

Jurisdiction Over Non-EU Defendants

Should the Brussels Ia Regulation be Extended?

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Extending the Brussels Ia Regulation to Third State Defendants – Cui Bono?

A Third State Perspective from the UK

JOHANNES UNGERER*

I. Introduction

When the Brussels Ia Regulation¹ was enacted in 2012 as a recast of the Brussels I Regulation,² there was no consensus over following the European Commission's proposal to unify the rules on international jurisdiction applicable to defendants not domiciled in a Member State. It was however agreed to revisit the issue a decade later. Now, it is high time to reconsider the arguments for and against unifying the rules for Third State defendants by extending the Regulation's rules to them. Instead of simply assuming that the unification by extension is an end worthwhile pursuing in itself, the question has to be raised whether and, most importantly, for whom the extension would be beneficial.³ While several scholars from within the EU have argued in favour of the extension,⁴ this chapter will advocate a more cautious approach by showing that the extension would not be of greater benefit to the EU and its Member States, but rather Third States. To illustrate this, the perspective of the UK will be taken, which due to Brexit has joined the ranks of Third States and now competes with the EU over international litigation and the profits for the legal services industry. In the light of this change of circumstances

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¹ Regulation (EU) No 1215/2012.

² Council Regulation (EC) No 44/2001.

³ Similarly R Fentiman, 'Brussels I and Third States: Future Imperfect?' (2010) 13 *Cambridge Yearbook of European Legal Studies* 65, 69.

⁴ A Bonomi, 'European Private International Law and Third States' [2017] *Praxis des Internationalen Privat- und Verfahrensrechts* 184, 185 et seq.; B Hess, *Europäisches Zivilprozessrecht* 2nd edn (De Gruyter, 2020) para 5.24; T Lutz and FM Wilke, 'Brüssel Ia extendenda est?' (2022) 86 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 841; R Luzzatto, 'On the Proposed Application of Jurisdictional Criteria of Brussels I Regulation to Non-Domiciled Defendants' in F Pocar, I Viarengo and FC Villata (eds), *Recasting Brussels I* (Cedam, 2012); J Weber, 'Universal Jurisdiction and Third States in the Reform of the Brussels I Regulation' (2011) 75 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 619; also see U Magnus and P Mankowski, 'The Proposal for the Reform of Brussels I' (2011) 110 *Zeitschrift für Vergleichende Rechtswissenschaft* 252, 262 et seq.; M Poesen, 'Civil litigation against Third-Country defendants in the EU: effective access to justice as a rationale for European Harmonization of the law of international jurisdiction' (2022) 59 *Common Market Law Review* 1597.

since the extension was discussed a decade ago, it will be demonstrated that the EU would do itself a disservice if it were to unify the jurisdictional rules on Third State defendants by extending the Regulation to them while the EU Member States actually wish to win over litigation from London and other popular hubs overseas.

II. Status Quo

Under the status quo of the Brussels Ia Regulation, the EU unification of the rules on jurisdiction is limited to proceedings with a sufficient connection to the territory of the Member States (or, the EU Single Market).⁵ This means that Third State defendants are presently not covered by the ordinary Brussels Ia rules, for instance Art 7 which determines jurisdiction over EU defendants in matters such as contract and tort. Instead, the autonomous rules of Member States govern jurisdiction of Member State courts over defendants from Third States in principle.⁶ Consequently, in cases against Third State defendants, Member State courts can still employ autonomous rules which are exorbitant in the sense that those rules are internationally unusual and are based on a fairly tenuous connection of the defendant with the forum.⁷ Exposing Third State defendants in this way is discriminatory in comparison to how EU defendants are treated:⁸ EU defendants are protected from the autonomous rules of other Member States, especially exorbitant rules, because EU defendants may only be sued in another Member State according to the unified Brussels Ia rules.⁹

The discriminatory effect of the Brussels Ia Regulation is worsened by the fact that autonomous exorbitant rules of any Member State which only apply to nationals of that Member State are made available by the Regulation to all claimants domiciled in that Member State regardless of their nationality.¹⁰ This is relevant in particular with regard to Art 14 of the French Civil Code, so that any claimant domiciled in France can sue a Third State defendant there.¹¹

In addition, Third State defendants are discriminated against by the Brussels Ia Regulation when it comes to recognition and enforcement of Member State courts' judgments in other Member States. Even if a Member State's jurisdiction over a Third State defendant is based on the autonomous exorbitant rules of the respective Member

⁵ Recital 13 Brussels Ia Regulation; also see Case C-281/02 *Owusu*.

⁶ Recital 14 and Art 6(1) Brussels Ia Regulation.

⁷ D Childress, 'Jurisdiction, Limits under International Law' in J Basedow and others (eds), *Encyclopedia of private international law* (Elgar, 2017) 1054.

