 797 (Rix J. without deciding the point); *IFR Ltd v Federal Trade SpA* [2001] All ER (D) 48 (Colman J.); and *Sonatrach petroleum Corp v Ferrell International Ltd* [2002] 1 All ER (Comm) 627 at [30] (Colman J.); *Connex South Eastern Ltd v MJ Building Services Group Plc* [2004] EWHC 1518.

¹⁴⁰ [1999] 1 Lloyd's Rep 784.

agreements and arbitration agreements. In *Deutsche Bank AG v Asia Pacific Wireless Broadband Wireless Communications*¹⁴¹ Longmore, LJ reiterated that a challenge to the validity of the main contract itself was not sufficient to impeach the choice of court agreement. In each case it was necessary to find a direct attack on the choice of court agreement itself. Longmore, LJ then repeated the possible example of forged signatures that had been referred to in the House of Lords in *Fiona Trust and Holding Corp v Privalov*.

Quite apart from binding precedent, there are a number of reasons why it is suggested that this approach is sound in principle. First, the policy of giving effect to party autonomy applies with as much force to a jurisdiction agreement as it does to an arbitration agreement. Secondly, the principle of severability has achieved wide acceptance in the international community in relation to jurisdiction and arbitration agreements alike. This is especially important in the context of dispute resolution agreements where the validity of such an agreement must be determined by reference to its proper law. This is unlikely to be English law in the case of a foreign jurisdiction agreement. Thirdly, a similar result to that obtained by applying the principle of severability as explained in *Harbour v Kansa* is arrived at under the Brussels I Regulation and it would make no sense for English common law to approach the matter differently. Fourthly, as has been seen already, dispute resolution agreements take many forms including giving parties an option either to litigate or arbitrate. The application and extent of the principle of severability should not depend upon which option is taken, particularly once a dispute has arisen.

An agreement conferring jurisdiction under Article 25 of the Regulation is given effect even when the dispute concerns whether or not the contract which contains the jurisdiction agreement is void.¹⁴² Although not expressly referred to by the Court of Justice of the EU in these terms, a jurisdiction agreement should be seen as an independent and collateral bargain that is established in accordance with the autonomous requirements of Article 25. Thus it is open to establish consensus between the parties as to the terms of the substantive contract but not as regards the agreement to confer jurisdiction. The existence or otherwise of a contract between the parties and its terms is established by reference to the requirements of Article 25. The Court of Justice in *Benincasa v Dentalkit Srl* was faced with

¹⁴¹ [2008] EWCA Civ 1091; [2008] 2 Lloyd's Rep at [24].

¹⁴² *Benincasa v Dentalkit Srl* Case C-269/95 [1997] ECR I-3767 at [28]-[30]; *Trasporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA* Case C-159/97 [1999] ECR I-1597 at [51]; See PF Schlosser, 'The Separability of Arbitration Agreements – A Model for Jurisdiction and Venue Agreements?' in T Einhorn and K Siehr (eds.), *Intercontinental Cooperation through Private International Law: Essays in Memory of Peter E. Nygh* (TMC Asser Press 2004) 305, 313.

questions that arose under a franchising agreement said to confer jurisdiction on the courts of Florence. The claimant commenced proceedings in Germany, seeking a declaration that the franchising agreement including the jurisdiction agreement was void under German law. The Court of Justice concluded that, if the disputes fell within the scope of the jurisdiction agreement, then an Article 25 agreement also conferred exclusive jurisdiction on the chosen court, notwithstanding that the dispute concerned the question of whether or not the contract containing the jurisdiction agreement was void. The Court of Justice's reasoning was not explicitly based on an application of the principle of severability, but was couched in terms of the attainment of the objectives of the Brussels Convention; namely giving effect to the principle of party autonomy and legal certainty. In particular, the Court of Justice stated that the objectives of the Brussels Convention would be undermined if a party could escape its bargain on jurisdiction by asserting the invalidity of the substantive contract. It is submitted; however, that the result arrived at by the CJEU is entirely consistent with the principle of severability and was certainly viewed in this way by Justice Moore Bick in *AIG Europe SA v QBE International*¹⁴³ and by the Court of Appeal in *Deutsche Bank AG v Asia Pacific Wireless Broadband Wireless Communications*.¹⁴⁴

Interim Conclusion

The specific provision for the principle of severability along with a choice of law rule for the substantive validity of a jurisdiction agreement in the Hague Convention and the Recast Regulation support the arguments in favour of an essentially contractual justification for choice of court agreements. The referral of issues relating to material validity, a substantive element of a jurisdiction agreement, to the law of the chosen forum including its private international law rules recognises the complex hybrid or 'mixed' nature of a choice of court agreement incorporating a mix of substantive and procedural components.¹⁴⁵ Article 3(d) of the Hague Convention and Article 25(5) of the Recast Regulation offer an additional layer of protection for choice of court agreements by emphasizing that an attack on the existence and validity of the main contract does not by itself impeach the existence and validity of the

¹⁴³ [2001] 2 Lloyd's Rep 268 at [26].

¹⁴⁴ [2008] EWCA Civ 1091; [2008] 2 Lloyd's Rep at [24]; See *Aeroflot v Berezovsky* [2013] EWCA Civ 784, [64]: Aikens LJ followed the ruling of Longmore LJ in *Deutsche Bank v Asia Pacific* and held that 'the doctrine of "separability" is now uncontroversial as a matter of EU law.'

¹⁴⁵ For a discussion of the juridical nature of arbitration agreements and choice of court agreements and the classification of such 'procedural agreements' as 'mixed contracts', see, Alexander J Belohlavek, 'The Definition of Procedural Agreements and Importance to Define the Contractual Nature of the Arbitration Clause in International Arbitration' in M Roth and M Giestlinger (eds.), *Yearbook of International Arbitration* (Intersentia / DIKE / NWV, Vienna-Graz, 2012) 21, 45.

independent choice of court agreement.¹⁴⁶ This ensures that the forum chosen by the parties exercises adjudicatory authority even where the very existence of the contract is in dispute. The principles of party autonomy and legal certainty justify the exercise of jurisdiction by the chosen court where the validity of the substantive contract is impugned.

To reiterate, the establishment of a choice of law rule for material validity and the enshrinement of the principle of severability for choice of court agreements will reinforce a contractual interpretation of such agreements. However, to view these developments as impetus or justification for the contractual enforcement of jurisdiction agreements via anti-suit injunctions and the damages remedy may border on the naïve. The principal method of enforcing choice of court agreements in both the Hague Convention on Choice of Court Agreements and the Brussels I Regulation (Recast) is jurisdictional or procedural and not contractual. The designated court in a choice of court agreement shall exercise jurisdiction whilst all other courts are required to stay and eventually decline jurisdiction.¹⁴⁷ In the case of the Brussels I Regulation (Recast) a reverse *lis pendens* rule accords primacy to proceedings commenced in the chosen court over any other court seised.¹⁴⁸ The prospects of contractual remedies enforcing choice of court agreements making headway is necessarily curtailed in a ‘double convention’ multilateral jurisdiction and judgments system which prioritizes the overarching principle of mutual trust and the *effet utile* of EU law over and above the enforcement of private law rights and obligations embodied in an exclusive jurisdiction agreement.

Having considered that the principle of severability developed in the context of arbitration agreements applies equally to jurisdiction agreements, the time is ripe for a comparison of the two types of forum selection clauses in order to reveal their fundamental points of divergence.

Deconstructing the Arbitration Agreement Analogy

There is a pervasive tendency, especially in the English common law tradition, to paint both arbitration agreements and jurisdiction agreements with the same broad brushstroke.¹⁴⁹

¹⁴⁶ Article 3(d) of the Hague Convention on Choice of Court Agreements; Article 25(5) of the Brussels I Regulation (Recast).

¹⁴⁷ Articles 5 and 6 of the Hague Convention.

¹⁴⁸ Article 31(2) of the Brussels I Regulation (Recast).

¹⁴⁹ Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford Private International Law Series, OUP 2008) Chapter 3; ZS Tang, *Jurisdiction and Arbitration Agreements in International Commercial Law* (Routledge

Certain significant elements of functional identity along with the general emphasis on serving the ‘dispute resolution’ needs of the litigating parties in the English courts may be responsible for conjuring up the similar practical treatment of both types of choice of forum agreements.¹⁵⁰ For instance, both types of agreement are based on the parties genuine consent and mutual agreement along with the basic contract formation requirements to be considered valid,¹⁵¹ both promote procedural certainty, predictability and economic efficiency in the legal relations between the contracting parties, both serve the procedural function of invoking the jurisdiction of the chosen court or arbitral tribunal and both (except non-exclusive or asymmetric jurisdiction agreements) exclude the possibility of any otherwise competent non-chosen forum from taking jurisdiction. As a result, they are frequently equalized by the courts, which apply the same principles to both jurisdiction and arbitration agreements.¹⁵² In English law, exclusive jurisdiction agreements and arbitration agreements are accorded equivalent effect when courts exercise their discretion in granting anti-suit injunctions or awarding damages for breach of such agreements.¹⁵³ The principles of deciding whether to grant anti-suit injunctions in cases where there is an exclusive jurisdiction agreement are summarized in *Donohue v Armco*.¹⁵⁴ The landmark House of Lords decision has been followed in cases granting anti-suit injunctions in support of arbitration agreements.¹⁵⁵

Apart from a contractual analysis of the classification and enforcement of arbitration agreements, the enforcement of arbitration agreements and the resulting arbitral awards

Research in International Commercial Law, Routledge, London & New York 2014) Chapter 1, 3; Chee Ho Tham, ‘Damages for Breach of English Jurisdiction Clauses: More than Meets the Eye’ [2004] *LMCLQ* 46, 50-56.

¹⁵⁰ See Horatia Muir Watt, ‘Party Autonomy in International Contracts: From the Makings of a Myth to the Requirements of Global Governance’ (2010) 3 *European Review of Contract Law* 1, 29-32.

¹⁵¹ See Article II(3) of the New York Convention; Article 23 of the Brussels I Regulation; Article 25 of the Brussels I Regulation (Recast); Articles 3(c), 5(1), 6(a) and 9(a) of the Hague Convention on Choice of Court Agreements.

¹⁵² See JJ Fawcett and JM Carruthers, *Cheshire, North & Fawcett: Private International Law* (14th Ed, Oxford University Press 2008) 469-475; Thomas Raphael, *The Anti-Suit Injunction* (Oxford Private International Law Series, OUP 2008) Chapter 7; cf Tham (n 149) argues that the analogy between jurisdiction and arbitration clauses is misplaced as jurisdiction agreements are no more than ancillary contracts which do not give rise to primary and secondary obligations of their own. However, it is submitted that the English authorities actually demonstrate a clear acceptance that exclusive forum clauses give rise to independent obligations, breach of which sounds in the award of damages or the grant of an anti-suit injunction. The orthodox English authorities and scholarship draw no distinction between the treatment of arbitration clauses and jurisdiction clauses.

¹⁵³ See Fawcett and Carruthers (n 152) 470-475; *Donohue v Armco Inc.* [2001] UKHL 64, [2002] 1 All ER 749; *Union Discount Co v Zoller* [2001] EWCA Civ 1755, [2002] 1 WLR 1517; *Aggeliki Charis Compania Maritima SA v Pagnan SpA, The Angelic Grace* [1995] 1 Lloyd’s Rep 87; *Welex AG v Rosa Maritime Ltd* [2003] 2 Lloyd’s Rep 509; *A v B (No 2)* [2007] EWHC 54 (Comm), [2007] 1 Lloyd’s Rep 358.

¹⁵⁴ [2001] UKHL 64, [2002] 1 All ER 749.

¹⁵⁵ *Atłaska Płovidba v Consignaciones Asturianas SA (The Lapad)* [2004] 2 CLC 886, para 28; *Noble Assurance Co v Gerling-Konzern General Insurance Co* [2007] 1 CLC 85, paras 85-85; *Welex AG v Rosa Maritime Ltd* [2003] 2 Lloyd’s Rep 509, paras 47-52.

are governed globally by the New York Convention.¹⁵⁶ Article II(3) of the Convention provides:

The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III of the Convention states that each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the Convention. The New York Convention has proved to be a very successful global framework for the allocation of arbitral jurisdiction and the recognition and enforcement of arbitration awards.

Although from a pragmatic perspective, an arbitration agreement appears to possess a similar function as compared to an English exclusive jurisdiction agreement, it is submitted that the two types of choice of forum agreements operate at different levels in relation to both their classification and enforcement. The observation of Fletcher Moulton LJ in *Doleman and Sons v. Ossett Corporation*¹⁵⁷, that by agreeing to send their disputes to arbitration:

The parties have agreed that the rights of the parties in respect of that dispute shall be as stated in the award [as determined by the arbitrator], so that in essence it partakes the character of ‘accord and satisfaction by substituted agreement’. The original rights of the parties have disappeared, and their place has been taken by their rights under the award.

The question is whether a jurisdiction agreement is treated in the same way by the courts. However, a jurisdiction agreement does not manifest itself as an agreement by the parties that their original primary and secondary obligations are to be discharged by accord and satisfaction arising from the judgment by the judge. The substitution of the original rights of the parties under the contract does not occur as a result of any private agreement but by operation of law pursuant to the ‘doctrine of merger’.¹⁵⁸ When an English court pronounces judgment, the cause of action disclosed by the pleadings is ‘merged’ with the judgment:¹⁵⁹

¹⁵⁶ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June, 1958, 330 UNTS 4739.

¹⁵⁷ [1912] 3 KB 257 (CA).

¹⁵⁸ See Peter Barnett, *Res Judicata, Estoppel, and Foreign Judgments: The Preclusive Effects of Foreign Judgments in Private International Law* (Oxford Private International Law Series, OUP 2001) 88-90; Tham (n 149) 50-56.

¹⁵⁹ *Blair v Curran* (1939) 62 CLR 464, 532 HCA (Dixon J).

‘the very right or cause of action claimed or put in suit has in the first proceedings passed into judgment, so that it merged and has no longer an independent existence’.

Given its status as a distinct collateral contractual agreement of its own, the effect of which is to discharge the primary and secondary obligations under the main agreement and bind the parties to a new procedure, Fletcher Moulton LJ’s observation in *Doleman & Sons*¹⁶⁰ that contractual damages should be available to compensate a contracting party when the other initiates legal proceedings in breach of an arbitration clause should come as no surprise.¹⁶¹ An arbitration agreement constitutes a collateral contract with distinct primary and secondary obligations of its own. Furthermore, the arbitration agreement is subject to the technique of severability which serves to insulate or protect the arbitration agreement from a challenge to the validity of the substantive contract.¹⁶² Similarly, it may be observed that under the English common law an exclusive choice of court agreement is also susceptible to being breached and where breached may lead to both primary and secondary obligations of its own.¹⁶³ However, the contractual analysis borrowed from the parallel world of arbitration agreements may not always effortlessly translate into viable solutions for the enforcement of choice of court agreements as the latter may operate within a multilateral jurisdiction and judgments framework which may prioritize international allocative concerns over and above the private law enforcement of court access:¹⁶⁴

¹⁶⁰ *Doleman & Sons v Ossett Corporation* [1912] 3 KB 257 (CA).

¹⁶¹ *Schiffahrtsgesellschaft Detlev von Appen GmbH v. Voest Alpine Intertrading GmbH* [1997] 2 Lloyd’s Rep. 279 (CA); *Mantovani v. Caparelli SpA* [1980] 1 Lloyd’s Rep. 375 (CA); *CMA CGM SA v. Hyundai Mipo Dockland Ltd* [2008] EWHC 2791 (Comm); *West Tankers Inc. v. Allianz SpA* [2012] EWHC 854 (Comm); See Gary B Born, *International Commercial Arbitration* (2nd Edition, Kluwer Law International 2014) 1253ff; Briggs, *Agreements* (n 136) 499-504; Hakeem Seriki, *Injunctive Relief and International Arbitration* (Informa Law, Routledge 2014) 134-135; cf Nigel Blackaby and Constantine Partasides with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (5th Edition, OUP 2009) 20, express a view preferring the *international* enforcement of arbitration agreements through Article II(3) of the New York Convention rather than national enforcement in the place where the agreement was made: ‘an agreement to arbitrate is a contract of *imperfect obligation*. If it is broken, an award of damages is unlikely to be a practical remedy, given the difficulty of quantifying the loss sustained’ (Emphasis added).

¹⁶² See Section on ‘Severability in Dispute Resolution Agreements’ above; cf Section 7 of the Arbitration Act 1996 (England and Wales); Section 5(1) of the Arbitration (Scotland) Act 2010.

¹⁶³ *Donohue v Armco Inc* [2001] UKHL 64, [2002] 1 All ER 749; *Union Discount Co v Zoller* [2001] EWCA Civ 1755, [2002] 1 WLR 1517.

¹⁶⁴ (Emphasis in original): Daniel Tan, ‘Enforcing International Arbitration Agreements in Federal Courts: Rethinking the Court’s Remedial Powers’ (2007) 47 *Virginia Journal of International Law* 545, 601; Moses, *The Principles and Practice of International Commercial Arbitration* (n 133) 97: ‘Although the framework of legal analysis tends to be the same for anti-suit injunctions whether they are intended to protect rights in litigation or in arbitration, *courts in common law countries seem to be somewhat more likely to issue an anti-suit injunction to protect an arbitration agreement*, because of the strong public policy favouring arbitration.’ (Emphasis added).

It may be more palatable to certain courts for a party to request that the court enforce an arbitration agreement – when a court enforces an *arbitration* clause, it does not prefer one national court over another. The court is merely ordering that the dispute be resolved in accordance with the parties’ agreement. This is nothing more than enforcing a privately agreed upon means of dispute resolution, without attempting to allocate jurisdiction between national courts. Choice of court agreements, on the other hand, are different. Where a court enforces a choice of court agreement, it could conceivably be seen, by ordering the parties to litigate their case in a particular national forum, as preferring one national court over another – an impression that some court may be reluctant to give. Moreover, some courts regard the jurisdiction of a court as a matter of public law. These courts will not enforce a choice of court agreement if seen as an attempt to do just that.

Daniel Tan’s insightful observation in the context of the American federal courts may be further developed by an instructive reference to the public or regulatory function of multilateral private international law rules by the Supreme Court of Canada:¹⁶⁵ ‘the twin objectives sought by private international law in general [are] *order* and *fairness*’. The emphasis on ‘order’ here refers to the systemic structural demands of the public or constitutional ordering of private law in contrast to the goal of substantive justice and fairness between the parties in the individual case. Such a focus is natural within a conception of private international law as a multilateral framework for the allocation of regulatory authority in federal systems.¹⁶⁶

On the other hand, the English common law’s jurisprudence on the unilateral use of anti-suit injunctions and the damages remedy for enforcing choice of forum agreements has emerged without a proper and careful consideration of the wider regulatory implications of the development of such remedies for the allocative and distributive function of private international law.¹⁶⁷ Anti-suit injunctions can effectively derail foreign proceedings and infringe upon the sovereignty of the foreign state in the process of enforcing an exclusive jurisdiction agreement. Moreover, applying an unrestrained contractual analysis to the damages remedy for breach of exclusive jurisdiction agreements may mean that considerations of a unilateral substantive law nature will always prevail over international

¹⁶⁵ (Emphasis added) *Holt Cargo Systems Inc. v ABC Containerline NV* [2001] 3 SCR 907, [71]; *Morguard Investments Ltd. v De Savoye*, [1990] 3 SCR 1077, (1990) 76 DLR (4th) 256 (Supreme Court of Canada).

¹⁶⁶ See Alex Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (Cambridge University Press 2009) Chapter 1; Campbell McLachlan, *Lis Pendens in International Litigation* (Pocketbooks of the Hague Academy of International Law, Martinus Nijhoff Publishers, Leiden & Boston 2009) 76-81; Campbell McLachlan, ‘International Litigation and the Reworking of the Conflict of Laws’ (2004) 120 *LQR* 580, 581-582; Campbell McLachlan, ‘The Jurisdictional Limits of Disclosure Orders in Transnational Fraud Litigation’ (1998) 47 *ICLQ* 3, 3.

¹⁶⁷ *Turner v Grovit* C-159/02 [2004] ECR I-3565; Muir Watt, *Party Autonomy in International Contracts* (n 150) 30-32.

procedural concerns, thereby wreaking havoc for a multilateral conception of private international law. For instance, the prospect of second guessing the findings of a foreign court on the merits and recovering substantive claw back damages may effectively reverse or nullify the foreign judgment and in the process damage the reputation of private *international* law as part of the larger international legal order.

However, the specific public procedural constraints on the private law enforcement of jurisdiction agreements in a multilateral conception of private international law should not inhibit the enforcement of arbitration agreements.¹⁶⁸ In exceptional circumstances, an anti-arbitration injunction (or the damages remedy) has been awarded by an English court to restrain a foreign arbitral tribunal.¹⁶⁹ Arguably, an anti-suit injunction or the damages remedy may also be granted by an arbitral tribunal as tribunals are not subject to the EU rules on international civil procedure.¹⁷⁰ In the context of the European judicial area, the Grand Chamber of the CJEU's pragmatic decision in *Gazprom* has confirmed the accuracy of the latter hypothesis.¹⁷¹ The decision seeks to limit the operation of the principles of mutual trust and the effectiveness of EU law (*effet utile*) to court to court proceedings in Member States as in the paradigm case of *West Tankers*.¹⁷² Therefore, it may be observed that the scope for the enforcement of arbitral autonomy is greater than the avenues available for the private law enforcement of jurisdiction agreements in the EU.¹⁷³ A pervasive contractual analysis vouched in the language of substantive law rights and obligations arising from such agreements is thus more readily attributable to arbitration agreements as compared to

¹⁶⁸ See Article 1(2)(d) of the Brussels I Regulation (Recast) and Article 1(2)(d) of the Brussels I Regulation.

¹⁶⁹ *Claxton Engineering Services Limited v Tam Olaj-Es Gazkutato* [2011] EWHC 345 (Comm) (Hamblen J); *Albon v Naza Motor Trading Sdn Bhd* [2007] EWCA Civ 1124, [2008] 1 Lloyd's Rep 1; See Rory Butler and Baptiste Weijburg, 'Do Anti-Suit Injunctions Still Have a Role to Play? – An English Law Perspective' (2011-2012) 24 *University of San Francisco Maritime Law Journal* 257, 279-283.

¹⁷⁰ See *West Tankers Inc. v Alliance SpA* [2012] EWHC 854 (Comm) [78] (Flaux J), determined that the arbitral tribunal 'was not deprived, by reason of European law, of the jurisdiction to award equitable damages for breach of the obligation to arbitrate.'; For the view that the arbitral tribunal may award damages, because the Brussels I Regulation recognises that a tribunal has a freedom which is not extended to a court in a Member State, see *CMA CGM SA v Hyundai Mipo Dockyard Co Ltd* [2008] EWHC 2792 (Comm), [2009] 1 Lloyd's Rep 213 (Burton J).

¹⁷¹ Case C-536/13 *Gazprom* ECLI:EU:C:2015:316.

¹⁷² *Ibid*, [32]-[34]; C-185/07 *West Tankers* EU:C:2009:69, [29]-[31]; See Chukwudi Paschal Ojiegbe, 'From *West Tankers* to *Gazprom*: anti-suit injunctions, arbitral anti-suit orders and the Brussels I Recast' (2015) 11 *Journal of Private International Law* 267, 289-290.

¹⁷³ See Ewelina Kajkowska, 'Anti-Suit Injunctions in Arbitral Awards: Enforcement in Europe' (2015) 74 *Cambridge Law Journal* 412, 415; Trevor C Hartley, 'Antisuit Injunctions in Support of Arbitration: *West Tankers* Still Afloat' (2015) 64 *International and Comparative Law Quarterly* 965, 975; Cf *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG (The Alexandros T)* [2014] EWCA Civ 1010 (Longmore LJ).

exclusive jurisdiction agreements.¹⁷⁴ It may also be argued that the strong notion of mutual trust which animates the EU private international law regime does not similarly constrain the enforcement of arbitration agreements within the EU under the New York Convention.¹⁷⁵

Parties are only subject to arbitration if they have contracted to be so - *ex contractu*.¹⁷⁶ The submission of a dispute to arbitration is therefore exclusively premised on freedom of contract and the presence of an appropriately worded arbitration agreement is both a necessary and generally sufficient basis for the arbitrator to be seised with the dispute. The current Article 25(1) of the Brussels I Regulation (Recast) does not require a connection between the parties to the choice of court agreement and the chosen court or the EU and the chosen court must accept jurisdiction if the clause meets the comprehensive criteria for validity set out in that provision. Article 23(1) of the Brussels I Regulation required at least one of the parties to the choice of court agreement to be domiciled in the EU but where both parties were not domiciled in the EU and the chosen court was in the EU, the English common law jurisdictional regime governed the prorogation of jurisdiction.¹⁷⁷ According to the increasingly less relevant common law regime, the English courts will usually enforce an English jurisdiction agreement in the absence of strong reasons to the contrary but it is neither necessary nor sufficient to establish an English court's jurisdiction.¹⁷⁸

Arbitration agreements submit disputes to arbitral tribunals, which are private bodies, acquiring their dispute resolution power solely and exclusively from the autonomy of the parties.¹⁷⁹ In addition to designating the seat of the tribunal, the parties have the autonomy

¹⁷⁴ Jonathan Harris, 'Agreements on Jurisdiction and Choice of Law: Where Next?' [2009] LMCLQ 537, 555

¹⁷⁵ See Recital 12 of the Brussels I Regulation (Recast); AG Wathelet has even radically argued that the second paragraph of Recital 12 attempts to 'exclude from the scope of the regulation any proceedings in which the validity of an arbitration agreement was contested' and supported the conclusion that anti-suit injunctions in relation to arbitration proceedings are allowed by the Recast Regulation: Case C-536/13 *Gazprom OAO* ECLI:EU:C:2014:2414, [125] (Opinion); cf Berk Demirkol, 'Ordering Cessation of Court Proceedings to Protect the Integrity of Arbitration Agreements under the Brussels I Regime' (2016) 65 *ICLQ* 379, 401.

¹⁷⁶ Jonathan Hill and Adeline Chong, *International Commercial Disputes: Commercial Conflict of Laws in English Courts* (Fourth Edition, Hart Publishing, Oxford 2010) 755-756.

¹⁷⁷ Article 23(3) of the Brussels I Regulation.

¹⁷⁸ This is presumably because the adjudicatory authority of the English courts is a function of the sovereign power of the state and cannot be regulated by a private agreement between the parties. Although the state has sanctioned some recognition of party autonomy as a jurisdictional connecting factor insofar as the parties may have made provision for the manner in which their disputes should be resolved, such provision is only effective with the concurrence of the court. If a defendant can be served with a claim form, the burden will be on him to demonstrate that there are sufficient reasons why the court does not possess jurisdiction or that there is no good arguable case for it to stay the proceedings on *forum non conveniens* grounds and thereby not exercise its jurisdiction.

¹⁷⁹ For the contractual and jurisdictional character of arbitration agreements, see, Julian DM Lew, Loukas A Mistelis and Stefan Kroll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 99.

to select the composition of the tribunal, the law applicable to the arbitration agreement, the arbitration procedure and the merits of the dispute.¹⁸⁰ It may be argued that the parties can also exclude the application of the domestic law of any states and subject the merits of the dispute to flexible international commercial norms, such as the *lex mercatoria*.¹⁸¹ However, it has been argued that the Rome I Regulation applies in the determination of the law applicable to the merits of the dispute in international commercial arbitration proceedings with a seat in the EU.¹⁸² According to the Rome I Regulation, the parties are not entitled to make a choice of a non-state body of law, such as the *lex mercatoria* as the Regulation refers to 'the law of a state' in the relevant provisions.¹⁸³ Therefore, the Rome I Regulation will restrict the choice of the applicable law on the merits in arbitration proceedings to the law of a state. However, in the absence of any choice of law by the parties, Section 46(3) of the English Arbitration Act 1996 provides that the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable. It has been argued that this statutory discretion in favour of the arbitrator enabling the selection of the conflict of laws rules of a jurisdiction to which the Rome I Regulation is irrelevant will not render the award capable of being challenged by the English courts.¹⁸⁴ However, this latter approach assumes that it is a provision in the English law of arbitration that leads to the application of either the Rome I Regulation or another system of conflict of laws which then determines the applicable law. On the contrary, if the Rome I Regulation is in fact applicable, the principles of supremacy and direct effect of EU law would operate to disable Section 46 of the Arbitration Act 1996 itself and render superfluous any need to refer to the

¹⁸⁰ Burcu Yüksel, 'The Relevance of the Rome I Regulation to International Commercial Arbitration in the European Union' (2011) 7 *Journal of Private International Law* 149, 167-168, notes that from the perspective of the autonomous conception of international commercial arbitration and the Arbitration Act 1996 (England and Wales and Northern Ireland), an arbitral tribunal may encounter fewer constraints in determining the law applicable to the merits of the dispute. However, she argues that the Rome I Regulation should be relevant in the context of international commercial arbitration in the EU because the 'arbitration agreement' exclusion does not extend to the law applicable to the substance of the dispute and that an arbitrator sitting in a Member State is similar in function to a judge and therefore should be bound to apply the rules of the Rome I Regulation.

¹⁸¹ Ibid 169-170.

¹⁸² Ibid 154.

¹⁸³ Cf A choice of non-state body of law, such as the *lex mercatoria* is allowed under Section 46(1)(b) of the Arbitration Act 1996; cf Recital 13 of the Rome I Regulation allows the parties to incorporate a non-state body of law or an international convention by reference into their contract. Moreover, Recital 14 of the Rome I Regulation states that if the EU adopts rules of substantive contract law (including standard terms and conditions) in a relevant legal instrument that instrument may provide that the parties may choose to apply those rules.

¹⁸⁴ See R Merkin, 'The Rome I Regulation and Reinsurance' (2009) 5 *Journal of Private International Law* 69, 77; R Merkin, *Arbitration Law* (3rd Edition, Informa Law 2004) [7.40]-[7.41]; R Merkin, *Arbitration Act 1996: An Annotated Guide* (London 1996) 76.

Rome I Regulation or another system of conflict of laws indirectly through a provision of national law.

Party autonomy is the very foundation of international commercial arbitration.¹⁸⁵ The degree of flexibility that exists in international commercial arbitration is not matched by international litigation. Although most states allow the parties to choose the forum to hear their disputes, the parties cannot tailor the civil procedure and private international law rules of the chosen forum to suit their needs. Party autonomy is a complementary rule in international litigation which promotes certainty, predictability and economic efficiency in the legal relations between the contracting parties. It is not, however, the foundation of cross border adjudication.

In *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp. Ltd*¹⁸⁶, it was clearly accepted that the primary obligations contained within an arbitration agreement can be discharged by frustration or breach.¹⁸⁷ If so, the arbitration agreement comes to an end the arbitrator will no longer be seised of any power over the resolution of the dispute. Can this also be said of jurisdiction agreements? Although it may be possible for an English jurisdiction agreement to cease to have effect due to frustration, can a party to an English jurisdiction agreement ever perform his part of the bargain in so defective a manner as to entitle the other party to elect to discharge the jurisdiction agreement so as to relieve the English courts of their jurisdiction over the dispute in relation to the *main contract*? Surely such a breach is a theoretical impossibility? This helps to point out the fundamental difference between the jurisdiction of arbitrators and that of the courts: the former derive their jurisdiction solely from the arbitration agreement between the parties, whereas the latter derive their jurisdiction from a multiplicity of factors centred on the concept of connection with the forum (one of which is the presence of an English choice of court agreement). Apart from consent and agreement between the parties to settle disputes in the chosen forum, a jurisdictional framework would provide that the connection between the defendant and the forum and the connection between the cause of action (claim) and

¹⁸⁵ Blackaby and Partasides (n 161) 85; Moses (n 133) 18.

¹⁸⁶ [1981] AC 909; [1981] 1 Lloyd's Rep 253.

¹⁸⁷ [1981] AC 909, 980-981 and 982.

the forum are the fundamental localizing elements that animate the corpus of rules of jurisdiction *in personam*.¹⁸⁸

Another fundamental difference between the jurisdiction of arbitrators and that of the courts is that an arbitration agreement by its very nature cannot bind third parties whilst a national court can compel a third party to be joined in the proceedings so that the court can resolve all the matters in dispute in the course of a single action.¹⁸⁹ Seen from this perspective, the exercise of arbitral autonomy creates a fragmented and atomised form of dispute resolution in which the jurisdiction of each arbitral tribunal is limited by the extent of the parties' arbitration agreement.¹⁹⁰ The arbitration agreement and process presupposes that there will be other closely related disputes which will have to be decided by other courts or tribunals.¹⁹¹ The very exercise of party autonomy may require a preliminary determination, whether by a national court or tribunal, as to the validity and scope of the arbitration agreement.¹⁹² As Dickinson aptly puts it, '.....arbitration processes cannot be said to be small islands in the sea of dispute resolution that enjoy total independence from national legal systems – at best they are semi-autonomous.'¹⁹³

The conflation in the treatment of both arbitration and jurisdiction agreements by English courts has been questioned in relation to whether the interests of third parties and wider societal concerns are adequately factored into a 'dispute resolution'¹⁹⁴ focussed model of adjudication in which the English Commercial Court acts 'as an umpire'¹⁹⁵ when passively deciding on the private interests as between the parties.¹⁹⁶ It has been argued that a stronger emphasis on the unique public procedural imperatives at play in international litigation as opposed to international arbitration may help reconcile the systemic perspective

¹⁸⁸ *Actor sequitur forum rei* (the claimant goes to the court of the defendant) enshrined in Article 2 of the Brussels I Regulation; Rules of special jurisdiction in Article 5 of the Brussels I Regulation; See Trevor C Hartley, *International Commercial Litigation* (Cambridge University Press 2009) Chapter 2, 15-16.

¹⁸⁹ CPR 19 and PD 19A; See Blackaby and Partasides (n 161) 99-106; Moses (n 133) 5; Ronald A Brand and Paul M Herrup, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents* (Cambridge University Press 2008) 217.

¹⁹⁰ McLachlan, *Lis Pendens in International Litigation* (n 166) 409.

¹⁹¹ *Ibid.*

¹⁹² See George A Bermann, 'Forum Shopping at the 'Gateway' to International Commercial Arbitration' in Franco Ferrari (ed.), *Forum Shopping in the International Commercial Arbitration Context* (Sellier European Law Publishers, Munich 2013) 69.

¹⁹³ Andrew Dickinson, 'Brussels I Review – Interface with Arbitration' (Conflictflaws.net, 17 June 2009) < <http://conflictflaws.net/2009/brussels-i-review-interface-with-arbitration/> > accessed 3 July 2014; Jan Paulsson, *The Idea of Arbitration* (OUP 2013) 30, observes that: 'The great paradox of arbitration is that it seeks the cooperation of the very public authorities from which it wants to free itself.'

¹⁹⁴ See Muir Watt, *Party Autonomy in International Contracts* (n 150) 29-32

¹⁹⁵ Briggs, *Agreements* (n 149) 532.

¹⁹⁶ See Muir Watt, *Party Autonomy in International Contracts* (n 150) 30-31.

of private international law with the unilateralism of the English conflict of laws and in the process also address wider public concerns that lie beyond the narrow remit of the parties' interests.

The concern with connection to the forum as opposed to simple reliance on party choice reflects the foundation of judicial power as an emanation of state sovereignty.¹⁹⁷ It follows that the basis for enforceability of damages pursuant to a judgment of an English court differs from that of an arbitral award or for that matter damages pursuant to a foreign judgment. A judgment for damages by an English court is an exercise of sovereign power. An English judgment even if made in error has binding effect unless and until set aside on appeal. Execution may be taken out immediately on the judgment without any regard as to its underlying merits, unless leave has been granted to stay execution. In contrast although an arbitral award is supposed to be treated as if it were a judgment, a number of defences may be raised to prevent its having such an effect. A judgment therefore peremptorily directs the distribution of economic resources from one litigant to another and immediately entitles the judgment creditor to the full array of judicial enforcement machinery to ensure performance of the judgment by the judgment creditor.

At risk of some over simplification, an arbitral award is toothless in England without the backbone of recognition by the English courts, which can treat such awards as an obligation in their own right, and upon which court proceedings may be brought (an action on the award).¹⁹⁸ Like foreign judgments, arbitral awards are only enforceable at common law in England at one remove. Without the interposition of recognition as a species of obligation, the beneficiary of such awards (like a foreign judgment creditor) cannot levy execution against the assets of the losing party, nor can application be made for committal for contempt (as there can be none). The same is also true when reliance is placed on the English Arbitration Act 1996, Section 66(1), which provides that an arbitral award may be enforced as if it were an English judgment, albeit only with leave of court. Like foreign judgments, therefore, whether at common law or under statute, enforcement only comes at one remove following some degree of approbation by the English courts.

¹⁹⁷ See generally, Arthur Taylor von Mehren, 'Adjudicatory Jurisdiction: General theories Compared and Evaluated' (1983) 63 *Boston University Law Review* 279, on the 'power' and 'fairness' theories of adjudicatory authority; The foundation of adjudicatory jurisdiction is echoed in the following words of Justice Oliver Wendell Holmes: "The foundation of jurisdiction is physical power....." in *McDonald v Mabee* 243 US 90, 91 (1917).

¹⁹⁸ See Brand and Herrup (n 189) 217.

Conclusion

The underlying differences between choice of court agreements and arbitration agreements determine the fact that some states provide the same contractual requirements in deciding their formation and validity, while providing more stringent restrictions to the enforcement of choice of court agreements.¹⁹⁹ In other states even the validity requirements differ between jurisdiction and arbitration agreements.²⁰⁰

The contractual requirements for formation and the principle of severability provide the basis for an analogy to be drawn between arbitration agreements and jurisdiction agreements. However, extending the contractual analysis of arbitration agreements to the issue of the private law enforcement of jurisdiction agreements is not free from difficulty. Therefore, caution needs to be exercised when transplanting a concept from the context of private ordering by private arbitral institutions onto the interstate jurisdictional framework of transnational adjudication which prioritizes both ‘public law and private law’²⁰¹ considerations – the twin private international law functions of ‘order and fairness’ are both significant but the former generally prevails over the latter. This is particularly so in a multilateral conception of private international law found within federal systems where the public ordering of private law may prevent unilateral private law remedies from privatizing court access as between the parties and from distorting the allocative or distributive function of the conflict of laws.

The dual role of an exclusive jurisdiction agreement as both invoking the jurisdiction of a court (prorogation and derogation function) and as an independent subsisting promissory obligation between the parties to sue only in the nominated court also does not *intrinsically* support a pure contractual analysis either. It is highly unlikely that an exclusive choice of court agreement will be able to act as an independent source of legal obligation between

¹⁹⁹ Following the CJEU decision in *Gazprom*, the scope for the enforcement of arbitration agreements is arguably greater than the private law enforcement of jurisdiction agreements by the English courts in the EU. Cf *Starlight Shipping Co v Allianz* [2014] EWCA Civ 1010 (Longmore LJ); In the United States, the enforcement of jurisdiction agreements is more uncertain in state courts than arbitration agreements. See Tang (n 149) Chapter 1, 5; EF Scoles, P Hay, PJ Borchers and SC Symeonides, *Conflict of Laws* (4th Edition, Thomson West 2004) 488-489; ZS Tang states that in the People’s Republic of China, there is explicit legislation providing the requirements to enforce arbitration agreements (Civil Procedure Law 2012, Article 271), while there is no such requirement for choice of court agreements: See Tang (n 149) Chapter 1, 5.

²⁰⁰ In the EU jurisdiction agreements are governed by Article 25 of the Recast Regulation while arbitration agreements are regulated by the New York Convention; ZS Tang notes that in China, more restrictive requirements are provided for jurisdiction agreements as compared to arbitration agreements: See Tang (n 149) Chapter 1, 5.

²⁰¹ McLachlan, *Lis Pendens in International Litigation* (n 166) 90.

the parties where it has been declared inapplicable, invalid or ineffective by the courts of another EU Member State.²⁰² The invocation of the relative effect of the jurisdiction agreement as an independent subsisting private law obligation (*in personam* effect) despite the obvious invalidity of the clause (*in rem* effect) is in a sense reminiscent of *Turner v Grovit* where the anti-suit injunction was hailed as not aimed towards the civil jurisdictional apparatus of the Member State but as a restraining measure directed at the party in breach. The separation of the functions within a jurisdiction agreement is obviously incompatible (in terms of both classification and effects) with a strict multilateral and *internationalist* paradigm of party autonomy and private international law.²⁰³

Outside the confines of the European judicial area, the variable geometry which is characteristic of the international civil and commercial litigation will not oppose the idea of the application of equivalent principles to the unilateral private law enforcement of jurisdiction and arbitration agreements by the English courts.²⁰⁴ Whether the English courts *ought* to adopt a unified approach to the enforcement of jurisdiction and arbitration agreements is of course another matter.

Chapter 4 examines the fundamental juridical nature and classification of jurisdiction agreements. The continental civil law understanding of choice of court agreements as ‘procedural contracts’ will be discussed and compared to the English common law’s attribution of a relative effect to such agreements. Non-exclusive jurisdiction agreements are also considered and particularly from the perspective of the damages remedy, whether such agreements can be breached. Asymmetric or unilateral choice of court agreements play a significant role in practice but their validity has been impugned by the rulings of the French Cour de Cassation in *Banque Rothschild* and *ICH v Credit Suisse*. The validity of asymmetric clauses is also a preliminary issue prior to the question of the application of Article 31(2) of the Recast Regulation to such clauses. It will be argued that asymmetric clauses are valid under Article 25 of the Recast Regulation as the substantive validity of the clause is referred to the *lex fori prorogatum* including its private international law rules which would validate

²⁰² Pursuant to Articles 23 and 24 of the Brussels I Regulation; Articles 25 and 26 of the Recast Regulation (Prorogation of jurisdiction); Article 22 of the Brussels I Regulation; Article 24 of the Recast Regulation (Exclusive Jurisdiction); Articles 13, 17, 21 of the Brussels I Regulation; Articles 15, 19, 23 of the Recast Regulation (Limitations on jurisdiction agreements in matters relating to insurance, consumer contracts and individual contracts of employment).

²⁰³ Muir Watt, *Party Autonomy in International Contracts* (n 150) 30.

²⁰⁴ See *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, [2013] 1 WLR 1889; [2013] 1 CLC 1069, [21]-[28] (Lord Mance delivering the judgment of the UK Supreme Court).

clauses selecting the English courts as such clauses are valid according to English law. Alternatively, it may be argued that the compatibility of an asymmetric jurisdiction agreement with Article 25 of the Recast Regulation is not an issue of substantive validity but a question of the scope of an 'agreement' governed by an autonomous interpretation of Article 25 of the Recast Regulation.

Chapter 4 – Private Law or Public Law? An Assessment of the Fundamental Juridical Nature and Classification of Jurisdiction Agreements

Fundamental Juridical Nature and Classification of Choice of Court Agreements

The ‘procedural contract’ conception of choice of court agreements,²⁰⁵ conceives such clauses as merely a ‘joint statement of consent’ by the parties to the jurisdiction of the selected court which may or may not be conclusive in determining the question of jurisdiction.²⁰⁶ Unlike a substantive characterization, an independently enforceable *inter partes* contractual obligation to sue only in the elected forum is not embodied in the jurisdiction agreement under the procedural contract classification. As a consequence, the function of the jurisdiction agreement is reduced or limited to the prorogation or derogation of the jurisdiction of courts. LC Ho is one of the few English common law commentators to adopt a position similar to the continental civil law conception of a ‘procedural contract’.²⁰⁷ He argues that the only way that the nominated court can honour the statement of consent is to hear the action and if necessary restrain proceedings in a foreign court whose jurisdiction falls outside that consent. Ho comments that:²⁰⁸

It is only to this extent that a forum selection clause is ‘enforceable’. It is only to this extent that there is an ‘obligation’ on the claimant to proceed in the chosen forum. It

²⁰⁵ The jurisprudence of the German Federal Court (*Bundesgerichtshof* BGH) classifies a jurisdiction clause as a contract about the procedural relationship between the parties – a ‘procedural contract’. The scope of a jurisdiction agreement is confined to its effects on prorogation or derogation of certain courts (*prozessuale Verfügungswirkung*), meaning that a jurisdiction agreement may add or remove certain courts from the list of competent courts which are available to the parties. No primary or secondary obligation can be derived from perceiving the jurisdiction agreement as a procedural contract. See Jonas Steinle and Evan Vasiliades, ‘The Enforcement of Jurisdiction Agreements under the Brussels I Regulation: Reconsidering the Principle of Party Autonomy’ [2010] *Journal of Private International Law* 565, 576; BGH [1968] *Neue Juristische Wochenschrift* (NJW), 1233; BGH [1972] NJW, 1622; BGH [1989] NJW 1431; BGH [1997] NJW, 2885; The prevailing view among German commentators (including P. Gottwald, P. Mankowski, T. Pfeiffer, Sandrock, I. Naumann, A. Dutta and C. Heinze) is to interpret jurisdiction agreements as not entailing any substantive rights and obligations. However, a minority of German scholars (including B. Hess, D. Jasper, Kurth and J. Schroder) attribute legal rights and obligations to a jurisdiction clause. See Alexander J Belohlávek, ‘Rome Convention - Rome I Regulation’ (Volume I, Juris Publishing 2011) 363-366, for a discussion of choice of court agreements as ‘procedural contracts’ in Austrian, German, Swiss, Czech and European Union law; See also, Felix Sparka, ‘Classification of Choice of Forum Clauses and their Separability from the Main Contract’ in *Jurisdiction and Arbitration Clauses in Maritime Transport Documents: A Comparative Analysis* (Hamburg Studies on Maritime Affairs 19, Springer-Verlag Berlin Heidelberg 2010) 81.

²⁰⁶ See LC Ho, ‘Anti-suit Injunctions in Cross Border Insolvency: A Restatement’ [2003] *ICLQ* 697, 707-709; Andreas F Lowenfeld, *Conflict of Laws: Federal, State and International Perspectives* (2nd Edition New York: Matthew Bender 1998) 308; CJS Knight, ‘The Damage of Damages: *Agreements on Jurisdiction and Choice of Law*’ [2008] *Journal of Private International Law* 501, 506-507 suggests that the correct way to view a jurisdiction agreement is to see it as an invitation to the court to exercise its public law powers and take jurisdiction over the dispute. He concludes that ‘Evaluating the jurisdictional competencies of a judicial body is a quintessentially public law topic.’

²⁰⁷ Ho (n 1206).

²⁰⁸ *ibid* 708-709.

is also only to this extent that there is a 'right' of the defendant not to be sued in the non-selected forum. There is no independent right to contractual remedy for breach of contract.

CH Tham has challenged the contractual enforcement of jurisdiction agreements by choosing to classify such terms as ancillary obligations.²⁰⁹ Tham relies on the classification of contractual obligations adopted by Treitel to support the argument:²¹⁰

[t]he primary obligation is one to render the actual performance promised; the secondary obligation is one to pay damages for failure to perform the primary obligation..... *Primary obligations must also be distinguished from ancillary ones*, that is, those imposed by provisions which deal not with the performance to be rendered, but with such matters as *the resolution of disputes arising out of the contract*, or the inspection by one party of records to be kept by the other for the purpose of ascertaining what rights and duties have come into existence under the contract. Normally, such *ancillary obligations* are intended to survive rescission and are accordingly not released by it.

The classification of contractual obligations into primary, secondary and ancillary obligations is derived from Lord Diplock's analysis in *Photo Production Ltd v Securior Ltd*.²¹¹ Analyzing primary and secondary obligations, Lord Diplock specifically left out arbitration or jurisdiction clauses due to their irrelevance in that context.²¹² In similar vein, a civil law commentator has argued that choice of court agreements are functionally dependent on the primary contract and thus should be classified as collateral (dependent) agreements which does not give rise to an enforceable obligation.²¹³

It should be noted that if a procedural or public law classification of jurisdiction agreements is adopted the argument of the contractual damages remedy for breach of such agreements becomes significantly weaker.²¹⁴

However, orthodox English common law judicial authority and scholarship conceptualizes an agreement to submit disputes to an identifiable forum as giving rise to the mutually enforceable right and obligation to bring any claims arising under the agreement exclusively

²⁰⁹ CH Tham, 'Damages for breach of English jurisdiction clauses: more than meets the eye' [2004] *LMCLQ* 46, 47-50.

²¹⁰ GH Treitel, *The Law of Contract* (11th Edition, London 2003) 850-851 (emphasis added).

²¹¹ [1980] AC 827, 847-850; [1980] 1 Lloyd's Rep 545, 552-553.

²¹² *Ibid* 850.

²¹³ Belohlávek, *Rome Convention - Rome I Regulation* (n 205) 359.

²¹⁴ For further discussion on the procedural or 'public law' classification of jurisdiction agreements, see Petr Briza, 'Choice-of-Court Agreements: Could the Hague Choice of Court Agreements Convention and the Reform of the Brussels I Regulation be the way out of the Gasser-Owusu Disillusion?' [2009] *Journal of Private International Law* 537, 551; B. Hess, T. Pfeiffer and P. Schlosser, *Report on the Application of Regulation Brussels I in the Member States*, Study JLS/C4/2005/03, ('Heidelberg Report') para 377; PE Nygh, *Autonomy in International Contracts* (OUP 1999) 81-82.

in that court.²¹⁵ Such an agreement is referred to as an exclusive choice of court agreement. The initiation of proceedings by a party to the exclusive jurisdiction agreement in a court other than the nominated court will ordinarily be a breach of contract. Under the common law jurisdictional regime, in the absence of strong reasons, the English courts will ordinarily enforce an exclusive choice of court agreement, and will restrain the party acting in breach of its contractual obligation by either the grant of an anti-suit injunction or a stay of proceedings.²¹⁶ The presence of a foreign exclusive choice of court agreement does not at common law oust the jurisdiction of the English court, but it does give rise to an obligation that will be enforced in the absence of strong reasons.²¹⁷ In similar vein, a party to the exclusive jurisdiction agreement acting in breach of its obligation to bring proceedings exclusively in the nominated court might be held liable in damages.²¹⁸ To reiterate, the core and kernel of the exclusive jurisdiction agreement is the positive contractual right and obligation to bring disputes that fall within the ambit of the clause in a prescribed manner. A

²¹⁵ *Donohue v Armco Inc.* [2001] UKHL 64; [2002] 1 Lloyd's Rep. 425, [24] (Lord Bingham of Cornhill) and [45] (Lord Hobhouse of Woodborough) (Lord Bingham at [24]: 'the general rule is clear: where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it'); *The Angelic Grace* [1995] 1 Lloyd's Rep 87, 96 (CA) (Millett LJ) (an anti-suit injunction case, stating that the injunction defendant had 'promised not to bring' the foreign proceedings); *Continental Bank NA v Aeakos Compania Naviera SA* [1994] 1 WLR 588, 598 (CA) (Steyn LJ) (an anti-suit injunction case, referring to the injunction defendant's 'clear breach of contract'); *Sohio Supply Co v Gatoil (USA) Inc* [1989] 1 Lloyd's Rep 588, 592 (CA) (an anti-suit injunction case, referring to 'the continuance of foreign proceedings in breach of contract'); *The Eleftheria* [1970] P 94, 99G (CA) (a stay case, referring to suing in England 'in breach of an agreement to refer disputes to a foreign court'); See Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford Private International Law Series, OUP 2008) 324-325; David Joseph QC, *Jurisdiction and Arbitration Agreements and their Enforcement* (2nd Edition, Sweet and Maxwell, London 2010) 102; Thomas Raphael, *The Anti-Suit Injunction* (Oxford Private International Law Series, OUP 2008) 322; Edwin Peel, 'Exclusive Jurisdiction Agreements: Purity and Pragmatism in the Conflict of Laws' [1998] *LMCLQ* 182, 207-209; Louise Merrett, 'The Enforcement of Jurisdiction Agreements within the Brussels Regime' [2006] *ICLQ* 315, 317; Daniel Tan and Nik Yeo, 'Breaking Promises to Litigate in a Particular Forum: Are Damages an Appropriate Remedy' [2003] *LMCLQ* 435, 437; Koji Takahashi, 'Damages for Breach of a Choice of Court Agreement' [2008] *Yearbook of Private International Law* 57, 88.

²¹⁶ *Donohue v Armco Inc.* [2001] UKHL 64; [2002] 1 Lloyd's Rep. 425, [24]-[25] (Lord Bingham of Cornhill), [40] (Lord Mackay of Clashfern), [41] (Lord Nicholls of Birkenhead) and [45] (Lord Hobhouse of Woodborough); For a discussion of strong reasons not to give effect to the contractual obligation contained in a jurisdiction agreement and the availability of the alternative remedy of damages *in lieu* of an injunction or damages at common law, see Adrian Briggs, *Private International Law in English Courts* (OUP 2014) 397.

²¹⁷ *The Fehmarn* [1958] 1 WLR 159, 161-162 (CA) (Lord Denning); *Carvalho v Hull Blyth Ltd* [1979] 1 WLR 1228, [1979] 3 All ER 280, [1980] 1 Lloyd's Rep 172 (CA); *The Hollandia (The Morviken)* [1983] AC 565, [1982] 3 WLR 1111, [1982] 3 All ER 1141, [1983] 1 Lloyd's Rep 1 (HL); For a discussion of the treatment of foreign choice of court agreements by the English courts in these cases, see Trevor C Hartley, *Choice of Court Agreements Under the European and International Instruments: The Revised Brussels I Regulation, the Lugano Convention, and the Hague Convention* (Oxford Private International Law Series, OUP 2013) 6-10.

²¹⁸ *Union Discount Co v Zoller* [2001] EWCA Civ 1755 (Schiemann LJ delivering the judgment of the court); *Donohue v Armco Inc* [2001] UKHL 64; [2002] 1 Lloyd's Rep. 425, [36] (Lord Bingham of Cornhill) and [48] (Lord Hobhouse of Woodborough).

close parallel can be drawn between an arbitration agreement and an exclusive jurisdiction agreement in this respect.²¹⁹

Can a Non-Exclusive Jurisdiction Agreement be breached?

Although the contracting parties are free to tailor dispute resolution agreements to suit their specific needs, in practice the most significant distinction to be drawn when considering the nature of a jurisdiction agreement is whether the agreement is properly to be classified as exclusive or non-exclusive. Briggs has suggested in his monograph, *Agreements* that it might be useful to cast aside what he calls “the unhelpful terminology of non-exclusive jurisdiction agreements” and recalibrate the focus instead on construing what obligations the parties wished to create and impose on one another.²²⁰

However, as a matter of logic, it is important that the courts treat disputes subject to non-exclusive jurisdiction clauses as being different from disputes subject to exclusive jurisdiction clauses. Otherwise, the non-exclusivity expressly provided for by the parties in their non-exclusive jurisdiction agreement may be undermined. Similarly, Briggs’ advancement of a unified category for both types of choice of court agreements is not without doubt as it all too easily blurs into insignificance the existing boundary in theory and practice between exclusive and non-exclusive jurisdiction agreements.²²¹ In practice, the categories exclusive and non-exclusive jurisdiction agreement and the distinction between them are of central importance to the application of Article 25 of the Recast Regulation.²²² The distinction retains its importance in relation to Article 3(a) of the Hague Convention on Choice of Court Agreements which excludes non-exclusive choice of court agreements from the scope of the Convention. Recital 22 and Article 31(2) of the Recast Regulation also rely on the distinction and a literal reading of the provision and the recital limits the reverse *lis pendens* rule to

²¹⁹ *The Angelic Grace* [1995] 1 Lloyd’s Rep. 87, 96 (Millett LJ) and 97 (Neill LJ); *Voest Alpine* [1997] 2 Lloyd’s Rep. 279, 285 (Hobhouse LJ); Mandatory dispute resolution invoked by an arbitration agreement is not only the parties’ right but also their obligation, see Nigel Blackaby and Constantine Partasides with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (5th Edition, OUP 2009) 108.

²²⁰ Briggs, *Agreements* (n 215) 110-121, 120; Adrian Briggs, ‘The Subtle Variety of Jurisdiction Agreements’ [2012] *LMCLQ* 364, 375-376; Briggs, *Private International Law in English Courts* (n 216) 398; TM Yeo, ‘The Contractual Basis of the Enforcement of Exclusive and Non-Exclusive Choice of Court Agreements’ (2005) 17 *Singapore Academy of Law Journal* 306, 351; See Lawrence Collins and others (eds.), *Dicey, Morris and Collins on the Conflict of Laws* (15th Edition, Sweet and Maxwell, London 2012) Chapter 12, 603.

²²¹ CJS Knight, ‘Anti-suit Injunctions and Non-exclusive Jurisdiction Clauses’ [2010] *Cambridge Law Journal* 25, 26; Joseph (n 191) 102-105.

²²² Article 25(1) of the Recast Regulation and Article 23(1) of the Brussels I Regulation create a presumption of exclusivity by providing that: ‘Such jurisdiction shall be exclusive unless the parties have agreed otherwise.’ Cf Article 3(b) of the Hague Convention on Choice of Court Agreements; See PR Beaumont and PE McElevy, *Anton’s Private International Law* (SULI, 3rd Edition, W Green 2011) 241; Thalia Kruger, *Civil Jurisdiction Rules of the EU and their Impact on Third States* (Oxford Private International Law Series, OUP 2008) 226.

exclusive choice of court agreements.²²³ Similarly, the distinction between the two types of agreement is of significance in relation to the enforcement of the jurisdiction agreements by the courts, including enforcement by way of a claim for damages for breach of contract.

At this juncture, it is important to highlight that the issue of breach and the consequent action for damages for breach of choice of court agreements is predominantly, if not solely, relevant in relation to exclusive jurisdiction agreements, because non-exclusive jurisdiction agreements by their very nature do not lend themselves towards the finding of an *inter partes* contractual obligation to sue only in the nominated forum.²²⁴ Non-exclusive jurisdiction agreements may attribute jurisdiction to a court which would otherwise not be competent. Thus, they have the effect of widening the range of courts that can potentially be seised by the parties.²²⁵

As examined, an exclusive choice of court agreement gives rise to the mutual right and obligation to refer disputes that fall within the scope of the clause to the identified court. In contrast, a non-exclusive jurisdiction agreement is an agreement by one or more contracting parties to submit to the jurisdiction of one or more identified courts. By its very nature, a non-exclusive choice of court agreement also does not create a contractual obligation to bring proceedings in the identified court or courts.²²⁶ The contracting party or parties agree to submit to the identified jurisdiction. Possibly more accurately, it is an agreement whereby the parties preclude themselves from denying that the identified court or courts has substantive jurisdiction.²²⁷ Under a non-exclusive jurisdiction agreement, if a party brings proceedings in another court which has jurisdiction – for example by reference to domicile

²²³ See U Magnus, 'Gerichtsstandsvereinbarungen unter der reformierten EuGVO' in N Witzleb, R Ellger, P Mankowski, H Merkt and O Remien (eds.), *Festschrift für Dieter Martiny zum 70. Geburtstag* (Mohr Siebeck, Tübingen 2014) 797, 799; P Neilson, 'The New Brussels I Regulation' (2013) 50 *Common Market Law Review* 503, 521.

²²⁴ J Fawcett, 'Non exclusive jurisdiction agreements in private international law' [2001] *Lloyd's Maritime and Commercial Law Quarterly* 234, 253; Raphael (n 215) Chapter 9, 223; Merrett (n 215) 316; Steinle and Vasiliades (n 205) 577; Takahashi, *Damages for Breach of a Choice of Court Agreement* (n 215) 59; Daniel Tan, 'Damages for Breach of Forum Selection Clauses, Principled Remedies, and Control of International Civil Litigation' [2005] *Texas International Law Journal* 623, 627; Rory Butler and Baptiste Weijburg, 'Do Anti-Suit Injunctions Still Have a Role to Play? – An English Law Perspective' (2011-2012) 24 *University of San Francisco Maritime Law Journal* 257, 277-279; cf TM Yeo, 'Breach of Agreements on Choice of Law' [2010] *LMCLQ* 194, 195-196.

²²⁵ Raphael (n 215) Chapter 9, 223; Merrett (n 215) 316; Steinle and Vasiliades (n 205) 577; Takahashi, *Damages for Breach of a Choice of Court Agreement* (n 215) 59.

²²⁶ *Austrian Lloyd Steamship Co v Gresham Life Assurance Society Ltd* [1903] 1 KB 249; *Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan* [2003] 2 Lloyd's Rep 571 at [30]-[34] Waller LJ; *Canon Screen Entertainment Ltd v Handmade Films (Distributors) Ltd* Unreported July 11, 1989, Hobhouse J.

²²⁷ *Royal Bank of Canada v. Centrale Raiffeisen-Boerenleenbank* [2004] EWCA Civ 7; [2004] 1 Lloyd's Rep 471 at [4].

of the defendant – this will not, without more, amount to a breach of contract.²²⁸ It ought, however, to be a breach of contract to act in a manner so as to prevent a party from bringing proceedings in the non-exclusive forum.²²⁹ It is instructive to contrast two decisions of the English Court of Appeal which in part turned on the different wording of the respective clauses. In *Sabah Shipyard (Pakistan) Ltd. V. Islamic Republic of Pakistan*²³⁰ the defendant had in a contract of guarantee agreed to submit to the non-exclusive jurisdiction of the English courts, but had commenced proceedings in Pakistan seeking, inter alia, an injunction restraining the claimant from presenting any demand under or enforcing the guarantee. This conduct was cited by Lord Justice Waller as an example of a breach of the non-exclusive jurisdiction clause, since one party could not act in such a manner so as to prevent the other from exercising his rights under it.²³¹ In *Royal Bank of Canada v. Centrale Raiffeisen-Boerenleenbank*²³² the parties swap agreement expressly contemplated the ability of either party to bring proceedings other than in England, to whose jurisdiction each party agreed to submit. Proceedings in due course were brought by the defendant in New York and the claimant in England. The claimant successfully sought to restrain the defendant from proceeding with the New York action. The Court of Appeal concluded that, by reason of the terms of the swap agreement, there was no breach involved in the bringing of the New York proceedings and there was nothing to suggest that the conduct of those proceedings had been or become oppressive or vexatious.

At its core, a non-exclusive choice of court agreement permits a party to be sued in one or more identified courts without creating any positive obligation to bring proceedings in that forum. A non-exclusive jurisdiction agreement is nevertheless given effect at common law either by refusing to stay proceedings brought in England pursuant to such a clause or by the grant of a stay on grounds of *forum non conveniens* if proceedings are brought in England, and England is a forum other than the identified non-exclusive forum. The enforcement of a non-exclusive jurisdiction by the grant of an anti-suit injunction is more problematic because of the need in such cases to show either a breach of contract, or vexatious or oppressive conduct. The Court of Appeal in *Highland Crusader Offshore Partners LLP v Deutsche Bank*

²²⁸ *Turner v Grovit* [2002] 1 WLR 107, 118C at [25] Lord Hobhouse; *Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan* [2002] EWCA Civ 1643; [2003] 2 Lloyd's Rep 571 at [34] Waller LJ.

²²⁹ *Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan* [2003] 2 Lloyd's Rep 571 at [36]-[37], Waller LJ.

²³⁰ [2003] 2 Lloyd's Rep. 571.

²³¹ *Ibid* at [36]-[37].

²³² [2004] 1 Lloyd's Rep 471.

AG²³³ has decisively moved in the right direction by making it clear that there is no presumption that the pursuit of parallel proceedings in the context of a non-exclusive jurisdiction agreement is by itself vexatious or oppressive. A party complaining of such parallel proceedings in order to obtain the grant of an anti-suit injunction will need to point to factors over and above the mere existence or pursuit of parallel proceedings.

Interim Conclusion

In view of the foregoing excursus, it is quite clear that at common law, an exclusive choice of court agreement creates and gives rise to the mutual right and obligation to bring proceedings exclusively in the nominated forum and none other. The initiation of proceedings by either contracting party in a non-chosen forum will amount to a breach of the exclusive choice of court agreement. The same analysis cannot be applied verbatim to the case of the non-exclusive choice of court agreements as a result of the differing nature of obligations created and imposed between the parties in such agreements. A non-exclusive jurisdiction agreement is essentially enabling in effect as it allows the contracting parties to initiate proceedings in a range of potential forums. The wider range of prospective courts available and tolerance of parallel proceedings make non-exclusive jurisdiction agreements less susceptible to being breached by either contracting party.

Hybrid Jurisdiction-Arbitration Agreements

Apart from the conventional binary categories of exclusive and non-exclusive choice of court agreements, the venue provisions in a dispute resolution agreement may adopt a more sophisticated hybrid form. The hybrid agreement may provide that litigation in a given court is primary, with arbitration as an alternative,²³⁴ or that arbitration is primary and litigation secondary.²³⁵ Such hybrid agreements are often asymmetric or unilateral, giving one party the option to choose how the dispute should be resolved. An international finance agreement might, for instance, provide that the English courts have jurisdiction, but provide that 'any dispute arising out of or in connection with this agreement, may at the option of the bank be referred to and finally resolved by arbitration'.²³⁶

²³³ [2009] EWCA Civ 725.

²³⁴ *Deutsche Bank AG v Tongkah Harbour Public Co Ltd* [2011] EWHC 2251 (QB).

²³⁵ *Law Debenture Trust Corporation Plc v Elektrim Finance BV* [2005] EWHC 1412.

²³⁶ For a more detailed hybrid agreement see *Deutsche Bank AG v Tongkah Harbour Public Co Ltd* [2011] EWHC 2251 (QB); See R Garnett, 'Coexisting and Conflicting Jurisdiction and Arbitration Clauses' (2013) 9 *Journal of Private International Law* 361.

Hybrid agreements may also possess a more complex and multi-tiered structure. Such agreements may make provision for an escalating series of optional dispute resolution mechanisms, ascending in formality from various types of alternative dispute resolution (pre-action negotiation, conciliation, mediation, expert determination), until arbitration or litigation is necessitated. However, such a hybrid clause has to be clearly and unambiguously worded, as the optional nature of the agreement and the satisfaction of the pre-requisites for engaging a higher tier of dispute resolution may lead the court to strike down the clause for lack of certainty.²³⁷ For these reasons, optional clauses in major commercial transactions are generally limited to a choice between litigation and arbitration along with the added certainty that any choice is at the option of one party alone.

Hybrid jurisdiction-arbitration agreements offer significant advantages to the contracting parties by providing the flexibility of a wider range of available forums and extending the reach of party autonomy in forum selection by covering both litigation and arbitration. The inherent flexibility of the hybrid agreement may be harnessed to tailor dispute resolution to respond to the needs of a particular dispute. For instance, a multi-party and multi-jurisdictional dispute may be better suited to coordinated international commercial litigation in view of international commercial arbitration's often fragmented and atomized treatment of international commercial disputes. Alternatively, the parties may want to maintain an ongoing business relationship which may be jeopardized by the formal and adversarial nature of international litigation. Moreover, considerations based on the enforcement of the eventual judgment or arbitral award may also be very relevant when the parties opt for the method of international dispute resolution.²³⁸

The agreement to litigate in the courts of a Member State is the only element of a hybrid clause which is subject to the Brussels I Regulation. An agreement to submit disputes to an arbitral tribunal or arbitration is not subject to the Brussels I Regulation.²³⁹ The agreement to litigate in a hybrid clause must satisfy the usual requirements of form and agreement in Article 25 of the Recast Regulation.

²³⁷ *Sulamerica CIA Nacional De Seguros SA v Enesa Engenharia SA* [2012] EWHC 42 (Comm), [2012] EWCA Civ 638; *Tang Chung Wah (aka Alan Tang) v Grant Thornton International Limited* [2012] EWHC 3198 (Ch).

²³⁸ The option of international commercial arbitration offers the advantage of access to the enforcement regime of the highly successful New York Convention: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

²³⁹ Article 1(2)(d) of the Brussels I Regulation.

Asymmetric or Unilateral Choice of Court Agreements

A choice of court agreement may be bilateral, allowing each party to sue the other in the same court or courts of a Member State, or asymmetric,²⁴⁰ whereby one party alone submits to the agreed Member State court's jurisdiction and the other party has a wider choice of forum. Asymmetric or unilateral choice of court agreements are very common in cross border finance transactions, where the rights of one party to a jurisdiction agreement are at least partly unilateral. For instance, a borrower and lender in an international loan agreement will submit to the exclusive jurisdiction of a designated court, but the lender will reserve the right to sue the borrower in any other court of competent jurisdiction.²⁴¹ The jurisdiction of any alternative court depends on whether that court has personal or subject matter jurisdiction²⁴² and not on consent. Where the counterparty's obligation is the repayment of a debt, such clauses are less a mechanism for resolving disputes, and more an avenue for facilitating the enforcement of the debt.

The lender may rely on a summary enforcement procedure available under national law to recover the debt in any alternative court.²⁴³ A unilateral jurisdiction agreement allows a creditor the flexibility to seek enforcement wherever a borrower's assets are for the time being located. By minimizing enforcement risk they reduce the cost of the transaction to borrowers and enhance the readiness of lenders to provide finance. Asymmetric clauses are valid and enforceable in English law and have been upheld without challenge or reservation in a number of English decisions.²⁴⁴ However, the validity and enforcement of such

²⁴⁰ See Trevor C Hartley, *International Commercial Litigation: Text, Cases and Materials on Private International Law* (Cambridge University Press 2009) 164; ZS Tang, *Jurisdiction and Arbitration Agreements in International Commercial Law* (Routledge Research in International Commercial Law, Routledge, London & New York 2014) 10-12; Richard Fentiman, *International Commercial Litigation* (2nd Edition, OUP 2015) 79-88.

²⁴¹ See *BNP Paribas SA v Anchorage Capital Europe LLP & ors* [2013] EWHC 3073 (Comm), [91]-[93], where Males J on a proper construction of the non-exclusive jurisdiction agreement, granted an anti-suit injunction to enforce the defendant's contractual obligation to sue exclusively in the English courts.

²⁴² Under the EU private international law regime, other courts of competent jurisdiction will be determined by the rules on jurisdiction in Chapter II of the Brussels I Regulation and the Brussels I Regulation (Recast).

²⁴³ In the English law of civil procedure an action in debt enjoys the advantage of the ability to obtain a summary judgment under Part 24 of the Civil Procedure Rules.

²⁴⁴ *Mauritius Commercial Bank Limited v Hestia Holdings Limited and Sujana Universal Industries Limited* [2013] EWHC 1328 (Comm) (Popplewell J); *Continental Bank NA v Aeakos Compania Naviera SA* [1994] 1 WLR 588 (CA) (Steyn LJ) (delivering the judgment of the Court of Appeal); *Ocarina Marine Ltd v Marcard Stein & Co* [1994] 2 Lloyd's Rep 524; *Credit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd* [1999] CLC 579; *UBS AG and UBS Securities LLC v HSN Nordbank AG* [2008] EWHC 1529 (Comm); *Lornamead Acquisitions Limited v Kapthing Bank HF* [2011] EWHC 2611 (Comm); In *Three Shipping Ltd v Harebell Shipping Ltd* [2004] EWHC 2001 (Comm) a jurisdiction agreement coupled with a unilateral option to arbitrate was approved.

asymmetric provisions within the EU regime, and in many national legal systems,²⁴⁵ is uncertain.

Doubt has arisen in particular because of the controversial decision of the French Cour de Cassation in *Ms X v Banque Privée Edmond de Rothschild Europe (Société)* (hereinafter referred to as '*Banque Rothschild*').²⁴⁶ In *Banque Rothschild*, Ms X, a French national, commenced proceedings in Paris against Banque Rothschild, a Luxembourg bank with which she had an account. The contract between them provided that the Luxembourg courts should have exclusive jurisdiction over any claims brought by Ms X, but permitted the bank to sue either in Luxembourg or in the courts of the client's domicile or any other court of competent jurisdiction. Relying on the first limb of the clause, the bank argued that the French courts had no jurisdiction. Agreeing with the courts below, however, the Cour de Cassation held that Ms X was free to sue in France. The French Supreme Court held that, the jurisdiction agreement, purporting to confine her to suing in Luxembourg, was ineffective. Deploying a principle familiar in French contract law, the court held that the clause was *potestative*,²⁴⁷ as it merely granted an option to the bank to sue in Luxembourg.²⁴⁸ As such it was contrary to the objectives of Article 23 of the Brussels I Regulation. The effect of the decision is to destabilize a term frequently encountered in cross border commercial transactions. In future proceedings in EU Member States (including England) concerning asymmetric jurisdiction agreements, arguments based on the decision in *Banque Rothschild*

²⁴⁵ On 2 September 2011 (Judgment No. 71 in commercial case No. 1193/2010) the Bulgarian Supreme Court of Cassation (Commercial Chamber) struck down a one way arbitration/choice of court clause in a loan agreement and declared it void. The Russian Supreme Arbitrazh Court reached a similar conclusion concerning one way arbitration agreements on 2 September 2012 in *Russian Telephonic Company v Sony-Ericsson Mobile Communications* (Case No 1831/12).

²⁴⁶ *Ms X v Banque Privée Edmond de Rothschild Europe (Société)* Cass civ, 1ère, 26.9.2012, No 11-26.022, [2013] ILPr 12; See Adrian Briggs, 'One Sided Jurisdiction Clauses: French Folly and Russian Menace' [2013] LMCLQ 137; Richard Fentiman, 'Unilateral Jurisdiction Agreements in Europe' (2013) 72 *Cambridge Law Journal* 24; Briggs, *Private International Law in English Courts* (n 192) 245; Gilles Cuniberti, 'French Supreme Court Strikes Down One Way Jurisdiction Clause' (ConflictOfFlaws.net, 3 October 2012) <<http://conflictoflaws.net/2012/french-supreme-court-strikes-down-one-way-jurisdiction-clause/>> accessed 21 April 2014.

²⁴⁷ *Potestatif*: Depends on the will of one of the parties; See '*potestatif*' in *Harrap's Dictionnaire Juridique* (Dalloz, Chambers Harrap Publishers Ltd 2004); '*Potestative condition*': a condition or term of a legal agreement that is completely within the power and control of one of the parties and that makes the agreement unenforceable for lack of mutuality of obligation; See Merriam-Webster's Online Dictionary <<http://www.merriam-webster.com/dictionary/potestative%20condition>> accessed 2 May 2015.

²⁴⁸ See Article 1170 of the French Civil Code: 'A potestative condition is one which makes the fulfilment of the agreement depend upon an event which one or the other of the contracting parties has the power to make happen or to prevent.'; Article 1174 of the French Civil Code: 'An obligation is void where it was contracted subject to a potestative condition on the part of the one who binds himself.' (Translated into English by Georges Rouhette, Professor of Law, with the assistance of Dr Anne Rouhette-Berton, Assistant Professor of English - www.legifrance.gouv.fr).

will inevitably be employed in an attempt to disable them. The effect is to generate uncertainty and expense, and to render a future reference to the CJEU more likely.

On 25 March 2015, the French Supreme Court for Civil and Criminal matters (*Cour de cassation*) upheld its decision in *Banque Rothschild* and ruled that an asymmetrical jurisdiction clause is not be enforceable in France.²⁴⁹ The case concerned a French business and a Swiss bank. The clause provided that the bank could sue in “any other court of competent jurisdiction”. The lower court had validated the clause. The *Cour de cassation* allowed the appeal and ruled that the clause could have been validated if it had made clear on which “objective elements” it granted jurisdiction, which the lower court did not discuss. The decision lacked a reference to the French contract law concept of *potestative* clauses. Contrary to *Banque Rothschild*, the case concerned Article 23 of the Lugano Convention (2007) and a consumer was not involved.

On 7 October 2015, the French Supreme Court (*Cour de cassation*) handed down a decision that has clarified its interpretation of the rules for jurisdiction clauses within the European Union.²⁵⁰ In this case, a company incorporated in France (*eBizcuss*) and a company incorporated in Ireland (*Apple Sales International*) had signed a contract with a jurisdiction clause whereby the parties agreed that disputes would be settled in the courts of the Republic of Ireland. However, the same clause also reserved the right of the Irish company alone to apply to the courts with jurisdiction over the counterparty's registered office, or those in any country where it suffered a loss caused by the counterparty. The French company complained that the Irish company was infringing competition law, and started proceedings before the Paris Commercial Court seeking compensation for the harm it had suffered. The Irish company successfully argued that the Commercial Court lacked jurisdiction, which belonged to the courts of Ireland. When the French company's appeal to the Paris Court of Appeal was also unsuccessful, it filed a Supreme Court appeal. The *Cour de cassation* took the opportunity in this decision to refine its jurisprudence in *Banque*

²⁴⁹ *ICH (Societe) v Credit Suisse (Societe)* Cass civ, 1ere, 25.3.2015, No 13-27.264, [2015] ILPr 39; Case Note in Jan Strnad (2015) 15 *The European Legal Forum* 72, 72-73; EB Crawford and JM Carruthers, *International Private Law: A Scots Perspective* (4th Edition, W Green, Edinburgh 2015) 7-44; See Gilles Cuniberti, ‘French Supreme Court Confirms Rothschild’ (Conflictolaws.net, 20 April 2015) <<http://conflictolaws.net/2015/french-supreme-court-confirms-rotschild/>> accessed 21 April 2015.

²⁵⁰ See *Apple Sales International v eBizcuss* Cass. 1ere Civ, 7.10.2015, No. 14-16.898; See M Keyes and BA Marshall, ‘Jurisdiction Agreements: Exclusive, Optional and Asymmetrical’ (2015) 11 *Journal of Private International Law* 345, 371-372, discussing the *Cour d’appel de Paris* decision in *Apple Sales International v eBizcuss* (*Cour d’appel*, Paris, 08.04.2014, RG no 13/21121) which was upheld on appeal by the *Cour de Cassation*.

Rothschild and *ICH v Crédit Suisse* by upholding asymmetric jurisdiction clauses provided that they objectively identify the courts that may have jurisdiction. In the view of the French Supreme Court even though the French and Irish companies did not enjoy the same freedom in choosing which court would hear their dispute, the jurisdiction clause did abide by the predictability requirement by making it possible to objectively identify which courts could conceivably have jurisdiction. It is submitted that the French Supreme Court is distancing itself from the requirement of strict mutuality of terms (*potestative*) by focusing on objective criteria that help identify the courts possessing jurisdiction. In this particular case, the option to sue in ‘any other court of competent jurisdiction’ frequently attributed to asymmetric jurisdiction agreements was replaced by a more predictable clause which provided a narrower range of readily ascertainable courts.

The issue exposed in the French Supreme Court rulings is whether, and if so in what circumstances, it is possible to advance an argument that asymmetric jurisdiction agreements are incompatible with what is now Article 25. Insofar as this is possible, the implications are serious and far-reaching. If such agreements are wholly ineffective and void neither party could rely on the agreement to found jurisdiction even in the primary court identified in the clause. Suppose that the parties to an international loan agreement confer jurisdiction on the English courts, but permit the lender to sue alternatively in any other court of competent jurisdiction. The borrower could now object even to proceedings brought by the lender in England. Again to challenge the validity of asymmetric jurisdiction agreements is to threaten a barrage of torpedo actions, in which counterparties, seeking to avoid a unilaterally exclusive jurisdiction agreement in favour of one court, commence pre-emptive proceedings elsewhere. Borrowers, contractually bound to litigate in England under English law, often seek to escape the pro creditor approach of the English courts when applying English law by seeking a declaration of non-liability in legal systems offering them greater protection. Such pre-emptive strikes are destined to fail if both contracting parties have bilaterally agreed to the exclusive jurisdiction of the English courts. But pre-emptive proceedings may become a feasible or even a viable option if the debtor has grounds to challenge the validity of asymmetric jurisdiction agreements. The French Supreme Court decisions have meant that the likelihood of pre-emptive proceedings being initiated in an attempt to impugn the validity of an asymmetric jurisdiction agreement conferring jurisdiction on the English courts has increased. However, the ruling in *Apple Sales International v eBizcuss* indicates a possible change in the French Supreme Court’s attitude

towards such clauses and arguably reduces the litigation risk arising from pre-emptive proceedings challenging the validity of an English asymmetric jurisdiction agreement. Under the circumstances and in the context of the Brussels jurisdiction and judgments regime, an action for damages for breach of the jurisdiction agreement may play a significant role in both effectively deterring the onset of these torpedo actions and in responding to the actual breach of contract by compensation.

Effectiveness of Asymmetric Jurisdiction Agreements and Article 25 of the Recast Regulation

It is submitted that, asymmetric non-exclusive jurisdiction agreements are in principle compatible with Article 25 of the Brussels I Regulation (Recast).²⁵¹ First, Article 25 expressly provides that agreements within its scope are exclusive unless otherwise agreed, thereby recognizing that non-exclusive jurisdiction agreements are compatible with the Regulation.²⁵² Second, the decision in *Banque Rothschild* is inconsistent with the assumptions underlying Article 25. The choice of court agreement provision in the Brussels Convention expressly provided that: ‘If an agreement conferring jurisdiction was concluded for the benefit of only one of the parties, that party shall retain the right to bring proceedings in any other court which has jurisdiction by virtue of this Convention’.²⁵³ Those words were omitted from Article 23 of the Brussels I Regulation not because such agreements are objectionable, but because (it was generally assumed) the endorsement of non-exclusive jurisdiction in Article 23 made explicit reference to unilateral agreements unnecessary.

Apart from evidence of the recognition of non-exclusive jurisdiction agreements, it is proposed that the effectiveness of asymmetric jurisdiction agreements under Article 25 of the Recast Regulation may be examined from the perspectives of validity, certainty, form and fairness. The validity of unilateral jurisdiction agreements is perhaps uncontroversial as these agreements will be valid if the parties select an appropriate forum. It is to be observed whether such agreements comply with Article 25’s requirements of form, certainty and fairness.

²⁵¹ M Ahmed, ‘The Legal Regulation and Enforcement of Asymmetric Jurisdiction Agreements in the European Union’ (2017) 28(2) *European Business Law Review* (forthcoming).

²⁵² For example, see, Case 23/78 *Meeth v Glacetal* [1978] ECR 2133.

²⁵³ Article 17 of the Brussels Convention.

Validity

The determination of the substantive validity of a jurisdiction agreement under Article 23 of the Brussels I Regulation is problematic. First, the question arises whether the requirements imposed by Article 23 are a sufficient guarantee of substantive validity. If the answer is in the negative then the issue arises whether and to what extent may the law of a national legal system be applied to determine the issue. The exact identity of the national law used to determine substantive validity raises its own challenges.

At the outset, it may be argued that the compatibility of an asymmetric jurisdiction agreement with Article 25 of the Recast Regulation is not an issue of substantive validity but a question of the scope of an ‘agreement’ governed by an autonomous interpretation of Article 25 of the Recast Regulation. It is arguable that the *potestative* nature of a jurisdiction clause and the existence of objective criteria that helps identify the courts possessing jurisdiction may be characterized as issues of formal consent. The advantage of such a characterization would be that it automatically facilitates a pan-European solution to the issue of the compatibility of asymmetric jurisdiction agreements with Article 25 of the Recast Regulation. The choice of law hurdle including the burden of pleading and proving foreign law on the validity of such agreements in the *lex fori prorogatum* would be eliminated.

However, it will be argued here that the compatibility of asymmetric jurisdiction agreements with Article 25 of the Recast Regulation should be characterized as an issue of substantive validity. Article 25 of the Recast Regulation provides that an agreement is ineffective if null and void as to its substantive validity under the law of the Member State whose courts are designated under the agreement. Therefore, the validity of an asymmetric jurisdiction agreement will depend on the law of the prorogated forum, including its rules of private international law.²⁵⁴ In practice, depending on the legal system in question, validity will therefore depend on the local law of the forum or on the law applicable to the main contract.

Where an agreement is valid as per the law of the agreed court, it will also be valid in the courts of another Member State. Article 25 stipulates that the law of the chosen court including its choice of law rules will govern substantive validity. If a bank and a borrower

²⁵⁴ Jan Strnad, ‘Determining the Existence of Consent for Choice-of-Court Agreements under the Brussels I-bis Regulation’ (2014) 14 *The European Legal Forum* 113, 117-118; Fentiman, *International Commercial Litigation* (2015) (n 240) 82.

agree to the jurisdiction of the English courts, in which such agreements are valid, but the bank is permitted to sue in addition in any other court of competent jurisdiction. Let's suppose, that the borrower brings proceedings in Austria, contrary to the agreement. If the bank then sues in the English courts, the English courts have sole responsibility under Article 31(2) for determining the validity of the agreement.²⁵⁵ Even if the bank does not sue in England so as to engage Article 31(2), the Austrian courts would be required to refer the agreement's validity to English law under Article 25. Conversely, suppose that the bank exercises its option to sue in any court of competent jurisdiction by initiating proceedings against the borrower in France. Suppose that the borrower challenges the bank's right to do so by relying on the argument that such agreements are invalid in French law. The borrower may also argue that such agreements are by necessary implication also contrary to European Union law. The challenge will fail because under Article 25 English law alone governs the validity of a jurisdiction agreement. The underlying logic is that the parties have agreed (although for the bank's sole benefit) to the non-exclusive jurisdiction of the English courts, making English law the law of the chosen court. Even if the bank opts to sue in France pursuant to the agreement, the jurisdiction of the French courts is not the agreed jurisdiction under Article 25. It will derive from whatever ground of personal or subject matter jurisdiction the bank relies on. There is no sense in which French law, as the law of the actual forum, is engaged.

Asymmetric jurisdiction agreements will be invalid if the parties select as the primary court designated in the agreement a court in a Member State which imposes strict requirements of mutuality on contractual terms. English law will refer the issue of the substantive validity of a jurisdiction agreement to the law governing the host contract. As observed above, asymmetric jurisdiction agreements have been upheld without challenge or reservation in numerous English decisions.

English law's positive treatment of asymmetric jurisdiction agreements is premised on three underlying principles.²⁵⁶ First, such agreements are considered as imposing an obligation on beneficiaries and do not lack mutuality. The beneficiary is obliged to accept that the English courts have jurisdiction over any claim brought by the counterparty. Second, the principles

²⁵⁵ This, of course, is subject to whether an asymmetric jurisdiction agreement qualifies as an exclusive jurisdiction agreement for the purposes of Article 31(2) of the Brussels I Regulation (Recast). An asymmetric jurisdiction agreement has been held to be exclusive for the borrower in an international loan agreement by the English courts in a case governed by the Brussels Convention: *Continental Bank NA v Aeakos Compania Naviera SA* [1994] 1 WLR 588, 592F-594G (CA) (Steyn LJ) (delivering the judgment of the Court of Appeal)

²⁵⁶ See Fentiman, *International Commercial Litigation* (2015) (n 240) 83.

of the freedom and sanctity of the contract are paramount in assessing the effect of such clauses.²⁵⁷ Even a clause requiring the borrower to accept the jurisdiction of any court in which the bank elects to sue would be valid. Third, Article 6 of the European Convention on Human Rights may not affect any restriction on a party's choice of forum. It has been judicially pronounced that it 'is directed to access to justice within the forum chosen by the parties, not to choice of forum'.²⁵⁸

Certainty

It may be argued that asymmetric jurisdiction agreements confer discretion on where one party might bring proceedings and hence undermine the legal certainty inherent in the Recast Regulation's jurisdictional regime. However, Article 25 itself recognises non-exclusive jurisdiction agreements and uncertainty as to venue are part and parcel of such agreements. Apart from the specific case of Article 25, the Recast Regulation clearly makes provision for allowing claimants a fettered or limited choice of venue or forum shopping. The special jurisdiction rules under Article 7 of the Recast Regulation are based on a connection between the subject matter of the dispute and the forum and are an alternative to personal jurisdiction under Article 4 of the Regulation.

Let's consider an asymmetric jurisdiction agreement providing that proceedings may be commenced in 'any other court of competent jurisdiction' from the perspective of certainty. It is submitted that, determining the court of competent jurisdiction under the clear and precisely demarcated jurisdictional rules of the Recast Regulation is not an onerous task and does not lead to wanton uncertainty. Under the Recast Regulation, the parties to the asymmetric jurisdiction agreement will be in a position to predict with reasonable clarity and certainty where they may sue and where they may be sued, thereby eliminating the element of uncertainty.

²⁵⁷ For a spirited exposition of the principle of freedom of contract and *pacta sunt servanda* in relation to the English private international law of jurisdiction agreements see Briggs, *Agreements* (n 215); See also Nygh (n 214) Chapter 1. For the development of the interlinked ideas of freedom and sanctity of contract in the English and Scots substantive law of contract respectively see Ewan McKendrick, *Contract Law* (9th Edition, Palgrave, Macmillan 2011) 2-4; Gillian Black, *Woolman on Contract* (4th Edition, W Green, Edinburgh 2010) 5-6.

²⁵⁸ *Mauritius Commercial Bank Limited v Hestia Holdings Limited and Sujana Universal Industries Limited* [2013] EWHC 1328 (Comm), [43] (Popplewell J).

Form

It might be suggested that asymmetric jurisdiction agreements are incompatible with the requirements as to form of Article 25. First, the objection to asymmetric jurisdiction agreements may be said to lie in their unilateral form, whereby one party assumes obligations regarding jurisdiction, while the other does not. This line of reasoning fails on two distinct grounds. On the one hand it mistakes the nature of such agreements. While they are clearly asymmetric, by giving one party alone the right to sue other than in the designated court, they are not truly unilateral in nature. Far from imposing no obligation on the beneficiary under the agreement, such agreements oblige that party to accept the jurisdiction of the designated court if sued there by the counterparty. Even if, as is common, such agreements are expressed to be for the benefit of one party, this does not entitle that party to renounce its agreement to proceedings in the designated court.

