

## PART XIV

### CROSS-BORDER AND INTERNATIONAL DIMENSIONS

#### PART II, CHAPTER 8

#### COORDINATION AND COOPERATION IN THE ERA OF GLOBALIZATION

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## Coordination and Coordination in the Era of Globalization

- 1 This chapter explores the significance of coordination and cooperation among courts dealing with civil matters in the context of globalization. It addresses key themes such as provisional measures, parallel proceedings, and communication between judges. The first subchapter on provisional measures examines the jurisdiction to grant such measures in a cross-border context, discussing various approaches to jurisdiction and the possibility of granting extraterritorial provisional measures. The text also delves into the management of parallel interim proceedings and concurrent provisional measures, outlining paradigms and doctrines aimed at effectively handling such situations. The second subchapter provides an overview of regulatory approaches to dealing with the phenomenon of parallel proceedings. It explores various doctrines and tools employed for this purpose and examines specific points of differentiation and convergence among them. Finally, the third subchapter explores coordination through communication between judges, focusing on the overarching trends in this area, ie, the tendency to institutionalize the judicial communication and the pursuit of its legitimacy.

### 1 PROVISIONAL MEASURES

#### 1.1 Introduction

- 2 The administration of justice can at times turn into a lengthy process and despite the enormous efforts put around the globe to remedy this regrettable state of affairs, the litigants are still quite accustomed to the sour flavour of delayed justice.<sup>1</sup> ‘Provisional measures’ can be viewed as an imperfect remedy to this less than ideal judicial world.<sup>2</sup>
- 3 The practical importance of ‘provisional measures’ in cross-border contexts has increased considerably over the last few decades. Unsurprisingly, the processes of globalization have also driven changes in practice of granting provisional measures that appear to impact persons and assets situated in the territory of other states.<sup>3</sup> As the intensity of transnational litigation in the globalized world increases both in number and complexity, so does the need for related provisional relief. The increased mobility of people, goods, business and capital has made it far easier to frustrate the effective enforcement of private and public claims. Internet has created a space that knows no border or at least attempts to pretend that there are none. This not only gave rise to further enforcement-related concerns resulting from, among others, the emergence of

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<sup>1</sup> Paraphrasing the famous quote credited to Francis Bacon: ‘swift justice is the sweetest.’

<sup>2</sup> Cf J Berryman, ‘The Centrality of Irreparable Harm in Interlocutory Injunctions’ (2015) 27 Intellectual Property Journal 299, 299.

<sup>3</sup> A Nuyts, ‘Cross-Border Provisional Measures: Stepping Backwards in the Brussels I Recast’, in G van Calster and J Falconis (ed), *European Private International Law at 50. Celebrating and Contemplating the 1968 Brussels Convention and Its Successors* (Intersentia 2018) 83, 84.

delocalized assets (eg, cryptocurrencies),<sup>4</sup> but has also erected a borderless arena where all sorts of human activity are made possible by non-State actors. In a world so configured, the absence of adequate and enforceable provisional protection can give rise to the proliferation of legal proceedings. A litigant may be tempted to initiate proceedings and/or seek provisional relief in any jurisdiction where they see some prospects for future enforcement of their claims.

- 4 Not unlike most precious medicines, effective provisional measures are not always universally available. Due to the diversity and varying availability of provisional measures, some jurisdictions are requested more frequently than others to grant specific measures, although their courts would not normally be called upon to resolve the dispute between the parties. Such a practice not only disconnects the procedure on provisional measures from the proceedings on the substance of the matter but also relocates the dispute on provisional measures far from the proceedings on the substance. In the most basic configuration, a court of one jurisdiction is requested to provide provisional relief, while a court in another jurisdiction is called upon to decide on the substance of the matter. The conceivable constellations go far beyond that. Each and every of them may raise a series of questions relating to the interconnectedness of those proceedings and their outcomes.
- 5 International courts and tribunals generally have the competence to issue provisional measures, usually bestowed upon them by the respective statutory document<sup>5</sup> or at least affirmed in the relevant sets of procedural rules.<sup>6</sup>
- 6 By contrast, the legal framework for provisional measures granted by national courts has been mainly provided for the purposes of domestic litigation. In the face of the challenges brought by globalization, there seems to be an unprecedented need to

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<sup>4</sup> Eg, in 2022, in *Li et al. v. Barber et al.* (Ontario Superior Court of Justice), Decision of 22 February 2022 [2022 ONSC 1176], the Court issued a freezing order restraining from undertaking virtually any operation with cryptocurrencies that would frustrate the future enforcement of a class action pending domestically. In the same year, in *CLM v CLN et al.* (High Court, Singapore), Decision of 4 March 2022 [2022 SGHC 46], the High Court of the Republic of Singapore granted a worldwide freezing injunction to prevent the dissipation of stolen cryptocurrency assets, against unknown persons suspected of having participated in or assisted with the theft of those assets.

<sup>5</sup> R Wolfrum, 'Interim (Provisional) Measures of Protection', Max Planck Encyclopedia of Public International Law <https://opil.ouplaw.com/> accessed on 30 June 2023.

<sup>6</sup> Ch M Cerna, 'Provisional Measures: How International Human Rights Law is Changing International Law (Inspired by Gambia V. Myanmar)' (2021) 11(1) Notre Dame Journal of International & Comparative Law 34, 43 and 45. For a discussion on the argument that the power to order provisional measures constitutes a general principle of international law and, as a consequence, no additional confirmation of such competence is needed see C A Miles, *Provisional Measures before International Courts and Tribunals* (Cambridge University Press 2017) 136-139.

address also the cross-border dimension of this matter.<sup>7</sup> And, indeed, efforts are being made on international and regional levels to develop uniform frameworks for seamless operation of provisional measures.<sup>8</sup> In their attempt to secure cooperation or at least coordination between the courts involved in trans-border cases, a number of soft law sources address the phenomenon of provisional measures.<sup>9</sup> Taking these efforts one step further, a framework establishing a uniform provisional measure for debt recovery has even been implemented among the EU Member States.<sup>10</sup>

## 1.2 Notion of ‘Provisional Measures’ and Scope of Inquiry

- 7 There is no uniform nomenclature to describe the tools that can be deployed to temporarily secure a particular outcome of proceedings pending or contemplated domestically or abroad, either by maintaining status quo or by preserving the likelihood of future fruitful enforcement. Despite functional similarities, a variety of terms are used around the world to describe the measures that serve this purpose. The non-definitive nature of the result that those measures aim at is described by terms such as ‘preliminary,’ ‘interlocutory,’ ‘interim’ or ‘provisional’.<sup>11</sup> There is also no notion consistently employed in order to designate the vehicle by which that aim is supposed to be achieved. The terms ‘injunction,’ ‘order,’ ‘relief’ or ‘attachment’ have their proper

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<sup>7</sup> M Kawano, ‘Provisional Measures as a Necessary Instrument for Effective Justice’ in R Stürner and M Kawano (ed), *Comparative Studies on Enforcement and Provisional Measures* (Siebeck 2011) 192, 192 ff.

<sup>8</sup> Eg, Art 50 of the TRIPS.

<sup>9</sup> Eg, Principles on Provisional and Protective Measures in International Litigation 1996 (ILA) (‘1996 Helsinki Principles’) and Final Resolution on Provisional Measures 2017 (IDI) (‘2017 IDI Resolution’). Multiple references to provisional measures are also contained in Principles of Transnational Civil Procedure 2004 (ALI / UNIDROIT) (‘2004 ALI-Unidroit Principles’) and Model European Rules of Civil Procedure 2020 (ELI / UNIDROIT) (‘2020 ELI-Unidroit Rules’). Provisional measures are also discussed in Art 10 of the Storme Draft 1994 [M Storme, *Approximation of Judiciary Law in the European Union* (Martinus Nijhoff 1994)], Guideline 13 of the Guidelines on Intellectual Property and Private International Law 2020 (ILA) (‘2020 Kyoto Guidelines’) and in Art 6 of the ‘Lisbon Guidelines’ on the Protection of Privacy in Private International and Procedural Law 2022 (ILA) (‘2022 Lisbon Guidelines’).

<sup>10</sup> Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters OJ L 189, 27.6.2014, 59–92, ‘EAPO Regulation’.

<sup>11</sup> Some scholars point out that each of these notions tends to describe a different characteristic of the measures discussed in this subchapter. ‘Provisional’ is said to emphasize the duration of the measures, ‘protective’ the purpose of the measures, and ‘interim’ the function of the measures operating as a relief granted prior to the final resolution of the dispute. However, even the advocates of such distinctions still tend to use a single term (eg, ‘interim’) to label the measures in question. See D Draguiev, *Interim Measures in Cross-Border Civil and Commercial Disputes. Interim Relief Proceedings in International Litigation and Arbitration* (Springer 2023) 9.

place in the legal vocabulary of the jurisdictions employing them,<sup>12</sup> but with no additional detail and context, their particularities are at risk of being lost in a comparative discourse. Furthermore, as the choice of local terminology is shaped by the local legal culture and the historical development of the legal system, the same term may have different meanings or connotations in different jurisdictions.

- 8 As a consequence, the present subchapter departs from local terminology used in the jurisdictions surveyed. The notion of 'provisional measures' has been chosen as a collective label for all the tools that share a common denominator: the purpose of the measures surveyed is to temporarily safeguard effective judicial protection of some rights without definitively adjudicating the substance of the matter.<sup>13</sup> Such a functional understating of the notion of 'provisional measures' encompasses a plethora of remedies available in various jurisdictions: asset freezing injunctions, injunctions to restrain fraudulent conveyances, *quia timet* injunctions and many others.
- 9 Detailed definitions of similar notions (ie, 'provisional and protective measures'), coined with the assistance of comparative studies, are said to cover measures aimed at (1) securing the enforcement of an expected decision on the merits of the case; (2) maintaining or regulating temporarily a certain state of affairs; (3) preserving or obtaining evidence or other information as well as (4) anticipatory measures equivalent to those available in proceedings on the merits.<sup>14</sup> EU private international law employs a similar notion ('provisional, including protective, measures')<sup>15</sup>, which encompasses measures that are 'intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is otherwise sought from the court having jurisdiction as to the substance of the case'.<sup>16</sup> It covers 'protective orders aimed at obtaining information or preserving evidence', however, 'measures which are not of a protective

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<sup>12</sup> Eg, 'freezing order' under Australian law can be considered as the equivalent of the notion of 'freezing injunction' in the UK. See M Douglas and N Ekanayake, 'Extraterritorial Freezing Order' (2022) 49 Brief 36, 36.

<sup>13</sup> Although measures corresponding to that definition are provisional in nature, it has been observed in the doctrine that in practice some provisional measures operate as 'final' judgments because parties do not initiate the main proceedings after the issuance of the requested measure. See X Kramer, 'Harmonisation of Provisional and Protective Measures in Europe' in M Storme (ed), *Procedural Laws in Europe. Towards Harmonisation* (Maklu 2003), 305, 312.

<sup>14</sup> Cf in the context of 2020 Kyoto Guidelines J Blom, R C Dreyfuss, P Jurcys et al., 'International Law Association's Guidelines on Intellectual Property and Private International Law' (2021) 12 Jipitec 13, 31.

<sup>15</sup> Art 35 of the Brussels Ibis Regulation, Art 14 of the Maintenance Regulation, Art 15 of the Brussels IIter Regulation and – albeit inconsistently and in parallel to the notion of 'provisional and protective measures' – Art 131 of the EU Trademark Regulation.

<sup>16</sup> *Reichert and Kockler*, Case C-261/90 (CJEU), Judgment of 26 March 1992 [ECLI:EU:C:1992:149] para 34.

nature, such as measures ordering the hearing of a witness' do not fall within the scope of that notion.<sup>17</sup>

- 10 Employed in the cross-border context, the notion of 'provisional measure' serves specific purposes. If a court not having jurisdiction over the substance of the matter nonetheless has jurisdiction to grant provisional measures, the accepted understanding of the concept of 'provisional measure' delineates the range of powers enjoyed by that court. The notion of 'provisional measures' can also be relied upon to shape the concept of foreign judgment susceptible of enforcement under the relevant legal framework, either by narrowing its scope or by defining its contours.<sup>18</sup>
- 11 Whatever the precise understanding of the notion of 'provisional measures' in various contexts might be, the ambition of the present subchapter is not to examine the entire array of such measures through a comparative lens.<sup>19</sup> Instead, its aim is to focus on the cross-border operation of these measures and to provide a comparative analysis of their capability to act as instruments furthering international coordination and cooperation.<sup>20</sup> Nonetheless, the present subchapter is not intended to provide a detailed account of all the issues that arise in international litigation in connection with various provisional

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<sup>17</sup> Recital 25 of the Brussels Ibis Regulation. See also St. Paul Diary, Case C-104/03 (CJEU), Judgment of 28 April 2005 [ECLI:EU:C:2005:255] para 17.

<sup>18</sup> Eg, Art 3(1)(b) of the 2019 HCCH Judgments Convention clarifies that 'an interim measure of protection is not a judgment'. A provisional measure cannot be recognized or enforced under the Convention. However, the Convention does not bar the recognition and enforcement of such measures under national law. See F Garcimartín and G Saumier, *Explanatory Report to the 2019 HCCH Judgments Convention* (HCCH 2020) para 99. In a similar vein, Art 2(a) of the Brussels Ibis Regulation clarifies that for the purpose of its Chapter III on recognition and enforcement, the notion of 'judgment' encompasses provisional measures ordered by a court having jurisdiction as to the substance of the matter under that Regulation. It follows, a contrario, that the notion of 'judgment' does not cover provisional measures granted by the courts not having jurisdiction over the substance of the matter. That article also explains that the notion of 'judgment' does not include a provisional measure ordered by a court having jurisdiction over the substance of the matter without the defendant being summoned to appear, unless the judgment containing the measure is served on the defendant prior to enforcement.

<sup>19</sup> For detailed survey of national solutions see Chapter 1 on provisional and protective measures within Part 11.

<sup>20</sup> It should be noted that anti-suit injunctions are not discussed in the present subchapter on provisional measures. Due to their ability to prevent parallel proceedings or provoke their discontinuation, anti-suit injunctions are examined in the following subchapter. Additionally, it is debatable whether anti-suit injunctions serve the same purpose as more 'traditional' provisional measures. One could argue that an anti-suit injunction does not necessarily secure a specific outcome of proceedings or a substantive right, but rather protects the procedural right to initiate proceedings before a chosen adjudicative body.



measures.<sup>21</sup> Given that coordination and cooperation in the globalized world are central to this study, it first examines the paradigms that govern the jurisdictional framework authorizing courts in different jurisdictions to grant provisional measures (1.3). Following this, it addresses the tools employed to manage parallel proceedings and concurrent provisional measures (1.4).

- 12 In light of this objective, since the English courts' case law on the so-called 'freezing orders' can be considered a main driver of the intensified debate on provisional measures in cross-border cases, the present subchapter builds its comparative narrative around the measures aimed at preventing the disposal of assets. In the common law world, the freezing injunction, previously known as 'Mareva injunction', achieved its modern form in the decision of 1975 in *Nippon Yusen Kaisha v. Karageorgis*.<sup>22</sup> It received its name after *Mareva Compania Naviera S.A.*, the company that sought an injunction restraining disposition of defendant's assets within the jurisdiction of the court in a subsequent case dealt with shortly after the decision of 1975.<sup>23</sup> The freezing injunction does not operate as *in rem* injunction. It does not target the assets themselves but rather the conduct of the person against whom the injunction is issued. By contrast, a number of asset freezing measures available in common law (pre-judgment attachment) and civil law world (*saisie conservatoire* known under French law<sup>24</sup> or *sequestri conservati* under Italian law<sup>25</sup>) can be likened to an *in rem* injunction – they do not merely compel the debtor to refrain from removing or dissipating assets; instead, they constitute an attachment or arrest of the said assets. Nonetheless, from the functional viewpoint, all these measures share a similar objective of enhancing the likelihood of future successful enforcement against assets and, as such, constitute interesting comparative material.

### 1.3 Jurisdiction to Grant Provisional Measures in Cross-Border Context

- 13 Due to the limited limited significance of the imperatives of public international law with regard to the issue of granting provisional measures, the question as to whether a court has jurisdiction to issue such a measure is in principle answered according to the

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<sup>21</sup> For an extensive study see L Collins, 'Provisional and Protective Measures in International Litigation' in *Collected Courses of the Hague Academy of International Law – Recueil des cours* (Brill 1992) Vol 234, with an updated version in L Collins, *Essays in International Litigation and the Conflict of Laws* (Clarendon Press 1994) 7 ff.

<sup>22</sup> *Nippon Yusen Kaisha v. Karageorgis* (England and Wales Court of Appeal), Decision of May 1975 [1975 1 WLR 1093].

<sup>23</sup> *Mareva Compania Naviera SA v International Bulkcarriers SA The Mareva* (England and Wales Court of Appeal), Decision of 23 June 1975, [1980 1 All ER 213].

<sup>24</sup> Case 17-20.296 (Court of Cassation, France), Judgment of 3 October 2018 [ECLI:FR:CCASS:2018:C100908].

<sup>25</sup> Case 25064 (Court of Cassation, Italy), Order of 16 September 2021 [ECLI:IT:CASS:2021:25064CIV] para 16.

provisions of relevant uniform legal framework (eg, international agreement or EU secondary law) or according to a unilateral choice made by a country of the court from which the provisional measure is sought. To paint a full picture of the jurisdictional matrix under which the courts of different jurisdictions can grant such measures, it is necessary to distinguish two axes along which these courts operate. The first axis pertains to the requisite jurisdiction to grant a provisional measure and its underlying rationale. The second axis concerns the permissible extent of the exercise of that jurisdiction.

### 1.3.1 *Inherent and Stand-Alone Jurisdiction to Grant Provisional Measures*

- 14 There are two main concepts that underpin the jurisdiction to grant provisional measures.
- 15 Pursuant to the concept of ‘ancillary jurisdiction’,<sup>26</sup> also referred to as ‘accessory’<sup>27</sup> or ‘inherent’<sup>28</sup> jurisdiction, a court with jurisdiction over the substance of the matter has jurisdiction to adopt measures necessary to safeguard the effective exercise of its jurisdiction on the merits. The ordinarily competent court should be viewed as the natural forum for granting measures that seek to protect the outcome of the case that can be or already has been brought before that court.
- 16 Pursuant to the concept that can be referred to as ‘stand-alone’ or ‘provisional-measures-specific’ jurisdiction, under certain conditions, a court that has no jurisdiction over the substance of the matter can grant provisional measures. Under this concept, a court has the authority to issue a provisional measure even if there is no sufficient basis for establishing jurisdiction on the merits, provided there is a sufficient link between the requested measure and the state where provisional protection is sought. By definition, such a court is acting in support of foreign proceedings (ie, future foreign proceedings, proceedings already pending abroad, or potentially even the proceedings that have resulted in a decision). Art 24 of the 1968 Brussels Convention, Art 31 of the Brussels I Regulation and now Art 35 of the Brussels Ibis Regulation are often considered to be the illustrations of the second concept. Art 35 of the Brussels Ibis Regulation reads:

Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that Member

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<sup>26</sup> T Hartley, *Civil Jurisdiction and Judgments in Europe: The Brussels I Regulation, the Lugano Convention, and the Hague Choice of Court Convention* (Oxford UP 2017) 379.

<sup>27</sup> Blom, Dreyfuss, Jurcys et al. (n 14) 32.

<sup>28</sup> IDI - Provisional Measures, Final Report: December 23, 2016, 272.

State, even if the courts of another Member State have jurisdiction as to the substance of the matter.

- 17 While in some contexts only the concept of ‘inherent jurisdiction’ is accepted,<sup>29</sup> the stand-alone jurisdiction for granting provisional measures is strongly endorsed by various sources of soft law<sup>30</sup> and reflected with increasing frequency in regional instruments,<sup>31</sup> as well as in domestic legislation and judicial practice.<sup>32</sup> That trend can be also observed in the evolution of the common law approach to jurisdiction for granting freezing injunctions.

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<sup>29</sup> See below (para 18 ff) the discussion on Mareva injunction under the traditional authorities of English common law. Furthermore, under Art 6 of the EAPO Regulation ‘jurisdiction to issue a Preservation Order shall lie with the courts of the Member State which have jurisdiction to rule on the substance of the matter in accordance with the relevant rules of jurisdiction applicable’ and, where the creditor has already obtained a judgment or court settlement, ‘jurisdiction to issue a Preservation Order for the claim specified in the judgment or court settlement shall lie with the courts of the Member State in which the judgment was issued or the court settlement was approved or concluded’.

<sup>30</sup> Eg, Seventh Principle of the 2017 IDI Resolution (‘A national court may make orders for provisional or protective measures in relation to assets, or to acts, within its territory even if a court in another country has jurisdiction over the merits. A court may order provisional measures in relation to acts and property abroad provided this does not infringe upon the exclusive jurisdiction of foreign courts’); Principle 2.3 2004 ALI/Unidroit Principles (‘Court may grant provisional measures with respect to a person or to property in the territory of the forum state, even if the court does not have jurisdiction over the controversy’); Guideline 13(2) of the 2020 Kyoto Guidelines (‘Other courts [than the court having jurisdiction as to the merits of the case] shall have jurisdiction to order provisional and protective measures within their territory’); Art 6(2) of the 2022 Lisbon Guidelines (‘The court of another State to which the publication in question was directed shall have the power to grant provisional injunctive relief in accordance with its own law in order to support the main proceedings. However, this provisional injunctive relief shall be strictly territorial within the jurisdiction of this court’). Rule 202(3) of 2020 ELI-Unidroit Rules (‘Without prejudice to applicable European Union rules and international conventions, another court may grant such provisional and protective measures necessary to protect interests located within the jurisdiction or the subject-matter of which have a real connecting link with the territory of the court, or that are necessary to support proceedings brought in another country’).

<sup>31</sup> Eg, Art 35 of the Brussels Ibis Regulation; Art 15(1) of the Brussels IIter Regulation (‘[...] measures which may be available under the law of that Member State in respect of [...] a child who is present in that Member State or [...] property belonging to a child which is located in that Member State’); Art 31 of the 2007 Lugano Convention.

<sup>32</sup> Eg, Art 10(b) of the Loi fédérale sur le droit international privé (Federal Act on Private International Law) (Switzerland). For discussion on the application of the concept in France, Italy and Germany see, inter alia, N Trocker, Provisional Remedies in Transnational Litigation: A Comparative Outline of Forms of Judicial Cooperation, in R Strüner and M Kawano (ed), *Comparative Studies on Enforcement and Provisional Measures* (Siebeck 2011) 271, 277 and 278.

- 18 Under traditional authorities of English common law,<sup>33</sup> a court would only grant a freezing injunction if it was auxiliary to a claim on the substance over which the English courts had jurisdiction. The traditional approach has changed only in recent years.
- 19 In 2015, the High Court of Australia clarified that the power to issue a freezing order in relation to an anticipated judgment of a foreign court, which would then be registrable by order of the Supreme Court of Western Australia, is within the inherent power of that Supreme Court since the freezing order seeks to protect the future local registration and enforcement of the foreign judgment.<sup>34</sup>
- 20 In 2019, more in line with traditional authorities of English common law mentioned above, the Singapore Court of Appeal held that a Mareva injunction in aid of foreign proceedings can be granted if (1) the court in Singapore has personal jurisdiction over the defendant and (2) the plaintiff has a 'reasonable accrued cause of action' against the defendant in Singapore.<sup>35</sup>
- 21 In the UK, the first significant deviation from the strict approach to the auxiliary nature of provisional measures resulted from the application of the abovementioned articles of 1968 Brussels Convention and of the Brussels I/Ibis Regulations. These instruments provide for a stand-alone jurisdiction for granting provisional measures. It is true that the relevance of the solutions emanating from EU law has been called into question in the UK legal order in the post-Brexit reality. Nonetheless, in 2021,<sup>36</sup> the Privy Council overruled the traditional authorities of English common law and liberated the freezing order from being merely an auxiliary to a claim pending in the forum state. It clarified that a freezing order can be granted in order to secure the enforcement of (future) foreign judgments, as long as the domestic court has personal jurisdiction over the defendant.
- 22 For the sake of completeness, it is worth mentioning that freezing orders have had less success in the United States. In 1999, in *Grupo Mexicano*,<sup>37</sup> the US Supreme Court departed from the approach taken by the English common law courts and refused to

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<sup>33</sup> *Siskina (Owners of cargo lately laden on board) v Distos Cia Naviera SA* (House of Lords, UK), Judgment of 26 October 1977 [1979 AC 210]; *Mercedes-Benz AG v. Herbert Heinz Horst Leiduck Co* (Hong Kong), No 18 of 1995 (Judicial Committee of the Privy Council) Judgment of 24 July 1995 [1995 UKPC 31].

