

## **How Far Should We Trust Each Other?**

**The positive implementations and the negative implications of the European Union principle of mutual trust in the stages of jurisdiction and recognition and enforcement of foreign judgments in civil and commercial matters**

**Sarah Faisal Saleh Alwahaibi**

Submitted in accordance with the requirements for the degree of  
<Doctor of Philosophy >

The University of Leeds  
School of Law

November 2021

The candidate confirms that the work submitted is her own and that appropriate credit has been given within the thesis where reference has been made to the work of others.

This copy has been supplied on the understanding that it is copyright material and that no quotation from the thesis may be published without proper acknowledgement.

## Acknowledgements

I thank Allah almighty who helped me, guided me and healed me throughout this bittersweet journey.

In every beautiful story, there are significant people who contributed in its beauty and uniqueness. I would like to acknowledge those people who helped me throughout my story and journey.

I would like to thank my main supervisor professor Gerrard McCormack who gave me his ultimate support in my doctorate journey. I am truly grateful for his patience and his guidance in this journey.

I would also like to thank my second supervisor professor Surya Subedi and my previous supervisor Dr Mihail Danov for their guidance and support. In addition, I would like to thank the University of Leeds for supporting me in my Journey. In particular, I would like to thank Andrew Bowdin, who was always willing to help me any time I needed help.

I would like to thank my employer, Kuwait University, for sponsoring me to do my studies in the UK. I would like to particularly thank international law department for their trust and support. In addition, I would like to thank Dr Theqal Alajmi who always welcomed my discussions with him.

I would like to thank my older brother, Salem, who used to give me a ride to school every day for 8 years in his old yet beautiful car filled with funny and tearful memories. In addition, a special thanks to my second older brother Sulaiman, whose sense of humour never failed to put me into a good mood. In addition, to my hero, my little brother Saleh, who taught me that one can rise from ashes, that change is possible and one should never lose hope when you believe in Allah. To my soulmate and baby sister, Saja, my black knight, shield and study companion in this journey. I am grateful to Allah to have such a great and pure person in my life, someone who believed in me in a time when I did not believe in myself. To my cousin, Noor Alshubaiki, who never failed to show me how important I am and who never stopped texting me and calling me throughout my study years.

I would like to thank my friends Feetoh Al Ali, Noor Alawadhi, Aisha Almubarak, Latifa Almeer, Rachenkorn, Ibukun, Shahad Almutairi, Sarah Alshahrani and Noura Alkatheri for their ultimate support. I would like to thank two special friends, Sundos Alrashid and Sarah Alhindi who were the light in my darkest moments. Having you as my friends is indeed a blessing from Allah. To my dad who always encourages me and eases my worries, that hard time will pass and I will have the joy of my hard work. Thank you. To the heroine in my life, to the person who was present in every moment in this journey, the person who never stopped believing in me, my mom. I am truly grateful to Allah to have such a magnificent mother like you. I love you.

Finally, to my late sister, Thekayat, this thesis is dedicated to you.

## **List of Abbreviations**

AFSJ	Area of Freedom, Security, and Justice
CJEU	The Court of Justice of the European Union
CPR	Civil Procedural Rules
ECHR	The European Convention for the protection of Human Rights
ECHtR	European Court of Human Rights
ECSC	The European Coal and Steel Community
EEC	European Economic Community
TEU	Consolidated Version of The Treaty on European Union
TFEU	Consolidated Version of The Treaty on The Functioning of The European Union
The EU	The European Union

## Abstract

The principle of mutual trust plays an undeniable role in the constitution and the continuous development of the European Union Area of Freedom, Security, and Justice. It enables people to move freely around the European Union Member States for various purposes, such as work, study, or even settling permanently in a different member state. Significantly, in order to enhance people's access to justice in the European Union, the principle of mutual trust empowers the European Union to adopt measures and regulations relating to judicial cooperation in civil and commercial matters having cross-border implications such as those governing Private International law rules. Moreover, explicit implementations of the principle of mutual trust are found in the private international law regulations such as the doctrine of *lis pendens* and mutual recognition and enforcement of foreign judgments. On the other hand, the principle of mutual trust has negative implications in rejecting the application of some of private international law doctrines well known in the common law systems, mainly the doctrine of *forum non-conveniens* and anti-suit injunction.

According to the Court of Justice of European Union, the principle of mutual trust is based on the presumption of Member states' compliance with the rule of law and fundamental rights, which is rebuttable only in exceptional cases. However, the reality shows that some member states are struggling to uphold the rule of law and fundamental rights in their justice systems. For the first time in the European Union history, The Court of Justice of the European Union delivered series of judgments against the Republic of Poland, declaring that it fails to observe and comply with its obligation to respect the right to effective judicial protection. As a result, the thesis seeks to answer a vital question: to what extent the principle of mutual trust should be respected when there is a serious case of violating fundamental rights by a member State's justice system. The thesis also examines the positive implantations and negative implications of the principle of mutual trust. Moreover, it analyses, where possible, the way the principle of mutual trust is reflected in the practice of the English courts, taking into consideration the impact of the Brexit decision on the judicial cooperation between the UK and the EU Member States. Lastly, it identifies the best means, which can enhance and strengthen the meaning of the principle of mutual trust in the area.

# Table of Contents

<b>Acknowledgements</b> .....	<b>II</b>
<b>List of Abbreviations</b> .....	<b>III</b>
<b>Abstract</b> .....	<b>IV</b>
<b>Table of Contents</b> .....	<b>V</b>
<b>Chapter 1 Introduction</b> .....	<b>1</b>
1.1 An overview on the importance of the principle of mutual trust, its meaning as understood by the CJEU, and its implementation in the Private International Law rules.....	1
1.2 The Rationale behind the Study, Research questions, and Aims.....	5
1.3 The Thesis Methodology .....	10
1.4 Structure of the Thesis .....	12
<b>Chapter 2 In search for a definition: the principle of mutual trust in an area of Freedom, Security and Justice</b> .....	<b>14</b>
2.1 Introduction .....	14
2.2 The meaning of trust.....	15
2.2.1 Trust based on a prediction or a rational choice .....	17
2.2.2 Moral Trust.....	22
2.2.3 Trust as an obligation .....	24
2.3 Mutual trust in the EU: From the Schuman Declaration to the constitution of the European Union .....	27
2.3.1 Mutual trust definition and its characteristics in the EU Lens.....	34
2.3.2 Mutual trust in the Scholars' Lens and as proposed by the Thesis .....	36
2.3.3 Limitations on the principle of mutual trust.....	48
2.4 The principle of mutual trust and similar terminologies .....	55
2.4.1 Comity and Mutual Trust.....	55
2.4.2 Mutual trust and reciprocity.....	58
2.3 Conclusions .....	61
<b>Chapter 3 The principle of mutual trust and the right to effective judicial protection</b> .....	<b>63</b>
3.1 Introduction .....	63
3.2 The right to effective remedy.....	65
3.3. The right to a fair trial within a reasonable time.....	66

3.3.1. A Fair Hearing.....	67
3.3.2 A Public Hearing.....	69
3.3.3 Impartial and independent tribunal established by law .....	69
3.3.4. Length of proceeding .....	71
3.4 Legal Aid.....	74
3.5. Limitation on the right to effective judicial protection.....	74
3.6 Conclusions .....	78
<b>Chapter 4 An overview on the implications and implementations of the principle of mutual trust in stages of jurisdiction and recognition and enforcement of judgments .....</b>	<b>80</b>
4.1 Introduction .....	80
4.2 The legal framework on private international law rules in matters of jurisdiction and recognition and enforcement in the EU.....	81
4.1.2 The position of some member states and the CJEU interpretation.....	83
4.3 The implementations of the principle of Mutual Trust in the Private International law Regulation .....	84
4.3.1 The Service of document Regulation.....	85
4.3.2 The Brussels I Regime.....	87
4.3.3 The Brussels Ila Regulation.....	95
4.3. The negative implications of the principle of mutual trust on other private international law norms .....	98
4.3.1 The Rejection of form non-conveniens doctrine.....	99
4.3.2 The refusal of an anti- suit injunction .....	100
4.4 Conclusions .....	101
<b>Chapter 5 The Implementation of the principle of Mutual Trust in the jurisdictional stage: Lis pendens.....</b>	<b>102</b>
5.1 Introduction .....	102
5.2 The meaning of lis pendens, its purpose, and significance .....	103
5.3 The Date of court seising .....	105
5.3.1At the time when the document instituting the proceedings or an equivalent document is lodged with the court or ,if the document has to be served before lodging to the court, at the time when it is received by the authority responsible for service .....	107
5.3.2 The claimant did not fail to take steps he is required to take to have the service effective on the defendant or was required to take to have the document lodged with the court.....	108
5.4 The requirement of lis pendens.....	112
5.4.1 The same cause of action.....	112

5.4.2 The same parties .....	116
5.5 Related Actions .....	118
5.6 The function of the lis pendens rules and Exclusive jurisdiction .....	119
5.6.1 The lis pendens rules and the exclusive jurisdiction by the jurisdictional rules .....	120
5.6.2 The function of the lis pendens rules and the exclusive choice of court agreement .....	122
5.7 The lis pendens and the length of proceeding .....	136
5.7.1 The Torpedo after the Recast .....	140
5.7.2 Possible solutions .....	141
5.8 The consequences of the non-respect of the lis pendens rules .....	143
<b>Chapter 6 The implementation of the principle of mutual trust in the stage of recognition and enforcement of judgment: mutual recognition and enforcement of judgments in the Brussels I Regulation .....</b>	<b>148</b>
6.1 Introduction .....	148
6.2 The strong examples of the principle of mutual trust in the stage of recognition and enforcement of judgment between the EU member states .....	151
6.2.1 Non review on the substance .....	151
6.2.2 No review on jurisdiction .....	152
6.2.3 A presumption in favour of recognition and the abolition of exequatur ...	154
6.3 Limitations to the principle of mutual trust .....	160
6.3.1 Public policy .....	161
6.3.2 Natural justice .....	170
6.3.3 the judgment conflicts with Sections 3, 4 or 5 of Chapter II where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee was the defendant or exclusive jurisdiction rules as in section 6 .....	178
6.3.4 Irreconcilable judgments .....	180
6.3.4.1 The judgment is irreconcilable with a judgment given between the same parties in the Member State addressed .....	184
6.4 The Brussels Ila Regulation: the return of child decision .....	187
6.4.1 The Brussels Ila Regulation Recast .....	190
6.5 Conclusion .....	191
<b>Chapter 7 The Negative Implications of the principle of mutual trust In EU Private International Law Rules .....</b>	<b>192</b>
7.1 Introduction .....	192
7.2 The doctrine of <i>forum non-conveniens</i> : Preliminary Remarks .....	192

7.3 <i>Forum non-conveniens</i> within the EU .....	197
7.3.1 The appropriate court is in a non-EU State.....	197
7.3.2 Andrew Owusu v Jackson after the recast.....	199
7.2.3 The appropriate court is in another EU member State.....	200
7.3.1 Anti-suit injunction and Comity.....	211
7.3.2 Anti-suit injunction, the Brussels I Regulation and the principle of mutual trust.....	214
<b>Chapter 8 The Fate of rules of jurisdiction and recognition and enforcement of judgments in civil and commercial matters between the UK and the EU Post Brexit: Walking through a Foggy Path? .....</b>	<b>227</b>
8.1 Introduction .....	227
8.2 Saying Goodbye and the withdrawal agreement.....	227
8.3 The Future Relationship.....	229
8.3.1 No agreement reached: the applicability of the English conflict of laws rules .....	229
8.3.2 Hague Convention on Choice of Court Agreement.....	231
8.3.3 The Lugano Convention?.....	233
8.3.4 The Hague judgment Convention .....	236
8.3.5 Another Solution? .....	237
8.4 Conclusion .....	239
<b>9 Toward further enhancement of the principle of mutual trust and judicial cooperation between the EU Member States in civil and commercial matters .....</b>	<b>240</b>
9.1 Introduction .....	240
9.2 Enhancing the rule of law and fundamental rights understanding and its enforcement in the EU .....	240
9.3 Improving the European judicial Network in civil and commercial matters ....	245
9.4 Judicial training .....	246
9.5 Conclusions .....	252
<b>10. Conclusions.....</b>	<b>254</b>
<b>Bibliography .....</b>	<b>260</b>

## Chapter 1 Introduction

The thesis examines and investigates the positive implementations and negative implications of the principle of mutual trust in the European Union Private International Law rules governing jurisdiction and recognition and enforcement of foreign judgment mainly in civil and commercial matters and their consistency with the rule of law and fundamental rights as key requirements underlying the principle. Its main objective is to provide a better understanding of the principle of mutual trust and to examine how it is reflected in different stages in the legal proceeding.

This chapter serves as an introduction to the thesis, consisting of four sections. Section 1.1 sets out the importance of the principle of mutual trust, its meaning as understood by the Court of Justice of the European Union (hereinafter CJEU), and its implementations in the Private International Law rules. Section 1.2 illustrates the rationale behind the study, research questions, and aims. Section 1.3 concerns the thesis methodology. Section 1.4 deals with the structure of the study.

### **1.1 An overview on the importance of the principle of mutual trust, its meaning as understood by the CJEU, and its implementation in the Private International Law rules**

The principle of mutual trust is seen as "the *raison d'être* of the European Union."<sup>1</sup> It plays an undeniable role in the constitution and the continuous development of the European Union Area of Freedom, Security, and Justice (hereinafter AFSJ).<sup>2</sup> It enables people to move freely around the European Union Member States for various purposes, such as work, study, or even settling permanently in a different member state. At the same time, however, such enjoyment means the inevitable rising number of cross-border disputes in the European Union Member States. When these disputes arise, people needs to access other EU Member States' justice systems as easily as

---

<sup>1</sup> *Joined cases C-411/10 and C-493/10 NS v Secretary of State for the Home Department and M E and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011] I-13905, para 83

<sup>2</sup> *Ibid*; *Case Opinion 2/13, Draft international agreement — Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms — Compatibility of the draft agreement with the EU and FEU Treaties* [2014] EU:C2014:2454, para 191 (hereinafter *Opinion 2/13*).

their own.<sup>3</sup> Therefore, to further enhance and foster access to justice in the European Union, the principle of mutual trust empowers the European Union to adopt measures and regulations relating to judicial cooperation in civil and commercial matters having cross-border implications such as those governing Private International law rules.<sup>4</sup>

Private international law concerns private disputes having a cross-border element. It governs rules of court's jurisdiction, the applicable law, and the recognition and enforcement of foreign judgments.

Since the Amsterdam Treaty,<sup>5</sup> the European Union has adopted several Regulations governing different areas of Private International Law. One significant example is the Brussels I Regulation, the dominant Regulation in the context of judicial cooperation between the European Union Member States, governing rules of jurisdiction, and the recognition and enforcement of judgments in civil and commercial matters.<sup>6</sup> Another example is the Brussel IIa Regulation, which concerns jurisdiction and recognition and enforcement of judgements in matrimonial and parental responsibility matters.<sup>7</sup>

Significantly, the principle of mutual trust not only allows for the adoption of EU secondary legislation governing private international law but also it is explicitly implemented in these provisions. In the Brussels I Regulation, for instance, the *lis pendens* rules is an implementation of the principle of mutual trust in the stage of jurisdiction. According to the rules, when two sets of proceedings involving the same cause of action and the same parties are pending before two-member states' court, the second seised court is under an obligation to stay its proceeding until the first seised court rule on its jurisdiction. If the jurisdiction is established, the second seised

---

<sup>3</sup> Tampere European Council 15 And 16 October 1999 Presidency Conclusions, para 5 (hereinafter Tampere Conclusions).

<sup>4</sup> Consolidated Version of The Treaty on The Functioning on The European Union [2008] OJ C115/13, art 81/2(hereinafter TFEU).

<sup>5</sup> Treaty Of Amsterdam Amending The Treaty n European Union, The Treaties Establishing The European Communities And Certain Related Acts [1997] OJ C 340.

<sup>6</sup> Council Regulation (EC) No 44/2001 of on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2000] OJ L 12(hereinafter the old Brussels I Regulation). In addition, its application was extended to Denmark by virtue of a parallel agreement see, Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[2005] OJ L 299.

<sup>7</sup> Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 OJ L 338 (hereinafter the Brussels IIa Regulation).

court must decline its jurisdiction.<sup>8</sup> The rationale behind it is to prevent or minimise the situation of concurrent proceedings situated in two different member states' courts, involving the same cause of action and the same parties, and to minimise the possibility of contradictory judgements and thereby the risk of its non-recognition.<sup>9</sup>

Another implementation of the principle of mutual trust in the Brussels I Regulation is mutual recognition of judgments. Mutual recognition is seen as the cornerstone and the objective of judicial cooperation in civil and commercial matters in the European Union and an essential way to facilitate access to justice further.<sup>10</sup> It means that a judgment given in a member state is to be recognised in another member state without any special procedure and without the need for a declaration of enforceability.<sup>11</sup> This means that a judgment from another member state is to be treated as a judgment given in the Member State where the enforcement is sought.<sup>12</sup> Moreover, mutual trust prohibits the court of enforcement from reviewing the court of origin's substance and jurisdiction.<sup>13</sup> This means that courts must refrain from deciding whether the other Member State's court judgment was correct.<sup>14</sup> In addition, it must not refuse the recognition and enforcement of such judgment because there is an error in law or facts.<sup>15</sup>

Mutual recognition of judgments is also adopted in the Brussels IIa Regulation but goes even further than the Brussels I Regulation when it precludes, in certain types of judgments, the possibility of raising non-recognition grounds.<sup>16</sup> This can mainly be seen in the rights of access and return of child decisions. Following the Tampere conclusions<sup>17</sup>, those decisions are automatically recognised without the need for the

---

<sup>8</sup> The Brussels I Recast, art 29

<sup>9</sup> The Brussels I Recast, recital 15, *c-144/86, Gubisch Maschinenfabrik KG v Giulio Palumbo*, [1987] ECR 04861, para 8

<sup>10</sup> TFEU, arts 67 and 81; Tampere Conclusions (n 3) para 33

<sup>11</sup> *ibid* Recital 26 and art 39. The declaration of enforceability, also known as the *exequatur* is 'Formal court procedure by which a foreign judgment is declared enforceable (i.e. "validated" for enforcement) in the state where enforcement is sought.' see the European Commission, 'Impact Assessment Accompanying Document To The Proposal For A Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)' COM (2010) 748 Final, SEC (2010) 1548 final' (Annex I Glossary of legal term) p45.

<sup>12</sup> *Ibid*, recital 26.

<sup>13</sup> Mr P Jenard, 'Report on the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters', vol 59 (1968) (hereinafter *Jenard Report*) p 46, *C-456/11 Gothaer Allgemeine Versicherung AG and Others v Samskip GmbH* [2012] para 35 .

<sup>14</sup> *Ibid*

<sup>15</sup> *Ibid*, *C-7/98 Dieter Krombach v André Bamberski* [2000] ECR I-01935 para 32 (hereinafter *Krombach*)

<sup>16</sup> The Brussels IIa Regulation arts 41 and 42

<sup>17</sup> Tampere Conclusions (n 3) para 34

declaration of enforceability and without any possibility of raising grounds for non-recognition before the Member State court where enforcement is sought after the certificate was issued satisfying certain conditions.<sup>18</sup> In these cases, the Member State court where the enforcement is sought can do no more than to declare that the judgment by the Member State court of origin is enforceable.<sup>19</sup>

The previous implementations and their function require a high level of mutual trust, leading us to raise an essential question; what is then the meaning of the principle of mutual trust? The founding treaties fail to provide a precise definition. Nevertheless, the CJEU, in its opinion on the European Union's accession to the European Convention for the protection of human rights (Hereinafter ECHR), provides some guidelines in this respect. It found that the notion of mutual trust is based on the presumption of Member States' compliance with the EU law and, more importantly, with fundamental rights in their justice systems, which is rebuttable only in exceptional cases.<sup>20</sup> Put it differently, it is based on the presumption that Member States' 'national legal systems are capable of providing an equivalent and effective protection of fundamental rights, recognised at European Union level, in particular, in the Charter of Fundamental Rights.'<sup>21</sup> This will mean that

[w]hen implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.<sup>22</sup>

Importantly, at the same time, the CJEU held on many occasions that the respect of the law and fundamental rights 'implies and justifies the existence of mutual trust

---

<sup>18</sup> The Brussels IIa Regulation, arts 41/1 and 42/1.

<sup>19</sup> *Case C-195/08 PPU Inga Rinau*[2008] ECR I-05271 para 89; *C-211/10 PPU Doris Povse v Mauro Alpago* [2010] ECR I-06673, para 73.

<sup>20</sup> Opinion 2/13 (n 2) para 191

<sup>21</sup> *C-491/10 PPU Joseba Andoni Aguirre Zarraga v Simone Pelz* [2010] ECR I-14247 para 70.

<sup>22</sup> Opinion 2/13 (n 2) para 192

between the Member States that those values will be recognised, and therefore that the EU law that implements them will be respected.<sup>23</sup>

## 1.2 The Rationale behind the Study, Research questions, and Aims

The previous implementations and their function were based on the presumption that Member States have effectively organised their justice systems to respect, comply, and promote fundamental rights. However, a closer examination of the current practice shows some Member states' struggle to uphold the rule of law and fundamental rights in their justice systems. For instance, according to the European Court of Human Rights (Hereinafter ECtHR) statistics, Italy has the highest number of cases violating the right to a fair trial particularly, in dealing with the issue within a reasonable time.<sup>24</sup> Furthermore, political and governmental interference were found in a number of member states as fatal reasons behind the lack of court independence.<sup>25</sup>

Significantly, the Republic of Poland is currently under the spotlight after enacting, amending laws, and issuing judgments and practices that evidently contradict and collide with the rule of law, particularly with the right to effective judicial protection. One example is lowering the age of retirement of the Supreme Court judges and, at the same time, empowering the President to extend the working period of the Supreme Court's judge beyond the new fixed retirement period, violating the principle of judge's irremovability and independency.<sup>26</sup> Moreover, a number of problems are detected under the new law of the Polish Supreme Court. The circumstances surrounding the creation of the disciplinary regime and the judges' appointing procedure raised doubts in the individuals' minds questioning the independence and the impartiality of the disciplinary regime.<sup>27</sup> For instance, the regime is composed of new judges proposed by the National Council for Judiciary and appointed by the President of the Republic, eliminating the possibility of assigning judges already sitting in the Supreme Court.<sup>28</sup>

---

<sup>23</sup> *Opinion 2/13*(n 2) para 168; *C-284/16 Slowakische Republik v Achmea BV* (n 24) 34; *Case C-216/18 PPU LM* (n 24) para 35.

<sup>24</sup> European Court of Human Rights Statistics, Violation by Article and by State 1959-2015' <[https://www.echr.coe.int/Documents/Stats\\_violation\\_1959\\_2015\\_ENG.pdf](https://www.echr.coe.int/Documents/Stats_violation_1959_2015_ENG.pdf)>. accessed on 7<sup>th</sup> September 2021

<sup>25</sup> The Commission, '2021 Rule of Law Report The Rule of Law Situation in the European Union' (2021) COM 700 final, p 8

<[https://ec.europa.eu/info/sites/default/files/communication\\_2021\\_rule\\_of\\_law\\_report\\_en.pdf](https://ec.europa.eu/info/sites/default/files/communication_2021_rule_of_law_report_en.pdf)>.

<sup>26</sup> *C-619/18 European Commission v Republic of Poland* [2019] ECLI:EU:C:2019:531

<sup>27</sup> *C 791/19 European Commission v Republic of Poland* [2021] ECLI:EU:C:2021:596.

<sup>28</sup> *European Commission v Republic of Poland*(no 26)

The National Council of the Judiciary composition itself raises doubts regards its independence since it is composed of judges appointed by legislature and executives.<sup>29</sup> Furthermore, the President of the Disciplinary Chamber is empowered with the ultimate discretion to assign a disciplinary tribunal to hear a particular disciplinary proceeding.<sup>30</sup> Such discretionary power undermines the meaning of a tribunal established by law as required under the right to effective judicial protection.<sup>31</sup> It is dangerous because the President can also assign particular judges to particular cases while preventing judges from taking particular cases for political reasons.<sup>32</sup>

As a result, for the first time in the EU history, the CJEU delivered series of judgments against Poland, declaring that the latter Member State fails to observe and comply with its obligation to respect the right to effective judicial protection.<sup>33</sup> Having regard to the preceding, the thesis seeks to answer a vital question: to what extent the principle of mutual trust should be respected when there is a serious case of violating fundamental rights by member states' justice systems.

Regretfully, looking into the CJEU case laws, particularly those governing areas of Private International Law, it seems that mutual trust is generally being preserved at the expense of fundamental rights. One example is found in the application of the *lis pendens* rules. The CJEU concluded that the second seised court is still obliged to stay its proceeding even if the first seised court takes an excessively long time to rule on its jurisdiction.<sup>34</sup> It justified its position on the existence of the principle of mutual trust between the EU Member States.<sup>35</sup> It is an invitation for bad faith litigants to infringe the person's right to a fair trial within a reasonable time by commencing proceeding which then proceeds at snail's pace in the courts of a particular Member State. To date, the problem continues to occur irrespective of the Brussels I Regulation Recast. It fails to provide a remedy that could solve or at least minimise the consequences of such a situation.

---

<sup>29</sup> *Joined Cases C-585/18, C-624/18 and C-625/18 A K and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy* [2019] ECLI:EU:C:2019:982, para 143.

<sup>30</sup> *European Commission v Republic of Poland* (no 26) para 173

<sup>31</sup> *ibid*

<sup>32</sup> *ibid*

<sup>33</sup> *ibid* ; *European Commission v Republic of Poland*(no 26);*C-192/18 European Commission v Republic of Poland* [2019] ECLI:EU:C:924

<sup>34</sup> C-116/02, *Erich Gasser GmbH v MISAT Srl* [2003] ECR I-14693, para 73

<sup>35</sup> *.ibid* , para 72

Another example is found in the context of family law issues where the CJEU held that the court where the enforcement is sought is under an obligation to recognise and enforce a return child decision even if it was evident that the child's right to be heard has not been complied within the court of origin.<sup>36</sup> According to the court, the Member State court where the enforcement is sought can do no more than declare that judgment by the member state court of origin is enforceable.<sup>37</sup> Once again, the CJEU justified its decision by relying on the principle of mutual trust based on the presumption of the member state's compliance with fundamental rights in their justice systems.<sup>38</sup> The CJEU reached its decision by relying on a conclusive presumption of compliance and a blind trust in the court of origin despite the fact that a clear violation of fundamental rights appears to have occurred.

The previous events raise reasons for concern. It shows how the principle of mutual trust was used as a justification to undermine and violate an individual's fundamental rights contrary to its actual meaning. Hence, having regard to the previous considerations, the thesis aims to achieve the following objectives:

1. Provide a better understanding of the principle of mutual trust and how it is implemented in different stages in the legal proceeding.
2. Explore the negative implications of the principle of mutual trust on other norms of private international law.
3. Analyse, where possible, the way the principle of mutual trust is reflected in the practice of the English courts, taking into consideration the impact of the Brexit decision on the judicial cooperation between the UK and the EU Member States.
4. Identify the best means, which can enhance and strengthen the meaning of the principle of mutual trust.

Until relatively recently, the majority of previous studies have only concentrated on the principle of mutual trust implications in the context of criminal matters, whereas little is known about the principle of mutual trust implementation in private international law. For instance, the focus of most of the previous studies was mainly on the principle of mutual recognition of judgments as a reflection of the principle of mutual trust in civil

---

<sup>36</sup> *Joseba Andoni Aguirre Zarraga v Simone Pelz* (n 21).

<sup>37</sup> *Ibid*, para 49

<sup>38</sup> *Ibid* para 59

justice and its interaction with fundamental rights. There is no doubt that the principle of mutual recognition is a prime expression of the principle of mutual trust, which was declared to be the cornerstone of the judicial cooperation in the European Union and which calls for an in-depth investigation. However, mutual recognition is only one example of the principle of mutual trust in the EU. Another implementation can be seen in a prior stage, which requires particular attention, such as the *lis pendens* rules in the stage of jurisdiction.

On the other hand, while a few influential studies started to examine the relationship on which the thesis builds, their scope was limited only to identify the implementation of the principle of mutual trust and their interpretation by the CJEU. There has been no detailed investigation that examines the consistency of the CJEU interpretation with the actual meaning of the principle of mutual trust and provides practical solutions that could prevent or at least minimise its infringement to fundamental rights.

The main aim of the thesis is to provide a better understanding of the principle of mutual trust and to investigate and evaluate how the principle of mutual trust is implemented mainly in the Brussels I Regulation. As seen above, the current practice shows a vague understanding of the principle of mutual trust and its relationship with the rule of law and fundamental rights, which calls for a reconsideration of the meaning of the principle of mutual trust. It examines how the presumption of member states' compliance with fundamental rights operates and how it should be operated, taking into consideration the recent CJEU series of judgments against Poland.

In addition, the thesis identifies the implementation of mutual trust and assesses whether there could be any negative impact on individual fundamental rights and if any negative impact is identified as a risk, how would the policymakers minimise it. In other words, it seeks to answer the following question; how is the principle of mutual trust reflected in the jurisdiction and the recognition and enforcement stages?

Moreover, to what extent the principle of mutual trust should be respected when serious violations are detected in the Member States' justice systems? In this respect, the Brussels I Regulation Recast and its predecessors are the focus of the thesis being the dominant Regulation that covers an area of jurisdiction and recognition and enforcement in civil and commercial matters. It also covers The Lugano Convention

where the principle of mutual trust is extended between the EU and the most of the European Free Trade Association Member states.<sup>39</sup>

However, this does not mean the exclusion of other Regulations where mutual trust also plays evident and strong role or where the CJEU defines the concept of mutual trust in the context of these regulations such as the Brussels Ila Regulation, the Service of document Regulation<sup>40</sup> or Regulations governing criminal law matters.

The thesis also examines the negative implications of the principle of mutual trust on other norms of private international law. The operation of the principle of mutual trust has led to the rejection of some of the private international law doctrines applicable in the common law systems, such as the anti-suit injunction and the doctrine of *forum non-conveniens*. An anti-suit injunction aims to restrain a party from commencing or pursuing legal proceedings in a foreign jurisdiction.<sup>41</sup> *Forum non-conveniens* allows the court to stay its proceeding if it is satisfied that there is another available forum, which is the appropriate forum to deal with the case for the interest of all the parties and the end of justice.<sup>42</sup> According to the CJEU, the previous norms collide with the meaning of the principle of mutual trust and its importance in the European Union.<sup>43</sup> Granting an anti-suit injunction, for instance, is not permissible even if it was employed to stop bad-faith litigants who wish to delay the existing proceeding.<sup>44</sup> In addition, granting an anti-suit injunction is not permissible even if it was issued in support of an arbitration agreement, a matter excluded from the scope of the Regulation.<sup>45</sup> The thesis, therefore, aims to evaluate whether the rejection of those norms corresponds to the meaning of the principle of mutual trust and its key requirements. In addition, it seeks to examine whether the use of such discretionary tools such as *forum non-conveniens* could be used to further promote and enhance the principle of mutual trust between the EU member states. In other words, it seeks to answer the following

---

<sup>39</sup> Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L 339, 21.12.2007, p. 3–41.

<sup>40</sup> Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation.

<sup>41</sup> *Société Nationale Industrielle Aerospatiale v Lee Kui JAK and Another* [1987] AC 871.

<sup>42</sup> *Spiliada Maritime Corporation V Cansulex Limited* [1987] 3 WLR 972

<sup>43</sup> *C-159/02, Gregory Paul Turner v Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA* [2004] ECR I-03565; *Case C-281/02 Andrew Owusu v N B Jackson* [2005] ECR I-01383.

<sup>44</sup> *Gregory Paul Turner v Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA* (n 34), para 31 .

<sup>45</sup> *Case C-185/07 Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc* [2009] ECR I-00663

questions: what are the negative implications of the principle of mutual trust on other norms of private international law? Do they contradict the notion of the principle of mutual trust?

Furthermore, the thesis aims, where possible, to analyse how the principle of mutual trust is reflected in the practice of the English courts. It is significant, particularly considering the impact of the Brexit decision on the judicial cooperation between the UK and the EU Member States. After nearly a half-century of membership, the United Kingdom left the European Union. This decision means that the EU law, such as Regulations and measures, ceases to apply in the UK. A decision to leave might be understood as a case of 'distrust.' Therefore, the thesis aims to address, evaluate difficulties and propose recommendations considering both the European Union and the UK views.

Finally, the thesis also aims to identify the best means to enhance and strengthen the meaning of the principle of mutual trust. It is significantly important, taking into account the growing role of the principle of mutual trust and its reliance on judicial cooperation in an area of justice.

In sum, the thesis seeks to investigate the principle of mutual trust in a broader scope than usually examined. It contributes to knowledge by clarifying the meaning of the principle of mutual trust in a way that can guide the policymakers, the national courts, and the CJEU in interpreting secondary legislations. Moreover, it seeks to propose remedies and amendments to shortcomings, unanswered questions, and overlooked concerns in such a way that corresponds to the principle of mutual trust and its objective to build and develop an area without internal borders in one hand, and the observance of fundamental rights as a crucial requirement for the principle of mutual trust and a limitation to the application of the presumption of compliance on the other hand.

### **1.3 The Thesis Methodology**

The thesis is mainly shaped as legal doctrinal research, which can be understood as “the formulation of legal 'doctrines' through the analysis of legal rules.”<sup>46</sup> It is seen as

---

<sup>46</sup>Paul Chynoweth, ‘Legal Research’ in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment* (first, Wiley-Blackwell 2008)

"research into the law and legal concept".<sup>47</sup> Importantly, it 'provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments.'<sup>48</sup> Being based on a normative framework means that not only it describes and explains what the law is,<sup>49</sup> but also it interprets and evaluates that law by showing its advantages and disadvantages and possibly recommends a solution to the problem.<sup>50</sup> The evaluation concerns primary sources, such as legislation, legal principles, and case laws, and secondary sources, such as books and articles. Such an approach relies on many methods such as deductive<sup>51</sup> and inductive<sup>52</sup> reasoning, analogy<sup>53</sup>, and, importantly, theory building.<sup>54</sup>

In this particular thesis, a detailed examination is given to the European Union Treaties, EU Conventions and Regulations, the Commission Reports and proposals, International Conventions, and scholarly work closely connected to the subject matter of the research.

In addition, the thesis gives particular attention to the right to effective judicial protection being the right most closely to the proper administration of justice. The right includes the right to a fair trial within a reasonable time, the right of defence, and the right to an effective remedy. Examining the meaning of this right, its scope, and its limitation is essential to measure the compatibility of Member States' acts with the observance of such rights. It is determined by the ECHR, the ECtHR, and the European Charter of Fundamental Rights (hereinafter the Charter).<sup>55</sup> Analysing the meaning of the right to effective protection by looking at both the ECHR and the CJEU

---

<[http://www.csas.ed.ac.uk/\\_data/assets/pdf\\_file/0005/66542/Legal\\_Research\\_Chynoweth\\_-\\_Salford\\_Uni..pdf](http://www.csas.ed.ac.uk/_data/assets/pdf_file/0005/66542/Legal_Research_Chynoweth_-_Salford_Uni..pdf)>, 29.

<sup>47</sup> Terry Hutchinson and Nigel Duncan, 'Defining And Describing What We Do: Doctrinal Legal Research'[2012] 17, No 1 Daekin Law Review, p 85 <https://ojs.deakin.edu.au/index.php/dlr/article/view/70/75>. accessed on 7 September 2021

<sup>48</sup> Ibid p 101

<sup>49</sup> Mark Van Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' in Mark Van Hoecke (ed), *Methodologies of Legal Research* (Hart Publishing 2011), <<http://dx.doi.org/10.5040/9781472560896.ch-001>> accessed on 7 September 2021. p 8 . Mark stated that the "explanation is at the service of interpretation".

<sup>50</sup> Sanne Taekema, 'Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice' [2018] Law and Method, p7 <https://ssrn.com/abstract=3123667> . Accessed on 7 September 2021. Sanne explains this in comparison between normative framework and theoretical framework.

<sup>51</sup> It means, "reasoning from a general rule to a specific case". see Chynoweth (n 46), 33.

<sup>52</sup> It means "the reasoning from specific cases to general rule." ibid

<sup>53</sup> "it involves process of reasoning from one specific case to another specific case." ibid

<sup>54</sup> Van Hoecke (n 49), p 14.

<sup>55</sup> European Union, Charter of Fundamental Rights of the European Union [2012] OJ C 326. (*hereinafter the Charter*)

case laws is essential for several reasons. First, the EU founding treaties and the CJEU case laws clearly stated that the ECHR rights are general principles of laws that should be respected in the European Union.<sup>56</sup> In addition, according to the Charter, the ECHR case laws are relevant in interpreting the meaning and scope of the rights adopted under the Charter.<sup>57</sup> Moreover, the ECHR imposes an obligation on the member states to respect the rights enriched in it even when they are applying EU law. The fact that the Member States have been part of an international cooperative organisation does not exclude or limit their duty as Contracting States of the ECHR.<sup>58</sup>

#### **1.4 Structure of the Thesis**

The thesis is structured into eight substantive chapters;

**Chapter 2** attempts to search for a definition for the principle of mutual trust by reviewing its origin, its characteristics, and its key requirements.

**Chapter 3** examines the right to effective judicial protection as the most significant right to the principle of mutual trust in the administration of justice.

**Chapter 4** provides an overview on the implications and implementations of the principle of mutual trust in stages of jurisdiction and recognition and enforcement of judgments

**Chapter 5** concerns the *lis pendens* rules as an explicit implementation of the principle of mutual trust in the Brussels I Regulation in the jurisdiction stage.

**Chapter 6** examines the mutual recognition and enforcement of judgments between the EU member states as another explicit reflection of the principle of mutual trust in the Brussels I Regulation.

**Chapter 7** addresses the negative implications of the principle of mutual trust on other norms of private international law, such as the rejection of *forum non-conveniens* and anti-suit injunction and whether such effect corresponds to the meaning of mutual trust.

---

<sup>56</sup> Consolidated Version of the Treaty on European Union [2008] OJ C115/13 art 6/3.

<sup>57</sup> The Charter art 52/3.

<sup>58</sup> *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi V Ireland Application no 45036/98*(ECHR 30 June 2005) para 153.

**Chapter 8** concerns the implications of Brexit and its impact on judicial cooperation between the UK and the EU Member States.

**Chapter 9** examines methods that could enhance and foster the principle of mutual trust between the EU member states. In this regard, the chapter reviews existing mechanisms, which aims to further protect and respect the rule of law and fundamental rights, such as the EU rule of law framework and whether it provides protective measures against all violations on the rule of law and fundamental rights. In addition, it examines methods suggested in the EU justice agenda such as judicial training, operational cooperation, and codification of the private international law rules and how they could contribute to strengthening mutual trust.

**Chapter 10** provides a conclusion to the thesis

## Chapter 2 In search for a definition: the principle of mutual trust in an area of Freedom, Security and Justice

### 2.1 Introduction

The purpose of this chapter is to provide a better understanding for the principle of mutual trust between the EU Member States in an area of Freedom, Security and Justice in terms of its nature, its foundations and limitations. This is essential taking into account its vital role in the constitution and the continuous development of an area of freedom, security and justice and more importantly, its role as a normative principle underlying EU Private International law rules. It is thought that a real and effective mutual trust is “the glue” that ensures the effective work of the EU<sup>1</sup>, “the bedrock”<sup>2</sup> of European area of justice and a “common asset”<sup>3</sup> that needs to be observed by the member states to reach a genuine area of justice and judicial cooperation.<sup>4</sup> However, despite its importance, it is rightly seen as “ambiguous”<sup>5</sup> and “elusive”.<sup>6</sup> Giving a clearer understanding of the principle of mutual trust will provide unity, certainty and further boost judicial control in daily work.<sup>7</sup>

In order to properly define the concept of trust and clarify the type of mutual trust the member states have and the extent or the scope of such trust, the Chapter draws inspirations from trust definitions and scope from other disciplines. The chapter is divided into 4 sections. Section 1 lays draws out general observations of the concept of trust in other disciplines, highlighting the most renowned theories in the trust literature particularly

---

<sup>1</sup> Antonina Bakardjieva Engelbrekt and others, ‘Trust in the European Union: What Is It and How Does It Matter?’ in Antonina Bakardjieva Engelbrekt and others (eds), *Trust in the European Union in Challenging Times: Interdisciplinary European Studies* (Springer International Publishing 2019) 3 <[https://doi.org/10.1007/978-3-319-73857-4\\_1](https://doi.org/10.1007/978-3-319-73857-4_1)>; See also the European Commission, ‘A New EU Framework to Strengthen the Rule of Law, COM(2014) 158 Final’ (2014)p 4 <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52014DC0158>>

<sup>2</sup> The European Commission, ‘The EU Justice Agenda for 2020 - Strengthening Trust, Mobility and Growth within the Union’ COM (2014) 144 Final .

<sup>3</sup> *ibid*

<sup>4</sup> ‘The Stockholm Programme – An Open and Secure Europe Serving and Protecting the Citizens’ (2009) 4; see by analogy the European Commission Vice- President Viviane Reding Press Release, ‘From Maastricht to Lisbon: Building a European Area of Justice in Small Steps and Great Bounds’ (2013) 1.

<sup>5</sup> Mattias Wendel, ‘Mutual Trust, Essence and Federalism – Between Consolidating and Fragmenting the Area of Freedom, Security and Justice after LM’ (2019) 15 *European Constitutional Law Review* 17, 20 <[https://www.cambridge.org/core/product/identifier/S1574019619000063/type/journal\\_article](https://www.cambridge.org/core/product/identifier/S1574019619000063/type/journal_article)>.

<sup>6</sup> Jukka Snell, ‘The Single Market: Does Mutual Trust Suffice?’, in Evelien Brouwer and Damien Gerard (eds.), *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law* (2016) 13 <[https://cadmus.eui.eu/bitstream/handle/1814/41486/MWP\\_2016\\_13.pdf?sequence=1](https://cadmus.eui.eu/bitstream/handle/1814/41486/MWP_2016_13.pdf?sequence=1)>.

<sup>7</sup> Evelien Brouwer, ‘Mutual Trust and Judicial Control in the Area of Freedom, Security, and Justice: An Anatomy of Trust’ in Evelien Brouwer and Damien Gerard (eds.), *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law* (2016) 13 <[https://cadmus.eui.eu/bitstream/handle/1814/41486/MWP\\_2016\\_13.pdf?sequence=1](https://cadmus.eui.eu/bitstream/handle/1814/41486/MWP_2016_13.pdf?sequence=1)>.

important in the determination of the meaning of the principle of mutual trust in the EU. Section 2 examines the birth of the principle of mutual trust in the EU. This includes the CJEU's understanding of the principle, scholars' opinions, and the thesis's perspective on the principle. Section 3 explains the limitations of the principle of mutual trust. The CJEU's case laws on the criminal matters are examined, since most of the development of the principle of mutual trust starts from these authorities. Section 3 examines the principle of mutual trust and other terminologies that are similar yet distinct such as Comity and reciprocity.

## 2.2 The meaning of trust

The concept of trust is often seen as “elusive”<sup>8</sup>, “vague”<sup>9</sup>, “contested”<sup>10</sup> and “multifaceted”<sup>11</sup> concept attracting scholars from different disciplines and leading to form different theories, definitions and typologies. For instance, in political science, trust is generally concerned with people's confidence and support for institutions such as the government, the parliament, the judiciary and the police.<sup>12</sup> It is based on performance evaluation to those institutions and whether they meet people's expectations.<sup>13</sup> On the other hand, in sociology, trust is often seen as a way to minimise the complexity of a society and its future.<sup>14</sup> It is thought that, in an organised society, it is impossible to predict every future actions and outcomes.<sup>15</sup> It is also both time and resources consuming to even attempt predicting those outcomes.<sup>16</sup> Therefore, trust is used to “go[es] beyond the information it receives and risks defining the future.”<sup>17</sup> Put it differently, trust plays a role when prediction ends.<sup>18</sup>

Before reviewing the diverse approaches and theories of trust, it is important to highlight some points that received most consensus between the scholars. First, trust includes

---

<sup>8</sup>Trudy Govier, *Dilemmas of Trust* (McGill-Queen's University Press 1998) ,preface <[<sup>9</sup> Tom WG van der Meer, 'Political Trust and the "Crisis of Democracy"' \[2017\] Oxford Research Encyclopedia,6.](http://www.questia.com/read/93945576/dilemmas-of-trust.></a>; Antonina (n 1)</p></div><div data-bbox=)

<sup>10</sup> Margaret Levi and Laura Stoker, 'Political Trust and Trustworthiness' (2000) Vol. 3 Annual Review of Political Science,476.

<sup>11</sup> Eric M Uslaner, *The Moral Foundations of Trust* (Kindle Edi, Cambridge University Press 2002).

<sup>12</sup> Eric M Uslaner, 'Part I Approaches to the Study of Trust, Chapter 1:The Study of Trust' in Eric M Uslaner (ed), *The Oxford Handbook of social and political Science* (2017),2; Meer (n 2),1. It also extends it to cover procedures

<sup>13</sup>The Political Relevance of Political Trust,791 cites: Stokes 1962,A.Miller 1974b;Meer (n 67) 5; Uslaner (n 70) 3.

<sup>14</sup> Niklas Luhmann, *Trust And Power* (Tom Burns and GianfrancoPoggi eds, John Wiley & Sons Ltd) (1979),71; Blaine G Robbins, 'What Is Trust? A Multidisciplinary Review, Critique, and Synthesis' (2015) Volume10, Sociology Compass,973.

<sup>15</sup> Luhmann (n 14),25.

<sup>16</sup>J David Lewis and Andrew Weigert, 'Trust as a Social Reality' (1985) Vol. 63, N Social Forces 969.

<sup>17</sup> Luhmann (n 14),20.

<sup>18</sup>J David Lewis and Andrew Weigert(n 16) 976.

elements of risk, uncertainty and vulnerability.<sup>19</sup> One reason rests on granting the trustee a discretionary power over the trustor's interest.<sup>20</sup> The trustor is the person who puts his trust on the other person to do the job. The trustee or the trusted is the person who is entrusted to do that job or work.

Another reason is that while the trustor believes that the trusted is trustworthy to carry on the task or the mission he is asked for, it is not really clear whether the trusted will in fact fulfil that mission. There is a chance that a valuable thing will be lost.<sup>21</sup> Put it differently, there is a risk of betrayal.<sup>22</sup> As a result, trust is seen as "dangerous".<sup>23</sup> This leads to the second agreed point that trust is not absolute, not blind and it is subject to limitation.<sup>24</sup> As rightly put by a scholar "We only trust "except if" and "as long as.""<sup>25</sup>

Thirdly, trust consists of three parts; A trusts B to do X.<sup>26</sup> As a consequence, trust's scope is limited between specific people to do a specific mission. Fourthly, it is agreed that trust is important because not only it is a sign of respect between the parties but also it encourages and facilitates cooperation.<sup>27</sup> However, it is noteworthy that while cooperation can be an indication and proof of trust, it is not always based on trust.<sup>28</sup> Cooperation can exist even between rivals.<sup>29</sup> In addition, a person could cooperate with another out of fear or coercion.<sup>30</sup> Cooperating with someone under the threat of a gun is one example.<sup>31</sup>

---

<sup>19</sup>Luhmann (n 14) 26; Weigert (n 16) 968; Russell Hardin, *Trust and Trustworthiness* (The Russell Sage Foundation Series on Trust 2002) 11; Meer (n 9) 5; Stoker (n 10) 476 ;Roger C Mayer, James H Davis and F David Schoorman, 'An Integrative Model of Organizational Trust' (1995) Vol. 20, No 3, *The Academy of Management Review* 709, 712;GOVIER (n 8) 6; A Hil Claire and O'Hara Erin Ann, 'A Cognitive Theory of Trust' (2006) 84 *Washington University Law Review* 1724; Carolyn McLeod, 'Trust', *The Stanford Encyclopedia of Philosophy* (Fall 2020, 2020).see also Diego Gambetta, 'Can We Trust Trust?' in Diego Gambetta (ed), *Trust: Making and Breaking Cooperative Relations* (electronic, Department of Sociology, University of Oxford 2000) 218.

<sup>20</sup> Hardin (n 19) 11.

<sup>21</sup> Mayer, Davis and Schoorman (n 19) 712.

<sup>22</sup>Gambetta (n 19) 219; Hardin (n 19); KATHERINE HAWLEY, 'Trust, Distrust and Commitment' [2014] *Wiley Periodicals, Inc* 1, 2 <<https://onlinelibrary.wiley.com/doi/epdf/10.1111/nous.12000>>; McLeod (n 19);Weigert (n 16) 971.

<sup>23</sup> McLeod (n 19).

<sup>24</sup>Luhmann (n 14); Meer (n 9) 5;AARON M HOFFMAN, 'A Conceptualization of Trust in International Relations' (2002) 8 *European Journal of International Relations* 375,377 <<https://journals.sagepub.com/doi/pdf/10.1177/1354066102008003003>>.

<sup>25</sup> Thomas Wischmeyer, 'Generating Trust Through Law? – Judicial Cooperation in the European Union and the 'Principle of Mutual Trust' 17 *German L. J.* (2016). 347

<sup>26</sup>Hardin (n 19) cites; (Baier 1986; Luhmann 1980, 27); Robbins (n 14).

<sup>27</sup> GOVIER (n 8) 9; Mayer, Davis and Schoorman (n 19) 712;Robbins (n 14) 977; Uslaner (n 12) 215 cites; Putnam (1993, 171).

<sup>28</sup>Mayer, Davis and Schoorman (n 19); Hardin (n 19) 10; Claire and Ann (n 19) 1724; Robbins (n 14) 977.

<sup>29</sup> Axelrod Robert, *The Evolution of Cooperation* (Revised Ed, Basic Books 1984) 3.

<sup>30</sup>Hardin (n 19).

<sup>31</sup> Ibid 12.

Fifth, there should be “good reasons” to trust someone to do something.<sup>32</sup> Trustworthiness is generally understood as the trustee’s competence<sup>33</sup> and willingness to fulfil what the trustor wants him to do.<sup>34</sup> Competence is generally understood as having certain set of skills that enable the trustee to carry out the mission entrusted to him by the trustor.<sup>35</sup> As for the trustee’s willingness or driving force, this could be due to different reasons; his good will or integrity<sup>36</sup>, self-interest, or out of obligation as it will further be seen.

However, differences exist. The next sub sections will highlight theories of trust that is related and is important in defining the principle of mutual trust in the EU. While some of these theories are usually used in the context of private or personal relationship, political research literature shows that some international politics theories were construed and developed by using other disciplines theories such as game theory or social psychological theories.<sup>37</sup>

The first theory the chapter examine is that trust is based on a cognitive and rational assessment on the trustworthiness of the trusted. The second theory is trust as a moral value. The third theory is trust as an obligation.

### **2.2.1 Trust based on a prediction or a rational choice**

Some view trust as ‘willingness of a party to be vulnerable to the actions of another party based on the expectation that the other will perform a particular action important to the trustor,...’.<sup>38</sup> This is generally based on evidence derived from interactions and experiences.<sup>39</sup> It is seen as “an attitude based on the past and extending into the future;”<sup>40</sup> It is based on a calculation of the other’s trustworthiness.<sup>41</sup>

---

<sup>32</sup>Weigert (n 16) 970.

<sup>33</sup> GOVIER (n 8) 6; Hardin (n 19) 7; Mayer, Davis and Schoorman (n 19).

<sup>34</sup>e.g McLeod (n 19).

<sup>35</sup>Mayer, Davis and Schoorman (n 19); Harrison McKnight and Norman L. Chervany, ‘Trust and Distrust Definitions: One Bite at a Time’ in R Falcone, M Singh and Tan Y.-H. (eds), *Trust in Cyber-societies* (Springer-Verlag Berlin Heidelberg 2001) 36 <<https://msu.edu/~mcknig26/Trust and Distrust Definitions.pdf>>.

<sup>36</sup> e.g; Mayer, Davis and Schoorman (n 19).

<sup>37</sup> Axelrod Robert (n 29) where he developed a theory of cooperation based on prisoner's dilemma game. In addition, as it will further be seen in section 2.3, emotions such as fear, threat or loyalty plays a role in the the sphere of international politics and particularly in trust building between States.

<sup>38</sup> Mayer, Davis and Schoorman (n 77) 712.

<sup>39</sup>GOVIER (n8); Hardin (n 19).

<sup>40</sup> GOVIER (n 8) 18.

<sup>41</sup> Karen S. Cook and Jessica J. Santana, ‘Trust and Rational Choice’ in Eric M Uslaner (ed), *The Oxford Handbook of social and political Science* (Oxford Handbooks Online, Oxford University Press) <<https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780190274801.001.0001/oxfordhb-9780190274801-e-4>>.

One of the most renowned theory on trust is given by Russel Hardin. He formulates trust as an encapsulated interest. In his view, “we trust you because we think you take our interests to heart and encapsulate our interests in your own...”<sup>42</sup>To his mind, a question of trust is generally a question whether the person is trustworthy.<sup>43</sup> In other words, it concerns the other trustworthiness. Hardin argues that trustworthiness needs not only that the trustee is competent to do what the trustor wants him to do but importantly, that his motivation to do that work rests on his concern about the trustor’s interest to some extent and more importantly, the trustee’s willingness to maintain and sustain the relationship between him and the trustor.<sup>44</sup> The compatibility of interests is not enough for trust to emerge.<sup>45</sup> The main point is the assurance of the continuity of the relationship between the parties.<sup>46</sup> In the context of mutual trust, the encapsulated interest is reciprocal between both parties, meaning that each party is a trustor and trustee. The trustor’s trust stems from the trustee’s own interest to fulfil what the trustor want him to do, and the trustee, which will also be a trustor in the mutual trust relationship, trusts the other party for the exact same reason.<sup>47</sup>

For Hardin, trust is a three-part relation; A trust B to do X.<sup>48</sup> In addition, trust is based on a rational and cognitive assessment on the trustworthiness of the trusted.<sup>49</sup> The trustor must gather information to decide whether the other person is trustworthy. Such knowledge can be gained through the previous interactions with that person or his reputation.<sup>50</sup> As one scholar puts it, “If you kept your promises in the past, I should trust you. If you have not, I should not trust you.”<sup>51</sup> As a result, this theory is often called as “strategic theory” or “calculated interests”.<sup>52</sup> Once trustworthiness is assured, trust can emerge quickly.<sup>53</sup>

However, Hardin’s theory faced criticism. The fact that the theory is based on calculation of interests, a part of rational choice theory, make it hard to distinguish it from mere reliance.<sup>54</sup> The core of Hardin theory is the trustee’s wish to maintain the relationship theory. If the main

---

<sup>42</sup> Levi Cook, Karen S.,Russel Hardin, and Margaret, *Cooperation without Trust?* (Vol XI, Ki, The Russell Sage Foundation Series on Trust 2005) 5.

<sup>43</sup> Hardin (n 19)1.

<sup>44</sup>ibid 32.

<sup>45</sup> ibid 4.

<sup>46</sup> ibid 5.

<sup>47</sup> ibid 18.

<sup>48</sup>Hardin (n 19) Preface; Cook, Karen S.,Russel Hardin, and Margaret (n 41) 6.

<sup>49</sup> Hardin (n 19) 13.

<sup>50</sup> ibid 198.

<sup>51</sup> Uslaner (n 12) 3.

<sup>52</sup> Laszlo Zsolnai, ‘The Rationality of Trust’ [2005] International Journal of Social Economics 268-269 <[http://laszlo-zsolnai.net/sites/default/files/3/documents/The Rationality of Trust.pdf](http://laszlo-zsolnai.net/sites/default/files/3/documents/The_Rationality_of_Trust.pdf)>.

<sup>53</sup> Hardin (n 19)80.

<sup>54</sup> HAWLEY (n 22) 2;HOFFMAN (n 24) ; McLeod (n 19).,

core is the durability of the relationship, Hardin theory of trust is not really about trust. Rather, it is a theory of cooperation.<sup>55</sup> As it will be seen later, trust requires “some extra factor”<sup>56</sup> or “[s]omething more”.<sup>57</sup> In addition, Hardin theory or strategic trust is viewed as not being stable since it depends on the experiences and the consequences of the interaction, something that it is subject to change.<sup>58</sup> In addition, it is seen as limited since the degree of trust depends on the current knowledge of each other.<sup>59</sup>

Trying to broaden the rational choice circle, A.Hill and O’hara view trust as a rational and cognitive assessment of the trustworthiness of others depending on both conscious and subconscious elements.<sup>60</sup> In the first place, like others, to trust someone is to make oneself vulnerable to other person.<sup>61</sup> In addition, according to their view, trust consists mainly of ‘trust that’ trust and ‘trust in’ trust. ‘Trust that’ trust is the prediction or an expectation that the trustee will behave in a way that is not deterrent to the trustor.<sup>62</sup> To their mind, trust is a mechanism used to reduce uncertainty by assessing that the probability of doing what the trustor wants is higher than the probability the trustee would harm the trustor.<sup>63</sup> ‘Trust that’ trust assessment is conducted irrespective of the trustee’s character or his values.<sup>64</sup>

However, the scholars rightly acknowledges that maintaining a strong relationship that could last for a long time not only needs information related to the situation but also information about the character of the trustee.<sup>65</sup> This led them to consider the importance of “trust in” the trust assessment. “Trust in” trust can be understood as the belief related to the trustee’s attributes such as his internal values.<sup>66</sup> Including “trust in” trust in the trust assessment has the benefit of minimising the need for negotiating or drafting a contract.<sup>67</sup>

---

<sup>55</sup> Robert (n 29).

<sup>56</sup> HAWLEY (n 22) 5.

<sup>57</sup>HOFFMAN (n 24) 381.

<sup>58</sup> Uslaner (n 12) 24.

<sup>59</sup> *ibid* 16.

<sup>60</sup>Claire and Ann (n 19) 1721.

<sup>61</sup> *ibid* 1724 cites : "Trust is not a behavior (e.g., cooperation) or a choice (e.g., taking a risk), but an underlying psychological condition that can cause or result from such actions." Rousseau et al., *supra* note 18, at 395; see also Blair & Stout, *supra* note 12, at 1739–40; Jan Delhey & Kenneth Newton, *Who Trusts? The Origins of Social Trust in Seven Societies*, 5 EUR. SOCIETIES 93, 105 (2003) (providing “a working definition of trust as the belief that others will not, at worst, knowingly or willingly do you harm, and will, at best, act in your interests.”).”

<sup>62</sup> *ibid* 1725.

<sup>63</sup> *ibid* 1735.

<sup>64</sup> *ibid* 1725.

<sup>65</sup> *ibid* 1726–1727.

<sup>66</sup> *ibid* 1725 See the footnote.

<sup>67</sup>*ibid* 1727.

In addition, the scholars provides that trust decision can be made subconsciously or consciously. The advantage of taking subconscious trust decisions is to minimise the need for continues calculations to determine whether to trust someone or not.<sup>68</sup> One example is the person's propensity to trust others or as other calls it, initial trust.<sup>69</sup> This person would have a principle rule to trust others unless a specific knowledge points to the contrary. According to the scholars, growing a disposition to trust is linked with the person being trustworthy. The more trustworthy the person is, the more he is willing to trust others and form trusting relationship.<sup>70</sup> Forming trust relationship in this type usually starts with small steps so that the trustor can know who to trust and disregard those who are not trustworthy. The drawback of this trust decision is that there is a high possibility of faults and imperfection because specific trust related knowledge is not taken into consideration in the assessment process.<sup>71</sup>

Taking into account the foregoing, the scholars provides that the scope of a relationship based on trust, is generally governed by two types of trust; residual trust and specific trust. Residual trust can be understood as the general belief of the trustworthiness of the other party.<sup>72</sup> It is another example of a subconscious process.<sup>73</sup> Specific trust on the other hand, is the belief of the trustworthiness of the other party in a specific or given situation. Each type can be the foundation of the other. Specific trust relationship that goes over time can grows up to create the residual trust about that particular person. This was called the "paradigmatic form".<sup>74</sup> Here, law plays little role in encouraging Trust optimal level.<sup>75</sup> On the other hand, residual trust can be the foundation governing the relationship, which can be undertaken by specific trust. The latter mechanism is understood as the "dual mechanism for trust-based assessments".<sup>76</sup> It obviates the need for constant calculations in every possible situation. At the same time, in order to minimise the costs of error, the trustor can use specific trust to replace the residual trust.<sup>77</sup>

Having the residual trust as the dominant trust type in the relationship is often seen between family member states and closed group members. However, the drawback of this type of

---

<sup>68</sup> *ibid* 1741.

<sup>69</sup> GOVIER (n 8) 207.

<sup>70</sup> Claire and Ann (n 19).1741-1742.

<sup>71</sup> *ibid* 1743.

<sup>72</sup> *ibid* 1745.

<sup>73</sup> *ibid* 1745.

<sup>74</sup> *ibid* 1749.

<sup>75</sup> *ibid* 1750.

<sup>76</sup> *ibid* 1745.

<sup>77</sup> *ibid* 1745.

trust is that it is “sticky”,<sup>78</sup> meaning that the assessor or the evaluator’s “emotional loyalties” can lead him to disregard certain information to obviate a situation of the trustee’s untrustworthiness.<sup>79</sup> Considerations of loyalty, love and friendship might influence and override the knowledge and evidence in the evaluator’s assessment.<sup>80</sup> As a result, residual trust might not always be accurate.<sup>81</sup>

The scholars recognised the effects of positive or negative emotions in influencing the cognitive process of trust.<sup>82</sup> According to the “affect as information” hypothesis, the information that finds its roots in emotions is a significant piece of information that is being used in the trust decision.<sup>83</sup> Emotions, moods or feelings work as “affective cues” that assist and illuminate actions and decision taking process.<sup>84</sup> In other words, they can direct the way we make our decision. Good feeling for instance can make a person depend on old information, have more general idea about the person while more feared person would be more cautious, gather more information, focus on the new information and take into account both ‘trust that’ and ‘trust in’ trust in his assessment.<sup>85</sup> An assessment guided by emotion and feeling that leads to disregard some information can produce a problem of over trust.<sup>86</sup> As put by the scholars, “overtrust leads to ineffective monitoring, fraud, reduced efficiency, and incompetence.”<sup>87</sup> It will further be seen that emotions such as fear, threat or loyalty plays a role not only in the interpersonal relationships but also in the sphere of international politics.<sup>88</sup>

On the other hand, the scholars provides for the possibility of the coexisting of trust and distrust in the same relationship. In their view, “Trust involves positive expectations about things hoped for; distrust involves positive expectations about things feared.”<sup>89</sup> Having a low trust is not the same as having high distrust. The same is true between high trust and low distrust. Trust and distrust coexistence can be due to number of reasons such as different

---

<sup>78</sup> *ibid* 1746.

<sup>79</sup> *ibid* 1747.

<sup>80</sup> GOVIER (n 8) 132–133.

<sup>81</sup> Claire and Ann (n 19).

<sup>82</sup> *ibid* 1747.

<sup>83</sup> *ibid* 1747 cites; Gerald L. Clore et al., Affective Feelings as Feedback: Some Cognitive Consequences, in THEORIES OF MOOD AND COGNITION: A USER’S HANDBOOK 27 (Leonard L. Martin & Gerald L. Clore eds., 2000).

<sup>84</sup> *ibid* 1747.

<sup>85</sup> *ibid* 1748.

<sup>86</sup> *Ibid* 1749.

<sup>87</sup> *ibid* 1720.

<sup>88</sup> See section 2.3

<sup>89</sup> *ibid* 1730 cites; *Id* at 439.

behaviour incentives and a variation between people's talent.<sup>90</sup> They further held that if relationship starts with low trust and low distrust, it will gradually grow over time with continuous interactions to have high trust and low distrust.

Taking into account the above, the scholars looked at the possible role played by law for optimised level of trust between the parties in a relationship governed by trust. To their minds, optimal level is generally seen where trust decisions initiate as specific trust and grow gradually until creating residual trust. On the other hand, trust level can be not optimal which is found for instance in relationship where residual trust is the dominant type of trust that governs the relationship. This is because the evaluator can disregard specific trust relevant information, making its assessment not accurate.<sup>91</sup>

The scholars sought to use law to encourage and promote forming trusting relationship by being a "safety net" and by minimising the risk surrounded such relationship.<sup>92</sup> The law can promote optimal trust by either encouraging more clear trust levels or minimise costs resulted from wrong assessment.<sup>93</sup> The law can provide the potential evaluator relevant trust information about the potential trustee

The degree of trusting someone not only depend upon evidence or knowledge about the potential trustee, but also the type of such information and the weight it has in the assessment process, the degree of the trustor exposure or vulnerability to betrayal and the general idea about that person.<sup>94</sup> The more what is at stake is high, the more likely trust is to be based on more concrete information and evidence.<sup>95</sup>

### **2.2.2 Moral Trust**

Uslaner departs from the cognitive assessment of other trustworthiness and view trust as based on a moral foundation. According to him, trust is based on the presumption that most people share the trustor's fundamental values.<sup>96</sup> In other words, it "is a commandment to treat people as *if* they were trustworthy."<sup>97</sup> In this context, the trustor is optimistic about the world and people surrounds him, thinking that everything would be all right, most people would not exploit him and he would have control on his surroundings.<sup>98</sup> As a result, such

---

<sup>90</sup> *ibid* 1732.

<sup>91</sup> *ibid*

<sup>92</sup> *ibid* 1795.

<sup>93</sup> *ibid* 1722

<sup>94</sup> GOVIER (n 8) 135.

<sup>95</sup> *ibid*

<sup>96</sup> Uslaner (n 12) 18.

<sup>97</sup> *ibid*.

<sup>98</sup> *ibid* 23 cites;(cf. Seligman 1997, 47).

presumption or optimistic minimises the risk inherited in trust.<sup>99</sup> In addition, moral trust exists irrespective whether there is reciprocity or not.<sup>100</sup>

Uslaner reports differences between the strategic trust and moral trust. First, moral trust is not based on expectation or prediction on the other's behaviour.<sup>101</sup> In his wording, "people ought to trust each other".<sup>102</sup> Secondly, unlike strategic trust where experiences and interactions are central to identify a trustworthy person, experiences are less relevant in the moral trust.<sup>103</sup> Thirdly, moralistic trust is stable and does not change frequently, whereas strategic trust is subject to variation and changes due to the experiences and reputation.<sup>104</sup> Fourthly, moral trust enables to build bridges, cooperate and interact with strangers whereas strategic trust allows such coordination between only specific people for specific reason.<sup>105</sup>

Uslaner identifies two types within the moral trust; generalised trust and particularised trust. The main difference between them is trust's scope in the community.<sup>106</sup> Generalised trust is presuming that most people share your norms. Generalised trustor means that he trusts without specifying the trustee or the entrusted job. In other words "A trusts".<sup>107</sup> On the other hand, particularized trust is understood as "[P]lacing faith only in our own kind..."<sup>108</sup> They are people he already knows or have experience with. In this respect, particularized trust is similar to strategic trust when it is based on information such as experiences.<sup>109</sup> However, particularized trust differ from strategic trust with respect of the scope of that trust. While strategic trust is A trusts B to X, particularized trust is that A trust B in general without any specification on the job.<sup>110</sup>

An approach similar yet distinct from Uslaner is taken by another scholar, Horsburgh.<sup>111</sup> After providing different types of the trustor's reliance on the other person, Horsburgh provides for therapeutic trust, where it is understood as placing or cultivating trust on someone who is probably not trustworthy to do the entrusted job, aiming that such cultivation

---

<sup>99</sup> *ibid* 18

<sup>100</sup> Uslaner (n 12) 24.

<sup>101</sup> *ibid* 18.

<sup>102</sup> *ibid* 23.

<sup>103</sup> *ibid* 17.

<sup>104</sup> *ibid* 51.

<sup>105</sup> *ibid* 20.

<sup>106</sup> *ibid* 27.

<sup>107</sup> *ibid*.

<sup>108</sup> *ibid* 28.

<sup>109</sup> *ibid* 28

<sup>110</sup> *ibid*

<sup>111</sup> Horsburgh, H. J. N. "The Ethics of Trust." *The Philosophical Quarterly* (1950-) 10, no. 41 (1960) <https://www.jstor.org/stable/2216409>

would produce and increase the person's trustworthiness.<sup>112</sup> An example is loaning money to someone who promises to pay it with profit and while the trustor sees that such probability is low, he takes the risk and trust that person.<sup>113</sup> Horsburgh provides for two types of therapeutic trust. The first type is trust that is related to loyalty relationship such as between family members and friends. In this type, if a family member was a criminal or did something morally wrong, his family and friends would nevertheless point out and focus on his good deeds only known to them, irrespective of a clear evidence on the contrary.<sup>114</sup> In this context, while such trust could encourage that person to change significantly, by attending to other's good hopes and views about him, in other cases, such type can lead to catastrophe.<sup>115</sup>

The second type is trust, which not only intends to increase the other trustworthiness but also intends to make the relationship generally based on moral value rather than the person's competence.<sup>116</sup> The type of trust is viewed as better than the former for number of reasons. The scope of this type's effect is broader than the first type. For instance, if B was successfully affected by therapeutic trust placed by A, not only he will act in goodwill with A, but also with regards C and D. This is because the purpose of this type is to change the morality of the person.<sup>117</sup>

Both Uslaner and Horsburgh focus and cherish the moral value of trust rather than a mere calculation of probabilities. However, they differs in the way of obtaining that value. In the case of Uslaner, such value is presumed to be existed. Put it differently, the other is presumed to be trustworthy. However, in Horsburgh case, trustworthiness to certain extent is lacking and trust is being used to increase the trustworthiness of that person in its moral ingredient. In other words, the trustor knows that it is unlikely that B will do X or will do it probably but nevertheless risks to go with him and trust him to plant that morality and goodness in him and thereby do the entrusted job.

### **2.2.3 Trust as an obligation**

Some scholars view trust not as a prediction or an expectation of the other's behavior, but as a belief or an expectation that the trustee is responsible, bound and under an obligation

---

<sup>112</sup> *ibid*; GOVIER (n 8) 171.

<sup>113</sup> *ibid*

<sup>114</sup> Horsburgh (n 11) 348.

<sup>115</sup> *ibid*

<sup>116</sup> *ibid*

<sup>117</sup> *ibid* 349.

to do what he is entrusted to do.<sup>118</sup> As one puts it, “[w]e expect them to act not simply as we assume they *will*, but as they *should*.”<sup>119</sup> This is true even if doing such job would mean losing more beneficial opportunity elsewhere available for the trustee.<sup>120</sup> Trustworthy person is then a person who is responsible to do the job.<sup>121</sup> However, the scholars who adopt such approach diverge on the incentives that makes a person responsible. Some finds that a person can be responsible and fulfil the obligation for different reasons such as his good will, integrity, or even fear of punishment if such job is not completed<sup>122</sup>, while others, like Hoffman, finds that a responsible person should be “‘upright’, ‘honorable’, ‘truthful’, ‘loyal’ and ‘scrupulous’“.<sup>123</sup>

An interesting argument is given by Hoffman. He examines the possibility of trusting relationship in interstate relationships. Taking the obligation approach, Hoffman confirms that trusting relationship is created when the trustor believes that the trustee is trustworthy and is responsible.<sup>124</sup> Here, the trustor would be subject to vulnerability to the trustee’s acts, since the trustee will have discretion and control over things used to be under the trustor’s control.<sup>125</sup>

Hoffman goes further and suggests methods that helps in the identification and the measurement of the extent of a trusting relationship. The first indicator is the existence of discretion policy, where the trustor empowers the other with the discretion to control and decide on matters used to be under the trustor’s control.<sup>126</sup> The incentive or the motive behind granting such discretion policies is that the party believes that the other party is trustworthy.<sup>127</sup> In this respect, political speeches, for instance, play a role in identifying decision makers’ motives and whether they are based on trust. Private statement have more credibility and weight than the public speeches because the chance of lying in the latter is higher.<sup>128</sup>

---

<sup>118</sup>Morton Deutsch, ‘Trust and Suspicion’ (1958) 2 *The Journal of Conflict Resolution* 265, 267; Bernhardt Liberman, ‘I-Trust: A Notion of Trust in Three-Person Games and International Affairs’ (1964) 8 *The Journal of Conflict Resolution* 271, 273 <<http://www.jstor.com/stable/172739>>;

<sup>119</sup> Carolyn McLeod, ‘Trust’, *The Stanford Encyclopedia of Philosophy* (Fall 2020 Edition) Edward N. Zalta (ed.), URL = <<https://plato.stanford.edu/archives/fall2020/entries/trust/>>..

<sup>120</sup> Deutsch (n 118) 268; Liberman (n 115) 279; HOFFMAN (n 24) 379 cites: (Barber, 1983; Hollis, 1998; Kegley and Raymond, 1990; Lieberman, 1967).

<sup>121</sup> HOFFMAN (n 24).

<sup>122</sup> Deutsch (n 118) 268.

<sup>123</sup> HOFFMAN (n 24) 381.

<sup>124</sup> *Ibid* 376

<sup>125</sup> *Ibid*

<sup>126</sup>*Ibid*, 386

<sup>127</sup> *Ibid*

<sup>128</sup> *Ibid*

In addition, Hoffman states that trusting relationship can be detected by looking at the behavior indicators. Friendship between leaders is one example.<sup>129</sup>

The second indicator is the existence of oversight mechanisms. They aim to monitor the discretionary decisions taken by the party in the trusting relationship. Hoffman agrees with others that oversight can be used before making a discretion decision, also called “(‘before-the-fact’ oversight)”. ‘police patrol’” methods is one example.<sup>130</sup> “Police patrol” aims to investigate and monitor the actor’s work in order to prevent any failure in fulfilling the job. In addition, Oversight methods can be after making such decision, also called “(‘after-the-fact’ oversight)”.<sup>131</sup> “fire alarm”” method is one example.<sup>132</sup> “Fire alarm” plays a role when the unwanted decision is already made and a sanction is put forward.<sup>133</sup>

To Hoffman, the oversights’ types used in an interstate relationship could indicate the extent of a trusting relationship. For instance, using before the fact oversights limit the other party’s power to exercise his discretion.<sup>134</sup> On the other hand, using after effect mechanisms could indicate a strong trusting relationship.<sup>135</sup> Put it differently, the more discretion given to the trustee, the more trust is bestowed to him.<sup>136</sup>

The third indicator of a trusting relationship, which is related to the discretion policy making, is the rules’ types adopted in the parties’ agreement. The more relaxing rules that gives way discretion, the more trust the relationship is based.<sup>137</sup> Hoffman states two types of rules that can be adopted in a written agreement; “framework-oriented agreement” and “statue-oriented agreement”.<sup>138</sup> Framework-oriented agreement is concerned with rules governing “constitutive rules that specify basic structure, institutional forms, procedures and rights.”<sup>139</sup> Statue-oriented agreement is concerned with “specific codes that regulate the behaviour of actors under specific circumstances.”<sup>140</sup> According to him, when the states’ agreement relies heavily on the first type, it indicates that more freedom and discretion is given to the

---

<sup>129</sup> Ibid 387

<sup>130</sup> Ibid 388, cites: (McCubbins and Schwartz, 1984).

<sup>131</sup> Ibid cites: “I owe the phrases ‘before-the fact’ and ‘after-the fact’ monitoring to a presentation by Margaret Levi at the 2000 American Political Science Association Convention, Washington, DC.”

<sup>132</sup> Ibid 388 cites: (McCubbins and Schwartz, 1984).

<sup>133</sup> Ibid.

<sup>134</sup> Ibid 389

<sup>135</sup> Ibid 390-391

<sup>136</sup> Ibid

<sup>137</sup> Ibid

<sup>138</sup> Ibid 391

<sup>139</sup> Ibid

<sup>140</sup> Ibid

parties, meaning more trust. It provides parties with rules without instructing them specifically how to apply or comply with them.<sup>141</sup>

Hoffman highlights that being trustworthy is not always the way to start and develop a trusting relationship. The existence of significant goals and aims such as reaching peace and obtaining security are essential to develop a relationship based on trust.<sup>142</sup> At the end, he recommends a combination of three measures for better trusting relationship, with a particular focus on the discretion policymaking and its data, that could provide more accurate status on the relationship.<sup>143</sup>

Looking at the foregoing, one can conclude that trust has different actors, different shapes and different types. Yet, within such variations, it is agreed that trust contains elements of risk and uncertainty, making the trustor subject to vulnerability and betrayal. As a result, a trusting relationship should be based on something more than a mere detection and gathering of past experiences. Rather, a trusting relationship needs the existence of internal values or 'trust in' element, such as honesty, to ensure a long and stable relationship.