More significantly, whatever the nature of such agreements, there is nothing in the Recast Regulation or its objectives to suggest that any asymmetry or lack of mutuality is an objection to their effectiveness. Indeed, Article 25's language clearly suggests that such concerns about form are irrelevant. Article 25 expressly demands that jurisdiction agreement be in writing, or otherwise in a form evident to the parties, but says nothing more about their permitted structure.

Second, it might be suggested that hybrid jurisdiction agreements are incompatible with Article 25, because the Recast Regulation governs only agreements to the jurisdiction of one Member State, being limited to agreements to submit to the court or courts of that Member State. This is misconceived for two reasons. There is no reason why the parties cannot agree to the jurisdiction of the courts of more than one Member State. More importantly, such an agreement misunderstands the nature of a typical asymmetric clause. Such clauses do not purport to confer jurisdiction on the courts of more than one Member State. The only jurisdiction agreement contained in such a clause is the agreement to the jurisdiction of the designated court. Whether any court has jurisdiction depends not on agreement, but on whether any other court is otherwise competent, by reason of the defendant's domicile, or because it has subject matter jurisdiction under Article 7. The wording of the former Article 17 of the Brussels Convention is here instructive. It provided that where an agreement conferring jurisdiction was concluded for the benefit of only one of the parties, that party

shall retain the right to bring proceedings in any other court which has jurisdiction by virtue of this Convention.

Third, it may be said that only an agreement which excludes the possibility of proceedings in more than one Member State is exclusive. An asymmetric agreement is therefore inevitably non-exclusive. Although no such definition is provided by the Regulation, exclusive jurisdiction agreements are thus defined by Article 3(a) of the Hague Convention on Choice of Court Agreements ('Hague Convention'): The parties agree to 'the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts'. In the context of the Hague Convention this narrow definition serves its purpose as only exclusive jurisdiction agreements are regulated by the Convention. In the context of the Regulation, however, the effect of regarding asymmetric agreements as non-exclusive is potentially problematic. There is nothing incoherent about concluding that such agreements are non-exclusive for the purposes of Article 31(2), but intractable problems arise in the context of Article 25. Such a conclusion is inconsistent with a counterparty's clear agreement that it will sue exclusively in the designated court, and it cannot have been intended to deny such an agreement exclusive effect should a counterparty sue in another court in breach of the agreement.

Arguably, the solution is to draw a distinction between a jurisdiction clause and the distinct agreements it may compromise. It is coherent to say that asymmetric clauses are to be classified as non-exclusive, insofar as they do not confine proceedings to a single court. However, such clauses contain separate exclusive and non-exclusive jurisdiction agreements, whereby the counterparty's agreement to sue in the designated court is exclusive, and the beneficiary's agreement to sue in that court is non-exclusive.

Fourth, it may be argued that Article 25 allows for the possibility that a jurisdiction agreement may be either exclusive or non-exclusive, but not both. Certainly, Article 25 describes these as alternatives, but again, it is important to distinguish jurisdiction clauses, in the sense of terms or paragraphs in a contract, from jurisdiction agreements, being the legal binding promises contained in such clauses. A jurisdiction agreement cannot logically be both exclusive and non-exclusive simultaneously, but a single clause may incorporate distinct agreements on both types.

Fairness

It may be suggested that asymmetric jurisdiction agreements are incompatible with the principle of equal access to justice premised on Article 6 of the European Convention on Human Rights ('ECHR').²⁵⁹ This argument supplies a means for challenging such provisions for lack of mutuality otherwise lacking in the letter and spirit of the Brussels I Regulation, but it fails to convince. First, the requirement of equal access to justice cannot realistically be applied in a manner in which each party is actually placed on an equal footing in litigation. Such an altruistic supposition is necessarily divorced from the complex realities of high value international commercial litigation where equality of arms is at best an illusion. Second, it is difficult to countenance why a freely entered into contractual agreement, in the absence of malice or bad faith by the other party, could be regarded as infringing a party's rights. In a different but related context it appears that a party which has agreed to the exclusive jurisdiction of the English courts cannot complain that its Article 6 ECHR rights are infringed if an English court grants an injunction to prevent it from suing elsewhere.²⁶⁰ Even if Article 6 ECHR engages in the present context, it is doubtful that it can be concerned with the extent of a party's choice of jurisdiction. As has been said:

Article 6 of the ECHR does not deal at all with where the right to a fair and public hearing before an independent and impartial tribunal established by law is to be exercised by a litigant. The crucial point is that civil rights must be determined somewhere by a hearing and before a tribunal in accordance with the provisions of Article 6.²⁶¹

As this implies, the principle of equality of arms enshrined in Article 6 ECHR is concerned with the position of the parties before a particular court, not whether the parties have an equal choice of court prior to selecting a forum to litigate in.²⁶² It is possible that some involuntary restriction on a party's right to litigate, such as an anti-suit injunction which denies a claimant the opportunity to sue anywhere, might infringe the requirement of access to justice.²⁶³ The principle would also be infringed if the effect of limiting a party's choice of

²⁵⁹ The first sentence of Article 6(1) of the ECHR reads as follows: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' The Human Rights Act 1998 incorporates into UK law the rights contained in the European Convention on Human Rights.

²⁶⁰ *OT Africa Line Ltd v Hijazy (The Kribi) (No 1)* [2001] 1 Lloyd's Rep 76, [42].

²⁶¹ *Ibid.*

²⁶² *Mauritius Commercial Bank Limited v Hestia Holdings Limited and Sujana Universal Industries Limited* [2013] EWHC 1328 (Comm), [43] (Poplewell J).

²⁶³ *OT Africa Line Ltd v Hijazy (The Kribi) (No 1)* [2001] 1 Lloyd's Rep 76, [42].

forum is to force them into a court where they would not receive substantial justice,²⁶⁴ but in such cases it is not any lack of equality in the choice of forum which is the source of the injustice. The source of injustice is rather the determination of the party's civil rights and obligations in a court which denies them a fair, just and impartial hearing resulting in a miscarriage of justice.

Interim Conclusion

Building on the arguments above, principle suggests that unilateral or asymmetric non-exclusive jurisdiction agreements are compatible with Article 25 of the Recast Regulation. These are agreements whereby the parties agree to the jurisdiction of a given court, but one party alone has the right to sue in any other court of competent jurisdiction. Thus, one party submits to the exclusive jurisdiction of a given court, whereas the other party submits to that court's non-exclusive jurisdiction. Such provisions are a type of non-exclusive jurisdiction agreement, which are expressly permitted by Article 25.

Notwithstanding any arguments regarding the compatibility of an asymmetric non-exclusive jurisdiction agreement with Article 25, the potential for torpedo actions impugning the validity of such agreements in the wake of *Banque Rothschild* cannot be ruled out. However, the ruling in *Apple Sales International v eBizcuss* indicates a possible change in the French Supreme Court's attitude towards such clauses and arguably reduces the litigation risk arising from pre-emptive proceedings challenging the validity of an English asymmetric jurisdiction agreement. Whether any subsequent proceedings in the English courts will trigger Article 31(2) of the Recast Regulation is uncertain at the moment. However, it has been argued that the borrower in an international finance agreement is obliged to litigate in the primary forum and thus the jurisdiction agreement is exclusive in a sense. Hence, proceedings in the primary forum in response to the commencement of a torpedo action by the borrower should in principle be able to rely on Article 31(2).²⁶⁵ In the event that Article 31(2) cannot be invoked or even otherwise, seeking damages for breach of the asymmetric jurisdiction agreement in the English courts may compensate the disgruntled party. Thus, the common law's pragmatic damages remedy will be revitalized by augmenting the

²⁶⁴ ECHR, 27 October 1993, *Dombo Beheer BV v Netherlands*, [33]; ECHR, 23 October 1996, *Ankerl v Switzerland*, [38]; *Mauritius Commercial Bank Limited v Hestia Holdings Limited and Sujana Universal Industries Limited* [2013] EWHC 1328 (Comm), [43] (Poplewell J).

²⁶⁵ Ian Bergson, 'The Death of the Torpedo Action? The Practical Operation of the Recast's Reforms to Enhance the Protection for Exclusive Jurisdiction Agreements within the European Union' (2015) 11 *Journal of Private International Law* 1, 22.

procedural mechanisms for the enforcement of jurisdiction agreements in the Recast Regulation.

From a systemic perspective, a future reference to the CJEU concerning the validity of such agreements may help clarify the waters muddled by the decision of the Cour de Cassation in *Banque Rothschild*. A positive development which may ameliorate the litigation risk created by *Banque Rothschild* is the incorporation of a new provision in the Recast Regulation which refers the substantive validity of a jurisdiction agreement to the law of the selected forum including its rules of private international law. This will mean that the courts of any Member State seised with a dispute will refer the substantive validity of an asymmetric jurisdiction agreement to the law of the selected forum and that such agreements shall be valid, if valid under the *lex fori prorogatum*. The alternative argument that the compatibility of asymmetric jurisdiction agreements with Article 25 is solely an issue of the scope of an ‘agreement’ governed by an autonomous interpretation of Article 25 of the Recast Regulation has also been explored. A clarification of the position on the compatibility of asymmetric jurisdiction agreements with Article 25 of the Recast Regulation from a CJEU decision would be most welcome.

Effectiveness of Asymmetric Jurisdiction Agreements and Article 23 of the Brussels I Regulation

Jurisdiction agreements in disputes commenced before 10 January 2015 are subject to Article 23 of the Brussels I Regulation, if one party is domiciled in an EU Member State. The effect of asymmetric jurisdiction agreements is in principle the same as under Article 25 of the Recast Regulation, with the important exception that Article 23 makes no explicit reference to the law governing the substantive validity of jurisdiction agreements. The law governing the substantive validity of a jurisdiction agreement is therefore a controversial issue under the Brussels I Regulation.²⁶⁶

It is possible that the conditions of validity stipulated by Article 23 are complete and that a jurisdiction agreement is enforceable merely if the requirements of consensus, form and certainty are satisfied. The alternative is that substantive validity of such an agreement is within the remit of national law, with the effect that the law governing the agreement regulates such matters as the vitiation of consent by reason of fraud, duress or mistake. The

²⁶⁶ Heidelberg Report (n 214) 91-92.

English courts have accepted that no reference to national law is possible.²⁶⁷ However, this view is not the norm elsewhere²⁶⁸ and the opposite view has been adopted in some EU Member States.²⁶⁹ Some Member States apply the law of the forum and others the law governing the contract.²⁷⁰

If Article 23 is an autonomous regime, not subject to national law, the issue of substantive validity becomes irrelevant and leaves asymmetric agreements to be decided by reference to considerations of form, certainty and fairness. Insofar as substantive validity is subject to national law, their validity is a matter for that law, exposing such agreements to the risk of invalidity depending on the content of that law. Such agreements would be valid, therefore, in an English court, in a contract governed by English law.

Asymmetric Agreements Subject to National Law

Under Article 23 of the Brussels I Regulation, national law governs the prorogative effect of agreements to the jurisdiction of EU national courts, neither party to which is EU domiciled.²⁷¹ However, Article 23 precludes any court but the designated court from exercising jurisdiction unless the designated court has declined jurisdiction.²⁷² The effect is that an English court will apply English law to determine the validity and effect of an asymmetric agreement in which the English court is the primary forum. As a consequence, such an agreement would be valid if contained in a contract governed by English law.

²⁶⁷ *Aeroflot v Berezovsky* [2013] EWCA Civ 784, [65].

²⁶⁸ U Magnus and P Mankowski, *Brussels I Regulation* (2nd Edition, Sellier European Law Publishers 2012) 477, citing a number of German authorities.

²⁶⁹ Heidelberg Report (n 214) 92.

²⁷⁰ *Ibid.*

²⁷¹ Article 23(1) of the Brussels I Regulation.

²⁷² Article 23(3) of the Brussels I Regulation; The derogative effect of a jurisdiction agreement selecting the courts of a Member State concluded by non EU domiciliaries is regulated by the Brussels I Regulation.

Fundamental Juridical Nature and Classification of Choice of Court Agreements under the Brussels I Regulation (Recast)

As mentioned above, the distinction between an exclusive and non-exclusive choice of court agreement remains relevant in the context of the European Union private international law regime exemplified by the Brussels I Regulation and the Recast Regulation. Exclusive jurisdiction agreements for the courts of a Member State, which meet the requirements of Article 25 of the Recast Regulation will take precedence and oust the jurisdiction of the courts of the defendant's domicile (Article 4 – incorporating the *actor sequitur forum rei* principle), and the special jurisdiction provisions in Articles 7 and 8 of the Recast Regulation.²⁷³ Any court other than the chosen court must stay proceedings once the chosen court is seised and eventually decline jurisdiction unless a party has submitted to the jurisdiction of that court under Article 26.²⁷⁴ Exclusive jurisdiction under Article 24 of the Recast Regulation will also assume priority over an exclusive jurisdiction agreement pursuant to Article 25. If the parties have conferred non-exclusive jurisdiction on the courts of one or more identified Member States, then this will not take precedence over the jurisdiction of the courts of the defendant's domicile (Article 4) or any special jurisdiction available under Articles 7 and 8 of the Recast Regulation. The allocation of substantive jurisdiction in such a case will be determined by the order in which proceedings are brought. Under Article 27 of the Brussels I Regulation, any other court than the court first seised must stay its proceedings.²⁷⁵ However, Article 31(2) of the Recast Regulation has reversed the CJEU's commercially inept ruling in *Gasser* by making provision for a reverse *lis pendens* rule which accords priority to the court chosen in an exclusive jurisdiction agreement.

Shedding light on the different treatment of exclusive and non-exclusive choice of court agreements under Article 25, may serve to conceal a rather more fundamental contrast between the approach to jurisdiction agreements at the English common law and under the European Union's Brussels I Regulation (Recast). It has been observed that at common law an exclusive choice of court agreement contains a positive contractual obligation to refer disputes that fall within the ambit of the clause to an identified court and an obligation not

²⁷³ *Estasis Salotti di Colzani Aimo et Gianmario Colzani v Ruwa Polstereimaschinen Gmbh* Case C-24/76 [1976] ECR 1831 at [7]; *Galeries Segoura Sprl v Socite Rahim Banakdarian* Case C-25/76 [1976] ECR 1851 at [1]; *Overseas Union Insurance* Case C-351/89 [1991] ECR I-3317; *Erich Gasser Gmbh v MISAT Srl* Case C-116/02 [2004] 1 Lloyd's Rep 222.

²⁷⁴ *Overseas Union Insurance* Case C-351/89 [1991] ECR I-3317 at [26]; *Erich Gasser Gmbh v MISAT Srl* Case C-116/02 [2004] 1 Lloyd's Rep 222 at [49].

²⁷⁵ Article 27 of the Brussels I Regulation.

to bring proceedings elsewhere.²⁷⁶ On the other hand, Article 25 of the Regulation ‘serves a procedural purpose’,²⁷⁷ in that it determines whether a jurisdiction agreement successfully prorogates the jurisdiction of a court or derogates the jurisdiction of a court or neither.²⁷⁸ Briggs has argued that a contractual understanding of a jurisdiction agreement is neither necessary nor desirable and it is unhelpful to think of such agreements as capable of being breached.²⁷⁹ He advances the view that:²⁸⁰ ‘Article 23 does not require, and is not necessarily satisfied by, a contractually binding agreement on jurisdiction’. The English courts have held that what is required is that the party who is to be held to a proposed agreement has agreed with the person who wishes to sue him, in a sufficient form, to accept the jurisdiction of the court in which he is to be sued.²⁸¹ The CJEU has declined to analyse jurisdiction agreements in the language of private law rights and as though they were contracts, or to invalidate them when the contract in which they are made is legally invalid.²⁸² As a consequence, if the parties make their agreement in the form of a contract to sue in one court and to not sue in any other, a term of the contract will be able to serve or fulfill the procedural or jurisdictional purpose of determining, or contributing to the determination of, the jurisdiction of courts of Member States. In the concluding chapter of *Agreements*, Briggs whilst summarizing the common law private international law rules states that ‘agreements on jurisdiction within the Brussels scheme operate by formal waiver of jurisdictional privilege, and do not depend upon the existence of a private contract.’²⁸³

The essentially procedural character of jurisdiction agreements under the Regulation is given credence by the fact that the original Rome Convention and its successor instrument the Rome I Regulation expressly exclude arbitration agreements and agreements on choice of court from their material scope of application.²⁸⁴ When the European Economic and Social Committee was consulted on a draft text of the Rome I Regulation, it observed that the

²⁷⁶ See Briggs, *Private International Law in English Courts* (n 216) 345-346.

²⁷⁷ C-269/05 *Francesco Benincasa v. Dentalkit Srl*. [1997] ECR I-3767, [25]; Beaumont and McEleavy (n 222) 252; JJ Fawcett and JM Carruthers, *Cheshire, North & Fawcett: Private International Law* (14th Ed, OUP 2008) 287, 290.

²⁷⁸ Briggs, *Private International Law in English Courts* (n 216) 243.

²⁷⁹ Briggs, *Agreements* (n 215) Chapter 7, 253-258.

²⁸⁰ *Ibid* 257.

²⁸¹ *JSC Aeroflot-Russian Airlines v Berezovsky* [2013] EWCA Civ 784.

²⁸² C-269/05 *Benincasa v. Dentalkit Srl* [1997] ECR I-3767.

²⁸³ Briggs, *Agreements* (n 215) 524.

²⁸⁴ Rome Convention, Article 1(2)(d); Rome I Regulation, Article 1(2)(e). See also Fawcett & Carruthers (n 277) 684; Hartley, *International Commercial Litigation* (n 240) 572.

exclusion of choice of court agreements was due to their procedural status.²⁸⁵ The Giuliano–Lagarde Report on the Rome Convention notes that choice of court agreements were excluded from the design of the Convention because ‘the matter lies within the sphere of procedure and forms part of the administration of justice (exercise of State authority)’.²⁸⁶ The official report also stated that ‘rules on jurisdiction are a matter of public policy and there is only marginal scope for freedom of contract’.²⁸⁷ As a matter of fact, the UK delegation had sought to include arbitration agreements into the choice of law regime of the Rome Convention, arguing that they were of a different nature to jurisdiction agreements.²⁸⁸ The UK delegation ‘emphasized that an arbitration agreement does not differ from other agreements as regards the contractual aspects’²⁸⁹ thus hinting at the special procedural role of jurisdiction agreements in the allocation of jurisdiction.²⁹⁰

Where a substantive challenge to the jurisdiction agreement was admissible, the common law had tended to refer to the law which governs the agreement as if it were a contract. The reasoning was that the question whether there is an agreement, by which the person is bound, is functionally similar to the question whether there is a contract by which parties are bound; and that each is referable to a form of proper law. There exists little or no support for this methodology in the jurisprudence of the European Court. It simply stated that the presence and effect of an agreement on jurisdiction is to be determined by reference to the formality requirements, and is not to be subjected to rules for determination of the applicable law, which may be complicated and which may vary, to an unacceptable degree, from court to court.²⁹¹ It would follow that within the context of the Regulation, a jurisdiction agreement is not essentially contractual in character. Rather, it is a formal statement, by a party or parties not otherwise subject to the jurisdiction of a court, that a jurisdiction will be accepted, and a public statement by a party or parties that a court

²⁸⁵ Opinion of the European Economic and Social Committee on the Proposal for a Regulation of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I) OJ C 318/56, 58, 3.1.4; See Takahashi, *Damages for Breach of a Choice of Court Agreement* (n 215) 67.

²⁸⁶ Giuliano-Lagarde Report on the Convention on the law applicable to contractual obligations [1980] OJ C282, 11-12.

²⁸⁷ *Ibid.*

²⁸⁸ See Knight (n 206) 506.

²⁸⁹ Giuliano-Lagarde Report (n 286) 11-12.

²⁹⁰ See Fentiman, *International Commercial Litigation* (2015) (n 240) 186; R Fentiman, *International Commercial Litigation* (OUP 2010) 177.

²⁹¹ C-269/05 *Benincasa v. Dentalkit Srl* [1997] ECR I-3767; Case C-106/95 *MSG* [1997] ECR I-911, [15]; *Coreck Maritime* [2000] ECR I-9337, [13].

which would otherwise have had jurisdiction will not be seised with a claim to which this agreement refers.²⁹²

When the agreement is seen in those terms, it is much less obvious that one should assess its validity as though it were contractual in nature. In particular, a party to such an agreement who departs from it may not be breaching the agreement, for there is nothing to breach. The proper question is instead whether the party proposed to be bound had agreed or assented, in writing, to the jurisdiction of the court. This would explain why Articles 25 and 26 are grouped together as ‘prorogation’: the one is an acceptance of the jurisdiction of a court prior to the institution of proceedings; the other is an acceptance of the jurisdiction of a court after the institution of proceedings.²⁹³ Each amounts to an acceptance which is immediately binding according to its terms, and valid as soon as it is made in due form.

The Recast Regulation has introduced a new choice of law provision which refers issues of substantive validity to the *lex fori prorogatum* including its private international law rules and the technique of severability has also been codified.²⁹⁴ The question that arises is whether and to what extent the amendments in Article 25 of the Recast Regulation coupled with the traditional requirement for ‘agreement’ in the text of the current and preceding instruments render jurisdiction agreements as ‘contracts’ under the Regulation.

It is submitted that the determination whether a jurisdiction agreement is a ‘contract’ is a matter of perspective and is ‘culturally conditioned’.²⁹⁵ The Anglo-American approach to contract views contract as a mutual exchange of promises, and is sometimes referred to as the promissory approach.²⁹⁶ The substantive law conception of jurisdiction agreements as giving rise to mutually enforceable executory promises not to sue in a non-contractual forum can be easily justified by the promissory approach to contracts. In contrast, the approach in Scotland and Civilian jurisdictions focuses on the agreement of the parties, using a consensual analysis.²⁹⁷ Arguably, the procedural contract conception of a jurisdiction agreement as not giving rise to mutually enforceable executory promises not to sue in a non-

²⁹² *JSC Aeroflot-Russian Airlines v Berezovsky* [2013] EWCA Civ 784.

²⁹³ Briggs, *Private International Law in English Courts* (n 216) 251.

²⁹⁴ See Chapter 9 below.

²⁹⁵ See Horatia Muir Watt, ‘Party Autonomy in International Contracts: From the Makings of a Myth to the Requirements of Global Governance’ (2010) 3 *European Review of Contract Law* 1, 30.

²⁹⁶ See Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Harvard University Press 1981).

²⁹⁷ See Black, *Woolman on Contract* (n 257) 2; Robin-Evans Jones and Geoffrey MacCormack, ‘Obligations’ in Ernest Metzger (ed.), *A Companion to Justinian’s Institutions* (Duckworth, London 1998) 127, 150.

contractual forum can be satisfactorily reconciled with an approach based solely on the agreement of the parties.

Therefore, it may be unfair or at least simplistic to classify jurisdiction agreements under the Brussels regime as merely 'procedural'.²⁹⁸ For instance, German law employs the term 'procedural agreement' for jurisdiction agreements, but according to the prevailing juristic opinion, in particular, the choice of court agreement is perceived as a substantive law agreement.²⁹⁹ Jurisdiction agreements are governed primarily by procedural rules, but substantive law rules may also be applied. It is commonly understood that the validity of the main contract and the jurisdiction agreement need to be assessed independently and that the material validity of jurisdiction agreements should be governed by the *lex causae* and not the *lex fori*.³⁰⁰ The *lex fori* is applied to the procedural effects and in relation to the formal requirements of Section 38 of the ZPO.³⁰¹ Thus the effects of forum selection are manifested in civil procedure rules which limit the scope of application of the substantive law rules.³⁰² Therefore, it would be more accurate to state that German doctrine defines choice of court agreements as 'bilateral procedural acts'³⁰³ or 'hybrid contracts'³⁰⁴ or

²⁹⁸ Ulrich Magnus, 'Choice of Court Agreements in the Review Proposal for the Brussels I Regulation' in Eva Lein (ed.), *The Brussels I Review Proposal Uncovered* (BIICL, London 2012) 83, 86-87, is critical of Briggs' interpretation of Article 23 of the Brussels I Regulation and his denial that a bilateral agreement is required. He notes that it is contrary to the prevailing view among leading German and English academics. See references to German language sources in the text and Fentiman, *International Commercial Litigation* (2015) (n 240) 68-69; Magnus and Mankowski (n 268) 474-475; A Layton and H Mercer, *European Civil Practice* (2nd Edition, Sweet & Maxwell, London 2004) 720; See Jonathan Hill and Adeline Chong, *International Commercial Disputes: Commercial Conflict of Laws in English Courts* (Hart Publishing 2010) 123-125, for a good overview of the differing views.

²⁹⁹ Belohlávek, *Rome Convention - Rome I Regulation* (n 205) 364; Sparka (n 205) 87; Both Belohlávek and Sparka refer extensively to German case law and literature on the issue. The 'procedural contract' approach may be regarded as a general principle common to the law of a number of continental civil law Member States including Germany, Austria, Switzerland and the Czech Republic. See Ralf Michaels, 'Two Paradigms of Jurisdiction' [2006] *Michigan Journal of International Law* 1003, 1041-1045, for a discussion of the German law of civil jurisdiction (*internationale Zuständigkeit*) as the blueprint for the European paradigm of jurisdiction.

³⁰⁰ Sparka (n 205) 86-87.

³⁰¹ Sparka (n 205) 87; Section 38 of the German Code of Civil Procedure ('ZPO'); See Arthur T von Mehren and Eckart Gottschalk, *Adjudicatory Authority in Private International Law: A Comparative Study* (Martinus Nijhoff Publishers, 2007) 220-224.

³⁰² Magnus and Mankowski (n 268) 511: 'In Civil Law the view appears to prevail that [breach of a jurisdiction agreement] can only result in procedural sanctions.'; See P Gottwald, 'art 23 EuGVVO' in T Rauscher, J Wenzel and P Wax (eds.), *Münchener Kommentar zur Zivilprozessordnung* (3rd Edition, Beck 2008) [79] (only procedural sanctions); Briza (n 214) 551; Alexander J Belohlávek, 'Arbitration Agreement, MDR Clauses and Relation thereof to Nature of Jurisdictional Decisions on the Break of Legal Cultures' in Józef Okolski, Andrzej Catus, Maksymilian Pazdan, Stanisław Sołtysiński, Tomasz Wardyński, Stanisław Włodyka (eds.), *Essays in Honour of 60 years of the Court of Arbitration at the Polish Chamber of Commerce in Warsaw [Księga pamiątkowa 60-lecia Sądu Arbitrażowego przy Krajowej Izbie Gospodarczej w Warszawie]* (Warszawa 2010) 401, 408-409.

³⁰³ Ingo Saenger, *Zivilprozessordnung: Handkommentar* (2nd Edition, Nomos, Baden-Baden 2007) 65; Alexander J Belohlávek, 'The Definition of Procedural Agreements and Importancy to Define the Contractual Nature of the Arbitration Clause in International Arbitration' in M Roth and M Giestlinger (eds.), *Yearbook of International Arbitration* (Intersentia / DIKE / NWV, Vienna-Graz, 2012) 21, 35-36.

‘substantive law agreements regulating procedural relationships’³⁰⁵ or as both ‘substantive and procedural’.³⁰⁶ Procedural contracts can only operate where there are no mandatory provisions in the procedural law (ZPO) prohibiting them.³⁰⁷ Swiss law also adheres to a ‘procedural agreement’ conception and refers to the procedural implementation of these agreements as ‘instruments of a procedural modification of the claim’ (*prozessuale Modifikation der Forderung*).³⁰⁸

The Regulation is concerned with the allocation of adjudicatory authority between the courts of the Member States of the EU. The Regulation establishes a framework for the allocation or distribution of jurisdiction and these provisions have a hierarchical structure, including, but not limited to, the obligation upon each Member State court to give effect to the parties agreement to confer exclusive jurisdiction on identified courts of a Member State unless a party submits to another jurisdiction (Article 26). Under the Recast Regulation, each Member State is required to give effect to an agreement that satisfies the requirements of Article 25. It is not permissible for the courts of one Member State to review the jurisdiction of another Member State court.³⁰⁹ This does not apply at common law. At common law the English courts are concerned not so much with the allocation of jurisdiction, but rather the ascertainment and enforcement of an obligation to bring proceedings only in one forum.

Conclusion

Apart from the cursory difference in treatment accorded to exclusive and non-exclusive choice of court agreements, Article 25 sheds light on the consequences of a ‘paradigmatically’³¹⁰ or ‘fundamentally’³¹¹ different jurisdictional regime for the

³⁰⁴ Burkhard Hess, ‘The Draft Hague Convention on Choice of Court Agreements, External Competencies of the European Union and Recent Case Law of the European Court of Justice’ in Arnaud Nuyts and Nadine Watté (eds.), *International Civil Litigation in Europe and Relations with Third States* (Bruylant 2005) 263, 271.

³⁰⁵ Belohlávek, *Rome Convention - Rome I Regulation* (n 205) 364.

³⁰⁶ Sparka (n 205) 87.

³⁰⁷ Rauscher, Wenzel and Wax, *Münchener Kommentar zur Zivilprozessordnung* (n 275) [73].

³⁰⁸ Belohlávek, *Rome Convention - Rome I Regulation* (n 205) 365-366.

³⁰⁹ *Overseas Union Insurance* Case C-351/89 [1991] ECR I-3317 at [26]; *Erich Gasser GmbH v MISAT Srl* Case C-116/02 [2004] 1 Lloyd’s Rep 222 at [54].

³¹⁰ See Michaels, *Two Paradigms of Jurisdiction* (n 299); Aude Fiorini, ‘The Codification of Private International Law in Europe - Could the Community Learn from the Experience of Mixed Jurisdictions’ (2008) 23 *Tulane European and Civil Law Forum* 89, 100-101; cf Giesela Ruhl, ‘Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency’ in Eckart Gottschalk, Ralf Michaels, Giesela Ruhl and Jan von Hein (eds.), *Conflict of Laws in a Globalized World* (CUP 2007) 153, conducts a comparative analysis of party autonomy in the private international law of contracts and argues that American and European law demonstrate a high degree of convergence in relation to the grant and design of party autonomy and its limitations as opposed to choice of law in general.

³¹¹ Jonathan Harris, ‘Understanding the English Response to the Europeanisation of Private International Law’ (2008) 4 *Journal of Private International Law* 347, 352-353; Anna Gardella & Luca G Radicati Di Brozolo, ‘Civil

enforcement of such clauses by the English common law as compared to the European Union's Recast Regulation. The English common law's pragmatic, 'practice driven'³¹² focus on the enforcement of an *inter partes* contractual obligation contained within a jurisdiction agreement is met with a 'theory driven'³¹³ hierarchical jurisdictional framework where giving effect to party autonomy has to be balanced against other arguably procedural concerns.³¹⁴ The Regulation's emphasis is on the multilateral allocation of adjudicatory authority between the courts of the Member States of the EU, where the contractual enforcement of private law rights embodied in a jurisdiction agreement by way of a claim for damages may call into question the primacy accorded to the principle of mutual trust and the principle of effectiveness of EU law (*effet utile*).

It has been observed that a multilateral jurisdiction and judgments order such as the Recast Regulation may only permit jurisdiction agreements to manifest procedural consequences. In other words, the contractual obligation not to be sued in a non-elected forum and the correlative right to sue only in the contractual forum are intrinsically incompatible with the system of the international public ordering of private law affected by the Regulation. Notwithstanding the procedural consequences, the contractual components of a choice of court agreement are evident in the agreement between the parties and the explicit sanctioning of the technique of severability and the explicit referral of issues of material validity to the *lex fori prorogatum* including its private international law rules under Article 25 of the Recast Regulation.

Chapter 5 examines the legal basis of the damages remedy for breach of a choice of court agreement from the perspective of jurisdiction to enforce a choice of court agreement, applicable law and recognition and enforcement of the judgment awarding the damages remedy. Prior to the assessment of the legal basis, the practical preliminary issue of drafting undertakings, indemnity clauses and liquidated damages clauses to enforce the breach of the choice of court agreement are discussed.

Law, Common Law and Market Integration: The EC Approach to Conflicts of Jurisdiction" (2003) 51 *American Journal of Comparative Law* 611; See also, Peter F Schlosser, 'Lectures on Civil-Law Litigation Systems and American Cooperation With Those Systems' (1996-1997) 45 *University of Kansas Law Review* 9, 37-38; Friedrich Juenger, 'Judicial Jurisdiction in the United States and in the European Communities: A Comparison' (1984) 82 *Michigan Law Review* 1195, 1210-1212.

³¹² Trevor C Hartley, 'The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws' (2005) 54 *ICLQ* 813, 814.

³¹³ *Ibid.*

³¹⁴ See Hartley (n 312); Hartley, *Choice of Court Agreements under the European and International Instruments* (n 217) 12, para 1.28.

Chapter 5 - 'Dispute Resolution' Epitomized: An Assessment of the Damages Remedy for Breach of Jurisdiction Agreements

Introduction

Before proceeding to explore the legal basis, jurisdiction, applicable law and the recognition and enforcement of the judgment awarding damages for breach of an exclusive jurisdiction agreement, it is necessary to digress briefly to examine the practical value of drafting and inserting clauses in international commercial contracts which guarantee the secondary enforcement of exclusive choice of court agreements and choice of law agreements. An examination of these clauses as a preliminary issue is warranted because these clauses possess a universal appeal and are not specific to the English common law tradition. Indeed, prominent civil law commentators have advanced the use of penalty clauses in international commercial contracts as a deterrent and to guarantee secondary enforcement as the continental 'procedural contract' conception of an exclusive jurisdiction agreement does not give rise to a substantive obligation not to sue in a non-elected forum which can be employed to ground a cause of action for damages. Moreover, the operation of these clauses may not strictly depend on the concept of a 'breach' of a choice of court agreement as understood by the common law notion that suing in a non-chosen Member State constitutes a 'wrong'. Non-compliance with the exclusive jurisdiction agreement is sufficient to trigger these clauses into operation. A liquidated damages clause also has the additional advantage of predictability in terms of the heads and quantum of damages when compared to an action for damages for breach of an exclusive jurisdiction agreement.

Preliminary Issue: Practical Solutions for Enforcing English Exclusive Choice of Court Agreements by Drafting Clauses to Guarantee the Secondary Enforcement of Jurisdiction Agreements

This section provides some practical solutions aimed at preventing and effectively responding to the initiation of preemptive proceedings in a foreign court in breach of an English exclusive choice of court agreement. The suggested practical solutions are based on English law and focus on the effective management of legal risk in multistate transactions by utilizing drafting best practice to augment jurisdictional party autonomy and enforce the ensuing obligation not to sue in a non-elected forum.

The suggested drafting solutions are designed to operate at two levels. First, they should provide additional deterrent value, which should help avoid a breach of the choice of court agreement in the first place. Secondly, in the event of a breach of the choice of court agreement, they should work to assist the aggrieved party in responding to the breach. It is submitted that, the very apt general observation that ‘prevention is better than the cure’ does not lose any of its significance when applied in the context of the preventative and responsive aspects of enforcing choice of court agreements via undertakings and indemnity clauses. The following paragraphs assess the utility of drafting and inserting undertakings, indemnity clauses and liquidated damages clauses to ensure the performance of the obligation not to sue in a non-nominated forum encapsulated in an exclusive choice of court agreement.

Undertakings Not to Breach the Choice of Court Agreement

Well advised parties seeking to minimize litigation risk³¹⁵ arising from multistate transactions should endeavour to devote as much drafting time and attention to the choice of court provision of an international commercial contract as they do to the substantive performance provisions when negotiating the terms. One way of protecting the innocent party is to insert appropriate undertakings in the contract pursuant to which the parties undertake not to bring court proceedings in breach of the choice of court agreement.³¹⁶ The advantage of drafting such specific undertakings is that the innocent party will be able to rely on the obligations owed by the party in breach without the need to invoke a separate cause of action for damages for breach of the choice of court agreement. This should make it easier and quicker to enforce the terms in the event of a breach.

In addition to the undertakings in the agreement, parties may wish to bolster their relative positions by obtaining personal undertakings from the directors and the senior management of the respective companies, thereby making those individuals party to the contract.³¹⁷ However, it should be noted that, apart from the specific case of contractual undertakings by the directors and senior management of the company, the scope for lifting the corporate veil

³¹⁵ See Richard Fentiman, *International Commercial Litigation* (2nd Edition, OUP 2015) Chapter 2: Litigation risk arising from multistate transactions is the risk to each party that any dispute will not be resolved in their preferred forum (Venue risk). Another species of litigation risk is enforcement risk. This is the risk that a judgment debtor with worldwide assets will disperse or conceal those assets, and the risk that a judgment obtained in one court will be unenforceable elsewhere.

³¹⁶ Neville Byford and Afzalah Sarwar, ‘Arbitration Clauses after *West Tankers*: The Unanswerable Conundrum? Practical Solutions For Enforcing Arbitration Clauses’ [2009] *International Arbitration Law Review* 29, 30.

³¹⁷ Ibid.

and thereby making the controllers of the company constructive parties to the contract has been severely restricted by the Supreme Court of the UK in *VTB Capital Plc v Nutritek International Corp & Ors*.³¹⁸

As a result of the personal undertakings, companies may be less likely to take steps in breach of the choice of court agreement if those in control of the company and those making the relevant decisions are personally bound by the relevant obligations. These personal undertakings would be identical to those given by the company and would include for instance an undertaking not to induce or cause the relevant company to bring proceedings in breach of the choice of court agreement.³¹⁹ The parties' position may also be strengthened by obtaining financial guarantees from the directors and senior management of the company. In the event of a breach, in addition to having a direct claim against the company, the innocent party has the option of suing the individuals concerned who would otherwise not be parties to the contract.

Indemnity Clauses and Liquidated Damages Clauses Enforcing the Breach of a Choice of Court Agreement

Before proceeding to examine the fundamental nature and enforcement of choice of court agreements, it is useful to highlight the importance of drafting and inserting an indemnity clause as best practice in international commercial contracts. It is increasingly common to reinforce an exclusive choice of court agreement by drafting a clause whereby each party undertakes to indemnify the other against any loss arising from a failure to comply with the

³¹⁸ In *VTB Capital Plc v Nutritek International Corp & Ors* [2013] UKSC 5, the claimants sought to bring two potential defendants before the court by arguing that they were co parties to a contract concluded by a company subject to their control, and so subject to a jurisdiction agreement in the contract in favour of the English courts. The UK Supreme Court declined to accept that the potential defendants were constructive parties to the contract. The corporate veil should not be pierced so as to deem a third party to be a party to a contract which it has not in fact concluded. The UK Supreme Court expressly overruled controversial previous authority in favour of binding alleged 'puppeteers' to jurisdiction agreements in contracts concluded by companies subject to their control: *Antonio Gramsci Shipping Corporation v Stepanovs* [2011] EWHC 333 (Comm); *Alliance Bank JSC v Aquanta Corp* [2011] EWHC 3281 (Comm); *Kensington International Ltd v Republic of Congo* [2005] EWHC 2684 (Comm); See, further, Fentiman, *International Commercial Litigation* (2015) (n 315) 90-91; Adrian Briggs, *Private International Law in English Courts* (OUP 2014) 253; Adrian Briggs, 'The Subtle Variety of Jurisdiction Agreements' [2012] *LMCLQ* 364, 370-371.

³¹⁹ Apart from a specific contractual undertaking couched in these terms, it has been argued that a claim in damages may lie against a claimant's lawyers for the tort of inducing breach of contract where it can be established that the claimant was advised by them to bring pre-emptive proceedings in breach of a choice of court agreement in *AMT Futures Ltd v Marzillier, Dr Meier & Dr Guntner Rechtsanwalts-gesellschaft MbH* [2014] EWHC 1085 (Comm) (Popplewell J); *Marzillier, Dr Meier & Dr Guntner Rechtsanwalts-gesellschaft MbH v AMT Futures Ltd* [2015] EWCA Civ 143 (Christopher Clarke LJ)

agreement.³²⁰ It may be inserted in addition to an agreement not to sue other than in accordance with the choice of court agreement and not to challenge the effect of the clause in another court. A comprehensive and well drafted clause must itemize all potential litigation costs and expenses, to avoid any argument that litigation costs are a normal business expense which should be met.

Conceptually, an indemnity clause works around the difficulties associated with penalty clauses in the English common law.³²¹ It should be noted that, an indemnity clause does not imply that suing contrary to a choice of court agreement is a breach of contract. Determining whether a choice of court agreement may be breached by suing in a non-elected forum is a separate issue subject to the applicable law of the jurisdiction agreement.³²² The indemnity clause also avoids any risks that the counterparty may argue that its conduct may be excused. The insertion of an indemnity clause in an international commercial contract will also be appropriate in cases where under the applicable law of the choice of court agreement the breach of such an agreement does not lead to the award of substantial compensatory damages. The act of suing contrary to the choice of court agreement will trigger an independent obligation to indemnify, thus sidestepping any argument about the lack of a legal basis for the recoverability of damages under the applicable law of the choice of court agreement. It is irrelevant that the court where the counterparty brings proceedings adjudicates that the agreement is ineffective and asserts jurisdiction accordingly. The promise to reimburse is independent of whether another court has jurisdiction.

From the standpoint of international legal practice, indemnity clauses operate at three levels. First, is the case where the court in which the counterparty commences proceedings declines jurisdiction, or asserts jurisdiction but finds against the counterparty on the merits. The indemnity clause ensures that the costs and expenses of defending proceedings are recoverable, as they may not be recoverable or sufficiently recoverable in the court concerned. Second, is the scenario where the alternative court asserts jurisdiction and awards damages on the merits to the counterparty. The indemnity clause confers on the judgment debtor a separate right of action which effectively neutralizes the judgment debt.

³²⁰ Fentiman, *International Commercial Litigation* (2015) (n 315) 121-122; Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford Private International Law Series, OUP 2008) 175-176; Byford and Sarwar, *Arbitration Clauses After West Tankers* (n 316) 30; Koji Takahashi, 'Damages for Breach of a Choice of Court Agreement' (2008) 10 *Yearbook of Private International Law* 57, 87-88.

³²¹ Hugh Beale, *Chitty on Contracts* (30th Edition, 2008) para 26-125ff.

³²² In English Law, suing in a non-elected forum is considered to be a breach of the contractual obligation not to sue in the non-nominated forum attributed to an exclusive jurisdiction agreement.

Third, the indemnity clause may act as an effective deterrent by discouraging and dissuading the counterparty from launching the preemptive proceedings in the first place.

This latter aspect of the operation of an indemnity clause is the optimal solution and probably it's most significant effect in practice. The remedial response of an indemnity clause to actual non-compliant proceedings may not be a commercially viable option. It may require separate enforcement in further proceedings, which for a party already embroiled in a costly dispute, may not be the best way forward.³²³ In fact, the effective and efficient resolution of disputes may be protracted and undermined by separate proceedings to enforce the indemnity clause. Moreover, disputes about the actual amount of the indemnity may also not be foreclosed. On balance, where available, the specific enforcement of a choice of court agreement by way of an anti-suit injunction is likely to be perceived by litigants as preferable to secondary enforcement by way of an indemnity.³²⁴

An issue which has attracted the attention of some continental civil law jurists is the possibility of guaranteeing the performance of the choice of court agreement through a penalty clause.³²⁵ Borrowing from this idea, it is submitted that, problems of assessment might in principle be solved by prior agreement as to the quantum of each identified head of loss.³²⁶ Such a provision may be unenforceable in English and Scots contract law if

³²³ Briggs when referring to the separate enforcement proceedings in the context of the damages remedy for breach of choice of court agreements, observes that '.....litigation about where to litigate will be replaced by litigation about where the litigation should have taken place.' in Adrian Briggs, 'The Impact of Recent Judgments of the European Court on English Procedural Law and Practice' (2005) Vol. II, No. 124 *Zeitschrift für Schweizerisches Recht* 231-262; Oxford Legal Studies Research Paper No. 11/2006 <Available at SSRN: <http://ssrn.com/abstract=899689>> accessed 15 December 2014, 20.

³²⁴ In Case C 159/02 *Turner v Grovit* [2005] 1 AC 101 and then Case C 185/07 *West Tankers* [2009] 1 AC 1138, the CJEU has held that the legal technique used by the English courts to prevent a party from commencing or continuing proceedings in breach of a jurisdiction or arbitration agreement, the anti-suit injunction, could not be granted in circumstances in which the foreign proceedings are before the courts of another EU Member State and are within the scope of the Brussels I Regulation. In both rulings the CJEU held that anti-suit injunctions offend the principle of mutual trust enshrined in the Brussels I Regulation.

³²⁵ Santiago Alvarez Gonzalez, 'The Spanish Tribunal Supremo Grants Damages for Breach of a Choice of Court Agreement' [2009] *IPRax* 529, 532-533; Peter Mankowski, 'Ist eine vertragliche Absicherung von Gerichtsstandsvereinbarungen möglich?' (2009) *IPRax*, 23-35; Miguel Virgós Soriano and J Garcimartín Alférez, *Derecho procesal civil internacional : litigación internacional* (2nd Edition, Cizur Menor, Navarra: Thomson Civitas 2007) 301; Ulrich Magnus and Peter Mankowski, 'Joint Response to the Green Paper on the Review of the Brussels I Regulation' 3.3 Permitting Contractual Remedies <http://ec.europa.eu/justice/news/consulting_public/0002/contributions/civil_society_ngo_academics_others/prof_magnus_and_prof_mankowski_university_of_hamburg_en.pdf> accessed 15 February 2014; Ulrich Magnus, 'Choice of Court Agreements in the Review Proposal for the Brussels I Regulation' in Eva Lein (ed.), *The Brussels I Review Proposal Uncovered* (BIICL, London 2012) 89-90.

³²⁶ Martin Illmer, 'Chapter 2 – Article 1' in Andrew Dickinson and Eva Lein (eds.), *The Brussels I Regulation Recast* (OUP 2015) 80.

characterized as a penalty clause,³²⁷ but not if the assessment is proportionate to the legitimate interest of the innocent party in the enforcement of the primary obligation.³²⁸ The advantage of inserting a liquidated damages clause is that it brings certainty for the innocent party who will know in advance of the dispute, which losses it will be able to recover under the agreement. Furthermore, unless the clauses are deemed to be unenforceable, these clauses will allow the innocent party to recover for types of losses which may otherwise be struck out for being unforeseeable or too remote.³²⁹ A further advantage of liquidated damages clauses is that it will make it quicker and easier for the innocent party to bring a claim for the losses it has already identified and quantified. It is submitted that, quantification presents a substantial practical impediment to the development of a predictable and cost effective damages remedy for breach of jurisdiction agreements.³³⁰ The identification and quantification of specific heads of damages by prior agreement in a

³²⁷ The UK Supreme Court has recently rejected the traditional test of whether a clause that takes effect on breach is a 'genuine pre-estimate of loss' and therefore compensatory, or whether it is aimed at deterring a breach and therefore penal. The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. If so it will be penal and therefore unenforceable: See *Cavendish Square Holding BV v Talal El Makdessi*; *ParkingEye Limited v Beavis* [2015] UKSC 67, [2015] WLR (D) 439, [32] [Lord Neuberger and Lord Sumption (with whom Lord Carnwath agrees)]; Ewan McKendrick, *Contract Law* (9th Edition, Palgrave Macmillan 2011) 368-373; Gillian Black, *Woolman on Contract* (4th Edition, W Green 2010) 150-152; cf Ignacio Marin Garcia, 'Enforcement of Penalty Clauses in Civil and Common Law: A Puzzle to be Solved by the Contracting Parties' (2012) 5 *European Journal of Legal Studies* 98, highlights the differing approaches of civil law legal systems to the enforcement of penalty clauses. Article 1152 of the French Civil Code makes provision for the enforcement of penalty clauses, subject to moderation of the agreed penalty by the judge who may raise the issue of his own motion. Any stipulation to the contrary shall be deemed unwritten.

³²⁸ In *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1914] UKHL 1, [1915] AC 79, 86 (HL) Lord Dunedin set out the principles for distinguishing between penalty clauses and liquidated damages clauses. These principles were criticized by the UK Supreme Court in *Cavendish Square Holding BV v Talal El Makdessi*; *ParkingEye Limited v Beavis* [2015] UKSC 67, [2015] WLR (D) 439, [18]-[30] [Lord Neuberger and Lord Sumption (with whom Lord Carnwath agrees)] for being treated as a code. The speeches of the rest of the Appellate Committee, particularly Lord Atkinson, were at least as important and instructive. The Supreme Court noted that a legitimate interest in the recovery of a sum constituted a reasonable pre-estimate of damages, but the innocent party may have a legitimate interest in performance which extends beyond the recovery of pecuniary compensation. See McKendrick, *Contract Law* (n 327) 368-373; Black, *Woolman on Contract* (n 327) 151.

³²⁹ For a discussion of the remoteness of damages in the English and Scots law of contract respectively, see, McKendrick, *Contract Law* (n 327) 354-359; Black, *Woolman on Contract* (n 327) 146-149.

³³⁰ Jonathan Harris, 'Agreements on Jurisdiction and Choice of Law: Where Next?' [2009] *LMCLQ* 537, 546; Thomas Raphael, *The Anti-Suit Injunction* (OUP 2008) 330; Briggs, *Private International Law in English Courts* (n 318) 399: 'assessment of damages for breach of a jurisdiction clause is liable to be problematic, and any attempt at quantification not much more than speculative'; Francisco Garcimartin, 'Chapter 11 – Article 31(2)-(4)' in Andrew Dickinson and Eva Lein (eds.), *The Brussels I Regulation Recast* (OUP 2015) 338; Illmer (n 326) 80: 'The calculation of the actual damage will potentially be very difficult and time consuming, carrying a considerable degree of uncertainty.'; Gary B Born, *International Commercial Arbitration* (2nd Edition, Kluwer Law International 2014) Chapter 8, 1304: 'calculating the quantum of damages is difficult and speculative'; Nigel Blackaby and Constantine Partasides with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (5th Edition, OUP 2009) 20: 'an agreement to arbitrate is a contract of imperfect obligation. If it is broken, an award of damages is unlikely to be a practical remedy, given the difficulty of quantifying the loss sustained'.

liquidated damages clause may be a preferable approach and in appropriate cases may reduce the need to rely on a separate cause of action of damages for breach of a jurisdiction agreement.

Indemnity clauses may escape the charge of interfering with the *kompetenz-kompetenz* of the sovereign jurisdictional apparatus of the foreign court and undermining the *res judicata* effect of a judgment obtained by the counterparty in non-compliant proceedings because these clauses are fundamentally contractual in nature and their purpose is to regulate the conduct of the parties. Nevertheless, the theoretical possibility of the contractual enforcement of an indemnity clause indirectly interfering with the principle of mutual trust and the principle of the effectiveness of the Brussels I Regulation cannot be foreclosed. Contractual drafting devices in the form of undertakings, indemnity clauses and liquidated damages clauses serve as a deterrent and provide additional layers of protection to reinforce the enforcement of choice of court agreements by reining in and compensating for the loss suffered as a result of preemptive proceedings in a non-chosen forum. The obligation to indemnify encapsulated in an indemnity clause is triggered by proceedings launched by a counterparty in a non-elected court. Therefore, the separate and independent obligation to indemnify is at one remove from the choice of court agreement and related issues including, whether such agreements may be breached and the existence of a separate cause of action of damages for breach of such agreements.

Undertakings and Indemnity Clauses Enforcing the Breach of the Choice of Law Agreement

Multistate transaction risk may be minimized by inserting an appropriate undertaking in the contract pursuant to which the parties undertake to comply with the choice of law agreement. The advantage of drafting such specific undertakings is that the disgruntled party will be able to rely on the obligations owed by the party in breach without the need to invoke a separate cause of action for damages for breach of the choice of law agreement. This should make easier and quicker to enforce the agreement in the event of a breach.

In addition to the undertakings in the agreement, parties may wish to bolster their relative positions by obtaining personal undertakings from the directors and the senior management of the respective companies, thereby making those individuals party to the contract. In the event of a breach, in addition to having a direct claim against the company, the innocent party has the option of suing the individuals concerned who would otherwise not be parties to the contract.

An indemnity clause is another effective drafting device which seeks to indemnify the aggrieved party as a consequence of the other party's non-compliance with the governing law clause.³³¹ There should be no legal constraint on a clause which indemnifies or makes provision for liquidated damages in the event of non-compliance with the choice of law agreement. A liquidated damages clause provides a proportionate pre estimate of the damages recoverable for the loss incurred due to breach of contract. This is, however, without prejudice to a penalty clause which seeks to punish the non-compliant party with punitive or exemplary damages.

In relation to indemnity clauses the question arises whether a party may be required to pay where it has merely pleaded that a given issue is not regulated by the chosen law. If the answer is in the affirmative, reliance on mandatory rules or public policy of the forum may constitute an act of non-compliance with the governing law clause. In similar vein, a party pleading that a particular matter properly belongs within the domain of procedure and hence is regulated by the *lex fori regit processum*³³² rule should be seen as a derogation from the applicable law specified by the choice of law agreement. However, in reality, choice of law agreements are subject to rules which define the scope of the applicable law specified by such agreements. Therefore, the applicable law in a choice of law agreement applies only to substantive issues determined by the choice of law rules of the forum. The choice of law rules of the forum are mandatory and cannot be waived by private agreement between the parties. However, a choice of law agreement may perhaps be seen as not conflicting with the choice of law regime for allocating regulatory authority, but as a contractual agreement between the parties where each party promises to comply with the choice of law agreement. Under this conception, the choice of law agreement constitutes an independent and subsisting source of contractual obligation regardless of the treatment of the clause by a choice of law regime.

³³¹ Briggs, *Agreements* (n 320) 175-176.

³³² '[t]he law of the forum governs procedure': See Richard Garnett, *Substance and Procedure in Private International Law* (Oxford Private International Law Series, OUP 2012) Introduction, 1-4.

The Legal Basis of the Claim for Damages for Breach of a Choice of Court Agreement

Introduction

A defendant in proceedings in which the claim was commenced in breach of a validly concluded jurisdiction agreement may wish to claim damages in the English courts to recover the loss sustained in defending the action. However, the claim for damages has no prospects of success unless it is supported by an appropriate cause of action or legal basis. This section will examine and seek to identify the most suitable legal basis for the claim of damages within the law of contract, tort, restitution and equity respectively. The survey will not limit itself to an assessment of the legal basis of the damages claim within the English substantive law of obligations or equity and will therefore endeavour to adopt a comparative law approach as far as possible where the respective influences of the common law and the civil law legal systems are accorded perspective.

The English common law conflict of laws regime conceptualizes a choice of court agreement as performing a dual role and function; a procedural role as a basis for the invocation of the jurisdiction of the court and a substantive role in giving rise to an *inter partes* independently enforceable contractual obligation to sue only in the elected forum and none other.³³³ This substantive contractual obligation and the corresponding substantive right not to be sued in a non-contractual court forms the basis of the contractual enforcement of a choice of court agreement. Therefore, by relying on the substantive nature of the right not to be sued in the non-contractual forum contained within the choice of court agreement, there is scope for characterizing as substantive the issues of whether, in what circumstances, and to what extent damages are recoverable for breach of a choice of court agreement. The substantive characterization of this right contained within a jurisdiction agreement gives rise to a choice of law issue and much will depend on the applicable law attributed to the damages claim, which will in turn depend on the legal basis such as contract, tort, restitution or equity in which the claim is framed. It is crucial to emphasize, that the legal basis of the claim for damages in the law of contract is dependent on a substantive characterization of the choice of court agreement. A purely procedural characterization of the choice of court agreement will lead to the sole application of the law of the forum (*lex fori*), without regard to any

³³³ Trevor C Hartley, *Choice of Court Agreements under the European and International Instruments: The Revised Brussels I Regulation, the Lugano Convention and the Hague Convention* (Oxford Private International Law Series, OUP 2013) 4, para 1.03; *ibid* 129, para 7.01.

substantive element within the agreement requiring the application of the choice of law rules.

Before analyzing the contractual legal basis of the claim for damages for breach of an exclusive choice of court agreement and related choice of law issues, the question of jurisdiction to enforce the jurisdiction agreement will be addressed. The contractual basis is explored prior to the other possible legal bases since the debates in the common law jurisdictions generally presuppose that the breach of a choice of court agreement is a contractual question.³³⁴ Issues arising from the recognition and enforcement of the English judgment granting the damages remedy are considered towards the end of the chapter.

³³⁴ Briggs, *Agreements* (n 320) 327.

Jurisdiction to Enforce Breach of a Choice of Court Agreement: Can an Anti-Suit Injunction or Damages Remedy be Awarded for Breach of a Foreign (Non-English) Choice of Court Agreement?

The orthodox English common law principles governing exclusive choice of court agreements attribute a substantive right not to be sued in a non-chosen forum to each contracting party.³³⁵ This substantive right is capable of being breached and where breached by the instigation of proceedings in a non-elected forum by one of the parties gives rise to both primary and secondary remedies.³³⁶ The applicable law of the exclusive choice of court agreement governs the substantive right not to be sued in a non-contractual forum including its existence, validity, breach and enforcement.

Where an exclusive jurisdiction agreement has been breached by reference to its governing law, the issue of which court or courts possess the jurisdiction to enforce the clause arises.³³⁷ Briggs mentions three possibilities: the chosen court, the court in which proceedings have been brought which are arguably in breach, or any court which has *in personam* jurisdiction over the party in breach.³³⁸ The jurisdiction of the English courts in relation to a claim in tort for damages for inducing breach of an English exclusive choice of court agreement is examined in Chapter 6.

The nominated court clearly has a strong interest in enforcing a contract which provides for its jurisdiction but it may not be the only court with a claim to enforce such a contract.³³⁹ The choice of court agreement can also be enforced in the court where the wrongful proceedings have been initiated. However, the proposition that the clause can only be enforced in the place where it was breached is counter intuitive, not only because of the opportunity given to the party in breach to select his court. Briggs argues that the contract may be enforced by any court which has, according to its civil procedural law, personal jurisdiction over the party in breach.³⁴⁰ This last option is the most controversial and theoretically enticing and gives rise to a debate about the proper role of comity in the

³³⁵ *Donohue v Armco Inc* [2001] UKHL 64, [2002] 1 All ER 749 (Lord Bingham); *The Angelic Grace* [1995] 1 Lloyd's Rep 87 (CA).

³³⁶ See Briggs, *Agreements* (n 320) Chapter 6 and Chapter 8.

³³⁷ *ibid* 207-212.

³³⁸ *Ibid* 207.

³³⁹ See *Mantovani v. Carapelli* [1978] 2 Lloyd's Rep. 63, 73 (Donaldson J), affirmed by the Court of Appeal in *Mantovani v. Caparelli* [1980] 1 Lloyd's Rep 375, 382: An arbitration agreement was interpreted as covering a damages claim for its breach.

³⁴⁰ Briggs, *Agreements* (n 320) 207.

enforcement of foreign exclusive choice of court agreements through anti-suit injunctions and the damages remedy. This section will explore the issues surrounding the enforcement of an exclusive choice of court agreement by any court having personal jurisdiction over the party in breach.

It is submitted that where a foreign court is the chosen forum under an exclusive choice of court agreement, English courts should not, at least in general, grant an anti-suit injunction to enforce the clause, for reasons of comity. This conclusion follows from the general principle, established in *Airbus Industrie GIE v Patel*³⁴¹ that the English court should have a sufficient interest in or connection with the matter in question to justify the indirect interference with the foreign court which an anti-suit injunction entails. In *Airbus Industrie GIE v Patel*, the House of Lords held that the third party court will usually have no sufficient interest in deciding before which of two foreign courts a matter should be heard, even if the injunction defendant is resident within its territorial jurisdiction, and even if the foreign court which would be most appropriate to hear the substantive case will not be able to grant effective anti-suit relief. Although Lord Goff of Chieveley ruled that England must normally be the 'natural forum'³⁴² in which to seek an anti-suit injunction, he made it clear that he was not addressing the situation where there was an alleged breach of a jurisdiction agreement:³⁴³

I wish to stress however that, in attempting to formulate the principle, I shall not concern myself with those cases in which the choice of forum has been, directly or indirectly, the subject of a contract between the parties. Such cases do not fall to be considered in the present case.

Rule 39(4) of *Dicey, Morris and Collins on The Conflict of Laws* is ambivalent on the issue:³⁴⁴

An English court may restrain a party over whom it has personal jurisdiction from the institution or continuance of proceedings in a foreign court in breach of a contract to refer disputes to an English (or, *semble*, another foreign) court, or to arbitration, unless the foreign proceedings in question are in a civil or commercial matter brought, or to be brought, before the courts of a Member State or a Convention State.

³⁴¹ *Airbus Industrie GIE v Patel* [1999] 1 AC 119.

³⁴² See *Spiliada Maritime Corp v Cansulex Ltd* [1986] 3 WLR 972, [1986] 3 All ER 843, [1987] AC 460 (Lord Goff).

³⁴³ [1999] 1 AC 119, 138F.

³⁴⁴ Lawrence Collins and others (eds.), *Dicey, Morris and Collins on the Conflict of Laws* (15th Edition, Sweet and Maxwell, London 2012) Chapter 12, 600 [Rule 39(4)].

The use of the word *semble*³⁴⁵ in relation to the English enforcement of a breach of foreign choice of court agreement via an anti-suit injunction indicates that the point is undecided or doubtful.

There is little English case law relating to the problem, although the approach taken in *The MSC Dymphna*, which is apparently the only English decision directly on the point, suggests that where the English court is a third state court, it would be inclined not to enforce the foreign exclusive forum clause by an anti-suit injunction.³⁴⁶ In *OT Africa Line Ltd v Magic Sportswear Corp*, Longmore LJ made *obiter* comments which may be interpreted to suggest that the English courts will not hesitate in granting anti-suit injunctions in aid of exclusive choice of court agreements selecting third state courts.³⁴⁷ However, it is doubtful that Longmore LJ was considering the third state court situation as the case before him involved an exclusive choice of court agreement selecting the English courts. Moreover, the issues of international comity necessarily implicated in interfering on behalf of another court were not considered. In *A/S D/S Svendborg v Wansa*, an anti-suit injunction was granted to restrain proceedings in Sierra Leone which were in breach of an Estonian exclusive choice of court agreement.³⁴⁸ However, the anti-suit injunction was not granted to force the parties to litigate in Estonia, but rather to ensure that the substantive claims were heard in England together with other linked substantive claims which were governed by English exclusive choice of court agreements. It could thus be said that the English court did have 'sufficient interest', because of the intended proceedings before it. Notwithstanding, *Svendborg v Wansa* must be viewed as a marginal decision, arising out of very unusual facts; the injunction defendant had boasted of his ability to subvert the process of the courts of Sierra Leone. If the parties had agreed to a jurisdiction other than England, that should be a strong factor against the grant of an anti-suit injunction restraining proceedings in a third country in favour of English proceedings. At the very least, it cannot be right to apply the *Angelic Grace*³⁴⁹ principles without qualification in such a situation.

³⁴⁵ 'semble' [Latin: it seems] Used to suggest that a particular point may be doubtful; See Jonathan Law and Elizabeth A Martin (ed.), *Oxford Dictionary of Law* (7th Edition, OUP 2009).

³⁴⁶ *The Owners of the 'MSC Dymphna' v Agfa-Gevaert NV* (David Steel J, 19 December 2001), where Steel J held (in an unreserved judgment) that the court had no jurisdiction to grant an anti-suit injunction restraining proceedings in Belgium once he had held, contrary to the injunction claimant's submissions, that the relevant exclusive jurisdiction clause was actually a clause for exclusive US jurisdiction. The Judge observed that the claimant could apply to the US courts for an anti-suit injunction.

³⁴⁷ *OT Africa Line Ltd v Magic Sportswear Corp* [2005] 2 Lloyd's Rep 170 (CA) (Longmore LJ).

³⁴⁸ *A/S D/S Svendborg v Wansa* [1996] 2 Lloyd's Rep 559, 563, 575; [1997] 2 Lloyd's Rep 183 (CA), 186-188

³⁴⁹ *The Angelic Grace* [1995] 1 Lloyd's Rep 87 (CA), 96.

In *People's Insurance Co v Akai Pty Ltd*, Mr. Judicial Commissioner Choo Han Teck of the High Court of Singapore dismissed an application for an anti-suit injunction to restrain proceedings in Australia in order to enforce an English exclusive jurisdiction clause, stating that the application should be made to the English court, as 'the Singapore Court should not assume the role of an international busybody', and 'where there are two courts having jurisdiction a third court with tenuous connection should not influence the course unless there are strong reasons to do so.'³⁵⁰

However, an English academic commentator,³⁵¹ and other commonwealth decisions suggest that anti-suit injunctions may be granted in the third country situation, at least where the injunction is sought to enforce a foreign arbitration agreement. In *IPOC International Growth Fund Ltd v OAO CT Mobile*,³⁵² the Court of Appeal of Bermuda held that an anti-suit injunction could be granted to enforce foreign arbitration agreements, where the Bermudan courts had personal jurisdiction over the defendant, and a similar decision has been reached by the Eastern Caribbean Supreme Court.³⁵³ In *IPOC International Growth Fund Ltd v OAO CT Mobile*, a dispute arose between parties who had made contracts which contained arbitration agreements for Sweden and Switzerland. In breach of these agreements, one of the parties, a Bermudan entity, brought proceedings before the Russian courts, apparently designed to undermine the outcome of the arbitration. The other parties to the agreement applied to the Bermuda courts for an injunction to restrain the breaches of the arbitration agreements; and the Court of Appeal upheld the decision of the judge below to make the orders.

The Court of Appeal of Bermuda in *IPOC International Growth Fund Ltd v OAO CT Mobile* did not consider that international comity required it to refrain from issuing an anti-suit injunction where the dispute was insufficiently connected to Bermuda. On the contrary, international comity was viewed as requiring courts to cooperate with one another in holding parties to their contractual bargains. But the comity issue is about *where* those rights should be enforced and is not an emanation of the principle of *pacta sunt servanda*.

³⁵⁰ *People's Insurance Co v Akai Pty Ltd* [1998] 1 SLR 206 (Singapore High Court), quoted with apparent approval in *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90, 108; See Richard Fentiman, 'Comity and Antisuit Injunctions' (1998) 57 *Cambridge Law Journal* 467, 467.

³⁵¹ Briggs, *Agreements* (n 320) 208-212; Adrian Briggs, *The Conflict of Laws* (3rd Edition, Clarendon Law Series, OUP 2013) 134.

³⁵² [2007] Bermuda LR 43.

³⁵³ *Finecroft Ltd v Lamane Trading Corp* (Eastern Caribbean Supreme Court, 6 January 2006) It should be noted, that *Airbus v Patel* was not referred to and may not have been cited to the court.

The sufficient interest or connection requirement as a restraint on the award of anti-suit injunctions for reasons of comity supports the adoption of an 'international systemic'³⁵⁴ approach to private international law and in this respect can be compared loosely to the *locus standi* requirement for judicial review of bodies exercising public functions in domestic administrative law.³⁵⁵ The unrestrained contractual enforcement of exclusive choice of court agreements by any court with personal jurisdiction over the defendant will promote the availability of anti-suit relief in common law jurisdictions and allow states with tenuous links with the dispute to pronounce on the validity and enforcement of a foreign jurisdiction agreement. A remedy will be available in a third state court for those parties who have been sued in a non-chosen forum despite the presence of a valid choice of forum agreement. The inability of the elected court itself to restrain the proceedings in the non-chosen forum will be compensated by litigation for an anti-suit injunction in the third state court with *in personam* jurisdiction over the defendant, provided that the applicable law of the choice of court agreement recognises the existence of a substantive right not to be sued in a non-chosen forum and can grant anti-suit injunctions.³⁵⁶ Thus, based on this conception, the contractual anti-suit injunction can be seen to evolve purely as a manifestation of the principle of *pacta sunt servanda*. Forum and remedy shopping in the major common law centres of litigation offering anti-suit relief may flourish as a result. Moreover, the law on contractual anti-suit injunctions unhinged from the sufficient interest or connection requirement may be seen to move further away from the general law on cross border injunctive relief on the basis of vexatious and oppressive litigation abroad.

Nevertheless, it is suggested that Mr. Judicial Commissioner Choo Han Teck's prudent approach has much to commend it, at least in relation to exclusive choice of court agreements in favour of a foreign court and governed by foreign law.³⁵⁷ Despite Lord Goff's

³⁵⁴ Alex Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (Cambridge University Press 2009) Chapter 1, 10-11.

³⁵⁵ In order to bring an application for judicial review, a party must have: "sufficient interest in the matter to which the application relates" (Section 31(3) of the Senior Courts Act 1981).

³⁵⁶ See Cameron Sim, 'Choice of Law and Anti-Suit Injunctions: Relocating Comity' [2013] *ICLQ* 703; Briggs, *The Conflict of Laws* (n 351) 133; Adrian Briggs, 'The Unrestrained Reach of an Anti-Suit Injunction: A Pause for Thought' [1997] *LMCLQ* 90. The *lex fori* governs matters of procedure including the enforcement of the remedy. However, it can be argued that, if the *lex causae* does not recognise and cannot grant anti-suit injunctions, the English court should not do so either. By granting an anti-suit injunction through a simplistic and reductive application of the *lex fori*, the English court would be transforming the nature of the underlying right which would be inappropriate: *Phrantzes v Argenti* [1960] 2 QB 19, 35-36 Cf *IPOC International Growth Fund Ltd v OAO CT Mobile* [2007] Bermuda LR 43.

³⁵⁷ In *The Angelic Grace* [1995] 1 Lloyd's Rep 87 (CA), 96 (CA), Millett LJ suggested that there should be no hesitation in granting an anti-suit injunction to restrain a party from proceeding in breach of an arbitration agreement governed by English law. However, the third state court issue was not before Millett LJ, who should

suggestion in *Airbus Industrie GIE v Patel* that the sufficient interest or connection requirement does not apply to contractual anti-suit injunctions, there is no obvious reason why this is so. It is submitted that, the principles articulated in *Airbus Industrie GIE v Patel* logically apply in the contractual situation as a matter of comity. Ordinary contractual anti-suit injunctions will not be affected by the principles circumscribing the remedy articulated by Lord Goff as the selection of English jurisdiction *ipso facto* gives the English courts a sufficient interest or connection. Although, the existence of an exclusive jurisdiction clause in favour of the English courts or an English arbitration clause may diminish comity concerns about interfering with litigation in an unchosen forum, it does not follow that comity becomes irrelevant where the English forum is enforcing a foreign choice of court agreement.

To reconcile intervention by anti-suit injunction by a third state court with comity, there would need to be some factor which gave the third state court an interest in intervention. The primary rationale that has been so far articulated in the case law and the academic discourse is the overriding importance of the principle of *pacta sunt servanda*.³⁵⁸ But this creates no specific jurisdictional connection between the third state court and the dispute and is premised on a purely private law and perhaps misconceived conception of the rules of international civil procedure. Such an approach neglects the international ordering of regulatory authority in private law affected by private international law concepts such as international comity. Further, even if the injunction defendant were resident within the third state court's jurisdiction, it is suggested that this is not sufficient to justify, as a matter of comity, the indirect interference with the targeted courts own assessment of whether or not the proceedings before it are in breach of contract or should be stayed. Finally, it should not suffice that the chosen court cannot itself grant anti-suit injunctions as a matter of its own law, as this lacuna is part of the package to which the parties have agreed. If under the applicable law of the choice of court agreement, anti-suit injunctions cannot be granted or the substantive right not to be sued in a non-chosen forum does not exist, the *lex fori* will not be able to grant an anti-suit injunction to enforce the clause.³⁵⁹

not be read as holding that, if an agreement to arbitrate in a foreign in a foreign country is governed by English law, the English courts should have no hesitation in intervening.

³⁵⁸ Briggs, *Agreements* (n 320).

³⁵⁹ *Ubi jus, ibi remedium* (Latin maxim: *where there is a right there is a remedy*), *Ashby v White* (1703) 14 St Tr 695, 92 ER 126 (Lord Chief Justice Holt); See Jonathan Law and Elizabeth A Martin (ed.), *Oxford Dictionary of Law* (7th Edition, OUP 2009).

The commonwealth cases where injunctions in support of a foreign forum have been granted all involve arbitration agreements and it could be argued that concerns about being an ‘international busybody’ are mitigated where the English court is not intervening to protect another court, but instead in support of an arbitration tribunal that cannot protect itself. The arbitration tribunal derives its jurisdiction solely from the arbitration agreement between the parties whereas the jurisdiction of a court as an emanation of state sovereignty is premised on the concept of connection with the forum with jurisdictional party autonomy being a supplementary basis for jurisdiction and not the foundation of international adjudication.³⁶⁰ Therefore, it is easier to enforce a foreign arbitration agreement as compared to a foreign jurisdiction agreement because the requirement of a sufficient interest or connection with the forum loses part of its significance in the context of the former and the *pacta sunt servanda* principle dominates in the enforcement of the arbitration clause. Yet, notwithstanding these arguments, it is submitted that the English court, in general, does not have a sufficient interest to intervene by injunction in favour of a foreign arbitration.³⁶¹ Indeed, the general principle of international arbitration law, that the courts of the seat of the arbitration are the natural forum to provide any ancillary relief to support the arbitration, should also discourage the English court from granting anti-suit injunctions to protect overseas arbitrations.³⁶² Additionally, it can be argued that an anti-arbitration injunction is a violation of Article II(3) of the New York Convention in circumstances where, by blocking a foreign arbitration agreed to in a contract, the English courts fail to ‘refer the parties to arbitration.’³⁶³ However, it should be noted that the latter argument assumes that the French notion of negative *kompetenz-kompetenz* applies.³⁶⁴ Outside of France, the international commercial arbitration law of the vast majority of states allows broad judicial intervention on issues at the threshold of arbitration.³⁶⁵

³⁶⁰ ZS Tang, *Jurisdiction and Arbitration Agreements in International Commercial Law* (Routledge Research in International Commercial Law, Routledge, London & New York 2014) 3-5; Chee Ho Tham, ‘Damages for Breach of English Jurisdiction Clauses: More than Meets the Eye’ [2004] *LMCLQ* 46, 50-56.

³⁶¹ See *Claxton Engineering Services Ltd v TXM Olaj-es Gazkutato KTF* [2011] EWHC (Comm) 345, [2011] 1 Lloyd’s Rep 510 (QB); Rory Butler and Baptiste Weijburg, ‘Do Anti-Suit Injunctions Still Have a Role to Play? – An English Law Perspective’ (2011-2012) 24 *University of San Francisco Maritime Law Journal* 257, 279-283

³⁶² Butler and Weijburg (n 361) 280; *Black Clawson International v Papierwerke Waldhof-Ashaffenburg AG* [1981] 2 Lloyd’s Rep 446 (QB).

³⁶³ Article II(3) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June, 1958, 330 UNTS 4739.

³⁶⁴ George A Bermann, ‘Forum Shopping at the ‘Gateway’ to International Commercial Arbitration’ in Franco Ferrari (ed.), *Forum Shopping in the International Commercial Arbitration Context* (Sellier European Law Publishers, Munich 2013) 86-91.

³⁶⁵ *Ibid* 91-94.

If an exclusive choice of court agreement stipulates that all proceedings must be commenced in a given foreign court, it might be argued that the jurisdiction agreement is itself infringed by an application to the English courts for an anti-suit injunction.³⁶⁶ Under the circumstances, it is far from clear whether the English courts right to interfere in the course of proceedings of a foreign court is justified where its own assumption of jurisdiction is open to question.

The position that any court with personal jurisdiction over the defendant can grant an anti-suit injunction is even more difficult to reconcile with the view that the English courts should only grant anti-suit injunctions where the foreign court's jurisdiction is exorbitant and 'serious injustice will be occasioned as a result of the failure of a foreign court to decline jurisdiction.'³⁶⁷ It is not easy to see that there will be many cases where England is a proper forum in which to seek injunctive relief for a breach of a foreign jurisdiction clause. Apart from concerns about England having tenuous links or not being the natural forum of the dispute, the applicable law of the foreign choice of court agreement may not grant anti-suit injunctions or recognise the existence of a substantive right not to be sued in a non-elected forum. Furthermore, any attempt to interfere as a global guardian of contractual rights is likely to provoke irritation elsewhere.³⁶⁸

The legal bases of the claim for damages in the substantive law of contract, tort, restitution and equity are examined in parallel with applicable law issues next.

³⁶⁶ Briggs, *Agreements* (n 320) 211; Harris, *Agreements on Jurisdiction and Choice of Law: Where Next?* (n 330) 542; Raphael (n 330) 191.

³⁶⁷ For an approach that considers that the 'sufficient interest' or connection principle enunciated in *Airbus Industrie GIE v Patel* [1999] 1 AC 119 imposes a necessary but not sufficient condition for compliance with international comity: See *Amchem Products Inc v British Columbia (Workers Compensation Board)* (1993) 102 DLR (4th) 96 [29]-[30], [61] (Supreme Court of Canada) (Sopinka J); *Re Maxwell Communications Corporation plc (No 2)* [1992] BCC 757 (Hoffman J); *Highland Crusader LP v Deutsche Bank AG* [2009] EWCA Civ 725 (Toulson LJ); *Star Reefers Pool Inc v JFC Group Co. Ltd.* [2012] EWCA Civ 14 (Rix LJ); Richard Fentiman, 'Anti-Suit Injunctions – Comity Redux' [2012] *Cambridge Law Journal* 273; Mills, *The Confluence* (n 354) 172-173; Campbell McLachlan, *Lis Pendens in International Litigation* (Pocketbooks of the Hague Academy of International Law, Martinus Nijhoff Publishers, Leiden & Boston 2009) 161-163; Fentiman, *International Commercial Litigation* (2015) (n 315) 537; Richard Fentiman, *International Commercial Litigation* (OUP 2010) 583-586: Fentiman refers to 'The broad theory of comity' as opposed to 'The narrow theory of comity' articulated by Lord Goff in *Airbus Industrie GIE v Patel*; Briggs, *The Conflict of Laws* (n 351) 134.

³⁶⁸ Harris, *Agreements on Jurisdiction and Choice of Law: Where Next?* (n 330) 542; Raphael (n 330) 192.

Contract

The *contractual* claim for damages for breach of a choice of court agreement is only sustainable where the jurisdiction clause is conceived of as equivalent to an ordinary commercial contract. On the other hand, the conception of a jurisdiction agreement as a contract with a special character or as a contract which regulates procedure ('procedural contract') does not lend support to the contractual claim of damages. Therefore, at the very foundation of the damages remedy issue, lies the perplexing question of the appropriate characterization of a jurisdiction agreement as an ordinary contract susceptible to breach and damages or as a special contract with only procedural consequences.³⁶⁹ In opposition to this reductive and binary understanding of the fundamental nature of a choice of court agreement, it is suggested that the true nature of such a clause is most closely modelled or represented by a 'hybrid' contract incorporating a combination of substantive and procedural elements.³⁷⁰ For instance, issues relating to the formation of a choice of court agreement, such as the effect of fraud or duress and other vitiating factors on validity should be characterized as substantive and accordingly be subject to the ordinary choice of law process. On the other hand, issues relating to the administration of justice which have a direct impact on the resources of the state should be characterized as procedural and accordingly be determined by the law of the forum (*lex fori*). For example, the conferral or exclusion of jurisdiction by a valid choice of court agreement is an issue which should be characterized as procedural.

³⁶⁹ See Tang (n 360) 1-2, 13: ZS Tang conceives dispute resolution agreements as 'special contract terms' as they aim to grant jurisdictional competence to an authority, while derogating other competent authorities from their jurisdiction. As state sovereignty is involved, the choice of court agreement, though aiming to resolve private law matters between private parties, cannot be classified as purely private. The interaction between private rights and public powers in a jurisdiction agreement may give rise to a clash between the contractual and procedural imperatives such as the infringement of another Member States paramount jurisdiction (Article 24 of the Recast Regulation), the exercise as opposed to the existence of jurisdiction may be impractical (*forum non conveniens* analysis) and the sceptical view of the ouster of a courts' adjudicatory authority by private agreement. Moreover, considerations of the orderly resolution of international commercial disputes where third parties are involved may trump the choice of court agreement and the public policy or fundamental national interest of the forum may also override the jurisdiction agreement.

³⁷⁰ See F Sparka, 'Classification of Choice of Forum Clauses and their Separability from the Main Contract' in *Jurisdiction and Arbitration Clauses in Maritime Transport Documents: A Comparative Analysis* (Hamburg Studies on Maritime Affairs 19, Springer-Verlag Berlin Heidelberg 2010) 97-98; TM Yeo, 'The Contractual Basis of the Enforcement of Exclusive and Non-Exclusive Choice of Court Agreements' (2005) 17 *Singapore Academy of Law Journal* 306, 320: Professor Yeo argues that, although choice of court agreements can be viewed from a procedural and contractual perspective, the predominant approach in Singapore and English law in respect of the exclusive jurisdiction agreement has been to give primacy to the rationale of the enforcement of a contractual bargain, tempered by a judicial discretion in its enforcement within the procedural jurisdictional context; See also, TM Yeo, 'Natural Forum and the Elusive Significance of Jurisdiction Agreements' [2005] *Singapore Journal of Legal Studies* 448, 454.

The 'procedural contract' conception of a choice of court agreement does not rely on the analogy with an ordinary commercial contract and its enforcement through contractual remedies. The role of an exclusive jurisdiction agreement under the procedural contract characterization is solely to prorogate the jurisdiction of a court and does not lead to the creation of an independently enforceable obligation between the parties to sue only in the nominated forum. Takahashi notes that, in Japan, agreements on procedural steps, such as a choice of court agreement, are referred to as 'procedural contracts' (*sosho keiyaku*).³⁷¹ Takahashi mentions other varieties of procedural contracts including arbitration agreements, choice of law agreements, anti-suit agreements, agreements to discontinue an action, agreements to desist from executing a judgment, agreements to abstain from disputing particular facts, and agreements to refrain from adducing particular evidence. In case there is a breach of a procedural contract, it is generally assumed that the court may either bring the action to an end or specifically enforce the agreement.³⁷² In Japanese jurisprudence, there is no discussion of the possibility of awarding damages for breach of any of these procedural contracts. However, Takahashi suggests that the possibility of an award of damages may not be foreclosed.³⁷³

A minority view which acknowledges the distinctive character of a choice of court agreements is also to be found in the scholarship of the common law tradition. Thus it has been suggested that a choice of court agreement is not an ordinary contract creating an independently enforceable obligation and that the only way to enforce the agreement is to uphold or decline jurisdiction or to restrain proceedings in other countries.³⁷⁴ However, orthodox common law authority and scholarship makes no dogmatic distinction in character between choice of court agreements and substantive contracts. In the words of Briggs: "There is no distinction between a contract to sell and a contract to sue."³⁷⁵ In fact, the commentaries and analyses emphasize an attribute shared by both - that they are a

³⁷¹ Takahashi, *Damages for breach of a Choice of Court Agreement* (n 320) 68-71, 69.

³⁷² *Ibid.*

³⁷³ *Ibid.*

³⁷⁴ LC Ho, 'Anti-suit Injunctions in Cross Border Insolvency: A Restatement' [2003] *ICLQ* 697, 707-709; CJS Knight, 'The Damage of Damages: *Agreements on Jurisdiction and Choice of Law*' [2008] *Journal of Private International Law* 501, 507-508; Andreas F Lowenfeld, *Conflict of Laws: Federal, State and International Perspectives* (2nd Edition New York: Matthew Bender 1998) 308; See also the debate in the German legal system regarding the appropriate characterization of a choice of court agreement as a substantive or a procedural contract: Magnus, *Choice of Court Agreements in the Review Proposal for the Brussels I Regulation* (n 325) 89-90; U Magnus and P Mankowski, *Brussels I Regulation* (2nd Edition, Sellier 2012) 511; Sparka (n 370) 81; Jonas Steinle and Evan Vasiliades, 'The Enforcement of Jurisdiction Agreements under the Brussels I Regulation: Reconsidering the Principle of Party Autonomy' [2010] *Journal of Private International Law* 565, 575-580.

³⁷⁵ Briggs, *Agreements* (n 320) 195.

consequence of some *quid pro quo* in the negotiation process culminating in the conclusion of a contract. Declining to enforce a choice of court agreement thus upsets the parties bargain as much as would refusal to enforce a price term or limitation clause.

Traditionally, however, the English common law has been treating a breach of a choice of court agreement differently from the breach of an ordinary contract. Thus the primary remedy available as of right for breach of an ordinary contract is damages whereas specific performance is only granted at the court's discretion where damages do not provide adequate relief. On the other hand, the usual remedy for breach of a choice of court agreement has not been the award of damages but a stay of proceedings or, where the action was brought abroad, the issuing of anti-suit injunction.³⁷⁶ An English Court of Appeal decision has attributed this difference in treatment not to any dogmatic characterization of a choice of court agreement but to more practical reasons, namely, the difficulty of quantifying damages for its breach and the negative impact that damages award may have on international comity.³⁷⁷ It should, however be highlighted that the difficulty of quantification by itself is not a good enough reason to deny the recoverability of damages. The potential negative impact on the concept of international comity is dealt with in the appropriate section below and for present purposes it is a consideration extraneous to the assessment of the contractual legal basis for breach of a choice of court agreement.

In cases where quantification and comity do not pose insurmountable obstacles, the common law jurists are not deterred from submitting the breach of a choice of court agreement to the normal contractual analysis. This would result in the award of damages, if the applicable law is English law or another common law legal system, because damages are recoverable as of right as the primary remedy and because liability for breach of contract is strict,³⁷⁸ requiring neither negligence nor intent on part of the party in breach.

In civil law legal systems, on the other hand, liability for breach of contract is traditionally fault based.³⁷⁹ Takahashi notes that under Japanese law both judicial authority and academic commentary require negligence or intent as an essential element for liability for breach of

³⁷⁶ Stays of proceedings: *The Eleftheria* [1970] P 94; *The El Amria* [1981] 2 Lloyd's Rep 119; *The Sennar (No 2)* [1985] 1 WLR 490; Anti-suit injunctions: *Continental Bank NA v Aeakos SA* [1994] 1 WLR 588, 598 (CA); *The Jay Bola* [1997] 2 Lloyd's Rep 79; *OT Africa Line Ltd v Magic Sportswear Corp* [2005] EWCA Civ 710 [33].

³⁷⁷ *OT Africa Line Ltd v Magic Sportswear Corp* [2005] EWCA Civ 710, [2005] 1 CLC 923, [33] (Longmore LJ); For the difficulties encountered in quantifying damages for breach of a choice of forum agreement see FN 330 above.

³⁷⁸ See Stephen A Smith, *Contract Theory* (Clarendon Law Series, OUP 2004) 376.

³⁷⁹ Takahashi, *Damages for Breach of a Choice of Court Agreement* (n 320) 68-71, 71.

contract.³⁸⁰ Accordingly, if a choice of court agreement were to be treated under the normal contractual principles, liability for its breach would not be established unless negligence or intent was proved on the part of the claimant bringing the action complained of. It follows if the claimant was in genuine belief that the agreement was null and void and if he is found to be faultless in so believing he may be exonerated. It would be possible to find negligence or intent in cases where the court first seised finds that the proceedings before it have been commenced in breach of a choice of court agreement and accordingly refuses to hear the case by either dismissing or staying its proceedings. Making such a finding, however, would be more difficult in cases where the court first seised does not acknowledge that there is a breach, though it might still be legitimate to hold that there was an intentional breach in such cases as where the claimant has flouted a plainly valid choice of court agreement by bringing an action before a remote court which would, to his knowledge, exercise an exorbitant jurisdiction and deny effect to any foreign choice of court agreement.

³⁸⁰ Ibid.

Applicable Law of the *Contractual* Claim for Damages

The private international law rules of most countries recognise the autonomy of the parties to select the law applicable to their contract in the form of a valid choice of law agreement.³⁸¹

As a matter of principle, an express choice of law agreement specifically directed at disputes arising from the breach of a choice of court agreement should also be given effect.³⁸² The role of party autonomy in choice of law of contractual obligations is significantly enhanced as a result of the enforcement of such specific clauses. Rare as they may be in international civil and commercial litigation, express choice of law agreements of this nature can be conceptualized without stretching the existing contours of such agreements beyond their proper limits. Since some of the model clauses for choice of court agreements have already begun to provide for an express provision on damages in case of its breach, it is not a bridge too far to consider including an express choice of law agreement for the damages claim.

However, in the vast majority of cases, even the parties who are legally prudent to conclude a choice of court agreement do not take the trouble of negotiating a choice of law agreement to govern disputes arising from a potential breach of their choice of court agreement. Then, by default, a contractual damages claim for breach of a choice of court agreement will be governed by the law applicable to the choice of court agreement in the absence of choice. As to what that law is, the positions under the national choice of law rules of the Member States of the EU vary.³⁸³ The likely options are the applicable law of the substantive contract to which the choice of court agreement is attached,³⁸⁴ the substantive

³⁸¹ See Recital 11 and Article 3(1) of the 'Rome I Regulation': Regulation No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations OJ L/2008/177/6; See also Article 3(1) of the Rome Convention; CGJ Morse, 'Conflict of Laws' in HG Beale and others (eds), *Chitty on Contracts* (Volume I, 31st Edition, Sweet and Maxwell, London 2012) Chapter 30, 2195 .