<sup>34</sup> *PT Bayan Resources TBK v BCBC Singapore Pte Ltd & Ors, Case P14/2015* (High Court of Australia), Judgment of 14 October 2015 [2015 HCA 36].

<sup>35</sup> *Bi Xiaoping v China Medical Technologies, No 188 of 2018* (Court of Appeal of the Republic of Singapore), Judgment of 30 September 2019 [2019 SGCA 50].

<sup>36</sup> *Broad Idea International Ltd v Convoy Collateral Ltd* (British Virgin Island), No 004 of 2020 (Judicial Committee of the Privy Council), Judgment of 4 October 2021 [2021 UKPC 24].

<sup>37</sup> *Grupo Mexicano de DeSarollo, S.A. v. Alliance Bond Fund, Inc.* (Supreme Court, US), Decision of 17 June 1999 [527 US 308 1999].

render the Mareva injunction available in the US. Echoing the dissenting opinion drafted by Justice Ginsburg, the decision has been lamented for insufficient consideration of the development of Mareva-jurisdiction in the common law world.<sup>38</sup>

### 1.3.2 Jurisdiction to Grant Extraterritorial Provisional Measures

- 23 The question of whether a court has jurisdiction to grant provisional measures in aid of foreign proceedings is one issue, but the question of the scope of the measures that can be granted within the limits of that jurisdiction is a separate matter. Regardless of the basis underpinning *in concreto* the jurisdiction of the court before which the provisional protection is sought, concerns related to sovereignty, national policies, oppressiveness to the defendant and enforcement difficulties were commonly seen as obstacles to issuing provisional measures intended to have effects in other jurisdictions.<sup>39</sup>
- 24 Against this background, although civil law courts are still reluctant to issue provisional measures that affect assets situated in foreign jurisdictions, there exist legal precedents that contradict this tendency.<sup>40</sup> Already in 1985, the Italian Court of Cassation considered lawful an order of sequestration (*sequestro giudiziario*)<sup>41</sup> affecting property located in other countries.<sup>42</sup> Commentators point out that 'it was irrelevant that it might [have been] difficult to enforce the measures abroad'.<sup>43</sup>
- 25 Around the same time, similar trends emerged in the common law world and marked in particular the case law records of England<sup>44</sup>. *In personam* nature of the freezing order enabled its transformation into a provisional measure impacting the defendant's actions abroad, potentially resulting in a worldwide freezing effect (worldwide freezing injunction).<sup>45</sup> Although the proportionality of such a measure and its conformity with international comity still raised concerns, a court could compel the defendant not to dispose assets situated abroad. The approach spread in the common law world. In 2007,

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<sup>38</sup> H Buxbaum, 'Asset Freezes in United States Federal Courts: Grupo Mexicano de Desarrollo, S.A. v Alliance Bond' (2000) IPRAX 39, 39 ff.

<sup>39</sup> O G Chase, H Hershkoff, L Silberman, J Sorabji, R Stürner, Y Taniguchi, V Varano, *Civil Litigation in Comparative Context* (West Academic Publishing 2007) 317.

<sup>40</sup> Eg, Case 5A\_259/2010 (Federal Supreme Court, Switzerland), Decision of 26 April 2012 and Case 5A\_262/2010 (Federal Supreme Court, Switzerland), Decision of 31 May 2012.

<sup>41</sup> Collins (n 21) 25 fn 23, describes Italian order of sequestration – *sequestro giudiziario* [Art 670 of the Codice di procedura civile (Code of Civil Procedure) (Italy)] as an attachment to ensure that judgment can be satisfied and *sequestro conservativo* (Art 671 of that Code) as a protective attachment to preserve property in dispute.

<sup>42</sup> Case 3464 (Court of Cassation, Italy), Judgment of 8 June 1985.

<sup>43</sup> Collins (n 21) 106.

<sup>44</sup> Eg, *Derby & Co. Ltd v. Weldon* (No 1) [1990] Ch. 48.

<sup>45</sup> IDI - Provisional Measures, Final Report: December 23, 2016, 334.

the Supreme Court of Cyprus confirmed that a Cypriot court can issue a worldwide freezing order with no explicit reference to the relevance of perspectives for its enforcement.<sup>46</sup> In 2021, the High Court of Australia further clarified that the Federal Court's power to grant a freezing order over assets outside of Australia is not conditioned by a realistic possibility of enforcement of a judgment on the substance in each jurisdiction to which the requested order relates.<sup>47</sup>

- 26 Thus, there is no impassable barrier derived from considerations of sovereignty or comity that prevents the issuance of provisional measures intended to produce effects in other states. Ultimately, if direct enforcement abroad is necessary, it is for the states where enforcement is sought to decide whether they will render the foreign provisional measure effective. However, it does not mean that the risk of excessive international jurisdiction can be neglected. A worldwide freezing order can potentially affect non-parties, ie, a person not being directly concerned by the main proceedings. The issue was addressed in early decisions that restrained defendants from disposing of assets held anywhere in the world. Specific wording of the injunction ('Babanaft proviso') was supposed to mitigate the effects of freezing order on third parties.<sup>48</sup>
- 27 Lastly, from the standpoint of potential extraterritorial effects, it is important to distinguish between courts having jurisdiction over the substance and the courts enjoying the stand-alone jurisdiction to grant provisional measures. Measures issued by the latter courts tend to be strictly local and are typically not intended to have effects abroad.<sup>49</sup> Taking EU private international law as an example, there are reasons to believe that a measure can be granted by a court without jurisdiction over the substance only if the effects of that measure are limited to the territory of the Member State of the forum. It can be argued that this interpretation results from the *dictum* of the CJEU in *Van*

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<sup>46</sup> *Seamark Consultancy Services Limited v Joseph P Lasala et al.* (Supreme Court, Cyprus), Judgment of 2007 [2007 1 C.L.R. 162]. Cf previous decision in *Metro Shipping Travel Ltd v Global Cruises SA* (Supreme Court, Cyprus), Judgment of 1989 [1989 1 C.L.R. 182], where it defined the asset freezing injunction as a measure restraining from moving assets within the jurisdiction.

<sup>47</sup> *Deputy Commissioner of Taxation v Huang* (High Court of Australia), Judgment of 8 December 2021 [2021 HCA 43].

<sup>48</sup> In particular see *Babanaft International Co SA v Bassatne* (England and Wales Court of Appeal), Judgment of 29 June 1988 [1989 1 All ER 433]. For discussion on the so-called 'Babanaft proviso' see D Capper, 'Worldwide Mareva Injunction' (1991) 54(3) *The Modern Law Review* 329, 345–347. Specific guidelines aiming to attenuate the risk of excessive exercise of jurisdiction has been also set out in *Dadourian Group International Inc v Simms* (England and Wales Court of Appeal), Judgment of 11 April 2006 [EWCA Civ 399], as the so-called 'Dadourian guidelines'.

<sup>49</sup> Eg, Rule 202(3) of 2020 ELI-Unidroit Rules; Guideline 13(2) of the 2020 Kyoto Guidelines; Art 6(2) of the 2022 Lisbon Guidelines.

*Uden*,<sup>50</sup> reiterated in *Mietz*<sup>51</sup> and *TOTO*<sup>52</sup> ('the granting of provisional or protective measures on the basis of [Art 35 of the Brussels Ibis Regulation] is conditional on, inter alia, the existence of a real connecting link between the *subject-matter* of the measures sought and the *territorial jurisdiction* of the Contracting State of the court before which those measures are sought'). There are also some other findings presented in the case law suggesting that a measure qualifies as a 'provisional measure' only if it is territorially limited. In fact, such a territorial limitation of provisional measures is echoed in *Van Uden*<sup>53</sup> and *Mietz*,<sup>54</sup> where the CJEU explained that a provisional measure issued by a court with no jurisdiction over the substance of the matter has to relate 'only to specific assets of the defendant located or to be located within the confines of the territorial jurisdiction of the court to which application is made'. It is not clear, however, whether this dictum applies to all provisional measures in general or only to highly specific measures in question in the cases that led to the requests for a preliminary ruling.

#### 1.4 Managing Parallel Interim Proceedings and Concurrent Provisional Measures

- 28 In the absence of relevant international or supranational instruments, a court requested to grant a provisional measure determines whether it has jurisdiction in the light of relevant domestic legal framework. The court does not need to have jurisdiction over the substance of the matter and the main proceedings may be already pending elsewhere. Nor does this court have to be the only authority to which a request for a provisional measure can be made. Such a court can also be requested to issue a provisional measure although a court in another jurisdiction has already pronounced on that matter. Even when an international or supranational uniform framework addressing the issue of provisional measures has been put in place, as in the EU Member States, the simultaneous reliance on the two approaches to jurisdiction for granting provisional measures (ie, concept of 'inherent jurisdiction' and the concept of provisional-measures-specific jurisdiction) raises questions about the ramifications of concurrent jurisdiction.
- 29 By its very nature, a provisional measure is not final as it seeks only to temporarily safeguard the effective judicial protection of certain rights. Two important consequences follow from this: first, the interim measure does not possess the character of a final judgment and, therefore, second, it may be possible to revoke or modify it where necessary or appropriate.

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<sup>50</sup> *Van Uden*, Case C-391/95 (CJEU), Judgment of 17 November 1998 [ECLI:EU:C:1998:543] para 40.

<sup>51</sup> *Mietz*, Case C-99/96 (CJEU), Judgment of 27 April 1999 [ECLI:EU:C:1999:202] para 42.

<sup>52</sup> *TOTO*, Case C-581/20 (CJEU), Judgment of 6 October 2021 [ECLI:EU:C:2021:808] para 52.

<sup>53</sup> *Van Uden*, Case C-391/95 (CJEU), Judgment of 17 November 1998 [ECLI:EU:C:1998:543] para 47.

<sup>54</sup> *Mietz*, Case C-99/96 (CJEU), Judgment of 27 April 1999 [ECLI:EU:C:1999:202] para 42.



- 30 The enforcement of foreign decisions has been traditionally limited to the decisions that are final and as such definitely settle the matters between the parties. Provisional measures lack those attributes. Accordingly, a number of states refuse to recognize and enforce foreign provisional measures due to their non-definitive nature.<sup>55</sup> Other states consider that the effects of provisional measures are confined within the territory of the issuing state and resort to the technique of parallel provisional measures in order to give practical effect to those measures.<sup>56</sup> In a similar vein, multilateral international agreements that provide for an obligation to enforce foreign judgments often exclude provisional measures from the scope of that obligation.<sup>57</sup>
- 31 The trend is changing. Some jurisdictions declare increasing readiness to enforce foreign provisional measures at least in the context of specific areas of law and under some circumstances either on the basis of international or supranational legal frameworks (eg, EU secondary law) or on the basis of domestic rules on enforcement.<sup>58</sup> Nonetheless, despite the growing openness toward foreign provisional measures, the approach favourable to their enforcement still cannot be regarded as the widespread standard of international civil procedure.
- 32 Furthermore, even under the frameworks that are providing some forms of enforcement of foreign provision measures, there is a general tendency to refuse enforcement of the measures that are granted by the courts not having jurisdiction over the substance. Taking EU law as an example, the measures granted in civil and commercial matters by an EU Member State court having provisional-measures-specific jurisdiction are not only

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<sup>55</sup> Eg, Italy, where under Article 64(1)(iv) of the *Legge di riforma del sistema italiano di diritto internazionale privato* (Law on the reform of the Italian system of private international law) n 218 of 31 May 1995 (Italy), the recognition, and by extension the enforcement, is limited to foreign judgments that have res judicata effect under the law in force in the state of origin.

<sup>56</sup> See 'ALI/Unidroit Principle of Transnational Civil Procedure' (2004) 4 Uniform Law Review, 758, 807-808.

<sup>57</sup> Eg, Art 3(1)(b) of the 2019 HCCH Judgments Convention; Art 31(4) of the Convention on the Contract for the International Carriage of Goods by Road 1956 ('CMR Convention').

<sup>58</sup> Eg, S Nathan Park, 'Recognition and Enforcement of Foreign Provisional Orders in the United States: Toward a Practical Solution' (2017) 38 University of Pennsylvania Journal of International Law 999; under Art 25(b) of the *Loi fédérale sur le droit international privé* (Federal Act on Private International Law) (Switzerland) 'a foreign decision is recognized in Switzerland [...] if it is a final decision' but that provisions is increasingly often interpreted as not precluding enforcement of foreign provisional measures – see A Bonomi, 'Interim Measures at the Crossroads of International Litigation and Arbitration. Some Remarks on Concurrent Jurisdiction and Cross-Border Enforcement' (2019/2020) 21 YPIL 137, 143.



local but also do not benefit from the uniform EU rules on the recognition and enforcement of judgments.<sup>59</sup>

- 33 In light of these observations, a question may arise as to whether there is indeed a need to address the issue of concurrent jurisdiction for issuing provisional measures.
- 34 It is true that since provisional measures do not definitively determine the merits they are typically refused *res judicata* effect, in spite of the prospects of their enforcement in other jurisdictions.<sup>60</sup> However, a provisional measure cannot be denied some specific authority with regard to the protection it seeks to ensure.<sup>61</sup> Unless the circumstances change, the court and the parties remain bound by the measure. In fact, the finding that a provisional measures does not have *res judicata* effect implies solely that a measure does not enjoy such an effect with regard to the underlying substance of the matter.<sup>62</sup> In order to grant a provisional measure the court is not required to adjudicate the substance but confines itself to a preliminary assessment of the case, to the extent necessary to grant or refuse such a measure. Such a summary assessment is nonetheless conducted with regard to specific circumstances underlying the substance of the matter. It is widely accepted that the applicant seeking provisional protection has to show that they have a *prima facie* case on the merits.<sup>63</sup> Hence, there is an element of pre-assessment of the substance involved in granting of provisional measures and therefore a risk that one court will not recognize a claim that other courts will protect by provisional measures. The outcome can be particularly paradoxical if a court having jurisdiction over the substance refuses to grant interim protection since it finds that the applicant does not have a *prima facie* case on the merits but another court issues a provisional measure.

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<sup>59</sup> Eg, Art 2(a) of the Brussels Ibis Regulation specifies that for the purposes of the rules on recognition and enforcement the notion of 'judgment' includes provisional, including protective, measures ordered by a court or tribunal which by virtue of this Regulation has jurisdiction as to the substance of the matter. It follows, *a contrario*, that a measure granted by a court not having jurisdiction over the merits is not recognised and enforced in other EU Member States on the basis of the Regulation.

<sup>60</sup> S Schaffstein, *The Doctrine of Res Judicata Before International Commercial Arbitral Tribunals* (Oxford UP 2016).

<sup>61</sup> See G Cuniberti, 'Quelle solution au conflit de procédures conservatoires en droit judiciaire européen?' (2020) 2 *Revue critique de droit international privé* 350, 350 ff.

<sup>62</sup> Cf, Principe 21 of the 1996 Helsinki Principles ('The fact that the court has granted a provisional and protective measure does not in itself found jurisdiction over the substantive claim, whether or not limited to the value of the frozen assets'); Rule 147(2) of 2020 ELI-Unidroit Rules ('Provisional measures do not have *res judicata* effects on the merits of the issues in dispute in proceedings').

<sup>63</sup> Eg, Second Principle of the 2017 IDI Resolution; Art 10.2 of the Storme Draft 1994 ('The remedy may be granted whenever the court is satisfied, without going into the matter at length, that the existence of the claimed right is obvious and that its infringement is imminent.').

- 35 Second, if one accepts that provisional measures have some specific authority with regard to the protection they seek to ensure and multiple courts might have concurrent jurisdiction to issue measures susceptible of enforcement, there is a non-negligible risk of existence of conflicting measures also with regard to the other conditions for granting provisional measures, eg, the urgency and proportionality of the measures.
- 36 Lastly, third, even if provisional measures emanating from courts having concurrent jurisdiction cannot collide since they are territorially limited and refused enforcement, the coexistence of contradictory measures might be viewed as undesirable because it weakens the credibility of provisional relief.<sup>64</sup>
- 37 In order to reduce the likelihood of contradictory decisions and to discourage the pursuit of repetitive proceedings concerning provisional measures it is crucial to properly manage the concurrent jurisdiction of the courts involved in providing provisional relief. Several answers for reaching that ambitious goal have been given in the legal literature and practice. Among the most heavily discussed are, first, the hierarchy between the grounds of jurisdiction, second, the operation of classic private international law mechanisms dealing with parallel proceedings and *res judicata*, third, the exclusive choice of court agreements and, fourth, coordination and cooperation achieved through communication between the courts. It must be stressed that these tools for managing parallel interim proceedings and concurrent provisional measures are not mutually exclusive and may complement each other.

#### 1.4.1 Hierarchy of the Grounds of Jurisdiction to Grant Provisional Measures

- 38 The necessity of addressing the power dynamics between the courts potentially involved in granting provisional relief is apparent in situations where multiple fora have jurisdiction to issue provisional measures. Although the specific solutions tend to vary across the jurisdictions surveyed for the purpose of the present subchapter, there are two main paradigms that those answers tend to reflect.
- 39 In the first paradigm, greater authority is given to the court potentially or effectively exercising the jurisdiction over the substance of the matter since it is the natural forum for granting provisional measures relating to the merits of the case that it will or already is adjudicating. The provisional measures issued by a court not having such a jurisdiction are aimed exclusively at supporting the main proceedings pending or anticipated elsewhere. Accordingly, the jurisdiction of that court is subsidiary to the jurisdiction of the ordinarily competent court and it can be extinguished once the main proceedings

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<sup>64</sup> Bonomi (n 58) 143.

are initiated,<sup>65</sup> the provisional measures adopted by that court can cease to apply once the court having jurisdiction over the substance awards provisional protection<sup>66</sup> and the latter court can be empowered to modify or revoke provisional measures granted by other courts.<sup>67</sup>

- 40 In the second paradigm, equal authority is given to the courts having – or already exercising – jurisdiction over the substance of an action, on the one hand, and to the courts enjoying stand-alone jurisdiction to grant provisional measures, on the other hand.<sup>68</sup> This paradigm seems to be founded on the view that the urgent nature of interim protection and the practical need of immediate judicial intervention – albeit often territorially limited – justifies no preference in favour of the courts with jurisdiction over the substance of the matter. The second paradigm does not resolve the issue of concurrent jurisdiction for granting provisional measures; it merely defers the question of whether and how to address it to a later stage.

#### 1.4.2 Provisional Measures as a Subject of *Lis Pendens* and *Res Judicata*

- 41 The classic response of international civil procedural law to the problem of concurrent jurisdiction is *lis pendens* and *res judicata*. The concept of *lis pendens* will be discussed in more detail the context of proceedings on the merits in the second subchapter. The concept of *res judicata* is elaborated upon in the chapter on recognition and

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<sup>65</sup> For doctrinal interpretation of the Brussels I and Brussels Ibis Regulation to that effect see J Turek, 'Wzruszanie orzeczeń w postępowaniu o udzielenie zabezpieczenia' (2010) 15 Monitor Prawniczy 821, 822; J Zatorska, *Komentarz do rozporządzenia nr 1215/2012 w sprawie jurysdykcji i uznawania orzeczeń sądowych oraz ich wykonywania w sprawach cywilnych i handlowych*, LEX, Commentary to Art 35. That interpretation has been rejected by Polish courts under Lugano I Convention [Case V CO 3/01 (Supreme Court, Poland), Order of 6 April 2001 [OSNC 2001 vol. 12 175] and under the Brussels Ibis Regulation [Case I ACz 1333/17 (Court of Appeal in Poznań, Poland), Order of 11 October 2017 [orzeczenia.ms.gov.pl].

<sup>66</sup> Eg, Art 15(3) of the Brussels IIa Regulation ('The measures taken pursuant to para 1 shall cease to apply as soon as the court of the Member State having jurisdiction under this Regulation as to the substance of the matter has taken the measures it considers appropriate.'), Art 12(2) of the 1996 HCCH Child Protection Convention ('The measures taken under the preceding para with regard to a child habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Arts 5 to 10 have taken a decision in respect of the measures of protection which may be required by the situation').

<sup>67</sup> Cf Art 6(3) and (4) of the 2022 Lisbon Guidelines. In favour of implementation this solution in the future instalment of the Brussels I Regulation see B Hess, 'Reforming the Brussels Ibis Regulation: Perspectives and Prospects' (2012) 4 MPI Lux Research Paper Series 1, 12–13.

<sup>68</sup> In *TOTO*, Case C-581/20 (CJEU), Judgment of 6 October 2021 [ECLI:EU:C:2021:808] para 61, the CJEU held that under the Brussels Ibis Regulation a court having stand-alone jurisdiction to grant provisional measure is not required to decline jurisdiction if a court of another Member State, which has jurisdiction as to the substance, has already ruled on an application having the same cause of action and the same object and between the same parties.

enforcement. At this point, the focus should be on whether provisional measures are at all subject to these concepts.

- 42 As already discussed, provisional measures do not to produce *res judicata* effect with regard to the substance of the matter but do enjoy some authority with regard to the protection they ensure. Nonetheless, there is little comparative evidence showing that a foreign decision on provisional measure is generally capable of preventing the local forum from hearing another application for provisional relief. However, EU private international law provides one of the rare examples of contemplation of such an effect of provisional measures, although it is questionable whether they are based on the doctrine of *res judicata*. The CJEU confirmed that in the presence of multiple irreconcilable decisions on provisional measures, the recognition of a decision on provisional measure adopted in another Member State contradicting the decision handed down in the forum state has to be refused.<sup>69</sup> It has to be underscored that under EU private international law the irreconcilability of decisions constitutes a specific ground for refusal of recognition that cannot be automatically approximated to the *res judicata* situation.<sup>70</sup> There is little guidance in the CJEU case law supporting the view that a provisional measure could generally have *res judicata* effects and prevent the local forum from hearing an application for provisional measures. However, some EU Member States drew inspiration from the case law of the CJEU and felt compelled to recognize the *res judicata* effect of foreign provisional measures.<sup>71</sup>
- 43 Generally speaking, pendency of foreign proceedings for provisional measures does not seem to trigger the application of the rules on *lis pendens* before the local forum and prevent it from issuing a provisional measure corresponding to the measure sought abroad. According to CJEU case law, the existence of proceedings for a provisional measure cannot activate the *lis pendens* rule unless the claim for the provisional

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<sup>69</sup> See *Italian Leather*, C-80/00 (CJEU), Judgment of 6 June 2002 [ECLI:EU:C:2002:342] para 41, issued under the 1968 Brussels Convention, where the CJEU held that a decision on provisional measure awarded by the court having jurisdiction over the substance of the matter might be irreconcilable with a provisional measure previously granted by a court having stand-alone jurisdiction to issue provisional measures. As a consequence, the latter court it is required to refuse to recognise the foreign decision.

