

Cross-border disputes

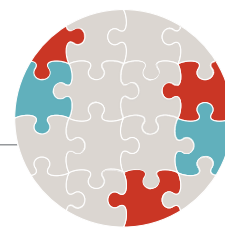
Forum/jurisdiction and parallel proceedings

International interim/protective relief

English Judge decides that EU rules oblige him to hear claim against UK-domiciled Defendant despite Saudi jurisdiction agreement (but he discharges worldwide freezing order)

A. Summary

1. The Judgment in *Gulf International Bank BSC v Sheik Badr Fahad Ibrahim Aldwood* [2019] EWHC 1666 (QB) concerned a claim brought in the English Courts by a Bahrain bank (with branch in Saudi Arabia) against a Saudi citizen who, following the imminent failure of Saudi companies whose debts he had personally guaranteed, had recently moved to the UK. The Judge made two principal decisions.
2. First, he ruled that, despite the existence of a choice of Court agreement in favour of a non- EU/ Lugano country (the Kingdom of Saudi Arabia):
 - the English Courts nevertheless had jurisdiction in respect of the substantive claim because the Defendant was domiciled in the UK; and
 - as a consequence, pursuant to the application of the EU principle in *Owusu v Jackson* following the recasting of the Brussels I Regulation, the English Courts were unable to decline to hear that claim or stay the proceedings.
3. Secondly, the Judge discharged the English worldwide freezing order which the Claimant had previously obtained against the Defendant on a “without notice” basis in support of the English proceedings. That was because the Defendant’s behaviour, whilst being less than admirable, nonetheless provided insufficient evidence of a real risk of dissipation, or unjustified dealing, of assets.
4. Crucially in relation to the jurisdiction issue, the Judge said that he could not have declined to hear the claim or stayed the proceedings even if the Saudi jurisdiction clause was exclusive. It is this view which may spark controversy amongst global lawyers.



5. If correct, it would mean that where civil or commercial proceedings against an EU/Lugano- domiciled Defendant are commenced first in the Courts of an EU/Lugano country (i.e. an EU Member State or Iceland, Switzerland or Norway), such Courts will not, and indeed cannot, honour an exclusive choice of Court agreement in favour of a non- EU/Lugano country by declining jurisdiction or staying their proceedings unless (in the case of the Courts of an EU Member State) the non- EU/Lugano country selected by the parties is, like the EU, bound by the Hague Convention on Choice of Court Agreements of 2005 and that Convention applies in the circumstances. Only Mexico, Montenegro and Singapore are currently so bound. Although China, Ukraine and the USA have also signed that Convention, it is not yet in force in those countries.
6. Whilst the Judge's view is aligned with the EU principles of certainty, predictability and uniformity when addressing issues of jurisdiction, and whilst his reasoning on the basis of the terms of the recast version of the Brussels I Regulation ("**Recast Brussels I**")¹ is persuasive, some will argue that the application of his views would:
 - run contrary to a number of English and EU authorities (albeit in relation to the position prior to the recasting of the Brussels I Regulation), and the views of a number of renowned commentators;
 - undermine the principle that party autonomy is (save in limited circumstances) to be respected where parties have agreed that their disputes will be resolved exclusively by the Courts of a particular country;
 - in other ways run contrary to the spirit of the Brussels/Lugano regime which, for the purposes of allocating jurisdiction (albeit as between EU/Lugano countries), had created a hierarchy of the factors connecting a dispute to each that elevated the status of an exclusive jurisdiction clause above other factors such as domicile;
 - implicitly serve to condone conduct that would amount to a contractual breach of a jurisdiction agreement and, if an anti-suit injunction were obtained from the other Court, a breach of a foreign Court Order;
 - create a tension with the Hague Convention on Choice of Court Agreements of 2005 (the "**2005 Hague Convention**") (by which the EU is bound) in view of the polar opposite approach to be taken under its terms such that exclusive jurisdiction clauses in favour of the courts of contracting non-EU countries² are generally respected;
 - mark a further erosion of the UK Courts' inherent discretionary powers (subject to the effect of Brexit);
 - frequently result in parallel proceedings in the Courts of the non- EU/Lugano country that were contractually agreed upon by the parties (which might include damages claims for breach of the exclusive jurisdiction clause and/or claims for anti-suit injunctions), and increase the risk of conflicting judgments; and
 - cause a number of other practical difficulties associated with international recognition and enforcement worldwide.

¹ Regulation (EU) No. 1215/2013 on jurisdiction and the recognition and enforcement of judgment in civil and commercial matters.

² In addition to the EU, the contracting states to the 2005 Hague Convention (i.e. those bound by it) are currently Mexico, Montenegro and Singapore. The 2005 Hague Convention has also been signed by, although it is not yet in force in (or, thus, in respect of), China, Ukraine and the USA.