The next section takes the next step and views the temporal development of the concept of mutual trust in the EU and the different shapes it take.

### **2.3 Mutual trust in the EU: From the Schuman Declaration to the constitution of the European Union**

After the tragic event of the Second World War, the French Foreign Minister, Robert Schuman, proposed what is well known as the Schuman Declaration, an invitation for the creation of a common market of coal and steel between France and Germany.<sup>144</sup> The purpose of the declaration was to provide peace in the shape of an economic integration.<sup>145</sup> The constitution of such integration would "make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible."<sup>146</sup> Moreover, such integration would pave the way for further European integration in the future.<sup>147</sup>

---

<sup>141</sup> *ibid*

<sup>142</sup> *ibid* 387

<sup>143</sup> *ibid* 393

<sup>144</sup> Robert Schuman, 'The Schuman Declaration – 9 May 1950' <[https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration\\_en](https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en)> accessed 09 October 2021.

<sup>145</sup> *ibid*.

<sup>146</sup> *ibid*

<sup>147</sup> *ibid*

In 1951, six States (France, Belgium, Italy, West Germany, the Netherlands, and Luxembourg) came together and formed the European Coal and Steel Community (hereinafter the ECSC)<sup>148</sup>, a community established a common market for steel and coal production supervised by a high authority. Some argued that mutual trust was “undoubtedly there in the background” as the basis of cooperation.<sup>149</sup> However, the political scene at that time lead us to investigate further before assuming the existence of such principle.

The political reality shows that the driving force of the French's initiative consisted of mixed motives. In the first place, there is no doubt that the desire to increase and level up people living standard and the desire to build a united Europe in the future were incentives to pursue the adoption of the ECSC.<sup>150</sup> However, the idea was in fact born out of fear to German's revival and its control over the coal and steel production industry.<sup>151</sup> This was highlighted by Monnet, one of the founding fathers, where he described German status as “a cancer” which would threaten the safety of Europe, urging to take measure to delay its revival.<sup>152</sup> An important reason to France's fear was the Ruhr. Ruhr, a mine area and a critical source of coal, was situated in Germany. At that time, Germany used all the coal taken from the Ruhr, preventing any access outside it.<sup>153</sup> Such domination threat would negatively affect France's plan of security and national reconstruction since its industry depends on the Ruhr production.<sup>154</sup> In addition, France's strategy of being the dominant player in the European region for the steel production also played a role in seeking such initiative.<sup>155</sup> On the other hand, such initiative was welcomed by Germany since it was an essential way to recognize its power as equal to France.<sup>156</sup>

---

<sup>148</sup> TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY and ANNEXES I-III 1951.

<sup>149</sup> Jukka Snell (n6),11.

<sup>150</sup> The ECSC ( 148); Schuman (n 144).

<sup>151</sup> Karen Alter and David Steinberg, 'The Theory and Reality of the European Coal and Steel Community' in Meunier S and McNamara K (eds), *Making History: European Integration and Institutional Change at the 50th Anniversary of the Treaty of Rome* (Oxford University Press 2007) 89; see also; Wolfgang F Stolper and Michael Hudson Dietmar Petzina, 'The Origin of the European Coal and Steel Community: Economic Forces and Political Interests' (1981) 137 *Zeitschrift für die gesamte Staatswissenschaft / Journal of Institutional and Theoretical Economics* 450, 456  
<<http://www.jstor.org/stable/40750370>>. <[https://faculty.wcas.northwestern.edu/~kal438/KarenJAlter2/ECJsPolitical\\_Power\\_files/ECSCTheory&Reality.pdf](https://faculty.wcas.northwestern.edu/~kal438/KarenJAlter2/ECJsPolitical_Power_files/ECSCTheory&Reality.pdf)>.

<sup>152</sup> Monnet Jean, 'Discussion Paper by Jean Monnet, Translation CVCE.EU by UNI.LU' (*the rights of reproduction are reserved and limited.*, 1950) II <<http://www.uni.lu/>> accessed 29 November 2020; Franco Piodi, 'From the Schuman Declaration to the Birth of the ECSC: The Role of Jean Monnet' (2010) No 6 *cardoc Journals* cites; *ibid.*, p. 325; see also; 'Germany and France, an Interview with German Chancellor, Konrad Adenauer, Translation CVCE.EU by UNI.LU' (*Die Zeit*, 1949) the rights of reproduction are reserved and limited <<http://www.uni.lu/>> accessed 29 November 2020.

<sup>153</sup> Franco Piodi (n 152) cites; J. Monnet, *Memoires*, op.cit., pp. 324.

<sup>154</sup> Dietmar Petzina (n 148) 463-464; see also Alter and Steinberg (n 148) 90; Jean (n 152) III.

<sup>155</sup> *ibid* 459 and 462.

<sup>156</sup> 'Germany and France, an Interview with German Chancellor, Konrad Adenauer, Translation CVCE.EU by UNI.LU' (n 152).

In this context, a question arises as whether emotions, feelings or mood could have any implications in the political world in general and in building trusting relationship between states in particular. Recent political science literature confirmed that emotions such as fear, threat or empathy play an essential role in international politics such as in confidence building or deterrence.<sup>157</sup> It has an effect on cognition, decision making, information sorting process and the policies adopted.<sup>158</sup> For instance, high level of empathy may result in the existence of flexible and easy going negotiation and the possibility of cooperation.<sup>159</sup> In addition, decision makers with positive moods tends to be optimistic by predicting the probability of the occurrence of good situations and underestimate the probability of the occurrence of bad situations.<sup>160</sup> On other hand, fear and the existence of responsibility lead the actor to thoroughly assess and gather more information to tackle the threat and to resolve difficult situations.<sup>161</sup> an actor with negative mood also pays more attention to details and analyses thoroughly.<sup>162</sup> Conversely, an actor with good mood and feeling processes information generally without going deeply into details which could lead to possible defective performance which otherwise requires paying more attention to details.<sup>163</sup>

Importantly, Monnet stated the need to “sweep fear aside, revive hope in the future and make it possible to set up a force for peace.”<sup>164</sup> This statement could cause confusion as categorising the relationship as trusting one. Applying trust definitions as provided for by the different disciplines described above lead us to reach a conclusion that the Schuman declaration and the end result, the ECSC, might not be really based on trust. The parties did not view each other as being trustworthy, a central condition for a trusting relationship. The cooperative relationship was based on reaching peace and importantly, a fear of Germany’s

---

<sup>157</sup> Ariffin Y, Coicaud J-M and Popovski V (eds), “Emotions in International Politics: Beyond Mainstream International Relations (Cambridge University Press 2016); Crawford, Neta C. “The Passion of World Politics: Propositions on Emotion and Emotional Relationships.” *International Security* 24, no. 4 (2000), 137, <http://www.jstor.org/stable/2539317>. See also Shiping, Tang, “Fear in International Politics: Two Positions”, *International study Review*,(2008)10; <http://www.jstor.org/stable/25481988>; Emma Hutchison states the importance of emotions “they can shape, in often unseen and inaudible ways, the motives and behaviors of states and they underpin phenomena such as terrorism, international security and cooperation.” See Hutchison E, “Affective Communities in World Politics: Collective Emotions after Trauma” (Cambridge University Press 2016, Kindle Version)

<sup>158</sup> Crawford (ibid), 137; Alexieva A, “The Role of Emotions in Foreign Policy Decision Making: Embarrassment from the Bay of Pigs” in Yohan Ariffin, Jean-Marc Coicaud and Vesselin Popovski (eds), *Emotions in International Politics: Beyond Mainstream International Relations* (Cambridge University Press 2016), 292

<sup>159</sup> Crawford (ibid) ,135

<sup>160</sup> Ibid 143

<sup>161</sup> Ibid 138

<sup>162</sup> Ibid cite: Norbert Schwarz and Herbert Bless, “Happy and Mindless, but Sad and Smart? The Impact of Affective States on Analytic Reasoning,” in Joseph P. Forgas, *Emotion and Social Judgements* (New York: Pergamon Press, 1991), pp. 55-71, at p. 56.

<sup>163</sup> Ibid

<sup>164</sup> Jean (n 152) VI.

dominant over the steel industry. In other words, there was an intention to cooperate out of peace and fear. In this context, there was no initial trust.

Another point is that the risk associated with trust is different from the scenario here. In the trust scenario, the trustee is trustworthy enough to be entrusted with the job and the risk is related to the situation whether he would actually do the work. However, the cooperative relationship in the Schumann and the ECSC was agreed to obviate the risk of revival and control of the steel and coal industry by Germany.

On the other hand, one might claim that the existence of mixed motives might categorise the relationship as strategic trust as provided by Hardin. However, as mentioned above, the trust definition provided by Hardin is about cooperation rather than trusting relationship.

That being said, the closest definition that could govern the relationship between the ECSC would be therapeutic trust. As seen above, the trustor intends to cultivate trust on the trustee even though evidence shows that the latter is not trustworthy. Here, France took step forward to enter the relationship on the hope that the physiological feeling would change in the future to create a united Europe.<sup>165</sup> To this end, one can say that while The Schuman Declaration, followed by the ECSC, were not based on trust and the trustworthiness of the parties, it undoubtedly constituted an essential step to create mutual trust between the EU member states.<sup>166</sup>

The principle of mutual trust starts to show more evidently after the adoption of The Treaty of Rome. It constituted the European Economic Community (hereinafter the EEC), where a common market between the Member states was established. The CJEU, formally the ECJ, starts to recognise mutual trust judicially.<sup>167</sup> Nevertheless, the normative use of mutual trust might be found prior to that time, at least in the area of civil justice, by the adoption of the Brussels Convention.<sup>168</sup> The flourish of business between the member states urged the need to secure people's rights and interest in cross border disputes through a convention

---

<sup>165</sup> Jean Monnet states, 'If the fear of German industrial domination could be allayed, the greatest obstacle to European Union would be lifted. A solution that put French industry on the same footing as German industry, while freeing the latter from the discrimination born of defeat, would restore the economic and political preconditions for the mutual understanding so vital to Europe. It could, in fact, become the germ of European unity.' See Franco Piodi (n 149) 24 cites; J. Monnet, op. cit., pp. 346-347.

<sup>166</sup> see by analogy HOFFMAN (n 24) 387.

<sup>167</sup> *Case 120/78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*. [1979] ECR 00649 where the principle of mutual recognition came into existence; *Case 46-76 W J G Bauhuis v The Netherlands State* [1977] ECR 1977-00005 para 22. It states "THIS SYSTEM IS BASED ON THE TRUST WHICH MEMBER STATES SHOULD PLACE IN EACH OTHER AS FAR AS CONCERNS THE GUARANTEES PROVIDED BY THE INSPECTIONS CARRIED OUT INITIALLY BY THE VETERINARY AND PUBLIC HEALTH DEPARTMENTS OF THE MEMBER STATES FROM WHICH THE ANIMALS ARE EXPORTED ."

<sup>168</sup> *ADVOCATE COLOMER, RUIZ-JARABOCASE, C-159/02 Gregory Paul Turner v Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA* (2003) para 31.

governing recognition of enforcement of judgment.<sup>169</sup> In the EEC Commission wording “legal certainty in the common market are essentially dependent on the adoption by the Member States of a satisfactory solution to the problem of recognition and enforcement of judgments.”<sup>170</sup> As it will further be demonstrated in the upcoming chapters, the Brussels Convention itself is an example of mutual trust between the member states of the ECC at that time. This was confirmed by the CJEU in many occasions.<sup>171</sup> This was also confirmed by Jenard Report where he refers to “complete confidence” in the state where the judgment was given by non-reviewing the substance of the judgment.<sup>172</sup> Put it differently, the Brussels Convention paved the way to introduce trust as an obligation.

The significance of mutual trust in the EU was clearly recognised in the adoption of Amsterdam Treaty<sup>173</sup> and the Tampere conclusions.<sup>174</sup> mutual recognition was seen as the cornerstone of judicial cooperation in civil, commercial and criminal matters which needed to be preserved and strengthened in the EU.<sup>175</sup> It also emphasised on the member states’ obligation to reach such level. <sup>176</sup>

Later on, the importance of mutual trust in the EU as an obligation was clearly endorsed in many occasions by the CJEU case-laws<sup>177</sup> and by the entry into force of the Lisbon Treaty.<sup>178</sup> The latter Treaty made amendments to the Treaty on European Union (hereinafter the TEU) and the Treaty on the European Community which was renamed to be the Treaty on the Functioning of the European Union (hereinafter the TEFU). According to article 4 TEU, all member states are under an obligation, based on mutual respect, to fulfil the obligations adopted under the treaties and to refrain from any acts which could jeopardise or undermine such cooperation. In this context, by including mutual respect with the obligation of sincere cooperation, the principle of mutual trust was impliedly seen as an obligation. Moreover, the

---

<sup>169</sup> Robert C Reuland, ‘The Recognition of Judgments in the European Community: The Twenty-Fifth Anniversary of the Brussels Convention’ (1993) 14 Michigan Journal of International Law 560,572 <<https://core.ac.uk/download/pdf/232702604.pdf>>.

<sup>170</sup> Jenard MP, ‘Report on the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters’, vol OJ C 59/79 (1979)

<sup>171</sup> C-116/02, *Erich Gasser GmbH v MISAT Srl* [2003] ECR I-14693, para 72; C-159/02 *Gregory Paul Turner v Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA* [2004] ECR I-03565, para 24.

<sup>172</sup> Jenard report (n 170).

<sup>173</sup> Treaty Of Amsterdam Amending The Treaty On European Union, The Treaties Establishing The European Communities And Certain Related Acts 1997 (hereinafter Treaty of Amsterdam).

<sup>174</sup> Tampere Conclusions.

<sup>175</sup> *Ibid*, para 33

<sup>176</sup> *ibid*

<sup>177</sup> see e.g *Gasser* (n 171); *Turner* (n 171)

<sup>178</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C 306

principle of Mutual recognition, which is based on mutual trust as it will further be seen, is now an obligation recognised on the treaties' level.<sup>179</sup> Later on, Mutual trust was confirmed to be a significant principle that governs the EU and its member states by the CJEU in its opinion on the EU accession to the ECHR which will be examined later.<sup>180</sup>

One can say that mutual trust clearly transformed to trust as an obligation that needs to be fulfilled by both the trustor and the trustee. Each member state is a trustor and a trustee toward other member states.<sup>181</sup> In one hand, the trustor is under an obligation to trust that the trustee would do the entrusted job. On the other hand, the trustee is responsible to fulfill the entrusted job. However, as it will further be demonstrated, the obligation to trust is subject to the fact that the trustee is trustworthy; that he complies with the rule of law and fundamental rights.

Having regard to Hoffman indicators of trusting relationship as an obligation, one can identify some of those indicators under the EU law. One indicator is the adoption of discretionary policy such as framework-oriented agreement rules. an example can be seen in article 19 TEU. It gives each Member State the discretion and freedom to organise and build their justice systems provided that such establishment is compatible with the right to effective judicial protection as provided for by the EU law. In other words, the construction of such provision gives more freedom to the member states, meaning more trust.<sup>182</sup>

Another indicator of trusting relationship as an obligation as given by Hoffman is the oversight mechanisms. Looking at the EU, it adopts oversight mechanisms that aim to oversee and observe whether the member states are respecting the rule of law and fundamental rights in their justice systems. In recent years, Police Patrol methods become more evident under the EU law. For instance, the Commission adopts an annual report on the rule of law in each member, which aims to promote, understand the application of the rule of law and prevent any future breaches of the rule.<sup>183</sup> In addition, The Commission also

---

<sup>179</sup> TEFU article 67/3 and article 81/1

<sup>180</sup> *Case Opinion 2/13, Draft international agreement — Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms — Compatibility of the draft agreement with the EU and FEU Treaties .*

<sup>181</sup> There is also a vertical trust between the member states and the EU institutions; see section 2.3.2 where Brouwer makes such distinction.

<sup>182</sup> Hoffman(n 24) p 391

<sup>183</sup>The European Commission, '2020 Rule of Law Report The Rule of Law Situation in the European Union COM/2020/580 Final' <<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1602583951529&uri=CELEX%3A52020DC0580>> accessed 12 October 2021; The European Commission, '2021 Rule of Law Report The Rule of Law Situation in the European Union' (2021) <[https://ec.europa.eu/info/sites/default/files/communication\\_2021\\_rule\\_of\\_law\\_report\\_en.pdf](https://ec.europa.eu/info/sites/default/files/communication_2021_rule_of_law_report_en.pdf)> accessed 12 October 2021.

adopted the rule of law framework, which aims to “resolve future threats to the rule of law”<sup>184</sup> and concerns with violations of the rule of law of a “systemic nature”.<sup>185</sup> Moreover “‘after-the-fact’ oversight” exists in the EU such as article 258 TFEU. According to the provision, the Commission is empowered to bring infringement proceeding before the CJEU against a member state, which fails to comply with its obligations under the EU.<sup>186</sup>

One might argue that the existence of such oversights could weaken the principle of mutual trust. However, the fact remains that mutual trust level in the EU is high. The establishment of an area without borders is one evident example. Another evident example is mutual recognition of judgments. The court of enforcement is giving away its control of issuing a declaration of enforceability, a power that is used to be under its control, due to its trust for the court of origin. In addition, as it will further be demonstrated, the existence of the principle of mutual trust depends on the respect and the observance of the rule of law and fundamental rights.

On the other hand, the European Union also governs other types of trust; residual trust and particularised trust. As seen above, residual trust means that a party is having a general trustworthiness in the other party without specifying the trust’s object. In this sense, residual trust exists in the EU where member states needs to trust each other generally, being members of the same polity. This is true by looking at article 4 TEU which provides a general obligation to trust other member states to carry out the obligation underpinned in the treaties. One evident drawback attributed to this type of trust is that it allows for a case of over trust. This is true by ignoring and disregarding evident information of the trustee violating the rule of law and fundamental rights. One example is found in one case where the CJEU clearly uphold mutual trust even when it recognises a member state’s court having a long time to hear a case.<sup>187</sup> On the other hand, particularised trust exists in the EU. This is true where member states are required for instance, to trust each other in the area of freedom, security and justice and particularly in judicial cooperation in civil and commercial matters.

Moreover, the existence of a presumption that entails member states’ compliance with the rule of law and fundamental rights is similar to trust as moral value adopted by Uslaner. As

---

<sup>184</sup> the European Commission, ‘A New EU Framework to Strengthen the Rule of Law(n 1) 3.

<sup>185</sup> *ibid* p 7

<sup>186</sup>Article 258 TFEU states ‘If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.’

<sup>187</sup> *Gasser* (n 170)

seen previously, trust as a moral value is based on the presumption that the trustee is trustworthy in sharing the truster's fundamental values. In particular, the relationship between the EU Member States is governed by moral particularised trust as adopted by Uslaner. Here, each member state trusts another member state in the same entity which is the EU.

To this end, mutual trust in the European Union in its current position is a combination of most of trust types mentioned above. Mutual trust itself is an obligation based on an obligation to respect and comply with the internal values of the EU which is the rule of law and fundamental rights. It is an obligation that needs to be fulfilled by all members and actors of the EU. The EU is governed by residual or general trust, where member states needs to trust each other generally, being members of the same polity. It is also governed by specific particularised trust where member states are required to trust each other on specific matters such as the constitution and the continuous development of the area of freedom, security and justice and particularly in judicial cooperation in civil and commercial matters.

The next subsection views mutual trust and its characteristics in the EU Lens.

### **2.3.1 Mutual trust definition and its characteristics in the EU Lens**

Despite the omission of the principle of mutual trust in the founding treaties, the CJEU plays a vital role in identifying its importance, some of its characteristic and its possible nature. It recognised the significant role played by the principle of mutual trust in building and constructing an area without borders between the EU member states.<sup>188</sup> Importantly, the CJEU states that the existence of the mutual trust rests on a presumption that each member states respect, comply and apply the rule of law, fundamental rights and EU law in their justice systems, rebuttable only in exceptional circumstances.<sup>189</sup> Such presumption puts the member states under two negative obligations,<sup>190</sup>

not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other

---

<sup>188</sup> *Case Opinion 2/13*(n 166).

<sup>189</sup> *Case Opinion 2/13*,(n 166) *para 168and191*; *C-284/16 Slovakische Republik v Achmea BV 2016 para 34*; *Case C-216/18 PPU LM, para 35*.

<sup>190</sup> Koen LENAERTS, 'The Principle of Mutual Recognition in The Area of Freedom, Security And Justice' (All Souls College, University Of Oxford 2015)7

<[https://www.law.ox.ac.uk/sites/files/oxlaw/the\\_principle\\_of\\_mutual\\_recognition\\_in\\_the\\_area\\_of\\_freedom\\_ju dge\\_lenaerts.pdf](https://www.law.ox.ac.uk/sites/files/oxlaw/the_principle_of_mutual_recognition_in_the_area_of_freedom_ju dge_lenaerts.pdf)>.

Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.<sup>191</sup>

The existence of such presumption and obligations led to the CJEU's refusal to the EU accession to the ECHR. In the CJEU's view, allowing human rights checks between the member states would undermine and violate the essence of the principle of mutual trust.<sup>192</sup>

As for its characteristics, mutual trust entails that each member state has the ability to apply and interpret the EU law, its aims and objectives equivalent to other member states.<sup>193</sup> In other words, no member state is in a higher ranking or position than the others.<sup>194</sup> In addition, mutual trust recognises member state's justice systems qualities and their ability to apply, comply and preserve EU law such as fundamental rights.<sup>195</sup> Moreover, Mutual trust not only covers EU law but it also extends to cover the court of origin's laws despite variations in other member state's laws.<sup>196</sup> Here, mutual trust ensures building bridges between the diverse member states justice courts and their laws rather than law unification.<sup>197</sup> In addition, mutual trust puts each member states under an obligation not to issue, by its own power, any protective or corrective measures to prevent a breach by another member state for an EU law such as fundamental rights.<sup>198</sup> Moreover, mutual trust should not be undermined by any specific conventions between the EU member states particularly if that specific convention govern judicial cooperation area, an area principally based on mutual trust.<sup>199</sup>

---

<sup>191</sup> *Case Opinion 2/13*, (n 166) para 192.

<sup>192</sup> *Ibid* para 258.

<sup>193</sup> *Joined Cases C-404/15 and C-659/15 PPU Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* para 77; *C-116/02, Erich Gasser GmbH v MISAT Srl* (n 161) para 48; *C-159/02 Gregory Paul Turner v Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA* (n 161) para 25; *C-352/89, Overseas Union Insurance Ltd and Deutsche Ruck UK Reinsurance Ltd and Pine Top Insurance Company Ltd v New Hampshire* [1991] ECR I-03317 para 23.

<sup>194</sup> *C-116/02, Erich Gasser GmbH v MISAT Srl* (n 161) para 48; AG Geelhoed, 'Case C-304/02 COMMISSION v FRANCE' [2004] ECR I-6263, para 8.

<sup>195</sup> *C-491/10 PPU Joseba Andoni Aguirre Zarraga v Simone Pelz* [2010] ECR I-14247, para 70.

<sup>196</sup> Sacha Prechal, 'Mutual Trust before the Court of Justice of the European Union' (2017) volume 2 European Papers pp.75

<[https://www.europeanpapers.eu/en/system/files/pdf\\_version/EP\\_EJ\\_2017\\_1\\_7\\_Article\\_Sacha\\_Prechal.pdf](https://www.europeanpapers.eu/en/system/files/pdf_version/EP_EJ_2017_1_7_Article_Sacha_Prechal.pdf)> cites; Gözütok and Brügge, cit., para. 33 .and in the same sense, in relation to the recognition and enforcement of judgments imposing a custodial sentence, Court of Justice, judgment of 8 November 2016, case C-554/14, Ognyanov, paras 47-49. For the need to accept different legal rules of another Member State in civil law see, for instance, Meroni, cit., para. 41.

<sup>197</sup> Prechal (n 179) 85; see also the European Commission Vice- President Viviane Reding Press Release (n 62) 1.

<[https://www.europeanpapers.eu/en/system/files/pdf\\_version/EP\\_EJ\\_2017\\_1\\_7\\_Article\\_Sacha\\_Prechal.pdf](https://www.europeanpapers.eu/en/system/files/pdf_version/EP_EJ_2017_1_7_Article_Sacha_Prechal.pdf)>.

<sup>198</sup> *Case C-94 The Queen v Ministry of Agriculture, Fisheries and Food, ex parte: Hedley Lomas (Ireland) Ltd* para 19-20.

<sup>199</sup> *C 533/08 TNT Express Nederland BV v AXA Versicherung AG* [2010] ECR I-04107, para 49-50; see also *c-452/12, Nipponkoa Insurance Co (Europe) Ltd v Inter-Zuid Transport* [2013] para 47.

On the other hand, while the principle of mutual trust exceptions will be discussed in depth throughout the thesis, one can briefly say that the EU institutions, particularly the CJEU, rightly begins to demolish the sacred ideology of the principle of mutual trust. In its case laws, the CJEU recognises that while the principle of mutual trust is based on a presumption of member states' compliance with fundamental rights, such presumption is not conclusive. However, the presumption is only rebuttable in exceptional circumstances defined by the CJEU jurisprudence. One example is the existence of systematic deficiency in the member state's justice system.<sup>200</sup> However, as it will further be seen, such presumption was created to observe the State's interests rather than individual's rights.<sup>201</sup>

The following subsection will view mutual trust in some of the scholar's understanding and the thesis proposition.

### **2.3.2 Mutual trust in the Scholars' Lens and as proposed by the Thesis**

The importance of the principle of mutual trust given by the EU institutions attracted scholars from different legal disciplines to investigate its meaning, its nature and its limitations.<sup>202</sup>

In the first place, there is consensus among the scholars that recognise the rule of law and fundamental rights as fundamental premises for the principle of mutual trust.<sup>203</sup> Professor Weller for instance, looked at the mutual trust as a legal principle of European Private

---

<sup>200</sup> *Joined cases C-411/10 and C-493/10 NS v Secretary of State for the Home Department and M E and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011] I-13905.

<sup>201</sup> Valsamis Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual' (2012) 31 *Yearbook of European Law* 319 <<https://academic.oup.com/yel/article-lookup/doi/10.1093/yel/yes023>>; Dominik Dusterhaus, 'In the Court(s) We Trust - A Procedural Solution to the Mutual Trust Dilemma' n.1 *Freedom, Security & Justice: European Legal Studies* 26 <<http://www.fsjeurostudies.eu>>.

<sup>202</sup> e.g ; Wischmeyer(n25);Wendel M, 'Mutual Trust, Essence and Federalism – Between Consolidating and Fragmenting the Area of Freedom, Security and Justice after LM' [2019] *European Constitutional Law Review*, 15Evelien Brouwer and Damien Gerard (eds.), 'Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law: Jukka Snell, The Single Market: Does Mutual Trust Suffice?' (2016) 13 ;Prechal S(n 79);

Mitsilegas (n 184); Weller M, 'Mutual Trust: In Search of the Future of European Union Private International Law, *Journal of Private International Law* *Journal of Private International Law*, <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2538389](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2538389)>E; Kramer X, 'Cross-Border Enforcement in the EU: Mutual Trust versus Fair Trial? Towards Principles of European Civil Procedure' (2011) 2 *International Journal of Procedural Law* 202;Sulima A, 'THE NORMALITY OF THE PRINCIPLE OF MUTUAL TRUST BETWEEN EU MEMBER STATES WITHIN THE EMERGING EUROPEAN CRIMINAL AREA' (2014) 3 *Wroclaw Review of Law, Administration & Economics* ;Weller M, 'Choice of Forum Agreements under the Brussels I Recast and under the Hague Convention: Coherences and Clashes' [2017] *Journal of Private International Law*, 1 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2827711](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2827711)>

<sup>203</sup> See e.g *ibid*; Eva STORSKRUBB, 'Mutual Trust and the Dark Horse of Civil Justice' (2018) 20 *Cambridge Yearbook of European Legal Studies* 179 <[https://www.cambridge.org/core/product/identifier/S1528887018000022/type/journal\\_article](https://www.cambridge.org/core/product/identifier/S1528887018000022/type/journal_article)>; Prechal (n 179);Nathan Cambien, 'Mutual Recognition and Mutual Trust in the Internal Market' (2017) 2 *European Papers - A Journal on Law and Integration* 93 <<https://www.europeanpapers.eu/en/e-journal/mutual-recognition-and-mutual-trust-internal-market>>. .

international law and addressed the question what to trust in. In answering this question, he states that such principle is based on the assumption that member states are complied with the rule of law and fundamental rights, and only because of that, the European Union was able to offer an area of freedom, security and justice where the free movement of person is ensured.<sup>204</sup> As he puts it ‘one may induce that only such mutual trust allows and justified the mutual recognition to the extent necessary to implement the Union’s vision of an area of freedom, security and justice.’<sup>205</sup>

Moreover, in looking on ways to strengthen the rule of law in the EU, Closa and Kochenov rightly made the following statement:

...mutual trust, on which the Union is constructed, does not work as smoothly as it should : being a Member State of the Union does not automatically imply living by the book of principles and values of which the Rule of Law is the key component. The presumptions made in the past and seemingly valid in the past must now be laid to rest: mutual trust among the Member States in the checks and balances of each other’s constitutional systems cannot simply be mandated, which has always been the traditional view: enforcing trust in each other without enforcing adherence by the Member States to the essential principles which would justify such trust in the first place cannot produce a lasting constitutional edifice.<sup>206</sup>

In addition, scholars agree that the principle of mutual trust is a normative principle,<sup>207</sup> meaning that it is used to lead, influence and affect the interpretation of the secondary EU laws such as the Brussels I Regulation.<sup>208</sup> At the same time, some scholars went further, and view the principle of mutual trust as “constitutional”<sup>209</sup>, or “structural” which affect the work of the EU as a whole.<sup>210</sup> Both Lenaerts and Prechal relies on the CJEU 2/13 opinion where it sets out the importance of the principle of mutual trust in the EU. In their view, it would mean that mutual trust could go beyond the area of freedom, security and justice and

---

<sup>204</sup> Ibid p11

<sup>205</sup> Ibid p 11

<sup>206</sup> Carlos Closa and Dimitry Kochenov, *Reinforcing Rule of Law Oversight in the European Union* (Carlos Closa and Dimitry Kochenov eds, Cambridge University Press 2016) 2–3.

<sup>207</sup> Matthias Weller(n 185);Eva STORSKRUBB,(n 186)179

<[https://www.cambridge.org/core/product/identifier/S1528887018000022/type/journal\\_article](https://www.cambridge.org/core/product/identifier/S1528887018000022/type/journal_article)>.

<sup>208</sup> Prechal (n 179) 79; STORSKRUBB (n 186) 180; Weller (n 185).

<sup>209</sup> Lenaerts K (n173)

<sup>210</sup> Prechal (n 179) 76.

cover the EU as a whole.<sup>211</sup> Prechal also made a connection between the principle of mutual trust and the principle of sincere cooperation. 4/3 TEU reads as follows;

3-Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

Gerard went even further and viewed the principle of mutual trust as embodying,

a particular constitutionalism for the Union, as an inherently diverse political community bound by an entrenched set of shared values and principles built over than six decades which combined with deep interdependencies, allows its constituent parts to recognised each other' domestic solution as equivalent to their own, different but equally valid and by extension their own self as being intrinsically dependent on others.<sup>212</sup>

In his view, the principle of mutual trust can be seen as a form of loyalty, stemming from the principle of sincere cooperation enriched in article 4 of TEU, which guarantees the effectiveness of EU laws, justifies the substantive validity of the European Union and recognises the adequacy of each member states domestic solutions.<sup>213</sup>

It is true that there is a connection between the principle of mutual trust and fulfilling the obligations laid down in the treaties and secondary laws pursuant to article 4 TEU. As seen above, Hoffman theory of trust as obligation can be seen as a reflection of the connection made between mutual trust and sincere cooperation. In addition, it is true that a systematic<sup>214</sup> or residual trust governing the whole EU exists.

---

<sup>211</sup> *ibid*

<sup>212</sup> *ibid* p.78

<sup>213</sup> *ibid* p 73

<sup>214</sup> Storskrubb (n 186) 187.

However, it is difficult to accept that the principle can be the ultimate foundation of the EU or carries such heavy value. One reason is the fact that some EU secondary laws are extended to apply to other non-EU Member States' citizens such as Member States citizens of the Lugano Convention.<sup>215</sup> While it is true that there is an internal market agreement applicable between the EU and the Lugano Convention Member States, the nature and the construction of that agreement differ substantially from the founding EU treaties. Put it differently, the Lugano Member States are still not members of the EU. As it will further be demonstrated, the reasons and the foundation that governs such agreements are the objective to secure the protection of people's access to justice, mutual trust is but a normative principle, and a tool used to enhance access to justice by facilitating access to justice.

Instead, Brouwer attempts to provide an anatomy to trust.<sup>216</sup> In her view, achieving a precise and clear definition of the principle of mutual trust and its exceptions is significant for the effectiveness of judicial control.<sup>217</sup> Such achievement requires to take into account not only the different objectives that create the basis of mutual trust, but also the subject of trust, the actors of trust and the different stages where trust play role.<sup>218</sup>

As for the trust objective for instance, Brouwer pointed out that it differs from the internal market to the area of Freedom, Security and justice. While, the objective of trust in internal market is that member states are under an obligation not to obviate the enjoyment of freedom of movement of workers and trade, the objective of trust in the area of freedom, security and justice is the cooperation itself, which requires member states' active role, thereby increasing the possibility of affecting fundamental rights.<sup>219</sup> In addition, Brouwer illustrated the meaning of actors of trust that could influence the concept of mutual trust, which can be divided into political trust and functional trust. Political trust was considered to be trust between stakeholders, the heads of states, or EU ministers which has the power to create, develop or modify EU instruments. It refers, as she put it, to "the availability (or the absence) of trust between the negotiators to the effect that they, when developing instruments of cooperation, pursue the same objectives, and once adopted, that EU law is observed and fundamental rights are protected."<sup>220</sup> It may also include trust between the

---

<sup>215</sup> Brouwer (n7) p 56.

<sup>216</sup> *ibid*

<sup>217</sup> *ibid* p 59

<sup>218</sup> *ibid*

<sup>219</sup> *ibid* p 60

<sup>220</sup> *ibid* p 61

EU member states and the Commission. On the other hand, functional trust is trust between the national authorities, that they will be implementing or applying EU law including fundamental rights such as courts.<sup>221</sup>

More importantly, Eveline distinguish between formal trust and material trust. The EU instruments adopted for the development of an area of freedom, security and justice is based on the formal trust which imposes an obligation on the member states to recognise certificates or to enforce judgment given by other member states.<sup>222</sup> Notably, she pointed out that the application of formal trust require the fulfilment of three conditions, in particular with regards cooperation in criminal matters. The first is that all member states are bound by the same obligations and principles to apply the instrument according to the EU law including fundamental rights. Secondly is that specific procedural safeguard are fulfilled such as time limits and the availability of legal remedies in the other member states.<sup>223</sup> Thirdly, formal trust needs the existence of minimum harmonization of law in those member states. Although the pre mentioned conditions are specifically concerned with the meaning of mutual trust in criminal matters, it can still be used as guidance to construe the concept in the area of civil justice.

To this end, the principle of mutual trust is a normative and structuring principle. In addition, it could have a constitutional rule provided that it is understood as a tool used to further facilitate the rule of law and fundamental rights as general principle of EU as it will further be articulated.

On the other hand, examining the CJEU's presumption shows two vital points that needs particular focus. First, the existence of this presumption actually entails that, there is an obligation to respect and comply with the rule of law and fundamental rights that needs to be complied with first, which is later presumed to be fulfilled. As seen above, in order to trust someone to do something, trust should be based on good reasons. Put it differently, the cognitive process should be satisfied. The compliance with the rule of law and fundamental rights, in the CJEU wording, "implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the EU law that implements them will be respected."<sup>224</sup> Moreover, The Commission states that "This

---

<sup>221</sup> Ibid p 62

<sup>222</sup> Ibid, 62

<sup>223</sup> Ibid 63

<sup>224</sup> *Opinion 2/13* (n 166) para 168; *C-284/16 Slowakische Republik v Achmea BV* (n 172) 34; *Case C-216/18 PPU LM* ECLI:EU:C:2018:586,para 35.

confidence will only be built and maintained if the rule of law is observed in all Member States.”<sup>225</sup> Secondly, mutual trust is limited. This is also consistent with the fact that mutual trust implies an element of risk that justifies the need for limitation. As rightly put by a scholar, “We only trust “except if” and “as long as.”<sup>226</sup>

As a result, defining the principle of mutual trust require us to look at the rule of law and fundamental rights and their exact roles in the meaning of mutual trust. it will be argued that the respect of the rule of law and fundamental rights are constitutional general principles which guides the interpretation of the EU law and its objectives and that they must always be respected and complied with by the EU institutions, Member States and the CJEU. It will be concluded that Mutual trust and judicial cooperation are *tools* that are used to facilitate and enhance the protection of the rule of law and fundamental rights.

### **2.3.2.1 The importance of the rule of law and fundamental rights in the EU**

This section explores the significance of the rule of law and fundamental rights in the EU. It will be argued that the rule of law and fundamental rights should always be in a higher position than the principle of mutual trust. The latter was possible because of the respect of the former. Subsection 1 examines the importance of the rule of law in the EU while subsection 2 examines the importance of fundamental rights in the EU. Subsection 3 examines the rule of law and fundamental rights as general principles of the EU law.

#### **2.3.2.1.1 The significance of the rule of law in the EU**

In general, the rule of law justifies the existence and the consistency of a legal system.<sup>227</sup> It is “the backbone of any modern constitutional democracy”.<sup>228</sup> In number of occasions, The CJEU clearly states that the European Union is based on the rule of law<sup>229</sup> and it is one of the foundational principles underlying the EU’s entire constitutional framework.<sup>230</sup> This view

---

<sup>225</sup> the European Commission, ‘A New EU Framework to Strengthen the Rule of Law’ (n 1) 2.

<sup>226</sup> Wischmeyer (n 25).

<sup>227</sup> Pech, Laurent, ‘The Rule of Law as a Constitutional Principle of the European Union’ (April 28, 2009). Jean Monnet Working Paper Series No. 4/2009, 44, SSRN: <https://ssrn.com/abstract=1463242> or <http://dx.doi.org/10.2139/ssrn.1463242> .

<sup>228</sup> The European Commission(n168) 2; see also Venice Commission, ‘Report on the Rule of Law’ CDL-AD(2011)003rev <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2011\)003rev-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)003rev-e)>.

<sup>229</sup> *Case 294/83 Parti écologiste ‘Les Verts’ v European Parliament*[1986] ECR 01339, para 23; *C-64/16 Associação Sindical dos Juizes Portugueses v Tribunal de Contas* para 31 ; *C-583/11 P Inuit Tapiriit Kanatami and Others v Parliament and Council* para 91; *C-402/05 P and C-415/05 P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*[2008] ECR I-06351, para 281.

<sup>230</sup> Pech (n 210) 57.

was confirmed by the entry into force of the Amsterdam Treaty, and later by the adoption of Lisbon Treaty.<sup>231</sup> According to the Commission, the rule of law is “prerequisite for upholding all rights and obligations deriving from the Treaties and from international law.”<sup>232</sup>

Importantly, it is a precondition for the accession of the EU.<sup>233</sup> Failing to comply with the rule of law as a significant foundation of the EU by a member state is dangerous and devastating since such violation not only affects that particular member state, but also undermines the whole EU system.<sup>234</sup> Importantly, a violation or a breach of the rule of law would negatively affect people’s exercise of their rights in the whole EU.<sup>235</sup> This is certainly true when there are judicial cooperation measures based on mutual trust and mutual recognition. As a result, mutual trust and mutual recognition of judgements would be “damaged.”<sup>236</sup> Therefore, protecting the respect of the rule of law and the continuous monitoring of the level of the rule of law in the member states is seen as a central objective that needs to be achieved.<sup>237</sup> Such power can go further to punish the member state who violates such principle.<sup>238</sup>

---

<sup>231</sup> Article 2 TEU

<sup>232</sup>the European Commission(n 168) 4;see also Carlos Closa, ‘Reinforcing EU Monitoring of the Rule of Law: Normative Arguments, Institutional Proposals and the Procedural Limitations’ in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) p22 <[https://www.cambridge.org/core/product/identifier/9781316258774%23CT-bp-2/type/book\\_part](https://www.cambridge.org/core/product/identifier/9781316258774%23CT-bp-2/type/book_part)>.

<sup>233</sup> TEU article 49.

<sup>234</sup> e.g the European Commission, ‘2020 Rule of Law Report The Rule of Law Situation in the European Union’ (n 167) 2.

<sup>235</sup> Dimitry Kochenov and Laurent Pech, ‘Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality’ (2015) 11 *European Constitutional Law Review* 512, 521 <[https://www.cambridge.org/core/product/identifier/S1574019615000358/type/journal\\_article](https://www.cambridge.org/core/product/identifier/S1574019615000358/type/journal_article)> accessed 11 October 2021.

<sup>236</sup>The European Commission, ‘Further Strengthening the Rule of Law within the Union State of Play and Possible next Steps’ COM(2019) 163 Final, 2 <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019DC0163&from=EN>>.

<sup>237</sup>the European Commission, ‘ 2020 Rule of Law Report The Rule of Law Situation in the European Union’ <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0580&from=EN>>.

<sup>238</sup> Article 7 TEU states

‘1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure. The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.

Importantly, the rule of law is not only significant in the context of EU internal affairs but extends to guide its external relations. In the event of concluding international agreements with third countries, the EU is not only guided by those principles that inspired its creation, but also it is required to adopt international agreements with countries that respect and comply with those principles such as the rule of law and human rights.<sup>239</sup>

One example is the Lugano Convention, which governs rules of jurisdiction and recognition and enforcement between the EU member states and Iceland, Norway and Switzerland. Although economic goals and objective existed, the existence of shared principles of rule of law, human rights and the protection of people's right were prerequisites to the Convention's adoption.<sup>240</sup>

The EU institutions such as the Commission, the Parliament, the Council and the CJEU are under an obligation to comply with the rule of law such as the right to effective judicial protection.<sup>241</sup> This includes for instance the early stages of proposing an EU law by the Commission and the CJEU's interpretation of the EU Law.<sup>242</sup>

Moreover, Member State's legislative, administrative acts and in particular judicial practice should also be compatible with the rule of law.<sup>243</sup> Such obligation on the member states extends to interpreting both their national law and any EU secondary legislation in such a way that does not conflict or contradict with the rule of law.<sup>244</sup> In addition, the respect of the

---

4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

5. The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 of the Treaty on the Functioning of the European Union.'

<sup>239</sup> Article 21/1 TEU states "1. The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations..."

<sup>240</sup> Mr P Jenard and MR G Möller, 'Report on Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters' (1988).

<sup>241</sup> C-299/95 *Friedrich Kremzow v Republik Österreich* [1997] ECR I-02629 para 14; the European Commission, 'Commission Staff Working Paper, Operational Guidance on Taking Account of Fundamental Rights in Commission Impact Assessments'; Commission Communication SEC(2011)567 final; European Commission, 'Strategy for the effective Implementation of the Charter of Fundamental Rights by the European Union' (2010) COM 573 final.

<sup>242</sup> *ibid*

<sup>243</sup> With regards the right to a fair trial and the right to an effective remedy, see C-213/89, *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and Others* [1990] ECR I-02433 para [20].

<sup>244</sup> *Joined cases C-411/10 and C-493/10 N.S.*, para 77.

rule of law entails a negative obligation to not to disrespect those rules. For instance, member states should refrain from adopting or interpreting a rule in such way that collide with the rule of law.<sup>245</sup>

What does the rule of law then include? Looking at the CJEU case laws and the Commission guidance in the rule of law framework,<sup>246</sup> the rule of law includes the following principles; the principle of legality<sup>247</sup>, legal certainty, the equality before the law, the right to judicial protection before an impartial and independence courts, respect for human rights, the right to judicial review, and the non-arbitrary of powers.

The principle of legality means that the law should be complied with by both individuals and authorities.<sup>248</sup> In addition, the authorities should act within the power given to them by law.<sup>249</sup> On the other hand, Legal certainty means that law must be “*accessible*”,<sup>250</sup> “*foreseeable*”<sup>251</sup> and “clear and predictable for those who are subject to it.”<sup>252</sup> Ambiguous laws cannot be used for instance to undermine fundamental rights.<sup>253</sup>

The no arbitrary of powers is clearly confirmed by the CJEU in its case law, where it states that authorities should not intervene in private actors’ enjoyment of activities or exceeds their powers given to them by the law.<sup>254</sup> Intervention is justifiable only to the scope given by the law and without any disturbance to the rights under that law.<sup>255</sup>

Moreover, the equality before the law and non-discrimination are principles of law recognised both the CJEU case laws and the EU charter. They mean that “everyone are equal before the law”, “that comparable situations [are]not[to] be treated differently and different situations[are] not [to]be treated alike unless such treatment is objectively

---

<sup>245</sup> *ibid* para 77; C-791/19 (chapter 1 no 37) para 56.

<sup>246</sup> The Commission also states that it was influenced by the ECtR case laws and the Venice Commission Report on the rule of law.

<sup>247</sup> Case C-496/99 P *Commission of the European Communities v CAS Succhi di Frutta SpA* [2004] ECR I-03801, para 63.

<sup>248</sup> Venice Commission Report on the rule of law (n 190) 10

<sup>249</sup> *ibid* cites; Jeffrey Jowell, *The Rule of Law and its underlying Values*, in: Jeffrey Jowell/Dawn Oliver (Eds.), *The Changing Constitution*, p10.

<sup>250</sup> *Ibid*, 10.

<sup>251</sup> *Ibid*

<sup>252</sup> *Joined cases 212 to 217/80 Amministrazione delle finanze dello Stato v Srl Meridionale Industria Salumi and others ; Ditta Italo Orlandi & Figlio and Ditta Vincenzo Divella v Amministrazione delle finanze dello Stato* [1981] ECR-02735 para 10

<sup>253</sup> Venice Commission Report on the rule of law (n 190) cites; *The Council of Europe and the Rule of Law - An overview*, CM(2008)170 21 November 2008, see para. 43.

<sup>254</sup> *Joined cases 46/87 and 227/88 Hoechst v Commission* [1989] ECR 02859 para 19.

<sup>255</sup> *Ibid*.

justified”<sup>256</sup>, and finally, that no one should be discriminated for reasons such as sex or religion.<sup>257</sup>

On the other hand, the right to judicial review is that EU institutions and member states’ acts are subject to review before the CJEU.<sup>258</sup> Measures and regulations for instance can be considered void by the CJEU.<sup>259</sup> As for the right to judicial protection, it includes both the right to a fair trial before an impartial and independent courts and the right to an effective remedy.<sup>260</sup> It is enriched in article 19 TEU that obliges the member states to ensure an effective judicial protection in their justice systems.<sup>261</sup>

While more discussion is conducted in the upcoming chapters, one can say that the right to effective judicial protection is probably the most vital right in the EU and the right most closely to the function of the principle of mutual trust in the administration of justice. This is true, taking into the fact that, it ensures the enforcement of all the rights guaranteed under the EU laws.<sup>262</sup> It is also needed for the creation, the development and the actual enjoyment of an area of freedom, security and justice particularly judicial cooperation in civil and commercial matters.<sup>263</sup> One member state’s struggle to have an effective justice system will negatively affect the EU as a whole.<sup>264</sup>

To this end, the rule of law is a constitutional principle combining procedural and substantive principles, which are needed for building and enhancing mutual trust in the EU.<sup>265</sup> A real and effective mutual trust depends essentially on the member states’ assurance of the rule of law and the existence of effective justice systems. The next subsection examines the importance of fundamental rights as an essential pillar for the establishment and the continuous development of the principle of mutual trust and judicial cooperation in civil and commercial matters.

---

<sup>256</sup> *C-292/97 Kjell Karlsson and Others* [2000] ECR I-02737 para 39. see caselaws cited. (Words in brackets are used for a correct grammar.

<sup>257</sup> The Charter, article 21.

<sup>258</sup> *Case 294/83 Parti écologiste ‘Les Verts’ v European Parliament* (n 287) para 23.

<sup>259</sup> TFEU article 263

<sup>260</sup> The Charter article 47.

<sup>261</sup> Article 19/1 second paragraph TEU states “... Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.”

<sup>262</sup> *LM* para 48.

<sup>263</sup> e.g The European Commission, ‘Strengthening Trust, Mobility and Growth within the European Union “A New EU Framework to Strengthen the Rule of Law”’ .

<sup>264</sup> The European Commission, ‘The EU Justice Scoreboard: A Tool to Promote Effective Justice and Growth’ (2013) 0160 Final.

<sup>265</sup> The European Commission, ‘ (n 59).

### 2.3.2.1.2 The significance of fundamental rights in the EU

It will be argued that fundamental rights not only is legally binding by the adoption of the Lisbon Treaty and the Charter, but they are also general principles of EU having a constitutional status, being derived from the rule of law.

Prior to the entry into force of the Lisbon Treaty, the CJEU has confirmed in many occasions the importance of respecting human rights. It held that not only it forms as an integral part of the general principles of EU law but also, it is a condition to the lawfulness of The Union's act.<sup>266</sup> This approach was inspired by the common constitutional traditions to the Member States and more importantly guidelines by the international treaties to which all member States have collaborated with or are signatories, such as the ECHR<sup>267</sup> .

The importance of respecting fundamental right has been explicitly provided for by the entry into force of the Lisbon treaty. It confirmed the significant role of the fundamental rights as founding principle of the European Union<sup>268</sup>, a precondition for the accession to the European Union<sup>269</sup> and as a vital element for the constitution of an area of Freedom, Security and justice.<sup>270</sup> In addition, by following the steps taken in the Maastricht Treaty<sup>271</sup> , it restates the obligation to respect the rights guaranteed under the ECHR .<sup>272</sup>

More importantly, it gave the Charter the same legally binding effect as the treaties.<sup>273</sup>The Charter contains different types of rights and freedom that are related to dignity, freedom, equality, solidarity, citizen's rights and justice. According to article 51 of the Charter, those rights and principles should be respected by all EU institutions and bodies and by Member states when they are implementing Union law. EU measures and regulations should also be

---

<sup>266</sup>Case 11-70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (1970) ECLI:EU:C:1970:114 para 4; Case 29-69 *Erich Stauder v City of Ulm*[1969] ECLI:EU:C:1969:57; *Opinion 2/94 Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*[1996] ECR I-01759.

<sup>267</sup> Case 4-73 *J Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* [1974] ECR -00491 para 13.

<sup>268</sup> TEU article 6

<sup>269</sup> Ibid article 49

<sup>270</sup> TFEU article 67/1

<sup>271</sup> Treaty on European Union, as signed in Maastricht on 7 February 1992, OJ C 191.(Hereinafter Maastricht Treaty). Article F/2 states '2 . The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.'

<sup>272</sup> TEU article 6.

<sup>273</sup>TEU, article 6

compatible with fundamental rights.<sup>274</sup> The Brussels I regime for instance, went further and codify such obligation, stating that it 'respects fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union, in particular the right to an effective remedy and to a fair trial guaranteed in Article 47 of the Charter.'<sup>275</sup>

### 2.3.2.1.3 The Rule of law and fundamental rights as general principles

The significance of the rule of law and fundamental rights can clearly be seen as general principles of law. General principles can be understood as 'principles which are derived by the courts from specific rules or from the legal system as a whole and exist beyond written law.'<sup>276</sup> It is used to interpret both primary law such as the treaties and secondary law such as Regulations.<sup>277</sup> In addition, where written law fails to provide a solution, general principles fill that gap.<sup>278</sup>

In EU, general principles can be divided into two types; first, principles that is derived from the rule of law, such as fundamental rights in particular the right to an effective judicial protection.<sup>279</sup> This type is an "umbrella constitutional principle" which is used to interpret legal rules including those which has constitutional dimension, fill in the gaps in the written law or is used as a basis to create new rules.<sup>280</sup> The second type of general principles is systematic principles that underpins the EU constitutional structure such as the principle of direct effect and the principle of sincere cooperation.<sup>281</sup>

Principles derived from the rule of law has a constitutional status which imposes an obligation on the EU institutions, the CJEU and member states to act in conformity with

---

<sup>274</sup> C-519/13, *Alpha Bank Cyprus Ltd v Dau Si Senh and Others*, [2015], para 31; C-325/11, *Krystyna Alder and Ewald Alder v Sabina Orłowska and Czesław Orłowski* [2012], para 35; C-14/07, *Ingenieurbüro Michael Weiss und Partner GbR v Industrie- und Handelskammer Berlin* [2008], para 47.

<sup>275</sup> The Brussels I Regulation Recast, recital 38. In addition, in recital 38, the Brussels IIa Regulation states 'This Regulation recognises the fundamental rights and observes the principles of the Charter of Fundamental Rights of the European Union. In particular, it seeks to ensure respect for the fundamental rights of the child as set out in Article 24 of the Charter of Fundamental Rights of the European Union'.

<sup>276</sup> Takis Tridimas, *The General Principles of EU Law* (2nd Edition, Oxford University Press 2006) 1.

<sup>277</sup> Armin Cuyvers, 'General Principles of EU Law' in Emmanuel Ugirashebuja and others (eds), *East African Community Law Institutional, Substantive and Comparative EU Aspects* (Brill Nijhoff 2017) 219 <[https://library.oapen.org/bitstream/handle/20.500.12657/37805/9789004322073\\_webready\\_content\\_text.pdf?sequence=1#page=232](https://library.oapen.org/bitstream/handle/20.500.12657/37805/9789004322073_webready_content_text.pdf?sequence=1#page=232)>.

<sup>278</sup> *ibid* 217; see also Koen LENAERTS and JOSÉ A. GUTIÉRREZ-FONS, 'The Constitutional allocation of powers and general principles of EU Law' (2010) 47 *Common Market Law Review*.

<sup>279</sup> Tridimas (n 334) 8.

<sup>280</sup> Koen LENAERTS and JOSÉ A. GUTIÉRREZ-FONS (n261) 47-48

<sup>281</sup> Tridimas (n 259) 8

these principles and to not to disregard them.<sup>282</sup> Their status are similar to the treaties and higher than the EU secondary laws.<sup>283</sup>

More importantly, they essentially affect the way the Treaty provisions are interpreted and applied.<sup>284</sup> Their influence would go far as to prevail over the central objectives and principles sought by the EU such as the free movement of goods.<sup>285</sup> In one case, the CJEU overlooked the free movement of goods, a dominant objective sought by the EU, when upholding such objective would undermine and violate the fundamental rights. In the CJEU wording, fundamental rights as general principles, "...justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods."<sup>286</sup> As a result, one can argue that the case could apply generally as to disregard any EU objective, such as the free circulation of judgements, when such objective collide with the respect of the rule of law-derived principles such as the right to effective judicial protection. Indeed, the judgment translate how the true relationship between the principle of mutual trust, its objectives and reflections should be in one hand, and upholding and respecting the rule of law and fundamental rights in the other hand.

To this end, the rule of law and fundamental rights are constitutional general principles that should be respected by member states, institutions and the bodies of the EU. It is so powerful in the sense that they can modify the objectives in which the EU seek to achieve if these objectives contradict with the rule of law and fundamental rights. Moreover, mutual trust and mutual recognition are tools, which were created to enhance people's access to justice and their effective judicial protection. Its existence depends on the respect of the rule of law and fundamental rights.

### **2.3.3 Limitations on the principle of mutual trust**

This sub section examines the limitations of the principle of mutual trust. it will be argued that the limitations on the principle of mutual trust can take different shapes. Importantly, there should be a clear general test applied to the principle of mutual trust in addition to other specific limitations.

---

<sup>282</sup> *ibid*

<sup>283</sup> *ibid* 51

<sup>284</sup> *Tridimas* (n 259) 53.

<sup>285</sup> *ibid*

<sup>286</sup> *C-112/00 Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR I-05659 para 74.

The CJEU rightly provides that although the principle of mutual trust is based on a presumption of member state's compliance with the rule of law and fundamental rights, such presumption is not absolute and is subject to limitation. Indeed, the latest events in the EU shows, that violation of the rule of law and fundamental rights in some member states' justice systems exist and that a real recognition by the EU institutions particularly the CJEU, the mastermind behind the presumption is needed. However, as it will further be articulated in this section and the upcoming chapters, the CJEU is narrowing the scope of the limitation as much as possible for the sake of the principle of mutual trust, undermining once again the respect of the rule of law and fundamental rights.

The first case was *N.S case*, decided in the context of the Dublin II Regulation. The latter Regulation governs the criteria that governs which EU member state is under an obligation to examine an asylum application lodged by a third country national in one of the member states. The CJEU was essentially asked, whether a member state can be relieved from its obligation under the principle of mutual trust, when the asylum seeker is under serious infringement of his rights due to the existence of systematic deficiencies. It answered on the affirmative. It held that, while the EU and the constitution of an area of freedom, Security and Justice, in particular, the adoption of the Dublin II Regulation are based on the principle of mutual trust and the presumption of member state's compliance with the rule of law and fundamental rights, such presumption is not absolute and can be rebutted.<sup>287</sup> As a result, it found that the member state may not transfer the asylum seeker to the member state responsible for examining the application in accordance with the Regulation ,

where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.<sup>288</sup>

For the first time, the CJEU gave hope, upheld considerations of fundamental rights, and limits the principle of mutual trust. It recognised that the reality is different from the theory, that violations of fundamental rights should not be overlooked.

---

<sup>287</sup> *Joined cases C-411/10 and C-493/10 N.S.*, para 83 and 99.

<sup>288</sup> *Ibid* para 94

However, despite such hope, the CJEU starts to define those limitation or more accurately, narrowing its scope. In *Stefano Melloni v Ministerio Fiscal* (hereinafter *Melloni*)<sup>289</sup>, the case was decided in the context of the Framework Decision on the European arrest warrant and the surrender procedures between Member States. The CJEU was asked whether the Spanish court, the judicial authority responsible for issuing an arrest warrant against a person convicted *in absentia*, is allowed to make such arrest subject to a condition, which is allowing a retrial in the requesting State. Under a previous Spanish constitutional court's ruling, the Spanish court is allowed to subject the arrest warrant to such a condition. Such national rule provides more extensive protection of the right of defence than that provided for by the Charter and the Framework itself.

However, the CJEU did not accept such rule. In its ruling, it held that the national courts are free to apply national higher standard protection of fundamental rights so long as it does not contradict with the principle of primacy, the unity and the effectiveness of EU.<sup>290</sup> It further held that such condition upset the uniformity of the protection provided by the Framework and thereby undermining the principle of mutual trust in which the framework is based on.<sup>291</sup>

Put it differently, member states are prohibited to provide higher standard of protection of fundamental right, which has the effect of undermining the unity, the primacy, the effectiveness and the principle of mutual trust.

Another set of cases decided in the context of arrest warrant Framework were the joined cases of *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*.<sup>292</sup> The court was essentially asked whether the judicial authority is still under an obligation to surrender a person when there are strong signs to believe that detention conditions in the issuing member state violate the person's fundamental rights. The CJEU answered the question on the affirmative. Confirming its position in *N.S*, The CJEU held that although the framework decision is based on the principle of mutual trust between the member states, that principle is based on a rebuttable presumption.<sup>293</sup> Significantly, it rightly states that "The framework decision is not to have the effect of modifying the obligation to respect fundamental rights as enriched in,inter alia, the Charter."<sup>294</sup> As a result, the judicial authority

---

<sup>289</sup> C-399/11 *Stefano Melloni v Ministerio Fiscal* ECLI:EU:C:2013:107.

<sup>290</sup> *Ibid* para 60

<sup>291</sup> *Ibid* para 63

<sup>292</sup> *Joined Cases C-404/15 and C-659/15 PPU Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* (n 176).

<sup>293</sup> *Ibid* para 82

<sup>294</sup> *Ibid* para 83

is under an obligation to examine whether such risk exists.<sup>295</sup> In such assessment, the judicial authority depends on reliable and objective sources of information, such as reports from the ECtHR.<sup>296</sup> However, the CJEU at the same time narrow its interpretation. According to the Court, the existence of systematic or generalised deficiency, does not itself mean that that the person right will be undermined.<sup>297</sup> Thereby, in order to refuse such surrender, there should be an evidence that lead to the substantial ground to believe that the person's right in this particular case will be violated.<sup>298</sup>

The former cases were decided on the context of absolute rights, raising the question of whether the matter would be different if the right is not an absolute right such as the right to effective judicial protection.

Recently, the CJEU had the chance to answer this question in *LM*.<sup>299</sup> The case is one of the most significant and interesting judgment on the EU level. This is certainly true for number of reasons; Firstly, it is the first case where the right to judicial protection, as a non-absolute right, is examined with regards the principle of mutual trust limitations. Secondly, the Commission reports on the rule of law threats in Poland, particularly its reasoned proposal to the Council to activate article 7 TEU, were raised for the first time as an evidence on the existence of systematic deficiency in a Member State.

The Polish authorities issued number of European arrest warrants against a person for doing criminal acts. He was arrested in Ireland and refused his surrender to the Polish authorities, claiming that there is a risk that his right to a fair trial before an impartial and independent court would be violated. He relied on the Commission reasoned proposal for the Council to activate article 7 TEU against Poland for violating the right to effective judicial protection. The CJEU was essentially asked whether the two steps test given in *Pál Aranyosi case* applies.

The court answered on the affirmative. As the first step, the CJEU explicitly affirmed the position that the EU is based on the premise of Member States' compliance with the rule of law, common values and fundamental rights and that such premise made it possible for the establishment of the principle of mutual trust and mutual recognition.<sup>300</sup> Importantly, the CJEU then highlighted the significance of the right to judicial protection and particularly the

---

<sup>295</sup> *ibid* para 88

<sup>296</sup> *ibid* para 94

<sup>297</sup> *ibid* para 91.

<sup>298</sup> *ibid* para 94

<sup>299</sup> *Case C-216/18 PPU LM*.

<sup>300</sup> *ibid* para 35

independence of the tribunal not only as a part of the essence of this right but the essence of the rule of law itself.<sup>301</sup> In the court's view, the right to effective judicial protection is the guardian and the assurance for all rights guaranteed under the EU systems.<sup>302</sup> That being said, member states' justice systems must be organised in such a way that ensure the effective protection of people's rights.<sup>303</sup>

The CJEU then followed its past decisions and applied two steps test to rebut the presumption of member state's compliance with fundamental rights. The first step is that the member state of execution must find that there is generalized deficiency in the member state of arrest. This can be discovered by relying on reliable sources of information.<sup>304</sup> The Commission reasoned proposal to the Council to activate article 7 in Poland is one example.<sup>305</sup> The second step is to see whether there are substantial grounds to believe that that particular person in this particular case will be at risk of violation of his fundamental rights.

Moreover, the CJEU held if there is a decision from the Council declaring that there is a real risk and persistent violation in Poland and that the EWA Framework Decision is suspended in that Member State, The Irish court can automatically refuse to surrender the person concerned to the Polish authorities without doing the specific assessments. However, without the Council's decision, the executing court should do its assessment to see whether there is a substantial ground to believe that the person concerned will have a risk of violating his right to effective judicial protection.<sup>306</sup>

The CJEU's conclusions, to large extent, are welcomed. First, it first stressed on the importance of the rule of law and fundamental rights being the basis for the principle of mutual trust. Second, it rightly recognised the significance of the right to effective judicial protection not only for the person concerned, but also its implications on the EU as a whole. Moreover, requiring personal assessment whether that particular person will be subject to real risk of violation of his right make a balance between the right to a fair trial and mutual recognition in which the framework is built on.

---

<sup>301</sup> Ibid para 51

<sup>302</sup> Ibid para 48

<sup>303</sup> Ibid para 52

<sup>304</sup> Ibid

<sup>305</sup> Ibid para 61

<sup>306</sup> Ibid paras 72-73

Nevertheless, as it will further be demonstrated, the future CJEU jurisprudence on the member state's failure to fulfil its obligation should have the same power, as it is with the Council decision on the existence of a real risk on the rule of law violations.

Recently, the CJEU delivered series of judgments, which are viewed as the most crucial judgments in the history of the EU. The Commission brought infringement proceedings against Poland for violating the right to effective judicial protection as provided for by article 19 TEU and article 47 of the Charter. For instance, number of problems were detected under the new law of the Polish Supreme Court. The circumstances surrounding the creation of the disciplinary regime and the judges' appointing procedure raised doubts in the individuals' minds questioning the independency and the impartiality of the disciplinary regime.<sup>307</sup> For instance, the regime is composed by new judges proposed by the National Council for Judiciary, and appointed by the President of the Republic, eliminating the possibility of assigning judges already seated in the Supreme Court.<sup>308</sup> The National Council of the Judiciary's composition itself raises doubts regards its independency since it is composed by judges appointed by legislature and executives.<sup>309</sup>

Furthermore, the president of the Disciplinary Chamber is empowered with the ultimate discretion to assign a disciplinary tribunal to hear a particular disciplinary proceeding.<sup>310</sup> Such discretionary power undermines the meaning of a tribunal established by law as required under the right to effective judicial protection.<sup>311</sup> It is dangerous because the president can also assign particular judges with particular cases while preventing judges from taking particular cases for political reasons.<sup>312</sup> Having regard the preceding, The CJEU declared that Poland, a Member State of the EU, has failed to uphold its obligation to respect the rule of law, and particularly the right to effective judicial protection.

The CJEU's approach is a message that the presumption of member state's compliance with the rule of law and fundamental rights should no longer be taken into granted, and an action could be taken whenever such values are under threat.<sup>313</sup> In addition, these case laws should and must empower the other member state's authorities to reject automatically any judgment given by the Polish authorities such as those given with respect to the Brussels I

---

<sup>307</sup> *C 791/19 European Commission v Republic of Poland* [2021] ECLI:EU:C:2021:596.

<sup>308</sup> *C-619/18 European Commission v Republic of Poland* [2019] ECLI:EU:C:2019:531

<sup>309</sup> *Joined Cases C-585/18*, para 143.

<sup>310</sup> *European Commission v Republic of Poland* para 173

<sup>311</sup> *ibid*

<sup>312</sup> *ibid*

<sup>313</sup> See by analogy the Commission, '2021 Rule of Law Report The Rule of Law Situation in the European Union' (n 167).

Regulation. These case laws are legal declarations that the principle of mutual trust is defected between Poland and other countries. In other words, such cases are clear limitations on the principle of mutual trust.

On the other, mutual trust can also be limited in specific situations. For instance, while judicial cooperation in civil and commercial matters is based on mutual recognition, such recognition is limited and can be refused when one of the grounds specified applied such as public policy, or irreconcilable judgments. However, as it further be demonstrated in the upcoming chapters, those refusal grounds cannot be raised by the court of enforcement, attempting once again to prioritise the principle mutual trust over upholding the rule of law and fundamental rights.

To this point, one can summarize as follows: the principle of mutual trust is normative principle which is significant to the functioning of the EU and particularly to an area without internal borders. It is based on a presumption of member state's compliance with the rule of law, fundamental rights and the EU law. Such presumption is however limited, when there is a clear violation of fundamental rights, irrespective whether it is an absolute or non-absolute right. This is true whether the violation of fundamental rights is due to systematic or individual violation. The importance of the rule of law and fundamental right in the EU require that mutual trust should be limited, irrespective of whether such violation is due to systematic deficiency or individual violations. Otherwise, the right to effective judicial protection would be undermined.

In addition, the principle of mutual trust should be limited when there is a Council decision that there is a risk and persistent violation of the member state done by a Member State. Likewise, the principle of mutual trust should be limited when the CJEU declares that a specific member states has failed its obligations to respect the rule of law and fundamental rights under the EU law. The CJEU stated clearly that mutual trust should not have the effect of violating fundamental rights.<sup>314</sup> In other words, fundamental rights should be in a higher position than the principle of mutual trust. The latter was possible because of the respect of the former.

The next section looked at the principle of mutual trust and other definitions that are similar to it.

---

<sup>314</sup> *Pál Aranyosi* (n 176) para 83.

## 2.4 The principle of mutual trust and similar terminologies

This section examines and compares the principle of mutual trust with existing similar terminologies applicable in international law and private international law rules, namely Comity and reciprocity

### 2.4.1 Comity and Mutual Trust

Comity is usually described as “ambiguous”<sup>315</sup> and as “an open-ended term”.<sup>316</sup> Nevertheless, in the context of Private International Law, Comity is generally used as a method to determine the degree and scope of a State’s recognition of another State’s authority acts within its borders such as their laws and their judicial decisions.<sup>317</sup>

The adoption of the principle of Comity can be traced back to the late Sixteenth Century. After the end of the Thirty Years War in Europe and Seventy Years War between Spain and Netherlands, the idea of sovereignty grows bigger. The principle of sovereignty is based on the idea that each State has the power to determine matters within its borders without an interference by other states.<sup>318</sup> In addition, it entails that State’s laws applies domestically, having no effect outside its borders.<sup>319</sup>

At the same time however, under the idea of sovereignty, States are under no obligation to recognise and enforce foreign laws and acts within their borders.<sup>320</sup> This aspect was generally seen as an obstacle to prosperity in Netherlands, the most significant and dominant place in Europe in respect of commerce, literature and knowledge at that time,

---

<sup>315</sup> Joel R Paul, ‘Comity in International Law’ (1991) volume 32, no 1 Harvard International Law Journal, 78 <[https://repository.uchastings.edu/faculty\\_scholarship/625/](https://repository.uchastings.edu/faculty_scholarship/625/)>.

<sup>316</sup> Elisa D’Alterio, ‘From Judicial Comity to Legal Comity: A Judicial Solution to Global Disorder?’ *International Journal of Constitutional Law*, Volume 9, Issue 2, April 2011, 399 <<https://doi.org/10.1093/icon/mor036>>

<sup>317</sup> *Hilton v Guyot*, 159 US 113 (1895), 163; Adrian Briggs, *THE PRINCIPLE OF COMITY IN PRIVATE INTERNATIONAL LAW*, Collected Courses of the Hague Academy of International Law, The Hague Academy of International Law, Volume 354 (2012), 148 ; Thomas Schultz and Jason Mitchenson, ‘Rediscovering the Principle of Comity in English Private International Law’, King’s College London Dickson Poon School of Law Legal Studies Research Paper Series: Paper No. 2018 -13, 11 ; Thomas Schultz and Jason Mitchenson, ‘The History of Comity’ (2019) vol 5, Forthcoming, *Jus Gentium – Journal of International Legal History*, King’s College London Law School Research Paper Forthcoming. <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3405341](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3405341)>, 383.

<sup>318</sup> Daniel Philpott, ‘Sovereignty’, *The Stanford Encyclopedia of Philosophy* (Fall 2021) <<https://plato.stanford.edu/archives/fall2020/entries/sovereignty/>> accessed 15 October 2021; Thomas Schultz and Jason Mitchenson, ‘The History of Comity’ (n300), 394 cites: Alex Mills, “The Private History of International Law”, *International and Comparative Law Quarterly*, LV (2006), pp.18-26; Donald Childress, “Comity as Conflict: Resituating International Comity as Conflict of Laws”, *UC Davis Law Review*, XLIV (2010), p. 17.

<sup>319</sup> *Hilton v. Guyot* (n 300), 163

<sup>320</sup> Thomas Schultz and Jason Mitchenson, ‘The History of Comity’ (n300), 390

and was particularly seen as an obstacle to trade, which led the Dutch scholar to find a way to reconcile those ideas.<sup>321</sup> However, fundamentally, one might argue that the aspect that there is no obligation to recognise foreign laws and acts such as decisions has been a deterrent to the idea of justice. This can clearly be seen in article 7 of Union of Utrecht, which urges, “[”to administer good law and justice to foreigners and citizens alike”]”<sup>322</sup> in order to avoid the breakout of war with foreign States. In that sense, Netherlands was in fact under an obligation to find a way that fulfil justice and prosperity and that maintaining and encouraging international trade is only one aspect of fulfilling that obligation.

Accordingly, one can say that aiming to reconcile and facilitate the idea of States’ sovereignty and mutual respect<sup>323</sup> between the powers in one hand, and to preserve justice and prosperity and encourage the international commerce to fulfil the latter from the other hand, were the driving force behind the creation of the principle of Comity.

Later on, the principle found its way in the English courts. Significantly, unlike Netherlands, where promoting international trade was a strong aim, Comity was clearly used as a tool to fulfil justice in the English courts.<sup>324</sup> The courts recognised that applying English law in every case, including those having foreign elements, might result to injustice.<sup>325</sup> As a result, Comity was borrowed and employed to fulfil that concept of justice.<sup>326</sup>

Importantly, the significance of Comity in Private International Law is still a controversial topic among scholars and courts.<sup>327</sup> For instance, for *Cheshire, North & Fawcett*<sup>328</sup>, the principle of comity plays no role in private international law. In their view, a court’s application of foreign law or its recognition of a foreign judicial decision does not stem from Comity or

---

<sup>321</sup>Hessel E Yntema, ‘The Comity Doctrine’, *Michigan Law Review*, Vol. 65, No. 1 (Nov., 1966),19; Mitchenson, ‘The History of Comity’ (n 289),391;; Mitchenson, ‘Rediscovering the Principle of Comity in English Private International Law’ (n 289),3; John DeQ Briggs & Daniel S Bitton, ‘Heisenberg’s Uncertainty Principle, Extraterritoriality and Comity’ [2015] *Sedona Conference Journal* 16,344.

<sup>322</sup> Yntema (n 293), 19

<sup>323</sup> JOEL R. PAUL, ‘THE TRANSFORMATION OF INTERNATIONAL COMITY’ (2008) 71, No. 3 *Law and Contemporary Problems*

<<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1477&context=lcp>>,38.

<sup>324</sup> In see *Holman v Johnson*, Lord Mansfield states, “I am very glad the old books have been looked into. The doctrine Huberus lays down, is founded in good sense, and upon general principles of justice. I entirely agree with him.” see *Holman v Johnson* (1775) 1 Cowp 341. For more analysis on the connection between comity and justice in the beginning by the English courts, See Mitchenson, ‘The History of Comity’ (n 289),407.

<sup>325</sup> *Ibid*, 412

<sup>326</sup> *Ibid*

<sup>327</sup> See eg. Briggs, *THE PRINCIPLE OF COMITY IN PRIVATE INTERNATIONAL LAW* (n 300); Lara Walker Uglesa Grusic, Christian Heinze, Louise Merrett, Alex Mills, Carmen Otero Garcia-Castrillon, Zheng Sophia Tang, Katrina Trimmings, *Cheshire, North & Fawcett Private International Law* (Paul Torremans ed, Fifteenth, Oxford University Press).

<sup>328</sup> Uglesa Grusic and others (n 310).

courtesy but its need to fulfil justice.<sup>329</sup> On the other hand, Professor Briggs and others argues, while Comity might not be the basic of private international law, it plays a role in practice in shaping and developing its rules.<sup>330</sup> In their view, Comity's influence could take different shapes and forms. For instance, it can influence the court's interpretation to its local laws in a way, which does not conflict with Comity.<sup>331</sup> One example is that in principle, the local laws should not apply extraterritorially.<sup>332</sup> It is also thought that Comity considerations play an important role in setting out limitation on the court's power to issue an order, such as an anti-suit injunction.<sup>333</sup> In addition, limiting the exercise of the court's own jurisdiction, for instance by the application of *forum non-conveniens* can be seen as an example of Comity.<sup>334</sup> In this respect, Comity considerations could also restrict the court's power in applying the test. Abstaining from evaluating the foreign court's justice system without a cogent evidence is one example.<sup>335</sup> Moreover, Comity also plays a role as a basis for recognising and enforcing foreign judgments.<sup>336</sup> However, Comity is not without any

---

<sup>329</sup> They further states that "the word itself is incompatible with the judicial function, for comity is a matter for sovereigns, not for judges required to decide a case according to the rights of the parties. Again, if the word is given its normal meaning of courtesy it is scarcely consistent with the readiness of English courts to apply enemy law in time of war. Moreover, if courtesy formed the basis of private international law a judge might feel compelled to ignore the law of Utopia on proof that Utopian courts apply no law but their own, since comity implies a bilateral, not unilateral relationship. If, on the other hand, comity means that no foreign law is applicable in England except with the permission of the sovereign, it is nothing more than a truism. The fact is, of course, that the application of foreign law implies no act of courtesy, no sacrifice of sovereignty. It merely derives from a desire to do justice." *ibid*, p.4

<sup>330</sup> *Thomas Schultz and Jason Mitchenson* (n300), 4; Adrian Briggs (n 300) 147; Thomas Schultz & Niccol'o Ridi, 'Comity and International Courts and Tribunals' (2017) 50 *Cornell International Law Journal*, 583-585.