<sup>70</sup> Eg, Case 03-14.553 (Court of Cassation, France), Judgment of 20 June 2006 [ECLI:FR:CCASS:2006:C101024], confirming the reasoning according to which a decision on provisional measure does not necessarily need to have *res judicata* effect in order to provoke the refusal of recognition of foreign decision. Cf Case 09-13.830 (Court of Cassation, France), Judgment of 8 March 2011 [ECLI:FR:CCASS:2011:CO00202], where the Court recognized *res judicata* effect of a foreign decision on provisional measures.

<sup>71</sup> Eg, Case 09-13.830 (Court of Cassation, France), Judgment of 8 March 2011 [ECLI:FR:CCASS:2011:CO00202].

measure and the subsequent claim regarding substantive matters form a procedural unit.<sup>72</sup>

#### 1.4.3 Exclusive Choice of Court Agreement and Jurisdiction to Grant Provisional Measures

- 44 The multiplication of fora capable of granting provisional protecting raises the question of whether the parties can prevent the courts of a particular state from issuing such measures through an exclusive choice of court agreement.<sup>73</sup>
- 45 Overall, there seems to be sufficient support in national case law for the view that exclusive choice of court agreements do not necessarily prevent actions for provisional measures in jurisdictions that are not covered by the parties' agreement and should not have jurisdiction to adjudicate their dispute.<sup>74</sup> Even the jurisdictions that appear to be reluctant to allow bypassing of exclusive choice of court agreements for the purpose of granting provisional protection, do recognise that the considerations of urgency or efficiency can, in some situations, justify exceptions to the general principle of strict observance of such agreements.<sup>75</sup> Therefore, it follows from all these findings that an exclusive choice of court agreement is not entirely effective in dealing with concurrent jurisdiction for granting provisional measures.

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<sup>72</sup> *HanseYachts*, Case C-29/16 (CJEU), Judgment of 4 May 2017 [ECLI:EU:C:2017:343] para 35 and *Purrucker*, C-296/10 (CJEU) Judgment of 9 November 2010 [ECLI:EU:C:2010:665] para 80. The current state of affairs in civil and commercial matters has been described in the literature not only as the inapplicability of the *lis pendens* rule between two parallel interim proceedings but in general as lacking any alternative coordination mechanism. L Sandrini, 'Current challenges in the EU rules on cross-border enforcement of claims: Cross-border provisional measures', in F C Villata and B Hess (ed), *Towards more Effective enforcement of claims in civil and commercial matters within the EU – 'EFFORTS'*, 63, 73 <https://efforts.unimi.it/> accessed on 30 June 2023.

<sup>73</sup> It is noteworthy that the HCCH 2005 Convention on Choice of Court Agreements does not provide a proper answer as it does not address interim measures of protection. Art 7 of the HCCH 2005 Convention on Choice of Court Agreements stipulates that '[i]nterim measures of protection are not governed by this Convention. This Convention neither requires nor precludes the grant, refusal or termination of interim measures of protection by a court of a Contracting State and does not affect whether or not a party may request or a court should grant, refuse or terminate such measures.'

<sup>74</sup> See Paper by H van Loon, August 21, 2015, 348 ff in IDI - Provisional Measures, Final Report: December 23, 2016: 'It appears that there is good support in national case law for the view that such agreements do not prevent action in other countries for provisional measures.' For a detailed discussion on English and Dutch as well as more strict US and French case law see C Kessedjian, *Note on provisional and protective measures in private international law and comparative law*, Preliminary Document No 10 of October 1998, Enforcement of Judgments, Prel. Doc. No 10, October 1998, para 32, 64, 104 and 118.

<sup>75</sup> For discussion in the context of French court practice see Kessedjian (n 74) 34.

#### 1.4.4 Coordination and Cooperation through Communication

- 46 If the classic mechanisms of private international law fail or are not applicable with regard to provisional measures, the question whether a court should grant such a measure is left, as a matter of self-restraint and of proportionality, to the assessment carried out by the judge in complete isolation. Under such circumstances, on the one hand, provisional measures issued abroad can be fully ignored, leading to excessive securitization at the defendant's expense. There is also a non-negligible risk of issuing provisional measures that are contradictory. On the other hand, it can also happen that the measure provided by a specific forum will turn out to be insufficient to provide adequate and continued protection of the rights of the applicant. From the perspective of the rights of individuals and in the interest of global harmony of decisions, there is a persisting need to ensure that the unilateral monologue of judges providing interim protection is transformed into a true dialogue. This can be achieved with the support of international judicial communication. As the third subchapter discusses the communication seeking to ensure coordination and cooperation in cross-border litigation in general, the present subchapter outlines the mechanics of the communication concerning specifically the provisional measures.
- 47 In some jurisdictions there is no general framework allowing for formal direct or indirect judicial communication. Increasing awareness of the importance of communication among courts, coupled with the experience gained over the past few decades through the application of certain international instruments (eg, 1980 HCCH Child Abduction Convention), has led to a shift in approach. Nonetheless, if any form of institutionalised communication related to provisional measures is provided for in the relevant legal framework, it still tends to occur most frequently in the context of family and insolvency matters. Some illustrations of the varying trends are provided below.
- 48 A number of the HCCH Conventions in the field of international family law – and, consistent with these frameworks, several pieces of EU legislation – establish communication mechanisms. Under the HCCH instruments there are two main methods of ensuring coordination and cooperation through the dialogue between the courts involved in granting provisional measures: direct judicial communication<sup>76</sup> and indirect

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<sup>76</sup> Under the 1996 HCCH Child Protection Convention, both in the case of urgency (Art 11) and in the lack thereof (Art 12), the authorities may communicate in order to ensure continued protection of the child through protection (including provisional) measures. *Practical Handbook on the Operation of the 1996 Hague Child Protection Convention* hcch.net, 81.

communication with the assistance of the so-called Central Authorities.<sup>77</sup> Those approaches are not mutually exclusive and some instruments endorse both of them.<sup>78</sup>

- 49 In the field of civil and commercial matters, the plea for a cooperative approach to provisional protection receives much support in soft law sources.<sup>79</sup> In a similar vein, in the EU, the initial Commission Proposal on the Brussels Ibis Regulation contained a provision to that effect. Art 31 of the Proposal read:

If proceedings as to the substance are pending before a court of a Member State and the courts of another Member State are seised with an application for provisional, including protective measures, the courts concerned shall cooperate in order to ensure proper coordination between the proceedings as to the substance and the provisional relief. In particular, the court seised with an application for provisional, including protective measures shall seek information from the other court on all relevant circumstances of the case, such as the urgency of the measure sought or any refusal of a similar measure by the court seised as to the substance.

- 50 However, the EU lawmaker did not implement that solution in the Brussels Ibis Regulation. In the EU, in line with general trends, institutionalised cooperation is far more prominent in matters of family<sup>80</sup> and – in general, with no specific emphasis on provisional measures – in matters of insolvency.<sup>81</sup>
- 51 As an alternative solution to the problem of deficient or inadequate communication between courts, the applicant requesting provisional measures may be required to

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<sup>77</sup> Eg, under the 2007 Maintenance Convention, a Central Authority of a Contracting State in particular shall transmit and receive applications under the Convention for recognition or recognition and enforcement, enforcement, establishment or modification of a maintenance decision and initiate or facilitate the institution of proceedings in respect of such applications [Art 6(1)]. ‘In relation to such application [a Central Authority] shall take all appropriate measures [...] to initiate or facilitate the institution of proceedings to obtain any necessary provisional measures that are territorial in nature and the purpose of which is to secure the outcome of a pending maintenance application’ [Art 6(2)(i)]. A Central Authority can also request assistance of a Central Authority in another Contracting State (Art 7) in particular with respect to obtaining interim or provisional measures.

<sup>78</sup> Eg, 1996 HCCH Child Protection Convention.

<sup>79</sup> Eg, Principles 18-20 of the 1996 Helsinki Principles; Principle 31 of the 2004 ALI/Unidroit Principles; Rule 203(3) of the 2020 ELI-Unidroit Rules.

<sup>80</sup> Art 15(3) in fine of the Brussels IIter Regulation (‘Where appropriate, that court [with jurisdiction over the substance of the matter] may inform the court having taken provisional, including protective, measures, either directly in accordance with Art 86 or through the Central Authorities designated pursuant to Art 76, of its decision.’). Recital 30 states, *inter alia*, that ‘insofar as the protection of the best interests of the child so requires, the court [not having jurisdiction over the substance of the matter] should inform, directly or through the Central Authorities, the court of the Member State having jurisdiction over the substance of the matter under this Regulation about the measures taken.’

<sup>81</sup> Art 42 of the 2015 Insolvency Regulation.



provide information allowing the national courts to grant proportionate and harmonious provisional protection.<sup>82</sup> Of course, it is also possible to combine the obligations incumbent on the individuals with the mechanisms allowing for direct or indirect communication between the courts.<sup>83</sup>

## 2 PARALLEL PROCEEDINGS

### 2.1 Introductory Remarks and Scope of Inquiry

- 52 Due to its transnational nature and attachment to more than one jurisdiction, a subject matter of a cross-border litigation is prone to multiple interventions before different judicial actors. The more globalised and therefore interconnected the world becomes, the more vast is the reach of human activity, potentially leading – in the absence of a common framework for the allocation of jurisdiction (or even where it does exist but tolerates the multiplication of actions or is not able to thwart them) – to the proliferation of proceedings concerning identical or related claims.
- 53 The notion of ‘international parallel proceedings’ encompasses this phenomenon and refers to the concurrence of lawsuits over the same or closely related matter in courts belonging to different legal systems.<sup>84</sup> Within the present subchapter, the term ‘international’ implies that those proceedings are pending before courts of different states. Domestic and – in federal states – interstate parallel proceedings are addressed only to the extent necessary to elaborate on the multiplication of proceedings that is ‘international’ in the sense defined above.
- 54 The legal panorama becomes even more perplexing if one factors in the ‘concurrence’ between proceedings before national courts, on the one hand, and arbitral tribunals or international courts, on the other hand. The multiplication of proceedings resulting from the operation of such bodies of adjudication does not constitute the focal point of the chapter, which concentrates on the national courts’ perspective on the challenges brought by the globalisation. As a consequence, arbitration-related dimension of the

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<sup>82</sup> Art 16(2) of the EAPO Regulation requires the creditor to declare in the application for an EAPO ‘whether he had lodged with any other courts or authority an application for an equivalent national order against the same debtor and aimed at securing the same claim or has already obtained such an order. He shall also indicate any applications for such an order which have been rejected as inadmissible or unfounded’. Principle 16 of the 1996 Helsinki Principles endorsed a similar approach but provided that both approaches (ie, direct judicial communication and duties imposed on the applicant) can be combined.

<sup>83</sup> Cf Principle 16 of the 1996 Helsinki Principles.

<sup>84</sup> G A Bermann, ‘Parallel Litigation: Is Convergence Possible’ (2011) XIII YPIL 21, 21.



phenomenon of international parallel proceedings is addressed in the present subchapter only to a limited extent.

- 55 Regardless of the context, a whole range of reasons may prompt parties to pursue parallel proceedings. Proceedings for a negative declaration, known as 'reactive actions,' may be brought as a means of defence against litigation pending elsewhere. A party may initiate concurrent proceedings, referred to as 'repetitive' or 'duplicative' actions, to explore the prospects of outcome more favourable to its interest in various jurisdictions. The multiplication of proceedings may result simply from the desire to harass the defendant. Additionally, the increasing importance of class actions adds complexity to these procedural configurations.
- 56 Apart from that, the interest in obtaining satisfaction of the claim through enforcement of a judgment is among the main reasons compelling the parties to engage in multiple proceedings. On the one hand, the inability to enforce a foreign judgment in a specific jurisdiction encourages parallel proceedings. On the other hand, the easier it is to recognize or enforce foreign judgments, the more desirable it becomes to comprehensively acknowledge and address the problem of international parallel litigation.<sup>85</sup> Hence, a connection between the issue of international parallel proceedings and the recognition and enforcement of foreign judgments certainly exists.<sup>86</sup>
- 57 Similar to domestic parallel proceedings, international parallel proceedings between the same parties concerning the same or related issues can lead to injustice, delays, increased expenses and inconsistent decisions. Therefore, generally, both domestic and international parallel proceedings are considered undesirable.
- 58 Most countries have developed a proper framework for dealing with domestic parallel litigation. Similar developments do occur with regard to the international sphere, although the process is accompanied by additional hardships that render it more burdensome for at least two reasons. First, while domestic parallel litigation does not necessarily raise questions of comity and sovereignty (though the latter might be of some relevance in federal states), its international counterpart clearly does. International parallel proceedings can also provoke tensions between the countries involved, as a matter of their diplomatic and political relations.<sup>87</sup> Second, domestic parallel litigation is handled by a framework operating within the confines of a single

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<sup>85</sup> Generally speaking, a court of the state where recognition is sought may be required to consider whether the court in the state of origin had an acceptable basis for its jurisdiction. In the process, it might be troubled by the questions pertaining to the impact of parallel proceedings.

<sup>86</sup> L E Teitz, 'Both Sides of the Coin: A Decade of Parallel Proceedings and Enforcement of Foreign Judgments in Transnational Litigation' (2004) 38 Law Faculty Scholarship 1, 2–3.

<sup>87</sup> N J Calamita, 'Rethinking Comity: Towards a Coherent Treatment of International Parallel Proceedings' (2006) 27(3) University of Pennsylvania Journal of International Economic Law 601, 612.

legal order. In contrast, tools used to manage international parallel proceedings must address the same phenomenon from the perspective of different jurisdictions and the solutions adopted around the globe tend to vary to a greater or lesser extent.

- 59 In a simplified overview, in the common law world, the doctrine of *forum non conveniens* allows the courts to decide whether to exercise their jurisdiction based on an assessment of which court is the most convenient or adequate to resolve the dispute. In the civil law world, the doctrine of *lis alibi pendens* dictates that it is the court seized first that shall decide the dispute and the court seized second shall refrain from exercising its jurisdiction. The difference between *forum non conveniens* and *lis alibi pendens* is that the former prompts the court to decline jurisdiction because another forum is more appropriate, while the latter implies that a court should not hear the case because an action is already pending before foreign court. Accordingly, on the one hand, while the doctrine of *forum non conveniens* may be favoured for avoiding a race to a court, it lacks predictability. On the other hand, the doctrine of *lis pendens* is more predictable but encourages a race to file an action.<sup>88</sup> However, this simplified overview offers only a snapshot of the varying approaches to dealing with the phenomenon of international parallel litigation. Not only are *forum non conveniens* and *lis pendens* understood and applied differently in various jurisdictions, but there are also numerous other doctrines and tools that do not fit within this dichotomous worldview.
- 60 In an ideal world, these approaches would be replaced by a uniform framework with global reach. A slightly less ambitious goal is to focus on creating international or at least regional frameworks that address selected aspects of the phenomenon of international

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<sup>88</sup> R A Brand, 'Forum non conveniens', Max Planck Encyclopedia of Public International Law [opil.ouplaw.com](https://opil.ouplaw.com) accessed on 30 June 2023.

parallel proceedings.<sup>89</sup> Although such solutions are already emerging,<sup>90</sup> they are still relatively rare. Therefore, the domestic legal frameworks should demonstrate awareness of the differing approaches and aspire to operate in a manner that promotes coordination between legal systems. This increased awareness could pave the way to some form of convergence at global or at least regional level. This ambition underpins the present subchapter, which – through a comparative lens – attempts to identify points of differentiation and unexplored prospects for convergence among the doctrines and tools used to address international parallel proceedings. To achieve this, the subchapter surveys regulatory approaches to designing a framework for handling international parallel proceedings (see below pt 2.2) and the main doctrines and tools available to national courts (pt 2.3). It then elaborates on specific points of differentiation and convergence identified in the process (pt 2.4). Finally, based on these considerations, it offers concluding remarks and systematizes the doctrines and tools discussed in this subchapter (pt 2.5).

## 2.2 Regulatory Approaches to the Framework for Dealing with International Parallel Proceedings

- 61 International agreements and supranational sources of international civil procedural law (eg, EU secondary law) tend to contain rules dealing specifically with the phenomenon of international parallel proceedings. Such rules are given priority over the solutions set forth in domestic laws of the jurisdictions concerned. However, international and supranational frameworks tend to be limited in their scope of application and typically

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<sup>89</sup> In 1992, the HCCH commenced work on the international jurisdictions of the courts and on the recognition and enforcement of foreign judgments. The original objective was to create a single convention containing rules relevant to those two areas. In the course of the preparatory works a decision has been taken to focus on the recognition and enforcement. This decision resulted in the creation of the 2019 HCCH Judgments Convention. The focus of the normative work of the HCCH now turned again to the question of jurisdiction ('Jurisdiction Project'). The Working Group on matters related to jurisdiction in transnational civil or commercial litigation is currently working on the future convention. The phenomenon of international parallel litigation is among the core issues that this instrument is intended to address. A 2022 draft of the provision on parallel proceedings for future discussion confines itself to the scenarios of *eadem res*, ie, proceedings on the same subject matter. The draft itself relies on the rules of 'priority jurisdiction': a court of a Contracting State has such a jurisdiction if it is connected in a specific manner with the dispute (eg, 'the defendant is habitually resident in the State at the time the proceedings are instituted'). The draft contains also a provision that is attempting to address the issue of parallel proceedings through a mechanism that seeks to determine the clearly more appropriate forum. See Prel. Doc. No 7 of February 2022, 'Report of the Working Group on Jurisdiction', hcch.net. The attempts to ensure uniform rules on the international parallel proceedings have been also made through the elaboration of soft law. Eg, Rules 142-146 of the 2020 ELI-Unidroit Rules covering scenarios of *eadem res* and of related proceedings and relying on priority rule in the attempt of ensuring consolidation of proceedings. See also Principle 2.6 of the 2004 ALI-Unidroit Principles.

<sup>90</sup> Eg, Brussels I bis Regulation and 2007 Lugano Convention.

concern only selected subject matters. Hence, the domestic legal frameworks are still often relied upon in scenarios of international parallel proceedings. On the domestic level, there seem to be three main model approaches to the design of a legal framework for dealing with international parallel proceedings, resulting from legislative action or judicial activity or a combination of both.<sup>91</sup>

### 2.2.1 *Absence of Framework*

- 62 In some jurisdictions, there is no proper framework for dealing with international parallel litigation. As a consequence, parallel proceedings are tolerated and allowed to continue. This often prompts national courts to mitigate the adverse effects of multiple proceedings on a case-by-case basis. Such ad hoc responses are often inconsistent and cannot be considered a systemic solution to the phenomenon of international parallel proceedings (eg, doctrine of abuse of process and similar concepts – see below pt 2.3.6).
- 63 However, while some countries intentionally refrain from establishing a specialised framework for dealing with parallel litigation and ignore the proceedings pending abroad, their legislation might explicitly clarify that exceptions can result from international treaties and bilateral agreements.<sup>92</sup> Such a regulatory choice may reflect the readiness and willingness of those jurisdictions to conclude international agreements. It can be also argued that such a choice seeks to prevent the application of the solutions developed for domestic parallel litigation in the international sphere.

### 2.2.2 *Mutatis Mutandis Application of the Framework for Dealing with Domestic Parallel Proceedings*

- 64 In a number of countries, there is no statutory or judge-made general legal framework designed specifically for dealing with international parallel proceedings. Instead, solutions used for domestic cases are 'lifted' to the international sphere and adapted to

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<sup>91</sup> Eg, in China, the statutory law is interpreted through Supreme People's Court (SPC) notes on interpretation that are highly influential and followed by lower courts despite some discretion that they enjoy in interpretation and application of law. Through those notes, the detailed framework for dealing with the phenomenon of international parallel proceedings, discussed in this subchapter, has been established.

<sup>92</sup> Art 24 of the *Código de Processo Civil* (Civil Procedure Code) 2015 (Brazil) states that: 'The claim initiated before a foreign court will not constitute *litis pendens* and will not prevent the Brazilian judiciary from hearing the same claim and other connected claims, to the exception of international treaties and bilateral agreements in force in Brazil providing otherwise'. Translation by L Lixinski in J Basedow, G Rühl, F Ferrari, P De Miguel Asensio (ed), *Encyclopedia of Private International Law* (Edward Elgar Publishing 2017) 3016 ff.

its particularities (eg, Germany,<sup>93</sup> Austria,<sup>94</sup> the United States<sup>95</sup>). A priori, due to the nature of international parallel proceedings, this adaptation process might seem less problematic in federal states. However, there appears to be no correlation between the federal or unitary organization of a state and its adherence to the adaptation ('mutatis mutandis') approach. In fact, numerous unitary states also follow this approach (eg, France<sup>96</sup>).

### 2.2.3 Dedicated Framework for Dealing with International Parallel Proceedings

- 65 Some countries establish a dedicated framework addressing the phenomenon of international parallel proceedings (eg, Poland<sup>97</sup>). Such a framework may result from authoritative case law, which can eventually be transformed into a statutory solution (eg, Japan, although there is some debate as to whether the current legislative solution is a mere codification of jurisprudence – see below pt 2.3.4).

## 2.3 General Overview of the Main Doctrines and Tools

### 2.3.1 Doctrine of *Forum Non Conveniens*

#### 2.3.1.1 Definition of the Notion of *Forum Non Conveniens*

- 66 Although already the Romans devised the concept that not every forum is appropriate for suit,<sup>98</sup> the Scottish courts are credited with developing the doctrine of *forum non conveniens* in the early 17th century.<sup>99</sup> The notion of *forum non conveniens* has not been employed until 19th century and the doctrine itself has not been offered its elaborated definition until the early 20th century.<sup>100</sup> Contrary to what the Latin tag *forum non conveniens* might suggest, the doctrine is not based on a 'mere practical convenience' but on 'suitability or appropriateness of the relevant jurisdiction'.<sup>101</sup> *Forum non*

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<sup>93</sup> L H Wilhelmsson, *International Commercial Arbitration and the Brussels I bis Regulation* (Edward Elgar 2018) para 6.62-6.63.

<sup>94</sup> T Petz, 'Austria' in T Kono (ed), *Intellectual Property and Private International Law: Comparative Perspectives* (Hart Publishing 2012) 217, 335.

<sup>95</sup> M Gardner, 'Deferring to Foreign Courts' (2021) 23(6) *Journal of Constitutional Law* 2227, 2269-2270.

<sup>96</sup> Eg, Case 73-13820 (Court of Cassation, French), Judgment of 26 November 1974 and Case 16-11630 (Court of Cassation, French), Judgment of 18 January 2017 [ECLI:FR:CCASS:2017:C100087].

<sup>97</sup> Eg, Art 1098 and 1098(1) *Ustawa – Kodeks postępowania cywilna* (Code of Civil Procedure) (Poland).

<sup>98</sup> See J R Paul, 'The Isolation of Private International Law' (1988) 7 *Wisconsin International Law Journal* 149, 156.

<sup>99</sup> See *Vernor v Elvies* (Scottish Court of Session), Judgment of 23 November 1610 [1610 Mor 4788].

<sup>100</sup> *Société du Gaz de Paris v Armateurs Français* (House of Lords), Judgment of 3 December 1925 [1925 UKHL 2].

<sup>101</sup> *Spiliada Maritime Corp v Cansulex Ltd* (House of Lords), Decision of 19 November 1986 [1986 UKHL 10].

*conveniens* gives the courts a discretionary power to refuse to exercise jurisdiction in certain circumstances. The doctrine has not been designed as a tool for specifically addressing a scenario where the proceedings are pending in multiple jurisdictions. However, in most jurisdictions adhering to that doctrine, it has found applications also in this context.