7. As it happened, the Judge subsequently found the jurisdiction clause in this case to be non-exclusive in any event - in that its terms did not prevent the bank from suing in the Courts of a country outside of Saudi Arabia.
8. However, since that was only a secondary reason for his decision and as this is the first case on these issues since the Brussels I Regulation was recast, the Judge's view (pending Brexit and the related negotiations) may well be followed by other High Court Judges unless they are convinced that it is wrong, or unless and until a higher UK Court or the Court of Justice of the EU overrules that view, or the Regulation itself is further recast.

B. The basis of jurisdiction in *Gulf International* and the potential effect of *Owusu*³

9. On the basis of the express wording of the Recast Brussels I, the English Courts had jurisdiction to hear the claim in *Gulf International* under Article 4 because the Defendant was domiciled in England.
10. Further, if the English Courts did have jurisdiction on that basis and the principle in *Owusu*⁴ applied, the English Courts could not stay the proceedings on the basis that the Saudi Courts were clearly and distinctly the more appropriate forum.
11. However, a question of law nevertheless arose in this case as to whether, if the jurisdiction clause in favour of Saudi Arabia was exclusive, the English Courts were either obliged to decline jurisdiction, or (despite *Owusu*) entitled to stay the English proceedings, in favour of the Courts of Saudi Arabia (a non- EU/Lugano country).
12. That depended upon whether, in those circumstances, "reflexive effect" should/could be given to the hierarchical rules in the Brussels/Lugano regimes which, on their face, only served to allocate jurisdiction as between the Courts of two or more EU/Lugano countries that had connections with a dispute, rather than as between the Courts of an EU/Lugano country and the Courts of a non- EU/Lugano country.
13. This legal issue, and the history of how it arose, can be summarised as follows.

C. The EU/Lugano regimes, *Owusu* and the "reflexive effect" issues – a summary

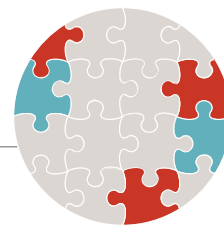
14. Initially, the Brussels/Lugano regimes⁵ established the rules to be applied for:
 - determining whether the Courts of EU/Lugano countries⁶ in principle had jurisdiction in respect of a dispute; and
 - allocating jurisdiction as between EU/Lugano countries where there were factors connecting the dispute to more than one such country.

³ *Owusu v Jackson (t/a Villa Holidays Bal Inn Villas)* (C-281/02); [2005] Q.B. 801, ECJ.

⁴ The *Owusu* principle is explained in more detail in paragraphs 17-18 and 20-21 below.

⁵ I.e. the regimes originally established by the Brussels Convention of 1968 (later the Brussels I Regulation (EC) No 44/2001 in its original and recast form) by which EU Member States are bound, and the Lugano Convention of 1988 (later the Lugano Convention of 2007) by which EU Member States and also Iceland, Norway and Switzerland are bound.

⁶ I.e. EU Member States and Iceland, Norway and Switzerland.



15. For the purposes of allocation as between EU/Lugano countries, the rules provided that certain connecting factors sometimes “trumped” others – for example:
- an exclusive jurisdiction clause in favour of one EU/Lugano country would ordinarily “trump” most other factors, such as the EU/Lugano country of domicile of the Defendant⁷; and
 - if the claim was of a nature such that exclusive jurisdiction was automatically allocated to a particular EU/Lugano country (for example if the proceedings had as their object, or were primarily concerned with:
 - » rights *in rem* in immovable property in that country;
 - » the validity of the constitution, the nullity or the dissolution of companies seated in that country or the validity of decisions of their organs;
 - » the validity of entries in public registers in that country;
 - » the registration or validity of certain intellectual property rights required to be deposited or registered in that country),then that would “trump” all other connecting factors⁸ (even an exclusive jurisdiction clause)⁹.
16. Where the respective factors connecting the dispute to more than one EU/Lugano country were of equal standing however (such as the country of domicile of the Defendant on the one hand¹⁰, and the place of performance of a contract or (in a tortious claim) the place of action/omission or damage¹¹ on the other), jurisdiction as between those EU/Lugano countries was resolved in favour of the country in which proceedings were commenced first¹².
17. Prior to the decision of the ECJ in *Owusu*, it was considered by most in England that the Brussels/Lugano regime did not affect the allocation of jurisdiction as between an EU/Lugano country on the one hand, and a non- EU/Lugano country¹³ on the other, and that the English Courts thus retained their (common law) discretion to decline jurisdiction or stay their proceedings in favour of a non- EU/Lugano country if they considered that country was the more appropriate forum.
18. In *Owusu* however, the European Court of Justice (“**ECJ**”)¹⁴ made clear that, in the interests of certainty on jurisdiction issues, such a discretion no longer existed where the Defendant was domiciled in an EU (or Lugano) country. The same principle was subsequently applied where any of the Brussels/Lugano factors connecting the dispute to an EU/Lugano country was present so as to allocate jurisdiction to the Courts of that country under the Brussels/Lugano regime¹⁵.