³⁸² See 'Dépeçage' (Splitting the Applicable Law) provided for in the last sentence of Article 3(1) of the Rome I Regulation: 'By their choice the parties can select the law applicable to the whole or to part only of the contract.' See P Beaumont and P McEleavy, *Anton's Private International Law* (SULI/W Green 2011) 454-455; Fentiman, *International Commercial Litigation* (2010) (n 367) 192; Morse (n 381) Chapter 30, 2200-2201; See Morse, (n 381) Chapter 30, 2178-2179 as authority for the splitting of the applicable law under the common law's 'proper law' doctrine. Giuliano-Lagarde Report page 17.

³⁸³ There is no uniform practice among the EU Member States since Article 1(2)(e) of the Rome I Regulation excludes choice of court agreements from its scope of application. National choice of law rules are applicable; See Article 1(2)(d) of the Rome Convention; Mario Giuliano and Paul Lagarde, 'Report on the Convention on the Law Applicable to Contractual Obligations' [1980] OJ C282/1, 11-12; Collins, *Dicey, Morris and Collins on the Conflict of Laws* (n 344) Chapter 32, 1788; Beaumont and McEleavy (n 382) Chapter 10, 434-439; Morse (n 381) Chapter 30, 2258.

³⁸⁴ This option finds support in the English case law as observed by: Collins, *Dicey, Morris and Collins on the Conflict of Laws* (n 344) Chapter 12, 603-604; David Joseph QC, *Jurisdiction and Arbitration Agreements and their Enforcement* (2nd Edition, Sweet & Maxwell, London 2010) 182; Briggs, *The Conflict of Laws* (n 351) 231;

law of the *forum prorogatum*,³⁸⁵ and the law specified by the private international law rules of the forum chosen by the choice of court agreement.³⁸⁶

The last option has been adopted by Articles 5(1) and 6(a) of the Hague Convention on Choice of Court Agreements³⁸⁷ (30 June, 2005) read in conjunction with its official explanatory report.³⁸⁸ The alignment of the Brussels I Regulation (Recast) with the Hague Convention has ensured that the substantive validity of a choice of court agreement under the Recast Regulation is also governed by the law specified by the choice of law rules of the *forum prorogatum*.³⁸⁹ Under the new Article 25(1) the elected court shall have jurisdiction ‘unless the agreement is null and void as to its substantive validity under the law of that Member State’.³⁹⁰ This position has been defended on the basis that it serves to avoid the undesirable result of parallel proceedings and the denial of justice which might arise if the court seised and court chosen apply different laws.³⁹¹ The motivation of the Hague Convention for allowing the application of the doctrine of *renvoi* is driven by the need to further enhance party autonomy in international commercial transactions.³⁹² However, some academic commentators wonder whether the same objective could not be achieved equally well, with the added advantages of simplicity and certainty, by the second option i.e. the substantive law of the forum chosen by the choice of court agreement.³⁹³

Takahashi states that the first and second options tend to coincide with each other in practice.³⁹⁴ This is because where parties to a contract conclude a choice of court agreement; they often favour the application of the law of the chosen forum and conclude a

See *Sulamerica CIA Nacional de Seguros SA and others v Enesa Engenharia SA and others* [2012] EWCA Civ 638, [2012] 1 All ER (Comm) 795; Morse (n 381) Chapter 30, 2190.

³⁸⁵ *Forum prorogatum*: [Latin] Prorogated jurisdiction. See Jonathan Law and Elizabeth A Martin (ed.), *Oxford Dictionary of Law* (7th Edition, OUP 2009); Daniel Tan and Nik Yeo, ‘Breaking Promises to Litigate in a Particular Forum: Are Damages an Appropriate Remedy?’ [2003] *LMCLQ* 435.

³⁸⁶ B. Hess, T. Pfeiffer and P. Schlosser, *Report on the Application of Regulation Brussels I in the Member States*, Study JLS/C4/2005/03, (‘Heidelberg Report’) para 377.

³⁸⁷ The Hague Convention on Choice of Court Agreements has entered into force in Mexico and 27 Member States of the EU (except Denmark) on 1 October 2015.

³⁸⁸ Trevor C Hartley and Masato Dogauchi, ‘Explanatory Report on the 2005 Hague Choice of Court Agreements Convention’ (2007) para 125 in Ronald A. Brand and Paul Herrup, *The 2005 Hague Convention on Choice of Court Agreements, Commentary and Documents* (Cambridge University Press 2009).

³⁸⁹ Article 25(1) and Recital 20 of the Brussels I Regulation (Recast).

³⁹⁰ *Ibid.*

³⁹¹ A Schulz, ‘The Hague Convention of 30 June 2005 on Choice of Court Agreements’, *Journal of Private International Law* [2006] 243, 256; Beaumont and McElevy (n 382) 253-255; Hartley, *Choice of Court Agreements* (n 333) 165-171.

³⁹² Beaumont and McElevy (n 382) 253-255.

³⁹³ Koji Takahashi, ‘Damages for Breach of a Choice of Court Agreement: Remaining Issues’ [2009] *Yearbook of Private International Law* 73, 84 – 86; Burkhard Hess, ‘The Brussels I Regulation: Recent Case Law of the Court of Justice and the Commission’s Proposed Recast’ (2012) 49 *Common Market Law Review* 1075, 1107.

³⁹⁴ Takahashi, *Damages for Breach of a Choice of Court Agreement: Remaining Issues* (n 393) 84-86.

choice of law agreement accordingly. Even in the absence of an express choice of law agreement, the presence of an exclusive choice of court agreement may serve as evidence of an implied choice in favour of the law of the chosen court.³⁹⁵ In this regard, recital 12 of the Rome I Regulation prescribes an exclusive choice of court agreement as one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated.

³⁹⁵ The choice of a particular forum may indicate that the parties intend the contract to be governed by the law of that forum: For a discussion of the English common law presumption *Qui elegit judicem elegit jus* see, BA Marshall, 'Reconsidering the Proper Law of the Contract' (2012) 13 *Melbourne Journal of International Law* 1, 15-17; See Report on the Convention on the Law Applicable to Contractual Obligations by Professors Mario Giuliano and Paul Lagarde ('Giuliano- Lagarde Report') [1980] OJ C282/1, 16; Morse (n 381) Chapter 30, 2262.

Tort

Where a claim has been commenced in breach of a choice of court agreement, the defendant in those proceedings may seek to recover damages premised on a cause of action in the substantive law of tort instead of relying on the more conventional contractual legal basis.³⁹⁶ The prospective claim for tortious damages is supported by the fact that at least under some legal systems, an institution of an action may constitute a tortious act in certain circumstances. Thus, the American Law Institute's Restatement (Second) of Law of Torts defines '*wrongful civil proceedings*' concisely in Section 674:³⁹⁷

One who takes an active part in the initiation, continuation or procurement of civil proceedings against another is subject to liability to the other for *wrongful civil proceedings* if:

- (a) *He acts without probable cause, and primarily for a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based,*
and
- (b) Except when they are *ex parte*, the proceedings have terminated in favor of the person against whom they are brought.

The challenging task facing any legal system willing to treat the initiation of civil proceedings in certain circumstances as constituting a tortious act is to endeavor to clearly and precisely

³⁹⁶ Adrian Briggs accepts that the claim for compensation may be characterized as 'tortious or non-contractual' and that such a cause of action may fit more easily into the 'public law' rubric of the Brussels I Regulation, but does not explore the issue any further: Briggs, *Agreements* (n 320) 326-327, 337; Thomas Raphael describes the possibility of an award of damages outside the contractual case as 'unexplored territory', but in contrast to Briggs argues that, where there is no clear and concrete personal contractual obligation to enforce, it is harder to avoid the conclusion that the award of damages inherently involves an assessment of the jurisdiction of another Member State court, and is thus prohibited: Raphael (n 330) 296, 331, 341; Fentiman also alludes to the possibility of recovering damages from a pre-emptive claimant, in tort, arising from the defendant's 'abuse of process', but does not develop the argument: Fentiman, *International Commercial Litigation (2015)* (n 315) 113; Tham argues that a claim for damages in tort is more appropriate than contractual damages because an exclusive jurisdiction clause would have to constitute more than a mere ancillary obligation to the overarching substantive contract (e.g. on the sale of goods) and give rise to a primary or secondary contractual obligation in its own right in Tham (n 360). However, it is submitted that the English authorities actually demonstrate a clear acceptance that exclusive forum clauses give rise to independent obligations, breach of which sounds in damages and draw no distinction between arbitration clauses and jurisdiction clauses.

³⁹⁷ Emphasis added.

define those instances, so that the fundamental right to seek judicial remedies is not attenuated without cause.³⁹⁸

The tort of malicious prosecution is dominated by the problem of balancing two countervailing interests of high social importance: safeguarding the individual from being harassed by unjustifiable litigation and encouraging citizens to aid in law enforcement.³⁹⁹

A Japanese Supreme Court decision has emphasized that a cautious approach should be taken to avoid imposing undue limitations on the right to seek judicial remedies and declared that the institution of an action was under most circumstances not a tortious act.⁴⁰⁰ However, the Japanese Supreme Court acknowledged that where the institution of an action was plainly unreasonable in the light of the purpose of the judicial system, it could constitute a tortious act. Similarly, the French Cour de Cassation, too, exercised caution when it held that the institution of an action was in principle a right and did not give rise to liability to pay damages unless it was done with malice, bad faith or gross negligence.⁴⁰¹

In English law, the viability of a claim for damages in tort in respect of allegedly wrongful civil proceedings abroad needs to be assessed.⁴⁰² The recent decision of the Judicial Committee of the Privy Council in *Crawford Adjusters (Cayman) Ltd v Sagikor General Insurance (Cayman) Ltd*⁴⁰³ ('Sagikor') might be instructive in this respect as the ruling has clarified the scope of the torts of malicious prosecution and the abuse of legal process.⁴⁰⁴ Indeed, it may now be possible to employ the generally applicable tort of malicious prosecution to the case of wrongful civil proceedings abroad. However, Chapter 6 will demonstrate that allocation of

³⁹⁸ Jenny Steele, 'Malicious Prosecution' in Michael A Jones and Anthony M Dugdale, *Clerk and Lindsell on Torts* (20th Edition, Sweet and Maxwell 2010) Chapter 16, 1066; Tom KC Ng, 'The Torts of Malicious Prosecution and Abuse of Legal Process' (2014) 130 *LQR* 43, 43.

³⁹⁹ John G Fleming, *The Law of Torts* (8th Edition, Sweet and Maxwell 1992) 609.

⁴⁰⁰ Takahashi, *Damages for Breach of a Choice of Court Agreement: Remaining Issues* (n 393) 79-82, 79.

⁴⁰¹ *Ibid*; The French Cour de Cassation Civ 2, 11 January 1973, No. 71-12.446 (reported in *Bulletin des arrêts Cour de Cassation Chambre civile 2* N. 17 P.12).

⁴⁰² Raphael (n 330) 332.

⁴⁰³ *Crawford Adjusters (Cayman) Ltd v Sagikor General Insurance (Cayman) Ltd* [2013] UKPC 17; [2013] 3 W.L.R. 927 ('Sagikor'); It should be noted that the decisions of the Judicial Committee of the Privy Council (JCPC) are not strictly binding upon the English courts. However, the decisions are considered to possess persuasive authority. In practice many of the judges which make up the JCPC are also judges of the UK Supreme Court. Therefore, the decisions of the JCPC are considered to be significant, worthy of consideration and it is not unusual for them to be followed by the English courts. ; See MDJ Conaglen and RC Nolan, 'Precedent from the Privy Council' (2006) 122 *LQR* 349: The note highlights the differing approaches adopted by the English courts to the issue of the authority of rulings by the JCPC on appeals to the Committee from jurisdictions outside England.

⁴⁰⁴ KC Ng (n 398) 43-47; See, generally: John Murphy and Christian Witting, *Street on Torts* (13th Edition, OUP 2012) Chapter 23, 615-624; Simon Deakin, Angus Johnston and Basil Markesinis, *Markesinis and Deakin's Tort Law* (7th Edition, OUP 2013) Chapter 10, 382-386.

jurisdiction over tortious claims for damages under Article 7(2) of the Brussels I Regulation (Recast) will prevent rather than support the exercise of jurisdiction by the English courts. Similarly, as will be discussed in the next section, there are serious difficulties in showing that English law is the applicable law of the tortious claim for damages. Significantly, the classification of the cause of action as a tort will not alter the fact that the damages remedy interferes with the principle of mutual trust and the principle of effectiveness of EU law (*effet utile*).

According to the traditional understanding of the tort of malicious prosecution a claimant must establish the following:⁴⁰⁵

1. The prior proceedings brought by a respondent were determined in the claimant's favour.
2. The proceedings were instituted without reasonable and proper cause.
3. The respondent acted maliciously.
4. The claimant had suffered (and can only recover in respect of) one or more of only three permissible heads of damage: namely, actual damage to reputation, person or property (that is, out of pocket expenses but not consequential economic loss).
5. The prior proceedings were criminal in nature (the tort was inapplicable to most civil proceedings, the major exception being winding-up petitions).

Moreover, it was thought that the tort of abuse of process required proof of some overt act or threat apart from the instigation of legal proceedings. The tort of abuse of process also did not allow recovery of pure economic loss.

The majority of the Privy Council in *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* rejected propositions 4 and 5 above. The Privy Council by a majority of three (Lady Hale, Lord Kerr and Lord Wilson) to two (Lord Neuberger and Lord Sumption), held that malicious prosecution extended to civil proceedings.⁴⁰⁶ Lord Wilson and Lord Sumption observed that abuse of process did not require proof of an overt act. Lord Wilson further suggested that both torts could lead to recovery for pure economic loss.

⁴⁰⁵ James Edelman and John Davies, 'Torts and Equitable Wrongs' in Andrew Burrows (ed.), *English Private Law* (Oxford Principles of English Law, 2nd Edition, OUP 2007) 1313-1314; KC Ng (n 398) 44.

⁴⁰⁶ *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* [2013] UKPC 17; [2013] 3 W.L.R. 927, [40]-[56] (Lord Wilson).

In relation to the search for an appropriate tortious cause of action to support the claim for damages for wrongful civil litigation it is necessary to analyse the nature of the loss sustained and its treatment under English tort law. The loss suffered as a result of the breach of the jurisdiction agreement may consist of wasted costs and expenses of litigating in the non-contractual forum and if the foreign court assumes jurisdiction, a judgment on the merits of the dispute. It is submitted that the loss incurred is in the nature of pure economic loss. Pure economic loss is treated differently from other forms of loss by some legal systems within their regime for tort liability, whereas others make no such distinction.⁴⁰⁷ Under English tort law, while the largest category of tort is negligence, its core is to protect persons and property.⁴⁰⁸ The protection of purely economic interests is largely left to the defined categories of intentional torts,⁴⁰⁹ which the English courts would not be easily persuaded to expand.

Following the Privy Council's interpretation of the scope of the tort of malicious prosecution in *Sagikor*, the chances of a tortious cause of action of malicious prosecution premised on remedying wrongful civil litigation abroad succeeding have been augmented.⁴¹⁰ Previously, the House of Lords in *Gregory v. Portsmouth City Council*⁴¹¹ had held that the tort of malicious prosecution is limited to the malicious institution of criminal prosecutions and certain civil proceedings which constituted special cases of abuse of legal process. Under the tort of malicious prosecution, it is wrongful maliciously to procure the commencement or continuance of criminal proceedings, and also certain limited categories of civil proceedings, including the malicious presentation of a winding up order or bankruptcy petition, maliciously procuring a bench warrant⁴¹² or search warrant⁴¹³ and the malicious arrest of a ship.⁴¹⁴ But to complete this cause of action, the criticized proceedings must have been

⁴⁰⁷ English tort law draws a distinction between pure economic loss and loss arising from damage to reputation, persons and property: See Deakin, Johnston and Markesinis (n 404) 471; Murphy and Witting (n 404) 356.

⁴⁰⁸ See *Murphy v Brentwood District Council* [1991] 1 AC 398.

⁴⁰⁹ For example: the torts of inducing breach of contract, causing loss by unlawful means (tortious interference), conspiracy, passing off, malicious falsehood.

⁴¹⁰ For commentary on adapting the tort of malicious prosecution to serve the needs of remedying cross border wrongful civil litigation prior to the decision in [2013] UKPC 17; [2013] 3 W.L.R. 927: See Tham (n 360) 60-62; Raphael (n 330) 332-335; Takahashi, *Damages for Breach of a Choice of Court Agreement: Remaining Issues* (n 393) 79-82.

⁴¹¹ *Gregory v. Portsmouth City Council* [2000] 1 AC 419; See Joseph (n 384) 487.

⁴¹² *Roy v Prior* [1971] AC 470 HL.

⁴¹³ *Gibbs v Rea* [1998] AC 786 PC.

⁴¹⁴ *Congentra AG v Sixteen Thirteen Marine SA (The Nicholas M)* [2008] EWHC 1615 (Comm); [2009] 1 All ER (Comm) 479; [2008] 2 Lloyd's Rep 602: Flaux J. concluded that the facts could arguably fall within the category of 'wrongful arrest' of a ship. The ship had been detained for repairs while chartered by the defendant, and the claimant argued that the delay (which had caused them to lose their next charter) was the product of a conspiracy; See generally, Raphael (n 330) 333-334.

brought maliciously and without reasonable and probable cause, and must have failed. It might be argued that, the Privy Council's decision in *Sagicor* has given rise to a tort of maliciously instituting civil proceedings of general applicability in English law. Under the existing authorities the same conditions apply in relation to foreign proceedings, so that if the claimant abroad has succeeded in his foreign proceedings, no cause of action will lie under English law.⁴¹⁵ These limitations mean that the tort of malicious prosecution, in its current state of development in English law, affords no platform for the award of damages against vexatious or oppressive foreign litigation.⁴¹⁶ Other available tortious causes of action do not directly target vexatious or oppressive foreign litigation. It is presumably the limited utility and applicability of tortious claims that explain why, in practice, general non-contractual anti-suit injunctions have not been based upon tortious causes of action.⁴¹⁷

Where an exclusive choice of court agreement is binding between A and B and a third party, C, who is in practical control of B, has directed B to breach the agreement, the English courts have accepted that anti-suit injunctions or claims for damages, could be founded on the tort of inducing breach of contract.⁴¹⁸ In *Kallang Shipping SA v Axa Assurances Senegal (The Kallang)*, Gloster J held that a claim for an anti-suit injunction against a third party insurer, based on the torts of inducing a breach of contract, interference with business, and conspiracy for inducing its insured to breach an exclusive jurisdiction clause, was arguable.⁴¹⁹ In *Kallang Shipping SA v Axa Assurances Senegal ("The Kallang") (No.2)*, where Axa Senegal had induced their insureds to breach an arbitration clause by orchestrating proceedings before the courts of Senegal, Jonathan Hirst QC, sitting as a deputy High Court judge, awarded damages against Axa Senegal for procuring a breach of contract.⁴²⁰ He observed that an alternative claim for interference in business relations by unlawful means added

⁴¹⁵ Ibid.

⁴¹⁶ Ibid.

⁴¹⁷ Ibid 335.

⁴¹⁸ See, generally, *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1, for the leading authority on the tort of inducing breach of a contract in English substantive private law.

⁴¹⁹ *Kallang Shipping SA v Axa Assurances Senegal (The Kallang)* [2007] 1 Lloyd's Rep 160 (Gloster J); See also, *Horn Linie GmbH v Panamericana Formas e Impresos SA (The Hornbay)* [2006] 2 Lloyd's Rep 44, [26], where Morison J even suggested that claims for damages for inducing breach of contract would in principle be a more attractive solution to the problem than granting an anti-suit injunction. The choice of law issue was not raised in this case; Raphael (n 330) 335-336.

⁴²⁰ *Kallang Shipping SA v Axa Assurances Senegal ("The Kallang") (No.2)* [2008] EWHC 2761 (Comm), [2009] 1 Lloyd's Rep 124, [90]-[94] (Jonathan Hirst QC J); See also *The Duden* [2008] EWHC 2762 (Comm), [2009] 1 Lloyd's Rep 145 (Jonathan Hirst QC J); See Joseph (n 384) 493-494; Thomas Raphael, *The Anti-Suit Injunction: Updating Supplement* (Oxford Private International Law Series, OUP 2010) 69.

nothing.⁴²¹ A conspiracy claim was rejected on the grounds that Axa Senegal controlled the running of the case exclusively and so did not conspire with its insured in any meaningful sense.⁴²² However, as Jonathan Hirst QC stressed, both parties agreed that this issue was to be determined in accordance with English law and no case on Senegalese law was pleaded.⁴²³ This line of decisions is welcome from a purely pragmatic standpoint and provides the aggrieved party with a wider potential range of parties to sue for an effective remedy. However, it will be argued that the jurisdictional and choice of law issues that arise from a claim for damages for inducing breach of a choice of court agreement under the Brussels I Regulation and Rome II Regulation present a substantial impediment to both the legal basis and the viability of such a claim. These issues are examined in depth in Chapter 6.

The pure economic loss will be more readily recoverable under legal systems which adopt the French tradition of a single compensation rule.⁴²⁴ Article 1382 of the French Code Civil embraces all kinds of losses, stipulating that 'Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it.'⁴²⁵ Negligent conducts are subject to the same rule as intentional acts.⁴²⁶ Takahashi notes that Japanese tort law also belongs to the French tradition and its Civil Code provides in Article 709 that anyone who intentionally or negligently violates other's rights or interests worthy of legal protection must compensate for the losses thereby caused.⁴²⁷ Despite the German Civil Code's ('Bürgerliches Gesetzbuch' or 'BGB') categorical exclusion of liability for tortious damages for pure economic loss, the German courts have zealously endeavored to fill in the gaps by finding ways to compensate for pure economic loss.⁴²⁸ This is in sharp contrast to the great weight reputedly given by German law to theoretical orthodoxy over pragmatism.

⁴²¹ *Kallang Shipping SA v Axa Assurances Senegal ("The Kallang")* (No.2) [2008] EWHC 2761 (Comm), [2009] 1 Lloyd's Rep 124, [94].

⁴²² Ibid [96].

⁴²³ Ibid [90].

⁴²⁴ Cees van Dam, *European Tort Law* (2nd Edition, OUP 2013) 210-211; Takahashi, *Damages for Breach of a Choice of Court Agreement: Remaining Issues* (n 393) 79-82, 81; G Wagner, 'Comparative Tort Law' in M Reimann and R Zimmermann (Eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 1012, 1020 argues that the difference between English and Continental legal systems is more apparent than real but does not deny that a difference exists between English law and French law on the recoverability of pure economic loss.

⁴²⁵ Article 1382 of the French Civil Code provides: '*Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer*' (English Translation from *Legifrance*) <<http://www.legifrance.gouv.fr>>.

⁴²⁶ Article 1383 of the French Civil Code provides: '*Chacun est responsable du dommage qu'il a causé non seulement par son fait, mais encore par sa négligence ou par son imprudence*' (Everyone is liable for the damage he causes not only by his intentional act, but also by his negligent conduct or by his imprudence.) (English translation from *Legifrance*) <<http://www.legifrance.gouv.fr>>.

⁴²⁷ Takahashi, *Damages for Breach of a Choice of Court Agreement: Remaining Issues* (n 393) 79-82, 81

⁴²⁸ van Dam (n 424) 211-213.

It should be noted that the tort claim is not founded upon the breach of a choice of court agreement *per se* but upon a broader context in which the action has been commenced.⁴²⁹ Though a breach of a choice of court agreement is a major element of that context, the test is whether the whole circumstances are such that the institution of the action is, under the Restatement, 'primarily for a purpose other than that of securing the proper adjudication of the claim' or, under the test of the Japanese Supreme Court, 'plainly unreasonable in the light of the purpose of the judicial system.' Since the procedural character of a choice of court agreement does not have a direct impact, the tort claim is more conducive to substantive characterisation than the contractual claim. It means that the court which would not allow a contractual claim to recover damages for breach of a choice of court agreement by treating it as a procedural matter may allow a tort claim, provided that the requirements in all other respects are fulfilled. Briggs does suggest that, a claim for damages based on the law of tort may fit more easily into the rubric of the 'public law' oriented Brussels I Regulation than a contractual legal basis.⁴³⁰

⁴²⁹ Ibid.

⁴³⁰ Briggs, *Agreements* (n 320) 327.

Applicable Law of the *Tortious* Claim for Damages

The following general observations may be made in order to facilitate the creation of a framework for inquiry into the applicable law of a tortious claim of damages for breach of a jurisdiction agreement. Specific reference will be made to the European Union's Rome II Regulation⁴³¹ and the choice of law rules contained therein to assist us in the determination of the applicable law.

According to Article 1(1) of the Rome II Regulation, 'This Regulation shall apply, in situations involving a *conflict of laws*, to *non-contractual obligations in civil and commercial matters*.'⁴³² The CJEU has held that the term 'civil and commercial matters' must be interpreted autonomously without regard to national Member State jurisprudence.⁴³³ Decisions of the CJEU that define what constitutes a civil and commercial matter under Article 1(1) of the Brussels I Regulation offer general guidance in determining what constitutes a 'civil and commercial matter' for the Rome II Regulation.⁴³⁴ The CJEU has defined the term negatively: a matter is not civil or commercial if (a) a public authority is involved in creating the disputed obligations and (b) this public authority acts 'in the exercise of its powers'.⁴³⁵ It is submitted that a tortious action for wrongful civil proceedings based on the tortious right not to wrongfully sued abroad falls under 'civil and commercial matters' because it is premised on a private law relationship.

The Rome II Regulation governs non-contractual obligations.⁴³⁶ The CJEU's interpretations of comparable provisions in the Brussels I Regulation may serve as guidance. Under Article 5 of the Brussels I Regulation, the courts must distinguish between contractual and non-

⁴³¹ Regulation (EC) No 864/2007 of the European Parliament and of the Council on the Law Applicable to Non-Contractual Obligations [2007] OJ L199/40 'Rome II Regulation'; See generally, John Murphy, 'Foreign Torts' in Michael A Jones and Anthony M Dugdale, *Clerk and Lindsell on Torts* (20th Edition, Sweet and Maxwell 2010) Chapter 7.

⁴³² Article 1(1) of the Rome II Regulation (Emphasis added); See Ivo Bach, 'Article 1' in Peter Huber (ed.), *Rome II Regulation: Pocket Commentary* (Sellier European Law Publishers, Munich 2011) 28-44; Richard Plender and Michael Wilderspin, *The European Private International Law of Obligations* (3rd Edition, Sweet and Maxwell 2009) 472-478.

⁴³³ *LTU v Eurocontrol* (Case C-29/76) [1976] ECR 1541, para 3.

⁴³⁴ The Brussels I Regulation, Rome I Regulation and Rome II Regulation form an integrated and coherent system of harmonized private international law rules in civil and commercial matters in the European Judicial Area. See Eva Lein, 'The New Rome I / Rome II / Brussels I Synergy' (2008) 10 *Yearbook of Private International Law* 177, 189-190; Bach (n 432) 31-35.

⁴³⁵ *LTU v Eurocontrol* (Case C-29/76) [1976] ECR 1541, para 4; *Sonntag v Waidmann* (Case C-172/91) [1993] ECR I-1963, para 20; *Netherlands v Reinhard Ruffer* (Case 814/79) [1980] ECR I-3807 para 9.

⁴³⁶ See Andrew Scott, 'The Scope of 'Non-Contractual Obligations'' in John Ahern and William Binchy (eds), *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: A New International Litigation Regime* (Martinus Nijhoff Publishers, Leiden and Boston 2009) 57-83; Bach (n 432) 36-43.

contractual obligations to determine which State's courts have jurisdiction over a case: those of the place of performance (for contractual obligations) or those of the places where the harmful event occurred or may occur (for non-contractual obligations).⁴³⁷ In making this distinction, the CJEU defined the term non-contractual negatively: it encompasses every damages claim that cannot be classified as contractual. Therefore any obligation that the obligor has not freely assumed must be considered non-contractual and thus within the scope of the Rome II Regulation.⁴³⁸ The tortious right not to be wrongfully sued abroad and the corresponding tortious obligation are not freely assumed and thus must be considered non-contractual and within the scope of the Rome II Regulation.

The Rome II Regulation applies only in 'situations involving a conflict of laws'.⁴³⁹ This qualification to the applicability of Rome II Regulation is unnecessary and superfluous as the need to refer to the Regulation does not arise in a dispute with connections to only one State. Secondly, the term 'conflict of laws' is potentially misleading as the term covers the entire discipline of private international law in common law jurisdictions. A reference to 'choice of law rules' instead of 'conflict of laws' would have been more appropriate. The connection with more than one State or a situation 'involving a conflict of laws' is apparent in the case of wrongful civil proceedings abroad.

Under the general choice of law rule for torts in the Rome II Regulation, the applicable law of a tort/delict claim shall be the law of the country in which the damage occurs (*lex loci damni*) irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.⁴⁴⁰ Which place would this rule point to if it is applied to the case where a tort claim for wrongful civil proceedings is made to recover damages for breach of a choice of court agreement? It is easy to imagine that the place of the direct damage will be localised in the court where the allegedly wrongful litigation was pursued.⁴⁴¹ However, Articles 4(1) and

⁴³⁷ Articles 5(1) and 5(3) of the Brussels I Regulation.

⁴³⁸ Bach (n 432) 36-37.

⁴³⁹ *ibid* 44.

⁴⁴⁰ Article 4(1) of the Rome II Regulation; See Bach (n 432) 70-91; Plender and Wilderspin (n 432) 499-534.

⁴⁴¹ Bach (n 432) 87, para 49: 'If the tort consists in an **abusive court proceeding** against the victim, the damage will regularly not be physical but exclusively economic in nature. In these cases, the proceeding itself must be regarded as the direct damage.' (emphasis in original); See Alexander Layton, 'Anti-Arbitration Injunctions and Anti-Suit Injunctions: An Anglo-European Perspective' in Franco Ferrari (ed.), *Forum Shopping in the International Commercial Arbitration Context* (Sellier European Law Publishers, Munich 2013) 135 for the consequences of applying a choice of law analysis under the Rome II Regulation to anti-suit injunctions. Such an approach may lead to the application of a law which does not recognise the remedy; Briggs, *Private International Law in English Courts* (n 318) 401-402, notes that the jurisprudence of the English courts has

4(2)⁴⁴² can be displaced⁴⁴³ by the operation of an ‘escape clause’ where it is clear from all the circumstances of the case that the tort/delict is ‘manifestly more closely connected with another country.’⁴⁴⁴ To prevent EU Member State courts from abusing the escape clause by using it as a pretext for the application of the *lex fori*, the European legislature refused to establish Article 4(3) as a general rule and instead structured it as an exception.⁴⁴⁵ As a consequence, the escape clause must be applied restrictively.⁴⁴⁶ Raphael suggests that the Court of Justice of the European Union may well not accept that the place where the litigation ‘should’ have happened is manifestly more closely connected to the tort than the place where it did happen.⁴⁴⁷ Additionally, it is difficult to avoid the conclusion that, at least in most cases where non-contractual anti-suit injunctions might be sought on the basis that vexatious or oppressive proceedings have been brought before the courts of country A, the events constituting any tort have occurred in country A, and the most significant legal factor relating to any tortious conduct is its engagement of the legal system of country A.⁴⁴⁸

On the contrary, Adrian Briggs suggests that the applicable law should be ‘that of the country with which the dispute between the parties has its closest and most real connection’.⁴⁴⁹ Similarly, Chee Ho Tham avers that ‘it would be substantially more appropriate to apply the law of the forum’ to a tort claim brought where the claimant

adopted the view that there is no role for a choice of law analysis and that applying a foreign applicable law as the *lex loci damni* would ultimately be a futile endeavour. The choice of England as the natural forum for the dispute acts as a surrogate choice of law rule and leads to the application of English principles of equity to assess the conduct complained of.

⁴⁴² See Plender and Wilderspin (n 432) 534-536.

⁴⁴³ Article 4(3) of the Rome II Regulation.

⁴⁴⁴ Recital 18 of the Rome II Regulation.

⁴⁴⁵ Explanatory Memorandum of the Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations (“Rome II”) COM (2003) 427 final, 12.

⁴⁴⁶ See *Winrow v Hemphill* [2014] EWHC 3164 (QB) [63] (Slade J) (‘Article 4(3) places a high hurdle in the path of a party seeking to displace the law indicated by Article 4(1) or 4(2).’); *Stylianou v Toyoshima and Suncorp Metway Insurance Limited* [2013] EWHC 2188 (QB) (Sir Robert Nelson J); Collins, *Dicey, Morris and Collins on the Conflict of Laws* (n 344) Chapter 35, 2214-2215 (‘the court must be satisfied that the threshold of closer connection has been clearly demonstrated’); Andrew Dickinson, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations* (Oxford Private International Law Series, OUP 2008) Chapter 4, 340-341 (‘Article 4(3) must, therefore, be considered exceptional, requiring strong and clear reasons for displacing the law otherwise applicable under Arts 4(1) and (2)’); Plender and Wilderspin (n 432) Chapter 18, 536 and R Plender and M Wilderspin, *The European Private International Law of Obligations* (2015) (Sweet & Maxwell 2015) 555 (‘art. 4(3) should be resorted to only in exceptional circumstances.’); JJ Fawcett and JM Carruthers, *Cheshire, North & Fawcett: Private International Law* (14th Ed, Oxford University Press 2008) 799; Richard Fentiman, ‘The Significance of Close Connection’ in John Ahern and William Binchy (eds), *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: A New International Litigation Regime* (Martinus Nijhoff Publishers, Leiden and Boston 2009) 85-112; Beaumont and McElevay (n 382) Chapter 14, 649; Bach (n 432) 99.

⁴⁴⁷ Raphael (n 330) 333.

⁴⁴⁸ *Ibid* 332.

⁴⁴⁹ Briggs, *The Unrestrained Reach of an Anti-Suit Injunction* (n 356) 95; cf Jonathan Harris, ‘Anti-Suit Injunctions – A Home Comfort’ [1997] LMCLQ 413.

abroad was acting in breach of an exclusive jurisdiction agreement.⁴⁵⁰ Relying on Article 4(3) of the Rome II Regulation, Takahashi also opines that a tort claim seeking damages for breach of a choice of court agreement will in the final analysis be governed by the law which governs the agreement since the claim is undeniably closely connected with the agreement.⁴⁵¹ The law applicable to a choice of court agreement is discussed in the appropriate section above.

It can be difficult to reconcile the arguments of Briggs and Tham with the statutory terms of Part III of the Private International Law (Miscellaneous Provisions) Act 1995, in force at that time.⁴⁵² The Act does not mandate a generalized assessment of substantial appropriateness but rather a narrower assessment of connecting factors related to the tort. The country where litigation should take place is not the country where a tort of wrongfully litigating abroad has taken place, nor is it the country to which that tort is most closely connected. To aver that the most legally significant feature of a tortious action for damages is someone else's judgment as to where it should have been brought but certainly was not, seems to be reasoning tainted by the desired result.

In the preceding section, we assessed that damages may be awarded by the English courts applying English law for the tort of inducing breach of the choice of forum agreement. However, the rational development of this tortious cause of action will be encumbered by and would have to surmount the choice of law hurdle.⁴⁵³ In *OT Africa Line Ltd v Magic Sportswear Corp*,⁴⁵⁴ Langley J was faced with an application to serve an application for an anti-suit injunction out of the jurisdiction, not only on the contractual party to the exclusive forum clause, who had breached the clause by commencing proceedings in Canada, but also on their third party insurers. One of the bases advanced for the injunction against the third party insurers was the tort of inducing a breach of contract. The judge applied Part III of the Private International Law (Miscellaneous Provisions) Act 1995 and concluded that under

⁴⁵⁰ Tham (n 360) 66.

⁴⁵¹ Takahashi, *Damages for Breach of a Choice of Court Agreement: Remaining Issues* (n 393) 87.

⁴⁵² Raphael (n 330) 333; For Private International Law (Miscellaneous Provisions) Act 1995, See Dickinson, *The Rome II Regulation* (n 446) Chapter 1, 9-12; It should be noted, that the arguments in favour of displacing the applicable law under Articles 4(1) and (2) by virtue of Article 4(3) of the Rome II Regulation will have to cross a higher threshold as compared to Section 12 of the Private International Law (Miscellaneous Provisions) Act 1995. 'A comparison of the respective wording "*substantially more appropriate*" as opposed to "*manifestly more closely connected*" indicates that the burden imposed by the Rome II Regulation is probably heavier than that imposed by Section 12 of the 1995 Act.' (Emphasis added) Plender and Wilderspin (n 432) Chapter 18, 537 and Plender and Wilderspin, *The European Private International Law of Obligations (2015)* (n 446) 557.

⁴⁵³ Raphael (n 330) 335.

⁴⁵⁴ [2005] 1 Lloyd's Rep 252, 256.

Section 11,⁴⁵⁵ the most significant elements of the tort occurred in Canada, which is where the insurers caused their insured to issue proceedings. The claimants did not even argue that it was substantially more appropriate for English law to apply under Section 12 but the judge observed that in his view they were right not to do so.⁴⁵⁶ As a result Canadian law applied and Langley J refused to accept that Canadian law would treat the Canadian proceedings as tortious, in a case where Canadian law treated the exclusive jurisdiction clause as non-binding. It is submitted, that even if Langley J had been considering the Rome II Regulation it seems likely that he would have concluded that the place where the direct damage occurred was Canada, and thus that Canadian law was applicable under Article 4(1).⁴⁵⁷

The application of the law of the place of the wrongful proceedings will mean that any claim in tort will usually be pointless, because in the rare cases where a court will accept that the commencement of litigation before it in the normal way is actionably wrongful, it will usually provide adequate remedies to resolve the problem.⁴⁵⁸ However, the law of the place of the wrongful proceedings will not apply in all cases. For instance, a pre-existing relationship between the parties in the form of a contract which has a close connection with the tort in question can result in the applicable law of the contract extending its cover to the tort as well.⁴⁵⁹ In the specific case of the breach of a choice of court agreement, the tort for wrongful civil litigation does have a close connection with the choice of court agreement and it can be argued that the law applicable to the jurisdiction agreement also applies to the tort. Another example of the displacement of the applicable law under Article 4(1), is where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, therefore, resulting in the application of the law of that country.⁴⁶⁰

⁴⁵⁵ Section 11(1) of the Private International Law (Miscellaneous Provisions) Act 1995 provides: 'The general rule is that the applicable law is the law of the country in which the events constituting the tort or delict in question occur.'

⁴⁵⁶ Section 12(1) of the Private International Law (Miscellaneous Provisions) Act 1995 provides: 'If it appears, in all the circumstances, from a comparison of—

(a) the significance of the factors which connect a tort or delict with the country whose law would be the applicable law under the general rule; and

(b) the significance of any factors connecting the tort or delict with another country, that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country, the general rule is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other country.'

⁴⁵⁷ Raphael (n 330) 336.

⁴⁵⁸ *ibid* 333.

⁴⁵⁹ Article 4(3) of the Rome II Regulation.

⁴⁶⁰ Article 4(2) of the Rome II Regulation; See Bach (n 432) 92-99.

The choice of law rules of some countries may allow the parties to choose the applicable law before a tortious act takes place and may give party autonomy precedence over the objective connecting factors.⁴⁶¹ Article 14(1) of the Rome II Regulation makes provision for a choice of law made by an agreement entered into after the event giving rise to the damage occurred or where all the parties are pursuing a commercial activity, by an agreement freely negotiated before the event giving rise to the damage occurred. Under such rules, effect will be given to an express choice of law agreement specifically made for disputes arising from the breach of a choice of court agreement, if it is framed in terms wide enough to cover a claim in tort. As noted above, such an express choice of law agreement is, albeit not wholly inconceivable, unlikely to be concluded in practice.

Before concluding our foray into the law applicable to a tortious claim for damages for breach of contract, it is necessary to consider an anomalous choice of law rule premised on parochial policy oriented grounds. The choice of law rules for tort of some countries may retain what is known as the double actionability rule,⁴⁶² under which the cumulative application of the law of the forum is reserved. If the claim is brought in a forum adopting such a rule, the hurdle that the claim must overcome is so much the higher since it has to meet the requirements of the law of the forum over and above the requirements of the law of the place of the tort.

⁴⁶¹ See Thomas Kadner Graziano, 'Freedom to Choose the Applicable Law in Tort – Articles 14 and 4(3) of the Rome II Regulation' in John Ahern and William Binchy (eds), *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: A New International Litigation Regime* (Martinus Nijhoff Publishers, Leiden and Boston 2009) 113-132; Ivo Bach, 'Article 14' in Peter Huber (ed.), *Rome II Regulation: Pocket Commentary* (Sellier European Law Publishers, Munich 2011) 324-342.

⁴⁶² Among the common law countries which had been influenced by the English line of authority originating from *Phillips v Eyre* (1870) LR 6 QB 1 (Willes J), some have since rejected the double actionability rule (e.g. the Supreme Court of Canada in *Jensen v Tofofon* [1994] 3 SCR 1022; the Australian High Court in *Régie Nationale des Usines Renault SA v Zhang* (2002) 187 ALR 1) but there are other countries which still retain some variant of the rule. For instance, in Scots law an action for a delict committed outside Scotland will fail unless the pursuer can show that the specific *jus actionis* which he invokes is available to him both by Scots law and by the *lex loci delicti commissi*. The Scottish courts have failed to accept the flexible exception employed in the persuasive authority of *Boys v Chaplin* [1971] AC 356 (Lord Wilberforce). However, the Scottish courts now apply the Rome II Regulation and the common law rule is restricted to defamation cases; See Beaumont and McEleavy (n 382) Chapter 14, 714-722.

Restitution

A restitutionary claim is not a claim seeking to recover compensatory damages for loss suffered but is a claim seeking to strip away gain. It is outside the scope of the present discussion on the legal basis of the damages remedy if the expression 'damages for breach of a choice of court agreement' is strictly understood. However, the restitutionary claim does merit an examination since, by bringing an action in breach of a choice of court agreement, the claimant may obtain gain and the defendant may wish to deprive him of it. A claimant who suffers a smaller loss than the defendant's gain or who suffers injury of a non-pecuniary kind from the breach of contract will find a gain based award more attractive than compensatory damages for loss suffered.

In cases where the court first seised declines jurisdiction, both parties may suffer losses in the form of costs and expenses but neither will obtain gain. As a consequence, a restitutionary claim will not be available. However, in cases where the court first seised accepts jurisdiction and decides to hear the case on the merits, the claimant may obtain gain if the judgment is more favourable to him than that which would have been rendered in the forum chosen by the choice of court agreement. Since the gain obtained by the claimant in this situation is also manifested as the loss incurred by the defendant, the defendant may make a claim in contract, tort or equity to recover damages. However, as observed above, a tort claim may not be granted unless the wrong has been committed intentionally or negligently. Also as examined above, a contractual claim, too, may be subject to a fault-based liability regime depending on the applicable legal system. Since fault will not be a prerequisite for a restitutionary claim, the absence of intention or negligence will not constitute an obstacle if the defendant frames the claim in the law of restitution.

Even if a claim framed in contract or tort is considered to be available, a concurrent restitutionary claim should not be precluded⁴⁶³ since the cause of action is different: a claim for damages, whether framed in contract or tort, is founded on the wrong causing losses whereas a restitutionary claim is founded on the wrong resulting in gain. That is not, however, the position accepted by all legal systems.

⁴⁶³ This is the position widely accepted under Japanese law; See Takahashi, *Damages for Breach of a Choice of Court Agreement: Remaining Issues* (n 393) 82.

In English law, the availability of restitution for wrongs, as distinguished from restitution for subtractive unjustified enrichment, is severely restricted.⁴⁶⁴ Thus, restitution for a tort is normally only granted for proprietary torts in which the title to, or possession of, the property of the injured party has been infringed. With respect to restitution for a breach of contract, the traditional view is that it does not succeed save in exceptional circumstances such as where the breach of contract also constitutes a proprietary wrong (whether breach of a restrictive covenant or a tort) or an equitable wrong (such as breach of confidence or breach of fiduciary duty).⁴⁶⁵ The restriction was apparently somewhat relaxed by the House of Lords in *Attorney General v. Blake*,⁴⁶⁶ in which it was held that restitution of profits could be ordered for a breach of contract in an exceptional case where damages measured by a claimant's loss or specific relief were inadequate or unavailable, especially if the claimant had a legitimate interest in preventing the defendant's profit making activity.⁴⁶⁷ In the absence of more specific guidance, it is not certain how that test would be applied to the case of a breach of a choice of court agreement even if we assume for the sake of argument that damages do not provide adequate relief. However, in a very significant judgment of the English High Court in *Vercoe v Rutland Fund Management Ltd*⁴⁶⁸ Sales J identified a number of key principles to determine when the remedy of restitution of profits should be available for breach of contract. The general principle concerns the identification of the just response to the particular wrong, which is determined by assessing whether the claimant's objective interest in performance of the relevant obligation makes it just and equitable that the defendant should retain no benefit from the breach of the obligation, so that the remedy awarded is not disproportionate to the wrong done to the claimant. Where the claimant has a particularly strong interest in full performance, he should be entitled to a choice between damages and account of profits. The claimant might have a particularly strong interest in full

⁴⁶⁴ See McKendrick, *Contract Law* (n 327) 343: 'But, where the ground on which restitution is sought is that the defendant has broken his contract with the claimant, then a restitutionary remedy is available only within very narrow confines.'; For a critique, see D Visser, 'Unjustified Enrichment in Comparative Perspective' in M Reimann and R Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (OUP 2006) 969, 979.

⁴⁶⁵ Charles Mitchell, 'Unjust Enrichment' in Andrew Burrows (ed.), *English Private Law* (2nd Edition, Oxford Principles of English Law, OUP 2007) Chapter 18, para 18.236.

⁴⁶⁶ *Attorney General v Blake* [2000] UKHL 45, [2001] 1 AC 268, 285 (Lord Nicholls): 'An account of profits will be appropriate in exceptional circumstances.' (at 285) Lord Hobhouse dissented on the ground that an account of profits, a remedy based on property rights, should not be given where the necessary property rights are absent. (at 298) Cf. *Hospitality Group Pty Ltd v Australian Rugby Football Union Ltd* [2001] FCA 1040 (in Australia loss recoverable for breach of contract is limited to compensation).

⁴⁶⁷ Graham Virgo, 'Restitution' in HG Beale and others (eds), *Chitty on Contracts* (Volume I, 31st Edition, Sweet and Maxwell, London 2012) Chapter 29, 2130-2134; McKendrick, *Contract Law* (n 327) Chapter 20, 345-346.

⁴⁶⁸ *Vercoe v Rutland Fund Management Ltd* [2010] EWHC 424 (Ch), [339]-[343]; See Virgo (n 467) Chapter 29, 2132.

performance of the contract where, for example, the breach of contract involves infringement of property rights, including intellectual property rights, or where it would not be reasonable to expect the contractual right to be released for a reasonable fee, such as the right to have state secrets maintained as in *Attorney General v Blake* itself or rights arising under fiduciary relationships. If the claimant does not have a strong interest in performance, as will be the case in a more commercial context, account of profits should not be available and the claimant should be confined to what the parties would have reasonably agreed that the defendant would have paid to the claimant to release the contractual right. If, as Sales J in the English High Court has determined, the circumstances must be exceptional, a breach of a choice of court agreement would not normally qualify for restitution of profit.

In many civil law systems, both restitution for wrongs and restitution for subtractive unjustified enrichment will be covered by a broad rule allowing the claimant to deprive the defendant of gain obtained without legal basis.⁴⁶⁹ Under Japanese law, for example, restitution is granted if the defendant has gained at the expense of the claimant in the circumstances where the gain has no legal basis.⁴⁷⁰ If, by bringing an action in breach of a choice of court agreement, the claimant has obtained gain in the shape of a more favourable judgment than that which would be rendered in the forum chosen by the choice of court agreement, that gain may be deemed to have no 'legal basis,' depending on the interpretation of that expression under the applicable law.

It should be noted that the restitutionary claim is not founded upon the breach of a choice of court agreement *per se* but upon a broader context in which the breach has resulted in the claimant's gain. Since the procedural character of a choice of court agreement does not have a direct impact, the restitutionary claim is more conducive to substantive characterisation than the contractual claim. It means that the court which would not allow a contractual claim to recover damages for breach of a choice of court agreement by treating it as a procedural question may allow a restitutionary claim to strip away the claimant's gain, provided that the requirements in all other respects are fulfilled.

⁴⁶⁹ cf. In English law, the absence of legal basis is not enough but it is necessary to identify a specific 'unjust factor' such as mistake or duress. Although the late Professor Peter Birks advocated abandoning that approach in favour of the civil law approach in his last monograph *Unjust Enrichment* (2nd Edition, Clarendon Law Series, OUP 2005), that view has not earned a wide support in England: See Visser (n 464), 997.

⁴⁷⁰ Article 703 of the Civil Code (Japan); See Takahashi, *Damages for Breach of a Choice of Court Agreement: Remaining Issues* (n 393) 83.

Applicable Law of a Restitutionary Claim

The connecting factors for a restitutionary claim depend on the precise formulation of the applicable choice of law rules. The applicable choice of law rules in turn are determined by the nature of the substantive obligation and the specific policy goals of the choice of law regime. For the purposes of both English substantive private law characterization and English private international law characterization pursuant to Articles 4 and 10 of the Rome II Regulation, restitution for unjust enrichment is to be differentiated from restitution for wrongs.⁴⁷¹ In the case of restitution for a wrong there has been a breach by the defendant of a primary duty owed to the claimant.⁴⁷² Where one is dealing with restitution for a wrong, the relevant event or cause of action is the wrong and the enrichment purely goes to the remedial question of whether the claimant is entitled to restitution, rather than the more usual compensation. As a result of an event or cause of action based characterization, restitution for wrongs should be subject to Article 4 of the Rome II Regulation whereas restitution for unjust enrichment should be regulated by Article 10 of the Rome II Regulation.⁴⁷³ The alternative consequence based approach would subsume both restitution for wrongs and restitution for unjust enrichment under Article 10 of the Rome II Regulation.⁴⁷⁴ The lack of a definitive CJEU authority on the matter means that the more

⁴⁷¹ For the differentiated English substantive private law characterization of restitution for unjust enrichment and restitution for wrongs see, Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford University Press 2012) s 1(3), 26-28; Graham Virgo, *The Principles of the Law of Restitution* (2nd Edition, OUP 2006) Chapter 15; Professor Birks originally treated restitution for wrongs as founded on the reversal of unjust enrichment in Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press, OUP 1989) 313, but he subsequently altered his position in Birks, *Unjust Enrichment* (n 469) 12-16; Mitchell (n 465) 1333-1334; That restitution for wrongs is not founded on the unjust enrichment principle was recognised by Millett J in *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1995] 1 WLR 978, 988; cf *Halifax Building Society v Thomas* [1996] Ch 217, 224 (Peter Gibson LJ); For the differentiated English private international law characterization of restitution for unjust enrichment and restitution for wrongs in relation to Article 10 and Article 4 of the Rome II Regulation respectively see, Dickinson, *The Rome II Regulation* (n 446) 302; Ivo Bach, 'Article 4' in Peter Huber (ed.), *Rome II Regulation* (Sellier European Law Publishers, Munich 2011) 66; Plender and Wilderspin, *The European Private International Law of Obligations* (n 432) 24-085; Plender and Wilderspin, *The European Private International Law of Obligations (2015)* (n 446) 728; Collins, *Dicey, Morris and Collins on the Conflict of Laws* (n 344) 2209 ('although the matter is not free from doubt'); George Panagopoulos, *Restitution in Private International Law* (Hart Publishing, Oxford 2000) 16-17; Adeline Chong, 'Choice of Law for Unjust Enrichment/Restitution and the Rome II Regulation' (2008) 57 *ICLQ* 863, 890-892; Adam Rushworth and Andrew Scott, 'Rome II: Choice of Law for Non Contractual Obligations' [2008] *LMCLQ* 274, 286.

⁴⁷² A right to restitution founded on a civil wrong including restitution for torts, restitution for breach of contract and restitution for the equitable wrongs of breach of fiduciary duty (including breach of trust) or breach of confidence.

⁴⁷³ See FN 471 above.

⁴⁷⁴ Fawcett and Carruthers (n 446) 825 argue that a better alternative would be for situations falling within the category of restitution for wrongdoing be subsumed under the unjust enrichment by subtraction category. Article 10 would then apply to both categories; Takahashi prefers an Article 10 classification for restitutionary damages for breach of a jurisdiction agreement: See Takahashi, *Damages for Breach of a Choice of Court Agreement: Remaining Issues* (n 393) 88.

elegant differentiated approach to both categories in English law will prevail, at least for the time being.

A choice of law analysis pursuant to Article 4 of the Rome II Regulation is considered above under the section titled 'Applicable Law of the Tortious Claim for Damages'. In case Article 10 is deemed to apply in relation to restitution for wrongs or the claim for restitution lacks the element of fault and is akin to subtractive unjust enrichment, it will be necessary to examine the connecting factors in Article 10 of the Rome II Regulation. The development of an autonomous European concept of unjust enrichment as an aid in the characterization process will be considered first.

Recital 11 of the Rome II Regulation requires the integration of the prevalent diverse approaches to unjust enrichment in the EU Member States into an autonomous European concept of unjust enrichment. An autonomous, unitary definition of unjust enrichment will be an indispensable aid in the characterization of claims and for distinguishing unjust enrichment from claims in contract, tort and *negotiorum gestio*. In the context of a substantive law action for unjust enrichment against the European Commission under EU law the Grand Chamber of the ECJ has held that unjust enrichment does not require fault or conduct by the defendant but merely proof that the defendant has been enriched without any legal basis⁴⁷⁵ for the enrichment and that the claimant has been impoverished in a way that is linked to the defendant's enrichment.⁴⁷⁶ The definition proffered by the ECJ is very similar to the definition of the Draft Common Frame of Reference:⁴⁷⁷

[A]n enrichment which is not legally justified, with the result that, if it is obtained by one person and is attributable to another's disadvantage, the first person may, subject to legal rules and restrictions, be obliged to that other to reverse the enrichment.

Where the restitution concerns an existing relationship between the parties arising out of a contract or a tort/delict, the choice of law rules of some countries may give priority to the

⁴⁷⁵ In contrast to the approach in civil law legal systems, which determine the 'unjust question' by reference to whether there has been an 'absence of basis', the best interpretation of English law is that this question is approached by requiring the claimant to establish an 'unjust factor': See Burrows, *A Restatement of the English Law of Unjust Enrichment* (n 471) s 3(2)-(5), 31-32; cf Birks, *Unjust Enrichment* (n 469) in his final writings preferred the continental conception of 'absence of basis'.

⁴⁷⁶ *P Masdar (UK) v Commission* (C-47/07) [2008] ECR I-9761.

⁴⁷⁷ Christian von Bar and others (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (Sellier, Munich 2008) Annex 1 at 343. Dickinson follows this model in his suggested definition of unjust enrichment for the Rome II Regulation, See Dickinson, *The Rome II Regulation* (n 446) 10.19-10.21; Beaumont and McEleavy (n 382) Chapter 14, 681-682.

law that governs that relationship.⁴⁷⁸ Under such choice of law rules, a restitutionary claim seeking to strip away the gain which has resulted from a breach of a choice of court agreement will be governed by the law that governs the choice of court agreement. As to what law governs a choice of court agreement, reference should be made to the discussion above in the section titled 'Applicable Law of the Contractual Claim for Damages'.

Where there is no pre-existing relationship between the parties, the Rome II Regulation provides for the application of the *lex domicilii communis* i.e. the law of the country in which both parties to the unjust enrichment have their habitual residence.⁴⁷⁹ In accordance with the objective of parallel interpretation and the internal coherence and consistency of provisions within the Rome II Regulation, Article 10(2) of the Rome II Regulation is almost identical to Article 4(2) and as such reference may be made to the commentary on Article 4(2) in interpreting Article 10(2).

Under the choice of law rules of some countries, the governing law of a restitutionary claim will be the law of the country where the causal facts have taken place or, more precisely, the law of the place where the gain has accrued.⁴⁸⁰ If such rules are applied to the cases where a restitutionary claim is made to strip away the gain which has resulted from a breach of a choice of court agreement, which places would they point to? It is easy to imagine that the place of causal facts will be localised in the forum first seised since, the institution of the action in breach of a choice of court agreement can be deemed to be the fact causing the gain. It is equally likely that the place of gain will also be localised in the forum first seised since, the gain can be deemed to have accrued in that forum through the costs order and the judgment on the merits.

The choice of law rules of some countries may contain a rule of displacement under which the otherwise applicable law is displaced by the law of the place with which the restitution is 'manifestly more closely connected' in the light of all the circumstances of the case.⁴⁸¹ It should be noted that the 'escape clause' provided in Article 10(4) of the Rome II Regulation

⁴⁷⁸ Article 10(1) of the Rome II Regulation; See Peter Huber and Ivo Bach, 'Article 10' in Peter Huber (ed.), *Rome II Regulation: Pocket Commentary* (Sellier European Law Publishers, Munich 2011) 286-300; Plender and Wilderspin, *The European Private International Law of Obligations* (2015) (n 446) 729-731.

⁴⁷⁹ Article 10(2) of the Rome II Regulation; See Huber and Bach (n 478) 295-296; Plender and Wilderspin, *The European Private International Law of Obligations* (2015) (n 446) 731-732.

⁴⁸⁰ Article 10(3) of the Rome II Regulation; See Huber and Bach (n 478) 296-299; Plender and Wilderspin, *The European Private International Law of Obligations* (2015) (n 446) 732-734.

⁴⁸¹ Article 10(4) of the Rome II Regulation; See Huber and Bach (n 478) 299; Plender and Wilderspin, *The European Private International Law of Obligations* (2015) (n 446) 734-735.

sets a high threshold: the unjust enrichment obligation must be *manifestly* more closely connected with a law other than with the law deemed applicable under Articles 10(1) to (3).⁴⁸²

The choice of law rules of some countries may allow the parties to choose the governing law before the event causing unjust enrichment takes place and may give the party autonomy precedence over the objective connecting factors.⁴⁸³ Under such rules, effect will be given to an express choice of law agreement specifically made for disputes arising from the breach of a choice of court agreement, if it is framed in terms wide enough to cover a claim in restitution. As noted in the section above titled ‘Applicable Law of the Contractual Claim for Damages’, such an express choice of law agreement is, albeit not wholly inconceivable, unlikely to be concluded in practice.

⁴⁸² Chong (n 471) 889; Plender and Wilderspin, *The European Private International Law of Obligations* (2015) (n 446) 735, note that the phrase ‘manifestly more closely connected’ is intended to impose a ‘strict test’ and suggest that the language in Article 10(4) should be construed so as to reflect an approach akin to that adopted under Article 4(3) of the Rome II Regulation.

⁴⁸³ Article 14(1)(b) of the Rome II Regulation but only if the choice is made by an agreement freely negotiated between parties pursuing a commercial activity.

Damages in Equity

Does a Substantive Equitable Right Not to be Sued Abroad Vexatiously Exist?

Having examined the contractual and tortious legal bases for a claim of damages for breach of a choice of court agreement, it is now time to turn towards a claim of damages based on equitable principles. The existence of a substantive equitable right not to be subjected to vexatious and oppressive foreign litigation or not to be affected by unconscionable conduct in the pursuit of foreign legal proceedings which is capable of supporting a claim for damages has been doubted by English courts and commentators alike. The issue of the existence of a substantive equitable right not to be sued abroad vexatiously and oppressively is common to both the legal basis of non-contractual anti-suit injunctions and the legal basis of non-contractual damages for breach of a choice of court agreement.

Borrowing from the jurisprudence of non-contractual anti-suit injunctions, there is a strong argument that although the court may be exercising an equitable power when granting an anti-suit injunction, it is not necessarily doing so to protect any substantive equitable right.⁴⁸⁴ In similar vein, Fentiman argues that equitable rights are not substantive but remedial in nature.⁴⁸⁵ The infringement of an equitable right is merely a legal conclusion drawn from the fact that the respondent's conduct has been held unconscionable.⁴⁸⁶ Briggs refers to the notion of an equitable right as a 'troublesome expression' and prefers to describe the behaviour of the respondent as vexatious or oppressive, bearing in mind that England is the natural forum for the litigation.⁴⁸⁷ Outside the context of the court's practice of granting anti-suit injunctions there is no identifiable basis for a general substantive equitable right; therefore it is circular to invent retrospectively a notional equitable right to fit the situations where the remedy would be granted in any event.⁴⁸⁸ However, as a matter of principle, a private law remedy should be based on the infringement of a substantive right.⁴⁸⁹ Where the basis of the remedy extends beyond the vindication of private law rights and into the domain of public or procedural law, a substantive right is no longer required as

⁴⁸⁴ Raphael (n 330) 67-71, 69.

⁴⁸⁵ Fentiman, *International Commercial Litigation* (2015) (n 315) 497; Fentiman, *International Commercial Litigation* (2010) (n 367) 560.

⁴⁸⁶ Ibid.

⁴⁸⁷ Briggs, *Private International Law in English Courts* (n 318) 399.

⁴⁸⁸ Raphael (n 330) 69-70.

⁴⁸⁹ *Ubi jus, ibi remedium* (Latin: where there is a right, there is a remedy); See Lord Chief Justice Holt in *Ashby v White* (1703) 14 St Tr 695, 92 ER 126.

a justification for an anti-suit injunction.⁴⁹⁰ Instead, the need to protect the judicial processes of the forum grounds the grant of the anti-suit injunction.⁴⁹¹ It is submitted that, the significance of the need to keep the private law and public law justifications of the non-contractual anti-suit injunction separate cannot be overstated.⁴⁹² The lack of logical order and clarity in the anti-suit injunction right/remedy conundrum is the result of conflating the private and public law justifications for the award of non-contractual anti-suit injunctions. Secondly, it is submitted that, the need to ‘invent’ a substantive equitable right has application beyond the realm of non-contractual anti-suit injunctions. The existence of a substantive equitable right is crucial for the legal basis of equitable damages for breach of a choice of court agreement.

In *Masri v Consolidated Contractors*⁴⁹³, Lawrence Collins LJ⁴⁹⁴, who accepted *obiter* with some reluctance that the authorities supported the existence of a legal or equitable right in ‘single forum’⁴⁹⁵ cases, held after full argument that there was no relevant equitable right in ‘alternative forum’⁴⁹⁶ cases. Raphael in his monograph, *The Anti-Suit Injunction*, argues that as a matter of principle there is no obvious reason why if there is a right not to be sued abroad vexatiously in single forum cases there cannot be a right not to be sued abroad vexatiously in alternative forum cases.⁴⁹⁷ On the other hand, Briggs argues against the preferential treatment of single forum cases and advocates that the same set of rules and principles should apply to all cases of restraint of vexatious or oppressive behaviour.⁴⁹⁸

Raphael further argues that if the ramifications of the existence of a substantive equitable right were neutral, there would be much to be said for casting aside ‘an essentially fictitious substantive right’.⁴⁹⁹ However, the continued existence and development of a substantive equitable right affects and is affected by other extraneous issues and should not be decided

⁴⁹⁰ Briggs, *Private International Law in English Courts* (n 318) 403-405.

⁴⁹¹ See *Masri v Consolidated Contractors International (UK) Ltd (No 3)* [2008] EWCA Civ 625, [2009] QB 503; *Ahmed v Mehmet* [2014] EWCA Civ 277 (instituting proceedings in respect of a matter which has already been adjudicated in England with a view to undermining the English judgment).

⁴⁹² Sim (n 356) 708.

⁴⁹³ *Masri v Consolidated Contractors International (UK) Ltd (No 3)* [2008] EWCA Civ 625, [2009] QB 503 (Lawrence Collins LJ); See also, *British Airways Board v Laker Airways Ltd* [1985] AC 58; *Airbus Industrie GIE v Patel* [1999] 1 AC 119.

⁴⁹⁴ Longman LJ and Sir Anthony Clarke MR agreeing.

⁴⁹⁵ In a single forum case the foreign claim can only be brought in the foreign country.

⁴⁹⁶ In an alternative forum case the claim which is being made in the foreign action can be heard either in England or abroad, or even in both jurisdictions. The possible actions in the competing jurisdictions do not need to be identical, provided that they are substantially similar.

⁴⁹⁷ Raphael (n 330) 71.

⁴⁹⁸ Briggs, *Private International Law in English Courts* (n 318) 402.

⁴⁹⁹ *Ibid.*

without reference to those factors. Thus, the existence of a substantive equitable right is supported by the possibility that, in the absence of such an equitable right, the court will have no power to serve claims for final anti-suit injunctions out of the jurisdiction under CPR 6.20, which would be an undesirable result.⁵⁰⁰ On the other hand, grounding the non-contractual anti-suit injunction on a substantive equitable right would pose choice of law issues. The implications of a choice of law analysis of the substantive equitable right not to be sued abroad vexatiously and oppressively are considered in the appropriate sub-section below.

Choice of Law and Equity

Equitable doctrines and remedies have historically presented challenges for a straightforward and seamless choice of law analysis.⁵⁰¹ In broad terms, at one end of the spectrum equity traditionalists argue that when the court's equitable jurisdiction is invoked, it leads to the application of the law of the forum without any reference to choice of law rules. At the other end of the spectrum is the view that equitable doctrines themselves should be subject to choice of law analysis; that the equitable principles of the forum should be applied only if the forum's choice of law rules identify the law of the forum as the *lex causae* (applicable law).⁵⁰²

In his seminal monograph, Yeo outlines three possible frameworks for analyzing choice of law for equitable doctrines.⁵⁰³ The first is that equity has its own choice of law rules.⁵⁰⁴ The second is that there is a single choice of law system, but one which has distinct categories for equitable doctrines.⁵⁰⁵ The third, which Yeo favours, is that the division of common law and equity is only relevant after English law has been determined as the applicable law by choice of law rules.⁵⁰⁶ The essential argument supporting this latter framework is that drawing a distinction between legal and equitable wrongs perpetuates a domestic law distinction, which is only relevant if choice of law analysis has identified that an issue should be determined by a legal system which draws such a distinction. The process of

⁵⁰⁰ Sim (n 356) 707.

⁵⁰¹ *ibid* 720-721; Collins, *Dicey, Morris and Collins on the Conflict of Laws* (n 344) Chapter 34, 2188-2189.

⁵⁰² Garnett, *Substance and Procedure in Private International Law* (n 332) 107-108, 111-112; Briggs, *The Unrestrained Reach of an Anti-Suit Injunction* (n 356); cf Harris, *Anti-Suit Injunctions – A Home Comfort* (n 449); Fawcett and Carruthers (n 446) 459-460; See also, Sparka (n 370) 97-98.

⁵⁰³ TM Yeo, *Choice of Law for Equitable Doctrines* (Oxford Private International Law Series, OUP 2004) 56-66.

⁵⁰⁴ *Ibid* 56-57.

⁵⁰⁵ *Ibid* 57-61.

⁵⁰⁶ *Ibid* 61-66.

characterization is to bring together functionally similar issues, irrespective of historical origins or domestic classification.

There has been a recent shift away from the bland application of the *lex fori* to subjecting equitable claims to choice of law analysis achieved by identification of the closest established category of characterization.⁵⁰⁷ An issue is not to be classified as procedural simply because it has the capacity to interfere with English notions of equity. Whilst some may approach the non-contractual anti-suit injunction without recourse to choice of law principles, the sole application of the law of the forum is an indulgence which promotes forum shopping, curbs international harmony in decision making and militates against the contemporary trend of allocating a potentially larger sphere of operation for the applicable law (*lex causae*).

Equitable Damages

There is no precedent in English law where damages have been sought in equity for wrongful foreign litigation (breach of an equitable obligation not to sue abroad vexatiously and oppressively) and there is no principle of the traditional rules of equity on which it could be based.⁵⁰⁸ The historical development of the anti-suit injunction is implicitly inconsistent with the existence of a right to damages.

As observed above, it is uncertain whether there is a substantive equitable right which underpins general non-contractual anti-suit injunctions. Even if such a substantive equitable right does exist, its support for a claim for equitable damages or compensation is not without doubt.⁵⁰⁹ It may well be that any substantive equitable right will support only an injunction and no more.

Further, if an equitable right to damages did exist, it would confront and create serious problems. First, the scope of the equitable right would presumably have to match, or at least

⁵⁰⁷ Plender and Wilderspin, *The European Private International Law of Obligations* (2015) (n 446) 728, argue that the better view is to characterize equitable wrongs, for choice of law purposes, under one of the four main categories of obligations: tort, contract, property and restitution; Layton, *Anti-Arbitration Injunctions and Anti-Suit Injunctions* (n 441) 134; For example in *OJSC Oil Co Yugraneft v Abramovich* [2008] EWHC 2613 (Comm) a claim for unjust enrichment based on knowing assistance was characterised as a tort and subject to English law, while a claim for unjust enrichment based on knowing receipt was held to be subject to Russian law as the law having the closest and most real connection with the obligation to make restoration; See Yeo, *Choice of Law for Equitable Doctrines* (n 503) 320.

⁵⁰⁸ Raphael (n 330) 336.

⁵⁰⁹ Ibid 337.

be related to, the scope of the injunction.⁵¹⁰ In particular, it would be undesirable if an equitable right to damages were to exist in many cases where an injunction should be refused as a matter of comity or discretion.

Second, if a substantive equitable right to damages does exist, it will face the obvious choice of law hurdle. The question of how choice of law rules apply to equitable claims is complex and uncertain. But it is probable that, if there were a substantive equitable right capable of supporting a claim in damages for wrongful civil litigation, then such a right would in principle be indistinguishable from a claim in tort. Consequently, it is likely that the Rome II Regulation's choice of law regime for non-contractual obligations will apply.⁵¹¹ The right not to be sued reflects precisely the sort of 'fault' based remedial concept which Rome II is intended to capture under the broad definition of tort/delict contained in Article 4(1).⁵¹² Article 4(1) of Rome II Regulation prescribes the *lex loci damni* as the general rule for the determination of the applicable law. The applicable law is that of the country in which the damage occurs, irrespective of where the event, or indirect consequences of the event, that give rise to the damage occurred. In the context of wrongful litigation, this seems to point away from the forum and towards the place of the 'immediate effect' of the conduct in bringing proceedings.⁵¹³ However, if proceedings are pending between the same parties in the forum at the time of the commencement of the foreign proceedings, the parties may be said to be in a 'pre-existing relationship', which then triggers the applicability of the *lex fori* by reason of Article 4(3).⁵¹⁴

Arguments directed against the *lex causae* selected by the choice of law rule prescribed by the Rome II Regulation are strictly irrelevant. Fears that applying the law of the place where the wrong was committed, or the law which has the closest connection to the claim, might 'wreak havoc' by leading to the application of the law of the place where proceedings were being brought (and the alleged likelihood that this would mean that no relevant wrong had been committed) are predicated on a refusal to accept the relevance of foreign law. In the present context, the application of foreign law will usually preclude any claim based on a substantive equity, let alone for damages in equity or equitable compensation.

⁵¹⁰ Ibid.

⁵¹¹ Layton, *Anti-Arbitration Injunctions and Anti-Suit Injunctions* (n 441) 134-135; Yeo, *Choice of Law for Equitable Doctrines* (n 503) 66.

⁵¹² Sim (n 356) 724; Dickinson, *The Rome II Regulation* (n 446) 356.

⁵¹³ Layton, *Anti-Arbitration Injunctions and Anti-Suit Injunctions* (n 441) 135; Sim (n 356) 724; Dickinson, *The Rome II Regulation* (n 446) 357.

⁵¹⁴ Sim (n 356) 724; Dickinson, *The Rome II Regulation* (n 446) 357.

Raphael suggests that one way of resolving the friction between choice of law and equitable principles that arises if a substantive right not to be vexed by litigation abroad is considered to exist, is to attenuate the substantive content of the right.⁵¹⁵ The more any right becomes a right to an injunction and no more, the easier it becomes to view it as not analogous to a claim in tort, but instead as akin to a matter of procedure, and thus legitimately a matter of English law alone, as the *lex fori*.⁵¹⁶ However, it is submitted, that there is no principled basis for devising a half-way house based on convenience from the hallowed substantive equitable right which supports an injunction but will be incapable of supporting a claim in damages. This is without prejudice to the statutory power to award damages in lieu of an injunction under Section 50 of the Senior Court Act 1981, which will be considered in the next section.

In similar vein, Dickinson suggests that the most obvious way of circumventing the choice of law impasse would be to reject the view of Lord Hobhouse of Woodborough that anti-suit injunctions should be seen as being based on 'wrongful conduct' and instead to treat them as procedural measures ancillary to an existing or future claim before the courts of the forum state.⁵¹⁷ In *Masri v Consolidated Contractors*, Lawrence Collins LJ expressed the *obiter* view that an interim anti-suit injunction qualifies as a protective measure within Article 31 of the Brussels I Regulation, being designed to protect the claimant's underlying rights and the integrity of the English substantive proceedings in which it was granted.⁵¹⁸ On this view anti-suit injunctions outside the contractual context may be characterized as being procedural in nature and falling outside the Rome II Regulation, by reason of the exclusion of matters of evidence and procedure in Article 1(3). Nevertheless, the Rome II Regulation would, apparently, continue to apply to 'single forum' cases.⁵¹⁹

⁵¹⁵ Raphael (n 330) 338.

⁵¹⁶ Thomas Raphael's pragmatic truncation of the substantive right not to be vexed by litigation abroad by limiting it to cases of cross border injunctive relief may be unprincipled as the necessary implication is for the procedural law of the forum to apply. The English common law has adopted a wide view of procedural matters as a result of its traditional right/remedy approach, whereas, recent developments in other commonwealth jurisdictions such as Australia and Canada have given rise to a larger 'outcome determinative' role for the applicable law as compared to a more limited 'mode or conduct of proceedings' sphere of operation for the procedural law of the forum. The Rome I and Rome II Regulations also accord a wider scope to the applicable law as compared to the English common law. See Garnett, *Substance and Procedure in Private International Law* (n 332) Chapter 2.

⁵¹⁷ Dickinson, *The Rome II Regulation* (n 446) 358; See *Turner v Grovit* [2001] UKHL 64, [2001] 1 WLR 107, [24] (Lord Hobhouse of Woodborough).

⁵¹⁸ *Masri v Consolidated Contractors* [2008] EWCA Civ 625, [2008] 2 Lloyd's Rep 301, [66] (Lawrence Collins LJ)

⁵¹⁹ *Ibid* [42]-[44], [56] (Lawrence Collins LJ).

A principled criticism of the pragmatic workaround highlighted by Raphael and Dickinson is that the application of Rome II Regulation choice of law rules may well preclude the grant of non-contractual anti-suit injunctions or non-contractual claims for damages in many cases but the rules seek to determine the rights of the parties under the most appropriate legal system, rather than a blanket application of the *lex fori* which leads to the creation of essentially fictitious rights. Under a choice of law analysis, the rules of the forum are only applied when the choice of law rules of the forum indicate that the *lex fori* is the *lex causae*. This choice of law methodology is indeed more principled than reversing the accepted order of analysis of a conflict of law issue and applying the law of the forum without reservation or restraint. A choice of law analysis of non-contractual anti-suit injunctions and claims for non-contractual damages may also give a role to comity in matters of choice of law, in addition to its more traditional role as a factor taken into consideration when the court exercises its discretion in granting the remedy.⁵²⁰

⁵²⁰ See generally, Sim (n 356): A conception of ‘comity’ as an expression of justice in cases involving foreign elements which serves as the catalyst for taking account of foreign law assuages concerns about interfering with foreign courts.

Damages in Lieu of an Injunction: Section 50 of the Senior Courts Act 1981

Power to award damages as well as, or in substitution for, injunction or specific performance.

Where the Court of Appeal or the High Court has jurisdiction to entertain an application for an injunction or specific performance, it may award damages in addition to, or in substitution for, an injunction or specific performance.⁵²¹

Where the court has power to grant an injunction, it can in its discretion award damages in addition to, or in substitution for an injunction under Section 50 of the Senior Courts Act 1981, which restates the powers granted by Lord Cairns' Act.⁵²² Where the court decides to exercise its discretion to award damages, damages are assessed on the same basis as common law damages for breach of contract.⁵²³ It has been suggested by some prominent English common law commentators that this power could justify the award of the damages remedy in place of an anti-suit injunction.⁵²⁴ For instance, Clare Ambrose anticipates no problems with the grant of damages under Section 50.⁵²⁵ Likewise, Chee Ho Tham also considers that damages under this provision should be available in an appropriate case.⁵²⁶ A grant of damages under the statutory power would have the advantage, in contrast to a substantive equitable right to damages, that the award of damages under Section 50 is discretionary, and thus flexible.⁵²⁷

This argument is further supported by the traditional justification for the availability of the injunction remedy; that common law damages would be inadequate. The justification presupposes that damages, but for their supposed inadequacy, would have been the proper response to such breaches. Therefore, if the courts will grant anti-suit injunctions to restrain breaches of choice of court clauses, they must necessarily have the corollary power to award damages in response to such breaches as well.

⁵²¹ Section 50, Senior Courts Act 1981.

⁵²² The power to grant damages in lieu of an injunction was originally granted to the Court of Chancery by the Chancery Amendment Act 1858, section 2, commonly known as Lord Cairns' Act.

⁵²³ *Johnson v Agnew* [1980] AC 367, 400; cf *Surrey CC v Bredero Homes Ltd* [1993] 1 WLR 1361, 1366-67; McKendrick, *Contract Law* (n 327) Chapter 21, 382.

⁵²⁴ Raphael (n 330) 338-340; For a discussion of Section 50 of the Senior Courts Act 1981 and damages for breach of an arbitration agreement, see, Steven Gee, 'Lord Bingham, Anti-Suit Injunctions and Arbitration' in Mads Andenas and Duncan Fairgrieve (eds.), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (OUP 2009) 635, 638-643.

⁵²⁵ Clare Ambrose, 'Can Anti-Suit Injunctions Survive European Community Law' (2003) 52 *ICLQ* 401, 416.

⁵²⁶ Tham (n 360) 68.

⁵²⁷ Raphael (n 330) 339.

Raphael questions whether it would be legitimate to grant damages in lieu of an injunction under Section 50 in respect of vexatious litigation, if damages of that nature could not in principle be awarded at common law or equity for such a wrong.⁵²⁸ Tham affirms the legitimacy of damages in such situations by stating that the damages are available as long as the court has jurisdiction to grant an injunction or make an order of specific performance, even if there is no cause of action at common law.⁵²⁹ On the contrary, it is suggested, that apart from the clear case of contractual damages, Section 50 of the Senior Courts Act 1981 does not provide a useful route to recover damages for allegedly wrongful foreign litigation. This reasoned observation is predicated on the prevailing doubts concerning the existence of a substantive legal or equitable right not to be sued abroad vexatiously and if such a right does exist, whether its breach can support a cause of action for tortious or equitable damages. In the case of contractual damages, the existence and breach of a legal right not to be sued abroad in a non-contractual forum provides a sound legal basis for both contractual anti-suit injunctions and contractual damages for breach of a choice of court agreement.

Potential issues relating to choice of law for the statutory provision would also need to be addressed. However, the need for a choice of law analysis will turn on the appropriate characterization of the statutory power to award damages as an issue of substance or procedure. If the provision is classified as being premised on the substantive right not to be sued abroad vexatiously, it will be subject to the Rome II Regulation and the choice of law rules contained therein. However, it is arguable that claims for damages in lieu of an injunction are a purely procedural matter governed by the *lex fori regit processum*⁵³⁰ rule without reference to any underlying substantive equitable obligation not to be subject to wrongful civil litigation requiring a choice of law analysis. Furthermore, the Rome II Regulation applies to 'non-contractual obligations in civil and commercial matters'⁵³¹ but not to matters of 'evidence and procedure'.⁵³² Article 15 of the Rome II Regulation provides that: 'The law applicable to non-contractual obligations under this Regulation shall govern in particular.....(c) the existence, the nature and the assessment of damage or the remedy claimed'.⁵³³ However, it is submitted, that if there is no relevant non-contractual obligation

⁵²⁸ Ibid.

⁵²⁹ Tham (n 360) 67.

⁵³⁰ Procedure is governed by the law of the forum.

⁵³¹ Article 1(1) Rome II Regulation.

⁵³² Article 1(3) Rome II Regulation.

⁵³³ Article 15(c) Rome II Regulation.

within the scope of the Regulation, then logically the need for any remedy to be governed by the applicable law under Article 15 does not arise in the first place.

Last but not least, even if the power to award damages in lieu of an injunction does exist in general, it is doubtful whether it can be exercised in a situation where the power to grant an anti-suit injunction has been removed by the Court of Justice of the European Union in its interpretation of the Brussels I Regulation.⁵³⁴

⁵³⁴ *Turner v Grovit* C-159/02 [2004] ECR I-3565.

Recognition and Enforcement of the English Judgment Awarding Damages for Breach of a Choice of Court Agreement

Introduction

Where a judgment has been rendered by the English courts awarding damages for breach of a choice of court agreement or in exceptional circumstances ordering restitution of the gain which had resulted from the breach, if the judgment debtor does not have sufficient assets in the jurisdiction, the judgment creditor may wish to seek recognition and enforcement abroad.⁵³⁵

The crucial question is the likelihood of the recognition and enforcement of an award of damages⁵³⁶ where for all practical purposes the enforcement of such a judgment bears very close resemblance to the effects of an anti-suit injunction on the jurisdiction and judgments apparatus of the foreign court. Indeed, the enforcement of the judgment awarding damages may render the future commencement or continuance of proceedings on the substantive contract in the foreign court futile or contradict an actual judgment of the foreign court on the substantive contract by second guessing and nullifying or reversing its effects. In this regard, Briggs admits that an English judgment awarding damages for breach of a jurisdiction agreement is 'in reality unlikely to have international legs'.⁵³⁷ However, Yeo and Tan have suggested that a judgment awarding damages would, unlike an anti-suit injunction, be enforceable under the Brussels I Regulation.⁵³⁸

Moreover, Tan in a separate article has argued that the damages remedy has a potentially greater reach than the anti-suit injunction.⁵³⁹ At common law foreign courts do not generally enforce equitable remedies such as injunctions but they have been more willing to enforce liquidated money judgments rendered by foreign courts.⁵⁴⁰ Foreign common law courts may

⁵³⁵ See Fentiman, *International Commercial Litigation* (2015) (n 315) Chapter 2: Enforcement risk is a constituent part of Litigation risk and has to be factored into the costs associated with entering into a particular cross border commercial transaction. It may be defined as the risk that a judgment debtor with worldwide assets will disperse or conceal those assets, and the risk that a judgment obtained in one court will be unenforceable elsewhere.

⁵³⁶ See Takahashi, *Damages for Breach of a Choice of Court Agreement: Remaining Issues* (n 393) 97-99.

⁵³⁷ Briggs, *Agreements* (n 320) 321.

⁵³⁸ Nik Yeo and Daniel Tan, 'Damages for Breach of Exclusive Jurisdiction Clauses' in Sarah Worthington (ed.), *Commercial Law and Commercial Practice* (Hart Publishing 2003) Chapter 14, 416.

⁵³⁹ Daniel Tan, 'Damages for Breach of Forum Selection Clauses, Principled Remedies, and Control of International Civil Litigation' (2005) 40 *Texas International Law Journal* 623, 645.

⁵⁴⁰ See Peter Barnett, *Res Judicata, Estoppel, and Foreign Judgments: The Preclusive Effects of Foreign Judgments in Private International Law* (Oxford Private International Law Series, OUP 2001) 49-54; It is a basic

therefore assist the English courts by enforcing such damages awards, even in circumstances where they would not enforce an anti-suit injunction. An award of damages is accordingly more effective because it is, at least in theory, enforceable by common law courts overseas and not restricted to the territorial jurisdiction of the issuing court.

It will be useful to first evaluate the recognition and enforcement of the English judgment awarding damages for breach of a jurisdiction agreement under the Brussels I Regulation followed by a consideration of the recognition and enforcement of such judgments under national rules of private international law.

Recognition and Enforcement under the Brussels I Regulation and the Recast Regulation

The classical ‘double convention’ model is characteristic of the original Brussels Convention (1968) and both its successor instruments, the Brussels I Regulation and the Brussels I Regulation (Recast). Under such a multilateral jurisdiction and judgments framework, mandatory and non-discretionary rules of direct jurisdiction are complemented by a simplified and near automatic regime for the recognition and enforcement of judgments. The principle of mutual recognition of Member State judgments both underpins and informs the corpus of jurisprudence on the Brussels I Regulation developed by the CJEU and the courts of the Member States. The principles of mutual trust and effectiveness of EU law (*effet utile*) have been deployed by the CJEU to prevent interference by anti-suit injunctions issued by English courts with the civil jurisdictional and judgments apparatus of Member State courts.

In *Gothaer v Samskip* the CJEU adjudicated that a decision of a Member State to decline jurisdiction on the basis of a jurisdiction agreement in favour of another Member State is a judgment which qualifies for recognition under Chapter III of the Brussels I Regulation.⁵⁴¹ Moreover, the necessary underpinning for the operative part of the judgment must also be recognised.⁵⁴²

principle of common law enforcement that only money judgments are enforceable at common law; and therefore anti-suit injunctions, like other injunctions, are not enforceable at common law.

⁵⁴¹ Case C-456/11 *Gothaer Allgemeine Versicherung AG v Samskip GmbH* EU:C:2012:719, [2013] QB 548.

⁵⁴² *Ibid* [40]-[41]; The recognition of both the result and the reasons underpinning the decision was referred to by the counsel for the defendants in argument before Flaux J in [2014] EWHC 3068 (Comm) as a ‘Euro-estoppel’. Mutual trust between the courts of the Member States necessitates the recognition of the equivalence of judicial decisions from all Member States; For a critical analysis of the CJEU’s ruling in *Gothaer v Samskip* and the development of the concept of European *Res Judicata*, see Elisa Torralba-Mendiola and Elena

Recognition is subject to the limited defences to recognition in Articles 34 and 35 of the Brussels I Regulation, including if the recognition of the judgment is manifestly contrary to the public policy of the Member State in which recognition is sought.⁵⁴³ Since the award of damages for breach of a choice of court agreement by the English courts is potentially prohibited by the jurisprudence of the CJEU, the courts of the Member State called upon to recognise and enforce the judgment may choose to refer the matter for a preliminary ruling to the CJEU. The question referred would seek a clarification on the grounds for refusing recognition to a Member State judgment and in particular whether a judgment awarding damages (and declaratory relief) for breach of a jurisdiction agreement falls foul of the public policy defence. It is submitted that the principle of mutual trust is the ‘bedrock upon which EU justice policy should be built’⁵⁴⁴ and may be considered to be a component of European Union public policy.⁵⁴⁵ Hence, a judgment which undermines the principles of mutual trust and the effectiveness of EU law (*effet utile*) may be deemed to be contrary to EU public policy and be refused recognition.⁵⁴⁶ However, the CJEU has recently adjudicated that where there is an infringement of EU law in the judgment of the Member State of origin:⁵⁴⁷ ‘the public-policy clause would apply only where that error of law means that the recognition of the judgment concerned in the State in which recognition is sought would result in the *manifest breach of an essential rule of law in the EU legal order and therefore in the legal order of that Member State*’. In that particular case, the infringement of EU trademark law was not deemed to be a manifest breach of an essential rule of law in the EU

Rodriguez-Pineau, ‘Two’s Company, Three’s a Crowd: Jurisdiction, Recognition and *Res Judicata* in the European Union’ (2014) 10 *Journal of Private International Law* 403.

⁵⁴³ Article 34(1) of the Brussels I Regulation; Article 45(1)(a) of the Brussels I Regulation (Recast).

⁵⁴⁴ The EU Justice Agenda for 2020 - Strengthening Trust, Mobility and Growth within the Union COM (2014) 144 final; See Matthias Weller, ‘Mutual trust: in search of the future of European Union private international law’ (2015) 11 *Journal of Private International Law* 64, 79-80.

⁵⁴⁵ For a discussion of a European public policy exception to the rules regarding the enforcement of judgments: See, Jonathan Fitch, ‘Chapter 13 – Article 45’ in Andrew Dickinson and Eva Lein (eds.), *The Brussels I Regulation Recast* (OUP 2015) 432, 440-450; Mills, *The Confluence* (n 354) Chapter 4, 194-198; Jerca Kramberger Škerl, ‘European Public Policy (With an Emphasis on *Exequatur* Proceedings)’ (2011) 7 *Journal of Private International Law* 461, 468-474; Alex Mills, ‘The Dimensions of Public Policy in Private International Law’ (2008) 4 *Journal of Private International Law* 201, 214; It is not for the CJEU to define the content of the public policy of the Contracting State but the Court of Justice has adopted the view that the limits of public policy are a question of interpretation of the Brussels Convention and are therefore a matter which must be determined by it: Case C-7/98 *Krombach v Bamberski* [2000] ECR I-1935 [22]-[23]; Case C-38/98 *Renault v Maxicar* [2000] ECR I-2973 [27]-[28]; Case C-394/07 *Marco Gambazzi v Daimler Chrysler Canada Inc* [2009] ECR I-2563 [26]-[28]; Case C-420/07 *Meletis Apostolides v David Charles Orams* [2009] ECR I-3571 [56]-[57]; Case C-619/10 *Trade Agency Ltd v Seramico Investments Ltd* ECLI:EU:C:2012:531 [49]; Case C-302/13 *flyLAL-Lithuanian Airlines* ECLI:EU:C:2014:2319 [47].

