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Burke, John J. A.

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Section I

PRIVATE INTERNATIONAL LAW AND INTERNATIONAL CIVIL PROCEDURE

Foreclosure of the Doctrine of *Forum Non Conveniens* under the Brussels I Regulation: Advantages and Disadvantages

John JA Burke[1]

Abstract

The European Court of Justice [ECJ] in its decision *Owusu v. Jackson* [Trading as "Villa Holidays Bal-Inn Villas" and Others] foreclosed the use of the doctrine of "*forum non conveniens*" in United Kingdom Courts.[2] With nuances to be discussed in this article, the discretion historically exercised by United Kingdom courts to recognize jurisdiction in the forum most appropriate for the resolution of the dispute, is dead. The advantage of the *Owusu* decision is its definitive resolution of a vexing legal question pending for more than a decade and creating uncertainty for United Kingdom Courts about the viability of the doctrine of "*forum non conveniens*" under the Brussels Convention. A purported, though non-persuasive, second advantage is the brake upon the misuse of "forum shopping", a practice of plaintiffs seeking a forum best suited to provide favourable remedies and place the defendant at a procedural and economic disadvantage.[3] The primary disadvantage is inflexibility. Courts invoke the doctrine of "*forum non conveniens*" in select cases where the aggregate of factors point toward the jurisdiction of another court better positioned to resolve the litigation. In addition, United Kingdom Courts had established criteria to control court discretion. A secondary disadvantage is Europe's decision to pursue a policy of doctrinal purity in shaping rules of jurisdiction. In a global economy, foreclosing the court's discretion may lead to waste of resources, prohibit judicial economy, and eschew the convergence of legal orders.[4] The ECJ's ruling in *Owusu* is mechanical, provincial, and arguably poorly reasoned. This article provides a brief history and functional explanation of the doctrine of *forum non conveniens*, analyses the ECJ decision in *Owusu* identifying its effect upon Brussels I, and criticises the decision for disregarding vexing questions posed by litigation implicating multiple jurisdictions.[5]

Forum Non Conveniens: Origins and Contemporary Criteria

The doctrine of "*forum non conveniens*" first manifested itself in Scotland in the seventeenth century, essentially a civil law regime, arising first as "*forum non competens*" in cases where the parties were aliens and litigation in Scotland was deemed inconvenient.[6] The doctrine was adopted by the United Kingdom in late nineteenth century, coined "*forum non conveniens*", and found its elaboration and development in the jurisprudence of the United Kingdom and the United

1 *Prof. Dr. John JA Burke*, Kazakhstan Institute of Management, Economics and Strategic Research, Faculty of Law, Almaty, Kazakhstan; Associate Professor of Research, Riga International School of Economics and Business Administration, Department of Law, Riga, Latvia.

2 ECJ 1 March 2005 – C-281/02 – *Owusu v. N. B. Jackson and Others* [2005] ECR I-1383 = [2005] EuLF I-72, II-66 ["while the ECJ decided the case under the Brussels Convention, the rationale applies with equal conviction under the Brussels I Regulation"], and there is no doubt among authorities as to its continuing relevance. See, Brussels I Regulation 71, 2/6 and 7 (eds. *Ulrich Magnus* and *Peter Mankowski* 2007).

3 *Cf*, *American Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994) (noting that the doctrine of "*forum non conveniens*" prevents abusive forum shopping). See also, *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504 (1947) (noting that a court having statutory jurisdiction may resist imposition of jurisdiction when an analysis of factors leads to the conclusion that another court is the appropriate forum to decide the dispute).

4 *E.g.*, *Ralf Michaels*, Two Paradigms of Jurisdiction, 27 Mich. J. Int'l L. 1003, 1004 (2006) (noting "globalisation causes convergence of legal orders", however, this is not to be so in the realm of jurisdiction).

5 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, replacing the Brussels Convention, with the exception of the Member State of Denmark. The Regulation does not replicate the "Convention" verbatim as significant changes were made to Article 5. However, the Regulation carried forward the Article 2 rule, positing jurisdiction in the Member State of where the defendant is domiciled.