7 Now Article 25 of Recast Brussels I, and Article 23 of the 2007 Lugano Convention.

8 Now Articles 24 and 27 of Recast Brussels I and Articles 22 and 25 of the 2007 Lugano Convention.

9 See Article 25(4) of Recast Brussels I and Article 23(5) of the 2007 Lugano Convention.

10 Now Article 4 of Recast Brussels I and Article 2 of the 2007 Lugano Convention.

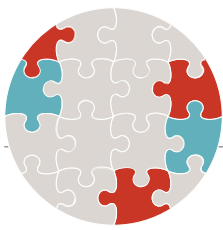
11 Now Article 7 of Recast Brussels I and Article 5 of the 2007 Lugano Convention.

12 Now Articles 29-32 of Recast Brussels I and Articles 27-30 of the 2007 Lugano Conventions.

13 I.e. a country other than EU Member States and Iceland, Norway and Switzerland.

14 Now the “Court of Justice of the EU”.

15 See, e.g. *Gomez v Gomez-Monche Vives* [2008] EWHC 259 (Ch).



19. However, that decision still left certain issues unresolved. In particular, what was the position where:

- there was a factor connecting the dispute to a non- EU/Lugano country which, had it pointed instead to an EU/Lugano country, would (under the Brussels/Lugano rules) have “trumped” the factor connecting the dispute to EU/Lugano country in which the proceedings were commenced (such as the country domicile of the Defendant); or
- there were prior equivalent or related proceedings pending in the Courts of a non- EU/Lugano country?

Must, or may, the Courts of an EU/Lugano State in which claims are brought in such circumstances decline to hear the dispute or stay their proceedings (as they would be obliged, or have a discretion, to do in favour of another EU/Lugano country), or must they instead hear the claim (on the basis of *Owusu*) despite the existence of such circumstances?

20. In *Owusu*, two questions had been referred to the ECJ:

- first, whether it was inconsistent with the Brussels regime for the Courts of EU countries to exercise a discretionary power, under their national law, to decline to hear proceedings brought against an EU-domiciled Defendant in favour of a non- EU country; and
- secondly, if so, whether that was the case in all circumstances or only in some and, if the latter, then which.

21. The second question was asked in order to provide an opportunity to highlight the potential difficulties which could arise in certain circumstances if a positive answer were given to the first question, and also to encourage the ECJ (if so) to give a more expansive answer that also addressed the question of what should happen in the difficult circumstances so highlighted. Unfortunately, the ECJ declined to address these additional circumstances, on the basis that they did not in fact arise in *Owusu* itself.

22. After the *Owusu* decision, the generally accepted view in England however (at least prior to the re-casting of the Brussels I Regulation) was that the rules allocating jurisdiction as between EU/Lugano countries could be given “reflexive effect” - such that they, in effect, also operated so as to either oblige, or entitle, the Courts of an EU/Lugano country to decline jurisdiction, or stay their proceedings, in favour of the Courts of the non- EU/Lugano country¹⁶.

¹⁶ As regards the first issue in paragraph 19 above, see *Winnetka Trading Corp v Julius Baer International Ltd and anor* [2008] EWHC 3146 (Ch) and *Plaza BV v The Law Debenture Trust Corporation PLC* [2015] EWHC 43 (Ch) in which claims against English-domiciled companies were stayed because of the existence of a Guernsey jurisdiction clause, and a jurisdiction clause in favour of the Courts of Western Australia respectively. Further, in *Ferrexpo AG v Gilson Investments Ltd and ors* [2012] EWHC 3146 (Ch), a stay of English proceedings was granted on the basis that the proceedings had as their object the validity of the resolutions of an organ of a Ukraine company.

As regards the second issue in paragraph 19 above, an Irish Court made a reference for a preliminary ruling in *Goshawk Dedicated Ltd v Life Receivables Ireland Ltd* [2009] IESC 7, but the case settled before the reference proceeded. Whilst in *Catalyst Investment Group Ltd v Lewinsohn* [2009] EWHC 1964, the Court considered itself powerless to stay its proceedings where there were prior proceedings involving the same parties and the same cause of action in a non- EU/Lugano country, in *Ferrexpo* the Judge stated *obiter* that he would also have stayed the proceedings on the basis that there were prior related proceedings in such a country.



23. When the Brussels I Regulation was recast, the second issue highlighted in paragraph 19 above (namely circumstances in which there were prior equivalent or related proceedings pending in a non– EU/Lugano country) was addressed by means of the insertion of new express rules creating a discretion to stay proceedings in those circumstances in certain instances¹⁷. The first issue however, regarding the existence of “trump” factors connecting a claim to a non- EU/Lugano country, was not addressed.
24. Consequently, following the re-casting of the Brussels I Regulation it remained unclear what the obligations/abilities of the English Courts were where:
- there was an exclusive jurisdiction clause in favour of a non- EU/Lugano country; or
 - the claim was of a nature connecting the dispute with a non- EU/Lugano country which, had its nature instead connected the dispute to another EU/Lugano country, would have caused exclusive jurisdiction to have been allocated that other EU/Lugano country¹⁸.
25. It was the first of these scenarios (the “**exclusive jurisdiction clause scenario**”) which arose and was addressed by the Judge when he considered the jurisdiction challenge in the case at hand. The second scenario (the “**nature of claim scenario**”) did not arise.