### 2.3.1.2 *Forum Non Conveniens* as a Multi-Faced Doctrine

- 67 There is no single version of the doctrine of *forum non conveniens*. Its various applications across the world tend to vary, in particular with regard to the test for *forum non conveniens* and the factors taken into account in the process.<sup>102</sup>
- 68 In England, the current statement of the doctrine has been set out by the House of Lords in the seminal decision *Spiliada Maritime Corp v Cansulex Ltd*,<sup>103</sup> which has been widely accepted across common law jurisdictions. The *Spiliada* formula translates into a two-fold test:
- a) in the first stage, defendant who seeks a stay has to show that there is another available forum which is clearly or distinctly more appropriate than the English forum;
  - b) in the second stage, the plaintiff, to whom the burden of proof shifts, has to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place before local forum.

Under the *Spiliada* formula, parallel proceedings are relevant due to concerns regarding resource duplication and the potential for conflicting judgments.<sup>104</sup> Both identical and related foreign proceedings might be taken into consideration for the purposes of the doctrine of *forum non conveniens*.<sup>105</sup> There is no strict requirement for these proceedings to be initiated before the local proceedings. Nonetheless, the amount of discretion enjoyed by the courts in their assessment is limited in presence of choice of court agreements (for general discussion see below pt 2.4.3).

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<sup>102</sup> P Webb, 'Forum non conveniens: a comparative perspective' in T John, R Gulati, B Koehler (ed), *The Elgar Companion to the Hague Conference on Private International Law* (Edward Elgar Publishing) 390, 391.

<sup>103</sup> *Spiliada Maritime Corp v Cansulex Ltd* (House of Lords), Decision of 19 November 1986 [1986 UKHL 10].

<sup>104</sup> Eg, *Best Soar Ltd v Praxis Energy Agents Pte Ltd* (High Court of the Singapore), Judgment of 6 July 2017 [2017 SGHC 158] para 23.

<sup>105</sup> Eg, *Virsagi Management (S) Pte Ltd v Welltech Construction Pte Ltd* and another appeal (Court of Appeal of the Republic of Singapore), Judgment of 25 September 2013 [2013 SGCA 50] para 40.

- 69 In Canada, the *Spiliada* formula has not been followed rigorously and has been re-constructed as a single-stage test asking whether ‘the alternative forum is clearly more appropriate’. In other words, the Canadian approach differs from the two-fold test by considering factors relevant to its second stage within the overall assessment of *forum non conveniens* exception. Regarding parallel proceedings, the Supreme Court of Canada has held that although the presence of parallel proceedings abroad is a factor in assessing *forum non conveniens*, it is not a determinative one.<sup>106</sup>
- 70 Due to the specific nature of its legal system, which does not easily fit within civil or common law category, the Canadian province of Quebec is noteworthy in the context of discussion on various representations of the doctrine of *forum non conveniens*. It provides both a statutory rule for *lis alibi pendens* (Art 3137 QCC), and also a statutory basis for *forum non conveniens*, in Art 3135 QCC:
- Even though a Quebec authority has jurisdiction to hear a dispute, it may exceptionally and on application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide.
- 71 In Australia, the High Court of Australia declined to follow the *Spiliada* formula in *Oceanic Sun Line Special Shipping Co v Fay*<sup>107</sup> and subsequently in *Voth*,<sup>108</sup> where it replaced the ‘clearly more appropriate forum’ test with the requirement of proof that the local forum is a ‘clearly inappropriate forum’. That being said, the survey of case law leads some authors to contend that, ‘[at least] in certain cases, the courts in Australia were willing to betray the language of the clearly inappropriate forum test and ultimately adopted the more appropriate forum analysis’.<sup>109</sup>
- 72 In the US, the modern model of *forum non conveniens* doctrine has been established in two decisions of the US Supreme Court of 1947,<sup>110</sup> refined in the decision of 1981 in *Piper Aircraft Co. v. Reyno*.<sup>111</sup> Under this model, a court is required to: (1) examine whether an adequate alternative forum exists and, if so, (2) balance public and private

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<sup>106</sup> *Teck Cominco Metals Ltd. v Lloyd's Underwriters* (Supreme Court, Canada), Judgment of 20 February 2009 [2009 SCC 11] para 29.

<sup>107</sup> *Oceanic Sun Line Special Shipping Co v Fay* (High Court of Australia), Judgment of 30 June 1988 [1988 HCA 32].

<sup>108</sup> *Voth v Manildra Flour Mills Pty Ltd* (High Court of Australia), Judgment of 13 December 1990 [1990 HCA 55].

<sup>109</sup> P Sooksripaisarnkit, ‘Forum Non Conveniens in Australia - How Much Weight Should Be Given to Comity?’ in P Sooksripaisarnkit and D Prasad (ed), *Blurry Boundaries of Public and Private International Law Towards Convergence or Divergent Still?* (Springer 2022) 51, 56–57.

<sup>110</sup> *Gulf Oil Corp. v. Gilbert* (Supreme Court, US), Decision of 10 March 1947 [330 US 501]; *Koster v. Lumbermens Mutual Casualty Co.* (Supreme Court, US), Decision of 10 March 1947 [330 US 518].

<sup>111</sup> *Piper Aircraft Co. v. Reyno* (Supreme Court, US), Decision of 8 December 1981 [454 US 235].



interests factors. That being said, a recent study has shown that there is no single doctrine of *forum non conveniens* in the US at the state courts. While most states are said to have converged around the federal *forum non conveniens* doctrine, a substantial number of states reject selected aspects of the federal model.<sup>112</sup>

- 73 Although typically associated with the common law world, the doctrine of *forum non conveniens* finds some representations in the countries of civil law tradition and in those that do not easily fit in the common law category.
- 74 In China, the SPC 2015 Note on Interpretation, manifested an indifferent approach to foreign parallel proceedings.<sup>113</sup> Under that Note, the doctrine of *forum non conveniens* seemed to be the only tool for dealing with international parallel litigation. The doctrine could have been relied upon to dismiss proceedings on the request of the defendant in favour of a foreign court, which has jurisdiction over the matter and is more convenient forum provided that (1) there was no agreement on jurisdiction of a Chinese court; (2) the case did not fall under the exclusive jurisdiction of Chinese courts; (3) main facts of the dispute did not occur within the territory of the People's Republic of China and its law was not applicable to the case; (4) the case did not involve the interests of the nation, citizens, legal persons or other organisations of the People's Republic of China.<sup>114</sup> The SPC 2022 Note on Interpretation reiterated that solution.<sup>115</sup> Since 1 January 2024, a formal rule for the doctrine of *forum non conveniens* exists in Chinese law.<sup>116</sup> It has some substantial changes compared to the pre-existing solution resulting from the Notes on Interpretation. In particular, it replaced the factor of involvement of the interests of the nation, citizens, legal persons and other organizations of China by the factor relating to involvement of the sovereignty, safety, or public interests of China.<sup>117</sup> More importantly, the newly adopted rules contain also some solutions concerning specifically foreign

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<sup>112</sup> W S Dodge, M Gardner, Ch A Whytock, 'The Many Doctrines of State Forum Non Conveniens' (2023) Duke Law Journal 72(6) 1163, 1197 ff.

<sup>113</sup> Art 533 of the 2015 Note on Interpretation provided that: 'where a Chinese court and a foreign one both have jurisdiction over a foreign-related dispute, and one party has brought it before the foreign court, the other party may sue in the Chinese court and the Chinese court may exercise jurisdiction. Once the dispute is decided by the Chinese court, the foreign judgment on the same dispute may not be recognized and enforced in China unless the international agreements China has contracted or accessed to provide the otherwise'.

<sup>114</sup> Art 532 of the 2015 Note on Interpretation.

<sup>115</sup> L Zhao, 'Forum Non Conveniens in China: From Judicial Practice to Law' (2023) 11(3) The Chinese Journal of Comparative Law 1, 8.

<sup>116</sup> See Art 282 of the Civil Procedural Law 2023 (China).

<sup>117</sup> See L Zhao (n 115) 10.



parallel proceeding that seem to echo the doctrine of *lis pendens* and these solutions seem to be a more suitable candidate for dealing with international parallel litigation.<sup>118</sup>

- 75 In South Africa, the status of the doctrine of *forum non conveniens* is debatable. Although there are some provisions that to a larger or lesser extent seem to rely on the doctrine of *forum non conveniens* with regard to specific and narrowly designed subject matters<sup>119</sup> (pursuant to the *Spiliada* formula),<sup>120</sup> the doctrine does not seem to be accepted as a generally applicable mechanism for dealing with international parallel proceedings.<sup>121</sup> That being said, much attention seems to be brought to the decision of the Supreme Court of Appeal of South Africa,<sup>122</sup> which struck down as unconstitutional doctrine of arrest of *peregrini ad fundandam jurisdictionem* (ie, an arrest of the person in order to establish jurisdiction of the domestic courts). To compensate, the same decision accepts the jurisdiction of the local forum based on the mere presence of the party. It states that the South African High Court will have jurisdiction 'if the summons is served on the defendant while in South Africa and there is a sufficient connection between the suit and the area of jurisdiction of the court concerned so that disposal of the case by that court is appropriate and convenient'.<sup>123</sup> Some scholars view that

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<sup>118</sup> See Art 281 of the Civil Procedural Law 2023 (China).

<sup>119</sup> It has been pointed out in the literature that already in the 80s South Africa had a statutory provision based on the doctrine of *forum non conveniens*, relating to the sequestration of an estate of a person not domiciled in that State. If it appeared to the court 'equitable and convenient' that the said estate be sequestrated elsewhere, the court could 'refuse or postpone the acceptance of the surrender to the sequestration' E Spiro, 'Forum non conveniens' (1980) 13 Comparative and International Law Journal of Southern Africa 333, 337. However, more authors tend to mention in this context another provision dating back to that same era according to which a South African court could 'decline to exercise its admiralty jurisdiction in any proceedings instituted or to be instituted, if it is of the opinion that any other Court or any other court or any arbitrator, tribunal or body elsewhere will exercise jurisdiction in respect of the said proceedings and that it is more appropriate that the proceedings be adjudicated upon by any such other court or by such arbitrator, tribunal or body'. E Schoeman, 'South Africa: Time for Reform' in M Keyes (ed), *Optional Choice of Court Agreements in Private International Law* (Springer 2020) 347, 362.

<sup>120</sup> M van der Merwe, 'The Promotion of Access to Justice through the Constitutional Development of the Doctrine of Forum Non Conveniens' (2022) 55(1) Comparative and International Journal of Southern Africa 1, 14.

<sup>121</sup> *Agri Wire (Pty) Ltd v Commissioner, Competition Commission* (Supreme Court of Appeal of South Africa), Judgment of 27 September 2012 [2013 5 SA 484] Wallis JA para 19: 'Save in admiralty matters, our law does not recognise the doctrine of forum non conveniens, and our courts are not entitled to decline to hear cases properly brought before them in the exercise of their jurisdiction.'

<sup>122</sup> *Bid Industrial Holdings (Pty) Ltd v Strang and Others* (Supreme Court of Appeal of South Africa), Judgment of 23 November 2007 [2007 ZASCA 144].

<sup>123</sup> *Ibid* para 59.

decision as a seed of the doctrine of *forum non conveniens*,<sup>124</sup> while others seem more skeptical and see it rather as an illustration of *forum conveniens* considerations.<sup>125</sup> That being said, it has to be underscored that the doctrine of *lis pendens* is relied upon in South Africa to deal with foreign parallel proceedings.<sup>126</sup>

## 2.3.2 Doctrine of Lis Pendens

### 2.3.2.1 Definition of the Notion of Lis Pendens

- 76 *Lis alibi pendens*, conventionally shortened to *lis pendens*, describes a situation where proceedings that, according to certain criteria, are considered to be the same or related to the proceedings brought before a local court are already pending in another forum: the suit (*lis*) is pending elsewhere (*alibi*). In such a situation, the court may be authorised or obliged to refuse to exercise jurisdiction. The normative concept under which such a court operates is described as the doctrine of *lis pendens*.<sup>127</sup> The doctrine functions as a pre-emptive corollary to the *res judicata* effect of foreign judgments<sup>128</sup>. In anticipation of the outcome of parallel proceedings already pending in another jurisdiction, the court is authorized to stay and eventually dismiss local proceedings.
- 77 The doctrine of *lis pendens* is typically associated with the countries of the civil law tradition. The legal system of those countries tends to rely on statutory rules of direct jurisdiction, or at least on the rules of direct jurisdiction more or less clearly defined by the jurisprudence. The availability of a forum for the plaintiff under those rules implies that the court should exercise the jurisdiction granted to it. Thus, generally speaking, there is no place for discretionary refusal to exercise jurisdiction in a manner similar to the logic of the doctrine of *forum non conveniens*.<sup>129</sup> The rigidity of the solution is tempered by the 'jurisdiction-defeating' rule of *lis pendens*.<sup>130</sup> There are, however, also

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<sup>124</sup> J Kramberger Škerl and E Schoeman, 'South Africa' in J Basedow, G Rühl, F Ferrari, P De Miguel Asensio (ed), *Encyclopedia of Private International Law* (Edward Elgar Publishing 2017) 2515, 2518; less categorically E Schoeman, 'South Africa: Time for Reform' in M Keyes (ed), *Optional Choice of Court Agreements in Private International Law* (Springer 2020) 347, 363.

<sup>125</sup> van der Merwe (n 120) 15.

<sup>126</sup> See below para 83.

<sup>127</sup> Cf M Gebauer, 'Lis Pendens, Negative Declaratory-Judgment Actions and the First-in-Time Principle' in E Gottschalk, R Michaels, G Rühl and J von Hein (ed), *Conflict of Laws in a Globalized World* (Cambridge UP 2007) 89, 90.

<sup>128</sup> L Silberman, 'Lis alibi pendens' in J Basedow, G Rühl, F Ferrari, P De Miguel Asensio (ed), *Encyclopedia of Private International Law* (Edward Elgar Publishing 2017) 1158, 1159.

<sup>129</sup> See *Owusu*, Case C-281/02 (CJEU), Judgment of 1 March 2005 [ECLI:EU:C:2005:120] para 37–43.

<sup>130</sup> R A Brand and S R Jablonski, 'Related Doctrines in Civil Law System' in R A Brand and S R Jablonski (ed), *Forum Non Conveniens: History, Global Practice, and Future under the Hague Convention on Choice of Court Agreements* (Oxford UP 2007) 121, 121.

some jurisdictions that do not easily fit within the civil law category, which follow the doctrine (eg, Quebec<sup>131</sup>) or declare adherence to it (eg, South Africa<sup>132</sup>).

### 2.3.2.2 Pendency of *Eadem Res* and of Connected/Related Actions

- 78 Most commonly, the doctrine of *lis pendens* is associated with the multiplication of cases of *eadem res*. The ‘identity’ of proceedings is established with a test seeking to determine whether the ‘parties’ and the ‘case’ (typically understood as identity of ‘object’ and of ‘basis’ of the action) are the ‘same’. In some jurisdictions, there is a tendency to favour a lax understanding of those criteria. Eg, in South Africa, the doctrine relies on a three-fold identity test (same parties or their successors in title, cause of action and relief sought),<sup>133</sup> although ‘there is room for [adaptation of the relevant criteria and for their] extension based on the underlying requirement that the same thing is in issue as well as the reason for the existence of the plea’.<sup>134</sup>
- 79 Some legal systems take this concept further and attribute some significance also to foreign proceedings that are connected to the proceedings pending before the domestic court (the so-called ‘related’ or ‘connected’ actions, eg, the Brussels I bis Regulation within the EU). The notion of ‘*lis pendens*’ is often used to describe solely the situation of cases that are considered to be the ‘same’. Nonetheless, it seems that at least on the terminological level, *lis pendens* (suit that is ‘pending’ and not necessarily the suit that is the ‘same’) can also encompass related or connected cases.<sup>135</sup> In comparison to *eadem res* situations, courts are generally given more discretion to stay or dismiss a related action. More importantly, it can be argued that the recognition of the relevance of related (as opposed to ‘same’) actions diminishes the differences between the doctrine of *lis pendens* and the doctrine of *forum non conveniens*. In principle, the latter doctrine takes into account both ‘same’ and ‘connected’ actions pending abroad.

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<sup>131</sup> Art 3137 QCC: ‘The Quebec authority, at the request of a party, may, when an action is brought before it, stay the proceedings if another action between the same parties, based on the same facts and having the same object, is already pending before a foreign authority, provided that it may give rise to a decision that may be recognized in Quebec, or if such a decision has already been given by a foreign authority.’

<sup>132</sup> See below para 83.

<sup>133</sup> See *Vedanta Resources Holdings Limited and ZCCM Investmen Holdings PLC and Lungu* (High Court of South Africa), Judgment of 23 July 2019 [2019 ZAGPJHC 250] Adams J para 48; *Swanvest 234 (Pty) Ltd v Nkwazi Resources Investments (Pty) Ltd and Another* (High Court of South Africa) Judgment of 30 June 2010 [2010 ZANHC 30] Majiedt J para 36.

<sup>134</sup> *Caesarstone Sdot-Yam Ltd. v/s The World of Marble & Granite 2000 CC & Others* (Supreme Court of Appeal of South Africa), Judgment of 26 September 2013 [2013 ZASCA 129] Wallis JA para 21.

<sup>135</sup> L Silberman, ‘*Lis alibi pendens*’ in J Basedow, G Rühl, F Ferrari, P De Miguel Asensio (ed), *Encyclopedia of Private International Law* (Edward Elgar Publishing 2017) 1158, 1162.

## 2.3.2.3 Lis Pendens as a Rule of Priority and its Erosion

- 80 The doctrine of *lis pendens* is sometimes perceived as a rigid rule of priority (ie, stay or dismissal due to the proceedings pending before a foreign court seized first, regardless of the circumstances related to the proceedings), clearly distinguishable from the doctrine of *forum non conveniens*.<sup>136</sup> However, with some rare exceptions (eg, situation of intra-EU pendency)<sup>137</sup>, stay and dismissal of proceedings under the doctrine of *lis pendens* are subject to additional requirements: (1) the prospects of recognition and enforcement of a future foreign decision (eg, Poland<sup>138</sup> or Argentina<sup>139</sup>); the capability of the foreign forum to deliver its decision within a reasonable time (eg, Poland<sup>140</sup>); (3) proper administration of justice requires the stay (extra EU-pendency<sup>141</sup>; Belgium<sup>142</sup>).
- 81 In some jurisdictions relying on the doctrine of *lis pendens*, even where these requirements are met, the courts enjoy discretionary power to stay and dismiss local proceedings. Eg, in South Korea,<sup>143</sup> a court seized with the same case pending in a foreign court between the same parties is authorised (and not obliged) to suspend domestic proceedings, provided that the judgment rendered in the foreign proceedings is expected to be approved in Korea.
- 82 Furthermore, in some legal systems, the doctrine of *lis pendens* relies on the criteria that are commonly associated with the doctrine of *forum non conveniens*, such as convenience or appropriateness of both local and foreign fora.

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<sup>136</sup> A Fiorini, 'The Codification of Private International Law: The Belgian Experience' (2005) 54(4) International and Comparative Quarterly 499, 512.

<sup>137</sup> Arts 29 and 30 of the Brussels Ibis Regulation.

<sup>138</sup> Art 1098 *Ustawa – Kodeks postępowania cywilna* (Code of Civil Procedure) (Poland).

<sup>139</sup> Art 2604 *Código Civil y Comercial de la República Argentina* (Civil and Commercial Code of the Republic of Argentina) (Argentina).

<sup>140</sup> Art 1098 of the *Ustawa – Kodeks postępowania cywilna* (Code of Civil Procedure) (Poland).

<sup>141</sup> Art 33(1)(b) of the Brussels Ibis Regulation.

<sup>142</sup> Art 14 of the *Code de droit international privé* (Code of Private International Law) (Belgium): 'When a claim is pending before a foreign court and it is foreseeable that the foreign decision will be susceptible of recognition or enforcement in Belgium, the Belgian judge seized in the second place of a claim between the same parties having the same object and the same cause of action, may stay the proceedings until the foreign decision is rendered. [The judge] shall take into account the requirements of the proper administration of justice. [The judge] shall decline jurisdiction where the foreign decision is capable of being recognized under this Act.' (our translation).

<sup>143</sup> Art 11(1) Amended Korea's Act on Private International Law.

- 83 Eg, in South Africa, ‘in deciding the issue of *lis pendens*, a court exercises a discretion – considerations of equity and convenience would be the deciding factors’.<sup>144</sup> Furthermore, it is reported that two conditions must be satisfied for a stay of proceeding to be possible: first, the defendant must satisfy the court that there is another forum to whose jurisdiction they are amenable and in which justice can be done at substantially less convenience or lower expense (a stay should not be granted though, if a substantiated claim is made that the local forum is more convenient, in particular due to access to evidence)<sup>145</sup>, second, the stay must not deprive the applicant of legitimate personal or juridical advantage resulting from the jurisdiction of the South African court.<sup>146</sup> Even if parallel proceedings are pending in foreign court the stay is not mandatory,<sup>147</sup> although the commencement of proceedings abroad may afford a *prima facie* case for a stay in the absence of proof that injustice would be done if a stay was granted.<sup>148</sup>
- 84 In a similar vein, following some discussions,<sup>149</sup> a rule echoing the doctrine of *lis pendens* has been recently introduced in China. Under that rule, the domestic proceedings may be stayed at the request of a party on the ground that foreign court has accepted the parallel case prior to the local forum unless the parties have concluded a choice of court agreement in favour of Chinese courts or the local forum is evidently more convenient.<sup>150</sup>
- 85 The rigidity of the rules based on the doctrine of *lis pendens* is further eroded through legislative change and case law. Echoing those tendencies, EU private international law serves as a perfect illustration of the erosion of a rigid rule of pendency. In EU Member States the practical relevance of national solutions for dealing with the international parallel proceedings has been largely limited by EU law, at least with regard to the matters falling within the scope of application of the EU Regulations. The EU itself took

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<sup>144</sup> *Swanvest 234 (Pty) Ltd v Nkwazi Resources Investments (Pty) Ltd and Another* (High Court of South Africa) Judgment of 30 June 2010 [2010 ZANHC 30] Majiedt J para 37. Furthermore, the appropriateness of the local forum also being taken into consideration – cf *Caesarstone Sdot-Yam Ltd. v/s The World of Marble & Granite 2000 CC & Others* (Supreme Court of Appeal of South Africa), Judgment of 26 September 2013 [2013 ZASCA 129] Wallis JA para 39.

<sup>145</sup> *Caesarstone Sdot-Yam Ltd. v/s The World of Marble & Granite 2000 CC & Others* (Supreme Court of Appeal of South Africa), Judgment of 26 September 2013 [2013 ZASCA 129] Wallis JA para 39–40.

<sup>146</sup> R F Oppong, *Private International Law in Commonwealth Africa* (Cambridge University Press 2013) 101.

<sup>147</sup> See *Vedanta Resources Holdings Limited and ZCCM Investmen Holdings PLC and Lungu* (High Court of South Africa), Judgment of 23 July 2019 [2019 ZAGPJHC 250] Adams J para 50.

<sup>148</sup> Oppong (n 146) 101.

<sup>149</sup> N Yuxin and L Chang, A Major Amendment to Provisions on Foreign-Related Civil Procedures Is Planned in China conflictolaws.net posted on 3 January 2023.

<sup>150</sup> Art 281 of the Civil Procedural Law 2023 (China).

a bifurcated approach to the issue of parallel proceedings depending on whether they occur intra-EU (ie, parallel proceedings pending before the courts of EU Member) or involve a non-EU State. On the one hand, both the 1968 Brussels Convention and its successor, the Brussels I Regulation, contained provisions for intra-EU parallel proceedings. Under the interpretation provided by the CJEU in *Gasser*,<sup>151</sup> a rigid priority rule in favour of the court first seized has been installed within the EU: the proceedings before the court first seized enjoyed priority even if the parties had concluded an exclusive choice of court agreement in favour of the court seized in the second place. On the other hand, the Convention and the Regulation did not explicitly deal with parallel proceedings in a non-EU State. The EU lawmaker addressed both facets of the matter in the Brussels Ibis Regulation and in the process the rigidity of the rule of priority has been put into question.