⁵⁴⁶ European public policy operates as a form of flexibility in the application of uniform rules throughout Europe and unlike national public policy it does not need to be attenuated. See Mills, *The Confluence* (n 354) 197.

⁵⁴⁷ See Case C-681/13 *Diageo Brands BV v Simiramida* ECLI:EU:C:2015:471 [50] (emphasis added).

legal order.⁵⁴⁸ Nevertheless, it is submitted that a fundamental contravention of the principles that animate the multilateral jurisdiction and judgments order of the Brussels I Regulation may still fall within the purview of the public policy exception. Hence, there may be room to argue that an infringement of the principles underlying EU private international law rules may be more significant than an infringement of EU private law rules *per se* for the purposes of the public policy exception.

Recognition and Enforcement under National Private International Law Rules

Significant lessons may be learnt from the developing jurisprudence on the recognition and enforcement of anti-suit injunctions⁵⁴⁹ by national courts applying national private international law rules for the purposes of assessing the likelihood of recognition and enforcement of a judgment awarding damages for breach of a jurisdiction agreement.

Civil law jurisdictions usually do not recognise anti-suit injunctions as a technique for controlling the conflicts of jurisdictions. Therefore, the sceptical attitude towards common law jurisdictions issuing such remedies and the subsequent enforcement of these measures in civil law jurisdictions is not without reason. However, there is at least some precedent of a civil law jurisdiction enforcing an anti-suit injunction order to the detriment of its own proceedings in order to enforce an exclusive jurisdiction agreement.

French courts have traditionally refused to enforce anti-suit injunctions against French proceedings, considering them to be infringing the sovereignty of France and contrary to French public policy.⁵⁵⁰ However, in *In Zone Brands International Inc. v In Beverage*

⁵⁴⁸ Ibid [51].

⁵⁴⁹ See George A Bermann, 'Parallel Litigation: Is Convergence Possible?' in K Boele-Woelki, T Einhorn, D Girsberger and S Symeonides (eds), *Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr* (Eleven International Publishing, 2010) 579, 587-588; Tang (n 333) 167-168.

⁵⁵⁰ *Stolzenberg v Diamler Chrysler Canada Inc* [2005] ILPr 24, is a French *Cour de Cassation* decision adjudicating that Mareva injunctions were not contrary to international public policy under Chapter III of the Brussels Convention, 1968 and were thus enforceable. An observation concerning anti-suit injunctions was made at [4]: 'That prohibition on the debtor, preventing him from disposing of his assets anywhere at all insofar as necessary to preserve the legitimate rights of his creditors, does not prejudice any of the debtor's fundamental rights or (even indirectly) foreign sovereignty and, in particular, unlike the so-called "anti-suit" injunctions, does not affect the jurisdiction of the State in which enforcement is sought' (Emphasis added); See Rev Crit DIP (2004) 815; Louis Perreau-Saussine, 'Forum Conveniens and Anti-Suit Injunctions Before French Courts: Recent Developments' (2010) 59 *International and Comparative Law Quarterly* 519, 524; Horatia Muir-Watt notes that the observation concerning anti-suit injunctions in *Stolzenberg* must be interpreted in light of the decision in *Banques Brachot v Worms* [2003] Rev Crit DIP 816, note H Muir Watt, where the French courts awarded a remedy resembling an anti-suit injunction in the context of pre Regulation insolvency proceedings. The order was for the parties to desist from judicial proceedings abroad sanctioned by an 'astreinte' (a sum of money by way of a private penalty to be paid to the claimant per day of non performance/obedience to the order): Horatia Muir Watt, 'Injunctive Relief in the French Courts: A Case of Legal Borrowing' (2003) 62 *Cambridge Law*

International,⁵⁵¹ a case outside the scope of the Brussels I Regulation, the French *Cour de Cassation* has upheld the enforcement in France of an American anti-suit injunction to enforce an exclusive jurisdiction agreement and rejected arguments that anti-suit injunctions were an infringement of French judicial sovereignty or an interference with a party's right of access to a court.⁵⁵² In a brief, yet very pragmatic judgment, the *Cour de Cassation* referred to 'the jurisdiction clause freely accepted by the parties' and that access to justice was not an issue since 'the decision adopted by the Georgian court [America] had precisely as its object to decide on its own jurisdiction and as its ultimate purpose to ensure that the jurisdiction clause agreed by the parties was complied with.'⁵⁵³ An anti-suit injunction (outwith the scope of the Brussels-Lugano regime) to 'sanction the breach of a pre-existing contractual obligation' was held to be 'not contrary to international public policy.'⁵⁵⁴

German courts, however, take a very different approach.⁵⁵⁵ In a German case, the *Oberlandesgericht* (Regional Court of Appeal) of Dusseldorf refused to serve on the respondent the anti-suit injunction granted by the English High Court under Article 13 of the Hague Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil and Commercial Matters 1965.⁵⁵⁶ The anti-suit injunction was aimed at preventing the respondent from continuing proceedings in German courts in breach of an arbitration agreement selecting the London Court of International Arbitration as the *forum prorogatum*. The German court decreed that the injunction infringed the jurisdiction of Germany because the German court, representing the state's sovereignty, alone has the power to adjudicate

Journal 573; See also, *Rapport* of Madame Pascal (Juge-Rapporteur) in *In Zone Brands International Inc v In Beverage International*.

⁵⁵¹ *In Zone Brands International Inc v In Beverage International* [2010] ILPr 30 (French *Cour de Cassation*).

⁵⁵² *Ibid* [4]; See Raphael, *Updating Supplement* (n 420) 1-5; Perreau-Saussine (n 550) 523-525; Horatia Muir-Watt, 'Surprise? Yes and No' (Conflictolaws.net, 22 October 2009) < <http://conflictolaws.net/2009/surprise-yes-and-no/>> accessed 1 February 2015; Thomas Raphael, 'The Execution of the Anti-Suit Injunction' (Conflictolaws.net, 20 October 2009) < <http://conflictolaws.net/2009/the-execution-of-the-anti-suit-injunction/>> accessed 1 February 2015.

⁵⁵³ *In Zone Brands International Inc v In Beverage International* (n 551) [4].

⁵⁵⁴ *Ibid*.

⁵⁵⁵ In similar vein, the Brussels Civil Court has held that an American anti-suit injunction could not be recognised in Belgium because it was repugnant to Belgian public policy in combination with Article 6 of the European Convention on Human Rights: Belgium Civ Bruxelles, 18 December 1989, RW 1990-1991, 676; The Luxembourg Court of Appeal has also held that as a matter of principle there can be no such thing as an anti-suit injunction (let alone an extra territorial anti-suit injunction) under Luxembourg law: 24 February 1988, Numero 10047.

⁵⁵⁶ *Re the Enforcement of an English Anti-Suit Injunction* (Case 3 VA 11/95) (*Oberlandesgericht*, Dusseldorf) [1997] ILPr 320, [14]-[19]; In *Phillip Alexander Securities and Futures Limited v Bamberger* [1997] ILPr 73, the German courts have reiterated their stance on English anti-suit injunctions as an infringement of their sovereignty and have refused to enforce them.

upon its jurisdiction and no instruction shall be taken from a foreign court on the matter.⁵⁵⁷ The German court rejected the justification provided by the English courts that the injunction was granted against the respondent instead of the foreign court. An injunction restraining the respondent from access to the German court directly influenced the court's adjudicatory function and was deemed to be equivalent to an injunction directed at the court itself.⁵⁵⁸

From the foregoing it is apparent that the strict territorial objection to the use of anti-suit injunctions within the European Union should be limited to the specific architecture of the Brussels I Regulation and not on the cultural incompatibility of extraterritorial injunctive relief with the civilian tradition.⁵⁵⁹ The breach of a pre-existing contractual obligation in a choice of court agreement may warrant the recognition and enforcement of the foreign judgment rendering an anti-suit injunction or damages award by the French courts.

This chapter has examined the legal basis of the damages remedy in the law of contract, tort, restitution, equity and under statute pursuant to Section 50 of the Senior Courts Act 1981. Jurisdiction to enforce the choice of court agreement has been considered alongside issues of applicable law under the Rome II Regulation and the recognition and enforcement of the judgment awarding the damages remedy. Prior to the assessment of the legal basis, the practical preliminary issue of drafting undertakings, indemnity clauses and liquidated damages clauses to enforce the breach of the choice of court agreement have been considered.

The next chapter will provide an overview of the emerging case law on the damages remedy for breach of choice of court agreements. Significantly, two recent decisions of the Court of Appeal of England and Wales in the context of the Brussels I Regulation are instructive as they may be taken to illustrate that the unilateral national private law remedy for enforcing choice of court agreements may run counter to the *ethos* of the multilateral jurisdiction and judgments order which seeks to prioritize the principle of mutual trust and the principle of effectiveness of EU law (*effet utile*).

⁵⁵⁷ Ibid [14].

⁵⁵⁸ Ibid [16].

⁵⁵⁹ Muir Watt (n 550) 576; Perreau-Saussine (n 550) 525.

Chapter 6 - An Overview of the Case Law on the Damages Remedy for Breach of Exclusive Jurisdiction Agreements: Firmly Entrenched or a Nascent Remedy in Need of Development?

The concept of awarding damages for breach of a jurisdiction agreement is a brainchild⁵⁶⁰ of the common law tradition which draws no dogmatic distinction in character between jurisdiction agreements and substantive contracts.⁵⁶¹ It has not formed part of the corpus of rules of the Hague Convention on Choice of Court Agreements⁵⁶² nor has it been discussed by the draftsmen in the official explanatory report.⁵⁶³

Briggs traces the origins of the damages remedy for breach of jurisdiction agreements to the decision in *Ellerman Lines Ltd. v. Read*.⁵⁶⁴ Summarizing the facts, an English jurisdiction agreement was breached when a salvor arrested a ship in Turkey and brought successful proceedings before the Turkish court. According to Briggs, this decision of the English Court of Appeal to allow damages, expressed in strikingly assertive language, made this an early but clear illustration of the rule that damages may be recovered for breach of an agreement which provided for the exclusive jurisdiction of an English court or tribunal.⁵⁶⁵ However, Harris contends that although the ship was arrested to found jurisdiction in Turkey and the Turkish judgment caused the loss, the damages claimed were actually for the costs of rescuing the ship and for its lost value.⁵⁶⁶ Both Harris and Raphael recognise that the case provides only indirect support for the availability of damages for breach of a jurisdiction agreement as the Court of Appeal drew no distinction between damages recoverable as a result of the breach of contract and damages recoverable for fraud.⁵⁶⁷ In any case, it still

⁵⁶⁰ Koji Takahashi, 'Damages for breach of a Choice of Court Agreement' (2008) 10 *Yearbook of Private International Law* 57, 58.

⁵⁶¹ *Ibid* 88.

⁵⁶² Adopted at the 20th Session of the Hague Conference on Private International Law, The Hague, 30th June 2005.

⁵⁶³ See Trevor Hartley and Masato Dogauchi, *Explanatory Report* of the Hague Convention on Choice of Court Agreements.

⁵⁶⁴ *Ellerman Lines Ltd. v. Read* [1928] 2 KB 144 (CA); Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford Private International Law Series, OUP 2008) 301-302; cf However, Edwin Peel has previously noted that there is no English authority for an action for damages for breach of an exclusive jurisdiction agreement and no reported case in which the argument has ever been advanced: See Edwin Peel, 'Exclusive Jurisdiction Agreements: Purity and Pragmatism in the Conflict of Laws' [1998] *LMCLQ* 182, 225.

⁵⁶⁵ Briggs, *Agreements* (n 564) 301-302.

⁵⁶⁶ Jonathan Harris, 'Agreements on Jurisdiction and Choice of Law: Where Next?' [2009] *LMCLQ* 537, 544.

⁵⁶⁷ *Ibid*; Raphael notes that the Turkish ship arrest proceedings were in breach of contract and also involved a fraud. The claimant recovered damages for tug and crew expenses as a result of the arrest, legal expenses incurred in an attempt to obtain the ship's release, and the value of the ship which had been lost due to the arrest. However, the courts drew no distinction between damages recoverable as a result of the breach of contract, and damages recoverable for fraud. Thus, the decision casts a shadow of doubt on the precise legal

took a further seventy years before this novel remedy was applied in the context of modern international commercial litigation before the English courts.

In the leading English Court of Appeal decision of *Union Discount Co Ltd v Zoller and Others*,⁵⁶⁸ parties to a financial services contract had agreed to the exclusive jurisdiction of the English courts and in breach of that agreement Zoller brought proceedings in the courts of New York. An application to dismiss on jurisdictional grounds was granted by the New York court, but the court had no power to award costs against Zoller. Proceedings were brought against Zoller in London, claiming as damages for breach of contract the sums which represented the loss sustained by Union Discount in securing the dismissal of the New York proceedings. Zoller applied to have the claim struck out on the basis of a rule of English domestic law which prohibits the claimant from bringing a claim for damages to top up an award of costs which falls short of a complete indemnity.

Delivering the leading judgment in the Court of Appeal, Schiemann L.J. ruled:

In our judgment, just as a malicious prosecutor should not be able to rely for his own benefit on any policy consideration which is designed to keep down the cost of litigation, so a person who starts totally unnecessary proceedings in a foreign jurisdiction in breach of an exclusive jurisdiction clause should not be able to rely on such policy considerations.⁵⁶⁹

The Court of Appeal made it clear that the claimant had a right to the damages which were being claimed. It reasoned that there was a general contractual entitlement to damages; that an award of damages in respect of losses incurred in the form of legal costs in America did not contradict anything which the American court had decided and that the rule which prohibited an action for damages to top up an English costs order had no application to the claim for damages in respect of losses caused by Zoller's breach of contract by suing abroad.

However, Schiemann L.J. took care to highlight the unique features of *Union Discount Co Ltd v Zoller* and that applications for damages for breach of an exclusive jurisdiction agreement would have to be treated case by case:

It is important to emphasise that in the present case the following unusual features are all present: (i) The costs which the claimant seeks to recover in the English proceedings were incurred by him when he was a defendant in foreign proceedings

basis for the recovery of damages being a breach of contract *per se*: See Thomas Raphael, *The Anti-Suit Injunction: Updating Supplement* (Oxford Private International Law Series, OUP 2010) 66.

⁵⁶⁸ [2001] EWCA Civ 1755, [2002] 1 WLR 1517.

⁵⁶⁹ [2002] 1 WLR 1517, 1522 at [12].

brought by the defendant in the English proceedings, (ii) The claimant in the foreign proceedings brought those proceedings in breach of an express term, the exclusive jurisdiction clause, which, it is assumed for present purposes, has the effect of entitling the English claimant to damages for its breach, (iii) The rules of the foreign forum only permitted recovery of costs in exceptional circumstances. (iv) The foreign court made no adjudication as to costs.⁵⁷⁰

In concluding its decision, the Court of Appeal was at pains to limit its judgment to cases as clear as *Union Discount Co Ltd v Zoller*: “Treading cautiously in a field not much explored in recent litigation we do not propose to go further. One can envisage more doubtful cases.”⁵⁷¹

In *Donohue v Armco Inc.*⁵⁷², the House of Lords lent indirect support to the proposition that an action for damages could be founded on the allegation that a jurisdiction agreement had been breached. Some of the parties involved in the proceedings had agreed to an exclusive jurisdiction clause in favour of the English courts. When proceedings were initiated in the United States of America by those who were parties to the jurisdiction agreement, and by others associated with them but not privy to the forum selection agreement, an application for an anti-suit injunction was made. This motion was defeated by the argument that the anti-suit injunction would only restrain those who were party to the choice of court agreement and thus considerations of the orderly resolution of disputes trumped the issue of the enforcement of the jurisdiction agreement.

From the standpoint of the damages remedy for breach of jurisdiction agreements, counsel for the respondent conceded in argument that if his client, a party to the jurisdiction agreement, were to pursue a claim before the American courts which could not have been successfully brought before the English courts, it would face liability for damages. Lord Bingham of Cornhill⁵⁷³ and Lord Hobhouse of Woodborough⁵⁷⁴ were prepared to accept this concession without formally deciding on the merits that it was well founded and Lord Scott of Foscote⁵⁷⁵ was prepared to accept it to the extent that costs and expenses were incurred in the United States. Commenting on the decision, Daniel Tan and Nik Yeo note that: ‘[t]heir lordships’ comments were in reply, and were not the subject of any further analysis.’⁵⁷⁶

⁵⁷⁰ Ibid 1524 at [18].

⁵⁷¹ Ibid 1526 at [35].

⁵⁷² [2001] UKHL 64, [2002] 1 All ER 749, [2002] CLC 440.

⁵⁷³ [2002] CLC 440, 454 at [36].

⁵⁷⁴ Ibid, 457 at [48].

⁵⁷⁵ Ibid, 462 at [75].

⁵⁷⁶ D Tan and N Yeo, *Breaking Promises to Litigate in a Particular Forum: Are Damages an Appropriate Remedy?* [2003] *LMCLQ* 435, 436 FN 3.

In *A/S D/S Svendborg v Akar*⁵⁷⁷ the court ordered damages and an indemnity in respect of reasonable costs and expenses incurred in defeating claims brought in breach of a jurisdiction agreement for the English courts before the courts of Hong Kong and Guinea. The High Court held that costs were available even if they could be recovered abroad. In *National Westminster Bank plc v Rabobank Nederland*⁵⁷⁸, it was held, in broad language capable of covering the case of a breach of a choice of court agreement, that damages would be awarded for the costs incurred in restraining proceedings in California which had been brought in breach of an agreement not to bring any action i.e. an anti-suit agreement.

In the decision in *Sunrock Aircraft Corp Ltd v Scandinavian Airline Systems Denmark-Norway-Sweden*⁵⁷⁹ the Court of Appeal noted that:⁵⁸⁰

It is established that damages can be awarded for a loss incurred by the failure to comply with the terms of an exclusive jurisdiction clause or alternative dispute resolution clause: for example, in *Union Discount v Zoller* [2002] 1 WLR 1517, this court held that a party was entitled to claim as damages the costs reasonably incurred by it in foreign proceedings which had been brought in breach of an exclusive jurisdiction clause.

Commenting on the line of English judicial authority quoted above, Briggs submits that ‘The proposition appears to have gone from novelty to banality in a very short time.’⁵⁸¹ However, it is submitted that the damages remedy for breach of exclusive jurisdiction agreements in the English courts is at a phase in its development where clarification is needed in the more doubtful ‘penumbral’⁵⁸² cases.⁵⁸³ For instance, Black notes that most of these cases recognise the new cause of action only inferentially or in *obiter*.⁵⁸⁴ Similarly, Tett is sceptical of the damages remedy and opines that it ‘is not free from doubt’.⁵⁸⁵

This is evident from the present state of the law which is ambivalent as to the full implications of whether this new stream of cases permits an action to be started to claw

⁵⁷⁷ [2003] EWHC 797 (Comm).

⁵⁷⁸ [2007] EWHC 1056 (Comm).

⁵⁷⁹ [2007] EWCA Civ 882.

⁵⁸⁰ *Ibid* at [37].

⁵⁸¹ Briggs, *Agreements* (n 564) 307.

⁵⁸² See HLA Hart, *The Concept of Law* (2nd Ed, Clarendon Press, OUP 1994) 121-150; HLA Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71 *Harvard Law Review* 593.

⁵⁸³ Takahashi (n 560) 58: ‘The remedy is at an early stage of development’; James Ruddell, ‘Monetary Remedies for Wrongful Foreign Proceedings’ [2015] *LMCLQ* 9, 12, comments that ‘much of the jigsaw remains incomplete’ in relation to the development of the damages remedy for breach of jurisdiction agreements.

⁵⁸⁴ Vaughan Black, ‘Review Essay of *Agreements on Jurisdiction and Choice of Law*’ [2010] *Canadian Business Law Journal* 300, 306.

⁵⁸⁵ Richard Tett, ‘*Donohue v Armco*: A Sensible and Pragmatic Approach to Anti-suit Injunctions’ 109 (2003) *British Insurance Law Association Journal* 7, 14.

back substantive damages (over and above costs) which had been ordered to be paid by the non-contractual forum after a decision on the merits of the claim. Furthermore, the damages remedy for breach of an exclusive jurisdiction agreement is as yet untested in the context of the European Union's Brussels I Regulation. At the outset, it seems that the damages remedy will not take root and make much headway before the pre-dominantly civilian Court of Justice of the European Union with its strong emphasis on the primacy of the doctrine of mutual trust between the courts and institutions of the Member States of the EU. Quantification of damages also presents a significant practical impediment to the rational development of the remedy. The interaction of the availability of the remedy with principles of *res judicata* and the finality of international dispute resolution also cannot be ignored.

Before moving on towards a detailed assessment of the dynamics of the damages remedy in theory and practice, it is worth noting a significant decision of the Spanish *Tribunal Supremo* (Supreme Court) with potentially far reaching ramifications concerning the fundamental nature and consequences of choice of court agreements.⁵⁸⁶ Summarizing the facts, a contract was concluded between a Spanish company and a foreign company and under Clause 14 of the agreement, they agreed to submit any dispute arising from the contract to the courts of Barcelona, and chose the law of Spain as the applicable law. The Spanish company sued the other contracting party in Florida, USA and this initiation of proceedings in a non-chosen forum, as per common law principles at least, is tantamount to a breach of contract, and resulted in the incurrence of extra costs (such as fees for local lawyers hired). The crucial question confronting the Spanish courts was whether a conception of a choice of court agreement analogous to the English common law's pragmatic approach of a wronged party being able to recover compensation for breach of a choice of court agreement could be invoked from within the Spanish civil law legal system. It should be noted that, the instant case is outside the scope of application of the Brussels I Regulation and that Spain has no

⁵⁸⁶ *Sogo USA Inc v Angel Jesus*, STS (Sala de lo Civil, Sección 1ª), 12 January 2009, Repertorio de Jurisprudencia 2009/544; See Marta Requejo, 'On the Value of Choice of Forum and Choice of Law Clauses in Spain' (Conflictoflaws.net, 24 April 2009) <<http://conflictoflaws.net/2009/on-the-value-of-choice-of-forum-and-choice-of-law-clauses-in-spain/>> accessed 15 February 2014; Santiago Alvarez Gonzalez, 'The Spanish Tribunal Supremo Grants Damages for Breach of a Choice of Court Agreement' [2009] *IPRax* 529; Miguel Torres, 'USA Sogo Inc v Angel Jesus: Case Comment' (2009) 20 *International Company and Commercial Law Review* 44; Koji Takahashi, 'Damages for Breach of a Choice of Court Agreement: Remaining Issues' (2009) 11 *Yearbook of Private International Law* 73, 77; Adrian Briggs, 'What should be done about Jurisdiction Agreements' (2010) 12 *Yearbook of Private International Law* 311, 324; Sara Sanchez Fernandez, 'Choice of Court Agreements: Breach and Damages within the Brussels I Regime' (2010) 12 *Yearbook of Private International Law* 377, 382-385.

agreement on recognition and enforcement of judgments in civil and commercial matters with the United States of America.⁵⁸⁷

On 12th January 2009, the *Tribunal Supremo* did award the damages remedy for breach of the choice of court agreement to the wronged party. Apart from the English courts, this is the first or at least one of the first decisions in Europe to deal with this controversial issue at the highest appellate level.⁵⁸⁸ In the process, the *Tribunal Supremo* overturned two prior rulings of the Court of First Instance (*Juez de Primera Instancia*) and Court of Appeals (*Audiencia Provincial*) respectively, both of which had favoured the procedural character of the choice of court agreement. Under the procedural conception of a choice of court agreement, the breach of such an agreement does not give rise to a claim for damages.

The inconsistency between the decision of the *Tribunal Supremo* on the one hand and the lower courts on the other can be attributed to the ongoing debate in the Spanish legal system over the proper and legitimate characterization of a choice of forum clause.⁵⁸⁹ For the Court of First Instance and the Spanish company, the jurisdiction agreement is not part of the substantive contract, nor is it a contract itself; on the contrary, it is an agreement of an adjectival or procedural nature. Its breach (the non-submission of the parties to the nominated court) has a restrictive effect: depending on the willingness of the counterparty, the claim before the non-chosen court will not be decided by that court. The law provides no other penalty for failure to comply with the clause.

The Court of Appeals followed the Court of First Instance's opinion, noting that: "the principle of contractual freedom does not work the same way in cases where only private interests are at stake, and in case of procedural covenants to submit to jurisdiction", the latter having limitations of a public-procedural order; "agreements of contractual contents (economic agreements) and procedural covenants to submit to jurisdiction cannot be assimilated"; "the pact to submit to a certain jurisdiction is a subsidiary one; it only comes into play when the contract has to be enforced or interpreted." The Court also said that there is no causal link between the breach of the covenant and the damages claimed by the foreign company in Spain: these damages being due for the proceedings before the Courts of

⁵⁸⁷ Alvarez Gonzalez (n 586) 529.

⁵⁸⁸ *ibid* 529; STS (Civil) 23 February 2007, Repertorio de Jurisprudencia 2007/2118 was the first case where damages were awarded by the Tribunal Supremo for breach of a Spanish choice of court agreement. However, it is the 2009 decision that shows an awareness of the complex issues raised by such a case.

⁵⁸⁹ Requejo, *On the Value of Choice of Forum and Choice of Law Clauses in Spain* (n 586).

Florida, they must be labelled as “costs of the proceedings” (legal costs); and only the Florida Court could determine the costs to be paid.

The claimant’s (the foreign company) thesis, relying on Spanish and foreign academics, is the opposite: the choice of forum agreement should be treated like any other substantive contractual clause. The claimant also reiterated the fact that there was a Spanish choice of law agreement over and above the choice of court agreement for the courts of Barcelona. Finally, the claimant averred bad faith on part of the defendant. The sole purpose of the defendant’s claim (of several hundred million dollars) in Florida was to cause injury and to intimidate the claimant.

The *Tribunal Supremo* ruled in favour of the claimant. The court expressly stated that “[the choice of forum agreement] is incorporated to the contractual relationship as one of the rules of conduct to be observed by the parties; it creates a duty (albeit an accessory one); failure to comply with it (...) must be judged in relation to the significance that such failure may have in the economy of the contract, as this Court has consistently maintained (...) that breaches determining the economic frustration of contract for one party are to be regarded as having substantial meaning (...)”. The *Tribunal Supremo* goes on saying that “(...) in the instant case, the choice of the applicable law and jurisdiction may have been crucial when deciding whether to establish the relationship. If so, they would have clear significance for the economy of the contract, given that Spanish law establishes a concrete contractual framework for the assessment of damages (for instance, it excludes punitive damages, which on the contrary may be awarded under the law of the United States of America);” “ The conscious breach of the covenant, raising a claim where the law of the U.S. was to applied (...) and asking for punitive damages , has created the counterparty the need for a defense, generating costs that go beyond the predictable expenses in the normal or the pathological development of the contractual relationship”.

Finally, the *Tribunal Supremo* denied that costs can only be imposed by the court in Florida. In this regard, the *Tribunal Supremo* said that neither the attorneys’ fees nor other damages claimed by the claimant are considered “costs” in the U.S. The *Tribunal Supremo* also added that even if they were to be deemed so, this would not have hindered the claim for damages for breach of contract: the only effect would have been the reduction of the amount that could be claimed. Hence the *Tribunal Supremo* quashed the Court of Appeal ruling, without

entering to determine whether the Spanish company acted in bad faith or with abuse of her right to litigate.

Recent English Court of Appeal decisions further illustrate the proactive stance adopted by the English courts in protecting and enforcing jurisdiction agreements.⁵⁹⁰ In *Bank St Petersburg OJSC & Anor v Arkhangelsky & Ors*, the contracting parties had agreed that the substantive dispute between them was to be resolved exclusively in England,⁵⁹¹ the Court of Appeal was prepared to grant an anti-enforcement injunction to prevent the claimants from breaching the relevant jurisdiction agreement by attempting to enforce Russian judgments concerning the same matters that were now before the English courts.⁵⁹² Counsel for the claimants stated that the only example of the grant of an anti-enforcement injunction by the English courts was in the case of *Ellerman Lines v Read*.⁵⁹³ The case falls outside the ambit of the Brussels I Regulation as the Russian judgments originate from outside the European Union and the jurisdiction agreement is agreed between two non EU domiciliaries.⁵⁹⁴ Therefore, the prohibition on anti-suit injunctions within the European Judicial Area will not preclude or even act as an impediment to the enforcement of the private law rights and obligations of the parties in relation to the exclusive jurisdiction agreement.⁵⁹⁵ There is an argument that an anti-enforcement injunction may be permitted under the Brussels I Regulation (Recast) as it does not interfere with another Member State court's right to determine its own jurisdiction and could be employed to postpone enforcement of a Member State court judgment in breach of an arbitration agreement until a proper determination of the substantive issues in dispute by the arbitral tribunal.⁵⁹⁶ Nevertheless, the right of a Member State court to determine its own jurisdiction is arguably an emanation of the mutual trust principle which is premised on the simplified system for the mutual

⁵⁹⁰ *Bank St Petersburg OJSC & Anor v Arkhangelsky & Ors* [2014] EWCA Civ 593, [2014] 1 CLC 670 (Longmore LJ with whom Kitchin LJ and McCombe LJ concurred) (anti-enforcement injunction); *Caresse Navigation Ltd v Zurich Assurances MAROC ('The Channel Ranger')* [2014] EWCA Civ 1366 (anti-suit injunction); cf *Royal Bank of Scotland Plc v Highland Financial Partners LP* [2013] EWCA Civ 328 (Appellant refused anti-suit injunction on the basis of the 'unclean hands' defence).

⁵⁹¹ [2014] EWCA Civ 593, [2014] 1 CLC 670 [28].

⁵⁹² *Ibid* [29]; See *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, [2013] 1 WLR 1889, [25]-[27] (Lord Mance).

⁵⁹³ *Bank St Petersburg OJSC & Anor v Arkhangelsky & Ors* [2014] EWCA Civ 593, [2014] 1 CLC 670, [36]; *Ellerman Lines v Read* [1928] 2 KB 144 (CA).

⁵⁹⁴ Article 23(3) of the Brussels I Regulation; cf Article 25(1) of the Brussels I Regulation (Recast).

⁵⁹⁵ *Turner v. Grovit* (Case C-159/02) [2005] ECR I-3565; [2004] 2 Lloyd's Rep 169; *West Tankers Inc v Allianz SpA ('The Front Comor')* (Case C 185/07) [2009] 1 AC 1138.

⁵⁹⁶ Simon P Camilleri, 'Recital 12 of the Recast Regulation: A New Hope?' (2013) 62 *ICLQ* 899, 906-907, regards anti-enforcement injunctions as compatible with the CJEU's reasoning in *West Tankers* but considers such injunctive relief as a 'remedy without any teeth'.

recognition of civil and commercial judgments in Europe. The anti-enforcement injunction actually hampers the cross border recognition and enforcement of judgments and may fall foul of the principle of mutual trust and the effectiveness of EU law (*effet utile*).

It is now time to examine two recent English Court of Appeal decisions which have adjudicated upon the validity of the damages remedy in the context of the Brussels I Regulation. Commensurate to the significance of these significant decisions, separate sections now proceed to grapple with whether and to what extent the decision is faithful to the principle of mutual trust underlying and animating the European Union law of international civil procedure.

The English Court of Appeal Validates the Damages Remedy for Breach of English Exclusive Jurisdiction Agreements: The Principle of Mutual Trust and Interference with the Effectiveness of the Multilateral Jurisdiction and Judgments Order of the Brussels I Regulation?

The damages remedy for breach of an exclusive choice of court agreement is as yet untested in the context of the Brussels I Regulation by the Court of Justice of the European Union and the matter has not been addressed by the European legislature. However, the English Court of Appeal has recently awarded damages for breach of a choice of court agreement in a case falling within the ambit of the Brussels I Regulation in *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG (The Alexandros T)*.⁵⁹⁷ At the outset, it should be noted that, the decision is controversial as the systemic implications of the pragmatic remedy may affect the operation of the multilateral jurisdiction and judgments regime established by the Brussels I Regulation.

In brief, the initial proceedings arose from the loss of the vessel *The Alexandros T* off the coast of South Africa. In 2006, Starlight sued the insurers in England. Starlight's claim was denied by the insurers on the basis that the vessel was unseaworthy with the privity of Starlight. In response, Starlight made a number of serious allegations against the insurers including allegations of misconduct involving tampering with and bribing of witnesses. These proceedings settled pursuant to Tomlin orders, and the settlement agreements contained English exclusive jurisdiction clauses. However, in 2009 Starlight launched nine sets of proceedings in Greece against the insurers, reiterating the same allegations that had been raised and settled in England, although they were expressed as torts actionable in Greece. In 2011, the insurers applied to the English courts to enforce the terms of the 2006 settlements, and brought new proceedings in England for damages, an indemnity and declarations concerning the breach of that settlement. Starlight applied for a stay of these proceedings, firstly pursuant to Article 28⁵⁹⁸ then Article 27⁵⁹⁹ of the Brussels I Regulation.⁶⁰⁰

⁵⁹⁷ *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG (The Alexandros T)* [2014] EWCA Civ 1010 (Longmore LJ with whom Rimer LJ and Lord Toulson agreed); See M Ahmed, 'The enforcement of settlement and jurisdiction agreements and parallel proceedings in the European Union: *The Alexandros T* litigation in the English courts' (2015) 11 *Journal of Private International Law* 406, 433-439; Martin Illmer, 'English Court of Appeal confirms Damages Award for Breach of a Jurisdiction Agreement' (Conflictolaws.net, 31 July 2014) <<http://conflictolaws.net/2014/english-court-of-appeal-confirms-damages-award-for-breach-of-a-jurisdiction-agreement/>> accessed 31 July 2014; Andrew Dickinson, 'Once Bitten – Mutual Distrust in European Private International Law' (2015) 131 *LQR* 186; Ruddell (n 583).

⁵⁹⁸ Article 28 (Brussels I Regulation)

The judge refused to grant a stay under Article 28 and gave summary judgment to the insurers.⁶⁰¹ The Court of Appeal held that it was bound to stay the 2006 proceedings under Article 27, which provides for a mandatory stay, and it was not therefore necessary to reach a final determination of the position under Article 28.⁶⁰² Before the Supreme Court of the UK, the insurers challenged the correctness of the Court of Appeal's conclusion under Article 27 and submit that the judge was correct to refuse a stay under Article 28.

In principle, a claim in damages for breach of a choice of court agreement is distinct and separate from the substantive claim in the foreign court which infringes the agreement. The UK Supreme Court concluded that such a claim is not prevented by Article 27 of the Brussels I Regulation (Article 29 of the Recast Regulation).⁶⁰³ The claim may fall within Article 28 of the Brussels I Regulation (Article 30 of the Recast Regulation), being a related action, but the Supreme Court confirmed the line of authority that the existence of the choice of court agreement has the effect that a court will not exercise its discretion to stay its

1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.

2. Where these actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.

3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

⁵⁹⁹ Article 27 (Brussels I Regulation)

1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

⁶⁰⁰ Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) [2001] OJ L12/1 ('Brussels I Regulation'). In accordance with Article 81 of the Brussels I Regulation (Recast), the Recast Regulation shall apply as of 10 January 2015 to legal proceedings instituted (and to judgments rendered) on or after that date. As *The Alexandros T* litigation in the English courts was governed by the Brussels I Regulation, reference to its articles is supplemented by the Recast Regulation's closest equivalent provisions in the footnotes. New provisions and provisions that override aspects of the operation of the Brussels I Regulation in relation to parallel proceedings and the enforcement of jurisdictional party autonomy in the EU are considered in the course of examining the UK Supreme Court decision.

⁶⁰¹ *Starlight Shipping Co v Allianz Marine & Others* [2011] EWHC 3381 (Comm); [2012] 1 Lloyd's Rep 162 (Burton J).

⁶⁰² *Starlight Shipping Co v Allianz Marine & Others* [2012] EWCA Civ 1714; [2013] 1 Lloyd's Rep 217 (Longmore, Toulson and Rimer LJ).

⁶⁰³ *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG (The Alexandros T)* [2013] UKSC 70 (Lords Neuberger, Mance, Clarke, Sumption and Hughes); *Continental Bank NA v Aeakos Compania Naviera SA* [1994] 1 WLR 588, 595H-596C (Steyn LJ) (giving the judgment of the Court of Appeal); *Alfred C Toepfer International GmbH v Molino Boschi Sarl* [1996] 1 Lloyd's Rep 510, 513 (Mance J); *Toepfer International GmbH v Société Cargill France* [1997] 2 Lloyd's Rep 98, 106 (Colman J); *Sinco*, [50] and [54] (Beatson J); *WMS Gaming Inc v Benedetti Plus Giocolegale Ltd* [2011] EWHC 2620 (Comm), [32] (Simon J).

proceedings.⁶⁰⁴ As a result, proceedings in both the English and the Greek courts were allowed to continue in parallel.

Thereafter, the case was remitted back to the Court of Appeal for adjudication on the substantive issues and the court has handed down its judgment.⁶⁰⁵ Although, the Court of Appeal's judgment builds upon the prior decision of the UK Supreme Court on the issue of Articles 27 and 28 of the Brussels I Regulation – in particular, the finding of the Supreme Court that the claims in the two proceedings did not concern the same cause of action – it is likely that the Court of Appeal would have reached the same decision even if the Article 27 issue was not raised and adjudicated upon in the first place. The court decided that the Greek proceedings fell within the scope of the jurisdiction provisions of the underlying insurance contract and the settlement agreement. The Court of Appeal has upheld the ruling of Burton J at first instance by granting declarations and damages for breach of English exclusive jurisdiction agreements. However, the full repercussions of the English judgment granting damages for breach of an exclusive jurisdiction agreement for the jurisdiction of the Greek court were not discussed by Longmore LJ.⁶⁰⁶

In the UK Supreme Court judgment, Lord Clarke had expressed the opinion that a final judgment of the English courts will be recognisable in Greece and will assist the Greek court.⁶⁰⁷ Therefore, he opined that the principles of mutual trust upon which the Brussels I Regulation is founded will be respected and the risk of irreconcilable judgments will be eliminated. However, in practical terms the Court of Appeal's judgment awarding damages reassesses and nullifies or reverses the effect of the foreign proceedings. On the expectation measure, the damages award would recoup the loss sustained in terms of the costs of the proceedings and claw back any substantive damages awarded in the foreign proceedings.

⁶⁰⁴ *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG (The Alexandros T)* [2013] UKSC 70; *Nomura International Plc v Banca Monte Dei Paschi Di Siena SpA* [2013] EWHC 3187 (Comm) (Eder J); *JP Morgan Europe Ltd v Primacom AG* [2005] 2 Lloyd's Rep 665 (Cooke J); *Nordea Bank Norge ASA, Vasonia Shipping Company Limited v Unicredit Corporate Banking SpA, Banca di Roma SpA* (2011) EWHC 30 (Comm) (Gloster J); JJ Fawcett and JM Carruthers, *Cheshire, North & Fawcett: Private International Law* (14th Ed, Oxford University Press 2008) 315; R Fentiman, *International Commercial Litigation* (2nd Edition, OUP 2015) 398; R Fentiman, *International Commercial Litigation* (OUP 2010) 449; R Fentiman in U Magnus and P Mankowski, *Brussels I Regulation* (2nd Edition, Sellier European Law Publishers 2012) 602-603; Thalia Kruger, *Civil Jurisdiction Rules of the EU and their Impact on Third States* (Oxford Private International Law Series, OUP 2008) 309-311; cf Jonathan Hill and Adeline Chong, *International Commercial Disputes: Commercial Conflict of Laws in English Courts* (4th Revised Ed, Hart Publishing 2010) 291; David Joseph QC, *Jurisdiction and Arbitration Agreements and their Enforcement* (2nd Edition, Sweet & Maxwell, London 2010) 494-495.

⁶⁰⁵ [2014] EWCA Civ 1010 (Longmore LJ with whom Rimer LJ and Lord Toulson agreed).

⁶⁰⁶ *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG (The Alexandros T)* [2014] EWCA Civ 1010 [15]-[17] (Longmore LJ).

⁶⁰⁷ *The Alexandros T* [2013] UKSC 70; [2014] 1 All ER 590; [2014] 1 Lloyd's Rep 223, [96] (Lord Clarke).

Nullifying or reversing the effect of the foreign judgment is undoubtedly contrary to the principle of mutual trust and the obligation not to question the jurisdiction of another Member State court⁶⁰⁸ (which emanates from the principle of mutual trust). The multilateral double convention framework of common rules of direct jurisdiction and the resulting simplified regime for the recognition and enforcement of Member State judgments is firmly anchored to the principle of mutual trust. An award of damages would reverse the effects of a Member State judgment and indirectly subvert Article 27 of the Brussels I Regulation by questioning the assumption of jurisdiction by the court first seised.⁶⁰⁹ Given the effect of Article 27, a party is entitled to test the validity and effect of the jurisdiction agreement in any Member State court.⁶¹⁰ Arguably, to penalize such conduct would undermine that party's right to seise its preferred court, embodied in Article 27. It might also be characterized as an assault on the entitlement of that court to determine whether it has jurisdiction.⁶¹¹ In similar vein, declarations for breach of English exclusive jurisdiction agreements may also infringe the mutual trust principle. A declaratory order stating that English exclusive jurisdiction agreements have been breached implies that proceedings in other Member State courts within the scope of the jurisdiction provisions are wrongfully pursued. A declaratory order explicitly stating that proceedings in another Member State are in breach or blatantly in breach of an English exclusive jurisdiction agreement are even more confrontational and necessarily at odds with the mutual trust principle. As observed, Article 27 of the Brussels I Regulation allows a party to test the jurisdiction agreement in any Member State court. As such, the declaratory relief might also be characterized as an assault on the entitlement of a Member State court to determine whether it has jurisdiction. However, arguably, a declaration raises far fewer mutual trust concerns than an anti-suit injunction or the damages remedy in similar circumstances. A declaration that an exclusive choice of court agreement is binding will provide an effective anticipatory defence to recognition of a judgment obtained in breach of the clause.⁶¹² Declaratory relief has been employed as a shield to deny recognition to a judgment from another Member State court in

⁶⁰⁸ Case C-351/89 *Overseas Union Insurance Ltd v New Hampshire Insurance Company* [1991] ECR I-3317, [23]-[25].

⁶⁰⁹ Fentiman, *International Commercial Litigation* (2015) (n 604) 120; Fentiman, *International Commercial Litigation* (2010) (n 604) 88-90.

⁶¹⁰ See Case C-116/02 *Erich Gasser GmbH v. MISAT Srl*. [2003] ECR I-14693.

⁶¹¹ Case C 159/02 *Turner v Grovit* [2005] 1 AC 101.

⁶¹² Under the English common law jurisdictional regime, the declaration will establish that Section 32 of the Civil Jurisdiction and Judgments Act 1982 applies, unless there was submission to the jurisdiction of the foreign court.

breach of an English arbitration agreement.⁶¹³ Declarations that a clause is contractually binding may also provide a springboard for claims for damages; and depending on the private international law rules of the foreign court, may be used to establish a *res judicata* abroad.⁶¹⁴

Even though the UK Supreme Court has held that Articles 27 and 28 of the Brussels I Regulation are not applicable and that the English and Greek proceedings do not share the same cause of action, the judgment of the Court of Appeal may still interfere with the right of the Greek court to determine its jurisdiction and may render the continuance of the Greek proceedings or for that matter the institution of any other foreign proceedings futile as any potential sum recovered under a future Greek or other foreign judgment would have to be reversed, clawed back and used to indemnify the insurers as a breach of the English exclusive jurisdiction agreements. Thus, the damages award may have a restraining or preclusive effect on the foreign proceedings very similar to an anti-suit injunction. It may be argued that if the specific performance of a jurisdiction agreement can no longer be granted due to the constraints imposed by the European Union law of international civil procedure, the common law remedy of damages may equally not be awarded.⁶¹⁵ After all both anti-suit injunctions and the damages remedy for breach of choice of court agreements are grounded on the same contractual right not to be sued in a non-elected forum.⁶¹⁶ Therefore, if the

⁶¹³ *West Tankers v Allianz* [2011] EWHC 829 (Comm); *West Tankers v Allianz* [2012] EWCA Civ 27.

⁶¹⁴ Thomas Raphael, *The Anti-Suit Injunction* (Oxford Private International Law Series, OUP 2008) 344-345; Alexander Layton, 'The Prohibition on Anti-Suit Injunctions and the Relationship Between European Rules on Jurisdiction and Domestic Rules on Procedure' in Pascal de Vareilles-Sommieres (ed.), *Forum Shopping in the European Judicial Area* (Hart Publishing, Oxford 2007) 91, 97.

⁶¹⁵ For a similar contention in relation to damages for breach of an arbitration agreement as being incompatible with the Brussels I Regulation and the CJEU's interpretation in the *West Tankers* decision, see, Martin Illmer, 'Chapter 2 – Article 1' in Andrew Dickinson and Eva Lein (eds.), *The Brussels I Regulation Recast* (OUP 2015) 79.

⁶¹⁶ *Donohue v Armco Inc.* [2001] UKHL 64, [2002] 1 All ER 749, [36] (Lord Bingham of Cornhill), [48] (Lord Hobhouse of Woodborough); The breach of an arbitration agreement, if it is governed by English law, also gives a right to damages: See *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, [2013] 1 WLR 1889, [25] (Lord Mance); In Case C-536/13 *Gazprom OAO* ECLI:EU:C:2015:316, the Grand Chamber of the CJEU adjudicated that the Brussels I Regulation does not preclude a court of a Member State from recognising and enforcing, or from refusing to recognise and enforce an arbitral award prohibiting a party from bringing certain claims before a court of that Member State since the Regulation does not govern the recognition and enforcement in a Member State of an arbitral award issued by an arbitral tribunal in another Member State; The CJEU's ruling in *Gazprom* retrospectively confirms the decision in *West Tankers Inc. v Allianz SpA* [2012] EWHC 854 (Comm) [78], where Flaux J determined that the arbitral tribunal 'was not deprived, by reason of European law, of the jurisdiction to award equitable damages for breach of the obligation to arbitrate.'; cf Hartley had casted doubt on Flaux J's decision and argued that imposing damages for suing in the 'wrong' court would prevent the party concerned from even trying to sue in the other Member State: 'Such a ruling would be an antisuit injunction in all but name.' See TC Hartley, 'The Brussels I Regulation and Arbitration' (2014) 63 *ICLQ* 843, 862-864; cf On the contrary, *Gazprom* endorses the view that an arbitral tribunal may award damages because the Brussels I Regulation recognises that a tribunal has a freedom which is not extended to a court in a Member State, see *CMA CGM SA v Hyundai Mipo Dockyard Co Ltd* [2008] EWHC 2792 (Comm), [2009] 1 Lloyd's Rep 213 (Burton J); cf For a more cautious doubting the veracity of Burton J's

intrusive anti-suit injunction enforcing the underlying contractual right not to be sued in a non-elected forum falls foul of the European Union law of international civil procedure, the damages remedy may also succumb to a similar fate. Even if a procedural characterization of anti-suit injunctions is preferred, the availability of damages *in lieu* or in addition to specific performance also highlights the concomitant and coextensive nature of the remedies.⁶¹⁷ The overarching principle of mutual trust and the principle of the effectiveness of Regulation are undermined by the Court of Appeal's judgment as the English court is seeking to force its own view on the validity and effectiveness of the settlement and jurisdiction agreements on the Greek court. As a result, the Greek court's right to determine its own procedural jurisdiction (*kompetenz-kompetenz*) and to rule on the substance of the case may be overridden by the recognition of the Court of Appeal's judgment in the Greek courts under Chapter III of the Brussels I Regulation.

From the perspective of effective dispute resolution, it should be noted that dispute resolution is itself undermined if the English courts attempt to re-open or second guess a foreign court's decision on the basis that the English court is the chosen venue. The dispute is effectively protracted⁶¹⁸ and not resolved with the incidence of satellite or sub-litigation and the increased potential for conflicting Member State judgments.⁶¹⁹ For the litigants,

reasoning, see *National Navigation Co v Endesa Generacion SA (The Wadi Sudr)* [2009] EWCA Civ 1397, [2010] 1 Lloyd's Rep 193, [54]-[56] (Waller LJ), [115]-[118] (Moore-Bick LJ); cf However, the pragmatic CJEU ruling in *Gazprom* and paragraph 2 of Recital 12 of the Recast Regulation will reverse the Court of Appeal's decision in *The Wadi Sudr* by liberally construing the arbitration exception; See A Briggs, *Private International Law in English Courts* (OUP 2014) 1000; The Swiss Bundesgericht (Case No 4A_232/2013 of 30 September 2013) has also upheld an arbitral award which granted damages for breach of an arbitration agreement. The arbitral tribunal was composed of Michael M Collins, Lord Hoffmann, and Pierre-Yves Gunter. See Matthias Scherer, 'Damages as a Sanction for Commencing Court Proceedings in Breach of an Arbitration Agreement' (Kluwer Arbitration Blog, 21 February 2014) <<http://kluwerarbitrationblog.com/blog/2014/02/21/damages-as-a-sanction-for-commencing-court-proceedings-in-breach-of-an-arbitration-agreement/>> accessed 30 May 2015.

⁶¹⁷ See Section 50 of the Senior Courts Act 1981 (England & Wales) which restates the powers originally granted to the Court of Chancery by Section 2 of the Chancery Amendment Act 1858, commonly known as the Lord Cairns' Act.

⁶¹⁸ Arnaud Nuyts, 'The Enforcement of Jurisdiction Agreements Further to *Gasser* and the Community Principle of Abuse of Right' in Pascal de Vareilles-Sommieres (ed.), *Forum Shopping in the European Judicial Area* (Hart Publishing, Oxford 2007) 57.

⁶¹⁹ Andrew Dickinson, 'Brussels I Review – Choice of Court Agreements' (Conflictflaws.net, 11 June 2009) <<http://conflictflaws.net/2009/brussels-i-review-choice-of-court-agreements/>> accessed 15 December 2014; Andrew Dickinson, 'Response to the Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters' (Europa.eu, 30 June 2009) <http://ec.europa.eu/justice/news/consulting_public/0002/contributions/civil_society_ngo_academics_others/mr_andrew_dickinson_en.pdf> accessed 15 December 2014, para 24; Response of the Law Society of England and Wales, Review of Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters – "Brussels I" (Europa.eu, July 2009) <http://ec.europa.eu/justice/news/consulting_public/0002/contributions/civil_society_ngo_academics_others

protracted litigation will result in higher costs and expenses.⁶²⁰ To quote Briggs, ‘In other words, litigation about where to litigate will be replaced by litigation about where the litigation should have taken place.’⁶²¹ However, there is a strong argument that litigation about where litigation should have taken place is neither an efficient nor effective method of dispute resolution in international commercial litigation.⁶²² Above all, the damages remedy fails to deliver what many potential claimants desire most, particularly in an action in debt; it cannot deliver prompt, summary judgment on the merits in the agreed court.⁶²³ Hence, damages for breach of a forum selection agreement and their deterrent value are a ‘second-best solution’ to a uniform EU wide mechanism for the avoidance of parallel proceedings *ab initio*, as was suggested in the Commission proposal.⁶²⁴ Where available, an anti-suit injunction is likely to be a commercial litigant’s preferred option.⁶²⁵

Notwithstanding any arguments to the contrary, the Court of Appeal held that the claims for declarations and damages for breach of the exclusive jurisdiction agreements did not breach EU law even though the matter has not yet been adjudicated upon by the CJEU nor resolved by EU legislation. Moreover, it considered it unnecessary to send a preliminary reference

[/law_society_england_wales_en.pdf](#) > accessed 15 December 2014, para 12; cf Bar Council of England and Wales’ Response to the Brussels I Regulation Green Paper, para 3.9.

⁶²⁰ Dickinson, *Brussels I Review – Choice of Court Agreements* (n 619); Dickinson, *Response to the Green Paper* (n 619).

⁶²¹ Adrian Briggs, ‘The Impact of Recent Judgments of the European Court on English Procedural Law and Practice’ (2005) Vol. II, No. 124 *Zeitschrift für Schweizerisches Recht* 231-262; Oxford Legal Studies Research Paper No. 11/2006 <Available at SSRN: <http://ssrn.com/abstract=899689>> accessed 15 December 2014, 20.

⁶²² See Luboš Tichý, ‘Protection against Abuse of Process in the Brussels I Review Proposal?’ in Eva Lein (ed.), *The Brussels I Review Proposal Uncovered* (BIICL, London 2012) 103, 189: Professor Tichý refers to the damages remedy as ‘a weak consolation’ due to the need for separate enforcement proceedings; For a similar argument in relation to the inadequacy of the damages remedy for breach of an arbitration agreement in the English courts, see, *Sheffield United Football Club Ltd v West Ham United Football Club plc* [2008] EWHC 2855 (Comm), [22] (Teare J): ‘However, it is well established that the remedy of damages is not regarded as an adequate remedy for breach of an arbitration clause’; *Starlight Shipping Co v Tai Ping Insurance Co* [2007] EWHC 1893 (Comm), [12] (Cooke J): ‘Damages would, for all the reasons given in the authorities, be an inadequate remedy for breach of such a clause since its very nature requires the parties to have their disputes determined in arbitration. A party to such an agreement should not be put to the trouble of having disputes determined elsewhere in a manner contrary to the express contract between the parties’; See Gary B Born, *International Commercial Arbitration* (2nd Edition, Kluwer Law International 2014) Chapter 8, 1304: ‘It was frequently (and correctly) remarked, however, that damages for breach of an arbitration agreement are an uncertain and inadequate means of enforcement’; Nigel Blackaby and Constantine Partasides with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (5th Edition, OUP 2009) 20: ‘an agreement to arbitrate is a contract of imperfect obligation. If it is broken, an award of damages is unlikely to be a practical remedy, given the difficulty of quantifying the loss sustained’.

⁶²³ Fentiman, *International Commercial Litigation* (2010) (n 604) 90; Richard Fentiman, ‘Parallel Proceedings and Jurisdiction Agreements in Europe’ in Pascal de Vareilles-Sommieres (ed.), *Forum Shopping in the European Judicial Area* (Hart Publishing, Oxford 2007) 45; Fentiman, *International Commercial Litigation* (2015) (n 604) 113.

⁶²⁴ Illmer, *The Brussels I Regulation Recast* (n 615) 80 (discussing damages for breach of arbitration agreements but the same analysis applies to damages for breach of jurisdiction agreements by parity of reasoning).

⁶²⁵ Fentiman, *International Commercial Litigation* (2015) (n 604) 113; A Briggs, *Private International Law in English Courts* (OUP 2014) 399; Stephen Males, ‘Comity and Anti-Suit Injunctions’ [1998] *LMCLQ* 543, 550.

under Article 267 TFEU to the CJEU on the legality and legitimacy of the declarations and damages remedy in the European Judicial Area despite repeated requests from Starlight.⁶²⁶ It may be argued that this issue did warrant a preliminary reference to the CJEU as it would have helped clarify whether the CJEU's ruling in *Turner v Grovit* does preclude the recovery of damages for breach of an exclusive jurisdiction agreement. Had a preliminary reference on the issue been sent to the CJEU, the answer received would have probably been very different from the one delivered by the Court of Appeal.⁶²⁷ It is highly unlikely that the CJEU would have favoured a contractual remedy for the European conflicts of jurisdiction which has made its way through the back door as an ingenious alternative to the defunct anti-suit injunction.⁶²⁸ With the *Gasser* loophole closed, the prospects of a party pleading a sham

⁶²⁶ The English courts, in the litigation that followed the CJEU's *West Tankers* ruling, appear to be very reluctant to refer matters to the CJEU for a preliminary ruling. It seems that the negative perception of the CJEU's decisions in *West Tankers*, *Turner*, and *Gasser* in the eyes of the English courts may have a part to play in this reluctance to refer matters for a preliminary ruling. Moreover, the English courts may wish to continue to rely on alternatives to anti-suit injunctions regardless of their potential incompatibility with the Brussels I Regulation as interpreted by the CJEU. See Illmer, *English Court of Appeal Confirms Damages Award for Breach of a Jurisdiction Agreement* (n 597); Dickinson, *Once Bitten – Mutual Distrust in European Private International Law* (n 597) 190-191.

⁶²⁷ See Albert Dinelli, 'The Limits on the Remedy of Damages for Breach of Jurisdiction Agreements: The Law of Contract Meets Private International Law' [2015] *MelbULawRw* 9; (2015) 38 *Melbourne University Law Review* 1023, 1028.

⁶²⁸ See Illmer, *The Brussels I Regulation Recast* (n 615) 79; Gilles Cuniberti and Marta Requejo, 'La sanction des clauses d'élection de for par l'octroi de dommages et intérêts', *ERA Forum* 2010-1 (SSRN, February 18, 2010) <<http://ssrn.com/abstract=1689417>> or <<http://dx.doi.org/10.2139/ssrn.1689417>> accessed 15 December 2014; Briggs, *Agreements* (n 564) Chapter 8, 330-338; TC Hartley, *Choice of Court Agreements under the European and International Instruments* (OUP 2013) Chapter 10, 220; Fentiman, *International Commercial Litigation* (2015) (n 604) 115; Fentiman, *International Commercial Litigation* (2010) (n 604) 90; Harris, *Agreements on Jurisdiction and Choice of Law: Where Next?* (n 566) 547; CJS Knight, 'The Damage of Damages: Agreements on Jurisdiction and Choice of Law' [2008] *Journal of Private International Law* 501, 509; Edwin Peel, 'Introduction' in Pascal de Vareilles-Sommieres (ed), *Forum Shopping in the European Judicial Area* (Hart Publishing, Oxford University Press 2007) 1, 15-17; Fentiman, *Parallel Proceedings and Jurisdiction Agreements in Europe* (n 623) 43-45; Nuyts (n 618) 57; Petr Briza, 'Choice-of-Court Agreements: Could the Hague Choice of Court Agreements Convention and the Reform of the Brussels I Regulation be the way out of the Gasser-Owusu Disillusion?' [2009] *Journal of Private International Law* 537, 548-554; cf Raphael (n 614) 294; Felix Blobel and Patrick Späth, 'The Tale of Multilateral Trust and the European Law of Civil Procedure' (2005) 30 *European Law Review* 528, 545-546, highlight the counterproductive effects of secondary remedies on the principle of mutual trust in the European Union; P Gottwald, 'art 23 EuGVVO' in T Rauscher, J Wenzel and P Wax (eds.), *Münchener Kommentar zur Zivilprozessordnung* (3rd Edition, Beck 2008) [79]; Peter Mankowski, 'Ist eine vertragliche Absicherung von Gerichtsstandsvereinbarungen möglich?' (2009) *IPRax*, 23-35, argues that all claims that directly or indirectly sanction a claim not to sue in a *forum derogatum* militate against the ratio underpinning the inhibition of anti-suit injunctions in *Turner v. Grovit* since a right not to sue abroad is not recognised under the Brussels I regime; For another analysis of the relevance of *Turner v. Grovit* for the damages remedy, see, Thomas Pfeiffer, 'Die Absicherung von Gerichtsstandsvereinbarungen durch Vereinbarung eines materiell-rechtlichen Kostenerstattungsanspruchs' in Wolfgang Hau and Hubert Schmidt (eds.), *Facetten des Verfahrensrecht Liber amicorum Walter F. Lindacher* (Heymanns 2007) 77, 81ff; Anatol Dutta and Christian Heinze, 'Prozessführungsverbote im englischen und europäischen Zivilverfahrensrecht' *Zeitschrift für Europäisches Privatrecht (ZEuP)* (2005) 428, 458-461, suggest that damages in relation of the foreign court's substantive liability award are impermissible, but that damages in respect of litigation costs are more defensible, although still doubtful; Alexander J. Belohlávek, 'Rome Convention - Rome I Regulation' (Volume I, Juris Publishing 2011) 360, does not entirely exclude the possibility of a claim for damages in this context; Guido Carducci, 'The New EU Regulation 1215/2012 of 12 December 2012 on Jurisdiction and International

jurisdiction agreement under the Brussels I Regulation (Recast) may grant a new lease of life to the damages remedy, at least until the matter is addressed by a CJEU decision or considered by the European Union legislature.

It will, of course, be a matter for the Greek courts to decide whether to recognise the English judgments in *The Alexandros T* litigation. In *Gothaer v Samskip* the CJEU decided that a decision of a Member State to decline jurisdiction on the basis of a jurisdiction agreement in favour of another Member State is a judgment which qualifies for recognition under Chapter III of the Brussels I Regulation.⁶²⁹ Moreover, the necessary underpinning for the operative part of the judgment must also be recognised.⁶³⁰ However, recognition is subject to the limited defences to recognition in Articles 34 and 35 of the Brussels I Regulation, including if the recognition of the judgment is manifestly contrary to the public policy of the Member State in which recognition is sought.⁶³¹ In this case, the decision on the scope of the jurisdiction agreements is intertwined with the decision to award damages and declaratory relief for the breach of such agreements. Since the latter rulings are potentially prohibited by the jurisprudence of the CJEU, the Greek court may choose to refer the matter for a preliminary ruling from the CJEU. The question referred would seek a clarification on the grounds for refusing recognition to a Member State judgment and in particular whether a judgment awarding damages and declaratory relief for breach of a jurisdiction agreement falls foul of the public policy defence. It is submitted that the principle of mutual trust is the 'bedrock upon which EU justice policy should be built'⁶³² and may be considered to be a component of European Union public policy.⁶³³ Hence, a judgment which undermines the principles of mutual trust and the effectiveness of the Regulation may be deemed to be contrary to EU public policy and be refused recognition.⁶³⁴ However, the CJEU has recently

Arbitration' (2013) 29 *Arbitration International* 467, 489, is more optimistic regarding the compatibility of damages for breach of an arbitration agreement with the Brussels I Regulation; See also the Opinion of Advocate General M. Wathelet in Case C-536/13 *Gazprom OAO* [2014] ECLI:EU:C:2014:2414, FN 87, who regarded an award of damages as compatible with the Brussels I Regulation, although it was not in issue in that case. AG Wathelet referred to the European Parliament resolution of 7 September 2010 on the implementation and review of Council Regulation (EC) No 44/2001 in support of his averment. (P7_TA(2010)0304, recital M).

⁶²⁹ Case C-456/11 *Gothaer Allgemeine Versicherung AG v Samskip GmbH* EU:C:2012:719, [2013] QB 548.

⁶³⁰ Ibid [40]-[41]; See FN 542 in Chapter 5 above for the concepts of European *res judicata* and Euro-estoppel.

⁶³¹ Article 34(1) of the Brussels I Regulation; Article 45(1)(a) of the Brussels I Regulation (Recast).

⁶³² The EU Justice Agenda for 2020 - Strengthening Trust, Mobility and Growth within the Union COM (2014) 144 final; See Matthias Weller, 'Mutual trust: in search of the future of European Union private international law' (2015) 11 *Journal of Private International Law* 64, 79-80.

⁶³³ For CJEU case law and secondary sources discussing a European public policy exception to the rules regarding the enforcement of judgments: See FN 545 in Chapter 5 above.

⁶³⁴ European public policy operates as a form of flexibility in the application of uniform rules throughout Europe and unlike national public policy it does not need to be attenuated. See A Mills, *The Confluence of Public and Private International Law* (CUP 2009) 197.

adjudicated that where there is an infringement of EU law in the judgment of the Member State of origin:⁶³⁵ ‘the public-policy clause would apply only where that error of law means that the recognition of the judgment concerned in the State in which recognition is sought would result in the *manifest breach of an essential rule of law in the EU legal order and therefore in the legal order of that Member State*’. In that particular case, the infringement of EU trademark law was not deemed to be a manifest breach of an essential rule of law in the EU legal order.⁶³⁶ Nevertheless, it is submitted that a fundamental contravention of the principles that animate the multilateral jurisdiction and judgments order of the Brussels I Regulation may still fall within the purview of the public policy exception. Hence, there may be room to argue that an infringement of the principles underlying EU private international law rules may be more significant than an infringement of EU private law rules *per se* for the purposes of the public policy exception.

The lack of a higher authority based on pure European principles means that the pragmatic virtues of the decision in *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG (The Alexandros T)*⁶³⁷ will hold sway in the English courts for now.

⁶³⁵ See Case C-681/13 *Diageo Brands BV v Simiramida* ECLI:EU:C:2015:471 [50] (emphasis added).

⁶³⁶ *Ibid* [51].

⁶³⁷ [2014] EWCA Civ 1010.

Recovering Damages for the Tort/Delict of Inducing Breach of a Choice of Court Agreement against a Claimant's Legal Advisers: The English Court of Appeal Adjudicates on Whether England is the Place Where the Economic Loss Occurred under Article 5(3) of the Brussels I Regulation?⁶³⁸

Apart from the prospects of recovering contractual damages for breach of an English exclusive choice of court agreement from the counter party,⁶³⁹ it has been argued that in some instances, it may make sense to extend the scope of the recovery beyond the parties' privity to the jurisdiction agreement.⁶⁴⁰ Potential third parties may include the directors and senior management of the company, the legal advisers of the company, another company within the group of companies or even a competitor company. However, in order to sue a third party, the English courts must have jurisdiction over the matter and a specific cause of action must lie against the third party under the applicable law of the particular legal relationship.

Where an exclusive choice of court agreement is binding between A and B and a third party, C, who is in practical control of B, has directed B to breach the agreement, the English courts have accepted that anti-suit injunctions or claims for damages, could be founded on the tort of inducing breach of contract.⁶⁴¹ In *Kallang Shipping SA v Axa Assurances Senegal* ("The Kallang") (No.2), where Axa Senegal had induced their insureds to breach an arbitration clause by orchestrating proceedings before the courts of Senegal, Jonathan Hirst QC, sitting as a deputy High Court judge, awarded damages against Axa Senegal for procuring a breach

⁶³⁸ *Marzillier, Dr Meier & Dr Guntner Rechtsanwaltsgesellschaft MbH v AMT Futures Ltd* [2015] EWCA Civ 143 (Christopher Clarke LJ with whom Tomlinson LJ and Laws LJ agreed); See M Ahmed, 'Case Comment: *Marzillier, Dr Meier & Dr Guntner Rechtsanwaltsgesellschaft MbH v AMT Futures Ltd* [2015] EWCA Civ 143' (2015) 6 *Aberdeen Student Law Review* 118; See, generally, M Lehmann, 'Where Does Economic Loss Occur?' (2011) 7 *Journal of Private International Law* 527; A Dickinson, *The Rome II Regulation* (OUP 2008) Chapter 4, 327-330; E Lein, 'Chapter 4 - Article 7(2)' in A Dickinson and E Lein (eds.), *The Brussels I Regulation Recast* (OUP 2015) 155-172.

⁶³⁹ See *Union Discount Co Ltd v Zoller and Others* [2001] EWCA Civ 1755, [2002] 1 WLR 1517 (Schiemann LJ); *Donohue v Armco Inc* [2001] UKHL 64, [2002] 1 All ER 749, [36] (Lord Bingham of Cornhill) and [48] (Lord Hobhouse of Woodborough); *A/S D/S Svendborg v Akar* [2003] EWHC 797 (Comm) (Julian Flaux QC J); *National Westminster Bank plc v Rabobank Nederland* (No 3) [2007] EWHC 3163 (Comm), [2008] 1 All ER (Comm) 266 (Sir Anthony Colman J); *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG* (*The Alexandros T*) [2014] EWCA Civ 1010 (Longmore LJ): A significant recent Court of Appeal decision endorsing the damages remedy in the context of the Brussels I Regulation.

⁶⁴⁰ Briggs accepts that the claim for compensation may be characterized as 'tortious or non-contractual' and that such a cause of action may fit more easily into the 'public law' rubric of the Brussels I Regulation, but does not explore the issue any further: Briggs, *Agreements* (n 564) 326-327, 337; cf Raphael describes the possibility of an award of damages outside the contractual case as 'unexplored territory', but in contrast to Briggs argues that, where there is no clear and concrete personal contractual obligation to enforce, it is harder to avoid the conclusion that the award of damages inherently involves an assessment of the jurisdiction of another Member State court, and is thus prohibited: Raphael (n 614) 296, 331, 341.

⁶⁴¹ See Raphael (n 614) 335-336.

of contract.⁶⁴² However, as Jonathan Hirst QC stressed, both parties agreed that this issue was to be determined in accordance with English law and no case on Senegalese law was pleaded.⁶⁴³

In the context of the Brussels I Regulation, the English High Court held that, in principle, a claim in damages may lie against a claimant's lawyers (a German law firm) for the tort of inducing breach of contract where it can be established that the claimant was advised by them to bring pre-emptive proceedings in breach of a choice of court agreement.⁶⁴⁴ In such cases, the potential impediment is not the existence of the cause of action or legal basis,⁶⁴⁵ but satisfying an English court that it has jurisdiction under Article 5(3) of the Brussels I Regulation.⁶⁴⁶ The High Court has held that, such jurisdiction exists, pursuant to Article 5(3) of the Brussels I Regulation, because to induce breach of an English choice of court agreement is to deprive the claimant of the benefit of a clause conferring exclusive jurisdiction on the English courts, which constitutes harm suffered in England.⁶⁴⁷

The German law firm responsible for inducing the breach of the choice of court agreement appealed the High Court decision on the issue of whether or not the English courts have jurisdiction to entertain the action under the Brussels I Regulation. Overturning the first instance decision, the Court of Appeal held that the English court had no jurisdiction over the claim. Both the event giving rise to the damage and the damage itself occurred in Germany, not in England. That was the place of the 'harmful event' for the purposes of Article 5(3) of the Brussels I Regulation. The Court of Appeal relied on the leading CJEU

⁶⁴² *Kallang Shipping SA v Axa Assurances Senegal ("The Kallang") (No.2)* [2008] EWHC 2761 (Comm), [2009] 1 Lloyd's Rep 124, [90]-[94] (Jonathan Hirst QC J); See also *The Duden* [2008] EWHC 2762 (Comm), [2009] 1 Lloyd's Rep 145 (Jonathan Hirst QC J); See Joseph (n 604) 493-494; Raphael, *The Anti-Suit Injunction: Updating Supplement* (n 567) 69.

⁶⁴³ *Kallang Shipping SA v Axa Assurances Senegal ("The Kallang") (No.2)* [2008] EWHC 2761 (Comm), [2009] 1 Lloyd's Rep 124, [90].

⁶⁴⁴ *AMT Futures Ltd v Marzillier, Dr Meier & Dr Guntner Rechtsanwalts-gesellschaft MbH* [2014] EWHC 1085 (Comm) (Popplewell J).

⁶⁴⁵ Liability for the tort of inducing breach of contract was established in English law by the famous case of *Lumley v Gye* (1853) 2 E & B 216 and the actionable wrong was recognised as part of Scots law in *British Motor Trade Association v Gray* 1951 SC 586, 1951 SLT 247 (Lord Russell). *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1 is the current leading authority on the tort of inducing breach of contract in English law and was followed by Lord Hodge in *Global Resources Group v MacKay* 2008 SLT 104, 106-107: Lord Hodge identified five characteristics which appear to the essential elements of the delict: (1) Breach of contract (2) Knowledge on the part of the inducing party that this will occur (3) Breach which is either a means to an end for the inducing party or an end in itself (4) Inducement in the form of persuasion, encouragement or assistance (5) Absence of lawful justification. See J MacLeod, 'Offside Goals and Induced Breaches of Contract' (2009) 13 *Edinburgh Law Review* 278; J Thomson, *Delictual Liability* (Bloomsbury Professional 2014) 44-47.

⁶⁴⁶ Article 7(2) of the Brussels I Regulation (Recast).

⁶⁴⁷ *AMT Futures Ltd v Marzillier* [2014] EWHC 1085 (Comm) (Popplewell J).

authorities⁶⁴⁸ and reached the conclusion that the German law firm procured the former clients to start proceedings in Germany in consequence of which AMT Futures Ltd suffered loss predominantly in Germany.⁶⁴⁹ The court rejected an argument that the harm suffered was the loss of the benefit promised to the claimant – that they would only be sued in England. The harm was the commencement of proceedings in Germany and the damage suffered was the cost and expense caused by the litigation, which was suffered in Germany.

The localization of economic loss in Germany is in line with the principle that the victim's domicile should be avoided when determining the location of the economic loss unless the direct and immediate loss occurred there.⁶⁵⁰ This principle of localizing economic loss was followed by the CJEU in its recent decision in *Harald Kolassa v Barclays Bank plc* where it ruled that the courts in the Member State of the investor's domicile have jurisdiction 'in particular when the loss occurred itself directly in the applicant's bank account held with a bank established in the area of jurisdiction of those courts'.⁶⁵¹ In *Kronhofer*,⁶⁵² the ECJ stated that in determining the place of loss, the fact the ultimate adverse effects of the damaging behaviour were felt in Austria, where the claimant lived and where his assets were concentrated, could not be taken into account.⁶⁵³ The court gave two reasons for this. First, to hold otherwise would run counter to the objectives of the Brussels Convention, which aims at enabling the claimant to easily identify the court in which he may sue and the defendant to reasonably foresee in which court he may be sued.⁶⁵⁴ Secondly, to take into account the location of the claimant's assets would give jurisdiction to the courts of the claimant's home, a solution that is generally not favoured by the Brussels Convention.⁶⁵⁵

That said, Christopher Clark LJ stated that the first instance judge's analysis is a powerful⁶⁵⁶ and attractive one as there is much to be said for the determination of what is in essence an

⁶⁴⁸ Case 21/76 *Bier v Mines de Potasse d'Alsace* [1976] ECR 1735; Case C-220/88 *Dumez France and Tracoba v Hessische Landesbank (Helba)* [1990] ECR I-49; *Marinari v Lloyd's Bank plc* [1996] QB 217; *Reunion Europeene SA v Spliethoff Bevrachtungskantoor BV* [2000] QB 690; Case C-168/02 *Kronhofer* [2004] ECR I-6009.

⁶⁴⁹ *Marzillier v AMT Futures Ltd* [2015] EWCA Civ 143 (Christopher Clarke LJ with whom Tomlinson LJ and Laws LJ agreed).

⁶⁵⁰ Lehmann (n 638) 537-540.

⁶⁵¹ Case C-375/13 *Harald Kolassa v Barclays Bank plc* ECLI:EU:C:2015:37, [2015] WLR (D) 32; *Universal Music International Holding BV v Michael Tétéreault Schilling and Others* (Case C-12/15) is a pending preliminary reference before the CJEU from the Hoge Raad der Nederlanden (Netherlands) on Article 5(3) of the Brussels I Regulation including the questions of how a court should establish whether an economic loss is an 'initial loss' or a 'consequential loss' and in which country does the economic loss occur.

⁶⁵² Case C-168/02 *Kronhofer* [2004] ECR I-6009.

⁶⁵³ *Ibid* [21].

⁶⁵⁴ *Ibid* [20].

⁶⁵⁵ *Ibid*.

⁶⁵⁶ [2015] EWCA Civ 143 [49] (Christopher Clarke LJ).

ancillary claim in tort for inducement of breach of contract to be made in the court which the contract breaker agreed should have exclusive jurisdiction in respect of that contract, rather than in the courts of the country where the inducement and breach occurred.⁶⁵⁷ However, the former consideration is not a determining factor in the allocation of jurisdiction under the Brussels I Regulation. It is submitted, that the arguments favouring the pragmatic and remedy driven quest of localizing the economic loss in England militate against a reasoned and systemic response to the issue of multilateral jurisdictional allocation within the Brussels I Regulation regime.

Counsel for the German law firm also advanced an additional ground of appeal, which was not argued before the judge.⁶⁵⁸ Hugh Mercer QC, argued that the High Court could not exercise jurisdiction over the German law firm in relation to the subject matter of the action because any such claim necessarily and unavoidably offended against EU law principles. Insofar, as an injunction was claimed it would, involve the court in being asked to grant an order restraining a party from commencing proceedings before a properly constituted court of a Member State.⁶⁵⁹ Insofar, as damages were sought it involved the court being asked to determine issues which breached the principle of effectiveness of EU law (*effet utile*) and the principle of mutual trust, and constituted a collateral attack on the assumption of jurisdiction by the German courts and of judgments or court settlements obtained by investors in Germany, when under the Regulation any such attack was permitted only in the court where the substantive proceedings had been commenced.

However, Christopher Clarke LJ observed *obiter* that the additional ground of appeal was not well founded.⁶⁶⁰ In doing so he emphasized the divide between issues of jurisdiction which were a matter for the German courts and the private law rights and obligations of the parties in relation to the contractual choice of court agreement and ancillary claims in tort for inducing breach of the choice of court agreement. In support of his contention, Christopher Clarke LJ also cited and reiterated the recent landmark ruling of Longmore LJ in *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG (The Alexandros T)*,⁶⁶¹ that EU law was no obstacle to enforcing a cause of action for the award of damages for

⁶⁵⁷ *Ibid* [57].

⁶⁵⁸ *Ibid* [59].

⁶⁵⁹ See Case C-159/02 *Turner v Grovit* [2004] ECR I-3565; Case C 185/07 *West Tankers Inc v Allianz SpA (The Front Comor)* [2009] 1 AC 1138.

⁶⁶⁰ [2015] EWCA Civ 143 [61] (Christopher Clarke LJ).

⁶⁶¹ [2014] EWCA Civ 1010 [15]-[22] (Longmore LJ).

breach of an exclusive jurisdiction clause.⁶⁶² However, it should be noted that the Longmore LJ's ruling on the compatibility of the damages remedy with EU law is itself not free from controversy. Moreover, it is highly unlikely that the CJEU would on a preliminary reference from the English courts adjudicate that a unilateral private law remedy arising from the contractual right not to be sued in a non-elected forum is compatible with the principle of mutual trust which animates the double convention modelled jurisdiction and judgments order of the Brussels I Regulation.⁶⁶³ It is submitted that the relative effect of jurisdiction agreements as subsisting, independent and enforceable contractual obligations will necessarily distort the international allocative or distributive function of such agreements within a multilateral jurisdiction and judgments order such as the Brussels I Regulation.

Marzillier v AMT Futures Ltd is the first case in the English courts concerning Article 5(3) of the Brussels I Regulation in relation to the tort of inducing breach of a contract. The Court of Appeal's localization of the economic loss in Germany may end up inhibiting future claims for damages for inducing breach of an English choice of court agreement in the English courts. The decision may also be significant for the English courts when approaching the localization of economic loss under Article 7(2) of the Brussels I Regulation (Recast) more generally. It is submitted that, the approach of the Court of Appeal in localizing economic loss is firmly rooted in European Union private international law principles and the CJEU's leading authorities which favour neither the place where the country in which the event giving rise to the damage occurred nor the country or countries in which the indirect consequences of that event occur. This mature and systemic approach to the localization of loss seeks to ensure that the rights of the claimant and the defendant are evenly balanced without unduly prejudicing either. The immediate pragmatic value of localizing the economic loss in England would have sacrificed the certainty and predictability of the European Union private international law regime and accorded dubious jurisdictional precedence to the place where the indirect consequences of the economic loss occur.

The Court of Appeal decision may have significant implications for the applicable law of the cause of action as well. Article 4(1) of the Rome II Regulation uses the same criterion of the 'place where the damage occurred' that is the second prong of the tort jurisdiction under

⁶⁶² [2015] EWCA Civ 143 [62] (Christopher Clarke LJ).

⁶⁶³ See FN 628 above for a comprehensive review of the secondary sources which support the contention that the damages remedy is not compatible with the principles of mutual trust and the effectiveness of EU law (*effet utile*) that animate the Brussels I Regulation as interpreted by the Court of Justice of the EU.

Art 5(3) of the Brussels I Regulation⁶⁶⁴ (now Art 7(2) Brussels I Regulation (Recast)) in order to determine the applicable law of the tort. As the parallel interpretation and coherence of the European instruments on private international law is an objective in its own right,⁶⁶⁵ the applicable law for the tort of inducing breach of contract may also localize in Germany.⁶⁶⁶ However, it may be argued that English law is the law governing the tort by virtue of the choice of law agreement being construed as extending its cover to cases of tortious liability under Article 14 of the Rome II Regulation.⁶⁶⁷ Secondly, it may also be argued that the applicable law under Article 4(1) can be displaced in favour of the manifestly closer relationship based on a contract that is closely connected with the tort in question.⁶⁶⁸ Arguably, the English dispute resolution agreement is closely connected with the tort of inducing breach of contract. However, as indicated by the use of the word ‘manifestly’, a high threshold of connection must be passed for Article 4(3) to apply.⁶⁶⁹ As a result, the escape clause can only be resorted to in exceptional circumstances.

⁶⁶⁴ In Case 21/76 *Bier v Mines de Potasse d’Alsace* [1976] ECR 1735, the European Court of Justice has interpreted the predecessor provision of Article 5(3) of the Brussels I Regulation as giving the claimant the option to sue at the place of the event giving rise to the damage or the place where the damage occurred.

⁶⁶⁵ See Recital 7 of the Rome II Regulation; See E Lein, ‘The New Rome I/Rome II/ Brussels I Synergies’ (2008) 10 *Yearbook of Private International Law* 177.

⁶⁶⁶ Cf R Plender and M Wilderspin, *The European Private International Law of Obligations* (4th Edition, Sweet & Maxwell 2015) 551; R Plender and M Wilderspin, *The European Private International Law of Obligations* (3rd Edition, Sweet & Maxwell 2009) 532; I Bach, ‘Article 4’ in Peter Huber (ed.), *Rome II Regulation* (Sellier, Munich 2011) 86: In line with the decision regarding Article 5(3) of the Brussels I Regulation in [2014] EWHC 1085 (Comm) (Popplewell J), both Plender & Wilderspin and Bach argue against such a conclusion by favouring the law governing the contract.

⁶⁶⁷ Reference was made to issues concerning the scope of Article 14 of the Rome II Regulation in the Court of Appeal decision in *Marzillier v AMT Futures Ltd* [2015] EWCA Civ 143, [12] (Christopher Clarke LJ); See Th M de Boer, ‘Party Autonomy and its Limitations in the Rome II Regulation’ (2007) 9 *Yearbook of Private International Law* 19, 27.

⁶⁶⁸ Article 4(3) of the Rome II Regulation; For a discussion of the accessory connecting factor in Article 4(3) of the Rome II Regulation, see, M Czeplak, ‘Concurrent Causes of Action in the Rome I and II Regulations’ (2011) 7 *Journal of Private International Law* 393, 405-409; Plender and Wilderspin, *The European Private International Law of Obligations* (2015) (n 666) 68, and L Collins and others (eds.), *Dicey, Morris and Collins on the Conflict of Laws* (Sweet & Maxwell 2006) 1568, argue that the better view is that a contractual obligation regulated by the Rome I Regulation does not preclude a concurrent cause of action in tort governed by the Rome II Regulation; cf A Briggs, ‘Choice of Choice of Law?’ [2003] *LMCLQ* 12; For the English substantive private law position allowing claims for concurrent liability, see *Henderson v Merrett Syndicates* [1995] 2 AC 145 (HL) (Lord Goff of Chieveley); cf Lord Justice Jackson, ‘Concurrent Liability: Where Have Things Gone Wrong?’ (Lecture to the Technology and Construction Bar Association and the Society of Construction Law, 30th October 2014) examines the boundary between contract and tort in Roman, French, German and English common law and concludes that contracts should not, and generally do not, generate duties of care in tort which mirror the contractual obligations.

⁶⁶⁹ Recitals 14 and 18 of the Rome II Regulation; See, generally, CSA Okoli and GO Arishe, ‘The Operation of the Escape Clauses in the Rome Convention, Rome I Regulation and Rome II Regulation’ (2012) 8 *Journal of Private International Law* 513, 536.

The UK Supreme Court has recently granted permission to appeal to AMT Futures Ltd (the ‘Appellant’).⁶⁷⁰ From the foregoing, it is likely that the UK Supreme Court will prefer the principled stance of the CJEU case law in relation to the jurisdictional allocation of tort claims as opposed to a more pragmatic approach which would accord questionable jurisdictional precedence to the place where the indirect consequences of the economic loss occur. Moreover, if it is held that the English court does possess jurisdiction over the claim then a re-examination of the principal issue underlying Longmore LJ’s decision in *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG* may become necessary – whether the damages remedy is indeed compatible with the principle of effectiveness of EU law (*effet utile*) and the principle of mutual trust.⁶⁷¹ A preliminary reference to the CJEU from the highest court of a Member State is mandatory on a question of EU law that is necessary for the outcome of the case and is not clear beyond reasonable doubt without any case law from the CJEU or where the national court cannot decide the answer to the question simply by following the existing case law of the CJEU.⁶⁷²

It should be observed that institutionalizing an action of damages for the tort of inducing breach of an English exclusive choice of court agreement will endorse the view that it was wrong for the other party to have sued in another EU Member State where the rules of the Brussels I Regulation allow for such a jurisdictional possibility. Moreover, law firms are regulated and owe duties both to their Member State’s legal system and to their clients. Any attempt by the English courts to police the conduct of law firms in EU Member States and hold them liable in tort for giving their clients advice on jurisdictional matters is bound to provoke resentment elsewhere.

⁶⁷⁰ *AMT Futures Ltd v Marzillier and others* Case No: UKSC 2015/0091 (SupremeCourt.uk, 28 July 2015) <<https://www.supremecourt.uk/docs/permission-to-appeal-2015-0607.pdf>> accessed 10 September 2015.

⁶⁷¹ [2014] EWCA Civ 1010 [15]-[17] (Longmore LJ).

⁶⁷² See Article 267(3) TFEU; Case C-283/81 *CILFIT Srl and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415; M Horspool and M Humphreys, *European Union Law* (7th Edition, OUP 2012) Chapter 4, 80.

Chapter 7 - Assessing the Damages Remedy for Breach of Choice of Court Agreements

Having examined the state of the judicial authorities on the damages remedy for breach of choice of court agreements, the time is ripe for an exploration of the arguments of principle for and against this novel remedy.⁶⁷³ The necessary identification and articulation of these core arguments and their potential impact on the viability of the damages remedy will help us to ascertain the proper and legitimate scope of the remedy in private international law. Moreover, this exercise will help us to anticipate how the damages remedy may yet develop in the context of the European Union private international law regime personified in the Brussels I Regulation. Clarity with regard to the relative pros and cons of the remedy will also shed light on whether a claim of substantive claw-back damages which effectively reverse or nullify the decision of the foreign court should be allowed. Last but not least, a balanced and nuanced perspective on the arguments in support of and in opposition to the damages remedy will assist us in drawing conclusions towards the end of the thesis.

Arguments in Favour of the Damages Remedy for Breach of Choice of Court Agreements

1. Recognizing a general right to claim damages is the approach that best accords with existing English common law domestic contract law principles

By analogy with courts awarding damages in response to ordinary breaches of contractual agreements, there is *some* substance in the argument that they should also do so when the agreement breached is one embodied in a jurisdiction clause. On the other hand, this domestic contract law analogy can only be pushed as far as the private international law framework (both the European Union and the residual common law jurisdictional regime) of choice of court agreements allows. Thus, in equal measure, there is also *some* substance in the argument that ordinary contract law principles cannot be imported verbatim into a private international law context which incorporates and prioritises both procedural and substantive private law elements.

The viability of the claim for recovery of damages for breach of a jurisdiction agreement will also raise broader questions over the proper and legitimate role of remedies in private international law. The role of remedies in private international litigation is a relatively neglected but crucial area so much so that causes of actions are often referred to by the

⁶⁷³ Daniel Tan, 'Damages for Breach of Forum Selection Clauses, Principled Remedies, and Control of International Civil Litigation' (2005) 40 *Texas International Law Journal* 623, 637-657.

remedy sought. For instance, we refer to an ‘action’ for an anti-suit injunction instead of an action for breach of the underlying substantive legal or equitable right. A possible explanation for the lack of order and clarity in the anti-suit injunction right/remedy ‘pudding’⁶⁷⁴ is that the very existence of the underlying substantive equitable right is the subject of debate. This notion of allowing the right to masquerade as the remedy, brings to mind Lord Mance’s statement in the foreword to the first edition of Fentiman’s *International Commercial Litigation*: ‘*Ubi jus, ibi remedium* might, for a practitioner, read *ubi remedium, ibi jus*.’⁶⁷⁵ To a substantial extent, the challenge of rationalizing private international law remedies involves the identification, articulation and development of the outer limits placed on the remedies. It is clear that when a party seeks a remedy in domestic courts to influence litigation abroad (be it an anti-suit injunction or damages) comity and other private international law policies are actively engaged which demand that limits be placed on the parties right to such an outcome, even where domestic law principles would readily award a remedy to the party as of right.

Nevertheless, the private international law nature of choice of court clauses should not give rise to a blanket prohibition on the award of damages in each and every circumstance. Undoubtedly, the international ramifications of choice of court agreements call for a measured approach and unless it can be ascertained that the damages remedy cannot legitimately be awarded under *any* circumstances whatsoever, should the courts bar the cause of action altogether.

2. The damages remedy allows the court to preserve certainty, maintain the sanctity of the contractual bargain and control forum shopping

A clause in a cross border commercial contract nominating in advance the forum in which disputes are to be litigated is an essential precondition to the certainty and predictability we have come to expect from modern international business transactions.⁶⁷⁶

Litigation focussed on the ‘conflicts of jurisdiction’ and their massive untapped potential began to dominate the subject of English private international law towards the last quarter

⁶⁷⁴ Cameron Sim, ‘Choice of Law and Anti-Suit Injunctions: Relocating Comity’ [2013] *ICLQ* 703.

