

# The enforcement of settlement and jurisdiction agreements and parallel proceedings in the European Union: *The Alexandros T* litigation in the English courts

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This article examines the private law enforcement of English settlement and jurisdiction agreements where pre-emptive parallel proceedings have been commenced in the courts of another EU Member State. It will be argued that in *The Alexandros T* the UK Supreme Court adopted a narrow and instrumental ‘mirror images’ interpretation of the ‘same cause of action’ issue in Article 27 of the Brussels I Regulation which allowed the English and the Greek proceedings to continue in parallel. In cases where the strict tripartite test of Article 27 is not met, Article 28 with its discretionary power to stay in case of related actions is available as a more flexible alternative. It will be argued that the exercise of the discretion to stay proceedings under Article 28 of the Brussels I Regulation was legitimately denied effect in order to accord deference to jurisdictional party autonomy. The Court of Appeal’s decision clarifying that the claims for declarations and damages for breach of exclusive jurisdiction agreements are not in breach of EU law will not be the final word on this contentious and as yet unresolved issue. Any argument supporting the enforcement of the private law rights and obligations of the parties to the jurisdiction or settlement agreement may be deemed by the CJEU as necessarily infringing the principle of effectiveness of EU law (*effet utile*) and the principle of mutual trust which animates the multilateral jurisdiction and judgments order of the Brussels I Regulation.

**Keywords:** *The Alexandros T*; Private international law; European Union civil procedure; Brussels I Regulation; Parallel proceedings; *Lis pendens*; Jurisdiction Agreements; Settlement Agreements; Damages; Mutual trust; Principle of effectiveness; *effet utile*; Brussels I Recast Regulation

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## A. Introduction

The decisions of the superior courts of England and Wales in *The Alexandros T* are very significant in relation to the enforcement of English settlement and jurisdiction agreements in cases involving parallel proceedings in another EU Member State. The terms of a full and final settlement between the insurers<sup>1</sup> and the ship owners<sup>2</sup> arising out of the loss of the vessel *The Alexandros T* were in danger of being unravelled in the Greek courts three years after the conclusion of the settlement agreement. This article endeavours to examine *The Alexandros T* litigation in the English courts with reference to the prevailing legislative, judicial and academic authorities on parallel litigation and the enforcement of jurisdictional party autonomy in the EU.

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,<sup>3</sup> and the settlement agreements contained exclusive English 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, first pursuant to Article 28<sup>4</sup> then Article 27<sup>5</sup> of the Brussels I Regulation.<sup>6</sup> Burton

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<sup>1</sup>One group of insurers was described as the Company Market Insurers ('CMI') and the other group was described as the Lloyd's Market Insurers ('LMI').

<sup>2</sup>Starlight Shipping Company ('Starlight').

<sup>3</sup>See *infra* n 103.

<sup>4</sup>Art 28 (Brussels I Regulation).

"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."

<sup>5</sup>Art 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."

<sup>6</sup>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 Art 81 of the Brussels I Regulation (Recast), the Recast Regulation applies 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 where relevant. New provisions and provisions that override aspects of the operation of the Brussels I Regulation in relation to parallel proceedings and the

J refused to grant a stay under Article 28 and gave summary judgment to the insurers.<sup>7</sup> 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.<sup>8</sup> Before the Supreme Court of the UK, the insurers challenged the correctness of the Court of Appeal's conclusion under Article 27 and submitted that the judge was correct to refuse a stay under Article 28.

The decision of the Supreme Court of the UK in *The Alexandros T* examined the provisions on *lis alibi pendens*, related actions and seisin under Articles 27, 28 and 30 respectively of the Brussels I Regulation.<sup>9</sup> Although the UK Supreme Court was unanimous in deciding that Article 27 did not apply to the claims relating to an indemnity and exclusive jurisdiction agreement, a majority (Lord Mance and Lord Neuberger dissenting) held that Article 27 did not apply to the insurers application for declaratory judgments that they were released from all claims in view of the full and final settlement of the claims. The UK Supreme Court was unanimous in its judgment that, if Article 28 applied, as the proceedings were related actions, and if the English court were second seised, they would not exercise their discretion to stay the English proceedings in light of the English jurisdiction agreements.

After the landmark ruling of the UK Supreme Court the case was remitted back to the Court of Appeal for consideration of the appeal from the summary judgment of the judge at first instance.<sup>10</sup> The decision of Burton J was upheld, allowing declarations and damages to be claimed for breach of English jurisdiction agreements by the institution of proceedings in another Member State (Greece). It was decided that neither the damages remedy nor claims for declarations for breach of English jurisdiction agreements violated EU law.

Flaux J has recently delivered judgment in the latest instalment of *The Alexandros T* litigation.<sup>11</sup> The decision concerns relief sought by the insurers and servants and agents of the insurers, against whom proceedings had been commenced in Greece. The ruling is particularly instructive in its approach to granting equitable relief where proceedings are brought before the courts of another Member State in breach of the settlement agreement and where the English court is unable to grant an anti-suit injunction to enforce the exclusive jurisdiction agreement due to the constraints imposed by the European Union law of international civil procedure.

This article will commence with a cursory look at the factors giving rise to the phenomena of parallel proceedings and the legal techniques used to manage and control the incidence of

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enforcement of jurisdictional party autonomy in the EU are considered in the course of examining the series of decisions.

<sup>7</sup> *Starlight Shipping Co v Allianz Marine & Others* [2011] EWHC 3381 (Comm); [2012] 1 Lloyd's Rep 162 (Burton J).

<sup>8</sup> *Starlight Shipping Co v Allianz Marine & Others* [2012] EWCA Civ 1714; [2013] 1 Lloyd's Rep 217 (Longmore, Toulson and Rimer LJ).

<sup>9</sup> *The Alexandros T* [2013] UKSC 70; [2014] 1 All ER 590 (Lords Neuberger, Mance, Clarke, Sumption and Hughes); See Y Baatz, "The effectiveness of settlement agreements and English jurisdiction agreements" [2014] *Lloyds Maritime and Commercial Law Quarterly* 159; J McComish, "Stay of Parallel Proceedings and the Brussels I Regulation" (2014) *Cambridge Law Journal* 270.

<sup>10</sup> *Starlight Shipping Co v Allianz Marine & Others* [2014] EWCA Civ 1010 (Longmore LJ, Rimer LJ and Lord Toulson).

<sup>11</sup> *Starlight Shipping Co v Allianz Marine & Others* [2014] EWHC 3068 (Comm) (Flaux J).

concurrent proceedings in international commercial litigation. The collective impact of the CJEU's landmark decisions curbing jurisdictional party autonomy and its enforcement in the EU along with innovative alternative remedies developed by the English courts for the European conflicts of jurisdictions are then considered. The concept animating Articles 27 and 28 of the Brussels I Regulation is also explored. The decision of the Supreme Court of the UK in *The Alexandros T* is then examined within the framework of the existing judicial decisions and academic commentary on Articles 27 and 28 of the Brussels I Regulation. The ramifications of the decision for the management and control of parallel proceedings, the potential risk of irreconcilable or inconsistent judgments, the deference accorded to the principle of party autonomy, and the prospects for emerging tactical ploys in the European Union law of international civil procedure are analysed. At this juncture, the amendments to the *lis pendens* provisions seeking to augment jurisdictional party autonomy in the Brussels I Regulation (Recast) are discussed.<sup>12</sup> The recent Court of Appeal ruling upholding Burton J's first instance decision awarding declarations and damages for breach of English exclusive jurisdiction agreements is then assessed. In particular, the compatibility of these alternative remedies with the Brussels I Regulation's multilateral 'double convention'.<sup>13</sup> system prioritizing the principles of mutual trust and the effectiveness of the Regulation (*effet utile*) is examined. Flaux J's recent decision concerning the construction of the settlement agreement and the specific performance of the LMI settlement agreement is also considered.

## **B. The phenomena of parallel proceedings in private international law**

The term 'parallel proceedings' refers to the concurrence of legal proceedings in the courts of two different legal systems over the same or closely related matters.<sup>14</sup> The rise in the incidence of parallel proceedings worldwide is driven by the demands of globalization, technological advancements<sup>15</sup> and the movement of persons, companies and property across borders with little or no hindrance.<sup>16</sup> Delocalised transnational transactions with links to more than one state are increasingly frequent in the world today and these transactions have the potential to give rise to multistate civil and commercial litigation where multiple national courts exercise 'horizontally'.<sup>17</sup> overlapping or concurrent jurisdiction.<sup>18</sup> With a range of potential fora available to the prospective

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<sup>12</sup>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 ('Brussels I Regulation Recast').

<sup>13</sup>'conventions 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.

<sup>14</sup>G A Bermann, "Parallel Litigation: Is Convergence Possible?" (2011) *Yearbook of Private International Law* 21, 21; G 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, 579.

<sup>15</sup>Technological advancements in transport and telecommunication in particular.

<sup>16</sup>See A S Bell, *Forum Shopping and Venue in Transnational Litigation* (Oxford University Press, 2003) 1-5; The European Union's internal market seeks to guarantee the free movement of goods, capital, services, and people within the EU's twenty eight Member States: See, generally, M Horspool and M Humphreys, *European Union Law* (7<sup>th</sup> Edn, Oxford University Press, 2012) Chapters 9-13.

<sup>17</sup>C McLachlan, *Lis Pendens in International Litigation* (Martinus Nijhoff Publishers, 2009) 40-44.

<sup>18</sup>Bell (*supra* n 16) 5-14; McLachlan (*supra* n 17) 44-46 .

claimant, the claimant will seek a forum which provides the most advantageous set of procedural, substantive and choice of law rules.<sup>19</sup> This practice of a rational claimant choosing the most advantageous forum to litigate in is referred to as 'forum shopping'.<sup>20</sup>

In a globalized world where multiple fora exercise horizontally overlapping jurisdiction and forum shopping is a norm, parallel litigation can principally arise in two scenarios.<sup>21</sup> First, is the case of a preliminary tactical skirmish between the claimant and the defendant over the issue of jurisdiction, in which each party commences proceedings in their preferred forum. This 'litigation about where to litigate' determines the jurisdiction where the case will be heard on the merits. However, this tactical battle over jurisdiction need not result in a full trial on the merits of the dispute as a party may capitulate and compromise as a result of the crystallization of the civil procedural and private international law norms on the selection of a forum. Secondly, the prospective claimant may have sound reasons to commence and pursue until trial coordinated parallel litigation in more than one state. A very common example of this is international fraud litigation, where the widespread nature of the fraud and its perpetrators, and the dissipation of its monetary proceeds may necessitate a coordinated attempt at multistate litigation.

### C. Legal techniques for the control of competing jurisdictions

The control and management of parallel proceedings with multiple jurisdictions being seised of the same or related matter is an issue which needs resolution.<sup>22</sup> However, there is no one single definitive response to *lis pendens*, but a variety of approaches each rooted in their respective legal tradition and culture.<sup>23</sup> This section will identify these different approaches before moving on to examine the CJEU's very significant rulings limiting the enforcement of jurisdictional party autonomy in the European Union Judicial Area. Alternative remedies for the conflicts of jurisdictions developed by the English common law of conflict of laws in the form of declarations and damages for breach of English exclusive jurisdiction agreements may yet fill the void created by the now defunct anti suit injunction.

One way of approaching the issue is to tolerate parallel proceedings and leave any questions of conflicting judgments to be dealt with at the recognition and enforcement of judgments stage, by application of the rules of *res judicata*.<sup>24</sup> A second set of techniques is simple rules of priority as

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<sup>19</sup>Bell (*supra* n 16) 23-48.

<sup>20</sup>*The Atlantic Star* [1974] AC 436, 471 Lord Simon of Glaisdale stated that: "'Forum shopping' is a dirty word; but it is only a pejorative way of saying that, if you offer a plaintiff a choice of jurisdiction, 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."

<sup>21</sup>McLachlan (*supra* n 17) 36-40.

<sup>22</sup>McLachlan (*supra* n 17) 21, states the objectives of the rules for the control of international parallel proceedings: (a) as a pre-emptive corollary of the *res judicata* effect of foreign judgments; (b) to promote judicial efficiency; (c) as a means of declining or fine-tuning otherwise excessive exercises of original jurisdiction; (d) to promote comity between courts and (e) to promote the Rule of Law by providing due process for the fair trial of the dispute.