D. The worldwide freezing order in *Gulf International*

26. In *Gulf International*, the Claimant bank had not only commenced the substantive English proceedings (which were the subject of the jurisdiction challenge) when the Defendant left Saudi Arabia for England. In addition, it had applied to the English Court on a “without notice” basis, and obtained, an interim worldwide freezing order in support of, and pending the outcome of, those English proceedings.
27. The question of whether that worldwide freezing order should be revoked or continued also fell to be determined by the Judge.

E. The issues for the Judge

28. In essence, the issues for determination for the Judge were therefore the following:
- Was the Saudi jurisdiction clause exclusive – such that, under its terms, the Claimant bank was not permitted to commence proceedings in any Court outside of Saudi Arabia?
 - If the clause was exclusive:
 - » did the English Courts nevertheless have jurisdiction to hear the claim under Recast Brussels I, or were they obliged to set aside the claim form and declare that they had no jurisdiction?
 - » if the English Courts did have jurisdiction, could/should they stay the proceedings in favour of the Saudi Courts?
 - Should the worldwide freezing order be continued or discharged?

¹⁷ Articles 33-34 of Recast Brussels I.

¹⁸ See the second main bullet point in paragraph 15 above.



F. The decision of the Judge

The jurisdiction issues

29. The Judge (John Kimbell QC, sitting as a Deputy High Court Judge) took a slightly different approach to the jurisdiction issues identified above, electing to:
- first, consider whether the English Courts were obliged to set aside the claim form and declare that they had no jurisdiction;
 - secondly, consider whether the English Courts instead had a discretionary ability, under their national rules, to stay the proceedings on the basis that the Saudi Courts were clearly and distinctly the more appropriate forum; and
 - thirdly, consider whether any such discretion should be exercised (and, as part of that consider whether the jurisdiction clause was exclusive or non-exclusive, which the parties had agreed was an “important factor” in the exercise of any discretion).

The first point: assertion of no jurisdiction

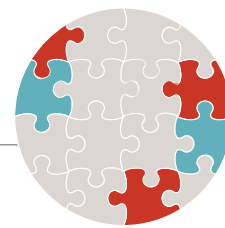
30. In this regard, the Judge simply noted that the Defendant did not pursue the first challenge at the hearing and said that it was right not to do so since jurisdiction was established under Recast Brussels I.

The second point: existence of discretion to stay

31. In this respect, the Judge decided that no such discretion to stay existed.
32. He first noted the following general principles underpinning Recast Brussels I:
- the Regulation should be interpreted to promote legal certainty, predictability and uniformity;
 - rules of national procedure must not undermine the Regulation;
 - exceptions are to be construed narrowly;
 - continuity as between incarnations of the Regulation.
33. The Judge viewed Article 4(1) of Recast Brussels I, which states: “*Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State*” as mandatory, save to the extent it could be departed from under the terms of the Regulation. He found that there were no such terms applicable in the case at hand.
34. Importantly, as part of that determination, he noted that when the Brussels I Regulation had been recast, a discretionary ability, on the part of the Courts of an EU Member State whose jurisdiction was founded on certain provisions of that Regulation (such as domicile), had specifically been introduced to stay its proceedings, but only where there were prior equivalent or related proceedings pending in a non-EU country¹⁹. He further noted that one of the considerations, when considering whether to exercise that discretion, was whether the non-EU country would have exclusive jurisdiction were it an EU Member State²⁰.

¹⁹ Articles 33-34 of Recast Brussels I.

²⁰ Recital (24) of Recast Brussels I.



35. He further considered that, to allow a wider parallel domestic discretionary power to be exercised alongside that new express discretion would undermine the effectiveness of Recast Brussels I by permitting stays in a wider set of circumstances than envisaged by the terms of the Regulation itself, and also contradict the principle of interpreting exceptions to jurisdiction based on Article 4(1) restrictively.
36. The Judge also considered that *Owusu* had been clear in excluding the possibility of any discretionary stay in favour of a non- EU/Lugano country under national rules. He said that, contrary to the principles of Recast Brussels I, it would create widespread unpredictability and inconsistency if EU Member States could, despite Article 4, exercise a discretion to stay proceedings under their own national law whose content would vary from one EU Member State to another. Importantly, he considered that to be the case even if those local rules were applied in such a way as to be consistent with the broad aims of Recast Brussels I.
37. The Judge noted that respect for party autonomy (to agree choice of Court clauses) was also one of the principles of Recast Brussels I, but he said that was limited by the terms of the Regulation itself which qualified that principle²¹.
38. The Judge also said that, whilst the Judges in a number of English cases (and also a number of commentators) had taken the opposite view to him in relation to these issues:
- some had based their view upon what he considered to be a mistaken interpretation of comments made by the ECJ in a case called *Coreck Maritime GmbH v Handelsveem BV*²² and the Schlosser Report which it had referenced;
 - the English cases in question were decided in the context of the pre-recast Brussels I Regulation, and that recasting had included the change identified above²³; and
 - recent comments by the Court of Appeal and the Supreme Court in the *Vedanta* case²⁴ had re-enforced the mandatory nature of jurisdiction based on a Defendant's domicile, subject only to the provisions of the Regulation itself.
39. The Judge also noted that the terms of the 2005 Hague Convention sometimes obliged the Courts of a contracting country (including EU Member States such as the UK) to stay their proceedings in favour of the Courts of another (non- EU/Lugano) contracting country where the parties had agreed that the latter was to have exclusive jurisdiction²⁵. He addressed that point, however, by simply saying that, although the UK was (as an EU Member State) a contracting country, the Kingdom of Saudi Arabia was not, so the issue did not arise in this case.