⁶⁷⁵ Richard Fentiman, *International Commercial Litigation* (OUP 2010) Foreword vii.

⁶⁷⁶ *Ibid* Chapter 2.

of the twentieth century.⁶⁷⁷ As a consequence, choice of law was relegated to a secondary position. This development was premised on the notion that, the forum where parties litigate their dispute influences the result of the case and that it is often outcome determinative.⁶⁷⁸ Well-advised parties often try to direct litigation into fora where they can litigate with the most advantage to themselves and with the maximum disadvantage to their opponents. This practice is referred to as 'forum shopping'.⁶⁷⁹

One of the goals of the discipline of private international law is to discourage unfair and opportunistic forum shopping.⁶⁸⁰ The principle of fairness demands that the claimant not be allowed an unfettered right to arbitrarily commence proceedings in any forum he wishes. The classical view against forum shopping is born out of a desire for fairness to the defendant and the need to curb the claimant's unfettered and arbitrary choice of forum.

Forum shopping also leads to burdensome litigation across multiple jurisdictions and is often accompanied by protracted litigation about where to litigate. As such, forum shopping wastes both private and judicial resources. The risk of irreconcilable judgments emanating from different jurisdictions is ever present and poses serious problems for the orderly resolution of disputes and the recognition and enforcement of judgments.

The uncertainty inherent in the concept of forum shopping is manifested by the fact that a party can only be certain of the law applicable to a transaction after the claimant has made a choice of forum. The prevalence of forum shopping in modern international commercial litigation is encouraged by the fact that litigation of the same dispute in different fora produces different outcomes.⁶⁸¹ One basic reason for the variation in the outcome between different fora is that courts draw a fundamental distinction between issues of substance and issues of procedure.⁶⁸² Where an issue is characterized as procedural the courts apply the

⁶⁷⁷ Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford Private International Law Series, OUP 2008) Preface vii; Adrian Briggs, *The Conflict of Laws* (2nd Edition, OUP 2008) Chapter 1, 1-2; R Fentiman, *International Commercial Litigation* (2nd Edition, OUP 2015) Chapter 1.

⁶⁷⁸ Trevor C Hartley, *International Commercial Litigation* (CUP 2009) Chapter 1, 5-8; Antony L Ryan, 'Principles of Forum Selection' (2000) 103 *West Virginia Law Review* 167, 200.

⁶⁷⁹ As Lord Simon commented in *The Atlantic Star* [1974] AC 436, 471 (HL): "'Forum-shopping' is a dirty word; but it is only a pejorative way of saying that, if you offer a plaintiff a choice of jurisdictions, he will naturally choose the one in which he thinks his case can most favourably be presented: this should be a matter neither for surprise nor for indignation." Cf In the same decision Lord Denning commented: "You may call this 'forum-shopping' if you please, but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of service." See *The Atlantic Star* [1973] QB 364, 382.

⁶⁸⁰ See Andrew S Bell, *Forum Shopping and Venue in Transnational Litigation* (OUP 2003) 24–26.

⁶⁸¹ See Bell (n 680) 23–48.

⁶⁸² See generally, Richard Garnett, *Substance and Procedure in Private International Law* (Oxford Private International Law Series, OUP 2012).

law of the forum (*lex fori regit processum*) rather than the applicable law of the transaction. Therefore, where the outcome determinative issue is likely to be characterized as procedural, the parties will attempt to litigate in the forum that possesses the most advantageous set of procedural rules. In other words, by selecting the forum, they can directly choose the rule that decides the merits of the case.

Even where an issue is characterized as substantive, each forum will apply its own choice of law rules to the substantive legal category in order to determine the applicable law. As choice of law rules vary from forum to forum, different courts—each applying different choice of law regimes—may end up applying different substantive governing laws to decide the merits of the case, again leading to different outcomes on the merits. By choosing the forum, the parties indirectly choose the substantive legal rules that apply to their case. Dr Andrew Bell, SC of the Sydney Bar explains how these differences are the motivating forces behind the concept of forum shopping:⁶⁸³

The *raison d'être* for forum shopping lies in lack of uniformity throughout the world's legal systems, in terms both of internal laws and choice of law rules and the procedural rules developed by different countries to facilitate the enforcement of those laws. To overlook or understate the significance of these differences to litigants "is to fly in the face of reality." for lack of uniformity in any one of these three areas produces the consequence that the legal result in any given fact situation may vary according to the forum in which litigation takes place.

Other matters, such as difficulties in establishing the proof of the content of foreign law, overriding public policies, and mandatory rules of the forum only add to the possibility of divergent results.⁶⁸⁴ Even where the substantive rules are the same, differences in legal culture, judicial attitudes and competence may result in courts applying apparently identical rules in radically different ways.

Consequently, having to litigate in a non-contractual forum is not a trivial matter of arguing the merits in a different location. Where the parties have explicitly agreed to resolve their disputes relying on the procedural rules, the choice of law rules, and the judicial attitudes of particular courts, it is certainly no substitute for a party to have to resolve the dispute before the courts of another country.

⁶⁸³ Bell (n 680) 25.

⁶⁸⁴ Additional factors include legal costs, speed and mode of litigation, and the quality and ability of the Judiciary.

Summing up, the choice of court agreement is vital to interpreting the substantive obligations embodied in an agreement since by agreeing to such a clause, the parties agree that the express terms of their agreement will be adjudicated by a particular court applying its own particular procedural rules and its particular choice of law rules to determine the substantive law that governs the contract. The selection of a non-contractual forum to adjudicate the issue will make it difficult for parties to discern with any degree of certainty the precise rights and obligations they have bound themselves to.

3. The Damages Remedy Provides the Court with Another Tool with Which to Control International Litigation

In addition to guaranteeing and promoting the cherished values of certainty and predictability in international commercial transactions, an award of damages is a potentially useful tool to control international civil and commercial litigation. The courts may want to control international litigation for two primary reasons. First, it serves to curb unfair and opportunistic forum shopping and prevents the undesirable consequences of that practice. Second, the courts may for policy reasons want to channel litigation into certain courts.⁶⁸⁵ If properly developed, the damages remedy can be effective in both controlling forum shopping and channelling litigation into the appropriate fora.

To influence and control international commercial litigation, the common law courts have thus far relied on two separate devices:⁶⁸⁶ a dismissal or stay of *local* proceedings based on *forum non conveniens* principles and an anti-suit injunction to enjoin *foreign* proceedings. Lord Goff in *Airbus v. Patel* commented on the limitations of these devices (albeit in the context of controlling parallel proceedings in general):⁶⁸⁷

I must stress again that, as between common law jurisdictions, there is no system as such, comparable to that enshrined in the Brussels Convention. The basic principle is that each jurisdiction is independent. There is therefore, as I have said, no embargo on concurrent proceedings in the same matter in more than one jurisdiction. There are simply these two weapons, a stay (or dismissal) of proceedings and an anti-suit injunction. Moreover, each of these has its limitations. The former depends on its voluntary adoption by the state in question, and the latter is inhibited by respect for comity. It follows that, although the availability of these two weapons should ensure that practical justice is achieved in most cases, this may not always be possible.

⁶⁸⁵ For instance, they may decide that cases pertaining to antitrust, intellectual property, or securities claims should, as a matter of policy, be tried in their own courts. See Tan, *Damages for Breach of Forum Selection Clauses* (n 673) 642.

⁶⁸⁶ See Lord Goff of Chieveley in *Airbus v Patel* [1999] 1 AC 119, 132-33 (HL).

⁶⁸⁷ Ibid 133.

As Lord Goff observes, the stay (or dismissal) device requires voluntary adoption and the anti-suit injunction is limited by demands of comity. The stay device is relevant only where the proceedings are in the English courts. Where proceedings are brought before the English courts in breach of a choice of court clause, the courts will ordinarily uphold the agreement by staying their own proceedings. But where a party breaches a choice of court clause by commencing proceedings in a foreign court, the English courts will ordinarily enjoin the foreign proceedings with an anti-suit injunction. Such an approach is fully consistent with the desire of the courts to uphold certainty, predictability and to impede attempts at forum shopping. These policy aims dictate that there should be some judicial response, be it an anti-suit injunction or damages, to deter parties from breaching choice of court or arbitration agreements.

However, the anti-suit injunction is constrained in its ability to control international litigation. First, the ability of the court to influence and control foreign proceedings with anti-suit injunctions is limited by respect and deference to the concept of comity and also by the uncertainty that comes with applying such an enigmatic constraining factor.⁶⁸⁸ Second, anti-suit injunctions are often ignored by litigants, especially where the party against whom the order is made has the ability to keep present and future commercial operations outside the jurisdiction of the issuing court. Third, anti-suit injunctions only operate *in personam* and cannot usually be issued against a person who is not within the jurisdiction of the issuing court.

Thus, the anti-suit injunction may be inadequate, by itself, to deal with the excesses of international litigation.⁶⁸⁹ A damages action, working in tandem with the anti-suit injunction, may provide more leverage and flexibility. An award of damages is more adaptable because the court can vary the quantum of the award to suit the circumstances and policy aims of any particular case. The anti-suit injunction, however, being of an all or nothing nature, does not have the same flexibility to provide a measured response to the varied situations that arise in international litigation.

An award of damages, together with the anti-suit injunction, empowers the courts to control international commercial litigation effectively and with greater flexibility. The availability of

⁶⁸⁸ See Daniel Tan, 'Anti-Suit Injunctions and the Vexing Problem of Comity' (2005) 45 *Virginia Journal of International Law* 283.

⁶⁸⁹ Tan, *Damages for Breach of Forum Selection Clauses* (n 673) 645.

two related but differing remedies enables the court to provide customized remedial action to suit the circumstances of the case.

4. The Damages Remedy Allows the Court to Give Effect to Public Policy

Considerations While Reconciling the Private Interests of the Contracting Parties

The court will not always give effect to a choice of court agreement by dismissing or staying local proceedings commenced in breach of it.⁶⁹⁰ Nor will the court always grant an anti-suit injunction to enjoin foreign proceedings commenced in breach of such clauses.⁶⁹¹

For example, the private interests of the parties to litigate in the contractual forum may sometimes be subordinated to public interests such as preventing irreconcilable judgments and the waste of judicial resources in trying identical or similar issues again in different courts. In such a case, despite the private interest of one party, evidenced in the choice of court clause, to have his dispute tried in the contractual forum, the court may decide that the private interests of the other party and the public interests of the case cumulatively demand that the matter be tried elsewhere. Taking this example further, where the court decides that the matter should be tried in a non-contractual forum, should the prejudiced party just accept that his private right to litigate in the contractual forum has become meaningless because of these other public concerns and private interests? The injustice of the situation is particularly evident if the party then litigates in the non-contractual forum at great inconvenience and has to put up with a radically different outcome compared to the result that would have been reached in the contractual forum. Instead of making no attempt to redress the imbalance in the private rights of the contracting parties *inter se*, the courts must consider if an award of damages might mitigate the injustice of having to litigate the dispute in the non-contractual forum.⁶⁹² Damages ameliorate the disparity between litigating in the contractual and non-contractual forum. In this way, an award of damages not only provides the courts with a guilt-free way to channel disputes into more appropriate

⁶⁹⁰ See Edwin Peel, 'Exclusive Jurisdiction Agreements: Purity and Pragmatism in the Conflict of Laws' [1998] *LMCLQ* 182, 225-226; cf Nicholas S Shantar, 'Forum Selection Clauses: Damages in Lieu of Dismissal?' (2002) 82 *Boston University Law Review* 1063, 1078-1088, argues that in relation to forum selection clauses in consumer adhesion contracts, a court should allow a consumer to pay damages in lieu of dismissal. In doing so he seeks to reconcile the interests of consumers by avoiding the unnecessary harshness of specific enforcement and sophisticated parties who are allowed to recover the costs of litigating in the consumer's home forum as damages for breach of the jurisdiction agreement.

⁶⁹¹ See *Donohue v Armco Inc* [2001] UKHL 64, [2002] 1 All ER 749.

⁶⁹² Peel (n 690) 225-226.

non-contractual fora to achieve wider policy concerns, but it also serves as a corrective device to rebalance the private interests of the parties.

Arguments against the Damages Remedy for Breach of Choice of Court Agreements

1. A Choice of Court Agreement Is a Special Contractual Term, the Breach of Which Does Not Give Rise to a Right to Damages

The simple retort to the argument that the breach of a choice of court agreement should give rise to an action for damages is that a jurisdiction agreement is a contract which regulates procedure (a 'procedural contract') or a special contractual term; the breach of which does not give rise to a right in damages. The procedural contract conception of a jurisdiction agreement can be compared to a choice of law agreement so much so that such agreements may be conceived of as a joint expression of intention or expectation by the parties, or a request or direction to the court.⁶⁹³ Furthermore, clauses of this nature do not give rise to a right to damages where the contractual expectation is not fulfilled.⁶⁹⁴ On balance, this argument is not entirely satisfactory. First, the argument is premised on the assumption that the breach of a choice of law agreement does not give rise to a right to damages. The veracity of this assumption is open to debate following the observation made by Justice Brereton of the New South Wales Supreme Court in *Ace Insurance v Moose*⁶⁹⁵ that an appropriately worded choice of law agreement can give rise to a promise not to sue in a jurisdiction that will disregard or not give full effect to the choice of law agreement.⁶⁹⁶ Second, even if we concede for the purposes of argument that the choice of law agreement is not promissory and is merely declaratory in nature and does not ground an action for damages, the argument still presupposes that choice of court agreements are analogous to choice of law clauses, such that if damages were unavailable for one, they must also be unavailable for the other. Although contracting parties tend to negotiate both choice of law and choice of court agreements in a comprehensive dispute resolution agreement, the analogy between the two clauses does not extend to make their fundamental nature and consequences identical.

⁶⁹³ See Andrew Dickinson, 'Restitution and Incapacity: A Choice of Law Solution?' (1997) *Restitution Law Review* 66, 68–69.

⁶⁹⁴ *Ibid* 69, FN 26.

⁶⁹⁵ *Ace Insurance v. Moose Enterprise Pty Ltd* [2009] NSWSC 724.

⁶⁹⁶ Briggs, *Agreements* (n 677) Chapter 11; TM Yeo, 'Breach of Agreements on Choice of Law' [2010] LMCLQ 194.

Choice of law agreements and choice of court agreements are fundamentally different. In the case of a choice of law agreement, should the courts choose not to rely on the applicable law specified by the clause, it is more difficult to localise the fault in the actions of either party. This makes it difficult to say that either contracting party breached its promise contained in the choice of law agreement. On the other hand, a choice of court agreement can only be breached where a party wilfully institutes proceedings in a non-contractual forum. The choice of court agreement can only be breached by the deliberate and wilful act of a party. This deliberate act causes loss to an identifiable innocent party to whom the court ought to award compensatory damages. Therefore, it is not inconsistent for the courts to order the breaching party to pay damages when a jurisdiction clause is breached while denying damages for breaches of choice of law clauses.

Third, although attractive in simplicity, the argument that jurisdiction agreements are special contractual terms is an *a priori* argument—it assumes the very thing that it seeks to prove. The argument does not explain why, and in what way, these clauses are special nor does it advance any reasons for its purported conclusion that damages are not payable where they are breached.

2. Courts Are Not Bound by Choice of Court Agreements on Ordinary Principles of Privity of Contract

A related argument posits that the courts, being third parties to the contract, are not bound by choice of court agreements on ordinary principles of privity of contract. Because courts are not bound by such agreements, damages are unavailable when courts refuse to uphold them. It is submitted, that this argument is not persuasive and provides no more than a contractual justification for why jurisdiction agreements are not binding on the courts. It does not seek to demonstrate why, as between the two contracting parties, the party who has breached his promise should be absolved from the ordinary obligation to pay damages.

Moreover, it is simpler and more realistic to say that the courts are the ultimate arbiters of the grounds for the *existence* and *exercise* of jurisdiction, and they will not be bound or constrained by private agreements that attempt to dictate whether they should take up or reject jurisdiction.⁶⁹⁷ There is no need to explain why the courts are not bound by the parties' agreement by forcing a contractual straitjacket on an essentially jurisdictional issue.

⁶⁹⁷ Adrian Briggs, *Private International Law in English Courts* (OUP 2014) 345.

That the courts, not the parties, ultimately decide matters of jurisdiction is the reasoning advanced by Edwin Peel on why courts are not obliged to exercise jurisdiction in accordance with the jurisdiction agreement.⁶⁹⁸ He finds it strange that there are few other contractual provisions that can be overridden at the discretion of the courts,⁶⁹⁹ and he posits that this is because there must be some limit on the parties' right to influence the exercise of jurisdiction.⁷⁰⁰ Even so, this only explains the court's unfettered discretion to exercise jurisdiction as it sees fit. It does not explain why damages should not be allowed if one of the parties deliberately breaches the jurisdiction agreement. As the next argument explains, even where the courts refuse to specifically enforce or give practical effect to the jurisdiction agreement, it would not be inconsistent for the court to award damages to vindicate the breach.

3. Where the Court Refuses to Enforce the Choice of Court Agreement, It Would Be Inconsistent for the Court to Then Award Damages for Its Breach

It seems logical to say that where the court refuses to give effect to the choice of court agreement, it should not award damages for the breach that it has just condoned. This is a contradiction in terms and comparable to the doctrine of approbation and reprobation.⁷⁰¹

But crucially, this argument fails to appreciate that even where the court refuses specific relief (for example, by refusing to grant an injunction or an order of specific performance) and permits the wrong to continue, it still retains the power to award damages to vindicate the breach. Thus, where the court does not specifically enforce the clause, it does not necessarily mean that it is barred from resorting to the common law remedy of damages. On the contrary, the court may revert to the remedy of common law damages even if the equitable remedy is unavailable or inappropriate. As such, there is no real merit to an argument that the availability of damages is directly linked to the availability of specific relief.

4. A Right to Damages Would Be Too Difficult and Inefficacious, If Not Impossible, to Quantify and Should Accordingly Be Disallowed on This Basis

⁶⁹⁸ See Peel (n 690).

⁶⁹⁹ *ibid* 221.

⁷⁰⁰ *Ibid*.

⁷⁰¹ Adrian Briggs & Peter Rees, *Civil Jurisdiction and Judgments* (3d ed. 2002) 294, comment that: 'when in a domestic case a court is applied to for, but declines to order, an injunction to restrain a breach of contract, [it] does not follow that there is no breach. Rather the claimant is left to his common law remedy of damages.'

Difficulties in quantification pose a significant practical problem to an award of damages for breach of choice of court agreements and present a formidable obstacle to developing the damages remedy into a predictable response to breaches of jurisdiction agreements.⁷⁰² Contractual damages are compensatory in nature as they aim to protect the expectation interest of the claimant by placing him in the position that he would have been in had the contract been performed.⁷⁰³ According to the expectation measure, where a choice of court agreement is breached, the appropriate measure of damages—to put the party in a position he would be in had the contract not been breached—would be the difference between the judgment obtained (or that will be obtained) in the contractual forum and the judgment obtained (or that will be obtained) in the non-contractual forum.

Applying the expectation measure in that way to quantify damages is problematic. To quantify damages where foreign litigation commenced in breach of the clause has been concluded, the court must determine the outcome that would have resulted had the litigation taken place in the contractual forum and award the difference between the judgment obtained in the foreign forum and the judgment that would have been obtained in the contractual forum.

Where litigation has been commenced but not concluded in the non-contractual forum, the situation is twice as dire—in such a situation, the court must determine not only the hypothetical result in the contractual forum, but also the hypothetical result in the non-contractual forum, and then award the defendant the difference between the two hypothetical judgments.

⁷⁰² *OT Africa Line Ltd v Magic Sportswear Corp* [2005] EWCA Civ 710, [2005] 1 CLC 923, [33] (Longmore LJ): ‘damages will not be easily calculable and can indeed only be calculated by comparing the advantages and disadvantages of the respective fora. This is likely to involve an even graver a breach of comity than the granting of an anti-suit injunction.’; See Briggs, *Private International Law in English Courts* (n 697) 399: ‘assessment of damages for breach of a jurisdiction clause is liable to be problematic, and any attempt at quantification not much more than speculative’; Francisco Garcimartin, ‘Chapter 11 – Article 31(2)-(4)’ in Andrew Dickinson and Eva Lein (eds.), *The Brussels I Regulation Recast* (OUP 2015) 338; Martin Illmer, ‘Chapter 2 – Article 1’ in Andrew Dickinson and Eva Lein (eds.), *The Brussels I Regulation Recast* (OUP 2015) 80: ‘The calculation of the actual damage will potentially be very difficult and time consuming, carrying a considerable degree of uncertainty.’; Gary B Born, *International Commercial Arbitration* (2nd Edition, Kluwer Law International 2014) Chapter 8, 1304: ‘calculating the quantum of damages is difficult and speculative’; Nigel Blackaby and Constantine Partasides with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (5th Edition, OUP 2009) 20: ‘an agreement to arbitrate is a contract of imperfect obligation. If it is broken, an award of damages is unlikely to be a practical remedy, given the difficulty of quantifying the loss sustained’.

⁷⁰³ Ewan McKendrick, *Contract Law* (Palgrave Macmillan Law Masters, 9th Edition, Palgrave Macmillan 2011) 339-343.

It is easy to see the difficulty that the courts face. They are understandably reluctant to engage in such judicial second guessing: it is difficult to predict the likely outcome of foreign litigation and how the matter would be tried in a foreign court (especially because of differing procedural rules, rules of evidence, public policies, choice of law rules, and legal cultures resulting in apparently similar substantive rules being applied differently). Such an exercise would be cumbersome, time consuming, and, ultimately, may be nothing more than an exercise in pure speculation and conjecture. It may even result in an embarrassing spectacle if the court makes evidently mistaken assumptions of how litigation would have been carried out in the foreign courts.

Nevertheless, difficulties in quantification should not mandate a blanket rule disallowing damages in every case where a choice of court agreement is breached.⁷⁰⁴ First, where the foreign proceedings have not been completed, the quantification problem is admittedly more difficult. The contractual forum may well find it difficult to predict the outcome of foreign litigation with any degree of accuracy. But are these difficulties so intractable that a blanket bar on such claims is necessary? At the very least, in clear-cut cases, the courts should be prepared to undertake a rough and ready assessment of damages (for example, where litigation takes place in a jurisdiction that has substantially similar rules of procedure) or where the result in the foreign jurisdiction can be readily ascertained (for example, where the action will inevitably fail in the foreign court because of a well-established mandatory rule or an applicable time bar). That quantification may be very difficult in some circumstances is no justification for a rule that, because of those difficulties, the courts must deny the damages cause of action.

Second, the court will not always face such seemingly insurmountable problems. Where the forum court deciding the damages action is itself the contractual forum, or the forum in which proceedings are instituted in breach of contract, the court need only determine how it would itself have decided the case. The forum court is only hypothesizing the likely outcome of one set of proceedings instead of two —since it should not be too difficult to work out how proceedings would have panned out in the forum court. In such a case, especially where the award in the relevant foreign forum is either already rendered or abundantly clear on the merits, the quantification objection is very much weakened.

⁷⁰⁴ See *Chaplin v Hicks* [1911] 2 KB 786: The defendant, by his breach of contract, denied the claimant the opportunity to participate in a beauty contest. The jury awarded her damages of £ 100 to represent her loss of a chance to win the contest and the Court of Appeal upheld the award; See Tan, *Damages for Breach of Forum Selection Clauses* (n 673) 653-656

Third, where the cause of action is clear and certain, the courts seldom regard difficulties in quantifying damages as barring the right to damages. Instead, the courts view the difficulties relating to quantification as an issue going to proof of damages; not as a bar to the right to claim damages. Furthermore, the courts are particularly unwilling to dismiss claims simply because the actual loss suffered by the claimant would be difficult to prove.

Fourth, in cases where quantification is difficult, a reasonable estimate of the damages suffered may even suffice. The rationale being that “substantial justice is better than exact justice.”

Fifth, costs and expenses incurred in defending proceedings brought in breach of jurisdiction agreements are usually easily quantifiable. There is really no reason why the courts should not award the innocent party the costs and expenses of having to defend the proceedings brought in breach of a forum selection agreement.

Accordingly, where the breach of a choice of court agreement has clearly caused some compensable loss, difficulties of quantification ought not to bar the right to claim damages. The innocent party must be allowed, perhaps even on less onerous terms, to attempt to prove his loss in every case. A blanket rule preventing him from proving his loss, generalizing that damages for breach of jurisdiction agreements are too difficult to quantify, is inconsistent with existing authorities.

5. A Right to Damages Would Infringe on International Comity to an Unacceptable Extent

Damages awarded for litigating in a foreign non-contractual court have far reaching implications and may have a drastic impact on comity. On the issue of whether damages for breach of choice of court agreements should be allowed, if the domestic right to contractual damages is the highly persuasive force, comity is the immovable object.

The far reaching effects of anti-suit injunctions are both a blessing and a bane. An anti-suit injunction is a device that the courts can use to indirectly influence the course of foreign litigation. But the injunction also indirectly interferes with the jurisdiction of the foreign court. For this reason, the common law courts never fail to emphasize that an anti-suit injunction is an order directed at the litigant and not against the foreign court. But the reality is that the anti-suit injunction undoubtedly interferes with the judicial processes of the foreign court.

Because of the potential impact on comity, the courts exercise caution when granting anti-suit injunctions. It is submitted that such caution should also extend to the damages remedy. The next section will examine the concept of comity primarily in relation to the private law enforcement of jurisdiction agreements via anti-suit injunctions and the damages remedy.

The Principle of Comity and the Damages Remedy

Introduction

Comity is a recurring concept across the discipline of private international law, but is considered to be vague, opaque and open textured. The vagueness associated with the notion of comity can be attributed in part to the lack of a sustained effort to precisely define or at least delineate the outer dimensions of the concept. In this regard, the Supreme Court of Canada in *Morguard v De Savoye*⁷⁰⁵ cited the famous US decision in *Hilton v Guyot*:⁷⁰⁶

Comity is the recognition which one nation allows within its territory to the 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.

A *positive* conception of comity may provide a justification for the recognition of the effects of foreign pending proceedings, just as it has long been seen as a justification for the application of foreign law.⁷⁰⁷ But comity also has a *negative* function. It serves as a short hand expression for the rules of jurisdiction in public international law, that limit the extent to which one state may permissibly intervene in the affairs of another. It has been in this sense that common law courts have consistently used comity as a factor limiting the grant of anti-suit injunctions.⁷⁰⁸

English courts are aware that anti-suit injunctions can be perceived as inherently opposed to the concept of comity and have always endeavoured to reconcile anti-suit injunctions with the principle of comity. Lord Hobhouse in *Turner v Grovit* emphasized that English law attaches high importance to international comity and the English court has in mind how the ‘restraining order’⁷⁰⁹ will be perceived by foreign courts.

Two Conceptions of Comity

English jurisprudence reveals the existence of two competing theories or concepts of comity in the case law. They have not yet been synthesized or resolved into an improved solution

⁷⁰⁵ [1990] 3 SCR 1077, 1096 (Supreme Court of Canada).

⁷⁰⁶ 159 US 113 (1895).

⁷⁰⁷ Campbell McLachlan, *Lis Pendens in International Litigation* (Pocketbooks of the Hague Academy of International Law, Martinus Nijhoff Publishers, Leiden & Boston 2009) Chapter 1, 73-90.

⁷⁰⁸ *Ibid* Chapter 2, 172-179.

⁷⁰⁹ ‘Restraining order’: Alternative terminology for an anti-suit injunction adopted by Lord Hobhouse in *Turner v Grovit*. However, subsequent English decisions have not adopted the term ‘restraining order’ and have continued to utilize the conventional nomenclature.

bringing about a more harmonious interface between anti-suit injunctions and comity. Only one of these concepts strictly represents the current state of the law. The development of the anti-suit injunction in English law is premised on a narrow interpretation of the principle of comity.⁷¹⁰ According to this approach, the demands of comity are satisfied provided that the English court has an interest in granting the relief.⁷¹¹ Inspired by judicial authority from other common law jurisdictions, other English courts have sometimes adopted a broader interpretation of comity. The broad conception of comity has found expression in the judgments of Hoffman J in *Re Maxwell Communications Corporation (No 2)*,⁷¹² and Toulson LJ in *Deutsche Bank AG v Highland Crusader Offshore Partners LP*.⁷¹³ The broad theory of comity limits anti-suit injunctions to situations where the foreign court has exercised an exorbitant jurisdiction, save to protect its own jurisdiction, or otherwise enforce public policy. The strong conception potentially precludes the restraint of foreign proceedings except in cases involving an abuse of process of the English courts, and perhaps where the enforcement of contractual rights is sought. Lord Goff's position in *Airbus Industrie v Patel* prevails as a matter of authority, and only that view is consistent with the current approach of the English courts. But it remains possible that the compatibility of anti-suit injunctions with international comity will in the future come before the Supreme Court of the United Kingdom.⁷¹⁴

Comity and the Enforcement of Exclusive Choice of Court Agreements by the English Courts

It has been doubted whether comity is a consideration where relief is sought to enforce an English arbitration agreement or exclusive choice of court agreement.⁷¹⁵ In such cases it has been said that 'the true role of comity is to ensure that the parties' agreement is respected', not to inhibit the grant of relief. In an important passage, Millett LJ drew a distinction

⁷¹⁰ Alex Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (Cambridge University Press 2009) 224; Lawrence Collins, 'Comity in Modern Private International Law' in James Fawcett (ed.), *Reform and Development of Private International Law: Essays in Honour of Sir Peter North* (Oxford University Press 2002) 89; Briggs, *Agreements* (n 677) 538; Adrian Briggs, 'The Principle of Comity in Private International Law' (2012) 354 *Recueil des Cours* 65, 181-182.

⁷¹¹ *Airbus Industrie GIE v Patel* [1999] 1 AC 119.

⁷¹² *Re Maxwell Communications Corporation plc (No 2)* [1992] BCC 757 (Hoffman J).

⁷¹³ *Highland Crusader LP v Deutsche Bank AG* [2009] EWCA Civ 725 (Toulson LJ).

⁷¹⁴ Fentiman, *International Commercial Litigation* (2015) (n 677) 537; Fentiman, *International Commercial Litigation* (2010) (n 675) 580.

⁷¹⁵ Collins, *Comity in Modern Private International Law* (n 710) 102; Fentiman, *International Commercial Litigation* (2015) (n 677) 528; Fentiman, *International Commercial Litigation* (2010) (n 675) 582; Richard Fentiman, 'Comity and Antisuit Injunctions' (1998) 57 *Cambridge Law Journal* 467, 467.

between cases where breach of contract is alleged, and those where the abusive nature of the respondent's conduct is in issue. In the latter case, comity may be an issue, but not it seems in the former.⁷¹⁶

In my judgment, the time has come to lay aside the ritual incantation that this is a jurisdiction which should only be exercised sparingly and with great caution. There have been many statements of great authority warning of the danger of giving an appearance of undue interference with the proceedings of a foreign court. Such sensitivity to the feelings of a foreign court has much to commend it where the injunction is sought on the ground of forum non conveniens or on the general ground that the foreign proceedings are vexatious or oppressive but where no breach of contract is involved. In the former case, great care may be needed to avoid casting doubt on the fairness or adequacy of the procedures of the foreign court. In the latter case, the question whether proceedings are vexatious or oppressive is primarily a matter for the court before which they are pending. But in my judgment there is no good reason for diffidence in granting an injunction to restrain foreign proceedings on the clear and simple ground that the defendant has promised not to bring them.

The role of comity in cases involving breach of contractual dispute resolution clauses was recently asserted by the UK Supreme Court.⁷¹⁷ Although the Supreme Court confirmed the grant of the injunction enforcing the agreement but Lord Mance observed that there will be cases involving the breach of such agreements where 'the appropriate course will be to leave it to the foreign court to recognise and enforce the parties' agreement on forum'.⁷¹⁸

The near irrelevance of comity in cases involving a breach of an exclusive choice of court agreement or arbitration agreement can be hard to justify in principle. The English court has derived its right to intervene from the parties' contractual choice of England as the forum for the substantive disputes. However, from a truly international systemic perspective this may not be enough to justify the award of an anti-suit injunction or damages for breach of an exclusive jurisdiction agreement. It has been argued that, in order for an anti-suit injunction or the damages remedy in such a case to be reconcilable with comity, there would at least have to be some system-transcendent reason why it was appropriate for English private international law rules to be given overriding effect, and for the English courts to intervene.⁷¹⁹ Possible contenders for a system transcendent rationale include the principle of freedom of contract or *pacta sunt servanda*: if the parties have elected to contract under a particular system of law, including that system's conflict of laws rules, and for the exclusive

⁷¹⁶ *The Angelic Grace* [1995] 1 Lloyd's Rep 87, 96 (CA) (Millett LJ).

⁷¹⁷ *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, [2013] 1 WLR 1889; [2013] 1 CLC 1069.

⁷¹⁸ *Ibid* [61] (Lord Mance delivering the judgment of the UK Supreme Court).

⁷¹⁹ Thomas Raphael, *The Anti-Suit Injunction* (Oxford Private International Law Series, OUP 2008) Chapter 1, 23.

jurisdiction of that system's courts, then their personal choices should be respected, and their personal obligations enforced; and it is legitimate for the chosen court to enforce those obligations.

However, the existence of a 'system transcendent rationale' underpinning the enforcement of exclusive jurisdiction agreements via anti-suit injunctions and the damages remedy may be challenged.⁷²⁰ First, the use of the term 'system transcendent rationale' alludes to the fact that the justification offered is descriptive and of general applicability. However, the very concept of a system transcendent postulate is undermined by the relative inability of any legal system to overcome its own normative biases and prejudices. Therefore, it may not be appropriate at all to use the term 'system transcendent rationale', where a legal system's approach towards a seemingly 'neutral' or 'value free' concept is laden with normative and interpretive meaning. For instance, the conception that exclusive jurisdiction agreements are ordinary contractual obligations that can be enforced in the same way as other contractual obligations is not adhered to in many civil law legal systems.⁷²¹ Notwithstanding any argument premised on a fallacious system transcendent rationale, the right to rely on the foreign court's law and policy choices still cannot be overridden.

Having realised the futility of postulating and relying on a 'system transcendent rationale', it essentially comes down to a fundamental choice between values: Does the importance that comity places on the sovereignty of other legal systems and their right to impose their own law and policy choices, require non-intervention, irrespective of any system transcendent rationale? Or the importance of achieving practical justice, and enforcing a party's personal obligations, according to the originating system's own perception of what is right (tempered, of course, by the widest possible conception of a system transcendent rationale that is necessarily 'internationalist' in spirit), be sufficient to warrant an order against the party concerned, even at the price of tensions with comity? The English common law conflict of laws chooses the latter result.

It should be noted that, the insistence on non-intervention is not a neutral solution either. Non-intervention would result in a freely assumed obligation being overridden by an applicable legal system. A practical example of viewing the same case from different perspectives and value systems is offered by *West Tankers*: Is it a question of whether the

⁷²⁰ Raphael acknowledges that a system transcendent rationale will ultimately reflect the English court's view of transcendence: Raphael (n 719) 24.

⁷²¹ cf the 'procedural contract' conception of choice of court agreements examined in Chapter 4 above.

English court trusts the Italian court or whether Italian or English private international law rules and contract law should be applied to determine whether an English arbitration clause providing for arbitration in England is valid, effective and binding? Briggs aptly likens the mutual interface between the English common law approach to jurisdiction and that of the Brussels I Regulation to the Chinese proverb describing the dialogue between the ‘chicken and the duck’.⁷²² It is submitted that the different fundamental values attributed to jurisdiction agreements and jurisdiction in general by the common law on the one hand and the multilateral jurisdiction and judgments system of the Brussels I Regulation on the other offers an insight into the different functional responses developed by each paradigm for the assumption and exercise of jurisdiction, combating parallel proceedings and the recognition and enforcement of judgments.

Two Fundamental Confusions

The foregoing excursus describes the current conceptual uncertainty regarding the role played by comity in the grant of anti-suit injunctions by the English courts. Much of the uncertainty can be attributed to two fundamental confusions between the concepts of obligation and regulation and between issues of substance and procedure.⁷²³

Difficulty has been caused by a failure to distinguish between civil and regulatory issues, between a court’s jurisdiction to provide private remedies and its jurisdiction to regulate the conduct of the litigants – between matters of obligation and regulation. In other words, the confusion lies in a failure to appreciate the distinction between ‘original’ and ‘enforcement’ jurisdiction, the jurisdiction to grant injunctions being the latter.⁷²⁴

Where a civil remedy is sought (damages in tort or contract, for instance) it is surely sufficient, as national jurisdiction regimes invariably confirm, that a court has personal

⁷²² Adrian Briggs, ‘The Impact of Recent Judgments of the European Court on English Procedural Law and Practice’ (2005) Vol. II, No. 124 *Zeitschrift für Schweizerisches Recht* 231-262; Oxford Legal Studies Research Paper No. 11/2006 <Available at SSRN: <http://ssrn.com/abstract=899689>> accessed 5 February 2014, 11; Briggs, *Agreements* (n 677) 201.

⁷²³ R Fentiman, ‘The Scope of Transnational Injunctions’ (2013) 11 *New Zealand Journal of Public and International Law* 323, 342-344.

⁷²⁴ FA Mann, ‘The Doctrine of International Jurisdiction Revisited after Twenty Years’ (1984) 186 *Recueil des Cours* 13; FA Mann, *Further Studies in International Law* (Clarendon Press, OUP 1990) Chapter 1; For an appraisal of FA Mann’s seminal contribution to the doctrine of jurisdiction in public international law and the conflict of laws, see, Lawrence Collins, ‘F.A. Mann (1907-1991)’ in Jack Beatson and Reinhard Zimmermann, *Jurists Uprooted: German-Speaking Émigré Lawyers in Twentieth Century Britain* (OUP 2004) 382, 408-410; Campbell McLachlan employs the terms ‘judicial’ and ‘enforcement’ jurisdiction to describe ‘original’ and ‘enforcement’ jurisdiction: See Campbell McLachlan, ‘International Litigation and the Reworking of the Conflict of Laws’ (2004) 120 *LQR* 580, 596-599; See also Campbell McLachlan, ‘The Jurisdictional Limits of Disclosure Orders in Transnational Fraud Litigation’ (1998) 47 *ICLQ* 3.

jurisdiction over the defendant. Subject matter jurisdiction is not also required. A court is no less competent to hear a claim in damages against an English resident just because the contract was broken abroad. But injunctions are different. Consider, for example, the operation of orders attaching to a defendant's assets in those jurisdictions where they operate *in rem*. Even if the proprietary effect of such relief is limited, principle suggests that such relief can be granted only in respect of local assets, because principle ordains that only the *lex situs* has jurisdiction in proprietary matters. Consider, by contrast, anti-suit injunctions in English law. Such injunctions involve an instruction to the enjoined party to abstain from forbidden conduct. The order is intended to control abusive behaviour, backed by judicial sanctions for disobedience. Such orders threaten a defaulting defendant with a regulatory, court imposed penalty for contempt. They also have a procedural public character in so far as disobedience is not merely a wrong done to the applicant seeking relief, but an abuse of the English court's process and an infringement of the respondent's duty to the court.

In relation to the second confusion, between substance and procedure, the grant of transnational injunctions has often been approached as if the existence of a ground for relief – the need to prevent unjust conduct – is the only question.⁷²⁵ In this regard, Hoffman J's observations in *Mackinnon v Donaldson, Lufkin and Jenrette Securities Corp.*,⁷²⁶ with specific reference to FA Mann's Hague Academy Lectures are instructive:⁷²⁷

I think this argument confuses personal jurisdiction, i.e., who can be brought before the court, with subject matter jurisdiction, i.e., to what extent the court can claim to regulate the conduct of those persons. It does not follow from the fact that a person is within the jurisdiction and liable to be served with process that there is no territorial limit to the matters upon which the court may properly apply its own rules or the things which it can order such a person to do. As Dr Mann observed in a leading article, 'The Doctrine of Jurisdiction in International Law', (1964) III *Recueil des Cours* 146: 'The mere fact that a state's judicial or administrative agencies are internationally entitled to subject a person to their personal or "curial" jurisdiction does not by any means permit them to regulate by their orders such person's conduct abroad. This they may do only if the state of the forum also has substantive jurisdiction to regulate conduct in the manner defined in the order. In other words,

⁷²⁵ Commenting on *Laker Airways Ltd. v. Sabena Belgian World Airlines* 731 F. 2d 909 (1984), FA Mann, *Foreign Affairs in English Courts* (OUP 1986) 141, states: 'In the *Sabena* case the American courts once again confused *in personam*, that is procedural jurisdiction and legislative, that is substantive jurisdiction. They undoubtedly had the power, but lacked the right in accordance with international law to restrain a Belgian defendant from applying against a British plaintiff to the British courts for injunctive relief.'

⁷²⁶ *Mackinnon v Donaldson, Lufkin and Jenrette Securities Corp.* [1986] Ch 482.

⁷²⁷ *Ibid*, 493; For an alternative discussion of the difference between 'adjudicative' (also termed personal, *in personam* or judicial jurisdiction) and 'subject matter' jurisdiction in the context of transnational private litigation, see, Cedric Ryngaert, *Jurisdiction in International Law* (OUP 2008) 11-15.

the international validity of an order, not only its making, but also its content must be authorised by substantive rules of legislative jurisdiction.’

Arguably, FA Mann’s strict territorial conception of international jurisdiction was informed by the confluence of public international law and private international law and the interplay between municipal and international law.⁷²⁸

Returning to our assessment of anti-suit injunctions, the issue of a court’s jurisdiction to restrain foreign proceedings has been ignored on the assumption that if equity demanded relief it should be granted. Only when the singular facts of *Airbus Industrie v Patel* arose were the courts forced to consider their jurisdiction explicitly. Similarly, when restraining foreign proceedings, it is tempting to ignore considerations of comity, or merely to pay lip service to such concerns.

The courts’ previous tendency to overlook the jurisdiction to grant relief, and the more current failure to recognise the importance of comity, reflect the idea that jurisdiction is supplied by the existence of a ground for relief and that comity can be no problem if that is the case.⁷²⁹ The ideology of equity persuades us that the court can do as it likes to prevent unconscionable conduct. To adapt a phrase, we assume that extremism in the pursuit of material justice in the individual instance is no vice. As this suggests, underlying the confusion between the substantive and the procedural, most obviously in the context of anti-suit injunctions, lies a more fundamental distinction – between an equitable approach, led by the imperative of avoiding material injustice in the individual case, and an international approach, driven by concerns about jurisdictional connection, comity and conflicts justice.

⁷²⁸ FA Mann, *Studies in International Law* (OUP 1972) 15; FA Mann considered that the development of the doctrine of *forum non conveniens* was evidence of the fact that ‘judges are to a far greater extent than in earlier days guided by international law: is it reasonably consistent with the demands of international jurisdiction and its essentially territorial character that the case should proceed in the English or the foreign court?’: Mann, *Foreign Affairs in English Courts* (n 725) 143; For a discussion of the interface between public and private international law in the writings of FA Mann, Kurt Lipstein and Otto Kahn Freund, see, Peter North, ‘Private International Law in Twentieth Century England’ in Jack Beatson and Reinhard Zimmermann, *Jurists Uprooted: German-Speaking Émigré Lawyers in Twentieth Century Britain* (OUP 2004) 483, 508-510.

⁷²⁹ For the difference between ‘jurisdiction to prescribe’ (subject matter jurisdiction) and ‘jurisdiction to adjudicate’ and the negative *international* repercussions of relying exclusively on the existence of the latter in cross border civil and commercial litigation before the English courts, see, *Masri v Consolidated Contractors (No 2)* [2008] EWCA Civ 303, [2009] 2 WLR 621, [35] (Lawrence Collins LJ), a Court of Appeal decision concerning a receivership order in respect of foreign assets of a foreign company: ‘Consequently the mere fact that an order is *in personam* and is directed towards someone who is subject to the personal jurisdiction of the English court does not exclude the possibility that the making of the order would be contrary to international law or comity, and outside the subject matter jurisdiction of the English court.’ (Emphasis added); Trevor C Hartley, ‘Jurisdiction in conflict of laws - disclosure, third-party debt and freezing orders’ (2010) 126 *LQR* 194, 194-202; Adam Johnson, ‘*Morrison v National Australia Bank*: Foreign Securities and the Jurisdiction to Prescribe’ in Duncan Fairgrieve and Eva Lein (eds.), *Extraterritoriality and Collective Redress* (OUP 2012) 379, 384-385.

Conclusions

The ramifications of a broad approach to comity enunciated in *Amchem* are potentially far reaching. Outside the domain of multilateral jurisdictional regimes⁷³⁰ and international conventions premised on qualified mutual trust,⁷³¹ a unilateral model of civil jurisdiction such as the one developed by the English common law conflict of laws imposes very few limitations on the extraterritorial or exorbitant exercise of adjudicatory authority. The sufficient interest or connection requirement for the award of an anti-suit injunction may not provide the necessary safeguards to promote private international law's aspiration towards an 'international systemic perspective'.⁷³² It is submitted, that the Supreme Court of Canada's decision in *Amchem* is premised on a mature and balanced conception of private international law where anti-suit injunctions are employed in exceptional circumstances so that the public function of private international law as a structural coordinating framework for the allocation of regulatory authority is not compromised. However, the 'jungle of separate, broadly based, jurisdictions all over the world'⁷³³ may necessitate the use of anti-suit injunctions and the damages remedy to achieve practical justice between the parties in some individual cases.

Lord Goff's speech in *Airbus Industrie v Patel* contains an elaborate discussion of the differing approaches which the United States federal courts have taken to the role of comity in anti-suit injunctions.⁷³⁴ There is a division of authority between the Circuits. There is what has been described as the laxer standard, under which the court will grant an anti-suit injunction if the foreign proceedings are vexatious or oppressive and cause inequitable hardship. This approach is adopted by the Fifth, Seventh and Ninth Circuits and involves consideration of the effect on the jurisdiction of a foreign sovereign as one factor relevant to the grant of relief, but requires evidence that comity is likely to be impaired. The stricter

⁷³⁰ Brussels I Regulation (Recast); Lugano Convention (2007).

⁷³¹ Hague Convention on Choice of Court Agreements (30 June, 2005); New York Convention (1958)

⁷³² See Mills, *The Confluence* (n 710) Chapter 1; Collins, *Comity in Modern Private International Law* (n 710) 107-110.

⁷³³ *Airbus Industrie GIE v Patel* [1999] 1 AC 119, 132-133.

⁷³⁴ *Ibid* 138-140; See Collins, *Comity in Modern Private International Law* (n 710) 103; McLachlan, *Lis Pendens in International Litigation* (n 707) 165-172; George A Bermann, 'Parallel Litigation: Is Convergence Possible?' in K Boele-Woelki, T Einhorn, D Girsberger and S Symeonides (eds), *Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr* (Eleven International Publishing, 2010) 579, 586-587, FN 23: Professor Bermann notes that some US circuit courts of appeal are said to issue anti-suit injunctions rather liberally (e.g. the 7th Circuit and 9th Circuit), while others are said to do so, restrictively, that is, only to protect their own jurisdiction or to safeguard a paramount public policy (e.g. the 3rd Circuit and 6th Circuit). He also states that other circuits have sought to strike an intermediate position (e.g. the 1st Circuit); Margaret L Moses, *The Principles and Practice of International Commercial Arbitration* (CUP 2012) 96-97.

standard (espoused by the Second and Sixth Circuits and the District of Columbia Circuit) requires the court to consider international comity and to grant an injunction only to protect its own jurisdiction or to prevent its public policies from being invaded. This latter approach reflects the Canadian Supreme Court's decision in *Amchem* whilst the former approach resembles the more pragmatic English attitude towards comity when granting anti-suit injunctions.

The International Law Association's *Leuven/London Principles on Declining and Referring Jurisdiction in Civil and Commercial Litigation*⁷³⁵ take a restrictive approach to anti-suit injunctions.⁷³⁶ Subject to the exception in Principle 7.3, Principle 7.1 accepts that there is no place for such a remedy where both states are parties to an international convention specifying common rules for the exercise of original jurisdiction. Nor indeed should such a remedy be ordered where the court is satisfied that the other court will apply the Principles (Principle 7.2). In this way, the Committee sought to build the idea that ordinarily deference should be given to the court seised of the substantive proceedings, at least where that court has rules permitting it to decline jurisdiction in certain cases.⁷³⁷ However, importantly Principle 7.3 qualifies both of the previous paragraphs by permitting an exception in the case of a manifest breach of an exclusive jurisdiction clause under the law of both states.

However, the International Law Institute's Resolution on *The Principles for Determining when the Use of the Doctrine of Forum Non Conveniens and Anti-suit Injunctions is Appropriate*⁷³⁸ adopts a more liberal approach towards anti-suit injunctions:⁷³⁹

Courts which grant anti-suit injunctions should be sensitive to the demands of comity, and in particular should refrain from granting such injunctions in cases other than (a) a breach of a choice of court agreement or arbitration agreement; (b) unreasonable or oppressive conduct by a plaintiff in a foreign jurisdiction; or (c) the protection of their own jurisdiction in such matters as the administration of estates and insolvency.

⁷³⁵ Resolution 1/2000, (2000) 69 *ILA Rep. Conf.* 13; Report (2000), 69 *ILA Rep. Conf.* 137.

⁷³⁶ McLachlan, *Lis Pendens in International Litigation* (n 707) 439-448.

⁷³⁷ See *Amchem Products Inc v Workers Compensation Board* (1993) 102 DLR (4th) 96.

⁷³⁸ International Law Institute, Bruges Session 2003, Second Commission, 2nd September 2003 (Rapporteur: Sir Lawrence Collins, Co-rapporteur: M Georges Droz) in 'Texts, Materials and Recent Developments' (2003) 5 *Yearbook of Private International Law* 337, 338.

⁷³⁹ Ibid Principle 5; Marie-Laure Niboyet, 'Le Principe de Confiance Mutuelle et Les Injonctions *Anti-Suit*' in Pascal de Vareilles-Sommieres (ed.), *Forum Shopping in the European Judicial Area* (Hart Publishing, Oxford 2007) 77, 85, highlights that the 2003 Bruges Resolution states that anti-suit injunctions are not, in principle, contrary to international law. However, the nature and scope of the exercise of the power to grant the injunction determines whether their use is appropriate.

As observed, the broad concept of comity accords greater deference to the territorial sovereignty of the foreign court by drastically limiting the scope for anti-suit injunctions and the damages remedy. As such the judicial self-restraint embodied in the broad interpretation of comity provides a solution to parallel proceedings which is based on deference to the adjudicatory authority of the foreign court and the realization that important lessons can be learnt from the emerging idea of judicial cooperation in federal systems of private international law. Thus, the conception of private international law as a truly international system for the allocation of regulatory authority drastically reduces the unilateral need to control and manage parallel proceedings through the pre-emptory exercise of exorbitant jurisdiction. However, the path towards judicial cooperation in civil and commercial matters at a global level is an aspiration which has encountered substantial obstacles most recently in the form of the failed Hague Judgments Convention. The variable geometry exhibited by unilateral civil jurisdictional regimes outside the confines of the federal systems of private international law may necessitate the use of anti-suit injunctions and the damages remedy to achieve practical justice between the parties in some individual instances.

It has been observed, that the broad concept of comity may accommodate anti-suit injunctions to curb the exercise of exorbitant and extraterritorial jurisdiction by a foreign court:⁷⁴⁰ 'The foreign court, not having, itself, observed the rules of comity, cannot expect its decision to be respected on the basis of comity.' The broad concept may also permit the English courts to restrain the breach of an arbitration agreement or an exclusive jurisdiction agreement. Moreover, a court should also be entitled to preserve the integrity of its own process.

⁷⁴⁰ *Amchem Products Inc v Workers Compensation Board* (1993) 102 DLR (4th) 96.

A Comparison of the Damages Remedy with Contractual Anti-suit Injunctions: Implications for Comity and the Relative Effectiveness of Each Remedy

Where proceedings are about to be commenced or have been commenced in breach of a choice of court agreement nominating a common law jurisdiction, the defendant may apply for an anti-suit injunction from the chosen courts to restrain the claimant from instituting or continuing with the proceedings.⁷⁴¹ As an established remedy for breach of choice of court agreements, a contractual anti-suit injunction offers a useful point of comparison with the damages remedy. The two aspects on which a particularly illustrative comparison may be made are implications for international comity and the relative effectiveness of each remedy.

The perceived incompatibility of an anti-suit injunction with the concept of international comity has been the subject of vigorous debate especially along the English common law / European civil law divide.⁷⁴² The English common law courts have left no stone unturned in their attempt to put up a spirited defence of the anti-suit injunction by highlighting its *in personam* nature and that it is not issued against the civil jurisdictional apparatus of the foreign court but against the conscience of the claimant in the foreign proceedings. A similar argument may be made⁷⁴³ to obviate any concern about the negative impact on comity which a damages award for breach of a choice of court agreement may have, by emphasizing that it is only a response to the claimant's wrongful or unconscionable conduct of commencing proceedings in a non-chosen court, rather than a criticism of the foreign court itself. It should be noted that the award of damages is indeed not incompatible with admitting that the foreign court's decision is correct under the law which it is supposed to apply in accordance with its own choice of law regime.⁷⁴⁴

It may further be argued that the damages remedy is in a sense less antagonistic and intrusive towards the territorial sovereignty of a country than an anti-suit injunction since they are not in general awarded until after the foreign court has ruled on its jurisdiction or the merits of the case, whereas an anti-suit injunction, if obeyed by the respondent, effectively derails the foreign proceedings in its tracks. The opposite view, however, could

⁷⁴¹ *Donohue v Armco Inc* [2002] 1 All ER 749 (HL).

⁷⁴² *Re the Enforcement of an English Anti-suit Injunction*, [1997] ILPr 320 (Oberlandesgericht Dusseldorf).

⁷⁴³ See e.g. Clare Ambrose, 'Can Anti-Suit Injunctions Survive European Community Law' (2003) 52 *ICLQ* 401, 415; Adrian Briggs, 'Distinctive aspects of the conflict of laws in common law systems: Autonomy and agreement in the conflicts of laws', *Doshisha Law Review* (2005), para. 40.

⁷⁴⁴ Louise Merrett, 'The Enforcement of Jurisdiction Agreements within the Brussels Regime' [2006] *ICLQ* 315, 321.

just as easily be justified by recourse to the fact that, unlike an anti-suit injunction, the damages remedy practically reverses or nullifies the effect of the foreign decision. It may be observed, that a contractual anti-suit injunction is a pre-emptive tactical weapon used to enforce the English courts verdict on the validity of the jurisdiction agreement in 'litigation about where to litigate'. Whereas, the damages remedy is concerned with compensating a party for the violation of a jurisdiction agreement in the eyes of English law in 'litigation about where litigation should have taken place'.

An illuminating comparison can also be made in relation to the relative effectiveness of each remedy.⁷⁴⁵ In *OT Africa Line Ltd v. Magic Sportswear Corp*⁷⁴⁶, the Court of Appeal of England and Wales observed that the damages remedy was not as effective as an anti-suit injunction because of the negation of the decision of the foreign court (comity) in the former and the difficulties in quantifying loss. It should be emphasized that, since an anti-suit injunction bites earlier in time than the damages remedy, it may provide a more cost effective solution for parties with limited financial resources, especially SMEs⁷⁴⁷ and individuals.

On the other hand, the versatility of the remedy of damages shows strength over the rigidity of an anti-suit injunction in some cases. Thus, in a multi-party suit involving parties some of whom are bound by a choice of court agreement while others are not, an anti-suit injunction restraining only the proceedings between the parties bound by the agreement would negate the advantages of a consolidated multi-party action such as the avoidance of irreconcilable decisions and the efficient administration of justice. On the other hand, if the damages remedy is tailored to target only the costs between the parties bound by the agreement, could to that extent realise the financial interests embodied in the agreement while at the same time keeping intact the advantages of a consolidated multi-party action. Thus, in

⁷⁴⁵ It has often been judicially pronounced that damages are an inadequate remedy for breach of an exclusive forum agreement: See *Continental Bank NA v Aeakos Compania Naviera SA* [1994] 1 WLR 588, 598 (CA) (Steyn LJ): 'a claim for damages for breach of contract would be a relatively ineffective remedy. An injunction is the only effective remedy for the defendants' breach of contract.'; *The Angelic Grace* [1995] 1 Lloyd's Rep 87, 96 (CA) (Millett LJ): 'The justification for the grant of the injunction in either case is that without it the plaintiff will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy'; *Voeft Alpine* [1997] 2 Lloyd's Rep 279, 285 (CA) (Hobhouse LJ); *OT Africa Line Ltd v Hijazy (The Kribi) (No 1)* [2001] 1 Lloyd's Rep 76, [87]; cf Ambrose (n 743), suggests that damages can be an adequate remedy; Peel (n 690) 207-209, suggests that the English domestic private law approach of considering in each case whether damages may not be an adequate remedy before granting an injunction should be followed in the private international law context as well.

⁷⁴⁶ *OT Africa Line Ltd v Magic Sportswear Corp* [2005] EWCA Civ 710, [2005] 1 CLC 923, [33] (Longmore LJ). See FN 702 above for secondary sources noting the substantial difficulties encountered when quantifying damages.

⁷⁴⁷ Small and Medium Enterprises.

Donahue v. Armco,⁷⁴⁸ the English court refused to issue an anti-suit injunction against a New York action involving parties some of whom were bound by an English choice of court agreement. But damages were held to be recoverable for breach of the agreement as between the parties to the agreement. Similarly, where the foreign court finds a breach of a choice of court agreement but nevertheless decides to hear the case, as where the claimant has been time barred from suing in the chosen forum but the court finds that he had not acted unreasonably in failing to sue within the time, it may not be appropriate or even possible to issue an anti-suit injunction, not least because the foreign proceedings may not in such circumstances be seen as vexatious or oppressive. Nevertheless, there is room to award damages for breach of the choice of court agreement to allow recovery of the unrecovered costs so that the financial purpose of the agreement is, if only partially, attained.

Damages may have another advantage over an anti-suit injunction in relation to enforceability. An anti-suit injunction, being an *in personam* order, is not effective unless the respondent obeys it. If the respondent disobeys an injunction and is found guilty of contempt of court, he may be imprisoned or have his assets sequestered.⁷⁴⁹ Those sanctions, however, do not necessarily bring about the intended effect of the injunction. On the other hand, if the award of damages is not voluntarily complied with, its enforcement would realise its intended pecuniary effect, although it must be acknowledged that the enforceability of an award of damages for breach of a choice of court agreement outside the forum will not be straightforward.

⁷⁴⁸ [2002] 1 All ER 749 (HL).

⁷⁴⁹ A party who fails to comply with an anti-suit injunction will be in contempt of an English court order, which is a criminal offence punishable by up to two years' imprisonment. Committal orders may be made against directors of a company to which an injunction is addressed (CPR 81.4(3)), provided a copy of the order containing the injunction has been served in accordance with CPR 81.5-81.8 and was brought to the attention of the relevant director. An application for committal against a director of the company who was actively involved in the breach of an anti-suit injunction succeeded in *Trafigura Pte Ltd v Emirates General Petroleum Corp (EMARAT)* [2010] EWHC 3007 (Comm) (Teare J), where the director was committed to prison for a period of 12 months. Furthermore, any foreign judgment obtained in breach of anti-suit injunction will not be enforceable in England.

Chapter 8 - An in Depth Examination of the Damages Remedy for Breach of Exclusive Jurisdiction Agreements under the English Common Law Jurisdictional Regime

In *Agreements*⁷⁵⁰, Briggs examines the application of the damages remedy for breach of jurisdiction agreements in various hypothetical factual scenarios. His purpose is to extrapolate the principle espoused by the English Court of Appeal in *Union Discount v Zoller* to more doubtful penumbral cases in need of clarification. These fact patterns are evaluated below to highlight some of the difficulties arising from a wider application of the damages remedy outside the narrower confines of cases analogous to *Union Discount v Zoller*.

It will be observed, that where a jurisdiction agreement is breached in a foreign court and is valid in the eyes of English private international law, a remedy in damages may be available.⁷⁵¹ However, the very availability of the damages remedy raises complex and sensitive questions as it may place the English courts on a collision course with the civil jurisdiction and judgments apparatus of the foreign courts.⁷⁵² Thus, there exists an underlying need to synthesize the pragmatism of contract theory, under which the parties should be held to their agreement, with the principled imperatives of private international law, which acknowledges that the exercise of the court's civil jurisdiction and judgments regime does not represent a purely private interest to be left solely to the redistributive will of the parties. A unilateral jurisdiction and judgments regime with a private law remedy and 'dispute resolution' emphasis will necessarily distort the regulatory and systemic effect of private international law rules within a multilateral constitutional ordering of private law such as the EU and damage private *international* law's aspiration of becoming an international system functioning as a structural coordinating framework for the allocation of regulatory authority.⁷⁵³ The yearning for a mature and sophisticated private international

⁷⁵⁰ Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford Private International Law Series, OUP 2008) Chapter 8.

⁷⁵¹ R Fentiman, *International Commercial Litigation* (2nd Edition, OUP 2015) 113; R Fentiman, *International Commercial Litigation* (OUP 2010) 86; J Harris, 'Agreements on Jurisdiction and Choice of Law: Where Next?' [2009] *LMCLQ* 537, 544-548; Jonathan Hill and Adeline Chong, *International Commercial Disputes: Commercial Conflict of Laws in English Courts* (4th Revised Ed, Hart Publishing 2010); T Raphael, *The Anti-Suit Injunction* (OUP 2008) 321-341; Lord Collins and others (eds), *Dicey Morris and Collins on the Conflict of Laws* (Sweet and Maxwell 2012) Para 12-164 – 12-165; JJ Fawcett and JM Carruthers, *Cheshire, North and Fawcett's Private International Law* (OUP 2008) 470; David Joseph QC, *Jurisdiction and Arbitration Agreements and their Enforcement* (2nd Edition, Sweet & Maxwell, London 2010) 487.

⁷⁵² Fentiman, *International Commercial Litigation* (2015) (n 751) 114; Fentiman, *International Commercial Litigation* (2010) (n 751) 86; Harris, *Agreements on Jurisdiction and Choice of Law: Where Next?* (n 751) 544-548.

⁷⁵³ See Alex Mills, *The Confluence of Public and Private International Law* (CUP 2009) 12-14; Henri Battifol, *Aspects Philosophiques du Droit International Privé* (Librairie Dalloz, Paris 1956) 311-335; Christa Roodt, 'Border

law has borne fruition within the supranational architecture of the European Union where it complements the principle of mutual recognition.⁷⁵⁴ The Brussels I Regulation is the most successful instrument on judicial cooperation in the European Judicial Area.⁷⁵⁵ Both the regulatory and systemic coordinating function of private international law and the more pragmatic objective of substantive justice in the individual instance have to be reconciled as far as possible. The issue of the effective enforcement of jurisdiction agreements by private law remedies falls to be considered within the opposing demands of public procedural order and private justice and fairness.

From the perspective of a litigant in the English Commercial Court seeking an effective remedy to resolve the dispute, “Nothing can be more material to the obligation of a contract than the means of enforcement.”⁷⁵⁶ It is hoped, that a critical assessment of the damages remedy in the paragraphs below will assist us in calibrating an appropriate balance between the objective of *international* systemic order and the demands of individual *private* justice. It should be noted, that references to “foreign court(s)” for the purposes of the analysis in this section exclude the courts of Member States of the European Union. The legality and legitimacy of the damages remedy where pre-emptive proceedings are launched in a Member State of the European Judicial Area are examined in a separate section below.

Skirmishes between Courts and Arbitral Tribunals in the EU: Finality in Conflicts of Competence’ (2011) 13 *Yearbook of Private International Law* 91, 97-98; Campbell McLachlan, *Lis Pendens in International Litigation* (Brill 2009) 453-454, 460, notes that private international law facilitates choices between parallel exercises of adjudicatory authority in two different states where the same parties and the same cause of action are involved. He argues that judicial cooperation is the most appropriate method by which to achieve this vision. See *The Leuven/London Principles on Declining and Referring Jurisdiction in International Civil and Commercial Litigation*, Adopted as Resolution No 1/2000 at the 69th ILA Conference, London, United Kingdom, 25-29 July 2000.

⁷⁵⁴ Cf There is a certain tension between European Union law and private international law. European Union law is concerned with the principle of mutual recognition and whether the imposition of a rule constitutes a restriction to the internal market. On the other hand, private international law does not seek to neutralise the disadvantages that result from differences between national laws but instead tries to locate the geographical centre of the legal relationship. See Jan-Jaap Kuipers, *EU Law and Private International Law* (Brill 2011); Jacco Bomhoff, ‘The Constitution of the Conflict of Laws’ in Horatia Muir Watt and Diego P Fernandez Arroyo (eds.), *Private International Law and Global Governance* (OUP 2014) 262, 276, refers to the ‘rather problematic constitutionalism of an incipient area of freedom, security and justice’, where the unreformed Brussels I Regulation (2001) is oblivious towards individuals not domiciled in an EU Member State or to litigation pending in third state courts; See also, Alexander Layton, ‘The Brussels I Regulation in the International Legal Order: Some Reflections on Reflectiveness’ in Eva Lein (ed.), *The Brussels I Review Proposal Uncovered* (British Institute of International and Comparative Law, London) 75.

⁷⁵⁵ Burkhard Hess, Thomas Pfeiffer and Peter Schlosser, *The Brussels I Regulation 44/2001: Application and Enforcement in the EU* (Verlag CH Beck Munchen 2008) (‘Heidelberg Report’) 17; The Brussels I Regulation has also been referred to as ‘the most prominent cornerstone of the European law of international civil procedure’ in U Magnus and P Mankowski, *Brussels I Regulation* (2nd Revised Ed, Sellier European Law Publishers 2012); Roy Goode, Herbert Kronke, Ewan McKendrick and Jeffrey Wool, *Transnational Commercial Law: Text, Cases and Materials* (OUP 2007) 793, assess the Brussels I Regulation as ‘the most successful instrument on international civil procedure of all times’.

⁷⁵⁶ *Van Hoffman v City of Quincy*, 71 US 4 Wall 535, 552 (1866).

It is now time to consider, assess and evaluate this ‘problematic’⁷⁵⁷ remedy in four factual scenarios in order to highlight the difficulties encountered in its practical application in private international law disputes before the English courts under the common law jurisdictional regime:

1. If the foreign court declines jurisdiction, damages might be claimed by the defendant in those proceedings which represent any costs and expenses irrecoverable in the foreign proceedings.⁷⁵⁸
2. If the foreign court declines jurisdiction, damages might be claimed by the defendant in those proceedings even though costs were recoverable in the foreign proceedings.
3. If the foreign court accepts jurisdiction but the claimant in those proceedings loses, the defendant might seek to recover its costs.
4. If the foreign court asserts jurisdiction and subsequently awards damages to the claimant, the defendant might seek to recover the sum awarded by way of claw back damages in the English courts.

Fentiman notes that a distinction must be drawn between three separate grounds on which the foreign court might deny effect to the English jurisdiction agreement.⁷⁵⁹ First, the foreign court may hold that the jurisdiction agreement is contractually ineffective. If the foreign court asserts jurisdiction on the basis that the English jurisdiction agreement is invalid, or if valid is non-exclusive, it is arguable that the plea of *res judicata* or issue estoppel would defeat the claim for damages. The foreign court’s finding that the jurisdiction agreement is ineffective may prevent attempts to enforce it in English proceedings unless the foreign court had no jurisdiction to adjudicate over the matter or other defences to recognition

⁷⁵⁷ Fentiman, *International Commercial Litigation* (2015) (n 751) 113; Fentiman, *International Commercial Litigation* (2010) (n 751) 86.

⁷⁵⁸ As in *Donohue v Armco Inc* [2001] UKHL 64, [2002] 1 All ER 749, [2002] CLC 440; *Union Discount Co v Zoller* [2001] EWCA Civ 1755, [2002] 1 WLR 1517.

⁷⁵⁹ Fentiman, *International Commercial Litigation* (2015) (n 751) 114; Fentiman, *International Commercial Litigation* (2010) (n 751) 87.

apply such as the foreign judgment is contrary to public policy or the foreign judgment is irreconcilable with a prior English judgment or it is irreconcilable with another prior foreign judgment which is entitled to recognition in England.⁷⁶⁰ Secondly, the foreign court may conclude that the agreement is ineffective under its procedural law to oust its jurisdiction without addressing its contractual effect. Thirdly, the foreign court may deny effect to the agreement because it is incompatible with the public policy or mandatory rules of the forum. The plea of *res judicata* or issue estoppel (denying a claim in damages for breach of the agreement) might arise in the first situation, but not on the second or third. Provided that the foreign court's finding does not impugn the contractual validity of the agreement, but is confined to findings founded on local procedural or mandatory law or public policy, the foreign court's decision creates no estoppel which precludes an action for breach of contract.

In situation (1) (cases analogous to *Union Discount v Zoller*), if the foreign court holds that the jurisdiction agreement is valid and exclusive (and declines jurisdiction on that basis) that finding will give rise to an issue estoppel and *found* (rather than preclude) the claimant's case for damages for breach of the English jurisdiction agreement. The law in relation to *Zoller* type cases from the perspective of English common law jurisdictional regime is quite clear – damages may be awarded in such circumstances.

With regard to situation (2), Briggs suggests that a successful claim for costs in the foreign court should not prevent an action for damages for breach of jurisdiction agreement in the English courts. However, Section 34 of the Civil Jurisdiction and Judgments Act 1982⁷⁶¹ bars the relitigation of claims and provides that no proceedings may be brought in England and Wales or Northern Ireland on a cause of action in respect of which a judgment has been given in proceedings between the same parties, unless that judgment is not entitled to recognition and enforcement in England and Wales or Northern Ireland.⁷⁶² Harris suggests

⁷⁶⁰ See A Briggs, *The Conflict of Laws* (3rd Edition, OUP 2013) 177ff.

⁷⁶¹ The text of Section 34 of the CJA 1982 is reproduced verbatim: 'No proceedings may be brought by a person in England and Wales or Northern Ireland on a cause of action in respect of which a judgment has been given in his favour in proceedings between the same parties, or their privies, in a court in another part of the United Kingdom or in a court of an overseas country, unless that judgment is not enforceable or entitled to recognition in England and Wales or, as the case may be, in Northern Ireland.'

⁷⁶² See *Republic of India v India Steamship Co Ltd; The Indian Endurance and The Indian Grace* [1998] AC 878 (HL) (Lord Steyn with whom Lords Browne-Wilkinson, Hoffman, Cooke of Thorndon and Hope of Craighead agreed); Adrian Briggs, 'Foreign Judgments and *res judicata*' (1997) 68 *British Yearbook of International Law* 355; Fentiman, *International Commercial Litigation* (2015) (n 751) 471; For an in depth discussion of the preclusive effect of the plea of former recovery under Section 34 of the CJA 1982 see, Peter Barnett, *Res*

that, it may be argued that the nature of the cause of action in the foreign court is for relief for breach of the jurisdiction clause and the relief granted is costs.⁷⁶³ Similarly, C.J.S. Knight suggests that the damages action commenced in the English court is barred by virtue of Section 34 of the Civil Jurisdiction and Judgments Act 1982, which is the statutory reflection of the underlying English public policy of not permitting undue relitigation of foreign cases which have been adjudicated.⁷⁶⁴ However, the foreign court must have rendered a final and conclusive judgment on the merits if it is to have preclusive effect in England.⁷⁶⁵ Whereas, the issue of jurisdiction can be *res judicata* for issue estoppel purposes by reason of being an issue determined 'on the merits',⁷⁶⁶ there is authority to suggest that dismissals for want of jurisdiction are not themselves decisions on the cause of action thus dismissed.⁷⁶⁷

In relation to situation (3), Briggs goes on to consider the case where a foreign court accepted that there was a breach of contract but refused jurisdictional relief, before deciding in favour of the defendant in the foreign proceedings. Briggs notes that the successful party would have incurred costs and expenses in defending the proceedings on the merits. However, the successful party would have also incurred costs had the proceedings taken place in the nominated forum. Briggs argues that the costs of defending proceedings in England should not be subtracted from the sum awarded, at least unless the party in breach can show that he would have sued in England had he not breached the jurisdiction agreement. By way of response, it can be argued that if the overseas claimant had a *contractual right* to sue in England, it may not be right to place the burden of proof on him to show that he intended to exercise this, and that this would have caused loss to the

Judicata, Estoppel, and Foreign Judgments: The Preclusive Effects of Foreign Judgments in Private International Law (Oxford Private International Law Series, OUP 2001) 98-116.

⁷⁶³ Harris, *Agreements on Jurisdiction and Choice of Law: Where Next?* (n 751) 545.

⁷⁶⁴ CJS Knight, 'The Damage of Damages: *Agreements on Jurisdiction and Choice of Law*' [2008] *Journal of Private International Law* 501, 510.

⁷⁶⁵ Barnett (n 762) 52-54; See Section 1(2)(a) of the Foreign Judgments (Reciprocal Enforcement) Act 1933 (Applicable in England and Wales, Scotland and Northern Ireland for judgments from countries including Australia, Canada (except Quebec), India, Pakistan and Israel); See also, Trevor C Hartley, *International Commercial Litigation* (CUP 2009) 345.

⁷⁶⁶ *The Sennar (No 2)* [1985] 1 WLR 490, 494 (HL) (Lord Denning): 'What [on the merits] means in the context of judgments delivered by courts of justice is that the court has held that it has jurisdiction to *adjudicate* upon an issue raised in the cause of action to which the particular set of facts give rise.' Peter Barnett highlights the significance of the use of the word '*adjudicate*' as opposed to dismissing the matter procedurally: Barnett (n 762) 52-53; cf Lord Brandon of Oakbrook in *The Sennar (No 2)* [1985] 1 WLR 490, 499 (HL); For the general principle that an issue estoppel can arise from an interlocutory or interim finding by a foreign court on a procedural or non-substantive matter, see, *Desert Sun Loan Corp v Hill* [1996] CLC 1132; For an Australian authority on the applicability of the doctrine of issue estoppel to the interpretation and enforcement of jurisdiction clauses, see, *Armacel Pty Ltd v Smurfit Stone Container Corporation* [2008] FCA 592 (Jacobson J) (Federal Court of Australia); See also, Fentiman, *International Commercial Litigation* (2015) (n 751) 476-477.

⁷⁶⁷ Barnett (n 762) 54; See *Hines v Birkbeck College (No 2)* [1992] Ch 33 (CA).

other party.⁷⁶⁸ Although it could be contended that in view of his breach, the claimant should not benefit from a presumption that he would have litigated in the chosen forum.⁷⁶⁹

From another perspective, given that the foreign court has agreed with the aggrieved party on both the jurisdictional point (albeit refusing jurisdictional relief) and on the merits there would appear to be a judgment in the English claimant's favour twice over.⁷⁷⁰ If the foreign court failed to award full costs to the defendant in the foreign proceedings, which is possible if the litigation is conducted in an obstructive manner, it should not be for an English court to second guess the point and reopen the foreign proceedings.⁷⁷¹ Knight submits that Colman J. failed to acknowledge such a policy argument by awarding costs in the English proceedings on an indemnity basis partly because the foreign proceedings were an abuse of the foreign court.⁷⁷² He questions how the English Commercial Court is in any position to adjudicate upon an alleged abuse of process in another jurisdiction.⁷⁷³

On the contrary and from a more pragmatic and practice oriented standpoint, Steven Gee QC justifies the award of damages on an indemnity basis by Colman J by observing that:⁷⁷⁴

An award of costs on the standard basis allows questions of proportionality to arise, whilst costs on an indemnity basis reflects what might have been recovered by way of costs for breach of contract. The principle is that where costs are incurred as a direct result of breach of the arbitration clause, fairness requires the contract breaker to provide an indemnity against those costs to the other party.

A closer scrutiny of the dynamics of situation (4) will serve to illustrate the difficulties associated with the damages remedy for breach of an English jurisdiction agreement. Where the party claiming damages in the English court is defeated on the merits in the foreign court the matter is particularly problematic. In the words of Dr. Andrew Bell SC of the Sydney Bar:⁷⁷⁵

In these circumstances, the theoretical availability of damages is not particularly practicable or desirable alternative. This is because their assessment would entail the effective relitigation of a dispute already tried, with or without third parties who may

⁷⁶⁸ Harris, *Agreements on Jurisdiction and Choice of Law: Where Next?* (n 751) 545.

⁷⁶⁹ Ibid.

⁷⁷⁰ Knight (n 764) 510.

⁷⁷¹ Ibid.

⁷⁷² Ibid; *National Westminster Bank v Rabobank Nederland (No. 3)* [2007] EWHC 1742 (Comm); [2008] 1 Lloyd's Rep 16.

⁷⁷³ Knight (n 764) 510.

⁷⁷⁴ Steven Gee, 'Lord Bingham, Anti-Suit Injunctions and Arbitration' in Mads Andenas and Duncan Fairgrieve (eds.), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (OUP 2009) 635, 640.

⁷⁷⁵ Andrew S Bell, *Forum Shopping and Venue in Transnational Litigation* (Oxford Private International Law Series, OUP 2003) 203.

have participated in the original hearing, and an award of anything more than nominal damages would carry the conclusion that the court in which proceedings took place abroad erred in its determination.

If the foreign court rejects the jurisdictional application and decides in favour of the party in breach of the jurisdiction agreement in proceedings on the merits, the unsuccessful party in the foreign proceedings may want to claim claw-back damages in the English courts. Briggs consistently maintains that the resulting judgment of the foreign court is not entitled to recognition because of Section 32 of the Civil Jurisdiction and Judgments Act 1982.⁷⁷⁶ Section 32 of the CJA 1982 provides that a foreign judgment shall not be recognised or enforced if the bringing of those proceedings it relates to in that court 'was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the court of that country' providing that there was no counterclaim or other submission to the foreign court.⁷⁷⁷ It is made clear in section 32(3) that no decision of the foreign court will bind the English court in determining whether the conditions just stated are met. However, the successful party would argue that the judgment of the foreign court is rendered *res judicata*⁷⁷⁸ in the eyes of the law and that by defending on the merits the unsuccessful party has submitted to the jurisdiction of the foreign court.⁷⁷⁹

Briggs contends that the fact that the foreign court has ruled against the unsuccessful party on the jurisdictional application does not imply that it has accepted their findings on the jurisdictional issue or waived the breach of contract. The unsuccessful party is just seeking to assert its rights on the merits regardless of the outcome of the jurisdictional application. Briggs himself highlights, that this gives the unsuccessful party two bites at the cherry: it will accept the foreign court's ruling if it wins on the merits and reject if it loses. Harris compares

⁷⁷⁶ Briggs, *Agreements* (n 750) 314; See Section 32 of the Civil Jurisdiction and Judgments Act 1982 (UK) and Section 7(4)(b) of the Foreign Judgments Act 1991 (Cth) (Australia); For a recent illustration and general comments on Section 32 of the CJA 1982, see, *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC*. [2011] EWCA Civ 647, [2011] 2 CLC 51, [149]-[165], [2012] 1 WLR 920, 971-972 (Rix LJ); The judgment of the Court of Appeal was affirmed by the UK Supreme Court without detailed consideration of Section 32: [2013] UKSC 35, [2013] 1 WLR 1889; See also, Collins, *Dicey, Morris and Collins on the Conflict of Laws* (2012) (n 751) 712.

⁷⁷⁷ It should be noted that a party participating in the foreign proceedings in an attempt to avoid judgment against him, while nevertheless seeking to avoiding submitting to the jurisdiction of the foreign court, has to tread 'a legal tightrope': as submitted in argument by Peter Gross QC in *The Angelic Grace* [1994] 1 Lloyd's Rep 168, 180 (Commercial Court); See also, Sir Peter Gross, 'Anti Suit Injunctions and Arbitration' [2005] *LMCLQ* 10, 13.

⁷⁷⁸ 'A final judgment already decided between the same parties or their privies on the same question by a legally constituted court having jurisdiction is conclusive between the parties, and the issue cannot be raised again.' *Jowitt's Dictionary of English Law* (3rd Ed. Sweet & Maxwell 2009).

⁷⁷⁹ Gee (n 774) 641.

this argument of Briggs's to the approbation and reprobation principle.⁷⁸⁰ However, Briggs insists that this is not a case of approbation and reprobation as the unsuccessful party is relentless in its claim that the foreign judgment was obtained in breach of a valid jurisdiction agreement. However, Harris argues that one who rejects the jurisdictional competence of a foreign court should withdraw from it once the jurisdictional motion is lost, knowing that if the English courts take a different view, Section 32 of the Civil Jurisdiction and Judgments Act 1982 will prevent the recognition of the foreign judgment.⁷⁸¹ It is submitted, that a party who chooses to defend itself on the merits in the foreign court may be taken to have waived its contractual right to be sued in the courts of England. Furthermore, the recovery of claw-back damages in England is tantamount to re-examining and negating the foreign judgment on the merits. The recovery of damages for breach of a jurisdiction agreement in the present fact pattern is arguably an infringement of the principles of *res judicata* and the comity of nations. Whilst it may seek to enforce a private contractual bargain, it has a negative impact on the *public, international* and *systemic* character of private international law functioning as a structural coordinating framework for the allocation of regulatory authority.

Questions of causation and remoteness of loss may also arise in an action for damages for breach of a jurisdiction agreement.⁷⁸² For instance, if the cause of the foreign judgment was a witness being believed in a civil law jurisdiction where he could not be cross-examined, one would question whether that impediment was sufficiently connected with the breach of the choice of forum clause to have been caused by it, or whether this type of loss was too remote to be fairly recoverable for breach of the clause.⁷⁸³ On the other hand, one can envisage a case where the foreign court granted judgment because a defence which would have been conclusive in London arbitration was simply not available in the foreign court.⁷⁸⁴ It is submitted that the selection of the forum would have been the causative event that led to the foreign judgment in the latter case.

⁷⁸⁰ Harris, *Agreements on Jurisdiction and Choice of Law: Where Next?* (n 751) 546; approbate and reprobate: 'To accept and reject. A person is not allowed to accept the benefit of a document (e.g. a deed of gift) but reject any liabilities attached to it.' Jonathan Law and Elizabeth A Martin (ed.), *Oxford Dictionary of Law* (7th Edition, OUP 2009).

⁷⁸¹ *Ibid.*

⁷⁸² For an account of remoteness and causation in the English and Scots substantive private law of contract respectively, see, Ewan McKendrick, *Contract Law* (Palgrave Macmillan Law Masters, 9th Edition, Palgrave Macmillan 2011) 354-360; Gillian Black, *Woolman on Contract* (Greens Concise Scots Law, 4th Edition, W Green 2010) 145-149.

⁷⁸³ Gee (n 774) 641.

⁷⁸⁴ *Ibid.*

Quantification of damages for breach of jurisdiction agreements raises its own troublesome issues.⁷⁸⁵ Firstly, one might effectively need an extended mini-trial in order to determine what the English courts would have decided on the merits and how it would have quantified the award of damages.⁷⁸⁶ Secondly, this might prove to be a significant burden on the court's resources if the findings of the foreign court on the merits are not deemed as *res judicata* because the unsuccessful party in the foreign court was constant in its claim that the party in breach of the jurisdiction agreement did not have the right to bring an action there.⁷⁸⁷

Another argument against the recovery of damages for breach of jurisdiction agreements is that, as a matter of public policy such claims should not be encouraged since they give rise to the question where the action should have been brought after the foreign court has addressed a similar question of equal complexity i.e. whether it has jurisdiction.⁷⁸⁸ It may therefore be thought that such a claim should be precluded by the general principles of procedural law, such as those of good faith and abuse of process.

A wide conception of *res judicata* may be harnessed to control and manage the incidence of 'litigation about where litigation should have taken place' just as a wide notion of *lis pendens* may be used to manipulate the incidence of parallel proceedings. The idea of employing a wide conception of *res judicata* to regulate the enforcement of jurisdiction agreements by the English courts has not been articulated or explored hitherto. The extended doctrine of *res judicata* based on abuse of process⁷⁸⁹ or the importation of the concept of constructive

⁷⁸⁵ *OT Africa Line Ltd v Magic Sportswear Corp* [2005] EWCA Civ 710, [2005] 1 CLC 923, [33] (Longmore LJ): 'damages will not usually be an adequate remedy in fact, since damages will not be easily calculable and can indeed only be calculated by comparing the advantages and disadvantages of the respective fora. This is likely to involve an even graver a breach of comity than the granting of an anti-suit injunction.'; See A Briggs, *Private International Law in English Courts* (OUP 2014) 399: 'assessment of damages for breach of a jurisdiction clause is liable to be problematic, and any attempt at quantification not much more than speculative'; Francisco Garcimartin, 'Chapter 11 – Article 31(2)-(4)' in Andrew Dickinson and Eva Lein (eds.), *The Brussels I Regulation Recast* (OUP 2015) 338; Martin Illmer, 'Chapter 2 – Article 1' in Andrew Dickinson and Eva Lein (eds.), *The Brussels I Regulation Recast* (OUP 2015) 80: 'The calculation of the actual damage will potentially be very difficult and time consuming, carrying a considerable degree of uncertainty.'; Gary B Born, *International Commercial Arbitration* (2nd Edition, Kluwer Law International 2014) Chapter 8, 1304: 'calculating the quantum of damages is difficult and speculative'; Nigel Blackaby and Constantine Partasides with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (5th Edition, OUP 2009) 20: 'an agreement to arbitrate is a contract of imperfect obligation. If it is broken, an award of damages is unlikely to be a practical remedy, given the difficulty of quantifying the loss sustained'.

⁷⁸⁶ Raphael (n 751) 330; Harris, *Agreements on Jurisdiction and Choice of Law: Where Next?* (n 751) 546.

⁷⁸⁷ Harris, *Agreements on Jurisdiction and Choice of Law: Where Next?* (n 751) 546.

⁷⁸⁸ Koji Takahashi, Damages for Breach of a Choice of Court Agreement (2008) 10 *Yearbook of Private International Law* 57, 77-78.

⁷⁸⁹ For the domestic doctrine of abuse of process in English law, see, *Henderson v Henderson* (1843) 3 Hare 100 (Wigram V-C); *Johnson v Gore Wood & Co* [2002] AC 1 (Lord Bingham of Cornhill); For the international dimension of the doctrine of abuse of process, see, *House of Spring Gardens v Waite* [1991] 1 QB 241, 251;

*res judicata*⁷⁹⁰ into the international commercial litigation sphere may preclude the litigation of subject matter which could and should have been adjudicated upon in previous foreign proceedings. The rule in *Henderson v Henderson* is to the effect that the parties to litigation before a court of competent jurisdiction must bring forward their whole case and cannot later re-open the litigation by relying on matters which ought to have been brought forward but were omitted due to negligence, inadvertence or accident. If a party to the choice of court agreement is sued in a non-contractual forum, the extended doctrine of *res judicata* will necessitate that the aggrieved party must exhaust all available remedies in the foreign court. A challenge to the assumption and exercise of jurisdiction by the foreign court should include an application for stay of proceedings based on the jurisdiction clause and a claim to recover monetary compensation for the breach of the choice of court agreement in the foreign court prior to approaching the English courts for an anti-suit injunction or the damages remedy for breach of the jurisdiction agreement.

There are arguments which may undermine the viability of such an approach. First, the constructive *res judicata* approach will work best where the other legal system has a comparable civil jurisdictional regime allowing the stay of proceedings or damages for breach of a jurisdiction agreement.⁷⁹¹ The potential utility of the constructive *res judicata* approach in relation to other common law jurisdictions may help obviate or at least alleviate the need to resort to unilateral and confrontational methods for the control and management of parallel proceedings. The possibility of a stay of proceedings by the foreign court on the basis of the jurisdiction agreement may not present a significant legal risk. An award of costs may reimburse the aggrieved party for wasted expenditure in defending proceedings in the foreign court. If costs cannot be recovered as per the costs regime of the foreign court, the aggrieved party may attempt to counterclaim the costs as damages for breach of the choice of court agreement in the same proceedings.⁷⁹² In *A v B (No 2)*,⁷⁹³

Desert Sun Corp v Hill [1996] 2 All ER 847, 859, 864; See Fentiman, *International Commercial Litigation* (2015) (n 751) 478-479; Barnett (n 762) Chapter 6.

⁷⁹⁰ See Section 11 of the Code of Civil Procedure, 1908 (Act No. V of 1908) (Explanation IV) (Applicable in India, Pakistan and Bangladesh): 'Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.'; See *Amalgamated Coalfields Ltd v. Janapada Sabha* 1961 AIR 964, 1962 SCR (1) 1 (Supreme Court of India).

⁷⁹¹ In *Amchem Products Inc v Workers Compensation Board* (1993) 102 DLR (4th) 96, 120 (Sopinka J) (Supreme Court of Canada) it was held that an anti-suit injunction should not be granted unless the foreign court took jurisdiction 'on a basis which is inconsistent with our rules of private international law.'

⁷⁹² Peel advances the possibility of a counterclaim for damages for breach of the jurisdiction agreement in the same proceedings: Edwin Peel, 'Exclusive Jurisdiction Agreements: Purity and Pragmatism in the Conflict of Laws' [1998] *LMCLQ* 182, 224.

⁷⁹³ *A v B (No 2)* [2007] EWHC 54 (Comm), [9] (Colman J).