<sup>23</sup>A T von Mehren and E Gottschalk, *Adjudicatory Authority in Private International Law: A Comparative Study* (Martinus Nijhoff Publishers, 2007) 350; Bermann, *supra* n 14, 21.

<sup>24</sup>*Laker Airways Ltd. v. Sabena, Belgian World Airlines* 731 F. 2d 909 (DC Cir., 1984) 926-927 (Judge Wilkey).

between two concurrent proceedings.<sup>25</sup> A third technique which may be utilised in dealing with closely related proceedings is that of consolidation, so as to enable claims concerned with substantially the same underlying facts, but perhaps involving different parties, to be litigated once in a single forum.<sup>26</sup> A jurisdiction agreement is an expression of the principle of party autonomy which gives precedence to the joint will of the parties in relation to choice of forum.<sup>27</sup> Thus the mutual agreement of the parties ensures to a large degree that the choice of forum will be respected by the parties and upheld by the courts. A fifth set of techniques for dealing with parallel litigation is to confer upon the court the discretion to decline jurisdiction in favour of the courts of another State.<sup>28</sup> Another possible technique is to restrain the parties from pursuing parallel litigation in another court or tribunal by issuing an anti-suit injunction.<sup>29</sup>

Having identified the different approaches used to control or manage the incidence of concurrent proceedings, it is now time to examine the European Union law of international civil procedure and the enforcement of party autonomy within that multilateral jurisdiction and judgments framework.

#### **D. Party autonomy and its enforcement in the EU: the overarching mutual trust principle reins in the pragmatic spirit of the English common law of conflict of laws**

*The Alexandros T* litigation in the English courts should be viewed in the wider context of the collective impact of the Court of Justice of the European Union's<sup>30</sup> landmark decisions in *Gasser v MISAT*,<sup>31</sup> *Turner v Grovit*<sup>32</sup> and *West Tankers*.<sup>33</sup> These rulings have meant that jurisdictional party autonomy and its enforcement in the EU have suffered a major setback. The predominantly civilian CJEU administers and interprets a largely 'closed system' multilateral jurisdiction and judgments regime which accords primacy to the overarching principle of mutual trust and systemic order over and above the provision of substantive justice to the litigant in the individual case.<sup>34</sup> The notorious decision in *Gasser* confirmed that the strict, automatic, blind and first come first served *lis pendens* rule enshrined in Article 27 of the Brussels I Regulation prevails over the choice of court agreement

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<sup>25</sup> Art II (3) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) (signed 10 June 1958, entered into force 7 June 1959) 330 UNTS 38; Art 27 of the Brussels I Regulation; Art 29 of the Brussels I Regulation (Recast).

<sup>26</sup> Art 6 of the Brussels I Regulation; Art 8 of the Brussels I Regulation (Recast).

<sup>27</sup> Art 23 of the Brussels I Regulation; Art 25 of the Brussels I Regulation (Recast); Art 5 of the Hague Convention on Choice of Court Agreements (30 June 2005) in R A Brand and P Herrup, *The 2005 Hague Convention on Choice of Court Agreements, Commentary and Documents* (Cambridge University Press, 2008).

<sup>28</sup> The common law doctrine of *forum non conveniens* as enunciated in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, [1986] 3 All ER 843; Art 28 of the Brussels I Regulation; Art 30 of the Brussels I Regulation (Recast).

<sup>29</sup> *Airbus Industrie GIE v Patel* [1999] 1 AC 119.

<sup>30</sup> 'CJEU' formerly the European Court of Justice (ECJ).

<sup>31</sup> Case C-116/02 *Erich Gasser GmbH v MISAT Srl* [2003] ECR I-14693.

<sup>32</sup> Case C 159/02 *Turner v Grovit* EU:C:2004:228, [2005] 1 AC 101.

<sup>33</sup> Case C 185/07 *West Tankers* EU:C:2009:69, [2009] 1 AC 1138.

<sup>34</sup> T 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 University Press, 2013) 12, para 1.28; R A Brand, *Transaction Planning Using Rules on Jurisdiction and the Recognition and Enforcement of Judgments* (Martinus Nijhoff, 2014) Chapter IV, 212-229; T C Hartley, "The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws" (2005) *International and Comparative Law Quarterly* 813.

provision in Article 23 of the same Regulation.<sup>35</sup> In *Turner v Grovit* and then *West Tankers*, 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’<sup>36</sup> enshrined in the Brussels I Regulation. Essentially, it is a question of whether the institutional value of harmony between courts should prevail over the more personal value of justice in the individual case.<sup>37</sup> From a civil law perspective, the widely adhered to English common law criticisms of the troika of CJEU decisions are mitigated largely due to the prevalence of a “paradigmatically”<sup>38</sup> or “fundamentally”<sup>39</sup> different jurisdictional regime.<sup>40</sup> A jurisdictional regime which incorporates a strict priority based *lis pendens* mechanism to resolve conflicts of jurisdiction and where jurisdiction is primarily a matter for the multilateral allocation of regulatory authority between states rather than the enforcement of the domestic private law rights and obligations of the parties to the litigation.<sup>41</sup> A difference of perspective, however, does not detract from the universally perceived shortcoming of the Brussels I Regulation that it does not adequately protect jurisdiction agreements from the threat of pre-emptive torpedo actions.<sup>42</sup>

The precedence of the *lis pendens* rule over the choice of court agreement provision in the scheme of the Brussels I Regulation has been abused by the commencement of ‘torpedo’<sup>43</sup> style tactical litigation where a party pre-empts litigation for the positive assertion of liability by commencing proceedings for negative declaratory relief in a Member State court with a slow moving civil justice system. Under the *lis pendens* rule of the Brussels I Regulation a positive assertion of liability in one Member State and a claim for negative declaratory relief in another Member State constitute the ‘same cause of action’ for the purposes of Article 27.<sup>44</sup> The preclusion of proceedings in the court second seised or the nominated court in an exclusive jurisdiction agreement until the time the court first seised declines jurisdiction is exacerbated by the fact that the civil justice systems

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<sup>35</sup>See Jonathan Mance, “Exclusive Jurisdiction Agreements and European Ideals” (2004) *Law Quarterly Review* 357.

<sup>36</sup>“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”: *Turner v Grovit* (*supra* n 31) [24] and [27]; See F Blobel and P Späth, “The Tale of Multilateral Trust and the European Law of Civil Procedure” (2005) *European Law Review* 528.

<sup>37</sup>T C Hartley, ‘Antisuit Injunctions and the Brussels Jurisdiction and Judgment Convention’ (2000) *International and Comparative Law Quarterly* 166, 171.

<sup>38</sup>R Michaels, ‘Two Paradigms of Jurisdiction’ (2006) *Michigan Journal of International Law* 1003.

<sup>39</sup>J Harris, ‘Understanding the English Response to the Europeanisation of Private International Law’ (2008) *Journal of Private International Law* 347, 352-353.

<sup>40</sup>See A Gardella & L G Radicati Di Brozolo, “Civil Law, Common Law and Market Integration: The EC Approach to Conflicts of Jurisdiction” (2003) *American Journal of Comparative Law* 611.

<sup>41</sup>Harris, *supra* n 39, 372-374.

<sup>42</sup>B Hess, T Pfeiffer and P Schlosser, *The Brussels I Regulation (EC) No 44/2001, The Heidelberg Report on the Application of Regulation Brussels I in 25 Member States (Study JLS/C4/2005/03)* (Verlag CH Beck, 2008) [388], 112.

<sup>43</sup>See M Franzosi, “Worldwide Patent Litigation and the Italian Torpedo” (1997) *European Intellectual Property Review* 382.

<sup>44</sup>Case 144/86 *Gubisch Maschinenfabrik KG v Palumbo* [1987] ECR 4861; Case C-406/92 *The Tatry* EU:C:1994:400, [1999] QB 515.

of some Member States suffer from protracted delays<sup>45</sup> and it may take many years for a court to adjudicate on the issue of jurisdiction.<sup>46</sup> Moreover, the lack of a preliminary procedure for the separate assessment of jurisdictional issues in some Member States contributes to the delays, which are imminent in a civil procedural regime which assesses jurisdictional issues and the substantive claim on the merits simultaneously.<sup>47</sup> The anti-suit injunction was a pragmatic remedy which could have been employed to restrain the claimant in the court first seised from commencing or continuing with proceedings in breach of an English exclusive jurisdiction agreement. However, the court first seised rule coupled with the cardinal principle of mutual trust have conferred on the courts of all Member States equality in the determination of procedural jurisdiction (*kompetenz-kompetenz*).<sup>48</sup> As a consequence, jurisdictional party autonomy in the European Union has been compromised. The nominated court in an exclusive choice of court agreement can only exercise jurisdiction once the court first seised has declined jurisdiction. If the court first seised has declared the choice of court agreement invalid or ineffective, the resulting judgment may be recognized in other Member States under Chapter III of the Brussels I Regulation.<sup>49</sup>

Following the prohibition of anti-suit injunctions within the European Union, the damages remedy for breach of exclusive jurisdiction agreements has presented itself as a likely contender in the scheme of techniques for the control of parallel litigation.<sup>50</sup> Declaratory relief can also be relied

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<sup>45</sup>See A Dickinson, "A Charter for Tactical Litigation in Europe? *Turner v Grovit*" [2004] *Lloyds Maritime and Commercial Law Quarterly* 273, 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](http://www.europa.eu.int/comm/enlargement/report_2003/index.htm)> accessed 15 December 2014.

<sup>46</sup>See Case C-159/97 *Transport Castelletti v Hugo Trumphy* [1999] ECR I-1597: The Italian court in this case took eight years to adjudicate on the issue of jurisdiction.

<sup>47</sup>Hess, Pfeiffer and Schlosser, *supra* n 42, [170]-[171], 49-50.

<sup>48</sup>In a contract with a dispute resolution agreement, the doctrine of *kompetenz-kompetenz* specifically means that the chosen forum should have the competence to decide its own jurisdiction. See McLachlan (*supra* n 17) 46-48; Z S Tang, *Jurisdiction and Arbitration Agreements in International Commercial Law* (Routledge, 2014) 74-82.

<sup>49</sup>Art 33 of the Brussels I Regulation; cf S 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 recognized or enforced in the United Kingdom.

<sup>50</sup>*Donohue v. Armco Inc.* [2001] UKHL 64, [2002] 1 All ER 749 (Lord Bingham of Cornhill at [36], Lord Hobhouse of Woodborough at [48] and Lord Scott of Foscote at [75]); *Union Discount Co Ltd v Zoller and Others* [2001] EWCA Civ 1755, [2002] 1 WLR 1517 (Schiemann LJ); For the development of the idea of the damages remedy for breach of jurisdiction agreements in the writings of the pre-eminent English academic proponent, see, A Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press, 2008) Chapter 8; A Briggs, "Anti-suit Injunctions and Utopian Ideals" (2004) *Law Quarterly Review* 529, 532; A Briggs, "Decisions of British Courts during 2001 involving Questions of Private International Law" (2001) *British Yearbook of International Law* 437, 446-452; The Spanish *Tribunal Supremo* has also granted damages for breach of a Spanish choice of court agreement in a case outside the scope of the Brussels I Regulation: *Sogo USA Inc v Angel Jesus*, STS (Sala de lo Civil, Sección 1ª), 12 January 2009, Repertorio de Jurisprudencia 2009/544; see S Alvarez Gonzalez, "The Spanish Tribunal Supremo Grants Damages for Breach of a Choice of Court Agreement" [2009] *IPRax* 529; S Sanchez Fernandez, 'Choice of Court Agreements: Breach and Damages within the Brussels I Regime' (2010) *Yearbook of Private International Law* 377, 382-385; For discussion of the debate about the classification and enforcement of choice of court agreements via damages for breach of such agreements in the German legal system, see, U Magnus and P Mankowski, *Brussels I Regulation* (2<sup>nd</sup> ed, Sellier European Law Publishers, 2012)



upon in the changing legal landscape of the EU to thwart the recognition and enforcement of a competing judgment from the courts of another Member State obtained in breach of an English arbitration agreement.<sup>51</sup> Therefore, claims for declarations and damages for breach of exclusive jurisdiction agreements can be considered to be innovative alternatives to the now defunct anti-suit injunctions.