6 *Ronald A. Brand*, Comparative *Forum Non Conveniens* and the Hague Convention on Jurisdiction and Judgments, 37 Tex. Int'l L.J. 467, 469 (2002).

States.[7] The objective of the doctrine of "*forum non conveniens*" is that litigation be conducted in the forum most closely connected with the dispute and likely to lead to the most just result. Two predicates are required for its application: (1) an alternative forum having jurisdiction, and, (2) litigation in the forum State would produce an unfair advantage to the plaintiff and result in a denial of justice to the defendant. It is an exception to the general rule that the court seized with general jurisdiction is the proper forum for adjudication of the case. The existence of the doctrine and its historical development predate the existence of the European Community.[8]

The doctrine of "*forum non conveniens*" is situated in the larger context of international parallel proceedings, notably "comity" whereby States recognise and enforce the judgments of foreign States. "Comity" is a non-binding legal principle, generally recognised among nations to deal with international disputes. The "common law adopted comity over two hundred years ago specifically to provide a theoretical justification for allowing courts to defer to the legislative, judicial, and executive activities of a foreign sovereign in order to do justice in individual cases". [9] What Professor Calamita calls "adjudicatory comity" evolved to develop the doctrine of "*forum non conveniens*". He states:

"Notably, while the common law originally developed the principle of adjudicatory comity to address the recognition and recognition and enforcement of previously rendered foreign judgments, it soon came to extend those principles to yet a third problem: whether, and under what circumstances, if any, a domestic sovereign should actually defer to a foreign court as the appropriate forum in the first instance, i.e., before a foreign action had ever been filed. As discussed [omitted], the common law developed the doctrine of "*forum non conveniens*" to address this problem, a doctrine that is itself rooted in the principles of adjudicatory comity".[10]

The historical and theoretical underpinnings of "*forum non conveniens*" demonstrate that that doctrine is a branch of concepts designed to introduce flexibility into the rigid territorial foundation of jurisdiction. Justice Joseph Story explained the rationale of the doctrine: "a sense of inconvenience would result from a contrary doctrine", and recognition of "*forum non conveniens*" is required "from a sort of moral necessity to do justice in order that justice may be done to us in return".[11]

The contemporary doctrine of "*forum non conveniens*" in English law derives from the 1986 House of Lords Judgment in *Spiliada Mar. Corp. v. Consulex Ltd.*[12] That court provided, that "a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e., in which the case may be tried more suitably for the interest of all the parties and the ends of justice".[13] *Spiliada* is based upon a two-stage process of assessment initiated on application of a party. The defendant first must demonstrate that there is another available forum "clearly or distinctly" more appropriate than the English court, premised upon connecting factors showing that the alternative forum has the closest and most substantial relation to the dispute. If the judge finds that the defendant[14] has met its burden and has demonstrated that the alternative forum is favourable, then the burden of persuasion shifts to the plaintiff to argue that the court should not grant a stay because justice cannot be achieved in the alternative forum. Arguments that the plaintiff may be deprived of advantages under English law, such as a higher scale of damages, more liberal limitations periods, or more efficient procedural rules, do not constitute valid reasons to sustain a denial of a stay. Unless the plaintiff shows that it cannot obtain justice in the alternative forum, the English court may stay the proceedings invoking the doctrine of "*forum non conveniens*".[15]

The practical application of *Spiliada* to subsequent cases best shows the English approach to "*forum non conveniens*" when the alternative forum is a non-contracting State. In *Connelly v. R.T.Z. Corp*.,[16] the House of Lords held that the English courts were not entitled to issue a stay even though the defendant was domiciled in England, and both the plaintiff and defendant acknowledged that the litigation was most closely connected with Namibia. The plaintiff, a Scottish citizen worked for several years in Namibia for a subsidiary of the defendant. The defendant, R.T.Z., was an English company with its registered office in London that conducted mining operations through its subsidiary. In Namibia, while working for the English subsidiary, the plaintiff contracted cancer as a result of inhaling silica uranium. The plaintiff secured legal aid to bring an action against the parent entity in England. Based on a reading of the Legal Aid Act of 1988, the lower court issued a stay to permit proceedings in Namibia. However, the plaintiff lacked the financial resources to conduct litigation in Namibia and effectively was left without a remedy. The

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

8 Civil law countries generally do not recognize the doctrine of "*forum non conveniens*" preferring to provide certainty where a defendant may be sued.