- 86 In a nutshell, first, under the Brussels Ibis Regulation, in the presence of an exclusive choice of court agreement, a court of another Member State of the EU now has to stay the proceedings until such time as the court seized on the basis of the agreement declares that it has no jurisdiction under that agreement.<sup>152</sup>
- 87 Furthermore, the doctrine of abuse of rights has a firm place in the EU legal order. The prohibition of abuse of law (ie, EU law cannot be relied on for abusive or fraudulent ends) is a general principle of EU law and seems to have already inspired some interpretations of the rules on conflict-of-laws.<sup>153</sup> Hence, although the hypothesis has not been yet tested before the CJEU, in the light of the process of erosion of the rigid rule of priority in various jurisdictions and the evolution of the EU law itself, it cannot be entirely excluded that abusive or fraudulent reliance on the rigid rule based on the doctrine of *lis pendens* could be defeated by the said general principle of EU law.
- 88 Second, the EU lawmaker decided to make a 'commendable gesture of good will towards third countries'<sup>154</sup> and enacted rules on parallel proceedings (*eadem res* and connected actions) before the courts of non-EU States<sup>155</sup>. However, there seems to be some controversy as to whether those provisions are based on the doctrine of *lis pendens* or rather on the doctrine of *forum non conveniens*. In particular, it is unclear whether those provisions are confined to the case where the proceedings in the non-EU State were

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<sup>151</sup> *Gasser*, C-116/02 (CJEU), Judgment of 9 December 2003 [ECLI:EU:C:2003:657] para 54.

<sup>152</sup> Cf Art 31 (2) of the Brussels Ibis Regulation.

<sup>153</sup> *Vinyls Italia*, Case C-54/16 (CJEU), Judgment of 8 June 2017 [ECLI:EU:C:2017:433] para 54.

<sup>154</sup> See S Symeonides, 'An Outsider's View of the Brussels Ia, Rome I, and Rome II Regulations' [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4254165](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4254165) accessed on 10 January 2023, yet, for the Author, regrettably 'virtually the only such gesture' in the Regulation.

<sup>155</sup> Arts 33 and 34 of the Brussels Ibis Regulation.



commenced prior to those in the Member State<sup>156</sup> or – in a manner more in line with the doctrine of *forum non conveniens* – it can also be applied also where the third State court has been seized in the second place.<sup>157</sup> Either way, this controversy shows that a strict demarcation line between the doctrines of *lis pendens* and *forum non conveniens* might indeed be overstated and as such should be put under scrutiny.<sup>158</sup>

### 2.3.3 Doctrine of International Abstention

- 89 It should be noted that *forum non conveniens* is not the only doctrine applied by the US courts in order to address international parallel proceedings. Over the years, US Federal Courts have developed a doctrine of deference to foreign courts previously seized of similar proceedings, referred to as the doctrine of international abstention. The doctrine has its origins in the federal abstention doctrine involving federal and state proceedings but it has been uprooted from its habitat and transformed into a doctrine applicable in international contexts.
- 90 Under the doctrine of federal abstention, the federal courts stay proceedings where parallel proceedings have been initiated in state courts. In *Colorado River Water Conservation District v. United States*,<sup>159</sup> the US Supreme Court outlined the rationale of the doctrine in the domestic context: although federal courts are obliged to exercise jurisdiction even in the event of concurrent proceedings, in the interest of wise judicial administration and in certain particular circumstances, these courts should abstain from exercising jurisdiction over a case pending in a state court. The US Supreme Court also detailed some of the factors that have to be taken into consideration by federal courts: (1) object of the dispute and whether it concerns a property, (2) the inconvenience of the federal forum, (3) the desirability of avoiding piecemeal litigation and (4) the order in which jurisdiction was obtained by the concurrent forums.<sup>160</sup>
- 91 In 1980s, US Federal Courts began to rely on abstention doctrines in deference of foreign courts although their case law was marked by inconsistencies and diverging approaches: while some circuits used some variation of *Colorado River*, others were outright rejecting

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<sup>156</sup> *Public Institution for Social Security v Ruimy & Aerium Finance Limited* (England and Wales High Court), Judgment of 31 January 2023 [2023 EWHC 177 (Comm)] para 122–127 and the case law cited.

<sup>157</sup> *BB Energy (Gulf) DMCC v Al Amoudi & Ors* (England and Wales High Court), Judgment of 4 October 2018 [2018 EWHC 2595 (Comm)] para 23 '[Art 33-34] do not seem to replicate the primacy of first seisin built into Art 29 and 30'.

<sup>158</sup> G van Calster, 'Lis Pendens and third states the origin DNA and early case law on Articles 33 and 34 of the Brussels Ia Regulation and its forum non conveniens light' (2022) 18 Journal of Private International Law 363, 383.

<sup>159</sup> *Colorado River Water Conservation District v. United States* (US Supreme Court), Judgment of 24 March 1976 [424 US 800 1976].

<sup>160</sup> *Ibid* 818.

its applicability in international setting.<sup>161</sup> Over a decade later, the Court of Appeals for the Eleventh Circuit developed a doctrine fashionably labelled as the doctrine of international abstention.<sup>162</sup> It has also identified three factors that a court examining whether to abstain from exercise of jurisdiction should take into consideration: (1) international comity, (2) fairness to litigants and (3) efficient use of scarce judicial resources.<sup>163</sup> It has to be underscored that while the doctrine of international abstention spread to some other circuits, it does not form a single and universally accepted concept in the US.<sup>164</sup>

- 92 In its most widely accepted form, the doctrine of international abstention shares some of the characteristics of the doctrine of *lis pendens*: foreign proceedings must be pending prior to the initiation of parallel proceedings in the US and the parties and the issues must be similar. Nonetheless, it is applied in a manner more flexible than the rigid variation of the doctrine of *lis pendens*: it covers also the proceedings that are similar and it does not require the identity of the parties. It also leaves space for taking into consideration some other factors that are typically irrelevant for the doctrine of *lis pendens*.<sup>165</sup>

#### 2.3.4 Doctrine of Exceptional/Special Circumstances

- 93 Japan is a civil law country and its procedural law is still said to be an 'adaption' of the German legal tradition.<sup>166</sup> As most civil law countries, Japan has not developed a proper doctrine of *forum non conveniens*. Its legal order does not provide for a mechanism addressing specifically the issue of international parallel litigation. However, Japanese courts have developed the so-called doctrine (theory) of 'exceptional circumstances' [tokudan no jijô] in order to achieve results somewhat similar to those of *forum non conveniens*.
- 94 The doctrine finds its roots in a decision of the Supreme Court in *Goto v. Malaysian Airline System Berhaa*<sup>167</sup>, which addressed the question whether the Japanese courts have jurisdiction over a cross-border dispute. The Supreme Court considered that this

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<sup>161</sup> See Teitz (n 86) 13-15.

<sup>162</sup> See *ibid* 15-21.

<sup>163</sup> *Turner Entertainment Co. v. Degeto Film GmbH* (Court of Appeals for the Eleventh Circuits, United States) (1994) 25 F.3d 1512.

<sup>164</sup> M Gardner (n 95) 2269-2270.

<sup>165</sup> G Cuniberti, 'Parallel Litigation and Foreign Investment Dispute Settlement' (2006) 21 ICSID Review - Foreign Investment Law Journal 381, 409.

<sup>166</sup> A W Markel, 'Japanese Judgments and the Common Law of Preclusion' (2014) 8 Law&Practice 235, 237.

<sup>167</sup> *Case Goto v. Malaysian Airline System Berhaa* (Supreme Court, Japan) Judgment of 16 October 1981, English translation in (1983) 26 Jap. Ann. Int'l Law izz.



question should be decided in accordance with the principles of ‘fairness and reasonableness’ (*‘jori’*), in order to promote the impartiality of the parties and the fair and speedy administration of justice. This Court found that as long as one of the grounds of jurisdiction provided for under Japanese law exists, the exercise of jurisdiction over a defendant is in accordance with these principles. Subsequently, the lower instance courts brought that concept further and found the reverse of the principle laid down by the Supreme Court.<sup>168</sup> These courts held that the jurisdiction established on such grounds should be exercised unless, due to ‘exceptional circumstances’, it would offend notions of fairness and due process. This is the element of the case law from which the doctrine of ‘exceptional circumstances’ received its name.

- 95 Originally, the doctrine of ‘exceptional circumstances’ has not been designed as a tool for dealing with international parallel proceeding but case law shows that it has been employed to address that phenomenon.<sup>169</sup>
- 96 In 2011, the judge-made solution was replaced by a statutory provision (using the notion of ‘special circumstances’ instead of ‘exceptional circumstances’),<sup>170</sup> although there seems to be some doubts as to whether the Japanese legislator merely codified pre-existing case law or attempted to fine-tune it in the process. Art 3-9 JCCP reads:

Even where the Japanese courts have jurisdiction over an action (except where the action has been brought on the basis of an exclusive jurisdiction agreement in favour of the Japanese courts), the court may dismiss the whole or part of the proceedings if, taking into account the nature of the case, the burden on the defendant to answer the claim, the location of evidence and any other factors, the court finds that there are special circumstances [*tokubetsu no jijō*] by reason of which hearing and determining the case in Japan would impair fairness between the parties or hinder the proper and efficient conduct of hearings.<sup>171</sup>

- 97 If concurrent local proceedings impair fairness between the parties or hinder the proper and efficient conduct of hearings, the local forum can refuse to exercise its jurisdiction

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<sup>168</sup> Case before Tokyo District Court, Japan, Judgment of 27 September 1982 [HJ 1075, 137]. See also E L Hayes, ‘Forum Non Conveniens in England, Australia and Japan: The Allocation of Jurisdiction in Transnational Litigation’ (1992) 26(1) University of British Columbia Law Review 41, 57.

<sup>169</sup> Case before Tokyo District Court, Japan, Judgment of 29 January 1991 [HJ 1390, 98].

<sup>170</sup> Act for the Partial Amendment of the Code of Civil Procedure [JCCP] and the Civil Provisional Remedies Act.

<sup>171</sup> As translated by K Takahashi, ‘The jurisdiction of Japanese courts in a comparative context’ (2015) 11(1) Journal of Private International Law 103, 104. For translation see also Y Okuda, ‘New Provisions on International Jurisdiction of Japanese Courts’ (2011) 13 Yearbook of Private International Law 367, 369–380.

on the basis of Art 3-9 JCCP.<sup>172</sup> In some instances, the courts indicate that the expression 'special circumstances' cannot be interpreted as restricted to extremely limited cases.<sup>173</sup> The identity of the proceedings is not required and the doctrine can be relied also in the context of related actions. However, the local forum should consider, in particular, the stage of the foreign proceedings, the connecting between the subject-matter of the claim and the forum, the location of the evidence and the prospects of recognition of a subsequent foreign judgment in Japan.<sup>174</sup>

### 2.3.5 Doctrine of Forum Election

- 98 In Singapore, the doctrine of forum election (ie, plaintiff is put to forum election and has to choose whether to proceed in Singapore or abroad) is employed alongside the doctrine of *forum non conveniens* in order to address the phenomenon of international parallel proceedings.
- 99 The scope of application of the forum election doctrine is narrow. It can be relied on exclusively in 'common plaintiff' situations, ie, the same plaintiff sues the same defendant in Singapore and abroad. Once the defendant has shown that parallel proceedings are pending in another jurisdiction, the doctrine of forum election requires the plaintiff to make a choice as to where they wish to pursue the action (in Singapore or abroad). However, the plaintiff can also attempt to demonstrate 'very unusual circumstances' under which the parties should tolerate duplicated suits.<sup>175</sup>
- 100 In Singapore, the defendant may choose to rely on the doctrine of *forum non conveniens* or on the doctrine of forum election.<sup>176</sup> They can also invoke both of them, but the court should address them in a specific order. Recently, 'as a matter of general practice', the Singapore Court of Appeal pronounced itself in favour of relying on *forum non conveniens* first: 'it is only if [under the doctrine of *forum non conveniens*] the court finds that the alternative forum is not clearly or distinctly more appropriate than Singapore for the determination of the dispute that it would then have to put the plaintiff to an election between forums'.<sup>177</sup>

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<sup>172</sup> See Takahashi (n 171) 107.

<sup>173</sup> Case 2013WLJPCA10218001 (Tokyo District Court, Japan), Judgment of 21 October 2013.

<sup>174</sup> Y Nishitani, 'International Jurisdiction of Japanese Courts in a Comparative Perspective' (2013) LX Netherlands International Law Review 251, 273.

<sup>175</sup> *Virsagi Management (S) Pte Ltd v Welltech Construction Pte Ltd and another appeal* (Court of Appeal of the Republic of Singapore), Judgment of 25 September 2013 [2013 SGCA 50] para 42.

<sup>176</sup> See *MAN Diesel & Turbo SE v IM Skaugen SE* (Court of Appeal of the Republic of Singapore), Judgment of 20 November 2019 [2019 SGCA 80] para 56 and 58.

<sup>177</sup> *Rappo v. Accent Delight International Ltd and another* (Court of Appeal of the Republic of Singapore), Judgment of 18 April 2017 [2017 SGCA 27] para 67.

### 2.3.6 Doctrine of Abuse of Process and Similar Concepts

- 101 There seems to be a common theme among most of the doctrines and tools surveyed so far: at least to a certain extent they take into consideration the ends of justice and/or oppressive and vexatious nature of the domestic or foreign proceedings. Hence, it can be argued that those doctrine and tools share a common objective – they seek to prevent the abuse of process. Unsurprisingly, in the jurisdictions that do not accept the main doctrines for dealing with the phenomenon of international parallel proceedings, the courts tend have recourse to the doctrine of abuse of process and other similar concepts in order to address that phenomenon.
- 102 Eg, Brazil is a civil law country of federal nature that, on the one hand, does not adhere to the doctrine of *lis pendens*.<sup>178</sup> On the other hand, it discarded the doctrine of *forum non conveniens* in the presence of a choice of forum agreement in favour of the Brazilian courts<sup>179</sup> and confirmed its rejection, albeit in a less categorical manner, in other contexts.<sup>180</sup> There are some reports of decisions attempting to mitigate the rejection of those doctrines through the recourse to the general duty of good faith, which is said to be violated by initiating proceedings in Brazil while parallel proceedings are pending in another jurisdiction.<sup>181</sup> However, while it is true that at least in one of its decisions the Superior Court of Justice established a link between the general duty of good faith and the initiation of multiple proceedings, it did so to refuse the issuance of an anti-enforcement injunction.<sup>182</sup>
- 103 Mexican legal system also follows the civil law tradition. On the one hand, unsurprisingly, the doctrine of *forum non conveniens* is not accepted in Mexico.<sup>183</sup> On the other hand, the Supreme Court of Justice of the Nation considers that the framework for dealing with domestic parallel proceedings is inapplicable in the international sphere.<sup>184</sup> The Court

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<sup>178</sup> See Art 24 of the *Código de Processo Civil* (Civil Procedure Code) 2015 (Brazil).

<sup>179</sup> Special Appeal No. 1.633.275 - SC (2012/0176312-5) (Superior Court of Justice, Brazil), Judgment of 8 November 2016.

<sup>180</sup> Case No 15.398 - RJ (2009/0051622-9) (Superior Court of Justice, Brazil), Decision of 2 April 2009.

<sup>181</sup> R V Gagilardi, G F Bechara, 'International Lis Pendens: New Perspectives For the Brazilian Approach' contribution of 27 October 2011 <https://www.mondaq.com/brazil> accessed on 10 June 2023.

<sup>182</sup> Case No 15.398 - RJ (2009/0051622-9) (Superior Court of Justice, Brazil), Decision of 2 April 2009.

<sup>183</sup> C Loperena, 'Issues in Cross-Border Tort Litigation: Forum Non Conveniens, Choice of Law, and Other Matters' (2005) 13 United States - Mexico Law Journal 77, 79; R M Kossick, 'Litigation in the United States and Mexico: A Comparative Overview' (2000) 31(1) University of Miami Inter-American Law Review 23, 24.

<sup>184</sup> *José Luis López Cruz against Morelia María Milagros Ybarra Valle*, Case 573/95 (Supreme Court of Justice of the Nation, Mexico), Opinion of 18 November 1996 – Consultation to the Full Court on the proceedings relating to the hearing, by the thirty-third family court judge in the Federal District, of the divorce lawsuit <http://www.supremacorte.gob.mx> accessed 30 June 2023.

does, however, see the need to address the phenomenon of international parallel litigation in order to respect the procedural rights of individuals.<sup>185</sup> For that reason, at least at one specific instance, it requested the lower instance courts to address the issue of parallel proceedings in accordance with general principles of its private international law.<sup>186</sup> This could pave the way to the reliance on the doctrine of abuse of process.

- 104 Overall, the doctrine of abuse of process seems to be less relevant in jurisdictions where other doctrines and tools can be employed to address the issue of international parallel litigation. Eg, in English common law, the doctrine of abuse of process has limited applications and has to be reserved for extreme scenarios: '[t]here may also be cases [...] where *forum non conveniens* factors may provide some evidential support for an argument that the proceedings have been brought for the improper collateral purpose of unfair harassment. However, save to that extent, the risk of inconsistent judgments and the other difficulties identified are matters to be confined to jurisdictional challenges, either under [Art 33-34 of the Brussels Ibis Regulation] or *forum non conveniens* principles'.<sup>187</sup> In a similar manner, in civil law countries that adhere to the doctrine of *lis pendens*, abuse of process and related concepts can be relied upon to mitigate the rigidity of that doctrine. Eg, in Argentina, a rigid rule based on the doctrine of *lis pendens* is used to deal with parallel proceedings.<sup>188</sup> This rule obliges the court to stay the local proceedings if it identifies positive prospects of recognition of a foreign judgment. Some scholars suggest that abusive reliance on the doctrine of *lis pendens* rule can be dealt with 'sophisticated arguments' about abuse or violation of fundamental rights in the procedure.<sup>189</sup> Lastly, in EU Member States, there might still be some space for reliance on the concept of abuse of rights under the Brussels Ibis Regulation in order to defeat the strict operation of the rules on *lis pendens*.<sup>190</sup>

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<sup>185</sup> Art 17 of the *Constitución Política de los Estados Unidos Mexicanos* (Political Constitution of the United Mexican State) (Mexico).

<sup>186</sup> C A Gabuardi, 'Entre la jurisdicción, la competencia y el *forum non conveniens*' (2008) XLI(121) *Boletín Mexicano de Derecho Comparado* 69, 69 ff.

<sup>187</sup> *Municipio de Mariana v BHP Group (UK) Ltd (formerly BHP Group Plc)* (England and Wales Court of Appeal) Judgment of 8 July 2022 [2022 EWCA Civ 951] para 197.

<sup>188</sup> Art 2604 *Código Civil y Comercial de la República Argentina* (Civil and Commercial Code of the Republic of Argentina) (Argentina): 'When an action with the same object and the same cause has been previously initiated and is pending between the same parties abroad, the Argentine judges must stay the ongoing domestic proceedings if it is foreseeable that the foreign decision may be eligible for recognition.' Translation in J Basedow, G Rühl, F Ferrari, P De Miguel Asensio (ed), *Encyclopedia of Private International Law* (Edward Elgar Publishing 2017) 2930 ff.

<sup>189</sup> D P Fernández Arroyo, 'A New Autonomous Dimension for the Argentinian Private International Law System' (2014/2015) 16 *Yearbook of Private International Law* 411, 420.

<sup>190</sup> See above para 87.

105 In conclusion, (1) while the doctrine of abuse of process and similar concepts may be relied on in order to address the phenomenon of international parallel proceedings, they cannot be considered as a systemic and coherent response to this phenomenon; (2) the doctrine of abuse of process and similar concepts seem to be more relevant in jurisdictions that do not accept other doctrines and tools discussed in this subchapter.

### 2.3.7 *Anti-Suit Injunction*

106 An anti-suit injunction is a tool designed to prevent a party from commencing or continuing legal proceedings in another forum. As such, it has the potential of being employed to prevent or discontinue foreign parallel proceedings. It can be also viewed as a relief necessarily possessing extraterritorial effects. Hence, an anti-suit injunction can be perceived as ‘aggressive’ and ‘unilateral’ tool for management of international parallel proceedings.<sup>191</sup> Unsurprisingly, it is also one of the most controversial tools in the arsenal of the courts dealing with the phenomenon of international parallel proceedings. Those controversies are reflected by the differing approaches to the availability of the anti-suit injunction (see below pt 2.3.7.1) and to the grounds on which it can be granted (pt 2.3.7.2).

#### 2.3.7.1 Availability of Anti-Suit Injunctions

107 In principle, an anti-suit injunction is not directed against a foreign court but against a party involved in foreign proceedings pending or contemplating to initiate them. Thus, the notion of ‘anti-suit injunction’ is seen as ‘misleading since it fosters the impression that the order is addressed to and intended to bind another court’.<sup>192</sup> That being said, the view that an anti-suit injunction interferes with the exercise of jurisdiction of a foreign forum and, as such, raises questions of sovereignty and international comity still seems to structure the discussion on the availability of anti-suit injunctions.

108 In the civil law world, anti-suit injunctions are said to affect the adjudicative jurisdiction of foreign States.<sup>193</sup> This is also the stance taken within the EU. In *Turner*,<sup>194</sup> the CJEU ruled that an anti-suit injunction cannot be granted to restrain proceedings in another Member State, inter alia, because it constitutes an ‘interference with the jurisdiction of

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<sup>191</sup> G Cuniberti, ‘Lis Pendens in International Litigation’ (2011) 2 Journal du droit international (Clunet).

<sup>192</sup> *Turner v Grovit* (House of Lords), Judgment of 13 December 2001 [2002 1 WLR 107 24].

<sup>193</sup> Case 01-03.248 and 01-15.452 (Cour of Cassation, France), Judgment of 30 June 2004.

<sup>194</sup> *Turner*, Case C-159/02 (CJEU), Judgment of 27 April 2004 [ECLI:EU:C:2004:228] para 27. In its judgment, the CJEU added that such relief also impairs the effectiveness of the Convention and infringes the principle of mutual trust between EU Member States. See para 28–30 of the judgment.

the foreign court'.<sup>195</sup> This view is shared by the common law world. Most US courts recognize that anti-suit injunctions 'effectively restrict the foreign court's ability to exercise its jurisdiction'.<sup>196</sup> A similar view is shared in the UK,<sup>197</sup> although much emphasis is placed on the 'indirect' nature of the interference.

- 109 However, as the understanding of sovereignty and international comity changes over time, so does the availability and conditions for granting anti-suit injunctions. The classic criticism against anti-suit injunctions based on the argument that a state should not attempt to control proceedings pending in another sovereign state has been described as outdated.<sup>198</sup> Furthermore, the finding that an anti-suit injunction is (albeit indirectly) affecting the exercise of jurisdiction is not necessarily seen as a sufficient reason to entirely outlaw such a measure. It rather calls for a cautious approach to the granting of anti-suit injunctions. The EU case law is also illustrative in this context: in order to justify the rejection of intra-EU anti-suit injunctions, the CJEU does not rely solely on the argument of 'interference' with the jurisdiction of foreign courts. It invokes also mutual trust and effectiveness of EU law.<sup>199</sup> There has been some debate as to whether the Brussels Ibis Regulation reversed the stance of the EU law towards anti-suit injunction in civil and commercial matters,<sup>200</sup> but it seems that an EU Member State court still cannot

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<sup>195</sup> See, in this vein, *Allianz (West Tankers)*, Case C-185/07 (CJEU), Judgment of 10 February 2009 [ECLI:EU:C:2009:69] para 28, where the CJEU held that an anti-suit injunction in defence of an arbitration agreement is incompatible with EU law as, in particular, 'the use of an anti-suit injunction to prevent a court of a Member State, which normally has jurisdiction to resolve a dispute [...] on the very applicability of the [Brussels I Regulation] to the dispute brought before it necessarily amounts to stripping that court of the power to rule on its own jurisdiction'.