Colman J adopted the view that in England, separate proceedings for damages could not be commenced because, when there was a breach of a jurisdiction agreement, the cause of action for the relief of staying proceedings and the cause of action for the relief of damages were normally the same.⁷⁹⁴

Secondly, the position is different where the foreign court proceeds to hear the case on the merits and decides in favour of the party in breach. It is unlikely that the foreign court will award damages for breach of the choice of court agreement where such an order will reverse or nullify the effect of the foreign court's judgment regarding the substantive dispute.⁷⁹⁵ However, Peel argues that an award of damages for breach of a foreign jurisdiction agreement by the English courts in cases where the English courts have refused to stay proceedings in deference to the foreign jurisdiction agreement is a compromise position which seeks to balance private interest and public interest.⁷⁹⁶ It has been argued that this approach is not tenable⁷⁹⁷ as it places the strong public interest on a direct collision course with the private law right and it is highly unlikely that the private law right will escape unscathed. However, there are cases where the English courts have assumed jurisdiction and refused to stay proceedings regardless of the foreign jurisdiction agreement⁷⁹⁸ and cases where the English courts have declined to issue an anti-suit injunction for breach of an English exclusive jurisdiction agreement because the ends of justice would be best served by a single composite trial abroad.⁷⁹⁹ *Donohue v Armco* falls in the latter category, where the Appellate Committee of the House of Lords accepted a concession by counsel,⁸⁰⁰ without deciding the issue on the merits, that damages may be available for breach of the English exclusive jurisdiction agreement. Therefore, as there is room to argue that the flexible

⁷⁹⁴ In English law, costs incurred in defending the action which go beyond the sum awarded by a costs order are not recoverable as damages under the principle established in *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674 (CA).

⁷⁹⁵ See Takahashi, *Damages for Breach of a Choice of Court Agreement* (n 788) 73.

⁷⁹⁶ Peel (n 792) 224-226; Daniel Tan and Nik Yeo, 'Breaking Promises to Litigate in a Particular Forum: Are Damages an Appropriate Remedy?' [2003] *LMCLQ* 435, 438; cf Nicholas S Shantar, 'Forum Selection Clauses: Damages in Lieu of Dismissal?' (2002) 82 *Boston University Law Review* 1063, 1078-1088, argues that in relation to forum selection clauses in consumer adhesion contracts, a court should allow a consumer to pay damages in lieu of dismissal. In doing so he seeks to reconcile the interests of consumers by avoiding the unnecessary harshness of specific enforcement and sophisticated parties who are allowed to recover the costs of litigating in the consumer's home forum as damages for breach of the jurisdiction agreement.

⁷⁹⁷ Knight (n 764) 508.

⁷⁹⁸ *The Fehmarn* [1958] 1 WLR 159, 161-162 (CA) (Lord Denning); *Carvalho v Hull Blyth Ltd* [1979] 1 WLR 1228, [1979] 3 All ER 280, [1980] 1 Lloyd's Rep 172 (CA); *The Hollandia (The Morviken)* [1983] AC 565, [1982] 3 WLR 1111, [1982] 3 All ER 1141, [1983] 1 Lloyd's Rep 1 (HL).

⁷⁹⁹ *Donohue v Armco Inc* [2001] UKHL 64; [2002] 1 Lloyd's Rep. 425.

⁸⁰⁰ Concession by Lord Gabor QC representing Armco in *Donohue v Armco Inc* [2001] UKHL 64; [2002] 1 Lloyd's Rep. 425, [36] (Lord Bingham of Cornhill).

damages remedy may operate to balance the public and private interests where the English courts assume jurisdiction, refuse to stay proceedings and awards damages for breach of the foreign jurisdiction agreement, conversely, where the foreign court assumes jurisdiction and refuses to stay proceedings, it may too award damages for breach of the English exclusive jurisdiction agreement.⁸⁰¹

Thirdly, it may be argued that a claim for damages for breach of a choice of court agreement is recognised as a distinct cause of action in its own right and as a result should not be precluded on the basis of *res judicata* as identity of cause of action with the substantive claim does not exist. The pragmatic techniques of severability and *kompetenz-kompetenz* as applied to jurisdiction agreements confirm such a logical conclusion. However, the extended doctrine of abuse of process or constructive *res judicata* does not warrant a technical application premised on identity of cause of action and parties as they apply to claims which could and should have been raised in the foreign court.⁸⁰² Moreover, the doctrine of abuse of process may engage in the absence of an earlier decision capable of amounting to *res judicata*.

Both the jurisdiction agreement and the substantive claim arise from the same factual matrix. If the substantive claim is raised in the foreign court, a cause of action based on the breach of the jurisdiction agreements may also be raised there. In this regard, it should be noted that Lord Neuberger recognised that a claim based on the dispute resolution agreement in the English courts may be ‘logically inconsistent’ with the substantive claim before the Greek courts but together they were ‘commercially pointless’.⁸⁰³ He was referring to the fact that the practical effect of the judgment of the English court was akin to an anti-

⁸⁰¹ See *Commonwealth Bank v White (No 2)* [2004] VSC 268, [5] (Mandie J) (Supreme Court of Victoria), where an English company sought to stay proceedings brought in Victoria in breach of an English exclusive jurisdiction agreement. Mandie J noted that ‘it is at least arguable’ that if the defendant succeeded in its defence on the merits before the Victorian court then ‘it might have a claim for damages for breach of contract notwithstanding that.....the court refused to stay the.....proceeding on a number of occasions when the defendant so applied.’; In *Incitec Ltd v Alkimos Shipping Corp* [2004] FCA 698, [67] (Allsop J), the Federal Court of Australia refused to stay its proceedings which had been brought in breach of an English jurisdiction agreement in order to avoid inconsistent decisions since the action involved parties who were not bound by the agreement. The court alluded to the breach of the jurisdiction agreement in holding that it would hear the parties on costs, implying that the breach of the jurisdiction agreement would be taken into account in the application of the normal costs rules; See Albert Dinelli, ‘The Limits on the Remedy of Damages for Breach of Jurisdiction Agreements: The Law of Contract Meets Private International Law’ [2015] *MelbULawRw* 9; (2015) 38 *Melbourne University Law Review* 1023, 1025 FN 5; Richard Garnett, ‘Jurisdiction Clauses Since *Aka*’ [2013] *University of Melbourne Law School Research Series* 6, FN 110-FN 111; Takahashi, *Damages for Breach of a Choice of Court Agreement* (n 788) 74.

⁸⁰² See Fentiman, *International Commercial Litigation* (2015) (n 751) 479.

⁸⁰³ *The Alexandros T* [2013] UKSC 70, [132] (Lord Neuberger).

suit injunction and will render the future Greek judgment nugatory. Moreover, the sheer futility of enforcing the ‘commercially pointless’ judgments of the English and Greek courts in a third state may help shed light on the inherent limitations of the contractual enforcement of jurisdiction agreements in managing concurrent proceedings on a global multilateral level.

The potential for the extended doctrine of abuse of process to be rationally developed into a global multilateral solution for managing parallel exercises of adjudicatory authority needs to be explored. In that capacity it may also act an effective control mechanism for regulating the unilateral use of primary and secondary remedies for breach of choice of court agreements by the English courts in situations where the foreign court has a comparable civil jurisdictional regime permitting the primary and secondary enforcement of English exclusive jurisdiction agreements.

Bearing in mind that the recognition criteria and the *res judicata* criteria are coextensive in the English common law,⁸⁰⁴ a wider conception of *res judicata* may be instrumental in facilitating a more liberal regime for the recognition and enforcement of judgments and in promoting a stronger notion of comity and judicial cooperation. The use of a wide conception of *res judicata* as an effective control mechanism in the parallel exercises of adjudicatory authority may also help private international law unlock the full potential inherent in its internationalist aspirations. The jurisprudence on anti-suit injunctions may yet move towards more stringent requirements for granting such injunctive relief by articulating the role of comity as a distinct factor in the exercise of the discretion to grant the equitable remedy.⁸⁰⁵ A comparable development in relation to the role of constructive *res judicata* in the emerging jurisprudence of the damages remedy for breach of jurisdiction agreements may aid in the process of synthesizing global solutions to *lis pendens* and eventually help forge a new paradigm of jurisdiction.⁸⁰⁶ A paradigm which effectively responds to the increasingly complex interplay between international law, EU law and national law, public

⁸⁰⁴ Barnett (n 762) 37.

⁸⁰⁵ Fentiman, *International Commercial Litigation* (2015) (n 751) 537; Fentiman, *International Commercial Litigation* (2010) (n 751) 580.

⁸⁰⁶ ‘If this traditional image of sovereignty is inadequate under conditions of globalization, as is frequently claimed, then both paradigms are inadequate as well, and both sides must come together to create a new, *third paradigm of jurisdiction*.’: (Emphasis added) Ralf Michaels, ‘Two Paradigms of Jurisdiction’ [2006] *Michigan Journal of International Law* 1003, 1069; See McLachlan, *Lis Pendens in International Litigation* (n 753) 438; Alex Mills, ‘Rethinking Jurisdiction in International Law’ (2014) 84 *British Yearbook of International Law* 187, 237.

law and private law and procedure and substance at the very heart of *lis pendens* and the effective enforcement of jurisdiction agreements in a globalized world.

Relying on the jurisprudence of the superior courts of England and Wales since the decision in *Union Discount Co v Zoller*, it may be observed that damages are, in principle, available for breach of an exclusive jurisdiction agreement. However, apart from cases analogous to *Union Discount Co v Zoller*, the practical issue of recovery of damages in each of the instances referred to in the analysis above is laden with complex and sensitive issues including the possibility of indirect interference with the civil jurisdiction and judgments apparatus of foreign courts. It is submitted, that these significant issues invite us to reflect on the adverse effects of the growing market driven contractualization drive on the inherent nature and function of private international law.⁸⁰⁷ Employing the terminology utilized but not their respective priorities for Briggs in the preface of *Agreements*, the primary function of private international law should be the “regulation of civil relations” within which “dispute resolution” should operate as one of the most significant objectives. To posit “dispute resolution” as the essential function of private international law (as Briggs does) would necessarily displace the very significant public and systemic objectives to the periphery and undermine the discipline’s inherent ability to act as a structural coordinating framework for the allocation of regulatory authority.⁸⁰⁸ In view of the arguments premised on the global regulatory function of private international law, it is this author’s considered view that the damages remedy should only have a limited role to play in a measured and mature conception of private *international* law. Widespread application of the private law remedy by the English courts, guided by the redistributive will of the parties, and seeking to redress the adverse effects of pre-emptive proceedings in breach of an English choice of court agreement will actually impede judicial cooperation between states, infringe a strong notion of comity, derail mutual trust between EU Member States and render the finality of dispute resolution nugatory.

⁸⁰⁷ Muir Watt is critical of the ‘commercial dispute resolution’ emphasis in the English common law of conflict of laws as it obscures private international law doctrine and method which should inform the role, nature and content of law beyond the state: Horatia Muir Watt, ‘The Relevance of Private International Law to the Global Governance Debate’ in Horatia Muir Watt and Diego P Fernandez Arroyo (eds.), *Private International Law and Global Governance* (Law and Global Governance Series, OUP 2014) 1, 1-2.

⁸⁰⁸ Alex Mills, ‘Variable Geometry, Peer Governance, and the Public International Perspective on Private International Law’ in Horatia Muir Watt and Diego P Fernandez Arroyo (eds.), *Private International Law and Global Governance* (Law and Global Governance Series, OUP 2014) 245, 252-253.

In fact, dispute resolution is itself undermined if the English courts attempt to re-open or second guess a foreign court's decision on the basis that the English court is the chosen venue. The dispute is effectively protracted⁸⁰⁹ and not resolved with the incidence of satellite or sub-litigation and the increased potential for conflicting Member State judgments.⁸¹⁰ For the litigants, protracted litigation will result in higher costs and expenses.⁸¹¹ To quote Briggs, 'In other words, litigation about where to litigate will be replaced by litigation about where the litigation should have taken place.'⁸¹² However, there is a strong argument that litigation about where litigation should have taken place is neither an efficient nor effective method of dispute resolution in international commercial litigation.⁸¹³ Above all, the damages remedy fails to deliver what many potential claimants desire most, particularly in an action in debt; it cannot deliver prompt, summary judgment

⁸⁰⁹ Arnaud Nuyts, 'The Enforcement of Jurisdiction Agreements Further to *Gasser* and the Community Principle of Abuse of Right' in Pascal de Vareilles-Sommieres (ed.), *Forum Shopping in the European Judicial Area* (Hart Publishing, Oxford 2007) 57.

⁸¹⁰ Andrew Dickinson, 'Brussels I Review – Choice of Court Agreements' (Conflictflaws.net, 11 June 2009) <<http://conflictflaws.net/2009/brussels-i-review-choice-of-court-agreements/>> accessed 15 September 2014; Andrew Dickinson, 'Response to the Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters' (Europa.eu, 30 June 2009)

<http://ec.europa.eu/justice/news/consulting_public/0002/contributions/civil_society_ngo_academics_others/mr_andrew_dickinson_en.pdf> accessed 3 September 2014, para 24;

Response of the Law Society of England and Wales,

Review of Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters – "Brussels I" (Europa.eu, July 2009)

<http://ec.europa.eu/justice/news/consulting_public/0002/contributions/civil_society_ngo_academics_others/law_society_england_wales_en.pdf> accessed 3 September 2014, para 12; cf Bar Council of England and Wales' Response to the Brussels I Regulation Green Paper, para 3.9.

⁸¹¹ Dickinson, *Brussels I Review – Choice of Court Agreements* (n 810); Dickinson, *Response to the Green Paper* (n 810).

⁸¹² Adrian Briggs, 'The Impact of Recent Judgments of the European Court on English Procedural Law and Practice' (2005) Vol. II, No. 124 *Zeitschrift für Schweizerisches Recht* 231-262; Oxford Legal Studies Research Paper No. 11/2006 <Available at SSRN: <http://ssrn.com/abstract=899689>> accessed 15 December 2014, 20.

⁸¹³ See Luboš Tichý, 'Protection against Abuse of Process in the Brussels I Review Proposal?' in Eva Lein (ed.), *The Brussels I Review Proposal Uncovered* (British Institute of International and Comparative Law, London 2012) 103, 189: Professor Tichý refers to the damages remedy as 'a weak consolation' due to the need for separate enforcement proceedings; For a similar argument in relation to the inadequacy of the damages remedy for breach of an arbitration agreement in the English courts, see, *Sheffield United Football Club Ltd v West Ham United Football Club plc* [2008] EWHC 2855 (Comm), [22] (Teare J): 'However, it is well established that the remedy of damages is not regarded as an adequate remedy for breach of an arbitration clause'; *Starlight Shipping Co v Tai Ping Insurance Co* [2007] EWHC 1893 (Comm), [12] (Cooke J): 'Damages would, for all the reasons given in the authorities, be an inadequate remedy for breach of such a clause since its very nature requires the parties to have their disputes determined in arbitration. A party to such an agreement should not be put to the trouble of having disputes determined elsewhere in a manner contrary to the express contract between the parties'; See Born (n 785) Chapter 8, 1304: 'It was frequently (and correctly) remarked, however, that damages for breach of an arbitration agreement are an uncertain and inadequate means of enforcement'; Blackaby and Partasides (n 785) 20: 'an agreement to arbitrate is a contract of imperfect obligation. If it is broken, an award of damages is unlikely to be a practical remedy, given the difficulty of quantifying the loss sustained'.

on the merits in the agreed court.⁸¹⁴ Hence, damages for breach of a forum selection agreement and their deterrent value are a 'second-best solution' to a uniform EU wide mechanism for the avoidance of parallel proceedings *ab initio*, as was suggested in the Commission proposal.⁸¹⁵ Where available, an anti-suit injunction is likely to be a commercial litigant's preferred option.⁸¹⁶

It has been observed, that the contractual damages remedy for breach of a jurisdiction agreement may be available under the English common law jurisdictional regime. However, outside the narrower confines of cases analogous to *Union Discount v Zoller*, the damages remedy raises complex and sensitive issues which require careful analysis and examination. The remedy still needs clarification and elucidation in the more doubtful penumbral cases, before the course of the remedy can be fully mapped. A decision of the foreign court on costs or on the merits may preclude the damages action by reliance on the *res judicata* effect of the foreign judgment. Quantification of damages is a significant practical impediment and may require a trial within a trial. The concept of the extended doctrine of *res judicata* based on abuse of process or the importation of the notion of constructive *res judicata* may be applied in the international litigation sphere to limit the claim for damages to the foreign court as it could and should have been raised there in the first place. Thus a more discriminating approach employing the notion of methodological pluralism will limit the private law remedy to the foreign court and may act as an effective control mechanism. In any case, damages are a second best solution to problems of *lis pendens*.

It is submitted that the damages remedy should have a very limited role to play in international commercial litigation. In addition to doubts about the practical effectiveness of the remedy, it can damage the reputation and coherence of private *international* law as an international system functioning as a structural coordinating framework for the allocation of regulatory authority. Chapter 9 will examine the dynamics of the damages remedy in the context of the Brussels I Regulation, the role played by the private law remedy in the process of reform leading up to the finalization of the Recast Regulation and whether the remedy

⁸¹⁴ Fentiman, *International Commercial Litigation* (2010) (n 751) 90; Richard Fentiman, 'Parallel Proceedings and Jurisdiction Agreements in Europe' in Pascal de Vareilles-Sommieres (ed.), *Forum Shopping in the European Judicial Area* (Hart Publishing, Oxford 2007) 45; Fentiman, *International Commercial Litigation* (2015) (n 751) 113.

⁸¹⁵ Illmer (n 785) 80 (discussing damages for breach of arbitration agreements but the same analysis applies to damages for breach of jurisdiction agreements by parity of reasoning).

⁸¹⁶ Fentiman, *International Commercial Litigation* (2015) (n 751) 113; Briggs, *Private International Law in English Courts* (n 785) 399.

may be employed to supplement the legal regulation of choice of court agreements under the Recast Regulation.

Chapter 9 – The Damages Remedy and the Brussels I Regulation

The Viability of the Damages Remedy under the Brussels I Regulation: Will the Backdoor Approach of the English Common Law be Permitted?

It is uncertain whether and to what extent the damages remedy for the enforcement of the jurisdiction agreements can operate in cases subject to the European Union private international law regime's Brussels I Regulation.⁸¹⁷ The uniform enforcement of choice of court agreements in the European Judicial Area took a setback with the decision of the Court of Justice of the EU in *Erich Gasser v MISAT Srl*.⁸¹⁸ As a consequence of the *Gasser* ruling, where actions are pending between the same parties on the same cause of action in the courts of two Member States, the court seised second must stay its proceedings until the court first seised has declined jurisdiction in accordance with the rules of the Brussels I Regulation which give precedence to the proceedings in the court first seised even if the court seised second considers itself to have been nominated by an exclusive choice of court agreement. Moreover, the ECJ's rulings in *Turner v. Grovit*⁸¹⁹ and *West Tankers*⁸²⁰ articulated the fact that the English courts cannot apply their own discretionary remedial devices in the form of anti-suit injunctions to safeguard forum selection clauses. Therefore; the need arose to provide adequate protection to choice of court agreements in the European Judicial Area, especially in cases of 'torpedo' actions where the court first seised principle was patently abused to block proceedings in the contractual forum for an extended period of time.⁸²¹ This

⁸¹⁷ Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford Private International Law Series, OUP 2008) 330-338; David Joseph QC, *Jurisdiction and Arbitration Agreements and their Enforcement* (2nd Edition, Sweet & Maxwell, London 2010) 494-495; Trevor Hartley, *Choice of Court Agreements under the European and International Instruments* (OUP 2013) 216-220; T Raphael, *The Anti-Suit Injunction* (OUP 2008) 294-296, 340-341; R Fentiman, *International Commercial Litigation* (2nd Edition, OUP 2015) 115-120.

⁸¹⁸ *Erich Gasser v. MISAT Srl*. (C-116/02) [2003] ECR I-14693; See ZS Tang, *Jurisdiction and Arbitration Agreements in International Commercial Law* (Routledge 2014) 180-184: ZS Tang classifies the English approach to exclusive jurisdiction agreements prior to *Gasser* as 'contract priority', the approach of AG Leger as an intermediate position and the approach of the ECJ decision in *Gasser* as 'procedure priority'. The English courts have adopted an instrumental approach in the application of Articles 27 and 28 of the Brussels I Regulation in cases where there is an English choice of court agreement: See *The Alexandros T* [2013] UKSC 70; [2014] 1 All ER 590 (Lords Neuberger, Mance, Clarke, Sumption and Hughes); See Tang (n 818) 185-188.

⁸¹⁹ *Turner v. Grovit* (Case C-159/02) [2005] ECR I-3565; [2004] 2 Lloyd's Rep 169.

⁸²⁰ *Allianz SpA (formerly Riunione Adriatica di Sicurtà SpA) v. West Tankers Inc (The Front Comor)* (Case C-185/07) [2009] 1 Lloyd's Rep 413.

⁸²¹ Mario Franzosi, 'Worldwide Patent Litigation and the Italian Torpedo' [1997] *European Intellectual Property Review* 382; Martin Gebauer, 'Lis Pendens, Negative Declaratory-Judgment Actions and the First-in-Time Principle' in E Gottschalk, R Michaels, G Ruhl and J von Hein (eds.), *Conflict of Laws in a Globalized World* (CUP 2007) 89, 94.

precarious predicament is further exacerbated by the slow moving civil judicial systems of some Member States of the European Union.⁸²²

The English common law, with its strong emphasis on the contractual private law nature of jurisdiction agreements, has an offering which can potentially fill this lacuna in the enforcement of jurisdiction agreements with the damages remedy. The Heidelberg Report on the application of the Brussels I Regulation in the courts of the Member States alludes to the possibility of strengthening jurisdiction agreements by an action for damages.⁸²³ This novel remedy also found its way into the EU Commission's Green Paper⁸²⁴ for the reform of the Brussels I Regulation but was not part of the final Proposal⁸²⁵ for the reform of the EU Judgments Regulation. The admissibility of the damages remedy into the jurisdictional framework of the Brussels I Regulation is still an 'open question' which needs to be answered.⁸²⁶ This section will examine the permissibility of the damages remedy for breach of choice of court agreements in the context of the Brussels I Regulation.

In this regard, it should be noted that the Brussels I Regulation only regulates the recognition and enforcement of final judgments and does not explicitly regulate *res judicata* and issue estoppel arising from the recognition and enforcement of judgments.⁸²⁷ However, if a final judgment must be recognised under the Brussels I Regulation, it no doubt follows that any findings which underpin the judgment must also be recognised.⁸²⁸ The concept of mutual trust between the courts of the Member States necessitates the recognition of the

⁸²² Andrew Dickinson, 'A Charter for Tactical Litigation in Europe?' *Turner v Grovit* [2004] LMCLQ 273.

⁸²³ B Hess, T Pfeiffer and P Schlosser, 'Report on the Application of Regulation Brussels I in the Member States' (Study JLS/C4/2005/03, September 2007) ('Heidelberg Report') [462].

⁸²⁴ Green Paper on the review of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM (2009) 175.

⁸²⁵ Proposal for the review of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM (2010) 748 final.

⁸²⁶ Magnus and Mankowski, *Brussels I Regulation* (Sellier 2012) 511; U Magnus and P Mankowski, 'Brussels I on the Verge of Reform – A Response to the Green Paper on the Review of the Brussels I Regulation' (2010) 109 *ZVglRWiss* 1, 13; U Magnus, 'Choice of Court Agreements in the Review Proposal for the Brussels I Regulation' in Eva Lein (ed.), *The Brussels I Review Proposal Uncovered* (The BIICL, London 2012) 89-90.

⁸²⁷ R Fentiman, *International Commercial Litigation* (OUP 2010) 88; Fentiman, *International Commercial Litigation* (2015) (n 817) 118; Christa Roodt, 'Border Skirmishes between Courts and Arbitral Tribunals in the EU: Finality in Conflicts of Competence' (2011) 13 *Yearbook of Private International Law* 91, 134; Peter Barnett, *Res Judicata, Estoppel, and Foreign Judgments: The Preclusive Effects of Foreign Judgments in Private International Law* (Oxford Private International Law Series, OUP 2001) Chapter 7, 273.

⁸²⁸ See, in particular, the recent CJEU decision in: Case C-456/11 *Gothaer Allgemeine Versicherung AG v Samskip GmbH* EU:C:2012:719, [2013] QB 548, [40]-[41]; For a critical analysis of the CJEU's ruling in *Gothaer v Samskip* and the development of the concept of European *Res Judicata*, see Elisa Torralba-Mendiola and Elena Rodriguez-Pineau, 'Two's Company, Three's a Crowd: Jurisdiction, Recognition and *Res Judicata* in the European Union' (2014) 10 *Journal of Private International Law* 403.

equivalence of judicial decisions from all Member States.⁸²⁹ If not, the conclusion that is worthy of recognition is undermined. Alternatively, it has been suggested that national law operates in such cases.⁸³⁰ The justification is that the Regulation requires a national court to treat a judgment capable of recognition as if it were one of its own, which may extend to treating as binding any findings upon which the judgment depends. If this is correct, issue estoppel operates as much in a Regulation case as in others.

Let's first delve into the situation where the court first seised upholds the jurisdiction agreement and declines jurisdiction. The decision of the court first seised on the validity and effect of the choice of court agreement has to be recognised in England.⁸³¹ *Prima facie*, the foreign court's finding supports rather than prevents any claim for damages. However, Fentiman argues that merely because the claimant in the court first seised was wrong about the agreement does not mean that it was in the wrong to have sued there.⁸³² Given the effect of Article 27, (confirmed in *Gasser*) that party is entitled to test the effect of the jurisdiction agreement there. Arguably, to penalize such conduct would undermine the party's right to seise its preferred court, embodied in Article 27. It might also be characterized as an assault on the entitlement of that court to determine whether it has jurisdiction.

In English domestic law, it is not possible to bring an action for damages to claim the difference between the costs awarded by an English court in a previous action and the actual costs incurred in (successfully) defending the action.⁸³³ The reason is that the 'extra' costs are not a recoverable loss: the award of costs is regarded as being all that the losing party is legally obliged to pay.

Consequently, for the English court to allow a party to recover its 'extra' costs where the first proceedings were brought in another Member State would involve treating the foreign order

⁸²⁹ The recognition of both the result and the reasons underpinning the decision was referred to by Steven Gee QC (counsel for the defendants) in argument before Flaux J in *Starlight Shipping Co v Allianz Marine & Others* [2014] EWHC 3068 (Comm) as a 'Euro-estoppel'.

⁸³⁰ Adrian Briggs and Peter Rees, *Civil Jurisdiction and Judgments* (5th Edition, Informa Law 2009) 449-450; Louise Merrett, 'The Enforcement of Jurisdiction Agreements within the Brussels Regime' (2006) 55 *ICLQ* 315, 332-334.

⁸³¹ See Article 32 of the Brussels I Regulation and the Lugano Convention (2007); Article 2(a) of the Brussels I Regulation (Recast); Francisco Garcimartin, 'Chapter 11 – Article 31(2)-(4)' in Andrew Dickinson and Eva Lein (eds.), *The Brussels I Regulation Recast* (OUP 2015) 338; Hartley, *Choice-of-Court Agreements Under the European and International Instruments* (n 817) 217.

⁸³² Fentiman, *International Commercial Litigation* (2015) (n 817) 120; Fentiman, *International Commercial Litigation* (2010) (n 827) 88-89.

⁸³³ *Cotterell v Jones* (1851) 11 CB 713; 21 LJ (CP) 2; 138 ER 655; *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) LR 11 QBD 674 (CA).

for costs as having a lesser effect than an equivalent English order. This would run counter to the policy of EU law in general⁸³⁴ and the Brussels I Regulation in particular.⁸³⁵ The same policy considerations that led the English courts to develop the principle in an English context apply equally where the first judgment was given by a court in another Member State.

In broader terms, a judgment that a party is entitled to a given sum necessarily involves the proposition that he is not entitled to a greater sum. This is obviously true of an award of damages; there is no reason why it should not also be true with regard to an award of costs. The fact that the new claim is brought on a different legal basis (breach of contract) should make no difference: it is the same claim. To allow a party to bring proceedings for the extra costs would infringe the obligation laid down in the Regulation to recognise the foreign judgment, including the foreign costs order.⁸³⁶

The same result should follow where Y could have obtained an order for costs but chose not to do so, or where costs were not recoverable under the foreign law.

Briggs himself recognises two possible objections to the availability of damages where the court first seised upholds the jurisdiction agreement and declines jurisdiction. As a judgment from another Member State of the European Union has to be accorded in the state of recognition the same legal consequences it has under the law of the state of origin,⁸³⁷ it is possible that an award in respect of costs precludes a further action for damages, i.e. ‘the obligation to recognise the costs order may prevent a further damages action’.⁸³⁸ Secondly, Briggs refers to the CJEU’s judgment in *De Wolf v Cox*⁸³⁹ which implies that under the Brussels I Regulation the procedure for recognition and enforcement of a foreign judgment

⁸³⁴ Article 18 TFEU provides ‘Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.’ The CJEU has interpreted this provision broadly, not only combat discrimination on the basis of nationality but also discrimination on other grounds that in fact lead to the same result. In the field of legal procedure, it has been held to preclude a Member State from requiring a party from another Member State to provide security for costs in circumstances in which this would not be required of a local party: Case C-323/95 *Hayes v Kronenberger* [1997] ECR I-1711.

⁸³⁵ The general principle is that when a foreign judgment is recognised, it should be given the same effect in the Member State addressed as it has in the Member State of origin: Case C-145/86 *Horst Ludwig Martin Hoffman v Adelheid Krieg* [1988] ECR 645, [9]-[11].

⁸³⁶ Article 33(1) of the Brussels I Regulation and the Lugano Convention (2007); Article 36(1) of the Brussels I Regulation (Recast).

⁸³⁷ Briggs, *Agreements* (n 817) 333 referring to Case C-145/86 *Hoffman v Krieg* [1988] ECR 645.

⁸³⁸ Briggs, *Agreements* (n 817) 333.

⁸³⁹ Case C-42/76 *Jozef de Wolf v Harry Cox BV* [1976] ECR 1759, where it was held that if a foreign judgment is enforceable in a Member State under the Brussels I Regulation, a party is not permitted to bring new proceedings for the same sum under national law.

is the only way for the judgment creditor to enforce his claim – he may not bring fresh proceedings on the underlying cause of action. The question is whether an order for costs from the court first seised may prevent a further action for damages.⁸⁴⁰ This depends on whether an action for damages for breach of a jurisdiction agreement might be seen as a separate and distinct cause of action, sufficiently different from the cause of action underlying the proceedings in the court first seised.⁸⁴¹ It should be noted that the Court of Justice interprets ‘cause of action’ quite broadly in order to prevent to the maximum possible extent the occurrence of irreconcilable judgments.⁸⁴² The Court of Justice can only authoritatively answer the question whether an award of damages for breach of a jurisdiction agreement is irreconcilable with an order awarding costs of the proceedings in which the court has declined jurisdiction. For the time being, serious doubts persist as to whether the damages remedy in this situation would conform to the mutual trust principle and to the provisions on judgments recognition as interpreted by the Court of Justice of the European Union.

The next possibility is that the Member State court decides that the choice of court agreement is invalid or ineffective and assumes jurisdiction. However, the foreign court gives judgment for the defendant on the merits. It awards costs to the aggrieved party but the sum awarded is insufficient to cover his actual costs. The same arguments based on the effects of the foreign judgment and the preclusion of a cause of action to recover ‘extra’ costs is equally applicable in this situation. The aggrieved party’s costs may be greater because it has to defend the case on the merits but nevertheless the English court cannot reject the ruling of the Member State court that it had jurisdiction.

In the course of Chapter 8 of *Agreements*, Briggs examines a hypothetical fact pattern where an Italian court adjudicates that no valid jurisdiction clause in favour of the English courts exists.⁸⁴³ He suggests that one would have to carefully and meticulously construe the Italian court’s decision, which may have found that the Article 23 formality requirements were not satisfied or that it was superseded by another provision in the jurisdictional hierarchy of the

⁸⁴⁰ Briggs, *Agreements* (n 817) 333.

⁸⁴¹ Cf Hartley, *Choice-of-Court Agreements Under the European and International Instruments* (n 817) 218-219: Hartley contends that a separate legal basis in breach of contract should make no difference as the cause of action would infringe the obligation in the Regulation to recognise the foreign judgment including the costs order.

⁸⁴² See eg Case C-406/92 *The Tatry* [1994] ECR I-05439.

⁸⁴³ Briggs, *Agreements* (n 817) 334.

Regulation. In effect, the ruling of the Italian court only determines the procedural effect of the jurisdiction agreement under the Brussels I Regulation. Briggs employs his dual characterization of jurisdiction agreements to demonstrate that the inability of the clause to prorogate jurisdiction does not prevent it from being a valid *inter partes* private agreement. In the words of Briggs:⁸⁴⁴

The foundation for this argument is that there is a distinction between two issues: whether the jurisdiction agreement is effective in law to prorogate or derogate from the jurisdiction of a court, and whether there was a private and binding agreement on seizing a court with jurisdiction, or on the issue of proceedings.

Therefore, the claim in the English court would not be reopening the Italian court's decision regarding Article 23 as it would simply be enforcing a private agreement between the parties.

Fentiman doubts whether the distinction between the procedural and contractual effects of jurisdiction agreements is of any real value as it is difficult to fathom a jurisdiction agreement being declared inapplicable, invalid or ineffective pursuant to Article 23 of the Brussels I Regulation and nevertheless enjoying an enforceable contractual *inter partes* existence.⁸⁴⁵ Secondly, employing general contractual principles, it may be asked how the party seeking damages could have suffered loss if the foreign court has definitively determined that it is inapplicable, invalid or ineffective.⁸⁴⁶ Muir Watt notes that the emphasis placed on the private law perspective to jurisdiction agreements in the English common law of conflict of laws is 'clearly culturally conditioned'.⁸⁴⁷ She further asserts that the position of the English courts in relation to the bifurcated conception of jurisdiction agreements stands in stark contrast to that of the CJEU and the courts of the continental tradition, for whom the obligational content of a contract (its effects *in personam*) cannot be dissociated from the effects it can produce under a public law rule (effects *in rem*).⁸⁴⁸ The 'privatization'⁸⁴⁹ or contractualization of private international law resulting from courts

⁸⁴⁴ Ibid.

⁸⁴⁵ Fentiman, *International Commercial Litigation* (2015) (n 817) 119; Fentiman, *International Commercial Litigation* (2010) (n 827) 89.

⁸⁴⁶ Ibid; Garcimartin (n 831) 338.

⁸⁴⁷ Horatia Muir Watt, "'Party Autonomy'" in *International Contracts: From the Makings of a Myth to the Requirements of Global Governance* (2010) 6 *European Review of Contract Law* 1, 30; Horatia Muir Watt, 'Injunctive Relief in the French Courts: A Case of Legal Borrowing' (2003) 62 *Cambridge Law Journal* 573, 573, refers to 'the *Justizkonflikt* between the models of adjudication in the common law and civilian worlds' which 'is clearly linked to profound cultural differences' including 'the perceived requirements of comity (or, in continental terms, of territorial sovereignty)'.

⁸⁴⁸ Ibid.

⁸⁴⁹ Ibid.

willing to enforce jurisdiction agreements as between the parties despite a public law rule allocating exclusive jurisdiction to another court appears to perpetuate the notion that the courts are only there to serve the private ‘dispute resolution’ needs of the business community⁸⁵⁰ and have little or no regard for the allocative function of private international law.⁸⁵¹ In this regard, Bomhoff has applied McLachlan’s recent observation that Dicey’s conception of the nature of sovereignty and his strict separation between public and private law have left much of the common law world ‘relatively underprepared to adopt a coherent approach to the extraterritorial rights and duties of states in the present century’⁸⁵² to explain the inward focus of the common law of conflict of laws and its reluctance to easily yield to the constitutional function of private international law rules as multilateral secondary rules for the allocation of regulatory authority.⁸⁵³ On the other hand, the close affinity between jurisdiction agreements and arbitration agreements seems only natural within the common law’s ‘dispute resolution’⁸⁵⁴ focused private international law and given the fact that the arbitrators investiture proceeds directly from the will of the parties to the contract.

In view of the distinctly multilateral countervailing *ethos* of the European Union private international law regime’s Brussels I Regulation, it is submitted, that the English proceedings

⁸⁵⁰ See the High Court of Australia in *Pan Foods Co Importers and Distributors Pty Ltd v Australia and New Zealand Banking Group Ltd* (2000) 170 ALR 579, [24] (Kirby J) discussed in Briggs, *Agreements* (n 817) 527.

⁸⁵¹ See Alex Mills, *The Confluence of Public and Private International Law* (CUP 2009).

⁸⁵² Campbell McLachlan, ‘The Allocative Function of Foreign Relations Law’ (2013) 84 *British Yearbook of International Law* 349, 356.

⁸⁵³ Jacco Bomhoff, ‘The Constitution of the Conflict of Laws’ in Horatia Muir Watt and Diego P Fernandez Arroyo (eds.), *Private International Law and Global Governance* (OUP 2014) 262, 267.

⁸⁵⁴ Briggs, *Agreements* (n 817) Preface, viii: ‘The view taken here is that the common law of private international law is much more about the resolution of civil disputes than the regulation of civil relations’; Horatia Muir Watt, ‘Private International Law Beyond the Schism’ (2011) 2 *Transnational Legal Theory* 347 (HAL Archive, 3 April 2014) <<https://hal-sciencespo.archives-ouvertes.fr/hal-00973084>> accessed 1 May 2015, 40; Robert Wai, ‘Private v Private: Transnational Private Law and Contestation in Global Economic Governance’ in Horatia Muir Watt and Diego P Fernandez Arroyo (eds.), *Private International Law and Global Governance* (OUP 2014) 34, 50-52, highlights the existence of a broader range of regulatory concerns behind the ‘smooth’ market for international dispute resolution – the distributional consequences of international dispute resolution agreements for third parties and weaker contracting parties may be neglected by national courts pro-actively seeking to enforce choice of forum and choice of law agreements; H Muir Watt, ‘The Relevance of Private International Law to the Global Governance Debate’ in Horatia Muir Watt and Diego P Fernandez Arroyo (eds.), *Private International Law and Global Governance* (OUP 2014) 1; Many scholars have expressed concern that party autonomy may enable private parties to evade the regulatory power of states interested in the dispute and its consequences: See Muir Watt, *Party Autonomy in International Contracts* (n 847); Robert Wai, ‘Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization’ (2001-02) 40 *Columbia Journal of Transnational Law* 209, 218; cf Gilles Cuniberti, ‘The Merchant Who Would Not be King: Unreasoned Fears About Private Lawmaking’ in Horatia Muir Watt and Diego P Fernandez Arroyo (eds.), *Private International Law and Global Governance* (OUP 2014) 142.

to enforce the private contractual agreement are in fact revisiting the Italian court's decision on the procedural effects of the jurisdiction agreement.

It is now time to consider the situation where the aggrieved party seeks to recover both substantive claw back damages (reflecting any substantive damages awarded to the other party in the courts of another Member State) and wasted costs and expenses for defending foreign proceedings before the English courts. In order to succeed in the claim for monetary compensation, the aggrieved party would have to show that if proceedings had been commenced in the English courts, it would have won on the merits. However, for the English court to entertain the damages action for breach of the choice of court agreement would be tantamount to reconsidering issues already decided by the courts of another Member State. Thus, this factual scenario will directly impair the operation of the Brussels I Regulation's regime for the recognition and enforcement of judgments.⁸⁵⁵ Article 32 of the Brussels I Regulation requires an English court to enforce any foreign judgment against the party who seeks to recover damages.

Moreover, allowing a party to recover damages for breach of a jurisdiction agreement indirectly impairs the effectiveness of the European jurisdictional regime.⁸⁵⁶ It qualifies the foreign court's finding that its jurisdiction is not ousted by Article 23. It indirectly undermines the principle that the court first seised has exclusive competence to determine the effect of a jurisdiction agreement. It also deters the other party from exercising its right to invoke the *competence-competence* of any court in the European Union. The Court of Justice of the EU has refused to countenance similar indirect impairments to the integrity of the Brussels I Regulation. Any distinction between regulating the conduct of the party who sues in the courts of a Member State, and questioning that court's right to determine its own jurisdiction is given short shrift.⁸⁵⁷ Where another court has found that the jurisdiction agreement is invalid or ineffective, any subsequent finding by an English court that the claimant abroad is in breach of contract may thus subvert Article 27, if only indirectly. Nor may it cohere with the Brussels regime to penalize the infringement of a jurisdiction agreement in any way, when the regime refrains from doing so. The Brussels I Regulation

⁸⁵⁵ Fentiman, *International Commercial Litigation* (2015) (n 817) 120; Fentiman, *International Commercial Litigation* (2010) (n 827) 89; Hartley, *Choice-of-Court Agreements Under the European and International Instruments* (n 817) Chapter 10, 219.

⁸⁵⁶ Fentiman, *International Commercial Litigation* (2015) (n 817) 120; Fentiman, *International Commercial Litigation* (2010) (n 827) 89-90.

⁸⁵⁷ *Turner v. Grovit* (Case C-159/02) [2005] ECR I-3565; [2004] 2 Lloyd's Rep 169; *West Tankers Inc v Allianz SpA (The Front Comor)* (Case C 185/07) [2009] 1 AC 1138.

requires a judgment to be enforced even if the enforcing court considers that it was obtained in breach of such an agreement.⁸⁵⁸

It seems that in every conceivable situation, damages cannot be claimed where the court in which the other proceedings were brought was in a Brussels or Lugano State and the case comes within the subject-matter scope of the Brussels I Regulation or Lugano Convention. Therefore, Briggs's argument regarding the possible application of the damages remedy in the European Judicial Area has very limited prospects of succeeding before the Court of Justice of the European Union.⁸⁵⁹ The principle of mutual trust between the courts of the Member States and the *effet utile* of EU law is high on the list of priorities for the Court of Justice, which necessarily limits the likelihood of success of a private law remedy for breach of jurisdiction agreements as it may distort the systemic effect of the multilateral and constitutional ordering of private law in the EU. A preliminary reference to the CJEU from the English courts regarding the legality and legitimacy of the damages remedy, may be viewed as yet another attempt to reassert the role of the common law of conflict of laws and to circumvent the uniform codified rules of the Brussels I Regulation.

The next section of this chapter evaluates the role of the damages remedy in the process of reform leading up to the finalization of the text of the Recast Regulation and examines the amendments to the choice of court agreement provision and the provision on *lis pendens*.

⁸⁵⁸ Article 33 of the Brussels I Regulation; cf Section 32 of the Civil Jurisdiction and Judgments Act 1982: Overseas judgments given in proceedings brought in breach of agreement for settlement of disputes shall not be recognised or enforced in the United Kingdom. (Geographical Extent: England and Wales, Scotland and Northern Ireland); See Hartley, *Choice-of-Court Agreements Under the European and International Instruments* (n 817) 186-187.

⁸⁵⁹ See Martin Illmer, 'Chapter 2 – Article 1' in Andrew Dickinson and Eva Lein (eds.), *The Brussels I Regulation Recast* (OUP 2015) 79; Gilles Cuniberti and Marta Requejo, 'La sanction des clauses d'élection de for par l'octroi de dommages et intérêts', *ERA Forum* 2010-1 (SSRN, February 18, 2010) <<http://ssrn.com/abstract=1689417>> or <<http://dx.doi.org/10.2139/ssrn.1689417>> accessed October 5, 2014; Hartley, *Choice-of-Court Agreements Under the European and International Instruments* (n 817) Chapter 10, 220; J Harris, 'Agreements on Jurisdiction and Choice of Law: Where Next?' [2009] LMCLQ 537, 547; Edwin Peel, 'Introduction' in Pascal de Vareilles-Sommieres (ed.), *Forum Shopping in the European Judicial Area* (Hart Publishing, Oxford University Press 2007) 1, 15-17; Fentiman, *International Commercial Litigation* (2015) (n 817) 115; Fentiman, *International Commercial Litigation* (2010) (n 827) 90; Arnaud Nuyts, 'The Enforcement of Jurisdiction Agreements Further to Gasser and the Community Principle of Abuse of Right' in Pascal de Vareilles-Sommieres (ed.), *Forum Shopping in the European Judicial Area* (Hart Publishing, Oxford 2007) 57; Petr Briza, 'Choice-of-court Agreements: Could the Hague Choice of Court Agreements Convention and the Reform of the Brussels I Regulation be the way out of the Gasser–Owusu Disillusion?' (2009) 5 *Journal of Private International Law* 537, 548-554; cf Raphael (n 817) 294; Felix Blobel and Patrick Späth, 'The Tale of Multilateral Trust and the European Law of Civil Procedure' (2005) 30 *European Law Review* 528, 545-546, highlight the counterproductive effects of secondary remedies on the principle of mutual trust in the European Union.

Choice of Court Agreements and the Brussels I Regulation (Recast)

In April 2009, the EU Commission adopted a Green Paper on the review of the Brussels I Regulation, asking interested parties to comment on potential improvements to the Regulation, including the role of choice of court agreements. ('Green Paper')⁸⁶⁰ The Green Paper emphasized the importance of ensuring that choice of court agreements are accorded the fullest possible effect due to their significance in international commerce.⁸⁶¹ In particular, the need to strengthen choice of court agreements in the event of parallel proceedings was highlighted.⁸⁶² After an extensive public debate on the proposed changes, the EU Commission tabled its proposal for a Regulation of the European Parliament and of the Council on the jurisdiction and recognition and enforcement of judgments in civil and commercial matters ('Proposal').⁸⁶³

The Proposal included two major amendments to the Brussels I Regulation aimed at improving the effectiveness of choice of court agreements.⁸⁶⁴ Where the parties have designated a particular court or courts to resolve their dispute, the Proposal gave priority to the chosen court to decide on its jurisdiction, regardless of whether it is first or second seised.⁸⁶⁵ Any other court had to stay proceedings until the chosen court had established or in case the agreement was invalid declined jurisdiction. This modification was intended to augment the effectiveness of choice of court agreements and eliminate the incentives for abusive litigation in non-competent courts. Moreover, the proposal introduced a harmonised choice of law rule on the substantive validity of choice of court agreements,

⁸⁶⁰ Green Paper on the review of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 21 April 2009, COM (2009) 175 final. See Magnus and Mankowski, *Brussels I on the Verge of Reform* (n 826) 11-16; Ulrich Magnus and Peter Mankowski, 'Joint Response to the Green Paper on the Review of the Brussels I Regulation' 3.3 Permitting Contractual Remedies <http://ec.europa.eu/justice/news/consulting_public/0002/contributions/civil_society_ngo_academics_others/prof_magnus_and_prof_mankowski_university_of_hamburg_en.pdf> accessed 15 February 2014.

⁸⁶¹ Green Paper (n 860) 5.

⁸⁶² Ibid.

⁸⁶³ Proposal for the review of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM (2010) 748 final. See Ulrich Magnus and Peter Mankowski, 'The Proposal for the Reform of Brussels I' (2011) 110 ZVglRWiss 252, 272-285; Magnus, *Choice of Court Agreements in the Review Proposal for the Brussels I Regulation* (n 826); Burkhard Hess, 'The Brussels I Regulation: Recent Case Law of the Court of Justice and the Commission's Proposed Recast' (2012) 49 *Common Market Law Review* 1075, 1100-1112; JM Carruthers, 'The Brussels I Regulation recast' [2011] *Scots Law Times* 31, 31-32; ZS Tang, 'Conflicts of Jurisdiction and Party Autonomy in Europe' (2012) LIX *Netherlands International Law Review* 321, 351-359; Ilaria Queirolo, 'Prorogation of Jurisdiction in the Proposal for a Recast of the Brussels I Regulation' in Fausto Pocar, Ilaria Viarengo and Francesca C Villata (eds), *Recasting Brussels I* (CEDAM 2012) 183.

⁸⁶⁴ Proposal (n 863) 8.

⁸⁶⁵ Ibid.

thus ensuring a similar decision on this issue wherever the court seised.⁸⁶⁶ Both modifications reflected the solutions established in the Hague Convention on the Choice of Court Agreements, thereby facilitating a possible conclusion of this Convention by the European Union.⁸⁶⁷

The Council and the European Parliament have adopted all of the proposed amendments relating to choice of court agreements, including the most significant changes to the *lis pendens* rules, albeit with some modifications in the Brussels I Regulation (Recast).⁸⁶⁸ The Brussels I Regulation (Recast) was adopted on 12 December 2012 and applies to legal proceedings commenced on or after 10 January 2015.⁸⁶⁹ The new Regulation will have a significant impact in augmenting jurisdictional party autonomy and minimizing opportunities for abusive tactical ploys in cross border litigation in Europe. Perhaps the most significant of these reforms in relation to choice of court agreements at least is the reversal of the effects of the CJEU's notorious decision in *Erich Gasser GmbH v MISAT Srl*.⁸⁷⁰ This section will examine the amendments to the choice of court agreement provisions in the Recast Regulation.

Before venturing into the details of the new choice of court agreement provisions in the Brussels I Regulation (Recast), it may be useful to consider whether contractual remedies for breach of choice of court agreements have had any role to play in the reform process. Anti-suit injunctions restraining proceedings in the courts of EU Member states have already been decommissioned by the CJEU as an affront to the principle of mutual trust.⁸⁷¹ However, the demise of the anti-suit injunction in the EU has led some English common law academics to suggest that damages may be awarded for breach of choice of court agreements.⁸⁷² The damages remedy has also found support in the decisions of the superior courts of England and the Spanish Tribunal Supremo.⁸⁷³ The Heidelberg Report on the application of the

⁸⁶⁶ Ibid.

⁸⁶⁷ Ibid.

⁸⁶⁸ Council Regulation (EU) 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) [2012] OJ L351/1; See Andrew Bowen, 'New Brussels I Regulation and Choice of Court Agreements' (2014) 24 *Scots Law Times* 99.

⁸⁶⁹ Article 81 of the Brussels I Regulation (Recast).

⁸⁷⁰ *Erich Gasser GmbH v MISAT Srl* Case C-116/02 [2004] 1 Lloyd's Rep 222.

⁸⁷¹ See *Turner v. Grovit* (Case C-159/02) [2005] ECR I-3565; [2004] 2 Lloyd's Rep 169; *Allianz SpA (formerly Riunione Adriatica di Sicurtà SpA) v. West Tankers Inc (The Front Comor)* (Case C-185/07) [2009] 1 Lloyd's Rep 413.

⁸⁷² See Briggs, *Agreements* (n 817) Chapter 8.

⁸⁷³ See *Union Discount Co Ltd v Zoller and Others* [2001] EWCA Civ 1755, [2002] 1 WLR 1517; *Donohue v Armco Inc* [2001] UKHL 64, [2002] 1 All ER 749; *Sogo USA Inc v Angel Jesus, STS* (Sala de lo Civil, Sección 1ª), 12 January

Brussels I Regulation alludes to the possibility of awarding damages for breach of choice of court agreements:⁸⁷⁴

Exclusion of Anti-Suit Injunctions – Exclusion of Damages?

An additional support to the efficiency of jurisdiction agreements may be achieved by granting damages for breach of that agreement. An alternative might be to refer the parties to collateral agreements securing compliance with the jurisdictional system, in particular with choice of forum agreements, in that the parties agree to compensate the costs of proceedings instituted with a court lacking jurisdiction including follow up damages e.g. arising from the delay or the exercise of default clauses in loan agreements. The judgment of the *ECJ* in *Turner* excluding anti-suit injunctions issued by a court purporting to avoid “abusive” proceedings does not seem to directly exclude the possibility of such collateral undertakings between the parties and their enforcement by the courts. However, the issue appears not to be fully explored.

Thus the Heidelberg Report suggests that damages may be awarded for breach of a choice of court agreement in order to act as a deterrent and secure compliance with the agreement. Collateral agreements awarding damages for breach of the choice of court agreement are also mentioned. It is submitted that such collateral agreements being independent and not a constituent part of the choice of court agreement may offer an alternative route to the award of the damages as compensation for Member States of the EU that rely on a ‘procedural contract’ conception of choice of court agreements. The ‘procedural contract’ conception of choice of court agreements conceives the function of such agreements as primarily focused on invoking the jurisdiction of a court without giving rise to an independent and subsisting contractual obligation to sue only in the nominated forum. The independent collateral agreement will circumvent the procedural limitations of the choice of court agreement and award damages for breach of choice of court agreements. However, it is argued in the course of this chapter that when a preliminary reference on the issue of the compatibility of the damages remedy with the Brussels-Lugano regime is sent to the CJEU for clarification, it is likely that the damages remedy may too succumb to the same fate as anti-suit injunctions.

The Green Paper also mentioned the award of damages for breach of choice of court agreements as one of the options to pursue in the reform of the Brussels I Regulation:⁸⁷⁵

2009, Repertorio de Jurisprudencia 2009/544 (Spanish Tribunal Supremo); *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG (The Alexandros T)* [2014] EWCA Civ 1010 (Authority for damages remedy under the Brussels I Regulation).

⁸⁷⁴ The Heidelberg Report (n 823) para [407], page 117.

The efficiency of jurisdiction agreements could also be strengthened by the granting of damages for breach of such agreements, arising for instance from the delay or the exercise of default clauses in loan agreements.

Legal practitioners in England voiced mixed opinions on the damages remedy. The General Council of the Bar of England and Wales expressed a view in favour of the remedy:⁸⁷⁶

Damages. The Green Paper suggests that “*the efficiency of jurisdiction agreements could also be strengthened by the granting of damages for breach of such agreements*”. The Bar Council endorses this suggestion. A party should not be able to breach his contract by litigating in another forum than the chosen forum without suffering the contractual consequences. The right to damages should be enshrined in Community law and, subject to the principle of effectiveness of such law, the assessment of such damages could be left to the law of the forum.

However, the Law Society of England and Wales expressed a view against it.⁸⁷⁷ The European Union Committee of the United Kingdom House of Lords also expressed a view against enshrining the damages remedy in the Brussels I Regulation.⁸⁷⁸

It has been argued that allowing contractual remedies for breach of choice of court agreements would bolster the strength and force of such agreements.⁸⁷⁹ At present it is not clear whether a collateral clause for liquidated⁸⁸⁰ damages or a genuine penalty clause would be upheld in the light of the CJEU’s decision in *Turner v Grovit*.⁸⁸¹ In similar vein, the

⁸⁷⁵ Green Paper (n 860) 5.

⁸⁷⁶ Bar Council of England and Wales, ‘Response of the Bar Council of England and Wales to the Commission’s Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters’ (June 2009) para. 3.9 ‘Consulting the public’ (Europa.eu, June 2009)

<http://ec.europa.eu/justice/news/consulting_public/0002/contributions/civil_society_ngo_academics_others/bar_council_of_england_and_wales_en.pdf> accessed 20 June 2014 (Emphasis in original).

⁸⁷⁷ ‘Review of Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters – Brussels I. Response of the Law Society of England and Wales’ (July 2009) para. 12 (Europa.eu, July 2009)

http://ec.europa.eu/justice/news/consulting_public/0002/contributions/civil_society_ngo_academics_others/law_society_england_wales_en.pdf.

⁸⁷⁸ The European Union Committee of the House of Lords, ‘Green Paper on the Brussels I Regulation: Report with Evidence’ 21st Report of Session 2008–09 (HL Paper 148) paras. 63 and 69 (UK Parliament Publications Website) <<http://www.publications.parliament.uk/pa/ld200809/ldselect/lddeucom/148/14805.htm>> accessed 12 October 2014.

⁸⁷⁹ Magnus and Mankowski, *Brussels I on the Verge of Reform* (n 826) 13.

⁸⁸⁰ See HG Beale, ‘Damages’ in HG Beale and others (eds), *Chitty on Contracts* (Volume I, 31st Edition, Sweet and Maxwell, London 2012) Chapter 26, 1761: The term liquidated damages is applied where the damages have been agreed and fixed by the parties in a way which complies with the criteria developed by the courts for the validity of penalty clauses.

⁸⁸¹ Peter Mankowski, ‘Ist eine vertragliche Absicherung von Gerichtsstandsvereinbarungen möglich?’ (2009) *IPRax*, 23–35; Magnus and Mankowski, *Brussels I on the Verge of Reform* (n 826) 13; Magnus and Mankowski, *Joint Response to the Green Paper* (n 826) 8–9.

recognition of a cause of action of damages for breach of jurisdiction agreements would create a massive incentive for parties to stay loyal to the agreement.⁸⁸²

However, an EC law remedy for ‘breach’ of choice of court agreements strays into the realm of substantive contract law and would appear outside the Community’s competence under Title IV of the Treaty.⁸⁸³ It would also promote satellite litigation, increasing costs and the potential for conflict between Member State judgments.⁸⁸⁴

The Proposal does not address the issue of remedies for breach of choice of court agreements.⁸⁸⁵ There is a view that it is doubtful whether damages can be awarded for breach of a choice of court agreement, unless the parties have expressly stipulated liquidated damages or a penalty for such a breach.⁸⁸⁶ The dichotomy between exclusive choice of court agreements as substantive contracts to sue only in the nominated forum and choice of court agreements as procedural contracts exclusively concerned with the procedural relationship between the parties has led to a debate regarding the legal basis of the damages remedy in the EU.⁸⁸⁷ Under Article 23 of the Brussels I Regulation the issue of damages for breach of a choice of court agreement is unresolved.⁸⁸⁸ A preliminary reference on the point would help clarify matters but the likelihood of the contractual remedy surviving an inquisition by the CJEU of its compatibility with the Brussels-Lugano regime is minimal.

The first area of reform in relation to choice of court agreements in the Brussels I Regulation (Recast) focusses on reversing the effects of the ‘Italian torpedo’. The ‘Italian torpedo’ is an abusive litigation tactic that relies on a combination of the Brussels I Regulation’s first come

⁸⁸² Ibid.

⁸⁸³ Andrew Dickinson, ‘Brussels I Review – Choice of Court Agreements’ (Conflictolaws.net, 11 June 2009) <<http://conflictolaws.net/2009/brussels-i-review-choice-of-court-agreements/>> accessed 15 December 2014.

⁸⁸⁴ Ibid; Horatia Muir Watt, ‘Conclusion’ in Pascal de Vareilles-Sommieres (ed.), *Forum Shopping in the European Judicial Area* (Hart Publishing, Oxford 2007) 145, 152.

⁸⁸⁵ Magnus and Mankowski, *The Proposal for the Reform of Brussels I* (n 863) 285; Magnus, *Choice of Court Agreements in the Review Proposal for the Brussels I Regulation* (n 826) 101; Pamela Kiesselbach, ‘The Brussels I Review Proposal – An Overview’ in Eva Lein (ed.), *The Brussels I Review Proposal Uncovered* (BIICL, London 2012) 1, 13.

⁸⁸⁶ Mankowski, *Ist eine vertragliche Absicherung von Gerichtsstandsvereinbarungen möglich?* (n 881).

⁸⁸⁷ See Magnus and Mankowski, *Brussels I Regulation* (n 826) 511. For Damages: *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG (The Alexandros T)* [2014] EWCA Civ 1010; Burkhard Hess, *Europäisches Zivilprozessrecht* (CF Muller 2010) para 6-146; Against Damages: Peter Gottwald in Thomas Rauscher, Joachim Wenzel and Peter Wax, *Münchener Kommentar zur Zivilprozessordnung* (3rd Edition, Beck 2008) art 23 EuGVVO, [79] (only procedural sanctions); Mankowski, *Ist eine vertragliche Absicherung von Gerichtsstandsvereinbarungen möglich?* (n 881) 27 (but possible where specifically agreed upon by the parties).

⁸⁸⁸ Magnus and Mankowski, *The Proposal for the Reform of Brussels I* (n 863) 285; Magnus, *Choice of Court Agreements in the Review Proposal for the Brussels I Regulation* (n 826) 101.

first served rule on *lis pendens*⁸⁸⁹ and the protracted delays in proceedings that occur in certain EU Member States with slow moving civil justice systems to allow unscrupulous litigants to block proceedings against them in other Member States. The *lis pendens* rule applies where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States. Article 27 of the Brussels I Regulation requires the court second seised to stay its own proceedings before it until the jurisdiction of the court first seised is established. If the court first seised concludes that it has jurisdiction, the other court must decline jurisdiction.

The ‘Italian torpedo’ was the brainchild of an Italian *avvocato*, Mario Franzosi, who conceived it as a tactic by which patent infringers could effectively block proceedings against them in other Member States.⁸⁹⁰ Mario Franzosi’s idea was that persons facing imminent patent infringement actions could protect themselves by pre-empting and commencing proceedings in Italy for a declaration of non-liability. Under Article 27 of the Brussels I Regulation proceedings for a declaration of non-liability in one Member State and proceedings for the positive assertion of liability in another Member State have the same cause of action.⁸⁹¹ Thus the *lis pendens* rule effectively blocks proceedings for a patent infringement action in any Member State other than the court first seised. Even if the party relying on the torpedo tactic is eventually bound to lose on the merits of the case, the Italian proceedings could continue for many years, thus buying time to negotiate a settlement. It did not matter if the Italian courts lacked jurisdiction, since it would take a long time indeed for a definitive ruling to this effect to be obtained.⁸⁹²

The legitimacy of the torpedo tactic came before the Court of Justice of the EU in the notorious case of *Erich Gasser v MISAT*.⁸⁹³ Gasser was an Austrian firm which entered into a contract with MISAT, an Italian company, under which Gasser sold children’s clothing to MISAT. A choice of court agreement selected a court in Austria. When a dispute arose, MISAT had the first strike and brought proceedings before a court in Italy, claiming that the contract had been terminated and that it had not breached it. After the Italian court was seised, Gasser brought proceedings before the Austrian court selected in the choice of court

⁸⁸⁹ Article 27 of the Brussels I Regulation.

⁸⁹⁰ Franzosi (n 821).

⁸⁹¹ *Gubisch Maschinenfabrik KG v Palumbo* (Case C-144/86) [1987] ECR 4861; *The Tatry* (Case C-406/92) [1999] QB 515.

⁸⁹² See *Transport Castelletti v Hugo Trumpy* (C-159/97) [1999] ECR I-1597: The Italian court in this case took eight years to adjudicate on the issue of jurisdiction.

⁸⁹³ *Erich Gasser GmbH v MISAT Srl* Case C-116/02 [2004] 1 Lloyd’s Rep 222.

agreement. MISAT claimed that these proceedings were precluded as a result of its prior action in Italy.

The case was referred to the Court of Justice of the EU by an Austrian appeal court. The main issue was the relationship between the *lis pendens*⁸⁹⁴ provision and the provision on choice of court agreements.⁸⁹⁵ The provision on choice of court agreements stated that the court designated by such agreements 'shall have exclusive jurisdiction' but what if another court is seised first? Is a court elected in a choice of court agreement required to stay proceedings whilst the court first seised rules on its jurisdiction including the validity and effectiveness of the choice of court agreement? The courts of Member States of the EU with slow moving civil justice systems would compound the problem by blocking proceedings for a protracted length of time. The United Kingdom government made submissions that the designated court should be entitled to decide these questions for itself and if it finds that the choice of court agreement is valid, effective and covers the case, it should go ahead without waiting for the other court to terminate the proceedings before it.

The CJEU held that the nominated court must stay the proceedings before it until the court first seised has established that it has no jurisdiction.⁸⁹⁶ It makes no difference if the court first seised is a Member State where legal proceedings take an inordinately long period of time.⁸⁹⁷ The court designated in a choice of court agreement may also not consider whether the proceedings in the court first seised were brought in bad faith as a delaying tactic.⁸⁹⁸ The ruling in *Gasser* seriously jeopardized the effectiveness of choice of court agreements in the EU.⁸⁹⁹ Some commentators even suggested that the decision would lead to a general preference for arbitration over litigation in the European Judicial Area.⁹⁰⁰

The amendments to the Brussels I Regulation (Recast) reversing the effects of the *Gasser* decision were subject to considerable discussion.⁹⁰¹ The main provision on *lis pendens*⁹⁰² is

⁸⁹⁴ Article 21 of the Brussels Convention [Now Article 27 of the Brussels I Regulation and Article 29(1) of the Brussels I Regulation (Recast)].

⁸⁹⁵ Article 17 of the Brussels Convention [Now Article 23 of the Brussels I Regulation and Article 25 of the Brussels I Regulation (Recast)].

⁸⁹⁶ *Erich Gasser GmbH v MISAT Srl* Case C-116/02 [2004] 1 Lloyd's Rep 222, [54].

⁸⁹⁷ *Ibid*, [73].

⁸⁹⁸ *Ibid*, paras 48 and 53; See *Overseas Union Insurance Ltd v New Hampshire Insurance Company* Case C-351/89 [1991] ECR I-3317, [25].

⁸⁹⁹ See Jonathan Mance, 'Exclusive Jurisdiction Agreements and European Ideals' (2004) 120 *LQR* 357

⁹⁰⁰ *Ibid* 358; Ilona Nurmela, 'Sanctity of Dispute Resolution Clauses: Strategic Coherence of the Brussels System' (2005) 1 *Journal of Private International Law* 115, 146.

⁹⁰¹ See P Beaumont and P McEleavy, *Anton's Private International Law* (W Green, Edinburgh 2011) 258-260, note that the Commission's proposal for the recast of the Brussels I Regulation in relation to choice of court

now subject to Article 31(2) of the Recast Regulation. It may be of use to reproduce Articles 31(2) to 31(4) of the Recast Regulation for the sake of illustration:⁹⁰³

2. 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 on the basis of the agreement declares that it has no jurisdiction under the agreement.
3. 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.
4. Paragraphs 2 and 3 shall not apply to matters referred to in Sections 3, 4 or 5 where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee is the claimant and the agreement is not valid under a provision contained within those Sections.

Article 31(2) is the provision which expressly overrides the *lis pendens* rule. It is itself subject to Article 26 which incorporates the principle of voluntary submission to jurisdiction.⁹⁰⁴ Article 25 is the new provision on choice of court agreements.⁹⁰⁵ The result is that Article 31(2) provides that where an exclusive jurisdiction agreement selects the courts of a Member State, a court in another Member State even if it was seised first must stay proceedings until such time as the selected court declares that it does not possess jurisdiction pursuant to a choice of court agreement. The selected court would declare that it lacked jurisdiction under a choice of court agreement if the clause was invalid or did not cover the dispute. Article 31(3) provides that where the selected court finds that it has jurisdiction pursuant to the choice of court agreement, courts in other Member States must give up jurisdiction.

Article 31(2) thus enshrines a reverse *lis pendens* rule in that the court first seised must stay proceedings in deference to the selected court. The elected court determines the validity of the choice of court agreement. Article 25(1) provides that the substantive validity of a jurisdiction agreement is to be decided by the law of the designated court including its private international law rules.

agreements goes beyond the solution adopted by the Hague Convention on Choice of Court Agreements (30 June, 2005) as it creates a rule on conflicts of jurisdiction (*lis pendens*) which accords priority to the chosen court. This is one example where the Brussels I Regulation will be able to make deference to party autonomy greater within the European Judicial Area than is possible globally under the Hague Convention.

⁹⁰² Article 29(1) of the Brussels I Regulation (Recast).

⁹⁰³ Articles 31(2), 31(3) and 31(4) of the Brussels I Regulation (Recast).

⁹⁰⁴ Article 24 of the Brussels I Regulation.

⁹⁰⁵ Article 23 of the Brussels I Regulation.

Recital 22 clarifies that the designated court “has priority to decide on the validity of the agreement and on the extent to which the agreement applies to the dispute pending before it”, even if it is second seised and even if the other court has not already decided on the stay of proceedings.⁹⁰⁶ Where, however, there is a conflict as to whether both courts have been chosen, then the court first seised will determine the validity of the jurisdiction clause.⁹⁰⁷

The result is that under the Recast Regulation, the ‘Italian torpedo’ will no longer preclude the nominated court in a jurisdiction agreement from hearing the case, even if another Member State court was seised first, and even if the latter court has not stayed the proceedings before it.

The risk of the solution adopted by the Recast Regulation was outlined by Advocate General Leger in his Opinion in *Gasser*.⁹⁰⁸ He thought that such a solution might encourage delaying tactics by an unscrupulous party by alleging the existence of an agreement and bringing an action before the court allegedly chosen in order deliberately to delay judgment until that court had declared that it had no jurisdiction. The central issue is whether there is an agreement or disagreement to the jurisdiction of a court?⁹⁰⁹ Briggs doubts whether we are justified in assuming, even generally and provisionally, that the party seeking to rely on a choice of court agreement is the one more likely to have right on his side.⁹¹⁰ He laments common law academics and the Heidelberg Report for letting the allegedly chosen court to go first as this solution is not axiomatic.⁹¹¹ Thus the presumption created in favour of party autonomy as an exception to the *lis pendens* mechanism presupposes the existence of a valid and effective choice of court agreement where they may be none.

⁹⁰⁶ Recital 22 of the Brussels I Regulation (Recast).

⁹⁰⁷ *Ibid.*

⁹⁰⁸ Case C-116/02 *Erich Gasser GmbH v MISAT Srl* [2003] ECR I-14693, Opinion of AG Léger, para 74; Adrian Briggs, ‘What should be done about Jurisdiction Agreements’ (2010) 12 *Yearbook of Private International Law* 311, 319-322; Tena Ratkovic’ and Dora Zgrabljic’ Rotar, ‘Choice-of-Court Agreements under the Brussels I Regulation (Recast)’ (2013) 9 *Journal of Private International Law* 245, 263-265; Queirolo (n 863) 195; Justin P Cook, ‘Pragmatism in the European Union: Recasting the Brussels I Regulation to Ensure the Effectiveness of Exclusive Choice-of-Court Agreements’ (2013) 4 *Aberdeen Student Law Review* 76, 85; Briza (n 859) 556-559 cf Trevor C Hartley, ‘Choice-of-Court Agreements and the New Brussels I Regulation’ (2013) 129 *LQR* 309, 312-313.

⁹⁰⁹ Briggs, *What should be done about Jurisdiction Agreements?* (n 908) 319; Adrian Briggs, ‘The Brussels I bis Regulation Appears on the Horizon’ [2011] *LMCLQ* 157, 162-164.

⁹¹⁰ Briggs, *What should be done about Jurisdiction Agreements?* (n 908) 322; Briggs, *The Brussels I bis Regulation Appears on the Horizon* (n 909) 164.

⁹¹¹ Briggs, *What should be done about Jurisdiction Agreements?* (n 908) 322; Briggs, *The Brussels I bis Regulation Appears on the Horizon* (n 909) 162.

In relation to the operation of the Article 31(2), the obligation on the non-designated court to stay proceedings arises only if the other court actually is nominated.⁹¹² This essentially means that there is a dispute before the non-designated court as to whether there actually is a choice of court agreement. The obligation to stay does not come into operation on the mere empty claims of one of the parties as to the existence of a valid and effective jurisdiction agreement.⁹¹³ Something more substantial than empty claims is needed. However, the non-designated court cannot decide for itself whether the choice of court agreement is valid, effective and covers the dispute.⁹¹⁴ Recital 22 expressly states that the nominated court has priority to adjudicate on these issues. This leaves the non-designated court with room to decide whether the claim that another court has been selected is entirely spurious. It can therefore require the party requesting a stay to present a *prima facie* case⁹¹⁵ that there was a choice of court agreement electing the court in question.⁹¹⁶ Once the standard of a *prima facie* case is met, the stay should be granted. However, it may be questioned whether a *prima facie* case that there was a choice of court agreement selecting the court would actually help where there was a genuine dispute as to the validity and effectiveness of the jurisdiction agreement requiring detailed examination. It may be that the court first seised where the *prima facie* case is made out has a genuine claim to jurisdiction in the event that the designated court eventually decides that there was no valid and effective choice of court agreement in the first place. Therefore, reducing the scope for abusive tactical litigation in the guise of the 'Italian torpedo' may give rise to a new breed of torpedoes where the presumption in favour of party autonomy is abused to advance the interests of litigants seeking to exploit the international civil procedural lacunas in the new Brussels I Regulation (Recast).

The potential problems posed by sham agreements giving rise to the new breed of torpedoes are exacerbated by the non-adoption of a six month rule for the nominated court to determine its jurisdiction under a choice of court agreement.⁹¹⁷ Breaches of the six month

⁹¹² Hartley, *Choice-of-Court Agreements and the New Brussels I Regulation* (n 908) 312.

⁹¹³ *Ibid* 313.

⁹¹⁴ *Ibid*.

⁹¹⁵ *Prima facie* [from Latin *prima facies*, first appearance] A case that has been supported by sufficient evidence for it to be taken as proved should there be no adequate evidence to the contrary. See Jonathan Law and Elizabeth A Martin (ed.), *Oxford Dictionary of Law* (7th Edition, OUP 2009).

⁹¹⁶ Hartley, *Choice-of-Court Agreements and the New Brussels I Regulation* (n 908) 313.

⁹¹⁷ Ratkovic' and Rotar (n 908) 264-265; Briggs, *What should be done about Jurisdiction Agreements?* (n 908) 325-328: Briggs supports the adoption of a uniform procedure for disposing of jurisdictional challenges in the European Union.

rule could potentially be enforced by the CJEU against Member States⁹¹⁸ through either infringement proceedings⁹¹⁹ or the doctrine of state liability.⁹²⁰ However, implementing a strict six month rule without an EU wide uniform procedure to dispose of jurisdictional challenges could give rise to intractable difficulty. A clear distinction between preliminary matters of jurisdiction and the substance of the dispute does not exist in the civil procedural rules of some Member States. Given the fact that some civil procedural regimes of Member States require the simultaneous evaluation of questions of jurisdiction and the substance of the claim,⁹²¹ the six month rule seems unrealistic. The concept of variable geometry in a multi speed Europe also militates against the imposition of a timeframe rule. The comparative state of civil justice⁹²² in the Member States of the EU varies considerably and may not as yet allow a timeframe rule without the EU first regulating preliminary matters of jurisdiction to a degree and providing the necessary institutional support to implement such a rule.

The lacuna permitting reliance on sham agreements giving rise to a new breed of torpedoes may just grant the damages remedy for breach of exclusive jurisdiction agreements a new lease of life under the Brussels I Regulation (Recast). In cases where the allegedly chosen court is not actually nominated, that court being seised will still have the *kompetenz-kompetenz* or procedural jurisdiction to adjudicate on the validity of the choice of court agreement. The defendant in those proceedings may then claim the wasted costs and expenses as damages for breach of an exclusive jurisdiction agreement in the nominated court. As observed, the prospects of a preliminary reference regarding the legality and legitimacy of the claim for damages succeeding before the Court of Justice of the EU are minimal. However, even though the preponderance of juristic opinion points away from the

⁹¹⁸ Case C-224/01 *Gerhard Köbler v Republic of Austria* [2003] ECR I-10239, paras 30–50; See Marten Breuer, 'State Liability for Judicial Wrongs and Community Law: the *Case Gerhard Köbler v Austria*' in Guy Canivet and others (eds), *Independence, Accountability and the Judiciary* (BIICL 2006).

⁹¹⁹ Article 258 TFEU.

⁹²⁰ Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Federal Republic of Germany and The Queen v Secretary of State for Transport, ex parte Factortame Ltd and Others* [1996] ECR I-01029, para 32.

⁹²¹ Heidelberg Report (n 823) paras [170]–[171], pages 49–50.

⁹²² See Dickinson, *A Charter for Tactical Litigation in Europe?* (n 822) 278–280: Professor Dickinson states that in reports completed in 2003 on the judicial systems of seven of the 10 accession states, the EU Commission identified difficulties in various areas, including the length of judicial proceedings, public confidence in the judiciary and judicial corruption. Thus, the mutual trust principle may open avenues for abuse and tactical litigation as the ground realities in the courts of the EU Member States vary considerably. See '2003 Monitoring Reports for Accession States Prepared by the EU Commission' (Europa.eu) <http://www.europa.eu.int/comm/enlargement/report_2003/index.htm> accessed 15 June 2014; For a recent critical survey of the comparative state of the civil justice systems of the EU Member States as an impediment to enhanced mutual trust, see, Matthias Weller, 'Mutual trust: in search of the future of European Union private international law' (2015) 11 *Journal of Private International Law* 64, 66–67.

use of the remedy, the issue is still unresolved in the context of the Brussels I Regulation and may continue to be for some time at least under the Recast Regulation. Therefore, for the time being, the pragmatic concerns of a litigant seeking redress for breach of an exclusive choice of court agreement may be answered with compensation in the form of an award of damages.

Article 23 of the Brussels I Regulation does not contain an express provision on the substantive validity of a choice of court agreement.⁹²³ However, the new Brussels I Regulation (Recast) applies the law of the *forum prorogatum* including its rules of private international law to the issue of the substantive validity of a choice of court agreement.⁹²⁴ Under the new Article 25(1) the elected court shall have jurisdiction ‘unless the agreement is null and void as to its substantive validity under the law of that Member State’.⁹²⁵ The policy basis animating the selection of the law of the chosen court including its choice of law rules is to render the Brussels I Regulation (Recast) compatible with the Hague Convention on Choice of Court Agreements. The wording of the rules for substantive validity for choice of court agreements in the both instruments is almost identical.⁹²⁶ This has facilitated the approval of the Hague Convention by the European Union and ensures the consistent treatment of issues of substantive validity of choice of court agreements under both the Recast Regulation and under the Hague Convention.⁹²⁷

⁹²³ See Beaumont and McEleavy (n 901) Chapter 8, 249-255; Briggs, *Agreements* (n 817) Chapter 7; Tang, *Jurisdiction and Arbitration Agreements* (n 818) Chapter 2, 22-25; cf Louise Merrett, ‘Article 23 of the Brussels I Regulation: A Comprehensive Code for Jurisdiction Agreements?’ (2009) 58 *ICLQ* 545, argues that the requirements of Article 23 are both necessary and sufficient conditions for the material validity of jurisdiction agreements in Brussels I Regulation cases and if any other tool is needed to deal with cases where the jurisdiction agreement itself is directly impeached, a Community notion of good faith is the appropriate way to deal with such cases; Andrew Dickinson, ‘Surveying the Proposed Brussels I bis Regulation – Solid Foundations but Renovation Needed’ (2010) 12 *Yearbook of Private International Law* 247, 301, contends that a solution to the issue is unnecessary and that the CJEU has already achieved a high level of legal certainty by affirming that the consent of the parties is to be determined solely by reference to the requirements of Article 23 of the Brussels I Regulation. Moreover, Dickinson argues that the new provision should not be used by Member State courts to permit a challenge to the validity of choice of court agreements on grounds which the CJEU has interpreted autonomously, i.e. CJEU jurisprudence should not be reversed; Catherine Kessedjian, ‘Commentaire de la refonte du règlement n° 44/2001’ (2011) 47 *Revue trimestrielle de droit européen* 117, 126-127, foresees that the introduction of a choice of law element into the substantive validity of jurisdiction agreements will have the knock on effect of increasing the number of disputes concerning the validity of such agreements; A Briggs, *Private International Law in English Courts* (OUP 2014) 251-252, terms the reference to the law of the chosen court including its private international law rules to assess matters of substantive validity as ‘retrograde’.

⁹²⁴ Article 25(1) and Recital 20 of the Brussels I Regulation (Recast).

⁹²⁵ *Ibid.*

⁹²⁶ Article 25(1) of the Brussels I Regulation (Recast); Article 5(1) of the Hague Convention.

⁹²⁷ Adopted at the 20th Session of the Hague Conference on Private International Law, The Hague, 30th June 2005; On 1 October 2015, the Hague Convention on Choice of Court Agreements entered into force in 28 States (Mexico and all Member States of the EU, except Denmark). The Civil Jurisdiction and Judgments (Hague

According to Recital 20 of the Brussels I Regulation (Recast) the reference to the nominated court's law includes both its substantive law and its choice of law rules. Therefore it is clear that the inclusion of *renvoi* within the new Article 25 is intended and the question whether a choice of court agreement is materially valid is therefore to be ascertained under the substantive law to which the choice of law rules of the Member State of the chosen court refer.⁹²⁸

Some academic commentators question whether *renvoi* should be applied in determining the substantive validity of a choice of court agreement.⁹²⁹ They argue that contractual relations governed by party autonomy should exclude *renvoi* from the application of choice of law rules.⁹³⁰ The exclusion of *renvoi* from the choice of law regimes of the Rome I⁹³¹ and Rome II⁹³² Regulations is evidence that certainty and predictability may be compromised by the application of *renvoi*. However, in some cases it would be unreasonable to apply the substantive law of the *forum prorogatum* to the issue of capacity.⁹³³ The forum chosen by the parties is often due to its neutrality and efficient dispute resolution and the chosen forum may have a tenuous connection with the actual dispute. In such cases it may be preferable to apply the choice of law rules of the chosen forum to determine the capacity of a party to enter into a choice of court agreement. The application of *renvoi* in these cases will lead to the application of a law closely connected to the dispute. In similar vein, where the parties have made an express choice of law that differs from the substantive law usually applied before the *forum prorogatum*, *renvoi* to the chosen law should be applied to respect the principle of party autonomy.⁹³⁴ On the other hand, in cases of fraud, duress and the plea of *non est factum*, it is not clear how *renvoi* can help in determining the substantive validity of a choice of court agreement. The substantive law of the chosen court may provide an

Convention on Choice of Court Agreements 2005) Regulations 2015, SI 2015/1644, have brought the Hague Convention into force in the UK.

⁹²⁸ For a discussion of *renvoi*, see Lawrence Collins and others (eds), *Dicey, Morris and Collins on the Conflict of Laws* (Sweet & Maxwell 2012) Chapter 4; JJ Fawcett and JM Carruthers, *Cheshire North and Fawcett: Private International Law* (OUP 2008) Chapter 5; Beaumont and McElevay (n 901) Chapter 4, 100-109.

⁹²⁹ Hess (n 863) 1107; Peter Hay, 'Notes on the European Union's Brussels-I "Recast" Regulation' (2013) 13 *The European Legal Forum* 1, 3; K Takahashi, 'Damages for Breach of a Choice of Court Agreement: Remaining Issues' [2009] *Yearbook of Private International Law* 73, 85; Briggs, *Private International Law in English Courts* (923) 252.

⁹³⁰ Peter E Nygh, *Autonomy in International Contracts* (Oxford Private International Law Series, OUP 1999) 83-84.

⁹³¹ Article 20 of Regulation 593/2008 EC on the law applicable to contractual obligations [2008] OJ L177/6 ('Rome I Regulation').

⁹³² Article 24 of Regulation 864/2007 EC on the law applicable to non-contractual obligations [2007] OJ L199/40 ('Rome II Regulation').

⁹³³ Ratkovic' and Rotar (n 908) 258.

⁹³⁴ Beaumont and McElevay (n 901) Chapter 8, 254-255.

appropriate legal regime to govern these issues, making a reference to the choice of law rules of the chosen court unnecessary. The factors pointing away from the law of the *forum prorogatum* in the case of matters of capacity may not exert the same pull in relation to issues of fraud, duress and the plea of *non est factum*. Indeed, the law of a neutral forum may negate any advantage available under a law closely connected to the dispute such as the *lex causae* of the main contract. The doctrines of severability⁹³⁵ and *Dépeçage*⁹³⁶ allow the choice of court agreement to be governed by a law separate from the law governing the substantive contract. In fact a separate law governing the choice of court agreement may ensure the continued validity of such agreements where the entire contract is impeached.

Difficult issues of proof of foreign law arise with the application of the doctrine of *renvoi*. Unlike civil law legal systems, foreign law is a question of fact in the English common law.⁹³⁷ Therefore, the party relying on foreign law is required to plead and prove the content of foreign law.⁹³⁸ When applying the doctrine of *renvoi*, evidence of the foreign rules on *renvoi* and foreign choice of law rules have to be pleaded and proved in the English common law courts.⁹³⁹ In civil law legal systems, evidence of the foreign choice of law rules will suffice for the application of the doctrine of *renvoi*.⁹⁴⁰ However, an inherent advantage of the English common law treating issues of proof of foreign law as questions of fact is that the parties can choose not to rely on the foreign law by not pleading it.⁹⁴¹ English law as *lex fori* is applied instead.⁹⁴² Secondly, the English courts usually apply English law as a fallback where the content of the foreign law is not proved.⁹⁴³ An analogy can be drawn between the parties not relying on the foreign law and a delayed choice of English law to govern the dispute.⁹⁴⁴ A flexible approach to proof of foreign law in English courts may help the litigants ignore the doctrine *renvoi* altogether by not pleading and proving the *lex causae*.

⁹³⁵ Article 25(5) of the Brussels I Regulation (Recast); Article 3(d) of the Hague Convention.

⁹³⁶ See '*Dépeçage*' ('Splitting the applicable law'): See Article 3(1) of the Rome I Regulation and the Rome Convention; Collins, *Dicey, Morris and Collins on the Conflict of Laws* (n 928) Chapter 32, 1789-1792; Beaumont and McEleavy (n 901) Chapter 10, 454-455.

⁹³⁷ Adrian Briggs, *The Conflict of Laws* (3rd Edition, OUP 2013) Chapter 1, 7-13.

⁹³⁸ *Ibid.*

⁹³⁹ Hartley, *Choice of Court Agreements* (n 817) Chapter 7, 165-167: Reference to the "foreign court" or "double *renvoi*" or "total *renvoi*" theory adopted by England and many other common law countries.

⁹⁴⁰ *Ibid.*: Reference to the "single *renvoi*" theory adopted by France and Germany.

⁹⁴¹ Briggs, *The Conflict of Laws* (n 937).

⁹⁴² *Ibid.*

⁹⁴³ *Ibid.*

⁹⁴⁴ See Article 3(2) of the Rome I Regulation and the Rome Convention; Collins, *Dicey, Morris and Collins on the Conflict of Laws* (n 928) Chapter 32, 1805-1806; Beaumont and McEleavy (n 901) Chapter 10, 455-456.

The Rome I Regulation does not apply to choice of court agreements.⁹⁴⁵ National choice of law rules will govern the issue of the substantive validity of a choice of court agreement.⁹⁴⁶ The lack of harmonization of national choice of law rules may lead to uncertainty in the determination of the applicable law of the choice of court agreement. For instance, in English law the ‘proper law’ of the choice of court agreement, which is quite often the *lex causae* of the substantive contract, applies.⁹⁴⁷ The proper law is the term which was used at common law to signify the law by which the validity of the contract was tested, and is used in this context to acknowledge that the identification of the law which governs a choice of court agreement is a matter for the common law rules of the conflict of laws.

The Brussels I Regulation (Recast) includes a new provision on the severability of choice of court agreements:⁹⁴⁸

An agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.

The validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid.

Severability of choice of court agreements was established by the CJEU jurisprudence even prior to the explicit provision in the Recast Regulation.⁹⁴⁹ In *Benincasa v Dentalkit* the CJEU found that a void provision of the contract does not render the choice of court agreement void as well.⁹⁵⁰

The technique of severability serves to insulate or protect the choice of court agreement from the invalidity of the main contract. A challenge to the existence and validity of the substantive contract will not on its own impugn the existence and validity of the choice of court agreement. However, a specific attack on the existence and validity of the choice of court agreement may impeach it. The doctrines of severability and *Dépeçage* allow the

⁹⁴⁵ Article 1(2)(e) of the Rome I Regulation; Article 1(2)(d) of the Rome Convention; See Mario Giuliano and Paul Lagarde, ‘Report on the Convention on the Law Applicable to Contractual Obligations’ [1980] OJ C282/1, 11-12; Collins, *Dicey, Morris and Collins on the Conflict of Laws* (n 928) Chapter 32, 1788; Beaumont and McElevay (n 901) Chapter 10, 434-439.

⁹⁴⁶ Heidelberg Report (n 823) paras [326]-[327] page 92.

⁹⁴⁷ Collins, *Dicey, Morris and Collins on the Conflict of Laws* (n 928) Chapter 12, 603-604; Joseph (n 817) 182; Briggs, *The Conflict of Laws* (n 937) 231; See *Sulamerica CIA Nacional de Seguros SA and others v Enesa Engenharia SA and others* [2012] EWCA Civ 638, [2012] 1 All ER (Comm) 795.

⁹⁴⁸ Article 25(5) of the Brussels I Regulation (Recast).

⁹⁴⁹ Case C-214/89, *Powell Duffryn plc v Wolfgang Petereit* [1992] ECR I-01745; Case C-269/95, *Francesco Benincasa v Dentalkit Srl* [1997] ECR I-03767; Case C-159/97 *Trasporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA* [1999] ECR I-01597.

⁹⁵⁰ *Francesco Benincasa v Dentalkit Srl*, (n 913), [24]–[29]. See also *Trasporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA*, (n 913), [34], [49], [51].

choice of court agreement to be governed by a law separate from the law governing the substantive contract. In fact a separate law governing the choice of court agreement may ensure the continued validity of such agreements where the entire contract is impugned. The principles of party autonomy and legal certainty provide the justification and legal basis for the technique of severability.

According to Article 23(1) of the Brussels I Regulation, at least one of the parties has to be domiciled in an EU Member State for the provision to apply. The other connecting factor for the operation of Article 23 is that the courts of an EU Member State have to be the designated court. The new Brussels I Regulation (Recast) provides:⁹⁵¹

If the parties, *regardless of their domicile*, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction.....

Thus, under the Brussels I Regulation (Recast) two non EU residents can choose a Member State court and if that choice is valid under the rules of the Regulation, the designated court will have jurisdiction over the dispute. This amendment reflects deference to the principle of party autonomy as the constraint of at least one of the parties being domiciled in the EU is shed. The result is that the scope of application of Article 25 has widened.