9 *N. Jansen Calamita*, Rethinking Comity: Towards a Coherent Treatment of International Parallel Proceedings, 27 U. Pa. J. Int'l Econ. L. 601, 606 (2006).

10 *Ibid* at 615. When a foreign court already has exercised jurisdiction in an international case, the problem of "*lis alibi pendens*" may arise if a party files in another jurisdiction. International parallel proceedings present problems of duplicative litigation, inconsistent judgments, and disadvantages for the party with limited financial resources. A forum court confronted with a matter of "*lis alibi pendens*" has three options: (1) stay the proceedings or dismiss the case, (2) issue an anti-suit injunction, and take exclusive jurisdiction, or (3) exercise concurrent jurisdiction. None of the options is free from practical and theoretical shortcomings.

11 *Story*, Commentaries on the Conflict of Laws § 23 (2nd ed. 1841).

12 *Spiliada Mar. Corp. v. Consulex Ltd*. [1986] ALL ER 843 (House of Lords).

13 *Ibid* at 460.

14 Note that the English court issues a "provisional suspension of the action" and retains residual jurisdiction. See, Opinion of Advocate General Leger delivered on 14 December 2004 in Case C-281/02 [2005] ECR I-1383, para. 6.

15 The *Spiliada* case is the subject of criticism as well of praise. Compare *Louise Merrett*, Uncertainties in the First Limb of the Spiliada Test, ICLQ 54 1 (211 (2005) (finding an insufficient definition of available forum) with *Megan Waples*, The Adequate Alternative Forum Analysis In *Forum Non Conveniens*: A Case for Reform, 36 Conn. L. Rev. 1475 (2004) (arguing that the English doctrine of *forum non conveniens* sets a model for US courts to follow).

16 *Connelly v. R.T.Z. Corp.,* House of Lords, 24 July 1997, [1998] A.C. 854.

House of Lords reversed the lower court, first by rejecting the lower court's narrow interpretation of the Legal Aid Act and second, by relying upon the ultimate objective of *Spiliada* that a stay shall be granted only if litigation in the alternative forum achieves the "ends of justice". The House of Lords concluded that Namibia was not the forum "in which the case can be tried more suitably for the interests of all the parties and for the ends of justice", since the plaintiff lacked the financial resources to conduct any prosecution of his case.

In *In Re Harrods (Buenos Aires) Ltd*,[17] the Court of Appeal "held that an English court could stay proceedings brought against an English domiciled defendant when the court was convinced that a non-contracting state was clearly the more appropriate forum"[18]. While the defendant was an English corporation, all of its activities were conducted in Argentina. Finding that Argentina was the favourable alternative forum, the Court of Appeal stayed the proceedings. The following reasons underpinned the decision of the Court of Appeal: (1) the Brussels Convention, premised upon Article 220 of the EEC Treaty has no effect outside the Member States; (2) Article 2 lacks mandatory effect between the courts of a Member State and a non-Contracting State; and (3) application of the doctrine of "*forum non conveniens*" between the English Court and a non-contracting State has no adverse effect upon the policy objectives of the Brussels Convention to promote the free circulation of judgments. On appeal, the House of Lords submitted a request for a preliminary ruling to the ECJ. However, the parties settled the case rendering the request for a preliminary ruling moot and the ECJ never rendered a decision, leaving open the question of the continuing validity of "*forum non conveniens*" within the Brussels Convention jurisdictional scheme.