<sup>196</sup> C Cohen, 'Foreign Antisuit Injunctions and the Settlement Effect' (2022) 116 *Northwestern University Law Review* 1577, 1593.

<sup>197</sup> *British Airways Board v Laker Airways Ltd* (House of Lords), Judgment of 18 July 1984 [1985 AC 58] para 54 ('disguised and indirect' interference with the process of justice in the foreign court'). Interestingly, while in *Société Nationale Industrielle Aérospatiale v Lee Kui Jak* (Privy Council), Judgment of 14 May 1987 [1987 UKPC 12], Lord Goff argued that many statements confirm that a court granting an anti-suit injunction 'does not pretend to any interference with the other court', in *Airbus Industrie G.I.E. v Patel and Others* (House of Lords), Decision of 2 April 1998 [1998 UKHL 12] he referred to the injunction as a matter of 'indirect interference'.

<sup>198</sup> The classic defense against anti-suit injunction based on the argument that a sovereign state should not attempt to regulate the proceedings before the court of a different sovereign state' has been referred to as outdated, stressing the *in personam* nature of the injunction. See *Vedanta Resources Holdings Limited and ZCCM Investmen Holdings PLC and Lungu* (High Court of South Africa), Judgment of 23 July 2019 [2019 ZAGPJHC 250] Adams J para 53 and 57.

<sup>199</sup> *Turner*, Case C-159/02 (CJEU), Judgment of 27 April 2004 [ECLI:EU:C:2004:228] para 27–30.

<sup>200</sup> Cf *Gazprom*, Case C-536/13 (CJEU), Opinion of AG Wathelet [ECLI:EU:C:2015:316], points 90 ff, where AG Wathelet argued that the findings of *West Tankers* were reversed by the Brussels Ibis Regulation.

issue an injunction preventing a party from commencing or continuing proceedings in another Member State.<sup>201</sup>

- 110 By the same token, comity-oriented considerations never seemed to stop the courts of EU Member States from preventing a party from commencing or continuing proceedings in non-EU States. In a similar vein, prior to Brexit, the availability of anti-suit injunctions in the UK has been restricted accordingly to the intra-EU standard resulting from the case law of the CJEU. Post-Brexit case law confirms that this is no longer the case and a court in the UK can issue an anti-suit injunction preventing a party from commencing or continuing proceedings before the courts of an EU Member State.<sup>202</sup>
- 111 In general, the courts of continental Europe are more reluctant to grant an anti-suit injunction than their common law counterparts. Eg, French and German courts are generally sceptical of anti-suit injunctions. Recently, the courts of those states have even granted their first anti-anti suit injunctions prohibiting a party from pursuing anti-suit injunction.<sup>203</sup> Furthermore, even the readiness to enforce foreign anti-suit injunctions by a specific jurisdiction does not necessarily run in parallel with the widespread availability of such injunctions in that jurisdiction. In France, the Cour of Cassation has initially, albeit obiter dictum, ruled that anti-suit injunctions should not be granted by French courts as they interfere with foreign adjudicative jurisdiction<sup>204</sup> (although it has held before that French courts would have the power to grant *in personam* injunctions with extra territorial reach with regard to a specific subject matter of insolvability)<sup>205</sup>. Few years later, the Court ‘qualified’ this decision<sup>206</sup> and confirmed that an anti-suit

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<sup>201</sup> See in *Nori Holdings Limited et al v PJSC Bank Okritie Financial Corporation* (England and Wales High Court), Judgment of 6 June 2018 [2018 EWHC 1343 (Comm)]. See also P Ortolani, ‘Anti-suit injunctions in support of arbitration under the Recast Brussels I Regulation’ (2015) 6 MPI Lux Working Paper 1, 6–9.

<sup>202</sup> See *QBE Europe SA/NV v Generali España de Seguros Y Reaseguros* (England and Wales High Court), Judgment of 1 August 2022 [2022 EWHC 2062 (Comm)] concerning an application for an anti-suit injunction to restrain parties to proceedings commenced in Spain contrary to an arbitration agreement (ie, London); *Ebury Partners Belgium SA/NV v Technical Touch BV* (England and Wales High Court), Judgment of 18 November 2022 [2022 EWHC 2927 (Comm)] (application for an anti-suit injunction to restrain parties to proceedings commenced in Belgium contrary to an exclusive choice of court agreement (in favour of the court of England and Wales)).

<sup>203</sup> For France see Case RG 19/21426 (Paris Court of Appeal, France), Judgment of 3 March 2020; for Germany see Case 21 O 9333/19 (Regional Court of Munich, Germany), Order of 2 October 2019.

<sup>204</sup> Case 01-03.248 and 01-15.452 (Court of Cassation, France), Judgment of 30 June 2004.

<sup>205</sup> Case 00-22.334 (Court of Cassation, France) Judgment of 19 November 2002.

<sup>206</sup> *G Cuniberti, Paris Court Issues Anti Anti Suit Injunction* <https://eapil.org/2020/03/25/paris-court-issues-anti-anti-suit-injunction> accessed on 30 June 2023.



injunction sanctioning a choice of court agreement in favour of a foreign forum can be enforced in France.<sup>207</sup>

- 112 In the Canadian province of Quebec, Art 751 to 761 QCCP cover permanent and provisional or interlocutory injunctions. Until 2016, Art 758 QCCP provided that ‘an order of injunction can in no case be granted to restrain legal proceedings or the exercise of functions for a legal person established in the public interest or for a private interest, except in the case provided for in Art 329 of the [QCC]’. The currently applicable nQCCP contains an identically worded Art 513.<sup>208</sup> While those provisions seem to outlaw anti-suit injunction, the courts of Quebec have developed an interpretation that these provisions do not apply in private international law matters.<sup>209</sup> A legal basis for granting anti-suit injunction with extraterritorial effects has been derived from Art 46 QCCP,<sup>210</sup> which is worded identically to Art 49 nQCCP.<sup>211</sup>
- 113 The courts of Asian countries adhering to the civil law tradition seem to be quite reluctant to grant an anti-suit injunction. Some reports suggest that an anti-suit injunction can be issued in Japan and South Korea,<sup>212</sup> although this view finds little support in case law.<sup>213</sup> In China, although there is a statutory basis for the issuance of an anti-suit injunction in maritime disputes, some controversy exists regarding whether a

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<sup>207</sup> Case 08-16.369 08-16.549 (Court of Cassation, France), Judgment of 14 October 2009; Case 21 O 9333/19 (Regional Court of Munich, Germany), Order of 2 October 2019.

<sup>208</sup> Art 513 nQCCP: ‘An injunction cannot be granted to restrain judicial proceedings or the exercise of an office within a legal person established in the public interest or for a private interest, except in the cases described in Art 329 [QCC]’.

<sup>209</sup> M E Castel, ‘Anti-Foreign Suit Injunctions in Common Law Canada and Quebec Revisited’ (2012) 40(2) *Advocates' Quarterly* 195, 205.

<sup>210</sup> See *Impulsora Turistica de Occidente, S.A. de C.V. v. Transat Tours Canada Inc.* (Supreme Court, Canada), Judgment of 25 May 2007 [2007 1 SCR 867] para 6, confirming the lower instance decision.

<sup>211</sup> Art 49 nQCCP: ‘The courts and judges, both in first instance and in appeal, have all the powers necessary to exercise their jurisdiction. They may, at any time and in all matters, even on their own initiative, grant injunctions or issue protection orders or orders to safeguard the parties’ rights for the period and subject to the conditions they determine. As well, they may make such orders as are appropriate to deal with situations for which no solution is provided by law.’

<sup>212</sup> S Qian, ‘Parallel Proceedings in China, Korea and Japan: A Comparative Analysis of the Development of General International Jurisdiction Rules’ <https://papyrus.bib.umontreal.ca> accessed on 13 June 2023, 185.

<sup>213</sup> Cf Nishitani (n 174) 273 and Min Kyung Kim, ‘Anti-Suit Injunctions Concerning Breach of an Arbitration Agreement: A Korean Law Perspective’ (2022) 15(1) *Contemporary Asia Arbitration Journal* 95, 95 ff.

universal legal basis for such injunctions can be identified in that legal system.<sup>214</sup> Nonetheless, anti-suit injunctions are also issued in other areas (eg, patent litigation).<sup>215</sup>

### 2.3.7.2 Conditions for Granting an Anti-Suit Injunction

- 114 Generally speaking, three conditions have to be met in order to grant an anti-suit injunction. The court in which the relief is sought has to (1) have jurisdiction to grant the anti-suit injunction; (2) find that the grounds for granting the injunction are met; (3) consider that the relief indeed should be granted.<sup>216</sup>
- 115 The jurisdiction to grant an anti-suit injunction does not necessarily coincide with the jurisdiction to hear the action that the injunction seeks to halt. A basis for jurisdiction of the local forum is nevertheless required. Eg, in Australia, there are two jurisdictional bases for granting of an anti-suit injunction: (1) inherent jurisdiction to protect the court's process, where the question of jurisdiction has to be addressed according to *Voth* test (ie, whether local forum is 'clearly inappropriate') and (2) equitable jurisdiction allowing to avoid unconscionability.<sup>217</sup> Similarly, in the province of Quebec, although Art 3138 and 3140 QCC authorize a court to issue a measure 'in cases of emergency or serious inconvenience' even if it has no jurisdiction over the merits of the dispute, these provisions are not sufficient to completely bypass the jurisdiction requirement for granting an anti-suit injunction.<sup>218</sup>
- 116 There are three widely accepted grounds for granting an anti-suit injunction: (1) breach of an exclusive choice of court agreement in favour of courts of the state where the injunction is sought or of arbitration agreement (2) oppressive or unreasonable conduct within foreign proceedings; (3) protection of the integrity of the forum state's

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<sup>214</sup> Liang Zhao, 'Party autonomy in choice of court and jurisdiction over foreign-related commercial and maritime disputes in China' (2019) 15(3) *Journal of Private International Law* 541, 565.

<sup>215</sup> Zeyu Huang, 'The Latest Development on Anti-suit Injunction Wielded by Chinese Courts to Restrain Foreign Parallel Proceedings' *conflictoflaws.net* posted on 9 July 2021. M Cohen, 'China's Practice of Anti-Suit Injunctions in SEP Litigation: Transplant or False Friend?' in J Barnett (ed), *5G and Beyond: Intellectual Property and Competition Policy in the Internet of Things* [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4124618](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4124618) accessed on 30 June 2023; J L Contreras, 'Will China's New Anti-Suit Injunctions Shift the Balance of Global FRAND Litigation?' (2020) 12 *Utah Law Digital Commons* 1, 1 ff.

<sup>216</sup> R Fentiman, 'Anti-suit injunctions' in J Basedow, G Rühl, F Ferrari, P De Miguel Asensio (ed) *Encyclopedia of Private International Law* (Edward Elgar Publishing 2017) 79, 82.

<sup>217</sup> *CSR Ltd v Cigna Insurance Australia Ltd* (High Court of Australia), Decision of 5 August 1997 [1997 HCA 33].

<sup>218</sup> Castel (n 209) 207.

jurisdiction.<sup>219</sup> This brief overview illustrates that both private and public interests might be considered by courts when granting anti-suit injunctions. However, jurisdictions that recognize the relevance of private interests do not approach them uniformly. In most common law countries, a breach of a choice of court or arbitration agreement constitutes a ground for granting an anti-suit injunction, whereas in some other countries the emphasis is placed on the rights enjoyed by the parties irrespective of such agreements (eg, China<sup>220</sup>).

- 117 Turning now to the pendency of parallel proceedings as a potential ground for granting an anti-suit injunction: under English common law, an injunction may be issued to discontinue foreign parallel proceedings provided that the local court is the natural forum for the trial of action and the pursuit of action in a foreign court is vexatious or oppressive to the defendant.<sup>221</sup> By contrast, in the last decade of the 20th century, some district courts in the US tended to adopt a lax standard for issuing anti-suit injunction upon the mere showing of duplication of parties and issues.<sup>222</sup> Overall, although an anti-suit injunction can be also used to prevent foreign parallel proceedings, it is less likely that such an injunction will be granted if no proceedings are already pending in another jurisdiction.<sup>223</sup> Nonetheless, Canadian courts seem grant anti-suit injunctions only if parallel proceedings are pending in a foreign court. Additionally, they will issue the injunction only if the foreign forum has not refrained from exercising its jurisdiction according to the doctrine of *forum non conveniens*, as it is applied in Canada.<sup>224</sup>
- 118 Lastly, a question arises whether a local forum can issue an anti-suit injunction to protect the integrity of jurisdiction of foreign courts. In the UK, the Court of Appeal answered in

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<sup>219</sup> See *AV v WV* (High Court of South Africa), Judgment of 6 July 2017 [2017 ZAGPPHC 324]. For detailed analysis of the judgment see also J L Neels, 'Divorce in Dubai or Pretoria - Domicile, Jurisdiction, Applicable Law, Anti-Suit Injunction, *AV v WC* [2017] ZAGPPHC 324 (case no 5881/17) (6 July 2017) (GDP)' (2017) 38(3) Nelson Mandela University of Law Journal 689, 694 ff.

<sup>220</sup> As observed in the literature, the conditions for issuance of anti-suit injunction under Chinese law are different from those of common law. 'The issue of anti-suit injunctions at common law is based on a breach of jurisdiction or arbitration agreement for jurisdiction, whereas Chinese anti-suit injunction is based on the infringement of parties' rights irrespective of jurisdiction agreement.' L Zhao (n 214) 566.

<sup>221</sup> *Société Nationale Industrielle Aérospatiale v Lee Kui Jak* (Privy Council), Judgment of 14 May 1987 [1987 UKPC 12].

<sup>222</sup> E Roberson, 'Comity be Damned: The Use of Antisuit Injunctions against the Courts of a Foreign Nation' (1998) 147 University of Pennsylvania Law Review 409, 424.

<sup>223</sup> Eg, T Einhorn, 'Anti-Suit Injunctions in Arbitral and Judicial Proceedings in Israel' in F de Ly (ed), *Anti-Suit Injunctions in Arbitral and Judicial Proceedings* [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3517733](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3517733) accessed on 30 June 2023.

<sup>224</sup> See *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, Case 22256 (Supreme Court of Canada), Judgment of 25 March 1993 [1993 1 S.C.R. 897].

the affirmative,<sup>225</sup> but the decision was overturned on a comity-related argument, stating that there had been no sufficient connection of the case with the forum state ('comity requires that the English forum should have a sufficient interest in, or connection with, the matter in question [...]).<sup>226</sup> This overruling does not necessarily imply that an injunction in support of foreign courts is entirely excluded. One could argue that it simply reinforces the requirement of jurisdiction for granting an anti-suit injunction. Nonetheless, subsequent decisions mentioning 'a clear need for protection of the English proceedings' may imply that an anti-suit injunction cannot, in fact, be issued in support of jurisdiction of foreign courts.<sup>227</sup>

### 2.3.8 *Clawback Statutes and Actions*

- 119 A 'clawback statute' confers on selected entities (nationals of a state having adopted the statute, its residents or persons doing business within its territory) a right to initiate a local action to recover all damages incurred as a result of being required to satisfy a foreign judgment. In practical terms, those statutes seek to 'reverse' the effect of judgments handed in another jurisdiction.<sup>228</sup> In a similar manner, in some countries (eg, UK), a party may request a declaration to be entitled to an indemnity against cost and liability incurred in connection to the foreign proceedings commenced in breach of an exclusive choice of court agreement.<sup>229</sup> As such, these actions might be viewed as a tool related to the phenomenon of international parallel proceedings. Nonetheless, a common objection to these actions is that they undermine the exercise of jurisdiction by a sovereign state.<sup>230</sup>

## 2.4 Specific Points of Differentiation and of Convergence

### 2.4.1 *Responses to Parallel Proceedings Pending in a Foreign Court*

- 120 If no efforts were employed to prevent the multiplication of proceedings or if those measures failed, a national court operating under the relevant legal framework may be

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<sup>225</sup> *Airbus Industrie G.I.E. v Patel and Others* (England and Wales Court of Appeal), Judgment of 31 July 1996 [1997 2 Lloyd's Rep 8].

<sup>226</sup> See *Airbus Industrie G.I.E. v Patel and Others* (House of Lords), Decision of 2 April 1998 [1998 UKHL 12].

<sup>227</sup> *Trafigura Behher BV v Kookmin Bank Co.* (England and Wales High Court, Commercial Court), Judgment of 5 August 2005 [2005 EWHC 2350 (Comm)] para 42, with reference to *Turner v Grovit* (House of Lords), Judgment of 13 December 2001 [2002 1 WLR 107 24] para 29.

<sup>228</sup> Cf clawback statutes enacted in Japan (see Bermann (n 84) 33).

<sup>229</sup> *Union Discount Co v Zoller and Others* (England and Wales Court of Appeal), Judgment of 21 November 2001 [2002 1 WLR 1517].

<sup>230</sup> F Varesis, 'Nori Holdings v PJSC Bank and the tale of anti-suit Injunctions' (2019) 35(2) *Arbitration International* 275, 287.

authorized or required to address the phenomenon of parallel proceedings pending in a specific manner. In response, it may:

- a) ignore parallel proceedings pending in a foreign court: this is the default reaction in legal systems that tolerate concurrent proceedings; such a reaction often simply postpones the need to address the issue to the phase of recognition/enforcement of a foreign judgment;
- b) stay and/or dismissal of local proceedings (sometimes with additional conditions – see below pt 2.4.2):<sup>231</sup> a preference for a stay might be explained by the reluctance to extinguish local proceedings, with no chance of their revival before the foreign forum;<sup>232</sup>
- c) transfer the local proceedings:<sup>233</sup> transfer requires a legal framework accepted by all jurisdictions involved and typically operates domestically; there are some rare exceptions operating on international or supranational level (eg, between the EU Member States);<sup>234</sup>
- d) restrain a party from initiating or continuing parallel proceedings in a foreign court (eg, anti-suit injunctions);
- e) encourage a party to opt for trial in one forum (eg, forum election)<sup>235</sup>.

121 Some of the responses to international parallel proceedings are not unique to a single doctrine or tool, illustrating that these mechanisms share common objectives. It can be argued that the choice of a specific response is guided by broader policy considerations

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<sup>231</sup> As J J Fawcett remarked in 'Declining jurisdiction in private international law. Reports to the XIVth Congress of the International Academy of Comparative Law, Athens, August 1994, Oxford 1995' 2, there is a difference between terminology used by English judges, who stay proceedings, and US judges, who either suspend or dismiss proceedings. In civil law jurisdictions, he continued, a stay of proceedings may refer to suspending proceedings pending a decision of a foreign court.

<sup>232</sup> J P George, 'Parallel Litigation' (1999) 51(4) *Baylor Law Review* 769, 780.

<sup>233</sup> Transfer desirably accompanied by 'consolidation', to borrow the terminology used by some authors. Cf George (n 232) 777.

<sup>234</sup> EU law provides some examples of such mechanism that applies to cases, which do not fall within the scope of 'civil and commercial matters'. See Art 15 of the Brussels IIbis Regulation and Arts 12 and 13 of its successor, the Brussels Ibis Regulation. Likewise, Art 6(a) of the Succession Regulation is said to reflect a mutation of the doctrine of *forum non conveniens* doctrine into a transfer of jurisdiction. C González Beilfuss, 'Forum non conveniens auf europäische Art: ein misslungener Dialog' (2022) 4 *IPRAX* 345, 346.

<sup>235</sup> Fawcett (n 231) 2.

regarding foreign jurisdiction and international comity, reflecting the level of coordination and cooperation a legal framework intends to ensure.

#### 2.4.2 Conditionality of the Response to Parallel Proceedings

- 122 Transfer and consolidation of proceedings may be viewed as the optimal solution for managing international parallel proceedings. In this approach, the case is ‘transferred’ to a court in a different jurisdiction and there is no need to initiate them anew. There is no risk that the case will be initiated after the expiration of the statute of limitations. It may be also possible to retain the validity of previous procedural actions and admissibility of gathered evidence. Nonetheless, for transfer to be possible, a specific legal framework must be established in both jurisdictions involved. Such frameworks are rare. As a result, the more common responses to international parallel proceedings are stay or dismissal of local proceedings. If no proceedings are pending in a foreign court or are not identical, staying or dismissing the local proceedings can expose the party to the burden of filing the claim again and to the risk of debating the question of jurisdiction anew before a foreign forum. Therefore, to mitigate these risks, a conditional stay or dismissal, rather than a definitive one, may be a more appropriate reaction to parallel proceedings.
- 123 The discretionary nature of the doctrine of *forum non conveniens* allows for the possibility to stay local proceedings with specific conditions, sometimes referred to as ‘undertakings’. These conditions most commonly involve:<sup>236</sup> (1) the acceptance of jurisdiction by the foreign court or the submission to its jurisdiction by the party,<sup>237</sup> and (2) the waiver of statute of limitation defences.<sup>238</sup>
- 124 The doctrine of *lis pendens* typically favours the stay of local proceedings (instead of their immediate dismissal) and is conditional by its very nature. In civil law countries, where judicial discretion is more limited, courts rarely supplement a stay with conditions beyond those provided by statutory law. Generally, the court will be required or authorized to lift a stay and continue the domestic proceedings under certain conditions

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<sup>236</sup> For a more extensive list see J Bies, ‘Conditioning Forum Non Conveniens’ (2000) 67(2) The University of Chicago Law Review 489, 501–503; T O Main, ‘Toward a Law of “Lovely Parting Gifts”: Conditioning Forum Non Conveniens Dismissals’ (2012) 78, Scholarly Works 475, 479–485.

<sup>237</sup> *Spiliada Maritime Corp v Cansulex Ltd* (House of Lords), Decision of 19 November 1986 [1986 UKHL 10] (‘The appropriate order, where the application of the time bar in the foreign jurisdiction is dependent upon its invocation by the defendant, may well be to make it a condition of the grant of a stay, or the exercise of discretion against giving leave to serve out of the jurisdiction, that the defendant should waive the time bar in the foreign jurisdiction....’).

<sup>238</sup> In the case that led to *Piper Aircraft Co. v. Reyno* (US Supreme Court), Decision of 8 December 1981 [454 US 235], where the dismissal was conditioned upon waiver of the time bar and submission to the jurisdiction of foreign court (‘agreed to submit to the jurisdiction of the Scottish courts’).

set forth by the statutory framework: (1) the foreign court declines jurisdiction; (2) the foreign proceedings are discontinued or resulted in no decision on the merits; (3) it is unlikely that the decision will be delivered within a reasonable time; (4) the recognition/enforcement of foreign judgment is refused.

#### 2.4.3 Consideration of Choice of Court Agreements

- 125 An exclusive choice of court agreement has both positive (grants jurisdiction to the chosen court) and negative (denies jurisdiction to other courts) effects. Non-exclusive jurisdiction agreements have only the positive effect and as such do not aim to disrupt the allocation of jurisdiction. Unsurprisingly, the doctrines and tools dealing with the phenomenon of parallel proceedings are not oblivious to such agreements. Their approach to choice of court agreements varies with respect to two aspects: (1) whether the choice of court agreement is exclusive or not and (2) whether the choice is made in favour of foreign or local court.
- 126 In the intra-EU scenarios, where a court of a Member State on which an agreement confers exclusive jurisdiction is seized, a court in another Member State shall stay the proceedings until such time as the court seized on the basis of the agreement declares that it has no jurisdiction under the agreement.<sup>239</sup> In a similar vein, the HCCH 2005 Convention on Choice of Court Agreements addresses only the exclusive choice of court agreements. As a matter of principle, a court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies, whether or not a parallel action has been started in the designated court.<sup>240</sup>
- 127 In Japan and in South Korea, on the one hand, a choice of court agreement (both exclusive and non-exclusive) in favour of a foreign court is not automatically binding on the local courts and does not require the local courts to stay or dismiss the proceedings. On the other hand, if an exclusive agreement is made in favour of local forum, the Japanese courts will not rely on the doctrine of exceptional/special circumstances<sup>241</sup> and the South Korean courts will not apply the rules based on the doctrine of *lis pendens*.<sup>242</sup>

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<sup>239</sup> Art 31(2) and (3) of the Brussels Ibis Regulation.