<sup>331</sup> *Ibid*; Adrian Briggs (n 300) 118.

<sup>332</sup> *Ibid*, 6. While illustrating the examples of interpreting statutes, Professor Briggs seems to argue that there is no clear principle that a local rule should not applied extraterritorially taking into account certain connections and limitation, see Adrian Briggs, (n 300) 95-105

<sup>333</sup> *Société Nationale Industrielle Aerospatiale Appellants v Lee Kui JAK and Another Respondents* [1987] 3 W; *Airbus Industrie GIE Respondents v Patel and Others Appellants* (1998) 2 W.L.R. 6; *Turner v Grovit and others* (2001) UKHL 65; *STAR REEFERS POOL INC v JFC GROUP CO LTD* [2012] EWC, 40; see also Thomas Schultz & Niccol'o Ridi (n313), 579.

<sup>334</sup> Elisa D'Alterio, (n11) 414. On the contrary, For Professor Briggs, *Forum non conveniens* is not an example of Comity. In his view, the principle gives a sense of superiority to the English court to tell the foreign court what it should do. In addition, to some extent, the principle is seen as "a form of dumping, possibly of toxic waste.", see Briggs (289), 118-121

<sup>335</sup> In *AK Investment CJSC (Appellant) v Kyrgyz Mobil Tel Limited and Others*, the court states "Comity requires that the court be extremely cautious before deciding that there is a risk that justice will not be done in the foreign country by the foreign court, and that is why cogent evidence is required. But, contrary to the Appellants' submission, even in what they describe as endemic corruption cases (i.e. where the court system itself is criticised) there is no principle that the court may not rule.." It then concluded, "The rule is that considerations of international comity will militate against any such finding in the absence of cogent evidence." This was later confirmed in *Lungowe and others v Vedanta Resources plc and another* 1528, [2017] EWCA Civ 3575, [2018] 1 WLR 1528

<sup>336</sup> Adrian Briggs (n289), 145

limitation. It can be limited and restricted when there are violations on public policy and human rights grounds.<sup>337</sup>

Looking at the foregoing, the principle of Comity and mutual trust overlap. Both principles are being used to defer to foreign law, recognise a foreign decision or abstain from issuing an order taking into account the other State. In addition, both principles are being used as a tool to fulfil and facilitate justice. Moreover, both principles are not without any limitation. However, the point of departure is the nature of the principles. In respect of Comity, there are disagreements between scholars and courts to its nature, whether applying it by the State is discretionary, obligatory, or something in between.<sup>338</sup> On the other, in the EU, the principle of mutual trust is a structural principle of the EU polity, regulating the relationship between the EU states and the EU bodies horizontally and vertically and made it possible for the creation and the development of an area without borders. Importantly, it is implemented in the EU Private international law Regulations such as the Brussels I Regulation.

#### **2.4.2 Mutual trust and reciprocity**

Like trust and comity, the meaning of reciprocity is described as “ambiguous”<sup>339</sup>, attracting scholars from different disciplines to examine its meaning and its benefits. Importantly, in international law, in the absence of international central authority, reciprocity is used to facilitate cooperation between sovereign states.<sup>340</sup> Generally, it governs every international treaty between states.<sup>341</sup> Reciprocity is understood as “*exchanges of roughly equivalent values in which the actions of each party are contingent on the prior actions of the others in such a way that good is returned for good, and bad for bad.*”<sup>342</sup> In other words, it “involves returning like behaviour.”<sup>343</sup>

---

<sup>337</sup> Mitchenson, ‘Rediscovering the Principle of Comity in English Private International Law’ (n289),19.

<sup>338</sup> Paul (n 1);Thomas Schultz & Niccol’o Ridi (n 313),583;. Mitchenson, ‘The History of Comity’ (n 300),397-407.

<sup>339</sup> Robert O. Keohane, ‘Reciprocity in International Relations’ (1986) Vol.40 International Organization 1, 3 <<https://www.jstor.org/stable/2706740>>.

<sup>340</sup> *ibid* 3;Francesco Paris and Ghei Nita, ‘The Role of Reciprocity in International Law’ (2003) 36 Cornell International Law Journal 93,94

<<https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1509&context=cilj>>; see also Arthur Lenhoff, ‘Reciprocity and the Law of Foreign Judgments: A Historical - Critical Analysis’ (1956) 16 LOUISIANA LAW REVIEW 465, 466 <<https://digitalcommons.law.lsu.edu/lalrev/vol16/iss3/2>>.

<sup>341</sup>Bruno Simma, ‘Reciprocity’, *Oxford Public International Law*, (2008)

<<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1461>>;.see also Paris and Nita (n 323) 119.

<sup>342</sup> O. Keohane (n 322) 8.

<sup>343</sup> Paris and Nita (n 323) p 94.

When a contracting party breaches its obligation under a treaty, negative reciprocity comes into play. It allows other contracting states to face such breach by either abstaining from performing the treaty obligation, retorsion<sup>344</sup> or reprisals.<sup>345</sup> Negative reciprocity is justifiable because international enforcement mechanisms does not exist.<sup>346</sup> Those sanctions are seen as an effective self-help mechanism to force the other party refraining from breaching.<sup>347</sup> It is thought that reciprocity can be divided into two types; specific reciprocity and diffused reciprocity. Specific reciprocity is invoked between particular parties about particular things having equivalent values, and if agreed, with particular rights and obligations.<sup>348</sup> On the other hand, diffused reciprocity is between parties belonging to a group of actors with shared interest. It is understood as “to contribute one's share, or behave well toward others, not because of ensuing rewards from specific actors, but in the interests of continuing satisfactory overall results for the group of which one is a part, as a whole.”<sup>349</sup> In this type, each party has rights and is under obligations toward the group. The party must trust and have good faith on the other actors to perform their obligations.<sup>350</sup> Here, actors are exposed to exploitation.<sup>351</sup>

In this sense, one might argue that the relationship between the member states is governed by diffused reciprocity. However, such claim needs more clarification. There is no doubt that reciprocity exist between the EU member states. One evident example is mutual recognition. However, one should bear in mind that such reciprocity is rather unique. The point of departure between classic reciprocity under international law and reciprocity under EU law is that negative reciprocity does not apply between the EU member states. If a member states breaches its obligation under the EU, other member states cannot simply retaliate the same breach. For instance, if a member state A refuse to recognise a judgment of member state B, the latter cannot refuse judgment rendered by member state A simply because the latter did so. Judgment can be refused under the grounds specified under the EU law. This is a good approach. Not only it observes mutual trust between the member states and ensures the principle of sincere cooperation, but also more importantly, observes

---

<sup>344</sup>Restorison means that a contracting party can either act in the same manner as the breached contracting party or discriminatory manner against the citizens of the former country. Forcing them to pay taxes is one example. see Arthur Lenhoff, '(n 323);see also Simma (n 324).

<sup>345</sup> It is considered one of the most dangerous tool since it can demolish the international order. See Simma (n 324).

<sup>346</sup> Lenhoff (n 323) 466; Simma (n 324).

<sup>347</sup> Ibid. it is also thought that the existence of negative reciprocity make its moral position questionable and ambiguous. see O. Keohane (n 322) 8.

<sup>348</sup> Ibid p 4

<sup>349</sup> Ibid 21.

<sup>350</sup> Ibid 25.

<sup>351</sup> Ibid 27.

fundamental rights in which mutual trust is trying to protect and facilitates. Refusing a well rendered judgment based only on negative reciprocity provides injustice to the aggrieved party to fulfil a pure public interest.<sup>352</sup> On the other hand, EU mutual recognition aims to fulfil justice through the principle of mutual trust. Here, if negative reciprocity justifies returning bad with bad, the real meaning of mutual trust justifies doing what is just and right. Another reason why negative reciprocity is precluded is that the EU system provides a system of remedies and enforcement mechanism where the breached member states can be held accountable for its violations.<sup>353</sup> The existence of EU institutions such as the CJEU and the EU Commission and EU tools such as the rule of law framework play vital rule in the observance of the member states' act.

---

<sup>352</sup> Louisa B Childs, 'Shaky Foundations: Criticism of Reciprocity and the Distinction between Public and Private International Law' (2005) 38 *New York University Journal of International Law and Politics* 221, 224,226 <[https://nyujilp.org/wp-content/uploads/2013/02/38.1\\_2-Childs.pdf](https://nyujilp.org/wp-content/uploads/2013/02/38.1_2-Childs.pdf)>.

<sup>353</sup> JHH Weiler, 'The Transformation of Europe' (1991) 100 *The Yale Law Journal* 2403, 2419,2422 < <https://digitalcommons.law.yale.edu/yj/vol100/iss8/5>>.

## 2.3 Conclusions

The chapter attempts to clarify the meaning of mutual trust in the EU. In order to achieve that, it started by exploring the meaning of trust in different disciplines. It concluded that trust has different actors, different shapes and different types. Yet, within such variations, it is agreed that trust contains elements of risk and uncertainty, making the trustor subject to vulnerability and betrayal. As a result, a trusting relationship should be based on something more than a mere detection and gathering of past experiences. Rather, a trusting relationship needs the existence of internal values or 'trust in' element, such as honesty, to ensure a long and stable relationship.

In the context of the EU, The principle of mutual trust evolved from mixed motives; from a fear of a State's domination of coal and a wish for peaceful area, to the birth of a polity without internal borders, where mutual trust is viewed as mutual obligation. In its current position, mutual trust adopts most of trust types mentioned above. Mutual trust itself is an obligation based on an obligation to respect and comply with the internal values of the EU which is the rule of law and fundamental rights. It is an obligation that needs to be fulfilled by all members and actors of the EU. It is governed by residual or general trust, where member states needs to trust each other generally, being members of the same polity. It is also governed by specific particularised trust where member states are required to trust each other on specific matters such as the constitution and the continuous development of the area of freedom, security and justice and particularly in judicial cooperation in civil and commercial matters.

Moreover, It is seen that the respect of the rule of law and fundamental rights are constitutional general principles which guides the interpretation of the EU law and its objectives and that they must always be respected and complied with by the EU institutions, Member States and the CJEU. Mutual trust and judicial cooperation are *tools* that are used to facilitate and enhance the protection of the rule of law and fundamental rights. Furthermore, the rule of law and fundamental rights should always be in a higher position than the principle of mutual trust. The latter was possible because of the respect of the former. However, despite the CJEU's attempt to take the rule of law and fundamental rights into consideration, it seems to be reluctant to widen the scope of the rebuttable presumption. Instead, a narrow interpretation is given to the exceptional circumstances where the

presumption can be rebutted. Furthermore, similarities are found between the principle of Comity and the principle of reciprocity. However, the principle of mutual trust departs from Comity being a compulsory normative principle underlying the interpretation of the Private international law instruments. Moreover, it departs from reciprocity in its classic definition provided by international law where negative reciprocity is prohibited and remedies and mechanisms, which sanction any breaches are available.

The upcoming chapter will view the right to effective judicial protection.

## Chapter 3 The principle of mutual trust and the right to effective judicial protection

### 3.1 Introduction

The purpose of this chapter is to examine the right to effective judicial protection as the right most closely linked to the function of the principle of mutual trust in the administration of justice. This is true, taking into account the fact that, it ensures the enforcement of all the rights guaranteed under the EU laws.<sup>1</sup> It is also needed for the creation, the development and the actual enjoyment of an area of freedom, security and justice particularly an effective judicial cooperation in civil and commercial matters.<sup>2</sup> Such area allows and encourage families, workers and corporations to move places for purposes of work, establishing business or settling in elsewhere in the EU. In this respect, cross border disputes would increase. This requires the existence of of judicial systems that ensure people's effective access to justice without difficulty and complexity.<sup>3</sup> With the existence of an area without an internal borders, one member state's struggle to have an effective justice system would negatively affect the EU as a whole.<sup>4</sup>

In addition, examining the right to effective judicial protection is crucial, in particular, when the principle of mutual trust is the justification to stay proceeding for other member state's court and to allow mutual recognition of judgment by abolishing any intermediate measures. Exploring its meaning and its scope of application is important to determine the member states' justice systems compatibility with such right as an essential requirement for the principle of mutual trust.

The significance of the right to judicial protection was highlighted and confirmed by the CJEU, as a general principle of EU law which is inspired by member state's constitutions and from the ECHR, specifically, from article 6 and article 13.<sup>5</sup> Article 6

---

<sup>1</sup> *Case C-216/18 PPU LM* ECLI:EU:C:2018:586, para 48.

<sup>2</sup> e.g The European Commission, 'Strengthening Trust, Mobility and Growth within the European Union "A New EU Framework to Strengthen the Rule of Law" .

<sup>3</sup> The Tampere conclusions

<sup>4</sup> The European Commission, 'The EU Justice Scoreboard: A Tool to Promote Effective Justice and Growth' (2013) 0160 Final.

<sup>5</sup> *C-432/05 Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern* (2007) I-02271, para 37.

concerns with the right to a fair trial within a reasonable time<sup>6</sup>, while article 13 governs the right to effective remedy.<sup>7</sup> Those rights are explicitly governed in article 47 of the Charter, which is read as the following:

“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”

Article 47 applies to EU institutions, such as the European Commission, and to the member states, when they are implementing EU law, such as the Brussels I Recast.<sup>8</sup>

Put it differently, both the EU institutions and member states are under an obligation to respect and comply with the right to effective judicial protection. Member states’ justice systems for instance, should be organised in a way that does not contradict or impartial the right to effective judicial protection.<sup>9</sup>

---

<sup>6</sup> Article 6 ECHR states “1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”

<sup>7</sup> Article 13 ECHR states “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

<sup>8</sup> The Charter ,article 51

<sup>9</sup> C-216/18 PPU LM ECLI:EU:C:2018:586,para 50

Importantly, the interpretation of article 47 should have the same meaning, scope and limitations given by the ECtHR on article 6 and article 16 ECHR. In this sense, the CJEU can provide higher protection and should never guarantee lower protection than that given under the ECHR.<sup>10</sup> As a result, ECtHR case laws are important in the process of exploring and interpreting article 47 of the Charter.

The chapter is divided into three sections. Section 2.1 concerns with the right to effective remedy. Section 2.2 deals with the meaning of the right to a fair trial within a reasonable time. Section 2.3 examines the limitations of the right to effective judicial protection.

### **3.2 The right to effective remedy**

Article 47/1 is concerned with the person's right to effective remedy. The right to an effective remedy forms a pivotal part of the right to judicial protection and a general principle of EU law. It is generally based on article 13 of the ECHR however, provides more protection by bringing the claim before a tribunal.<sup>11</sup> In addition, the exercise of this right is not limited to cover only violations of the rights under the Charter, but it also extends to all violations of rights and freedom under the EU law.<sup>12</sup> Pursuant to the dimensions of the principle of mutual trust, the protection of the right to effective remedy must be ensured both by the EU institutions and by the member states, when they are implementing EU law. On one hand, the legislative working process for instance, must formulate provisions in such way that is consistent with the right to an effective remedy.<sup>13</sup> This means that those measures and regulations should not have the effect of undermining the possibility of the right to effective remedy. On the other hand, according to article 19/1 TEU, Member States are under an obligation to create and develop justice systems which provide sufficient legal remedies and procedures and hence, that ensures effective judicial protection.<sup>14</sup> Moreover, they

---

<sup>10</sup>Explanations Relating to the Charter of Fundamental Rights[2007] OJ C 303;see also C- 279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* (2010) I-13849, para 35.

<sup>11</sup> Explanations Relating to the Charter of Fundamental Rights (n 10).

<sup>12</sup> *ibid*

<sup>13</sup> *WC-213/89, The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and Others* [1990] ECR I-02433 para [20].

<sup>14</sup> Article 19/1 paragraph 2 states "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law." *Case 14/83 Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] ECLI:EU:C:1984:153, para 23.see also, C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern*, 13 March 2007[41] C-619/18 *European Commission v Republic of Poland* case laws.

must ensure that the interpretation of their national law and the secondary legislations are consistent with the right to judicial protection and particularly the right to an effective remedy and does not jeopardise the core of this right.<sup>15</sup>

The EU does not provide uniform procedural rules applicable to all member states, leaving the matter to each member state to organise and apply its national procedural rules for both local and European actions. This is commonly known as the principle of procedural autonomy. However, such power is subject to two principles; the principle of equivalence and the principle of effectiveness. The principle of equivalence means that the claim which is concerned with right conferred to by the EU laws should not be less favourable than those national claims<sup>16</sup>. Put it differently, the applicability of national procedural rules must be without any distinction whether the claim concerns with violation of rights derived from national legislation or European Laws.<sup>17</sup> On the other hand, the principle of effectiveness requires that the national rules should not make the exercise of the rights enriched in the EU law impossible or excessively difficult.<sup>18</sup>

Both principle stems from the principle of sincere cooperation where the member states are under an obligation to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.<sup>19</sup> However, the principle of effectiveness of the EU is subject to its compatibility with the rule of law and fundamental rights. The application of the EU rule must not infringe or violate the fundamental rights.

### **3.3. The right to a fair trial within a reasonable time**

Article 47/2 guarantee the person's right to have a fair and public hearing within a reasonable time before an impartial and independent tribunal. The right to a fair trial is vital for the protection and the maintenance of the rule of law and the proper administration of justice. It is concerned with the procedural fairness, whether the

---

<sup>15</sup> Joined cases C-411/10 and C-493/10, *N.S v Secretary of State for the Home Department and M. E. and Others*, para [77]

<sup>16</sup> *C-416/10 Jozef Križan and Others v Slovenská inšpekcia životného prostredia*, [2013], ECLI:EU:C:2013:8 para 85

<sup>17</sup> *C-93/12 ET Agrokonstulting-04-Velko Stoyanov v Izpalnitelen direktor na Darzhaven fond 'Zemedelie' — Razplashatelna agentsia*[2013] ECLI:EU:C:2013:432, para39

<sup>18</sup> *C-234/04, Rosmarie Kapferer v Schlank & Schick GmbH*[2006], ECR I-02585, para 22

<sup>19</sup> TEU, article 4.

proceeding was fair and effective, rather than substantive fairness that is concerned with the result of the proceeding.<sup>20</sup>

An essential element of the right to a judicial protection and the right to a fair trial provided for by the ECtHR and confirmed by the CJEU is the person's right to a court.<sup>21</sup> This is certainly true considering the court's role in the protection of rights, the assurance of the rule of law, and the possibility of making rights practical and effective reality rather than theoretical.<sup>22</sup> It applies to both natural and legal persons.<sup>23</sup> It includes both the possibility to initiate proceeding before the court and the right to have a determination on the dispute.<sup>24</sup> Staying proceeding for a long time for instance, was considered as having the effect of depriving and undermining the litigant from his right to access to court, even if such stay was a result of waiting for new legislation's enactment.<sup>25</sup> Such fact will be of particular importance in cross border disputes and specifically in situations of parallel proceeding and the application of the *lis pendens* mechanism as it will further demonstrated.

### **3.3.1. A Fair Hearing**

Article 6 of the ECHR and article 47 of the Charter guarantee the person's right to a fair hearing. They impose an obligation on the member states to ensure that such requirement is respected in each case.<sup>26</sup> The ECtHR identifies principles or requirements that should be considered while examining the notion of the fair hearing. This include the right to equality of arms, the adversarial of proceeding and a reasoned decision.

#### **3.3.1.1. Equality of arms**

The equality of implies that 'each party must be afforded a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a

---

<sup>20</sup> James J. Fawcett, Máire Ní Shúilleabháin, and Sangeeta Shah Human Rights and Private International Law, Oxford private international law series, 2016, p. 60.

<sup>21</sup> *Golder V The United Kingdom*, (1975) Series A no 18 para 36

<sup>22</sup> European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Law Related to Access to Justice*, European Union Agency for Fundamental Rights and Council of Europe (2016) 26; *Airey v Ireland* application no. 6289/73 (ECtHR 09 October 1979) para 24.

<sup>23</sup> *C- 279/09 DEB Deutsche* (n 6) para 38.

<sup>24</sup> *Kutic v Croatia* (2002) application no 48778/99 (ECtHR 21 February 1975), para 25.

<sup>25</sup> *ibid* para 38.

<sup>26</sup> *Dombo Beheer BV v the Netherlands* applicatin no 14448/8 (ECtHR 27 October 1993), para 33.

substantial disadvantage vis-à-vis his opponent.<sup>27</sup> The rationale behind it is to provide a fair balance between the parties, giving each party the chance to examine and challenge any document submitted by the other party.<sup>28</sup> For example, the party's failure to receive the appeal and to reply to it was seen as a violation to the principle of equality of arms.<sup>29</sup>

### **3.3.1.2 Adversarial proceeding**

The adversarial of proceeding is another essential aspect that should be taken into consideration while determining the meaning of fair hearing. Its definition was provided for by the ECHR case laws which found that it is 'the opportunity for the parties to have knowledge of and comment on the observations filed or evidence adduced by the other party'.<sup>30</sup> It also include the individual's right to familiarise himself with the evidence before the court and have the opportunity to comment on the existence, the authenticity of the document in an appropriate form and time.<sup>31</sup> However, the right to adversarial proceeding is not absolute and its scope depends on the circumstance of each case.<sup>32</sup>

### **3.3.1.3 Reasoned decision**

Another important element of the right to fair hearing is a reasoned decision. Member states' courts are under an obligation to provide grounds and reasons to its judgment in such a way that enable the defendant to bring an effective appeal against that decision.<sup>33</sup> Such obligation differs according to the nature of the decision and the circumstances of the case.<sup>34</sup> That does not mean however, that the national court must provide a detailed reasoning to every argument put before it.<sup>35</sup> For instance, in a case of dismissing an appeal, the court of appeal can incorporate the reasoning of the lower court provided that the essential issues submitted to its jurisdiction was addressed.<sup>36</sup>

---

<sup>27</sup> *C 199/11 Europese Gemeenschap v Otis NV and Other*, (2012) ECLI:EU:C:2012:684 para 71; see also *ibid*.

<sup>28</sup> *Europese Gemeenschap v Otis NV and Other*(no 23), para 72.

<sup>29</sup> *Beer v Austria* (2001) application no 30428/96 (ECHtR 6 February 2001), para 19-20.

<sup>30</sup> ECHR, *Ruiz-Mateos v. Spain*, application no 12959/87, (ECHtR 23 June, 1993), para 63

<sup>31</sup> *Krčmář and Others v The Czech Republic* application no 35376/97(ECHtR 03 March 2000), para 42.

<sup>32</sup> *Hudáková and Others v Slovakia*, application no 23083/05(ECHtR 27/04/2010) para 26.

<sup>33</sup> *C-619/10 Trade Agency Ltd v Seramico Investments Ltd* [2012] ECLI:EU:C:2012:531 para 53; *Hadjianastassiou v Greece*[1992] application no 12945/87 (ECHtR 16 December 1992) para 33.

<sup>34</sup> *García Ruiz v Spain*[1999] application no 30544/96 (ECHtR , 21 January 1999), para 26

<sup>35</sup> *Van De Hurk v The Netherlands* application no 16034/90(ECHtR 19 April 1994), para 61.

<sup>36</sup> *Heele v Finland* (ECHtR 19 December 1997), para 60.

### 3.3.2 A Public Hearing

Another guarantee enriched in article 47/2 of the Charter and article 6 of the ECHR is that the litigants are entitled to have a public hearing. According to ECtHR, it endorses the individual's trust in courts and protects litigants against the administration of justice in secret without public scrutiny.<sup>37</sup> The right to a public hearing includes the right to oral hearing unless there are exceptional circumstances which could justify disregarding it.<sup>38</sup> For instance, a hearing may not be needed, when there are no contested facts that produce the need for a hearing and which the court can make reasonable judgment based on the written submission of the parties.<sup>39</sup> On the other hand, holding an oral hearing can be an indispensable element for example in issuing judgment on the return of the child or access rights provided for by the Brussels IIa Regulation.<sup>40</sup>

On the other hand, it should be noted that the litigant has the right to waive his right to a public hearing either expressly or impliedly, provided that it should be conducted in an unequivocal manner and must not run against any public interest.<sup>41</sup>

### 3.3.3 Impartial and independent tribunal established by law

The concept was defined by the CJEU to clarify the body, which can have the power to refer preliminary questions to the CJEU. It held that the tribunal must be an independent and permanent body established by law that applies rules of laws, have a compulsory jurisdiction, its procedures is *inter parte* and its proceeding will lead to a judgment of a judicial nature.<sup>42</sup>

The CJEU case-laws confirmed that "judicial independence forms part of the essence of the fundamental right to a fair trial".<sup>43</sup> The concept of independence requires "an authority acting as a third party in relation to the authority which adopted the contested decision".<sup>44</sup> The court further held that such concept encompasses two aspects. The first aspect is externally meaning that the concept of independence requires that the

---

<sup>37</sup> *Diennet v France*, 18160/91 (ECHR 26 September 1995) para 33.

<sup>38</sup> *Fischer V Austria*, application no 16922/90 (ECtHR 26 April 1995) para 44.

<sup>39</sup> *Ibid*

<sup>40</sup> The Brussels IIa Regulation article 41 and article 42

<sup>41</sup> *Håkansson And Stureson v Sweden application no 11855/85* (ECtHR 21 February 1990) para 66.

<sup>42</sup> C-54/96, *Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH*, 17 September 1997, para 23, and C-344/09, *Dan Bengtsson*. 24 March 2011, para 18

<sup>43</sup> *LM* (n 9) para 48

<sup>44</sup> C- 506/04, *Graham J Wilson v Ordre des avocats du barreau de Luxembourg*. [2006] ECR I-08613, para 49

body can decide freely without any external pressure or intervention from any outer source other than the tribunal's members themselves.<sup>45</sup> This includes both direct influence such as instructions and any indirect influence that can disturb the independence of the judges in fulfilling their obligations.<sup>46</sup>

On the other hand, the second element is internally which is connected to impartiality. According to the CJEU, this aspect

seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law.<sup>47</sup>

On the other hand, the concept of impartiality refers to “the absence of prejudice or bias”.<sup>48</sup> The ECtHR, followed by the CJEU<sup>49</sup>, established criteria for assessing whether or not the tribunal is impartial. Such assessment encompasses a subjective and an objective test. The subjective test is concerned with the judge's behaviour, whether he or she has any prejudice or bias in a particular case.<sup>50</sup> However, the judge is presumed to have a personal impartiality unless proven to the contrary.<sup>51</sup> It could be difficult to obtain evidence, which could rebut the presumption of the judge's personal impartiality, such as the ill will, or his or her hostility.<sup>52</sup> As a result, the objective test is seen to provide more guarantee in this respect.<sup>53</sup> According to the objective test, it must be ensured that ‘whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality’.<sup>54</sup> There should be ascertainable facts that arise doubts that a

---

<sup>45</sup> Ibid para 51; *C-619/18 European Commission v Republic of Poland* [2019] ECLI:EU:C:2019:531, para 72

<sup>46</sup> C-791/19, para 60

<sup>47</sup> Ibid para 73

<sup>48</sup> *Micallef v Malta*, application no 17056/06 (ECtHR 15 October 2009), para 93.

<sup>49</sup> *Joined Cases C-341/06 P and C-342/06 Chronopost SA and La Poste v Union française de l'express (UFEX) and Others*[2008] [54].

<sup>50</sup> *Micallef v Malta*(n 43), para 93

<sup>51</sup>Ibid, para 94

<sup>52</sup> ibid

<sup>53</sup> Ibid, para 95

<sup>54</sup> Ibid, para 93

particular judge or a body lacks impartiality.<sup>55</sup> A personal or professional relationship between a judge and a party could raise doubts to the judge's impartiality.<sup>56</sup>

In addition, the tribunal must be established by law. Such concept cover both the legal basis of the existence of the tribunal itself, its competence and compliance by the judges to the legal rules that govern the tribunal.<sup>57</sup> The rationale behind the inclusion of such phrase is to prohibit the judicial system from executive discretion.<sup>58</sup> Confirming that a tribunal is independent, impartial and established by the law emphasises people's trust in the democratic society.<sup>59</sup>

#### **3.3.4. Length of proceeding**

Another pivotal guarantee provided by article 47 of the Charter and article 6 of ECHR is that proceeding should be concluded within a reasonable time. It is important that the process of administering justice is conducted without any delays which could impair its effectiveness and credibility.<sup>60</sup> It applies to all levels of legal proceedings needed to determine the dispute, including proceeding conducted after having a judgment on the merit.<sup>61</sup> In order to calculate the length of proceeding, time generally starts running from the moment the action was instituted before the court and ends in the final determination of the case.<sup>62</sup> Proceeding for appeal is included.<sup>63</sup> Determining the reasonableness of the length of proceeding, is considered in the light of the circumstances of each case and by the application of specific criteria established by the ECHR case laws.<sup>64</sup> The criteria includes the complexity of the case, the conduct of the applicant, the conduct of the authority and what is at stake to the applicant.

##### **3.3.4.1 The complexity of the case**

The complexity of the case is an element that needs to be considered while assessing the reasonableness of the length of proceeding. Such complexity could relate to the facts of the case or the applicable laws.<sup>65</sup> The engagement of multiple parties in the

---

<sup>55</sup> Ibid para 96

<sup>56</sup> *Pescador Valero v Spain*, application no 62435 (ECHtR 24 June 2003) para 27.

<sup>57</sup> *Sokurenko and Strygun v Ukraine*, applications nos 29458/04 and 29465/04 (ECHtR 20 July 2006) para 24.

<sup>58</sup> C-791/19, para 168

<sup>59</sup> Ibid para 167

<sup>60</sup> *H v France*, application no 10073/82 (ECHtR 24 October 1989) para 58.

<sup>61</sup> *Robins v The United Kingdom*, application no 22410/93 (ECHtR 23 September 1997) para 28.

<sup>62</sup> *Poiss v Austria*, application no 9816/82 (ECHtR 23 April 1987) para 50.

<sup>63</sup> Ibid

<sup>64</sup> *Comingersoll SA v Portugal*, application no 35382/97 (ECHtR 6 April 2000) para 19.

<sup>65</sup> *Katte Klitsche de la Grange v Italy*, application no 12539/86 (ECHtR 27 October 1994) para 55.

case and the level of evidence that need to be collected as a result was considered as facts that contribute to the complexity of the case.<sup>66</sup> Moreover, legislation's change and balancing between the individual's interest and the public or general interest affect the complexity in its legal shape.<sup>67</sup>

#### **3.3.4.2 The conduct of the applicant**

The applicant's conduct is an objective fact that should be taken into account when determining the reasonable time requirement.<sup>68</sup> The applicant is neither required to cooperate with the court<sup>69</sup> nor "is blamed for making full use of the remedies available to them under domestic law".<sup>70</sup> Nevertheless, he is required 'to show diligence in carrying out the procedural steps relating to him, to refrain from using delaying tactics and to avail himself of the scope afforded by domestic law for shortening the proceedings.'<sup>71</sup> For instance, the ECtHR states that bringing proceeding in a court, which lacks jurisdiction, is seen as an example of the applicant's conduct, which contributed to the violation of the reasonable time requirement.<sup>72</sup> The latter is significantly important in the context of cross border disputes and particularly in the case of parallel proceeding, when the applicant bring proceeding in member states' court which is well known of its excessive length of proceeding and which clearly lacks jurisdiction.

#### **3.3.4.3 The conduct of the authority**

It was consistently held that the member states are under an obligation to construe their justice systems in such way that ensure the individual's right to have a final decision within a reasonable time.<sup>73</sup> This corresponds to the member state's general obligation to organise their justice systems in such way that is compatible with the right to judicial protection, a requirement of the mutual trust in the administration of justice.<sup>74</sup> Delays caused by the excessive workloads does not exclude the state's responsibility

---

<sup>66</sup> *H v The United Kingdom*, application no 9580/81 (ECtHR 8 July 1987) para 72.

<sup>67</sup> European Commission For The Efficiency Of Justice by Françoise Calvez and Nicolas Regis, 'Length of Court Proceedings in the Member States of the Council of Europe Based on the Case Law of the European Court of Human Rights' (2018), Third edition, 16.

<sup>68</sup> *Poiss v. Austria* (no 57), para 57.

<sup>69</sup> ECtHR, *Eckle v. Germany*, application 8130/78, 15 July 1982, para 82.

<sup>70</sup> *ibid*

<sup>71</sup> *Unión Alimentaria Sanders SA V Spain*, application no 11681/85 (ECtHR 7 July 1989) para 35.

<sup>72</sup> *Beaumartin v France*, application no 15287/89 (ECHta 24 November 1994) para 33.

<sup>73</sup> *Scordino v Italy (No 1)*, application no 36813/97 (ECtHR 29 March 2006) para 183; *COCCHIARELLA v ITALY*, application no 64886/01 (ECtHR 29 March 2006 ) para 74; *Sürmeli V Germany*, application no 75529/01 (ECtHR 8 June 2006) para 129.

<sup>74</sup> Article 19 TEU

in violating the reasonableness length of proceeding. on the other hand, temporary court backlog should not have the effect of raising the member states liability in its compliance with such requirement when it took serious remedial steps to solve such exceptional situation.<sup>75</sup>

#### **3.3.4.4 What is at stake to the applicant**

Another element that should be taken into account when considering the reasonable time requirement concerns what is at stake for the applicant. Some disputes by their nature require speedy proceeding such as cases related to child custody.<sup>76</sup>

If the assessment leads to finding a violation to the reasonable of length of proceeding, the litigant is entitled to an effective remedy pursuant to article 47/1 of the Charter and article 13 of the ECHR. Different types of remedy can redress this violation such as compensation. Nevertheless, The ECtHR consistently held that the best effective remedy in this situation is a remedy that is formulated to expedite the proceeding in order to preclude the excessive proceeding.<sup>77</sup> According to the court, "Such a remedy offers an undeniable advantage over a remedy affording only compensation since it also prevents a finding of successive violations in respect of the same set of proceedings and does not merely repair the breach *a posteriori*, as does a compensatory remedy..".<sup>78</sup>

On the other hand, the situation becomes more complex on choosing the best remedy when excessive proceeding occur in cross border disputes and more specifically in the case of parallel proceeding and the mechanism of *lis pendens*. In principle, the applicant who has been negatively affected by the excessive length proceeding in the first seised court should be entitled for an effective remedy. However, as it will be seen later, the CJEU in some cases turned a blind eye on the applicant's right to effective remedy even though it has recognised the delaying tactics conducted by bad faith litigant only to further strengthen the principle of mutual trust.

---

<sup>75</sup> *Buchholz V Germany*, application no 7759/77 (ECtHR 6 May 1981) para 51.

<sup>76</sup> *Hokkanen V Finland*, application no19823/92 (ECtHR 23 September 1994), para 72.

<sup>77</sup>For instance, see *Cocchiarella v. Italy* (no 68) para 74; *Scordino V. Italy* (no 68) para 183

<sup>78</sup> *ibid*

### 3.4 Legal Aid

The right to effective judicial protection also includes the right to legal aid. It is important since it enables an effective access to court and effective remedy.<sup>79</sup> The lack of financial resources should not be a deterrent to the party's access to justice.<sup>80</sup> According to article 47/3 "Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."

In order to decide whether the legal aid is necessary, the court needs to look, whether in the light of all the circumstances, the absence of such legal aid would deny the party from his right to a fair trial.<sup>81</sup> Numbers of factors can help to decide whether the legal aid is necessary such as the complexity of the case and the party's ability to present himself or herself properly and satisfactory without a lawyer.<sup>82</sup>

In order to further enhance access to justice, the EU adopts a directive that sets out certain minimum common standards that provide an adequate level of legal aid in cross border disputes in civil and commercial matters for litigants in need for such legal aids.<sup>83</sup> It applies to all litigants that are resident in a member states irrespective whether they are EU citizens or lawfully habitant third country nationals.<sup>84</sup> It covers 'pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings, legal assistance in bringing a case before a court and representation in court and assistance with or exemption from the cost of proceedings.'<sup>85</sup> The person who wishes to apply for a legal aid should fill a form either for a legal aid application in another EU member state or form for the transmission of a legal aid application.<sup>86</sup>

### 3.5. Limitation on the right to effective judicial protection

The right to judicial protection is not absolute and can be subject to limitations or restrictions. Such limitation however, is subject to the fulfilment of three conditions and

---

<sup>79</sup> *Airey v Ireland* (n 22); Explanations relating to the Charter of Fundamental Rights(n 10), explanations on article 47

<sup>80</sup> Council Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes (OJ L 026, 31.1.2003, p.41)

<sup>81</sup> *McVICAR v. THE UNITED KINGDOM* - 46311/99 [2002] ECHR 436 , para 51; explanatory notes

<sup>82</sup> *Airey v Ireland* (n22), para 24

<sup>83</sup> Directive 2003/8/EC(n 80)

<sup>84</sup> *Ibid* article 4

<sup>85</sup> *Ibid* recital 11

<sup>86</sup> *Ibid* article 16; for the forms, see [https://e-justice.europa.eu/157/EN/legal\\_aid\\_forms](https://e-justice.europa.eu/157/EN/legal_aid_forms)

only then, a limitation is permissible. This can be seen in the wording of article 52 of the Charter where it provides that the limitation on the right

must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

Article 52 corresponds to the case laws of the ECtHR where it found that the right to access to justice is not absolute and can be subject to restrictions. However, such restriction should pursue a legitimate aim, be proportionate and more importantly, should not have the effect of reducing or undermining the very essence of the right.<sup>87</sup> As for the general interest referred to by article 52, the explanatory report on the Charter states that it include both the European Union objectives recognised in article 3 and article 4 TEU.<sup>88</sup>

In this context, it could be argued that any limitation to the right to a judicial protection, which is necessary to fulfil the EU objectives based on the mutual trust, should be considered to be legitimate restriction. For instance, enhancing the free circulation of judgment throughout the European Union provided for by the Brussels I recast as a way to further develop an area of freedom, security and justice, could justify limitation to the right to judicial protection. However, this is subject to vital condition which is that limitation should not impair the very essence of the right. If achieving such objective would lead to the reduction of the essence of the right, such limitation is then not acceptable.

One of the legitimate restriction to the right to judicial protection is limitation periods. Limitation period aims to set out time limits in which the person could bring a claim or give a notice to another party regards a dispute. It

ensure[s] legal certainty and finality, protect potential defendants from stale claims which might be difficult to counter and prevent the injustice which might arise if courts were required to decide upon events which

---

<sup>87</sup> *ASHINGDANE v THE UNITED KINGDOM*, application no 8225/78 (ECtHR 28 May 1985) para 57.

<sup>88</sup> Explanations Relating to The Charter of Fundamental Rights (no 7)

took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time.<sup>89</sup>

Limitation period could be provided for both in the national and EU levels. In the absence of any uniform procedural rules governing periods and according to the principle of procedural autonomy, member states can designate time periods, provided that they do not have the effect of having the exercise of rights enriched in the EU laws virtually impossible or excessively difficult, and that they are not less favourable governing domestic actions.<sup>90</sup> On the other hand, limitation periods can be provided for by the EU regulations and instruments.

However, those restrictions are subject to the general conditions, to be proportionate to be necessary for the general interest of the EU and more importantly, not to undermine the essence of the right.

Another legitimate limitation to the right to judicial protection is the court fees. In principle, imposing court fees is not incompatible with the right to judicial protection since it supports the interest of administration of justice.<sup>91</sup> Such restriction however should be proportionate and should not have the effect of undermining the very essence of the right. For instance, it was considered that imposing excessive court fees which have the effect of preventing the litigant from bringing his claim before the court is an unlawful limitation to the right to access to justice.<sup>92</sup> Assessing whether the court fee is reasonable and does not impair the litigant's right to access to justice depends on the circumstances of the case, the litigant's ability to pay and the level of the proceeding where the restriction was imposed.<sup>93</sup>

On the other hand, excessive formalism or the strict interpretation of the procedural rules, such as time limits, was considered as an unlawful interference with the right to access to justice. As seen above, the interpretation of domestic procedural legislations lies on the national court subject to the principle of effectiveness and the principle of equivalence. In addition, procedural rules, which is derived from the EU laws, should

---

<sup>89</sup> *Stubbings and Others v. The United Kingdom*, application no 22083/93; 22095/93 (ECHtR 22 October 1996) para 51

<sup>90</sup> *Joined cases C-89/10 and C-96/10 Q-Beef NV (C-89/10) v Belgische Staat and Frans Bosschaert (C-96/10) v Belgische Staat, Vleesgroothandel Georges Goossens en Zonen NV and Slachthuizen Goossens NV*, [2011] ECR I-07819 paras 34,36.

<sup>91</sup> *Kreuz v Poland*, application no 28249/95 (ECHtR 19 June 2001) para 59.

<sup>92</sup> *Ibid* paras 66-67

<sup>93</sup> *ibid*

be interpreted in such way that does not conflict with the right to judicial protection. Nevertheless, it seems, as it will be further considered throughout the thesis, that the CJEU in some cases, prefer upholding principles of legal certainty and predictability over the right to access to the court and particularly the right to an effective remedy by its strict interpretation of procedural rules. This can be seen, for instance in the context of the Service of documents Regulation. The latter gives the default defendant the opportunity to submit an application to relief him from the effect of the expiry of the time to appeal.<sup>94</sup> Such entitlement however, is subject to an important condition among others, which is that the submission should be done within a reasonable time, identified by the member states in the communication to the Commission but no less than one year from the day of judgment. The latter implies the need for an effective service of the judgment to the defendant within the indicated period. However, some questions which needs to be answered are what if the service was conducted after the expiry of the reasonable time without any fault of the defendant and whether the latter could still submit the application under the national law? In *Emmanuel Lebek v Janusz Domino*<sup>95</sup>, the CJEU strictly interpreted the EU rule and found that the defendant does not have the right to submit the application irrespective whether such failure was due the late service conducted by the applicant and without any fault of the defendant. In addition, owing to the legal certainty and the effectiveness of the EU law, the defendant, in the court's view, does not have the right, to rely on the national rule which could still give him such option.<sup>96</sup>

While it is true that imposing time limits fulfil the objectives of legal certainty and proper administration of justice, a strict application of the procedural rule such as in the latter case, could deprive the litigant from the right to an effective remedy particularly, when the reason of the expiration was without any fault of his part.

---

<sup>94</sup> Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation, article 19

<sup>95</sup> C-70/15, *Emmanuel Lebek v Janusz Domino* [2016] ECLI:EU:C:2016:524

<sup>96</sup> *Ibid* para 55 and para 57

### 3.6 Conclusions

The Chapter examined in detail the right to effective judicial protection in accordance with the Charter and in light of the ECHR rights with a particular focus on the right to a fair trial and the right to an effective remedy. Such examination is significant taking into account the prominent place this right has in the EU. It is the key right that ensures the enforcement of all rights in the EU, in one hand, and enables the establishment of an area without internal borders between the EU Member States, on the other hand.

It is seen that the right to effective judicial protection applies to both EU institutions and EU member states when they are implementing the EU law. It means for instance, that EU measures and regulations should be compatible with the right to effective judicial protection and does not lead to undermine or hamper such right. In addition, member states justice systems should be organised in such a way that reflect and comply with the right to effective judicial protection. This would mean for instance, that courts need to be independent and impartial when deciding a case.

The chapter examined the right to effective remedy, the right to a fair trial within a reasonable time and the right for legal aid as essential elements of the right to judicial protection. Under the EU, the right to effective remedy provides more protection. The exercise of this right is not limited to cover only violations of the rights under the Charter, but it also extends to all violations of rights and freedom under the EU law. The chapter also examined the right to legal aid. The lack of financial resources should not be a deterrent to the party's access to justice.

On the other hand, the chapter explored the right to a fair trial within a reasonable time. One important element is the length of proceeding. According to the EU law, a remedy should be provided when excessive proceeding exist, something which is missing in the context of cross border disputes as it will further be seen. Moreover, the chapter shed the light on the significance of the court's independence and impartiality being at the heart of the right to a fair trial.

The chapter also examined the limitation of the the right to effective judicial protection such as time limits and court fees. It is seen that the right is not without any limitation. However, those limitations should be provided by law, are necessary and does not lead to undermining the right itself. This means that the objective of enhancing the free

circulation of judgments as a significant goal pursued by the EU should not undermine or hamper the exercise of the right itself.

The next Chapter will provide an overview on the role of the principle of mutual trust and its implementations in the private international law and whether the latter hamper the essence of the right to judicial protection.

.

## **Chapter 4 An overview on the implications and implementations of the principle of mutual trust in stages of jurisdiction and recognition and enforcement of judgments**

### **4.1 Introduction**

The purpose of this chapter is to generally examine the role of the principle of mutual trust in private international law rules, particularly those governing jurisdiction, recognition and enforcement of foreign judgments between the EU member states. It is argued that the principle of mutual trust played an undeniable role in the establishment and in the continuous development of private international law rules in the European Union. In addition, the principle is implemented in different regulations and at different stages to serve and achieve different goals and objectives. However, the current practice shows that serious violations of fundamental rights were overlooked and disregarded in the name of upholding and enhancing the principle of mutual trust, which calls for more substantive examination in the next chapters

In order to fulfil the latter aim, the Chapter is divided into three sections. Section 4.2 deals in general with the development and continuous growth of the private international law in the European Union. This will include the history of private international law in the European Union, the special position of the UK and Ireland and Denmark and finally the CJEU's power to interpret the EU Regulations. Section 4.3 concerns more specifically with the implementations of the principle of mutual trust in the private international law instruments particularly in the service of documents regulation, the Brussels I Regulation and the Brussels IIa Regulation and whether these implementations could hamper the essence of person's fundamental rights as key requirements of the principle of mutual trust. Section 4.4 outlines the negative implications of the principle of mutual trust in the private international law norms usually known in the common law systems such as the anti-suit injunction and the forum non-conveniens.

## 4.2 The legal framework on private international law rules in matters of jurisdiction and recognition and enforcement in the EU

The first article, which paved the way for the existence of Private International Law rules in the European integration, was article 220 of the 1957 Rome Treaty.<sup>1</sup> According to this article, to secure their national benefits, European Economic Community (hereinafter EEC) Member States at that time were urged to enter into negotiations with each other for 'the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.'<sup>2</sup> As a result, in 1968, the first instrument governing Private international Law rules was adopted and entered into force; the Brussels Convention.<sup>3</sup> The Brussels Convention governs matters of jurisdiction and the recognition and enforcement of a foreign judgment in civil and commercial matters. It was seen as a way to further enhance the common market between the ECC Member States, ensure, and secure legal protection.<sup>4</sup>

The adoption of the Maastricht Treaty brought crucial changes to the European integration by the creation of the European Union.<sup>5</sup> Importantly, in the context of private international law rules, judicial cooperation was regarded as a common interest and a way to enhance the free movement of persons.<sup>6</sup> However, at that time, adopting European legislation could only be done through intergovernmental cooperation between the EU Member State.

The role of the principle of mutual trust in the development of private international law in the European Union becomes more evident in the entry into force of the Amsterdam Treaty.<sup>7</sup> It constituted an area of freedom, security, and justice where the free movement of persons is ensured in the European Union.<sup>8</sup> Significantly, it gave the EU

---

<sup>1</sup> Treaty establishing the European Economic Community, Signed on 25 March 1957

<sup>2</sup> *ibid*, Article 220

<sup>3</sup> Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1968] OJ L 299 (hereinafter the Brussel Convention)

<sup>4</sup> *c-398/92 Mund & Fester V Hatrex internationaal Transport [1994] ECR I-00467, para 11*; M. Jenard, Report , p 46.

<sup>5</sup> Treaty on European Union, as signed in Maastricht on 7 February 1992.

<sup>6</sup> *ibid* article K.1 [6]

<sup>7</sup> Treaty Of Amsterdam Amending The Treaty On European Union, The Treaties Establishing The European Communities And Certain Related Acts, 2 October 1997

<sup>8</sup> *Ibid* ,article 61 EC

the competence to adopt measures and Regulations in judicial cooperation in civil and commercial matter having cross border implications so far as it is necessary for the functioning of the internal market, such as uniform rules of jurisdiction and recognition and enforcement.<sup>9</sup>

The entry into force of the Amsterdam Treaty was revolutionary for the area governed by private international law rules. Several instruments govern different rules of private international law and serves different objectives were adopted. For instance, in civil and commercial matters, the Brussels I Regulation was adopted which replaced the existing Brussels Convention. On the other hand, in the family law matters, the Brussels Ila Regulation was adopted, which concerns with jurisdiction and recognition and enforcement in matrimonial and parental responsibility matters.<sup>10</sup> Most of private international law rules take the shape of a Regulation. The advantage of using a Regulation is that it is applicable in all member states without the need to adopt domestic legislation to implement its rules.<sup>11</sup>

Next was the entry into force of the Lisbon Treaty. It emphasised the importance of fundamental rights, particularly when the Charter is given a legally binding statue similar to the treaties.<sup>12</sup> Moreover, the treaty confirmed the significance of private international law instruments as a way that contribute and facilitate access to justice in an area without an internal frontiers. According to article 67, access to justice shall be further facilitated in particular through the principle of mutual recognition. Moreover, it not only confirmed the European Union's power to adopt private international law measures<sup>13</sup>, but it also widened such power.<sup>14</sup> Unlike the Amsterdam Treaty, where

---

<sup>9</sup> Ibid, article 61 c and Article 65 EC

<sup>10</sup> Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000. OJ L 338(hereinafter the Brussels Ila Regulation)

<sup>11</sup> The Commission, Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (1999) COM 348 final.

<sup>12</sup> TEU article 6

<sup>13</sup>Consolidated version of the Treaty on the Functioning on the European Union( herinafter The TFEU) [2008] OJ C115/13, art 81.

<sup>14</sup> Fiorini Aude, 'The Evolution of European Private International Law' (2008) Vol. 57, No. 4 The International and Comparative Law Quarterly p976  
<https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/i-the-evolution-of-european-private-international-law/B8CF5B32ED1953235C65205714CA6B89> accessed on 6 September 2021

the adoption of these rules needs to be necessary for the internal market, such necessity is only an example of the adoption under the Lisbon treaty.<sup>15</sup>In other words, the European Union can adopt uniform rules of private international to fulfill a goal other than enhancing the internal market.

In sum, Since the Amsterdam Treaty, a connection between the constitution and the further development of an area without an internal frontiers, the enhancement of people's access to justice and the adoption of private international law was strengthened. Such measures also ensure legal certainty and predictability to the litigant in the legal proceeding.

#### **4.1.2 The position of some member states and the CJEU interpretation**

Some member states such as the UK, Ireland and Denmark, have a unique position concerning the adoption of measures and regulations related to the area of freedom, security, and justice including those governing rules of jurisdiction and recognition and enforcement of judgment.

##### **4.1.2.1 UK and Ireland**

Prior to Brexit, UK and Ireland have special arrangement for the adoption of measures and Regulations. According to Protocol 21, measures, regulations and international agreements provided for by Title V such as those related to private international law rules are not binding on UK and Ireland unless it declared its intention to have such an effect.<sup>16</sup> In principle, they are under no obligation either to participate in the adoption of proposed measures and regulations or their adoption after they entry into force. At the same, the protocol preserves UK and Ireland the right to opt in the Regulatory schemes in its early stages or to adopt those measures after its entry into force by a note sent to the Council. It should be noted that UK and Ireland have adopted most Regulations that govern Private international law Subjects.<sup>17</sup>

##### **4.1.2.2 Denmark**

The position of Denmark is different from that taken in the UK and Ireland. According to protocol 22, Denmark does not have the flexible opt in mechanism as provided for

---

<sup>15</sup> Ibid

<sup>16</sup> Consolidated version of the Treaty on the Functioning of the European Union Protocol (No 21) on The Position of The United Kingdom and Ireland in respect of The Area Of Freedom, Security and Justice, OJ C 202 2016, 295..

<sup>17</sup> Eg. See The Brussels I Recast, recital 40

by the UK and Ireland protocol.<sup>18</sup> It does not participate in the adoption of the proposed measures and regulation. Nevertheless, if it wishes to extend the application of those Regulations to its system, parallel agreement can be concluded between Denmark and the European Union.<sup>19</sup>

#### **4.1.2.3 The CJEU interpretation**

The CJEU is the body responsible for providing uniform and autonomous interpretation of the EU Regulations and measures such as those governing Private international law.<sup>20</sup> This is done in the shape of a preliminary reference by the national court when it is in doubt to the correct interpretation of its provisions and that such interpretation is necessary to solve a dispute.<sup>21</sup> Prior to the entry into force of the Lisbon Treaty, the power of national court to refer preliminary questions to the CJEU was only confined to the court of final stage whereas first instance does not have such power. However, this has been changed under the Lisbon Treaty in which any court can refer a question for preliminary ruling irrespective of its stage.

### **4.3 The implementations of the principle of Mutual Trust in the Private International law Regulation**

The principle of Mutual Trust plays an undeniable role in setting the scene to build, develop and enhance judicial cooperation in civil, commercial matters between the European Union member states by the adoption of uniform, binding and directly applicable rules between the member states governing matters of private international law. Such principle is implemented in the private international law instruments or instrument that is significantly important for the effective application of the private international law regulations such as the service of document regulation. The service of document regulation, the Brussels I regulation and the Brussels IIa Regulation will be examined respectively.

---

<sup>18</sup> Protocol No 22 on the position of Denmark annexed to the TEU and to the TFEU.

<sup>19</sup> In addition, according to article 7, Denmark is provided with an option 'to inform the other Member States that it no longer wishes to avail itself of all or part of this Protocol. In that event, Denmark will apply in full all relevant measures then in force taken within the framework of the European Union.' In 2016 however, a Danish referendum which proposed the change of opt out position was refused by 53% votes.

<sup>20</sup> TEU article 19/3(b) ;Court of Justice of The European Union, 'Recommendations to National Courts and Tribunals in Relation to the Initiation of Preliminary Ruling Proceedings' OJ C 338 (2012).

<sup>21</sup> TFEU article 267.

### 4.3.1 The Service of document Regulation

In the European Union, the service of documents was first governed by the 1965 Hague Convention on the Service of Documents.<sup>22</sup> However, pursuant to TFEU article 81/I, the latter convention was replaced by the 2000 service of document Regulation.<sup>23</sup> The latter was later amended by the 2007 Service of document Regulation.<sup>24</sup> It applies to all member states including Denmark by a parallel agreement.<sup>25</sup> It applies to service of judicial and extrajudicial documents from one member state to another in civil and commercial matters.<sup>26</sup> Like its predecessor, it seeks to improve and expedite the transmission of these documents for service between the Member States for the contribution of the proper functioning of the internal market.<sup>27</sup> It provides for different means of transmission such as the transmitting agencies and the receiving agency, postal service, direct service and diplomatic and counsel agents and Channels.<sup>28</sup>

The Service of document Regulation is seen as an implementation of the principle of mutual trust itself and as a significant ancillary instrument to other private international law instruments. It is one of the most significant Regulation in the context of judicial cooperation in the European Union and one of the most linked Regulation to the litigant's fundamental rights, particularly the right to a fair trial and the right of defence. This can certainly be seen in two particular situations. First, it covers the meaning of service of one of the most important document in the legal proceeding; the documents instituting the proceeding. The service of this document is essential to preserve both the defendant's right to a fair trial and his right of defence, and the right of the claimant

---

<sup>22</sup> Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

<sup>23</sup> Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, OJ L 160, 2000.

<sup>24</sup> Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation.

<sup>25</sup> See Agreement between the European Community and the Kingdom of Denmark on the service of judicial and extrajudicial documents in civil or commercial matters, OJ L 300/55, 17.11.2005 which entered into force on 1 July 2007.

<sup>26</sup> Council Regulation No 1393/2007 of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (The Service of documents Regulation), article 1.

<sup>27</sup> Ibid, recital 2, see also TFEU, article 81.

<sup>28</sup> The Service of documents regulation, article 4, article 12, article 13, article 14 and article 15

to have a judgment capable of being enforced.<sup>29</sup> It means that, there should be an actual service of documents in due time, which enables the defendant to be aware of proceeding in another member state and effectively and completely understand the subject matter and the scope of the action in such a way that to enable him to assert his right and prepare for his defence.<sup>30</sup>

Secondly, the Service Regulation has implications on other EU concepts of private international law that implement the principle of mutual trust such as the *lis pendens* and the mutual recognition. Failure to serve the documents instituting within the meaning provided for by the Regulation could put the judgment under serious risk of its non-recognition and enforcement.<sup>31</sup> According to recent evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments, failure to serve the document instituting the proceeding in a way that enables the defendant to ensure his right in sufficient time is seen as the most successful ground raised against the recognition and enforcement of Judgment according to article 34/2 of the Brussels I Regulation.<sup>32</sup>

On the other hand, the 2007 Service of document Regulation and its predecessor provide for other provisions, which attempt to bring a balance between a speedy transmission of document, and the addressee's right to a fair trial and his right of defence.<sup>33</sup> This can be seen for instance, in the defendant's right to refuse the document when it is not drafted or accompanied with a language in which he

---

<sup>29</sup> See by analogy, Consortium of European universities led by the MPI Luxembourg for Procedural Law as commissioned by the European Commission, 'An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law'

JUST/2014/RCON/PR/CIVI/0082.,p. 75

<sup>30</sup> *C-14/07, Ingenieurbüro Michael Weiss und Partner GbR v Industrie- und Handelskammer Berlin* [2008] ECR I-03367; *C-519/13 Alpha Bank Cyprus Ltd v Dau Si Senh and Others*[2015] ECLI:EU:C:2015:603; *Case C-354/15, Andrew Marcus Henderson v Novo Banco SA* [2017] ECLI:EU:C:2017:157.

<sup>31</sup> For further discussions, see Chapter 6

<sup>32</sup> Consortium of European universities led by the MPI Luxembourg for Procedural Law as commissioned by the European Commission (n30).

<sup>33</sup> *Weiss* (n30) para 47; *Alpha Bank* (n30) para 33; *C-384/14 Alta Realitat SL v Erlock Film ApS and Ulrich Thomsen* [2016] ECLI:EU:C:2016:316, para 51.

understands<sup>34</sup>, in the double date system<sup>35</sup>, in the acknowledgment of receipt<sup>36</sup> and in the protection to the default defendant.<sup>37</sup>

While it is true that in general, the Regulation rules ensure the parties' interest in the legal proceeding, the fact remains that it fails to address other procedural rules related to the service of documents. This can be seen for instance, in the failure to address the legal consequences of defective service or service by method not described under the Regulation.<sup>38</sup>As it will further be demonstrated, such omission not only produce uncertainty and hamper the essence of the right to fair trial and the right of defence, but also has serious implications on other implementation of the principle of mutual trust, which urge the need for further investigation.

#### **4.3.2 The Brussels I Regime**

The Brussels I Regulation is the dominant Regulation in the context of judicial cooperation between the EU Member States, governing rules of jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.<sup>39</sup> It has replaced the Brussels Convention and came into force on 1 March 2002. It is applicable to all member states including Denmark by parallel agreement.<sup>40</sup> Nevertheless, in order to further facilitate the free circulation of judgments and to enhance access to justice in the European Union,<sup>41</sup> The Brussels I Regulation was recast in 2012 (hereinafter the Brussels I Recast).<sup>42</sup> The latter applies to legal proceedings instituted and to court settlements approved or concluded on or after 10 January 2015.<sup>43</sup> It is applicable to all member states including Denmark by a parallel

---

<sup>34</sup> The 2007 Service of documents Regulation, article 8/1. For the CJEU case laws, see *C-519/13 Alpha Bank* (n 31) para 58; *C-384/14 Alta Realitat* (n 34) paras 74-75.

<sup>35</sup> *Ibid*, article 9

<sup>36</sup> *Ibid*, article 14

<sup>37</sup> *Ibid*, article 19.

<sup>38</sup> For more discussion, see chapter 6

<sup>39</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L 12, 16.1.2001(hereinafter the old Brussels I Regulation).

<sup>40</sup> Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 299, 16.11.2005

<sup>41</sup> Regulation (EU) No 1215/2012 OF The European Parliament And Of The Council Of 12 December 2012 On Jurisdiction and The Recognition And Enforcement of Judgments in Civil and Commercial Matters, OJ L 351

<sup>42</sup> *Ibid*

<sup>43</sup> The Brussels I Recast, article 66

agreement.<sup>44</sup> It should be noted that the interpretation of the European Court of Justice on the Brussels Convention and the Brussels I Regulation provisions continues to apply to the rule of the Brussel I Recast.<sup>45</sup>

The Brussels I recast and its predecessors provide uniform and predictable rules, which are directly applicable in all member states.<sup>46</sup> This is to ensure legal certainty in the legal proceedings.<sup>47</sup> The plaintiff knows where he could bring proceeding against the defendant whereas the defendant can foresee where he might be sued and defend his case.

Like its predecessors, The Recast adopts the defendant's domicile as the general principle of jurisdiction. According to article 4, the court where the defendant is domiciled will have general jurisdiction. Such court will have jurisdiction regardless of the defendant's nationality to ensure predictability and foreseeability for both litigants in the proceeding.<sup>48</sup> In addition, the Recast provides for other grounds of jurisdiction where member state courts other than the court of the place of domicile can have jurisdiction when a close connection between the court and the action exists or when the proper administration of justice required so.<sup>49</sup> For instance, in matters related to a contract, the court for the place of performance of the obligation in question will have jurisdiction.<sup>50</sup>

In addition, the Recast also covers situations where the member state court can have an exclusive jurisdiction either by the jurisdictional rules or by the existence of an exclusive choice of court agreement. In the first criteria, the court shall have jurisdiction regardless of the defendant domicile and irrespective of the defendant's submission to the jurisdiction of another member state court.<sup>51</sup> One example is 'in proceedings which have as their object rights in rem in immovable property or tenancies of

---

<sup>44</sup> Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 79, 21.3.2013, 2013.

<sup>45</sup> The Brussels I Recast, Recital,34

<sup>46</sup> Ibid, Recital 6

<sup>47</sup> Case C-281/02, *Andrew Owusu v N. B. Jackson* [2005] ECR I-01383

<sup>48</sup> The Brussels I Recast Recital 4 and Recital 15; see also Jenard Report, c59/14.

<sup>49</sup> Ibid, recital 16

<sup>50</sup> Ibid, article 7/1

<sup>51</sup> Ibid article 24 and article 26.

immovable property, the courts of the Member State in which the property is situated' will have jurisdiction.<sup>52</sup>

In the second criteria, a specific member state's court can have exclusive jurisdiction by the parties' choice. The choice of court agreement is an agreement concluded between the parties that a specific member state court or courts will have jurisdiction to decide on disputes that have arisen or may arise in the future.<sup>53</sup> This court will have an exclusive jurisdiction unless the parties agreed otherwise.<sup>54</sup> In addition, the EU member state court will have exclusive jurisdiction irrespective of the parties' domicile.<sup>55</sup>

The explicit implementations of the principle of mutual trust provided for by the Brussels I Recast can mainly be seen in the *lis pendens* rules and in the principle of mutual recognition.

#### **4.3.2.1 The *lis Pendens* rules**

The Brussels I recast provides for the *lis pendens* rules, a mechanism intends to prevent or at least minimise the possibility of parallel proceedings occur in number of member states courts and thereby reducing the situations of irreconcilable judgment given in these member states.<sup>56</sup> Article 29 states that

Without prejudice to Article 31(2), where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established' If the jurisdiction was established, the second seised court is under an obligation to decline its jurisdiction.

---

<sup>52</sup> *ibid* article 24/1

<sup>53</sup> *ibid.* article 25.

<sup>54</sup> *ibid.*

<sup>55</sup> *ibid.* this is one of new amendments provided for by the Brussels I Recast. According to Brussels I Regulation 2000, article 23, one of the parties must be domiciled in an EU member state.

<sup>56</sup> The Brussels I Recast , Recital 21;c-144/86, *Gubisch Maschinenfabrik KG v Giulio Palumbo*[1987] ECR 04861, para 8 .

The *lis pendens* rules are based on the principle of mutual trust, which supports a presumption of member state's compliance with fundamental rights. The second seised court stays its proceeding based on the trust that the first seised court has organised its justice system in such a way that reflect the respect of the right to effective judicial protection and thereby will determine its jurisdiction within a reasonable time. However, a question which needs to be answered is to what extend the presumption of compliance should apply particularly when the first seised court has a black history of infringing this right in particular the reasonable time requirement? According to the ECtHR statistics, Italy was the highest number state violating the right to a fair trial in particular with regards dealing with the issue within a reasonable time.<sup>57</sup> it shows that problems actually exist with regards member states' obligation to respect the rule of law and fundamental rights.

The matter was seen in *Erich Gasser GmbH V Misat Srl*<sup>58</sup> one of the most controversial cases in the European area in particular regards to the relationship between the principle of mutual trust, the compulsory application of the Regulation and preserving fundamental right. The case was decided in the context of interpreting the Brussels Convention rules, which continued to apply to the Brussels I Regulation<sup>59</sup> prior to its recast. The CJEU was essentially asked to examine whether the *lis pendens* rules applies even when there is a choice of court agreement designating a court other than the first seised court and also whether such rules still applies even if the first seised court takes excessively long time to rule on its own jurisdiction. The CJEU answered the questions in the affirmative and held that that the chosen court second seised court whose jurisdiction has been claimed under a choice of court agreement must nevertheless stay proceedings until the court first seised has declared that it has no jurisdiction."<sup>60</sup> In addition, the *lis pendens* rule will still apply and cannot be derogated from even when the duration of proceedings before the court first seised is excessively long.<sup>61</sup> In other words, an excessive length of proceeding in the member state of court first seised is not a reason to prevent or freeze the operation of *Lis pendens*. The Court

---

<sup>57</sup> European Court of Human Rights Statistics, Violation by Article and by State 1959-2015' <[https://www.echr.coe.int/Documents/Stats\\_violation\\_1959\\_2015\\_ENG.pdf](https://www.echr.coe.int/Documents/Stats_violation_1959_2015_ENG.pdf)>.

<sup>58</sup> Case C-116/02 [2003] ECR I-14693.

<sup>59</sup> The old Brussels I Regulation, recital 19

<sup>60</sup> Case C-116/02 (n 59) para 54

<sup>61</sup> *Ibid* para 73

justified its decision by relying on the legal certainty that allows the individual to foresee which court is to have jurisdiction<sup>62</sup> and more importantly on the principle of Mutual Trust. According to the CJEU( formally ECJ),

The Brussels Convention is necessarily based on the trust which the Contracting States accord to each other's legal systems and judicial institutions. It is that Mutual Trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of judgments.<sup>63</sup>

This decision means that upholding the principle of Mutual Trust prevails even if there is a choice of court agreement between the parties and even if the first seised court is well known of its length of proceeding to deal with the cases. This decision as Professor Hartley describes it “puts the desirability of maintaining good relations among the contracting states above that of doing justice to the parties.”<sup>64</sup> It attracts and encourages litigants with bad faith to take advantage of member state’s reputation having slow moving proceeding, like Italy, combined with the strict function and operation of *lis pendens*, to delay the execution of judgment as far as possible. This combination is called “the Italian Torpedo” as being introduced by Professor Mario Franzosi with regard of patent infringements actions.<sup>65</sup>

The previous judgment was faced with much criticism and was taken into account while reforming the regulation. Rightfully, the New Brussels I recast now provides an exception to the general rule of *lis pendens* to enhance the effectiveness of exclusive choice of court agreement. The non-designated court, which was seised first, should stay its proceeding as soon as the designated court has been seised and until the

---

<sup>62</sup> Ibid para 72

<sup>63</sup> Ibid para 72

<sup>64</sup> Trevor C Hartley, *International Commercial Litigation Text, Cases and Materials on Private International Law* (5th edn, Cambridge University Press 2013) p 258.

<sup>65</sup> Mario Franzosi, ‘Worldwide Patent Litigation and the Italian Torpedo’ (1997) 19 *European Intellectual Property Review* 382

<<https://uk.westlaw.com/Document/IB832E090E72111DA9D198AF4F85CA028/View/FullText.html>>.

latter court declares that it has no jurisdiction under the exclusive choice-of-court agreement.<sup>66</sup> More importantly, the designated court would be able to proceed irrespective whether the first seised court which is not designated in the agreement has stayed the proceeding.<sup>67</sup>

However, the Brussels I recast fails to provide a remedy, which could solve the situation where the first seised court take an excessively long time to decide on its own jurisdiction. This approach was taken notwithstanding the Commission suggestion for a direct communication between the courts seised combined with a deadline in which the first seised court should rule on its own jurisdiction.<sup>68</sup>

This means that the problem is not yet solved and a consideration of the most appropriate solution, which can prevent or at least minimize its negative effect is needed. This is because the existence of such situation collide with the actual meaning of the principle of mutual trust, which require member states to organise their justice systems in such way that respect, observe and promote fundamental rights and particularly the right to an effective judicial protection.<sup>69</sup> Here, on one hand, the first seised court would be liable for infringing the right to a fair trial within a reasonable time .On the other hand, the second seised court would also be liable for violating that right for staying its proceeding for a long in favor of the first seised court.<sup>70</sup> On the other hand, failure to include a solution for such situation conflicts with the fact that the Brussels I recast, should also be inconformity with the right to effective remedy, an essential element of the right to effective judicial protection.<sup>71</sup>

#### **4.3.2.2 Mutual recognition**

The matter of recognition and enforcement of judgments in civil and commercial matters between the Member States was first governed by the Brussels Convention.

---

<sup>66</sup> The Brussels I Recast, recital 22

<sup>67</sup> *ibid*

<sup>68</sup> The Commission, 'Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters' COM/2009/0175 Final (2009).

<sup>69</sup> For more discussion, see chapter 2.

<sup>70</sup> See by analogy ECtHR, *Kutic v Croatia* (2002) application no 48778/99.

<sup>71</sup> The Brussels I recast, recital 38

As noted above, it aimed at facilitating the common market between the member state of the EEC by the adoption of the jurisdictional rules and eliminating as far as possible difficulties concerning the recognition and enforcement of judgment in civil and commercial matters.<sup>72</sup> The entry into force of the Amsterdam Treaty where it constitute an area of freedom, security and justice has led to organise meeting and programs. One of the most remarkable meeting held at the European level was the Tampere conclusions.<sup>73</sup> It declared that mutual recognition should be the cornerstone of judicial cooperation in civil and criminal matter in the Union.<sup>74</sup> In addition, further abolition of the intermediate measures such as the exequatur was seen as a step toward to achieve mutual recognition between the member states.<sup>75</sup> The exequatur “is a formal court procedure by which a foreign judgment is declared enforceable in the state where enforcement is sought.”<sup>76</sup> It was further seen as a way to the enhancement of free circulation of judgments throughout the European Union.<sup>77</sup>

The principle of Mutual Recognition was explicitly endorsed in TFEU as a way to facilitate access to justice and that the adoption of measures covering judicial cooperation matter having cross border implication should be based on the principle of mutual recognition.<sup>78</sup>

The mutual recognition is incorporated in number of EU regulations such as the Brussels I recast. The latter Regulation explicitly linked the principle of mutual trust and the mutual recognition by stating that ‘mutual trust in the administration of justice justifies that judgments given in a Member State should be recognised in all Member States without the need for any special procedure.’<sup>79</sup> The latter principle justifies the abolition of the declaration of enforceability (the exequatur)<sup>80</sup> and even precludes the

---

<sup>72</sup>*c-398/92 Mund* (n 4) para 11.

<sup>73</sup> The Tampere Conclusions.

<sup>74</sup> *Ibid* para 33

<sup>75</sup> *ibid*

<sup>76</sup> The European Commission, ‘Impact Assessment Accompanying Document To The Proposal For A Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters COM (2010) 748 Final, Annex I Glossary of legal term [45].

<sup>77</sup> The Commission, ‘Draft Programme of Measures for Implementation of the Principle of Mutual Recognition of Decisions in Civil and Commercial Matters OJ C 12, 15.1.2001’ (2001).

<sup>78</sup> TFEU, article 67 and article 81.

<sup>79</sup> The Brussels I Recast, recital 26

<sup>80</sup> *Ibid*

court where enforcement is sought to review on the judgment's substance and the jurisdiction of the court of origin.<sup>81</sup> The latter examples, which require a high level of trust between the member states, are possible only when there has been observance of the rule of law and fundamental rights by the court of origin.

However, possible infringement of the fundamental rights can and has been found by the member states of origin. This is why the Brussels I recast at the same time retains grounds for non-recognition. For instance, the judgment shall not be recognised if it is manifestly contrary to the public policy in the member state where the enforcement is sought, or if the judgment was given in default of appearance due to insufficient service of document or in case of irreconcilability of judgments.<sup>82</sup> The Brussels I Recast rightfully abandoned the suggestion made in the mutual recognition programme to limit the grounds that can be raised for non recognition and enforcement, such as the removal of public policy.<sup>83</sup> Having regard to the foregoing, the approach adopted by the Brussels I Recast is to be welcomed since it affirms the importance of the fundamental rights as key requirement for the actual meaning of the principle of mutual trust and that an absolute presumption of compliance is not acceptable.<sup>84</sup>

Nevertheless, the implementation of the principle of mutual trust at the stage of recognition and enforcement could cause problems related to the rule of law and fundamental rights. For example, the recourse to the public policy ground is limited to cover only a manifest breach of rule of law and fundamental rights. In *Krombach v Bamberski*, the CJEU held that public policy exception can be used 'only where recognition or enforcement of the judgment delivered in another Contracting State

---

<sup>81</sup> Jenard Report, states : "The absence of any review of the substance of the case implies complete confidence in the court of the State in which judgment was given; it is similarly to be assumed, that that court correctly applied the rules of jurisdiction of the Convention."; see also, *Opinion 1/03 Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments, in civil and commercial matters*[2006] ECR I-01145 para 106; *C-456/11, Gothaer Allgemeine Versicherung AG and Others v Samskip GmbH* [2012] ECLI:EU:C:2012:719 para 35.

<sup>82</sup> The Brussels I Recast, article 45

<sup>83</sup> 'Draft Programme of Measures for Implementation of the Principle of Mutual Recognition of Decisions in Civil and Commercial Matters (n 78).

<sup>84</sup> The Brussels I Recast, Recital 29 it states "the direct enforcement in the member state addressed of a judgment given in a member state without a declaration of enforceability should not jeopardise the respect for the right of defence."

would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle.<sup>85</sup>

### 4.3.3 The Brussels Ila Regulation

The Brussels Ila Regulation concerns with jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility. It was adopted in 27 November 2003 and applied starting from 1 March 2005.<sup>86</sup> It replaced the Brussels II Regulation<sup>87</sup>

When the child is habitually resident in the territory of a member state, the Brussels Ila Regulation take precedence over The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (hereinafter the Hague Convention 1966)<sup>88</sup>, that covers the same scope and subject matter which all the EU Member State has ratified and entered into force.<sup>89</sup> It also takes precedence when it concerns the recognition and enforcement of a judgment given in a member state on the territory of another EU Member State irrespective of the child being habitually resident in a third state which is a contracting state of the Hague Convention 1966.<sup>90</sup>

The principle of Mutual trust has created a regulation in which the jurisdiction grounds are based on the best interest of the child, in particular the criterion of proximity<sup>91</sup> and that the best interests of the child must come first.<sup>92</sup> An explicit implementation of the

---

<sup>85</sup> *c-7/98 Dieter Krombach v André Bamberski*[2000] *ECRI-01935 para 37*.

<sup>86</sup> Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000. OJ L 338(hereinafter the Brussels Ila Regulation)

<sup>87</sup> Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses [2000] OJ L 160 2000.

<sup>88</sup> Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children

<sup>89</sup> Italy was the last EU member state which ratified the Hague Convention that entered into force on 1 January 2016.

<sup>90</sup> The Brussels Ila Regulation article 61.

<sup>91</sup> Brussels Ila Regulation, Recital 12

<sup>92</sup> *Case C-195/08 PPU Inga Rinau* [2008] ECR I-05271, para 51.

principle of mutual trust in this regulation is the mutual recognition and enforcement of judgments.