In *Lubbe v. Cape Plc.* [Lubbe II],[19] a result identical to *Connelly* was reached in a multi-jurisdictional dispute. The plaintiffs were 3,000 former employees of factories in South Africa engaged in the mining and processing of asbestos. The defendant was a public limited liability company incorporated in England in 1893. During the 20th century, the defendant engaged in a series of complex adjustments to its corporate structure related to its South African operations. However, by 1989, the defendant no longer had any assets in South Africa, having sold its interests to third parties. The lower court ruled that, given the fact of the group action and questions of causation and liability, the South African courts were best positioned to resolve the litigation and constituted the appropriate alternative forum. Reversing the decision, the House of Lords, following a line of reasoning similar to that used in *Connelly* held that, under *Spiliada*, England was the appropriate forum to settle the matter, since under all relevant factors, substantial justice could not be obtained in the alternative forum.

The doctrine of "*forum non conveniens*" is grounded in the jurisprudence of the United Kingdom. *Spiliada Mar. Corp. v. Consulex Ltd* modified the doctrine creating a two-step process to provide predictability of result and to restrain judicial discretion. Post-*Spiliada* decisions demonstrate the narrow scope in which English courts have invoked the doctrine to decline jurisdiction and issue a stay. The scorecard subsequent to *Spiliada* is two cases to retain English jurisdiction and one to cede jurisdiction to Argentina where all connecting factors were located. The decision in *Connelly* rests purely upon basic notions of justice, access to courts, and the right of redress involving a litigant entirely dependent upon legal assistance to prosecute his claim. The decision in *Lubbe* may be interpreted, not as a question of an alternative appropriate forum, but as a question where there was no alternative forum at all, thereby reposing jurisdiction in the English court. Finally, the decision in *In Re Harrods* reposed upon cogent reasons to posit jurisdiction in a foreign country. In hindsight, the results in each decision appear modest and constitute a correct exercise of judicial discretion.

The Decline of *Forum Non Conveniens* in Europe

The ECJ in a series of decisions indicated its anti-private right view of jurisdiction under the Brussels Convention. Edwin Peel has stated that the ECJ decisions in *Gasser* and *Turner* were simply the predicate for the inevitable decision in *Owusu*.[20] A recognised authority characterised the ECJ development as follows:

"… the Court of Justice does not appear to see the issue of jurisdiction in terms of rights, agreements, private law. It made it clear, in *Gasser* and *Turner*, that it saw the issue in terms of public law, of rules of jurisdiction which were wholly and exclusively the concern of the court whose jurisdiction had been invoked, and which were of no legitimate concern to the courts of another Contracting State. To put it another way … the Convention is to be read as containing instructions to a court which are not within the parties' power, and over which they have no private rights".[21]

The ECJ decision in *Group Josi Reinsurance SA v. Universal General Insurance Company*,[22] finding that Article 2 of the Brussels Convention was mandatory even when the plaintiff was domiciled in a non-contracting State, cast doubt on the continuing validity of the exercise of "*forum non conveniens*" by UK courts. It presaged the decision of *Owusu* and the continued systematic dismantling of English procedural law.

The death of "*forum non conveniens*" under the Brussels I Regulation

"The Brussels Convention, as amended by the 1978 Acces-

[17] [1990] 4 ALL ER 334, CA.

[18] *Graeme Halkerston*, A funny thing happened on the way to the forum …, 155 NJL 436 (2005).

[19] *Lubbe v. Cape Plc.*: House of Lords 20 July 2000, [2000] 1 WLR 1545.

[20] *Edwin Peel*, Forum Shopping in the European Judicial Area – Introductory Report, University of Oxford Faculty of Law Legal Studies Research Paper Series, 1-2 (2006); ECJ 9 December 2003 – C-116/02 – *Erich Gasser GmbH v. MISAT srl* [2003] ECR I-14693 = [2004] EuLF (E) 49; [2005] 1 QB1; ECJ 27 April 2004 – C-159/02 – *Turner v. Grovit* [2004] ECR I-3565 = [2004] EuLF (E) 120; [2005] 1 AC 101.