It is to be seen how the amendments to the choice of court agreement provisions in the Brussels I Regulation (Recast) fare before the CJEU and the national courts of the EU Member States. Under the Recast Regulation, the designated court in an exclusive choice of court agreement will have jurisdiction and all other courts are required to stay and eventually decline jurisdiction. The strengthening of choice of court agreements affected by reversing the *lis pendens* mechanism in favour of party autonomy should be welcomed. However, if there is a genuine conflict in relation to the existence and validity of the choice of court agreement, it may be difficult to apply a rule which makes a presumption in favour of party autonomy. Sham agreements on jurisdiction may be used to seise a court and block proceedings for a substantial amount of time in other courts of competent jurisdiction. The torpedo may thus survive by donning the guise of a sham jurisdiction clause choosing the courts of an EU Member State with a slow moving civil justice system. It has been argued in this section that the damages remedy for breach of choice of court agreements may continue to be of relevance under the Brussels I Regulation (Recast) by providing disgruntled

⁹⁵¹ Article 25(1) of the Brussels I Regulation (Recast) (Emphasis added).

litigants with compensation. The lack of CJEU authority on this contentious issue may therefore permit the continued use of this contractual remedy to render pragmatic solutions for the European conflicts of jurisdictions.

In relation to the choice of law rule on the substantive validity of a choice of court agreement, the application of the rules of *renvoi* may give rise to uncertainty. Another, arguably, practical concern is the difficult proof of foreign law issues arising from the application of *renvoi*. These issues may cause delay and increased expense in the determination of the applicable law of a choice of court agreement. However, this does not detract from the benefits associated with subjecting the material validity of a jurisdiction agreement to the national law of a Member States of the EU.

It has been observed that the damages remedy for breach of an exclusive choice of court agreement is as yet untested in the context of the Brussels I Regulation by the Court of Justice of the EU. The English Court of Appeal has however recently granted damages for breach of a choice of court agreement in a case covered by the Brussels I Regulation.⁹⁵² It is submitted that the full implications of the English judgment granting damages for breach of a jurisdiction agreement for the jurisdiction of the Greek court were not discussed by Longmore LJ.⁹⁵³ It is submitted that the judgment of the English Court of Appeal will render the continuance of the Greek proceedings futile as any sum recovered under a future Greek judgment would have to be clawed back and used to indemnify the insurers as a breach of the English exclusive choice of court agreements. In other words, the overarching principle of mutual trust is undermined by the Court of Appeal judgment as the English court is seeking to force its own view on the validity and effectiveness of the settlement and choice of court agreements on the Greek court. As a result, the Greek court's right to determine its own jurisdiction and rule on the substance of the case will be overridden by the future recognition and enforcement of the English Court of Appeal's judgment by the Greek court under the Brussels I Regulation.⁹⁵⁴ The English court held that the claims for declarations and damages for breach of the choice of court agreements did not breach European Union

⁹⁵² *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG (The Alexandros T)* [2014] EWCA Civ 1010 (Longmore LJ); See Martin Illmer, 'English Court of Appeal confirms Damages Award for Breach of a Jurisdiction Agreement' (Conflictoflaws.net, 31 July 2014) <<http://conflictflaws.net/2014/english-court-of-appeal-confirms-damages-award-for-breach-of-a-jurisdiction-agreement/>> accessed 31 July 2014.

⁹⁵³ *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG (The Alexandros T)* [2014] EWCA Civ 1010 (Longmore LJ) paras 15-17.

⁹⁵⁴ Chapter III of the Brussels I Regulation.

law.⁹⁵⁵ Moreover, it considered it unnecessary to send a preliminary reference to the CJEU on the legality and legitimacy of the damages remedy in the European Judicial Area despite repeated requests from *Starlight*.⁹⁵⁶ It has been argued that this issue did warrant a preliminary reference to the CJEU as it would have helped clarify whether the CJEU's ruling in *Turner v Grovit*⁹⁵⁷ does preclude the recovery of damages for breach of a choice of court agreement.⁹⁵⁸ Had a preliminary reference on the issue been sent to the CJEU, the answer received would have probably been very different from the one delivered by the English Court of Appeal. It is highly unlikely that the CJEU would have favored a remedy for the European conflicts of jurisdiction which has made its way through the back door as an alternative to the defunct anti-suit injunction.

⁹⁵⁵ *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG (The Alexandros T)* [2014] EWCA Civ 1010 (Longmore LJ) [16] and [18].

⁹⁵⁶ *Ibid* [16].

⁹⁵⁷ *Turner v. Grovit* (Case C-159/02) [2005] ECR I-3565; [2004] 2 Lloyd's Rep 169.

⁹⁵⁸ Illmer (n 952) Short Note, para 2; Simon Camilleri in Illmer (n 952) Comments.

The Scope for Pre-Emptive Proceedings and the Damages Remedy for Breach of Choice of Court Agreements in the Brussels I Regulation (Recast): Rendered Redundant or Bequeathed a New Lease of Life?

Having examined the amendments to the choice of court agreement provisions in the Brussels I Regulation (Recast) and the reversal of the effects of the CJEU decision in *Gasser*,⁹⁵⁹ we now turn our attention towards whether and to what extent the damages remedy survives the transition to the Recast Regulation. The solution proffered in the Recast Regulation is not perfect or complete and it is to be observed whether the lacunas in the legal regulation of choice of court agreements leave room for pre-emptive proceedings in breach of such agreements and whether the aggrieved party can seek monetary compensation for that breach.

It may be argued that the reversal of the notorious decision in *Gasser* should also mark the simultaneous demise of a contractual remedy which seeks to compensate the aggrieved party for the loss suffered in defending protracted torpedo proceedings in the court first seised.⁹⁶⁰ On the contrary, it may also be averred that the conferral of procedural jurisdiction or *kompetenz-kompetenz* on the chosen court in an exclusive choice of court agreement by the Recast Regulation may implicitly permit the chosen court to entertain proceedings in breach of the exclusive choice of court agreement. Moreover, the observation that the protective cover of Article 31(2) is not comprehensive, *Gasser* survives in some cases and significantly that the protective cover may not extend to asymmetric jurisdiction agreements lends supports to the continued use of actions for damages for breach of a choice of court agreements in the English courts. As a consequence, the lacunas in the governance of choice of court agreements in Europe may be supplemented and reinforced by the English common law's pragmatic remedy tailored and calibrated to suit the needs of cross border commercial litigants. However, it should be noted, that arguments premised on the contractual remedy undermining the principles of mutual trust and the effectiveness of EU law (*effet utile*) derived from the CJEU's decision in *Turner v Grovit* still present a separate and possibly substantial impediment to the rational development of the

⁹⁵⁹ See Felix M Wilke, 'The impact of the Brussels I Recast on important "Brussels" case law' (2015) 11 *Journal of Private International Law* 128, 129-131.

⁹⁶⁰ Garcimartin (n 831) 338: Garcimartin notes that cases seeking damages for breach of an exclusive choice of court agreement should become rare under the Recast Regulation.

damages remedy by the English courts.⁹⁶¹ For instance, if the court first seised adjudicates that the jurisdiction clause is inapplicable, ineffective or invalid and arrives at the decision prior to the commencement of proceedings in the chosen court or if no proceedings are instituted in the chosen court at all,⁹⁶² the judgment awarding damages for breach of the choice of court agreement by the chosen court would reassess and reverse the judgment of the court first seised and arguably infringe upon the principles of mutual trust and the effectiveness of EU law (*effet utile*). Such scenarios are likely to arise where an action in tort is commenced in the court first seised and an action with a contractual legal basis is instituted before the chosen court. Questions relating to the scope of the *res judicata* effect of the judgment from the court first seised may also preclude reliance on an alternative cause of action in the chosen court.⁹⁶³

Before delving into this crucial issue, a short detour examining the prospects of pre-emptive proceedings in the Lugano Convention (2007) in breach of an English exclusive jurisdiction agreement is called for. The variable geometry created by the existence of two materially different legal regimes for the regulation of choice of court agreements in Europe contributes towards increasing venue risk.⁹⁶⁴ However, the availability of damages for breach of a choice of court agreement in the English courts may both act as an effective deterrent⁹⁶⁵ and respond to the breach by compensating the disgruntled party.

⁹⁶¹ Case C-159/02 *Turner v Grovit* [2004] ECR I-3565; See R Fentiman, 'National Law and the European Jurisdiction Regime' in Arnaud Nuyts and Nadine Watté (eds.), *International Civil Litigation in Europe and Relations with Third States* (Bruylant 2005) 83, 106ff.

⁹⁶² See Quim Forner-Delaygua, 'Changes to jurisdiction based on exclusive jurisdiction agreements under the Brussels I Regulation Recast' (2015) 11 *Journal of Private International Law* 379, 392; Monica Herranz Ballesteros, 'The Regime of Party Autonomy in the Brussels I Recast: The Solutions Adopted for Agreements on Jurisdiction' (2014) 10 *Journal of Private International Law* 291, 307.

⁹⁶³ See S Harder, 'The Effects of Recognized Foreign Judgments in Civil and Commercial Matters' (2013) 62 *International and Comparative Law Quarterly* 446, 453.

⁹⁶⁴ The two substantially different legal regimes are the Lugano Convention (2007) and the Brussels I Regulation (Recast); The other existing legal regimes which will become increasingly less relevant are the English common law jurisdictional regime and the Brussels I Regulation. On 1 October 2015, The Hague Convention on Choice of Court Agreements (30 June, 2005) has entered into force in 28 states including all the Member States of the EU (except Denmark) and Mexico. The Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) Regulations 2015, SI 2015/1644, have brought the Hague Convention into force in the UK.

⁹⁶⁵ Fentiman, *International Commercial Litigation* (2015) (n 817) 113; For the deterrent value of damages for breach of an arbitration agreement, see, Gary B Born, *International Commercial Arbitration* (2nd Edition, Kluwer Law International 2014) Chapter 8, 1304.

Pre-emptive proceedings in the Lugano Convention⁹⁶⁶

Cases involving parallel proceedings governed by the Lugano Convention are not ubiquitous, but the situation has significance in practice where the parties to English proceedings have agreed to the jurisdiction of a Swiss court, or where they have agreed to the English court's jurisdiction and pre-emptive proceedings have been initiated in Switzerland.⁹⁶⁷ The Lugano Convention's rules mirror those of the unamended Brussels I Regulation, and in principle confer jurisdiction on the designated court. It is possible that pre-emptive proceedings in a Lugano Convention state preclude proceedings in an English court pursuant to a jurisdiction agreement, as they did under the unamended Brussels I Regulation following the decision of the CJEU in *Gasser v MISAT*.⁹⁶⁸ Significantly, however, decisions of the CJEU are not binding on non EU Member States party to the Lugano Convention, although they are of persuasive authority.⁹⁶⁹ Arguably, now that the effects of *Gasser* have been reversed in cases arising between two EU Member States, the courts of non EU Lugano states such as Switzerland should also decline to follow *Gasser* in the interests of uniformity.⁹⁷⁰ The *Gasser* doctrine will no doubt be expressly reversed in the Lugano Convention when it is next revised since it is

⁹⁶⁶ Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters: OJ 2009, L 147/5. For the Explanatory Report by Professor Fausto Pocar, see OJ 2009, C 319/1; If the decision in *Gasser* survives in the context of the Lugano Convention, a conflict of instruments between the Lugano Convention and the Hague Convention on Choice of Court Agreements (30th June, 2005) may also arise leading to differing results in the EU Member State courts depending on the applicable regime. See Article 26(2) of the Hague Convention; Hartley, *Choice of Court Agreements* (n 817) Chapter 6, 114-116; TC Hartley and M Dogauchi, *Explanatory Report of the Hague Convention on Choice of Court Agreements* [271]-[278].

⁹⁶⁷ See *Lehman Brothers Finance A.G. (In liquidation) v Klaus Tschira Stiftung GmbH, Dr H C Tschira Beteiligungs GmbH & Co KG* [2014] EWHC 2782 (Ch) (David Richards J): The initiation of conciliation proceedings by the lodging of a written request for conciliation fell within Article 30 of the Lugano Convention (2007) as being the first procedural step in a civil claim before the Swiss courts. The conciliation authorities fell within the definition of "court" for the purposes of Articles 27 to 30 of the Lugano Convention (2007) given their place in Swiss civil procedural law. The juridical basis for a broad interpretation of the *lis pendens* provision in the Brussels Convention was laid down in Case C-116/02 *Erich Gasser GmbH v MISAT Srl* [2003] ECR I-14693, [41]. See Fentiman, *International Commercial Litigation* (2015) (n 817) 380.

⁹⁶⁸ Case C-116/02 *Erich Gasser GmbH v MISAT Srl* [2003] ECR I-14693.

⁹⁶⁹ Article 1(1) of Protocol 2 on the Uniform Interpretation of the Lugano Convention; The courts of a Contracting State applying the Lugano Convention shall 'pay due account' to the principles laid down by any relevant decisions on the Lugano Convention (1988), Brussels I Regulation, Brussels I Regulation (Recast), Brussels Convention and the Convention between the EU and Denmark applying the Brussels I Regulation to that Member State. See Hartley, *Choice of Court Agreements Under the European and International Instruments* (n 817) 15-18.

⁹⁷⁰ Hartley, *Choice-of-Court Agreements and the New Brussels I Regulation* (n 908) 314; Hartley, *Choice of Court Agreements Under the European and International Instruments* (n 817) 231; Fentiman, *International Commercial Litigation* (2015) (n 817) 96; Garcimartin (n 831) 343; cf I Bergson, 'The Death of the Torpedo Action? The Practical Operation of the Recast's Reforms to Enhance the Protection for Exclusive Jurisdiction Agreements within the European Union' (2015) 11 *Journal of Private International Law* 1, 29, argues that fidelity to the text of the Lugano Convention should not be evaded through the guise of interpretation.

contrary to the current general scheme and objectives of the European jurisdictional order.⁹⁷¹

In the event that the decision in *Gasser* survives in such cases, the effect is to create the possibility of, for example, pre-emptive proceedings in Switzerland intended to circumvent an English jurisdiction agreement. The consequence is to force the party relying on the agreement to defend the proceedings, exposing it to delay and possible irrecoverable costs, and possibly precipitating a settlement.⁹⁷² Where such proceedings involve a claim identical with that in any English proceedings, as where declaration of non-liability is sought, Article 27 of the Lugano Convention will engage, and prevent English proceedings pursuant to the agreement.⁹⁷³ Where they are merely related, engaging Article 28, an English court is likely to refuse a stay of the proceedings given the existence of the agreement.⁹⁷⁴

In such cases, it may be difficult to argue that the decision in *Turner v Grovit*⁹⁷⁵ does not apply equally to cases subject to the Lugano Convention as to cases subject to the EU regime. If so, an English court would be unable to restrain such pre-emptive proceedings by an anti-suit injunction. This will depend, however, on whether the principle of mutual trust, central to *Turner*, is regarded as a principle special to the relations between EU Member States, or a principle underlying the technical operation of both the Lugano Convention and the EU regime. If an anti-suit injunction is unavailable, a party relying on such a jurisdiction agreement may seek to recover its wasted costs and expenses incurred in defending the foreign proceedings in an action for damages for breach of contract against the counterparty or its legal advisers.

Pre-emptive proceedings in an EU Member State under Brussels I Regulation (Recast)

Under the Brussels I Regulation (Recast) *kompetenz-kompetenz* is conferred on the agreed court in a choice of court agreement.⁹⁷⁶ In relation to proceedings commenced after 10 January 2015, the agreed court, even if second seised, has priority in determining the effect of a jurisdiction agreement. Article 31(2) provides that any court other than the chosen court

⁹⁷¹ Hartley, *Choice of Court Agreements Under the European and International Instruments* (n 817) 231.

⁹⁷² Richard Fentiman, 'Parallel Proceedings and Jurisdiction Agreements in Europe' in Pascal de Vareilles-Sommieres (ed.), *Forum Shopping in the European Judicial Area* (Hart Publishing, Oxford 2007) 27; Richard Fentiman, *Case C-116/02, Erich Gasser GmbH v. MISAT Srl, judgment of the Full Court of 9 December 2003* (2005) 42 *Common Market Law Review* 241.

⁹⁷³ *JP Morgan Europe Ltd v Primacom AG* [2005] EWHC 508 (Comm), [2005] 2 Lloyd's Rep 665 (Cooke J).

⁹⁷⁴ *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG (The Alexandros T)* [2013] UKSC 70.

⁹⁷⁵ *Case C-159 Turner v Grovit* [2004] ECR I-3565.

⁹⁷⁶ Article 31(2) of the Brussels I Regulation (Recast).

‘shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement’.⁹⁷⁷

The effect of Article 31(2) is to minimize the tactical benefit of proceedings in another court, insofar as the effect of such proceedings is no longer to block proceedings in the designated court. The solution it offers is, however, incomplete, and four areas of practical difficulty and legal risk may be identified:⁹⁷⁸

First, it is inherent in any rule of mechanical priority that a party might seek to exploit the rule for tactical purposes. A party wishing to pre-empt proceedings in one EU Member State’s court might initiate proceedings in another Member State court, alleging the existence of a jurisdiction agreement in favour of the court seised, thereby engaging Article 31(2) and forcing the defendant to defend the proceedings in the allegedly designated court.⁹⁷⁹ The paradoxical effect is to encourage a new generation of torpedo actions in the converse case to that illustrated in *Gasser*. It is uncertain, however, how real a risk this presents.⁹⁸⁰ Depending on the civil procedure rules of the court seised, an unsubstantiated claim to jurisdiction would presumably be struck out as an abuse of process⁹⁸¹ and penalized by an adverse costs order including perhaps an award against the claimant’s legal representative.⁹⁸²

Second, Article 31(2) ameliorates but does not eliminate the risk of pre-emptive proceedings. The burden on the aggrieved party of incurring costs and expenses in defending pre-emptive proceedings is still a real legal risk. The designated court has responsibility for determining the validity and effect of the agreement, and those matters clearly cannot be addressed in the court first seised. However, the court first seised will need to establish whether its duty to stay is engaged. This in turn depends on whether the choice of court agreement confers exclusive jurisdiction on the designated court. At the least, the court first seised would need to establish a *prima facie* case that such an agreement confers

⁹⁷⁷ See Recital 22 of the Brussels I Regulation (Recast).

⁹⁷⁸ Fentiman, *International Commercial Litigation* (2015) (n 817) 100.

⁹⁷⁹ Diana Sancho Villa, ‘Jurisdiction over Jurisdiction and Choice of Court Agreements: Views on the Hague Convention of 2005 and Implications for the European Regime’ (2010) 12 *Yearbook of Private International Law* 399, 404.

⁹⁸⁰ Fentiman, *International Commercial Litigation* (2015) (n 817) 100; Paul Beaumont & Burcu Yüksel, ‘The Reform of the Brussels I Regulation on Choice of Court Agreements and the Preparation for the European Union’s Ratification of the Hague Choice of Court Agreements Convention’ (2009) 9 *Spanish Yearbook of Private International Law* 129-159.

⁹⁸¹ For the continental notion of *Abus de droit* in relation to the enforcement of choice of court agreements see, Nuyts (n 859) 55.

⁹⁸² CPR r 46.8 (England and Wales).

jurisdiction on the designated court.⁹⁸³ Therefore, the scope for pre-emptive litigation on the threshold issue has not been removed.⁹⁸⁴ In the presumably unlikely scenario where the court first seised carries out an assessment of the validity and effect of the agreement which goes beyond the *prima facie* standard, infringes on the *kompetenz-kompetenz* of the chosen forum and contradicts the logic of Article 31(2), the disgruntled party may be able to recover damages on an indemnity basis for wasted costs and expenses for breach of contract in the English courts. However, damages may not be recoverable where the validity of the jurisdiction agreement is not established and the court first seised assumes jurisdiction. The encroachment on the *kompetenz-kompetenz* of the chosen court and the letter and spirit of Article 31(2) by the court first seised beyond the *prima facie* standard is a matter of degree and could possibly be problematic where the civil justice legal system of the court first seised is slow and does not determine jurisdiction as a separate and preliminary matter.⁹⁸⁵

Third, Article 31(2) assumes that there is a court seised on the basis of the choice of court agreement. It engages only if proceedings are commenced in the agreed court. The *Gasser* problem therefore remains unless the defendant in the court first seised initiates proceedings in the agreed court. The effect is that a party relying on the jurisdiction agreement must initiate proceedings in the agreed court so as to prompt a stay in the court first seised.⁹⁸⁶ This is important in principle, by confirming that Article 31(2) is not concerned with enforcing jurisdiction agreements, but about regulating parallel proceedings where the jurisdiction of one court has been agreed.⁹⁸⁷ It ignores the fact that a contracting party has a

⁹⁸³ In practice, it should be sufficient to offer evidence that another court of a Member State has been seised of proceedings between the same parties involving the same cause of action and on the basis of the choice of court agreement, for example by presenting a copy of the document instituting the proceedings before the designated court and a copy of any contract or other instrument containing the choice of court agreement. See Garcimartin (n 831) 340; Fentiman, *International Commercial Litigation* (2015) (n 817) 100; Hartley, *Choice of Court Agreements and the New Brussels I Regulation* (n 908) 312-313; Hartley, *Choice of Court Agreements under the European and International Instruments* (n 817) 229; Bergson, *The Death of the Torpedo Action?* (n 970) 10-13, argues that the appropriate standard of proof under English law should be a 'serious issue to be tried' and that the examination of the jurisdiction agreement should be limited to assessing the 'existence' of the agreement.

⁹⁸⁴ Briggs, *Private International Law in English Courts* (n 923) 315; Fentiman, *International Commercial Litigation* (2015) (n 817) 100; Garcimartin (n 831) 341.

⁹⁸⁵ See Heidelberg Report (n 823) paras [170]-[171], pages 49-50.

⁹⁸⁶ Cf The negative aspect of an arbitration agreement was enforced by the UK Supreme Court where no arbitral proceedings were on foot or proposed. The same approach was held to apply to exclusive choice of court clauses in cases subject to the common law jurisdictional regime: *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, [2013] 1 WLR 1889 (Lord Mance delivering the judgment of the UK Supreme Court); See Richard Fentiman, 'Antisuit Injunctions and Arbitration Agreements' (2013) 72 *Cambridge Law Journal* 521.

⁹⁸⁷ Garcimartin (n 831) 339; Fentiman, *International Commercial Litigation* (2015) (n 817) 100; Ballesteros (n 962) 307, argues that the correct interpretation of the Brussels I Recast's regulation of choice of court agreements is that if the defendant does not commence proceedings in the designated court, the court seised

legitimate objection to proceedings in breach of an exclusive jurisdiction agreement and whether or not that party is contemplating litigation. It suggests that the Regulation is not primarily concerned with commercial certainty, or with party autonomy or with respecting the parties' expectations. Rather its preoccupation is with preventing the parallel proceedings that might give rise to irreconcilable judgments. The requirement that the agreed court is seised is also important in practice. It forces a party seeking to enforce such an agreement to initiate proceedings in the agreed court, and to incur the costs of doing so, even if does not wish to do so, and thereby encourages litigation.

Under the Brussels I Regulation it is unclear as a matter of European Union law whether an English court can legitimately award damages for breach of a jurisdiction agreement involving pre-emptive proceedings in another EU Member State. Despite the lack of a CJEU authority on the matter, the English courts have held that the contractual remedy is compatible with EU law.⁹⁸⁸ In cases subject to the Recast Regulation, the position is particularly uncertain. The effect of Article 31(2) is to confer primacy on the agreed court to determine the effect of the agreement, but the scope of that protection is not comprehensive. It may be argued that a party relying on an exclusive jurisdiction agreement could elect not to initiate protective proceedings under Article 31(2) in the agreed court and rely instead on an action in damages.⁹⁸⁹

Fourth, Article 31(2) applies only to exclusive jurisdiction agreements.⁹⁹⁰ It does not apply where the parties seek to confer non-exclusive jurisdiction on a Member State. Significantly in practice, this may have the effect that an asymmetric jurisdiction agreement, of the type frequently encountered in cross border financial transactions, is not caught by Article 31(2). If such agreements are not protected by Article 31(2), there remains the potential for a party to an asymmetric agreement to disable the agreement by launching a pre-emptive strike in its preferred court. Suppose that A and B agree to the jurisdiction of the English courts. A

will adjudicate on the validity of the choice of court agreement. Therefore, the chosen court does not have priority to determine the validity of the agreement in all cases. Moreover, if the defendant enters into an appearance in the court seised and fails to contest its jurisdiction, then Article 26 of the Brussels I Recast applies and the court seised will have jurisdiction on the basis of submission which takes priority over the chosen court.

⁹⁸⁸ *Starlight Shipping Co v Allianz Marine & Others* [2014] EWCA Civ 1010 (Longmore LJ, Rimer LJ and Lord Toulson).

⁹⁸⁹ Fentiman, *International Commercial Litigation* (2015) (n 817) 118; cf FN 1000.

⁹⁹⁰ Recital 22 and Article 31(2) of the Recast Regulation; Ratkovic' and Rotar (n 908) 261-263; Hartley, *Choice-of-Court Agreements and the New Brussels I Regulation* (n 908); Hartley, *Choice of Court Agreements Under the European and International Instruments* (n 817) 228; EB Crawford and JM Carruthers, *International Private Law: A Scots Perspective* (4th Edition, W Green, Edinburgh 2015) 181.

alone has the right to sue in any other court of competent jurisdiction. B must sue exclusively in England. B launches a pre-emptive strike in France and A replies by suing in England. The question is whether Article 31(2) is engaged or does *Gasser* and the court first seised rule still prevent A from relying on the agreement.⁹⁹¹

In principle, such hybrid agreements are exclusive against a counterparty, but non-exclusive for the benefit of the beneficiary under the clause. This suggests that Article 31(2) should engage if the counterparty brings proceedings other than in the designated court in breach of its promise to sue only in that court,⁹⁹² but whether such hybrid agreements are subject to Article 31(2) is problematic.⁹⁹³ A fundamental difficulty, going beyond the effect of Article 31(2), is that such hybrid clauses may be ineffective under the Regulation.⁹⁹⁴ If such agreements are in principle compatible with the Regulation, their status under Article 31(2) depends on how the matter is characterized. Arguably, the nature of the agreement is a matter concerning the interpretation of the clause, and therefore a matter for the national law of the forum.⁹⁹⁵ Therefore, the effect of such a clause would vary and depend on which law the forum applies to that question. An asymmetric jurisdiction agreement might not be regarded as exclusive against a counterparty in some legal systems, perhaps because under the law governing the agreement only mutually exclusive agreements are regarded as exclusive. However, such an agreement would be regarded as exclusive against a counterparty where the law governing the contract is English law. Therefore, Article 31(2) would apply as the agreement would be treated as an exclusive jurisdiction agreement and

⁹⁹¹ See Case C-116/02 *Erich Gasser GmbH v MISAT Srl* [2003] ECR I-14693; cf Article 31(2) of the Recast Regulation has effectively reversed the CJEU ruling in *Gasser* but the exclusion of non-exclusive jurisdiction agreements from the scope of Article 31(2) may render such agreements susceptible to the very same torpedo tactics that had acquired notoriety under Article 27 of the Brussels I Regulation.

⁹⁹² An asymmetric jurisdiction agreement has been held to be exclusive for the borrower in an international loan agreement by the English Court of Appeal in a leading case governed by the Brussels Convention: *Continental Bank NA v Aeakos Compania Naviera SA* [1994] 1 WLR 588, 592F-594G (CA) (Steyn LJ) (delivering the judgment of the Court of Appeal); *Mauritius Commercial Bank Limited v Hestia Holdings Limited and Sujana Universal Industries Limited* [2013] EWHC 1328 (Comm) (Popplewell J).

⁹⁹³ Fentiman, *International Commercial Litigation* (2015) (n 817) 101; Garcimartin (n 831) 341; Bergson, *The Death of the Torpedo Action?* (n 970) 22.

⁹⁹⁴ Two significant French Supreme Court decisions have invalidated asymmetric jurisdiction agreements under Article 23 of the Brussels I Regulation and Article 23 of the Lugano Convention respectively: See *Ms X v Banque Privée Edmond de Rothschild Europe (Société)* Cass civ, 1ere, 26.9.2012, No 11-26.022, [2013] ILPr 12; *ICH (Société) v Credit Suisse (Société)* Cass civ, 1ere, 25.3.2015, No 13-27.264, [2015] ILPr 39; cf In *Apple Sales International v eBizcuss* Cass. 1ere Civ, 7.10.2015, No. 14-16.898, the French Supreme Court has validated an asymmetric jurisdiction agreement under Article 23 of the Brussels I Regulation because the courts possessing jurisdiction were objectively identifiable; The CJEU's position on this matter is unclear and the Recast Regulation has not endeavoured to clarify the status of these clauses in the European Union law of international civil procedure.

⁹⁹⁵ Case C-214/89 *Powell Duffryn plc v Wolfgang Peterit* [1992] ECR I-1745; A Layton and H Mercer, *European Civil Practice* (Volume I, 2nd Edition, Sweet & Maxwell, London 2004) 706.

the provision would prevent a counterparty from suing in a forum other than the designated court.

Notwithstanding any arguments premised on preserving the practice of the English courts in relation to asymmetric jurisdiction agreements, it has been argued that the language of Article 31(2) (construed in association with Recital 22) limits its application to those agreements which confer exclusive jurisdiction *simpliciter*.⁹⁹⁶ The definition of an exclusive choice of court agreement in Article 3(a) of the Hague Convention on Choice of Court Agreements may serve as a guide considering the fact that the Convention is in force in all the Member States of the EU (except Denmark):⁹⁹⁷

“exclusive choice of court agreement” means an agreement concluded by two or more parties that meets the requirements of paragraph c) and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, *the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts*

Therefore, under an autonomous interpretation of exclusive jurisdiction agreements only mutually exclusive jurisdiction agreements would benefit from the exception to the general rule on *lis pendens*.⁹⁹⁸

If it is determined that asymmetric jurisdiction agreements fall outside the protective cover of Article 31(2) and pre-emptive proceedings are commenced by the borrower in breach of his obligation to sue exclusively in the English courts, an action in damages for breach of contract may both act as an effective deterrent and respond to the breach by compensating the aggrieved financial institution.⁹⁹⁹ On the other hand, if asymmetric jurisdiction agreements are deemed to be exclusive jurisdiction agreements for the purposes of Article 31(2), the aggrieved party may nevertheless elect not to commence protective proceedings in the contractual forum and instead rely on the damages remedy to compensate for the breach of contract.¹⁰⁰⁰ However, it should be noted that the availability of damages in such

⁹⁹⁶ See U Magnus, ‘Gerichtsstandsvereinbarungen unter der reformierten EuGVO’ in N Witzleb, R Ellger, P Mankowski, H Merkt and O Remien (eds.), *Festschrift für Dieter Martiny zum 70. Geburtstag* (Mohr Siebeck, Tübingen 2014) 797, 799; P Neilson, ‘The New Brussels I Regulation’ (2013) 50 *Common Market Law Review* 503, 521; See also, the definition of an exclusive jurisdiction agreement in Article 3(a) of the Hague Convention.

⁹⁹⁷ Emphasis added.

⁹⁹⁸ Garcimartin (n 831) 341.

⁹⁹⁹ See *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG* (The Alexandros T) [2014] EWCA Civ 1010, [15]-[22] (Longmore LJ).

¹⁰⁰⁰ Fentiman, *International Commercial Litigation* (2015) (n 817) 98, suggests that the option of invoking the protective cover of Article 31(2) may be substituted by the secondary enforcement of choice of court

cases is conjectural and might not be permitted by the CJEU because the party relying on the jurisdiction agreement has failed to take advantage of the systemic solution provided by the Recast Regulation of seising the chosen court before the court first seised has adjudicated on the applicability and validity of the jurisdiction agreement.

Another area of uncertainty is whether the Recast Regulation's solution in Article 31(2) also extends to related actions underway in the courts of other Member States.¹⁰⁰¹ It is unlikely that the European Union legislature's intentions and the CJEU's interpretation of the Regulation will permit Article 31(2)'s protective cover to displace related actions in the courts of other Member States.¹⁰⁰² However, a more pragmatic approach to the issue would ideally seek to displace both identical claims and related actions in order to frustrate a wider potential range of pending torpedo actions. The *mirror image* approach to the same cause of action issue under Article 27 of the Brussels I Regulation in *The Alexandros T* confirms that a narrow range of parallel proceedings may trigger the *lis pendens* provision.¹⁰⁰³ This necessarily results in a wider scope of operation for Article 28 of the Brussels I Regulation which is concerned with entire 'actions' rather than 'claims' or 'causes of action' within proceedings.¹⁰⁰⁴ Bearing these factors in mind and in the interests of averting torpedo actions and preventing irreconcilable judgments, it may make commercial sense to interpret Article 31(2) as disabling both identical claims and related actions. On the other hand, Briggs argues that is not necessary that the proceedings be identical or related, but it is clear that both actions must be, potentially at least, within the scope of the exclusive jurisdiction agreement.¹⁰⁰⁵ It is submitted that, reliance on the scope of the exclusive jurisdiction agreement may be a practical method of determining whether the proceedings in the court first seised should be stayed and eventually declined. Nevertheless, this is a departure from the traditional *lis pendens* rule and the concept applied in the test to determine whether proceedings are precluded in the court second seised. Analysis of the scope of the

agreements via the damages remedy. However, he notes that the availability of damages in such cases is 'problematic'.

¹⁰⁰¹ See David Kenny and Rosemary Hennigan, 'Choice of Court Agreements, the Italian Torpedo, and the Recast of the Brussels I Regulation' (2015) 64 *ICLQ* 197.

¹⁰⁰² Recital 22 of the Brussels I Regulation (Recast) refers to the solution proffered as an exception to the general *lis pendens* rule and that both the court first seised and the court designated in an exclusive choice of court agreement should share the same cause of action and be between the same parties. Therefore, it is unlikely that related actions as opposed to identical claims will be precluded by Article 31(2) of the Brussels I Regulation (Recast); See Garcimartin (n 831) 339.

¹⁰⁰³ *The Alexandros T* [2013] UKSC 70; [2014] 1 All ER 590 (Lords Neuberger, Mance, Clarke, Sumption and Hughes).

¹⁰⁰⁴ Case C-406/92 *The Tatry v Mancioj Rataj* [1994] ECR I-5439, [52]; *The Alexandros T* [2013] UKSC 70; [2014] 1 All ER 590; *Sarrio S.A. v. Kuwait Investment Authority* [1999] 1 AC 32 (HL).

¹⁰⁰⁵ Briggs, *Private International Law in English Courts* (n 923) 314.

jurisdiction agreement rather than identity of cause of action and identity of parties is unlikely to find favour in the CJEU even though the difference between the two methods may only be semantic in some cases. It may also be argued that the construction of a jurisdiction agreement is a matter for the court designated in the jurisdiction agreement and hence, the scope of the agreement cannot be employed as a test for the application of the *lis pendens* rule. The court first seised may only conduct a *prima facie* review of the clause which may not involve a detailed assessment of the clause. In cases where Article 28 of the Brussels I Regulation is engaged and there is an exclusive choice of court agreement in favour of the second seised court, it has been held by the superior courts of England and Wales that the court second seised should exercise its discretion in favour of refusing a stay.¹⁰⁰⁶

The analysis in this section demonstrates that the scope of the protection offered by Article 31(2) is not comprehensive as the legal risk of pre-emptive proceedings in breach of an English jurisdiction agreement has been reduced but not definitively eliminated. As a result, the damages remedy in the English courts may also metamorphose under the Recast Regulation by offering commercial parties pragmatic redress where the principled legal regulation of choice of court agreements fails to yield.

Pre-emptive proceedings and Exclusive Jurisdiction

Under the Brussels I Regulation (Recast) proceedings in the chosen court under Article 25 are not prevented on the basis that the foreign court has exclusive jurisdiction under Article 24. Article 24(2) confers exclusive jurisdiction on the courts of a corporation's home state in proceedings having as their object the validity of the corporation's decisions. Article 25(4) ensures that jurisdiction derived from Article 24 trumps any derived from Article 25, creating the risk that corporate defendants might bring pre-emptive proceedings in their home court alleging that they lack the power to conclude the disputed transaction, relying on the argument that the dispute concerned corporate capacity, and that any proceedings should

¹⁰⁰⁶ *The Alexandros T* [2013] UKSC 70; [2014] 1 All ER 590; *Nomura International Plc v Banca Monte Dei Paschi Di Siena SpA* [2013] EWHC 3187 (Comm) (Eder J); *JP Morgan Europe Ltd v Primacom AG* [2005] 2 Lloyd's Rep 665 (Cooke J); *Nordea Bank Norge ASA, Vasonia Shipping Company Limited v Unicredit Corporate Banking SpA, Banca di Roma SpA* (2011) EWHC 30 (Comm) (Gloster J); Fawcett and Carruthers (n 928) 315; Fentiman, *International Commercial Litigation* (2015) (n 817) 398; Fentiman, *International Commercial Litigation* (2010) (n 827) 449; R Fentiman in U Magnus and P Mankowski, *Brussels I Regulation* (2nd Edition, Sellier European Law Publishers 2012) 602-603; Thalia Kruger, *Civil Jurisdiction Rules of the EU and their Impact on Third States* (Oxford Private International Law Series, OUP 2008) 309-311; cf J Hill and A Chong, *International Commercial Disputes: Commercial Conflict of Laws in English Courts* (Hart Publishing 2010) 291.

therefore be heard exclusively in their home state. In *BVG v JP Morgan Chase Bank NA* the CJEU blocked the escape route offered by Article 24(2), holding that it does not confer exclusive jurisdiction on the courts at a corporation's seat merely because infringement of the corporation's constitution is alleged.¹⁰⁰⁷ The reasoning of the CJEU in this decision is a departure from the formalistic and impractical application of Article 24(4) in *GAT v LuK* as it reposes trust in the contractual forum to decide incidental questions on the validity of a right within the ambit of Article 24. As a result, the pragmatic decision in *BVG* curtails the scope for tactical forum shopping and procedural maneuvering by offering a wider interpretation of the legitimate and proper ambit of Article 25.

The next chapter examines the Hague Convention on Choice of Court Agreements and whether the scheme of the Convention permits the use of private law remedies to enforce exclusive choice of court agreements.

¹⁰⁰⁷ C-144/10 *Berliner Verkehrsbetriebe (BVG) v JP Morgan Chase Bank NA* [2011] ECR I-3961; See Richard Fentiman, 'Disarming the Ultra Vires Torpedo' (2011) 70 *Cambridge Law Journal* 513; Hartley, *Choice of Court Agreements Under the European and International Instruments* (n 817) 296; Fentiman, *International Commercial Litigation* (2015) (n 817) 102; cf Case C-4/03 *Gesellschaft für Antriebstechnik mbH & Co. KG v Lamellen und Kupplungsbau Beteiligungs KG (GAT v LuK)* [2006] ECR I-6509 where the CJEU adopted a different solution in relation to Article 24(4) and held that the defendant pleading the invalidity of the registered patent right as a defence to a claim for infringement does not deprive the forum of jurisdiction over the infringement action, but if it is not a court of the State of registration it cannot decide the validity issue, even as an incidental question. This means that the infringement proceedings have to be suspended so that the validity issue can be determined by the court of the State of registration. See Hartley, *Choice of Court Agreements Under the European and International Instruments* (n 817) 300-301.

Chapter 10 - The Hague Convention on Choice of Court Agreements: Qualified Mutual Trust and the Scope for Contractual Remedies for Breach of Exclusive Choice of Court Agreements

The origins of the Hague Convention on Choice of Court Agreements¹⁰⁰⁸ ('Hague Convention') lie in the efforts to salvage something from the wreckage of the most ambitious project undertaken by the Hague Conference on Private International Law¹⁰⁰⁹ – The Hague Judgments Convention, (a failed global attempt at a 'mixed' convention).¹⁰¹⁰ The Hague Choice of Court Agreements Convention is designed to create a mandatory international legal regime for the enforcement of exclusive jurisdiction agreements in commercial transactions and the recognition and enforcement of judgments resulting from proceedings based on such agreements.¹⁰¹¹ The Hague Convention operates in parallel with the extremely successful 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.¹⁰¹² The choice of court agreement provisions in the Brussels I

¹⁰⁰⁸ Adopted at the 20th Session of the Hague Conference on Private International Law, The Hague, 30th June 2005. On 1 October 2015, the Convention of 30 June 2005 on Choice of Court Agreements has entered into force in 28 States (Mexico and all Member States of the European Union, except Denmark). See Marta Requejo, 'Ratification of The Choice of Court Agreements Convention' (Conflictolaws.net, 14 October 2014) <<http://conflictolaws.net/2014/ratification-of-the-choice-of-court-agreements-convention/>> accessed 14 October 2014.

¹⁰⁰⁹ The Hague Conference of Private International Law is an international intergovernmental organization facilitating the negotiation and conclusion of international multilateral conventions on private international law. It was founded in 1893 and according to Article 1 of the Statute of the Hague Conference on Private International Law its purpose is to 'work for the progressive unification of the rules of private international law'.

¹⁰¹⁰ In 2012, the Council on General Affairs and Policy of the Hague Conference on Private International Law agreed that work on the 'Judgments Project' should resume. In 2016, the Council welcomed the completion by the Working Group on the Judgments Project of a Proposed Draft Text, and decided to set up a Special Commission to prepare a draft Convention; See Paul Beaumont, 'The Revised Judgments Project in The Hague' [2014] *Nederlands Internationaal Privaatrecht* 532, 532-533; Trevor Hartley, *Choice of Court Agreements under the European and International Instruments* (OUP 2013) Chapter 1, 18-19; Ronald A Brand and Paul M Herrup, *The 2005 Hague Convention on Choice of Court Agreements, Commentary and Documents* (Cambridge University Press 2008) Chapter 1; T Hartley and M Dogauchi, *Explanatory Report Part I: Preface, 'Origins of the Convention'*; Ronald A Brand and Scott R Jablonski, *Forum Non Conveniens: History, Global Practice, and Future Under the Hague Convention on Choice of Court Agreements* (CILE Studies, Volume 3, OUP 2007) Chapter 8, 141-148.

¹⁰¹¹ See generally, Hartley, *Choice of Court Agreements* (n 1010); Brand and Herrup (n 1010); Andrea Schulz, 'The Hague Convention of 30 June 2005 on Choice of Court Agreements' [2006] *Journal of Private International Law* 243; TC Hartley, 'The Hague Choice of Court Convention' (2006) 31 *European Law Review* 414; Paul Beaumont, 'Hague Choice of Court Agreements Convention 2005: Background, Negotiations, Analysis and Current Status' [2009] *Journal of Private International Law* 125; Christian Thiele, 'The Hague Convention on Choice of Court Agreements: Was it Worth the Effort?' in Eckart Gottschalk and others (eds) *Conflict of Laws in a Globalized World* (Cambridge University Press 2007) 63; TC Hartley, *International Commercial Litigation: Text, Cases and Materials on Private International Law* (Cambridge University Press 2009) 201-203.

¹⁰¹² United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June, 1958, 330 UNTS 4739; cf Richard Garnett, 'The Hague Choice of Court Convention: Magnum Opus or Much Ado about Nothing?' (2009) 5 *Journal of Private International Law* 161, 171-173, doubts whether the Hague Convention is a true litigation counterpart of the New York Convention. This may be attributed to the presence of a wider range of excluded subject matter under Article 2 compared to international arbitration, the potentially wider

Regulation (Recast) have been aligned with the Hague Convention in order to ensure better coordination and to secure the consistent enforcement of jurisdiction agreements both within the EU and globally.¹⁰¹³ The rules coordinating conflicts between the private international law regimes of the Hague Convention and the Brussels I Regulation (Recast) have been referred to as 'tertiary rules'¹⁰¹⁴ forming part of an increasingly multi layered, multilateral and 'multi-speed'¹⁰¹⁵ regional and international legal order. According to the Hague Convention, the Convention will take precedence over the Brussels I Regulation if there is an actual incompatibility between the two instruments but excluding the situations when the parties reside exclusively within EU Member States.¹⁰¹⁶

Briggs briefly discusses the possible impact of the Hague Convention in the concluding chapter of *Agreements*.¹⁰¹⁷ He is critical of the exclusion of non-exclusive choice of court agreements from the scope of the Convention given 'their importance in commercial contract drafting'¹⁰¹⁸ in practice and the rigidity of the Convention when it requires the mandatory enforcement of a choice of court agreement regardless of the impact on third

defences to enforcement of agreements (particularly the 'manifest injustice' ground) and the scope for Contracting States to remove certain areas from the Convention under Article 21. Moreover, international arbitration offers advantages to parties relating to the process itself including neutrality, judicial support and arbitral institutions of the seat of arbitration, procedural flexibility, privacy and confidentiality.

¹⁰¹³ B Hess, T Pfeiffer and P Schlosser, 'Report on the Application of Regulation Brussels I in the Member States' (Study JLS/C4/2005/03, September 2007) ('Heidelberg Report') paras [338]-[344], [390] pages 95-97, 112; Tena Ratkovic' and Dora Zgrabljic' Rotar, 'Choice-of-Court Agreements under the Brussels I Regulation (Recast)' (2013) 9 *Journal of Private International Law* 245, 249-250.

¹⁰¹⁴ Alex Mills, 'Variable Geometry, Peer Governance, and the Public International Perspective on Private International Law' in Horatia Muir Watt and Diego P Fernandez Arroyo (eds), *Private International Law and Global Governance* (Oxford Law and Global Governance Series, OUP 2014) 245, 257; An early version of Alex Mills' chapter was presented to the Sciences Po Workshop on *Private International Law as Global Governance* in March 2012. It is available at SSRN: <<http://ssrn.com/abstract=2025616>> accessed 30 July 2014: Mills classifies 'conflicts of conflict of laws' as 'tertiary rules' because they operate at a level higher than private international law rules which he terms 'secondary rules' dealing with the allocation of regulatory authority in (primary) substantive private law; Nikitas Hatzimihail, 'General Report: Transnational Civil Litigation Between European Integration and Global Aspirations' in Arnaud Nuyts and Nadine Watté (eds.), *International Civil Litigation in Europe and Relations with Third States* (Bruylant 2005) 595, 654 employs the term 'conflict of conventions' to describe the interaction of different international instruments, especially those dealing with private law matters.

¹⁰¹⁵ 'Multi-speed' Europe is the term used to describe the idea of a method of differentiated integration whereby common objectives are pursued by a group of Member States both able and willing to advance, it being implied that the others will follow later. (Europa.eu Glossary) <http://europa.eu/legislation_summaries/glossary/multispeed_europe_en.htm> accessed 30 July 2014. See also 'Enhanced Cooperation' and 'Variable-geometry Europe'.

¹⁰¹⁶ Article 26 of the Hague Convention; Hartley and Dogauchi, *Explanatory Report* (n 1010) [267]; Hartley, *Choice of Court Agreements* (n 1010) Chapter 6, 121-126.

¹⁰¹⁷ Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford Private International Law Series, OUP 2008) Chapter 13, 528-532.

¹⁰¹⁸ Ibid, 529; cf This exclusion is partially mitigated by the fact that Article 3(b) of the Convention presumes agreements to be exclusive unless the parties have expressly provided otherwise and that Contracting States may make a declaration under Article 22 that they will recognise and enforce judgments given by courts of other Contracting States designated in non-exclusive choice of court agreements.

parties.¹⁰¹⁹ He concludes that the Hague Convention lends support to the view that choice of court agreements are ‘contractual in nature, and should be enforced because contracts should be enforced.’¹⁰²⁰ However, this section will emphasize that the Hague Convention does not deal with questions of the contractual enforcement of choice of court agreements via anti-suit injunctions or the damages remedy. Instead the primary solution it proffers is rather different in nature. It would be unfair to wholeheartedly affirm that such agreements are *intrinsically* contractual in nature, classification and effects from the arguably *extrinsic* residual allocative scope that a Convention premised on a system of partial or qualified mutual trust may offer for the contractual enforcement of choice of court agreements. Before delving into the issue of whether a jurisdiction agreement can be reinforced by national remedies and whether it can be binding on the parties as a contractual agreement even if it is ineffective under the Convention, it is necessary to highlight the defining characteristics of the Hague Convention.

The Hague Convention applies to exclusive choice of court agreements in international cases in civil and commercial matters.¹⁰²¹ Consumer and employment contracts are excluded from the scope of the Hague Convention.¹⁰²² Together with further exclusions under Article 2(2), this leads to the result that the Hague Convention primarily applies in ‘business to business’ commercial cases. The Hague Convention only applies in international cases. The definition of what is an international case differs between jurisdictional issues (Chapter II) and recognition and enforcement issues (Chapter III). For the Hague Convention’s jurisdictional rules to apply, a case is international unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State.¹⁰²³ For the purposes of obtaining the recognition and enforcement of a judgment in a Contracting State, it is sufficient that the judgment presented is foreign.¹⁰²⁴

¹⁰¹⁹ Briggs, *Agreements* (n 1017) 531; See *Donohue v Armco Inc* [2001] UKHL 64; cf Thiele (n 1011) 81, rejects any scope for court discretion in the Convention text. He even extends such inflexible reasoning to a court enforcing a judgment regardless of whether the ground of non-recognition are available. It is submitted that there is no support for such an assertion in the text of Article 9 of the Convention, the Official Explanatory Report or the *Travaux Préparatoires* leading up to the conclusion of the Convention.

¹⁰²⁰ Briggs, *Agreements* (n 1017) 531-532.

¹⁰²¹ Article 1(1) of the Hague Convention; See Schulz (n 1011) 248-250; Brand and Herrup (n 1010) Chapter 4; Thiele (n 1011) 67-73.

¹⁰²² Article 2(1) of the Hague Convention.

¹⁰²³ Article 1(2) of the Hague Convention.

¹⁰²⁴ Article 1(3) of the Hague Convention.

The basic principles of the Hague Convention can be summarized as follows:¹⁰²⁵ The chosen court in an exclusive choice of court agreement shall have jurisdiction to decide a dispute which falls within its purview, unless the agreement is null and void under the law of that state.¹⁰²⁶ Any court other than the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies.¹⁰²⁷ A judgment given by a chosen court shall be recognised and enforced in other Contracting States and recognition and enforcement may be refused only on the grounds specified in the Hague Convention.¹⁰²⁸ Article 22 provides an optional fourth basic rule allowing each Contracting State the opportunity to declare that, on the basis of reciprocity, its courts will recognise and enforce judgments given by courts of other Contracting States designated in a non-exclusive choice of court agreement.

The Hague Convention also gives effect to the principle of severability:¹⁰²⁹

An exclusive choice of court agreement that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid.

The substantive validity of the exclusive choice of court agreement in the Hague Convention is subject to the law of the state of the chosen court including its private international law rules.¹⁰³⁰ A court designated by a choice of court agreement has no power under the Hague Convention to stay its proceedings on *forum non conveniens* grounds or to stay its proceedings on the basis of the *lis alibi pendens* doctrine.¹⁰³¹ This might be interpreted as the conferral of a right on the parties to invoke the jurisdiction of the court. However, Article 19 of the Hague Convention allows a Contracting State to declare that its courts will not exercise jurisdiction when, except for the location of the chosen court, there is no connection between that State and the parties or the dispute. Thus, if a declaration pursuant

¹⁰²⁵ Hartley, *Choice of Court Agreements* (n 1010) Chapter 1, 21-22; Schulz (n 1011) 254-258; Brand and Herrup (n 1010) Chapter 2, 11-14; Hartley and Dogauchi, *Explanatory Report* (n 1010) [1].

¹⁰²⁶ Article 5 of the Hague Convention.

¹⁰²⁷ Article 6 of the Hague Convention.

¹⁰²⁸ Article 8 of the Hague Convention.

¹⁰²⁹ Article 3(d) of the Hague Convention; Brand and Herrup (n 1010) Chapter 4, 46-47.

¹⁰³⁰ Article 5(1) of the Hague Convention; Hartley and Dogauchi, *Explanatory Report* (n 1010) para 126; Hartley, *Choice of Court Agreements* (n 1010) Chapter 7, 165-171; Brand and Herrup (n 1010) Chapter 5, 80-82.

¹⁰³¹ Article 5(2) of the Hague Convention; See Brand and Herrup (n 1010) Chapter 5, 82-84; Brand and Jablonski, (n 1010) Chapter 9, 208.

to Article 19 has been made, the possibility of declining jurisdiction effectively trumps the rule in Article 5(2).¹⁰³²

The Hague Convention does not entirely resolve the *Gasser*¹⁰³³ problem of who should interpret the choice of court agreement as it does not confer sole competence on the court putatively chosen to do so.¹⁰³⁴ Where the parties have agreed to the exclusive jurisdiction of the English courts, and the courts of another Contracting State are seised, the other court must normally decline to exercise jurisdiction.¹⁰³⁵ The court other than the chosen court must decline jurisdiction if it is established that there is a valid and exclusive choice of court agreement in favour of the English courts and the claim falls within the scope of the choice of court agreement and the Hague Convention. At the least, the other court would need to establish a *prima facie* case that such an agreement confers jurisdiction on the English courts. It need not decline jurisdiction, however, principally, (a) if the agreement is invalid under the law of the state of the chosen court; (b) a party lacked the capacity to conclude the agreement under the law of the state of the court seised; (c) if giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the state of the court seised;¹⁰³⁶ (d) if for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed.¹⁰³⁷ Therefore the legal risk of pre-emptive proceedings in breach of an English exclusive choice of court agreement is reduced but not removed in cases subject to the Hague Convention on Choice of Court Agreements.¹⁰³⁸ The interpretation of the scope for pre-emptive litigation in relation to the threshold issue and the exceptions to the obligation to decline jurisdiction may come under judicial scrutiny and as a result acquire further clarity in the yet to develop jurisprudence of the Hague Convention.

The Hague Convention's regime does not counter the potential for pre-emptive proceedings in every situation. First, the Hague Convention can only apply if an English exclusive jurisdiction agreement is challenged in a Contracting State. Second, it does not apply to

¹⁰³² Brand and Herrup (n 1010) Chapter 5, 84; Schulz (n 1011) 259; Thiele (n 1011) 74; Beaumont (n 1011) 149.

¹⁰³³ *Erich Gasser GmbH v MISAT Srl* Case C-116/02 [2004] 1 Lloyd's Rep 222.

¹⁰³⁴ Articles 5 and 6 of the Hague Convention.

¹⁰³⁵ Article 6 of the Hague Convention.

¹⁰³⁶ Hartley and Dogauchi, *Explanatory Report* (n 1010) para 151-153; Hartley, *Choice of Court Agreements* (n 1010) Chapter 8, 184.

¹⁰³⁷ The exceptions in (c) and (d) are intended to apply 'only in the most exceptional circumstances': See Hartley and Dogauchi, *Explanatory Report* (n 1010) para 148; Hartley, *Choice of Court Agreements* (n 1010) Chapter 8, 183.

¹⁰³⁸ R Fentiman, *International Commercial Litigation* (2nd Edition, OUP 2015) 97.

asymmetric jurisdiction agreements, which are frequently encountered in international commercial transactions.¹⁰³⁹ Although there is no requirement that the parties should have equal rights, it was agreed by the Diplomatic Session that, in order to be covered by the Hague Convention, the agreement must be exclusive irrespective of the party bringing the proceedings.¹⁰⁴⁰ Moreover, the grounds for displacing an agreement provided in the Hague Convention also offer significant opportunities to undermine a jurisdiction agreement, and to create uncertainty as to their status. Despite the enhancement of the enforcement of choice of court agreements in some cases, the potential for tactical forum shopping remains along with the burden on a defendant in foreign proceedings to mount a defence and incur costs and expenses in those proceedings.

The lack of a *lis alibi pendens* mechanism¹⁰⁴¹ or a court first seised rule to coordinate proceedings and the apparent tolerance of ‘parallel proceedings’¹⁰⁴² suggests that the Hague Convention does not adhere to the strict multilateral jurisdiction and judgments model of the Brussels I Regulation premised on the mutual trust principle. Therefore, the issue of whether national remedies such as anti-suit injunctions and damages for breach of choice of court agreements might be relied upon may receive a different answer under the Hague Convention.

The specific provision for the principle of severability along with a choice of law rule for the substantive validity of a jurisdiction agreement in the Hague Convention does lend support to arguments in favour of an essentially contractual justification for choice of court agreements. The referral of issues relating to material validity, a substantive element of a jurisdiction agreement, to the law of the chosen forum including its private international law rules recognises the complex ‘hybrid’ nature of a choice of court agreement incorporating a mix of substantive and procedural components. Article 3(d) of the Hague Convention offers an additional layer of protection for choice of court agreements by emphasizing that an attack on the validity of the main contract does not by itself impeach the validity of the independent choice of court agreement. This ensures that the forum chosen by the parties

¹⁰³⁹ Hartley and Dogauchi, *Explanatory Report* (n 1010) [106]; Hartley, *Choice of Court Agreements* (n 1010) Chapter 7, 143-144.

¹⁰⁴⁰ Minutes No 3 of the Second Commission Meeting of Wednesday 15 June 2005 (morning) in *Proceedings of the Twentieth Session of the Hague Conference on Private International Law* (Permanent Bureau of the Conference, Intersentia 2010) 577, 577-578.

¹⁰⁴¹ Article 5(2) of the Hague Convention; cf Article 27 of the Brussels I Regulation.

¹⁰⁴² Brand and Herrup (n 1010) Chapter 5, 88; Hartley, *Choice of Court Agreements* (n 1010) Chapter 11, 231; Hartley and Dogauchi, *Explanatory Report* (n 1010) [132]-[134].

exercises adjudicatory authority even where the very existence of the contract is in dispute. The principles of party autonomy and legal certainty justify the exercise of jurisdiction by the chosen court where the validity of the substantive contract is impugned.

Article 7 of the Hague Convention states that the Convention does not affect the granting of interim measures of protection:¹⁰⁴³

Interim measures of protection are not governed by this Convention. This Convention neither requires nor precludes the grant, refusal or termination of interim measures of protection by a court of a Contracting State and does not affect whether or not a party may request or a court should grant, refuse or terminate such measures.

Although anti-suit injunctions might be classified as interim measures of protection, they are not specified as such in the Official Explanatory Report.¹⁰⁴⁴ However, the Explanatory Reports of the Draft Conventions on Choice of Court Agreements have cited an anti-suit injunction precluding a party from bringing proceedings in a court other than that chosen as an example of an interim measure of protection.¹⁰⁴⁵

A discussion between official delegates recorded in Minutes No 9 of a Second Commission meeting also provides support to the argument that anti-suit injunctions may be awarded to enforce choice of court agreements by Contracting States.¹⁰⁴⁶ Significantly, Mr. Paul R Beaumont of the United Kingdom delegation sought to clarify the position in relation to anti-suit injunctions by differentiating the formal 'process' of the Hague Convention from the

¹⁰⁴³ Article 7 of the Hague Convention; See Brand and Herrup (n 1010) Chapter 5, 95-96.

¹⁰⁴⁴ Hartley, *Choice of Court Agreements* (n 1010) Chapter 10, 215-216; Hartley and Dogauchi, *Explanatory Report* (n 1010) [160]-[163]; cf Burkhard Hess, 'The Draft Hague Convention on Choice of Court Agreements, External Competencies of the European Union and Recent Case Law of the European Court of Justice' in Arnaud Nuyts and Nadine Watté (eds.), *International Civil Litigation in Europe and Relations with Third States* (Bruylant 2005) 263, 281-282, argues that, in principle, anti-suit injunctions should be allowed as the EU notion of mutual trust does not apply between Contracting States of the Hague Convention. He even suggests that an express exclusive jurisdiction of the designated court to order such measures together with a corresponding obligation on all court of the Contracting States to recognise and enforce such orders should be incorporated into the Hague Convention.

¹⁰⁴⁵ TC Hartley and M Dogauchi, 'Explanatory Report on the Preliminary Draft Convention on Exclusive Choice of Court Agreements' (Preliminary Document No 26 of December 2004) in *Proceedings of the Twentieth Session of the Hague Conference on Private International Law* (Permanent Bureau of the Conference, Intersentia 2010) 167, 195-197, [131]; TC Hartley and M Dogauchi, 'Explanatory Report on the Preliminary Draft Convention on Choice of Court Agreements' (Preliminary Document No 25 of March 2004) (hcch.net) <http://www.hcch.net/upload/wop/jdgm_pd25e.pdf> accessed 01 July 2015, 24, [101].

¹⁰⁴⁶ Minutes No 9 of the Second Commission Meeting of Monday 20 June 2005 (morning) in *Proceedings of the Twentieth Session of the Hague Conference on Private International Law* (Permanent Bureau of the Conference, Intersentia 2010) 622, 623-624.

desired 'outcome'.¹⁰⁴⁷ Where anti-suit injunctions upheld choice of court agreements and thus helped achieve the intended outcome of the Convention, there was a consensus among the delegates in the meeting that the Convention did not limit or constrain national courts of Contracting States from granting the remedy.¹⁰⁴⁸

The primary meaning of the concept is measures intended to protect the position of the parties while the proceedings are pending.¹⁰⁴⁹ However, after mentioning freezing orders, interim injunctions and orders for the production of evidence the Official Explanatory Report states:¹⁰⁵⁰

All these measures are intended to support the choice of court agreement by making it more effective. They thus help to achieve the objective of the Convention. Nevertheless, they remain outside its scope.

Arguably, an anti-suit injunction granted for breach of an English exclusive jurisdiction clause is a measure intended to make the choice of court agreement more effective. This opens the possibility for a party faced with proceedings brought in clear breach of an English exclusive jurisdiction agreement to apply to the English courts for an anti-suit injunction in Hague Convention cases.¹⁰⁵¹ The *lex fori* will govern the issue of contractual remedies for breach of English exclusive choice of court agreements as the Hague Convention is silent on the matter.¹⁰⁵² On the other hand, the operation of national law in relation to interim measures of protection is not completely unfettered by the Hague Convention.¹⁰⁵³ Considerations of general treaty law may place constraints on the operation of national law. Thus, there is a legitimate question as to whether a court not chosen could issue an anti-suit injunction

¹⁰⁴⁷ Ibid 624.

¹⁰⁴⁸ Ibid; The delegates who expressed a view that anti-suit injunctions to enforce choice of court agreements were compatible with the Hague Convention included Mr Paul R Beaumont (United Kingdom), Mr Trevor C Hartley (co-Reporter), Mr David Bennett (Australia), Mr Gottfried Musger (Austria); The Chair [Mr Andreas Bucher (Switzerland)] noted that the co-Reporters would make what had been said on this clear, and that there would also be a process for commenting on the Explanatory Report.

¹⁰⁴⁹ Hartley, *Choice of Court Agreements* (n 1010) Chapter 10, 216.

¹⁰⁵⁰ Hartley and Dogauchi, *Explanatory Report* (n 1010) [160].

¹⁰⁵¹ David Joseph QC, *Jurisdiction and Arbitration Agreements and their Enforcement* (Sweet & Maxwell 2010) 410-411.

¹⁰⁵² Ibid.

¹⁰⁵³ Brand and Herrup (n 1010) Chapter 5, 96; Hartley and Dogauchi, *Explanatory Report on the Preliminary Draft Convention on Exclusive Choice of Court Agreements (December 2004)* (n 1045) 167, 193, [120]-[121]; Hartley and Dogauchi, *Explanatory Report on the Preliminary Draft Convention on Choice of Court Agreements (March 2004)* (n 1045) 22, [88]-[89]; See also Andrea Schulz, 'Reflection Paper to Assist in the Preparation of a Convention on Jurisdiction and Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters' (Preliminary Document No 19 of August 2002) in *Proceedings of the Twentieth Session of the Hague Conference on Private International Law* (Permanent Bureau of the Conference, Intersentia 2010) 11, 25, [77], who identified whether the Convention should contain a rule prohibiting the courts of a Contracting State from issuing anti-suit injunctions with regard to proceedings before the court in another Contracting State which was designated by an exclusive choice of court clause.

against proceedings in a court chosen in an exclusive choice of court agreement. It is submitted, that in these circumstances, the use of anti-suit injunctions will actually impede the sound operation of the Hague Convention and jeopardize the enforcement of jurisdictional party autonomy. Thus, there is a strong argument that the Hague Convention will not permit the use of anti-suit injunctions to render choice of court agreements ineffective.¹⁰⁵⁴

To reiterate, the establishment of a choice of law rule for material validity and the enshrinement of the principle of severability for choice of court agreements will reinforce the contractual foundation of such agreements. Furthermore, it has been observed that anti-suit injunctions granted for breach of English exclusive jurisdiction clauses are measures intended to make such agreements more effective. However, the principal method of enforcing choice of court agreements in both the Hague Convention and the Brussels I Regulation (Recast) is jurisdictional or procedural and not contractual in nature. The nominated court in a choice of court agreement shall exercise jurisdiction whilst all other courts are required to stay and eventually decline jurisdiction.¹⁰⁵⁵ In the case of the Brussels I Regulation (Recast) a reverse *lis pendens* rule according primacy to the choice of court agreement rather than the court first seised is the envisaged method of enforcing jurisdictional party autonomy in the EU.¹⁰⁵⁶ The prospects of contractual remedies enforcing choice of court agreements making much headway in the European Union is necessarily curtailed by a multilateral jurisdictional system that prizes the overarching principle of mutual trust and systemic objectives more than the enforcement of private rights and obligations embodied in an exclusive jurisdiction agreement.¹⁰⁵⁷

¹⁰⁵⁴ Brand and Herrup (n 1010) Chapter 5, 96; See Minutes No 9 of the Second Commission Meeting of Monday 20 June 2005 (morning) in *Proceedings of the Twentieth Session of the Hague Conference on Private International Law* (Permanent Bureau of the Conference, Intersentia 2010) 622, 623-624: The delegates who expressed a view that anti-suit injunctions preventing parties from bringing proceedings in the chosen court were incompatible with the Hague Convention included Mr Paul R Beaumont (United Kingdom), Mr Trevor C Hartley (co-Reporter), Mr David Bennett (Australia), Mr Gottfried Musger (Austria); The Chair [Mr Andreas Bucher (Switzerland)] noted that the co-Reporters would make what had been said on this clear, and that there would also be a process for commenting on the Explanatory Report.

¹⁰⁵⁵ Article 6 of the Hague Convention; Articles 31(2) and 31(3) of the Brussels I Regulation (Recast).

¹⁰⁵⁶ For criticism of the *kompetenz-kompetenz* of the 'allegedly' chosen forum in a choice of court agreement, See Case C-116/02 *Erich Gasser GmbH v MISAT Srl* [2003] ECR I-14693, Opinion of AG Léger, [74]; A Briggs, 'What should be done about Jurisdiction Agreements?' (2010) 12 *Yearbook of Private International Law* 319-322.

¹⁰⁵⁷ See Martin Illmer, 'English Court of Appeal confirms Damages Award for Breach of a Jurisdiction Agreement' (Conflictflaws.net, 31 July 2014) <<http://conflictflaws.net/2014/english-court-of-appeal-confirms-damages-award-for-breach-of-a-jurisdiction-agreement/>> accessed 30 July 2014.

In contrast, the Hague Convention is premised on a system of qualified or partial mutual trust which suggests that the arguments for the contractual enforcement of choice of court agreements may be pursued here with greater likelihood of success.¹⁰⁵⁸ However, it should be noted, that neither the anti-suit injunction nor the damages remedy for breach of exclusive jurisdiction agreements were discussed as viable options for the enforcement of exclusive jurisdiction agreements in the official explanatory report.¹⁰⁵⁹ The judgment of a Contracting State which rules on the validity of a choice of court agreement selecting that state itself shall be recognised and enforced in other Contracting States.¹⁰⁶⁰ However, the judgment of a Contracting State which rules on the validity of a choice of court agreement selecting another Contracting State will not be entitled to recognition and enforcement in other Contracting States.¹⁰⁶¹ The application of an anti-suit injunction and the damages remedy may be justified in the case of the assumption of jurisdiction by a Contracting State without regard to the presence of a valid choice of court agreement in favour of another Contracting State. Thus, the Hague Convention might allow an English court to second guess the findings of another Contracting State as to the validity and effectiveness of an English choice of court agreement and award damages for breach of the jurisdiction clause. However, it should be noted that, the Hague Convention is a codified regime regulating the validity and effectiveness of choice of court agreements globally.¹⁰⁶² The application of contractual remedies to enforce jurisdiction agreements by some Contracting States may create a rift in the yet to develop jurisprudence of the Hague Convention and without an international court interpreting the meaning of the global Convention it is likely that the uniform application of the Convention might be compromised.

Following the conclusion of the Lugano Convention (2007),¹⁰⁶³ which fell entirely within the sphere of exclusive competence of the EU,¹⁰⁶⁴ the Hague Convention was also concluded by

¹⁰⁵⁸ J Harris, 'Agreements on Jurisdiction and Choice of Law: Where Next?' [2009] LMCLQ 537, 560; Hartley, *Choice of Court Agreements* (n 1010) Chapter 10, 220; T Raphael, *The Anti-Suit Injunction* (OUP 2008) Chapter 1, 20 FN 97; Fentiman, *International Commercial Litigation* (2015) (n 1038) 98; Briggs, *Agreements* (n 1017) 531-532.

¹⁰⁵⁹ See Hartley and Dogauchi, *Explanatory Report* (n 1010).

¹⁰⁶⁰ Article 8(1) of the Hague Convention.

¹⁰⁶¹ Brand and Herrup (n 1010) Chapter 6, 100; Hartley, *Choice of Court Agreements* (n 1010) Chapter 9, 195; Hartley and Dogauchi, *Explanatory Report* (n 1010) [164]-[181].

¹⁰⁶² See Article 23 of the Hague Convention which highlights its international character and the need to promote uniformity in its application; Hartley and Dogauchi, *Explanatory Report* (n 1010) [256]; The equivalent provision in the preliminary draft Convention 1999 is Article 38(1). The commentary on this issue is in the Nygh/Pocar Report at 118 and 119.

¹⁰⁶³ OJ 2009, L 147/5; See Explanatory Report by Professor Fausto Pocar: OJ 2009, C 319/1.

¹⁰⁶⁴ See *Lugano Convention* Opinion 1/03, [2006] ECR I-1145; Opinion 1/13 of the CJEU (Grand Chamber) confirms that the exclusive competence of the EU encompasses the acceptance of the accession of a third State

the EU on behalf of the Member States (except Denmark).¹⁰⁶⁵ The fact that the EU is a party has important consequences within the Union. The Hague Convention has the status of EU law within the European Union (except Denmark)¹⁰⁶⁶ and the CJEU will have the final word on its interpretation as far as the EU Member States are concerned.¹⁰⁶⁷ The Hague Convention as EU law is directly applicable,¹⁰⁶⁸ would almost certainly fulfill the requirements for direct effect¹⁰⁶⁹ and would prevail over the law of the Member States in case of conflict.¹⁰⁷⁰ The CJEU would interpret the Hague Convention through the preliminary reference procedure from the courts of the Member States of the EU.¹⁰⁷¹

The possibility of anti-suit injunctions receiving another fatal blow in the context of the Hague Convention by a CJEU seeking to harmonize its approach to anti-suit relief in the Brussels-Lugano regime and under the Hague Convention cannot be foreclosed.¹⁰⁷² This is a sensitive issue lying at the interface between the Brussels I Regulation and the Hague Convention. Let's suppose that two non EU domiciliaries who are resident in Hague Convention Contracting States enter into an exclusive choice of court agreement for the English courts or one non EU domiciliary who is resident in a Hague Convention Contracting

to the Hague Convention on the civil aspects of international child abduction concluded on 25 October 1980. See Marta Requejo, 'Opinion 1/13 of the ECJ (Grand Chamber)' (Conflictolaws.net, 16 October 2014) <http://conflictolaws.net/2014/opinion-113-of-the-ecj-grand-chamber/> accessed 17 October 2014; See, generally, Hugh Hutchison, 'The External Competence of the European Union in Private International Law' (University of Aberdeen LLM Thesis, 2012).

¹⁰⁶⁵ On 4 December 2014, the Council adopted the decision to approve the Hague Convention on behalf of the European Union (2014/887/EU, OJ 2014 L 353/5); See Pietro Franzina, 'The EU prepares to become a party to the Hague Convention on Choice of Court Agreements' (Conflictolaws.net, 11 February 2014) <<http://conflictolaws.net/2014/the-eu-prepares-to-become-a-party-to-the-hague-convention-on-choice-of-court-agreements/>> accessed 31 July 2014.

¹⁰⁶⁶ Hartley, *Choice of Court Agreements* (n 1010) Chapter 1, 22-23.

¹⁰⁶⁷ Ibid 23.

¹⁰⁶⁸ The principle of direct applicability refers to the extent to which EU measures take effect in the legal system of each Member State without the need for further implementation by the Member States themselves. Authority for this interpretation is Article 288 of the Treaty on the Functioning of the European Union ("TFEU") which states specifically that a Regulation "shall be binding in its entirety and directly applicable in all Member States". Therefore, Regulations shall take effect in the legal system of each Member State without the need for any further implementation.

¹⁰⁶⁹ The principle of direct effect can be interpreted as meaning the extent to which EU law can produce legal rights and obligations which can be used in an action before a national court. The ECJ decision in *Van Gend en Loos v Nederlandse Administratie der Belastingen* (26/62) [1963] ECR 1, [1963] CMLR 105 states that "[Union] law has an authority which can be invoked by their nationals before those courts and tribunals". See Paul Craig and Grainne De Burca, *EU Law: Text, Cases and Materials* (5th Edition, OUP 2011) Chapter 7.

¹⁰⁷⁰ In *Costa v ENEL* (6/64) [1964] ECR 585 the ECJ espoused the principle of supremacy of EU law and stated that EU law could not "be overridden by domestic legal provisions, however framed, without being deprived of its character as [Union] law and without the legal basis of the [Union] itself being called into question". See TC Hartley, *The Foundations of European Union Law* (Eighth Edition, OUP 2010) Chapter 7; Craig and De Burca, *EU Law: Text, Cases and Materials* (n 1069) Chapter 9.

¹⁰⁷¹ Article 267 TFEU; See Hartley, *Foundations* (n 1070) Chapter 9; Craig and De Burca (n 1069) Chapter 13.

¹⁰⁷² See *Turner v. Grovit* (Case C-159/02) [2005] ECR I-3565; [2004] 2 Lloyd's Rep 169; *Allianz SpA (formerly Riunione Adriatica di Sicurtà SpA) v. West Tankers Inc (The Front Comor)* (Case C-185/07) [2009] 1 Lloyd's Rep 413.

State enters into an English exclusive choice of court agreement with an EU domiciliary. The Hague Convention is applicable pursuant to Article 26 of the same Convention.¹⁰⁷³ One of the parties commences pre-emptive torpedo proceedings in the Italian courts for a declaration of non-liability in breach of the English exclusive choice of court agreement. The question is whether the aggrieved party can legally and legitimately seek injunctive relief or monetary compensation for breach of contract before the English courts. As the dispute involves proceedings before the courts of two Member States, there are strong arguments of principle based on the principle of mutual trust and the *effet utile* of EU law which may override the underlying *ethos* of the Hague Convention and disallow a claim for an anti-suit injunction and damages for breach of choice of court agreements.¹⁰⁷⁴ In *Nipponkoa*, the CJEU has recently held that the application of an international convention under Article 71 of the Brussels I Regulation:¹⁰⁷⁵

cannot compromise the principles which underlie judicial co-operation in civil and commercial matters in the European Union, such as the principles, recalled in recitals 6, 11, 12 and 15 to 17 in the preamble to Regulation 44/2001, of free movement of judgments in civil and commercial matters, predictability as to the courts having jurisdiction and therefore legal certainty for litigants, sound administration of justice, minimisation of the risk of concurrent proceedings, and mutual trust in the administration of justice in the European Union.

Arguably, an anti-suit injunction in the context of an intra EU Hague Convention case will contradict these fundamental principles of EU law including the overarching mutual trust principle. However, following the controversial English Court of Appeal decision in *Starlight Shipping v Allianz*, a claim for damages for breach of a choice of court agreement could also be transposed into the intra EU Hague Convention context, at least until the matter is finally

¹⁰⁷³ See Article 26(6)(a) of the Hague Convention; Hartley, *Choice of Court Agreements* (n 1010) Chapter 6, 122-123; Hartley and Dogauchi, *Explanatory Report* (n 1010) [291]-[304]; See Marta Pertegás, 'The Revision of the Brussels I Regulation: A View from the Hague Conference' in Eva Lein (ed.), *The Brussels I Review Proposal Uncovered* (BIICL, London 2012) 193, 199-200; Francisco Garcimartin, 'Chapter 9 – Article 25' in Andrew Dickinson and Eva Lein (eds.), *The Brussels I Regulation Recast* (OUP 2015) 284.

¹⁰⁷⁴ The interface between the New York Convention and the Brussels I Regulation also proscribes anti-suit injunctions in support of arbitration agreements. Where proceedings before the courts of two Member States are involved, the principle of mutual trust and the *effet utile* of EU law will prevent the courts of one Member State from restraining pre-emptive proceedings brought before the courts of another Member State in breach of an arbitration agreement. See the recent decision of the CJEU's Grand Chamber in Case C-536/13 *Gazprom* [32]-[34], which purports to circumscribe the mutual trust principle and *effet utile* of EU law to court to court proceedings in Member States as in the core case of C-185/07 *West Tankers* EU:C:2009:69 [29]-[31]; See also, Martin Illmer, 'Chapter 2 – Article 1' in Andrew Dickinson and Eva Lein (eds.), *The Brussels I Regulation Recast* (OUP 2015) 86.

¹⁰⁷⁵ Case C-452/12 *Nipponkoa Insurance Co (Europe) Ltd v Interzuid Transport BV* ECLI:EU:C:2013:858, [2014] I.L.Pr. 10, [36]; See also to similar effect, Case C-533/08 *TNT Express Nederland BV v AXA Versicherung AG* ECLI:EU:C:2010:243, [2010] I.L.Pr. 35, [49]; See Pippa Rogerson, 'Chapter 17 – Article 71' in Andrew Dickinson and Eva Lein (eds.), *The Brussels I Regulation Recast* (OUP 2015) 569-571.

laid to rest by the CJEU on a preliminary reference from either the English courts or a Member State court seeking a clarification of its duty to recognise and enforce an English judgment awarding such remedies and whether the judgment contravenes the nature and scope of the public policy defence.¹⁰⁷⁶

It should be noted that such an interpretation would militate against the underlying *ethos* of the Convention *per se*, whose system of partial or qualified mutual trust may allow recourse to anti-suit injunctions and the damages remedy to enforce exclusive choice of court agreements. Secondly, a difference of approach to the interpretation of the Hague Convention in relation to the availability of contractual remedies within the EU and globally would widen the divide between European and worldwide practice, jeopardize the enforcement of jurisdictional party autonomy and limit the scope for pragmatic solutions to the conflicts of jurisdiction in Hague Convention cases within the EU. On the other hand, in relation to Hague Convention cases where the English courts are chosen by an exclusive choice of court agreement and pre-emptive torpedo proceedings are launched in a non-Member State, there is no similar or comparable legal impediment to the English courts enforcing the agreement by injunctive relief or by an action for damages for breach of contract.

Notwithstanding the incompatibility of anti-suit injunctions and the damages remedy with the European Judicial Area, Article 31(2) of the Brussels I Regulation (Recast) may still be applied within the scope of application of the Hague Convention. The *ethos* of the Hague Convention may not preclude the introduction by Contracting States of an exception to a *lis pendens* rule. This issue may be determined by the adoption of the most appropriate conception of Article 6 of the Hague Convention. If Article 6 of the Hague Convention is understood as a mere permissive rule, which does not oblige the non-designated court to decide on the validity and effectiveness of the clause but merely *allows* it to do so, Member States may apply the mandatory provisions of Article 31(2)-(3) consistently with the Hague Convention.¹⁰⁷⁷ However, Article 6 might alternatively be understood as a provision that

¹⁰⁷⁶ Damages for breach of an English exclusive jurisdiction agreement governed by English law have been held to be compatible with EU law (Brussels I Regulation) by the Court of Appeal in *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG (The Alexandros T)* [2014] EWCA Civ 1010 (Longmore LJ). Nevertheless, serious doubts persist on whether a reference to the CJEU on the matter will allow an ingenious alternative to the anti-suit injunction free reign to enforce a jurisdiction agreement; See also, *West Tankers Inc v Allianz SpA* [2012] EWHC 854 (Comm) (Flaux J).

¹⁰⁷⁷ Hartley and Dogauchi, *Explanatory Report* (n 1010) [300]; Heidelberg Report (n 1013) [391]; Article 26(1) of the Hague Convention; Francisco Garcimartin, 'Chapter 11 – Article 31(2)' in A Dickinson and E Lein (eds.), *The Brussels I Regulation Recast* (OUP 2015) 343; cf Matthias Weller, 'Choice of Forum Agreements under the

gives a *right* to the claimant to have the case heard when one of the exceptions to that provision applies irrespective of whether the designated court has been seised or not. If we adopted this conception, which departs from the opinion of Hartley and Dogauchi in the Official Explanatory Report,¹⁰⁷⁸ there would be a conflict between the two instruments and the Hague Convention should in principle prevail,¹⁰⁷⁹ assuming that the Hague Convention applies because one of the parties is resident in a Contracting State which is not a Member State.¹⁰⁸⁰ However, as noted above, in the recent decision in *Nipponkoa* concerning the application of an international convention under Article 71 of the Brussels I Regulation the CJEU has held that the fundamental principles underlying judicial co-operation in civil and commercial matters in the EU cannot be compromised - the 'minimisation of the risk of concurrent proceedings' is one of these overriding principles.¹⁰⁸¹ It further ruled that Article 71 of Brussels I Regulation must be interpreted as meaning that it precludes an interpretation of Article 31(2) of the CMR¹⁰⁸² according to which an action for a negative declaration or a negative declaratory judgment in one Member State does not have the same cause of action as an action for indemnity between the same parties in another Member State. The relevant provisions of the CMR could be applied in the European Union only if they enabled the objectives of the free movement of judgments in civil and commercial matters and of mutual trust in the administration of justice in the European Union to be achieved under conditions at least as favourable as those resulting from the application of the Brussels I Regulation.¹⁰⁸³ The CJEU's interpretation of Article 27 of the Brussels I Regulation prevailed over a contradictory interpretation of the *lis pendens*

Brussels I Recast and under the Hague Convention: Coherence or Clash?' Presentation at the plenary session of the 10th Anniversary of the *Journal of Private International Law* Conference 2015 (4th September 2015), argues that a clash does exist between the two instruments in relation to the *lis pendens* rule and suggests that the effects of the incompatibility may be minimised by recognizing the preclusive *res judicata* effect of the judgment validating the choice of court agreement in the chosen court in the other Member State court seised with the proceedings. See Case C-456/11 *Gothaer Allgemeine Versicherung AG v Samskip GmbH* ECLI:EU:C:2012:719, [2013] QB 548. However, the author disagrees with this approach and has argued that the principle of mutual trust and other fundamental principles animating the corpus of rules in the Brussels I Regulation may not permit a contradictory interpretation of Article 6 of the Hague Convention taking root in the first place. See Case C-452/12 *Nipponkoa Insurance Co (Europe) Ltd v Interzuid Transport BV* ECLI:EU:C:2013:858, [2014] I.L.Pr. 10, [36].

¹⁰⁷⁸ Hartley and Dogauchi, *Explanatory Report* (n 1010) [300].

¹⁰⁷⁹ Article 71 of the Brussels I Regulation (Recast).

¹⁰⁸⁰ Article 26(6) of the Hague Convention.

¹⁰⁸¹ Case C-452/12 *Nipponkoa Insurance Co (Europe) Ltd v Interzuid Transport BV* ECLI:EU:C:2013:858, [2014] I.L.Pr. 10, [36]; See also to similar effect, Case C-533/08 *TNT Express Nederland BV v AXA Versicherung AG* ECLI:EU:C:2010:243, [2010] I.L.Pr. 35, [49].

¹⁰⁸² Convention on the Contract for the International Carriage of Goods by Road, signed in Geneva on 19 May 1956, as amended by the Protocol signed in Geneva on 5 July 1978 ('the CMR').

¹⁰⁸³ Case C-452/12 *Nipponkoa Insurance Co (Europe) Ltd v Interzuid Transport BV* ECLI:EU:C:2013:858, [2014] I.L.Pr. 10, [37]-[38]; Case C-533/08 *TNT Express Nederland BV v AXA Versicherung AG* ECLI:EU:C:2010:243, [2010] I.L.Pr. 35, [55].

mechanism in the CMR. Therefore, in the context of the Hague Convention mutual trust and the other animating principles of the Brussels I Regulation may also override any interpretation of Article 6 of the Convention which does not conform to the operation of the reverse *lis pendens* mechanism in Article 31(2) of the Recast Regulation. As a result, the approach adopted by the Hartley and Dogauchi Report has much to commend it as it follows the path of least resistance by seeking to resolve any differences in relation to the Recast Regulation and simultaneously helps control the incidence of parallel proceedings and irreconcilable judgments, which are significant objectives under the Brussels I Regulation.

A concrete example will help illustrate both the issue of the perceived incompatibility of injunctive relief and monetary compensation for breach of a choice of court agreement with Hague Convention cases inside the EU and the mandatory operation of Article 31(2)-(3) of the Recast Regulation in Hague Convention cases within the EU:

Party A is domiciled in Spain and Party B is domiciled in Mexico. Both parties have agreed on the exclusive jurisdiction of the High Court in London. Party A sues first in Madrid and Party B sues afterwards in London. According to the analysis considered above, Party B may not be able to obtain anti-suit relief against the proceedings commenced and continued in Madrid or recover damages for breach of the English exclusive choice of court agreement, even though the case falls within the remit of the Hague Convention. However, the Spanish judge will be obliged to suspend the proceedings in accordance with Article 31(2) of the Recast Regulation, notwithstanding the applicability of the Hague Convention.

It is significant to note that anti-suit injunctions were discussed in the negotiations leading up to the conclusion of the Hague Convention but there was never any consensus that they would be prohibited by the Convention.¹⁰⁸⁴ Thus the Hague Convention is neutral in its stance towards anti-suit injunctions and neither prohibits nor requires them.¹⁰⁸⁵ However, a framework of partial or qualified mutual trust may allow an English court to enforce exclusive choice of court agreements through anti-suit injunctions and the damages remedy

¹⁰⁸⁴ Hartley, *Choice of Court Agreements* (n 1010) Chapter 10, 216.

¹⁰⁸⁵ It is clear from the *Travaux préparatoires* that the Hague Convention was not intended to affect the power to grant anti-suit injunctions: See Andrea Schulz, 'Report on the Second Meeting of the Informal Working Group on the Judgments Project 6 to 9 January 2003' in *Proceedings of the Twentieth Session of the Hague Conference on Private International Law* (Permanent Bureau of the Conference, Intersentia 2010) 55, 57, [15]-[16]; cf Thiele (n 1011) 75 states that: 'As with the general preclusion of *forum non conveniens* by the Convention, the preclusion of antisuit injunctions promotes legal certainty and predictability and is in line with the view of the European Court of Justice with respect to the Brussels Regulation.' However, it is submitted, that the alleged preclusion of anti-suit injunctions from the scheme of the Hague Convention is neither supported by the *ethos* or spirit of the Convention nor any official documentary evidence.

in cases involving the courts of non-Member States. Thus, the exclusion from the scope of the Hague Convention does not prevent contractual remedies for breach of exclusive jurisdiction agreements from helping achieve the very objective of the Convention.

The entering into force of the Hague Convention on Choice of Court Agreements should be a major step towards increased legal security for European enterprises conducting business in non-Member States.¹⁰⁸⁶ However, the actual success of the Hague Convention will depend on further ratifications by the major economic partners of the European Union.¹⁰⁸⁷ If this is not the case, the practical impact of the Hague Convention's entering into force will be negligible.

The penultimate chapter of this thesis will examine whether damages may be recovered for breach of a choice of law agreement. After examining the preliminary issue of the classification of a choice of law agreement as either being declaratory of the intentions of the parties or as a binding and enforceable promise, issues arising from the private law enforcement of a choice of law agreement will be explored.

¹⁰⁸⁶ On 4 December 2014, the Council adopted the decision to approve the Hague Convention on behalf of the European Union (2014/887/EU, OJ 2014 L 353/5). Under Article 2(2) of this Decision, the deposit of the instrument of approval shall take place within one month of 5 June 2015. The Convention shall enter into force for the Union and its Member States on the first day of the month following the expiration of three months after the deposit of the instrument of approval. On 1 October 2015, the Convention of 30 June 2005 on Choice of Court Agreements entered into force in 28 States (Mexico and all Member States of the European Union, except Denmark).

¹⁰⁸⁷ Gottfried Musger, 'The 2005 Hague Convention on Choice of Court and Brussels I Recast' at the European Parliament Workshop on *Cross-border activities in the EU – Making life easier for citizens* (PE: 510.003) (26 February 2015, Brussels) 317, 333-335; The major business partners of the EU include Canada, China, Korea, Russia, Turkey and the USA.

Chapter 11 - Damages for Breach of Choice of Law Agreements

The Primacy of Jurisdictional Disputes in Private International Law¹⁰⁸⁸

Before examining the specific issue of damages for breach of a choice of law agreement, it is necessary to examine the larger question of the proper role and scope of choice of law considerations in international commercial litigation before the English courts.¹⁰⁸⁹ In that regard, in recent times it has become apparent in the leading global centres of transnational litigation that the outcome of a case depends much more on jurisdictional concerns than choice of law. Therefore, the assessment of choice of law agreements and the award of damages for their breach will occupy a secondary position in this thesis in relation to the examination of choice of court agreements and contractual remedies for their breach.