<sup>240</sup> Art 6 HCCH 2005 Convention on Choice of Court Agreements.

<sup>241</sup> Art 3-9 JCCP.

<sup>242</sup> Under Art 11(1) SKPIL, a Korean judge seized with the same case pending in a foreign court between the same parties is authorised (and not obliged) to suspend domestic proceedings, provided that the judgment rendered in the foreign proceedings is expected to be approved in Korea. This is, however, excluded where: the court has international jurisdiction, in accordance with an agreement on exclusive international jurisdiction or it is obvious that the local court is more apt than its foreign counterpart to render a judgment in the case in question.



- 128 If the proceedings are brought before the English court in breach of an exclusive jurisdiction clause, the court will 'ordinarily exercise its discretion to secure compliance with the contractual bargain [...] unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum'.<sup>243</sup> By contrast, those principles generally do not apply to a non-exclusive choice of court agreement, where the common test *for forum non conveniens* can be applied.<sup>244</sup>
- 129 In South Africa, the courts are not unconditionally bound by foreign jurisdiction clauses. However, in presence of an exclusive agreement in favour of foreign courts, the plaintiff has to demonstrate the reasons for not staying the local proceedings and not giving effect to the agreement between the parties.<sup>245</sup>
- 130 In Singapore, the *Spiliada* formula for *forum non conveniens* is generally followed also in presence of a non-exclusive agreement in favour of a foreign court. By contrast, when faced with an exclusive choice of court agreement in favour of a foreign forum, the Singaporean court is expected to respect the parties' agreement unless a 'strong cause' for refusing the stay is demonstrated.<sup>246</sup> A similar standard applies in cases involving a non-exclusive agreement in favour of domestic courts: the defendant must demonstrate 'strong cause' to avoid being bound by the agreement.<sup>247</sup>
- 131 In conclusion, (1) with some exceptions resulting from international or regional treaties, an exclusive choice of court agreement in favour of a foreign court is not automatically binding on the local forum; (2) theoretically, the plaintiff can demonstrate that there are particular reasons for allowing the local action brought in breach of such an agreement to continue; (3) under the doctrine of *forum non conveniens*, in some circumstances, the courts are authorized to stay or dismiss proceedings also where an exclusive choice of court agreement is made in their favour; by contrast, an exclusive choice of court agreement in favour of domestic courts is typically binding under the other doctrines (eg, *lis pendens*, exceptional/special circumstances).

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<sup>243</sup> *Donohue v Armco Inc* (House of Lords), Decision of 13 December 2001 [2001 UKHL 64] para 24 (Lord Bingham).

<sup>244</sup> A Mills, *Cheshire, North & Fawcett Private International Law* (Oxford UP 2017) 414 and the case law cited.

<sup>245</sup> Oppong (n 146) 102.

<sup>246</sup> *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* (Court of Appeal of the Republic of Singapore), Judgment of 22 October 2018 [2018 SGCA 65] para 112.

<sup>247</sup> *Shanghai Turbo Enterprises Ltd v Liu Ming* (Court of Appeal of the Republic of Singapore) Decision of 13 February 2019 [2019 SGCA 11] para 94.

#### 2.4.4 Consideration of Private and/or Public Interests

- 132 The operation of the doctrines and tools surveyed in the present subchapter tends to vary with regard to the nature of factors taken into consideration in deciding whether to stay or dismiss local proceedings.
- 133 For the purposes of *forum non conveniens* analysis, under English common law, the ‘public interest considerations not related to the private interests of the parties and the ends of justice have no bearing on the decision which the court has to make’.<sup>248</sup> By contrast, in US, the *forum non conveniens* analysis involves ‘considerations affecting the courts own administrative and legal problems’.<sup>249</sup>
- 134 In the civil law world, public interest is nearly always taken into consideration when addressing the issue of international parallel proceedings through various doctrines and tools.
- 135 In Japan, where the doctrine of ‘special circumstances’ received a statutory status (Art 3-9 JCCP), only the ‘circumstances’ that are capable of impairing fairness between the parties or hinder the proper and efficient conduct of hearings can justify a dismissal of local proceedings. It can be argued that purely public interests, not related to private concerns, are of less relevance – or even of no relevance<sup>250</sup> – for the operation of that provision.

#### 2.4.5 Sua Sponte Stay/Dismissal Power

- 136 In common law countries adhering to the doctrine of *forum non conveniens*, a court typically cannot raise the exception based on this doctrine on its own motion. Thus, the wide margin of discretion that those courts typically enjoy in the process of deciding whether to stay or dismiss local proceedings does not necessarily grant them the power to act *sua sponte*.
- 137 However, US courts deem themselves empowered to raise the exception *ex officio*, although this practice may at first glance seem to be in contradiction with the importance that those courts attribute to the plaintiff's choice of forum and on the allocation of burden of proof under the doctrine of *forum non conveniens*. Such a

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<sup>248</sup> *Lubbe v Cape plc* (House of Lords), Decision of 20 July 2000 [2000 UKHL 41].

<sup>249</sup> *Gulf Oil Corp. v. Gilbert* (Supreme Court, US), Decision of 10 March 1947 [330 US 501]; *Piper Aircraft Co. v. Reyno* (Supreme Court, US), Decision of 8 December 1981 [454 US 235].

<sup>250</sup> According to some interpretations, only private factors are considered in the application of the Japanese doctrine of ‘special circumstances’. R A Brand, ‘Comparative Forum Non Conveniens and the Hague Judgments Convention’ (2002) 37 Texas International Law Journal 467, 488.

practice, albeit rare, can be explained by the relevance of public interest in the US approach to the doctrine of *forum non conveniens*.<sup>251</sup>

- 138 There is also no common solution in civil law countries, although under the rigid rules based on the doctrine of *lis pendens*, the courts are typically authorised to stay *sua sponte* the local proceedings. For instance, under *lis pendens* doctrine-based Art 7(1) of the *Legge di riforma del sistema italiano di diritto internazionale privato* (Law on the reform of the Italian system of private international law) n 218 of 31 May 1995 (Italy), the court must stay the proceedings if it finds that the decision of the foreign court may be recognized in Italy. Although there has been some interpretations according to which a request of the party is required,<sup>252</sup> the Italian Court of Cassation relied on the *ratio legis* of that provision and confirmed that a court can indeed stay the proceedings on its own motion.<sup>253</sup>
- 139 In Japan, under the ‘special circumstances’ doctrine, that is now enshrined in a statutory provision, the courts may also act *sua sponte*.
- 140 In South Korea, a court may stay the proceedings under the statutory rules inspired both by the doctrine of *forum non conveniens* and the doctrine of *lis pendens* only at the request of the defendant.<sup>254</sup> A similar solution seems to be adhered to also in Singapore in the context of the doctrines of *forum non conveniens* and forum election.<sup>255</sup>
- 141 Overall, it can be argued that if a local court is required to take into account public interests when deciding on the stay/dismissal of proceedings (eg, the doctrine of *lis pendens* and the doctrine of *forum non conveniens* in the United States), that court is often obliged to take such a decision on its own motion and stay or dismiss the proceedings even in the absence of a request from the parties.

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<sup>251</sup> Fawcett (n 231) 16, with reference to US courts.

<sup>252</sup> T Ballarino and A Bonomi, ‘The Italian Statute on Private International Law of 1995’ (2000) 2 YPIL 99, 107.

<sup>253</sup> Case 21108 (Court of Cassation, Italy), Judgment of 28 November 2012 <http://www.marinacastellaneta.it/wp-content/uploads/2013/01/sentenza-del-28-11-2012.pdf> accessed on 30 June 2023.

<sup>254</sup> Art 12(1) of the Amended Korea’s Act on Private International Law: ‘Even where the court has international jurisdiction under this Act, but where exceptional circumstances exist to make it inappropriate for the court to exercise such international jurisdiction and to make it more appropriate for a foreign court having international jurisdiction to resolve a dispute, the court, upon receipt of an application by the defendant, may, by decision, suspend the legal proceedings until the initial trial date or the date of pretrial hearing on the merits, or may dismiss such lawsuit’.

<sup>255</sup> See above para 100.

142 In conclusions: (1) co-existence of multiple doctrines employed alongside each other in order to deal with the phenomenon of parallel proceedings seems to disfavour the court's power to stay or dismiss local proceedings *sua sponte*;<sup>256</sup> (2) if a court is required to stay the local proceedings where specific conditions are met (eg, doctrine is *lis pendens*), it usually is allowed to do so *ex officio*; (3) relevance of public interest to the assessment conducted prior to stay or dismissal typically allows the local court to act *sua sponte*.

#### 2.4.6 Judicial Discretion

143 *Forum non conveniens* is often described as a discretionary doctrine that authorizes a court to abstain from exercising its jurisdiction. To a lesser extent, the same can be said with regard to civil law surrogates of the doctrine of *forum non conveniens* (eg, doctrine of extraordinary circumstances).

144 It does not mean that the doctrine of *lis pendens* is situated at the polar opposite of the spectrum and is entirely non-discretionary. Under the doctrine of *lis pendens*, stay and dismissal of local proceedings are often subject to conditions, requiring the court to engage in a nuanced and discretionary assessment. In some legal systems, the doctrine of *lis pendens* relies on the criteria that are commonly associated with the doctrine of *forum non conveniens*, such as convenience or appropriateness of both local and foreign fora.<sup>257</sup> Some countries adhering to the doctrine of *lis pendens* grant no discretion to their courts: once these specific conditions are met, the court is obliged to stay the proceedings (eg, Argentina,<sup>258</sup> Italy,<sup>259</sup> Poland<sup>260</sup>). However, in some jurisdictions, even where such conditions are met, the decision to stay the local proceedings results from discretionary power of the local forum: a court 'may' stay or dismiss proceedings (eg, South Korea,<sup>261</sup> Belgium<sup>262</sup>).

145 Overall, the assertion that discretion is entirely alien to the doctrine of *lis pendens* seems to be misguided. While this statement might seem true where a rigid priority-based rule of *lis pendens* (as in the intra-EU context) is benchmarked against *forum non conveniens* in common law courts, its accuracy is questionable where more nuanced forms of *lis*

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<sup>256</sup> However, that is not necessarily the case in the US despite the emergence of multiple doctrines that are employed in that jurisdiction to deal with the phenomenon of international parallel litigation.

<sup>257</sup> See above para 82.

<sup>258</sup> Art 2604 *Código Civil y Comercial de la República Argentina* (Civil and Commercial Code of the Republic of Argentina) (Argentina).

<sup>259</sup> Art 7(1) of the *Legge di riforma del sistema italiano di diritto internazionale privato* (Law on the reform of the Italian system of private international law) n 218 of 31 May 1995 (Italy).

<sup>260</sup> Art 1098 *Ustawa – Kodeks postępowania cywilna* (Code of Civil Procedure) (Poland).

<sup>261</sup> See above para 81.

<sup>262</sup> See above n 142.

*pendens* doctrine are taken into consideration. To conclude: (1) the fact that a court enjoys discretion is not sufficient to qualify the tools at its disposal as being based on the doctrine of *forum non conveniens*; (2) while the doctrine of *forum non conveniens* involves a fair amount of discretion, the doctrine of *lis pendens* tends to offer less room to manoeuvre; (3) although it might be compelling to argue that the discretion that the courts enjoy under *lis pendens* doctrine is not directed at allocating the case to the most appropriate forum, this is clearly not the case for some jurisdictions that do identify as those adhering to that doctrine but still taking into consideration the ‘convenience’ or ‘appropriateness’ of the fora seized.

## 2.5 Concluding Remarks

### 2.5.1 Fallacy of the Binary Systematization

- 146 The main doctrines referenced in discussions on international parallel proceedings, namely the doctrine of *forum non conveniens* and the doctrine of *lis pendens*, are typically associated with common law and civil law traditions, respectively. These two doctrines are often viewed as principal competitors or alternatives. However, such a simplified overview considers these two doctrines in isolation and in their most traditional forms. Consequently, it fails to present a complete picture and reinforces the binary worldview.
- 147 In fact, first, some countries that are associated with either common or civil law traditions do not adhere to their ‘default’ doctrine (eg, South Africa and its recognition of the doctrine of *lis pendens*). Some countries or their regions do not neatly fit within the binary distinction between the civil and common law worlds (eg, Quebec).
- 148 Second, in contrast to the doctrine of *lis pendens*, the doctrine of *forum non conveniens* is not specifically formulated to deal with the phenomenon of parallel proceedings. However, it can still serve this purpose. The contrast between the two doctrines exists only insofar as their more extreme and traditional forms are benchmarked against each other. Many rules based on the doctrine of *lis pendens* grant at least some discretion to the courts. Some incorporate elements that are typically associated with the doctrine of *forum non conveniens* (eg, ‘appropriateness’ of the local and/or foreign forum). Overall, it can be provocatively argued that the single characteristic that undeniably distinguishes the doctrine of *lis pendens* from the doctrine of *forum non conveniens* is the far more specialised character of the former. The rules based on the doctrine of *lis pendens* apply only where parallel proceedings are already pending in a foreign court.
- 149 Third, there are also other doctrines and tools relied upon to address the phenomenon of international parallel proceedings that do not perfectly align with the characteristics of the doctrines of *forum non conveniens* and *lis pendens*. Some of these developments appear to constitute a compromise between these two main doctrines and illustrate the potential for convergence. Such solutions have emerged in civil law countries, which do

not fully adhere to the doctrine of *lis pendens* (eg, doctrine of exceptional/special circumstances in Japan). Similar developments have occurred in common law jurisdictions, which seem to view the doctrine of *forum non conveniens* as not entirely appropriate to deal with this phenomenon (eg, doctrine of international abstention in the United States).

- 150 Fourth, adherence to the doctrine of *forum non conveniens* or *lis pendens* does not imply that there are no other means of addressing the issue of international parallel litigation. Auxiliary doctrines and tools have been developed on the foundations of the main aforementioned doctrines and/or to complement them (eg, doctrine of forum election in Singapore and anti-suit injunctions). Other doctrines and tools are also relied upon as remedies for the insufficiencies of the doctrines of *forum non conveniens* and *lis pendens* (eg, doctrine of abuse of process and similar concepts).
- 151 Fifth, the doctrines discussed in this subchapter are not necessarily mutually exclusive. There are some frameworks that do recognize both *forum non conveniens* and *lis pendens* (eg, Quebec; arguably South Africa and South Korea). In some jurisdictions, less common doctrines operate alongside one of the two main doctrines (eg, in Singapore doctrine of forum election applies alongside the doctrine of *forum non conveniens*; under English common law the doctrine of abuse of process applies alongside the doctrine of *forum non conveniens*). The co-existence of multiple doctrines and tools within a single framework raises the question whether they can be applied alongside each other. In each and every jurisdiction such question calls for a meticulous analysis of the relevant legal framework on a case by case basis. Some detail about relations between selected doctrines is already provided above, in respective parts of this subchapter. It is also possible to formulate a general observation concerning the two main doctrines. In fact, the mere availability of rules based on the doctrines of *lis pendens* and *forum non conveniens* in a specific jurisdiction does not necessarily imply that they can be applied with regard to the same instance of parallel proceedings.<sup>263</sup> Nonetheless, even if the doctrines are not applicable alongside each other, on the one hand, the doctrine of *forum non conveniens* may serve as pre-emptive measure to the situation that would call for a subsequent application of a rule based on the doctrine of *lis pendens*.<sup>264</sup> On the other hand, if the strict requirements of *lis pendens* are not met, *forum non conveniens* may still allow to take into consideration the action pending in a

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<sup>263</sup> For an illustration under EU law see *IQ*, Case C-478/17 (CJEU), Judgment of 4 October 2018 [ECLI:EU:C:2018:812] para 44, where the CJEU considered that a rule based on the doctrine of *forum non conveniens*, ie, Art 15 of the Brussels IIbis Regulation, cannot be relied upon to transfer a case between two courts having jurisdiction since such a scenario is covered by Art 19 of the Regulation ('*Lis pendens* and dependent actions').

<sup>264</sup> Such a possibility seems to be hinted by P Nygh and F Pocar, *Report on the preliminary draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters* <https://www.hcch.net/en/publications-and-studies/details4/?pid=3494&dtid=35>, 93.

foreign court. Eg, if foreign proceedings fail to pass the *eadem res* test and there is no rule concerning related actions, *forum non conveniens* may authorize the stay of local proceedings closely connected to the action pending in another jurisdiction.

### 2.5.2 Attempt of Systemization

- 152 In the light of the above, a meaningful comparative inquiry should look past the common tags of *forum non conveniens* and *lis pendens* and discuss the whole arsenal of doctrines and tools that are employed to deal with the phenomenon of international parallel proceedings. These doctrines and tools may be categorised according to various criteria. The contention here is that their nature and mode of operation varies across three axes, relating to their (1) specificity, (2) timing and (3) 'intrusiveness'.

#### 2.5.2.1 Specificity

- 153 Some of the aforementioned doctrines and tools employed to deal with international parallel proceedings are not designed specifically to address this phenomenon. This is in particular the case of the doctrine of *forum non conveniens* and its civil law surrogates (doctrine of special/extraordinary circumstances), which generally can be applied regardless of whether identical or related proceedings are pending elsewhere. By contrast, *lis pendens* and *forum election* represent the measures that operate solely as the tools for managing international parallel proceedings.

#### 2.5.2.2 Timing

- 154 Selected doctrines and tools are available only if parallel proceedings are already pending in a foreign court (*lis pendens* and doctrine of international abstention), while others can be employed also *ex ante*, in order to pre-empt the emergence of parallel proceedings (*forum non conveniens*, anti-suit injunctions)<sup>265</sup>. It does not mean, however, that the pendency of foreign proceedings is irrelevant for the operation of the latter tools: the fact there the proceedings are pending abroad is taken into account within the assessment that has to be carried out by the local forum. Some other tools are employed *ex post*, when both sets of proceedings were allowed to continue (eg, *res judicata* effect of foreign judgment; local pendency as a ground for non-recognition/non-enforcement of the foreign judgment; clawback statutes/actions).

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<sup>265</sup> Same for Canada where an anti-suit injunction is granted where the proceedings are already pending and the foreign court failed to respect the Canadian standard for *forum non conveniens*. See *Amchem Products Inc. v. British Columbia (Workes' Compensation Board)*, Case 22256 (Supreme Court of Canada), Judgment of 25 March 1993 [1993 1 S.C.R. 897].



### 2.5.2.3 'Intrusiveness'

155 The 'arsenal' of tools for dealing with international parallel proceedings can be divided into two categories: the measures of self-restraint and the measures restraining others.<sup>266</sup> However, a binary approach may be criticised for not painting the whole picture (eg, *forum non conveniens*, a measure of self-restraint, can be perceived by other jurisdictions as a tool exerting influence on them, their courts and citizens).<sup>267</sup> It seems therefore more appropriate to categorise the doctrines and tools according to their 'intrusiveness': from those more respectful of foreign jurisdictions (*forum non conveniens* and *lis pendens*), through those of more invasive nature (anti-suit-injunctions) to those that are utterly confrontational (clawback statutes/actions).<sup>268</sup>

## 3 COORDINATION AND COOPERATION BY COMMUNICATION BETWEEN JUDGES

### 3.1 Introductory Remarks and Scope of Inquiry

156 In the absence of relevant international instruments, measures employed to address the particularities of cross-border disputes are designed unilaterally by the states, often resulting in their incompatibility. Even when an appropriate international instrument exists, there is no guarantee that the measures contained therein will allow for efficient coordination of identical or similar proceedings pending in different jurisdictions. The proper operation of such measures relies heavily on the amount of information available to the courts involved in proceedings of trans-border nature. The information required to ensure adequate coordination and cooperation can be provided through judicial communication.

157 In the cross-border context, there are two main types of communication that should be considered separately since they have different subjects and therefore pose different challenges: general and not case-specific communication, on the one hand, and communication concerning a specific case, on the other hand. The present subchapter focuses solely on the latter, with particular emphasis placed on the use of communication to manage pending legal proceedings and to strengthen the effective

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<sup>266</sup> Bermann (n 82) 35.

<sup>267</sup> Some countries of Latin America seemed to view the US decisions declining jurisdiction on the basis of *forum non conveniens* doctrine due to existence of a more appropriate forum in the countries of that region as 'forcing' the claimants to file suits before their courts and requiring these courts to accept jurisdiction in order to avoid denial of justice. In reaction to those decisions, several countries (Costa Rica, Dominican Republic, Ecuador, Guatemala and Panama) attempted to challenge the practice through specifying legislation aiming to nullify *forum non conveniens* use in the US. For discussion see M W Gordon, 'Forum Non Conveniens Misconstrued: A Response to Henry Saint Dahl' (2006) 38 *Inter-American Law Review* 141, 151 ff.

<sup>268</sup> Bermann (n 82) 35–36.

protection of rights in the cross-border context. Viewed from that perspective, case-specific judicial communication can relate to a number of issues: (i) pendency of the case in a foreign court; (ii) scheduling of such a case; (iii) availability of provisional measure and the possibility of entertaining a mirror measure in both jurisdictions; (iv) local circumstances that might be relevant for the settlement of the case and for the enforcement of a future decision or (v) prospects of enforcement.

- 158 Furthermore, two forms of judicial communication need to be distinguished: ‘formal’ and ‘informal’ judicial communication. The notion of ‘informal communication’ is referenced in various sources,<sup>269</sup> but its contours are not well defined and it seems that there is no common understanding of that concept. While undeniably useful for obtaining general information on foreign law and court practice (ie, general and not case-specific communication), ‘informal’ communication can obviously raise concerns if it is used to achieve the objectives that are normally ensured through formal communication concerning a specific case.
- 159 Echoing those concerns, the present subchapter attempts to explore the overarching trends of transnational judicial communication. In this attempt, the present subchapter characterises the general tendency to institutionalise judicial communication (point 3.2) and elaborates on its legitimacy in international setting (point 3.3).

### 3.2 Institutionalisation of Judicial Communication

- 160 The importance of judicial communication has been most widely acknowledged with respect to family and insolvency matters. In these areas, the utility of judicial communication receives some consideration in particular with regard to provisional measures.<sup>270</sup> Further illustrations of reliance on judicial communication in family and insolvency law will be presented in the present subchapter.
- 161 In addition to these sectoral developments, an increasing number of national legal frameworks explicitly provide for a general legal basis for judicial communication. Such

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<sup>269</sup> Eg, L K Doré, ‘Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement’ (1999) 74 Notre Dame Law Review 283, 366 fn 329; M Župan, M Šego, P Poretti, M Drventić, Report on the Croatian Exchange Seminar, *EU FAMS II. Facilitating Cross-Border Family Life: Towards a Common European Understanding* <https://www.pravos.unios.hr/wp-content/uploads/2023/12/croatian-exchange-seminar.pdf> accessed on 23 July 2024.