⁸ This has been criticised since the times of the Brussels Convention, see for instance F Juenger, 'Judicial Jurisdiction in the United States and in the European Communities: A Comparison' (1984) 82 *Michigan Law Review* 1195, 1211; P Grolimund, *Drittstaatenproblematik des europäischen Zivilverfahrensrechts* (Mohr Siebeck, 2000) para 601 et seq. More recently, TC Hartley, *International Commercial Litigation: Text, Cases and Materials on Private International Law* 3rd edn (Cambridge University Press, 2020) 22, 191; SC Symeonides, 'The Brussels I Regulation and Third Countries' in *Libro homenaje al Profesor Eugenio Hernández-Bretón*, (Editorial Jurídica Venezolana, 2019). It is also described by B Hess, T Pfeiffer and P Schlosser, *The Brussels I-Regulation (EC) No 44/2001: The Heidelberg Report on the Application of Regulation Brussels I in 25 Member States (Study JLS/C4/2005/03)* (CH Beck, 2008) para 156.

⁹ Art 5 Brussels Ia Regulation.

¹⁰ Art 6(2) Brussels Ia Regulation.

¹¹ For a recent application of Art 14 French Civil Code in conjunction with Art 6(2) Brussels Ia Regulation, see Cour de cassation, ECLI:FR:CCASS:2022:C100536 and ECLI:FR:CCASS:2022:C100616.

State, the resulting judgment of this Member State court can nonetheless move freely across the EU due to the Brussels Ia Regulation,¹² which thus EU-wide multiplies the exorbitant effect of the autonomous rules.¹³

There are three limited instances under the status quo where the Brussels Ia rules apply instead of the autonomous rules of the Member States against Third State defendants; these instances are thus not subject to any further reform decisions about extending or not extending the Brussels Ia Regulation. First, the special protective rules of the Brussels Ia Regulation apply instead of the Member States' autonomous rules to consumer and employment disputes,¹⁴ and to a varied extent to insurance disputes.¹⁵ Secondly, the Brussels Ia rules apply in cases of exclusive jurisdiction, such as disputes about rights *in rem*.¹⁶ Thirdly, the autonomous rules of the Member States are superseded in cases of a choice of court,¹⁷ although the Brussels Ia Regulation itself is superseded in turn by the 2005 Hague Convention on Choice of Court Agreements if the case is covered by the Convention.¹⁸ The latter is highly relevant for exclusive prorogation agreements between EU and British commercial parties since both the EU and the UK are Contracting States of the Convention. Apart from these three instances, however, the autonomous rules of the Member States apply to Third State defendants under the status quo. As indicated above, this pertains to common commercial disputes, such as about contracts or torts, where no valid prorogation has been agreed upon; for such disputes, any reform decision about extending the Brussels Ia rules to Third State defendants would matter.

III. Full Extension of the Regulation to Third State Defendants

Fully extending the Brussels Ia Regulation to Third State defendants would mean that the rules on jurisdiction of the Regulation, which so far are only applicable to EU defendants, such as Art 7, would become applicable to Third State defendants as well. Treating EU and Third State defendants alike in this way by removing all differentiation in the Regulation was the Commission's proposal in 2010 for the recast of the Brussels I Regulation,¹⁹ but it was not adopted in the Brussels Ia Regulation. The reason was that,

¹² Art 36 et seq. Brussels Ia Regulation. However, see the exception in Art 72.

¹³ Criticised for instance by A Taylor von Mehren, 'Recognition and Enforcement of Foreign Judgments: General Theory and the Role of Jurisdictional Requirements' (1980) 167 *Recueil des cours* 9, 98 et seq regarding the Brussels Convention; K Takahashi, 'Review of the Brussels I Regulation: A Comment from the Perspectives of Non-Member States (Third States)' (2012) 8 *Journal of Private International Law* 1, 2.

¹⁴ Art 18(1), 21(2) Brussels Ia Regulation.

¹⁵ Art 11(2) Brussels Ia Regulation; cf P Vlas, 'Article 6' in U Magnus and P Mankowski (eds), *European Commentaries on Private International Law: Brussels Ibis Regulation* (Vol 1, Otto Schmidt, 2016) para 2.

¹⁶ Art 24 Brussels Ia Regulation.

¹⁷ Art 25 Brussels Ia Regulation.

¹⁸ Art 71 Brussels Ia Regulation.

¹⁹ European 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)' (COM(2010) 748 Final, 14.12.2010) www.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0748:FIN:EN:PDF.

in the Legal Affairs Committee of the European Parliament, it was felt that ‘it would be premature to take [the step of removing all differentiation in the Regulation] without wide-ranging consultations and political debate.’²⁰ Since it was agreed though in the adopted text of the Brussels Ia Regulation to re-evaluate the situation in January 2022,²¹ assessment of whether the Commission’s proposal is worth reviving or not is now overdue. Several scholars support the unification by full extension.²²

IV. Consequences of a Full Extension

At first sight, it might seem beneficial and desirable for the EU and its Member States to unify the rules for Third State defendants by fully extending the Regulation’s rules to them.²³ Indeed, it would at least increase the simplicity and clarity of the rules which Member State courts have to apply, because they would not have to potentially apply other rules to Third State defendants than to EU defendants.²⁴ However, it will be demonstrated that the rule unification by extension would ultimately be detrimental for the EU and its Member States and rather beneficial for Third States, such as the UK.