#### **4.2.3.3 Mutual recognition in the Brussels Ila Regulation**

The principle of mutual trust is reflected in the stage of recognition and enforcement of judgment. A judgment given in a Member State court should be recognized in other Member States without the need for any special procedure.<sup>93</sup> Hence, neither the jurisdiction of the Member State court nor the substance of the judgment are subject to a review by the member state court where enforcement is sought.<sup>94</sup>

The reflection of the principle of mutual trust at this stage in family matters is even stronger than the Brussels I Recast. For example, grounds for non recognition and enforcement of a judgment in matrimonial matters and parental responsibility exist, those grounds should be kept in minimum required to enhance the principle of mutual trust.<sup>95</sup>

Significantly, the objective of promoting the principle of mutual trust in the stage of recognition and enforcement was even taken further in certain types of judgments such as the rights of access and return of child decisions. Following the Tampere conclusions<sup>96</sup>, those decisions are automatically recognised without the need for the exequatur and without any possibility of raising grounds for non-recognition before the Member State court where enforcement is sought, when the certificate was issued satisfying certain conditions.<sup>97</sup> This certificate is also not subject to appeal to ensure the effectiveness of the Regulation's provision not to be undermined by the abuse of procedure.<sup>98</sup> The justification to abolish the exequatur and opposition of rising any grounds for non recognition ,for example in cases of the return of child is the immediate return of the child who was unlawfully abducted or removed from the country where he habitually resident.<sup>99</sup> At these cases, the Member State court where the

---

<sup>93</sup> The Brussels Ila Regulation, article 21.

<sup>94</sup> *ibid* article 24 and article 26; *Case c-4/14 Christophe Bohez v Ingrid Wiertz [2015]* ECLI:EU:C:2015:563 para 52

<sup>95</sup> *ibid*, recital 21.

<sup>96</sup> The Tampere meeting , para 34

<sup>97</sup> The Brussels Ila Regulation, article 41/1 and article 42/1

<sup>98</sup> *Inga Rinau* (n 93) para 85.

<sup>99</sup> *Ibid* para 63

enforcement is sought can do no more than to declare that the judgment by the member state court of origin is enforceable.<sup>100</sup>

These examples are based on the principle of mutual trust, which presumed that the member state court of origin is in conformity with the rule of law, and fundamental rights when deciding on the case and when issuing the certificate. However, what would then happen if the court of origin judgment consist of serious infringements of fundamental rights and that the certificate contains a declaration, which is manifestly inaccurate? Can the Member State court where the enforcement is sought exceptionally be empowered to review the judgment of the Member State court of origin and refuse its recognition and enforcement in this situation? These questions were considered in *Joseba Andoni Aguirre Zarraga v Simone Pelz* where it was argued that the child was not heard in the court of origin.<sup>101</sup> The CJEU held that the Member state Court where the enforcement is sought can do no more than declare that the judgment which was certified is enforceable. The latter court is also precluded to review the conditions for issuing the certificate.<sup>102</sup> The basis of the Court's decision was that the enforcement of return of child decision needs to be quick and without delay.<sup>103</sup> In addition, the Court explained that the child's right to have an opportunity to be heard does not impose an absolute obligation on the court of origin and that the court should assess whether such hearing is appropriate for the interest of the child.<sup>104</sup> Significantly, it also justified its finding on the principle of Mutual Trust which is based on the presumption of the member state's compliance with fundamental rights as enriched in the European charter of Fundamental rights.<sup>105</sup>

The judgment showed us the true meaning of a blind mutual trust between the member states. The Member State where the enforcement is sought has to blindly enforce such judgment even if it was clear to see that the court of origin infringe fundamental rights in its judgement and the best interest of the child and that the observance of its rights enriched in the Charter must prevail. This is a dangerous as it collide with the right to

---

<sup>100</sup> *Case C-211/10 PPU Doris Povse v Mauro Alpago* (n 19).Case c-211/10 PPU[2008] ECR I-05271, para 73 ; *Inga Rinau*(93) para 89

<sup>101</sup> *C-491/10* [2010] ECR I-14247.

<sup>102</sup> *Ibid* paras 49 and 54.

<sup>103</sup> *Ibid* paras 45-47

<sup>104</sup> *Ibid* para 64

<sup>105</sup> *Ibid* para 59

effective judicial protection as a general constitutional principle of the EU and that the application of mutual trust shall not, in all times, leads to undermine the essence of the right itself.

#### **4.2.3.4 The new Brussels Ila Regulation**

On 2 July 2019, in order to develop an area of justice based on the principle of mutual trust, the Brussels Ila Regulation was recently amended (hereinafter the new Brussels Ila Regulation).<sup>106</sup> The new Regulation explicitly confirmed that mutual trust in the administration of justice justifies the recognition of a judgment without any special procedure.<sup>107</sup> In addition, the *exequatur* for decisions on parental responsibility is abolished while maintaining the grounds for non-recognition and enforcement.<sup>108</sup> Importantly, the new regulation imposes an explicit obligation to give the child an opportunity to express his or her views in all cases of parental responsibility, but leaves the member State decides on how to hear a child.<sup>109</sup>

However, the explicit obligation to give the child an opportunity to express his or her view could be a false hope in respect with access rights and the return of child decisions. For instance, This can be seen by the explicit preclusion of application of the public policy, when the child's right to express his or her views was not conducted in such way that could ensure his rights.<sup>110</sup> This could means that *Joseba Andoni Aguirre Zarraga v Simone Pelz* could, to some extent, be still into play.

#### **4.3. The negative implications of the principle of mutual trust on other private international law norms**

The principle of mutual trust led to the rejection of other norms of private international law, namely the anti-suit injunction and the *forum non conveniens*.

---

<sup>106</sup> Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, OJ L 178, 2.7.2019.

<sup>107</sup> Ibid, article 30

<sup>108</sup> Ibid, article 39

<sup>109</sup> Ibid recital 57

<sup>110</sup> ibid

#### 4.3.1 The Rejection of form non-conveniens doctrine

The doctrine of *Forum non conveniens* allows the court to stay its proceeding if it is satisfied that there is another available forum which is the appropriate forum to deal with the case if it is in the interest of all the parties and the end of justice.<sup>111</sup> The application of the doctrine of *Forum non-conveniens* in the European Union level was questioned in *Andrew Owusu v N. B. Jackson*.<sup>112</sup> The questions referred to the CJEU were whether a court of a member state could decline its jurisdiction in favour of non EU Member state court on the basis of *forum non conveniens* even if the jurisdiction of no other Member State is in issue or the proceeding have no connecting factors with any other Member States. In addition, the court was asked whether the Member State court can apply the doctrine where there is already pending proceeding identical or related to the proceeding in the member state court.

In answering the first question, the CJEU generally examined the compatibility of *forum non conveniens* with the Brussel Convention. it held that the Brussels Convention precludes the Member State's court from declining its jurisdiction on the basis of *forum non conveniens* even when the jurisdiction or the proceeding of no other member states are in issue.<sup>113</sup> It reached its conclusion by relying on the mandatory nature of article 2(defendant domicile) inherited from the compulsory system created by the principle of mutual trust.<sup>114</sup> In addition, it based its decision on the respect of legal certainty as one of the Brussels Convention objectives which would not be achieved if the court of a member state is empowered with the discretion to refuse its jurisdiction.<sup>115</sup>

As for the second question, where there is already pending proceeding in the non-member state court identical or related to the Member's States proceeding, the CJEU refused to answer, since it is a hypothesis question, which is not applicable to the current case.<sup>116</sup> Having regard to the foregoing, the principle of mutual trust was indirectly used to justify the abandonment of the doctrine of forum non conveniens even when no member states court are involved.

---

<sup>111</sup> *Spiliada Maritime corporation v. cansulex*, House of Lords [1987] AC 460

<sup>112</sup> Case C-281/02 ECR [2005] ECR I-01383

<sup>113</sup> Ibid para 46

<sup>114</sup> Ibid para 37, as regards to the principle of Mutual Trust and its effect on the creation of compulsory system, the Court referred to paragraph 72 of *Gasser*.

<sup>115</sup> Ibid para 38

<sup>116</sup> Ibid para 50

The *Andrew Owusu v N. B. Jackson* was one of the most important cases that had the impact of modifying the Brussels Regulation provisions. The Brussels I recast has now answered the hypothesis question addressed in the case and empowers the Member State court to use discretion to stay its proceeding in favour of a pending proceeding in a non-state court.<sup>117</sup>

On other hand however, it is interesting that the Brussels I recast fails to address the operation of doctrine of forum non conveniens between the member states. In this respect, a question which needs to be asked is whether the doctrine of forum non conveniens, or a similar discretionary tool, that empowers the court to stay or transfer its proceeding in favor of another member state court which is better placed to hear the case can be used as a possible implementation of the principle of mutual in the context of the European Union. As it will be further demonstrated in chapter 7, forum non conveniens not only preserve the rights of the parties and minimise a situation of forum shopping<sup>118</sup> but it is also consistent with the principle of mutual trust.<sup>119</sup>

#### **4.3.2 The refusal of an anti- suit injunction**

An anti-suit injunction is an injunction aimed at restraining a party from commencing or pursuing legal proceeding in a foreign jurisdiction.<sup>120</sup> In *Turner v Grovit*<sup>121</sup> the CJEU once again confirmed its view on upholding the principle of Mutual trust and precluded the grant of anti-suit injunction even if this party is acting in a bad faith to frustrate the existing proceeding.<sup>122</sup> In addition, in *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc*, the CJEU refused the grant of an anti-suit injunction even if it was issued in support of an arbitration agreement, a matter excluded from the scope of the regulation and that the first seised court has the power to rule on its own jurisdiction.<sup>123</sup>

---

<sup>117</sup>Ibid, article 33.

<sup>118</sup> See by analogy, *CC v NC* [2014] EWHC 703 (Fam) para 14.

<sup>119</sup> See chapter 7.2.3

<sup>120</sup> *Societe nationale industrielle Aerospatiale v. Lee Kui JAK*[1987] AC 871

<sup>121</sup> *C-159/02 Gregory Paul Turner v Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA*[2004] ECR I-3565.

<sup>122</sup> Ibid 31

<sup>123</sup> Case C-185/07 [2009] ECR I-00663

## 4.4 Conclusions

It has been seen that the principle of Mutual Trust plays an undeniable role in setting the scene to build, develop and enhance judicial cooperation in civil, commercial matters between the European Union member states by the adoption of uniform, binding and directly applicable rules between the member states governing matters of private international law. Significantly, explicit implementations of the principle of mutual trust can be seen in private international law Regulations such as the *lis pendens* rules, and mutual recognition. These implementations, nevertheless, shows that it could cause some problems being incompatible with fundamental rights and rule of law in which the member states are presumed to comply with.

On the other hand, the principle of mutual trust had negative implications on other norms of private international law known in the common law systems mainly the anti-suit injunction and forum non conveniens. It is shown that the litigant is precluded from the recourse to it to even if was to stop a bad faith litigant.

The results of this chapter calls for more in depth analysis, which will be undertaken in the next chapters. It will also examine how to reform those reflections in such way that would be compatible with the rule of law and fundamental right. This is because the principle of mutual trust should not be used as justification to infringe the rule of law and fundamental rights. It is that rule of law and fundamental rights which enable the possibility to have the principle of mutual trust, which give the power to establish an area of freedom, security and justice and thereby the power to adopt uniform rules of Private International Law.

## Chapter 5 The Implementation of the principle of Mutual Trust in the jurisdictional stage: Lis pendens

### 5.1 Introduction

The purpose of this Chapter is to examine lis pendens rules, as an expression of the principle of mutual trust in in the Brussels I Regulation. it is a mechanism intended to prevent or minimise the situation of concurrent proceedings situated in two different Member States' courts, involving the same cause of action and the same parties, and to minimise the risk of conflicting decisions and thereby the risk of its non-recognition.<sup>1</sup> The rule of law and the right to a fair trial, as an essential component of the rule of law, require the court to take into consideration pending proceeding in another court to ensure proper treatment for the parties.<sup>2</sup> Moreover, its significance lies in preventing or limiting conflicting judgments, which might collide with the effect of res judicata in the future.<sup>3</sup>

Significantly, the lis pendens rule is an evident expression of the principle of mutual trust. The second seised court would stay its proceeding, on its own motion, based on trust that the first seised court is capable of ruling on its own jurisdiction, in such a way that complies with the right to judicial protection and particularly the right to a fair trial within a reasonable time, as crucial requirement underlying the principle of mutual trust.

Therefore, this chapter is divided into eight substantive sections. Section 2 provides preliminary remarks on the meaning of the lis pendens and its importance as specified by the CJEU jurisprudence. Section 3 examines the date the court is deemed to be seised. It is essential since it defines the courts' rights and obligations<sup>4</sup>, as will further be seen. Here, the interaction between the Service of document Regulation and the

---

<sup>1</sup> The Brussels I Regulation Recast, recital 21; *C-144/86, Gubisch Maschinenfabrik KG v Giulio Palumbo*, [1987] ECR 04861, para 8; *C-352/89, Overseas Union Insurance Ltd and Deutsche Ruck UK Reinsurance Ltd and Pine Top Insurance Company Ltd v New Hampshire* [1991] ECR I-03317, para 16; *C-116/02, Erich Gasser GmbH v MISAT Srl* [para 41].

<sup>2</sup> Campbell C Maclachlan, *Lis Pendens in International Litigation*, Vol 336, (Collected Courses of the Hague Academy of International Law, The Hague Academy of International Law 2009) 82-83.

<sup>3</sup> *ibid*

<sup>4</sup> Adrian Briggs, *Civil Jurisdiction and Judgments* (6th edn, Abingdon : Informa Law from Routledge 2015) 307.

lis pendens rules is examined. The Service of document Regulation plays a pivotal role, being an implementation of the principle of mutual trust itself in the one hand, and being an ancillary instrument to the Brussels I Regulation on the other hand.

Section 4 examines the requirements of the lis pendens, particularly the same cause of action and the same parties. Similar to the date of court seising section purpose, defining the lis pendens requirements will define the obligation of the courts dealing with the case whether it could stay or oblige to stay its proceeding. In addition. Section 5 examines the rules of the related actions as provided for by the EU Regulations.

On the other hand, Section 6 explores the lis pendens rules function when the second seised court has exclusive jurisdiction. As it will be seen, the application of the lis pendens rules can be paralyzed when the second seised court has exclusive jurisdiction either by the jurisdictional rules in subsection 6.1 or by the existence of an exclusive choice of court agreement in subsection 6.2. Evidently, sub-section 6.1.2 examines the lis pendens in the Hague Convention on the choice of court agreement, which entered into force to all EU member states, except Denmark, its interaction with the EU regulations and possible complications.

On the other hand, in section 7, the Chapter examines the function of the lis pendens when the second seised court takes excessively long to rule on its own jurisdiction. It is essential because the principle of mutual trust in the CJEU understanding can evidently be seen in this stage. It will be seen that according to the CJEU, the second seised court will be obliged to stay its proceeding even if the first seised court takes years to decide on its own jurisdiction. The Chapter proposes possible solutions that could prevent or minimise its negative effect on the right to judicial protection, subsection 7.1. Finally, in section 8, the Chapter looks at the consequences if lis pendens was not respected. For instance, will a judgment given contrary to the lis pendens rules be recognised and enforced?

## **5.2 The meaning of lis pendens, its purpose, and significance**

The lis pendens rule was first adopted under the Brussels Convention. According to article 21,

Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion

decline jurisdiction in favor of that court. A court which would be required to decline jurisdiction may stay its proceedings if the jurisdiction of the other court is contested.

However, the latter was subject to a subsequent amendment<sup>5</sup> until it reached its current version under the Brussels I Recast. In principle<sup>6</sup>, according to article 29/1 of the Brussels I recast,

Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

Such rules should, in principle, be interpreted broadly. Consequently, it applies irrespective of the parties' domicile, meaning that it applies regardless of whether the court will base its jurisdiction in accordance with the rules provided for by the Regulation or by the national law.<sup>7</sup> In addition, the lis pendens rule applies irrespective of the procedural nature of the claim, even if the claim has taken the shape of a negative declaration.<sup>8</sup> On the contrary, the lis pendens rules will not be applicable when it involves proceedings between two Member States' courts related to recognising and enforcing a judgment from a non-EU Member State's court.<sup>9</sup>

Furthermore, the application of lis pendens rules is extended to specific conventions concluded between the member states that regulate rules of jurisdiction and

---

<sup>5</sup> According to the Amended Convention, 'the second seised court shall of its own motion stay its jurisdiction until such time as the jurisdiction of the first seised court is established.' See article 21 of the Brussels Convention as amended by article 8 of the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic. This article was adopted in the Brussels I Regulation prior to its recast. The Brussels I Regulation article 27.

<sup>6</sup> It will be seen later that The Brussels I Regulation Recast provides for an exception to the general rule which concerns with the relationship between the application of lis pendens and exclusive choice of court agreement.

<sup>7</sup> *Overseas Union Insurance Ltd* (n 1), para 16. This is related to the fact that the recognition and enforcement of judgment between the EU member states which the lis pendens seeks to achieve, does not require that the jurisdiction of the court to be based on the Regulation, see to this respect, Fentiman R, *International Commercial Litigation* (second edi, Oxford University Press 2015) 11.18.

<sup>8</sup> Lord Collins of Mapesbury (ed), *Dicey, Morris and Collins on The Conflict of Laws* (Fifteenth, Sweet & Maxwell - Thomson Reuters).

<sup>9</sup> *C-129/92, Owens Bank Ltd v Fulvio Bracco and Bracco Industria Chimica SpA*[1994]ECR I-00117, para 37.

recognition and enforcement when such Convention does not cover specific *lis pendens* rules.<sup>10</sup> If the Convention provides for specific rules of *lis pendens*, the application of the Convention and particularly those rules are subject to its compatibility and conformity with the principles and objectives underlying judicial cooperation in civil and commercial matters, such as the principle of mutual trust, the predictability and legal certainty and the assurance of the free movement of judgments.<sup>11</sup> In other words, this means that the convention rules will be disregarded if their application will amount to a violation and an infringement of the main objectives and principles on which the Brussels I system is based.

We shall examine in-depth the date the court is deemed to be seised and the *lis pendens* requirements.

### **5.3 The Date of court seising**

Defining the moment in which the court is deemed to be seised is essential since it defines the rights and obligations of the seising courts.<sup>12</sup> If the court in a member state is considered to be seised first, the court will have the right to rule on its own jurisdiction in the proceeding before it. At the same time, it is under an obligation to refrain from staying its proceeding in favour of another court.

If, on the other hand, the court was considered to be second seised in accordance with the previous provision, the second seised court will then need to conduct an examination to see whether or not it is obliged to stay its proceeding in accordance with the *lis pendens* Security rules or have the discretion to stay under the related actions.

The matter in question was whether the Member State's court is considered to be seised of proceeding by the time the document instituting the proceeding was lodged with the court or by the time of service of that document on the defendant. Prior to adopting the Brussels I Regulation, the Brussels Convention provides no mechanism, which determines the time in which the court should be deemed to be seised.

---

<sup>10</sup>Case C-406/92 *The owners of the cargo lately laden on board the ship 'Tatry' v the owners of the ship 'Maciej Rataj'* [1994] ECR I-05439, para 25 .

<sup>11</sup> C 533/08, *TNT Express Nederland BV v AXA Versicherung AG* [2010] I-04107, para 49; c-452/12, *Nipponkoa Insurance Co (Europe) Ltd v Inter-Zuid Transport* [2013] , para 36-38.

<sup>12</sup>Briggs, *Civil Jurisdiction and Judgments* (n 4) 307.

Nevertheless, the CJEU in *Zelger v Salinitri*<sup>13</sup> had provided some guidance in this context. The CJEU provides that 'the court first seised is the one before which the requirements for proceedings to become definitively pending are first fulfilled, such requirements to be determined in accordance with the national law of each of the courts concerned.'<sup>14</sup> In other words, the time the court is to be seised should be determined according to each member states' domestic law.

Under the current position, The Brussels I regime adopted a more explicit approach than the CJEU interpretation. Article 32 of the Brussels I Recast is read as follows:

"For the purposes of this Section, a court shall be deemed to be seised:

(a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the claimant has not subsequently failed to take the steps he was required to take to have service effected on the defendant; or

(b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the claimant has not subsequently failed to take the steps he was required to take to have the document lodged with the court.

The authority responsible for service referred to in point (b) shall be the first authority receiving the documents to be serve.

2. The court, or the authority responsible for service, referred to in paragraph 1, shall note, respectively, the date of the lodging of the document instituting the proceedings or the equivalent document, or the date of receipt of the documents to be served."

The new provision provides an autonomous meaning when the court is deemed to be seised and recognises the variation in each Member State's procedural rules. It means that the court will be seised for the purposes of *lis pendens*, either by lodging the document or the authority receipt of the document, provided that the applicant has not subsequently failed to take steps he is required to take to have the service effected on the addressee or to have the document lodged with the court.<sup>15</sup> In addition, the

---

<sup>13</sup> *Case 129/83 Siegfried Zelger v Sebastiano Salinitri* [1984] ECR 02397.

<sup>14</sup> *ibid* para 15–16.

<sup>15</sup> *C-173/16 MH v MH* [2016] ECLI:EU:C:2016:542 ,para 28.

document instituting the proceeding will be lodged within the meaning of this provision, even if under the domestic law lodging the document does not in itself immediately initiate the proceeding.<sup>16</sup>

We shall now examine the situations in which the court is deemed to be seised, mainly the document instituting the proceeding or an equivalent document is lodged with the court and, if the document has to be served before lodging to the court, at the time when it is received by the authority responsible for service.

**5.3.1 At the time when the document instituting the proceedings or an equivalent document is lodged with the court or, if the document has to be served before lodging to the court, at the time when it is received by the authority responsible for service**

According to article 32/1(a) of the Brussels I Recast the court shall be deemed to be seised in a Member State at the time the document instituting the proceedings or an equivalent document is lodged with the court.<sup>17</sup> This requirement was further explained by the CJEU in *M.H v M.H* in the context of the Brussels IIa Regulation. The CJEU explicitly states that such provision does not require the fulfillment of two acts, namely lodging the documents to the court, and effective service on the defendant. Only one act is required which is lodging the document to the court.<sup>18</sup> Lodging the document to the court will render the court seised, so long as the claimant has not subsequently failed to take the steps he was required to take to have service effected on the respondent. The English court for instance, would be seised on issue and not the service provided that the applicant did not failed to take steps required to have the service effected.<sup>19</sup>

On the other hand, The court shall also be deemed to be seised, if the document has to be served before lodging to the court, at the time when it is received by the authority responsible for service, provided that the claimant has not subsequently failed to take the steps he was required to take to have the document lodged with the court. Here the date in which the authority responsible for service received the document is the

---

<sup>16</sup> *ibid* para 29.

<sup>17</sup> This is subject to the condition 'that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent.'

<sup>18</sup> *MH v MH*, (n 15) [ 26].

<sup>19</sup> *Mapesbury* (n 8).

significance with regards the date in which the action is pending and not the date of the actual service.<sup>20</sup>

### **5.3.2 The claimant did not fail to take steps he is required to take to have the service effective on the defendant or was required to take to have the document lodged with the court**

The previous two situations are subject to an important condition which is that ‘the claimant has not subsequently failed to take the steps he was required to take to have service effected on the respondent or ,in case of receipt by the authority, to have the document lodged with the court.’ The rationale behind this condition is to ensure protection against the applicant’s abuse of process.<sup>21</sup>

What are then those steps? The Brussels regime does not define or illustrate those steps. Nevertheless, the CJEU in *M.H v M.H* provided some guidelines. It held that ‘account would not be taken of delays caused by the judicial system applicable, but only of any failure of the applicant to act diligently’.<sup>22</sup> Put it differently, the court would be deemed to be seised either by lodging the documents instituting the proceeding to the court ,or by the authority responsible for service receipt of the document, so long as the applicant act diligently by taking the steps he is required to take to have the service effective on the defendant. Those steps are determined, by each member state’s legal system.<sup>23</sup> This means that those steps will vary according to the legal system in which the proceeding was brought before it, leading to a situation of uncertainty. In addition, CJEU conclusion is an indirect recognition that delays in a member state’s legal system is possible and can exist, something that could break the ideology of the principle of mutual trust.

One example of such steps can be seen in *S.K. Slavia Praha-Fotbal A.S. V Debt Collect London Limited Enic Group*.<sup>24</sup> In this case, The English found that the claimant’s non-payment of a compulsory fee for the service of document required under the Czech law is to be considered a failure to take steps he should take for an

---

<sup>20</sup>Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 14 July 1999 99/0154 (CNS).

<sup>21</sup> *M.H. v M.H.* (n 16) para 27.

<sup>22</sup> *Ibid*

<sup>23</sup> Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 14 July 1999 99/0154 (CNS).

<sup>24</sup> *SK Slavia Praha-Fotbal AS V Debt Collect London Limited Enic Group* [2010] EWCA Civ 1250.

effective service.<sup>25</sup>Hence, the English court decided that it was the court first seised for the matter in issue. On the hand, in *UBS AG, London Branch, UBS Global Asset Management (UK) Limited v Kommunale Wasserwerke Leipzig GmbH*,<sup>26</sup> the English court held that a delay in service, but within the time limit prescribed under the national law, will not be considered as a failure to take required steps necessary for the issuing court to remain seised. In this case, the claimant (UBS) has issued proceeding in the English court on 18 January 2010, but the claim was only served on the defendant (KWL) on 1 March 2010, six weeks after the former has become aware of it. (KWL) brought proceeding against it before the German Court.

The Court had to determine the court first seised and whether the fact that service was proceeded after six weeks from issuing the claim form, should be considered a failure by the claimant to take those necessary steps to have the service effective. After acknowledging the fact that a definition or criteria which specify those steps cannot be found in the European Law, the English court relied on its Civil Procedural Rules (hereinafter the CPR) which states that the claim form which is to be served out of the jurisdiction must be served within six months of issuing the claim. It held that 'There is no additional requirement upon the claimant to serve "forthwith" or "as soon as practicable". Nor is there any obligation upon a claimant to choose the quickest method of service'.<sup>27</sup> In this case, the claimant served within the period given in the CPR. The fact that he served after 6 weeks from issuing the claim form does not mean that he was late, so far as he acted within the time limit. Although it was argued before the court that the claimant's act should be seen as an abuse of process, which also encourage a matter of forum shopping, a matter which article 32 was to avoid, the court rejected such argument.<sup>28</sup>

The matter becomes even more complex when there is no time limit in which the service should take place within it. This was concerned in *Thum v Thum*<sup>29</sup>, a family law matter. The wife as the claimant, issued a divorce petition in the English courts on 26 October 2015 but not served until 27 February 2016, at the time the defendant has

---

<sup>25</sup> Ibid 27.

<sup>26</sup>[2010] EWHC 2566 (Comm).

<sup>27</sup> *UBS AG (London Branch) v Kommunale Wasserwerke Leipzig GmbH*, [2010] EWHC 2566 (Comm) [70]

<sup>28</sup> Ibid[72]

<sup>29</sup>*Thum v Thum* [2016] EWHC 2634

issued a petition in Germany. The question was whether such delay in service by the claimant is to be seen as a failure considering the fact that the Family Procedures Rules does not specify a time limit in which the issued claim should be served. The English court held that the Family Procedural Rules did not impose any obligation to serve the divorce petition as soon as practicable.<sup>30</sup>It also provides that the court should ‘infer a requirement of acting reasonably promptly and that promptitude should be informed in a broad way by the (extendable) time limits in CPR 7.5.’<sup>31</sup>

To this end, the previous cases shows that an autonomous short time limit in which service should be conducted within it after the act of either lodging the document with the court or the authority’s receipt of the documents, is needed, for example one month capable of extendable times if specific conditions were satisfied. The latter is in line with the applicant’s duty to act diligently, prevent the case of forum shopping and abuse of process.

### **3.2 The date of court seising and the amended claims**

A question arises as to whether the amended claims should be considered to be brought from the date the claim was reissued or from the date of the original claim. Answering this is significant since it can have the effect of amending the rights and the obligation of both the court seised on the one hand and the rights of the parties on the other hand. The Regulation does not provide an answer. Therefore, according to the CJEU jurisprudence, each national court will apply its national procedural rules provided that they do not make the application of the EU law impossible.<sup>32</sup>

In a recent English case law, *Barclays Bank Plc v Ente Nazionale Di Previdenza Ed Assistenza Dei Medici E Degli Odontoiatri*<sup>33</sup>(hereinafter the Barclays Bank Plc case), the English court of appeal held that that the amending claims should be considered as being brought from the day the amended claim was filed or lodged with the court and not from the date of the original claim.<sup>34</sup> According to the court, a determination to whether two proceedings involve the same cause of action and between the same

---

<sup>30</sup> *ibid* para 18.

<sup>31</sup>*ibid*

<sup>32</sup> C-234/04, *Rosmarie Kapferer v Schlank & Schick GmbH*, 16 March 2006 para 22

<sup>33</sup> *Barclays Bank Plc v Ente Nazionale Di Previdenza Ed Assistenza Dei Medici E Degli Odontoiatri* (2016) EWCA Civ 1.

<sup>34</sup> *ibid* para 19.

parties should be seen from the date of instituting the proceeding in the second seised court.<sup>35</sup> The court further held that no situation of *lis pendens* arises, and no need to exercise discretion to stay based on related action.

If we accept that the amended claim will be considered as being brought from the date of the original claim, the English court would be obliged to refuse to stay its proceeding in accordance with article 29 since they involve the same cause of action the same parties.<sup>36</sup> Accepting such a conclusion would increase the possibility of abusive tactical delays by the bad faith litigant and impair the litigant in the second seised court from his right to a fair trial within a reasonable time and the right to an effective remedy.

However, the answer could be slightly different when the matter comes under the concept of related actions. It will be recalled that the Brussels I Regulation empowers the second seised court to have a discretion whether to stay its proceeding or not when its actions are related to an action brought first before a member state court. The question arises as to whether the court first seised would also be considered as the first seised when amended claims were provided to the court or whether the second seised court, the court where the particular claim was first introduced before, should be considered as first seised for the purpose of the related action and therefore does not have the discretion to stay.

The question came before the English court in *Stribog Ltd v FKI Engineering Ltd*.<sup>37</sup> Stribog brought proceeding before the German court, claiming for a declaration of non-liability to FKI on any rights or claims, except for any potential purchase rights or claims plus interest under the Business Transfer Agreement(BTA) concluded between Stribog and DeWind GmbH. FKI, under an assignment agreement, concluded with DeWind GmbH brought proceeding against Stribog before the English court claiming for payment of the outstanding purchase price under the BTA, or alternatively damages for its breach and interest. Stribog then amended its claim before the German court, claiming that the assignment agreement is null and void. The court was essentially asked whether the English court was first or second seised for the purpose

---

<sup>35</sup> *Ibid* para 12

<sup>36</sup> In addition, in the previous case law, the fact that the claimant in the Italian proceeding amended his claim in such way as to include a challenge to the validity of jurisdictional clause was seen as an important factor for the English court not to say its proceeding based on related actions. See *ibid* para [31]

<sup>37</sup> *Stribog Ltd v FKI Engineering Ltd* [2011] EWCA Civ 622.

of related actions. The court held that the German court was first seised, and thereby, the English court has the discretion to decide whether or not to stay its proceeding, and in this case, a stay was granted.<sup>38</sup> According to the court, contrary to the position taken under article 27 at that time, related action is concerned with actions rather than claims.<sup>39</sup>

Interpreting the date of seising for the purpose of a related action in such a way that gives the court the power to stay rather than an obligation to proceed to minimise the risk of irreconcilable judgment in which the article intends to achieve and give it a possibility to consider the right of the parties.

#### **5.4 The requirement of lis pendens**

An examination of the lis pendens requirement is essential to view the implications of the scope of interpreting these requirements and whether it contributes or decreases the problems that already existed, such as tactical delays. Furthermore, this is important to determine whether the practice of both the CJEU and the English courts conforms with the parties' right to a fair trial within a reasonable time and the right to an effective remedy.

The application of the lis pendens rule requires the fulfillment of two conditions; the same cause of action and the same parties.

##### **5.4.1 The same cause of action**

The CJEU has consistently held that the concept of the same cause of action should be given an independent and autonomous meaning from those given under the member states' national laws.<sup>40</sup> A determination to whether two sets of proceedings involve the same cause of action was first examined by the CJEU in *Gubisch Maschinenfabrik KG v Giulio Palumbo* (hereinafter *Gubisch*).<sup>41</sup> In this case, the court was essentially asked whether an action brought before a member state court seeking

---

<sup>38</sup> The court has decided to exercise its power to stay. See *ibid* para 53. At the same time, it preserve its right to proceed with its proceeding by an application from KFI "If for any reason the question of the validity of the German assignment is not properly progresses in Lubeck,". See *ibid* para 131

<sup>39</sup>*ibid* 47. This approach was agreed by the court in *Barclays Bank Plc case*. see (n 18) para 16.

<sup>40</sup> *Gubisch* (n 1) para 11; '*Tatry*' (n 10), para 47.

<sup>41</sup> *Gubisch*, (n 1).

enforcement of the sale contract is considered to have the same cause of action with an action brought before another member state's court seeking a declaration for a rescission of the same contract. The CJEU answered the question in the affirmative. It first held that the concept of the same cause of action must be understood as consisting of two elements; the cause of action and the object or the subject matter of the action.<sup>42</sup> According to the court, the cause of actions in both actions were identical, which is the same contractual relationship.<sup>43</sup> As regards the subject matter, the court also considered that both actions have the same object since the binding force of the contract is the dominant matter.<sup>44</sup>

In reaching its decision, the court also took into account the risk of the non-recognition of a judgment to enforce the contract in the State where a judgment of contract rescission was given. Accepting otherwise would have the effect of undermining the legal protection provided for by the rules.<sup>45</sup> In this sense, the CJEU decision is in conformity with the right to a fair trial within a reasonable time as an essential key requirement of the principle of mutual trust. This can particularly be seen when the CJEU took into consideration the parties' right to have a judgment capable of being enforced as an essential element of the right to a fair trial.<sup>46</sup>

The second seised court should only take into account the claimant's claims without considering the defendant's defence.<sup>47</sup> This will have the effect of preventing excess delays and costs and the situation of declining jurisdiction, which it had otherwise before the defendant's defence submissions.<sup>48</sup>

The meaning and the scope of the cause of action were further developed in the case of the *Tatry*.<sup>49</sup> In this case, a soybean oil cargo owned by several owners was carried by the Vessel *Tatry*. A complaint was raised by the cargo owner against the shipowner that the cargo was contaminated with diesel or other hydrocarbons. The ship owners then commenced proceeding before the Rotterdam District Court against two groups

---

<sup>42</sup> *ibid* , para 14

<sup>43</sup> *Ibid*, para 15

<sup>44</sup> *Ibid*, para 16

<sup>45</sup> *ibid*, para 18

<sup>46</sup> For more information, see chapter 4

<sup>47</sup> C-111/01, *Gantner Electronic GmbH v Basch Exploitatie Maatschappij BV* [2003] I-04207, para 26 and 31.

<sup>48</sup> *ibid*, para 30.

<sup>49</sup> *The Tatry*. (n 10).

of cargo owners, seeking a declaration of non-liability of the damages, while part of the cargo owners brought proceeding for damages before the English court in rem. Several questions were referred to the CJEU for a preliminary ruling. One essential question related to the cause of action was whether an action seeking a declaration of non-liability and an action for claiming damages for loss could be considered as the same cause of action for the purposes of lis pendens rules.

The CJEU has answered the question in the affirmative. In the course of reasoning its approach, the CJEU define the elements presented in Gubisch and held that The cause of action consists 'of the facts and the rule of law relied on as the basis of the action'<sup>50</sup> while the object or the subject matter 'means the ends the action has in view.'<sup>51</sup> As a result, an action for a declaration of non-liability was seen as having the same cause of action and the same object with an action brought for claiming damages.

#### **4.1.2. Negative declaration**

A claim for a declaration of non-liability or a negative declaration arises from 'the fact that the claimant is seeking to establish that the pre conditions for liability, as a result of which the defendant would have a right of redress, are not satisfied.'<sup>52</sup> In principle, the claimant can have an interest in bringing the proceeding in the form of a negative declaration.<sup>53</sup> This can be seen, for instance, in the case of the insurer's claim against his insured.<sup>54</sup>

In the English courts, negative declarations can be granted when justice requires so. According to *MESSIER-DOWTY LTD & ANR V SABENA SA & ORS* decision<sup>55</sup>, the court held that "the deployment of negative declarations should be scrutinised and their use rejected where it would serve no useful purpose. However, where a negative declaration would help to ensure that the aims of justice are achieved, the courts

---

<sup>50</sup> *ibid* para 39

<sup>51</sup> *ibid*, para 40

<sup>52</sup> *c 133/11, Folien Fischer AG and Fofitec AG v Ritrama SpA [2012]*, para 42.

<sup>53</sup> *Case C-406/92 The owners of the cargo lately laden on board the ship 'Tatry' v the owners of the ship 'Maciej Rataj'*, Opinion of AG Tesauero, para 23.

<sup>54</sup> *Mapesbury* (n 8), 567.

<sup>55</sup> [2000] 1 WLR 2040

should not be reluctant to grant such declarations. They can and do assist in achieving justice"<sup>56</sup>.

The negative declaration has the effect of changing the parties' roles in the legal proceeding<sup>57</sup>. For instance, in a proceeding related to tort, the defendant who did the harmful act will be the claimant when he brings proceeding in the shape of negative declarations. The latter fact could bring injustice to the defendant. Hence, the English court has rules that caution should be taken to decide whether negative declarations are granted<sup>58</sup>.

In Taty, the CJEU has explicitly accepted a negative declaration as a proper cause of action. In addition, it broadens the scope of the negative declaration application to cover not only the non-liability arising from contractual relationships but also the non-liability arising from tort.<sup>59</sup> Moreover, the impact of the negative declaration was extended to cover the stage of recognition and enforcement. According to the CJEU case law, a negative declaratory judgment rendered in a member state will have the same cause of action of an indemnity action subsequently brought in another member state between the same parties thereby, preventing the second seised court from continuing the action.<sup>60</sup>

While these considerations could raise a concern and contribute to the problem and that a narrow interpretation is preferable, a wide scope of applying the negative declaration action is not itself the problem to the interpretation of the *lis pendens* and to the assurance of the right to a fair trial within a reasonable time. The real dilemma, as it will be seen further, occurs in the combination of bringing such an action before a member state court which is well known for its length of proceeding to rule on its own jurisdiction.

In order to determine whether two claims are based on the same cause of action, the English court held that those claims should be "mirror images of each other".<sup>61</sup> There is no need to construe the interpretation of those claims in such a way that make them

---

<sup>56</sup> *Ibid*, para 41

<sup>57</sup> *Ibid*, para 42

<sup>58</sup> *ibid*.

<sup>59</sup> See by analogy, *Folien Fischer AG and Fofitec AG*(n 36).

<sup>60</sup> See by analogy, *Gubisch* (n 1) para 9; *Nipponkoa Insurance Co.* (n 11) para 49.

<sup>61</sup> *In the matter of "The Alexandros T" In the matter of "The Alexandros T" (No 2) In the matter of "The Alexandros T" (No 3)* [2013] UKSC 70 para 30.

“to fit a case ”<sup>62</sup> of lis pendens. While such narrow interpretation could increase the cases of parallel proceeding in which the lis pendens tries to avoid, the fact remains that the court can use the rules of the related action to stay its proceeding. In addition, such interpretation can be used as a way to derogate from the application of such rules when the excessive length of proceeding occurs in the first seised court, as it will further be seen.

It should be noted that The Tatry also provides for another important aspect, which should be taken into account in consideration of the scope of the lis pendens rules interpretation. The CJEU held that an action in personam for a declaration of non-liability does not have the same cause of action and the same object with an action in rem brought before another member state court.<sup>63</sup> The decision can be seen as a lifeline from tactical delays produced by the bad faith litigant, particularly in cases of the length of proceeding.

#### **5.4.2 The same parties**

The concept of the same parties is also independent from the interpretation of the Member States' national law. According to the CJEU, a determination of whether the parties are the same in both proceedings does not rely on their procedural position in the action. A defendant in the first set of proceedings could be concerned as the same party even if he is a claimant in the second set of proceedings.<sup>64</sup> In addition, lis pendens applies to the extent that the same parties are identical in both sets of proceedings. Hence, the second seised court can proceed with the proceeding with respect to other parties which are not parties to the first set of proceedings.<sup>65</sup>

Interestingly, the CJEU held that the concept of the same parties could be satisfied and fulfilled, notwithstanding the fact that the parties in both set of proceedings are different. In *Drouot assurances SA v Consolidated metallurgical industries (CMI industrial sites)*, (hereinafter Drouot case),<sup>66</sup> Drouot, the insurer of the hull of the vessel "sequana", brought proceeding before the commercial court in Paris, against

---

<sup>62</sup> Ibid cites; *Glencore International AG v Shell International Trading and Shipping Co Ltd* [1999] 2 Lloyd's Rep 692 at 697

<sup>63</sup> *The Tatry* (n 10) para 47.

<sup>64</sup> *Ibid* para 36

<sup>65</sup> *Ibid* para 35

<sup>66</sup> *C-351/96 Drouot assurances SA v Consolidated metallurgical industries (CMI industrial sites), Protea assurance and Groupement d'intérêt économique (GIE) Réunion européenne*[1998].

CMI, the cargo owner, Protea, the insurer of the cargo and HIE Reunion as the Protea's agent, claiming for payment of refloating the vessel and, thereby saving CMI cargo after it foundered in the inland water of the Netherland. The defendants objected on the basis that a previous proceeding was already initiated in Rotterdam against the owner and the charterer of the vessel.

In this respect, an essential question raised before the CJEU was whether Drouot, the insurer of the vessel, could be regarded as the same party as the owner of the vessel for the purpose of the lis pendens rules. The CJEU held that the interest of the insurer of the vessel and the owner must be identical and indissociable from each other in order to consider them as the same parties for the purpose of applying the lis pendens rules.<sup>67</sup> A test that can help in satisfying the latter is that a judgment given against one of them will oblige the other on the basis of *res judicata*.<sup>68</sup> This is particularly the case when the insurer defends and acts as an agent of the insured, the vessel's owner. However, when their interest differs as decided in the case, the lis pendens rules cannot preclude the insurer from claiming his rights against the other parties.<sup>69</sup> Determining whether the interests are identical and indissociable is left to the national court.<sup>70</sup>

The English court employed the interest test in *Kolden Holdings limited v. Rodette Commerce Limited And Taplow Ventures Limited*.<sup>71</sup> The English court was essentially asked to examine whether Kolden, the assignee, in accordance with an assignment agreement, is considered to be the same party as Amherst, Hensher, and Conway, the assignor, for the purpose of the lis pendens rules. The English court answered the question in the affirmative. The court examined both the interest of the assignor and the assignee and concluded that their interests were indissociable and identical.<sup>72</sup> The court also considered that the judgment's binding force against the assignor would bind the assignor based on *res judicata*.<sup>73</sup>

---

<sup>67</sup> *ibid* para 25

<sup>68</sup> *ibid* para 19

<sup>69</sup> *ibid* para 20

<sup>70</sup> *ibid* para 23

<sup>71</sup> *Kolden Holdings Limited v Rodette Commerce Limited and Taplow Ventures Limited* (2008) EWCA Civ 10 .

<sup>72</sup> *Ibid* para 90

<sup>73</sup> *Ibid* para 88

The CJEU approach has broadened the scope of the concept's meaning of the same parties by providing for the mutual parties' interests as a new test that could be used to determine the concept. However, The CJEU tried to adopt more careful interpretation by limiting and confining it to cover only cases of identical and indissociable interests and by impliedly taking the insurer's right to a fair trial into consideration. Such new element should be interpreted narrowly as to cover only cases when 'there is no doubt, legally, that the parties' interests are the same and inseparable.'<sup>74</sup> Accepting otherwise could have the effect of impairing parties' rights, particularly his right to effective judicial protection.<sup>75</sup>

## 5.5 Related Actions

The Brussels I Regulation recast and its predecessors provide another mechanism that intends to minimise the risk of conflicting judgments and enhance the function of judicial proceedings and thereby the proper administration of justice.<sup>76</sup> Under article 30/1, the second seised court is empowered to stay its action, rather than oblige to stay, when related action is already pending before the first seised court. According to 30/3, actions will be deemed to be related when it is "so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."<sup>77</sup> This provision is applicable only when the case does not fall under the *lis pendens* rules.<sup>78</sup> Contrary to the position taken under article 29, the second seised court takes into account both claims and defenses in its determination of whether actions are related.<sup>79</sup>

According to the plain wording of the Regulation and the CJEU view, the proper administration of justice can be achieved by interpreting the related action provision in such a way that minimise the risk of irreconcilable decisions.<sup>80</sup> Consequently, in the

---

<sup>74</sup> *Case C-438/12, Irmengard Weber v Mechthilde Weber* [2014], Opinion of AG JÄÄSKINEN, para 54.

<sup>75</sup> *Ibid* para 55; see analogy, *C-351/96, Drouot assurances SA v Consolidated metallurgical industries (CMI industrial sites), Protea assurance and Groupement d'intérêt économique (GIE) Réunion européenne* [1998] I-03075, Opinion of AG Fennelly, para 31.

<sup>76</sup> The Brussels I Regulation Recast, recital 21; *The Tatry* (n 10).

<sup>77</sup> The Brussels I Regulation Recast, article 31/3

<sup>78</sup> *the Tatry* (n 10) para 50; *Case C-438/12, Irmengard Weber v Mechthilde Weber*, Opinion of AG JÄÄSKINEN (n 74) para 99.

<sup>79</sup> *Mapesbury* (n 8) 582.

<sup>80</sup> The Brussels I recast recital 21.

CJEU's view, this concept should be interpreted broadly to cover all cases of related actions even if both judgments can be enforced separately.<sup>81</sup>

The meaning of proper administration of justice should not be understood as to cover only the purpose of minimising the risk of irreconcilable judgment. However, it should be borne in mind that such understanding is accepted only to the extent that it will not violate the proper administration of justice in its wide scope.<sup>82</sup> Minimising the risk of irreconcilable judgment is only one example of the assurance of the proper administration of justice. The assurance of parties' fundamental rights and their autonomy, for instance, are other elements that need to be taken into consideration in ensuring the proper administration of justice. In other words, the existence of an exclusive jurisdiction designating the second seised court and the real risk of violating the parties' right to judicial protection can lead the first seised court to rebut the presumption and thereby lead the court to refuse to grant a stay.<sup>83</sup>

It has been argued that the application of the test might entails questioning which of the court will be in the better position to rule on the matter in dispute.<sup>84</sup> However, the problem with this argument is that it contradicts one of the principle of mutual trust characteristics, which is the equivalency of member states' justice systems in which no Member State's court is in a better position than the other State to rule on such issues. As a result, one can say that the real question that needs to be asked is whether having two related actions can lead to inconsistent judgment or to the violation of the proper administration of justice in its broader scope. On the one hand, this understanding is in conformity with the previous character of the principle of mutual trust and is consistent with the observance of the parties' right to judicial protection, such as the right to a fair trial and the right to an effective remedy on the other hand.

## **5.6 The function of the lis pendens rules and Exclusive jurisdiction**

---

<sup>81</sup> *The Tatry* (n 10) para 53; *Stribog Ltd v FKI Engineering Ltd*: CA [124].

<sup>82</sup> Richard Fentiman, *International Commercial Litigation* (second edi, Oxford University Press 2015) 11.99.

<sup>83</sup> C-367/96, *Alexandros Kefalas and Others v Elliniko Dimosio (Greek State) and Organismos Oikonomikis Anasygkrotisis Epicheiriseon AE (OAE)* [1996] I-02843, para 95; *Barclays Bank Plc* (n 18) para 31.

<sup>84</sup> C-129/92, *Owens Bank V Fulvio Bracco And Bracco Industria Chimica Spa* [1993] Opinion of AG Lenz, para 79.

As seen above, *lis pendens* imposes an obligation on the second seised court to stay its proceeding in favour of the first seised court when it involves the same cause of action and the same parties. In this respect, a question arises as to whether the second seised court is still required to stay its proceeding, based on mutual trust, when it has exclusive jurisdiction under the Regulation. Exclusive jurisdiction can be conferred to the court either by the jurisdictional rules or by choice of court agreement.

### **5.6.1 The *lis pendens* rules and the exclusive jurisdiction by the jurisdictional rules**

The Brussels I regulation gives specific member states' courts the power to have an exclusive jurisdiction irrespective of the parties' domicile and irrespective of whether the defendant has submitted to the jurisdiction of another court<sup>85</sup>. For instance, the member state court where the property is located shall have exclusive jurisdiction in proceedings, which have as their object rights in rem in immovable property or tenancies of immovable property<sup>86</sup>. The question arises as to whether the second seised will still oblige to stay its proceeding when it has exclusive jurisdiction. Neither the Brussels I recast, nor its predecessors considered the situation. Nonetheless, the latter fact did not preclude the CJEU from ruling on this matter. It can first be seen in *Overseas Union Insurance and Deutsche Ruck UK Reinsurance Ltd and Pine Top Insurance Company Ltd v New Hampshire Insurance Company*<sup>87</sup> ( hereinafter *Overseas Union Insurance*). The case was decided in the context of the Brussels Convention and in the course of defining the scope of the second seised court's obligation to decline its jurisdiction and stay its proceeding in accordance with the Convention. After recognising the fact that the main proceeding does not concern a matter which comes under the exclusive jurisdiction of the second seised court, the CJEU held that

In the case of a dispute over which it is not claimed that the court second seised has exclusive jurisdiction, the only exception to the obligation imposed by Article 21 of the Convention on that court to decline jurisdiction is where it stays proceedings, an option which it may exercise only if the jurisdiction of the court first seised is contested.<sup>88</sup>

---

<sup>85</sup> See the Brussels I Regulation Recast, article 26/1

<sup>86</sup> *Ibid*, article 22/1

<sup>87</sup> *C-352/89, Overseas Union Insurance* (n 1).

<sup>88</sup> *ibid* para 21.

The CJEU then concluded that

Without prejudice to the case where the court second seised has exclusive jurisdiction under the Convention and in particular under Article 16 thereof, Article 21 of the Convention must be interpreted as meaning that, where the jurisdiction of the court first seised is contested, the court second seised may, if it does not decline jurisdiction, only stay the proceedings and may not itself examine the jurisdiction of the court first seised.<sup>89</sup>

The language of the CJEU decision seems to suggest an exception to the second seised court's obligation to decline the jurisdiction when it has exclusive jurisdiction under the jurisdictional rules. However, it was unclear what type of action the second seised can employ when it has exclusive jurisdiction under the Brussels convention, whether to stay or proceed with its proceeding.

This concern was explicitly addressed in *Iremengard Weber v Mechthilde Weber* (hereinafter *Weber v Weber*)<sup>90</sup>; a case decided in the context of the Brussels I Regulation prior to its Recast. In this case, the CJEU held that the second seised court having an exclusive jurisdiction in accordance not only is not required to stay its proceeding but also has an obligation to proceed and examine the merit of the case<sup>91</sup>. The CJEU reached its decision taking into account the fact that a judgment rendered by the first seised court will be at risk of non-recognition in accordance with the Regulation<sup>92</sup>. Accepting otherwise will run counter against the administration of justice and hinder the objective of the Brussels Regulation of ensuring a free movement of judgments.<sup>93</sup> However, the new Recast did not address this situation. Therefore, It is in the interest of the parties' legal certainty, predictability, and forcibility to codify the latter cases.

To this end, it can be said that the second seised court is relieved from its obligation to stay its proceeding by virtue of the principle of mutual trust when it has exclusive jurisdiction in accordance with the specific head of jurisdictions under the Regulation.

---

<sup>89</sup> Ibid para 26

<sup>90</sup> *c-438/12 Iremengard Weber v Mechthilde Weber*[2014]

<sup>91</sup> Ibid para 56.

<sup>92</sup> Ibid para 55

<sup>93</sup> Ibid para 57-59

In other words, the principle of mutual trust is not a deterrent from applying the exclusive jurisdiction by jurisdictional rules.

### **5.6.2 The function of the *lis pendens* rules and the exclusive choice of court agreement**

The court can also have exclusive jurisdiction by way of the parties' agreement. The choice of court agreement is an agreement between parties where litigation will be held in a case of a dispute.<sup>94</sup> It was first governed by the Brussels Convention but was subject to a number of amendments. According to article 17, 'If the parties, one or more of whom is domiciled in a Contracting State, have agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction.'<sup>95</sup> The latter was replaced by the Brussels I Regulation which adopt a similar approach to its predecessor in addition to some points.<sup>96</sup>

A question that needs to be answered is whether the second court will still be obliged to stay its proceeding in favour of the first seised court in the name of the principle of mutual trust even if it is the court designated in the choice of court agreement. This was examined in *Erich Gasser GmbH v MISAT Srl.* (hereinafter *Gasser*)<sup>97</sup>, one of the most controversial cases decided by the CJEU. It was decided in the context of the Brussels Convention, which continued to apply in the context of the Brussels I Regulation prior to its Recast<sup>98</sup>.

*Erich Gasser GmbH*, a company registered in Dornbirn, Austria, sold children's clothing to *MISAT*, a company registered in Rome, Italy. *MISAT* commenced proceeding against *Gasser* before Rome Civil and Criminal district court, seeking a

---

<sup>94</sup> Trevor C Hartley, *Choice-of-Court Agreements under the European and International Instruments: The Revised Brussels I Regulation, the Lugano Convention, and the Hague Convention* (Oxford Private international law series 2013) para 1.03.

<sup>95</sup> See Brussels Convention as amended by the Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland - and by the Convention of 26 May 1989 on the accession of the Kingdom of Spain.

<sup>96</sup> The Brussels I Regulation 2001.under article 23, for instance, the Choice of court agreement will be exclusive unless the parties agreed otherwise.

<sup>97</sup> *Gasser* (n 1).

<sup>98</sup> *C- 292/08 German Graphics Graphische Maschinen GmbH v Alice van der Schee*[2009] I-08421, para 27.

judgment that the contract between them has been terminated ipso jure or, alternatively, that the contract has been terminated following a disagreement between the parties. In addition, MISAT sought a declaration that it had not failed to perform its obligation under the contract on the one hand and that Gasser should be required to pay damages for the non-fulfillment of its obligations of fairness, diligence, and good faith and to reimburse certain costs on the other hand.

Gasser then brought proceeding before the Regional court in Austria, seeking payment of outstanding invoices. According to Gasser, the latter court has jurisdiction since it is both the place of performance of the contract and notably as the court designated by choice of court agreement shown in all invoices between the parties without any objection raised by MISAT. However, MISAT argued that the Austrian court has no jurisdiction by denying the very existence of an exclusive choice of court agreement on one hand and relying on the *lis pendens* rule on bringing the proceeding in Italy, on the other hand. The Austrian court held for a stay to the proceeding based on the *lis pendens* rules. Gasser then appealed against that judgment to the Oberlandesgericht Innsbruck, arguing that the Regional court should have jurisdiction and that the proceeding should proceed. The Oberlandesgericht Innsbruck stayed its proceedings and referred several questions to the CJEU for a preliminary ruling. In this particular analysis, the following question was raised:

"May a court other than the court first seised, within the meaning of the first paragraph of Article 21 of the Brussels Convention (article of the Brussels I Regulation prior its Recast), review the jurisdiction of the court first seised, if the second court has exclusive jurisdiction pursuant to an agreement conferring jurisdiction under Article 17 of the Brussels Convention, or must the agreed second court proceed in accordance with Article 21 of the Brussels Convention notwithstanding the agreement conferring jurisdiction?"

The CJEU answered the question on the negative by ruling that the second seised court, whose jurisdiction relied on under choice of court agreement, is nonetheless under an obligation to stay its proceeding in favour of the first seised court<sup>99</sup>. In other words, the existence of a choice of court agreement designating a second seised court was not deterrent from applying the general *lis pendens* rules. The CJEU justified its

---

<sup>99</sup> Gasser (n 1), para 54.

decision by relying first on the procedural nature of the *lis pendens* rules. According to the court, the *lis pendens* rule is based "clearly and solely on the chronological order in which the courts involved are seised"<sup>100</sup>.

Significantly, the CJEU relied on the principle of mutual trust and the equivalency of all Member States courts to decide on the jurisdictional issue. According to the CJEU 'the court second seised is never in a better position than the court first seised to determine whether the latter has jurisdiction. That jurisdiction is determined directly by the rules of the Brussels Convention, which are common to both courts and may be interpreted and applied with the same authority by each of them'.<sup>101</sup> The equality of member states' courts justifies the power given to the non-chosen first seised court to examine the validity of the choice of court agreement designating another member state court in the pursuit of deciding its own jurisdiction. The use of tactical delays was not seen as sufficient to call the interpretation of the Brussels Rules.<sup>102</sup>

The judgment was faced with criticism by the legal scholars<sup>103</sup> where it was described "as one of the most glaring faults"<sup>104</sup>. Indeed, the Gasser case was a legal invitation that encourages litigants to forum shop and initiate proceeding in courts other than the one designated in the choice of court agreement for the sole purpose of tactical delays, hindering by that the party autonomy, undermining legal certainty and parties' expectation.

As an attempt to evade or minimise those negative implications, the litigant who has an interest in enforcing the choice of court agreement initiates proceeding before the designated court, claiming for damages from the other party for bringing proceeding in a breach of choice of court agreement. The Brussels I regulation did not address whether such a claim can be brought before a Member state Court. Nonetheless, according to the English courts, the claim has a different cause of action from a substantive claim for a breach of the contract or a claim in tort brought before

---

<sup>100</sup>ibid para 47.

<sup>101</sup>ibid para 48.

<sup>102</sup> Ibid para 53. The Court departed from the Advocate General Opinion, and the submissions of both Gasser and the UK Government.

<sup>103</sup> eg; Hartley (n 94) para 11.10; Fentiman (n 82).

<sup>104</sup> HOUSE OF LORDS quoting Mr Fentiman in 'Green Paper on the Brussels I Regulation Report with Evidence' (2009)

the non-chosen first seised court.<sup>105</sup> Moreover, in the court's view, it is different from the anti-suit injunction, a prohibited measure under EU law.<sup>106</sup> The claimant in the former does not require the other party to stop his proceeding in the non-chosen Member State's court but merely claims for damages for such breach<sup>107</sup>. According to the court, such an approach does not contradict with the principle of mutual trust<sup>108</sup>. Some commenter has argued that the EU might have little influence in this matter<sup>109</sup>.

While the claim for damages might be seen as a way to escape the negative effect of the lis pendens rules in the existence of a choice of court agreement and to enforce the latter agreement, it is argued that the CJEU would nonetheless prohibit bringing such proceeding. This is because the validity of the exclusive choice of court agreement will be examined by the English court in the process of deciding whether to award damages to the aggrieved party<sup>110</sup>, a position that is already taken by the first seised non-chosen court, according to Gasser. The designated court, in other words, will be considered as interfering with the power of the first seised non-chosen court. In addition, such a claim is based on initiating the proceeding in the non-chosen court<sup>111</sup>, which is to some extent similar to the anti-suit injunction. It has even been described as "a kind of first cousin to an anti-suit injunction and an improper attempt to influence jurisdictional decisions by courts in other states"<sup>112</sup>.

---

<sup>105</sup>*In the matter of "The Alexandros T" In the matter of "The Alexandros T" (No 2) In the matter of "The Alexandros T" (No 3)* [2013] UKSC 70, 38.; *Barclays Bank Plc v Ente Nazionale Di Previdenza Ed Assistenza Dei Medici E Degli Odontoiatri* (n 663).

<sup>106</sup> An anti-suit injunction is injunction, usually used to enforce a choice of court agreement, intends to restrain a party from bringing proceeding in a forum other than the designated court under the choice of court agreement. The CJEU prohibit the use of an anti-suit injunction between the EU member states even if the party was a bad faith litigant due to its violating the principle of mutual trust. since it undermine the meaning of the principle of mutual trust. For more details, see chapter 7

<sup>107</sup> Ibid. para 39

<sup>108</sup> Ibid

<sup>109</sup> Koji TAKAHASHI, 'Damages for Breach of a Choice-of-Court Agreement' (2008) 10 Yearbook of Private International Law 57, 66.

<sup>110</sup> See by analogy ibid para 39; See also Koji TAKAHASHI, he states "there is a 'breach of a choice-of-court agreement' if in the eyes of the court before which a claim for damages is made, there is a valid and exclusive choice-of-court agreement and it has been broken by the institution of an action in a non-chosen forum." See, TAKAHASHI (n 109) 59

<sup>111</sup> *Barclays Bank Plc v Ente Nazionale Di Previdenza Ed Assistenza Dei Medici E Degli Odontoiatri* (n 663). the English court stated the latter in the course of deciding whether the causes of action in the two proceeding is the same without objecting it as improper cause of action for the context of the EU law and Brussels I Regulation and thereby asserting the decision of the Alexandros X in this aspect.

<sup>112</sup> Mr Oliver Parker, HOUSE OF LORDS (n 91) . P 27 Q.123

Moreover, if the first seised non-chosen court, in the assertion of its own jurisdiction, concludes that there is no valid exclusive choice of court agreement, the other party should be precluded to initiate a proceeding in the EU member state chosen court to claim for damages for breach of exclusive choice of court agreement. This stems from the fact that the first seised non-chosen court decision is a judgment within the meaning of judgment under the Brussels I Regulation, which has the effect of res judicata and should be recognised and enforced based on the principle of mutual trust<sup>113</sup>. Moreover, a decision on damages could indirectly mean that the first seised non chosen court has wronged in its decision and reverse the implications of the first seised court decision<sup>114</sup>.

### **5.5.2.1 The function of the lis pendens and the choice of court agreement after the Recast**

Following the conclusions reached in Gasser, the Commission Proposal on the Brussels I recast put the assurance of the effectiveness of the choice of court agreement as an essential priority that needs to be sought in the new Recast.<sup>115</sup> According to the Commission, the Gasser findings had the effect of "create[ing] additional costs and delays and undermine[ing] the legal certainty and predictability of dispute resolution which choice of court agreements should bring about"<sup>116</sup>. For these reasons, it first proposes that any courts other than the court designated in the choice of court agreement should not have jurisdiction over the dispute until the designated rule that it has no jurisdiction. Secondly, it gave the court designated under the choice of court agreement priority over the dispute to rule on its own jurisdiction irrespective of whether it was seised first or second.

In this respect, while the Commission proposal paved the way for providing a solution to this dilemma, the fact remains that such an approach was, to some extent, lacking. For instance, it was not clear what mechanism should be employed in the occurrence of parallel proceedings when that first seised court is the non-designated

---

<sup>113</sup> See by analogy, *C-456/11, Gothaer Allgemeine Versicherung AG and Others v Samskip GmbH* [2012] ECLI:EU:C:2012:71.

<sup>114</sup> Koji TAKAHASHI (n 109), 82.

<sup>115</sup> European Commission, 'Proposal for a Regulation Amending Regulation 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters', vol 2010 (2013)

<sup>116</sup> *Ibid* p2.

court. Rather, The Commission simply proposes that such courts lack jurisdiction without clarifying the meaning of such a proposition.

The Brussels I recast adopted a clearer approach than that provided for by the proposal. According to the new provisions, in principle, when the court designated in the choice of court agreement is second seised, the first seised court is under an obligation to stay its proceeding until the former has ruled that it has no jurisdiction.<sup>117</sup> If the chosen court under the choice of court agreement found that it has jurisdiction pursuant to that agreement, all courts other than that court shall decline its jurisdiction.<sup>118</sup> Significantly, the second seised court may proceed with its proceeding irrespective of whether the first seised court has stayed its proceeding<sup>119</sup>.

An examination of these amendments is important in terms of the principle of mutual trust and upholding the effectiveness of the choice of court agreement as an objective sought by the provisions. On the one hand, the obligation to stay the proceeding by the first seised court provided for by the new provision can be seen as one form of the principle of mutual trust. The first non-chosen seised court is obliged to stay its proceeding based on the trust that the chosen court will be the better position court to rule on the validity of the choice of court agreement. In this sense, the new provision reversed the concept of equality of Member State's power to rule on jurisdiction relied on in *Gasser*.<sup>120</sup> Furthermore, the new provision empowers the chosen court second seised to proceed with the proceeding irrespective of whether the first seised court has stayed its proceeding, enhancing the effectiveness of the

---

<sup>117</sup> See the Brussels I Recast article 29. The latter is subject to article 26. This will mean that article 31/2 applies so long as the defendant enter an appearance before the court and contest its jurisdiction on the basis of the existence of choice of court agreement designating another court. However, If the defendant enters an appearance before the court without contesting its jurisdiction, article 26 then applies, giving the non-chosen court jurisdiction, irrespective of the existence of the choice of court agreement so long as the first seised court does not have exclusive jurisdiction. This approach is to some extent similar to the CJEU case law. See *c-150/80, Elefanten Schuh GmbH v Pierre Jacqmain*[1981] 01671 10; *c-111/09 Česká podnikatelská pojišťovna as, Vienna Insurance Group v Michal Bilas*,[2010] I-04545 p 25.

<sup>118</sup> The Brussels I regulation recast, article 31/1 and 31/2. The previous provisions are subject to article 26 in which the court will have jurisdiction when the defendant enter into appearance without contesting its jurisdiction. In this case, article 26 will apply instead of article 31. On the other hand, if the defendant contest the first seised court jurisdiction on the basis of choice of court agreement, then article 31/2. See by analogy, Trevor Hartley(n 94)

<sup>119</sup> Ibid recital 22.

<sup>120</sup> See by analogy to Hartley (n 94) para 11.17.

choice of court agreement on one hand and the right to an effective remedy on the other hand.

However, a number of questions remain unanswered. For instance, while the new provision only covers the situation where the chosen court is subsequently seised, The Recast does not cover where only the non-chosen court is seised. The latter leads to question the extent of power the non-chosen court has in order to determine the validity of the choice of court agreement to decide whether it has jurisdiction and thereby whether a stay should be granted.

In the first place, it should be borne in mind that the mere fact that the defendant contests the jurisdiction of the first seised court based on the existence of the choice of court agreement should not be seen as a sufficient ground to oblige the first seised court to stay, but only has the effect of contesting the submission to the court's jurisdiction.<sup>121</sup> Accepting otherwise will encourage the defendant to raise such defence for the mere desire of delaying the proceeding, "the risk of a reverse torpedo".<sup>122</sup>

The omission of a provision that covers the situation of the seising of the non-chosen court alone was described by professor Hartley as "a fly in the ointment, it is a small fly but a fly nonetheless". In his view, the non-chosen court's power to review the validity of the choice of court agreement and thereby stay its proceeding should be confined to only a prima facie review since, according to the new Recast, a full review is for the power of the chosen court<sup>123</sup>. This was also followed by Professor Fentiman<sup>124</sup> and Professor Weller, though Weller's specifying arguments that could favour a full standard review.<sup>125</sup> In this view, the wording of article 31 and the systematic analysis of it might suggest favouring a full review of the validity of the choice of court agreement by the non-chosen first seised court prior to chosen court seising. Nevertheless, He preferred a reduced standard of review to be followed,

---

<sup>121</sup> Matthias Weller, 'Choice of Forum Agreements under the Brussels I Recast and under the Hague Convention: Coherences and Clashes' [2017] *Journal of Private International Law*, p116 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2827711](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2827711)>

<sup>122</sup> Ian Bergson, 'The Death of the Torpedo Action? The Practical Operation of the Recast's Reforms to Enhance the Protection for Exclusive Jurisdiction Agreements within the European Union' [2015] *Journal of Private International Law*, p 8

<sup>123</sup> Trevor Hartley, 'Choice-of-Court Agreements and the New Brussels I Regulation' [2013] *Law Quarterly Review Legislative Comment* 1.

<sup>124</sup> Richard Fentiman, *International Commercial Litigation* (second ed, Oxford University Press 2015), para 2.202

<sup>125</sup> Weller (n 121) p 123-124.

relying on the fact that the non-chosen first seised court's obligation to stay indicates that full and detailed examination should be undertaken by that chosen court.<sup>126</sup>

However, one might argue that the plain language of the Brussels I recast and, in particular, recital 22 could suggest otherwise. In the circumstances where only the non-chosen court is seised, a full review on the validity of the choice of court agreement can be undertaken until the chosen court is seised. Recital 22 that states that:

"However, in order to enhance the effectiveness of exclusive choice-of-court agreements and to avoid abusive litigation tactics, it is necessary to provide for an exception to the general lis pendens rule in order to deal satisfactorily **with a particular situation** in which concurrent proceedings may arise. This is the situation where a court not designated in an exclusive choice-of- court agreement has been seised of proceedings and the designated court is seised subsequently of proceedings involving the same cause of action and between the same parties. **In such a case**, the court first seised should be required to stay its proceedings as soon as the designated court has been seised and until such time as the latter court declares that it has no jurisdiction under the exclusive choice-of-court agreement. This is to ensure that, **in such a situation**, the designated court has priority to decide on the validity of the agreement and on the extent to which the agreement applies to the dispute pending before it."<sup>127</sup>

The latter recital clearly deals with only one particular situation; the existence of parallel proceedings in two-member states' courts. In this regard, it could be argued that the power granted to the chosen court to decide on the validity of the choice of court agreement is only confined to it in this particular situation and that an exception should be construed and interpreted restrictedly. Therefore, Gasser might still be a valid case law when the chosen court is still not seised and thereby enabling the non chosen court to verify the validity of the choice of court agreement.

---

<sup>126</sup> Ibid, p 124.

<sup>127</sup> Bold is added for emphasis

On the one hand, such interpretation promotes the form of the principle of mutual trust in the CJEU understanding in *Gasser*, which is the equivalences of the member states court to rule on the issue of jurisdiction and that such rules will be applied correctly. On the other hand, however, it is a waste of time and resources, particularly when the chosen court could be seised at any time.<sup>128</sup> In addition, the new form of the principle of mutual trust proposed by the Regulation indicates, as professor Hartley, that such full review is only for the power of the chosen court.

Another question is related to the non chosen court obligation to stay. The new Recast did not specify a time limit that imposes an obligation on the defendant to commence proceeding in the designated court within it. Such omission could constitute a violation of the claimant's right to a fair trial within a reasonable and his right to an effective remedy, a key requirement for the principle of mutual trust and fundamental rights the Regulation ensures to respect.<sup>129</sup> In addition, it could encourage a case of abuse of process. Nevertheless, this does not change the fact that the person whose right could be affected by the stay can bring proceeding.

Another question arises in the relationship between the Brussels I Regulation in this context with the Hague Convention of Choice of Court Agreement.

### **5.5.2.2 The *lis pendens* and the Hague Convention on the Choice of Court Agreement**

The Hague Convention on the Choice of Court Agreement is an international Convention adopted on 30 June 2005 under The Hague Conference of Private International Law governing rules related to the exclusive choice of court agreement and the recognition and enforcement of judgment resulting from proceeding related to that choice<sup>130</sup>. It applies to exclusive choice of court agreement<sup>131</sup> in International cases<sup>132</sup> in civil and commercial matters and when one of the parties is resident in a

---

<sup>128</sup> Weller (n 121) , p.117

<sup>129</sup> See by analogy, Weller (n 121)

<sup>130</sup>The Hague Convention on Choice of Court Agreements 2005.

<sup>131</sup> The Convention can also be applicable to the recognition and enforcement of judgment given in a contracting State based on a non-choice of court agreement when the Contracting state where the enforcement is sought declare its intention to recognition such judgment. see article 22

<sup>132</sup> According to article 1, the case will be considered as an international "Unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected to only with that state."

contracting state<sup>133</sup>. In addition, it governs the recognition and enforcement of judgment based on that choice of court Agreement given from other Contracting State.

In the case of parallel proceedings and particularly to the operation of *lis pendens* rules, article 5 of the Convention, which concerns the jurisdiction of the designated court, is of particular interest. According to the latter, the court designated under the exclusive choice of court agreement shall have jurisdiction to decide a dispute covered by the agreement.<sup>134</sup> Significantly, it shall not decline its jurisdiction on the basis that another court should decide the matter.<sup>135</sup> This will mean that the chosen court is prohibited from staying its proceeding in favour of the non-chosen first seised court for the purpose of *lis pendens* rules,<sup>136</sup> in line with the approach adopted in the Brussels I Regulation Recast. The same provision will also mean a prohibition to decline its jurisdiction on the basis of *forum non-conveniens*.<sup>137</sup>

On the other hand, Contrary to the position taken under the Brussels I Recast, The Hague Convention on Choice of Court Agreement seems to put more trust in the non-chosen court to rule on the validity of the choice of court agreement in the context of deciding its jurisdiction.<sup>138</sup> According to article 6, the non-chosen court should suspend or dismiss its proceeding in favour of the chosen court unless one of the exceptions specified apply, such as when the choice of court agreement is null and void. If the latter exception applies, the non-chosen court can review the validity of the choice of court agreement in the same manner as the chosen court<sup>139</sup>. This is true even if the chosen court was subsequently seised. In other words, It does not provide the priority mechanism as adopted by the Brussels I regime, meaning that both non

---

<sup>133</sup> Ibid. article 1. In article 3(a) The Convention defines the meaning of the exclusive choice of court *agreement* as 'an agreement concluded by two or more parties that meets (certain requirements) and designated, for the purpose of deciding disputed which have arisen or may arise in connection with a particular legal relationship.'

<sup>134</sup> The Hague Convention on Choice of Court Agreements, article 5/1.

<sup>135</sup> *ibid*, article 5/2.

<sup>136</sup> Trevor Hartley & Masato Dogauchi, 'Explanatory Report on the 2005 Hague Choice of Court Agreements Convention' (2013), p 817.

<sup>137</sup> *ibid*.

<sup>138</sup> See by analogy Weller (n 121).

<sup>139</sup> *Ibid* , 112. However, it should be noted that the court is neither required nor obliged to review the validity of the choice of court agreement and exercise its jurisdiction. the law of seised court whether stemmed from its national law or EU law determine whether the latter has jurisdiction and whether such jurisdiction can be entertained. See Trevor Hartley & Masato Dogauchi (n 136) p 821.

chosen and the chosen court can fully review the validity of the choice of court agreement at the same time.<sup>140</sup>

### **5.2.2. 1The interaction between the Hague Convention on Choice of Court Agreement and the Brussels I Regime:**

On 1 October 2015, The Convention entered into force to all EU member states, except Denmark.<sup>141</sup> In principle, both the Convention and the Brussels I Regulation recast can be applied simultaneously, provided that such application will not amount to different outcomes.<sup>142</sup> Where such conflict may occur, the Convention makes express provisions that can resolve the solution.

In the first place, The Convention provides that its application should not affect the application of the rules adopted by the EU whether those rules were adopted before or after.<sup>143</sup> In addition, if all parties are resident in EU member states, the Convention provides that the EU measures such as the Brussels I Regulation will then prevail.<sup>144</sup> If, on the other hand, one of the parties is resident in a Hague contracting State which is not an EU member state such as Mexico, the Hague Convention will then prevail.<sup>145</sup>

The matter becomes more complex when parallel proceedings occur in two different member states; one of the parties is resident in a Hague contracting state, which is a non-EU Member State, meaning the application of the Hague Convention and the designated court is in an EU member state. A number of questions arise. One

---

<sup>140</sup> Ibid p 113; B Hess, T Pfeiffer and P Schlosser, 'Report on the Application of Brussels I Regulation in the Member States' (2007) JLS/C4/2005/03.

<sup>141</sup> Council Decision of 4 December 2014 on the approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements 2014 OJ L 353 <https://eur-lex.europa.eu/eli/dec/2014/887/oj>. This was possible due to article 29/1 of the Convention which states "A Regional Economic Integration Organisation which is constituted solely by sovereign States and has competence over some or all of the matters governed by this Convention may similarly sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that the Organisation has competence over matters governed by this Convention."

<sup>142</sup> Trevor Hartley & Masato Dogauchi (n 136) p 849.

<sup>143</sup> The Hague Convention on Choice of Court agreement, article 26.

<sup>144</sup> Ibid. Article 26/a

<sup>145</sup> Trevor Hartley & Masato Dogauchi (n 136). See also Hartley, *Choice-of-Court Agreements under the European and International Instruments: The Revised Brussels I Regulation, the Lugano Convention, and the Hague Convention* (n 94).

question is what rule will then govern the situation of parallel proceeding. In order to give an answer, an illustration is needed to clarify the idea:

Two parties, a Mexican company and a German Company, agreed on an exclusive choice of court agreement designating the French court as the chosen court. The German party brings proceeding in Italy while the Mexican party brings proceeding in French court based on the choice of court agreement.