21 Recital (19) of Recast Brussels I.

22 (C-387/98); [2000] ECR I-9337.

23 Note that, although the Judge's decision (that the Courts of an EU country could not decline to hear or stay proceedings against an EU-domiciled Defendant on the basis of an exclusive non- EU/Lugano jurisdiction clause) concerned the position under Recast Brussels I, much of his logic (including that regarding the need for continuity as between incarnations of the Regulations/Conventions) appears to suggest that he considered that the equivalent would also apply in respect of proceedings commenced in the Courts of EU/Lugano countries against a Lugano-domiciled Defendant under the pre-recast wording of the 2007 Lugano Convention (although that would run contrary to prior English authorities in respect of the pre-recast wording).

24 *Lungowe and Ors v Vedanta Resources Plc and Anor* [2017] EWCA Civ 1528; *Vedanta v Resources Plc and Anor v Lungowe and Ors* [2019] UKSC 20.

25 Article 6 of the 2005 Hague Convention.



The third point: exercise of any discretion to stay

40. On this point, the Judge decided that the jurisdiction clause in this case was in fact non-exclusive – in that its terms did not prevent the Claimant bank from suing in the Courts of a country outside of the Kingdom of Saudi Arabia.
41. However, the Judge did say that, had the Saudi jurisdiction clause been exclusive, then he would have stayed the proceedings in favour of the Courts of Saudi Arabia if, contrary to his view, a discretion to do so had been available to him under Recast Brussels I.

The worldwide freezing order

42. Having determined that the English Courts had jurisdiction to hear the substantive claim and could not/ should not stay its proceedings, the Judge however discharged the English worldwide freezing order. That was on the basis that the evidence of the Claimant bank fell a long way short of meeting the requisite threshold for obtaining and continuing such an order.
43. The Judge said that whilst it was “*not exactly admirable behaviour*” for the Defendant to “*simply leave a country when a company whose debts [he had] guaranteed [was] about to fail*”, such behaviour was not dishonest and did not:

“come anywhere near to the sort of evidence from which it would be reasonable for the court to infer that [the Defendant] was seeking to dissipate his assets then, still less that there is a real risk of dissipation / unjustified dealing now”.
44. The freezing order as a protective mechanism did not, he said, exist in order to “*punish individuals for not communicating as fully as might one expect with their creditors*”.

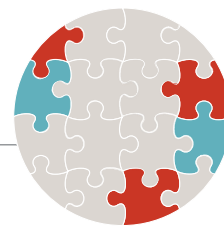
G. The effect of the decision and its practical and commercial implications

The jurisdiction issues

45. Had the Judge decided first that the Saudi jurisdiction clause was non-exclusive, any comments that he then made on the *Owusu* and “*reflexive effect*” issues under Recast Brussels I would have clearly been *obiter dicta* rather than binding precedent.
46. However, since his decision on the *Owusu* and “*reflexive effect*” issues were the primary basis in his Judgment for the outcome of the Defendant’s jurisdiction challenge, that might be viewed as a *ratio*²⁶ which, unless and until a higher UK Court or the Court of Justice of the EU overrules that view, or the Regulation itself is further recast, other English High Court Judges will follow²⁷ unless they are

²⁶ As regards the effect of the wording of Recast Brussels I (although probably not as regards the pre-recast wording of the 2007 Lugano Convention). Much could perhaps still be made, however, of the fact he did not need to make that decision, since he also found the jurisdiction clause to be non-exclusive. On that basis, his views could perhaps still be said to be *obiter*.

²⁷ Pending Brexit and the related negotiations.



convinced that it was wrong. This makes the decision an even more important one in circumstances in which it appears to be the first English Judgment which has addressed the issue on the basis of the recast version of the Brussels I Regulation²⁸.