Insofar, the verdicts of benefit and detriment are based on the assumption that a State, as a matter of principle, prefers to have its own courts affirm international jurisdiction wherever reasonable instead of rejecting it and leaving it to foreign courts. This assumption of self-interest of States to attract international litigation domestically is understandable in the context of the international competition of the various legal systems. The motivation for seeking to affirm jurisdiction and to attract litigation can,

²⁰ European Parliament (Committee on Legal Affairs, Rapporteur: Tadeusz Zwiefka), ‘Draft Report on 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)’ (PE467.046v01-00, 28.6.2011) www.europarl.europa.eu/meetdocs/2009_2014/documents/juri/pr/869/869709/869709en.pdf, 8, 47.

²¹ Art 79 Brussels Ia Regulation required the Commission to present a report by 11 January 2022.

²² For instance A Bonomi, ‘European Private International Law and Third States’, 186–87; J Weber, ‘Universal Jurisdiction and Third States in the Reform of the Brussels I Regulation’, 623 et seq; also see F Horn, ‘Note – 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)’ (DATE) [www.europarl.europa.eu/RegData/etudes/STUD/2011/453202/IPOL-JURI_NT\(2011\)453202_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2011/453202/IPOL-JURI_NT(2011)453202_EN.pdf), 17; ML Niboyet, ‘Note – 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)’ (DATE) [www.europarl.europa.eu/RegData/etudes/IDAN/2011/453204/IPOL-JURI_NT\(2011\)453204_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2011/453204/IPOL-JURI_NT(2011)453204_EN.pdf), 14.

²³ This has also been alleged by 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)’ (SEC(2010) 1548 Final, 14.12.2010), www.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2010:1547:FIN:EN:PDF, 26: ‘The full extension of the Regulation’s rules on jurisdiction to third country defendants would increase the possibilities for EU companies to litigate in the EU rather than abroad’.

²⁴ This was one of the main arguments for the reform by the European Commission, *ibid* 20. Cf A Nuyts, ‘Study on Residual Jurisdiction (Review of the Member States’ Rules Concerning the “Residual Jurisdiction” of Their Courts in Civil and Commercial Matters Pursuant to the Brussels I and II Regulations)’ (European Commission, 2007) para 147. Similarly L Mari and I Pretelli, ‘Possibility and Terms for Applying the Brussels I Regulation (Recast) to Extra-EU Disputes’ (2013) XV *Yearbook of Private International Law* 211, 243; and I Pretelli and others, ‘Study – Possibility and Terms for Applying Brussels I Regulation (Recast) to Extra-EU Disputes’ (European Parliament, 2014) [www.europarl.europa.eu/RegData/etudes/STUD/2014/493024/IPOL-JURI_ET\(2014\)493024_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/493024/IPOL-JURI_ET(2014)493024_EN.pdf), 39.

on the moral high ground, arise from the State's conviction that only its own courts are capable of administering justice in the best way possible. Yet the motives can also be of political and pecuniary nature if the State, its court system, and the national legal services industry profit from adjudicating cases and from advising and representing the parties. These motives certainly matter for commercial litigation hubs, such as London, in the world of Common Law. With regard to Continental Europe and Civil Law, the relevance of these motives might be questioned because the litigation ambitions of the States on the Continent might be considered to be neutral and not-for-profit. However, the EU Member States' eager determination to win over litigation from the UK post-Brexit is evident from their ambitions to establish special commercial courts handling cases in English.²⁵ Similar intentions on the part of the EU are apparent from the fact that, acting with exclusive competence on behalf of its Member States, it rejected the UK's application post-Brexit to join the 2007 Lugano Convention, which would have been the closest available replacement for the UK departing from the EU jurisdictional system of the Brussels Ia Regulation.²⁶

(a) Detriment to the EU and its Member States

If affirming jurisdiction and attracting litigation is the inclination of States, then it is counterproductive for the EU and its Member States to unify the jurisdictional rules for Third State defendants by extending the Regulation's rules to them. The reason is that this unification by extension is only imaginable if it is attained at the expense of displacing the autonomous exorbitant rules of the Member States, as the Commission admitted in its proposal.²⁷ In other words, the extension would, by virtue of the EU supremacy doctrine,²⁸ prevent that Member States could apply their autonomous exorbitant rules against Third State defendants any longer, who would then receive the same protection as EU defendants. Then, lacking their traditional exorbitant grounds of jurisdiction, the courts of the Member States would less often be able to affirm their jurisdiction compared to the situation without EU rule extension.²⁹