In the first place, it should be noted that an examination of the relationship between the Convention and the old Brussels I Regulation in respect to the function of the *lis pendens* rules is not required due to two reasons. First, the Convention only entered into force in all EU member states in 1 October 2015, at the time the old Brussels I regulation was already replaced by its Recast. Secondly, the Brussels I Recast modify its *lis pendens* rules with respect to the choice of court agreement as seen previously. Nevertheless, if we assume that the Lugano convention is in issue, it can be said that the English court will nevertheless be required to proceed with its proceeding, pursuant to the application of article 5 of the Convention, since one of the parties is resident in a Hague Contracting who is not an EU member state.<sup>146</sup>

However, it could be argued that the application of article 6 as a provision provided for by an international convention concluded by the EU Member States can be disregarded when such provision conflicts with the objectives of the EU and the principle of mutual trust.<sup>147</sup> According to the CJEU understanding of the principle of mutual trust in *Gasser*, the chosen court seised second is not in a better position to look at the jurisdiction. As a result, an application of article 6 in this sense will infringe the meaning of mutual trust as provided for by *Gasser*, even if its meaning does not reflect the true definition of the principle of mutual trust. However, accepting such an approach means that the violation of the right to a fair trial and the right to an effective remedy still exist when, on the other hand, the Hague Convention provides for an effective remedy.

Under the Brussels I recast, the English court may proceed with its proceeding in accordance with article 5 of the Convention. At this point, it does not make sufficient

---

<sup>146</sup> Trevor Hartley & Masato Doguchi (n 136).

<sup>147</sup> *TNT Express* (n11).

difference whether The Hague Convention or the Brussels I Regulation recast applies, since both instruments lead to the same result; the chosen court's power to proceed with the proceeding.

The more problematic situation, which needs to be examined, is the first seised non-chosen court's obligation to stay its proceeding, Italy in the previous example when the chosen court is subsequently seised. The question is then whether the former is empowered not to stay its proceeding as an obligation under the priority rule under the Brussels I recast when one of the exceptions provided for by article 6 of the Hague Convention applies.

In order to answer this question, it is important to distinguish between the exceptions provided by article 6 of the Hague Convention 2005.

According to the first and the second exceptions, the non-chosen court is under an obligation to dismiss its proceeding unless it is found that the agreement is null and void under the law of the chosen court or one of the parties lacks capacity under the law of the non-chosen court seised. In this case, the first seised non chosen court, Italy, in our example, should stay its proceeding on the basis of a prima facie review on the validity of the choice of court agreement. This is consistent with the designated court's power to rule on the substantive validity, which concerns capacity, mistakes, fraud conferred to it by the Brussels I recast. In addition, the new form of the principle of mutual trust provided for by the new Recast urges the need to interpret the rules in this matter. This is supported by the CJEU decision in *Nipponkoa Insurance Co. (Europe) Ltd v Inter-Zuid Transport*, where it held that the international Convention concluded between the member states

"cannot compromise the principles which underlie judicial cooperation in civil and commercial matters in the European Union, such as the principles, recalled in recitals 6, 11, 12 and 15 to 17 in the preamble to Regulation No 44/2001, of free movement of judgments in civil and commercial matters, predictability as to the courts having jurisdiction and therefore legal certainty for litigants, sound administration of justice,

minimisation of the risk of concurrent proceedings, and mutual trust in the administration of justice in the European Union"<sup>148</sup>.

This approach complies with the purpose of *lis pendens* rules to reduce the situation of parallel proceeding as much as possible. Moreover, it reduces the cost of litigation for the parties.

According to the third exception provided for by article 6, the non-chosen court could nevertheless abstain from dismissing its proceeding when the enforcement of the agreement could lead to manifest injustice. This would include situations where one of the parties will not get a fair trial in the other state court<sup>149</sup>.

Here we are concerned with the situation of whether an EU first seised non chosen court can nevertheless disregard its obligation under the Brussels I recast to stay its proceeding when the designated court is seised if the enforcement of the choice of court agreement could lead to a manifest injustice to one of the parties such as a corruptive court. One might argue that the court's abstention from the stay in this situation is against the principle of mutual trust, and thereby Hague Convention provisions should be disregarded.<sup>150</sup> The court should stay in favour of the designated court that is seised of the proceeding. In addition, this argument finds support in the Trevor Hartley & Masato Dogauchi Report, where it states that article 6, in general, does not impose an obligation on the non-chosen court to apply the exceptions. It merely permits it to do so.<sup>151</sup>

However, it is doubtful to say that the non-chosen court will nevertheless stay its proceeding, particularly when the enforcement of the exclusive choice of court agreement will lead to manifest injustice. Moreover, It has been shown that although the principle of mutual trust is based on the presumption of member states' compliance with the EU law, the rule of law, and fundamental rights, this presumption should be rebuttable when a serious violation of fundamental rights occur in the member state

---

<sup>148</sup> *c-452/12, Nipponkoa Insurance Co. (Europe) Ltd v Inter-Zuid Transport* (n 11), para 36-38; *TNT Express* (n 11) para 49.

<sup>149</sup> Trevor Hartley & Masato Dogauchi (n 136), 152.

<sup>150</sup> See *c-4 Nipponkoa Insurance Co. (Europe) Ltd v Inter-Zuid Transport* (n 11) para 36-38..pp 36-38; *TNT Express* (n 11) para 49.

<sup>151</sup> Trevor Hartley & Masato Dogauchi (n 136).

justice systems. The principle of mutual trust should not be used as a justification to allow serious injustice to the parties.

In addition, the Brussels I Recast has explicitly stated that it respects the right to a fair trial and the right to an effective remedy as fundamental rights adopted in the Charter of fundamental rights. The EU law, such as the Brussels regime, should be interpreted in such a way that does not contradict the right to a fair trial and the right to an effective remedy. An interpretation where those rights override should be adopted since they are the requirement on which the principle of mutual trust is based.

Nevertheless, the party who relies on the manifest injustice in the designated court must provide reliable documents, which makes the first seised non-chosen court substantially believe that that party in this specific case will receive a manifest justice in the designated court.<sup>152</sup> The mere fact that the defendant opposes the enforcement of the agreement on that basis is not sufficient to abstain the non-chosen court from staying its proceeding. This is to provide a balance between both parties' rights in the legal relationship.

## **5.7 The lis pendens and the length of proceeding**

The lis pendens is based on the trust that the first seised court will rule on its own jurisdiction within a reasonable time. It is based on the presumption of member states' compliance with EU law and particularly fundamental rights such as the right to a fair trial within a reasonable time and the right to an effective remedy. However, a question that needs to be asked is whether the situation will remain the same even when the first seised court has a poor history of infringing the right to a fair trial within a reasonable time?

According to the ECHtR statistics, Italy is the most State violating the reasonableness time as a key requirement of the right to a fair trial.<sup>153</sup> In addition, according to the Council's recommendation to Italy in 2017, the Italian judicial system is still one of the highest systems among the EU member states that suffer from its case backlogs and

---

<sup>152</sup> See chapter 2

<sup>153</sup> 'European Court of Human Rights Statistics, Violation by Article and by State 1959-2015' (n 24).

length of proceedings.<sup>154</sup> Hence, to what extent then *lis pendens* as an implementation to the principle of mutual trust should then be respected when an evident violation of the litigant's fundamental rights might occur.

The question was examined by the CJEU in *Gasser*. The court was asked whether the fact that an excessive length of proceeding occurs in the first seised court could be considered as an exception that relieves the second seised court from its obligation to stay the proceeding.

The CJEU answered the question on the negative. Providing an exception from the general rule in this situation is, in the court's view, contrary to the objective in which the Convention sought to achieve.<sup>155</sup> More importantly, the CJEU relies on the principle of mutual trust in justifying its approach. According to the court, the Brussels convention,

"is necessarily based on the trust which the Contracting States accord to each other's legal systems and judicial institutions. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of judgments. It is also common ground that the Convention thereby seeks to ensure legal certainty by allowing individuals to foresee with sufficient certainty which court will have jurisdiction."<sup>156</sup>

*Gasser* is actually suggesting is that there is a definite mutual trust in the equivalence of legal systems of the member states, which prevent any derogation from the application of the *lis pendens* rule when the first seised court has systematic problems even if such problems will infringe the defendant right to judicial protection. It is an

---

<sup>154</sup> Council Recommendation on the 2017 National Reform Programme of Italy and Delivering a Council Opinion on the 2017 Stability Programme of Italy EN' COM(2017) 511 final, p15; Commission Staff Working Document, 'Country Report Italy 2017 Including an In-Depth Review on the Prevention and Correction of Macroeconomic Imbalances' SWD(2017) 77 final.

<sup>155</sup> *Gasser* (n 1) para 68.

<sup>156</sup>*Ibid* para 72.

invitation for the bad faith litigant wishing to frustrate the choice of court agreement in one hand and/ or wanting to delay the delivery of judgment in the commencement of proceeding in a snail moving pace member state court. An anti-suit injunction cannot even be used to prevent or minimise the actions of such bad faith litigant.<sup>157</sup>

This dilemma is known as "the Italian torpedo", which is widely used in the context of intellectual property.<sup>158</sup> According to the latter, the litigant, relying on the finding of both the Tatry and Gasser, bring proceeding in Italy claiming for declaration of non-infringement of the patent in Italy and in other EU Member States, preventing any other action having the same cause of action in another member state. Gasser "gave it the green light, thereby encouraging its use."<sup>159</sup>

In *Weber v Weber*<sup>160</sup>, the matter was even advanced by the Advocate General opinion and by the Commission submission. The case concerns the application of the lis pendens rule when the second seised court has exclusive jurisdiction in a proceeding which has as their objects in rem in immovable property. It is an interesting case in many aspects. Not only it questions the second seised court's obligation to stay its proceeding when it has exclusive jurisdiction in accordance with the jurisdictional rules, but it also raises questions on whether the right to effective judicial protection could be considered as an element that needs to be taken into account in the interpretation of the lis pendens rules.

The CJEU held that not only the second seised court is under no obligation to stay the proceeding when it has exclusive jurisdiction under the Regulation, but it is obliged to proceed to have a judgment on the merit<sup>161</sup>. As a result, the court did not see the need to answer the other questions. Nevertheless, the Advocate General's opinion has attempted to answer the questions. Notwithstanding the fact that he stated the importance of the right to a fair trial and the right to an effective remedy as fundamental rights which must be protected in the context of the Brussels Regulation, He

---

<sup>157</sup> C-159/02, *Gregory Paul Turner v Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA*[2004] I-03565

<sup>158</sup> *Franzosi* (n 572).

<sup>159</sup> *Maire ni Shullebahain and Sangeeta Shah James J. Fawcett, Human Rights and Private International Law* (first, Oxford Private international law series 2016) para 4.152.

<sup>160</sup> *Case C-438/12, Irmengard Weber v Mechthilde Weber, 2014.*

<sup>161</sup> *Ibid*, para 65.

nevertheless held that the interpretation of article 27 in the light of the Charter could not amend the scope of that article. In his view, the article is based on a purely technical provision, which raises no problems as regards the application of the Charter, "since the parties to the dispute brought before the court second seised benefit from definition, as regards the judicial systems of the member states, from the right of access to justice and from the guarantee of a fair hearing before the court first seised."<sup>162</sup>

The Advocate General Opinion was influenced by the CJEU's interpretation in the *Gasser*. To support his conclusion, he also relied on the Commission submission, which held that, where the conditions of article 27 are met, the second seised has an obligation to stay the proceeding of its own motion and "and must do that without the possibility of taking into consideration other factors such as the effectiveness of an applicant's access to justice"<sup>163</sup>. In the Advocate General and the Commission view, the person's right to judicial protection is not a requirement, which must be taken into account while interpreting the *lis pendens* rule since it does not allow any discretion. On the contrary, the court is welcomed to investigate the person's right to judicial protection when applying article 28 since a margin of discretion is given to it.

The conclusions reached by both the CJEU in the *Gasser* and the Advocate General and the Commission in the *Weber v Weber* case cannot be accepted since it does not reflect the actual meaning of the principle of mutual trust. Such a situation collides with the actual meaning of the principle of mutual trust, which requires member states to organise their justice systems in such a way that respects, observes, and promotes fundamental rights and particularly the right to effective judicial protection. In this respect, not only the first seised court will be liable for infringing the right to a fair trial within a reasonable time, but also the second seised court for staying its proceeding for a long time in favor of the first seised court.<sup>164</sup> On the other hand, failure to include a solution for such a situation conflicts with the fact that the Brussels I Recast should also be in conformity with the right to an effective remedy, an essential element of the right to effective judicial protection<sup>165</sup>.

---

<sup>162</sup> *Irmengard Weber v Mechthilde Weber*, Opinion of AG JÄÄSKINEN. (n 74) para 87-88.

<sup>163</sup> *Ibid* para 89

<sup>164</sup> See by analogy, *Kutic v Croatia App 48778/99*(ECHtR, 1 March 2002); . see also *Maire ni Shullebahain and Sangeeta Shah James J. Fawcett*(n 159) para 4.141.

<sup>165</sup> The Brussels I Recast, recital 38.

### **5.7.1 The Torpedo after the Recast**

As seen above, the Brussels I recast provides an exception to the general rule with respect to the choice of court agreement to enhance and strengthen its effectiveness. This means that the Torpedo will be inoperative in this respect. However, the question which needs to be asked is whether any derogation was provided for by the Recast in case of a torpedo not involving a choice of court agreement. The Brussels I recast turned a blind eye to incorporating an exception that addresses this situation. Such failure occurs irrespective of the Commission's attempt to resolve the problem. The proposal states the following:

"In cases referred to in paragraph 1, the court first seised shall establish its jurisdiction within six months except where exceptional circumstances make this impossible. Upon request by any other court seised of the dispute, the court first seised shall inform that court of the date on which it was seised and of whether it has established jurisdiction over the dispute or, failing that, of the estimated time for establishing jurisdiction"<sup>166</sup>.

The proposal set a time limit in which the first seised court is obliged to rule on its jurisdiction within it as a way to minimise its length of proceeding. In addition, informing the second seised court of its estimated time to establish its jurisdiction upon request of the latter can be seen as an indirect way that could force the first seised court to rule on its own jurisdiction as soon as possible.

According to the current version, however, the second seised court is the one which needs to inform the first seised court of its seising date, without any obligation on the first seised court, as the Commission proposes, to inform the second seised court of its time of seising, whether it has established its jurisdiction, and more importantly of the estimated time to establish such jurisdiction. This follows that, in the absence of such an exception, the Gasser case still comes into play, authorising a bad faith claimant to delay as much as he can on the basis of the principle of mutual trust.

---

<sup>166</sup> The Commission Proposal for a Regulation of The European Parliament and of The Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,(Recast), Brussels, (2010) 748 final 2010.

### 5.7.2 Possible solutions

As seen in previous chapters, the principle of mutual trust is a tool that should be used to enforce and enhance access to justice rather than undermining it. It is based on the respect of the rule of law and fundamental rights, particularly the right to a fair trial and the right to an effective remedy trust.

It has been argued that the second seised court can proceed with its proceeding irrespective of the first seised court long proceeding if it has been evidenced that the litigant in the first seised court has abused his right provided by the EU law and in our case, the lis pendens rules.<sup>167</sup> The CJEU has ruled in many occasions that the EU law cannot be used in an abusive way.<sup>168</sup> It went further to allow the member state's court to rely on their domestic rules to prevent or minimise such abusive conduct, provided those rules will not affect the application of the principle of effectiveness of the EU law.<sup>169</sup>

While it is a way to prevent or at least minimise the conduct of the bad faith litigant who frustrates the EU provisions for his favour, the fact remains that the assessment of such act is not an easy task and particularly when such practice is conducted in another member state court. In addition, such examination could indirectly affect the first seised court's power to examine such abusive act, which occurs within its border, and therefore indirectly affect the principle of mutual trust as understood by the CJEU. Furthermore, this solution does not provide a remedy for the length of proceeding when the claimant in the first seised court acted in good faith. It only gives the second seised court the right to proceed only when the litigant in the first seised court has acted in an abusive way. More importantly, this assessment could lead to examine and review the first seised court's jurisdiction if it was pleaded that abusive act takes the shape of bringing proceeding in a court which does not have

---

<sup>167</sup>Nuyts A, 'The Enforcement of Jurisdiction Agreement Further to Gasser and the Community Principle of Abuse of Right' in Pascal de Vareilles-Sommières (ed), *Forum Shopping in the European Judicial Area* (1st edn)

<sup>168</sup> C-367/96, *Alexandros Kefalas and Others* (n 67) para 20; C-255/02, *Halifax plc, Leeds Permanent Development Services Ltd, County Wide Property Investments Ltd, v Commissioners of Customs & Excise*[2006] I-01609, para 68; C-321/05, *Hans Markus Kofoed v Skatteministeriet*, [2007] I-05795, para 38.

<sup>169</sup> *Alexandros Kefalas and Others* (n 168) paras 21–22.

jurisdiction in accordance with the Brussels I Regulation<sup>170</sup> and thereby clearly collide with the characteristic of the principle of mutual trust.

What is then the best solution? A proper solution that aims to provide a balance between minimising the situations of parallel proceeding and conflicting judgment and the respect of the rule of law norms and fundamental rights, particularly the right to a fair trial, can be reached by combining a number of suggestions.

One possible tool that could contribute to solving the problem is the new EU rule of law framework. In 2014, the Commission adopted the EU rule of law framework as a way to protect the rule of law as a prerequisite of the principle of mutual trust. The framework seeks to address and solve threats of the rule of law with a systematic nature.<sup>171</sup> It is based on three stages; assessment, issuing a recommendation, and follow-up to the recommendation.

While the latter is a promising tool and step forward in the protection of the rule of law in the European Union, it cannot be seen as the prime solution to the *lis pendens* problem due to a number of reasons. First, the mechanism by its three stages solution does not provide a rapid and instant remedy for the problem. In the situation of the rule of law in Poland, for instance, for more than two years, The Commission issued an assessment, three rule of law recommendations, and a reasoned proposal to activate article 7 of the TEU, without any actual preventive or sanctioned remedy provided<sup>172</sup>. A Polish judge even described the actions as “ridiculous”.<sup>173</sup> This follows that it cannot be considered as best and speedy resolution when parallel proceedings are already pending in the middle of applying these stages. In addition, the framework

---

<sup>170</sup> Professor Nuyts provides the lack of jurisdiction as an example for applying the test provided for by the CJEU case laws. Arnaud Nuyts(n 167), p 68.

<sup>171</sup> The Commission Proposal for a Regulation of The European Parliament and of The Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,(Recast), Brussels, COM(2010) 748 final.

<sup>172</sup> The European Commission, ‘Commission Recommendation (EU) 2016/1374 of 27 July 2016 regarding the Rule of Law in Poland’ (2016); The EU Commission, ‘Commission Recommendation of 21.12.2016 Regarding the Rule of Law in Poland Complementary to Commission Recommendation (EU) 2016/1374 EN’ (2016) Commission the E and The European Commission, ‘Commission Recommendation of 26.7.2017 Regarding the Rule of Law in Poland Complementary to Commission Recommendations (EU) 2016/1374 and (EU) 2017/146 EN C(2017) 5320 Final’ (2017), the EU Commission, Reasoned Proposal In Accordance With Article 7(1) Of The Treaty On European Union Regarding The Rule Of Law In Poland Proposal For A Council Decision On The Determination of a clear Risk of a serious breach by The Republic of Poland of The Rule of Law

<sup>173</sup>Bernd Riegert, Translated from German by Jon Shelton, ‘EU and Poland Battle It out over the Rule of Law’ (*DW Akademie*, 2021) <<https://www.dw.com/en/eu-and-poland-battle-it-out-over-the-rule-of-law/a-58865296>> accessed 29 August 2021.

only looks at the threats to the rule of law caused by systematic deficiency. Individual violation will not be taken into account.

Another suggestion is to provide a uniform provision that obliges the member states' courts to rule on their own jurisdiction at a first stage before going into the merit.<sup>174</sup> Some Member States' national procedural rules oblige the court to examine the jurisdictional aspect and the merit together. This has the effect of increasing the possibility of the length of proceeding in cross-border disputes on the one hand and the costs of defending the case on the merit on the other hand.<sup>175</sup>

Secondly, endorsing a time limit which obliges the first seised court to rule on its jurisdiction within it from the day the court is deemed to be seised in accordance with article 30. A uniform time limit provides legal certainty and predictability for all parties in the legal proceeding. This can be six months, extendable to one year. If the six-month period expired, the aggrieved party can go to the second seised and request to proceed with the proceeding. The second seised court should then communicate with the first seised court to ask it on the estimated time to have a judgment on the jurisdiction matter. This should be no longer than the remaining time given for an extension. If no answer was received from the first seised court or the reply shows that it will exceed the time given by the provision, the second seised can proceed simultaneously with the first seised court. The second seised court will proceed with the proceeding and rule on its own jurisdiction without obliging the first seised court to stay its proceeding.

It is true that this solution could increase the situations of parallel proceedings. On the other hand, it is consistent with the right to a fair trial and the right to an effective remedy for both parties in both proceedings since it does not oblige either court to stay its proceeding.

## **5.8 The consequences of the non-respect of the *lis pendens* rules**

---

<sup>174</sup> Fentiman R, 'Agreements, Parallel Proceedings and Jurisdiction' in pascal de Vareilles-sommieres (ed), *Forum Shopping in the European Judicial Area* (first, Hart Publishing 2008), 50

<sup>175</sup> *ibid* p 40

If the non-chosen first seised court does not stay its proceeding, contrary to its obligation when the chosen court is seised, or the second seised court proceed with its proceeding irrespective of the first seised court proceeding and issue a judgment, what are then the legal consequences of such non-respect?

The Brussels I Recast, and its predecessors fail to answer these questions. Nevertheless, the CJEU judgment in *Gothaer Allgemeine Versicherung AG and Others v Samskip GmbH*<sup>176</sup> could be seen as an answer to the question.

The case concerns an action brought before the Belgian court claiming damages. However, the court held that it lacks jurisdiction owing to the existence of a valid choice of court agreement designating Iceland as the chosen court. Another claim was then brought before the German court claiming damages against the defendant. The latter court referred a number of questions to the CJEU for a preliminary ruling. The CJEU was essentially asked whether a court's decision that it lacks jurisdiction on the basis of the existence of a valid choice of court agreement should be considered as a judgment in accordance with the Brussel I Regulation provisions and whether the court where the enforcement is sought should declare that the action before it is inadmissible, regarding the validity of the choice of court agreement.

The court answered both questions in the affirmative. In reaching its decision, the CJEU relied on the free circulation of judgment throughout the EU, the simplicity of the recognition, and enforcement formalities as essential objectives the Regulation seeks to achieve and importantly on the principle of mutual trust. According to the court, a restrictive interpretation on a judgment from a court of origin that it lacks jurisdiction due to the existence of a choice of court agreement could lead to undermining the free circulation of judgment<sup>177</sup>. In addition, it held that

"That mutual trust would be undermined if a court of a Member State could refuse to recognise a judgment by which a court of another Member State declined jurisdiction on the basis of a jurisdiction clause. To allow a court of a Member State to refuse to recognise such a judgment would run counter to the system introduced by Regulation No 44/2001, because such a refusal would be liable to compromise the effective

---

<sup>176</sup> *Gothaer* (n113).

<sup>177</sup> *Ibid* pp 27-28

operation of the rules set out in Chapter II of that Regulation on the distribution of jurisdiction as between the courts of the Member States"<sup>178</sup>.

As for the second question, it held that it would be contrary to the principle of mutual trust to permit the court where the enforcement is sought to review the same issue of validity, which was already decided by the court of origin in the process of deciding its jurisdiction<sup>179</sup>. According to the court, the concept of *res judicata* covers not only the operative part of the judgment but also to cover "the ratio decidendi of that judgment, which provides the necessary underpinning for the operative part and is inseparable from it"<sup>180</sup>. Therefore, the decision on the validity of the choice of court agreement as a reason for declining jurisdiction has *res judicata*.

This follows that the first seised non chosen court's judgment on the validity of the choice of court agreement will be recognised even if it was given in contrary to the new rules of *lis pendens*. As professor Weller put it that,

" as a matter of matter of mutual trust, the courts that are obliged to give priority to other courts under article 29(1) and 31(2) Brussels I Regulation are excepted, like any other member state court, to decide correctly on the harmonised jurisdictional rules. if the court first seised did in fact decide correctly on the validity or the invalidity, then the error in law and the binding effects from this erroneous judgment anyway are without practical consequences because the court second seised would have decided the jurisdictional issue identically"<sup>181</sup>.

As for the legal consequences on the non-respect of the *lis pendens* rules by the second seised court when the first seised takes an excessively long time to rule on its own jurisdiction. Neither the Brussels I regulation nor the CJEU jurisprudence provides for it. There is nothing in the wording of the Brussels I Regulation that could suggest a sanction or penalty, such as the non-recognition of the judgment if the second seised court did not comply with its obligation.

One can conclude that when the court of origin issues a judgment contrary to the *lis pendens* rules as an expression of the principle of mutual trust, the principle of

---

<sup>178</sup> Ibid para 29

<sup>179</sup> *Ibid para 36*

<sup>180</sup> *ibid*, para 40

<sup>181</sup> Weller (n 121) p 127.

the mutual trust itself nevertheless justifies the recognition and enforcement of such judgment.

## **5.9 Conclusion**

The Lis pendens rules is an expression of the principle of mutual trust, in which the second seised court would stay its proceeding, on its own motion, in favour of the first seised court when the subject matter, the object, and the same parties are identical with the first seised court, on the basis of trust that the first seised court is capable on ruling on its own jurisdiction, in such way that complies with the right to judicial protection and particularly the right to a fair trial within a reasonable time, as key requirement underlying the principle of mutual trust. It has been shown that the dispute in question does not need to be construed in such a way that fits the lis pendens rules. This is true taking into account the existence of the provisions of the related action, which empowers the second seised court to stay its proceeding when related action exists in the first seised court. A power to have discretion is better than imposing an obligation to stay since under the former, the second seised court would be allowed to assess all the relevant circumstances, particularly the parties' fundamental rights such as the right to a fair trial and the right to an effective remedy.

On the other hand, it has been shown that the second seised court is relieved from its obligation to stay its proceeding in favour of the first seised court when it has exclusive jurisdiction under the jurisdictional rules. However, the matter was not the same when the second seised court has exclusive jurisdiction under the exclusive choice of court agreement. Under the old Brussels I Regulation, the lis pendens applied notwithstanding the fact that the second seised court is the court designated under the exclusive choice court agreement. This was faced with wide criticism, which led to the Recast of the Brussels I Regulation. Under the new version, the second seised chosen court can proceed irrespective of the existence of proceeding in the first seised court, and the first seised court is under an obligation to stay its proceeding. However, several questions remained unanswered, such as the review of the first seised court to the validity of the choice of court agreement and, more importantly, on the interaction between the Brussels I Regulation recast and the Hague Convention on the choice of court agreement. One important question is whether the first seised non chosen court can nevertheless proceed with its proceeding when one of the

exceptions underlined by the Convention provision applied. This urges the need to codify the answers in the new Regulation to provide predictability and legal certainty as important norms of the rule of law.

Another important aspect that has been shown is the application of the *lis pendens* when the first seised court takes an excessively long time to determine its jurisdiction. The new Recast turned a blind eye in incorporating a solution that prevents or at least minimise the case of violating fundamental rights. A number of solutions have been suggested to prevent or minimise those negative implications, such as a time limit to which the first seised court should rule on its jurisdiction within it. To this end, it has been seen that when the court of origin issues a judgment contrary to the *lis pendens* rules as an expression of the principle of mutual trust, the principle of mutual trust itself nevertheless justifies the recognition and enforcement of such judgment.

## Chapter 6 The implementation of the principle of mutual trust in the stage of recognition and enforcement of judgment: mutual recognition and enforcement of judgments in the Brussels I Regulation

### 6.1 Introduction

The chapter examines the mutual recognition and enforcement of judgments between the EU Member States as an, if not the, most explicit reflection of the principle of mutual trust in the EU private international law rules. The recognition of judgment can be understood as “accepting the determination of the rights and obligation made by the court of origin”<sup>1</sup> while the enforcement of such judgement is “ensuring that the judgment-debtor obeys the order of the court of origin”.<sup>2</sup> In the European Union, the recognition and enforcement of judgment is based on the principle of mutual recognition, which started by simplifying the rules of recognition and enforcement between the EU member states in the Brussels Convention to reach the complete abolition of intermediate measures in the Brussels I regulation recast. The rationale behind it is to achieve the free circulation of judgment throughout the European Union.<sup>3</sup> Accordingly, a judgment given in a member state is to be recognised in another member state without any special procedure and without the need for declaration of enforceability.<sup>4</sup> This means that a judgment from another member state is to be treated as a judgment given in the member state where the enforcement is sought.<sup>5</sup> These rules apply widely to cover ‘any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court’<sup>6</sup> including introductory judgment<sup>7</sup> and protective measures.

---

<sup>1</sup> Trevor C Hartley, *International Commercial Litigation Text, Cases and Materials on Private International Law* (5th edn, Cambridge University Press 2013)319.

<sup>2</sup> *ibid.*

<sup>3</sup> The Brussels I Recast, recital 27

<sup>4</sup> *ibid* recital 26 and article 39

<sup>5</sup> *Ibid*, Recital 26.

<sup>6</sup> The Brussels I recast article 2

<sup>7</sup> *C-456/11, Gothaer Allgemeine Versicherung AG and Others v Samskip GmbH* [2012] ECLI:EU:C:2012:71.

Importantly, since the early beginnings of the Brussels regime, Mutual recognition and enforcement of judgment was seen as an essential tool to secure and enhance people's right in the European Union. According to article 220 of the Treaty of Rome, which paved the way for the adoption of private international law in the European Union, such as the Brussels Convention, a direct connection was made between the adoption of simple rules of jurisdiction and recognition and enforcement of judgment and the importance of securing people's right in the common market. Such significance was increased after the entry into force of the Amsterdam Treaty where the constitution of an area of freedom, security and justice with respect of fundamental rights is seen as a fundamental objective that needs to be fulfilled.<sup>8</sup> Aiming to achieve such goal, the Council significant meeting held in Tampere concluded that mutual recognition of judgement should be seen as the cornerstone of judicial cooperation in civil and commercial matters, which should be simplified.<sup>9</sup>

The Lisbon treaty followed the Tampere conclusions and explicitly provides that Mutual recognition is the objective of judicial cooperation in civil and commercial matters.<sup>10</sup> Importantly, it explicitly held that it is an important way to enhance access to justice, a significant objective sought by the treaty.<sup>11</sup> This means that mutual recognition and enforcement of judgment should not have the effect of undermining or hampering people's fundamental rights in the name of upholding mutual trust.

The question arises to what extent mutual trust and mutual recognition and enforcement as an example should be respected when the court where the enforcement is sought is faced with a judgment violating fundamental rights under the Charter and the ECHR rules. The chapter is divided to 4 sections. Section 2 examines the strong examples of the principle of mutual trust in the stage of recognition and enforcement. The principle of mutual trust has strong examples in these stages such as the non-review of substance and jurisdiction, the court's inability to raise refusal grounds by its own initiative and the abolition of the declaration of enforceability.

---

<sup>8</sup> Treaty of Amsterdam, article 1/3

<sup>9</sup> Tampere Conclusions ,para 33.

<sup>10</sup> TFEU, article 81

<sup>11</sup>Ibid, article 67/3

On the other hand, in its attempt to strike a balance between the principle of mutual trust and the right to a fair trial and the right of defence,<sup>12</sup> the Brussels Regime provides for refusal grounds that could be raised by the interested party such as public policy, natural justice and the irreconcilability of judgments. Section 3 examines those grounds in depth and questions whether they provide sufficient protection to the rule of law and fundamental rights as key requirement of the principle of mutual trust.

Importantly, the chapter sheds the light on the Service Regulation as a significant ancillary instrument to the Brussels I Recast particularly in the stage of recognition and enforcement. It should be remembered that it applies in civil and commercial matters when judicial and extrajudicial documents has to be transmitted from one Member state to another for service there.<sup>13</sup> It provides for different means of transmission such as the transmitting and the receiving agencies, the postal service and the direct service.<sup>14</sup> Such examination is certainly important, when the Regulation covers the service of the most important document in the legal proceeding; the document instituting the proceeding. It informs the defendant that legal proceeding is taking place against him to enable him to defend his rights. Failure to serve such service within the meaning provided by the Regulation could put the judgment under serious threat of its non-recognition and enforcement.

In addition, section 4 examines the recognition and enforcement of specific judgments under the Brussels IIa regulation. While the Brussels IIa Regulation also attempts to provide a balance between upholding the principle of mutual trust and protecting the rule of law and fundamental rights by laying down grounds for non-recognition and enforcement, such refusal grounds should be kept in minimum required to enhance the principle of mutual trust.<sup>15</sup>

Significantly, the objective of promoting the principle of mutual trust in the stage of recognition and enforcement was even taken further in certain types of judgments such as the rights of access and return of child decisions. As will further be

---

<sup>12</sup> *c-619/10 Trade Agency Ltd v Seramico Investments Ltd* [2012] ECLI:EU:C:2012:531; *C-420/07 Meletis Apostolides v David Charles Orams and Linda Elizabeth Orams* (2009); *C-70/15, Emmanuel Lebek v Janusz Domino* [2016] ECLI:EU:C:2016:52.

<sup>13</sup> The Service Regulation, article 1.

<sup>14</sup> The Service Regulation provides for the possibility to serve the judicial document by using a direct service when the member state where the service will be effected permit such service through its communication to the Commission. See article 15 and 23

<sup>15</sup> Brussels IIa Regulation, recital 21.

demonstrated, those decisions are automatically recognised without the need for the exequatur and without any possibility of raising grounds for non-recognition before the Member State court where enforcement is sought, when the certificate was issued satisfying certain conditions.<sup>16</sup> In these situations, the Member State's court where the enforcement is sought can do no more than to declare that the judgment by the member state court of origin is enforceable.<sup>17</sup> This requires a high level of mutual trust between the EU member states. However, a question arises which the chapter explores as whether the court where the enforcement is sought is empowered to refuse the enforcement when the judgment of the court of origin consist of serious infringements of fundamental rights.

These questions are examined, where possible, by looking at the interaction between the EU rules and the ECtHR jurisprudence when member state's court is to be in violation with the rights guaranteed under the Convention, taking into account the *Bosphorus* presumption developed by the ECtHR.

## **6.2 The strong examples of the principle of mutual trust in the stage of recognition and enforcement of judgment between the EU member states**

This section examines the strong implementations of the principle of mutual trust in the stage of recognition and enforcement. Since the beginning of simplifying the recognition and enforcement rules between the EU member states by the Brussels Convention, the principle of mutual trust reflections were evident. Importantly, over the years, aiming for the continuous enhancement of the free circulation of judgments as a main objective in the European Union, such examples became even more evident such as the abolition of the intermediate measures. These examples are the non-review on the substance and jurisdiction and the abolition of the exequatur which will be examined respectively.

### **6.2.1 Non review on the substance**

One of the strong reflection of the principle of mutual trust in the stage of recognition and enforcement is that member states are under an obligation not to review the substance of the judgment at all. This means that courts must refrained from deciding

---

<sup>16</sup> The Brussels IIa Regulation, article {41/1-42/1 Convention.”

<sup>17</sup> *Case C-211/10 PPU Doris Povse v Mauro Alpago* [2010] ECRI-06673 ,para 73; *Case C-195/08 PPU Inga Rinau*[2008] ECR I-05271 para 89

whether the other member state's court judgment was correct.<sup>18</sup> In addition, it must not refuse the recognition and enforcement of such judgment on the basis that there is error in law or facts.<sup>19</sup>

A matter closely connected to review the substance of the judgment is a determination to the scope of the regulation. It should be remembered that according to article 1, the Brussels I Regulation applies in civil and commercial matters. A question arises as to whether the court, in which the enforcement is sought, when enforcing the judgment, is obliged to respect the court of origin finding in this respect. It has been argued that defining the scope by the court of origin does not ban the court where the enforcement is sought from determining whether the judgment fall under the scope of the Regulation.<sup>20</sup> This can be understood by reference to the CJEU's decision in *LTU Lufttransportunternehmen GmbH & Co. KG v Eurocontrol*. In this case, the CJEU made it clear that the court of enforcement examination as to whether a matter falls within the scope of the regulation should be done by a reference to the objectives of the Regulation. This indicates that a new investigation to the scope of the regulation is conducted by the court of enforcement.

In this respect, while the CJEU decision could produce some uncertainty owing to the indefinite definition of the concept of civil and commercial matters<sup>21</sup>, this could ensure more protection to the defendant in the stage of recognition and enforcement, resulting in a limitation to the principle of mutual trust.

### **6.2.2 No review on jurisdiction**

In principle, member states are under an obligation to abstain from reviewing and checking the court of origin's basis of jurisdiction.<sup>22</sup> This is true even if the Brussels I jurisdictional rules was not followed correctly by the court of origin.<sup>23</sup> This would mean for example, that in principle, the court where the enforcement is sought is under an obligation to recognise and enforce the judgment even if it is against an exclusive

---

<sup>18</sup> Jenard report, no C59/46 .

<sup>19</sup> Ibid. see also *c-7/98 Dieter Krombach v André Bamberski* [2000] ECRI-01935,para 32.

<sup>20</sup> Uglesa Grusic, Christian Heinze, Louise Merrett, Alex Mills, Carmen Otero Garcia-Castrillon, Zheng Sophia Tang, Katrina Trimmings (n 368),614; see also ,Lord Collins of Mapesbury (ed), *Dicey, Morris and Collins on The Conflict of Laws* (Fifteenth, Sweet & Maxwell - Thomson Reuters), 768..

<sup>21</sup> Hartley, 'International commercial litigation text,cases and materials on private international law, 33

<sup>22</sup> The Brussels I recast article 45/3

<sup>23</sup> *c-7/98 Krombach* (n 19), para 33.

choice of court agreement designating a court other than the court of origin.<sup>24</sup> In addition, the public policy defence cannot be used as a way to review or investigate the court's jurisdiction.<sup>25</sup> According to Jenard Report, This "implies complete confidence in the court of the State in which judgment was given".<sup>26</sup>

At the same time however, the Brussels I regime provides for exceptions where the court of origin jurisdiction can be reviewed. This can be seen where the recognition and enforcement of the judgment can be refused if it conflicts with exclusive jurisdiction by jurisdictional rules and rules related to insurance, consumers, employment contracts "where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee was the defendant".<sup>27</sup> In order to refuse the recognition on such basis, the court have the power to check whether the court of origin comply with the previous rules.

In providing such exceptions, the Brussels regime narrow the scope of mutual trust in the recognition and enforcement stage since these rules are generally linked to public policy under the member state's national rules.<sup>28</sup> However, one should bear in mind that the court of enforcement is sought is under an obligation to respect and follow the facts in which the court of origin based its jurisdiction.<sup>29</sup>

In addition, under article 59 of the Brussels Convention, member states are under no obligation to recognise or enforce a judgment given by another member state's court on a defendant domiciled in a third state to which the member state of enforcement concluded a convention with. It is submitted that "there could have been no question of trusting that court" in that situation.<sup>30</sup> In this exception, the Convention clearly limits the scope of mutual trust when it concerns the right of third state's defendant.

However, article 59 was abolished from both the recast and its predecessor. Instead, Article 72 was endorsed in both versions, which only ensures the continuous application of the convention concluded before the entry into force of the Brussels I

---

<sup>24</sup> For further discussion, see chapter 5

<sup>25</sup> The Brussels I recast, article 45/3

<sup>26</sup> Jenard report.

<sup>27</sup> However, an equivalent provision cannot be found where the court of origin based its jurisdiction despite the existence of choice of court agreement designating another member states court.

<sup>28</sup> Jenard report.

<sup>29</sup> The Brussel I recast, article 45/2

<sup>30</sup> Hartley, *International Commercial Litigation Text, Cases and Materials on Private International Law* (n 1).,p 325

regulation between an EU member state of the EU and a third state in accordance of article 59 of the Brussels Convention. Such abolition is natural taking into account the increase desire to enhance the free circulation of judgment throughout the EU.<sup>31</sup> Indeed, the recast clearly states that achieving the objective of free circulation of judgment justifies that the recognition and enforcement rules will also be applicable even it was given against a non-EU domiciled defendant.<sup>32</sup>

To this end, the non-review of jurisdiction is a strong example of the principle of mutual trust between the EU member states in the stage of recognition and enforcement, allowing only number of grounds to disregard such obligation.

### **6.2.3 A presumption in favour of recognition and the abolition of exequatur**

Since the beginning of the Brussels regime, the recognition of a judgment given by a member state's court was considered as automatic, needing no special procedure. Such fact produced a presumption in favour of recognition, which can be rebuttable only if one of the grounds set out in the regulation occurred.<sup>33</sup>

In addition, one of the explicit expressions of the principle of mutual trust in the stage of recognition and enforcement is the abolition of the exequatur or the declaration of enforceability. The exequatur can be understood as “a formal court procedure by which a foreign judgment is declared enforceable in the state where enforcement is sought”.<sup>34</sup> In general, the exequatur empowers the court where the enforcement is sought to to examine whether the foreign judgment compatible with its legal order.<sup>35</sup> It will further be seen that such roles were strong in the Brussels Convention while started to fade in the old Brussels I Regulation and almost gone in the Brussels I regulation Recast.

---

<sup>31</sup> See by analogy , Jenard report.

<sup>32</sup> The Brussels I recast, recital 27

<sup>33</sup> Jenard report, no 59/43.

<sup>34</sup> The European Commission , Impact Assessment Accompanying Document To The Proposal For A Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) {COM (2010) 748 final} {SEC (2010) 1548 final}, Annex I Glossary of legal term [45].

<sup>35</sup> E. Kramer X, 'Harmonisation of Civil Procedure and the Interaction with Private International Law, X.E. Kramer & C.H. van Rhee (Eds.), Civil Litigation in a Globalising World', [2011] The Hague: T.M.C. Asser Press/Springer <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2194293](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2194293)>

Under the Brussels Convention, the enforcement procedure is governed by two stages: the first stage is the application for the declaration of enforceability by the interested party. In general, a copy of the judgment and a document that proves that a service has taken place are the documents needed for the exequatur procedure. Once a declaration of enforceability is obtained, the second stage is the ability of the debtor to appeal and resist the enforcement of the judgment by raising refusal grounds as indicated by the Convention. As it will further be seen that, unlike the old version of the Brussels Regulation and its recast, under the Brussels convention, the guarantee of the right to a fair trial and the right of defence is ensured by double protection. The first protection is the court of enforcement's power to review and investigate whether the grounds of recognition or enforcement applies in a particular case.<sup>36</sup> The courts role is not confined to mere checks but also to investigate the compatibility of the judgement with fundamental rights. The second protection is the ability of the debtor to appeal against granting a declaration of enforceability.<sup>37</sup>

However, the situation started to change with the entry into force of the Amsterdam treaty where it established an area of freedom, security and justice.<sup>38</sup> Following such change, in the remarkable meeting held in Tampere, a reduction to the exequatur procedure was suggested as an important step, that is needed to make mutual recognition of judgments the bedrock of judicial cooperation in civil and commercial matters.<sup>39</sup> As a result, a programme on the mutual recognition and civil and commercial matters was adopted, aimed to provide a plan to enhance and strengthen mutual recognition between the member states. According to the program, the exequatur procedure in the Brussels Convention was "too restrictive" which could hamper the free circulation of judgment throughout out the member states as an important objective sought by the EU.<sup>40</sup> Consequently, the abolition of the exequatur was seen as a necessary step, which should be implemented in the future. This found its way in the old Brussels I Regulation where it explicitly stated that the declaration of enforceability would be automatically given after mere formal checks to the documents. In general, a copy of the judgment and a certificate issued by the court of

---

<sup>36</sup> The Brussels convention, Article 34

<sup>37</sup> Ibid article 34 and 36

<sup>38</sup> Treaty of Amsterdam , article 2/1.

<sup>39</sup> Tampere Conclusions, para 34.

<sup>40</sup> The Commission, 'Draft Programme of Measures for Implementation of the Principle of Mutual Recognition of Decisions in Civil and Commercial Matters OJ C 12, 15.1.2001' (2001)

origin were the documents needed to announce the judgment enforceable.<sup>41</sup> Such uniform certificate was adopted to further enhance the speed of the procedure.<sup>42</sup> Importantly, this can be seen where the court where the enforcement is sought is precluded from raising refusal grounds by its own initiative.<sup>[3]</sup> The court is not allowed to review and investigate whether refusal grounds are applicable. Only the interested party should raise such grounds by an appeal.<sup>43</sup> The purpose of such preclusion is to ascertain the principle of mutual trust between the EU member states.<sup>44</sup> Here, the Brussels I Regulation clearly departed from the position taken in the Brussels Convention by only doing formal checks before issuing a declaration of enforceability, narrowing the role of the exequatur.

The abolition of the exequatur procedure continued to be an essential part in the EU plan such as The Hague and Stockholm programme.<sup>45</sup> At the same time, they stressed on the importance of adopting minimum standards to safeguard people's fundamental rights.<sup>46</sup> Interestingly, the ambition became even bigger for the complete abolition of the exequatur. In its proposal for the new Brussels I Regulation, the Commission clearly stated that the exequatur 'remain an obstacle to the free circulation of judgments which entails unnecessary costs and delays for the parties involved and deters companies and citizens from making full use of the internal market.'<sup>47</sup>

According to the Commission, the level of mutual trust reached justifies a complete abolition of the exequatur so that a further enhancement of the circulation of judgment can be reached.<sup>48</sup> As a result, the Commission proposes a complete abolition of the exequatur for all judgments governed under the regulation except for judgments given

---

<sup>41</sup> The old Brussels I Regulation, article 53

<sup>42</sup> The Commission Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (n 518).

<sup>[3]</sup> The old Brussels I regulation recital 17 and article 41

<sup>43</sup> The CJEU also narrowed the concept of interested party .

<sup>44</sup> The old Brussels I regulation, recital 17

<sup>45</sup> The Commission, 'The Stockholm Programme – An Open and Secure Europe Serving and Protecting the Citizens'; 'The Hague Programme: Ten Priorities for the next Five Years The Partnership for European Renewal in the Field of Freedom, Security and Justice(Communication), COM (2005) 184 Final'.

<sup>46</sup> *ibid*

<sup>47</sup> The Commission, 'Proposal for a Regulation Amending Regulation 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters', vol 2010 (2013)

<[http://ec.europa.eu/justice/civil/files/com\\_2013\\_554\\_en.pdf](http://ec.europa.eu/justice/civil/files/com_2013_554_en.pdf)>

<sup>48</sup> *ibid*, 6

in certain areas.<sup>49</sup> At the same time, in order to safeguard the fundamental rights of their defendant, the Commission proposes remedies available to him both in the court of origin and the court of enforcement is sought.<sup>50</sup>

The complete abolish of the exequatur finally found its way in The Brussels I recast. Not only it stressed that mutual trust in the administration of justice justifies an automatic recognition without any special procedure<sup>51</sup>, but it clearly stated that such judgment would be enforced without a declaration of enforceability.<sup>52</sup> This means that a judgment given in a member states should be treated in the court of the enforcement is sought as it was given by the latter.<sup>53</sup> The Recast abandoned the Commission proposal for minimum standard. Instead, the Recast retained refusal grounds for the recognition and the enforcement of the judgment. However, raising refusal grounds is only confined to the interested party under the judgment.<sup>54</sup> In other words, the court of enforcement cannot review and investigate by its own initiative whether one of non-recognition or enforcement grounds is applicable. It has been argued that the complete abolition of the exequatur did not demolish the functional role where an investigation can be held, but only moved it to a later stage, which is the enforcement of the judgement.<sup>55</sup>

A question arises whether the abolition of the exequatur as an implementation of the principle of mutual trust raises any concerns with regards fundamental rights. In the first place, it is thought that the exequatur is a mechanism where the member state's court of enforcement is empowered to review the court of origin's judgment compliance with fundamental rights as enriched in the Charter.<sup>56</sup>

The repetitive actions by the EU stakeholders on the introduction of minimum standards alongside the abolition of the exequatur reveal that it is not mechanism for

---

<sup>49</sup> Ibid

<sup>50</sup> This would be further demonstrated below

<sup>51</sup> The Brussels I recast, recital 26

<sup>52</sup> Ibid

<sup>53</sup> Ibid

<sup>54</sup> Ibid article 45. The Regulation followed the Parliament resolution in this matter, see European Parliament resolution of 7 September 2010 on the implementation and review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2009/2140(INI)), pp F

<sup>55</sup> Isabelle Cuniberti, Gilles and Rueda, 'Abolition of Exequatur - Addressing the Commission's Concerns' (2010) No. 2010-0 University of Luxembourg Law Working Paper, Mohr Siebeck GmbH & Co. KG, p 15 <https://www.jstor.org/stable/41151498>.

<sup>56</sup> Ibid

only formal checks but more importantly, is a way to ascertain the protection of fundamental rights.<sup>57</sup>

However, the real dilemma is not directly related to the procedure to obtain the declaration of enforceability but the fact that the court of enforcement is prohibited from reviewing the refusal grounds at that stage. The question arises as to whether such preclusion is consistent with fundamental rights, a key requirement of the principle of mutual trust and foundation of the European Union when there is violation.

A direct answer cannot be found in the CJEU jurisprudence. Nevertheless, a first step can be seen by a reference to the ECtHR case laws. In *Pellegrini v. Italy*,<sup>58</sup> the ECtHR was asked to examine whether the Italian court is breaching its obligation to respect the right to a fair trial under the convention when enforcing a judgment given in violation of this right by the Vatican courts. In that case, the ECtHR held that the applicant had not had the chance to review and comment on the evidence submitted by the other parties, thereby infringing the right to an adversarial proceeding, as an essential element under the right to a fair trial.<sup>59</sup> Importantly, the court stated that the contracting party's court is under an obligation to investigate whether the parties had had a fair trial.<sup>60</sup>

The court reached such conclusion despite the fact that the judgment was given by the Vatican court, a non-contracting party. As a result, one might argue that such obligation is more stressed out when the judgment is given by another contracting state of the Convention. It might also implies toward the direction that the member state's inability to raise ground of refusal by its own motion is a violation to the right to a fair trial. Regrettably however, the ECHR's position is different when the Contracting parties are members of an international organisation such as the European Union. While the ECHR recognised the fact that the contracting party's accession to an international organisation such as the EU, does not mean it could be relieved from being responsible for violating the Convention rules, the ECtHR applied what is known *Bosphorus* presumption.<sup>61</sup> According to the latter, if the member state's court has no

---

<sup>57</sup> Ibid,

<sup>58</sup> *Pellegrini v Italy*, application no ECHR 30882/96.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid pp 47

<sup>61</sup> *BOSPHORUS HAVA YOLLARI TURİZM VE TİCARET ANONİM ŞİRKETİ v. IRELAND* Application no. 45036/98) (n 58).

margin of discretion under the EU law and that the EU law provides substance guarantees to fundamental rights and mechanism, which ensures the enforcement of such rights, there would be a presumption, that the European Union observes fundamental rights which will be rebuttable only when the guarantees is deficient.<sup>62</sup> The rationale behind it is to provide a solution to the Contracting parties who are a party to an international organisation and their actions under the international organisation and their compatibility under the Convention.<sup>63</sup>

In the context of the execution and the enforcement of a judgment between the EU member states, despite stressing on the fact that mutual recognition should not have the effect of undermining the right guaranteed under the Convention, the ECtHR limits its power. It held that the fact that member states are under an obligation to presume that other member states has observed fundamental right with no discretion would result in the automatic application of the presumption.<sup>64</sup> In this case, The ECtHR was asked to examine whether the Latvian court is responsible for violating the right to a fair trial in accordance with article 6 of the Convention, when enforcing Cypriot judgment on the basis that the latter was given in breach of such right. The defendant resisted the enforcement of the judgment since it breaches article of the Brussel I regulation (article 45 of the Brussels I recast) that his right to a fair trial was infringed and that the judgment did not come to his knowledge until it was served for enforcement. The ECtHR stated the general principle in which, a request for enforcement cannot be given without having some review of the judgment on its compatibility with the right to a fair trial under the Convention.<sup>65</sup> In addition, the contracting parties' accession to an international organisation does not relieve them from their obligation under the Convention. However, those facts are limited by the application of the *Bosphorus* presumption which was applicable in this case. The ECtHR found that the exception is not applicable.<sup>66</sup>

Looking at the foregoing, leaving no space of discretion for the member state to raise refusal grounds in the stage of recognition and enforcement by its own initiative might

---

<sup>62</sup>Ibid ,156

<sup>63</sup> *MICHAUD v FRANCE*, application no 12323/11 (2012) , 104.

<sup>64</sup> Ibid,115

<sup>65</sup> ibid

<sup>66</sup> Although the court recognised that the Latvian court did not check whether a remedy is available, such absence does not rise to a defence violation

lead to the automatic application of the *Bosphorus* presumption, a welcome approach to the EU. However, the ECtHR must use the exception since such absence can be regarded as a “dysfunction of the mechanism of controls of the observance of Convention rights”.<sup>67</sup> In the context of EU law, such preclusion should also be considered as a violation of the fair trial under the Charter. The CJEU has held in multiple occasions that the objective of ensuring the free circulation of judgment should not have the effect of undermining people’s right to a fair trial and their right of defence.<sup>68</sup> In addition, member states are under an obligation to observe, comply and apply fundamental rights in their justice systems, as an important dimension of the principle of mutual trust. The assurance of the effectiveness of the EU law should not be interpreted in such a way that hamper the fundamental rights guaranteed under the Charter. On the contrary, it should enforce and enhance those rights.

### **6.3 Limitations to the principle of mutual trust**

The applicability of Mutual recognition of judgment as an expression of the principle of mutual trust and the objective of the free circulation of judgment throughout the EU is not without any limitation. The scope of application of the Regulation is one example. The rules of recognition and enforcement only applies when it concerns a judgment given by a member state’s court in civil and commercial matters. If the subject matter of the dispute is outside the scope of the regulation, the rules of recognition and enforcement will not be applicable even if it involves enforcement proceedings between EU member states’ courts. In *Owens Bank Ltd v Fulvio Bracco and Bracco Industria Chimica SpA* (hereinafter *Owens Bank*).<sup>69</sup> The CJEU held that the enforcement proceeding of a third state’s judgment by a member state’s court is outside the scope of the regulation and thereby will not preclude another member state’s court from examining whether that judgment was obtained by fraud.<sup>70</sup> In this scenario, the *lis pendens* rule is not applicable and that mutual trust is not hindered.

---

<sup>67</sup>*BOSPHORUS HAVA YOLLARI TURİZM VE TİCARET ANONİM ŞİRKETİ v. IRELAND Application no. 45036/98* (n 58). At 166

<sup>68</sup> *c-283/05, ASML Netherlands BV v Semiconductor Industry Services GmbH*[2006] ECLI:EU:C:2006:787, paras 23-24.

<sup>69</sup> *C-129/92, Owens Bank Ltd v Fulvio Bracco and Bracco Industria Chimica SpA*[ 1994] I-00117. (n 610).

<sup>70</sup> *Ibid* at 34

In addition, The Brussels regime rightly provides for grounds where judgment can be refused its recognition and enforcement by an application from the debtor. The rationale behind it is to provide a balance between mutual trust and mutual recognition in one hand and the debtor's right to a fair trial and the right of defence on the other hand.<sup>71</sup> If one of the grounds exist, the court where the enforcement is sought, by the application of the interested party, must refuse such recognition or enforcement.<sup>72</sup> However, the CJEU held that such grounds should be interpreted restrictively to promote the free circulation of judgment.<sup>73</sup> This section examines the limitations to the principle of mutual trust in the stage of recognition and enforcement. It examines whether they are consistent with access to justice as key requirement of the EU and the principle of mutual trust.

### 6.3.1 Public policy

Public policy is a significant exception used to prevent the recognition and enforcement of judgment from EU member states courts. Public policy is usually seen as encompassing two types; procedural public policy and substantive public policy. Procedural public policy plays a role when the procedural provisions of the court of origin violates the fundamental principles in the court where the enforcement is sought, or when procedural acts occur in the court of origin violates the latter courts values.<sup>74</sup> Length of proceeding is one significant example. On the other hand, substantive public policy plays a role when the substantive law of the court of origin collide with the fundamental principles of the court in which the enforcement is sought such as high level of damages.<sup>75</sup>

In the EU, defining its concept is left to each member state's court. Yet, its scope of application and its limitation are subject to the interpretation of the CJEU.<sup>76</sup> In this respect, the CJEU has consistently held that considerations of enhancing the free

---

<sup>71</sup> The Brussels I Recast recital 29

<sup>72</sup> *ibid* article 46

<sup>73</sup> C-414/92 *Solo Kleinmotoren GmbH v Emilio Boch* [1994] I-02237, para 20.

<sup>74</sup> European Parliament Study, Interpretation of the Public Policy Exception as Referred to in EU Instruments of Private International and Procedural Law (2011), p 29

<sup>75</sup> *ibid*.

<sup>76</sup> C-7/98 *Dieter Krombach v André Bamberski* (n 19), para 22.c- 38/98, *Régie nationale des usines Renault SA v Maxicar SpA and Orazio Formento* 2000, para 27; 7C-619/10 *Trade Agency Ltd* (n 12), para 49.

circulation of judgment throughout the EU and the assurance of a uniform interpretation of the Brussels I Regulation, a system based on the principle of mutual trust, lead to the conclusion that the interpretation of public policy should be narrow and applies only in exceptional cases.<sup>77</sup> Including the word “manifestly” in the Brussels I regulation and its recast confirms this view.<sup>78</sup> Hence, in principle, the misapplication of facts or law are not reason that call for the public policy exception.<sup>79</sup> This is true even if the misapplied law is an EU law rule.<sup>80</sup> Moreover, the wrong application of private international law rules cannot also be used to defy the recognition and enforcement of judgment.<sup>81</sup> Moreover, the different approach that might be taken by the court in which the enforcement is sought to decide the dispute is not a reason to refuse the recognition and enforcement of judgment.<sup>82</sup>

*Dieter Krombach v André Bambersk case (hereinafter Krombach)*<sup>83</sup> is a significant case law in the EU level particularly in the stage of recognition and enforcement of judgment. In this case, The CJEU tried to bring a balance between mutual recognition of judgment and free circulation of judgment as an explicit example of mutual trust in one hand, and the observance of the rule of law and fundamental rights as the bedrock of the EU and key requirements of the principle of mutual trust on the other hand. The CJEU was essentially asked to examine whether public policy can be used when the defendant did not have a fair trial in the court of origin.

While the court confirmed its approach of the exceptional use of public policy, the importance of fundamental rights particularly the right to a fair trial was stressed out as a principle protected and enriched in the EU law.<sup>84</sup> Importantly, it stated that using public policy

---

<sup>77</sup> C-619/10 *Trade Agency* (n 12), para 48

<sup>78</sup> Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters /\* COM/99/0348 final - CNS 99/0154

<sup>79</sup> C-38/98, *Régie nationale des usines Renault SA* (n 76), para 29.

<sup>80</sup> *Ibid*

<sup>81</sup> Jenard Report No 59/46.

<sup>82</sup> C-619/10 *Trade Agency Ltd v Seramico Investments Ltd* (n 12). At 50

<sup>83</sup> *Krombach* (n 19).

<sup>84</sup> *Ibid*, [25-26]

can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order.<sup>85</sup>

*Krombach* raises two points. First, the strong language of the case could point in the direction that manifest breach may be understood as not only a “clear”<sup>86</sup> breach but also “serious”<sup>87</sup> breach of the rule of law. Secondly, *Krombach* clearly states that violations of fundamental rights trigger the application of public policy ground. In this sense, public policy “transformed from a negative exclusionary doctrine to a positive mechanism for enforcing”<sup>88</sup> the rights agreed on the EU law.

However, some scholars went further to the extent that the public policy scope as understood by *Krombach* covers only violations of fundamental rights or substantive public policy that leads to violation of fundamental rights.<sup>89</sup> If the violation does not concern with fundamental rights, the public policy ground will not be applicable even though there might be a violation of the court of enforcement public policy. The basis of this argument was the authority of the CJEU case laws, where the CJEU for instance, rejects the misapplication of the EU law and threats to the economic interest of the court of enforcement as examples of manifest breach of the public policy.<sup>90</sup>

However, accepting this argument would frustrate the protection of the rule of law and legal order of the state of enforcement for the sake of mutual trust and mutual recognition of judgment. The language of *Krombach* clearly brings the possibility of

---

<sup>85</sup> Ibid at [37]

<sup>86</sup> Maire ni Shullebahain and Sangeeta Shah James J. Fawcett, *Human Rights and Private International Law* (first, Oxford Private international law series 2016).

<sup>87</sup> Alex Mills, ‘The Dimensions of Public Policy in Private International Law’ [2008] *Journal of Private International Law*, 16.

<sup>88</sup> *ibid.* 32

<sup>89</sup> James J. Fawcett (n 88), 213-214. High fee costs which leads to a prevention to access to court was seen as an example.

<sup>90</sup> *ibid.* 212-219

the infringement of the rule of law that does not concern fundamental rights.<sup>91</sup> The word “or” indicates that there are two examples where public policy applies and fundamental rights is one of them. In other words, it includes fundamental rights while at the same time, does not exclude other examples of infringement. In addition, the fact that the CJEU in its case laws limit the scope of public policy by excluding some matters, does not demolish or remove the basis provided by *Krombach* “a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought.” While in a specific case, a misapplication of an EU law was not seen as manifest as to trigger the application of public policy, such misapplication or such difference could lead to the application of public policy in other cases. This is when it is “so fundamental that to enforce such a judgment would severely threaten basic, indispensable principles, as well as the very underlying values of” the system of the court of enforcement.<sup>92</sup> Diversity or differences are accepted so long as that difference does not contradict with the rule of law and fundamental rights.

Another possible limitation to the applicability of the public policy ground can be seen by requiring a recourse to the remedies in the court of origin. The CJEU held that the court in which the enforcement is sought must see whether there are remedies provided for by the court of origin legal systems which provides a sufficient guarantee to people’s rights.<sup>93</sup> In principle, requiring a recourse to a remedy is consistent not only with the CJEU’s jurisprudence in narrowing the application of the public policy and its exceptional nature but also ensures that the objective of free circulation of judgment and the meaning of mutual trust as promoted by the EU. This also has the effect of preventing the bad faith debtor from waiting until the enforcement stage.

Looking whether remedies in the court of origin are sufficient to guarantee the defendant’s rights implies a review conducted by the court in which the enforcement is sought. In this respect, by allowing a review, the CJEU is in fact limiting the scope of mutual trust in favour of assuring people’s protection. To ensure an actual protection provided by these remedies, “sufficient” remedies should also include the

---

<sup>91</sup> According to *Krombach*, “the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought **or** of a right recognised as being fundamental within that legal order”(italic and bold added), see *c-7/98 Dieter Krombach v André Bamberski* (n 19).

<sup>92</sup> *ibid* The Commission submission; ‘c- 38/98, *Régie nationale des usines Renault SA v Maxicar SpA and Orazio Formento*, Opinion of AG ALBER, para 51

<sup>93</sup> *c- 38/98, Régie nationale des usines Renault*(n 76).

effectiveness of those remedies to ensure the protection of rights. Here, the fact that there are legal rules in theory that purposely ensure protection, does not necessarily mean that it actually guarantee that rights. This is true when there is corruption as it will be seen further.

In this context, two distinct yet related questions arise. The first question is whether the requirement to recourse to the remedies available before the court of origin prior to raising the public policy ground violate the right to a fair trial within a reasonable time. The second question is whether recourse to a remedy should be seen as a precondition that needs to be fulfilled in every case before raising public policy ground.

Answering the first question, in principle, it has been held by the CJEU that the right to a fair trial is not an absolute right and can be limited, so long as it is for a legitimate aim and that such measure does not lead to “a manifest and disproportionate breach” of that right.<sup>94</sup> In addition, according to the ECtHR, requiring exhausting remedies before the court of origin does not itself raise problems to the guarantee of the right to a fair trial.<sup>95</sup> In this respect, three situations needs to be distinguished.

The first situation is that when there is an infringement of the right to a fair trial and remedies are still available in the court of origin. In this scenario, it might be better for the court of enforcement to refer the party to exhaust those remedies before raising the ground of public policy since, at that stage, the court of origin would be better to assist the violation.<sup>96</sup> This situation reflects a strong mutual trust and the assurance as far as possible the free circulation of judgment throughout EU.

The second situation is that the debtor exhausted the available remedies in the court of origin. Following the CJEU case law previously mentioned, the court of enforcement must see whether those remedies were sufficient and effective to guarantee people’s right. Ineffective remedies could be due to the legal rules itself provided by the court of origin legal system such as short time limit to appeal. In addition, remedies could be ineffective when the judgment was obtained in corruption.

---

<sup>94</sup> *C-619/10 Trade Agency Ltd* (n 12), para 62.

<sup>95</sup> *AVOTIŅŠ v LATVIA*, App no17502/07 2016. At 118

<sup>96</sup> *Interdesco SA v Nullifire Limited* (1992) I.L.Pr. 97.

While there is no precise universal definition for corruption,<sup>97</sup> it has been generally seen as “any abuse of power for private gain”.<sup>98</sup> Notably, judicial corruption can be defined as “acts or omissions that constitute the use of public authority for the private benefit of court personnel and result in an improper and unfair delivery of judicial decisions”.<sup>99</sup> Bribery, gifts, speeding and delaying proceeding for the interest of one party are examples.<sup>100</sup> The existence of corruption hampers and disturb the meaning and the equal application of the rule of law, resulting in violating fundamental rights.<sup>101</sup>

In general, corruption is found in number of EU countries.<sup>102</sup> For instance, bribery as an example of judicial corruption was reported in Italy, Greece, Latvia and Lithuania.<sup>103</sup> More recently, According to the EU scoreboard 2019, political and governmental interference was found in number of member states as the main reason behind the lack of courts independency.<sup>104</sup> This raises the question whether the court where the enforcement is sought is allowed or even obliged to refuse to recognise a judgment from the court of origin generally known of its corrupted judicial systems on the basis of infringement of public policy.

In the first place, it is difficult to accept that a general data, without a judgment from the CJEU, that indicates the existence of judicial corruption in a particular EU legal

---

<sup>97</sup> The UN Convention for corruption did not provide for a specific definition.it only provides for examples such as bribery.

<sup>98</sup> Report From The Commission To The Council And The European Parliament EU Anti-Corruption Report Brussels, 3.2.2014 Com (2014) 38 Final Cites: The United Nations Convention Against Corruption, As Well As Council Of Europe Anti-Corruption Legal Instruments, Including The Resolution (97) 24 On The Twenty Guiding Principles For The Fight Against Corruption And The Recommendations No. R (2000) 10 on Codes Of Conduct For Public Officials And No. R (2003)4 On Common Rules Against Corruption In The Funding Of Political Parties And Electoral Campaigns.

<sup>99</sup>Council of Europe, Committee on Legal Affairs and Human Rights “Judicial Corruption: Urgent Need to Implement the Assembly’s Proposals” (2014). Cites: Global Corruption Report 2007 : Corruption in Judicial Systems

<sup>100</sup>ibid.p 8

<sup>101</sup> United Nations Convention against Corruption forward and preamble. see also EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION) RULE OF LAW CHECKLIST Adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016) p 30

<sup>102</sup> According to the Transparency International Corruption Perception Index 2018, Hungary and Greece was found as having high level of corruption compared to other EU member states. <https://www.transparency.org/news/feature/cpi2018-western-europe-eu-regional-analysis>

<sup>103</sup> Council of Europe, Committee on Legal Affairs and Human Rights Judicial Corruption: urgent need to implement the Assembly’s proposals. Interestingly, while Italy was also mentioned in these criteria, the Commission in its Anti-corruption report stated bribery is rarely found in Italy.

<sup>104</sup> ‘Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions :The EU Justice Scoreboard COM(2019) 198/2’ at 45

system does itself leads the court in which the enforcement is sought to refuse recognition and enforcement on public policy ground. The court which examined the dispute might be in compliance with the rule of law notwithstanding the legal system's bad reputation. Accepting otherwise not only will undermine the free circulation of judgments in the EU but also will hamper the claimant's right to have an enforceable judgment.

However, if there is reliable evidence that the decision was effected by corruption, the court of appeal was corrupted for instance, not only the court where the enforcement is allowed but also obliged to refuse to recognise judgment based on public policy ground. The judgment not only violates the general concept of rule of law but also the right to a fair trial before an impartial and an independent tribunal as enriched in article 47 of the Charter and 6 of the ECHR. According to the ECtHR, it would be a violation to article 6 if the judicial body responsible for reviewing the judgment does not respect the guarantee of article 6.<sup>105</sup> As a result, the remedy would be insufficient and ineffective and the court of enforcement must refuse the recognition or enforcement on public policy ground.

The third situation is that when remedies are not available anymore for the defendant to exhaust before invoking public policy ground. In this situation, two scenarios needs to be distinguished. If it was not possible for the defendant to exhaust the remedies, the court of enforcement should invoke public policy. Otherwise, the requirement of exhausting remedies would result in "a manifest and disproportionate"<sup>106</sup> breach of the right itself. If however, it was possible for the defendant to exhaust available remedies in the court of origin but did not do it or chooses not to, there would be no violation of the right to a fair trial and public policy cannot be triggered. This is the approach of the English court. *Dr Richard Barry Smith v Xavier Huertas*<sup>107</sup> is a significant case for two reasons. First, not only it is been claimed that there is a violation to the right to a fair trial but importantly, that the French court of origin was accused of being biased against the defendant. Secondly, as will be further demonstrated, the court went further to set out the exhaustion of remedies as a precondition for the applicability of

---

<sup>105</sup> *Pellegrini v Italy*, application no ECHtR 30882/96, para 74

<sup>106</sup> *C-619/10 Trade Agency Ltd*(n 12) para 62

<sup>107</sup> 2015) EWHC 3745

public policy ground. According to the court, in order to contest the recognition or the enforcement of the judgment based on public policy ground, the defendant

not only has to show an exceptional case of an infringement of a fundamental principle constituting a manifest breach of a rule of law regarded as essential in the legal order in this country or of a right recognised as being fundamental within it but that the system of legal remedies in France did not afford a sufficient guarantee of his rights.<sup>108</sup>

According to the court, two requirement needs to be met to apply public policy ground. The first point is ‘an exceptional case of an infringement of a fundamental principle constituting a manifest breach of a rule of law regarded as essential in the legal order in this country or of a right recognised as being fundamental within it.’<sup>109</sup> This corresponds to the principle set out in *Krombach*. In addition, the court stated that it correspond to the strong presumption of member state’s compliance with fundamental rights under the ECHR, which is rebuttable only in exceptional cases.<sup>110</sup> The second point is that the court requires that remedies were insufficient to guarantee the defendant’s right. At first glance, one would think that the court would apply the requirement literally and examine whether those remedies offer a guarantee to the defendant’s rights. Nevertheless, the requirement seems to be given a wider scope. According to the court, it will investigate not only what the court of origin’s conclusion was but also whether there were remedies afforded by the court of origin legal systems.<sup>111</sup> The latter mean that the question on whether the remedies were exhausted is central to the applicability of public policy. The court held that there would be no infringement of fundamental right if the defendant did not appeal when it was possible for him to do so.<sup>112</sup> According to the court, if the factors has already been shown to the court of appeal or could have been shown, the matter under dispute would be better heard and assist by an appeal in the court of origin.<sup>113</sup> The defendant’s failure to raise these points when he could have done it before the court of origin by an appeal was described as “highly unattractive”.<sup>114</sup> The court even went far to express

---

<sup>108</sup>Ibid.at p26

<sup>109</sup> *Dr Richard Barry Smith v Xavier Huertas* (2015) EWHC 3745.at 26

<sup>110</sup> Ibid at 22

<sup>111</sup> Ibid,at 27

<sup>112</sup> Ibid at 66

<sup>113</sup> Ibid, at 21

<sup>114</sup> Ibid at 21

its concern in its own ability in fulfilling the full justice in a manner better than the court of appeal in the member states addressed.<sup>115</sup> Such approach was influenced by both the Brussels I regulation where a review on the merit is prohibited and by Schlosser report.<sup>116</sup>

The outcome of the English case law raises, to certain extent, serious concerns. One should stressed on the fact that the availability of remedies and their exhaustion should not be seen as a requirement for the application of public policy ground. Rather, it should be seen as an essential element that needs to be considered while employing the public policy ground. As the Commission stated, public policy 'afforded an even greater degree of protection of fundamental rights as it did not require an appeal to be lodged in the State of origin.'<sup>117</sup> Accepting otherwise would force the court of enforcement to recognise and enforce a judgment contrary to its public policy due to the non-exhaustion of the available remedies and therefore the inapplicability of the public policy ground. This would also mean that the principle of mutual trust and the assurance of mutual recognition would lead to serious violation of the legal order of the court of enforcement if such meaning of public policy was adopted. For instance, it would be difficult to turn a blind eye where there is a manifest evidence that a judgment was obtained by corruption even though there was no exhaustion of remedies.

As for the position of ECHtR, the latter had the opportunity to rule on a similar yet distinct case in the relationship between the requirement to exhaust remedies before the court of origin and the applicability of the *Bosphrus* presumption. In *Avotins v Latvia*<sup>118</sup>, the court was essentially asked to examine whether the Latvian court violates article 6 in enforcing a judgment possibly given in violation of the same article. The case concerns with the refusal of recognition and enforcement based on article

---

<sup>115</sup> Ibid

<sup>116</sup> Schlosser PDP, 'Report on on the Convention of 9 October 1978 on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Mat' (1979). It stressed on the importance of the court of enforcement examination of whether the court of origin provides remedy before applying the public policy exception. para 192

<sup>117</sup>AVOTIŅŠ v. LATVIA, App no.17502/07,para 91 .

<sup>118</sup> ibid.

34(2). According to that provision. The judgment can be refused its recognition and enforcement

where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so.<sup>119</sup>

The defendant resisted the enforcement of the judgment since the judgment did not come to his knowledge until it was served for enforcement, violating his right to a fair trial. First, the Court held that the requirement to exhaust remedies according to article 34/2 before the court of origin does not raise problems itself to the guarantee of article 6.<sup>120</sup> The Court then explored the *Bosphorus* presumption and held that the explicit limitations and preconditions provided by the article leaves no room for discretion for the court of enforcement. As a result, the presumption applies and no deficient breach was found.

Following the outcome of the case, one might claim that this case applies by analogy to the exhaustion of remedies and the applicability of public policy, leading to the applicability of the presumption. However, the critical point is that the nature of the exhaustion of remedies in the public policy ground differ from that required for the natural justice provision. As seen above, the former is an essential element for the applicability of public policy rather than a precondition, meaning that the court of enforcement has a margin of discretion and that the presumption does not apply.

### **6.3.2 Natural justice**

The second ground where the recognition and enforcement can be refused is generally known as the natural justice ground. According to article 45/1 ,paragraph b, the judgment will be refused its recognition and enforcement

---

<sup>119</sup> The old Brussels I Regulation article 34/2

<sup>120</sup> *AVOTIŅŠ v. LATVIA* (n 117),118.

where the judgment was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so

The previous provision empowers the defendant who was in default of appearance to challenge the recognition and the enforcement of the default judgment if he was not served with the documents instituting the proceeding or an equivalent document in sufficient time and in such way as to enable him to arrange for his defence. Here, the protection of the defendant's right of defence who was in default of appearance is ensured by a double review system.<sup>121</sup> The first review is conducted by the court of origin when issuing a default judgment. A judgment will not be given in default unless it has satisfied that the document instituting the proceeding was served on the defendant in sufficient time and in such way that enable the defendant to know and understand the meaning and the scope of the action to assert his right. The second review is carried out by the court where the enforcement is sought.

Importantly, the court of enforcement is not bound by the finding of the court of origin, which can carry out an independent assessment of all the evidence to ascertain whether the defendant in default of appearance was served in sufficient time in such way that enable him to prepare for his defence.<sup>122</sup> This means that such assessment will be conducted even if the court of origin reached a conclusion that the service was served in a way that make it possible for the defendant to arrange for his defence.<sup>123</sup>

In this context, one can say that this review is a limitation to the principle of mutual trust between the EU member states. In fact, it is evident that safeguarding the defendant's right to fair trial and his right of defence is given more priority, reflecting the real meaning of the principle of mutual trust and its essential requirements.