Undoubtedly, the enforcement of party autonomy in the EU has suffered a major blow by the decommissioning of the anti-suit injunction. The existence of this precarious state of affairs brings us to the case of *The Alexandros T*, where both the *lis pendens* and the related actions provisions of the Brussels I Regulation were engaged in a dispute concerning the enforcement of English settlement and jurisdiction agreements. The next section will examine the concept animating Articles 27 and 28 of the Brussels I Regulation and serve as an effective prelude to the discussion of the UK Supreme Court decision.

### **E. The concept of Articles 27 and 28 of the Brussels I Regulation**

Articles 27 and 28 are part of Section 9 of Chapter II of the Brussels I Regulation and address the problem of irreconcilable judgments emanating from different Member States, by preventing those concurrent proceedings which have the potential to give rise to such judgments.<sup>52</sup> In a sense, the strict rule of priority of actions enshrined in Article 27 and the race to the court house that it can encourage anticipates the race to judgment that the *res judicata* approach to tackling irreconcilable judgments at the recognition and enforcement stage can give rise to.<sup>53</sup> In preventing concurrent proceedings which can give rise to irreconcilable judgments, both Articles 27 and 28 accord primacy to the court first seised of the proceedings and require proceedings in other courts to cease, by requiring the staying or dismissal of proceedings.

Articles 27 and 28 engage with different aspects or layers of the problem of irreconcilable judgments. Article 28 is concerned with the broader or more general problem of irreconcilable judgments, and in principle regulates all cases where there is the potential for inconsistent decisions originating in different Member States. In contrast, Article 27 is concerned with the narrower or

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511; U Magnus, "Choice of Court Agreements in the Review Proposal for the Brussels I Regulation" in E Lein (ed), *The Brussels I Review Proposal Uncovered* (BIICL, 2012) 89-90; J Steinle and E 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; F Sparka, *Jurisdiction and Arbitration Clauses in Maritime Transport Documents: A Comparative Analysis* (Springer, 2010) 81.

<sup>51</sup>*West Tankers Inc. v Allianz SpA* [2011] EWHC 829 (Comm); *West Tankers Inc. v Allianz SpA* [2012] EWCA Civ. 27.

<sup>52</sup>See L Collins et al (eds), *Dicey, Morris and Collins on the Conflict of Laws* (15<sup>th</sup> edn, Sweet and Maxwell, 2012) 570-583; J J Fawcett and J M Carruthers, *Cheshire, North & Fawcett: Private International Law* (14<sup>th</sup> edn, Oxford University Press, 2008) 303-315; A Briggs and P Rees, *Civil Jurisdiction and Judgments* (5<sup>th</sup> edn, Informa Law, 2009) 311-343; P R Beaumont and P E McEleavy, *Anton's Private International Law* (3<sup>rd</sup> edn, SULI/W Green, 2011) 351-359; R Fentiman, *International Commercial Litigation* (Oxford University Press, 2010) 421-452; R Fentiman in Magnus and Mankowski (eds), *Brussels I Regulation* (*supra* n 50) Arts 27-30, 558-560; McLachlan (*supra* n 17) 111-117; J Hill and A Chong, *International Commercial Disputes: Commercial Conflict of Laws in English Courts* (4<sup>th</sup> edn, Hart Publishing, 2010) 274-291; A Layton and H Mercer (eds), *European Civil Practice* (Volume 1, 2<sup>nd</sup> edn, Thomson Sweet & Maxwell, 2004) 770-815.

<sup>53</sup>For the 'anticipatory *res judicata*' justification for the *lis pendens* doctrine, See McLachlan (*supra* n 17) 88.

more specific problem of irreconcilable judgments which compete for enforcement within Chapter III of the Brussels I Regulation. Article 27 is in effect aimed at preventing *conflicting* judgments with mutually exclusive legal effects and Article 28 applies to *inconsistent* judgments which reach different conclusions but are legally compatible. Article 27 is thus an aspect of the Brussels I Regulation's regime for the mutual recognition and enforcement of judgments between Member States. On the other hand, Article 28 serves the broader goal of ensuring the coordination of the exercise of adjudicatory authority in the EU, and promoting uniform decisions. Thus, Article 27 regulates a particular aspect of a more general problem addressed by Article 28.

Articles 27 and 28 seek to avoid irreconcilable judgments by identifying and controlling those cases involving parallel proceedings in which the problem is likely to occur. Article 27 avoids conflicting judgments by regulating cases where the two sets of proceedings are legally congruent: those in which the proceedings have the same legal objective, and so may result in competing orders or awards. Article 28 avoids inconsistent judgments by regulating proceedings that are merely related: those in which the legal issues are the same, although there is no risk of a competition for enforcement, because the legal objectives are different.

Article 27 gives priority to the court first seised in two ways: by requiring (not merely permitting) the second court to decline jurisdiction if the first court asserts jurisdiction; and by requiring the second court to stay its proceedings to allow the first court to determine its competence. Article 28 permits (but does not require), the second court to stay its proceedings whenever there are related proceedings in two States, and to decline jurisdiction if both actions may be consolidated in the first court.

Articles 27 and 28 govern the procedure of the second court, except when the second court has exclusive jurisdiction under Article 22.<sup>54</sup> However, exclusive jurisdiction under Article 23 does not affect the operation of Articles 27.<sup>55</sup> Under Article 27 the second court has no choice but to desist, if the preconditions for staying or dismissing proceedings are satisfied. By contrast, Article 28 confers upon the second court discretion to stay or dismiss proceedings. Arguably, there may be in effect a presumption that the second proceeding should cease,<sup>56</sup> but the second court may choose to allow its proceedings to continue, if it considers that the 'presumption' in favour of the court first seised is rebutted.

Articles 27 and 28 do not confer substantive jurisdiction or jurisdiction on the merits of the claim upon the court first seised. They merely regulate the behaviour of the court second seised. Nevertheless, they confer upon the court first seised sole competence to determine in which Member State proceedings should be brought, except where the court second seised has exclusive jurisdiction under Article 22. If the court first seised asserts jurisdiction, no other court may hear the case. If it does not, only then may the second court consider its own jurisdiction – only if the first

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<sup>54</sup>Case C-438/12 *Weber v Weber* EU:C:2014:212, [56]; [2014] WLR (D) 165; Where the court second seised has exclusive jurisdiction pursuant to Art 22 (Art 24 of the Recast Regulation) a judgment issued by a court in another Member State is also bound to be refused recognition if an application is made for refusal of its enforcement, see A Briggs, *Private International Law in English Courts* (Oxford University Press, 2014) 308.

<sup>55</sup>Case C-116/02 *Erich Gasser v. MISAT Srl*. [2003] ECR I-14693; The Brussels I Regulation Recast has created an exception to the general *lis pendens* rule in cases where the court second seised is nominated by an exclusive choice of court agreement: See Recital 22 and Arts 29(1) and 31(2) of the Brussels I Regulation Recast.

<sup>56</sup>Case C-129/92 *Owens Bank Ltd v Bracco* EU:C:1994:13, [1994] QB 509.

court declines, may the second court assert jurisdiction. In that sense, Articles 27 and 28 confer procedural jurisdiction upon the first court ('jurisdiction to determine jurisdiction'<sup>57</sup>).

The operation of Articles 27 and 28 is facilitated by a provision, which autonomously defines the time at which a court becomes seised as that at which the first legally relevant step in the proceedings is taken.<sup>58</sup>

Having identified and considered the theoretical legal basis and concept underlying Articles 27 and 28 of the Brussels I Regulation, the time is ripe to turn towards an examination of the decision of the UK Supreme Court in *The Alexandros T* within the context of the existing judicial and academic authorities. An in depth discussion of the legal issues raised by the case will be interspersed with the implications of the decision for the most appropriate approach to adopt in the control and management of parallel proceedings, the increased potential risk of irreconcilable judgments, the augmentation of jurisdictional party autonomy in cases of European Union *lis pendens* and the possible emergence of new tactical ploys in the European Union law of international civil procedure.

## **F. Article 27 issues in *The Alexandros T*: introduction**

In relation to Article 27, the issues for determination before the UK Supreme Court were whether the proceedings in Greece and the proceedings in England involved 'the same cause of action', which court was the court first seised and the late reliance by the respondents on Article 27. At the outset, it should be noted that the CJEU has held that the principles developed in its jurisprudence with regard to Articles 21 and 22 of the Brussels Convention<sup>59</sup> apply equally to Articles 27 and 28 of the Brussels I Regulation.<sup>60</sup>

The purpose of Article 27 is to prevent the courts of two Member States from giving conflicting judgments and to preclude, so far as possible, the non-recognition of a judgment on the ground that it is irreconcilable with a judgment given by the court of another Member State.<sup>61</sup> Therefore, Article 27 anticipates and lessens the need for recourse to the preclusive provisions under Articles 34(3) and (4) of the Brussels I Regulation at the recognition and enforcement of

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<sup>57</sup> Also referred to as '*kompetenz-kompetenz*' (in the German language) or 'competence-competence': See McLachlan (*supra* n 17) 46-48; Tang (*supra* n 48).

<sup>58</sup> Art 30 of the Brussels I Regulation (Art 32 of the Recast Regulation) and Recital 15 of the Brussels I Regulation. Under the Brussels Convention a court was considered to be seised of proceedings on the date on which, according to its own national civil procedural law, the proceedings before it could be said to be definitively pending. See Briggs, *supra* n 54, 302-303.

<sup>59</sup> Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention/ Jurisdiction and Judgments Convention) (Brussels, 27 September 1968).

<sup>60</sup> Case C-133/11 *Folien Fischer AG v Ritrama SpA* EU:C:2012:664; [2013] QB 523, [31] and [32]; The Brussels Convention, the Brussels I Regulation and the Recast Regulation should be regarded as evolving versions of the same instrument to ensure the continuity of the law: Recital 19 of the Brussels I Regulation and Recital 34 of the Brussels I Regulation Recast; See E B Crawford and J M Carruthers, "Connection and Coherence Between and Among European Instruments in the Private International Law of Obligations" (2014) *International and Comparative Law Quarterly* 1.

<sup>61</sup> Case 144/86 *Gubisch Maschinenfabrik KG v Palumbo* [1987] ECR 4861, [8].

judgments stage.<sup>62</sup> The objective of Article 28 is to improve coordination of the exercise of judicial functions within the European Union and to avoid conflicting and contradictory decisions, thus facilitating the proper administration of justice.<sup>63</sup>

### **G. Article 27 issues in *The Alexandros T*: “same cause of action”**

Lord Clarke, delivering the majority judgment in *The Alexandros T*, first addressed the question of whether the English and the Greek proceedings share the same cause or causes of action. This section will examine the state of the judicial and academic authorities on the ‘same cause of action’ issue, discuss the decision of the UK Supreme Court on the point and then proceed to analyse the contribution of the decision in *The Alexandros T* to the appropriate approach to be adopted when interpreting the ‘same cause of action’ in Article 27.

The phrase ‘same cause of action’ in Article 27 has an independent and autonomous meaning as a matter of European Union law and it is thus not to be interpreted according to the criteria of national law.<sup>64</sup> It is submitted that the application of Article 27 gives rise to a problem of characterization.<sup>65</sup> Before a court can decide whether the two sets of proceedings share a common ‘cause of action’, the court must identify the basis and objective of each action. In effect, the court must characterize both actions so as to identify their essential features. This can be a challenging exercise, because the manner in which each action has proceeded under the local law of the Member State in question might disguise its essential features. Differences in form and procedure may hide the essential similarity between different actions. Keeping these considerations in mind, the adoption of an autonomous pan European or internationalist approach to the characterization of the respective causes of action is better suited for the purposes of the uniform application of Article 27 than reliance on parochial concepts rooted in the idiosyncrasies of national law. The development and subsequent refinement of autonomous European causes of action encouraged by the application of Article 27 may thus also lead to a degree of convergence between the diverse legal systems of the EU Member States and their substantive private law regimes. The CJEU has approached the ‘same cause of action’ issue by seeking to ignore the differences under local law and procedure and focussing on the essence of each action.<sup>66</sup>

In order for proceedings to involve the same cause of action they must have “*le même objet et la même cause*”.<sup>67</sup> This expression derives from the French language version of the Brussels I Regulation text and is not reflected expressly in the English or German language texts. However, the CJEU has held that the French language version of the text which incorporates a separation of ‘cause

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<sup>62</sup>For the ‘anticipatory *res judicata*’ rationale for the *lis pendens* doctrine, see McLachlan (*supra* n 17) 88.