²⁵ See, for instance, MR Isidro, 'International Commercial Courts in the Litigation Market' (2019) 9 *International Journal of Procedural Law* 4; X Kramer and J Sorabji, 'International Business Courts in Europe and Beyond: A Global Competition for Justice?' (2019) 12 *Erasmus Law Review* 1; SA Kruisinga, 'Commercial Courts in the Netherlands, Belgium, France and Germany – Salient Features and Challenges' [2019] *Praxis des Internationalen Privat- und Verfahrensrechts* 277; G Rühl, 'Settlement of International Commercial Disputes Post-Brexit, or: United We Stand Taller' in JA Kämmerer and HB Schäfer (eds), *Brexit: Legal and Economic Aspects of a Political Divorce* (Elgar, 2021) 195; M Witkamp, 'Internationalizing Domestic Courts in Europe' in SL Brekoulakis and G Dimitropoulos (eds), *International commercial courts* (Cambridge University Press, 2022) 278.

²⁶ For the reasons, see European Commission, 'Communication from the Commission to the European Parliament and the Council: Assessment on the Application of the United Kingdom of Great Britain and Northern Ireland to Accede to the 2007 Lugano Convention' (COM (2021) 222 Final, 4.5.2021) www.ec.europa.eu/info/sites/default/files/1_en_act_en.pdf.

²⁷ European Commission, 'Impact Assessment', 24. Cf T Lutzi and FM Wilke, 'Brüssel Ia extendenda est?', 845; A Nuyts, 'Study on Residual Jurisdiction', para 147; U Magnus and P Mankowski, 'The Proposal for the Reform of Brussels I', 263 and 266 have to concede this, too.

²⁸ Case C-26/62 *Van Gend en Loos*; Case C-6/64 *Costa v ENEL*; Case C-10/97 *Ministero delle Finanze v IN.CO.GE*.

²⁹ A Nuyts, 'Study on Residual Jurisdiction', para 166 referred to it as a 'paradoxical' consequence.

In full awareness of this, it is surprising that the Commission tried to gain support for its reform proposal in 2010 by arguing that, due to the divergence of the autonomous rules across Member States, EU claimants have unequal access to justice in cases against Third State defendants, and that this would be remedied by extending the uniform Regulation's rules to Third State defendants.³⁰ Strangely, the Commission tried to illustrate its point by reference to the example of Italy which has autonomously chosen to extend the unified rules of the Brussels Convention to Third State defendants in its courts.³¹ The Italian autonomous extension (and the absence of any autonomous exorbitant rule) has indeed led to instances where the claimant could not sue in Italy. The Commission contrasted the Italian dilemma with the French situation, where a claimant would most likely have been able to sue in France. Yet the Commission omitted the clarification that this discrepancy was due to the autonomous Brussels regime extension in Italy, in contrast to the claimant's ability in France to rely on the autonomous exorbitant rule of Art 14 of the French Civil Code.³²

The Commission is right about the discrepancy and inequality, but the comparison and conclusion are flawed. It is true that claimants in some Member States are in a better position to sue Third State defendants there than claimants in other Member States. Yet being better off in the former Member States than in the latter is due to the ability of the claimants being able or unable to rely on autonomous exorbitant rules of the respective Member State. If the autonomous exorbitant rules of the former Member States, such as France, were to be removed by flattening them off to level with the Brussels rules, such as in Italy, equality would be established. Then, however, access to justice in the EU would be reduced for all claimants in all Member States.³³ Being denied access to justice across the EU on 'equal' terms can surely not be regarded as a benefit for EU claimants worth striving for by EU law reform.

Therefore, the EU Member States should in their own interest maintain the status quo by refraining from the temptation to unify the rules on Third State defendants on the EU level. Claimants in some Member States, such as France, will continue to be better off than in others; however, at least all claimants domiciled in the EU can benefit from such preferential autonomous exorbitant rules, as pointed out above.³⁴ Member States can also choose, as Italy has done, to change their autonomous rules; they can amend their rules autonomously and discreetly, it does not have to be done through unification by the EU. The national choice may depend on whether the respective Member State actually wants to attract litigation or is quite happy not to. It is a corollary for those

³⁰ European Commission, 'Impact Assessment', 20. Previously addressed by B Hess, T Pfeiffer and P Schlosser, *The Brussels I-Regulation*, para 157 et seq; similarly A Bonomi, 'European Private International Law and Third States', 185–86.

³¹ A Nuyts, 'Study on Residual Jurisdiction', para 15.

³² European Commission, 'Impact Assessment', 20–21.

³³ See similarly A Dickinson, 'The Revision of the Brussels I Regulation: Surveying the Proposed Brussels Ibis Regulation – Solid Foundations but Renovation Needed' (2010) *XII Yearbook of Private International Law* 247, 278; A Dickinson, 'Note – 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)' (2011) [www.europarl.europa.eu/RegData/etudes/STUD/2011/453200/IPOL-JURI_NT\(2011\)453200_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2011/453200/IPOL-JURI_NT(2011)453200_EN.pdf), 14; also R Fentiman, 'Brussels I and Third States: Future Imperfect?', 73–74.