---

<sup>121</sup> *c-283/05, ASML Netherlands BV v Semiconductor Industry Services GmbH, ECLI:EU:C:2006:787* (n 68).[29]

<sup>122</sup> *Trade Agency* (n12) para 38.

<sup>123</sup> *Mapesbury* (n 20).

The provision requires that the judgment was given in a default of appearance. Article 45 also requires that such default of appearance occurred because the document was not served in such way to enable the defendant to prepare for his defence. If the defendant chooses not to appear despite that the documents was served on him within the previous meaning, the recognition and enforcement cannot be refused on this ground.<sup>124</sup>

A question arises as to what the document instituting the proceeding then means where failure to serve it would lead to the refusal of recognition and enforcement of judgment. In this context, The Service Regulation plays a pivotal role in this stage particularly when the documents needs to be transmitted from a member state to another. This was explained by the CJEU in *Ingenieurbüro Michael Weiss und Partner GbR v Industrie- und Handelskammer Berlin*(hereinafter *Weiss*)<sup>125</sup>, which was decided in the context of the previous Service Regulation. In this case, the matter in question was whether the addressee's right to refuse to accept the document<sup>126</sup>, the documents instituting the proceeding, extends to cover annexes, when they are not draft or accompanied in the language in which the addressee is expected to understand.

The CJEU held that the documents instituting the proceeding are “documents which must be served on the defendant in due time in order to enable him to assert his rights in legal proceedings in the State of transmission. Such a document must make it possible to identify with a degree of certainty at the very least the subject-matter of the claim and the cause of action as well as the summons to appear before the court or, depending on the nature of the pending proceedings, to be aware that it is possible to

---

<sup>124</sup> Mapesbury (n Lord Collins of Mapesbury (ed), *Dicey, Morris and Collins on The Conflict of Laws* (Fifteenth, Sweet & Maxwell - Thomson Reuters), 774..See also case c 420/07 *Apostolides v Orams*, 2009 I-03571, at 77

<sup>125</sup> C-14/07, *Ingenieurbüro Michael Weiss und Partner GbR v Industrie- und Handelskammer Berlin* [2008] ECR I-03367

<sup>126</sup> Article 8 of the Service Regulation confers to the addressee a right to refuse to accept the document if it not written or translated in a language which he understands, or in the official language of the member state addressed, or if there are several official languages in that Member State, the official language or one of the official language of the place where service is to be effected. The receiving agencies must inform the addressee in writing, using a standard form, that he may refuse to accept the document either at the time of service or ,by returning the document to the receiving agency within one week. This obligation is applicable in all circumstance and without any margin of discretion and irrespective whether the addressee has exercise this right or not. In this respect, see C- C-519/13 *Alpha Bank Cyprus Ltd v Dau Si Senh and Others*[2015] ECLI:EU:C:2015:603.

appeal".<sup>127</sup> According to the court, annexes which are essential to effectively understand the subject matter and the scope of the action forms part of the documents instituting the proceeding and thereby giving the addressee the right to refuse to accept the document<sup>128</sup>. By contrast, annexes which has only purely evidential character and which is not primarily essential to understand the subject matter and the scope of action does not come within the meaning of the documents instituting the proceeding and hence the addressee is not permitted to refuse the service of the document.<sup>129</sup>

As regards the meaning of the service of this document, this document must be served in such way that enable the addressee to actually be aware of the existence of proceeding in another member state in order to assert his right.<sup>130</sup> Service on a third party who is not an adult present at the time of the service in the residence of the addressee, such as a family member or an employee, does not come under the meaning of service of the document instituting the proceeding.<sup>131</sup> Such service does not enable the addressee to effectively understand the subject matter and the scope of the action and assert his right. The same can also be said regarding a notional service of the documents instituting the proceeding since the latter will not enable the addressee to identify the subject matter and the scope of the action to assert his right in the same manner as the actual receipt of the document.<sup>132</sup>

Following the previous interpretation of the CJEU case laws, It can be said that the service of the document instituting the proceeding means that, there should be an actual service of documents in due time, which enable the defendant to be aware of proceeding in another member state and effectively and completely understand the subject matter and the scope of the action in such way that to enable him to assert his

---

<sup>127</sup> Weiss(n 125) para 73. The court reached its conclusion by engaging with the Brussels I Regulation

<sup>128</sup> See by analogy, *ibid* paras[69][73]

<sup>129</sup> *ibid*[69][78]

<sup>130</sup> *Case C-354/15, Andrew Marcus Henderson v Novo Banco SA. ECLI:EU:C:2017:157*[2017] para 92.

<sup>131</sup> *Ibid*, para 95

<sup>132</sup> *C-325/11, Krystyna Alder and Ewald Alder v Sabina Orlowska and Czeslaw Orlowski* [2012], para 36. In this case, the CJEU examined the compatibility of a Polish Civil procedure law rules, which provides, that the service of judicial documents on an addressee who is resident in another member state is deemed to have been effected ,when the addressee has failed to appoint a representative who is authorised to accept service and is resident in the member state where the proceeding taking place. Such notional service was precluded by the CJEU.

right and prepare for his defence.<sup>133</sup> As a result, the recognition and enforcement can be refused if there was a failure to serve annexes which is primarily important to understand the scope and the subject matter of the action. In addition, it can be refused its recognition and enforcement if the judgment was based on a notional service or an acceptance of service by third party who does not ensure the effective protection of the defendant's right.

Another question arises as to whether formal irregularities could affect the recognition and enforcement of the judgment. Prior the Brussels I Regulation and its Recast, the matter was mainly governed by the Brussel Convention which explicitly require that the documents instituting the proceeding must be dully served in sufficient time to enable the defendant to prepare for his defence.<sup>134</sup> In other words, it require two conditions: the due service of the documents and the service in sufficient time.<sup>135</sup> The due service was considered to be one of the safeguards guaranteed for the defendant who failed to appear before the court, where Failure to satisfy it will put the judgment under threat of non-recognition.<sup>136</sup> However, the CJEU interpretation went further to provide that the judgment could be refused its recognition on the absence of this condition irrespective whether the defendant was actually aware of the documents instituting the proceeding by the defective service.<sup>137</sup> It is difficult to accept this result particularly, when the service achieved its purpose to inform the defendant of the proceeding in such way that enable him to prepare for his defence and thereby asserting his right of defence. Such result will encourage the defendant to preserve such defect to strike the recognition and enforcement of the judgment.<sup>138</sup>

Fortunately, the position of the Brussels I Regulation and its Recast departs from the Brussels Convention, which can clearly be seen in the wording of Brussels I and Its recast, omitting the "dully" word. This position has been affirmed by the CJEU in *ASML Netherlands BV v Semiconductor Industry Services GmbH* (hereinafter *ASML*).<sup>139</sup> It explicitly held that the position of the Brussels I regulation differ from the Brussels I

---

<sup>133</sup> See *C-519/13, Alpha Bank Cyprus Ltd v Dau Si Senh and Others*, (n 126) Para 32.

<sup>134</sup> The Brussels Convention article 27.

<sup>135</sup> Jenard Report , c No 59/44.

<sup>136</sup> *C-305/88 Isabelle Lancracy SA v Peters und Sickert KG ECLI:EU:C:1990:275[1990] para 18.*

<sup>137</sup> *ibid*, para 22.

<sup>138</sup> Adrian Briggs, *Civil Jurisdiction and Judgments* (6th edn, Abingdon : Informa Law from Routledge 2015), p657

<sup>139</sup> *c-283/05, ASML Netherlands* (n 68).

Convention in which the documents instituting the proceeding does not necessarily require to be properly served so long as the right of defence is respected. The court in which the enforcement is sought needs to consider whether serving the documents instituting the proceeding was in such way that respect the right of defence, even if the formality was not respected, so long as such formal irregularities does not contradict with the right of defence.<sup>140</sup> This provides a balance between ensuring the defendant right to defence and the claimant right to have an enforceable judgment. it can be said for instance that, if the member state, in its communication to the Commission, permit the use of a direct service by specific procedures but ,the service was nevertheless conducted in contrary to such communication, that service should not lead to the non-recognition of the judgment so long as the defendant's right of defence is observed.

However, the matter is different when the member state explicitly oppose the use of direct service when the document has to be transmitted from member state to another such as England.<sup>141</sup> In *Alder*, the court provide that where the document has to be transmitted from one member state to another, the service must be carried out by one of the method prescribed by the Regulation. it seems that the CJEU interpretation suggest that using direct service notwithstanding the fact that the member states clearly oppose it will mean that the applicant has carried out the service by using a method not prescribed by the Service Regulation. Therefore, one might argue for purposes of legal certainty, that such service should preclude the court from issuing a default judgment. However, the answer is still unclear and that different approaches could be taken in different member states. Having regard to the latter, the Service Regulation should provide a uniform rule which governs the legal consequences of using defective service or impermissible method under the Regulation to ensure legal certainty and uniformity.

On the other hand, the applicability of the natural justice is subject to a precondition that the defendant did not fail to challenge the judgment when it was possible for him to do so. The condition was endorsed under the old and the current Brussels I Regulation. It is intended to prevent the defendant from waiting for the recognition and enforcement to claim infringing his right of defence when it was possible for him to

---

<sup>140</sup> Ibid [20]

<sup>141</sup> See *ibid*, the United Kingdom Communications to the Commission, England and Wales.

raise such objection before the court of origin.<sup>142</sup> If the defendant did not challenge the proceeding before the court of origin when it was possible for him to do so, the recognition and enforcement cannot be refused on the basis of the natural justice provision.

However, in order for the defendant to challenge the judgment in the court of origin, he must be aware of its contents, which presupposes that there was service.<sup>143</sup> The mere fact that the judgment comes to the defendant's knowledge is not sufficient in this regard and thereby, will not bar the refusal of recognition and enforcement.<sup>144</sup>

In this context, a question arises whether the same is true when the defendant had not had the chance to submit an application to relief from the effect of the expiry time to appeal. According to Article 19 in paragraph 4 of the Service regulation, the court has the power to relieve the defendant from the effects of the expiry of the time for appeal when he has not appeared and the judgment has been entered against him. This is possible when three conditions are met. First, the defendant without any fault on his part, did not have knowledge of the documents in sufficient time to defend or knowledge of the judgment in sufficient time to appeal. Second, the defendant has disclosed a prima facie defence to the action on the merit. Lastly, the application for relief is filed within a reasonable time after the defendant has knowledge of the judgment. Each member state can indicate the period of time in which the application for relief can be submitted and entertained, which shall not be less than one-year.<sup>145</sup> If all conditions are fulfilled, the court is empowered to relieve the defendant from the effects of the expiry of the time of appeal. The purpose of this paragraph is to preserve the right of the defendant who has failed to enter an appearance to bring proceeding after the expiry of the period indicated in the law to exercise this right.<sup>146</sup>

In *Emmanuel Lebek v Janusz Domino* (hereinafter *Lebek*<sup>147</sup>), the CJEU had to examine whether the concept of "proceeding to challenge a judgment" as set out in article 34 of the Brussels I regulation (article 45/1(b) of the Brussels I Recast), should be interpreted to include the application for relief when the period for an appeal has

---

<sup>142</sup> Ibid para38.

<sup>143</sup> Ibid, para 40.

<sup>144</sup> Ibid, para [34]

<sup>145</sup> The Service Regulation, article19(4).

<sup>146</sup> *Lebek*(n 12) Para 42.

<sup>147</sup> *ibid*.

expired, and whether the court of origin can extend the period under its national law when the period indicated in the communication has expired. The CJEU held that the recognition and enforcement of a judgment in default of appearance could not be refused based on the previous provision when the conditions to submit an application for relief were met and the defendant has not taken advantage to use such right when it was possible for him to do so.<sup>148</sup> In this scenario, the defendant had had the chance to preserve and exercise his right by submitting an application for relief but nevertheless, did not make use of this guarantee. In contrary, if the defendant has applied for an application for relief but was later dismissed even if the condition were met, the CJEU provides that the judgment in default of appearance should not be recognised and enforced thereby restoring the defendant's right of defence by providing that.<sup>149</sup> On the other hand, the CJEU precluded the court of origin to even recourse to its national procedural rule, which permits, and allow the addressee to still submit the application after the expiry of the time to submit an application under the Communication to the commission. It justified its decision by a recourse to the legal certainty and the binding force of the Regulation.<sup>150</sup>

Following the provision and the CJEU decision in *Lebek*, one can detect concerns to the right to an effective judicial protection. One example is that the safeguard provided for by article 19 is only possible when the addressee submit the application for relief within the reasonable time indicated in the member state's communication to the Commission after his knowledge of the judgment. That presupposes that the judgement is served before the period is expired.<sup>151</sup> if the service of the judgment was conducted after the expiry of the reasonable time, the addressee cannot benefit from his right. Such consequence produce unfairness and effect the addressee's right to an effective remedy and his right of defence particularly when the late service was conducted without any fault on his part. However, it seems that the CJEU in this context, is moving toward assuring legal certainty rather than respecting the addressee's rights when it was evident that the addressee's late knowledge of the judgment was not due to any fault of his part. Upholding the effectiveness and the direct application of the EU cannot contradict with or undermine the addressee's right

---

<sup>148</sup>ibid para 46.

<sup>149</sup> Ibid para 47.

<sup>150</sup> Ibid para 55 and 57

<sup>151</sup> See by analogy *c-283/05, ASML* (n 68).

to an effective remedy and his right of defence. The latter urge for the need for an autonomous rule, which impose an obligation to conduct the service of the judgment within reasonable time in such way that does not impair the addressee from his chance to submit an application for relief. In addition, the beginning of the period should be a year from the date of serving the judgment rather the date of judgment.

### **6.3.3 the judgment conflicts with Sections 3, 4 or 5 of Chapter II where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee was the defendant or exclusive jurisdiction rules as in section 6**

The judgment can be refused its recognition and enforcement if it contradicts with jurisdictional rules related to consumer contract, employment contract and insurance contract where the defendant is weaker party in those contracts. Such ground is an exception to the general rule where the court of enforcement is prohibited from reviewing the court of origin's jurisdiction. The rationale behind such rule is to provide protection to the weaker party.

In addition, the provision provides that such judgement will be refused if it conflict exclusive jurisdiction rules as set out in section 6. The question arises whether such judgment should be refused when it was given in contrary with an exclusive choice of court agreement designating a court other than the court of origin. It should be remembered that the Brussels I regulation recast adopts an exception to the general application of the *lis pendens*, providing that a chosen court second seised can proceed with the proceeding notwithstanding the existence of prior proceeding before a non-chosen court. In addition, the non-chosen court seised first should stay its proceeding in favour of the chosen court. According to the Recast, the rationale behind such an inclusion is to ensure the effectiveness of parties' agreement and their expectations in the legal proceeding, and to minimise the risk of manipulating the proceeding by the parties.<sup>152</sup> However, it appears that such incorporation plays a role only in the stage of jurisdiction without any effect on the stage of recognition and enforcement. This is true by looking at various factors.<sup>153</sup> First, the fact that non-chosen court first seised is under an obligation to stay it proceeding has no legal

---

<sup>152</sup> The Brussels I recast recital 22

<sup>153</sup> Matthias Weller (2017) Choice of court agreements under Brussels Ia and under the Hague convention: coherences and clashes, Journal of Private International Law [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2827711](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2827711) ,

consequences if not respected such the risk of the non-recognition and enforcement of the judgment. Secondly, the CJEU decision in *Gothaer Allgemeine Versicherung AG and Others v Samskip GmbH* might suggest on that direction.<sup>154</sup> The CJEU held that an introductory decision stating that the court does not have a jurisdiction due to the existence of a valid choice of court agreement is a judgment within the Brussels I Regulation which must be recognised and enforced. The court of enforcement is prohibited from any review on the jurisdiction even it was applied the law incorrectly. Accepting otherwise would undermine the principle of mutual trust and the free circulation of judgment throughout the EU as an ultimate objective of the Brussels I regulation recast.<sup>155</sup> The *Gothaer* decision would mean that the court of enforcement would have no choice but to recognise and enforce such judgment even if was given in contrary to the *lis pendens* rules by the non-chosen court first seised.<sup>156</sup>

However, the real dilemma is when the court of enforcement is the chosen court under the exclusive choice of court agreement. The question arises whether the chosen court would also be obliged to recognise such decision if it has not decided on the matter. If one follows *Gothaer*, this would mean that the chosen court would have to recognise. The court cannot refuse the recognition and enforcement based on its irreconcilability with a judgment by the chosen court unless the chosen court has already decided on the validity of the exclusive choice of court agreement. If no judgment was made by the chosen court, the provision is inapplicable. A question arises as whether public policy exception can nevertheless allow the court in which the enforcement is sought particularly the court designating under the exclusive choice of court agreement in the case of error in applying the EU law. It should be remembered public policy can only be applied when “the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order”.<sup>157</sup> The CJEU held that misapplication of the national or EU laws does not give the court in which the enforcement is sought the power to refuse the recognition or the enforcement of the judgment on the basis of public policy.<sup>158</sup> In the advocate general

---

<sup>154</sup> C 456/11, *Gothaer* (n 7)

<sup>155</sup> *ibid*, para 29.

<sup>156</sup> See by analogy *Krombach* (n 19), para 31.

<sup>157</sup> *Ibid*, para 37

<sup>158</sup> c- 38/98, *Régie nationale des usines Renault SA v Maxicar SpA and Orazio Formento* (n 76), para 33 .

opinion, “Any such 'errors' in a ruling must be accepted<sup>159</sup>” and can only be used exceptionally as an excuse to apply the public policy exception where such error disturb the fundamental principle in the court in which enforcement is sought.<sup>160</sup>

To contest the judgment, the defendant should recourse to the available remedies in the court of origin to quash the judgment.<sup>161</sup> This is also true when the judgment was upheld by the court of origin, having a *res judicata*.<sup>162</sup> In addition, the fact remains that The CJEU decision in *krombach* was clear that the member state of origin’s noncompliance with the jurisdictional rules set out in the regulation cannot constitute a justification to the use of public policy.<sup>163</sup>

However, the latter produce problems particularly if such judgment would be recognised in the court designating under the choice of court agreement. Therefore, one can argue that the *lis pendens* rule which gives the chosen court a priority to rule on the validity of the exclusive choice of court to enforce the effectiveness of parties’ agreement and to minimise the tactical litigation by the parties and where the non-chosen is obliged to stay its proceeding in favour of the chosen court should be seen as a fundamental principle that allow the court to refuse the recognition and enforcement of a judgment based on public policy.

### 6.3.4 Irreconcilable judgments

While the *lis pendens* mechanism intends to minimise the situations of the concurrent proceeding and thereby the issuance of irreconcilable judgments,<sup>164</sup> conflicting judgments might occur. This can happen, for instance, when the second seised court does not know about the existence of another set of proceeding already pending in another member state<sup>165</sup>, or if the court second seised decides to proceed with its proceeding to respect fundamental rights.<sup>166</sup>

---

<sup>159</sup> Régie Nationale Des Usines Renault SA v Maxicar SpA and Orazio Formento, ‘Opinion of Advocate General Alber’

<sup>160</sup> Ibid para 67

<sup>161</sup> C- 38/98, *Régie nationale* (n 76) Para 33.

<sup>162</sup> ibid

<sup>163</sup> C-7/98 *Dieter Krombach v André Bamberski* (n 19), para 32.

<sup>164</sup> The Brussels I regulation recast , Recital 21

<sup>165</sup> C-157/12, *Salzgitter Mannesmann Handel GmbH v SC Laminorul SA*’ (2013), opinion of AG WAHL, para 28.

<sup>166</sup> For further discussion, see chapter 5

The judgments would be considered as irreconcilable if they “entail legal consequences that are mutually exclusive.”<sup>167</sup> According to the CJEU, Such irreconcilability “lies in the effects of judgments” without taking the admissibility and the procedure into account.<sup>168</sup> The irreconcilability exists even if one of the judgment’s scope was not within the Regulation.<sup>169</sup> For instance, a divorce judgment given by the court of enforcement and maintenance order given by another member state were considered as irreconcilable as the former indicates the end of the relationship while the latter indicates for the continuous relationship. This is thought as a reasonable approach.<sup>170</sup> It is not an issue for the court of enforcement to see whether the contradiction is from a judgment given within the scope of the regulation so long as the case of contradiction exists.<sup>171</sup>

The Recast and its predecessors provide for two provisions where the judgment can be refused its recognition or enforcement. Article 45(1) states that the judgment shall be refused if “the judgment is irreconcilable with a judgment given between the same parties in the Member State addressed”<sup>172</sup> or “if the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed”<sup>173</sup>. The inclusion of specific exceptions governing the irreconcilability was to limit the scope of public policy.<sup>174</sup>

Before going into details of those provisions, it is noteworthy to mention a preliminary issue connected to the scope of application of these provisions, where, as it is about to be mentioned, the principle of mutual trust played a role. In *Salzgitter Mannesmann Handel GmbH v SC Laminorul SA* (hereinafter *Salzgitter*)<sup>175</sup>, the CJEU was essentially asked to examine whether the court of enforcement can refuse to recognise a judgment which is irreconcilable with a previous judgment given by the same member

---

<sup>167</sup> C-145/86, *Horst Ludwig Martin Hoffmann v Adelheid Krieg*[1988] ECR 1988 -00645, para 22 .

<sup>168</sup> C-80/00 *Italian Leather SpA v WEKO Polstermöbel GmbH & Co*,2002 para 44

<sup>169</sup> C-145/86, *Horst Ludwig* (n 167).

<sup>170</sup> Trevor C Hartley, *Civil Jurisdiction and Judgments in Europe: The Brussels I Regulation, the Lugano Convention, and the Hague Choice of Court Convention* (Oxford Private international law series 2017)

<sup>171</sup> *Ibid*, at 18.56

<sup>172</sup> The Brussels I recast article 45(1) (c)

<sup>173</sup> *Ibid*, article 45(1) (d).

<sup>174</sup> Jenard report C59/45.

<sup>175</sup> C-157/12 *Salzgitter Mannesmann Handel GmbH v SC Laminorul SA*[2013] ECLI:EU:C:2013:597.

state based on article 34(4) of the old Brussels I regulation (article 45 (1) (d) in the Recast). In this case, Laminorul brought proceeding before the Romanian court against Salzgitter for payment for delivery of steel product. Salzgitter claimed that these proceeding should have been brought instead against the real party to the contract, Salzgitter Mannesmann Stahlhandel GmbH. On that basis, the Romanian court dismissed the case, and the judgment becomes final. However, Laminorul brought another proceeding against Salzgitter for the same cause of action before the same court, and the application was served on Salzgitter previous legal representative. Salzgitter did not appear, and judgment was given against him. Salzgitter appealed on the basis that he was not summoned to appear in the court. However, the appeal was refused because Salzgitter did not pay the needed fee. Salzgitter then provides for an extraordinary appeal on the basis that the judgment violated the finality principle of the first judgment. At the same time, the judgment was declared enforceable in Germany, and Salzgitter contested the enforcement based on article 34(4) of the old Brussels I regulation at that time.

The CJEU rejected the extension of the exception to cover conflicting judgments given from the same member state. Following its jurisprudence in giving the exceptions a narrow scope of application, the meaning of judgment under the provision was to be understood as a judgment given by another member state, not from the same state.<sup>176</sup> Importantly, the CJEU relied on the principle of mutual trust in its decision. It held that the recognition and enforcement rules under the regulation, based on the principle of mutual trust

“implies that the courts of the Member State of origin retain jurisdiction to assess, in the context of the legal remedies established by the legal system of that Member State, the lawfulness of the judgment to be enforced, to the exclusion, in principle, of the court of the Member State in which enforcement is sought, and that the final outcome of the assessment of the lawfulness of that judgment will not be called into question.”<sup>177</sup> The party should recourse to the legal remedies before raising the grounds for recognition and enforcement.<sup>178</sup> Moreover, according to the court, extending the application of the exception would offends the principle of mutual trust

---

<sup>176</sup> *ibid*, para 28-29.

<sup>177</sup> *Ibid* para 33

<sup>178</sup> *Ibid* para 35

since not only it will involve a review on the substance of the judgment by the court of enforcement, but it may lead the court of enforcement to substitute its own assessment on that given by the court of origin.<sup>179</sup> This will also have the effect of creating additional redress against a final and binding judgment.<sup>180</sup>

It was argued that the outcome of the judgment was “inadequate.”<sup>181</sup> The judgment facts raise some complex issues. First, while it is true that the CJEU imposes an obligation on the court of enforcement to trust the assessment of the court of origin in the lawfulness of the judgment under enforced, the fact remains that there was no actual assessment by the Romanian court on the question whether the second judgment violates the principle of finality. The application was dismissed merely on the ground that it was submitted out of time.

In addition, while it is accepted that legal remedies should be exhausted before a recourse to the non-recognition and enforcement grounds, this should be subject to the proviso that exhausting legal remedies were possible for the defendant. In this case, it was not clear the reasons behind the defendant’s failure to submit the fee necessary for the appeal or his late submission for the appeal application. As a principle, the court of enforcement is empowered to do some review to see whether it was possible for the defendant to recourse to the legal remedies. If the court of enforcement concluded that it was not possible for him, it could then refuse to recognise or enforce the judgment based on public policy considerations. If however, the court concluded that failure to use local remedies in the court of origin was due to the defendant’s deliberate negligence as a tactic, one might argue that the court is obliged not to refuse the recognition or the enforcement of the judgment. This is because the court needs to bring a fair balance to not only the right to a fair trial of the defendant but also to the creditor’s right to have an enforceable judgment and to protect him from any abuses of the process from the side of the defendant. However, the matter under dispute is the *res judicata*. one might argue that enforcing a judgment in violation of its might be considered as a manifest breach that disturb the legal order of the court of enforcement, leading to the applicability of public policy ground.

---

<sup>179</sup> Ibid para 36-37

<sup>180</sup> Ibid 38

<sup>181</sup> Briggs A, *Private International Law in English Courts* (Oxford University Press 2014), at 6.77

The next subsections examine article 45(1) (c) and (d) respectively

#### **6.3.4.1 The judgment is irreconcilable with a judgment given between the same parties in the Member State addressed**

The Brussels I Regulation Recast and its predecessors provide that the judgment can be refused its recognition and enforcement if it is irreconcilable with a judgment given between the same parties in the Member State of enforcement.<sup>182</sup>

The court of enforcement can refuse the irreconcilable foreign judgment irrespective whether its local judgment was given first or second.<sup>183</sup> However, the latter was criticised as being inconsistent with the *lis pendens* rules.<sup>184</sup> As a result, it was suggested that only earlier domestic judgment from the member state addressed should prevent recognition and enforcement of the foreign judgment on that refusal ground.<sup>185</sup> Determining the time the judgment should be considered as earlier is the time of the court's pendency.<sup>186</sup>

In principle, this argument respects the *lis pendens* by ensuring that the court first seised judgment is given priority over the court of enforcement's judgment and that the former will not be at risk of its recognition and enforcement based on this refusal ground. However, in practice, it might lead to exacerbating the impairment of the right to a fair trial within a reasonable time. As seen in Chapter 5, the current *lis pendens* rules can undermine the right to a fair trial within a reasonable time if the first seised court takes an excessively long time to rule on its jurisdiction. This fact will lead to not only to a violation of the right to a fair trial by the first seised court but also to a violation by the court second seised of the right to an effective remedy by staying its proceeding. It was suggested then that in order to ensure the protection of the fundamental rights, after exhausting some conditions, the second seised court is empowered to proceed with the proceeding before it. That being said, giving priority to the first seised court's

---

<sup>182</sup>The Brussels Convention article 27(3), the Brussels I Regulation article 34/3 and the Brussels I Regulation Recast article 45(1) (c)

<sup>183</sup> 'Opinion Of Advocate General Wahl on C-157/12, Salz (n 169),29 ; Jonathan Fitchen Pietro Franzina, Xandra Kramer, 'The Recognition and Enforcement of Member State Judgments' in Andrew James Andrew Dickinson, Eva Lein (ed), *the Brussels I regulation Recast* (Oxford University Press 2015),at 13.360

<sup>184</sup> Hess B, Pfeiffer T and Schlosser P, 'Report on the Application of Regulation Brussels I in the Member States' (2007),255

<sup>185</sup> Ibid

<sup>186</sup> Ibid, 256

judgment that took long time, and disregarding the local judgment, which was given as a remedy for the violation of the right to a fair trial, will lead to a disturbance of the rule of law in the member state of enforcement in one hand, and will ascertain the violation of fundamental rights on the other hand. Therefore, one can conclude that it is for the interest of justice not to limit the scope of the ground and not to take the time of pendency as the temporal time. On the other hand, it is submitted that looking at the changes brought by the Recast such as the abolition of the declaration of enforceability and the automatic recognition and enforcement of the judgment, the foreign judgment will produce legal effect in the member state of enforcement until the exception is applied by the court.<sup>187</sup> The time the local judgment is given should not be relevant here.

A related matter arises as to whether it would be better in the future version of the recast to include a provision similar to that provided for by the recent Hague convention on recognition and enforcement of a foreign judgment. In article 7 (2), the Convention provides that “recognition or enforcement may be postponed or refused if proceedings between the same parties on the same subject matter are pending before a court of the requested State, where (a) the court of the requested State was seised before the court of origin; and (b) there is a close connection between the dispute and the requested State.”<sup>188</sup> The provision tackles the situation where a judgment is delivered by a foreign court, and the proceeding is still pending in the member state of enforcement. If the conditions are fulfilled, the court of enforcement can postpone or refuse the recognition and the enforcement of the other judgment. Such postpone, or refusal will not prevent a subsequent enforcement application.<sup>189</sup>

If this were to be adopted, in principle, it would ensure the respect of the *lis pendens* rules. However, this would produce problems with fundamental rights. This is certainly true when the first seised court is taking too much time to rule on its jurisdiction. Allowing such power not only will undermine the right to an effective remedy and the right of enforceable judgment but also it will ascertain the infringement of the right to a fair trial in the first seised court in the member state of enforcement. In other words,

---

<sup>187</sup>Jonathan Fitchen Pietro Franzina, Xandra Kramer,(n 183), 13.362.

<sup>188</sup>‘Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters’

<sup>189</sup> Ibid, article 7(2)

it will leave the aggrieved party with a double infringement of his rights of the right to a fair trial and the right to an effective remedy.

#### **6.3.4.2 The judgment is irreconcilable with an earlier judgment given in another Member State or in a third State**

Article 45/1(d) provides that the judgment can be refused its recognition or enforcement if “it is irreconcilable with an earlier judgment by a member state or in a third states involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed”. The provision was first adopted under the old regulation and later confirmed by the recast.<sup>190</sup> The rationale behind it is to protect the rule of law in the member state of enforcement from any disturbance caused by conflicting judgments.<sup>191</sup> In order to determine which of the conflicting judgments takes priority, it might be better to differentiate between conflicting judgments from the EU member states and conflicting judgments from an EU member state and a third state

In the first scenario, it is submitted that the temporal time should be the time when each judgment has legal effects under the law of their legal systems.<sup>192</sup> This is consistent with the doctrine of extension where the effects of the judgment will be determined in accordance with the court of origin legal system.<sup>193</sup>

On the other hand, Professor Briggs thought that the day of the judgment is given should be the point which determines the time to tackle this issue.<sup>194</sup> According to him, this rule should be extended to apply in the situation of conflicting judgments between an EU judgment and a third state, leading us to the second scenario. This opinion was nevertheless criticised on the basis that it “pays undue deference to the third state judgment and does so at the expense of the Brussels I judgment creditor and EU civil justice generally.”<sup>195</sup> Accordingly, it is thought that the time should be the time when the foreign judgment is recognised under the private international law rules of the member state addressed.<sup>196</sup> Until then, the judgment does not produce any legal effect

---

<sup>190</sup> The old Brussels I regulation article 34,

<sup>191</sup> Jenard Report C59/45 cites: NIBOYET, *Traite de droit international prive franfais*, Paris 1949, Vol. VI, No 2028.

<sup>192</sup> Pietro Franzina, Xandra Kramer (n 183).

<sup>193</sup> *Ibid*, 13.44

<sup>194</sup> Adrian Briggs, (n 185).

<sup>195</sup> Pietro Franzina and others (n 183), 13.370.

<sup>196</sup> *ibid*, 13.371.

in the member state addressed.<sup>197</sup> According to this argument, the legal certainty and the principle of mutual trust to the EU member state judgment urge this choice notwithstanding the difficulty that might arise from the automatic recognition of the EU member state's judgment and its effects on the third state judgment.

This argument would be welcome in the EU. Requiring the recognition of the third state judgment for the application of this exception would mean that the EU judgment will rarely be refused its recognition and enforcement due to the automatic recognition of the EU judgment. This would also ensure the EU creditor's right to have an enforceable judgment within the EU. However, the problem with this argument is that it interprets the condition of "fulfill [ing] the conditions necessary for its recognition in the Member State addressed" narrowly to the extent that it substituted it. The wording of the condition does not presuppose that recognition should already be given to the third state to apply the exception, but merely that the conditions of recognition are seen to be fulfilled. Hence, it would be preferable to see when the judgment has legal effect under the law of the court of origin to ensure the interest not only the EU creditor but also the other party.

#### **6.4 The Brussels Ila Regulation: the return of child decision**

This section focuses on a particular type of judgments governed by the Brussels Ila Regulation mainly the return of child decisions where the objective of promoting the principle of mutual trust in the recognition and enforcement of these decisions was taken further by the Regulation and by the CJEU jurisprudence.

The Brussels Ila Regulation empowers the court of the child habitual residence to order a return of a child who was wrongfully retained or removed.<sup>198</sup> The rationale behind it is to protect the interest of the child from any harm from such removal.<sup>199</sup> The significance of these decisions is that, following the conclusions of the Tampere meeting, the return of child decision is automatically recognised and enforcement without a declaration of enforceability and importantly without any possibility to raise grounds of refusal.<sup>200</sup> The rationale behind it is to ensure speedy procedure in the

---

<sup>197</sup> *ibid*

<sup>198</sup> The Brussels Ila Regulation, article 11

<sup>199</sup> *C-491/10 PPU Joseba Andoni Aguirre Zarraga v Simone Pelz* [2010] ECR I-14247, para 44 .

<sup>200</sup> Tampere conclusions, para 34 ; the Brussels Ila Regulation article 41 and 42 and recital 17.

return of the child.<sup>201</sup> The court of origin issues a certificate on that decision. To further enhance the mutual recognition and enforcement of those decisions, the certificate is not subject to appeal.<sup>202</sup> One of the conditions that need to be examined before issuing a certificate is that “the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity.”<sup>203</sup> The importance of ensuring the child’s right to be heard is stressed out throughout the Brussels Ila Regulation as an essential right connected to the right to a fair trial.<sup>204</sup>

Following the preceding, the question arises what would then be the answer when the return of child decision constitutes a manifest violation of the child’s fundamental right to be heard and that the certificate was errored. The question was before the well-known case, *Joseba Andoni Aguirre Zarraga v Simone Pelz*. (hereinafter *Zarraga*). The CJEU was essentially asked whether the court of enforcement is nevertheless empowered to refuse to recognise and enforce the return of child decision when the court of origin did not guarantee the child’s right to be heard. The CJEU answered in the negative, rejecting any review. According to the court, allowing a review by the court of enforcement will undermine and hamper the effectiveness of the Brussels Ila Regulation system such as the speedy procedure required in these types of decisions.<sup>205</sup> It further held that, unlike a judgment on parental responsibility where it can be refused on public policy ground, a similar provision could not be found in the article governing the return of child decisions.<sup>206</sup> The CJEU held that hearing the child is not an absolute obligation on the court in every case. Nevertheless, when the court concludes that a hearing is needed, it must use any appropriate measures that can ensure the best interest of the child. Importantly, the court stated that the Brussels Ila Regulation is based on the premise that the EU obligation is being fulfilled by the court of origin in accordance with the Charter.<sup>207</sup> Moreover, the system of the Brussels Ila Regulation “is based on the principle of mutual trust between Member States in the fact that their respective national legal systems are capable of providing an equivalent

---

<sup>201</sup> *C-491/10 PPU Zarraga* (n 199), para 47.

<sup>202</sup> The Brussels Ila regulation, recital 24

<sup>203</sup> The Brussels Ila Regulation, article 42

<sup>204</sup> *Ibid*, recital 19,20 and 33

<sup>205</sup> *C-491/10 PPU Zarraga* (n 199), para 55.

<sup>206</sup> *Ibid* at 56, the Advocate General went even further as considering public policy ground in this type of decision as legalising the abduction of child. see Advocate General Bot Opinion, Case C-491/10 PPU *Joseba Andoni Aguirre Zarraga v Simone Pelz*’ (2010), para 127.

<sup>207</sup> *Ibid* para 59

and effective protection of fundamental rights, recognised at European Union level, in particular, in the Charter of Fundamental Rights.”<sup>208</sup> Accordingly, the aggrieved party should only recourse to the remedies in the court of origin.<sup>209</sup>

The judgment is an evident example of an absolute trust on the court of origin, leaving no room for “dual review”<sup>210</sup> by the court of enforcement despite the clear infringement of fundamental rights. The conclusion of this decision cannot be accepted for the following reasons. As seen in previous chapters, the principle of mutual trust requires effective justice systems that respect and comply with the rule of law and fundamental rights. The fact that there is a presumption of member state’s compliance with fundamental rights created to build and develop an area of freedom, security and justice and particularly enhancing mutual recognition between the member states does not mean that presumption is conclusive. In fact, In *N.S* case<sup>211</sup>, the CJEU itself rejected the operation of an absolute presumption of member state’s compliance with fundamental rights stating, that the existence of such non-rebuttable presumption undermines the fundamental rights protected under the EU law.<sup>212</sup> In addition, while the CJEU relied on its decision by the effectiveness of the Regulation and the assurance of a speedy procedure, such purpose cannot be used to justify the infringement of fundamental rights. In fact, the judgment is violating the same principle of effectiveness of EU law. It should be recalled that the principle of effectiveness imposes an obligation on the member states to provide protection of the EU fundamental rights. In addition, it imposes an obligation on the national courts not to render the application of the EU rights impossible or difficult.<sup>213</sup> In one hand, in ignoring the child’s right to be heard, the court is violating its obligation to ensure the protection of EU rights in their justice systems. On the other hand, rejecting any review by the court of enforcement put that court under risk of violating the right to an effective remedy for the aggrieved party in the court of enforcement thereby undermining the effectiveness of EU law. Moreover, the absence of public policy ground itself is a

---

<sup>208</sup> *C-491/10 PPU Zarraga* (n199) Para 70.

<sup>209</sup> *Ibid* para 71

<sup>210</sup> ‘Advocate General Bot Opinion, Case C-491/10 PPU Joseba Andoni Aguirre Zarraga v Simone Pelz’ (n 206) Para 130.

<sup>211</sup> *Joined cases C-411/10 and C-493/10 N.S v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*[2011]. 2011 I-13905 .

<sup>212</sup>*ibid*,para 100.

<sup>213</sup>*C-234/04, Rosmarie Kapferer v Schlank & Schick GmbH*,[2006], para 22

violation of the EU's obligation to respect the rule of law and fundamental rights which should be remedied by including it in the next recast.

#### **6.4.1 The Brussels IIa Regulation Recast**

On June 2019, the Brussels IIa regulation Recast was adopted.<sup>214</sup> The rationale behind it is to further enhance the protection of fundamental rights in the EU based on the principle of mutual trust.<sup>215</sup> This is done by removing limitations that are imposed on the free circulation of judgments in this area in one hand and to further emphasize the best interest of the child.<sup>216</sup> For instance, judgments on parental responsibility will be automatically recognised and enforced without the need for a declaration of enforceability.<sup>217</sup> In addition, it imposes an obligation on the court of origin to give an opportunity to hear the child who can express his or her views genuinely and effectively.<sup>218</sup> However, the way the hearing is conducted and by whom are a matter of the national court of the court of origin. The Recast further states that in issuing the certificate, the court of origin must write its reasons when the court decides not to hear the child.<sup>219</sup> However, the recast gives false hope for the protection of human rights. For instance, the recast does not provide for minimum standards on that hearing, leaving the matter to different national laws. Some member states, for instance, will only hear the child if they are above 12 years.<sup>220</sup> This could have the effect of hampering the child's right to be heard for those who can express their views under that age. Importantly, the Recast does not adopt the public policy as a ground to refuse the return of child decisions, meaning that absolute trust is reassured.

---

<sup>214</sup>Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)

<sup>215</sup>The Commission Proposal for a COUNCIL REGULATION on Jurisdiction, the Recognition and Enforcement of Decisions in Matrimonial Matters and the Matters of Parental Responsibility, and on International Child Abduction (Recast) COM/2016/0411 Final - 2016/0190' (2016)

<sup>216</sup> Ibid

<sup>217</sup> The Brussels IIa Regulation recast, article 27

<sup>218</sup> <https://www.consilium.europa.eu/en/press/press-releases/2019/06/25/more-effective-rules-to-deal-with-cross-border-matrimonial-matters-and-parental-responsibility-issues/>

<sup>219</sup> The Brussel IIa Regulation Recast Article 47

<sup>220</sup> Beaumont P and Walker L and HJ, 'Conflicts of EU Courts on Child Abduction: The Reality of Art 11(6)-(8) Proceeding across the EU' [2016] Journal of Private International Law, 26.

## 6.5 Conclusion

The chapter examined mutual recognition of judgments as an explicit reflection of the principle of mutual trust specifically in the Brussels I regulation. In this stage, the principle of mutual trust has evident examples. Not only the judgment will not be reviewed in substance and jurisdiction but goes further as to recognise and enforce this judgment without special procedure and without the need for a declaration of enforceability. One problem is the court's inability to raise these grounds by its own motion to protect fundamental rights, threatening the rule of law, fundamental rights and the legal order of the court of enforcement.

On the other hand, as an attempt to bring a balance between mutual trust and mutual recognition in one hand and the right to a fair trial on the other hand, the Brussels I Regulation provides for grounds where the judgment can be refused its recognition and enforcement, such as public policy and natural justice. Although the CJEU held that the mutual recognition of judgment is not without any limitation, it stressed on the need to interpret the refusal ground narrowly for the sake of upholding mutual trust and mutual recognition of judgment. Nevertheless, as seen above, the CJEU did not hesitate to provide protection to the rule of law and fundamental rights. The meaning of public policy is one example. In other cases, it went even further to provide ensured double protection for fundamental rights such as the court of enforcement's power to review whether service was sufficient regardless of the court of origin assessment.

On the other hand, the omission of some provisions provides uncertainty and unpredictability to the parties in this stage. One example was whether a judgment given contrary to the new rules of an exclusive choice of court agreement would be nevertheless recognised and enforced.

The Chapter also examined the return of child decisions as an explicit example of mutual trust in the Brussels IIa Regulation. The new recast gives a false hope for the protection of fundamental right by for instance, omitting public policy ground from the grounds.

## **Chapter 7 The Negative Implications of the principle of mutual trust In EU Private International Law Rules**

### **7.1 Introduction**

This chapter seeks to examine the negative implications of the principle of mutual trust in the EU private international law. It has been seen that the principle of mutual trust has explicit implementations in different EU regulations and at different stages. At the same time however, the application of other private international law norms well known in the common law systems, such as the anti-suit injunction and the *forum non conveniens*, were prohibited in the EU due to its apparent conflict with the meaning of the principle of mutual trust, as laid down by the CJEU. The objective of this chapter is to examine whether such prohibition is more apparent than real and whether the application of such norms could in fact strengthen the principle of mutual trust. In order to achieve the latter, this chapter is divided into 2 substantive sections with a conclusion. Section 1 will examine the doctrine of *Forum non conveniens*. This section will start with preliminary remarks on the doctrine of forum non-conveniens illustrating its meaning. It then examines its application in the context of the EU law and particularly the Brussel's I regulation and looks whether it is possible to apply it between the EU member states. In this respect, the chapter take into account transfer proceeding as solution provided by the Brussels Ila Regulation. Section 2 examines the doctrine of anti-suit injunction and its possible application in the EU and its consistency with the principle of Mutual trust. Section 3 serves as a conclusion for the chapter.

### **7.2 The doctrine of *forum non-conveniens*: Preliminary Remarks**

In the stage of jurisdiction, the English needs to answer two distinct questions; the first one is does it have jurisdiction? If the answer is yes, the second question the court needs to answer is whether it should entertain its jurisdiction. The latter is known as the doctrine of *forum non-conveniens*. The doctrine of *forum non-conveniens* is generally known as giving the court the power to stay its proceeding in favour of

another available appropriate forum. Unlike the *lis pendens* doctrine, the forum *non-conveniens* empowers the court to exercise its discretion regardless of the existence of parallel proceeding in another State. Parallel proceedings are only a factor that can be taken into account in applying the discretion.<sup>1</sup> Furthermore, Contrary to the *lis pendens* rules where the reduction of the parallel proceeding between the EU member states is its main purpose, the forum *non-conveniens* is to ensure that the proceeding is initiated before an appropriate court.<sup>2</sup>

In England, the doctrine of forum non conveniens is inherited from the Scottish law which has been applied in the latter since the eighteenth century.<sup>3</sup> Nevertheless, the level of similarity was reached gradually over the time. In its early stages, the claimant's right to access to court was regarded as a right that should not be easily disturbed.<sup>4</sup> Therefore, the English court could grant a stay to its proceeding only when two conditions were satisfied. First, it is satisfied that the continuous of the proceeding would lead to injustice by vexing or oppressing the defendant or by the court's abuse of its process. Secondly, that such stay will not lead to injustice to the plaintiff.<sup>5</sup>

However, the problem with that test was that the scope of the court's exercise of its discretion and the concept of injustice was limited and confined to cover only cases of vexatious and oppression. Consequently, the court was unable to exercise its power when other forms of injustice than abuses of process. Despite the attempt of giving the expressions "oppression" and the "vexatious" a liberal interpretation<sup>6</sup>, it was difficult and sometimes "confusing"<sup>7</sup> to fit a case in that category without manipulating with its meaning.<sup>8</sup> These reasons led to abandon the narrow test of the vexatious or oppression in *Mac Shannon v. Rockware Glass Ltd.*<sup>9</sup> where the House of Lords provided a wider approach. It concluded that, a stay would be justified if

---

<sup>1</sup> Eg *De Dampierre v De Dampierre* [1988] AC 92 108.

<sup>2</sup> *Spiliada Maritime Corporation v Cansulex Limited* [1986] UKHL 10,

<sup>3</sup> *ibid* 474. For more discussion on the history of the doctrine in Scotland see Ardavan Arzandeh, 'The Origins of the Scottish Forum Non Conveniens Doctrine' (2017) 13 *Journal of Private International Law* 130 <<https://www.tandfonline.com/doi/full/10.1080/17441048.2017.1303044>>; Ardavan Arzandeh, *Forum (Non) Conveniens in England Past, Present, and Future* (1st edition, Bloomsbury Publishing 2018).

<sup>4</sup> *St Pierre v South American Stores (Garth & Chaves) Ltd* [1936] 1 KB 382, 398.

<sup>5</sup> *Ibid*

<sup>6</sup> *Owners of the Atlantic Star v Owners of the Bona Spes (The Atlantic Star and The Bona Spes)* [1973] 2 WLR 795.

<sup>7</sup> *MacShannon v Rockware Glass Ltd* [1978] AC 795, 811 H.

<sup>8</sup> *ibid*

<sup>9</sup> *ibid*

the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court.<sup>10</sup>

The landmark case in England is decided by the House of Lords in the *Spiliada Maritime Corporation V. Cansulex Limited* (hereinafter *Spiliada*)<sup>11</sup> where it sets out the key principles of the doctrine of *forum non-conveniens* application. In principle, the case concerned with the court's power to serve out of jurisdiction. However, in order to answer the question, it distinguished between a court's power to exercise its discretion based on *forum non-conveniens* and the court's discretion to grant a leave for service outside the jurisdiction. According to the case, *forum non-conveniens* can be understood, as empowering the court to stay its proceedings

when it is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, in which the case may be tried more suitably for the interests of all the parties and the ends of justice.<sup>12</sup>

According to the court, the word *conveniens* should be understood as the court more appropriate and preferable to meet the end of justice for the parties.<sup>13</sup>

In elaborating the principle and its understanding, The House of Lords explicitly confirmed that the English *forum non-conveniens* is based on the Scottish doctrine of *forum non-conveniens*.<sup>14</sup> Notably, it adopts the principle laid down in the Scottish case of *Patrick Sim v Henry Robinow*<sup>15</sup> where it states:

---

<sup>10</sup> *ibid* p 812 B.

<sup>11</sup> *Spiliada*( n2)

<sup>12</sup> *Spiliada*(n2)

<sup>13</sup> *Ibid*; see also *Harrods (Buenos Aires) Ltd (No2), Re [1992] Ch 72*. It stated that "...what the court is trying to do is achieve a balance of justice, or a balance of fairness between the parties, upholding existing rights and not upsetting matters which later will have to be undone, preserving the status quo so far as is reasonably possible. That is not convenience in the sense of what is nice and easy for the parties in any proper sense, and nor here do the words *forum non conveniens* mean the most handy court into which to pop."

<sup>14</sup> *ibid*

<sup>15</sup> *Patrick Sim v Henry Robinow (1892) 19 R 665*.

“The plea can never be sustained unless the Court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice”.

In order to grant a stay of its proceeding, the defendant needs to prove not only that the English court is not the natural forum or the appropriate forum to hear the action, but more importantly, “to prove that there is another available forum which is clearly and distinctly more appropriate than the English forum.”<sup>16</sup> In this stage, the English courts will look at factors that could define or points toward the natural forum. The natural forum is the forum which “has the most real and substantial connection” with the action.<sup>17</sup> This includes factors such as the availability of witness, the applicable law, the place where the incident occur, and the parties’ resident and their place of business.<sup>18</sup>

If the court has *prime facie* satisfied that there is another available forum, which is the appropriate forum to hear the case, the court will grant a stay except where it has been proven that there are other circumstances to which justice will not be ascertained if the stay is granted.<sup>19</sup> At this stage, the burden of proof would be shifted to the plaintiff. In this context, one essential factor that can be taken into consideration is that justice will not be fulfilled in the natural or the appropriate forum based on an objective and reliable evidence.<sup>20</sup> In *lubbe v cape*<sup>21</sup>, the House of Lords refused to stay its proceeding on the basis of the forum non conveniens, despite the fact that the South African court was the natural forum to hear the case. The court reached its decision by relying on an evidence that indicates the absence of plaintiff’s legal representation before the South African court. Accepting otherwise would be a denial of justice and an infringement of the right to access to justice and the right to effective remedy before the English courts.<sup>22</sup> On the other hand, a comparison between the differences between the English common law system and another forum, which adopts a civil

---

<sup>16</sup> *Spiliada* (n 2).

<sup>17</sup> *ibid*

<sup>18</sup> *ibid*

<sup>19</sup> *ibid*

<sup>20</sup> *Ibid.* see also *Owners of the Las Mercedes v Owners of the Abidin Daver* [1984] 2 WLR 196 (*herinafter the Abidin Daver*).

<sup>21</sup> *Lubbe and others v Cape Plc* [2000] 1 W.L.R. 1545.

<sup>22</sup> *Ibid*, p 1559. The court also relies on the absence of a procedural system that can tackle the issue of group actions. See *ibid* 1560

system, was considered as unacceptable and should not be taken in to consideration when deciding whether to exercise the discretion or not.<sup>23</sup>

The mere practical inconvenience is not as decisive as to call for the court's power to exercise its discretion.<sup>24</sup> The latter should be considered in the light of the general principle. The same can be said with the plaintiff juridical or personal advantage. This can be understood as an advantage that can be obtained in the court where the stay has been requested such as higher rate of damages or discovery. In *Mach Shannon*, ensuring that the plaintiff will not be deprived from juridical or personal advantage was seen as condition that needs to be satisfied by the court to grant a stay under the forum non conveniens. However, this approach was later changed and confirmed by *Spiliada*. Lord Goff stated that it should be looked at from the position of the general principle, which is providing interest for all the parties and, for the end of justice. The prevention of such advantage does not itself imposes an obligation on the court to refuse to stay its proceeding in favour of the plaintiff.<sup>25</sup>

On the other hand, the court's power to exercise its discretion to grant a stay should be done with caution<sup>26</sup> and only justifiable when the principle applies. Yet, the latter does not change the fact that, while the plaintiff has a right to exercise the court's jurisdiction, the defendant has a right to request a stay of the proceeding on the basis of forum non conveniens.<sup>27</sup> As Lord Sumner states: "*the court's duty to entertain the suit can be no higher than its duty to listen to, and, if the circumstances warrant it, to sustain the plea*".<sup>28</sup>

To this end, obtaining justice was and is still at the heart of the *forum non-conveniens* despite its variation in its concept and the scope of its application over the time. as Professor Fentiman states " it is an instrument of justice...".<sup>29</sup>A good explanation can be seen by lord Salmon's statement in *MacShannon* where he stated, "The real test

---

<sup>23</sup> *The Abidin Daver* (n 20), 410 G.

<sup>24</sup> See *Spiliada*(n 2)., See also *Patrick Sim v Henry Robinow* (n 16) 668;*Societe du Gaz de Paris v Armateurs francais Societe du Gaz de Paris v SA de Navigation les Armateurs Francais* [1926] SC (HL) 13, p 19.

<sup>25</sup> *ibid*

<sup>26</sup> *The Abidin Daver* (n 20), 417

<sup>27</sup> *Societe du Gaz de Paris* (n 23).

<sup>28</sup> *Ibid*, Lord Sumner 21

<sup>29</sup>Richard Fentiman , *International Commercial Litigation* (second edi, Oxford University Press 2015) para 13.05.

of stay or no stay depends upon what the courts in its discretion that justice demands”<sup>30</sup>. The next section examines whether it is possible to apply it within the context of the EU.

### **7.3 *Forum non-conveniens* within the EU**

The doctrine of *forum non conveniens* was not explicitly provided for by the Brussels I Regulation and its predecessors. This raises a question whether the English court can still exercise its discretion to stay its proceeding when its jurisdiction is based on the Brussels I regulation provisions such as the defendant domicile. This also raises the question whether the application of the doctrine of *forum non conveniens* is compatible with the principle of mutual trust. In order to answer these questions, a distinction between two types of cases should be made; when the *forum conveniens* is in a non-EU state, when the *forum conveniens* is in the other member state.

#### **7.3.1 The appropriate court is in a non-EU State**

Prior to *Andrew Owusu v N.B Jackson*,<sup>31</sup> the English court in *In re Harrods (Buenos Aires) Ltd*<sup>32</sup> had the chance to answer the dilemma whether the court can stay its proceeding in favour of a non EU State even though the English court’s jurisdiction was based on the Brussels Convention. The court answered on the affirmative. According to the court, the objective of the convention was only to regulate the allocation of jurisdictions between the Member States and granting a stay does not contradict with the objective and the spirit of the Convention. As a result, the court granted a stay.

Later, the CJEU delivered the leading case, *Andrew Owusu v N.B Jackson*.<sup>33</sup> In this case, Mr Jackson, who is domiciled in the UK, rented a holiday villa to Mr Owusu, situated in Jamaica. However, when Mr Owusu dived into the Jamaican water, he hit his head by a sand bank. As a result, he became tetraplegic. He brought proceeding in the UK against Mr Jackson for a breach of contract where the latter impliedly provide for the safety to use the beach. The Court of appeal stayed its proceeding and refer a

---

<sup>30</sup> Lord Salmon *MacShannon* (n 7) 819 C.

<sup>31</sup> *Case C-281/02 Andrew Owusu v N B Jackson* [2005] ECR I-01383.

<sup>32</sup> *Harrods (Buenos Aires) Ltd (No2), Re* [1992] Ch 72.

<sup>33</sup> *Case C-281/02 Andrew Owusu v N B Jackson* [(n 33)]

preliminary ruling to the CJEU. The CJEU was essentially asked to examine whether the English court can exercise the doctrine of *forum non conveniens* when its jurisdiction is based on the Brussels I convention, defendant's domicile, no EU member states is involved and that the appropriate forum to hear the case is in a non EU state. According to the defendant, the claim has stronger the place of damage is Jamaica, the witnesses were based in Jamaica

The CJEU answered on the negative. In reaching its decision, the court has relied on the compulsory nature of the Brussels I Regulation rules, which allows no derogation except where explicitly provided for.<sup>34</sup> In fact, this reasoning was based on specific paragraphs from *Gasser* and *Turner* cases. The previous cases stated the characteristic of the principle of mutual trust and its importance in allowing the creation of a mandatory and compulsory uniform system of jurisdiction and recognition and enforcement between the EU member states.<sup>35</sup> This follows that the principle of mutual trust was indirectly used to justify the refusal of the application of *forum non conveniens* in the EU even when no EU member states is involved in the proceeding.

Furthermore, the court relied on the assurance of legal certainty as the basis of the Brussels Convention where rules of jurisdiction and recognition and enforcement can be easily identified and known by the potential parties in the legal proceeding, particularly the defendant.<sup>36</sup> In the court's view, the application of the doctrine of *forum non-conveniens* would create situations of unpredictability.<sup>37</sup> Moreover, the court stated that accepting the doctrine would have a negative impact on the uniform application of the Brussels Convention rules by the member states, being not recognised in most of the Member states justice systems.<sup>38</sup> The English court of appeal also asked the CJEU whether the answer would be different when a parallel proceeding exist in the non-EU state. However, the CJEU refused to answer a hypothetical question.

In addition, the Advocate General relied on the principle of effectiveness as a reason to defy the application of the doctrine of *forum non conveniens*.<sup>39</sup> In his view, if the

---

<sup>34</sup> Ibid, para 37

<sup>35</sup> Ibid

<sup>36</sup> Ibid paras 38-40

<sup>37</sup> Ibid para 41

<sup>38</sup> Ibid para 43

<sup>39</sup> Case C-281/02 *Andrew Owusu v N. B. Jackson* ECR I-01383, Opinion of AG LÉGER, para 261.

doctrine of *forum non conveniens* is considered to be a part from the national procedural law, its application is subject to its compatibility with the EU principle of effectiveness. He further stated that the principle of effectiveness could be undermined by undermining legal certainty and people's protection under the Regulation.<sup>40</sup>

### 7.3.2 Andrew Owusu v Jackson after the recast

The CJEU's conclusion was faced with criticism from the scholarly community. Professor Hartley stated that [t]he judgment is remarkable for its absolute refusal to consider the requirements of reasonableness."<sup>41</sup> He further stated that " ..., while we have to make sacrifices in order to protect the interests of our continental partners, they should allow us to go our own way where their interests are not affected."<sup>42</sup> Recently, the English court applied the *Owusu v Jackson* test in a case related to environmental tort in Zambia. The court pointed out that a stay in accordance with *forum non conveniens* is no longer available, making "one hand tied behind its back."<sup>43</sup>As a result, '...the risk of irreconcilable judgments becomes a formidable, often insuperable, obstacle to the identification of any jurisdiction other than England as the *forum conveniens*. Thus not only is one of the court's hands tied behind its back, but the other is, in many cases, effectively paralysed.'<sup>44</sup>

The negative reaction brought by the *Owusu v Jackson* led to the adoption of a new mechanism in the Recast, similar to the *forum non-conveniens* when a non EU State court is involved. According to article 34, when the jurisdiction is based on certain provisions<sup>45</sup>, the Recast empowers the Member State court seised of the dispute to stay its proceeding in favour of a third State court in a proceeding between the same parties and involving the same cause of action.<sup>46</sup> Such stay is possible when three conditions are fulfilled;

---

<sup>40</sup> Ibid para 271

<sup>41</sup> Trevor C Hartley, 'The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws' (2005) 54 International and Comparative Law Quarterly 813, 827 <<http://www.jstor.org/stable/3663399>>.

<sup>42</sup> Ibid, p 228

<sup>43</sup> *Vedanta Resources PLC & Anor v Lungowe & Ors* [2019] UKSC 20 para 39. According to the court, one hand is responsible for staying proceeding based on the *forum non-conveniens* and the other is responsible for refusing service out of the jurisdiction.

<sup>44</sup> Ibid

<sup>45</sup> The Brussels I recast, article 4 , article 7, article 8 or article 9

<sup>46</sup> The Brussels I recast, article 34

(a) it is expedient to hear and determine the related actions together to avoid the risk of irreconcilable judgments resulting from separate proceedings;

(b) it is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in that Member State; and

(c) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice.

The Member State court can take into consideration several factors in employing its stay such as the stage of the third State court's proceeding, the parties and the dispute's connection to the third State.<sup>47</sup>

### **7.2.3 The appropriate court is in another EU member State**

A question arises as to whether the doctrine of *forum non-conveniens* can apply between the EU member states and whether it could in fact enhance the meaning of the principle of mutual trust between the other member states.

In order to answer this question, it might be helpful to look first at the relationship between the doctrine of *forum non-conveniens* and the principle of Comity as a principle closely connected with the principle of mutual trust.<sup>48</sup> It has been seen that the principle of Comity is a tool that helps in the Private international law rules development and also has been used as a limitation to the court's power which otherwise has. In this context, Professor Briggs stated that *forum non conveniens* can actually undermine the principle of Comity rather than strengthen it. The application of the doctrine by the English court and the refusal of its own jurisdiction has the effect of telling the other court what it should do.<sup>49</sup> Such application is seen as "*a form of dumping, possibly of toxic waste*"<sup>50</sup> on that foreign court. He then preferred the

---

<sup>47</sup> Ibid, recital 24

<sup>48</sup> It has been argued in Chapter 2 that the principle of mutual trust has similar characteristics of the principle of Comity. See Chapter 2 for more details.

<sup>49</sup> Adrian Briggs, 'Comity in the Law of Jurisdiction to Adjudicate', *The Principle of Comity in Private International Law* (Collected Courses of the Hague Academy of International Law, The Hague Academy of International Law 2012).121

<sup>50</sup> Ibid p. 119

Australian approach of the doctrine of *forum non-conveniens*, where the Australian court would stay its proceeding if it is shown that it is clearly inappropriate forum to hear the case. In the court's view, the test formulation in this matter has the advantage of preventing a comparison and an examination to the foreign court appropriateness to hear the case.<sup>51</sup> It further held that while the availability of relief in the other court is viewed as a factor that needs to be taken into account in the application of the test, it does not go to the extent as to examine the foreign "court's legal system or the standards and impartiality of those who administer it."<sup>52</sup> Furthermore, the decision to grant a stay does not involve an evaluation to the substantive laws of the foreign law.<sup>53</sup>

Looking at Professor Briggs's opinion, while there is reality dimension in his opinion, the fact remains that the English court does not impose any obligation on the foreign court to take on the case. It simply put its own jurisdiction on hold based on factors balancing that other court will be more appropriate to hear the case for fulfilling the end of justice. The question of whether the foreign court will have jurisdiction and whether it will exercise rest and remain in the power of the latter.

Furthermore, while the Australian test might appear not to contradict with the principle of Comity in the process of weighing up the factors, it does not strengthen its meaning and more importantly, it might not necessarily fulfil the end of justice. According to the court, the fact that there is another appropriate foreign court to hear the case does not necessary mean that the local court is clearly inappropriate.<sup>54</sup> This is the point of departure with the English *forum non conveniens* where the court would stay its proceeding if it is satisfied that another court is more appropriate to hear the case and to fulfil the end of justice. This is reached by looking to all the circumstances which could favour or not favour the forum court.

The English courts has refused in number of occasions to stay its proceeding where there is a real risk, by a cogent and clear evidence, that substantial justice will not be obtained in the foreign court irrespective of the principle of Comity. In *Deripaska v Cherney*, the English court of appeal upheld the first instance court judgment and refused to stay its proceeding even though the Russian court seemed to be the natural

---

<sup>51</sup> *Voth v Manildra Flour Mills Pty Ltd* 1990 171 C. PP 36

<sup>52</sup> *Ibid* 37

<sup>53</sup> *Ibid* 42

<sup>54</sup> *Ibid* 37, in the court's view, this is only a rare possibility.

court to hear the dispute.<sup>55</sup> The instance court relied on a cogent evidence that there is a high risk that the claimant would not get a fair trial before the Russian court because of the government influence on the judicial system.<sup>56</sup> In the first instance, the judge stated that when there is no cogent evidence, Comity requires the court to assume that judicial systems in other countries will comply with the right to effective judicial protection before an impartial and independence courts. However, when an evidence which is directed toward the existence of a high risk government interference with the claimant's right to a fair trial, the English should refuse to stay its proceeding.<sup>57</sup> In *AK Investment CJSC (Appellant) v Kyrgyz Mobil Tel Limited and Others*<sup>58</sup>, the court has looked at the relationship between upholding the principle of Comity and the fulfilling the end of justice. It states:

Comity requires that the court be extremely cautious before deciding that there is a risk that justice will not be done in the foreign country by the foreign court, and that is why cogent evidence is required. But, contrary to the Appellants' submission, even in what they describe as endemic corruption cases (i.e. where the court system itself is criticised) there is no principle that the court may not rule...

It then concluded, "The rule is that considerations of international comity will militate against any such finding in the absence of cogent evidence."<sup>59</sup>

This was confirmed in a recent case, *Lungowe & Ors v Vedanta Resources Plc & Anor*<sup>60</sup> where the court of appeal accepts the observation made by the court of first instance that the court is not reviewing the legal systems of the foreign court. Rather, it only attempts to reach a decision on a specific matter in accordance with the evidence before it.<sup>61</sup> The court of appeal then add that "There must come a time when access to justice in this type of case will not be achieved by exporting cases, but by the availability of local lawyers, experts, and sufficient funding to enable the cases to be tried locally."<sup>62</sup> The Supreme Court later confirmed those findings.<sup>63</sup>

---

<sup>55</sup> *Deripaska v Cherney* [2009] EWCA Civ 849.

<sup>56</sup> *Ibid* see para 42 and 43 and the quoted paragraph from the court first instance

<sup>57</sup> *Ibid*. see also *Pacific International Sports Clubs Limited v Igor Surkis & Ors* [2010] EWCA Civ 753.

<sup>58</sup> *AK Investment CJSC (Appellant) v Kyrgyz Mobil Tel Limited and Others (Respondents)* [2011] UKP.

<sup>59</sup> *Ibid*

<sup>60</sup> *Lungowe & Ors v Vedanta Resources Plc & Anor* [2017] EWCA Civ 1528.

<sup>61</sup> *Ibid* para 133.

<sup>62</sup> *Ibid*

<sup>63</sup> *Vedanta Resources PLC & Anor v Lungowe & Ors* [2019]

On the other hand, in *Amin Rasheed Shipping Corporation v Kuwait Insurance Co*<sup>64</sup>, the House of Lords refused a comparison between the different legal systems adopted by the English common law system in one hand and Kuwait as civil law system on the other hand, as a factor that should be taken into account in applying the test.<sup>65</sup> This was also followed by *The Abidin Daver*.<sup>66</sup> In *Lubbe v Cape*, the court was first wary to make such a procedural comparison.<sup>67</sup> However, this did not prevent it to take such absence as an indirect element that strengthen the funding matter.<sup>68</sup>

A decision to stay the proceeding on the basis that another court is clearly more appropriate to hear the case is an indication itself that the forum based its trust on the other foreign to hear the case to fulfil the end of justice. Although the court does not reach that decision to fulfil the comity, the end result does reflect trust on the foreign court to fulfil justice to the party. On the other hand, one might suggest that a decision to refuse to grant a stay might indicate the inappropriateness of the court to hear the case particularly when the plaintiff prove that justice will not obtained in the other court, and thereby violate the principle of Comity. However, this should not be understood as a contradiction or a collision to the meaning of the principle of Comity or the principle of mutual trust. Rather, one should consider securing people's right as a limitation to the application of those principles particularly when reliable and cogent evident point toward a serious violation of people's fundamental rights and particularly their right to a fair trial and their right to an effective remedy.

To this end, one can say that the English case laws rightly shows that there is no contradiction between the application of the principle of comity and fulfilling the end of justice. The principle of Comity is respected only to the extent that it does not lead to undermining the fundamental rights or denial of justice.

---

<sup>64</sup> *Amin Rasheed Shipping Corp v Kuwait Insuranc* [1984] AC 50.

<sup>65</sup> *Ibid*, 67 E

<sup>66</sup> It states " My Lords, both Sheen J. and the Court of Appeal avowedly refrained from embarking upon a comparison of the quality of justice obtainable in a collision case conducted in a Turkish court which adopted a procedural system that is followed in civil law in other countries and that obtainable in a similar case conducted in an English court under the common law system of procedure." . see *the Abidin Daver* (n 20) 410.

<sup>67</sup> *Lubbe* (n 21), 1559 H.

<sup>68</sup> "... the exercise of jurisdiction by south African High court through separate territorial divisions, while not a potent obstacle in itself, could contribute to delay, uncertainty and cost. The procedural novelty of these proceedings, if pursued in South Africa, must in my view act as a further disincentive to any person or body considering whether or not to finance the proceeding" ,see *Ibid* 1560 D.

The question is now then whether the *forum non-conveniens* application is possible between the EU member state in the context of the Brussels I Regulation and if it is, what kind of factors can be employed to grant a stay on that basis.

Reaching an answer to this question becomes more complex when the member state's court jurisdiction is based on the regulation particularly the defendant domicile. According to Schlosser report,<sup>69</sup> it rejected the application of the doctrine between the member states and held that the member states "are not only entitled to exercise jurisdiction in accordance with the provisions laid down in Title 2; they are also obliged to do so."<sup>70</sup> In his view, accepting otherwise would have the effect of disturbing the claimant's right to choose the court more appropriate to him.<sup>71</sup> In addition, the application of the *forum non-conveniens* could lead to a case of a negative jurisdiction when the other court, that is more appropriate in the English court's eye, decline its jurisdiction.<sup>72</sup>

The refusal was confirmed by the CJEU in the *Owusu v Jackson*. As seen previously, the court rejects the application of *forum non-conveniens* irrespective whether it involves a non-state or not. It first relied on the compulsory system of the jurisdictional rules in the Brussels I regulation as a result of the principle of mutual trust. In addition, The CJEU was clearly concerned about the incompatibility of the doctrine with the legal certainty and predictability. According to the CJEU, both the uniform rules and its application by the member states court will be hampered if the doctrine of forum non-conveniens was allowed to be applicable.

However, looking at the doctrine, a decision to stay the proceeding on the basis that another court is clearly more appropriate to hear the case is an indication itself that the forum based its trust on the other foreign to hear the case to fulfil the end of justice. Although the court does not reach that decision to fulfil the comity or mutual trust, the end result does reflect trust on the other court to fulfil justice to the party. While one might suggest that a decision to refuse to grant a stay might indicate the inappropriateness of the court to hear the case particularly when the plaintiff prove

---

<sup>69</sup> Professor Dr Peter Schlosser, 'Report on the Convention of 9 October 1978 on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Mat' (1979).

<sup>70</sup> Ibid, para 78

<sup>71</sup> Ibid

<sup>72</sup> Ibid

that justice will not be obtained in the other court, and thereby violate the principle of mutual trust, this should not be understood as a contradiction or a collision to the meaning of the principle of mutual trust. Rather, one should consider securing people's right as a limitation to the application of this principle particularly when reliable and cogent evidence points toward a serious violation of people's fundamental rights and particularly their right to a fair trial and their right to an effective remedy.

In fact, looking at the EU law, a mechanism similar to the doctrine of *forum non conveniens* does exist. This is seen in the context of family law and particularly article 15 of the Brussels IIA Regulation. Article 15 empowers the court having jurisdiction, to transfer its proceeding to another member state court when specific conditions are met. In the first place, in matters of parental responsibility, the principle rule of jurisdiction is that the courts of a Member State where a child is habitually resident at the time the court is seised shall have jurisdiction.<sup>73</sup> However, for the interest of the child and by way of exception,

the courts of a Member State having jurisdiction as to the substance of the matter may, if they consider that a court of another Member State, with which the child has a particular connection, would be better placed to hear the case, or a specific part thereof, and where this is in the best interests of the child.<sup>74</sup>

Article 15 is an exception to the general rule of jurisdiction in which the court where the habitual residence of the child is to have jurisdiction. It is designed to fulfil the interest of the child where it could be fulfilled in a court other than this one.<sup>75</sup> It is an example and expression of the principle of mutual trust in the Brussels IIA regulation.<sup>76</sup> It should be noted that, the mechanism used under article 15 of the Brussels IIA regulation departs in substance from *forum non-conveniens*. For instance, unlike the *forum non conveniens* where all parties' interests are to be taken into consideration in the application of the test, transfer proceeding under article 15 takes only the interests of the child into account without regards to the parents' interest. Nevertheless, while there is a variation, there is a general similarity between the two doctrines. For

---

<sup>73</sup> The Brussels IIA regulation article 8

<sup>74</sup> *Ibid*, recital 13 and article 15

<sup>75</sup> *Ibid* recital 13

<sup>76</sup> <http://www.europeancivilaw.com/content/brusselstwo033.htm>

instance, article 15 requires the other court to have particular connection with the child. This is similar to the natural forum test as being applied by the *forum non-conveniens* as requiring the court to have a substantial connection with the case.

That being said, looking at article 15,<sup>77</sup> one can propose a modified version of forum non conveniens That should provide a balanced test between the rights of the parties, the legal certainty and predictability. The latter can be formed as the following:

The first rule is that , by way of exception, the court having jurisdiction to the matter by article 4, 6, 7, 8, can transfer its proceeding to another member state court which has a *prime facie* jurisdiction under the Regulation, which is better placed to hear the case for the interest of all parties. Such transfer must not lead to undermine the parties' rights particularly those as laid down by the Charter of fundamental rights and the Human rights Convention.

---

<sup>77</sup> Article 15 states '1. By way of exception, the courts of a Member State having jurisdiction as to the substance of the matter may, if they consider that a court of another Member State, with which the child has a particular connection, would be better placed to hear the case, or a specific part thereof, and where this is in the best interests of the child:

(a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other Member State in accordance with paragraph 4; or

(b) request a court of another Member State to assume jurisdiction in accordance with paragraph 5.

2. Paragraph 1 shall apply:

(a) upon application from a party; or

(b) of the court's own motion; or

(c) upon application from a court of another Member State with which the child has a particular connection, in accordance with paragraph 3.

A transfer made of the court's own motion or by application of a court of another Member State must be accepted by at least one of the parties.

3. The child shall be considered to have a particular connection to a Member State as mentioned in paragraph 1, if that Member State:

(a) has become the habitual residence of the child after the court referred to in paragraph 1 was seised; or

(b) is the former habitual residence of the child; or

(c) is the place of the child's nationality; or

(d) is the habitual residence of a holder of parental responsibility; or

(e) is the place where property of the child is located and the case concerns measures for the protection of the child relating to the administration, conservation or disposal of this property.

4. The court of the Member State having jurisdiction as to the substance of the matter shall set a time limit by which the courts of that other Member State shall be seised in accordance with paragraph 1.

If the courts are not seised by that time, the court which has been seised shall continue to exercise jurisdiction in accordance with Articles 8 to 14.

5. The courts of that other Member State may, where due to the specific circumstances of the case, this is in the best interests of the child, accept jurisdiction within six weeks of their seisure in accordance with paragraph 1(a) or 1(b). In this case, the court first seised shall decline jurisdiction. Otherwise, the court first seised shall continue to exercise jurisdiction in accordance with Articles 8 to 14.

6. The courts shall cooperate for the purposes of this Article, either directly or through the central authorities designated pursuant to Article 53.'

In other words, the court can transfer its proceeding, if its jurisdiction, for instance, was based on the defendant domicile. In contrary, the court cannot transfer its proceeding if its jurisdiction on matters related to a consumer or an individual employee. The latter jurisdictional rules were designed to protect the weak parties in the legal proceeding.

The second rule is a transfer request should be made by one of the parties, the courts own motion or the other court. The transfer must be accepted by at least one of the parties when it was made by the court's own motion or by application of a court of another Member State.

The third rule is about setting out a time limit. If the other court does not accept its jurisdiction within that time or indicate that it will do it within a maximum of two months, the court of the original jurisdiction should continue its proceeding. The significance of this condition is to ensure that the transfer will not lead to excessive delay, leading to violating parties' rights, the opposite of what the transfer attempt to achieve. This time limit can be extended to another time limit, two months to provide certainty and predictability. If the other court did not accept its jurisdiction within the time limit, the transfer will be invalid, and the court of original jurisdiction should continue its proceeding. If, the other court nevertheless, ignores the invalidity of the transfer request, accept its jurisdiction and have a judgment, the latter should not be recognised.