<sup>270</sup> See above para 46 ff.

legislative efforts either enable communication (eg, Spain)<sup>271</sup> or render it mandatory (eg, Argentina).<sup>272</sup>

- 162 Furthermore, the groundwork is currently carried out under the auspices of the HCCH with the objective of creating a general international instrument on jurisdiction in civil or commercial matters (ie, the Jurisdiction Project).<sup>273</sup> The Working Group responsible for this task is mandated to establish principles relating to international parallel proceedings. The Group recognised that it may be necessary to introduce a voluntary, non-binding cooperation and/or a communication mechanism. The details of such a solution and its mechanics are still open to discussion.<sup>274</sup>
- 163 Overall, the survey of these legal frameworks demonstrate there are two main approaches to judicial communication: direct judicial communication and indirect judicial communication with the assistance of specialised authorities. Both methods are not mutually exclusive and can be relied upon within a single framework. In the cross-border context, direct judicial communication can be defined as the process whereby two or more courts located in different jurisdictions communicate directly with each other in relation to a matter pertaining to a case in progress. In indirect communication, the process is channelled through a designated body, furthering the institutionalised nature of judicial communication.
- 164 The tendency to institutionalize judicial communication can be explained by the hardships that the judges dealing with cross-border matters regularly encounter. The 1980 HCCH Child Abduction Convention has been cited in the literature as an example of an international agreement depending on the functioning of Central Authorities, which took for granted the effective operation of judicial authorities on the national

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<sup>271</sup> Art 4 of the *Ley de cooperación jurídica internacional en materia civil* (Statute on international judicial cooperation in civil matters) (Spain) enables Spanish courts to engage in direct communications with foreign authorities as a means to enhance cooperation and pursue coordination in the management of cross-border cases.

<sup>272</sup> Eg, Arts 2611 and 2612 of the *Código Civil y Comercial de la República Argentina* (Civil and Commercial Code of the Republic of Argentina) (Argentina). Art 2611 of the Code provides that without prejudice to the obligations arising under international conventions, the national judges must provide broad jurisdictional cooperation in civil, commercial and labour matters. Art 2612 adds, in its second phrase, that - when the situation requires it - Argentinian judges are authorised to engage in direct communication with foreign judges who accept the practice, provided that due process is observed. The interpretation of those provisions according to which the judges are obliged to engage into cooperation is shared by a number of scholars. See D P Fernández Arroyo (n 189) 426; U Basset, 'Private International Law', in U Basset (ed), *Introduction to the Law of Argentina* (Kluwer Law International 2018) 269, 279.

<sup>273</sup> See above n 89.

<sup>274</sup> Prel. Doc. No 7 of February 2022, 'Report of the Working Group on Jurisdiction' <hcch.net> accessed on 10 January 2023, 6 of the annexed report, para 22.

level. However, the practical experience proved different. It has become apparent that the proper handling of cross-border cases requires the active involvement of judges having particular experience in the respective field. It has also shown that the proficiency of languages, the availability of operable and secure means of communication or even the ability to verify that the judged engaging and receiving the communications are authorised to do so, constitute necessary conditions – though not necessarily met in every jurisdiction – for effective judicial dialogue.<sup>275</sup>

165 In order to overcome those challenges, a number of judicial networks have been organized on international [eg, International Hague Network of Judges (IHJN)], regional [eg, European Judicial Network (EJN)<sup>276</sup>, Ibero-American Legal Assistance Network (Iber RED)<sup>277</sup>] and national [e.g. Canadian Network of Contact Judges<sup>278</sup> and Spanish Judicial Network for International Cooperation (REJUE)<sup>279</sup>] levels. Taking the IHJN as an example, its primary role is to assist judges dealing with the cases falling within the ambit of the 1980 HCCH Child Abduction Convention. The network's role is two-fold: general communication (eg, sharing information and fostering judicial education) and direct case-specific judicial communication, where the objective is to obtain information that will support the judge in their decision-making process.<sup>280</sup>

166 From the perspective of the institutionalisation of judicial communication, it might be also interesting to distinguish between the networks established by the legislature (EJN, European Judicial Network in Civil and Commercial Matters<sup>281</sup>) and those set up at the

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<sup>275</sup> M Thorpe, 'Judicial activism: A 20-year evolution', in M Freeman and N Taylor (ed), *Research Handbook on International Child Abduction* (Edward Elgar Publishing 2023) 131, 132.

<sup>276</sup> Joint Action 98/428/JHA of 29 June 1998 adopted by the Council on the basis of Art K.3 of the Treaty on European Union, on the creation of a European Judicial Network, O.J. L 191, 4 (EU).

<sup>277</sup> Inter RED was created on the basis of the Constitutive Act of 29 October 2004 and is a structure made up of central authorities and contact points from the 22 countries that make up the Ibero-American Community of Nations and by the Supreme Court of Puerto Rico. <https://iberred.notariado.org/en/reglamentacion-actas-acuerdos> accessed 30 June 2023.

<sup>278</sup> For further details concerning its conception and evolution see R M Diamond, 'Canada' (2013) XX *The Judges' Newsletter on International Child Protection* 7, 7 ff.

<sup>279</sup> The REJUE is governed by the *Reglamento 1/2018, sobre auxilio judicial internacional y redes de cooperación judicial internacional* (Regulation 1/2018 on international judicial assistance and international judicial cooperation networks) (Official State Gazette, no. 249 of 15 October 2018) (Spain). One of its two divisions is dedicated to civil law matters, namely the REJUE-CIVIL (Art 11(2) of the Regulation).

<sup>280</sup> J L Kreeger, 'The International Hague Judicial Network—A Progressing Work' (2014) 48(2) *Family Law Quarterly* 221, 223-224.

<sup>281</sup> Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters, OJ L 174, 27 June 2001, 35.

instigation of the judges.<sup>282</sup> By the same token, the judiciaries of some countries concluded agreements laying down specific principles for more efficient handling of cross-border cases.<sup>283</sup> However, such principles, born out of practical necessity, can be applied only insofar as they are not contradicted by the relevant legally binding framework. Hence, while grassroots initiatives of that kind have to be welcomed, their success depends on the support or, at the very least, on the non-obstructionist approach of the legislative and executive branches.

- 167 Furthermore, out of the necessity to ‘fill the gaps between the legal systems’,<sup>284</sup> some frameworks endorse the concept of the so-called ‘liaison judges’ (‘liaison magistrates’). A ‘liaison judge’ is supposed to act as a channel of communication and liaison with the national Central Authority, with judges within their own jurisdiction and with judges in other States.<sup>285</sup> The channelling of the communication through designated liaison judges facilitates the dialogue and diminishes the risks typically associated with judicial communication.<sup>286</sup>
- 168 Institutionalised state support is essential in particular in the context of information technology, which can immensely facilitate communication among judges. To illustrate this point with an example taken from EU legal order: launched in 2011, the Computerised system for communication in cross-border judicial proceedings (the e-CODEX system) is the technological backbone for the EU judicial cooperation in civil and

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<sup>282</sup> M Claes and M de Visser, ‘Are You Networked Yet? On Dialogues in European Judicial Networks’ (2012) 8(2) *Utrecht Law Review* 100, 107.

<sup>283</sup> Eg, 2003 UK-Pakistan Judicial Protocol on Children Matters under which both the UK and Pakistan have a designated liaison judge to help information about a case pass from one country to the other. See A Guide to International Parental Child Abduction to Pakistan. For further detail see <https://www.reunite.org/wp-content/uploads/2020/10/Pakistan-Review-Oct-2020.pdf> accessed 30 June 2023.

<sup>284</sup> B Rabatel and O Deparis, ‘Liaison Magistrates’. Their Role in International Judicial Cooperation and Comparative Law, in M Andenas and D Fairgrieve (ed), *Courts and Comparative Law* (Oxford UP) 614, 618.

<sup>285</sup> Cf *Conclusions and Recommendations of the Judicial Seminar on the International Protection of Children*, De Ruwenberg, 22-25 June 1998, in P Lortie, *Rapport relatif aux communications entre juges concernant la protection internationale de l'enfant* <https://assets.hcch.net/docs/0b1aa849-4291-4335-8a1f-5a56c29b27d3.pdf> accessed on 1 February 2023, 5.

<sup>286</sup> P McEleavy, ‘Judicial Communication and Co-Operation and the Hague Convention on International Child Abduction’ (2012) 2(1) *International Journal of Procedural Law* 36, 51.

commercial matters. It comprises a package of software products that allow for secure digital communication between courts.<sup>287</sup>

- 169 As a closing remark, the trend to institutionalise judicial communication does not necessarily run in parallel with its far-reaching formalization. On the contrary, the formalities and procedures should not hinder the process and they should be endorsed only insofar as they serve legitimacy-strengthening purposes (see below pt 3.3), leaving space for judicial discretion and bottom-up initiatives of the judiciary.

### 3.3 Legitimacy of Judicial Communication

- 170 The communication taking place between sitting judges, be it of direct nature or facilitated by specialised authorities (ie, centralised authorities or liaison judges), can be an efficient and swift method of ensuring adequate handling of pending cases and proper management of proceedings. It allows a judge to take an informed decision and ensure that the protection granted to the rights of the parties is neither excessive nor incomplete. Sometimes characterised as a part of a wider phenomenon of judicial activism,<sup>288</sup> judicial communication can be viewed as a pragmatic response to the challenges faced by the courts in the globalised world. The legitimacy of the process, however, cannot be sacrificed for the sake of practical benefits. There are two essential conditions discussed in the context of the legitimacy of judicial communication: the existence of safeguards throughout the process, on the one hand, and the existence of a legal basis that allows courts to engage into communication, on the other hand.

#### 3.3.1 Safeguards for Judicial Communication

- 171 Judicial communication relating to transnational disputes can raise concerns about the independent exercise of the adjudicative function by the courts involved in the dialogue. In its attempt to ensure effective coordination between proceedings and/or an informed decision-making process, case-specific communication must not compromise the fairness of the trial and procedural rights of the parties. Hence, judicial communication must be conducted in a manner that respects the legal requirements of the respective jurisdictions. However, due to differing requirements around the globe, the practicalities of communication may lead to diverging assessments of the conformity of judicial dialogue with local standards.

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<sup>287</sup> Regulation (EU) 2022/850 of the European Parliament and of the Council of 30 May 2022 on a computerised system for the cross-border electronic exchange of data in the area of judicial cooperation in civil and criminal matters (e-CODEX system), and amending Regulation (EU) 2018/1726, OJ L 150, 1 June 2022, 1–19.

<sup>288</sup> McElevay (n 286) 43; Thorpe (n 275) 132.

- 172 In order to address those discrepancies, efforts are necessary to establish common rules guiding the judicial communication, either in a binding legal instrument or in soft law sources. Legally binding instruments in that area are lacking. By contrast, commonly accepted safeguards for Direct Judicial Communications in specific cases have been developed under the auspices of the IHNJ.<sup>289</sup> In a similar vein, the Canadian Network of Contact Judges established 'Recommended Practices for Court-to-Court Judicial Communications' and a guide to judicial communication 'How to Communicate with a Judge in Another Jurisdiction – Canadian Network of Contact Judges Recommendations'.<sup>290</sup>
- 173 In essence, most of the common rules guiding judicial cooperation indicate that the communications must not compromise the independence of the judge in reaching their decision on the matter at issue.<sup>291</sup> Equally emphasised is the need to ensure the transparency of communications. The parties should be notified of the nature of the proposed communication and a record of the communication should be available to them.<sup>292</sup>

### 3.3.2 *Legal Basis for Judicial Communication*

- 174 The mechanisms enabling or mandating judicial communication are explicitly provided for only in some international instruments and in some domestic laws. In the absence of such an explicit legal basis, the question arises: can the judges nevertheless engage in dialogue, provided that they are able to put in place adequate safeguards?
- 175 Generally speaking, there seems to be some consensus on the need to identify a legal basis for judicial communication.<sup>293</sup> Such a legal basis should be viewed as an important

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<sup>289</sup> Direct Judicial Communications - Emerging Guidance regarding the development of the International Hague Network of Judges and General Principles for Judicial Communications, including commonly accepted safeguards for Direct Judicial Communications in specific cases, within the context of the International Hague Network of Judges, <https://www.hcch.net/en/publications-and-studies/details4/?pid=6024> accessed 30 June 2023.

<sup>290</sup> M Diamond, *International Child Relocation: Canadian Judicial Initiatives, Appendixes 'C' and 'D'* <https://studylib.net/doc/9030213/for-northern-ireland---american-bar-association> accessed on 1 July 2023.

<sup>291</sup> Eg, points 6.2 and 6.3 of the commonly accepted safeguards within HCCH Direct Judicial Communications; point B.2 of the Canadian Recommended Practices for Court-to-Court Communication.

<sup>292</sup> Eg, point 6.4 of the commonly accepted safeguards within HCCH Direct Judicial Communications; points A.2 and A.3 of the Canadian Recommended Practices for Court-to-Court Communication.

<sup>293</sup> HCCH Direct Judicial Communications, 7: 'Where there is concern in any State as to the proper legal basis for direct judicial communications, whether under domestic law or procedure, or under relevant international instruments, the necessary steps should be taken to ensure within the State that such legal basis exists.'



component of safeguards for ensuring the legitimacy of judicial communication discussed above. However, in both common law and civil law jurisdictions, there appears to be a broad acceptance of judicial communications even without explicit legal basis, with diverging justifications as to its foundations (eg, judicial communication as an element of judicial discretion, constitutional order, general principles of law, consent of the parties, judicial communication perceived solely as a matter of logistics).<sup>294</sup>

- 176 Judicial communication becomes more problematic from the viewpoint of international law. It has been argued in the literature that the courts involved in transnational communication conceive themselves as autonomous actors forging a relationship with foreign counterparts.<sup>295</sup> Although the vision of judicial bodies acting as autonomous interlocutors seems intellectually compelling, it raises several questions: is a national court, exercising adjudicative jurisdiction on behalf of a state, indeed authorized to engage in communication with a foreign adjudicative body and treat it as its peer? Conversely, is a national court obliged to consider communication from the court of another state as coming from its foreign counterpart? The more unclear the answer to that questions is, the more obvious is the need for a proper legal basis for judicial communication.
- 177 Lastly, whatever the ultimate stance of concerned domestic legal orders might be, those questions call for a further inspection in the context of EU law. In fact, on the one hand, EU legal order provides an interesting illustration of the challenges resulting from the lack of explicit endorsement of judicial communication by the relevant legal framework. On the other hand, judicial cooperation in civil matters is based on the mutual trust among EU Member States, which theoretically could eliminate the obstacles to effective communication between courts.
- 178 In her Opinion in the case *Purrucker*,<sup>296</sup> AG Sharpston distinguished the Brussels I Regulation and the Brussels IIbis Regulation and observed that only the latter ‘specifically contemplates communication between courts [in some contexts]’. She then argued that ‘it is conformity with the spirit of mutual cooperation which underpins the [Brussels IIbis Regulation] for such communication to extend to all matters which can facilitate or expedite proceedings’. This finding corresponds to the reasoning underpinning the judgment in *A*,<sup>297</sup> where the CJEU inferred an obligation to inform the courts in another

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<sup>294</sup> Cf *Seventh Meeting of the Special Commission on the practical operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention - October 2017* <https://hcch.net> accessed on 1 April 2023, pt 5, 12, 14.

<sup>295</sup> See A M Slaughter, ‘A Typology of Transjudicial Communication’ (1994) 29(1) *University of Richmond Law Review* 99, 123.

<sup>296</sup> *Purrucker*, Case C-256/09, Opinion of AG Sharpston [ECLI:EU:C:2010:437] point 144.

<sup>297</sup> *A*, Case C-523/07 (CJEU), Judgment of 2 April 2009, A [ECLI:EU:C:2009:225] para 61–64.

EU Member State about the provisional measures granted by the local forum from a general provision of the Brussels Ibis Regulation detailing the tasks of Central Authorities.<sup>298</sup>

- 179 The question remains whether – in the absence of any explicit contemplation of communication in a relevant EU law instrument – it can still be expected or even required from the national courts of the EU Member States to engage in judicial dialogue. Lacking explicit legal basis for judicial communications under EU private international law (eg, Brussels Ibis Regulation), judicial communication can be perceived as a logical extension of the need to ensure the practical effectiveness (*effet utile*) of the instruments on judicial cooperation in civil matters having cross-border implications, on the one hand, and of the duty of sincere cooperation enshrined in Art 4(3) TUE, on the other hand. However, it is a question of debate whether those rather general concepts of EU law constitute a sufficient legal basis for voluntary or mandatory judicial communication. At present, no clear answer to that question transpires from case law.
- 180 Faced with a problem of a lack of legal basis in the Succession Regulation<sup>299</sup> for communication of declarations in matter of succession between the courts in EU Member States, in *T.N. and N.N.*<sup>300</sup> and *M. Ya. M.*<sup>301</sup>, the CJEU did not resort to the concepts of *effet utile* or sincere cooperation. On the contrary, it held that ‘in the absence of a uniform system in EU law providing for the communication of declarations relating to the succession [...] it is for the person who has made a declaration concerning the waiver of succession to take the steps necessary to ensure that the court having jurisdiction to rule on the succession becomes aware of the existence of a valid declaration’. However, it is unclear whether any overarching principle of EU private international law can be inferred from that dictum. First, the transmission of information on a declaration made before a court of another Member State might have been viewed by the CJEU as a variation of the recognition of authentic documents, which is initiated at the request of the interested party<sup>302</sup>. Second, Recital 32 of the Succession Regulation

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<sup>298</sup> Art 55(c) of the Brussels Ibis Regulation stated that ‘[t]he central authorities shall, upon request from a central authority of another Member State or from a holder of parental responsibility, cooperate on specific cases to achieve the purposes of this Regulation. To this end, they shall, acting directly or through public authorities or other bodies, take all appropriate steps in accordance with the law of that Member State in matters of personal data protection to [...] facilitate communications between courts, in particular for the application of Art 11(6) and (7) and Art 15.’

<sup>299</sup> Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, No 650/2012 of 4 July 2012 (EU).

<sup>300</sup> *T.N. and N.N.*, Case C-617/20 (CJEU), Judgment of 2 June 2022 [CLI:EU:C:2022:426] para 47–48.

<sup>301</sup> *M. Ya. M.*, Case C-651/21 (CJEU), Judgment of 30 March 2023 [ECLI:EU:C:2023:277] para 47–48.

<sup>302</sup> Cf Arts 39(2) and 59(1), second phrase, of the Succession Regulation.

seems to express the EU legislator's intent to discharge the courts (only) from the specific duty of transmitting declarations related to succession.<sup>303</sup>

- 181 In light of the above, even if not out of necessity but at least to reinforce the legitimacy of the process and alleviate practical obstacles, international civil procedure instruments should provide rules for direct communication between courts in different jurisdictions involved in dealing with parallel proceedings.<sup>304</sup>

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<sup>303</sup> Recital 32 of the Succession Regulation provides that '[p]ersons choosing to avail themselves of the possibility to make declarations in the Member State of their habitual residence should themselves inform the court or authority which is or will be dealing with the succession of the existence of such declarations within any time limit set by the law applicable to the succession.'

<sup>304</sup> Cf in the context of the future Recast of the Brussels Ibis Regulation Hess (n 67) 15.

## ABBREVIATIONS AND ACRONYMS

ALI	American Law Institute
Art	Article/Articles
cf	<i>confer</i> (compare)
ch	chapter
CJEU	Court of Justice of the European Union
ECLI	European Case Law Identifier
ECtHR	European Court of Human Rights
ed	editor/editors
edn	edition/editions
eg	<i>exempli gratia</i> (for example)
ELI	European Law Institute
etc	<i>et cetera</i>
EU	European Union
ff	following
fn	footnote (external, ie, in other chapters or in citations)
HCCH	Hague Conference of Private International Law
IDI	Institut de Droit International
ie	<i>id est</i> (that is)
ILA	International Law Association
JCCP	<i>Minji soshō-hō</i> (Code of Civil Procedure) (Japan), as modified by the Act for the Partial Amendment of the Code of Civil Procedure and the Civil Provisional Remedies Act
SKPIL	국제사법/國際私法 (Act on Private International Law) (South Korea)
n	footnote (internal, ie, within the same chapter)
no	number/numbers
nQCCP	Code of Civil Procedure 2014 (Quebec, Canada)
para	paragraph/paragraphs
pt	point/points (internal, ie, within the same chapter)
QCC	Civil Code (Quebec, Canada)
QCCP	Code of Civil Procedure (Quebec, Canada)
Sec	Section/Sections
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UK	United Kingdom
UNIDROIT	<i>Institut international pour l'unification du droit privé</i> (International Institute for the Unification of Private Law)
US / USA	United States of America

USD	United States Dollar
v	versus
vol	volume/volumes

**LEGISLATION****International/Supranational**

1968 Brussels Convention

1980 Hague Convention

1996 HCCH Child Protection Convention,

2007 Lugano Convention

2015 Insolvency Regulation

2019 HCCH Judgments Convention

Agreement on Trade-Related Aspects of Intellectual Property Rights

Principles of Transnational Civil Procedure 2004 (ALI / UNIDROIT) ('2004 ALI-Unidroit Principles')

Brussels Ibis Regulation

Brussels IIter Regulation

Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters, OJ L 174, 27 June 2001

Model European Rules of Civil Procedure 2020 (ELI / UNIDROIT) ('2020 ELI-Unidroit Rules')

Final Resolution on the Provisional Measures adopted by IDI in 2017 ('2017 IDI Resolution')

HCCH 2005 Convention on Choice of Court Agreements

Guidelines on Intellectual Property and Private International Law 2020 (ILA) ('2020 Kyoto Guidelines')

Joint Action 98/428/JHA of 29 June 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on the creation of a European Judicial Network, O.J. L 191 (EU)

'Lisbon Guidelines' on the Protection of Privacy in Private International and Procedural Law 2022 (ILA) ('2022 Lisbon Guidelines')

Lisbon Treaty on the Functioning of the European Union (EU)

Maintenance Regulation

Principles on Provisional and Protective Measures 1996 (ILA) ('1996 Helsinki Principles')

Regulation (EU) 2022/850 of the European Parliament and of the Council of 30 May 2022 on a computerised system for the cross-border electronic exchange of data in the area of judicial cooperation in civil and criminal matters (e-CODEX system), and amending Regulation (EU) 2018/1726, OJ L 150, 1 June 2022 (EU)

Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters OJ L 189, 27.6.2014, 59–92, 'EAPO Regulation'.

Regulation 2017/1001 (EU Trademark Regulation)

Regulation No 650/2012 (Succession Regulation)

Resolution of the IDI on the principles for determining when the use of the doctrine of forum non conveniens and anti-suit injunctions is appropriate, 2 September 2003

### **National**

2003 UK-Pakistan Judicial Protocol on Children Matters under which both the UK and Pakistan have a designated liaison judge to help information about a case pass from one country to the other.

Civil Procedural Law 2023 (China)

Code de droit international privé (Code of Private International Law) (Belgium)

Code de procédure civil (Code of Civil Procedure) (France)

Code de procédure civile (Code of civil procedure) 1974 (Marocco)

Codice di procedura civile (Code of Civil Procedure) (Italy)

Código Civil y Comercial de la República Argentina (Civil and Commercial Code of the Republic of Argentina) (Argentina)

Código de Processo Civil (Civil Procedure Code) 2015 (Brazil)

Constitución Política de los Estados Unidos Mexicanos (Political Constitution of the United Mexican State) (Mexico)

Ley de cooperación jurídica internacional en materia civil (Statute on international judicial cooperation in civil matters) (Spain)

Loi fédérale sur le droit international privé (Federal Act on Private International Law) (Switzerland)



Reglamento 1/2018, sobre auxilio judicial internacional y redes de cooperación judicial internacional (Regulation 1/2018 on international judicial assistance and international judicial cooperation networks) [Official State Gazette, no. 249 of 15 October 2018] (Spain)

Ustawa – Kodeks postępowania cywilna (Code of Civil Procedure) (Poland)

국제사법/國際私法 (Act on Private International Law) (South Korea)

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