[21] *A. Briggs*, The Impact of Recent Judgments of the European Court on English Procedural Law and Practice, Zeitschrift fur Schweizerisches Recht (2005) II 231, 234.

[22] ECJ 13 July 2000 – C-412/98 – *Group Josi Reinsurance v. Universal General Insurance* [2000] ECR I- 5925 = [2000/01] EuLF (E) 49.

sion Convention, entered into force in the United Kingdom on 1 January 1987."[23] Council Regulation (EC) No 4/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, that replaced and revised the Brussels Convention, is a Community Level instrument grounded on Article 220 of the Treaty of the European Union. The Regulation, "intends to facilitate the judicial treatment of suits and judgments among the Member States. The Regulation aims at easier and more uniform rules and faster and simpler procedures for civil-cross-border litigation within the EU".[24] Since neither the Convention nor the Regulation specifically governs "*forum non conveniens*," the Regulation has left open the question of whether that doctrine is valid under Community law. In addition, neither the Jenard Explanatory Report" nor the "Schlosser Report" contain any definitive conclusions on whether the Brussels Convention precluded the use of the doctrine of "*forum non conveniens*." However, the ECJ decision in *Owusu v. Jackson* has left no doubt about the question. Professor Ulrich Magnus has announced unambiguously, "The doctrine of *forum non conveniens* so well known in Common Law jurisdictions is not allowed under the Regulation".[25]

a. Facts of the case[26]

Mr. Owusu, a British national, rented from Mr. Jackson, a British national, a villa located in Jamaica for holiday purposes.[27] In Jamaica, Mr. Owusu entered the sea, dove into the water, and hit his head against a submerged sand bank, sustaining serious spinal injuries. The accident rendered Mr. Owusu a tetraplegic. Subsequently, he brought an action in the United Kingdom against Mr. Jackson based on a theory of breach of contract, claiming an implied term of lack of hidden dangers and reasonable safety, and also brought tort actions against several Jamaican companies that owned, operated or had access to the beach where the injury occurred.

The defendants filed a petition arguing that the English court should issue a stay as the courts of Jamaica were the favourable forum with jurisdiction to resolve the dispute "in the interests of all the parties and the ends of justice". The petition reasoned that all connecting factors were in Jamaica making it not only the most logical forum to resolve the dispute but also the forum providing maximum judicial efficiency. The court found that the ECJ decision in *Group Josi* had effectively overruled the UK decision in *In Re Harrods*, and that, by reason of Article 2 of the Convention, the court lacked authority to stay the proceedings. The defendants appealed the order.

The Court of Appeal referred the following questions to the ECJ for preliminary rulings:

1) Where a claimant contends that a Member State court has jurisdiction under Article 2 of the Brussels Convention, is it permissible for the Member State court, under its national law, to decline jurisdiction in favour of the jurisdiction of a non-Member State when: (a) the jurisdiction of no other contracting State is implicated, and (b) the proceedings have no connecting factors to any other contracting State

2) If the answer to question 1(a) or 1 (b) is yes, is it consistent in all circumstances or only in some and if so which.

b. Legal reasoning

The ECJ first definitively replied that the Convention applies to parties that are domiciled outside the European Community. Support for this finding was found in the facts that the Convention's internationality requirement is satisfied in cases involving a Member State and a non-Member State, the rules governing *lis pendens* and related actions applied with equal validity to disputes between a Member State and a non-Member State allowing recourse to Article 2, and the designation of a Member State court with jurisdiction does not violate the law of treaties by imposing an obligation upon a non-contracting State. The Court rejected arguments that the uniform rules created by the Convention were limited to application to the single market. Consequently, the ECJ found that the present case fell squarely within the ambit of Article 2.

The court then embarked upon an analysis of whether the doctrine of "*forum non conveniens*" was consistent with the Brussels Convention. The ECJ found that Article 2 was mandatory in nature and insulated from any deviation unless the Convention explicitly permitted derogation from that principle. Since "It is common ground that no exception on the basis of the *forum non conveniens* doctrine was provided for by the authors of the Convention", that doctrine is incompatible with the mandatory system of jurisdiction established by the Convention. The court's reasoning as to this fundamental question went no further than this cursory list of reasons.