³⁴ See above section II. on Art 6(2) Brussels Ia Regulation.

Member States who want to attract litigation that they ask more of their own courts by requiring the judges to apply different rules to EU than to Third State defendants; yet this complexity is the only detriment of the status quo for an EU Member State.³⁵

(b) Benefit for the UK and other Third States

Unifying the rules in the EU for Third State defendants by extending the Regulation's rules to them would in fact be rather beneficial for Third States, such as the UK. In essence, the reason is that it would become easier for Third States, especially when they determine jurisdiction with Common Law methods, to affirm their own jurisdiction and it would let them attract more litigation. This would become possible for them because jurisdiction in EU Member States could no longer be established on the basis of autonomous exorbitant rules, which would be disabled by the Regulation's extension.

Exploring this more closely by reference to English law, the ultimately crucial question for determining jurisdiction of an English court is whether England is the proper place to bring the claim,³⁶ *forum conveniens*. This requires the claimant to show clearly and distinctly, when seeking permission for service out of the jurisdiction, that England is the 'natural forum' in which the case can be most suitably tried in the interest of the parties and for the ends of justice, which is negated if there is another more appropriate forum to adjudicate the claim. Also, in the other direction, if the defendant wants the English court to stay the proceedings, it has to be shown inversely that the English court is *forum non conveniens* because there is another more appropriate forum to hear the claim.³⁷ One can characterise these English autonomous rules as exorbitant because they provide English courts with plenty of discretion to exercise 'long-arm' jurisdiction.

For assessing whether there is another more appropriate forum than in England, for instance in an EU Member State, this depends in the first place on whether an EU Member State court would be able to affirm its jurisdiction. Where an EU Member State court, for instance in France, is able to affirm its jurisdiction based on the autonomous exorbitant rule of Art 14 of the French Civil Code under the status quo, the French court would be unable to do so if the Brussels Ia rules were to be extended and the autonomous exorbitant rules of the Member States were to be displaced. The French court in this situation would then have no jurisdiction, similar to an Italian court currently, as illustrated above.

So if the Regulation were to be extended, it would mean for the assessment of whether England is the appropriate forum in this situation that there would not be another, potentially more appropriate, (French) forum available. Thus, the English forum would, being left without any competition, be the only forum to hear the case. In other words, abolishing autonomous exorbitant rules through EU unification would

³⁵ The Commission, 'Impact Assessment', 22 and 25, had to concede that the detriment of the status quo is hard to quantify, which is of course not the same as saying it is hardly quantifiable, but perhaps it demonstrates that there is no real urgency and suffering.

³⁶ Civil Procedure Rules, r 6.37(3); cf for an overview A Briggs, *The Conflict of Laws* 4th edn (Oxford University Press, 2019) 108 et seq; J Hill and MN Shúilleabháí, *Clarkson & Hill's Conflict of Laws* 5th edn (Oxford University Press, 2016) para 2.150 et seq.

³⁷ *Spiliada Maritime Corp v Cansulex Ltd* [1986] UKHL 10; *VTB Capital plc v Nutritek International Corp* [2013] UKSC 5; *Vedanta Resources plc v Lungowe* [2019] UKSC 20.

reduce the chances that an EU forum is available and, in turn, this would make it more likely that England would be regarded as the natural forum. The underlying reason is that, in contrast to EU Member States giving up their autonomous exorbitant rules if the Regulation were to be extended, the UK can employ its 'long-arm' autonomous exorbitant rules. Due to Brexit and non-accession to the Lugano Convention, the UK has been able to reactivate its autonomous exorbitant rules again and can use them against EU Member States, which was prevented under the Brussels regime during the UK's period of EU membership. It has also to be borne in mind that the EU forwent the chance to bring the UK's autonomous exorbitant rules under control when it chose to reject the UK's application for accession to the Lugano Convention.

Accordingly, unifying the rules in the EU for Third State defendants by extending the Regulation's rules to them would drive litigation towards Third States and away from the EU. Similar predictions had already been made in respect of the Commission's proposal in 2010,³⁸ but the issue has become a lot more critical since Brexit with regard to the UK. As a consequence, the litigation service industry in England would benefit from extending the Regulation, at the expense of the service providers in the EU and to the detriment of European initiatives launched in the Brexit aftermath.³⁹

V. Other Reform Options

In addition or as an alternative to unifying the rules for Third State defendants by extending the Regulation's rules to them, which has been discussed so far, it is advisable to consider three other reform options. If they were to be introduced into the Regulation, they could – potentially – be suitable ways to meet the need in the EU for increased simplicity and clarity without driving litigation away from the EU. Yet, as will be shown, this would most likely not be achievable.