The significance and frequency of jurisdictional disputes is witnessed by the fact that in the English courts there are far more reported cases on international jurisdiction and procedure than on choice of law.¹⁰⁹⁰ These jurisdictional disputes are very rarely pursued till trial and are more in the nature of interlocutory or interim border skirmishes between the litigating parties to establish superiority.¹⁰⁹¹ This 'litigation about where to litigate'¹⁰⁹² often witnesses a relatively disadvantaged party capitulating and seeking to settle or compromise. However, there may be instances where a coordinated attempt at multistate litigation becomes necessary as in international fraud litigation where the widespread nature of the fraud and its perpetrators, and the dissipation of its monetary proceeds leave no other option.¹⁰⁹³ Therefore, jurisdictional disputes in the English courts may settle before the trial stage where the application of choice of law rules and foreign law become most relevant.

¹⁰⁸⁸ AS Bell, *Forum Shopping and Venue in Transnational Litigation* (OUP 2003) 14-19, 23-48; R Fentiman, *International Commercial Litigation* (2nd Edition, OUP 2015) 9-12; A Briggs, *Agreements on Jurisdiction and Choice of Law* (OUP 2008) Preface, vii; RH Graveson, *Comparative Conflict of Laws* (North Holland, Amsterdam 1977) 8; Aude Fiorini, 'The Codification of Private International Law in Europe - Could the Community Learn from the Experience of Mixed Jurisdictions' (2008) 23 *Tulane European and Civil Law Forum* 89, 100.

¹⁰⁸⁹ See Manuel Penadés Fons, 'Commercial Choice of Law in Context: Looking Beyond Rome' (2015) 78 *Modern Law Review* 241.

¹⁰⁹⁰ Trevor C Hartley, *International Commercial Litigation* (CUP 2009) 6.

¹⁰⁹¹ Campbell McLachlan, *Lis Pendens in International Litigation* (Martinus Nijhoff Publishers, Leiden & Boston 2009) 36-40.

¹⁰⁹² *Research in Motion UK Ltd v Visto Corp* [2008] EWCA Civ 153, [2008] Bus LR D141, [3] (in the context of the Brussels I Regulation): 'Too often one finds parties litigating as much about where and when disputes should be heard and decided as about the real underlying dispute'; See TM Yeo, 'The Future of Private International Law in Singapore' *Seventh Yong Pung How Professorship of Law Lecture*, Singapore Management University (22 May 2014), 17.

¹⁰⁹³ McLachlan (n 1091).

However, from the perspective of transaction planning and litigation strategy, choice of law considerations cannot be ignored as they may determine where a party may sue if the choice of law rules of that forum give a wide effect to the choice of law agreement in the absence of any countervailing factors such as mandatory rules and the public policy of the forum. On the other hand, a party seeking to avoid the choice of law agreement may seek a forum which limits the autonomy of the parties as to choice of law, restricts the scope of the applicable law or contains an anomalous public policy provision which overrides the applicable law. The applicable law may also determine the outcome of a dispute and thus influence the choice of forum. The applicable law is also a factor to consider in determining the most appropriate forum for the purposes of the doctrine of *forum non conveniens*.¹⁰⁹⁴

The choice of a particular forum in an exclusive jurisdiction agreement may indicate that the parties intend the contract to be governed by the law of the chosen forum.¹⁰⁹⁵ At common law, an exclusive jurisdiction or forum clause is considered to be ‘a weighty indication’¹⁰⁹⁶ of the parties’ common intention, albeit ‘one which may yield to others’.¹⁰⁹⁷ On the other hand, Recital 12 of the Rome I Regulation is more restrictive and provides that an exclusive jurisdiction agreement should be one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated. Unlike the Rome I Regulation which refers to the effect of a forum clause in a recital, Article 4 of the Hague Principles on Choice of Law in International Commercial Contracts contains a direct reference as to the effect of a forum clause on tacit choice of law: ‘An agreement between the parties to confer jurisdiction on a court or an arbitral tribunal to determine disputes under the contract is not in itself equivalent to a choice of law.’¹⁰⁹⁸

¹⁰⁹⁴ *Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 AC 460, 478 (HL) (Lord Goff of Chieveley); Ronald A Brand and Scott R Jablonski, *Forum Non Conveniens: History, Global Practice, and Future Under the Hague Convention on Choice of Court Agreements* (Oxford University Press 2007) 33; Richard Fentiman, ‘Foreign Law and the Forum Conveniens’ in James AR Nafziger and Symeon Symeonides (eds), *Law and Justice in a Multistate World: Essays in Honor of Arthur T. von Mehren* (Transnational Publishers, New York 2002) 275; Maria Hook, ‘The Choice of Law Agreement as a Reason for Exercising Jurisdiction’ (2014) 63 *ICLQ* 963, 965.

¹⁰⁹⁵ For a discussion of the English common law presumption *Qui elegit judicem elegit jus* see, BA Marshall, ‘Reconsidering the Proper Law of the Contract’ (2012) 13 *Melbourne Journal of International Law* 1, 15-17.

¹⁰⁹⁶ *Compagnie d’Armement Maritime SA v Compagnie Tunisienne de Navigation SA* [1971] AC 572, 587–91, 593, 596–600, 604–7 (HL); *John Kaldor Fabricmaker Pty Ltd v Mitchell-Cotts Freight (Australia) Pty Ltd* (1989) 18 NSWLR 172, 187.

¹⁰⁹⁷ *Compagnie d’Armement Maritime SA v Compagnie Tunisienne de Navigation SA* [1971] AC 572, 596 (Lord Wilberforce).

¹⁰⁹⁸ See Article 4 of the Hague Choice of Law Principles and Commentary in Permanent Bureau of the Conference, *The Hague Principles on Choice of Law in International Commercial Contracts* (Approved on 19 March 2015) <<http://www.hcch.net/upload/conventions/txt40en.pdf>> accessed 15 April 2015.

There are various reasons why choice of law has such a limited influence on the outcome of international commercial litigation. For starters, the procedural law of the forum is immune from the effects of choice of law.¹⁰⁹⁹ Moreover, the English common law's right-remedy approach to the substance-procedure distinction adopts a wide view of the proper and legitimate scope of the law of procedure.¹¹⁰⁰ However, the EU instruments on choice of law in contractual and non-contractual matters have reduced the scope of the law of the forum, as compared to English common law private international law.¹¹⁰¹

The English common law's treatment of foreign law may be pragmatic and cost efficient but it lacks a conception of foreign law that is principled, multilateral and does not discriminate on the basis of the origin of the law.¹¹⁰² Foreign law is a question of fact for the English courts.¹¹⁰³ As a consequence, the foreign law has to be pleaded by the party seeking to rely on the law. Furthermore, the content of the foreign law has to be proved to the satisfaction of the court. If neither party pleads the applicability of foreign law, the court will apply English domestic law to the issues in dispute. The English court has neither power nor duty to apply foreign law *ex officio*. It may be observed that, contract and tort cases litigated in the English courts will frequently be decided by application of English domestic law, even though choice of law rules might have indicated that a foreign law should be applied.¹¹⁰⁴ The difficulties in determining, understanding and correctly applying foreign law cannot be understated.¹¹⁰⁵

¹⁰⁹⁹ *Lex fori regit processum*: 'the law of the forum governs procedure'.

¹¹⁰⁰ Richard Garnett, *Substance and Procedure in Private International Law* (OUP 2012) 7-10; *Harding v Wealands* [2006] UKHL 32, [2007] 2 AC 1; See also Michael Bogdan, *Private International Law as Component of the Law of the Forum* (Martinus Nijhoff Publishers, Leiden & Boston 2012) Chapter VIII, 193.

¹¹⁰¹ The Rome I and II Regulations adopt a direct approach, whereby certain issues are subjected to the applicable law of the obligation [for example the existence, nature and assessment of damage, (Article 15(c) Rome II; Article 12(1)(c) Rome I) and limitation of actions (Article 15(h) Rome II; Article 12(1)(d) Rome I) and others, for example formal validity, to the law of the obligation or the law of the country of performance of the act (*lex loci actus*). (Article 21 Rome II; Article 11(1) Rome I) See Garnett, *Substance and Procedure in Private International Law* (n 1100) 37-39.

¹¹⁰² In civil law legal systems foreign law is a question of law and the judge is under a duty to establish the foreign law; accordingly, it is not permissible to simply apply the local law (or presume that it is the same). The civil law judge is presumed to know the law, which is well expressed by the Latin adage *jura novit curia* (the judge knows the law). Moreover, he has the duty to apply the law on the facts, which is expressed by the other famous Latin adage *da mihi factum, dabo tibi jus* (give me the facts, I will give you the law) See Sofie Geeroms, *Foreign Law in Civil Litigation* (Oxford Private International Law Series, OUP 2004) 30-34; 'Foreign law' in *Jowitt's Dictionary of English Law* (3rd Ed. Sweet & Maxwell 2009).

¹¹⁰³ See, generally, Richard Fentiman, *Foreign Law in English Courts* (Oxford Private International Law Series, OUP 1998); For a discussion on the *sua sponte* application of choice of law rules and foreign law, see: Bogdan (n 1100) Chapter VI, 'Should Conflict Rules and Foreign Law Be Applied Ex Officio?'.

¹¹⁰⁴ Adrian Briggs, *The Conflict of Laws* (OUP 2013) 9.

¹¹⁰⁵ Lord Mance, 'The Future of Private International Law' (2005) 1 *Journal of Private International Law* 185, 191.

The centrality of the procedural law of the forum in jurisdictional disputes and the wider conception of civil procedure in the English common law has effectively displaced choice of law concerns from the centre stage of private international law. Moreover, the English common law's pragmatic approach to proof of foreign law offers the litigants a flexible device to evade the choice of law issue altogether and instead rely on domestic English private law. As a consequence, these forum centric features of English private international law relegate choice of law considerations to a secondary position.

Fundamental Juridical Nature and Classification of Choice of Law Agreements

Under the proper law doctrine of the English common law, a court gives effect to an express choice of law, as long as it is bona fide, legal and not contrary to public policy.¹¹⁰⁶ Hence, the entitlement of the parties to select the governing law is not absolute and there are limitations on it.¹¹⁰⁷ The Rome Convention on the law applicable to contractual obligations replaced the English common law's proper law doctrine on 1 April 1991.¹¹⁰⁸ For contracts concluded after 17 December 2009,¹¹⁰⁹ the Rome I Regulation applies to cases involving a contractual obligation in civil and commercial matters litigated before an English court and involving a choice between the laws of different countries.¹¹¹⁰

Drawing an analogy with arbitration and jurisdiction agreements, Briggs argues that choice of law agreements have two functions. The first is to identify the proper law of the contract. The second emanates from the contractual effect of a choice of law agreement and is concerned with the consequences of breaching a choice of law agreement. Therefore, 'a choice of law clause may be interpreted as telling a court what it needs to know to adjudicate the dispute under the contract, *and* as each party telling the other what promises are made as to the law which will be applied to the contract'.¹¹¹¹ Ascribing the negative aspect of an arbitration agreement and exclusive choice of court agreement¹¹¹² to choice of

¹¹⁰⁶ *Vita Food Products Ltd v Unus Shipping Co Ltd* [1939] UKPC 7, [1939] AC 277 (Lord Wright) There is no reported English decision in which an express choice was disapplied on the basis of the proviso. See CMV Clarkson and Jonathan Hill, *The Conflict of Laws* (OUP 2011) 203-204.

¹¹⁰⁷ *Ace Insurance Ltd v. Moose Enterprise Pty Ltd* [2009] NSWSC 724, [52] (Brereton J).

¹¹⁰⁸ The Rome Convention 1980 on the law applicable to contractual obligations (OJ C 27, 26.1.1998, p 36-53) was enacted into law by the Contracts (Applicable Law) Act 1990 in the UK.

¹¹⁰⁹ Articles 28 and 29 of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) OJ L/2008/177/6.

¹¹¹⁰ Article 1(1) of the Rome I Regulation.

¹¹¹¹ Briggs, *Agreements* (n 1088) 436 (emphasis in original).

¹¹¹² For the negative aspect of an arbitration agreement and exclusive choice of court clause See, *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, [2013] 1

law agreements, Briggs suggests that a choice of law clause in favour of State X may be reinterpreted to connote both an agreement that, if a dispute arises, the claimant will contend that the parties' relationship is governed by the law of State X; but also an agreement between the parties that no law other than the law of State X shall govern their relationship.¹¹¹³

An express choice of law agreement specifies the applicable law of a contract.¹¹¹⁴ The rights and obligations of the parties to the contract will be determined by reference to the applicable law.¹¹¹⁵ However, the court seised with jurisdiction may not apply the selected law for a number of reasons – whether because its choice of law rules directed the judge to apply a different law; or its own choice of law rules, while accepting the right of the parties to choose the applicable law, regarded the particular choice as impermissible; or that the court was directed by its own choice of law rules to apply mandatory domestic law or public policy; that the court errs in its application of the chosen law. A controversial issue is whether adherence to a governing law clause may be enforced by an action for breach of contract.¹¹¹⁶

In other words, the legal basis of an action for damages for breach of a choice of law agreement hinges on the appropriate characterization of a choice of law agreement. Is the appropriate characterization of such agreements promissory or declaratory in nature? A recent decision of the New South Wales Supreme Court (Australia) has brought this issue to the fore and has tested the viability of Briggs's ideas regarding the breach of choice of law agreements in a practical context. *Ace Insurance v. Moose Enterprise Pty Ltd*¹¹¹⁷, is probably the first common law decision to consider whether proceedings in a foreign court could constitute breach of a choice of law agreement.¹¹¹⁸ In the words of Briggs this is 'territory into which the English courts have not [yet] been invited to go'.¹¹¹⁹

WLR 1889; [2013] 1 CLC 1069, [21]-[28] (Lord Mance with whom Lord Neuberger, Lord Clarke, Lord Sumption and Lord Toulson agreed) .

¹¹¹³ Briggs, *Agreements* (n 1088) 439.

¹¹¹⁴ Article 3(1) of the Rome I Regulation recognises the principle of party autonomy as one of the cornerstones of the European system of conflict of law rules in matters of contractual obligations (Recital 11 of the Rome I Regulation); See Article 14 and Recital 31 of the Rome II Regulation.

¹¹¹⁵ See Article 12 of the Rome I Regulation.

¹¹¹⁶ Briggs, *Agreements* (n 1088) 446-453.

¹¹¹⁷ *Ace Insurance Ltd v. Moose Enterprise Pty Ltd* [2009] NSWSC 724 (Brereton J); See Perry Herzfeld, 'Choice of Law Clauses are not Promissory' (ConflictOfLaws.net, 4 August 2009) <<http://conflictoflaws.net/2009/choice-of-law-clauses-are-not-promissory/>> accessed 15 February 2014.

¹¹¹⁸ TM Yeo, 'Breach of Agreements on Choice of Law' [2010] *LMCLQ* 194, 194.

¹¹¹⁹ Briggs, *Agreements* (n 1088) 424.

One of the arguments advanced by counsel for the claimant in that case was that by commencing Californian proceedings for the purposes of taking advantage of Californian law, the defendant had broken the implied promise arising from the Australian choice of law clause, and that an anti-suit injunction should be issued to restrain this breach. In support of this novel argument, the counsel for the claimant relied on the suggestions of Briggs in *Agreements*.¹¹²⁰ Brereton, J. observed that the submission was premised on the proposition that the choice of law agreement was promissory in effect and held:

No doubt a contractual provision could be framed which unambiguously contained a promise to do nothing that might result in some other system of law becoming applicable. *However, in my opinion that is not ordinarily the effect of a choice of law clause, which is usually declaratory of the intent of the parties, rather than promissory.*¹¹²¹

*In our system of private international law, therefore, choice of law is about ascertaining the intention of the parties as to the legal system that is to govern their contract, not about covenants or promises that a particular legal system will apply.....*It may well be that the parties could frame a provision which was promissory in effect, but – given the conventional function of a choice of law clause – it would require very clear language to make it promissory rather than declaratory.¹¹²²

Although Brereton, J. acknowledged the possibility of an appropriately framed choice of law clause using ‘very clear language’ leading to a promissory effect, he nevertheless refused to give effect to the clause in the instant case by relying on the conventional declaratory function of such clauses.¹¹²³ The path well-trodden was chosen and rightly so considering the dearth of judicial authority and a lack of academic consensus for the novel interpretation of choice of law agreements advanced by Briggs.

The promissory effect of a choice of law agreement was recently examined by the English Commercial Court in *The Lucky Lady*.¹¹²⁴ In that case, Navig8 (a Singaporean company) sought permission to serve Al-Riyadh (a Jordanian company) out of the jurisdiction, on the basis that proceedings brought by Al-Riyadh in Jordan were contrary to a choice of English law. Al-Riyadh claimed damages from Navig8 as the alleged carrier of damaged cargo. The bill of lading provided for English law. Pursuant to Jordanian choice of law rules, however, the law governing the dispute was Jordanian law. In the English court, Navig8 sought an anti-

¹¹²⁰ Ibid Chapter 11.

¹¹²¹ *Ace Insurance Ltd v. Moose Enterprise Pty Ltd* [2009] NSWSC 724, [47] (Brereton J) (emphasis added).

¹¹²² *Ace Insurance Ltd v. Moose Enterprise Pty Ltd* [2009] NSWSC 724, [51] (Brereton J) (emphasis added).

¹¹²³ Ibid; Yeo, *Breach of Agreements on Choice of Law* (n 1118) 196.

¹¹²⁴ *Navig8 Pte Ltd v Al-Riyadh Co for Vegetable Oil Industry ('The Lucky Lady')* [2013] EWHC 328 (Comm), [2013] 2 Lloyd's Rep 104, [2013] 2 CLC 461 (Andrew Smith J).

suit injunction, damages and a negative declaration that it was not a party to the contracts of carriage. It argued that, because English law contained certain protections that were not available to it under Jordanian law, the Jordanian proceedings were 'designed to defeat....their rights under English law'.¹¹²⁵

The English court rejected the applications for an anti-suit injunction and damages, on the basis that, by commencing the Jordanian proceedings, Al-Riyadh did not contravene 'any (contractual or other) duty owed to Navig8'.¹¹²⁶ The court found that in effect Navig8 was claiming:¹¹²⁷

a right, deriving apparently from the choice of English law, not to be sued in any jurisdiction that does not give effect to a choice of English law that is recognised by English private international law, at least unless the foreign jurisdiction recognises rights similar to those recognised by English law.

The court held that: 'There is no proper basis for so wide a proposition'.¹¹²⁸ Nevertheless, the court was willing to grant permission for leave to serve out of the jurisdiction the claims for declaratory relief, concluding that England was the proper place for these claims because of the parties' choice of English law.

Therefore, the English court in *The Lucky Lady* was quick to reject a submission that the English choice of law agreement conferred a right on the applicant to be sued in a forum that would give effect to it.¹¹²⁹ This ruling has confirmed the previous finding of the New South Wales Supreme Court in *Ace Insurance Ltd v Moose Enterprise Pty Ltd* that an ordinary choice of law agreement did not 'found implied negative stipulations' as to jurisdiction.¹¹³⁰

Similarly, Takahashi doubts whether a choice of law agreement could entail a contractual promissory effect.¹¹³¹ He argues that in most cases, a choice of law clause does not contain an express undertaking not to bring an action in a court which would deny effect to it. Therefore, it is even more difficult to read such an implied undertaking into a choice of law

¹¹²⁵ Ibid [16].

¹¹²⁶ Ibid [22].

¹¹²⁷ Ibid [22].

¹¹²⁸ Ibid [22].

¹¹²⁹ As opposed to the breach of a legal right or breach of contract in suing before a court which will not give effect to an express choice of law by the parties, it is not wrongful to sue in a court which will apply principles of private international law which are merely different from those applicable in an English court. See *Erste Group Bank AG v JSC 'VMZ Red October'* [2013] EWHC 2926 (Comm) (Flaux J); A Briggs, *Private International Law in English Courts* (OUP 2014) 400.

¹¹³⁰ *Ace Insurance Ltd v. Moose Enterprise Pty Ltd* [2009] NSWSC 724, [53] (Brereton J).

¹¹³¹ Koji Takahashi, 'Damages for Breach of a Choice of Court Agreement: Remaining Issues' (2009) 11 *Yearbook of Private International Law* 73, 101-102.

clause. He concludes that a contractual claim seeking damages for breach of a choice of law clause should not be allowed unless the agreement contains an express undertaking not to bring an action in a court which would deny effect to it. It is submitted, that the conventional wisdom in the *dicta* of Brereton, J. in the *Ace Insurance* decision is reflected in Takahashi's views.

Basedow starts his inquiry into the binding effect of choice of law agreements by highlighting that 'an inappropriate commingling of different types of contracts' has occurred.¹¹³² He submits that a choice of law agreement is of a different nature from an unfulfilled contract in which there is a mutual exchange of promises as to future conduct. He maintains that choice of law agreements are self-fulfilling dispositional contracts.¹¹³³ The effect of the agreement was realised at the moment it was jointly adopted by the parties. The contract embodies a dispositional character in that it disposes off the assignment of the contract to one of the several hundred legal orders found across the world. This position is in contrast to the classification adopted by Briggs which conceives choice of law agreements as part of a comprehensive dispute resolution agreement regulating the future conduct of the parties.¹¹³⁴

Fentiman comments on the possible promissory nature of choice of law agreements with: 'It is unclear how it assists to view the matter in contractual terms.'¹¹³⁵ He argues that it cannot be a breach to invite a court to characterize a given issue as one not falling within the scope of the agreed law, such as the law of the forum (*lex fori*). Such an allegation does not in any way deny that the contractual law governs matters to which it properly applies. A simple choice of law clause is not an agreement that the law agreed upon governs each and every aspect of the dispute. Moreover, if such a clause were to provide that the chosen law governs every aspect of a dispute it would be presumably ineffective. Fentiman concludes by

¹¹³² Jürgen Basedow, *The Law of Open Societies: Private Ordering and Public Regulation in the Conflict of Laws* (Brill Nijhoff, Leiden 2015) 145; Jürgen Basedow, 'The Law of Open Societies – Private Ordering and Public Regulation of International Relations' (2012) 360 *Recueil des Cours*, 199-200; cf Ralf Michaels, 'Party Autonomy in Private International Law--A New Paradigm Without a Solid Foundation?' (126th Conference of the Private International Law Association of Japan, 2 June 2013) 8 <http://www.pilaj.jp/data/2013_0602_Party_Autonomy.pdf> accessed 1 April 2015, notes that a choice of law agreement as a 'disposition' is similar in effect to an 'obligation' arising from the clause as both operate within the substantive law paradigm.

¹¹³³ Basedow, *The Law of Open Societies* (n 1132) 145.

¹¹³⁴ Cf J Harris, 'Agreements on Jurisdiction and Choice of Law: Where Next?' [2009] *LMCLQ* 537, 549, doubts the view that choice of law agreements are dispute resolution agreements by referring to their significant role in transaction planning prior to actual litigation.

¹¹³⁵ Fentiman, *International Commercial Litigation* (2015) (n 1088) 129; R Fentiman, *International Commercial Litigation* (OUP 2010) 106.

stating that, the parties cannot by choice oust the private international law rules of the forum.¹¹³⁶

Borrowing from HLA Hart's illuminating terminology, in the 'core'¹¹³⁷ case of exclusive choice of court agreements there is an express duty to bring proceedings only in the contractual forum and the correlative¹¹³⁸ right of the counterparty not to be sued in the non-elected forum. There is no such express duty to bring proceedings in a forum that will give effect to the choice of law agreement or correlative right not to be sued in a forum that will defeat the choice of law clause in the more doubtful 'penumbra'¹¹³⁹ case of choice of law agreements.¹¹⁴⁰ Building on this interpretation, a choice of law agreement may not be enforced by either party and it is simply an unequivocal expression of the law which the parties intend shall govern their contractual relationship.¹¹⁴¹ This may or may not be applied by a court faced with a dispute relating to the contract. It has also been argued that jurisdiction and choice of law agreements fundamentally differ from each other because if a court does not choose to apply the law specified in the choice of law agreement it is more difficult to conclude that either party is at fault:¹¹⁴² 'It is in fact impossible to say that either contracting party breached his promise contained in the choice-of-law clause.' The situation with respect to jurisdiction agreements differs in that a jurisdiction agreement can only be breached where one party willfully institutes proceedings in a non-contractual forum.¹¹⁴³ The jurisdiction clause can only be breached by the deliberate act of one party.¹¹⁴⁴

Non-exclusive choice of court agreements generally carry no promise not to sue in other jurisdictions.¹¹⁴⁵ However, the English Court of Appeal has reminded us that it is ultimately a

¹¹³⁶ Ibid.

¹¹³⁷ HLA Hart, *The Concept of Law* (2nd Ed, Clarendon Press, OUP 1994) 121-150; HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593.

¹¹³⁸ For the jural correlative concepts of right and duty see, Wesley N Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) Yale Law School Faculty Scholarship Series (Paper 4378) <http://digitalcommons.law.yale.edu/fss_papers/4378/> accessed 20 January 2015; Ernest J Weinrib, *The Idea of Private Law* (OUP 2012) Chapter 5, 'Correlativity'.

¹¹³⁹ Hart, *The Concept of Law* (n 1137) 121-150; Hart, *Positivism and the Separation of Law and Morals* (n 1137).

¹¹⁴⁰ *Ace Insurance Ltd v. Moose Enterprise Pty Ltd* [2009] NSWSC 724, [47] (Brereton J); Yeo, *Breach of Agreements on Choice of Law* (n 1118) 195.

¹¹⁴¹ Andrew Dickinson, 'Restitution and Incapacity: A Choice of Law Solution?' [1997] *Restitution Law Review* 66, 69 FN 26; Daniel Tan and Nik Yeo, 'Breaking Promises to Litigate in a Particular Forum: Are Damages an Appropriate Remedy' [2003] *LMCLQ* 435, 437 FN 8.

¹¹⁴² Daniel Tan, 'Damages for Breach of Forum Selection Clauses, Principled Remedies, and Control of International Civil Litigation' (2005) 40 *Texas International Law Journal* 623, 650.

¹¹⁴³ Ibid.

¹¹⁴⁴ Ibid 651.

¹¹⁴⁵ *Ace Insurance Ltd v. Moose Enterprise Pty Ltd* [2009] NSWSC 724, [15] (Brereton J); J Fawcett, 'Non exclusive jurisdiction agreements in private international law' [2001] *LMCLQ* 234, 253.

question of construction of the contract what promises the parties may have made in respect of a non-exclusive choice of court agreement.¹¹⁴⁶ Non-exclusive jurisdiction agreements may be the foundation for an anti-suit injunction to protect a contractual right if the conduct of foreign proceedings amounts to breach of an implied agreement not to bring such proceedings once proceedings have commenced in the non-exclusive but primary jurisdiction,¹¹⁴⁷ or if it amounts to the breach of an implied agreement because it (being a foreign anti-suit injunction action) attempts to restrain the exercise of a contractual right to commence proceedings in the non-exclusively chosen forum at all.¹¹⁴⁸ The analogy from non-exclusive jurisdiction agreements emphasizes that ultimately it is a question of construction what promises may be inferred from the parties in the contract.¹¹⁴⁹ In similar vein, whether or not a choice of law agreement is promissory in nature is, in the final analysis, an issue of construction.¹¹⁵⁰ To be fair, Brereton J also recognised that the issue is one of contractual construction¹¹⁵¹ and the intentions of the contracting parties are very significant in that regard.¹¹⁵²

The inherent value and necessary implications of a promissory choice of law agreement also need to be carefully examined. A promissory choice of law agreement comes close to being treated as an exclusionary jurisdiction agreement or an implied agreement to exclude the jurisdiction of the choice defeating forum. It is a matter of concern that this development has proceeded without any consideration of the principles and rules that would usually govern an agreement of this kind.¹¹⁵³ Exclusionary jurisdiction agreements that are implied from choice of law agreements fall short of the standard ordinarily required of jurisdiction agreements.

¹¹⁴⁶ *Highland Crusader Offshore Partners LP v Deutsche Bank AG* [2009] EWCA Civ 725; *Royal Bank of Canada v Cooperative Centrale Raiffeisen-Boerenleenbank* [2004] EWCA Civ 7, [2004] 1 Lloyd's Rep 471; Fawcett (n 1097) 235-236.

¹¹⁴⁷ See, for example, *BP Plc v Aon Ltd* [2005] EWHC 2554 (Comm), [2006] 1 Lloyd's Rep 549, [31]; *Royal Bank of Canada v Cooperative Centrale Raiffeisen-Boerenleenbank* [2004] EWCA Civ 7, [2004] 1 Lloyd's Rep 471, [24]-[25].

¹¹⁴⁸ See, for example, *Sabah Shipyard (Pakistan) Limited v Islamic Republic of Pakistan* [2003] 2 Lloyd's Rep 571; *Highland Crusader Offshore Partners LP v Deutsche Bank AG* [2009] EWCA Civ 725, [112].

¹¹⁴⁹ Yeo, *Breach of Agreements on Choice of Law* (n 1118) 196.

¹¹⁵⁰ *Ibid*; Adrian Briggs and Peter Rees, *Civil Jurisdiction and Judgments* (5th Edition, Informa Law from Routledge, 2009) 625; Briggs, *Agreements* (n 1088) 451.

¹¹⁵¹ *Ace Insurance Ltd v. Moose Enterprise Pty Ltd* [2009] NSWSC 724, [51] (Brereton J).

¹¹⁵² See *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40; [2007] 2 CLC 553; [2008] 1 Lloyd's Rep 254, [27] (a decision on arbitration agreements) where Lord Hope of Craighead stated that the same interpretive approach should be adopted in relation to choice of law and jurisdiction agreements.

¹¹⁵³ Hook (n 1094) 970.

It is submitted that, the principle of *pacta sunt servanda* should be inapplicable because the enforcement of an implied intention to derogate from the jurisdiction of the choice defeating courts is inconsistent with the principles and rules that govern jurisdictional party autonomy more generally. In *New Hampshire Insurance Co v Strabag Bau AG*, the Court of Appeal held that the requirements of Article 17 of the Brussels Convention could only be met by a choice of court agreement.¹¹⁵⁴ The English common law of conflict of laws also requires an express jurisdiction agreement.¹¹⁵⁵ By excluding a forum, the parties forsake their right of access to justice in that particular forum and the parties should be aware of the consequences of their decision.

An exclusionary jurisdiction agreement imputed from a choice of law agreement is neither express nor in most cases real. It is an implied term of the choice of law agreement that is based on the hypothetical or presumed intention of the parties: an agreement that the parties would have reasonably concluded if they had considered the matter. It is submitted that, parties should not be deprived of the ability to litigate in available jurisdictions on the basis of an imputed intention. As a matter of principle, a more stringent and objectively verifiable standard along the lines of the requirements for prorogation of jurisdiction should be a necessary pre-requisite for parties to effectively derogate from the jurisdiction of the available choice of law defeating courts.

Furthermore, conceiving choice of law agreements from a purely contractual perspective ignores the very significant role of the law of the forum including its mandatory choice of law regime.¹¹⁵⁶ If a choice of law agreement is accompanied by an agreement to the exclusive jurisdiction of a given court, this presumably constitutes an agreement that the conflicts rules of the forum shall apply, including those giving effect to any choice of law clause. If such a clause is tied to a non-exclusive jurisdiction agreement or contains no jurisdiction agreement at all, this suggests that the parties are content that the effect of the clause is subject to the conflicts rules of any court seised of proceedings.

¹¹⁵⁴ *New Hampshire Insurance Co v Strabag Bau AG* [1992] 1 Lloyd's Rep 361, 371-372 (CA); For a discussion of the formal validity requirements of a choice of court agreement, see, PR Beaumont and PE McElevay, *Anton's Private International Law* (3rd Edition, SULI/W Green 2011) 242-249.

¹¹⁵⁵ *New Hampshire Insurance Co v Strabag Bau AG* [1992] 1 Lloyd's Rep 361, 371-372 (CA); Lawrence Collins and others (eds.), *Dicey, Morris and Collins on the Conflict of Laws* (15th Edition, Sweet and Maxwell 2012) para 14-079.

¹¹⁵⁶ See Bogdan (n 1100) Chapter II.

Implied choice of law under Article 3(1) of the Rome I Regulation is a potential source of difficulty for those arguing that a choice of law agreement is promissory in nature.¹¹⁵⁷ Article 3(1) provides that the choice shall be ‘clearly demonstrated by the terms of the contract or the circumstances of the case.’ Where the choice of law is implied rather than express, it is not conceivable that there would be an implied negative stipulation not to invoke the jurisdiction of a court which would apply a law other than the chosen one. It is submitted that, this line of reasoning supports the conclusion that where there is an express choice of law agreement, there is similarly no implied obligation not to invoke the jurisdiction of a court which will not apply the chosen law. Therefore, the express choice of law in a choice of law agreement declares the intention of the contracting parties and is not promissory. The provision on party autonomy in the Rome I Regulation includes both express and implied choice within the same rule. This further suggests that an internally consistent and internally coherent application of Article 3(1) of the Rome I Regulation requires that both express and implied choice of law be interpreted as specifying the applicable law and as not supporting the conception of choice of law agreements as private law contracts between the parties to abide by the stipulated law. In the *Ace Insurance* decision, Brereton J used a similar argument to demonstrate that it cannot be a breach of contract to sue in a forum which will not give effect to an ‘inferred’ choice of law.¹¹⁵⁸ The promissory nature of a choice of law agreement is most plausible where there is a governing law clause and less so where the law chosen by the parties is identified from other terms of the contract or from their conduct.¹¹⁵⁹ Furthermore, Article 3(2) of the Rome I Regulation provides that: ‘The parties may at any time agree to subject the contract to a law other than that which previously governed it’.¹¹⁶⁰ Therefore, the subsequent agreement of the parties as to choice of law may override the choice of law agreement in their contract and render it nugatory.

In order to understand the relative autonomy of choice of law agreements and their functional dependence on the law of the forum it is necessary to delve deeper into the theoretical basis for party autonomy in choice of law. Nygh examines the source of party autonomy in *Autonomy in International Contracts*: what gives the parties permission to

¹¹⁵⁷ See Article 4 of *The Hague Principles on Choice of Law in International Commercial Contracts* (n 1098).

¹¹⁵⁸ *Ace Insurance Ltd v. Moose Enterprise Pty Ltd* [2009] NSWSC 724, [51] (Brereton J); Yeo, *Breach of Agreements on Choice of Law* (n 1118) 196.

¹¹⁵⁹ Dickinson, *Restitution and Incapacity: A Choice of Law Solution?* (n 1141) 69.

¹¹⁶⁰ See Article 2(3) of *The Hague Principles on Choice of Law in International Commercial Contracts* (n 1098).

make a choice in the first place?¹¹⁶¹ First, he considers the situation where the will of the parties is truly autonomous and supreme.¹¹⁶² In this scenario, the parties may choose to have the contract not governed by any law at all, or by the international principles of private law (*lex mercatoria*). If they do choose a municipal system of law they cannot be bound by subsequent changes in the law unless they agreed to be so bound. They can also contract themselves out of the operation of its mandatory rules including international mandatory rules and the public policy of the forum. However, Nygh remarks that a 'free floating' choice of law where the parties' will is truly autonomous and supreme 'does not as yet have much support'.¹¹⁶³ On the other hand, the choice of the parties must be based on the private international law rules of a particular municipal legal system and the scope of that choice of law will be necessarily limited by the operation of the mandatory rules and public policy of the forum.

Nygh then goes on to trace the source of party autonomy in national municipal legal systems.¹¹⁶⁴ Ehrenzweig expressed the prevailing majority view when he stated: 'Party autonomy is, of course, not an independent source of conflicts rules, but is effective only in so far as it is recognized by such a rule'.¹¹⁶⁵ In fact, Ehrenzweig went to the extent that he described this proposition as a 'truism'.¹¹⁶⁶ Therefore, party autonomy is only effective if it is inserted as a connecting factor in the relevant municipal choice of law rule. It is submitted, that party autonomy can only operate through the choice of law rules of a national legal system and that the law of the forum must provide the necessary entry point for this autonomy to be exercised.

With regard to Article 3(1)¹¹⁶⁷ of the Rome Convention, Nygh cites Paul Lagarde (one of the rapporteurs of the official accompanying report: the *Giuliano-Lagarde Report*) as stating that: '*Ce choix est un choix de droit international prive*'¹¹⁶⁸ ('This choice is a choice of private international law'¹¹⁶⁹). Therefore, when the parties enter into a contract in relation to the

¹¹⁶¹ PE Nygh, *Autonomy in International Contracts* (Clarendon Press, Oxford Private International Law Series, OUP 1999) Chapter 2, 31-45.

¹¹⁶² *Ibid* 31-32.

¹¹⁶³ *Ibid* 32.

¹¹⁶⁴ *ibid* 32-35.

¹¹⁶⁵ Albert A Ehrenzweig, *Private International Law* (Volume I, Sijthoff 1972) 44.

¹¹⁶⁶ *Ibid*.

¹¹⁶⁷ 'A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.'

¹¹⁶⁸ Nygh (n 1161) 33.

¹¹⁶⁹ Translation by author.

applicable law they are also agreeing to be bound by the mandatory private international law rules of the Rome Convention and its successor the Rome I Regulation that actually give effect to the choice of the parties and regulate or delimit the operation of the chosen law.

Nygh explains that the concept underlying the search for an authorizing national law, particularly the law of the forum, is the ancient idea of the territorial sovereignty of the nation state and its ability to command its courts.¹¹⁷⁰ On this view, any freedom that the parties may possess is one granted by the sovereign. This view of party autonomy as being predicated on the territorial sovereignty of the nation state has metamorphosed into the increasingly multi-dimensional and international private international law rules of the EU conflicts regime.

Nygh also examines international law or custom as a source of party autonomy.¹¹⁷¹ In this regard, Lowenfeld has stated that 'it is fair to say....that party autonomy- both for choice of law and for choice of forum, including an arbitral forum- is now part of an international customary law of dispute settlement'.¹¹⁷² An international basis for party autonomy is also supported by the Institute of International Law.¹¹⁷³ Ralf Michaels cites this 1991 resolution of the Institute of International Law as supporting the contention that party autonomy should be based on the notion of human rights.¹¹⁷⁴ Jayme explains that the foundation of party autonomy lies in the principle of liberty of the individual which is a part of Human Rights, as proclaimed most prominently in the Universal Declaration of Human Rights of 10 December 1948, which applies not merely in the personal but also in the economic sphere.¹¹⁷⁵ On that view, the freedom to choose the applicable law is not merely a connecting factor; it is the parties who insert their agreement in to the legal system they have freely chosen. In other words, the 'sovereignty of the individual' is recognised in an increasingly pluralistic and cosmopolitan international legal order.¹¹⁷⁶ In brief, 'Rules of private international law strike a

¹¹⁷⁰ Nygh (n 1161) 35.

¹¹⁷¹ Ibid 35-37.

¹¹⁷² Andreas F Lowenfeld, *International Litigation and the Quest for Reasonableness: Essays in Private International Law* (Clarendon Press, OUP 1996) 208-209.

¹¹⁷³ International Law Institute, 'Autonomy of the Parties in International Contracts Between Private Persons or Entities' (1991); *Annuaire de l'institut de droit international*, Session de Bale (1992) Volume 64-II, 208

¹¹⁷⁴ Ralf Michaels, 'Public and Private International Law: German Views on Global Issues' [2008] *Journal of Private International Law* 121, 132.

¹¹⁷⁵ Erik Jayme, 'Identite culturelle et integration: le droit international prive postmoderne', 251 *Recueil des Cours* (1995-I) 9, 147-148 in Nygh (n 1113) 36.

¹¹⁷⁶ Alex Mills, *The Confluence of Public and Private International Law* (CUP 2009) 291-295; Alex Mills, 'Normative Individualism and Jurisdiction in Public and Private International Law: Towards a Cosmopolitan Sovereignty' (Inaugural Cambridge Journal of International and Comparative Law Conference: *Agents of Change: The Individual as a Participant in the Legal Process*, Cambridge, 19 May 2012) 19.

balance between facilitating internationally recognised individual autonomy and respect for state regulatory authority – between individual freedom and collective cultural identity.’¹¹⁷⁷

Writing at the turn of the millennium, Nygh concludes that there is still general support for the proposition that the law of the forum (including its choice of law rules) must provide the authorization for the parties to ‘exit’ the otherwise applicable law or the jurisdiction of the competent court.¹¹⁷⁸ However, in the context of the increasingly important and ever burgeoning European private international law regime, the Brussels I, Rome I and II Regulations provide uniform international rules for civil jurisdiction and choice of law matters which form part of the law of the forum. Therefore, matters which are subject to and governed by the supra-national European conflicts regime may be more readily explained by a combination of the international justification for party autonomy and the justification predicated on the territorial sovereignty of the nation state. Nygh does recognise that the right of the parties to choose the applicable law represents a rule of international customary law.¹¹⁷⁹

It is the mandatory choice of law rules of the forum that characterize a given issue as procedural or substantive. The Rome I and II Regulations adopt a direct approach by subjecting particular issues to the applicable law of the contractual or non-contractual obligation.¹¹⁸⁰ The instruments exclude matters relating to ‘evidence and procedure’¹¹⁸¹ from their scope and lack any autonomous definition for these terms. The result is that national law will have to be applied to determine both the meaning given to these terms and what law should be applied to an individual issue (assuming that the matter has not been directly subjected to the applicable law by the Regulations). Considerable scope of operation is therefore left to national choice of law rules under the Regulations. Some commentators, in particular Illmer, have criticized this position, stating that the application of national law to matters of evidence and procedure, where the law of the cause of action falls under the Regulations, will lead to disharmony of court decisions and is incompatible with a European system of private international law.¹¹⁸² Illmer argues that an autonomous conception of

¹¹⁷⁷ Mills, *The Confluence* (n 1176) 294.

¹¹⁷⁸ Nygh (n 1161) 44.

¹¹⁷⁹ *Ibid* 45.

¹¹⁸⁰ Article 12 of the Rome I Regulation; Article 15 of the Rome II Regulation.

¹¹⁸¹ Article 1(3) of the Rome I Regulation; Article 1(3) of the Rome II Regulation.

¹¹⁸² Martin Illmer, ‘Neutrality Matters – Some Thoughts About the Rome Regulations and the so called Dichotomy of Substance and Procedure in European Private International Law’ (2009) 28 *Civil Justice Quarterly* 237; Dickinson sees the concepts of evidence and procedure as ‘matters that define the scope of the Regulation’ which must therefore be given a uniform, autonomous meaning, independent of the forum’s

‘evidence and procedure’ is required, based on the idea of ‘neutrality’,¹¹⁸³ which means that a national court must apply the law of the cause of action to any issue which is concerned with or directed at the decision on the merits and which requires the law of the forum to be applied to any matter which concerns the mode or conduct of court proceedings. Garnett argues that whether or not an autonomous definition of procedure is adopted in relation to matters not considered by the Regulations, procedure should be based on the narrow mode and conduct of court proceedings view espoused by the Australian courts¹¹⁸⁴ rather than the traditional right-remedy test.¹¹⁸⁵ Following the *lex fori regit processum*¹¹⁸⁶ rule, the law of the forum applies to matters of procedure and the applicable law applies to matters of substance.

Therefore, it cannot conceivably be a breach to invite a court to characterize an issue as one falling within the domain of procedure and outside the proper and legitimate scope of the agreed applicable law. As discussed above, national courts have the responsibility of defining the categories of procedure and substance and allocating a particular issue to either category. A conventional choice of law agreement is not an agreement that the law agreed upon will govern each and every aspect of a dispute. Such an agreement would presumably be ineffective as the parties cannot by agreement oust the mandatory choice of law rules of the forum.

The doctrine of *renvoi* may also supply courts the judicial discretion to avoid the foreign applicable law and apply the law of the forum instead.¹¹⁸⁷ However, in the most significant commercial areas of private international law that dominate the discipline the use of *renvoi* is expressly outlawed. For instance, the doctrine of *renvoi* is excluded in the field of contract

notions: See Andrew Dickinson, *The Rome II Regulation* (Oxford Private International Law Series, OUP 2008) para 14.57.

¹¹⁸³ Illmer, *Neutrality Matters* (n 1182) 246-247.

¹¹⁸⁴ *McKain v RW Miller and Co (South Australia) Pty Ltd* (1991) 174 CLR 1; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.

¹¹⁸⁵ Garnett, *Substance and Procedure in Private International Law* (n 1100) 39; Dickinson also suggests the adoption of a test on similar lines: Dickinson, *Rome II Regulation* (n 1182) para 14.60; Briggs and Bogdan too express dissatisfaction with the traditional English approach that remedies are a matter of procedure to be governed by the *lex fori*: Briggs, *The Conflict of Laws* (n 1104) 193; Bogdan, *Private International Law as Component of the Law of the Forum* (n 1100) Chapter VIII, 194.

¹¹⁸⁶ ‘the law of the forum governs procedure’: See Garnett, *Substance and Procedure in Private International Law* (n 1100) Introduction, 1-4.

¹¹⁸⁷ Bogdan, *Private International Law as Component of the Law of the Forum* (n 1100) Chapter IX, 206; See Clarkson and Hill (n 1106) 34-43.

by the Rome I Regulation¹¹⁸⁸ and in cases of non-contractual obligations by the Rome II Regulation.¹¹⁸⁹ Therefore, the issue of the application of *renvoi* to the applicable law specified by a choice of law agreement does not arise in the first place.

Further limitations on the content of the applicable law specified by a choice of law agreement take the form of mandatory rules and the public policy¹¹⁹⁰ (*ordre public*) of the forum.¹¹⁹¹ The contours of the public policy exception to the applicable law specified by a choice of law agreement can be defined, or at least described, with reference to the role of public policy as a basis for the non-recognition of a judgment under the Brussels I Regulation as interpreted by the CJEU:¹¹⁹²

In that regard, the Court explained that recourse to a public policy clause can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. The infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order (*Krombach*, paragraph 37).

Article 9(1) of the Rome I Regulation defines overriding mandatory provisions as:¹¹⁹³

.....provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization,

¹¹⁸⁸ Article 20 of the Rome I Regulation; See Markus Altenkirch, 'Article 20' in Franco Ferrari (ed.), *Rome I Regulation* (Sellier European Law Publishers, Munich 2015) 485-487; Bogdan, *Private International Law as Component of the Law of the Forum* (n 1100) Chapter IX, 210.

¹¹⁸⁹ Article 24 of the Rome II Regulation; See Markus Altenkirch, 'Article 24' in Peter Huber (ed.), *Rome II Regulation* (Sellier European Law Publishers, Munich 2011) 417-419; Clarkson and Hill (n 1106) 35.

¹¹⁹⁰ For a discussion of a European public policy exception to the rules regarding the recognition and enforcement of judgments: See, Mills, *The Confluence* (n 1176) Chapter 4, 194-198; Alex Mills, 'The Dimensions of Public Policy in Private International Law' (2008) 4 *Journal of Private International Law* 201, 214; It is not for the CJEU to define the content of the public policy of the Contracting State but the Court of Justice has adopted the view that the limits of public policy are a question of interpretation of the Brussels Convention and are therefore a matter which must be determined by it: Case C-7/98 *Krombach v Bamberski* [2000] ECR I-1935 [22]-[23]; Case C-38/98 *Renault v Maxicar* [2000] ECR I-2973 [27]-[28]; Case C-394/07 *Marco Gambazzi v Daimler Chrysler Canada Inc* [2009] ECR I-2563 [26]-[28].

¹¹⁹¹ Bogdan, *Private International Law as Component of the Law of the Forum* (n 1100) Chapter X, 214-257; SC Symeonides, 'Party Autonomy in Rome I and II From a Comparative Perspective' in K Boele-Woelki, T Einhorn, D Girsberger and S Symeonides (eds), *Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr* (Eleven International Publishing, 2010) 513, 528-530; Patrick J Borchers, 'Categorical Exceptions to Party Autonomy in Private International Law' (2008) 82 *Tulane Law Review* 1645, 1651-1657; cf HLE Verhagen, 'The Tension between Party Autonomy and European Union Law: Some Observations on Ingmar GB Ltd v Eaton Leonard Technologies Inc' (2002) 51 *International and Comparative Law Quarterly* 135.

¹¹⁹² Case C-394/07 *Marco Gambazzi v Daimler Chrysler Canada Inc* [2009] ECR I-2563 [27]; See Case C-7/98 *Krombach v Bamberski* [2000] ECR I-1935 [37]; Case C-38/98 *Renault v Maxicar* [2000] ECR I-2973 [30].

¹¹⁹³ A rule with similar effect is found in Article 16 of the Rome II Regulation, although the term 'overriding mandatory provisions' is not defined therein.

to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.

Apart from the compulsory application of the overriding mandatory provisions of the law of the forum,¹¹⁹⁴ effect may be given to such provisions of the law of the country where the obligations arising out of the contract have to be performed.¹¹⁹⁵

The mandatory rules and public policy of the forum cannot be derogated from or evaded by a choice of law agreement.¹¹⁹⁶ Therefore, the law of the forum retains ultimate control over the content of the applicable law and it is not completely indifferent to the outcome of the dispute.¹¹⁹⁷ The overriding mandatory rules of the place of performance of the contract may also limit the scope of the applicable law insofar as those provisions render the performance of the contract unlawful.

Having considered the role of the law of the forum, it is time to examine the viability of a claim for damages for breach of a choice of law agreement within the EU choice of law regime and beyond. Suppose that an international commercial contract is governed by an English choice of law agreement. If a party to the agreement sues in Italy and the Italian courts do not apply the English applicable law by characterizing an issue as procedural or override the applicable law by reference to its mandatory rules and public policy. Can the counterparty sue in England for breach of choice of law agreement? It is submitted, that such a cause of action would doubt the effectiveness of the choice of law regime of the Rome I Regulation. It will also indirectly imply that the party's right to sue in the Italian courts under the Brussels I Regulation is undermined. Moreover, it will also mean that there is reason to deny effect to the resulting judgment of the Italian courts. The implications of such a cause of action for the principle of mutual trust and the effectiveness of EU law (*effet utile*) militate against the possible development of this remedy in the English courts.

¹¹⁹⁴ Article 9(2) of the Rome I Regulation.

¹¹⁹⁵ Article 9(3) of the Rome I Regulation; See also, Article 7(1) of the Rome Convention; See Michael Hellner, 'Third Country Overriding Mandatory Rules in the Rome I Regulation: Old Wine in New Bottles?' (2009) 5 *Journal of Private International Law* 447.

¹¹⁹⁶ See Section 27(2) and 27(3) of the Unfair Contract Terms Act 1977 (Geographical Extent: England and Wales, Scotland and Northern Ireland) which apply regardless of the applicable law of the contract where the choice of law agreement appears to the court, or arbitrator to have been imposed wholly or mainly for the purpose of enabling the party imposing it to evade the operation of the Act or in the making of the contract one of the parties dealt as consumer, and he was then habitually resident in the United Kingdom, and the essential steps necessary for the making of the contract were taken there, whether by him or by others on his behalf.

¹¹⁹⁷ Bogdan, *Private International Law as Component of the Law of the Forum* (n 1100) Chapter X, 215.

To reiterate, it is perhaps misconceived to view the matter from a contractual or promissory perspective. The core of good sense in the conventional declaratory function of choice of law agreements has much to recommend it. This is due to the very prominent role of the law of the forum which actually authorises and recognises party autonomy as a connecting factor.

There is, however, one situation in which it has resonance to suggest that non-compliance with a choice of law agreement is a breach of contract.¹¹⁹⁸ Suppose that a party commences proceedings in breach of an exclusive choice of court agreement in a court which would not uphold the governing law clause as the agreed court would have done. It would presumably be a breach of contract to advance any argument which denies the effectiveness of the clause. It is submitted, that in practice a court may choose to rely on the more conventional breach of an exclusive jurisdiction agreement to award damages or an anti-suit injunction rather than grounding the action on the novel breach of a choice of law agreement. In the *Ace Insurance* decision, Brereton J after considering the issue of contravention of the implied negative stipulation arising from a choice of law clause, concluded by awarding an anti-suit injunction for breach of an exclusive jurisdiction agreement in favour of the Australian courts.¹¹⁹⁹

Private Law Enforcement of Choice of Law Agreements

Prior to enforcing a choice of law agreement, it is necessary to examine the particular conception of such agreements in the Rome I Regulation. As observed, the Brussels I Regulation has its own understanding of jurisdiction agreements and Briggs conceives that conception as enshrining a public law notion of jurisdiction which does not adequately emphasize the contractual rights encapsulated therein. In similar vein, the key issue is whether the European legislature conceives choice of law clauses in terms of dispute resolution and the conferral of private law rights by virtue of selection of the applicable law.¹²⁰⁰ Arguably, the Rome I Regulation is a complete code for determining which law or laws govern a contract. It seems unlikely that the argument that the choice of law clause has a separate, private validity (irrespective of the validity under the Regulation) would appeal to

¹¹⁹⁸ Fentiman, *International Commercial Litigation* (2015) (n 1088) 129.

¹¹⁹⁹ *Ace Insurance Ltd v. Moose Enterprise Pty Ltd* [2009] NSWSC 724, [82]-[83] (Brereton J); See Yeo, *Breach of Agreements on Choice of Law* (n 1118) 195; For a discussion of the *Ace Insurance* decision in the context of the construction of a jurisdiction agreement as exclusive or non-exclusive see Richard Garnett, 'Jurisdiction Clauses Since *Akai*' [2013] *University of Melbourne Law School Research Series* 6.

¹²⁰⁰ Harris, *Agreements on Jurisdiction and Choice of Law: Where Next?* (n 1134) 553.

the CJEU.¹²⁰¹ A subsisting, separate and promissory conception of such agreements would be very difficult to reconcile with a conception of such agreements which focusses on the application of the law of the forum and its choice of law rules which in turn authorise the court to apply the law selected in the choice of law clause, subject to the mandatory rules and public policy of the forum. Therefore, the promissory conception only succeeds in narrating or describing an aspect of the application of the choice of law rules of the forum and may not represent a universally shared understanding of choice of law agreements.

The remedy sought in the *Ace Insurance* case was an anti-suit injunction to restrain the breach of contract. The cross border injunctive remedy is unavailable to the English courts in respect of proceedings before the courts of another Member State and within the remit of the Brussels I Regulation, as the anti-suit injunction has been deemed to undermine both the principle of effectiveness of the Brussels regime and the overarching mutual trust principle which necessarily animates the EU private international law order.¹²⁰² Similar considerations premised on mutual trust and the principle of the effectiveness of the EU private international law instruments may well preclude cross border injunctive relief to restrain a party from commencing or continuing with proceedings in another Member State for the purpose of avoiding, evading or overriding the applicable law specified in a choice of law agreement.¹²⁰³ The primacy of the mutual trust principle may be gleaned from the EU Justice Agenda for 2020 which declares that mutual trust is the ‘bedrock upon which EU justice

¹²⁰¹ Ibid; If an action for breach of the choice of law clause were permitted, this would also raise questions as to which courts should determine the meaning of a choice of law agreement; and whether only the courts first seised in the EU should be empowered to do so. It is submitted, that if there is no jurisdiction agreement accompanying the choice of law clause, the court first seised should proceed to determine the meaning of the choice of law clause.

¹²⁰² Case C 159/02 *Turner v Grovit* [2005] 1 AC 101; Case C 185/07 *Allianz SpA v West Tankers Inc* [2009] 1 AC 1138.

¹²⁰³ An argument may be made, however, that the situation is different if the contractual remedy is a matter of application of a law sanctioned by another European Union private international law instrument i.e. the Rome I Regulation. Moreover, the Rome I Regulation does not apply to matters of procedure but if a cause of action for damages for breach of a choice of law agreement impeaches and calls into question the effectiveness of its mandatory private international rules, the Regulation may well preclude the enforcement of subsisting and independent private contractual agreements as to choice of law. It is nevertheless apparently unlikely that the foundational mutual trust principle will lose any of its relevance or significance in relation to the European Union choice of law regime for contractual obligations in civil and commercial matters. For a discussion of the principle of mutual trust as the basis for neutral, multilateral and universal *Savignyan* conflict of law rules, see, Matthias Weller, ‘Mutual trust: in search of the future of European Union private international law’ (2015) 11 *Journal of Private International Law* 64, 71-73 .

policy should be built'¹²⁰⁴ The controversial remedy remains available in the armoury of the English courts if proceedings are outside the European Union.¹²⁰⁵

As a matter of principle, the award of damages may also be available for breach of a choice of law agreement in accordance with the applicable law of the contract, but this is as yet untested in the case law.¹²⁰⁶ A claim for damages for breach of a choice of law agreement constituted by actions in other Member States may, however, be precluded for being incompatible with the choice of law instruments.¹²⁰⁷ Moreover, the allegation that another Member State court refused or denied effect to the choice of law agreement also imputes that it was somehow wrong for the counterparty to have sued there in the first place. Therefore, both the right to sue in a Member State under the Brussels I Regulation and the application of forum law and choice of law rules under the Rome I Regulation are impeached and called into question.¹²⁰⁸ Furthermore, as the damages remedy has the effect of second guessing and reversing or nullifying the judgment of the courts of another Member State, both the Brussels I Regulation's system of direct rules of jurisdiction and the resulting automatic recognition and enforcement of judgments are undermined. It is submitted that, nullifying or reversing the effect of the foreign judgment is undoubtedly contrary to the principle of mutual trust and the obligation not to question the jurisdiction of another Member State court¹²⁰⁹ and the obligation not to question a Member State court's application of its own choice of law rules (The harmonized rules on jurisdiction and choice of law facilitate the mutual recognition of judgments within the EU and are also animated by the principle of mutual trust). As a general observation, the likelihood for non-compliance with the applicable law in cases where the proceedings are commenced within the Brussels-

¹²⁰⁴ The EU Justice Agenda for 2020 - Strengthening Trust, Mobility and Growth within the Union COM (2014) 144 final; See Weller, *Mutual trust* (n 1155) 79-80.

¹²⁰⁵ See *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, [2013] 1 WLR 1889; [2013] 1 CLC 1069 (Lord Mance delivering the judgment of the UK Supreme Court).

¹²⁰⁶ Damages for breach of an English exclusive jurisdiction agreement governed by English law have been awarded by the English courts even against proceedings in the Greek courts and within the remit of the Brussels I Regulation, See, *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG (The Alexandros T)* [2014] EWCA Civ 1010 (Longmore LJ with whom Rimer LJ and Lord Toulson agreed); Substantive damages for breach of a jurisdiction agreement have been assumed to be an available remedy under English private international law: *Donohue v Armco Inc* [2001] UKHL 64, [2002] Lloyd's Rep 425, [2002] CLC 440, [48] (Lord Hobhouse of Woodborough); The Spanish *Tribunal Supremo* has affirmed the award of substantial damages for breach of a choice of court agreement: *Sogo USA Inc v Angel Jesus*, STS (Sala de lo Civil, Sección 1ª), 12 January 2009, Repertorio de Jurisprudencia 2009/544.

¹²⁰⁷ Yeo, *Breach of Agreements on Choice of Law* (n 1118) 199.

¹²⁰⁸ Harris, *Agreements on Jurisdiction and Choice of Law: Where Next?* (n 1134) 554.

¹²⁰⁹ Case C-351/89 *Overseas Union Insurance Ltd v New Hampshire Insurance Company* [1991] ECR I-3317, [23]-[25]; Case C-116/02 *Erich Gasser GmbH v MISAT Srl* [2003] ECR I-14693, [48].

Lugano regime is remote, because it is unlikely that the application of the same set of choice of law rules¹²¹⁰ within Member States will result in a breach of contract.¹²¹¹

The argument in favour of damages for breach of a choice of law agreement must also overcome the problem that a foreign court's ruling may be *res judicata* as to the applicable law. Separating the legal functions of a choice of law clause, Briggs suggests that this is not incompatible with a finding by the English courts that the parties had a binding contractual agreement as to choice of law. However, if the judgment emanates from a Member State, such an approach comes very near reviewing the foreign judgment as to its substance, or to second guessing the findings of the foreign court. Even in relation to proceedings brought in non-Member States, the very notion of allowing an action for breach of contract in the English courts seems likely to bring the English courts into conflict with foreign courts that have applied their own choice of law rules.¹²¹²

A claimant will be unable to recover damages in respect of the loss which he has suffered if he cannot establish a causal link between his loss and the defendant's breach of contract or that the loss is too remote.¹²¹³ Suppose that the forum classifies a particular issue as procedural and the chosen law thus does not properly apply to it. If that rule of the procedural law of the forum is the actual cause of the claimant's loss, the chain of causation between the breach of the choice of law agreement and the loss suffered by the claimant will be severed. Similarly, the private international law rules of the forum may have caused the loss sustained by the claimant by regulating the application of the chosen law. In the words of Alex Mills, private international law rules are concerned 'with the scope of

¹²¹⁰ There is a greater degree of harmonization in the Rome I Regulation as compared to the Rome Convention; there are no provisions which Member States may reserve against application in the Rome I Regulation. For instance, Germany, Ireland, Luxembourg, Portugal and the United Kingdom entered a reservation under Article 22 of the Rome Convention in relation to Article 7(1) of the Rome Convention. See Bogdan, *Private International Law as Component of the Law of the Forum* (n 1100) Chapter X, 247.

¹²¹¹ Yeo, *Breach of Agreements on Choice of Law* (n 1118) 200.

¹²¹² A possible solution would be to rely on Section 32 of the Civil Jurisdiction and Judgments Act 1982 which provides that a judgment may arguably not be recognised or enforced in England because it has been obtained in breach of a dispute resolution agreement. The English choice of law agreement would presumably have to be construed as a dispute resolution agreement by the English courts but the language of the provision may not support the claim as its application to choice of law agreements is doubtful; cf Briggs, *Private International Law in English Courts* (n 1129) 496; However, if the claimant in the English proceedings had submitted to the jurisdiction of the foreign court, Section 34 of the Civil Jurisdiction and Judgments Act 1982 will bar further proceedings in the English courts.

¹²¹³ For a discussion of causation and remoteness in the English and Scots substantive law of contract respectively, see, Ewan McKendrick, *Contract Law* (Palgrave Macmillan 2011) 354-360; Gillian Black, *Woolman on Contract* (W Green 2010) 145-149; For an analysis of causation and remoteness issues in relation to an action for damages for breach of a choice of forum agreement, see, Steven Gee, 'Lord Bingham, Anti-Suit Injunctions and Arbitration' in Mads Andenas and Duncan Fairgrieve (eds.), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (OUP 2009) 635, 641.

authority of the law, not the outcome in the specific case.’¹²¹⁴ From this perspective, there is no question of breach of the choice of law agreement when the law of the forum applies its choice of law rules. However, if it is determined that there is a breach, it may not always be an easy task to appropriate the entire blame on non-compliance with or breach of the choice of law agreement. The causation issue locates and traces the foundations of the choice of law agreement in the law of the forum and demonstrates the futility of viewing choice of law agreements from a contractual or promissory perspective.

The natural extrapolation of Briggs’s theoretical speculation is that damages would be available for breach of a choice of law agreement. The theory, no matter howsoever elegant, appealing and persuasive gives rise to significant practical difficulty. A major impediment to the rational development of the remedy is the issue of quantification of damages.¹²¹⁵ Suppose that there is a choice of law agreement for the law of State A. The courts of another state apply the law of State B instead. Should the English courts calculate the loss to the defendant overseas by determining what laws the English courts would have applied, and what the outcome would have been? The English courts applying the Rome I Regulation, may themselves not give unfettered effect to the law of State A, and may have imposed upon it provisions that cannot be derogated from by agreement of English law, or of some other state. The alternative is to consider the result had the law of State A alone been applied, albeit that there may not obviously be any state with jurisdiction which would have applied that law in its entirety and without any reservation. The problem gets enhanced when the court that denied effect to the clause is outside the EU and has fundamentally different choice of law rules as compared to the Rome I Regulation. The root cause of the difficulty stems from a misconception that the law chosen in a choice of law agreement governs each and every aspect of a dispute. However, as observed above, the parties cannot by agreement oust the mandatory choice of law regime of the forum. Characterization of an issue as procedural and outside the proper and legitimate ambit of the *lex causae*, the application of overriding mandatory provisions of the forum and other states and the public policy of the forum are all outcome determinative and regulate the application of the chosen

¹²¹⁴ Mills, *The Confluence* (n 1176) 19; Lord Mance describes the higher level secondary norms of private international law as ‘the infrastructure signposting parties towards the destination to determine substantive issues.’: Mance, *The Future of Private International Law* (n 1105) 186; See also JG Collier, *The Conflict of Laws* (Cambridge University Press 2001) Chapter 1, 6.

¹²¹⁵ For the substantial practical difficulties faced by English courts when quantifying damages for breach of a choice of forum agreement, see FN 702 in Chapter 7 above.

law. An unfettered, free standing and truly independent choice of law which applies irrespective of the law of the forum and its choice of law regime does not exist.

Suppose that the original proceedings took place in England and that it was the English courts which were unable to apply the law of State A in its entirety and without any reservation.¹²¹⁶ Would the English courts applying the choice of law rules of the Rome I Regulation, also have to award monetary compensation for the 'loss' caused to the defendant? By bifurcating the legal functions of a choice of law agreement into the law which the parties intended to apply to the contract and the contractual obligation to adhere to the chosen law in a choice of law agreement, it may be possible to allow an action for damages for breach of contract in this scenario.¹²¹⁷ However, it is submitted that the defendant will suffer no loss because the English court has applied the chosen law, subject to countervailing factors provided for by the Rome I Regulation. It may not be practicable to separate the procedural and substantive functions of the choice of law agreement because in this case the application of Rome I Regulation's choice of law regime trumps any subsisting and independent obligation to adhere to the chosen law. Furthermore, a cause of action for damages for breach of a choice of law agreement will negate the impact of the choice of law rules under the Rome I Regulation which make provision for and limit the scope of party autonomy in the first place.

In addition, one of the reasons for restricting party autonomy in relation to certain types of contract or fact patterns is because the law seeks to avoid the evasion of the rules of a particular state. In consumer contracts, the consumer retains the protection of rules of his home state, which cannot be derogated from by agreement.¹²¹⁸ This is a policy which intentionally protects weaker parties and limits party autonomy. However, if the agreement to choose another law can be upheld as a private international law bargain, this protection might come at a price.¹²¹⁹ A business which is sued and subjected to rules of the consumer's home legal system might obtain damages for that 'breach'.

Brigg's contractual analysis of choice of law agreements is without doubt a seminal contribution to legal scholarship. However, it is unlikely that the parallel existence of choice of law agreements as privately enforceable agreements for whose breach damages should

¹²¹⁶ Harris, *Agreements on Jurisdiction and Choice of Law: Where Next?* (n 1134) 554.

¹²¹⁷ Yeo, *Breach of Agreements on Choice of Law* (n 1118) 199.

¹²¹⁸ Article 6 of the Rome I Regulation; Article 5 of the Rome Convention.

¹²¹⁹ Harris, *Agreements on Jurisdiction and Choice of Law: Where Next?* (n 1134) 555.

be available will attract the attention of the CJEU or the European legislature. In assessing the relevance or significance of attributing an obligation to adhere to the chosen law in a choice of law agreement, it may assist us if we consider another perspective on the fundamental nature of private international law rules and their inherent function.

If the choice of law regime of the forum is conceived as a set of secondary rules for the allocation of regulatory authority, the descriptive, normative and interpretive narrative of the contractual perspective loses its perceived dominance and coherence as it fails to yield a complete and satisfactory justification for what we really understand by those rules. In the mantle of secondary power conferring rules as opposed to primary conduct regulating rules, choice of law rules perform a very significant public function of allocating regulatory authority. From this perspective, it is misplaced and misconceived to interpret choice of law clauses as contractual or promissory in essence. The contractual justification does not adequately account for the authorization of party autonomy by the choice of law rules of the forum, the supervening application of the laws of other states and ultimate forum control. Moreover, the pragmatic attractiveness of recovering damages for breach of choice of law agreements may be unsound in principle from the standpoint of a truly multilateral conception of private international law based on mutual trust or a strong notion of comity. An international private international law will always seek to promote judicial cooperation between legal systems in civil and commercial matters.

Chapter 12 - Conclusions and Contributions to Knowledge

This doctoral thesis has advanced the idea that it is misconceived to think of jurisdiction and choice of law agreements as unilaterally enforced domestic *private law* obligations within an English ‘dispute resolution’ paradigm because multilateral private *international law* rules are essentially secondary rules for the allocation or public ordering of regulatory authority which may not permit a separation of functions or the relative effect of such agreements. The author has endeavoured to subject the private law classification and enforcement of jurisdiction and choice of law agreements in the English common law of conflict of laws, the EU private international law regime and the Hague Convention on Choice of Court Agreements to a rigorous analysis and in the process made an original and significant contribution to knowledge in the field. As a matter of fact, this is the first full length analysis of the impact of a multilateral and regulatory conception of private international law on the private law enforcement of jurisdiction and choice of law agreements before the English courts. In this regard, the thesis seeks to both pre-empt and offer innovative solutions to issues that may arise under the jurisprudence of the emergent Brussels I Regulation (Recast) and the Hague Convention. Briggs’ common law idea of the separation of functions or the relative effect of jurisdiction and choice of law agreements in *Agreements* may be considered to be the pre-eminent scholarly invocation and possibly the academic high water mark advancing the unilateral private law enforcement of such agreements before the English courts.

The increasingly less relevant English common law jurisdictional regime in relation to choice of court agreements is a result of an ever burgeoning EU private international law regime and global efforts at regulation by the Hague Conference on Private International Law. Therefore, the need to understand the fundamental juridical nature, classification and private law enforcement of jurisdiction and choice of law agreements before the English courts from the perspective of the EU private international law regime and the Hague Convention is greater than ever. This doctoral thesis aims to fill an existing gap in the literature in relation to an account of jurisdiction and choice of law agreements which explores and reconnects arguments drawn from international legal theory with legal practice. However, the scope of the work remains most relevant for cross border commercial litigators and transactional lawyers interested in crafting pragmatic solutions to the conflicts of jurisdictions and conflict of laws. It is hoped that an awareness of the concept of a more reconciled international legal order in the form of multilateral private

international law rules should not blind us to the complex reality of international litigation where the distribution of regulatory authority by national private international law rules is often overlapping and may encourage competing jurisdictional claims.

The author has drawn upon the significant recent jurisprudential deliberations on the global governance function of private international law as a multilateral structural coordinating framework for the allocation of regulatory authority to enhance the contours of the contrast with the English 'dispute resolution' paradigm. In particular, the conception of private international law norms as higher level secondary rules for the allocation of regulatory authority focused primarily on conflicts justice or an allocative distributive justice may limit the significance of the separation of functions within jurisdiction agreements. This thesis has argued that the separation of functions within a jurisdiction agreement is in itself incompatible with an internationalist or multilateral conception of private international law. In other words, a system for the public ordering of private law assumes priority over or trumps the existence of the private law rights and obligations of the parties to the jurisdiction and choice of law agreements and their unilateral enforcement by the English courts. Otherwise, the private law enforcement of the mutual contractual obligation not to sue in a non-contractual forum attributed to an exclusive jurisdiction agreement may operate as a 'unilateral private international law rule' with a controversial and confrontational allocative function of its own. It may lead to the 'privatization of court access' by dubiously perpetuating and prioritizing the unilateral private ordering of private law over the multilateral public ordering of private law. Moreover, the enforcement of jurisdiction agreements by private law remedies within a multilateral system will necessarily distort the allocative or distributive function of private international law rules by giving precedence to the redistributive will of the parties premised on principles of corrective justice *inter partes* of questionable applicability. International structural order is compromised in the unilateral private law enforcement of jurisdiction and choice of law agreements as such enforcement gives rise to a clash of sovereign legal orders and also the possibility of 'regime collision' by interfering with the jurisdiction, judgments and choice of law apparatus of foreign courts which a multilateral conception of private international law is supposed to prevent in the first place. However, this thesis has argued that outside the confines of the European Union private international law regime, the variable geometry that is characteristic of the international civil and commercial litigation sphere may not impede

the separation of functions within such agreements. Whether an English court *ought* to grant a private law remedy enforcing such agreements is of course another matter.

The author has also sought to reconcile the lessons learnt from the quest for a sounder justification for the principle of party autonomy and the emerging third paradigm of jurisdiction with the continued viability of the damages remedy. A novel analysis of the damages remedy for breach of a choice of court agreement and parallel proceedings is carried out from the perspectives of the *substantive law* paradigm and the *internationalist* paradigm. It has been observed that those measures that exclusively rely on one paradigm largely to the exclusion of the other are most at risk of being rendered superfluous by Occam's razor in the complex process of integration. The author renders the insightful observation that the reform process of the Recast Regulation in relation to choice of court agreements provides an ideal example of the *internationalist* paradigm of party autonomy incorporating the concerns of the *substantive law* paradigm.¹²²⁰ Articles 5 and 6 of the Hague Convention are also identified as paradigm instances of the two paradigms of party autonomy at work in tandem. It is significant to note that the unilateral damages remedy was not a serious contender as a technique for managing and controlling the multilateral conflicts of jurisdiction in either the Recast Regulation or the Hague Convention.

Drawing upon the international and regulatory dimensions of the discipline, the author rejects the view advanced by some scholars that the principles of private international law should be reorganized in order to draw a more systematic distinction between agreements and non-agreements. The application of a different set of principles to cases of party autonomy in jurisdiction and choice of law is not substantiated as all private international law rules operate within a regulatory framework in which competing interests are reconciled. On the contrary, this thesis has suggested that in light of the emergence of a new paradigm for party autonomy, the linguistic distinction between the phrases *private international law agreements/non agreements* and *private international law rules by agreement/non agreement* may better orient and prepare us for the challenges that lies ahead in the paradigmatic shift. Private international law agreements may be said to operate within the *substantive law* paradigm whereas the private international law rules by agreement may be considered to operate within the *internationalist* paradigm.

¹²²⁰ For a discussion of the *substantive law* and *internationalist* paradigms of party autonomy featuring as dialectically opposite categories converging into a new and more reconciled *transnationalist* paradigm of party autonomy, see, Chapter 2 above.

The author attempts to deconstruct the pervasive analogy between arbitration agreements and jurisdiction agreements on an issue by issue basis to reveal the fundamental areas of divergence and the stronger public allocative imperatives in the private law enforcement of the latter. However, this thesis has argued that outside the strictures of the EU private international law regime the English courts are not constrained from applying unified principles for the unilateral private law enforcement of jurisdiction and arbitration agreements.

Pacta sunt servanda may be an appropriate term to describe the enforceability national private law rights arising from jurisdiction and choice of law agreements. However, it is submitted that these clauses are primarily concerned with the multilateral or international allocative relationship between the courts (prorogation and derogation function). As a result, both the principles of *pacta sunt servanda* and the freedom of contract may be justified by the *substantive law* paradigm of party autonomy but the employment of such terminology and their ramifications in terms of primary and secondary remedies for breach of jurisdiction and choice of law agreements may damage the reputation of the *internationalist* paradigm of party autonomy and private international law.

It has been observed that an English exclusive choice of court agreement gives rise to the mutual obligation not to sue in a non-contractual forum in the common law of conflict of laws whereas the civilian ‘procedural contract’ conception solely fulfills the international allocative function without giving rise to enforceable private law rights between the parties. The author has identified the existence of a minority view in the English common law of conflict of laws which adopts a conception of a jurisdiction clause bearing close resemblance with the ‘procedural contract’ model. An English non-exclusive choice of court agreement may generally not be breached but the mutual obligations of the parties with respect to such an agreement are properly a matter of contractual construction.

Despite the contrary rulings of the French Cour de Cassation,¹²²¹ asymmetric choice of court agreements should in principle be valid under Article 25 of the Recast Regulation as the substantive validity of a jurisdiction agreement for the English courts will be referred to English law where such agreements have been held to be valid. Even if the compatibility of asymmetric jurisdiction agreements with Article 25 of the Recast Regulation is deemed to be

¹²²¹ *Ms X v Banque Privée Edmond de Rothschild Europe (Société)* Cass civ, 1^{ère}, 26.9.2012, No 11-26.022, [2013] ILPr 12; *ICH (Société) v Credit Suisse (Société)* Cass civ, 1^{ère}, 25.3.2015, No 13-27.264, [2015] ILPr 39; cf *Apple Sales International v eBizcuss* Cass. 1^{ère} Civ, 7.10.2015, No. 14-16.898.

a question governed by an autonomous interpretation of the scope of an ‘agreement’, it has been argued that such agreements should fall within the definition of an ‘agreement’. However, it is likely that such agreements will not be covered by the protective umbrella of Article 31(2) of the Recast Regulation which would only extend to exclusive jurisdiction agreements. The author has argued that the damages remedy may compliment the protective function of Article 31(2) if it does not apply to such agreements or if recourse to the provision is available but the party does not commence proceedings in the contractual forum.

Under the Brussels I Regulation, choice of court agreements serve a procedural or international allocative function and do not give rise to an enforceable obligation not to sue in a non-contractual forum.¹²²² However, this thesis has argued that what counts as a ‘contract’ is a matter of perspective or legal culture and it would be unfair to classify the operation of a ‘procedural contract’ as a ‘formal waiver of jurisdictional privilege’ which does ‘not depend upon the existence of a private contract’.¹²²³ If consent or agreement rather than the mutual exchange of promises is considered to be the theoretical basis of a contract then there is no reason to deny a procedural contract the status of a contract. The use of the word ‘agreement’, the provision for the technique of severability and the utilization of the applicable law to assess the material validity indicate that Article 25 of the Recast Regulation is concerned with a contract but one that only gives rise to procedural consequences. This thesis has proposed that the employment of the neutral term ‘hybrid’ contract offers the advantage of a conception of a choice of court agreement which recognises and incorporates a mix of procedural and substantive elements without prioritizing either.

This doctoral thesis has argued that the private law enforcement of foreign (non-English) choice of court agreements premised on pure contractual principles and lacking any jurisdictional connection with the English forum is tantamount to enforcing an international contract between the parties (*in personam*) without any regard for the specific international allocative relationship between the foreign courts. (*in rem*) The author identifies this phenomena as another manifestation of the *substantive law* paradigm which subordinates the interests of states to the dispute resolution needs of the litigating parties. Moreover, the

¹²²² Cf *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG (The Alexandros T)* [2014] EWCA Civ 1010.

¹²²³ See Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (OUP 2008) 524.

prospects of English courts policing foreign choice of court agreements by treating them as ordinary contracts is bound to provoke resentment from other states.

A weaker conception of comity and the role of public international law imperatives is characteristic of the English *substantive law* paradigm which focusses on the vertical relationship between the court and the parties. As a result, the notion of comity is nearly irrelevant in the private law enforcement of choice of court agreements. The author has dismissed the use of a 'system transcendent' notion such as freedom of contract or *pacta sunt servanda* to justify the private law enforcement of choice of court agreements because such a concept still cannot justify the unilateral nature of the English court's interpretation of the rights of the parties and their enforcement without regard to the rights of other states.

This thesis has highlighted that indemnity clauses and liquidated damages clauses may act as an effective deterrent, obviate the need for a separate cause of action for breach of a choice of court agreement, reduce the burden of determining heads and quantum of damages and thus facilitate the secondary enforcement of choice of court and choice of law agreements.

Apart from the contractual basis for the recovery of damages for breach of a choice of court agreement, the author has explored the appropriate legal basis for tortious damages for breach of a choice of court agreement which point towards the tort of malicious prosecution or abuse of process and the tort of inducing breach of contract. However, the author concludes that the jurisdictional and choice of law rules under the Brussels I Regulation and the Rome II Regulation will be a substantial impediment and they may preclude the claim because of the localization of the damage in the forum where the abusive proceedings or the inducement of the breach of contract took place. Significantly, the principles of mutual trust and the effectiveness of EU law (*effet utile*) may render the claim for tortious damages incompatible with the European private international law regime.

The author has argued that restitutionary damages for breach of a choice of court agreement may not normally be recovered. It has been argued that the characterization of the event rather than the consequences of the restitutionary remedy should determine whether Article 4 or Article 10 of the Rome II Regulation is applicable. As a matter of principle, restitution for wrongs should fall under Article 4 of the Rome II Regulation. It is submitted that the jurisdictional and choice of law impediments under the Brussels I

Regulation and the Rome II Regulation that apply to a tortious claim will also preclude a restitutionary cause of action.

Problems of a similar nature surface in relation to the award of equitable damages. Doubts have been expressed about both the existence of a substantive equitable right not to be sued abroad vexatiously and whether this right is capable of supporting a claim of equitable damages. Even though the contemporary trend is to apply choice of law principles to equitable obligations, it has been argued that if non contractual anti-suit injunctions are classified as procedural matters then the choice of law problem does not arise in the first place. The author extrapolates the choice of law consequences of a procedural classification of an anti-suit injunction to a claim for equitable damages. The procedural classification has the knock on effect of truncating the substantive right and not extending it to a claim for damages in equity. Thus, it is at best doubtful, whether the non-contractual avenues explored in this thesis will yield the required result and be more than a dead end.

It has been observed, that the contractual damages remedy for breach of a jurisdiction agreement might be available under the English common law jurisdictional regime. However, outside the narrower confines of cases analogous to *Union Discount v Zoller*,¹²²⁴ the damages remedy raises complex and sensitive issues which require careful analysis and examination. The author notes that the remedy still needs clarification and elucidation in the more doubtful penumbral cases, before the course of the remedy can be fully mapped. A decision of the foreign court on costs or on the merits may preclude the damages action by reliance on the *res judicata* effect of the foreign judgment. Quantification of damages is a significant practical impediment and may require a trial within a trial.

In the course of Chapter 8, the author renders an innovative suggestion that the concept of the extended doctrine of *res judicata* based on abuse of process or the importation of the notion of constructive *res judicata* may be applied in the international litigation sphere to limit the claim for damages to the foreign court as it could and should have been raised there in the first place. Therefore, a more discriminating approach employing the notion of methodological pluralism will limit the private law remedy to the foreign court and may act as an effective control mechanism. The author notes that in terms of practical effectiveness, damages are a second best solution to problems of *lis pendens* and the enforcement of jurisdictional party autonomy.

¹²²⁴ *Union Discount Co v Zoller* [2001] EWCA Civ 1755, [2002] 1 WLR 1517 (Schiemann LJ).

This doctoral thesis concludes that the damages remedy should have a very limited role to play in international commercial litigation. The remedy can damage the reputation and coherence of private *international* law as an international system functioning as a structural coordinating framework for the allocation or mapping of regulatory authority.

The author reasons and arrives at the conclusion that in every conceivable situation damages cannot be claimed in the European Judicial Area. *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG*¹²²⁵ is a decision to the contrary but it is submitted that it is a controversial authority which has not reconciled the countervailing demands of the principle of mutual trust and the *effet utile* of EU law adequately. This was arguably a case where a reference to the CJEU on the matter should have been sent. It is highly unlikely that the CJEU will adjudicate that the private law remedy is compatible with the principles of mutual trust and the effectiveness of EU law (*effet utile*). Indeed, it may be viewed as yet another attempt to reassert the role of the common law of conflict of laws and to bypass the operation of the uniform codified rules of the Brussels I Regulation.

It may be that the damages remedy post *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG* has been bequeathed a new lease of life under the Recast Regulation,¹²²⁶ at least until the issue is finally determined and laid to rest by the CJEU on a preliminary reference from the English courts or from the courts of another Member State in cases where the judgment creditor is seeking to rely on an English judgment awarding the controversial remedy. In this interim phase, it is arguable that the damages remedy may be applied to plug the lacunas in the legal regulation of choice of court agreements by the English courts. Until the Lugano Convention (2007) is reformed along the lines of the Recast Regulation, the threat of torpedo proceedings in the Lugano Convention area cannot be foreclosed. A remedy in the form of a claim of monetary compensation may ameliorate the legal risks that surface from for instance, torpedo proceedings before the Swiss courts in breach of an English jurisdiction agreement.

Damages may also compensate for the legal risks in relation to threshold issues. If a Member State court is seised in breach of an English jurisdiction agreement, and in its proceedings

¹²²⁵ *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG* [2014] EWCA Civ 1010, [15]-[22] (Longmore LJ); Longmore LJ's decision was cited with approval and endorsed by Christopher Clarke LJ in *Marzillier, Dr Meier & Dr Guntner Rechtsanwaltsgesellschaft MbH v AMT Futures Ltd* [2015] EWCA Civ 143, [62]. Permission to appeal was granted to the appellant in the latter decision and the case is now pending before the UK Supreme Court.

¹²²⁶ [2014] EWCA Civ 1010.

the court goes beyond a *prima facie* examination of the agreement, undermines the *kompetenz-kompetenz* of the English court and also Article 31(2), damages may arguably be recovered for the wasted costs and expenses of litigating in the Member State court. A party may also not choose to initiate protective proceedings under Article 31(2) but wait for the Member State court to decline jurisdiction and then recover damages for breach. Damages may also be recovered for breach of asymmetric or unilateral jurisdiction agreements because Article 31(2) may not extend its cover to such agreements.

The author has conducted original primary research into the role played by private law remedies enforcing exclusive choice of court agreements in the context of the Hague Convention and made a significant contribution to knowledge. It has been argued that the Hague Convention's system of qualified or partial mutual trust does not expressly or implicitly sanction but may permit contractual remedies for breach of a choice of court agreement in non EU cases, if such measures further the objective of the Convention. The author identifies two relevant issues that lie at the interface between the Hague Convention and the Brussels I Regulation which may constrain private law remedies enforcing exclusive choice of court agreements. First, as a matter of principle, anti-suit injunctions and the damages remedy may arguably not be awarded in Hague Convention cases within the EU (between the courts of two Member States) as the mutual trust principle and the *effet utile* of EU law will be compromised.¹²²⁷ Court of Justice jurisprudence on the interface between the New York Convention and the Brussels I Regulation and the interface between the CMR Convention and the Brussels I Regulation confirm the accuracy of this hypothesis.¹²²⁸ Secondly, Article 31(2) of the Recast Regulation may nevertheless apply in intra EU Hague Convention cases as it is arguably compatible with the prevailing interpretation of Articles 5 and 6 of the Hague Convention.

Choice of law considerations are relegated to a secondary position in the English common law as compared to jurisdictional issues. It has been argued that it is fundamentally misconceived to view choice of law agreements from the purely contractual perspective as the very significant role of the law of the forum and its choice of law regime are not factored into the equation. If choice of law rules are primarily and essentially secondary power

¹²²⁷ Case C-159/02 *Turner v Grovit* [2004] ECR I-3565.

¹²²⁸ Case C-185/07 *West Tankers Inc v Allianz SpA* ECLI:EU:C:2009:69, [2009] 1 AC 1138 (Arbitration interface); See also, Case C-536/13 *Gazprom OAO* ECLI:EU:C:2015:316 (Arbitration interface); Case C-452/12 *Nipponkoa Insurance Co (Europe) Ltd v Interzuid Transport BV* ECLI:EU:C:2013:858, [2014] ILPr 10 (CMR Convention interface); Case C-533/08 *TNT Express Nederland BV v AXA Versicherung AG* ECLI:EU:C:2010:243, [2010] ILPr 35 (CMR Convention interface).

conferring rules for the allocation or mapping of regulatory authority rather than primary conduct regulating rules, the descriptive, normative and interpretive narrative of the contractual perspective loses its perceived dominance, consistency and coherence as it fails to yield a complete and satisfactory justification for what we understand by choice of law agreements. The author concludes that a 'promissory' conception of a choice of law agreement can only be subsumed under the *substantive law* paradigm because it fails to incorporate the demands of the *internationalist* paradigm of party autonomy.

Moreover, the decisions in *Ace Insurance v Moose Enterprise Pty Ltd*¹²²⁹ and *Navig8 Pte Ltd v Al-Riyadh Co for Vegetable Oil Industry (The Lucky Lady)*¹²³⁰ support the conventional declaratory function of choice of law agreements. It is submitted that the enforcement of choice of law agreements by the damages remedy within the EU will compromise the mutual trust principle and the *effet utile* of EU law in relation to the European choice of law regulations (Rome I and II Regulations) and also question the assumption of jurisdiction by the court seised and the eventual judgment rendered by that court under the Brussels I Regulation. Outside the EU, the choice of law issue may have been rendered *res judicata* by the judgment of the foreign court and in that case the judgment creditor will be estopped from raising the issue in the English enforcement proceedings. The language of Section 32 of Civil Jurisdiction and Judgments Act 1982 may also not permit the extension of its scope to the refusal of recognition of judgments rendered in breach of a choice of law agreements as such agreements may not be deemed to be dispute resolution agreements. In any case submission by the party to the foreign court under Section 34 of the Civil Jurisdiction and Judgments Act 1982 will render Section 32 inapplicable.

¹²²⁹ *Ace Insurance v Moose Enterprise Pty Ltd* [2009] NSWSC 724 (Brereton J).

¹²³⁰ *Navig8 Pte Ltd v Al-Riyadh Co for Vegetable Oil Industry (The Lucky Lady)* [2013] EWHC 328 (Comm), [2013] 2 Lloyd's Rep 104, [2013] 2 CLC 461 (Andrew Smith J).

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