Further support for the Court's judgment reposed upon the principles of legal certainty and of predictability. The argument for legal certainty restated the argument for the mandatory nature of Article 2. The ECJ remarked that the Convention's recitals required respect for legal certainty; that certainty would be undermined if the Community recognised the doctrine of "*forum non conveniens*". Similarly, given the discretionary nature of the doctrine of "*forum non conveniens*", persons domiciled within the Community would have difficulty foreseeing where they could be sued thereby undermin-

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[23] Opinion of Advocate General Leger, *supra* note 14.

[24] European Commentaries on Private International Law, Brussels I Regulation 7 (2007 Sellier eds. *Ulrich Magnus* and *Peter Mankowski*).

[25] *Ibid* at 8.

[26] The first question to be asked is why really did the defendants want to relocate the forum to Jamaica. The answer: the insurance coverage of defendant Jackson and the Jamaican defendants did not cover compensation for damages respecting judgments obtained in proceedings outside Jamaica. The prospective personal liability of the defendants motivated the filing of the petition for a stay of the proceedings. In addition, conducting litigation in England would impose additional costs on the Jamaican defendants and, depending upon differences between the substantive law of England and Jamaica expose them potentially to increased tort liability. Alternatively, it is true that litigation in England benefitted Mr. Owusu as England is his domicile. The decision protected him from the risk of litigation in a foreign jurisdiction. However, since all relevant factors were located in Jamaica: the place of the accident, location of witnesses, and access to relevant documents, Mr. Owusu is likely to incur additional expenses to prove his claims, though all or part may be recoverable if he prevails.

[27] A similar but fuller description of the facts and the ECJ's argument is found in *F. Ibili*, Civil Jurisdiction and Enforcement of Judgments in Europe, Netherlands International Law Review, LIII: 127-139 (2006).

ing the predictability of jurisdictional rules. The doctrine of "*forum non conveniens*" also threatened the legal protection of Community "persons" as they would be deprived of the mechanical rule that a defendant is sued in the Member State where the defendant is domiciled.

The ECJ framed its final reason in the context of protecting uniformity. Since many Member States do not recognise "*forum non conveniens*," the Convention could not be uniformly applied throughout the Community, if the doctrine were recognised. The Court therefore answered the first question as follows: "The Brussels Convention precludes a court of a Contracting State from declining the jurisdiction conferred on it by Article 2 of that convention on the ground that a court of a non-contracting State would be a more appropriate forum for the trial of an action even if the jurisdiction of no other Contracting State is in issue or the proceedings have no connecting factors to any other contracting State". Given that answer, the ECJ declined to provide an answer to question 2, which it deemed a request for an advisory opinion.

Advantages of the Court's decision in *Owusu v. Jackson*

The ECJ decision provides a clear rule to a vexing and pending legal question: a Member State court is prohibited from altering the mandatory nature of Article 2 jurisdiction by invoking the doctrine of "*forum non conveniens*". That clarity is welcome, even if one is unimpressed by the court's reasoning, objects to its breadth, or opposes the rule on its merits as it leads to potential cases where jurisdiction is posited in an inappropriate jurisdiction. The question remains: has the decision shut the door completely upon the doctrine of "*forum non conveniens*". For all practical purposes, the answer is yes.

However, nuances remain in circumscribed areas. Contrary to this author's view, Graeme Halkerston[28] states, "The practical impact of the judgment is not so clear". However, his statement refers to obvious matters. First, the court failed to clarify whether its decision applies retroactively. He maintains that the decision should have retroactive effect and existing stays be lifted. Second, he states that the doctrine of "*forum non conveniens*" applies to cases not governed by the Brussels Convention, now Brussels I. The latter is a statement of the obvious. Third, he questions whether the ECJ would apply the same reasoning to jurisdiction founded under other articles that are derogations from Article 2. Given the ECJ's reasons under *Owusu*, it is unlikely that the ECJ would introduce the destabilising force of "*forum non conveniens*" throughout the Regulation. A contrary result would reverse the objectives of predictable jurisdictional rules, legal certainty, and legal protection of Community persons.