<sup>63</sup>Case C-406/92 *The Tatry* EU:C:1994:400, [1999] QB 515, [32], [52] and [55]; *Sarrio SA v Kuwait Investment Authority* [1999] 1 AC 32, 39F-H (Lord Saville).

<sup>64</sup>Case 144/86 *Gubisch Maschinenfabrik KG v Palumbo* [1987] ECR 4861, [11].

<sup>65</sup>Fentiman, *Brussels I Regulation* (*supra* n 52) 589-590; Fentiman, *International Commercial Litigation* (*supra* n 52) 439; McLachlan (*supra* n 17) 123-127.

<sup>66</sup>See Case C-406/92 *The Tatry* EU:C:1994:400, [1999] QB 515: An action *in rem* and an action *in personam* were held to have the ‘same cause of action’ for the purposes of Art 27. The classification of a claim under national law is not material for the purposes of establishing identity of object and identity of cause.

<sup>67</sup>“*le meme objet et la meme cause*” (French) Translation: “the same object and the same cause”; see Briggs, (*supra* n 54) 310-311.

of action' into *le même objet et la même cause* applies generally.<sup>68</sup> Identity of cause means that the proceedings in each jurisdiction must have the same facts and rules of law relied upon as the basis for the action.<sup>69</sup> The cause of action refers to the juridical basis of the claim in this case. Identity of object means that the proceedings in each jurisdiction must have the same end in view.<sup>70</sup> In other words, the object of an action is its legal purpose which is defined by reference to the intended legal outcome. The strategic intentions or underlying motives of the parties are of no relevance. The assessment of identity of cause and identity of object is to be made by reference only to the claims in each action and not to the defences to those claims.<sup>71</sup>

In the course of the judgment, Lord Clarke cites *Rix J*, as he then was, in *Glencore International AG v Shell International Trading and Shipping Co Ltd*<sup>72</sup> as having summarized the approach to the 'same cause of action' issue clearly and accurately.<sup>73</sup> According to this approach, the tripartite requirements of the same parties, the same cause and the same object ensure that Article 27 is engaged in relatively straightforward situations where the individual claims are mirror images of one another. Article 28 with its more flexible discretionary power to stay is available in the case of related proceedings which need not involve the strict triple requirement of Article 27. Therefore, there is no need to fit a case into the demanding rubric of Article 27 where Article 28 is available as an alternative in case of related proceedings.

At this juncture, it is significant to note that there are alternative approaches to interpreting the 'same cause of action' requirement in Article 27. Fentiman argues that a common object or subject matter may be in practice the only requirement for the operation of Article 27, apart from the same parties.<sup>74</sup> Therefore, the additional requirement of common cause is subsumed by the requirement of a common subject matter or object. The possibility that the object or subject matter is at root the only necessary requirement is alluded to by the CJEU in *Gantner*.<sup>75</sup> Fentiman bases his conceptual approach to the issue on the observation that proceedings having a common objective or subject matter are bound to share a common legal and factual basis, while those not having a common legal objective inevitably fall outside Article 27. Another, arguably more radical, approach to the issue would be to shift the focus from the congruence between the proceedings to whether the proceedings are likely to give rise to conflicting judgments.<sup>76</sup>

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<sup>68</sup> Case C-144/86 *Gubisch Maschinenfabrik KG v Palumbo* [1987] ECR 4861, [14]; Case C-406/92 *The Tatry* EU:C:1994:400, [1999] QB 515, [38]; *Underwriting Members of Lloyd's Syndicate 980 v Sinco SA* [2009] Lloyd's Rep IR 365, [24] (Beatson J).

<sup>69</sup> Case C-406/92 EU:C:1994:400, *The Tatry* [1999] QB 515, [39].

<sup>70</sup> Case C-406/92 *The Tatry* EU:C:1994:400, [1999] QB 515, [41]; Case C-111/01 *Gantner Electronic GmbH v Basch Exploitatie Maatschappij BV* [2003] ECR I-4207, [25]; *JP Morgan Europe Ltd v Primacom AG* [2005] 2 Lloyd's Rep 665, [42]; *Underwriting Members of Lloyd's Syndicate 980 v Sinco SA* [2009] Lloyd's Rep IR 365, [24].

<sup>71</sup> Case C-111/01 *Gantner Electronic GmbH v Basch Exploitatie Maatschappij BV* [2003] ECR I-4207, [24]-[32]; See also to similar effect *Kolden Holdings Ltd v Rodette Commerce Ltd* [2008] 1 Lloyd's Rep 434, [93] (Lawrence Collins LJ) and *Research in Motion UK Ltd v Visto Corporation* [2008] 2 All ER (Comm) 560, [36] (Mummery LJ).  
<sup>72</sup> [1999] 2 Lloyd's Rep 692, 697.

<sup>73</sup> *The Alexandros T* [2013] UKSC 70; [2014] 1 All ER 590; [2014] 1 Lloyd's Rep 223, [28(VII)] (Lord Clarke).

<sup>74</sup> Fentiman, *Brussels I Regulation* (n 52) 586-588; Fentiman, *International Commercial Litigation* (*supra* n 52) 438-439.

<sup>75</sup> Case C-111/01 *Gantner Electronic GmbH v Basch Exploitatie Maatschappij BV* [2003] ECR I-4207, [25].

<sup>76</sup> Fentiman, *Brussels I Regulation* (*supra* n 52) 588.

The essential question facing the UK Supreme Court was whether the claims in England and Greece were mirror images of one another and thus legally irreconcilable. For the purposes of comparing the individual causes of actions, the UK Supreme Court considered the insurers' claims under three heads: indemnity, exclusive jurisdiction and release.

The insurers argued that the Greek proceedings had breached the indemnity clauses in the settlement agreements and that they were entitled to be indemnified against the consequences of those proceedings. Lord Clarke determined in relation to cause that the claims in Greece are claims in tort and the claim for an indemnity in England was a claim in contract. In relation to object, the object of the Greek proceedings was to establish liability under Greek law akin to tort whereas the object of the insurers' claim in England was to establish a right to be indemnified in respect of such a liability. Therefore, Lord Clarke concluded that the respective causes of action had neither the same object nor the same cause.

Lord Clarke next considered the insurers claim that the respondents had commenced the proceedings in Greece in breach of the exclusive jurisdiction agreements in the settlement agreements and in the insurance policies. The settlement agreements provided that they were subject to English law and the jurisdiction of the High Court in London. The insurers claim that they are entitled to damages for breach of the exclusive jurisdiction agreements and also sought a declaration that the claims in the Greek proceedings fell within the scope of the settlement agreement. There is an established line of judicial precedent in English law to the effect that claims based on an alleged breach of an exclusive jurisdiction or an arbitration agreement are different causes of action from claims for substantive relief based on a breach of the underlying contract.<sup>77</sup> The existence of judicial authority on the issue, lends support to the conclusion that the claims of the insurers in England for breach of exclusive jurisdiction agreements in the insurance policies and in the settlement agreements do not involve the same cause of action as the respondent's claims in tort in the Greek proceedings.

A majority of the Supreme Court (Lord Neuberger and Lord Mance dissenting on the declaration that the Greek claims had been settled) held that the insurers' claim for a declaration that the Greek claims fell within the terms of the settlement agreement and that they were entitled to a declaration that the bringing of those claims was a breach of the agreement and that they were entitled to damages for that breach did not have the same cause of action as the Greek proceedings. Again the Greek claims were claims in tort and these were contractual claims. The factual bases for the two claims were entirely different and the object of the two claims was different.

By holding that Article 27 did not apply to any of the causes of action advanced by or against the insurers, Lord Clarke arrived at a different conclusion on the 'same cause of action' issue from that of Longmore LJ in the Court of Appeal. It is submitted that, the conceptual approach adopted by the Court of Appeal to the 'same cause of action' issue is the root cause of the divergence in the rulings. The Court of Appeal conceptualized the issue of the 'same cause of action' from a broader

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<sup>77</sup>*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 Giocollegale Ltd* [2011] EWHC 2620 (Comm), [32] (Simon J).

perspective focussing on the overall result in each jurisdiction.<sup>78</sup> A broad approach risks neglecting an examination of the individual claims made in each jurisdiction to ascertain whether there is an identity of cause and an identity of object and is not consistent with the principles laid down by the CJEU. As noted above, the defences advanced in each jurisdiction are of no consequence in this comparative exercise. A fundamental distinction between Article 27 and Article 28 is that the former involves a comparison between causes of action within the different sets of proceedings or actions whereas the latter is concerned with entire actions or proceedings themselves. In paragraph 48, Longmore LJ recognized that there were causes of action in the English proceedings which are not exactly mirror images of the allegations in the Greek proceedings but said that, to the extent that they are not, “they are essentially the same in the sense that the key assertion in Greece is that there are non-contractual claims and the key assertion in England is that those non-contractual claims have been compromised by the settlement agreements”.<sup>79</sup> The focus in the Court of Appeal was on the nature of settlement agreements as a defence to the Greek action in tort, which is irrelevant. The irrelevance of the defences in each set of proceedings lends support to a narrower construction of the ‘same cause of action’ in Article 27 and that the analysis cannot involve a broad comparison of what each party ultimately hopes to achieve. The analysis simply involves a comparison between the individual claims in order to see whether they have the same cause and the same object.

Lord Neuberger and Lord Mance took a different view of the applicability of Article 27 to the insurers’ claim for a declaration that the claims in the Greek proceedings had been released by the settlement agreement. They considered that Article 27 was applicable in this case. In Lord Neuberger’s view, if the Greek court were to uphold Starlight’s claim and the English court were to grant the insurers a declaration that the claim had in fact been settled, the two judgments would be logically incompatible.<sup>80</sup> This was conceptually different from the insurers’ claim for an indemnity, which would only be commercially but not logically inconsistent with any Greek judgment in favour of Starlight. The former, but not the latter aspect of the insurers’ claim therefore fell within Article 27.

In Lord Mance’s view, the English claims for a declaration that the Greek claims had been settled or were compromised within the terms of the release were mirror images of the Greek tort claims as one asserted and the other denied the existence of liability.<sup>81</sup> Thus, they had the same cause of action. As to the same object, Lord Mance held that the end that the Greek and English proceedings had in view was the same in each case i.e. to decide the issue of liability for the torts alleged in Greece. The issue of liability was central to both sets of proceedings and if both sets of proceedings were pursued to judgment it would lead to judgments which were legally and directly incompatible. In such a situation, Article 27 would apply.

Thus, the UK Supreme Court decision in the *Alexandros T* validated a narrow construction of Article 27 by focussing on the tripartite test involving the same cause, the same object and the same

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<sup>78</sup>[2012] EWCA Civ 1714; [2013] 1 Lloyd’s Rep 217, [47]-[50] (Longmore LJ).

<sup>79</sup>*Ibid*, [48] (Longmore LJ).

<sup>80</sup>[2013] UKSC 70, [128]-[132] (Lord Neuberger); Lord Neuberger referred to the majority’s view that the English declaration claims did not fall under Art 27 as giving the expression *le même objet et la même cause* a “very narrow effect”.

<sup>81</sup>[2013] UKSC 70, [142]-[143] (Lord Mance).

parties. Individual claims in each jurisdiction were compared to determine identity of cause and object, without reference to the defences. Broad brush interpretations concerning the overall result in each jurisdiction were held to be inconsistent with the principles laid down by the CJEU. Similarly, it is submitted that an approach focussed on avoiding the threat of irreconcilable judgments rather than on the extent of congruence between each set of proceedings is not in consonance with the jurisprudence of the CJEU. The emphasis on the extent of congruence between each set of proceedings and not on avoiding the threat of irreconcilable judgments seems to suggest that the risk of contradictory judgments has deliberately not been eliminated by the CJEU's interpretation of Article 27.<sup>82</sup> In summation, the broader interpretations of the 'same cause of action' seem to lack the necessary 'gravitational force'<sup>83</sup> and are not in agreement with the letter and spirit of Article 27 as interpreted by the CJEU.