(a) Adding Exorbitant Rules to the Regulation

If the Regulation were to be reformed to cover Third State defendants, one could consider the idea of additionally introducing some exorbitant rules into the Regulation.⁴⁰ These uniform exorbitant rules could be modelled on autonomous exorbitant rules of Member States. For instance, the Commission proposed in 2010 to introduce a 'mildly' exorbitant rule into the Regulation which 'grants jurisdiction to the court of the Member State where assets of the defendant are situated'.⁴¹ Adding exorbitant rules to the Regulation seems to ensure uniformity and greater simplicity within the EU than having various autonomous ones in Member State laws. Most importantly, these benefits seem to be

³⁸ From within the EU pre-Brexit: A Dickinson, 'The Revision of the Brussels I Regulation', 277; Dickinson, 'Note', 14.

³⁹ See above, n 24.

⁴⁰ For an upheld proposal to introduce 'one or two' uniform exorbitant rules, see for instance H Schack, *Internationales Zivilverfahrensrecht: mit internationalem Insolvenzrecht und Schiedsverfahrensrecht* (8th edn., CH Beck 2021) para 111.

⁴¹ European Commission, 'Impact Assessment', 24, 27.

achievable without running the risk that the EU and its Member States would be losing litigation: at least some exorbitant rules would be saved by transferring them from the autonomous regimes into the Regulation.

However, this would elevate the discrimination of the exorbitant rules to the EU level.⁴² It would then be the EU instead of the Member States which would discriminate against Third States, and the EU would do it outrightly and intentionally in a uniform manner. The Member States might have got away with their sporadic autonomous exorbitant rules as relicts predating modern reforms, but there would be no excuse for the EU to take such action nowadays after decades of consideration. Adopting truly exorbitant rules in the Regulation would potentially be harmful to the EU's external relations on the global level.⁴³ In addition, within the EU, it would be difficult to decide which exorbitant rules from the autonomous laws of the Member States are so common that they should be transferred into the Regulation and are worth the potential diplomatic disaster. Not even the 'mildly' exorbitant rule basing jurisdiction on the location of the defendant's assets, which the Commission had in mind, is sufficiently common among all Member States.⁴⁴ If, nonetheless, a fairly common exorbitant rule were to be adopted into the Regulation, it would neither be easy, given the divergence among autonomous laws, to agree within the EU on the criteria according to which this uniform rule should be applicable, ie how tenuous a connection of the defendant with the forum would be deemed acceptable. Moreover, if an antiquated exorbitant rule of common Member State heritage were to be transposed nowadays in an effective manner into the Regulation, determining the scope would be a vital and equally uneasy task especially in the light of its exorbitant character; for instance, in the case of a rule relating to assets, this would be tricky in today's world of intangible and digital assets.⁴⁵ Hence, neither the flattening off of the exorbitant rules, as discussed for the full extension of the Regulation's rules to Third State defendants, nor the idea of levelling up the exorbitant rules by copying them into the Regulation are viable options for unification on the EU level.

What might seem like another possible alternative in order to avoid the intensification of Third State discrimination would be to introduce exorbitant rules into the Brussels regime which would, however, be applicable to EU and Third State defendants equally. Yet this is completely unimaginable because this would mean taking disputes within the EU back to the situation before any unification, ie pre-1968 and before the Brussels Convention.

(b) Adding a Forum Necessitatis

Instead of adding specific exorbitant rules to the Regulation, which would untenably intensify Third State discrimination, one might consider simply introducing a rule for

⁴² A Nuyts, 'Study on Residual Jurisdiction', para 173 considered this option as likely to prove 'very controversial'.

⁴³ Conceded by European Commission, 'Impact Assessment', 27.

⁴⁴ A Nuyts, 'Study on Residual Jurisdiction', para 77; see also A Dickinson, 'The Revision of the Brussels I Regulation', 278–79; A Dickinson, 'Note', 14–15.

⁴⁵ A Dickinson, 'The Revision of the Brussels I Regulation', 279; A Dickinson, 'Note', 15; also K Takahashi, 'Review of the Brussels I Regulation', 8.

establishing jurisdiction of a Member State court out of necessity in cases in which jurisdiction cannot be established otherwise. This would still somewhat resemble a rule of exorbitant character, but it might seem less problematic internationally. In the 2010 Commission proposal for such a *forum necessitatis*, it was suggested that a court of a Member State may assume jurisdiction for the purposes of offering a fair trial and granting access to justice ‘if proceedings cannot reasonably be brought or conducted or would be impossible in a Third State with which the dispute is closely connected’.⁴⁶ If the rule were to be adopted in a reform of the Brussels Ia Regulation, it would seem as if it would become harder for English courts to deny the availability of an EU forum. The particular attractiveness of introducing it might be seen in the fact that the reasonableness requirement for an EU *forum necessitatis* resembles the appropriateness requirement of the English *forum conveniens*. So, perhaps, a *forum necessitatis* rule would be the best way for the EU to beat Common Law jurisdictions in their own game; however, in fact, the resemblance with the *forum conveniens* doctrine is the Achilles’ heel of the *forum necessitatis* rule.