Dr. Ibili supports this view stating, "In my opinion, certainly, the curtain fell for *forum non conveniens* in European civil procedural law. Once the case falls within the scope of the Brussels Convention, the jurisdiction provisions of the Convention have a mandatory effect, i.e., jurisdiction must be exercised". His answer applies to non-Article 2 provisions, as he makes clear in his discussion of *American Motorists v. Cellstar*.[29]

A final advantage is the placement of a curb on forum shopping. However, that consequence of the decision is a two-edged sword. Forum shopping is conducted in the interests of the client and it is counsels' obligation to protect the client's interest. In addition, not all forum shopping is abusive.[30] Consequently, while legitimate reasons exist to eliminate the abusive aspects of forum shopping, the issue is more complicated than a rule that simply prohibits it in its entirety.

Disadvantages of the Court's decision in *Owusu v. Jackson*

The principal disadvantages of the ECJ's decisions are threefold: (1) provincialism, (2) inflexibility, and (3) a failure to distinguish between sophisticated and non-sophisticated parties. In a world of increasing cross-border transactions, disputes involving juridical persons from several different jurisdictions, *e.g.* multi-national firms, and a defendant located in a Member State, it may be preferable to yield jurisdiction to a court having the closest connection to the case and in the best position to resolve the issue with judicial economy and fairness. These parties neither need nor want the paternalism of the ECJ. The provincial and inflexible ruling in *Owusu* cuts off this alternative completely. The solution is to oust the jurisdiction of the courts by executing arbitration clauses.

Certain issues as to third states remain open. For example, as Dr. Ibili notes, "What about the mandatory nature of Article 2 Brussels Convention, if for example the court of a non-Member State has been previously seized of the matter, which could give rise to a situation of *lis pendens*?" Most important, the decision should not have the effect of depriving parties to select a forum based on private agreement. That case should constitute an exception to the mandatory rule of Article 2. Although the ruling produces clarity, the terse reasoning, absolute view of mandatory jurisdictional rules, and failure to distinguish between consumers and commercial parties, may produce undesirable results in diverse cases. Legal rules cannot foresee the future and the variety of cases that actually will confront courts.

The Misleading Simplicity of the *Owusu* Judgement

The jurisdictional rules of Brussels I are based on territory. Several examples illustrate this point: (1) the Article 2 default rule that a defendant is sued where domiciled, (2) the place of the tort, and (3) the place of performance of the principal obligation of the contract. "Jurisdiction in Europe is still mainly about places".[31] In addition, the Brussels I Regulation of inducing parties to race to the courthouse does not appear to be a superior solution to permitting "an alternative venue rule".

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[28] *Graeme Halkerston* (*supra* note 18).

[29] [2003] EWCA Civ 206, [2003] ALL ER (d) 26 Mar.

[30] *American Dredging*, *supra* note 3 and discussion *infra* at page 16-17.

[31] *Ralf Michaels*, *supra* note 4 at 1058.

In addition, the notion of territory and "place" are disintegrating as beacons of light to determine jurisdiction in terms of modern commercial activity. Global commerce and, particularly cross-border financial services, transcend these 19th century notions upon which the rules of conflicts of law were erected. In an earlier article, my colleague and I have proved the inability of the Brussels I Regulation to resolve a jurisdictional problem arising from failed transactions in the indirect holding system of securities.[32] Further, Article 5 that provides new jurisdictional rules for provision of services and delivery of goods poses thorny interpretive questions. The ECJ is disingenuous when it insinuates that the Brussels I Regulation provides a paradigm of jurisdictional certainty, contrary to alternative legal orders such as the jurisdictional laws of the United States. When the surface of Brussels I is penetrated and its rules subject to scrutiny, recognition of the doctrine of "*forum non conveniens*" would not turn Brussels I on its head. The rule is a rarely invoked exception to general rules of jurisdiction in the European Union. In *American Dredging Co. v. Miller*, Justice Scalia aptly described the doctrine as "nothing more or less than a supervening venue provision, permitting displacement of ordinary rules of venue when, in light of certain conditions, the trial court thinks that jurisdiction ought to be declined".[33] The doctrine serves the salutary purpose of preventing the plaintiff from forum shopping. The Brussels' system of creating "a strict race to the courthouse" does not induce integrity or advance justice.[34]