The UK Supreme Court's decision is undoubtedly imbued with the pragmatic spirit of the English common law dispensing substantive justice in the individual case. However, it may be argued that, the majority's decision does not adequately address the larger systemic issue of the threat of irreconcilable judgments, which the *lis pendens* provisions in the Brussels I Regulation are designed to curb from the very outset. The majority's very narrow or perhaps 'semantic' construction of the 'same cause of action' under Article 27 of the Brussels I Regulation militates against an autonomous and enlightened comparative law approach to characterization of the 'same cause of action' which would focus on the fundamental natures of the underlying causes of action rather than attributing significance to superficial or linguistic differences of form and idiom.<sup>84</sup> In view of the autonomous definition of 'cause of action' in the Brussels I Regulation, the majority's characterization of the reason for denial of liability as the 'contractual' settlement agreement becomes irrelevant. The distinction drawn between the Greek 'tortious' and English 'contractual' claims by the majority in relation to the insurers' claim for a declaration that the Greek claims fell within the terms of the settlement agreement (essentially a declaration of non-liability) was therefore concealing the same underlying cause of action. For instance, in *The Tatry*, an action *in rem* and an action *in personam* were held to have the 'same cause of action' for the purposes of Article 27.

In light of the different views on whether Article 27 applied to the claims for a declaration that the Greek claims fell within the terms of the release in the settlement agreements or that under the agreements the tort claims had been settled, which was similar to the claims being essentially for declarations for non-liability, Lord Clarke held that, unless the insurers abandoned any claim for a

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<sup>82</sup>Collins et al (eds.), *supra* n 52, 577; There is evidence of recognition of this narrow approach to Art 27 in the preclusive recognition and enforcement provisions under Arts 34(3) and 34(4) of the Brussels I Regulation.

<sup>83</sup>See R Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) Chapter 4 'Hard Cases'; 'Gravitational force' here refers to the pull or tension exerted by previous decisions of the CJEU on current decisions and on the eventual course the law will take. For the development of a de facto principle of precedent of EU law at the CJEU see: K McAuliffe, "Precedent at the Court of Justice of the European Union: The Linguistic Aspect" (2013) *Law and Language, Current Legal Issues* Forthcoming (SSRN): <<http://ssrn.com/abstract=2208710>> accessed 15 December 2014.

<sup>84</sup> For a discussion of the instrumental approach adopted by the English courts when applying Art 27 in relation to English jurisdiction agreements and thereby narrowing the application of *Gasser*, see Tang (*supra* n 48) 185-188.



declaration of non-liability, the question whether those claims involved the same cause of action as the claims in Greece within the meaning of Article 27 should be referred to the CJEU.<sup>85</sup>

#### **H. Article 27 issues in *The Alexandros T*: seisin under Article 27**

If it was determined that the declaratory relief pursued in the English courts (seised in 2011) and the Greek claims share the same cause of action, the question of which court was first seised becomes crucial for the operation of Article 27. Lord Clarke considered the issue briefly because if the appellants persisted in their claims for declarations and the issue became critical for the resolution of the appeal, the proper course would be to refer the question to the CJEU.

The Supreme Court observed that a court is only seised of claims by or against new parties from the date that those parties are added to the proceedings.<sup>86</sup> However, the more challenging question is whether the court first seised remains so where the proceedings are subsequently amended by the addition of new claims. It is submitted that the court should be seised of the proceedings in relation to the amendment from the date of the amendment and not from the time of the institution of the original proceedings.

The transitional provisions of Article 66 of the Brussels I Regulation support the proposition that proceedings have only one date upon which they are instituted and are inconsistent with the idea that they can have several such dates as and when new claims are added by amendment. The appellants recognised that for the purposes of deciding whether there is the same cause of action the court must look to the claims made but for the purposes of deciding which court is deemed to be first seised under Article 27, the autonomous test in Article 30 is to be applied. There is no mention of causes of action in Article 30 and the word proceedings is used twice in Article 27. Although, the word proceedings is not defined in the Brussels I Regulation, it appears nearly fifty times in the Regulation used as a word of general application. The usage of the word 'proceedings' in the Brussels I Regulation suggests that issues or causes of action or claims may change during the course of one single 'procedural unit'<sup>87</sup> of proceedings.

This approach possesses the merits of certainty and predictability but is far too simplistic and reductive to cater to the needs of the complex realities of international commercial litigation, where issues may crystallize over time. As new issues arise, whether or not linked to the original claim, a party will need to amend the claim to reflect the changing ground realities. There is considerable support in the judicial authorities and the leading English conflict of laws texts for the proposition that the new claims added to the 2006 proceedings, which were founded on the Greek proceedings and thus second in time, were new claims, that the English court should be regarded as seised of them only when they were added to the 2006 proceedings and that the Greek court was

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<sup>85</sup>Following the Supreme Court decision, the claim for a declaration that the claims made in the Greek courts fell within the terms of the release in the settlement agreement was abandoned by at least the CMI defendants: [2014] EWCA Civ 1010, [18] (Longmore LJ).

<sup>86</sup>*The Alexandros T* [2013] UKSC 70, [60] (Lord Clarke); Briggs, *supra* n 54, 305.

<sup>87</sup>See Case C-296/10 *Purrucker v Vallez-Perez* (No 2) [2010] ECR I-11163.

the first seised within the meaning of Article 27.<sup>88</sup> Notwithstanding the argument to the contrary, Lord Clarke was unsure whether the existing case law and literature has effectively engaged with the issues arising from the language of the Brussels I Regulation.

The UK Supreme Court decided that this point was not *acte clair* and that a reference to the CJEU would be necessary if the court had to decide the point.<sup>89</sup>

### **I. Article 27 issues in *The Alexandros T*: too late to rely on Article 27?**

In the Commercial Court at first instance, Starlight had expressly disclaimed any intention to rely upon Article 27. The question before the Supreme Court was whether LMI could rely on this in response to the assured's late attempt to rely upon Article 27 or whether, as the Court of Appeal had held, the latter was bound to consider Article 27 because it expressly provides that "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". There is an express requirement in Article 27(1) that the second seised court shall of its own motion stay its proceedings.<sup>90</sup> The wording of the provision clearly removes from the court the option, permitted by the Brussels Convention, of dismissing rather than staying the action,<sup>91</sup> and ensures that a court can act in the absence of an application or motion by the defendant.<sup>92</sup> However, the scope of the second court's obligation to examine jurisdiction *ex officio* is uncertain.

Undoubtedly, a defendant may make such application to the court as national procedural law permits, even if the purpose of the application is to deny the forum of its jurisdiction by seeking a stay of proceedings. It has been suggested that, if the second court's power to act *ex officio* is to have any substantial effect, it must at least be required to examine whether a stay is justified in any case where the circumstances suggest that Article 27 may be of relevance.<sup>93</sup> However, to oblige a Member State court to examine each and every case before it for the possible application of Article 27, would be impractical, burdensome and would probably go beyond what is required to give effect to the provision.<sup>94</sup> The national procedural regimes of some Member States require courts to examine jurisdiction *ex officio* when their jurisdiction is invoked, if only perhaps in limited cases, such as those involving parties originating, or events occurring in other Member States. For instance, in English law service of process abroad in a case under the Brussels I Regulation is permitted only if

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<sup>88</sup> *FKI Engineering Ltd v Stribog Ltd* [2011] 1 WLR 3264, [84] (Rix LJ); *Underwriting Members of Lloyd's Syndicate 980 v Sinco SA* [2009] Lloyd's Rep IR 365, [61]-[68] (Beatson J); *Research in Motion UK Ltd v Visto Corporation* [2007] EWHC 900 (Ch), [19] (Lewison J); Collins et al (eds), *supra* n 52, 574-580; Briggs and Rees, *supra* n 52, 320-327; Fentiman, *International Commercial Litigation* (*supra* n 52), 433-434; Briggs, *supra* n 54, 305.

<sup>89</sup> [2013] UKSC 70, [72] (Lord Clarke).

<sup>90</sup> Schlosser Report on the Brussels Convention [1979] OJ C 59/71, 125, [181]; Briggs, *supra* n 54, 307.

<sup>91</sup> See Layton and Mercer, *supra* n 52, 793-794.

<sup>92</sup> For a discussion on the *sua sponte* application of choice of law rules and foreign law, see M Bogdan, *Private International Law as Component of the Law of the Forum* (Martinus Nijhoff, 2012) Chapter VI, "Should Conflict Rules and Foreign Law Be Applied Ex Officio?"

<sup>93</sup> Jenard Report on the Brussels Convention [1979] OJ C 59/1, 41: "A court will not always have to examine of its own motion whether the same proceedings are pending in the courts of another country, but only when the circumstances are such as to lead the court to *believe* that this may be the case." (Emphasis added to typo in the original text).

<sup>94</sup> Layton and Mercer, *supra* n 52, 794; Fentiman, *Brussels I Regulation* (*supra* n 52), 590-591.

the claimant states that no proceedings are pending in another Member State.<sup>95</sup> A procedural norm which militates against the *ex officio* examination of jurisdiction in the English courts is that the parties and not the courts are the masters of the dispute.<sup>96</sup> This in turn raises the issue whether CPR Part 11 which specifies the procedure for an application by a defendant to dispute the court's jurisdiction but does not make provision for a *sua sponte* examination of jurisdiction is consistent with the Brussels I Regulation.<sup>97</sup> The inevitable operation of diverse national civil procedural laws in this area may compromise to some extent the uniform application of Article 27 of the Brussels I Regulation.<sup>98</sup>

The Supreme Court held that it was too late for Starlight to rely upon Article 27. The assured had not brought any claim on Article 27 within the procedural limits provided for by national law.<sup>99</sup> The judge at first instance had had an opportunity to consider Article 27. However, if it were necessary for the determination of the appeal, the question of the meaning and effect of the duty to consider Article 27 of its own motion should be referred to the CJEU.<sup>100</sup>

#### **J. Article 28 issues in *The Alexandros T*: introduction**

The exercise of discretion referred to in Article 28(1) applies to any court other than the court first seised. If the English court is the court first seised, it has no discretion to stay. Article 28 applies to related actions pending in the courts of different Member States and 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.<sup>101</sup> The fact that the various proceedings are related proceedings for the purposes of Article 28 is not in dispute. The questions in need of determination were whether the actions were pending, whether the English court was the court first seised and if it was not, how the discretion should be exercised.

#### **K. Article 28 issues in *The Alexandros T*: Seisin under Article 28**

Lord Clarke stated that the correct approach for establishing seisin under Article 28 is “once you have found two related and pending actions and seek to stay one of them, invoking Article 28, which of the two courts was the first to achieve seisin of one or other of the actions?”<sup>102</sup> The court first

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<sup>95</sup>CPR 6.19.

<sup>96</sup>*dominus litis* (Latin: ‘master of the suit’) A person who has control over an action or other judicial proceeding and can dispose of it as he thinks fit. See *Jowitt’s Dictionary of English Law* (3<sup>rd</sup> edn, Sweet and Maxwell, 2009).

<sup>97</sup>Case C-365/88 *Kongress Agentur Hagen GmbH v Zeehaghe BV* [1990] ECR I-1845, [19]-[20], ‘the Court [CJEU] has consistently held that, as regards procedural rules, reference must be made to the national rules applicable by the national court’; cf However, ‘the application of national procedural rules may not impair the effectiveness of the Convention’; See X E Kramer, “Harmonisation of Civil Procedure and the Interaction with Private International Law” in X E Kramer & C H van Rhee (eds), *Civil Litigation in a Globalising World* (TMC Asser Press/Springer, 2012) 121.

<sup>98</sup>Fentiman, *Brussels I Regulation* (supra n 52), 591.

<sup>99</sup>Voluntary submission to jurisdiction at common law and deemed submission to jurisdiction under CPR 11.

<sup>100</sup>[2013] UKSC 70, [123] (Lord Clarke).

<sup>101</sup>Art 28(3) of the Brussels I Regulation; Art 30(3) of the Brussels I Regulation Recast.