The fourth rule is that the other court should be better placed to hear the case for the interest of all parties. In determining whether the other court is better placed to hear the case, one can apply the natural forum test applied by the *Spiliada* case. For instance, the location of the witnesses and evidence and the applicable law can be seen as factors that can be taken in to account. Moreover, the fact that the other member state court infringe the parties' right to a fair trial such as the excessive length proceeding or the corrupted court are a significant factors that must be taken into consideration when applying the test. Such claim should be supported by a cogent evident that there is a real risk that the other party will not have a substantial justice.

In order for the transfer of proceeding to succeed, there should be excellent channels of communications between the court of the different Member states. Having a strong communication between the justice systems enhance judicial cooperation and

strengthen the legal protection of parties in the legal proceeding and promote and enhance the principle of mutual trust between the parties.

#### **7.4 The anti-suit injunction: Preliminary Remarks**

An anti-suit injunction is an injunction aims to restrain a party from commencing or continuing proceeding in a foreign court.<sup>78</sup> Granting such relief is possible by section 37 of the Senior Courts Act 1981, which states, ‘the High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.’<sup>79</sup> Similar to the *Forum non-conveniens*, the anti-suit injunction aims to ensure practical justice to the parties.<sup>80</sup> The general principle is that the English court will grant an anti-suit injunction when the end of justice require so.<sup>81</sup> It is seen as an effective remedy specifically when the foreign court does not stay its proceeding on the basis of the doctrine of *forum non conveniens*.<sup>82</sup> In order to grant such relief, the English court is required to have a personal jurisdiction over the party to be restrained.<sup>83</sup> This can be fulfilled when the writ was served on him in England or any permitted service under the English law.<sup>84</sup>

In this context, an important question arises to the categories, which explains and justifies when and why the injunction is being used. A consensus cannot be found in the academic scholars on categorising these justifications. For instance, *Dicey, Morris and Collins* submitted that “an injunction may be granted if there is a legal or an equitable right not be sued in the foreign jurisdiction, or if it is otherwise unconscionable for the proceeding to be brought in the foreign jurisdiction, or if the order is necessary to protect the jurisdiction of the court”.<sup>85</sup> On the other hand, Professor Fentiman, sets up a criteria based on the right to which the injunction seek to protect. The first criteria is procedural rights, which tends to cover the right to protection from an abuse of the court’s process and from oppressive and vexatious

---

<sup>78</sup> *Societe Nationale Industrielle Aerospatiale (SNIA) v Lee Kui Jak* [1987] A.C. 871 (n 41).

<sup>79</sup> Senior Courts Act 1981 c.54.

<sup>80</sup> *Airbus Industrie GIE v Patel and Others* [1998] UKHL 12, 133 H.

<sup>81</sup> *Ibid* 134 D; *Societe Nationale Industrielle Aerospatiale* (n 1) 892 A.

<sup>82</sup> Fentiman (n 29), 16.01.

<sup>83</sup> *Turner v Grovit and others* (2001) UKHL 65, 22; *Societe Nationale Industrielle Aerospatiale* (n 1).

<sup>84</sup> Fentiman (n 29).

<sup>85</sup> Mapesbury (n 125).

act by the party.<sup>86</sup> The second criteria is substantive rights such as the applicant right to enforce an exclusive choice of court agreement or an arbitration agreement.

One can provide some examples that might explain when and why the court may grant an anti-suit injunction. The English courts may generally grant an anti-suit injunction if bringing proceeding in the foreign court is oppressive and vexatious.<sup>87</sup> according to the court, it “will interfere when a party is acting under colour of asking for justice in a way which necessarily involves injustice to others.”<sup>88</sup> For instance, bringing proceeding in the foreign court would be considered as vexatious or oppressive when it was brought in bad faith by the other party.<sup>89</sup> At the same however, bringing proceeding in multiple jurisdictions is not itself considered as vexatious and oppressive.<sup>90</sup>

Moreover, the English court will grant a relief if bringing foreign proceeding is an abuse of process of the English court.<sup>91</sup> However, in this context, it is necessary to note that the English court may issue an injunction “when foreign proceeding represent an abuse of the process of the English court, insofar as their object is to vex a party to pending proceeding.”<sup>92</sup>

In addition, the English court may generally grant an anti-suit injunction to ensure the effectiveness of the jurisdictional agreements such as an English choice of court agreement or an arbitration agreement.<sup>93</sup> In this context, the anti-suit injunction’s aims to restrain the party who acted in a breach of contract in commencing proceeding in the non-chosen court.<sup>94</sup> Issuing such an injunction is seen as providing more effective remedy for the applicant than redress.<sup>95</sup> If no such injunction can be granted, the

---

<sup>86</sup> Fentiman (n 29) 16.39.

<sup>87</sup> *McHenry v Lewis* [1882] 22 ChD 397.

<sup>88</sup> *Societe Nationale Industrielle Aerospatiale* (n 77) cites *McHENKY v. LEAVIS* 22 ch D 397.

<sup>89</sup> Lord Collins of Mapesbury (ed), *Dicey, Morris and Collins on The Conflict of Laws* (Fifteenth, Sweet & Maxwell - Thomson Reuters), 588.

<sup>90</sup> *Societe Nationale Industrielle Aerospatiale* (n 77). 894 B.

<sup>91</sup> Mapesbury (n 89), 586; *Turner v. Grovit and others* (n 81) 120 B

<sup>92</sup> Fentiman (n 29)

<sup>93</sup> *Donohue v Armco Inc and Others* [2001] UKHL 64. Lord Bingham made it clear that such rule is not absolute and an injunction can be refused if “ the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum.” See also *OT Africa Line Ltd v Magic Sportswear Corporation & Ors* [2005] EWCA Civ 710, 933 A.

<sup>94</sup> *OT Africa Line Ltd* (n 16).

<sup>95</sup> *ibid*, 33.

aggrieved party's right under the exclusive choice of court agreement would be "valueless".<sup>96</sup>

In a case other than the existence of a choice of court agreement or an arbitration agreement, the court must first ensure that it is the natural forum for the action.<sup>97</sup> However, an injunction should not be granted on the sole ground that the English court is the natural forum. The injunction will be granted only to "prevent injustice".<sup>98</sup> Accepting otherwise will be against the principle of comity and the purpose of issuing an anti-suit injunction, which is the prevention of injustice.<sup>99</sup> In other words, adopting such alternative understanding suggest that not only the court is declaring that it is the natural forum to hear the action, but goes further as to restrain proceeding initiated in another foreign state and declaring indirectly the inappropriateness of the court to hear the case. However, the terminology "the natural forum" itself bring confusion. The fact that "the natural forum" instead of "natural forum" might suggest what the court is trying to avoid; a clash with the principle of Comity specifically if the other court has concluded that it is the appropriate forum. It might be better for the court as it will be further discussed to be a natural forum, meaning a court having a strong connection with the disputes.

In its discretion whether to grant an anti-suit injunction, it is essential for the court to ensure that the grant of an anti-suit injunction will prevent injustice to the applicant, and that such grant will not lead to injustice to the person whom the injunction is directed to.<sup>100</sup> The English court will not grant an anti-suit injunction if it would lead to prevent the party from pursuing an advantage he would have in the foreign court.<sup>101</sup>

To sum, this section examined the meaning of the anti-suit injunction as being applied by the English courts. Although the English courts granted an anti-suit injunction to achieve different purposes, one should not forget the main purpose which is the prevention of injustice. The next section examines the relationship between the anti-suit injunction and consideration of the principle of Comity.

---

<sup>96</sup> *Continental Bank NA v Aeakos Compania Naviera SA* [1994] 1 WLR 588.

<sup>97</sup> *Societe Nationale Industrielle Aerospatiale* (n 77),895

<sup>98</sup> *ibid* 899.

<sup>99</sup> *Ibid* 895

<sup>100</sup> *Ibid* 896

<sup>101</sup> *ibid* 896 G.

### 7.3.1 Anti-suit injunction and Comity

The anti-suit injunction is intended to be directed against the party to whom the injunction is sought to restrain and not against the foreign court.<sup>102</sup> The English court is rather evaluating the party's act.<sup>103</sup> According to the House of Lords, '[r]estraining orders come into the picture at an earlier stage and involve not a decision upon the jurisdiction of the foreign court but an assessment of the conduct of the relevant party in invoking that jurisdiction.'<sup>104</sup> Nevertheless, the English court has recognised in many occasions the fact that the anti-suit injunction could lead to indirect interference with the foreign court's proceeding, leading to a possible disturbance to the principle of Comity between the countries.<sup>105</sup> As a result, issuing such an injunction should be done with caution.<sup>106</sup> Notably, in *Airbus Industrie G.I.E v. Patel and Others*<sup>107</sup>, the principle of Comity was seen as a limitation to the exercise of the anti-suit injunction. Lord Goff states "comity requires that the English forum should have a sufficient interest, or connection with, the matter in question to justify the indirect interference with the foreign court which an anti-suit injunction entails".<sup>108</sup>

*Airbus* finding was later confirmed in *Turner v Grovit*, where the House of Lords "attaches a high importance to international comity".<sup>109</sup> In *Star Reefers Pool Inc V Jfc Group Co Ltd*<sup>110</sup>, the English court gave the principle of Comity more significant rule. This can be seen when it is seen as an important factor that needs to be considered in determining whether to exercise the power to grant an anti-suit injunction after finding that there is unconscionable conduct.<sup>111</sup> According to the court, the principle of Comity should make the court "to pause long and hard before granting an injunction".<sup>112</sup> The fact that the judge in the first instance did not consider comity was seen as error.<sup>113</sup>

---

<sup>102</sup> *ibid*, 829 C; *Airbus Industrie GIE* (n 3); *Turner v Grovit and Others* [2000] Q.B. 345, 117 A .

<sup>103</sup> *Turner v Grovit and others* (2001) UKHL 65, para 26.; *OT Africa Line Ltd v* (n 16), 80.

<sup>104</sup> *Turner v Grovit and others* (n 81) 119 B.

<sup>105</sup> *Societe Nationale Industrielle Aerospatiale* (n 1); *Airbus Industrie GIE* (n 3) 133 F.

<sup>106</sup> *Airbus Industrie GIE* (n 3)

<sup>107</sup> *ibid*

<sup>108</sup> *ibid*

<sup>109</sup> *Turner v Grovit and* (n 26), para 28

<sup>110</sup> *Star Reefers Pool Inc v JFC Group Co Ltd* [2012] EWCA Civ 14 .

<sup>111</sup> *ibid*

<sup>112</sup> *Ibid*, 40

<sup>113</sup> *Star Reefers Pool* (n 33).

However, the English court's conclusion in *Star Reefers Pool Inc V Jfc Group Co Ltd* is questionable in giving the principle of Comity a larger role than needed. Accepting further consideration of notion of comity in later stage, will undermine the anti-suit injunction as an effective remedy to the aggrieved applicant in the English proceeding specifically when domestic remedies in the foreign court's is absent or ineffective.

Considerations of Comity decreases significantly in the case when bringing proceeding is contrary to a jurisdictional agreement such as an exclusive choice of court agreement.<sup>114</sup> In one case, the English court even held that "the true role of comity is to ensure that the parties' agreement is respected."<sup>115</sup> This is because the existence of the agreement entails an obligation not to pursue proceeding in court other than the chosen court.<sup>116</sup> In fact, what the English court is doing is to "merely restraining a party to a contract from doing something which he has promised not to do."<sup>117</sup>

The real question, which the court needs to pause before issuing anti-suit injunction, is not whether there is a possible contradiction with the principle of Comity but rather whether such issuance would undermine the claimant's right to an access to court before that foreign court. In order to answer this question, it is necessary to distinguish between the ECHR and the EU approaches. In addition, it is necessary to distinguish between three different situations; the alternative forum cases, where there is more than one court having jurisdiction over the dispute ,the single forum cases, where the foreign court is the only court having jurisdiction over the dispute<sup>118</sup> or is the only court where the claimant can bring a successful outcome., and where there is an arbitration agreement.

In the alternative forum case, it is submitted that anti-suit injunction is not inconsistent with the right to access to court as enriched in article 6 of the ECHR.<sup>119</sup> This is supported by the ECHtR case laws where it held that the assurance that the right to a fair trial should be done by looking at the conduct of the proceeding. It has not been mentioned where such conduct should be done. In addition, it is argued that anti-suit

---

<sup>114</sup> *OT Africa Line Ltd v* (n 16), 32.

<sup>115</sup> *ibid.*

<sup>116</sup> *ibid.*

<sup>117</sup> *Ibid*, 35

<sup>118</sup> *Airbus Industrie GIE* (n 3), 134 C.

<sup>119</sup> *James J. Fawcett* (n 88).

injunction, would not violate the right to access to court where there is an effective remedy by the English court.<sup>120</sup> It goes even further as that the element of the existence of effective remedy reduced when the commencement of foreign proceeding was in a bad faith.<sup>121</sup>

In the single forum cases, it is submitted that, in principle, the issuance of anti-suit injunction in this types will consider a flagrant denial of justice since it is affecting the essence of the right itself.<sup>122</sup> Nevertheless, the English court would be able to grant a relief in these cases where the claimant's conduct is unconscionable before the foreign court.<sup>123</sup> However, it would be really difficult to accept that an anti-suit injunction can nevertheless be granted when the foreign court is the only court having jurisdiction on the matter.

In the situation where there is an arbitration agreement, the ECtHR held that the parties' waiver to their right to access to a court by their agreement to arbitration does not conflict with the right as enriched in article 6 of the Convention.<sup>124</sup>

As for the EU, as it will be seen later, the CJEU referred to the right to access to effective judicial protection only in the relationship between the court's power to determine jurisdiction, arbitration and anti-suit injunction. When no arbitration agreement involved, anti suit injunction is not welcomed due to its contradiction with the principle of mutual trust. Where there is an arbitration agreement, the CJEU departs from the position taken by the ECtHR and provides a higher protection for the claimant's right to access to court. The fact that there is an arbitration agreement is not so decisive as to prevent the claimant's from his right to judicial protection before a member state's court.

In sum, this section examined the relationship between the principle of comity and anti-suit injunction. One can say that consideration of comity is satisfied once the English court establish a sufficient connection with the dispute. Giving the principle of Comity stronger approach by considering it in a later stage will hinder the applicant's right to have an effective remedy. The English court must be concerned with the

---

<sup>120</sup> Fentiman (n 29), 16.102.

<sup>121</sup> *ibid*, 15.105.

<sup>122</sup> James J. Fawcett (n 88), 6.214.

<sup>123</sup> *ibid*, 6.214 and 6.217.

<sup>124</sup> *Deweere v Belgium* [1980] 2 EHRR 439, 49.

question whether its issuance would preclude the person from his right to an access to court in that foreign court.

### **7.3.2 Anti-suit injunction, the Brussels I Regulation and the principle of mutual trust**

A question arises as to whether issuing an anti-suit injunction is compatible with the Brussels Regulation and the principle of Mutual trust. This section is divided into 2 subsections. Subsection 1 examines the applicability of anti-suit injunction in the case where no jurisdictional agreement is agreed on. Sub section 2 examines the situation where a jurisdictional agreement such as the choice of court agreement and arbitration agreement is found.

#### **7.3.2.1 The applicability of anti-suit injunction in the case when no jurisdictional agreement is agreed on**

The question came before the CJEU in *Turner v Grovit*.<sup>125</sup> Mr Turner was a British solicitor who worked in a company based in the UK, which is a part of a group of companies managed by Mr Grovit. Mr Turner then moved to work in the company office in Madrid, Spain. He then brought proceeding before the Employment tribunal in England claiming for damages for his wrongful dismissal by Mr Grovit. However, irrespective of the English proceeding, C.S.A. company, another company in the group, brought proceeding before the Spanish court against Mr Turner claiming for damages sustained for Turner's departure from the company. Mr Turner applied for an anti-suit injunction to restrain Grovit and the other defendant from continuing proceeding in the Spanish court. The deputy judge refused to grant such relief, since the anti-suit injunction would have the effect of interfering with the Spanish court's power to determine its jurisdiction. However, the court of appeal took another view and granted a relief. According to the court, the English court will issue an antisuit injunction if it appears to the court that the commencement of proceeding in another member state's court was for the sole purpose of harassing or oppressing the applicant in the English proceeding.<sup>126</sup> In addition, one reason, which influenced the English court in its decision, was the result of a comparison between the cause of action and same parties in the English court and the Spanish court. The court concluded that, the fact

---

<sup>125</sup> C-159/02 *Gregory Paul Turner v Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA* [2004] ECR I-03565.

<sup>126</sup> *Turner v Grovit and Others* [2000] QB 345.

that the English court is the first seised court and that the Spanish court involves the same cause of action and between the same parties justifies the use of the anti-suit injunction to protect it.<sup>127</sup>

C.S.A appealed before the House of Lords and a question was referred to the CJEU for a preliminary ruling. The CJEU was asked to examine whether a member state's court can issue an anti-suit injunction to preclude a party from continuing proceeding in another member state's court. The CJEU answered on the negative. In reaching its decision, the CJEU mainly relied on the principle of mutual trust and its characteristics. According to the court, the principle of mutual trust enables the establishment of a mandatory system, governing uniform rules of jurisdiction and recognition and enforcement applicable in the member states' court, and gives an equal power to each member states' court to examine its own jurisdiction.<sup>128</sup> These facts preclude an injunction that interferes with the other court's power to determine and rule on its own jurisdiction.<sup>129</sup>

The CJEU rejected Mr Turner and United Kingdom argument that the anti-suit injunction intends to prevent the abusive conduct of the other party and that such interference with the other member state's court is only indirect. In the CJEU view, the English court's assessment to the other party's act implies an assessment to the appropriateness of the member state's court.<sup>130</sup> The Court also rejected the proposition that the anti-suit injunction might reduce the risk of issuing conflicting judgment since the latter risk can be minimised by the mechanism of the *lis pendens*.<sup>131</sup> The Court concluded that such reliance is prohibited even if the party to whom this injunction is directed to is in bad faith.<sup>132</sup>

The CJEU reasoning was mainly based on the negative implication of the anti-suit injunction on the principle of mutual trust between the EU member states courts and its effects on their ability to rule on their own jurisdiction without disturbance from

---

<sup>127</sup> *ibid*, 364

<sup>128</sup> *C-159/02 Gregory Paul Turner* (n 48), paras 24-25.

<sup>129</sup> *Ibid*; *C-159/02 Gregory Paul Turner v Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA, Opinion of AG Colomer, Ruijarabocase'* (2003), 33.

<sup>130</sup> *C-159/02 Gregory Paul Turner* (n 123)

<sup>131</sup> *Ibid*, para 30

<sup>132</sup> *Ibid*, para 31

another court. This is true despite its recognition of the possible situation of the claimant acting in bad faith.

The real dilemma is whether of the principle of mutual trust can be used to deter the fulfilment of justice to the applicant. Principally, the principle of mutual trust requires member states to ensure the respect of rule of law and fundamental rights in their justice systems in particular an effective judicial protection to the parties. In theory, granting anti suit injunction is directed toward the party rather than the foreign court. One could then argue that an English court could grant an anti-suit injunction. However, in reality, it does indirectly affect the foreign court's ability to exercise its jurisdiction over the claimant<sup>133</sup>; something will never be accepted by the CJEU.

One scholar suggests that the first seised court should rely on trust that the second seised court would stay its proceeding.<sup>134</sup> As seen previously, according to the lis pendens rules, the second seised court is under an obligation to stay its proceeding in favour of the first seised court when it involves the same cause of action, the same subject matter and between the same parties. The applicant could prevent such injustice by arguing that the dispute falls in the scope of the lis pendens rules and thereby the second seised court must stay its proceeding.

However, one serious obstacle might be that the second seised court takes a long time to rule on its own jurisdiction ,or according to its national law, it decide on the jurisdiction alongside the merit. This could create another lis pendens dilemma particularly if the applicant does not have the aid to defend himself in the other court. The better approach would be to set a time limit where the second seised court is obliged to rule on its own jurisdiction within it.

One possible solution is a combination between endorsing a time limits to the pendens rules with courts' communication. A direct communication between the court is an essential tool to enhance the parties rights and mutual trust between the Member states.

---

<sup>133</sup> Clare Ambrose, 'Can Anti-Suit Injunctions Survive European Community Law?' (2004) Vol. 52 The International and Comparative Law Quarterly 409 <<https://www.jstor.org/stable/3663114>>.

<sup>134</sup> *ibid*

### **7.3.2.2 The applicability of anti-suit injunction when there is a jurisdictional agreement**

A question arises as to whether anti-suit injunction can nevertheless be used to protect the parties' exclusive choice of court agreement or an arbitration agreement in the context of Brussels I Regulation and its Recast. This sub section is divided into two parts: the first part examines the application of the anti-suit injunction when there is an arbitration agreement. The second part examines the application of the anti-suit injunction when there is exclusive choice of court agreement.

#### **7.3.2.2.1 The application of the anti-suit injunction and arbitration agreement**

An important question arises as whether the prohibition of issuing an anti-suit injunction to restrain a member state's court proceeding would also be extended when there is arbitration agreement, a matter excluded from the scope of the Brussels I Regulation. The question came before the CJEU in *Allianz SpA v West Tankers Inc.*<sup>135</sup> The case concerns with the collision happened in Italy between vessel owned by West tankers and Chartered by Erg, and a jetty owned by Erg. The Charter party provides for an arbitration agreement in London. After Erg claiming for compensation from his insurers, Allianz and Generali, the insurers brought proceeding in Italy against West Tankers to recover the amount paid to Erg. West tankers contested the Italian court's jurisdiction on the basis that there is an arbitration agreement. It also brought proceeding before the English court claiming for declaration that the issue comes under the scope of the arbitration and requesting an anti-suit injunction in support of arbitration. The English court granted an anti-suit injunction and the other party appealed before the House of Lords which referred the matter to the CJEU for a preliminary ruling. The CJEU was asked to examine whether a member state's court can issue an anti-suit injunction to restrain proceeding in another member state's court on the basis that there is an arbitration agreement.

The CJEU answered on the negative. It held that the court must look at the subject matter of the dispute in order to determine whether it falls within the scope of the Regulation.<sup>136</sup> If the subject matter comes within the scope of the Regulation, the preliminary question on the validity of the arbitration agreement also comes under the

---

<sup>135</sup> Case C-185/07 *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc* [2009] ECR I-00663.

<sup>136</sup> *Ibid* para26

Regulation's scope.<sup>137</sup>In this case, the subject matter of the dispute is claim for damages, a matter that is within the scope of the Regulation. On this basis, the court held that an anti-suit injunction which has the power to "strip[ing] that court of the power to rule on its own jurisdiction" under the Brussels I Regulation is incompatible with the Regulation.<sup>138</sup> While anti-suit injunction proceeding in support of the arbitration agreement is outside the scope of the Brussels I regulation, the CJEU recognised its negative affect on the uniform rules of jurisdiction and recognition and enforcement as laid down by the Regulation.<sup>139</sup> It further held that issuing such an injunction is contrary to the principle of mutual trust and its characteristics, where each member state's court has the power to determine its own jurisdiction without an intervention and a review by member state's court.<sup>140</sup> Importantly, The CJEU held that allowing an anti-suit injunction both would encourage a party to avoid proceeding by relying solely on the arbitration agreement and would have the effect of preventing a party from his right to access to court as guaranteed under the Charter.<sup>141</sup>

In *West tankers*, the CJEU provide higher protection to the right to access to court than that provided for by the ECHtR interpretation. It should be remembered that the ECHtR held that parties could waive their right to access to court by the conclusion of an arbitration agreement.<sup>142</sup> However, the CJEU departs from the ECHtR interpretation by providing more extensive protection to the party's right to an access to court. The fact that there is an arbitration agreement is not a deterrent from bringing proceeding before a member state's court.

On the other hand, the matter differ when an anti-suit injunction is issued to restrain a member state's proceeding by an arbitral tribunal. The matter came before the CJEU in *Gazprom" OAO v Lietuvos Respublika*.<sup>143</sup> In this case, a shareholder agreement was concluded between Gazprom and the Ministry of Lithuania on behalf of the Lithuanian State, containing an arbitration clause. A proceeding was initiated by the Ministry before the Lithuanian court to investigate a legal person's activities. This was contested by Gazprom on the basis of the existence of an arbitration agreement. An

---

<sup>137</sup> Ibid.

<sup>138</sup> Ibid para 28.

<sup>139</sup>Ibid para 24

<sup>140</sup> Ibid paras 29-30

<sup>141</sup> Ibid para 31

<sup>142</sup>*Deweere v. Belgium* (n 47), para 49.

<sup>143</sup> *C-536/13, Gazprom" OAO v Lietuvos Respublika*[2015] ECLI:EU:C:2015:316.

arbitral tribunal was initiated where Gazprom requested an order restraining the Ministry from continuing its proceeding before the Lithuanian court. Such request was granted. At the same time however, the Lithuanian court granted permission to investigate and Gazprom requested the recognition and enforcement of the arbitral award. The two appeal were before the Lithuanian Supreme Court, which referred the matter for the CJEU for a preliminary ruling.

The CJEU was asked to examine whether a member state's court could refuse to recognise an arbitral award, which its main purpose is to restrain the member state's court from continuing its current proceeding, and thereby limits its power to rule on its own jurisdiction. The CJEU held that the Regulation does not impose an obligation to recognise or to refuse a recognition and enforcement of an arbitral tribunal restraining a party from continuing its proceeding before a member state's court.<sup>144</sup> According to the CJEU, the principle of mutual trust plays no role owing to the fact that an anti-suit injunction was granted by an arbitral tribunal rather than a member state's court.<sup>145</sup> In the court's view, there is no interference by a member state's court in other member state's court determination of its own jurisdiction.<sup>146</sup> As for the right to judicial protection as mentioned in *West Tankers*, the CJEU seems to accept a limitation to the right to access to court, since the right to judicial protection would be safeguarded by the party's ability to request a refusal to recognise and enforced the arbitral award.<sup>147</sup> The CJEU further held that recognising arbitral award comes under the scope of national and international rules such as the New York Convention.<sup>148</sup>

#### **7.3.2.2.1 Anti-suit injunction and arbitration after the Recast**

The *West tankers* case brought confusion with regards the scope of exclusion of the arbitration as provided for by article 1(2) and to the applicability of the anti-suit injunction to secure parties' agreement. Not only would the judgment undermine the enforceability of the arbitration agreement by recognising the decision within the Brussels I regulation rules, but also would encourage a litigant who wants to avoid the arbitration agreement by referring the matter to a member state's court.<sup>149</sup> As a result,

---

<sup>144</sup> *ibid* para 44.

<sup>145</sup> *Ibid* para 37

<sup>146</sup> *Ibid*

<sup>147</sup> *Ibid* para 38

<sup>148</sup> *Ibid* para 41

<sup>149</sup> 'Commission Staff Working Paper Impact Assessment Accompanying Document to the Proposal for a Regulation of The European Parliament And of The Council on Jurisdiction and the Recognition

the relationship between the Brussels I regulation and arbitration found its way in the Commission proposal to the Regulation Recast.<sup>150</sup>

The Commission proposed three options. The first option is preserving the *status quo*. Keeping the latter would negatively affect the economy of businesses and arbitration centres in the EU, the freedom to do business and the possible discouragement of non-EU companies to arbitrate in the EU.<sup>151</sup>

The second option was the exclusion of arbitration proceeding and any court proceeding related to arbitration such as the validity of the arbitration agreement. In addition, such judgment would not be subject to the recognition and enforcement under the new regime. However, while it might minimise the problems brought by *West Tankers's* decision, the Commission recognised some problems might still exist. One example is that parallel proceeding would continue to exist under this option, negatively affecting the meaning of justice in the EU.<sup>152</sup>

The third option, which the Commission preferred, was the inclusion of a *lis pendens* rule, which obliges any EU member state's court other than the court of the seat of arbitration to stay its proceeding for the court of the seat of arbitration or arbitral tribunal, to decide on the validity of the arbitration agreement. According to the Commission, this would stop parallel receding between the member state's court and arbitral tribunal. In addition, it would preserve the litigant his right to judicial protection before the court of the seat of arbitration.<sup>153</sup>

Recital 12 of the recast partially adopts the Commission option. It states the following:

This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether

---

and Enforcement of Judgments in Civil and Commercial Matters (Recast)' {COM(2010) 748 final}, 2.4.1.1.

<sup>150</sup> Commission, 'Proposal for a Regulation Amending Regulation 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters' vol 2010 (2013) <[http://ec.europa.eu/justice/civil/files/com\\_2013\\_554\\_en.pdf](http://ec.europa.eu/justice/civil/files/com_2013_554_en.pdf)>.

<sup>151</sup> Commission Staff Working Paper Impact Assessment (n 72), 2.4.5.1.

<sup>152</sup> Ibid, 2.4.5.2

<sup>153</sup> Ibid, 2.4.5.3

the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law.

A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question.

On the other hand, where a court of a Member State, exercising jurisdiction under this Regulation or under national law, has determined that an arbitration agreement is null and void, inoperative or incapable of being performed, this should not preclude that court's judgment on the substance of the matter from being recognised or, as the case may be, enforced in accordance with this Regulation. This should be without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 ('the 1958 New York Convention'), which takes precedence over this Regulation.

This Regulation should not apply to any action or ancillary proceedings relating to, in particular, the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure or any other aspects of such a procedure, nor to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award.

Recital 12 attempts to provide a balance between the effectiveness of arbitration and the court's power to determine the validity of the arbitration agreement. In one hand, the member state's court can rule on the validity of the arbitration agreement. On the other hand, and unlike the result of *West Tankers*, the decision on this issue will not be subject to the rules of recognition and enforcement of judgment as provided for by the Brussels I recast. Instead, each member state's national law will govern the recognition and enforcement of such judgment. This correspond to the second option

proposed by the Commission in its impact assessment.<sup>154</sup> In addition, the recast clearly states that the New York Convention would take precedence over the Recast when it concerns the recognition and enforcement of arbitral awards.

Some argue that the new recital demolishes the effect of *West tankers*<sup>155</sup> and some goes even further to exclude the arbitration as a whole from the scope of the regulation and thereby lifting the prohibition of anti-suit injunction when it was issued in support of an arbitration agreement.<sup>156</sup> In their view, *West tankers* excluded the applicability of anti-suit injunction only when the question on the validity of the arbitration agreement is incidental. In other words, if the main subject matter of the dispute before the member state's court is to examine the validity of the arbitration agreement, it would be regarded as a matter excluded from the scope of the Regulation and thereby, an anti-suit injunction can be applicable.<sup>157</sup>

In addition, the language of the recital in its fourth paragraph where it excludes the applicability of an ancillary proceeding to arbitration from the scope of the recast could be understood as including anti-suit injunction.<sup>158</sup> Moreover, the fact that the Brussels I Recast provides a mechanism, which enforces and upholds the parties' exclusive choice of court agreement might point toward the direction that an anti-suit injunction can be granted to ensure the effectiveness of the parties' agreement to arbitration.<sup>159</sup> Others also support this view by relying on paragraph 2 of article 73 of the recast where it states, "This Regulation shall not affect the application of the 1958 New York Convention. According to this view, this should be understood as ensuring that arbitration agreements are enforced and ensured. Therefore, the English court should not be prevented from issuing such as injunction."<sup>160</sup>

However, in a recent English case, the court rejected the argument mentioned above and held that the prohibition of granting an anti-suit injunction in support of an

---

<sup>154</sup> 'Commission Staff Working Paper Impact Assessment (n 72), 2.4.3.

<sup>155</sup> Fentiman (n 29), 16.142.

<sup>156</sup> 'Gazprom' OAO v Lietuvos Respublika, Opinion of AG Wathelet' (2014), 141.

<sup>157</sup> Fentiman (n 29), 16.145. At 16.145

<sup>158</sup> 'Opinion of AG Wathelet' (n 79).

<sup>159</sup> Fentiman (n 29), 16.146.

<sup>160</sup> Julio-César Betancourt, 'Does the (Recast) Brussels Regulation Allow for Court-Ordered Anti-Suit Injunctions within the EU?' (*Kluwer Arbitration Blog*, [arbitrationblog.kluwerarbitration.com/2018/08/16/booked-brussels-regulation-recast-allow-court-ordered-anti-suit-injunctions-within-eu/](http://arbitrationblog.kluwerarbitration.com/2018/08/16/booked-brussels-regulation-recast-allow-court-ordered-anti-suit-injunctions-within-eu/), 2018).

arbitration agreement will be extended under the recast. Affirming the *West Tankers*'s decision, the court held that anti-suit injunction would disturb the effectiveness of the recast since it would interfere with the court's power to determine its own jurisdiction.<sup>161</sup> Furthermore, the court also relied on the CJEU's decision in *Gazprom* where the court affirmed its vision with regard to anti-suit injunction and its conflict with the principle of mutual trust and the party's right to access to a court.<sup>162</sup> Moreover, the English court further held that the fact that the decision of a member state's court on the validity of the arbitration agreement would not be subject to the recognition and enforcement rules under the recast does not mean that such decision is outside the scope of the Regulation and thereby an anti-suit injunction might be issued.<sup>163</sup> In addition, the court rejected the proposition that there should be a difference in treatment between when the validity of the arbitration agreement was raised as a preliminary issue or incidental issue, since, anti-suit injunction would affect the Recast's effectiveness.<sup>164</sup>

It is more likely that the CJEU would follow the English law reasoning in the future with the support of other reasons. Understanding an anti-suit injunction as ancillary proceeding that supports arbitration and thereby excluding it from the scope of the Regulation conflicts with the first paragraph of recital 12, which clearly states that nothing in the Regulation would prevent a member state's court from ruling on the validity of the arbitration agreement. More importantly, the first paragraph of the recital corresponds to the higher protection of the party's right to access to a member state's court set out by the *West Tankers*. Accepting otherwise, would undermine the protection provided by the CJEU to that party as a fundamental right guaranteed under the Charter and as a key requirement for the existence of the principle of mutual trust. In addition, the fact that the judgment on the substance is to be recognised under the Recast might indicate that the court needs to determine its own jurisdiction without any interference from any other courts, meaning that *West Tankers* reasoning might still be alive.

---

<sup>161</sup> *Nori Holding Ltd & Ors v Public Joint-Stock Company 'Bank Otkritie Financial Corporation'* (2018) EWHC 1343, para 80.

<sup>162</sup> *ibid* para 82.

<sup>163</sup> *Ibid* para 94

<sup>164</sup> *Ibid* para 95

Moreover, while the Brussels I recast clearly states that it shall not affect the New York Convention, the New York Convention itself in its article 2 preserves the contracting state court's power to examine the validity of the arbitration agreement. What the decision of *West Tankers* had in effect was providing a uniform interpretation applicable between the EU member states on the scope of the Brussels I Regulation that is consistent with the New York Convention, which would continue to apply under the Brussels I recast.

Nevertheless, recital 12 preserves the party who has an interest in enforcing his contractual agreement. This is true by stating that recognition and enforcement of the court's decision on the validity of the arbitration agreement would be subject to each member state's national law and importantly, that the New York Convention would take precedence. This means that an arbitral awards would have precedence over the member state's judgment on merit. In this context, recital 12 demolish the implication of *West Tankers*.

### **7.3.2.3 The application of Anti suit injunction and an exclusive choice of court agreement**

As for the exclusive choice of court, it should be remembered that the Brussels I recast empowers the chosen court second seised to proceed and determine its exclusive jurisdiction under the agreement irrespective whether the non-chosen court first seised stays its proceeding.<sup>165</sup> In addition, under the new recast, as a matter of mutual trust, the first seised court should stay its proceeding in favour of the chosen court second seised.<sup>166</sup> If the non-chosen court first seised nevertheless, decides to determine whether there is an agreement, that non-chosen court is in fact undermining the new reflection of the principle of mutual trust provided by the Recast, which explicitly gives the chosen court such power. In this scenario, issuing an anti-suit injunction would protect and enforce the parties' agreement and indirectly enforce the new reflection of the principle of mutual as provided by the Recast. it would ensure the effectiveness of the Brussels I recast, particularly rules governing the exclusive choice of court agreement. In addition, it would ensure recognition and enforcement of the chosen

---

<sup>165</sup> The Brussels I recast recital 22

<sup>166</sup> See the analysis in Chapter 5

court's judgment since there is no ground to refuse to recognise and enforce the judgment given by the non-chosen court.

## 7.4 Conclusion

The principle of mutual trust has negative implications on private international law rules, which are well known in the common law systems, mainly *forum non-conveniens* and anti-suit injunction. *Forum non-conveniens* allows the court to not exercise its own jurisdiction and stay its proceeding when there is another foreign court more appropriate to hear the dispute for the end of justice. Contrary to the CJEU's position, the chapter concluded that a decision to stay the proceeding on the basis that another court is clearly more appropriate to hear the case is an indication itself that the forum based its trust on the other foreign to hear the case to fulfil the end of justice. Although the court does not reach that decision to fulfil the mutual trust, the end result does reflect trust on the other court to fulfil justice to the party. While one might suggest that a decision to refuse to grant a stay might indicate the inappropriateness of the court to hear the case particularly when the plaintiff prove that justice will not obtained in the other court, and thereby violate the principle of mutual trust, this should not be understood as a contradiction or a collision to the meaning of the principle of mutual trust. Rather, one should consider securing people's right as a limitation to the application of this principle particularly when reliable and cogent evident point toward a serious violation of people's fundamental rights and particularly their right to a fair trial and their right to an effective remedy. Discretion should not be understood as violating the objective of the recast of legal certainty. This is true by looking at the transfer proceeding mechanism given by the Brussels Ila Regulation. Discretion with the direct communication between the member states' courts can provide more protection to the parties and enhance the principle trust between the EU Member states.

On the other hand, anti-suit injunction allows the court to grant an injunction to restrain proceeding initiated in a foreign court when the end of justice requires so. Issuing such injunction is faced with strong objection from the EU being a clear obstacle to the Member State's enjoyment of reviewing its jurisdiction without any intervention. The

House of Lords tried to clarify that anti suit injunction does not affect the foreign court's jurisdiction. However, the reality shows that such mechanism does intervene with the court's power to exercise its jurisdiction over the claimant. As seen above, other solutions could be used to prevent abuse of process by the claimant such as modified lis pendens rules. In addition, anti-suit injunction could be used in a limited scope particularly in the enforcement of the choice of court agreement and the judgment resulting from such choice.

## **Chapter 8 The Fate of rules of jurisdiction and recognition and enforcement of judgments in civil and commercial matters between the UK and the EU Post Brexit: Walking through a Foggy Path?**

### **8.1 Introduction**

After nearly a half century of membership, the United Kingdom left the European Union. This decision means that the EU law such as Regulations and measures cease to apply in the UK. Such fact produces a situation of uncertainty and unpredictability and raises significant questions about the future relationship between the EU and the UK in the area governed by the Brussels I Regulation rules.

The chapter seeks to identify the main challenges created by Brexit on the stages of jurisdiction and recognition and enforcement of judgments in civil and commercial matters between the UK and the EU. In addition, it seeks to propose some possible solutions that could regulate the future relationship between the EU and the UK in the area governed by the Brussels I Regulation. The chapter is divided into two sections. Section 1 examines the referendum result and the withdrawal agreement between the UK and the EU. Section 2 explores the post-Brexit relationship between the UK and the EU in jurisdiction and the recognition and enforcement of judgments, examining options that might serve as solutions.

### **8.2 Saying Goodbye and the withdrawal agreement**

On 23 June 2016, the UK decided to leave the European Union in a referendum. It means that all EU laws should cease to apply once the UK exit the European Union such as the Brussels I Recast. On 29 March 2017, the UK government triggered Article 50 of Treaty on the European Union and informed the European Council of its intention to leave the EU. Article 50 entitles any member states to leave the EU and states that The Council 'shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union.'<sup>1</sup> It further states that

---

<sup>1</sup> Ibid, article 50

The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.<sup>2</sup>

The withdrawal agreement between UK and EU was adopted.<sup>3</sup> It entered into force in 1<sup>st</sup> February 2020. The rationale behind the agreement was to ensure the UK's orderly withdrawal from the EU and the Euratom and to start negotiation on their future relationship.<sup>4</sup> One important provision agreed was the transition period. The transition period started from 1<sup>st</sup> February 2020 until 31 December 2020.<sup>5</sup> During this period, in general, EU laws continued to apply between UK and EU.<sup>6</sup> Its purpose was to provide legal certainty to people and businesses during such period until the date of its expiration which was 31 December 2020.

Importantly, the withdrawal agreement governed the position of rules regarding judicial cooperation in civil and commercial matters such as the Brussels I Regulation. According to the agreement, the Brussels I regulation continued to apply between the UK and EU when the proceeding instituted before the end of the transition period.<sup>7</sup> In addition, the Brussels I Regulation would continue to apply to related proceeding even if the latter instituted after the transition period so long as the first set of proceeding was commenced before the end of the transition period.<sup>8</sup> This would mean that *lis pendens* rules would continue to govern the situation. Moreover, the Regulation continued to apply to the recognition and enforcement of judgment given in proceeding which was commenced before the end of transition period.<sup>9</sup>

On 31 December 2020, the transition period was expired and a new era has started. Although the UK and the EU have held on many occasions that they want to be “as

---

<sup>2</sup>Ibid

<sup>3</sup> Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ L 29, 31.1.2020

<sup>4</sup> Preamble

<sup>5</sup> Article 126

<sup>6</sup> Some matters were excluded see article 127/ 1

<sup>7</sup> Ibid article 67/1/a

<sup>8</sup> Ibid article 67/1

<sup>9</sup> Ibid article 67/2/a

close as possible”<sup>10</sup> with a “deep and special partnership”<sup>11</sup> after the UK’s exit particularly in the area of judicial cooperation in civil and commercial matters,<sup>12</sup> the ‘no deal scenario’<sup>13</sup> became a reality.

### **8.3 The Future Relationship**

The “unlikely event”<sup>14</sup> occurred and the transition period ended without an agreement that regulates the EU and the UK future relationship regarding rules of jurisdiction and recognition and enforcement of judgments. This section explores the current situation and options that might be available to adopt, and whether they might serve as appropriate solutions. This section is divided into 3 parts. The first is the application of the English conflict of law rules. The second is the Hague Convention on Choice of Court agreement. The third option is the Lugano Convention. the fourth option concerns with an alternative solution to the Lugano Convention.

#### **8.3.1 No agreement reached: the applicability of the English conflict of laws rules**

Currently, with the absence of an agreement, the English court applies its conflict of law rules<sup>15</sup> as endorsed in the common law and by statutes.<sup>16</sup> The English court for instance, will have jurisdiction if the writ was served on the defendant in England.<sup>17</sup> In addition, it can have jurisdiction and permit service on a defendant outside the jurisdiction<sup>18</sup> if one of the grounds laid down by the Practice Direction 6b exist,<sup>19</sup> and

---

<sup>10</sup> See European Council (article 50) guidelines on the framework for the future EU-UK relationship 23, March 2018, pp 3

<sup>11</sup> Government Framework for the UK-EU partnership civil judicial cooperation, June 2018, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/715834/Framework\\_for\\_the\\_UK-EU\\_partnership\\_Civil\\_judicial\\_cooperation.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/715834/Framework_for_the_UK-EU_partnership_Civil_judicial_cooperation.pdf)

<sup>12</sup> See *ibid*, see also, White paper on The future relationship between the United Kingdom and the European Union July 2018 ,1.7.7. See also, European Council (article 50) guidelines on the framework for the future EU-UK relationship 23, March 2018, where it states, “The future partnership should include ambitious provisions on movement of natural persons, based on full reciprocity and non-discrimination among Member States, and related areas such as coordination of social security and recognition of professional qualifications. In this context, options for judicial cooperation in matrimonial, parental responsibility and other related matters could be explored, taking into account that the UK will be a third country outside Schengen and that such cooperation would require strong safeguards to ensure full respect of fundamental rights”

<sup>13</sup> <https://www.parliament.uk/globalassets/documents/lords-committees/eu-justice-subcommittee/justiceforfamilies/attachment-2--cjc--insolvency---published.pdf>

<sup>14</sup> *Ibid*

<sup>15</sup> Conflict of laws rules is the English terminology of private international law.

<sup>16</sup> *Ibid*

<sup>17</sup> *Colt Industries Inc v Sarlie* [1966] 1 WLR 440.

<sup>18</sup> The Civil procedures Rule, 1998, Rule 6.36

<sup>19</sup> Practice Direction 6B ,3.1

that the English court is the *forum conveniens*.<sup>20</sup> A claim may be permitted for service for instance, if “(a) damage was sustained, or will be sustained, within the jurisdiction; or (b) damage which has been or will be sustained results from an act committed, or likely to be committed, within the jurisdiction”.<sup>21</sup>

In addition, the recognition and enforcement of European Union Member States judgments would be subject to the English conflict of law rules in the common law and the statutes. Under the common law, for instance, the English court is required to examine whether the foreign court had jurisdiction over the defendant to enforce a foreign court’s judgment.<sup>22</sup> This is contrary to the general position taken under the Brussels I Recast where the member states’ courts of enforcement are prohibited from any review to the jurisdiction of the court of origin owing to the principle of mutual trust between the member states courts.<sup>23</sup>

On the other hand, applying the UK conflict of laws also means that mechanisms rejected by the European Union and the CJEU would be available, such as the anti-suit injunctions and the *forum non conveniens* in the future relationship between the EU and the UK. As seen in a previous chapter, the application of anti-suit injunction

---

<sup>20</sup> According to Civil Procedure Rules 6.37 paragraph (3) “The court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim”. In other words, the plaintiff is required to convince the English court that it is clearly the appropriate forum to hear the action. See *Spiliada Maritime Corporation V Cansulex Limited* (1987) [1987] 1 A ,p 481 D

<sup>21</sup> See Practice Direction 6B ,3.1 Claims in tort

<sup>22</sup>Hartley, *International Commercial Litigation Text,Cases and Materials on Private International Law* (n 571) 346.

<sup>23</sup> Jenard Report states: “The absence of any review of the substance of the case implies complete confidence in the court of the State in which judgment was given; it is similarly to be assumed, that that court correctly applied the rules of jurisdiction of the Convention. see also, Opinion 1/03 [2006] ECR I-1145, the CJEU held that “the simplified mechanism of recognition and enforcement set out in Article 33(1) of that regulation, to the effect that a judgment given in a Member State is to be recognised in the other Member States without any special procedure being required and which leads in principle, pursuant to Article 35(3) of that regulation, to the lack of review of the jurisdiction of courts of the Member State of origin, rests on mutual trust between the Member States and, in particular, by that placed in the court of the State of origin by the court of the State in which enforcement is required....”. Jenard report , 46.

On the other hand, the Brussels I Recast made an exception to the court’s prohibition to review the court of origin’s jurisdiction. According to article 45, the court of enforcement can review the judgment given by the court of origin, when it assesses whether to refuse to recognise such judgment as being contrary to the exclusive jurisdiction laid down by article 24 , or to “Sections 3, 4 or 5 of Chapter II where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee was the defendant”.

mechanism was precluded between the European Union member states as it is against the principle of mutual trust even if the claimant was in bad faith.<sup>24</sup>

However, the drawback of this situation is that each EU Member States decide, according to its domestic law, whether it has jurisdiction on a UK national domiciled in its territory, meaning that the claimant might not foresee in the same manner as with the Brussels I Recast. Moreover, the recognition and enforcement of judgments given by the UK courts would be subject to 27 different laws of the European Union member states, meaning that the assurance given by the Brussels I Recast for mutual recognition and enforcement of judgment with limited grounds would be affected.

### **8.3.2 Hague Convention on Choice of Court Agreement**

The Hague Convention on Choice of Court Agreement is an international Convention adopted on 30 June 2005 under The Hague Conference of Private International Law.<sup>25</sup> It governs rules that regulates the exclusive choice of court agreement and the recognition and enforcement of judgment as a result of that choice.<sup>26</sup> For instance, it defines the meaning of the exclusive choice of court agreement, its scope of application, and the situations in which the judgment will be recognised or be refused. The rationale behind it is to strengthen judicial cooperation between the Contracting States, to assure legal certainty and the effectiveness of parties' exclusive choice of court agreement and the enforcement of judgment on such a choice.<sup>27</sup>

On 1 October 2015, The Convention entered into force in respect to all EU member states, including Denmark by a later accession.<sup>28</sup> The conclusion of the agreement by the EU was possible by article 31 which enables a Regional Economic Integration Organisations, such as the European Union having the power in accordance to its founding treaties, to ratify, accept or approve the Convention, which will be applicable

---

<sup>24</sup> C-159/02, *Gregory Paul Turner v Felix Fareed Ismail Grovit*,

<sup>25</sup> The Hague Convention on Choice of Court Agreements 2005.

<sup>26</sup> *ibid*

<sup>27</sup> *Ibid.* see the preamble.

<sup>28</sup> Council Decision of 4 December 2014 on the approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements, OJ L 35. As for Denmark, it acceded to the Convention on 30 May 2018 and entered into force on 1 September 2018. See Hague Conference on Private International Law, 'Denmark Accedes to the Choice of Court Convention' (2018) <<https://www.hcch.net/en/news-archive/details/?varevent=611>> accessed 21 October 2021.

in all member states without the latter being a party to the Convention.<sup>29</sup> In this context, the Hague Convention on choice of court agreement concluded by the EU means that it has the status of a Union law, and thereby it is under the CJEU's power to interpret its rules when is asked by a member state's court.<sup>30</sup>

After Brexit, the Convention ceases to apply in the UK, since it applies to it due to its membership in the EU and the latter's power in the conclusion of the Convention.<sup>31</sup> However, according to article of the convention, a state can sign and ratify, accept, approve or accede to the Convention.<sup>32</sup> The article further states that "Instruments of ratification, acceptance, approval or accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention."<sup>33</sup> Indeed, on 28 September 2020, the UK deposited its instrument to accede the Convention. Accordingly, the Convention started to apply in the UK on 1 January 2021, the day the transition period ended.<sup>34</sup>

That being said, The Hague Convention on choice of court agreement applies between the UK and the EU member states. It provides more certainty and predictability to the parties. However, one should bear in mind that the UK, though its departure from the EU, might still take into account the CJEU's interpretation. According to article 23 'In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application.' In this respect, the court of a Contracting State should take foreign decisions into account when interpreting the rules of the Convention.<sup>35</sup> The fact that the CJEU has the power to provide a uniform interpretation binding on all EU member states might have an affect on other contracting states, including the UK, when interpreting the Convention's rules.<sup>36</sup>

---

<sup>29</sup> The Hague Convention on Choice of Court Agreements, article 30.

<sup>30</sup> Trevor C. Hartley, **Choice-of-court agreements under the European and International Instruments : the Revised Brussels I Regulation, the Lugano Convention, and the Hague Convention**, (Oxford private international law series, 2013) at 1.59

<sup>31</sup> The Hague Convention on choice of court agreement at 2.24

<sup>32</sup> Ibid. article 27

<sup>33</sup> ibid, article 27/ 4.

<sup>34</sup> Hague Conference on Private International Law, 'United Kingdom Joins 2005 Choice of Court and 2007 Child Support Conventions' (2020) <<https://www.hcch.net/en/news-archive/details/?varevent=751>> accessed 21 October 2021.

<sup>35</sup> Trevor Hartley & Masato Dogauchi, 'Explanatory Report on the 2005 Hague Choice of Court Agreements Convention' (2013)

<sup>36</sup> Matthias Weller (2017) Choice of court agreements under Brussels Ia and under the Hague convention: coherences and clashes, *Journal of Private International Law*, pp 93 [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2827711](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2827711) cited (, SD Murphy, "The Relevance of

### 8.3.3 The Lugano Convention?

As seen in a previous chapter, The Lugano Convention is a multilateral Convention concluded between the European Union, Denmark and most of the European Free Trade Association members; Iceland, Norway, and Switzerland (Hereinafter EFTA Members). The first version was based on the Brussels Convention, which was later modified after the Brussels Convention being replaced by 2001 the Brussels I Regulation.

A Significant question arises whether the UK can accede to the Lugano Convention. The Lugano Convention provides number of provisions, which regulates the accession process to the Convention. One important provision is that the country wishing to be part to the Convention, should gain consent from all the Contracting States in the Lugano Convention.<sup>37</sup> Otherwise, the country cannot become a party to the Lugano Convention.

In April 2020, the UK submitted its application to accede to the Lugano Convention. Interestingly, the application was faced with rejection from the EU Commission.<sup>38</sup> The Commission justifies its position on the idea that the Lugano Convention is complementary Convention to the economic relationship between the EU Member States and the EFTA Member States.<sup>39</sup> The series of economic agreements between the EU and EFTA Member States made the latter as a part of the EU internal market, leading the need to extend the application of the Brussels Regulation in the shape of a Convention.<sup>40</sup> The Commission also points out that while the Lugano Convention provides that 'Third States' are one of the States eligible to apply for an accession to the Lugano convention, this should not be understood as any third states in the world but only EFTA/EEA Contracting States.<sup>41</sup> Furthermore, in the Commission wording, 'The Convention is based on a high level of mutual trust among the Contracting Parties and represents an essential feature of a common area of justice commensurate to the

---

Subsequent Agreements and Subsequent Practice for the Interpretation of Treaties", in G Nolte (ed), *Treaties and Subsequent Practice* (Oxford University Press, 2013), 82.

<sup>37</sup> The 2007 Lugano Convention article 72/3

<sup>38</sup> The European Commission, 'Assessment on the Application of the United Kingdom of Great Britain and Northern Ireland to Accede to the 2007 Lugano Convention' (2020) <[https://ec.europa.eu/info/sites/default/files/1\\_en\\_act\\_en.pdf](https://ec.europa.eu/info/sites/default/files/1_en_act_en.pdf)>.

<sup>39</sup> Ibid pp8

<sup>40</sup> Ibid

<sup>41</sup> Ibid

high degree of economic interconnection based on the applicability of the four freedoms.<sup>42</sup>

one can say that the Commission's position is not accurate and needs to be further investigated. Looking at the objective and the scheme of the Lugano Convention, It is argued that, in fact, not only is the Lugano Convention opened for any third state to accede but also it confirms indirectly, the real requirements for the principle of mutual trust in general and in the Lugano Convention in particular.

Going back into history, the existence of both European Community and the EFTA marked one of the largest trade market in the world.<sup>43</sup> This meant that the number of judgments between those countries would rise, raising the need for the adoption of a Convention similar to the Brussels Convention. The Convention was adopted and then replaced by its recast in 2007. However, in both versions of the Convention preamble, strengthening and enhancing people's legal protection and access to justice was explicitly stated and highlighted as the main reason why the convention came into existence.<sup>44</sup> Importantly, the scope of parties that can be part of the Convention is not only confined to partners of trade. In particular, article 70/1/c the 2007 Lugano Convention explicitly states "any other State, under the conditions laid down in Article 72" can apply for accession. If it is meant to be a Convention limited to the member States of the EU and EFTA, it would not have included this subparagraph.

Significantly, Looking through the mentioned article 72, the State that wishes to accede to the Convention should, along with other process,<sup>45</sup>submit information about its judicial system and the independence of its judges, its national civil procedure law

---

<sup>42</sup> Ibid 3.

<sup>43</sup>Jenard Report, p 63

<[http://aei.pitt.edu/1464/1/Commercial\\_reports\\_Jenard\\_OJ\\_C\\_189\\_90.pdf](http://aei.pitt.edu/1464/1/Commercial_reports_Jenard_OJ_C_189_90.pdf)>.

<sup>44</sup> The Lugano Convention 1988 preamble read as follows "THE HIGH CONTRACTING PARTIES TO THIS CONVENTION, ANXIOUS to strengthen in their territories the legal protection of persons therein established,..." The Lugano Convention 2007 preamble read as follows "THE HIGH CONTRACTING PARTIES TO THIS CONVENTION, DETERMINED to strengthen in their territories the legal protection of persons therein established,..."

<sup>45</sup> Article 72/ 1 states "Any State referred to in Article 70(1)(c) wishing to become a Contracting Party to this Convention:

- (a) shall communicate the information required for the application of this Convention;
- (b) may submit declarations in accordance with Articles I and III of Protocol 1;and".

and finally its private international law rules in civil matter.<sup>46</sup> That being said, requiring these information in fact, confirms that the principle of mutual trust existence does not depend on the existence of a an economic cooperation between the Contracting States of the Lugano Convention, but to make sure that those countries, are importantly, respecting the right to access to justice. Here, one could go far to suggest that the open language of the Lugano convention could be a possible substitute to the Hague convention to those preferring the Brussels Regulation project. At the time of writing this thesis, the matter is in the hands of the Council to decide whether to consent to the UK's application to join the Lugano Convention.

The other question is then whether the UK's application to accede to the Lugano convention is a good option. As a former Member State of the EU and particularly to the Brussels I Regime, the Lugano Convention might be both a good and bad option for the UK. One evident advantage is the UK's familiarity with the Lugano Convention, being based on the Brussels regime. The familiarity includes not only the application of the Lugano Convention but also, the CJEU's jurisprudence. Another advantage is the high degree of mutual recognition of judgments done with mere formal checks.

At the same time however, the UK would also inherit the obstacles and drawbacks in the Lugano Convention as the latter is based on the old Brussels I Regulation. One example is the Italian torpedo. The fact that the UK adopted the Hague choice of court agreement does not prevent a collision with *lis pendens* rules from happening. This was explained by Hartley & Dogauchi Report on the Hague choice of court agreement<sup>47</sup>, that the problem in *Gasser* is still alive under the Lugano Convention. This means that the court designated under the choice of court agreement which was seised second, is under an obligation to stay its proceeding in favour of the non-chosen court which was first seised court, a situation was rejected by the UK.<sup>48</sup> In addition, the old version does not cover the issue where sets of proceedings exist in a member states court and non-EU member state court. Such omission could hinder the parties' right particualry if the adminstration of justice might be better fulfilled in the non EU state's court.

---

<sup>46</sup>Ibid article 72/1 c

<sup>47</sup> Trevor Hartley & Masato Dogauchi (n 44).

<sup>48</sup> C-116/02, *Erich Gasser GmbH v MISAT Srl* [29-33].

Looking at the foregoing, The Commission seems to give implied message and warning to other EU member states that wish to follow UK's steps and exit the EU. A message which indicates that a member state that wishes to leave the UK would not have the same benefits given to States that are part of the EU polity. This is true by looking at its rejection to UK's accession to the Lugano Convention eventhough the latter convention itself allow for accession to other third state.This is also true by stating that a future relationship between the EU and the UK , 'a third state' could be covered by the Hague judgment Convnetion without declraing the possibility of a bilateral agreement that is based on the Brussels I regulation or the Lugano Convention.<sup>49</sup>

### **8.3.4 The Hague judgment Convention**

Another possible option for the UK is the Hague Convention on the recognition and enforcement of foreign judgments in civil or commercial matters<sup>50</sup> (hereinafter,The Hague Judgment Convnetion). In 2019, the Hague Judgment Convention finally came into existence by the Hague conference on Private Interational Law. The desire to further enhance litigants' access to justice by the enhancement of the free circulation of judgment across the world, and the assurance of providing more legal certainty and predictability led to the formulation of a convention, that governs uniform rules of recongition and enforcment of judgment in civil and commercial matters.<sup>51</sup>

Unlike the Brussels regime and the Lugano Convention, The Hague judgment Convention adopts the indirect jurisdictional rules.<sup>52</sup> it means that in order for a judgment to be recognised or enforced, it should first satsify one of the jurisdictional rules listed by the Convention.<sup>53</sup>While the court of origin jurisdictional basis is not reviewed, the court where the recongition or the enfrocment is sought, should investigate whether the judgment could be recongised and enforced under the convention conditions. In this sense, the Convention departs from the Brussels I Recast by not allowing a mutual recongition of the judgment without the need for the

---

<sup>49</sup> The European Commission (n 38) p 3.

<sup>50</sup> Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. available at [806e290e-bbd8-413d-b15e-8e3e1bf1496d.pdf](https://www.hcch.net/doc/806e290e-bbd8-413d-b15e-8e3e1bf1496d.pdf) (hcch.net).

<sup>51</sup> Ibid preamble

<sup>52</sup> Ibid article 5.

<sup>53</sup> Ibid .

declaration of enforceability. It is also different from the Lugano Convention which allows recognition and enforcement of the judgment after mere formal checks.

The Hague judgment provides for grounds to refuse recognition and enforcement of the judgment such as the natural justice, public policy and fraud.<sup>54</sup> In addition, the Convention provides for a new ground where the court of enforcement may refuse or postpone such recognition or enforcement. According to article 7/2,

Recognition or enforcement may be postponed or refused if proceedings between the same parties on the same subject matter are pending before a court of the requested State, where – (a) the court of the requested State was seised before the court of origin; and (b) there is a close connection between the dispute and the requested State.

The purpose of the first condition is to respect the *lis pendens* rules in allowing the court of enforcement which is first seised to proceed and where the court of origin should have given the priority to the first seised court to proceed.<sup>55</sup> In addition, the purpose of the second condition is to prevent any tactical moves by the defendant in bringing proceedings in a court based on an extrajurisdiction. At the same time however, the new paragraph could lead to the possible revival of the Italian torpedo. This could happen when the court of enforcement is the Italian court or a court which takes long time to deliver its judgment.

Although the EU Commission refused the UK's accession to the Lugano option, it shows its intention that a future relationship could be covered by the Hague judgment Convention.<sup>56</sup> Adopting the Convention would decrease uncertainty and unpredictability caused by the UK exit from the EU.

### **8.3.5 Another Solution?**

Prior to its application to accede to the Lugano convention, on 12 July 2018, the UK Government adopted the UK White Paper on The Future Relationship between The

---

<sup>54</sup> Ibid article 7.

<sup>55</sup> Francisco Garcimartín and Geneviève Saumier, 'Explanatory Report on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters' (2020) 124 <<https://assets.hcch.net/docs/a1b0b0fc-95b1-4544-935b-b842534a120f.pdf>>.

<sup>56</sup> The European Commission (n 3) p 3.

United Kingdom and the European Union post Brexit.<sup>57</sup> The UK White paper is a proposal made by the UK Government, which reflects its unilateral idea on the future relationship between the UK and the EU. In the context of rules of jurisdiction and recognition and enforcement of judgment, at that time, although the UK government took into consideration joining the Lugano Convention, it recognised its limited scope in comparison with the Brussels I Regulation Recast.<sup>58</sup> As a result, The UK government sought to adopt a bilateral agreement, which “build on the principles established in the Lugano Convention and subsequent developments at EU level in civil judicial cooperation between the UK and Member States”.<sup>59</sup>The UK proposition might be understood as a bilateral agreement between the EU and the UK based on the Brussels I Recast. this would provide predictability and legal certainty to the parties in the legal proceeding. However, the current situation does not show any positive attempt to conclude a bilateral agreement, particularly after the Commission declaration that a relationship with the UK, a third state, should be governed by the Hague Conventions.

---

<sup>57</sup> White Paper on the Future Relationship between the United Kingdom and the European Union. <https://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union/the-future-relationship-between-the-united-kingdom-and-the-european-union-html-version>

<sup>58</sup> Ibid, pp 147

<sup>59</sup> Ibid

## 8.4 Conclusion

One of the European Union's important objective is to establish an area without internal frontiers where people can move easily around the EU member states to achieve different goals and aims. One way to develop such an area and to secure people's access to justice was the adoption of the Brussels I Recast, a uniform instrument that governs predictable and binding rules of jurisdiction and recognition and enforcement of foreign judgment in civil and commercial matters applicable between the EU member states.

The UK left the EU with no deal regarding the judicial cooperation in civil and commercial matters. This means that the English court would apply English conflict of law rules. This would also means that the recognition and enforcement would be subject to different EU member states' legal systems, providing less certainty than that guaranteed by the Recast. On the other hand, the UK's adoption to the Hague choice of court agreement convention will provide more legal certainty since the latter agreement is also adopted by the EU.

At the time of writing this chapter, The Commsision rejected the UK's application to accede to the Lugano Convention. It seems that the Commission wants to deliver an implied message and warning to any EU member states that wish to exit the EU that the leaving State will not have the same benefits given under the EU polity. This could be seen by rejecting the UK's application to accede to the Lugano convention despite the clear language of the convention's provision that allows third state to join the convention. This is also true by declaring its intention that a future relationship between the EU and the UK a 'third state' in this area could be governed by the Hague judgment Convention without mentioning the possibility of adoption a bilateral agreement,

## **9 Toward further enhancement of the principle of mutual trust and judicial cooperation between the EU Member States in civil and commercial matters**

### **9.1 Introduction**

The chapter examines ways and tools that could enhance and foster the principle of mutual trust between the EU member states. Looking at the previous chapters, the proper functioning of the EU and particularly an area without internal borders, strengthening the principle of mutual trust and its requirements must be viewed as a priority. Indeed, the goal of enhancing mutual trust is recognised in different EU documents such as 2020 EU Justice Agenda.<sup>1</sup> It recognised the importance of the principle of mutual trust in building an area of justice that connects different Member states from different cultures and different legal systems. The chapter first focus on the rule of law and tools that is designed to ensure the protection of it. Secondly, it examines methods suggested in the EU justice agenda such as judicial training and how they could contribute to strengthening mutual trust. It is argued that the EU existing tools and the recent adopted tool box can promote mutual trust and enhance rule of law and fundamental rights if it includes further modifications.

### **9.2 Enhancing the rule of law and fundamental rights understanding and its enforcement in the EU**

As seen throughout the thesis, the respect of the rule of law and fundamental rights are key requirements for the principle of mutual trust and judicial cooperation in civil and commercial matters in the EU. Significantly, The *Tempere* conclusions confirmed that people's rights should not be undermined by the inadequate of the legal systems of the Member states.<sup>2</sup> A member state's struggle to uphold the rule of law and fundamental rights in their justice systems would negatively affect both other Member

---

<sup>1</sup> The European Commission , 'The EU Justice Agenda for 2020 - Strengthening Trust, Mobility and Growth within the Union COM (2014) 144 Final' (2014)

<sup>2</sup> Tampere Conclusions, para 1.

States and the entire Union.<sup>3</sup> This fact calls for the need to focus on enhancing the rule of the law and fundamental rights understanding and its enforcement in the EU.

The Hague programme put the development of the EU's ability to protect and guarantee people's rights at the heart of its objectives, suggesting number of initiatives such as the adoption of common minimum standards.<sup>4</sup> The Stockholm programme and its action plan also gave priority for further enhancing and asserting people's access to justice where the EU charter was seen as the "compass for all EU and policies".<sup>5</sup> For that, the action plan suggested the creation of an Annual Report on the EU Charter of fundamental rights in the EU and the negotiation for the accession to ECHR.<sup>6</sup>

In 2014, to take the protection of the rule of law to the next level, the Commission launched the rule of law framework.<sup>7</sup> The Commission recognised the fact that, despite the principle idea that member states are presumed to have justice systems that are in conformity with the rule of law and fundamental rights, some member states struggle with their obligation to ensure that respect.<sup>8</sup> The rule of law framework aims to "resolve future threats to the rule of law".<sup>9</sup> It concerns with violations of the rule of law of a "systemic nature"<sup>10</sup> excluding any individual violation of fundamental rights in a specific case.<sup>11</sup> It is based on entering into a dialogue with the member state concerned to prevent the threat from levelling up to a "real risk of serious breach" of the rule of law, thereby triggering article 7 TEU.<sup>12</sup>

---

<sup>3</sup>The European Commission, 'Strengthening the Rule of Law within the Union A Blueprint for Action(Communication) COM/2019/343 Final' (2019).

<sup>4</sup> The Council, 'The Hague Programme: Strengthening Freedom, Security and Justice in The European Union' (2005/C 53/01), para 1.

<sup>5</sup> The Commission, 'Action Plan Implementing the Stockholm Programme (Communication) 2010/0171 Final' (2010),p 3.

<sup>6</sup> Ibid; for the annual report on the charter , see The Commission, 'Annual Reports on the Application of the Charter' <[https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights/application-charter/annual-reports-application-charter\\_en](https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights/application-charter/annual-reports-application-charter_en)>.

<sup>7</sup> The European Commission, 'A New EU Framework to Strengthen the Rule of Law, (Communication)(2014) 158 Final' (2014) <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52014DC0158>>.

<sup>8</sup> Ibid p 5

<sup>9</sup> Ibid p 3

<sup>10</sup> Ibid p 7

<sup>11</sup> Ibid p 6

<sup>12</sup> The European Commission, 'Proposal for a Council Decision on the Determination of a Risk of a Serious Breach by the Republic of Poland of the Rule of Law COM (2017) 835 Final' (2017) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52017PC0835>>.

The rule of law framework consist of three stages: the Commission assessment, recommendation and follow up to recommendation. The first step is the Commission assessment. Under this step, the Commission starts collecting and examining data taken by reliable sources such as the Fundamental rights agency to see whether a specific member state is threatening the rule of law.<sup>13</sup> If the Commission concludes that threat of the rule of law is identified, it would issue a rule of law opinion and refer it to the member state concerned, commencing a dialogue to reach a solution to the problem.<sup>14</sup>

If the Commission sees that the member states does not provide sufficient steps to solve the problems, the second step is to initiate a rule of law recommendation. The recommendation includes the Commission's concerns over the threat, recommendation to the member state's concerns to solve the issue within a specific time limit and may include measures, which could contribute to resolve the problem.<sup>15</sup> The third step is the follow up to recommendation. In this step, the Commission would observe the response of the member state concerned. Such observance includes whether the problem still exist and whether the member state concerned took steps to resolve it. If the Commission found that the problem still exist, it would trigger article 7 TEU.<sup>16</sup>

Since its adoption, the rule of law framework is triggered in respect with Poland. Over the period of five years, there was a continuous dialogue between the Commission and Poland, leading to issuing one rule of law opinion and four recommendations.<sup>17</sup>

---

<sup>13</sup> the European Commission (n 7), p 7.

<sup>14</sup> Ibid

<sup>15</sup> Ibid p. 8

<sup>16</sup> Ibid

<sup>17</sup>The European Commission, 'Recommendation (EU) 2016/1374 of 27 July 2016 Regarding the Rule of Law in Poland' (2016) <[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L\\_.2016.217.01.0053.01.ENG&toc=OJ%3AL%3A2016%3A217%3ATOC](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2016.217.01.0053.01.ENG&toc=OJ%3AL%3A2016%3A217%3ATOC)>; The European Commission, 'Recommendation (EU) 2017/146 of 21 December 2016 Regarding the Rule of Law in Poland Complementary to Recommendation (EU) 2017/146 , (OJ L 22, 27.1.2017, p. 65)' (2017) <[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L\\_.2017.022.01.0065.01.ENG&toc=OJ%3AL%3A2017%3A022%3ATOC](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2017.022.01.0065.01.ENG&toc=OJ%3AL%3A2017%3A022%3ATOC)>; The European Commission, 'Recommendation (EU) 2017/1520 of 26 July 2017 Regarding the Rule of Law in Poland Complementary to Recommendation (EU) 2016/1374 and (EU) 2017/146 (OJ L 228, 2.9.2017, p. 19)' <[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L\\_.2017.228.01.0019.01.ENG&toc=OJ%3AL%3A2017%3A228%3ATOC](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2017.228.01.0019.01.ENG&toc=OJ%3AL%3A2017%3A228%3ATOC)>; The European Commission, 'Recommendation (EU) 2018/103 of 20 December 2017 Regarding the Rule of Law in Poland Complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520, (OJ L 17, 23.1.2018)' <[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018H0103#ntr1-L\\_2018017EN.01005001-E0001](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018H0103#ntr1-L_2018017EN.01005001-E0001)>.

However, the framework proved that while it played an important role in identifying rule of law issues, it fails to resolve these threats at the time of violations, leading the Commission to activate article 7 TEU.<sup>18</sup> The long process was another identifiable problem, which could in itself raises concerns of the protection of the rule of law.

In 2019, the Commission shows its willingness to further strengthen the rule of law and prevent or minimise the risk of serious infringement of it by adopting a blue print for action.<sup>19</sup> After signalling the significance of the rule of law to the function of the EU and to the development of an area of freedom, security and justice, the Commission sets out three important pillars that would protect the rule of law in the EU; promoting the rule of law, preventing the threat of the rule of law and a response to that threats.

The First pillar is promoting the rule of law in the EU. Having a solid understanding and legal culture of the rule of law is the best protection for the rule of law in the EU.<sup>20</sup> A lack of knowledge was seen as a contributing element to the impairment of the rule of law in the EU.<sup>21</sup> Therefore, raising both public and professional actors' awareness is essential. Train judges and civil servants on the notion of the rule of law and its importance is one example. This could be achieved by further supporting and funding the European networks such the European Training Network for judges and the European Network of Councils for the Judiciary.<sup>22</sup> Moreover, promoting the importance of the rule of law can also be seen, by further engaging with other European bodies such as the Council of Europe and the Venice Commission. In addition, reopening a negotiation to the accession to the ECHR is vital step toward enhancing the EU willingness to protect the rule of law and fundamental rights.

The second pillar is preventing rule of law problems from escalating. The aim of it is to “detect potential rule of law issues early”<sup>23</sup> before it level up to trigger the formal response such as the rule of law framework and article 7 TEU.<sup>24</sup> In order to achieve it, the Commission proposes launching “Rule of Law Review Cycle” where all aspects of

---

<sup>18</sup> The European Commission, ‘Proposal for a Council Decision on the Determination of a Risk of a Serious Breach by the Republic of Poland of the Rule of Law’ (n 12).

<sup>19</sup>The European Commission, ‘Strengthening the Rule of Law within the Union A Blueprint for Action(n 2).

<sup>20</sup> Ibid p 5

<sup>21</sup> Ibid

<sup>22</sup> Ibid 6

<sup>23</sup> Ibid p. 11

<sup>24</sup> Ibid p. 9

the rule of law issues would be examined such as systematic deficiencies.<sup>25</sup> In addition, it would examine whether the EU law is sufficiently applied by the EU Member States and their actors such as courts. Here, a continuous dialogue between the Commission and the Member States is needed. Therefore, the Commission rightly suggests the establishment of national contact points in each member states. They would play an essential role on providing information on the situation of the rule of law in the member state concerned, and the best practices in each member state. This is seen as essential tool for the establishment of the Annual Rule of law Report. The latter is another tool where the Commission intends to monitor and observe each member states' compliance with the rule of law in their national justice systems.<sup>26</sup>

The third pillar is the EU's response to the threats of the rule of law when the Member states fails to resolve the problem. The purpose of the previous pillars are to minimise as much as possible the recourse to the EU formal recourse such as the rule of law framework and article 7 TEU.<sup>27</sup> However, when the Member states fails to address the problem, EU formal procedures intervention is needed. In this respect, the Commission stresses on the need to amend the current procedure for a swift protection of the rule of law. Developing the "institutional steps" needed for article 7 TEU is one example.<sup>28</sup> In addition, the involvement of other institutions in the rule of law framework is another example.<sup>29</sup>

Looking at the foregoing, theoretically, the new proposed actions are promising and point toward further protecting the rule of law by promoting the understanding of the rule of law and engaging in a continuous dialogue with the member states and other actors to detect threats on the rule of law and exchange best practices. However, one needs to clarify the starting and the finishing point of those dialogues. As seen previously, the dialogue initiated under the rule of law framework alone went for 3 years. If the dialogue under the new project is seen as distinguishable from the dialogue initiated under the rule of law framework, the rule of law would be further undermined by the length of time taken to solve these threats. Therefore, one should

---

<sup>25</sup> Ibid

<sup>26</sup> Ibid p. 11

<sup>27</sup> Ibid p13

<sup>28</sup> Ibid

<sup>29</sup> Ibid

use the dialogue as strong evidences for the application of the rule of law framework and set out a time limit for the application of the latter.