47. Further, the Judgment itself will not be the subject of an appeal (or a reference to the Court of Justice of the EU) since permission has since been refused by the Court of Appeal (although that may have been because of the Judge's finding that the relevant jurisdiction clause was non-exclusive in any event).
48. If the Judge's view²⁹ is correct it would mean that, if the 2005 Hague Convention did not apply³⁰, then despite an exclusive jurisdiction agreement in favour of the Courts of a non- EU/Lugano country (such as the USA):
 - a UK-domiciled party could (at least pre-Brexit) always be sued³¹ in the UK Courts, or in the Courts of another EU/Lugano country if a relevant connecting factor could be established, and those Courts would be unable decline to hear that claim in favour of the Courts of the non- EU/Lugano country, unless there were prior equivalent or related proceedings pending there;
 - a party domiciled in any other EU/Lugano country could always be sued in the Courts of that country, or in the Courts of any other EU/Lugano country if a relevant connecting factor could be established, and those Courts would be unable decline to hear that claim in favour of the Courts of the non- EU/Lugano country, unless there were prior equivalent or related proceedings pending there.
49. Further, if similar logic to that of the Judge was applied, such inability to decline to hear proceedings would probably also apply to the "nature of claim scenario" (i.e. where a claim concerned rights *in rem* in immovable property in a non- EU/Lugano country, constitutional issues (as regards validity, nullity or dissolution) in respect of a non- EU/Lugano company, the validity of entries in public registers in a non- EU/Lugano country or the registration or validity of intellectual property rights deposited/ registered in a non- EU/Lugano country). However, it should be noted that the EU/Lugano rules

28 In *B.B. Energy (Gulf) DMCC v Amoudi and Ors* [2018] EWHC 2595 (Comm) at [23], the Judge said that, following the express introduction in Recast Brussels I of a discretion to stay where there are prior equivalent or related proceedings in the Courts of a non- EU/Lugano country (Articles 33-34 of Recast Brussels I), no (different) discretion to stay could exist on the basis of a "reflexive effect" argument made on the same basis. However, he did not express a view on the position under Recast Brussels I in the "exclusive jurisdiction clause scenario" or the "nature of claim scenario", which were not scenarios that were expressly addressed in the recast text.

In *UCP Plc v Nectrus Limited* [2018] EWHC 380 (Comm), the Judge noted that the discretion to stay where there are prior equivalent or related proceedings in the Courts of a non- EU country (under Articles 33-34 of Recast Brussels I) did not, unlike Articles 29-31 (which concerned the effect of the existence of prior equivalent or related proceedings in the Courts of another EU country) apply where the jurisdiction of the English Court was based on a non-exclusive jurisdiction clause in favour of England. Thus, the Judge was there again addressing a different point to the one at hand.

29 Including as regards his apparent view as to the effect of the pre-recast wording in the 2007 Lugano Convention.

30 For the 2005 Hague Convention to apply and instead oblige the Courts of EU Member States to honour an exclusive jurisdiction clause in favour of the Courts of a non- EU/Lugano country by declining jurisdiction or staying their proceedings, that Convention would have had to come into force in respect of the non- EU/Lugano country in question, and its terms would have to apply in the circumstances at hand (including by meeting the requirement that at least one of the parties was resident in a contracting state to the Hague Convention other than an EU Member State – see Article 26).

31 In relation to a dispute concerning a "civil and commercial matter" within the scope of the Brussels/Lugano regime.



allotting exclusive jurisdiction to the Courts of an EU/Lugano country in an equivalent scenario are even more powerful than those allotting exclusive jurisdiction to such a country by reason of an exclusive jurisdiction clause. Indeed, those rules not only “trump” an exclusive jurisdiction clause³² (and even submission to a different Court by a Defendant)³³, but they also impose a burden on a Court to decline jurisdiction of its own motion (i.e. regardless of whether the Defendant contests jurisdiction)³⁴. As such, a conclusion that such rules should not be “reflexively” applied in favour of non- EU/Lugano Courts would be an even bigger step.

50. Whilst it may be beneficial for non- EU/Lugano creditors such as banks, and for other non- EU/Lugano Claimants, to have the benefit of certainty that they can sue EU/Lugano-domiciled Defendants in the Courts of an EU/Lugano country without the risk of a successful jurisdiction challenge in favour of a non- EU/Lugano country, that may not be good news for EU/Lugano-domiciled parties. Further, suing such a Defendant in an “exclusive jurisdiction clause scenario” or a “nature of claim scenario” would frequently result in parallel proceedings in the Courts of the relevant non- EU/Lugano country (which might include a damages claim for breach of any exclusive jurisdiction clause and/or a claim for an anti-suit injunction), increase the risk of conflicting judgments, and create numerous international recognition and enforcement issues globally.
51. With that in mind, it is worth noting that some the Judge’s reasoning in his Judgment might be prone to attack in a future case - for example:
- the effect of the comments in the Schlosser report as referenced in *Coreck*;
 - the fact that the comments of the Court of Appeal and Supreme Court in *Vedanta* were not made in the context of, or specifically directed towards an “exclusive jurisdiction clause scenario” or a “nature of claim scenario”;
 - the fact that the focus of argument in *Gulf International* was on a discretionary ability to stay under national law, rather than an ability to decline jurisdiction or stay proceedings that was to be implied under EU law;
 - the fact that, despite the Judge’s ruling that there is no ability at all under Recast Brussels I for the Courts of EU Member States to decline jurisdiction or stay their proceedings in an “exclusive jurisdiction clause scenario”, where the exclusive jurisdiction clause in question is in favour of a country which is also bound by the 2005 Hague Convention³⁵ the Courts of EU Member States would not only have that ability, but be obliged to exercise it pursuant to the terms of that Convention³⁶;
 - the fact that the Judgment only addressed the “exclusive jurisdiction clause scenario” and did not address, or consider the impact of its reasoning upon, the “nature of claim scenario”.