<sup>102</sup>*FKI Engineering Ltd v Stribog Ltd* [2011] 1 WLR 3264, [119] (Rix LJ).

seised means the court first seised of the action, meaning first seised of the proceedings, not of particular claims or causes of action.

Starlight argued that there was no related action pending in England when the Greek proceedings were commenced. In the alternative they say that, even if the 2006 proceedings were still alive, the English court was not first seised because the new claims now brought were entirely new claims, which should be equated with new proceedings.

The insurers argued that the 2006 proceedings were still on foot, and thus pending, having been stayed but not finally concluded. Lord Clarke agreed with the insurers on this point. In so far as the insurers were seeking to enforce the settlement agreements then the English court was first seised, as the 2006 proceedings were still on foot. They were “unstayed” for the purposes of carrying into effect the terms agreed.

For the parts of the action that were stayed under the Tomlin Orders<sup>103</sup> (i.e. the claims for breach of the exclusive jurisdiction clauses in the policies of insurance, which do not depend on the terms of the settlement agreements), Lord Clarke, following *Rofa Sport Management AG v DHLK International (UK) Ltd.*<sup>104</sup>, found that, as the 2006 proceedings had not been dismissed or discontinued, the court remained seised of them. Lord Clarke rejected Starlight’s arguments that the new claims in the 2006 proceedings should be treated as new proceedings. In the context of Article 28 it was wrong to ask which court was seised of a cause of action or claim, because Article 28 was concerned with related actions as a whole. Additionally, the “new” claims in the 2006 proceedings were not entirely new as they were unquestionably related to the original action. Hence Lord Clarke thought that the English court was first seised.

The appellants relied upon principles developed by the English courts as a matter of English law not European Union law. Lord Clarke considered this to be a permissible approach because Article 30 only provides for the circumstances in which a court is deemed to be seised but does not make express provision for the circumstances in which it ceases to be seised.<sup>105</sup>

On balance, Lord Clarke recognized the scope for argument on the point and consequently a potential reference to the CJEU. He therefore went on to consider the discretion to stay proceedings in the event that the English court was seised second. A preliminary reference to the CJEU on this issue was deemed to be unnecessary as even if the English court was second seised, it was decided that, the discretion to stay proceedings should not be exercised.

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<sup>103</sup>When a claim is settled it is common for the terms agreed to be recorded in the form of order known as a “Tomlin Order” as the form was originally devised by Mr Justice Tomlin; see *Practice Note* [1927] W.N. 290. The effect of the order is that the claim is stayed by consent of the parties and on terms scheduled to the order. The current usual wording of the order is as follows: “AND the Claimant and the Defendant having agreed to the terms set forth in the Schedule to this order IT IS ORDERED that all further proceedings in this claim be stayed except for the purpose of carrying those terms into effect and there is permission to apply for that purpose”. Not being a judgment, no interest will be attracted by any money payment due under the scheduled terms unless specifically provided for. The judge will not normally inquire into the terms of the agreement which is a contract between the parties. See *Noel v Becker (Practice Note)* [1971] 1 WLR 355 (CA) (Davies, Edmund Davies and Karminski LJ); CPR 40.6 on “Consent Judgments and Orders” in Lord Justice Jackson et al (eds), *The White Book 2015* (Sweet & Maxwell, 2015); See also, *Jowitt’s Dictionary of English Law* (3<sup>rd</sup> edn, Sweet and Maxwell, 2009).

<sup>104</sup>[1989] 1 WLR 902.

<sup>105</sup>Briggs, *supra* n 54, 305-306.

## L. Article 28 issues in *The Alexandros T*: discretion under Article 28

Based on the assumption that the English court is second seised for the purposes of Article 28, the question arose whether the action or actions should be stayed as a matter of discretion. A partial comparison may be drawn between Article 28 of the Brussels I Regulation and the common law doctrine of *forum non conveniens* in this respect.<sup>106</sup> However, the two techniques of controlling parallel proceedings differ as under Article 28 only the court second seised can exercise the discretion to stay proceedings and more significantly, natural forum considerations are absent from the Article 28 equation. The central issues engaged are the scope and nature of the discretion under Article 28. By synthesizing the language of Article 28, whereby a court has discretion to stay with the underlying *ethos* of procedural certainty, the most appropriate approach to the operation of Article 28 is where a court has discretion not to stay proceedings but only in exceptional cases.<sup>107</sup> There is support for *this* solution in the Jenard report, which states that in the event of related proceedings ‘the first duty of the court is to stay its proceedings’.<sup>108</sup>

In *Owens Bank Ltd v Bracco*<sup>109</sup>, Advocate General Lenz identified a number of factors which could be relevant to the exercise of the discretion. In brief, the circumstances of each case are of particular importance but the aim of Article 28 is to avoid parallel proceedings and conflicting decisions. In case of doubt it would be appropriate to grant a stay. Indeed, AG Lenz appears to have approved the proposition that there is a strong presumption in favour of a stay. However, he identified three particular factors as being of importance: (1) the extent of the relatedness between the actions and the risk of mutually irreconcilable decisions; (2) the stage reached in each set of proceedings; and (3) the proximity of the courts to the subject matter of the case. In conclusion, the Advocate General said at para 79 that it goes without saying that in the exercise of the discretion regard may be had to the question of which court is in the best position to decide a given question.

A matter of particular significance concerns the exercise of the Article 28 discretion where the court second seised has jurisdiction pursuant to an agreement subject to Article 23. Although the true construction of the settlement agreements and the question whether Starlight is in breach of them was a matter for the Court of Appeal, there is a strong argument that the Greek proceedings have been brought by Starlight in breach of the settlement agreements, which were subject to the exclusive jurisdiction of the English courts and in breach of the exclusive jurisdiction clauses in the insurance contracts. Therefore, there is a compelling and persuasive argument that the English courts are best placed to adjudicate on the matter. The exercise of the discretion not to stay

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<sup>106</sup>Von Mehren and Gottschalk (*supra* n 23) 317-318; *Lis pendens* is a factor to consider in determining the most appropriate forum for the purposes of the doctrine of *forum non conveniens*: R A Brand and S R Jablonski, *Forum Non Conveniens: History, Global Practice, and Future Under the Hague Convention on Choice of Court Agreements* (Oxford University Press, 2007) 34.

<sup>107</sup>Fentiman, *Brussels I Regulation* (*supra* n 52), 600-603; Fentiman, *International Commercial Litigation* (*supra* n 52), 448-449; D Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (2<sup>nd</sup> edn, Sweet & Maxwell, 2010) 494; cf Briggs, *supra* n 54, 313 argues against the presumption that the primary duty of the court seised second is to stay its proceedings. He contends that the court should look at the litigation as a whole and take account of the likely consequences of the various forms of relief which might be ordered, and the effect which these would have on an orderly and coherent resolution of disputes before deciding whether to make an order.

<sup>108</sup>Jenard Report on the Brussels Convention [1979] OJ C59/1, 41.

<sup>109</sup>Case C-129/92 *Owens Bank Ltd v Bracco* EU:C:1994:400, [1994] QB 509, [74]-[79].

proceedings under Article 28 should undoubtedly be influenced by the presence of exclusive jurisdiction clauses in favour of the English courts.

A question arises whether considerations of this nature are impermissible in the light of the decision in *Gasser*.<sup>110</sup> It was there held that, if the criteria for ordering a mandatory stay under Article 27 are satisfied, then the court second seised must stay its proceedings even if the court second seised has jurisdiction under an exclusive choice of court agreement falling within Article 23. That conclusion was reached on the basis that, under Article 27, where there are two sets of proceedings which involve the same cause of action and the same parties, the court second seised is obliged to order a stay. The Brussels I Regulation only permits one set of proceedings to continue. The position is quite different under Article 28, which clearly contemplates that where there are two related sets of proceedings they may continue in parallel. That conclusion follows from the proposition that the grant of a stay is discretionary and not mandatory. Where Article 28 is engaged and there is an exclusive choice of court agreement in favour of the second seised court, it has been held by the English courts that the court second seised should exercise its discretion in favour of refusing a stay.<sup>111</sup> This interpretation of the exercise of discretion under Article 28 received the seal of approval from the UK Supreme Court in the *Alexandros T* decision. It is quite obvious that a pragmatic approach to complex conflicts of jurisdiction in the EU demands that the claimant in the foreign proceedings is not condoned for breaching the exclusive choice of court agreement by suing in another court.

By refusing to stay proceedings under Article 28, the decision in the *Alexandros T* anticipates and is in line with the amendments to the *lis pendens* rules affected by the Brussels I Regulation Recast. Under the Brussels I Regulation Recast, deference to the principle of party autonomy in parallel proceedings will be augmented in an effort to resolve complex conflicts of jurisdiction in the EU. The prioritization of party autonomy reflects the ground realities of cross border commercial litigation, where the emphasis is on minimizing 'litigation'<sup>112</sup> and 'transaction'<sup>113</sup> risk and on the provision of remedies tailored to the needs of the litigants.<sup>114</sup>

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<sup>110</sup>Case C-116/02 *Erich Gasser GmbH v. MISAT Srl*. [2003] ECR I-14693.

<sup>111</sup>*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, *supra* n 52, 315; Fentiman, *International Commercial Litigation* (*supra* n 52), 449; Fentiman, *Brussels I Regulation* (*supra* n 52) 602-603; T Kruger, *Civil Jurisdiction Rules of the EU and their Impact on Third States* (Oxford University Press, 2008) 309-311; cf Hill and Chong (*supra* n 52) 291.

<sup>112</sup>Litigation risk is the risk to each party that any dispute will not be resolved in their preferred forum. Litigation risk which includes venue risk can be managed by the provision of jurisdiction agreements in international commercial contracts. See Fentiman, *International Commercial Litigation* (*supra* n 52) Chapter 2.

<sup>113</sup>Transaction risk is the risk that the parties' expectations will be defeated by the application of a law which does not give effect to the object of the transaction. Transaction risk can be managed by the provision of choice of law agreements in international commercial contracts. See Fentiman, *International Commercial Litigation* (*supra* n 52) Chapter 3.

<sup>114</sup>Lord Mance's apt statement in the foreword to R Fentiman's *International Commercial Litigation* succinctly describes the significance of remedies in cross border commercial litigation before the English courts: '*Ubi jus, ibi remedium* might, for a practitioner, read *ubi remedium, ibi jus*.' See Fentiman, *International Commercial Litigation* (*supra* n 52) Foreword vii.

## M. Parallel proceedings and jurisdiction agreements under the Brussels I Regulation (Recast)

The Brussels I Regulation Recast which applies to legal proceedings instituted on or after 10 January 2015 will reverse the effects of the CJEU's decision in *Gasser*.<sup>115</sup> The provisions of the Recast Regulation on parallel proceedings with the court second seised being nominated by a choice of court agreement differ from the position under the unrecast Brussels I Regulation and are closely aligned to the priority accorded to exclusive jurisdiction agreements by the Hague Convention on Choice of Court Agreements.<sup>116</sup> Article 29(1) of the Recast Regulation is subject to Article 31(2), which provides that, where a court has been chosen in accordance with Article 25 (the successor provision to Article 23 of the Brussels I Regulation) any court of another Member State shall stay its proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.<sup>117</sup> Where the court chosen has established that it has jurisdiction, any court of another Member State shall decline jurisdiction in favour of that court.<sup>118</sup> and will be bound by its duty to recognize as conclusive the ruling of that court on the scope of the clause.<sup>119</sup> 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. Where, however, there is a conflict as to whether both courts have been chosen, the court first seised will determine the validity of the jurisdiction clause.<sup>120</sup>

The risk of the solution adopted by the Recast Regulation was outlined by Advocate General Léger in his Opinion in *Gasser*.<sup>121</sup> 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

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<sup>115</sup>Hartley, *Choice of Court Agreements under the European and International Instruments* (supra n 34) Chapter 11; T C Hartley, "Choice-of-Court Agreements and the New Brussels I Regulation" (2013) *Law Quarterly Review* 309; Tang (supra n 48) 215-219; T Ratković and D Zgrabljic' Rotar, "Choice-of-Court Agreements under the Brussels I Regulation (Recast)" (2013) *Journal of Private International Law* 245.