Conclusion

The doctrine of "*forum non conveniens*" does not have a role in the Brussels I jurisdictional system. The advantage is clarity and predictability of legal rules. The disadvantage is lack of flexibility for courts faced with unanticipated legal questions. *Owusu* has built a fortress around Europe erected on dubious assumptions and inadequate forethought. The judgment in *Owusu* is misguided because the doctrine of "*forum non conveniens*" lacks the power to destabilise the rules of the Brussels I Regulation, and the latter, despite statements to the contrary, is riddled with perplexing questions of which court has appropriate jurisdiction. Rejecting a doctrine designed to identify the court best suited to decide a dispute is a puzzling judgment.

[32] *John JA Burke* and *Anatoly Ostrovskiy*, The Intermediated Securities System: Brussels I Breakdown = [2007] EuLF I-197. See also for similar difficulties of locating "place of performance", *John JA Burke*, Brussels I Regulation (EC) 44/2001: Application to Financial Services under Article 5(1)(b), 10 Colum. J. Eur. L. 527 (2004).

[33] 510 U.S. 443, 453 (1994).

[34] *Ronald A. Brand*, *supra* note 6 at 490.

What "law" to choose for international contracts?

*Giulia Sambugaro**

1. Introduction

25 years after the publication of the 1980 Rome Convention on the law applicable to contractual obligations[1], there appears to be a renewed interest in its provisions on party autonomy in general and the law that the parties are allowed to choose as the law applicable in particular.[2]

The renewed interest in party autonomy is due to the partially different characteristics attributed to it by the various drafts of the recently adopted Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)[3], which will take the place of the aforementioned Rome Convention.[4] In effect, one of the issues focused on by the drafters of the new Regulation was that of the extent to which the parties to an international contract are free to choose the law applicable. When looking at the forty-six recitals of the Rome I Regulation, one is struck by the incessant reference to party autonomy: above all, the eleventh recital expressly states that party autonomy in the sense of the "*parties' freedom to choose the applicable law*", is "*one of the cornerstones of the system of conflict-of-law rules in matter of contractual obligations*".

The point is of a certain interest since, as regards the issue at hand, the 2005 Draft Regulation differed from the text eventually adopted in June, and since the differences relate to the problem of whether the parties are free to choose non-State law as the law governing their contract. In effect, while the 2005 Draft Regulation expressly stated in Article 3(2), that

* *Giulia Sambugaro, J.D. Verona University School of Law (IT); Teaching assistant of Private International and International Commercial Law,. Verona University School of Law (IT); Trainee at Dindo, Zorzi & Associates Law Firm, Verona (IT).*

[1] European Community Convention on the law applicable to contractual obligations.

[2] See for a historical analysis of the principle of party autonomy, *Giesela Rühl*, Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency, CLPE Research Paper Series, 1 *et seq*. (2007); *Pierpaolo Vinci*, La «modernizzazione» della Convenzione di Roma sulla legge applicabile alle obbligazioni contrattuali: la scelta del diritto applicabile, Contratto e Impresa 1223, 1226 *et seq.* (2007).

[3] Hereinafter referred to as Rome I Regulation.

Pursuant to its Articles 28 and 29, the regulation will apply from 17 December 2009, to contracts concluded after the same date.

[4] The English version of the just approved Rome I Regulation is available at the following web page http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0016:EN:PDF.