### **9.3 Improving the European judicial Network in civil and commercial matters**

Another tool which can enhance access to justice, judicial cooperation in civil commercial matters is The European judicial Network in civil and commercial matters (hereinafter the EJM). In 2001, the EJM was established<sup>30</sup>, which aims to improve, develop and reinforce judicial cooperation between the EU member states in civil and commercial matters and access to justice by providing and exchanging information and data between the member states in that area.<sup>31</sup>

The EJM consists of the following role players; contact points, central bodies and central authorities designated under the EU instruments, any judicial or administrative authorities concerned with judicial cooperation in civil and commercial matters in which the member state find it helpful to be involved in the network and finally national professional associations which represent legal practitioners involved in the application of EU instruments that covers issues of judicial cooperation in civil and commercial matters.<sup>32</sup>

In particular, contact points plays a major role in the network work. One of its main and essential tasks is to provide information concerned with judicial cooperation in civil and commercial matters to its national authorities and other member states.<sup>33</sup> Such information should be given in a quick and speedy way within fifteen days and no longer than thirty days.<sup>34</sup> Moreover, , the contact points of different member states hold meetings to exchange information and best practices and detect problems that could undermine judicial cooperation in civil and commercial matters.<sup>35</sup>

---

<sup>30</sup> 'Council Decision of 28 May 2001 Establishing a European Judicial Network in Civil and Commercial Matters, OJ L 174, 27.6.2001' (2001) (hereinafter Council Decision 2001). It was later modified by another Council decision; 'Decision No 568/2009/EC of the European Parliament and of the Council of 18 June 2009 Amending Council Decision 2001/470/EC Establishing a European Judicial Network in Civil and Commercial Matters' (2009)(herinafter Council Decision 2009).

<sup>31</sup> Council Decision 2001(n 30) Recital 10 ;'The European Judicial Network in Civil and Commercial Matters' <[https://e-justice.europa.eu/431/EN/about\\_the\\_network](https://e-justice.europa.eu/431/EN/about_the_network)>.

<sup>32</sup>Council Decision 2001(n 30)

<sup>33</sup> ibid Article 5/2 a

<sup>34</sup> Council Decision 2009(n30) article 8

<sup>35</sup> Council Decision 2001, article 10

In addition to the role players in the EJM, the EJM website page provides for fact sheets on the member states legal systems and citizens and practitioners guides on judicial cooperation in civil and commercial matters.<sup>36</sup> They aim to provide accessible data and information for both public and professional sector such as judges and lawyers. However, looking through the website, there is no in-depth publication that governs the Brussels I Regulation, which is the dominant regulation on judicial cooperation in civil and commercial matters. The data found provides for an abstract information on the Regulation and some examples, lacking an in-depth analysis of the rules of the Regulation.<sup>37</sup> Here one could suggest providing a specific publication where each article is explained thoroughly with its application by the CJEU. Nevertheless, providing such tool is not the ultimate solution. This should be complemented by judicial training of the relevant instruments as it will be seen further.

To this end, The European judicial Network in civil and commercial matters is an important tool in enhancing and reinforcing judicial cooperation in civil and commercial matters between the EU member states through its role players and its website. Trying to improve and develop the EJM is essential and vital for successful judicial cooperation in civil and commercial. However, one should note that the EJM cannot stand alone and should be supported by judicial training for both promoting the visibility of the network and increasing the knowledge of the legal practitioners on judicial cooperation in civil and commercial matters.

#### **9.4 Judicial training**

Judicial training is a, if not, the most important piece in the enhancement of mutual trust and judicial cooperation in civil and commercial matters. A good judicial training ensures a good and consistent understanding of the EU law, and other member state's laws and thereby reinforce mutual trust, judicial cooperation and an effective access to justice to all litigants.<sup>38</sup> The significance of judicial training in the development of an area of freedom, security and justice was highlighted in numerous EU documents as a priority such as the Stockholm program, its action plan and 2020 justice agenda.<sup>39</sup> It

---

<sup>36</sup>EJM, 'Information on National Law (Information Sheets)' <[https://e-justice.europa.eu/439/EN/information\\_on\\_national\\_law\\_information\\_sheets](https://e-justice.europa.eu/439/EN/information_on_national_law_information_sheets)>

<sup>37</sup>EJM, 'EJM's Publications Documents and Guides for EU Citizens and Practitioners Regarding EJM-Civil Topics' <[https://e-justice.europa.eu/287/EN/ejm\\_s\\_publications](https://e-justice.europa.eu/287/EN/ejm_s_publications)>

<sup>38</sup>The Commission, 'Report on Judicial Training' (2018) [https://www.ejtn.eu/PageFiles/18504/2018\\_Training\\_report\\_v2\\_EU\\_en.pdf](https://www.ejtn.eu/PageFiles/18504/2018_Training_report_v2_EU_en.pdf), p 1

<sup>39</sup> The European Council, 'The Stockholm Programme – An Open and Secure Europe Serving and Protecting the Citizens, 17024/09' (2009); The European Commission, 'Action Plan Implementing the

is a shared responsibility between the EU and the member states to develop strong judicial training activities that have the effect of increasing the degree of knowledge of EU law.<sup>40</sup> The basis of the EU engagement in the judicial training activities stems from article 81 where it clearly states the EU's ability to adopt measures to "support for the training of the judiciary and judicial staff."<sup>41</sup>

In 2011, 51% of judges stated that they have never participated in a training on EU law or on other Member State's law. <sup>42</sup> 24% stated that such non-participation is due to the non-availability of training course on such subject.<sup>43</sup>

Taking into consideration the above, the Commission launched a Strategy on judicial training where judicial training was confirmed as a priority.<sup>44</sup> This is essential since "the national judge has become the front-line judge of Union law."<sup>45</sup> The Commission's main aim is to use judicial training in the development of a legal culture and to ensure effective implementation of the EU law and other member state's laws.<sup>46</sup> In order to achieve that, the Commission sets out number of objectives. For example, it aims to enable half of legal practitioners in the EU to take part in training activities by 2020.<sup>47</sup> In addition, the Commission stresses on the idea that, such training should focus on both providing knowledge on the EU law and other member states' laws to further enhance and reinforce judicial cooperation and mutual trust and particularly the recognition and enforcement of judgments.<sup>48</sup> It also states the need to increase and improve the EU funds, the number of initial and continuous training, exchange programmes, and e learning.<sup>49</sup> The Commission made it clear that the strategy's success depends on cooperation between Member states, training providers and the Commission itself. <sup>50</sup>

---

Stockholm Programme(n 5); The European Commission, 'The EU Justice Agenda for 2020 - Strengthening Trust, Mobility and Growth within the Union' (Communication) (2014) 144 Final.

<sup>40</sup>The Commission, 'Report on Judicial Training'(n 46) p 17

<sup>41</sup> TFEU article 81(2)(h)

<sup>42</sup> The European Commission, 'Building Trust In EU-Wide Justice ;a New Dimension To European Judicial Training' (Communication) 2011/0551 Final, p 4

<sup>43</sup> Ibid

<sup>44</sup> Ibid, p 3

<sup>45</sup> Ibid, [2]

<sup>46</sup> Ibid, p [1-2]

<sup>47</sup> Ibid

<sup>48</sup> Ibid, p 2

<sup>49</sup>Ibid, p [5-7]

<sup>50</sup>Ibid, p 6

One of the important EU training providers is the European judicial training network, (hereinafter the EJTN). The EJTN is “the network of the national judicial training structures’ and the Academy of European law.<sup>51</sup> It ‘develops training standards and curricula, coordinates judicial training exchanges and programmes, disseminates training expertise and promotes cooperation between EU judicial training institutions.’<sup>52</sup>

Following the strategy, extensive projects on judicial training took place. For instance, in 2011, the Parliament published a study on judicial training in the EU.<sup>53</sup> Importantly, the study identified obstacles to judicial training such as the non-availability of courses on EU law and member states laws, the language barriers, lack of places and lack of funding.<sup>54</sup> The most recognisable obstacle and “enormous enemy”<sup>55</sup> to judicial training was the lack of time due to workload.<sup>56</sup> The study shows that in most countries, judges who are involved in training are not exempted from their duties and are not replaced by other judges. Such situation could have the effect of disturbing the administration of justice in that member state and thereby in the whole EU.<sup>57</sup>

Another notable study was the Pilot project funded by the Commission and prepared by the EJTN, which was on Best Practices in training of judges and prosecutors.<sup>58</sup> The study identified best<sup>59</sup>, better<sup>60</sup> and promising<sup>61</sup> practices on judicial training identified by member states and EU training providers such as the EJTN. These practices were seen in different categories such as the training needs assessment, innovative

---

<sup>51</sup> Ibid, p 9

<sup>52</sup> <https://www.ejtn.eu/About-us/>

<sup>53</sup> European Parliament, ‘Judicial Training in The European Union Member States’ (2011) <[https://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/453198/IPOL-JURI\\_ET\(2011\)453198\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/453198/IPOL-JURI_ET(2011)453198_EN.pdf)>.

<sup>54</sup> Ibid, p [33-40]

<sup>55</sup> Ibid, p 35

<sup>56</sup> Ibid, p 34

<sup>57</sup> Ibid

<sup>58</sup> The European judicial training network, ‘Study on Best Practices in Training of Judges and Prosecutors’ (2014) <[https://www.ejtn.eu/Documents/Resources/Lot1\\_final\\_Jan2015.pdf](https://www.ejtn.eu/Documents/Resources/Lot1_final_Jan2015.pdf)>.

<sup>59</sup> The study identified best practices as “A Best a training programme or strategy having the highest degree of proven effectiveness supported by objective and comprehensive research and evaluation”. See *ibid.* p 19

<sup>60</sup> The study identified good practice as “ a programme or strategy that has worked within one or more organisation and shows promise of becoming a Best Practice, as it has some objective basis for claiming effectiveness and potential for replication among other organisations. *Ibid.* p 19

<sup>61</sup> The study identified promising programme as “is a Practice with at least preliminary evidence of effectiveness or for which there is potential for generating data that will be useful in determining its promise to become a Good or Best Practice for transfer to wider, more diverse judicial training environments”. *Ibid.*

methodology and the promotion of the correct application of the EU judicial cooperation instrument in civil and commercial matters and member states' laws.

The training needs assessment might be seen as the most important step in the training cycle.<sup>62</sup>The training providers assess and analyse the judge's training needs, ensures it is implemented in the training course and regularly updates the training contents to satisfy new needs and enhance previous ones.<sup>63</sup> The practice of the Academy of the European Law was identified as best practice. It not only assesses the judges' needs but it also assesses the extent of that knowledge by examining their previous skills and experience on the area of the course.<sup>64</sup>

In the innovation methodology category, E-learning, blended learning and online podcasts and conferences were highlighted. E-learning gives the legal practitioners the chance to access and use the online materials anytime and anywhere, thereby, minimising largely the lack of time and places obstacles identified in the Parliament study. In addition, its cost is 3 to 4 times lesser than the actual training course where the trainee need to be present.<sup>65</sup> The Bulgarian practice was identified as best practice. It consists of an online course, which lasts for 3 to 4 months involving presentations, case studies, assignments and exams.<sup>66</sup>

On the other hand, blended learning consists of both E-learning and face to face learning. In this respect, the Spanish practice was considered as good. The training would first start with an online course for nearly eight weeks. After the successful pass, the trainees would participate in a face-to-face seminar where they discuss practical problems. Not only would the trainee gain access on the materials but would also interact actively with the trainers.<sup>67</sup>

Importantly, the Study also examined best, good and promising practices and tools for the correct and consistent application of the EU judicial cooperation instruments and other member states laws. The study identifies Eurinfra project in the Netherland, as

---

<sup>62</sup> Ibid, p 31

<sup>63</sup> Ibid, p 26

<sup>64</sup> Prior to the start of a workshop or a training module, the Academy of the European law sends a questionnaire and registration form to identify the judge's level of knowledge and experience and their expected knowledge gained by the course. Such assessment has the objective of identifying the precise group that meets the course's objectives. see *ibid*, p 39

<sup>65</sup> Ibid, p 69

<sup>66</sup> Ibid, p 68

<sup>67</sup>Ibid, p 71

best practice in this area.<sup>68</sup> The project consists of the following aims: providing knowledge on EU law through training, the availability of the EU materials online and importantly, the establishment of contacts points in the local courts. The contact point would work as consultant on EU law for legal practitioners who needs to know more about the EU law. This will have the benefit of increasing the judge's understanding of the EU in their day-by-day cases.

Other tools, which can ensure the correct application of the EU judicial cooperation instruments are exchange programmes, "operational cooperation" and "Learning by doing". Exchange programme is the "EJTN flagship programme"<sup>69</sup> whereby the trainee can learn about other member state's legal systems and engage directly with the judges in the host country. Such exchange can take the shape of either short, long exchanges, study visits or initial training for new judges, also known as AIAKOS Project.<sup>70</sup>

"Operational cooperation" is cooperation between numbers of Member States, which aim to provide training to their legal practitioners. One example is the Visegrad group which consists of four member states; Slovakia Hungary, Poland and Czech Republic. The group provides judicial training on EU law and international cooperation.<sup>71</sup> Learning by doing is that the participants get involved and interact in the training. This could be by providing materials and case laws, giving presentations and acts in certain roles.<sup>72</sup>

Regardless of the extensive work done, the question arises as whether the strategy's implementation was successful after 8 years of its adoption. In 2019, the Commission adopted study on the evaluation of its strategy on judicial training (hereinafter, the Evaluation study).<sup>73</sup> It is based on the public consultation<sup>74</sup>, targeted consultation<sup>75</sup>

---

<sup>68</sup> Ibid, Fact Sheet No. 37

<sup>69</sup> The EJTN, 'The Exchange Programme for Judicial Authorities' <<https://www.ejtn.eu/Exchange-Programme/>>.

<sup>70</sup>The EJTN, 'AIAKOS Programme' <<https://www.ejtn.eu/Exchange-Programme/Activities/AIAKOS-Programme/>>.

<sup>71</sup> The European judicial training network, 'Study on Best Practices in Training of Judges and Prosecutors' (n 66), p 98.

<sup>72</sup> Ibid, p 99.

<sup>73</sup>The European Commission, 'The Commission Staff Working Document Evaluation of the 2011-2020 European Judicial Training Strategy' {SWD(2019) 381 Final((hereinafter, the Evaluation study).

<sup>74</sup>The European Commission, 'Evaluation of the 2011 European Judicial Training Strategy and Preparation of the Future Strategy, Analysis of the Responses Received to the Public Consultation' (2018).

<sup>75</sup> The European Commission (81)

and external study.<sup>76</sup> Overall, the study shows that the strategy's objectives were achieved in a sufficient way and at reasonable cost.<sup>77</sup> For instance, the objective of training half of legal practitioners is achieved two years earlier than the indicated time.<sup>78</sup> In addition, the strategy led to the increase of training activities particularly the cross border ones such as judicial exchanges.<sup>79</sup> According to the study, judicial exchange contributed to the increase mutual trust between the legal professionals in the EU.<sup>80</sup> Moreover, the EU funds that supports judicial training was almost doubled leading to develop the capacity of the EJTN and the Academy of European law.<sup>81</sup> Importantly, the study shows that almost 50% of the public consultation respondents stated that there was a neutral to high-level mutual trust in judicial cooperation in civil and commercial matters.<sup>82</sup> It also shows that the quality of EU member states decisions improved.<sup>83</sup>

Although the strategy brought some noticeable change in the area of judicial training, problems still exist, gaps needs to be filled and improvement is needed. For instance, the evaluation study identifies that knowledge on EU law is increased only to some extent.<sup>84</sup> The lack of time was seen as the most significant obstacle that contributed to the problem.<sup>85</sup> Such problem can be minimised by improving, developing and promoting the use of e learning between the legal professionals.<sup>86</sup> As seen previously, improving e-learning not only would give the judge's access to the training courses and materials anytime and anywhere but it is evidently less costly than the traditional face-to-face training. Increasing the visibility of E-Justice Portal and its importance is important to take e judicial training to the next level.<sup>87</sup>

Another problem, which was identified by the Commission 2018 report on the judicial training and confirmed by the evaluation study, is that fundamental rights topics are

---

<sup>76</sup>Deloitte, 'Evaluation of the 2011 European Judicial Training Strategy Final Report' (2019) <[https://ec.europa.eu/info/sites/default/files/dg\\_just\\_ejts\\_final\\_report\\_23052019.docx.pdf](https://ec.europa.eu/info/sites/default/files/dg_just_ejts_final_report_23052019.docx.pdf)>.

<sup>77</sup> The Evaluation Study(81) p 72

<sup>78</sup> Ibid, p 22

<sup>79</sup> Ibid

<sup>80</sup> Ibid,

<sup>81</sup> Ibid, p 27 and p 33

<sup>82</sup> Ibid, p 38

<sup>83</sup>Ibid, p 39

<sup>84</sup> Ibid, p 18

<sup>85</sup> Ibid,

<sup>86</sup> This was also recognised by the Evaluation Study as an area that needs more attention. Ibid, for instance p 23 and p 35

<sup>87</sup> Ibid p 23

not getting much attention.<sup>88</sup> Only 7.6% of the whole topic is related to the fundamental rights.<sup>89</sup> This reinforces the need to have a legal culture based on the better understanding of the rule of law and fundamental rights to further facilitate access to justice, judicial cooperation in civil and commercial matters and thereby enhance mutual trust.

Another problem identified by the Evaluation study is the complexity of the EU funds application process.<sup>90</sup> It shows that the difficult application procedure to the EU funds makes some training providers reluctant to apply for it. Simplifying the procedure and raising the amount of funds will further contribute to not only better judicial training and understanding of the EU, but to better access to justice and mutual trust.

Importantly, while the evaluation study stated that almost 50% of the public consultation respondents stated there was a neutral to high level of mutual trust, the fact remains that those respondents were only 572, forming 0.5% of all legal professionals in the EU.<sup>91</sup> In other words, this data does not reflect the view of all legal professionals in the EU, but only a very small percentage. One might argue that it is an indication of the principle of mutual trust. However, one can say that it is a weak indication owing not only to the small group of respondents but also to their geographical distribution. The study shows that one of its limitations is that there was a geographical imbalance concerning the respondents' countries. For instance, 30% of respondents were from Germany and 20% from Italy.<sup>92</sup> This does not really give a strong indication of mutual trust even between small groups of respondents.

## 9.5 Conclusions

The chapter examined existing methods and tools that could enhance and foster trust between the EU Member states' judicial actors. It is argued that, in general, the existing tool box provides a good basis for achieving this goal. However, as seen above, a number of issues need to be addressed and modified for the proper administration of justice. A knowledge of EU law, particularly those related to judicial cooperation, the

---

<sup>88</sup> The European Commission, 'Report on Judicial Training'(n46), 14; The Evaluation Study(b 81) 45.

<sup>89</sup> Ibid, p 14

<sup>90</sup> Ibid, p 65

<sup>91</sup> Deloitte (n 84), p 55.

<sup>92</sup> The Evaluation Study (n 81), p 21

importance of the rule of law and fundamental rights are crucial for the enhancement of mutual trust. This is certainly true when the respect of the rule of law and fundamental rights are the fundamental reasons why judicial cooperation exist in the first place.

## 10. Conclusions

The principle of mutual trust played a pivotal role in setting the scene to build and further develop an area without internal frontiers in the EU. People are allowed to move freely around the EU Member States to start a business, grant an education or simply to live and settle permanently in other EU Member State. It also empowers the EU to adopt rules and regulations related to judicial cooperation in civil and commercial matters such as those governing private international law. According to the CJEU, the principle of mutual trust is based on the presumption of member states' compliance with the rule of law and fundamental rights in their justice systems.

The thesis attempted to provide a definition for the principle of mutual trust. In order to achieve this, the thesis drew inspirations from trust definitions from other disciplines and theories such as trust as a prediction, trust as an obligation and trust as moral or therapeutic. It concluded that trust has different actors, different shapes and different types. Yet, within such variations, it is agreed that trust contains elements of risk and uncertainty, making the trustor subject to vulnerability and betrayal. As a result, a trusting relationship should be based on something more than a mere detection and gathering of past experiences. Rather, a trusting relationship needs the existence of internal values or 'trust in' element, such as honesty, to ensure a long and stable relationship.

The next step was looking at the meaning of mutual trust in the EU. It started by tracing the historical background of the principle in the EU. Unlike other scholars, the thesis demonstrated that mutual trust did not exist in the beginning of the European integration, namely the ECSC. Instead, a mix of German's domination of the Region's Coal and a dream of having a peaceful region were the reasons behind the adoption of the ECSC. Thereby, the thesis characterised the early beginning of the European integration as a therapeutic trust where the trustor trusts the trustee despite the fact that the trustee might not be that trustworthy.

In addition, the thesis demonstrated that the principle of mutual trust evolved and developed until it is viewed as an obligation. Under the latter, each Member State is under an obligation to trust each other. Such obligation is divided into two types of trust; residual trust and specific trust. Residual trust means that Member States need to trust each other generally, being members of the same polity. The other type

is specific particularised trust, where it is required to trust each other on specific matters such as the constitution and the continuous development of the area of freedom, security and justice and particularly in judicial cooperation in civil and commercial matters.

As for its nature, the thesis demonstrated that the principle of mutual trust is a normative and structural principle, which is essential for the functioning of the EU and particularly in the area of freedom, security and justice. While some argued of its constitutional character, the thesis came into conclusion that the variation of its application make it difficult to accept its constitutional character. Instead, the thesis illustrated that the rule of law and fundamental rights are constitutional general principles, which affect the interpretation of the EU law. Mutual trust is only a tool that is used to enhance the legal protection of people. Such protection should never be compromised by upholding the principle of mutual trust.

According to the CJEU, the principle of mutual trust is based on the presumption of Member State's compliance with the EU law, the rule of law and fundamental rights. This would mean that Member states are prohibited to check whether other Member states are complying with fundamental rights in their justice systems. The CJEU rightly held that the presumption is not conclusive and it is subject to limitations. However, such presumption is only rebuttable in exceptional circumstances. However, the thesis came into the conclusion that the principle of mutual trust is rebutted when there is a clear violation of fundamental rights. This is true irrespective whether it is an absolute or non-absolute right. This is also true irrespective whether it is individual violation or a violation because of a systemic deficiency.

The thesis gave a special focus to the right to effective judicial protection being the right most closely to the proper administration of justice. This is certainly true when it is the key right that ensures the enforcement of all rights in the EU, in one hand, and enables the establishment of an area without internal borders between the EU Member States, on the other hand.

It is seen that the right to effective judicial protection applies to both EU institutions and EU member states when they are implementing the EU law. It means for instance, that EU measures and regulations should be compatible with the right to effective judicial protection and does not lead to undermine or hamper such right. In addition,

member states justice systems should be organised in such a way that reflect and comply with the right to effective judicial protection.

The thesis then examined the explicit implantation of the principle of mutual trust in the stage of jurisdiction, which is the doctrine of *lis pendens*. *Lis pendens* is an expression of trust between the EU Member states' courts. According to the doctrine, when the same cause of action and the same parties are before two Member states' courts, the second seised court must stay its proceeding based on the trust that the first seised court would rule on its own jurisdiction in a reasonable time.

However, the reality shows that some Member states take long time to decide on its own jurisdiction. One solution proposed by the thesis is to set out a time limit accompanied by a communication between the courts for a proper administration of justice. Another solution is to decide on the jurisdictional question without going into the merits of the case like the practice of some Member State.

The thesis also looked at the relationship between *lis pendens* and the choice of court agreement. While in general, the conflict between the doctrine and the exclusive choice of court agreement was resolved, some matters need to be addressed in the future such as the scope of the first seised court non-chosen power to review the validity of the choice of court agreement.

The thesis then examined mutual recognition and enforcement of judgments between the EU member states as a clear implementation of mutual trust in the stage of recognition and enforcement of judgment. The thesis illustrated that mutual recognition is a tool to enhance and foster the free circulation of judgments and more importantly, to foster people's access to justice throughout the EU. The idea of mutual recognition and enforcement of judgment evolved significantly from the court's power to do checks and its ability to raise refusal grounds by its own to the complete abolition of the *exequatur* and the prohibition on the court to raise such refusal grounds by its own initiative. Explicit examples of mutual trust were found in the stage of recognition and enforcement such as the non-review of the court of origin's jurisdiction and the substance of its judgment, the presumption in favour of recognition and the abolition of *exequatur*.

On the other hand, the applicability of mutual recognition of judgment as an expression of the principle of mutual trust and the objective of the free circulation of judgment

throughout the EU is not without any limitation. The Brussels I Regulation attempted to strike a balance between mutual trust and the defendant's right to a fair trial by providing grounds for the non-recognition and enforcement of the judgment. Public policy, the natural justice, the irreconcilability of judgments were grounds for the refusal of such recognition and enforcement. However, despite the existence of these refusal grounds, problems exist. For instance, the court where the enforcement is sought is prohibited from raising those grounds by its own motion. This is true even if it collide with its public policy. Moreover, the narrow interpretation of the public policy exception could lead to hampering the rule of law and fundamental rights in the EU in general and in the Member State in particular. Requiring exhausting the remedies in the court of origin is one example. In addition, the omission of some provisions provides uncertainty and unpredictability to the parties in this stage. One example was whether a judgment given contrary to the new rules of an exclusive choice of court agreement would be nevertheless recognised and enforced. On the contrary, the CJEU did not hesitate to provide more protection to the rule of law and fundamental rights in other refusal grounds. For instance, it went even further to provide ensured double protection for fundamental rights such as the court of enforcement's power to review whether service was sufficient regardless of the court of origin assessment.

The thesis then examined the negative implications of the principle of mutual trust. It rejects some of private international law rules well known in the common law system, mainly the forum non-conveniens and anti-suit injunction. Forum non-conveniens based on the idea that the court could would stay its proceeding when it is satisfied that there is another court, which is more appropriate to hear the dispute for the interest of all the parties and the end of justice. At first, the CJEU refused to accept forum non-conveniens in its system. However, for the proper administration of justice, the new recast adopted a discretionary mechanism similar to the forum non-conveniens when the appropriate court is a non EU Member State. However, such mechanism does not exist when the appropriate court is another EU Member State.

The thesis came to the conclusion that a decision to stay the proceeding on the basis that another court is clearly more appropriate to hear the case is an indication itself that the forum based its trust on the other foreign to hear the case to fulfil the end of justice. Although the court does not reach that decision to fulfil mutual trust, the end result does reflect trust on the other court to fulfil justice to the party. While one might

suggest that a decision to refuse to grant a stay might indicate the inappropriateness of the court to hear the case particularly when the plaintiff prove that justice will not be obtained in the other court, and thereby violate the principle of mutual trust, this should not be understood as a contradiction or a collision to the meaning of the principle of mutual trust. Rather, one should consider securing people's right as a limitation to the application of this principle particularly when reliable and cogent evident point toward a serious violation of people's fundamental rights and particularly their right to a fair trial and their right to an effective remedy. Discretion should not be understood as violating the objective of the recast of legal certainty. As a result, the thesis proposes a discretionary where a court can transfer its proceeding to another Member states when it is the better place to hear the case when certain conditions are fulfilled. Having such mechanism not only will provide legal protection to the parties in the proceeding but also it will strengthen and promote the principle of mutual trust.

On the other hand, the thesis shed the light on anti-suit injunction. It allows the court to grant an injunction to restrain proceeding initiated in a foreign court when the end of justice requires so. The English court attempts to defend the use of this injunction by stating that it is directed toward the party rather the court. However, the reality shows that it does disturb the foreign court from entertaining its own jurisdiction. As a result, the CJEU refused the use of anti-suit injunction even if the other party brought proceeding in the other Member State's court in a bad faith. The thesis observed that instead of forcing such injunction into the EU system, one could protect the interest of all parties and prevent injustice by a modified version of lis pendens combined with a direct communication between the courts. In addition, anti-suit injunction could be used in a limited scope particularly in the enforcement of the choice of court agreement and the judgment resulting from such choice, when communication with the court first seised court fail.

The thesis also examined the future relationship between the EU and the UK amid Brexit. After nearly a half century, the UK said goodbye and left the EU. The UK left the EU with no deal regarding the judicial cooperation in civil and commercial matters. This means that the English court would apply English conflict of law rules. This would also means that the recognition and enforcement would be subject to different EU member states' legal systems, providing less certainty than that guaranteed by the Recast. On the other hand, the UK's adoption to the Hague choice of court agreement

convention will provide more legal certainty since the latter agreement is also adopted by the EU.

At the time of writing this thesis, The Commission rejected the UK's application to accede to the Lugano Convention. In its understanding, the Lugano Convention is seen as an ancillary instrument to the internal market built between the EU member states and the EFTA member states. However, the thesis concluded that while economic goal did encourage the adoption of the Lugano convention, it was the enhancement of the legal protection of people and their access to justice, which were the driving forces behind the adoption of such instrument. The thesis also viewed the Hague Judgment Convention as a possible instrument, which could regulate and govern the recognition and enforcement of judgment between the EU and the UK.

It seems that the Commission wants to deliver an implied message and warning to any EU member states that wish to exit the EU that the leaving State will not have the same benefits given under the EU polity. This could be seen by rejecting the UK's application to accede to the Lugano convention despite the clear language of the convention's provision that allows third state to join the convention. This is also true by declaring its intention that a future relationship between the EU and the UK a 'third state' in this area could be governed by the Hague judgment Convention without mentioning the possibility of adoption a bilateral agreement,

On the other hand, The thesis examined existing methods and tools that could enhance and foster trust between the EU Member states' judicial actors. It is argued that, in general, the existing tool box provides a good basis for achieving this goal. However, as seen above, number of issued needs to be addressed and modified for the proper administration of justice. A knowledge of EU law particular those related to judicial cooperation and the importance of the rule of law and fundamental rights are crucial for the enhancement of mutual trust. This is certainly true when the respect of the rule of law and fundamental rights are the fundamental reasons why judicial cooperation exist in the first place.

One should always remember that the principle of mutual trust is a tool, which serves the respect of the rule of law and fundamental rights. The real meaning of mutual trust justifies doing what is just and right.

## Bibliography

'Advocate General Bot Opinion, Case C- 491/10 PPU Joseba Andoni Aguirre Zarraga v Simone Pelz' (2010)

AG opinion F, 'C-351/96, Drouot Assurances SA v Consolidated Metallurgical Industries (CMI Industrial Sites), Protea Assurance and Groupement d'intérêt Économique (GIE) Réunion Européenne' (1998)

Alter K and Steinberg D, 'The Theory and Reality of the European Coal and Steel Community' in Meunier S and McNamara K (eds), *Making History: European Integration and Institutional Change at the 50th Anniversary of the Treaty of Rome* (Oxford University Press 2007) <[https://faculty.wcas.northwestern.edu/~kal438/KarenJAlter2/ECJsPolitical\\_Power\\_files/ECSCTheory&Reality.pdf](https://faculty.wcas.northwestern.edu/~kal438/KarenJAlter2/ECJsPolitical_Power_files/ECSCTheory&Reality.pdf)>

Ambrose C, 'Can Anti-Suit Injunctions Survive European Community Law?' (2004) Vol. 52 The International and Comparative Law Quarterly <<https://www.jstor.org/stable/3663114>>

Arzandeh A, 'The Origins of the Scottish Forum Non Conveniens Doctrine' (2017) 13 Journal of Private International Law 130 <<https://www.tandfonline.com/doi/full/10.1080/17441048.2017.1303044>>

—, *Forum (Non) Conveniens in England Past, Present, and Future* (1st editio, Bloomsbury Publishing 2018)

Aude F, 'The Evolution of European Private International Law' (2008) 57, The International and Comparative Law Quarterly <<https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/i-the-evolution-of-european-private-international-law/B8CF5B32ED1953235C65205714CA6B89>>

B Childs L, 'Shaky Foundations: Criticism of Reciprocity and the Distinction between Public and Private International Law' (2005) 38 New York University Journal of International Law and Politics 221 <[https://nyujilp.org/wp-content/uploads/2013/02/38.1\\_2-Childs.pdf](https://nyujilp.org/wp-content/uploads/2013/02/38.1_2-Childs.pdf)>

Bakardjieva Engelbrekt A and others, 'Trust in the European Union: What Is It and How Does It Matter?' in Antonina Bakardjieva Engelbrekt and others (eds), *Trust in the European Union in Challenging Times: Interdisciplinary European Studies* (Springer International Publishing 2019) <[https://doi.org/10.1007/978-3-319-73857-4\\_1](https://doi.org/10.1007/978-3-319-73857-4_1)>

Bergson I, 'The Death of the Torpedo Action? The Practical Operation of the Recast's Reforms to Enhance the Protection for Exclusive Jurisdiction Agreements within the European Union' [2015] Journal of Private International Law,

Betancourt J-C, 'Does the (Recast) Brussels Regulation Allow for Court-Ordered Anti-Suit Injunctions within the EU?' (*Kluwer Arbitration Blog*, [arbitrationblog.kluwerarbitration.com/2018/08/16/booked-brussels-regulation-](https://arbitrationblog.kluwerarbitration.com/2018/08/16/booked-brussels-regulation-)

*recast-allow-court-ordered-anti-suit-injunctions-within-eu/*, 2018)

Bitton JDB& DS, 'Heisenberg's Uncertainty Principle, Extraterritoriality and Comity' [2015] *Sedona Conference Journal* 16

Briggs A, 'Comity in the Law of Jurisdiction to Adjudicate', *The Principle of Comity in Private International Law* (Collected Courses of the Hague Academy of International Law, The Hague Academy of International Law 2012)

—, *THE PRINCIPLE OF COMITY IN PRIVATE INTERNATIONAL LAW* (Collected Courses of the Hague Academy of International Law, The Hague Academy of International Law, Volume 354 2012)

—, *Private International Law in English Courts* (Oxford University Press 2014)

—, *Civil Jurisdiction and Judgments* (6th edn, Abingdon: Informa Law from Routledge 2015)

Brouwer E, 'Mutual Trust and Judicial Control in the Area of Freedom, Security, and Justice: An Anatomy of Trust', (2016) <[https://cadmus.eui.eu/bitstream/handle/1814/41486/MWP\\_2016\\_13.pdf?sequence=1](https://cadmus.eui.eu/bitstream/handle/1814/41486/MWP_2016_13.pdf?sequence=1)>

Calvez F and Regis N, 'Length of Court Proceedings in the Member States of the Council of Europe Based on the Case Law of the European Court of Human Rights' (2018)

Cambien N, 'Mutual Recognition and Mutual Trust in the Internal Market' (2017) 2 *European Papers - A Journal on Law and Integration* 93 <<https://www.europeanpapers.eu/en/e-journal/mutual-recognition-and-mutual-trust-internal-market>>

'Case C-281/02 Andrew Owusu v N. B. Jackson ECR I-01383, Opinion of AG LÉGER'

Chynoweth P, 'Legal Research' in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment* (first, Wiley-Blackwell 2008) <[http://www.csas.ed.ac.uk/\\_\\_data/assets/pdf\\_file/0005/66542/Legal\\_Research\\_Chynoweth\\_-\\_Salford\\_Uni..pdf](http://www.csas.ed.ac.uk/__data/assets/pdf_file/0005/66542/Legal_Research_Chynoweth_-_Salford_Uni..pdf)>

Claire AH and Ann OE, 'A Cognitive Theory of Trust' (2006) 84 *Washington University Law Review*

Closa C, 'Reinforcing EU Monitoring of the Rule of Law: Normative Arguments, Institutional Proposals and the Procedural Limitations' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) <[https://www.cambridge.org/core/product/identifier/9781316258774%23CT-bp-2/type/book\\_part](https://www.cambridge.org/core/product/identifier/9781316258774%23CT-bp-2/type/book_part)>

Closa C and Kochenov D, *Reinforcing Rule of Law Oversight in the European Union* (Carlos Closa and Dimitry Kochenov eds, Cambridge University Press 2016)

Commission E, 'Proposal for a Regulation Amending Regulation 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters', vol 2010 (2013) <[http://ec.europa.eu/justice/civil/files/com\\_2013\\_554\\_en.pdf](http://ec.europa.eu/justice/civil/files/com_2013_554_en.pdf)>

‘COMMISSION STAFF WORKING PAPER IMPACT ASSESSMENT Accompanying Document to the Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)’

Commission T, ‘Annual Reports on the Application of the Charter’ <[https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights/application-charter/annual-reports-application-charter\\_en](https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights/application-charter/annual-reports-application-charter_en)>

—, ‘Draft Programme of Measures for Implementation of the Principle of Mutual Recognition of Decisions in Civil and Commercial Matters OJ C 12, 15.1.2001’ (2001)

—, ‘Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters COM/2009/0175 Final’ (2009)

—, ‘Action Plan Implementing the Stockholm Programme (Communication) 2010/0171 Final’ (2010)

—, ‘Proposal for a Council Decision on the Determination of a Risk of a Serious Breach by the Republic of Poland of the Rule of Law COM (2017) 835 Final’ (2017) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52017PC0835>>

—, ‘Strengthening the Rule of Law within the Union A Blueprint for Action(Communication) COM/2019/343 Final’ (2019)

—, ‘2021 Rule of Law Report The Rule of Law Situation in the European Union’ (2021) <[https://ec.europa.eu/info/sites/default/files/communication\\_2021\\_rule\\_of\\_law\\_report\\_en.pdf](https://ec.europa.eu/info/sites/default/files/communication_2021_rule_of_law_report_en.pdf)>

Commission TE, ‘Impact Assessment Accompanying Document To The Proposal For A Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters Recast) COM (2010) 748 Final, SEC (2010)’

—, ‘Recommendation (EU) 2017/1520 of 26 July 2017 Regarding the Rule of Law in Poland Complementary to Recommendation (EU) 2016/1374 and (EU) 2017/146 (OJ L 228, 2.9.2017, p. 19)’ <[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L\\_.2017.228.01.0019.01.ENG&toc=OJ%3AL%3A2017%3A228%3ATOC](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2017.228.01.0019.01.ENG&toc=OJ%3AL%3A2017%3A228%3ATOC)>

—, ‘Recommendation (EU) 2018/103 of 20 December 2017 Regarding the Rule of Law in Poland Complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520, (OJ L 17, 23.1.2018)’ <[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018H0103#ntr1-L\\_2018017EN.01005001-E0001](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018H0103#ntr1-L_2018017EN.01005001-E0001)>

—, ‘Recommendation (EU) 2017/146 of 21 December 2016 Regarding the Rule of Law in Poland Complementary to Recommendation (EU) 2017/146 , (OJ L 22, 27.1.2017, p. 65)’ (2017) <[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L\\_.2017.022.01.0065.01.ENG&toc=OJ%3AL%3A2017%3A022%3ATOC](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2017.022.01.0065.01.ENG&toc=OJ%3AL%3A2017%3A022%3ATOC)>

—, 'Evaluation of the 2011 European Judicial Training Strategy and Preparation of the Future Strategy, Analysis of the Responses Received to the Public Consultation 2018' (2018)

—, 'Report on Judicial Training' (2018) <[https://www.ejtn.eu/PageFiles/18504/2018 Training report\\_v2\\_EU\\_en.pdf](https://www.ejtn.eu/PageFiles/18504/2018%20Training%20report_v2_EU_en.pdf)>

Commission V, 'Report on the Rule of Law' <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2011\)003rev-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)003rev-e)>

Cook, Karen S., Russel Hardin, and Margaret L, *Cooperation without Trust?* (Vol XI, Ki, The Russell Sage Foundation Series on Trust 2005)

'Council Decision of 28 May 2001 Establishing a European Judicial Network in Civil and Commercial Matters, OJ L 174, 27.6.2001' (2001)

'Council of Europe, Committee on Legal Affairs and Human Rights "Judicial Corruption: Urgent Need to Implement the Assembly's Proposals"' (2014)

Council TE, 'The Stockholm Programme – An Open and Secure Europe Serving and Protecting the Citizens, 17024/09' (2009)

Cuniberti, Gilles and Rueda I, 'Abolition of Exequatur - Addressing the Commission's Concerns' (2010) No. 2010-0 University of Luxembourg Law Working Paper

Cuyvers A, 'General Principles of EU Law' in Emmanuel Ugirashebuja and others (eds), *East African Community Law Institutional, Substantive and Comparative EU Aspects* (Brill Nijhoff 2017) <[https://library.oapen.org/bitstream/handle/20.500.12657/37805/9789004322073\\_weready\\_content\\_text.pdf?sequence=1#page=232](https://library.oapen.org/bitstream/handle/20.500.12657/37805/9789004322073_weready_content_text.pdf?sequence=1#page=232)>

D'Alterio E, 'From Judicial Comity to Legal Comity: A Judicial Solution to Global Disorder?' (2011) 9 International Journal of Constitutional Law 394 <<https://doi.org/10.1093/icon/mor036>>

'Decision No 568/2009/EC of the European Parliament and of the Council of 18 June 2009 Amending Council Decision 2001/470/EC Establishing a European Judicial Network in Civil and Commercial Matters' (2009)

Deloitte, 'Evaluation of the 2011 European Judicial Training Strategy Final Report' (2019) <[https://ec.europa.eu/info/sites/default/files/dg\\_just\\_ejts\\_final\\_report\\_23052019.docx.pdf](https://ec.europa.eu/info/sites/default/files/dg_just_ejts_final_report_23052019.docx.pdf)>

Deutsch M, 'Trust and Suspicion' (1958) 2 The Journal of Conflict Resolution 265

Dietmar Petzina WFS and MH, 'The Origin of the European Coal and Steel Community: Economic Forces and Political Interests' (1981) 137 Zeitschrift für die gesamte Staatswissenschaft / Journal of Institutional and Theoretical Economics 450 <<http://www.jstor.org/stable/40750370>>

Düsterhaus D, 'In the Court(s) We Trust - A Procedural Solution to the Mutual Trust Dilemma' n.1 Freedom, Security & Justice: European Legal Studies 26 <<http://www.fsjeurostudies.eu>>

EJTN T, 'AIAKOS Programme' <<https://www.ejtn.eu/Exchange-Programme/Activities/AIAKOS-Programme/>>

—, 'The Exchange Programme for Judicial Authorities' <<https://www.ejtn.eu/Exchange-Programme/>>

Europe EUA for FR and C of, *Handbook on European Law Related to Access to Justice, European Union Agency for Fundamental Rights and Council of Europe* (2016)

European Commission, 'European Commission, Communication from The Commission to The European Parliament, The European Council and The Council: Further Strengthening the Rule of Law within the Union State of Play and Possible next Steps, COM(2019) 163 Final' (2019) <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019DC0163&from=EN>>

European Commission CC, 'Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union' (2010)

'European Court of Human Rights Statistics, Violation by Article and by State 1959-2015' <[https://www.echr.coe.int/Documents/Stats\\_violation\\_1959\\_2015\\_ENG.pdf](https://www.echr.coe.int/Documents/Stats_violation_1959_2015_ENG.pdf)>

*European Parliament Study, Interpretation of the Public Policy Exception as Referred to in EU Instruments of Private International and Procedural Law* (2011)

'Explanations Relating to the Charter of Fundamental Rights OJ C 303, 14.12.2007'

Fentiman R, *International Commercial Litigation* (second edi, Oxford University Press 2015)

Franco Piodi, 'From the Schuman Declaration to the Birth of the ECSC: The Role of Jean Monnet' (2010) No 6 cardoc Journals

Franzosi M, 'Worldwide Patent Litigation and the Italian Torpedo' (1997) 19 *European Intellectual property Review* 382 <<https://uk.westlaw.com/Document/IB832E090E72111DA9D198AF4F85CA028/View/FullText.html>>

Gambetta D, 'Can We Trust Trust?' in Diego Gambetta (ed), *Trust: Making and Breaking Cooperative Relations* (electronic, Department of Sociology, University of Oxford 2000)

Garcimartín F and Saumier G, 'Explanatory Report on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters' (2020) <<https://assets.hcch.net/docs/a1b0b0fc-95b1-4544-935b-b842534a120f.pdf>>

'Gazprom" OAO v Lietuvos Respublika, Opinion of AG Wathelet' (2014)

Geelhoed A, 'Case C-304/02 COMMISSION v FRANCE'

'Germany and France,an Interview with German Chancellor, Konrad Adenau, Translation CVCE.EU by UNI.LU' (*Die Zeit*, 1949) the rights of reproduction are reserved and limite <<http://www.uni.lu/>> accessed 29 November 2020

GOVIER T, *DILEMMAS OF TRUST* (McGill-Queen's University Press 1998) <<http://www.questia.com/read/93945576/dilemmas-of-trust.>>

Hardin R, *Trust and Trustworthiness* (The Russell Sage Foundation Series on Trust 2002)

Hartley T, 'Choice-of-Court Agreements and the New Brussels I Regulation' [2013] *Law Quarterly Review* Legislative Comment 1

Hartley TC, 'The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws' (2005) 54 *International and Comparative Law Quarterly* 813 <<http://www.jstor.org/stable/3663399>>

Hartley TC, *Choice-of-Court Agreements under the European and International Instruments: The Revised Brussels I Regulation, the Lugano Convention, and the Hague Convention* (Oxford Private international law series 2013)

—, *International Commercial Litigation Text, Cases and Materials on Private International Law* (5th edn, Cambridge University Press 2013)

HAWLEY K, 'Trust, Distrust and Commitment' [2014] Wiley Periodicals, Inc 1 <<https://onlinelibrary.wiley.com/doi/epdf/10.1111/nous.12000>>

Hess B, Pfeiffer T and Schlosser P, 'Report on the Application of Brussels I Regulation in the Member States' (2007)

HOFFMAN AM, 'A Conceptualization of Trust in International Relations' (2002) 8 *European Journal of International Relations* 375 <<https://journals.sagepub.com/doi/pdf/10.1177/1354066102008003003>>

Horsburgh HJ., 'The Ethics of Trust' 10 *The Philosophical Quarterly* 343

HOUSE OF LORDS, 'Green Paper on the Brussels I Regulation Report with Evidence' (2009) <[http://ec.europa.eu/justice/news/consulting\\_public/0002/contributions/ms\\_parliaments/united\\_kingdom\\_house\\_of\\_lords\\_en.pdf](http://ec.europa.eu/justice/news/consulting_public/0002/contributions/ms_parliaments/united_kingdom_house_of_lords_en.pdf)>

HUTCHINSON T and DUNCAN N, 'DEFINING AND DESCRIBING WHAT WE DO: DOCTRINAL LEGAL RESEARCH' 17, No 1 *Daikin Law Review* 83 <<https://ojs.deakin.edu.au/index.php/dlr/article/view/70/75>>

James J. Fawcett M ni S and SS, *Human Rights and Private International Law* (first, Oxford Private international law series 2016)

Jean M, 'Discussion Paper by Jean Monnet, Translation CVCE.EU by UNI.LU' (*the rights of reproduction are reserved and limited.*, 1950) <<http://www.uni.lu/>> accessed 29 November 2020

Jenard MP, 'Report on the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters', vol OJ C 59/79 (1979)

Jenard MP and MOLLER MG, 'Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters Done at Lugano on 16 September 1988' (1990) <[http://aei.pitt.edu/1464/1/Commercial\\_reports\\_Jenard\\_OJ\\_C\\_189\\_90.pdf](http://aei.pitt.edu/1464/1/Commercial_reports_Jenard_OJ_C_189_90.pdf)>

Jenard MP and Möller MG, 'Report on Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters' (1988)

JOEL R. PAUL, 'THE TRANSFORMATION OF INTERNATIONAL COMITY' (2008) 71, No. 3 *Law and Contemporary Problems*

<<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1477&context=lcp>>

Kochenov D and Pech L, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' (2015) 11 *European Constitutional Law Review* 512 <[https://www.cambridge.org/core/product/identifier/S1574019615000358/type/journal\\_article](https://www.cambridge.org/core/product/identifier/S1574019615000358/type/journal_article)> accessed 11 October 2021

Koji TAKAHASHI, 'Damages for Breach of a Choice-of-Court Agreement' (2008) 10 *Yearbook of Private International Law* 57

Law HC on PI, 'Denmark Accedes to the Choice of Court Convention' (2018) <<https://www.hcch.net/en/news-archive/details/?varevent=611>> accessed 21 October 2021

—, 'United Kingdom Joins 2005 Choice of Court and 2007 Child Support Conventions' (2020) <<https://www.hcch.net/en/news-archive/details/?varevent=751>> accessed 21 October 2021

LENAERTS K, 'THE PRINCIPLE OF MUTUAL RECOGNITION IN THE AREA OF FREEDOM, SECURITY AND JUSTICE' (ALL SOULS COLLEGE, UNIVERSITY OF OXFORD 2015) <[https://www.law.ox.ac.uk/sites/files/oxlaw/the\\_principle\\_of\\_mutual\\_recognition\\_in\\_the\\_area\\_of\\_freedom\\_judge\\_lenaerts.pdf](https://www.law.ox.ac.uk/sites/files/oxlaw/the_principle_of_mutual_recognition_in_the_area_of_freedom_judge_lenaerts.pdf)>

LENAERTS K and A. GUTIÉRREZ-FONS J, 'THE CONSTITUTIONAL ALLOCATION OF POWERS AND GENERAL PRINCIPLES OF EU LAW' (2010) 47 *Common Market Law Review*

Lenhoff A, 'Reciprocity and the Law of Foreign Judgments: A Historical - Critical Analysis' (1956) 16 *LOUISIANA LAW REVIEW* 465 <<https://digitalcommons.law.lsu.edu/lalrev/vol16/iss3/2>>

LENZ MAG, 'OPINION OF MR ADVOCATE GENERAL LENZ, C-129/92, OWENS BANK v FULVIO BRACCO AND BRACCO INDUSTRIA CHIMICA SPA' (1993)

Liberman B, 'I-Trust: A Notion of Trust in Three-Person Games and International Affairs' (1964) 8 *The Journal of Conflict Resolution* 271 <<http://www.jstor.com/stable/172739>>

Luhmann N, *TRUST AND POWER* (Tom Burns and Gianfranco Poggi eds, John Wiley & Sons Ltd 1979)

Maclachlan CC, "*Lis Pendens in International Litigation (Volume 336)*" (Collected Courses of the Hague Academy of International Law, The Hague Academy of International Law 2009)

Mapesbury LC of (ed), *Dicey, Morris and Collins on The Conflict of Laws* (Fifteenth, Sweet & Maxwell - Thomson Reuters)

Mayer RC, Davis JH and Schoorman FD, 'An Integrative Model of Organizational Trust' (1995) Vol. 20 *The Academy of Management Review* 709

McKnight H and L. Chervany N, 'Trust and Distrust Definitions: One Bite at a Time' in R Falcone, M Singh and Tan Y.-H. (eds), *Trust in Cyber-societies* (Springer-Verlag Berlin Heidelberg 2001) <[https://msu.edu/~mcknig26/Trust\\_and\\_Distrust\\_Definitions.pdf](https://msu.edu/~mcknig26/Trust_and_Distrust_Definitions.pdf)>

- McLeod C, 'Trust', *The Stanford Encyclopedia of Philosophy* (Fall 2020, 2020)
- Meer TWG van der, 'Political Trust and the "Crisis of Democracy"' [2017] OXFORD RESEARCH ENCYCLOPEDIA
- Mills A, 'The Dimensions of Public Policy in Private International Law' [2008] *Journal of Private International Law*, 32
- Mitchenson TS and J, 'Rediscovering the Principle of Comity in English Private International Law' King's College London Dickson Poon School of Law Legal Studies Research Paper Series: Paper No. 2018-13
- , 'The History of Comity' (2019) vol 5, Forthcoming, *Jus Gentium – Journal of International Legal History*, King's College London Law School Research Paper Forthcoming. <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3405341](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3405341)>
- Mitsilegas V, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual' (2012) 31 *Yearbook of European Law* 319 <<https://academic.oup.com/yel/article-lookup/doi/10.1093/yel/yes023>>
- Nuyts A, 'The Enforcement of Jurisdiction Agreement Further to Gasser and the Community Principle of Abuse of Right' in Pascal de Vareilles-Sommières (ed), *Forum Shopping in the European Judicial Area* (1st edn)
- O. Keohane R, 'Reciprocity in International Relations' (1986) Vol.40 *International Organization* 1 <<https://www.jstor.org/stable/2706740>>
- 'OPINION OF ADVOCATE GENERAL ALBER ,Régie Nationale Des Usines Renault SA v Maxicar SpA and Orazio Formento.'
- 'OPINION OF ADVOCATE GENERAL WAHL on C-157/12, Salzgitter Mannesmann Handel GmbH v SC Laminorul SA' (2013)
- Opinion of AG Colomer R, 'C-159/02 Gregory Paul Turner v Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA, Opinion of AG Colomer, Ruijarabocase' (2003)
- Paris F and Nita G, 'The Role of Reciprocity in International Law' (2003) 36 *Cornell International Law Journal* <<https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1509&context=cilj>>
- Parliament E, 'Judicial Training in The European Union Member States' (2011) <[https://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/453198/IPOL-JURI\\_ET\(2011\)453198\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/453198/IPOL-JURI_ET(2011)453198_EN.pdf)>
- Paul JR, 'Comity in International Law' (1991) 32, n *Harvard International Law Journal* <[https://repository.uchastings.edu/faculty\\_scholarship/625/](https://repository.uchastings.edu/faculty_scholarship/625/)>
- Pech L, 'The Rule of Law as a Constitutional Principle of the European Union' [2009] *SSRN Electronic Journal* <<http://www.ssrn.com/abstract=1463242>>
- Pietro Franzina, Xandra Kramer JF, 'The Recognition and Enforcement of Member State Judgments' in Andrew James Andrew Dickinson, Eva Lein (ed), *the Brussels I regulation Recast* (Oxford University Press 2015)
- Prechal S, 'Mutual Trust before the Court of Justice of the European Union' (2017) volume 2 *European Papers* pp. 75

<[https://www.europeanpapers.eu/en/system/files/pdf\\_version/EP\\_EJ\\_2017\\_1\\_7\\_Article\\_Sacha\\_Prechal.pdf](https://www.europeanpapers.eu/en/system/files/pdf_version/EP_EJ_2017_1_7_Article_Sacha_Prechal.pdf)>

Reuland RC, 'The Recognition of Judgments in the European Community: The Twenty-Fifth Anniversary of the Brussels Convention' (1993) 14 Michigan Journal of International Law 560 <<https://core.ac.uk/download/pdf/232702604.pdf>>

Riegert B and Jon Shelton T from G, 'EU and Poland Battle It out over the Rule of Law' (*DW Akademie*, 2021) <<https://www.dw.com/en/eu-and-poland-battle-it-out-over-the-rule-of-law/a-58865296>> accessed 29 August 2021

Robbins BG, 'What Is Trust? A Multidisciplinary Review, Critique, and Synthesis' (2015) Volume 10, *Sociology Compass*

Robert A, *The Evolution of Cooperation* (Revised Ed, Basic Books 1984)

S. Cook K and J. Santana J, 'Trust and Rational Choice' in Eric M Uslaner (ed), *The Oxford Handbook of social and political Science* (Oxford Handbooks Online, Oxford University Press) <<https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780190274801.001.0001/oxfordhb-9780190274801-e-4>>

Schlosser PDP, 'Report on on the Convention of 9 October 1978 on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Mat' (1979)

Schuman R, 'The Schuman Declaration – 9 May 1950' <[https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration\\_en](https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en)>

Simma B, 'Reciprocity', *Oxford Public International Law* (2008) <<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1461>>

Snell J, 'The Single Market: Does Mutual Trust Suffice? In Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law (Evelien Brouwer and Damien Gerard (Eds.))' (2016) 13

Stoker ML and L, 'Political Trust and Trustworthiness' (2000) Vol. 3 *Annual Review of Political Science*

STORSKRUBB E, 'Mutual Trust and the Dark Horse of Civil Justice' (2018) 20 *Cambridge Yearbook of European Legal Studies* 179 <[https://www.cambridge.org/core/product/identifier/S1528887018000022/type/journal\\_article](https://www.cambridge.org/core/product/identifier/S1528887018000022/type/journal_article)>

'TAMPERE EUROPEAN COUNCIL 15 AND 16 OCTOBER 1999 PRESIDENCY CONCLUSIONS'

'The Commission Evaluation of the 2011 European Judicial Training Strategy and Preparation of the Future Strategy, Analysis of the Responses Received to the Targeted Consultation' (2018)

'The COUNCIL, THE HAGUE PROGRAMME: STRENGTHENING FREEDOM, SECURITY AND JUSTICE IN THE EUROPEAN UNION (2005/C 53/01)'

the European Commission, '2020 Rule of Law Report The Rule of Law Situation in the European Union COM/2020/580 Final' <<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1602583951529&uri=CELEX%3A52020DC0580>>

—, 'Commission Staff Working Paper, Operational Guidance on Taking Account of Fundamental Rights in Commission Impact Assessments'

—, 'COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS 2020 Rule of Law Report The Rule of Law Situation in the European Union' <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0580&from=EN>>

—, 'A New EU Framework to Strengthen the Rule of Law, (Communication)(2014) 158 Final' (2014) <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52014DC0158>>

—, 'Recommendation (EU) 2016/1374 of 27 July 2016 Regarding the Rule of Law in Poland' (2016) <[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L\\_.2016.217.01.0053.01.ENG&toc=OJ%3AL%3A2016%3A217%3ATOC](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2016.217.01.0053.01.ENG&toc=OJ%3AL%3A2016%3A217%3ATOC)>

The European Commission, 'Strengthening Trust, Mobility and Growth within the European Union "A New EU Framework to Strengthen the Rule of Law"' (2014)

—, 'The EU Justice Agenda for 2020 - Strengthening Trust, Mobility and Growth within the Union COM (2014) 144 Final' (2014)

—, 'The COMMISSION STAFF WORKING DOCUMENT EVALUATION of the 2011-2020 European Judicial Training Strategy {SWD(2019) 381 Final' (2019)

—, 'Assessment on the Application of the United Kingdom of Great Britain and Northern Ireland to Accede to the 2007 Lugano Convention' (2020) <[https://ec.europa.eu/info/sites/default/files/1\\_en\\_act\\_en.pdf](https://ec.europa.eu/info/sites/default/files/1_en_act_en.pdf)>

the European Commission Vice- President Viviane Reding Press Release, 'From Maastricht to Lisbon: Building a European Area of Justice in Small Steps and Great Bounds' (2013)

'The European Judicial Network in Civil and Commercial Matters' <[https://e-justice.europa.eu/431/EN/about\\_the\\_network](https://e-justice.europa.eu/431/EN/about_the_network)>

The European judicial training network, 'Study on Best Practices in Training of Judges and Prosecutors' (2014) <[https://www.ejtn.eu/Documents/Resources/Lot1\\_final\\_Jan2015.pdf](https://www.ejtn.eu/Documents/Resources/Lot1_final_Jan2015.pdf)>

'The Hague Programme: Ten Priorities for the next Five Years The Partnership for European Renewal in the Field of Freedom, Security and Justice. Communication from the Commission to the Council and the European Parliament. COM (2005) 184 Final' (2005)

Thomas Schultz & Niccol'o Ridi, 'Comity and International Courts and Tribunals' (2017) 50 Cornell International Law Journal

Trevor Hartley & Masato Dogauchi, 'Explanatory Report on the 2005 Hague Choice of Court Agreements Convention' (2013)

Tridimas T, *The General Principles of EU Law* (2nd Editio, Oxford University Press 2006)

Uglesa Grusic, Christian Heinze, Louise Merrett, Alex Mills, Carmen Otero Garcia-Castrillon, Zheng Sophia Tang, Katrina Trimmings LW, *Cheshire, North & Fawcett Private International Law* (Paul Torremans ed, Fifteenth, Oxford University Press)

UNION COJOTE, 'Recommendations to National Courts and Tribunals in Relation to the Initiation of Preliminary Ruling Proceedings, OJ C 338, 6.11.2012' (2012)

Uslaner EM, *The Moral Foundations of Trust* (Kindle Edi, Cambridge University Press 2002)

—, 'Part I Approaches to the Study of Trust, Chapter 1: The Study of Trust' in Eric M Uslaner (ed), *The Oxford Handbook of social and political Science* (2017)

Van Hoecke M, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' in Mark Van Hoecke (ed), *Methodologies of Legal Research* (Hart Publishing 2011)

Weigert JDL and A, 'Trust as a Social Reality' (1985) Vol. 63, N Social Forces

Weiler JHH, 'The Transformation of Europe' (1991) 100 *The Yale Law Journal* 2403 <<https://digitalcommons.law.yale.edu/yj/vol100/iss8/5>>

Weller M, 'Mutual Trust: In Search of the Future of European Union Private International Law, *Journal of Private International Law*' *Journal of Private International Law*, <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2538389](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2538389)>

—, 'Choice of Forum Agreements under the Brussels I Recast and under the Hague Convention: Coherences and Clashes' [2017] *Journal of Private International Law*, 1 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2827711](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2827711)>

Wendel M, 'Mutual Trust, Essence and Federalism – Between Consolidating and Fragmenting the Area of Freedom, Security and Justice after LM' (2019) 15 *European Constitutional Law Review* 17 <[https://www.cambridge.org/core/product/identifier/S1574019619000063/type/journal\\_article](https://www.cambridge.org/core/product/identifier/S1574019619000063/type/journal_article)>

Wischmeyer T, 'Generating Trust Through Law? – Judicial Cooperation in the European Union and the 'Principle of Mutual Trust' 17 *German L. J.* (2016)

Yntema HE, 'The Comity Doctrine' Vol. 65, *Michigan Law Review*

Zsolnai L, 'The Rationality of Trust' [2005] *International Journal of Social Economics* 268 <[http://laszlo-zsolnai.net/sites/default/files/3/documents/The Rationality of Trust.pdf](http://laszlo-zsolnai.net/sites/default/files/3/documents/The_Rationality_of_Trust.pdf)>

*Airbus Industrie GIE v Patel and Others* [1998] UKHL 12

*Airey v Ireland* (1979) applicatio

*AK Investment CJSC (Appellant) v Kyrgyz Mobil Tel Limited and Others (Respondents)* [2011] UKP

*Amin Rasheed Shipping Corp v Kuwait Insuranc* [1984] AC 50

*ASHINGDANE v THE UNITED KINGDOM*, application no 8225/78 (ECHtR 28 May 1985)

*AVOTIŅŠ v LATVIA, App no17502/07 2016*

*Barclays Bank Plc v Ente Nazionale Di Previdenza Ed Assistenza Dei Medici E Degli Odontoiatri (2016) EWCA Civ 1*

*Beaumartin v France, application no 15287/89 (ECHtR 24 November 1994)*

*Beer v Austria (2001) applicatio*

*BOSPHORUS HAVA YOLLARI TURİZM VE TİCARET ANONİM ŞİRKETİ v IRELAND Application no 45036/98)*

*Buchholz V Germany, application no 7759/77 (ECHtR 6 May 1981)*

*C- 279/09 DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland (2010) I-13849*

*C- 292/08 German Graphics Graphische Maschinen GmbH v Alice van der Schee*

*c- 38/98, Régie nationale des usines Renault SA v Maxicar SpA and Orazio Formento 2000*

*C- 506/04, Graham J Wilson v Ordre des avocats du barreau de Luxembourg*

*c-111/09 Česká podnikatelská pojišťovna as, Vienna Insurance Group v Michal Bilas*

*C-112/00 Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*

*C-116/02, Erich Gasser GmbH v MISAT Srl*

*C-129/92, Owens Bank Ltd v Fulvio Bracco and Bracco Industria Chimica SpA*

*C-14/07, Ingenieurbüro Michael Weiss und Partner GbR v Industrie- und Handelskammer Berlin, ECR I-03367 2008*

*c-144/86, Gubisch Maschinenfabrik KG v Giulio Palumbo,*

*C-145/86, Horst Ludwig Martin Hoffmann v Adelheid Krieg*

*C-157/12 Salzgitter Mannesmann Handel GmbH v SC Laminorul SA*

*C-159/02 Gregory Paul Turner v Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA*

*C-173/16 MH v MH*

*C-192/18 European Commission v Republic of Poland (2019) ECLI:EU:C:*

*C-213/89, The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and Others,*

*C-255/02, Halifax plc, Leeds Permanent Development Services Ltd, County Wide Property Investments Ltd, v Commissioners of Customs & Excise*

*c-283/05, ASML Netherlands BV v Semiconductor Industry Services GmbH, ECLI:EU:C:2006:787*

*C-284/16 Slowakische Republik v Achmea BV*

*C-292/97 Kjell Karlsson and Others*

*C-299/95 Friedrich Kremzow v Republik Österreich*

*C-305/88 Isabelle Lancracy SA v Peters und Sickert KG ecli:EU:C:1990:275[1990]*

*C-321/05, Hans Markus Kofoed v Skatteministeriet,*

*C-325/11, Krystyna Alder and Ewald Alder v Sabina Orłowska and Czesław Orłowski*  
2012

*C-352/89, Overseas Union Insurance Ltd and Deutsche Ruck UK Reinsurance Ltd and Pine Top Insurance Company Ltd v New Hampshire*

*C-367/96, Alexandros Kefalas and Others v Elliniko Dimosio (Greek State) and Organismos Oikonomikis Anasygkrotisis Epicheiriseon AE (OAE)*

*C-384/14 Alta Realitat SL v Erlock Film ApS and Ulrich Thomsen ECLI:EU:C:2016:316*

*c-398/92 Mund & Fester V Hatrex internationaal Transport ECR I-00467*

*C-402/05 P and C-415/05 P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*

*C-414/92 Solo Kleinmotoren GmbH v Emilio Boch*

*C-420/07 Meletis Apostolides v David Charles Orams and Linda Elizabeth Orams,*  
2009 I-03571 (2009) 2009

*C-432/05 Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern (2007)*  
I-02271

*c-438/12 Iremengard Weber v Mechthilde Weber*

*c-452/12, Nipponkoa Insurance Co (Europe) Ltd v Inter-Zuid Transport*

*C-491/10 PPU Joseba Andoni Aguirre Zarraga v Simone Pelz*

*C-519/13 ,Alpha Bank Cyprus Ltd v Dau Si Senh and Others, 2015*

*C-519/13 Alpha Bank Cyprus Ltd v Dau Si Senh and Others, ECLI:EU:C:2015:603*

*C-536/13, Gazprom" OAO v Lietuvos Respublika*

*C-583/11 P Inuit Tapiriit Kanatami and Others v Parliament and Council*

*c-7/98 Dieter Krombach v André Bamberski*

*C-70/15, Emmanuel Lebek v Janusz Domino (2016) ECLI:EU:C:*

*C-399/11 Stefano Melloni v Ministerio Fiscal ECLI:EU:C:2013:107*

*C-456/11, Gothaer Allgemeine Versicherung AG and Others v Samskip GmbH*

*C-619/10 Trade Agency Ltd v Seramico Investments Ltd*

*C-619/18 European Commission v Republic of Poland*

*C-64/16 Associação Sindical dos Juizes Portugueses v Tribunal de Contas*

*C 199/11 Europese Gemeenschap v Otis NV and Other, (2012) ECLI:EU:C:*

*C 456/11, Gothaer Allgemeine Versicherung AG and Others v Samskip GmbH, ECLI:EU:C:2012:719*

*C 533/08, TNT Express Nederland BV v AXA Versicherung AG*

*C 791/19 European Commission v Republic of Poland*

*Case 11-70 Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel (1970) ECLI:EU:C:*

*Case 120/78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*

*Case 129/83 Siegfried Zelger v Sebastiano Salinitri*

*Case 14/83 Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*

*Case 29-69 Erich Stauder v City of Ulm ECLI:EU:C:1969:57*

*Case 294/83 Parti écologiste 'Les Verts' v European Parliament*

*Case 4-73 J Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*

*Case 46-76 W J G Bauhuis v The Netherlands State*

*Case C-185/07 Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc*

*Case C-195/08 PPU Inga Rinau*

*Case C-211/10 PPU Doris Povse v Mauro Alpago*

*Case C-216/18 PPU LM*

*Case C-281/02 Andrew Owusu v N B Jackson ECR I-01383*

*Case C-354/15, Andrew Marcus Henderson v Novo Banco SA ECLI:EU:C:2017:157*

*Case c-4/14 Christophe Bohez v Ingrid Wiertz , ECLI:EU:C:2015:563*

*Case C-406/92 The owners of the cargo lately laden on board the ship 'Tatry' v the owners of the ship 'Maciej Rataj'*

*Case C-496/99 P Commission of the European Communities v CAS Succhi di Frutta SpA*

*Case C-94 The Queen v Ministry of Agriculture, Fisheries and Food, ex parte: Hedley Lomas (Ireland) Ltd*

*Case C-438/12, Irmengard Weber v Mechthilde Weber*

*Case Opinion 2/13, Draft international agreement — Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms — Compatibility of the draft agreement with the EU and FEU Treaties*

*CC v NC [2014] EWHC 703 (Fam)*

*COCCHIARELLA v ITALY, application no 64886/01 (ECHtR 29 March 2006 )*

*Comingersoll SA v Portugal, application no 35382/97 (ECHtR 6 April 2000)*

*Continental Bank NA v Aeakos Compania Naviera SA* [1994] 1 WLR 588

*De Dampierre v De Dampierre* [1988] AC 92

*Deripaska v Cherney* [2009] EWCA Civ 849

*Deweer v Belgium*, 2 EHRR 439

*Diennet v France*

*Dombo Beheer BV v the Netherlands* (1993) applicatio

*Donohue v Armco Inc and Others* [2001] UKHL 64

*Dr Richard Barry Smith v Xavier Huertas* (2015) EWHC 3745

*Fischer V Austria*, application no 16922/90

*García Ruiz v Spain*, application no 30544/96

*Golder V The United Kingdom*, (1975) Series A n

*H v France*, application no 10073/82 (ECHtR 24 October 1989)

*H v The United Kingdom*, application no 9580/81 (ECHtR 8 July 1987)

*Hadjianastassiou v Greece*, application no 12945/87

*Håkansson And Stuesson v Sweden*

*Harrods (Buenos Aires) Ltd (No2), Re* [1992] Ch 72

*Heele v Finland*

*Hilton v Guyot*, 159 US 113 (1895) 159 U.S. 1

*Hokkanen V Finland*, application no19823/92 (ECHtR 23 September 1994)

*HOLMAN V JOHNSON*, (1775) 1 Cowper 341 (1775) 1 C

*Hudáková and Others v Slovakia*, application

*In the matter of “The Alexandros T” In the matter of “The Alexandros T” (No 2) In the matter of “The Alexandros T” (No 3)* [2013] [2013] UKSC 70

*In the matter of “The Alexandros T” In the matter of “The Alexandros T” (No 2) In the matter of “The Alexandros T” (No 3)*

*Interdesco SA v Nullifire Limited* (1992) I.L.Pr. 97

*Joined cases 46/87 and 227/88 Hoechst v Commission*

*Joined Cases C-341/06 P and C-342/06 Chronopost SA and La Poste v Union française de l’express (UFEX) and Others*

*Joined Cases C-404/15 and C-659/15 PPU Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*

*Joined cases C-411/10 and C-493/10 NS v Secretary of State for the Home Department and M E and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*[2011] I-13905

*Joined Cases C-585/18, C-624/18 and C-625/18 A K and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy*

*Joined cases C-89/10 and C-96/10 Q-Beef NV (C-89/10) v Belgische Staat and Frans Bosschaert (C-96/10) v Belgische Staat, Vleesgroothandel Georges Goossens en Zonen NV and Slachthuizen Goossens NV, ECR I-07819*

*Katte Klitsche de la Grange v Italy, application no 12539/86 (ECHtR 27 October 1994*

*Kolden Holdings Limited v Rodette Commerce Limited and Taplow Ventures Limited (2008) [2008] EWC*

*Krčmář and Others v The Czech Republic (2000) applicatio*

*Kreuz v Poland, application no 28249/95(ECHtR 19 June 2001)*

*Kutic v Croatia (2002) 48778/99*

*Lubbe and others v Cape Plc, [2000] 1 WLR 1545*

*Lungowe & Ors v Vedanta Resources Plc & Anor [2017] EWCA Civ 1528*

*Lungowe and others v Vedanta Resources plc and another 1528, [2017] EWCA Civ 3575, [2018] 1 WLR 1528, [201*

*MacShannon v Rockware Glass Ltd [1978] AC 795*

*McHenry v Lewis[1882] 22 ChD 397*

*Micallef v Malta, application no 17056/06,*

*MICHAUD v FRANCE,application no 12323/11 (2012) 2012*

*Nori Holding Ltd & Ors v Public Joint-Stock Company ‘Bank Otkritie Financial Corporation’ (2018) EWHC 1343*

*Opinion 1/03 Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments, in civil and commercial matters, ECR I-01145*

*Opinion 2/94 Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*

*OT Africa Line Ltd v Magic Sportswear Corporation & Ors [2005] EWCA Civ 710*

*Owners of the Atlantic Star v Owners of the Bona Spes (The Atlantic Star and The Bona Spes) [1973] 2 WLR 795*

*Owners of the Las Mercedes v Owners of the Abidin Daver [1984] 2 WLR 196*

*Pacific International Sports Clubs Limited v Igor Surkis & Ors [2010] EWCA Civ 753*

*Patrick Sim v Henry Robinow (1892) 19 R 665*

*Pellegrini v Italy,application no ECHtR 30882/96*

*Pescador Valero v Spain, application no 62435 (ECHtR 24 June 2003)*

*Poiss v Austria, application no 9816/82 (ECHtR 23 April 1987)*

*Robins v The United Kingdom, application no 22410/93 (ECHtR 23 September 1997)*

*SK Slavia Praha-Fotbal AS V Debt Collect London Limited Enic Group* [2010] EWC

*Scordino v Italy (No 1), application no 36813/97 (ECHtR 29 March 2006)*

*See c-150/80, Elefanten Schuh GmbH v Pierre Jacqmain*

*Societe du Gaz de Paris v Armateurs francais Societe du Gaz de Paris v SA de Navigation les Armateurs Francais* [1926] SC (HL) 13

*Societe Nationale Industrielle Aerospatiale (SNIA) v Lee Kui Jak* [1987] AC 871

*Sokurenko and Strygun v Ukraine (applications nos 29458/04 and 29465/04)*

*Spiliada Maritime Corporation v Cansulex Limited*

*St Pierre v South American Stores (Garth & Chaves) Ltd* [1936] 1 KB 382

*Star Reefers Pool Inc v JFC Group Co Ltd* [2012] EWCA Civ 14

*Stribog Ltd v FKI Engineering Ltd: CA*

*Sürmeli V Germany ,application no 75529/01 (ECHtR 8 June 2006)*

*Turner vGrovit and others* (2001) UKHL 65

*Turner v Grovit and Others* [2000] QB 345

*UBS AG, LONDON BRANCH UBS GLOBAL ASSET MANAGEMENT (UK) LIMITED v KOMMUNALE WASSERWERKE LEIPZIG GMBH* (2010) [2010] EWH

*Unión Alimentaria Sanders SA V Spain, application no 11681/85 (ECHtR 7 July 1989)*

*Van De Hurk v The Netherlands, application no 16034/90*

*Vedanta Resources PLC & Anor v Lungowe & Ors* [2019] UKSC 20

*Voth v Manildra Flour Mills Pty Ltd* 1990 171 C

Commission T, Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 1999

TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY and ANNEXES I-III 1951

Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 79, 21.3.2013, 2013

Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 16.11.2005, OJ L 299

Brussels Convention as amended by article 8 of the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic

Brussels Convention as amended by the Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland - and by the Convention of 26 May 1989 on the accession of the Kingdom of S

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION (2000/C 364/01)

Consolidated Version of the Treaty on European Union [2008] OJ C115/13

Consolidated version of the Treaty on the Functioning of the European Union  
PROTOCOL (No 21) ON THE POSITION OF THE UNITED KINGDOM AND IRELAND  
IN RESPECT OF THE AREA OF FREEDOM, SECURITY AND JUSTICE, OJ C 202  
2016 295

Consolidated version of the treaty on the Functioning on the European Union(TFEU)  
[2008] OJ C115/13

Convention on jurisdiction and the recognition and enforcement of judgments in civil  
and commercial matters OJ L 339, 21.12.2007, p. 3–41

Council Decision of 4 December 2014 on the approval, on behalf of the European  
Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements 2014  
OJ L 353

Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the  
recognition and enforcement of judgments in matrimonial matters and in matters of  
parental responsibility for children of both spouses [2000] OJ L 160 2000

Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member  
States of judicial and extrajudicial documents in civil or commercial matters, OJ L 160,  
2000

Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition  
and enforcement of decisions in matrimonial matters and the matters of parental  
responsibility, and on international child abduction, OJ L 178, 2.7.2019

Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13  
November 2007 on the service in the Member States of judicial and extrajudicial  
documents in civil or commercial matters (service of documents), and repealing  
Council Regulat

Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12  
December 2012 on jurisdiction and the recognition and enforcement of judgments in  
civil and commercial matters 2012 1

Senior Courts Act 1981 c.54

The Convention of 2 July 2019 on the Recognition and Enforcement of Foreign  
Judgments in Civil or Commercial Matters

The Hague Convention on Choice of Court Agreements 2005

Treaty Of Amsterdam Amending The Treaty On European Union, The Treaties  
Establishing The European Communities And Certain Related Acts 1997. 1997

Treaty on European Union, as signed in Maastricht on 7 February 1992