<sup>116</sup>Adopted at the 20<sup>th</sup> Session of the Hague Conference on Private International Law, The Hague, 30<sup>th</sup> June 2005. See Art 5 of the Hague Convention on Choice of Court Agreements.

<sup>117</sup>See Recital 22 and Arts 29(1) and 31(2) of the Brussels I Regulation Recast.

<sup>118</sup>Art 31(3) of the Brussels I Regulation Recast.

<sup>119</sup>Case C-456/11 *Gothaer Allgemeine Versicherung AG v Samskip GmbH* ECLI:EU:C:2012:719, [2013] QB 548.

<sup>120</sup>Art 31(1) of the Brussels I Regulation Recast.

<sup>121</sup>Case C-116/02 *Erich Gasser GmbH v MISAT Srl* [2003] ECR I-14693, Opinion of AG Léger, para 74; A Briggs, "What should be done about Jurisdiction Agreements" (2010) *Yearbook of Private International Law* 311, 319-322; D Sancho Villa, "Jurisdiction over Jurisdiction and Choice of Court Agreements: Views on the Hague Convention of 2005 and Implications for the European Regime" (2010) *Yearbook of Private International Law* 399, 404; Ratković and Zgrabljic' Rotar (supra n 115) 263-265; I Queirolo, "Prorogation of Jurisdiction in the Proposal for a Recast of the Brussels I Regulation" in F Pocar, I Viarengo and F C Villata (eds), *Recasting Brussels I* (CEDAM, 2012) 183, 195; J P Cook, 'Pragmatism in the European Union: Recasting the Brussels I Regulation to Ensure the Effectiveness of Exclusive Choice-of-Court Agreements' (2013) *Aberdeen Student Law Review* 76, 85; 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, 556-559; cf It is uncertain, however, how real a risk this new generation of torpedoes present: Hartley, *Choice-of-Court Agreements and the New Brussels I Regulation* (supra n 115), 312-313; Richard Fentiman, *International Commercial Litigation* (Oxford University Press, 2015) 100; P Beaumont & B 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) *Spanish Yearbook of Private International Law* 129-159.

it had no jurisdiction. This was a risk but presumably a lesser one than that to which *Gasser* gave rise, as the party would need to point to a jurisdiction agreement.

#### **N. The Court of Appeal validates declarations and damages award for breach of English exclusive jurisdiction agreement**

The case was remitted back to the Court of Appeal for adjudication on the substantive issues and the court has given its judgment.<sup>122</sup> 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 upheld the ruling of Burton J 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 examined by Longmore LJ.

In the UK Supreme Court judgment, Lord Clarke had expressed the opinion that a final judgment of the English courts would be recognisable in Greece and would assist the Greek court.<sup>123</sup> Therefore, he opined that the principles of mutual trust upon which the Brussels I Regulation is founded would be respected and the risk of irreconcilable judgments would 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. 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 been performed and not been breached<sup>124</sup>—would be the difference between the hypothetical judgment that would have been obtained in the nominated forum and the actual judgment obtained in the non-contractual forum.<sup>125</sup> 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 court.<sup>126</sup> (which emanates from the principle of mutual trust). The multilateral double convention framework of common rules of direct jurisdiction and the

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<sup>122</sup>[2014] EWCA Civ 1010 (Longmore LJ with whom Rimer LJ and Lord Toulson agreed); See A Dickinson, "Once Bitten – Mutual Distrust in European Private International Law" (2015) *Law Quarterly Review* 186; J Ruddell, "Monetary Remedies for Wrongful Foreign Proceedings: *The Alexandros T (No 2)*" [2015] *Lloyds Maritime and Commercial Law Quarterly* 9.

<sup>123</sup>*The Alexandros T* [2013] UKSC 70; [2014] 1 All ER 590; [2014] 1 Lloyd's Rep 223, [96] (Lord Clarke).

<sup>124</sup>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. See E McKendrick, *Contract Law* (9<sup>th</sup> edn, Palgrave Macmillan, 2011) 339-343.

<sup>125</sup> It is submitted that difficulties in quantification pose a significant practical problem to an award of damages for breach of a choice of court agreement and present a formidable obstacle to rationally developing the damages remedy into a predictable response to breaches of jurisdiction agreements. See *OT Africa Line Ltd v Magic Sportswear Corp* [2005] EWCA Civ 710, [2005] 1 CLC 923, [33] (Longmore LJ); Briggs, *Private International Law in English Courts* (supra n 54) 399; F Garcimartin, 'Chapter 11 – Article 31(2)-(4)' in A Dickinson and E Lein (eds), *The Brussels I Regulation Recast* (Oxford University Press, 2015) 338.

<sup>126</sup>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].



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.<sup>127</sup> 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.<sup>128</sup> 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.<sup>129</sup> 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.<sup>130</sup> Declaratory relief has been employed as a shield to deny recognition to a judgment from another Member State court in breach of an English arbitration agreement.<sup>131</sup> 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.<sup>132</sup>

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. After all both anti suit injunctions and the damages remedy for breach of choice of court agreements

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<sup>127</sup>Fentiman, *International Commercial Litigation* (supra n 52), 88-90.

<sup>128</sup>See Case C-116/02 *Erich Gasser GmbH v. MISAT Srl*. [2003] ECR I-14693.

<sup>129</sup>Case C-159/02 *Turner v Grovit* EU:C:2004:228, [2005] 1 AC 101.

<sup>130</sup>Under the English common law jurisdictional regime, the declaration will establish that s 32 of the Civil Jurisdiction and Judgments Act 1982 applies, unless there was submission to the jurisdiction of the foreign court.

<sup>131</sup>*West Tankers v Allianz* [2011] EWHC 829 (Comm); *West Tankers v Allianz* [2012] EWCA Civ 27.

<sup>132</sup>T Raphael, *The Anti-Suit Injunction* (Oxford University Press, 2008) 344-345.

are grounded on the same contractual right not to be sued in a non-elected forum.<sup>133</sup> Therefore, if the 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.<sup>134</sup> The overarching principle of mutual trust and the principle of the effectiveness of EU law (*effet utile*).<sup>135</sup> 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 protracted<sup>136</sup> and not resolved with the incidence of satellite or sub-litigation and the increased potential for conflicting Member State judgments.<sup>137</sup> For the litigants, protracted litigation will result

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<sup>133</sup>*Donohue v Armco Inc.* [2001] UKHL 64, [2002] 1 All ER 749; 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; In *West Tankers Inc. v Allianz 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.”; cf Hartley casts doubt on Flaux J’s decision and argues 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 T C Hartley, “The Brussels I Regulation and Arbitration” (2014) *International and Comparative Law Quarterly* 843, 862-864; On the contrary, in Case C-536/13 *Gazprom OAO* EU:C:2015:316, the CJEU purports to limit the prohibition on anti-suit injunctions in aid of arbitration agreements to court to court proceedings in the Member States, which would grant tribunals freedom to enforce arbitral autonomy unhindered by the EU rules on civil procedure, mutual trust and the principle of effectiveness (*effet utile*).

<sup>134</sup>See s 50 of the Senior Courts Act 1981 (England & Wales) which restates the powers originally granted to the Court of Chancery by s 2 of the Chancery Amendment Act 1858, commonly known as the Lord Cairns’ Act.

<sup>135</sup>In matters not expressly covered by the terms of an EU instrument such as the Brussels I Regulation, Member States may apply national substantive and procedural rules provided that they do not render the application of EU law impossible or excessively difficult: Case 288/82 *Duijnste v Goderbauer* [1983] ECR 3663, [13]; Case C-159/02 *Turner v Grovit* [2004] ECR I-3565, [29].

<sup>136</sup>A Nuyts, “The Enforcement of Jurisdiction Agreements Further to *Gasser* and the Community Principle of Abuse of Right” in P de Vareilles-Sommieres (ed), *Forum Shopping in the European Judicial Area* (Hart Publishing, 2007) 57.

<sup>137</sup>A 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; A 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](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](http://ec.europa.eu/justice/news/consulting_public/0002/contributions/civil_society_ngo_academics_others)

in higher costs and expenses.<sup>138</sup> To quote Briggs, ‘In other words, litigation about where to litigate will be replaced by litigation about where the litigation should have taken place.’<sup>139</sup> 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.<sup>140</sup> 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.<sup>141</sup> 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.<sup>142</sup> Where available, an anti-suit injunction is likely to be a commercial litigant’s preferred option.<sup>143</sup>

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 decided by the CJEU nor resolved by EU legislation. Moreover, it considered it unnecessary to send a preliminary reference under Article 267 TFEU to the CJEU on the legality and legitimacy of the declarations and damages remedy in the European Union Judicial Area despite repeated requests from Starlight.<sup>144</sup> 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. It is highly unlikely that the CJEU would have favoured a contractual remedy for the European conflicts

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[/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.

<sup>138</sup>Dickinson, *Brussels I Review – Choice of Court Agreements* (supra n 137); Dickinson, *Response to the Green Paper on the Review of Council Regulation (EC) No 44/2001* (supra n 137)

<sup>139</sup>A Briggs, “The Impact of Recent Judgments of the European Court on English Procedural Law and Practice” (2005) *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.

<sup>140</sup>See L Tichý, “Protection against Abuse of Process in the Brussels I Review Proposal?” in E Lein (ed), *The Brussels I Review Proposal Uncovered* (BIICL, 2012) 103, 189; Professor Tichý refers to the damages remedy as ‘a weak consolation’ due to the need for separate enforcement proceedings.

<sup>141</sup>Fentiman, *International Commercial Litigation* (supra n 52), 90; Richard Fentiman, ‘Parallel Proceedings and Jurisdiction Agreements in Europe’ in P de Vareilles-Sommieres (ed), *Forum Shopping in the European Judicial Area* (Hart Publishing, 2007) 45; Fentiman, *International Commercial Litigation (2015)* (supra n 121), 113.

<sup>142</sup>M Illmer, “Chapter 2 – Article 1” in A Dickinson and E Lein (eds), *The Brussels I Regulation Recast* (Oxford University Press, 2015) 80 (discussing damages for breach of arbitration agreements but the same analysis applies to damages for breach of jurisdiction agreements by parity of reasoning).

<sup>143</sup>Fentiman, *International Commercial Litigation (2015)* (supra n 121), 113; Briggs, supra n 54, 399; S Males, “Comity and Anti-Suit Injunctions” [1998] *Lloyds Maritime and Commercial Law Quarterly* 543, 550.

<sup>144</sup>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 M Illmer, “English Court of Appeal Confirms Damages Award for Breach of a Jurisdiction Agreement” (Conflictoflaws.net, 31 July 2014) <<http://conflictolaws.net/2014/english-court-of-appeal-confirms-damages-award-for-breach-of-a-jurisdiction-agreement/>> accessed 15 December 2014; Dickinson, *Once Bitten – Mutual Distrust in European Private International Law* (supra n 122), 190-191.

of jurisdiction which has made its way through the back door as an ingenious alternative to the defunct anti-suit injunction.<sup>145</sup> The lack of a higher authority based on definitive EU law principles means that the pragmatic virtues of the decision in *Starlight Shipping Co v Allianz Marine & Others (The Alexandros T)* will prevail in the English courts for now.<sup>146</sup>

### **O. The High Court rules on the Construction of the Settlement Agreements and the Specific Performance of the ‘LMI Settlement Agreement’<sup>147</sup>**

On 26 September 2014, Flaux J delivered judgment in the latest round of *The Alexandros T* litigation.<sup>148</sup> Flaux J decided that as a matter of construction, the settlement agreements settled claims against the insurers and the servants or agents, and that claims within the scope of the settlement agreements included those now brought in Greece against the insurers and their servants or agents. In any event, as a matter of English law the settlement agreements released the servants or agents from liability insofar as the liability alleged was as joint tortfeasors. Under English

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<sup>145</sup>See Illmer (*supra* n 142) 79; G Cuniberti and M 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* (*supra* n 50) Chapter 8, 330-338; Hartley, *Choice of Court Agreements under the European and International Instruments* (*supra* n 34) Chapter 10, 220; Fentiman, *International Commercial Litigation* (*supra* n 52) 90; J Harris, “Agreements on Jurisdiction and Choice of Law: Where Next?” [2009] *Lloyds Maritime and Commercial Law Quarterly* 537, 547; C J S Knight, “The Damage of Damages: *Agreements on Jurisdiction and Choice of Law*” (2008) *Journal of Private International Law* 501, 509; E Peel, “Introduction” in P de Vareilles-Sommieres (ed), *Forum Shopping in the European Judicial Area* (Hart Publishing, 2007) 1, 15-17; Fentiman, *Parallel Proceedings and Jurisdiction Agreements in Europe* (*supra* n 141), 43-45; Nuyts (*supra* n 136) 57; Briza (*supra* n 121) 548-554; cf Raphael (*supra* n 132) 294; Blobel and Späth (*supra* n 36) 545-546, highlight the counterproductive effects of secondary remedies on the principle of mutual trust in the European Union; A Dutta and C Heinze, “Prozessführungsverbote im englischen und europäischen Zivilverfahrensrecht” (2005) *Zeitschrift für Europäisches Privatrecht (ZEuP)* 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; G Carducci, “The New EU Regulation 1215/2012 of 12 December 2012 on Jurisdiction and International Arbitration” (2013) *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 Wathelet in Case C-536/13 *Gazprom OAO* EU:C:2014:2414, n 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 refers 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 opinion. (P7\_TA(2010)0304, recital M).