If adopted, the EU *forum necessitatis* rule would not be capable of neutralising or softening the effects of extending the Regulation’s rules to Third State defendants because it would not change the jurisdiction assessment and affirmation by an English court. When determining under English rules whether a more appropriate forum exists than the English one, as discussed above, the English court would consider whether there is an EU forum, and this EU forum could be based on an EU *forum necessitatis* rule if introduced in the Brussels Ia Regulation. As part of this exercise by the English court to determine whether it has jurisdiction, the English court would, in order to determine the existence of an EU forum, look through the glasses of the EU *forum necessitatis* rule. When doing so, however, the English court would not act in complete self-denial: the English court would not find that the English proceedings, which are closely connected with England, could not be reasonably brought in England and that, thus, an EU *forum necessitatis* should be affirmed. In consequence, the English court looking through the EU glasses would not conclude that the EU *forum necessitatis* exists in the case at hand, and that the (in fact denied) EU forum is distinctly and clearly the more appropriate forum than the English forum.

Therefore, the introduction of an EU *forum necessitatis* rule would still be beneficial only for the UK and other Third States, but detrimental to the EU Member States. In addition, the *forum necessitatis* rule would not even achieve the most basic goal of the reform, namely increasing simplicity and clarity for the courts of Member States when dealing with Third State defendants. On the contrary, it would impose complex and uncomfortable questions on the courts of Member States,⁴⁷ as they would have to assess whether the claimant has sufficiently demonstrated the necessity for an EU forum because the Third State, to which the dispute is connected, for instance the UK, cannot

⁴⁶ European Commission, ‘Proposal’, Art 26 (p 34). Supported by A Bonomi, ‘European Private International Law and Third States’, 186, 188; ML Niboyet, ‘Note’, 15–16; also see T Lutzi and FM Wilke, ‘Brüssel Ia extendenda est?’, 871; A Nuyts, ‘Study on Residual Jurisdiction’, para 179; European Group for Private International Law (GEDIP/EGPIL), ‘Proposed Amendment of Regulation 44/2001 in Order to Apply It to External Situations’ [2009] *Praxis des Internationalen Privat- und Verfahrensrechts* 283, Art 22 bis.

⁴⁷ A Dickinson, ‘Revision of the Brussels I Regulation’, 280; A Dickinson, ‘Note’, 15; R Luzzatto, ‘On the Proposed Application of Jurisdictional Criteria of Brussels I Regulation to Non-Domiciled Defendants’, 115.

offer a fair trial and grant access to justice. At least as long as the respective Third State belongs to the Council of Europe and the European Convention on Human Rights, which provides for a fair trial and access to justice,⁴⁸ it is hard to believe how a court of an EU Member State could conclude that fairness and justice would be unavailable there. A *forum necessitatis* is helpful and important in cases where no other jurisdiction is willing to offer a fair trial and to grant access to justice, but it is not useful for the EU Member States as a tool to mitigate the fallout of disabling the autonomous exorbitant rules by extending the Regulation's rules to Third State defendants.

(c) Permitting Reflexive Effect

A way of partially extending the Regulation's rules to Third States might be the doctrine of reflexive effect (*effet réflexe*).⁴⁹ The doctrine posits that in cases of exclusive jurisdiction, for instance over rights *in rem* in a Third State, a Member State court could decline any jurisdiction it might have under other Brussels Ia rules; it would do so by reflexively giving effect to the Brussels Ia rules on exclusive jurisdiction in favour of the Third State court. The rationale of reflexive effect is to respect the spirit of exclusive jurisdiction. The underlying idea resembles the flexibility under the Common Law approach to jurisdiction and the *forum non conveniens* doctrine. However, the reflexive effect doctrine does not fit with the Brussels Ia Regulation's rigid and mandatory nature according to which Member State courts do not have discretion to decline jurisdiction in favour of Third State courts.⁵⁰ The discretion of the doctrine of reflexive effect would also create a risk of arbitrariness when Member State courts were free to decline or not to decline their otherwise existing jurisdiction.⁵¹ Moreover, if the discretion were to be bound insofar as it would require the Member State court to determine whether the Third State court would provide a fair trial and access to justice,⁵² it would impose the same complex and uncomfortable questions on Member State courts as a *forum necessitatis* rule.

In any case, the doctrine of reflexive effect would not be suitable to mitigate the fallout from extending the Regulation's rules to Third State defendants considering the way the doctrine operates. Due to the reflexive effect, Member State courts would further limit their jurisdiction by declining their otherwise existing jurisdiction in favour of Third State courts, albeit discretionary and in individual cases only. If paired with extending the Regulation's rules to Third State defendants, this would in fact aggravate the detriment to EU Member States' jurisdiction.

⁴⁸ Art 6(1), 13 ECHR.