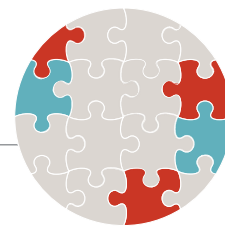
32 Article 25(4) of Recast Brussels I.

33 Article 26(1) of Recast Brussels I.

34 Article 27 of Recast Brussels I.

35 See footnote 2 above.

36 Bearing in mind Article 6 of the 2005 Hague Convention (save where the Convention did not apply, for example because of Article 16 or Article 26). The technical justification for this may lie in Article 67 and/or 71 of Recast Brussels I which limits its application where there contrary provisions in other instruments of the Union or conventions to which EU Member States are party. However, it would still be curious, in an “exclusive jurisdiction scenario”, for EU Member States to be compelled to take such a polar opposite approach (i.e. either being obliged to decline jurisdiction or stay its proceedings, or being obliged not to do so) depending upon whether or not the country selected by the parties was itself bound by the 2005 Hague Convention.



52. Further, such an attack might be bolstered by the fact that a number of respected commentators had, for a long time, been very strongly in favour of the “reflexive effect” approach. Indeed, in its 15th Edition, Dicey, Morris & Collins had said:

“the argument for giving “reflexive effect” to [the EU/Lugano provisions affording “exclusive jurisdiction” because of the nature of the claim and because of an exclusive jurisdiction clause], or to apply these provisions by analogy, is overwhelming”³⁷,

and the authors had arguably been of the view that such an approach was even more justifiable in an “exclusive jurisdiction clause scenario” or a “nature of claim scenario” than where there were prior equivalent or related proceedings pending in a non- EU/Lugano country.

53. All of that said however, the Judge’s reasoning on the express terms of the Recast Brussels I itself is persuasive. That is especially the case in view of the discretion that was introduced as part of that recasting (i.e. where there were prior equivalent or related proceedings pending in a non-EU country) and the content of a related recital³⁸. It was this that prompted the Cumulative Supplement to Dicey, Morris & Collins to “downgrade” its previous analysis to a statement that:

“It is tentatively submitted that the views expressed in this paragraph of the main work that it is permissible for an English court, at its discretion, to grant a stay in these circumstances apply also in respect of the recast Brussels I Regulation”³⁹,

and for some other commentators to go further and express the view that any ability to decline jurisdiction or stay proceedings in an “exclusive jurisdiction clause scenario” had not survived the recasting of the Brussels I Regulation.

54. Further, even if an exception might be based more on an implied EU rule (rather than discretionary national rules) in order to satisfy the demands for certainty, predictability and uniformity, it is very difficult (in view of the express terms of the Brussels I Regulation in its recast form) to nail down a legal route for establishing the existence of any obligation to decline jurisdiction or any discretionary ability to stay proceedings, and for ascertaining how such obligation or discretion should operate.

55. Regardless of the merits of the Judge’s detailed legal analysis however (and the difficulties of finding a route to a different conclusion), the application of his view would have a number of problematic effects, including:

- the undermining of the general principle of respecting party autonomy – which permits parties (albeit subject to certain limitations and safeguards) to agree where their disputes will be determined;

³⁷ At para 12-021 of the 15th Edition.

³⁸ Specifically, Recital (24).

³⁹ At para 12-024 of the Fifth Cumulative Supplement to the 15th Edition.

Note however that, despite acknowledging there that the express introduction of the discretion to stay where there were prior equivalent or related proceedings pending in a non-EU country but not in the “exclusive jurisdiction clause scenario” or a “nature of claim scenario” might support the inference that no stay was permissible in the latter two circumstances, the authors nevertheless still expressed the view that: “... for reasons of logic, policy and practice, there remain strong grounds for permitting the courts of a Member State to stay their proceedings by analogy to Arts 24 and 25 of the recast Brussels I Regulation.”.



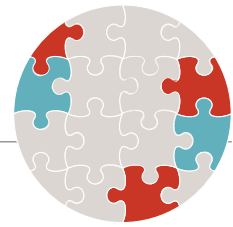
- the implicit condoning of conduct that would amount to a contractual breach of a jurisdiction agreement – and indeed, if an anti-suit injunction were obtained from the other Court, arguably the implicit condoning of a breach of a foreign Court Order;
- the creation of a tension with the 2005 Hague Convention, in view of the polar opposite approach to be taken by EU Member States under its terms where exclusive jurisdiction clauses are in favour of the courts of contracting non-EU countries;
- the further erosion of the UK Court’s inherent discretionary powers (subject, of course, to the effect of Brexit);
- the consequential practical difficulties highlighted above in both “exclusive jurisdiction clause scenarios” and “nature of claim scenarios”, including as regards parallel proceedings, an increased risk of conflicting judgments, and numerous tricky issues associated with international recognition and enforcement worldwide.