<sup>146</sup>Christopher Clarke LJ has recently cited with approval and reiterated the landmark ruling of Longmore LJ in *Starlight Shipping Co v Allianz Marine & Others (The Alexandros T)* [2014] EWCA Civ 1010, that EU law presents no obstacle to enforcing a cause of action of damages for breach of an exclusive jurisdiction agreement. In doing so he emphasised 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: *Marzillier, Dr Meier & Dr Guntner Rechtsanwalts-gesellschaft mbH v AMT Futures Ltd* [2015] EWCA Civ 143, [61]-[62] (Christopher Clarke LJ with whom Tomlinson LJ and Laws LJ agreed).

<sup>147</sup>The abbreviation ‘LMI’ refers to the ‘Lloyd’s Market Insurers’ and the relevant terms of the settlement agreement between Starlight and LMI are reproduced in [2014] EWHC 3068 (Comm), [7] (Flaux J) and [2013] UKSC 70, [9] (Lord Clarke).

<sup>148</sup>[2014] EWHC 3068 (Comm) (Flaux J).

law, settlement with one alleged joint tortfeasor releases all other alleged joint tortfeasors.<sup>149</sup> The upshot of the findings on construction was that the proceedings in Greece against the servants or agents were in breach of the settlement agreements. The servants or agents were thereby entitled to the substantive relief granted by Burton J to the insurers.

Flaux J also decided that it was appropriate to decree specific performance of the LMI settlement agreement and to grant mandatory injunctions to execute a "Receipt and Recognition of Release Agreement".<sup>150</sup> The "specific performance of the promise not to sue"<sup>151</sup> in a settlement agreement is comparable to an anti-suit injunction enforcing the more specific and separate contract not to sue in a court other than the contractual forum in an exclusive jurisdiction agreement.<sup>152</sup> From one perspective the English court has equitable jurisdiction to grant injunctions which may assist in the recognition of English judgments before the courts of another EU Member State. However, it is submitted that the decree of specific performance of the LMI settlement agreement may be a greater infringement of mutual trust and the principle of the effectiveness of EU law (*effet utile*) than declarations and damages for breach of English exclusive jurisdiction agreements as injunctive relief is inherently more intrusive, directly interferes with the right of the Greek court to determine its own jurisdiction and imposes on it the English court's understanding of the settlement agreement and its enforcement.<sup>153</sup> Therefore, the specific performance of the LMI settlement agreement may pre-empt the Greek court's own independent assessment of the settlement agreements' scope, validity, effectiveness and enforcement. As such the interference with the Greek court's right to determine its own jurisdiction and the resulting futility of the Greek proceedings is directly comparable to the effect of an anti-suit injunction. It is relatively easy to assess that the English court did not repose trust in its Greek counterpart to faithfully apply the Brussels I Regulation.

The HD parties (Hill Dickinson and individual lawyers) and the CTa parties (Charles Taylor Adjusting Ltd and an individual adjustor) sought to enforce the promise made by Starlight not to sue them by the terms of the settlement agreements through a damages award pursuant to the Contracts (Rights of Third Parties) Act 1999. In light of Flaux J's findings on the construction issue that the settlement agreements encompassed the servants or agents of the insurers, he held that the agreements purported to confer a benefit on the third parties and there was nothing in the agreements to suggest that this was not the parties' intention for the purposes of Section 1(2) of the Contracts (Rights of Third Parties) Act 1999. Furthermore, this finding meant that the third parties were "expressly identified in the contract by name [or] as a class" by the term "underwriters" in the settlement agreements. Accordingly, Flaux J considered that the third parties did have a claim for damages for breach of the settlement agreements pursuant to the 1999 Act.

It will, of course, be a matter for the Greek court to decide whether to recognise the English judgments of the Court of Appeal, Burton and Flaux JJ. In *Gothaer v Samskip* the CJEU decided that a

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<sup>149</sup>See *Gladman Commercial Properties v Fisher Hargreaves Proctor* [2013] EWCA Civ 1466 (Briggs LJ).

<sup>150</sup>[2014] EWHC 3068 (Comm), [73]-[79] (Flaux J).

<sup>151</sup>*Ibid*, [75] (Flaux J).

<sup>152</sup>Briggs equates an exclusive jurisdiction agreement with a settlement agreement in relation to a cause of action of damages for breach of the promise not to sue contrary to the agreement: Briggs, *supra* n 121, 323.

<sup>153</sup>Flaux J observes that damages would clearly be an inadequate remedy for the breaches of the LMI settlement agreement or the other settlement agreements: [2014] EWHC 3068 (Comm), [80] (Flaux J).

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.<sup>154</sup> Moreover, the necessary underpinning for the operative part of the judgment must also be recognized.<sup>155</sup> 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.<sup>156</sup> 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 the jurisdiction agreements and the specific enforcement of the LMI settlement agreement. 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 and specific performance of the LMI settlement 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'<sup>157</sup> and may be considered to be a component of European Union public policy.<sup>158</sup> Hence, a judgment which undermines the principles of mutual trust and the effectiveness of the Regulation (*effet utile*) may be deemed to be contrary to EU public policy and be refused recognition.<sup>159</sup>

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<sup>154</sup> Case C-456/11 *Gothaer Allgemeine Versicherung AG v Samskip GmbH* EU:C:2012:719, [2013] QB 548.

<sup>155</sup> *Ibid* paras 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 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 E Torralba-Mendiola and E Rodriguez-Pineau, "Two's Company, Three's a Crowd: Jurisdiction, Recognition and *Res Judicata* in the European Union" (2014) *Journal of Private International Law* 403.

<sup>156</sup> Art 34(1) of the Brussels I Regulation; Art 45(1)(a) of the Brussels I Regulation Recast.

<sup>157</sup> The EU Justice Agenda for 2020 - Strengthening Trust, Mobility and Growth within the Union COM(2014) 144 final.

<sup>158</sup> For a discussion of a European Union public policy exception to the rules regarding the enforcement of judgments: See, A 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) 194-198; J Kramberger Škerl, "European Public Policy (With an Emphasis on *Exequatur* Proceedings)" (2011) *Journal of Private International Law* 461, 468-474; A Mills, "The Dimensions of Public Policy in Private International Law" (2008) *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].

<sup>159</sup> European Union 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 of Public and Private International Law* (*supra* n 158), 197.

## P. Conclusions

Notwithstanding the fact that *The Alexandros T* litigation is governed by the European Union private international law regime's Brussels I Regulation, it is reminiscent of a conception of international commercial litigation which borrows from the pragmatic spirit of the English common law of conflict of laws. The UK Supreme Court's decision confirms a narrow approach to the 'same cause of action' issue in Article 27 and ensures that the provision bites in relatively straightforward situations where the causes of action are 'mirror images' of one another. However, it may be observed that the UK Supreme Court majority's overly narrow and instrumental conception of the 'same cause of action' may have served the cause of substantive justice in the individual case, but from a European Union systemic perspective it may give rise to inconsistent judgments, which the *lis pendens* provision in the Brussels I Regulation is designed to eliminate from the very outset. Lord Neuberger and Lord Mance differed from the majority's very narrow view and Lord Mance reasoned that the English claims for a declaration that the Greek claims had been settled or were compromised within the terms of the release were mirror images of the Greek tort claims as one asserted and the other denied the existence of liability. As a consequence, the future recognition and enforcement of the English judgments in the Greek courts might impact on the right of the Greek court to determine its procedural jurisdiction or *kompetenz-kompetenz*. Moreover, the overly narrow interpretation of the 'same cause of action' might give rise to the dilemma that would be encountered if both the English and Greek courts reached a mutually inconsistent decision, which then had to be recognised and enforced in a third state.

The UK Supreme Court's narrow conception of the 'same cause of action' ensures that the tripartite requirements of same cause, same object and same parties are necessary for the operation of Article 27. Alternative approaches to Article 27, which adopt a broad brush interpretation of 'same cause of action' and focus on the overall result in each jurisdiction rather than individual claims within each set of proceedings, were rejected by the UK Supreme Court. Other approaches to the issue which focus on the spectre of irreconcilable judgments rather than a comparison of the individual claims in each set of proceedings are also inconsistent with the UK Supreme Court's understanding of Article 27 of the Brussels I Regulation. The irrelevance of the defences raised in each set of proceedings supports the argument for a narrow construction of Article 27.

A narrow construction of Article 27 has obvious implications for the scope of operation of Article 28. Article 28 is broader, taking into account entire actions, rather than specific claims and defences can be taken into account as well. In cases where the strict tripartite test of Article 27 is not met, Article 28 with its discretionary power to stay in case of related actions is available as a more flexible alternative. It is submitted that, the exercise of the discretion to stay proceedings under Article 28 of the Brussels I Regulation was legitimately denied effect in order to accord deference to jurisdictional party autonomy. The UK Supreme Court's instrumental interpretation of Articles 27 and 28 of the Brussels I Regulation will go a long way in enabling English courts to deal effectively with the abusive litigation tactics that the unreformed *lis pendens* provision encourages in cases involving jurisdiction agreements for Member State courts. From January 10, 2015, Article 31 read in conjunction with Recital 22 of the Brussels I Regulation Recast augments jurisdictional party autonomy in the EU by reversing the effects of the notorious decision in *Gasser* and obliging any courts other than the chosen court to stay and ultimately decline their proceedings.

The Court of Appeal's decision clarifying that the claims for declarations and damages for breach of exclusive jurisdiction agreements are not in breach of EU law will not be the final word on this contentious and as yet unresolved issue. The compatibility of an English decree of specific performance of the settlement agreement with the mutual trust principle and the right of the Greek court to determine its own jurisdiction is even more questionable. A future preliminary reference to the CJEU on these issues may result in an answer reaffirming the mutual trust principle as an essential pre-requisite or condition for the multilateral jurisdiction and judgments order created by the Brussels I Regulation. Therefore, any argument supporting the enforcement of the *private* law rights and obligations of the parties to the jurisdiction agreement or settlement agreement may be perceived as necessarily distorting the systemic and distributive function of private *international* law as a structural coordinating framework for the allocation of regulatory authority.

Two tactical issues of potential value to cross border commercial litigators arise from this decision. On settlement, where there is any risk of follow-on foreign proceedings which are in breach of the settlement, it is worth not discontinuing or seeking a dismissal of the English proceedings. A stay (such as under a Tomlin Order) allows the original proceedings to be resurrected to enforce the settlement, and will help with any argument on the question of which court was first seised. A second tactical issue is that, if stayed proceedings do have to be resurrected in order to enforce a settlement in the face of competing foreign proceedings, careful thought must be given as to how any additional claims should be framed. This is because claims in complex transnational commercial litigation may crystallize over time and entirely new claims which are not based on the original proceedings or are based on facts which were not known at the time of the institution of the original proceedings may affect the issue of when the court is seised. The UK Supreme Court managed to reach a conclusion in this case without having to make a reference to the CJEU, but it did make clear that this is an uncertain point of law.