56. It is worth noting that the issues in this case provide a very good example of circumstances in which rigid EU rules, designed to create certainty, can operate at the expense of flexibility and discretion in particular circumstances, and thus create tension with the flexible English common law system. Indeed, the Judge noted in his Judgment that:

“For better or worse, the authors of the Regulation and its predecessors chose a system which favoured the certainty of a basic general rules of jurisdiction based on domicile over flexibility and discretion. The contrast between the common law approach and European approach has recently been commented upon by the Court of Appeal in these terms in Merinson v Yukos International UK BV [2019] EWCA Civ 830:

‘[Recast Brussels I] and its predecessors introduced jurisdiction rules differing markedly from those hitherto prevailing at common law. In place of flexibility and judicial discretion (including the doctrine of forum non conveniens), fixed rules were introduced, prioritising certainty and predictability, in accordance with the philosophy underpinning [Recast Brussels I]’.

57. However, regardless of the relative merits of certainty over flexibility, a formulaic regime arguably only functions effectively when determining jurisdiction as between the Courts of countries which are all subject to identical jurisdictional rules. That is not so in the circumstances at hand since non- EU/ Lugano countries have their own, different, jurisdictional rules.
58. Of course, this is not the only tension with which the UK and the EU have grappled in recent times, and indeed the Brussels/Lugano regimes are currently set to cease to apply in the UK post-Brexit. If, as part of the Brexit negotiations, the UK and the EU seek to reach consensus on rules equivalent to the Brussels/Lugano regimes, it will be interesting to see whether this issue is addressed.
59. If the UK and EU/Lugano countries are unable to agree terms broadly equivalent to the Brussels/ Lugano regimes, the UK Courts would themselves no longer be bound by the principle determined by the Judge in *Gulf International*.



60. However, if that principle is correct, the Courts of EU Member States might in those circumstances be unable to respect exclusive English jurisdiction clauses in certain instances. For example, if the relevant jurisdiction clause was entered into before the UK acceded in its own right to the 2005 Hague Convention upon Brexit, and that Convention was found not to apply to such clauses⁴⁰, the Courts of EU Member States, if first seised in proceedings against an EU-domiciled Defendant, would be unable to decline to hear or stay such proceedings in favour of the English Courts⁴¹.
61. Further, if an equivalent principle were also applied under the (differently worded) 2007 Lugano Convention⁴², the Courts of EU/Lugano countries would also be unable to respect an exclusive English jurisdiction clause if first seised of proceedings against a Lugano-domiciled Defendant, unless the Hague Convention applied and obliged them to do so (and in the case of the Courts of the three non-EU Lugano countries, the 2005 Hague Convention could not apply since those three countries are not currently a party to it).
62. That said, the English Courts in that instance would have regained their power to grant anti-suit injunctions restraining a party from commencing/continuing proceedings in the Courts of an EU/Lugano country, which might offer a potential solution to the problem.
63. Regardless of Brexit issues, the best way for these problems to be resolved now (for the benefit of all EU/Lugano countries) would probably be for the Recast Brussels I Regulation (and the Lugano Convention of 2007) to be amended further to tackle them expressly - if necessary by the introduction of further certain, predictable and uniform rules⁴³. Indeed, it is unfortunate that these issues were not specifically addressed at the time of the last recasting (or indeed by the ECJ in *Owusu* itself).

Worldwide freezing orders

64. In view of the jurisdictional debate in relation to the substantive proceedings, it is perhaps worth noting that:
- English Courts are able to grant interim relief not only in support of English substantive proceedings, but in support of foreign substantive proceedings too⁴⁴ so long as there is a real connecting factor with England, and the fact that the Defendant had moved to England would have sufficed for that purpose;
 - thus, had the Claimant bank commenced its substantive proceedings in the Saudi Courts rather than in England, it might (in theory) still have been in a position to seek a “without notice” worldwide freezing order from the English Courts in support of those substantive Saudi proceedings.

40 By reason of Article 16.

41 Note also that if all other parties were resident in either the EU or in countries that were not contracting states to the 2005 Hague Convention, the rules in Recast Brussels I would override the application of that Convention even if it was generally applicable in respect of the UK – see Article 26 of the 2005 Hague Convention.

42 See footnote 23 above.

43 In the case of an “exclusive jurisdiction clause scenario”, such rules could perhaps mirror those in Article 6 of the 2005 Hague Convention itself, by which EU Member States will be bound in any event as regards disputes covered by exclusive jurisdiction clauses in favour of contracting non-EU countries.

44 Pursuant to Section 25 of the Civil Jurisdiction and Judgments Act 1982, and Order in Council SI 1997/302 (which, in accordance with Section 25(3)(a), extended that ability to circumstances in which the substantive proceedings are in the Courts of a non- EU/Lugano country).



65. However, in order to obtain and maintain any English freezing order, one must show - by reference to solid evidence - that there is real risk of illegitimate dissipation of, or an unjustified dealing with, assets so as to frustrate the enforcement of any judgment that might be obtained. Since a freezing order is such a draconian measure that threshold is a high one, and it was not met in this case in any event.

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