⁴⁹ Originally devised by GAL Droz, *Compétence judiciaire et effets des jugements dans le Marché commun (étude de la Convention de Bruxelles du 27 septembre 1968)* (Dalloz, 1972) para 164 et seq. Recommended for instance by European Group for Private International Law (GEDIP/EGPIL), 'Proposed Amendment of Regulation 44/2001', Art 24 bis; ML Niboyet, 'Note', 15; J Weber, 'Universal Jurisdiction and Third States in the Reform of the Brussels I Regulation', 630, 632–33, 644; also see A Nuyts, 'Study on Residual Jurisdiction', para 180 et seq.

⁵⁰ Case C-281/02 *Owusu v Jackson*, para 37; Case C-420/07 *Apostolides v Orams*, opinion of AG Kokott, para 86 with reference to the Lugano Opinion 1/03; also see T Kruger, *Civil Jurisdiction Rules of the EU and Their Impact on Third States* (Oxford University Press 2008) para 3.19, 5.118.

⁵¹ Similarly Pretelli and others, 'Possibility and Terms for Applying the Brussels I Regulation (Recast) to Extra-EU Disputes', 19.

⁵² For this suggestion see B Hess, *Europäisches Zivilprozessrecht*, para 5.17.

So the remaining question is whether the doctrine of reflexive effect would at least be, if not a mitigation strategy, a suitable alternative to fully extending the Regulation's rules to Third State defendants. In other words, would it be overall possible and better for the EU and its Member States to 'unify' the rules on Third State defendants by simply introducing an express provision on reflexive effect into the Regulation? Certainly, the general problems of this discretionary doctrine and the corollary of risking unequal exercise of discretion across Member States would persist and would undermine the very unification effort, which aims at guaranteeing equal access to justice across the EU. The main problem is, however, that the doctrine of reflexive effect can only cover selected cases, such as of exclusive jurisdiction, and can only be used in a negative way by Member State courts, namely to decline their jurisdiction in favour of Third State courts.⁵³ By contrast, reflexive effect is incapable of offering ways for Member States' courts to affirm their jurisdiction over Third State defendants. In fact, establishing jurisdiction (at least in the first place, subject to possibly declining it subsequently) would still be left to the autonomous rules of the Member States. This means in essence that the EU 'unification' by introducing a reflexive effect rule into the Brussels regime would be plagued by problems of discretionary application, and would be limited to a narrow range of applicable cases. Most importantly, the reflexive effect rule would be operating in the same disadvantageous direction as the full extension of the Regulation's rules to Third State defendants. Reflexive effect is unsuitable to create a beneficial uniform framework for establishing jurisdiction of EU Member State courts over Third State defendants.

VI. Conclusion

The current regime of the Brussels Ia Regulation discriminates against Third State defendants because, in contrast to EU defendants, they are not protected from autonomous exorbitant rules of Member States in principle. If the uniform rules of the Brussels Ia Regulation applicable to EU defendants were to be extended to Third States, the discrimination would be remedied.

Based on the understanding that States seek to affirm their own jurisdiction and to attract litigation, it has been shown that unifying the rules for Third State defendants by fully extending the Regulation to them has, however, greater benefits for Third States than the EU and its Member States. While the unification by extension would simplify jurisdictional issues for Member State courts, these courts would less often be able to affirm their jurisdiction compared to the current situation where they can rely on their autonomous exorbitant rules. For the UK as a Third State, conversely, the EU rule unification by extension would make it easier to conclude that, for instance, England is *forum conveniens* instead of concluding that there is a potentially more appropriate forum in the EU available under autonomous exorbitant rules of a Member State.

Since the unification by full extension of the Regulation's rules cannot be recommended, three other options for reforming the Brussels Ia Regulation have been considered,

⁵³ Therefore approving the idea: K Takahashi, 'Review of the Brussels I Regulation', 10.

but none of them is a realistic option for the EU either. First, transposing some exorbitant rules common among the autonomous laws of the Member States into the Regulation could be harmful to the EU's external relations, and it would be difficult for the Member States to agree on which rule design is worth the trouble. Secondly, introducing a uniform rule on *forum necessitatis* would not help prevent that an English court would affirm its own jurisdiction as *forum conveniens*. Thirdly, enacting the doctrine of reflexive effect would not be helpful for Member States courts because it would only allow them to decline their jurisdiction in favour of Third State courts.

So, after all, how severe would the consequences be if the status quo with the different rules for EU defendants and Third States defendants were maintained? For Member States, whose courts have managed the practical application for the past decades, it is not a huge problem to continue business as usual. Admittedly, the discrimination against Third States would remain, which is not ideal, but at least it would not be worsened. If Member States genuinely intended to reduce this discrimination, they could always autonomously choose to extend for their courts the Brussels Ia regime to Third State defendants and thereby give up their autonomous exorbitant rules, following the example of Italy; each Member State can make this decision to reduce its share of international litigation and to promote international fairness. Consequently, it seems neither necessary nor recommendable to reform the Brussels Ia Regulation by uniformly extending its rules to cover Third State defendants. It would be self-contradictory to do so while also trying to win over litigation from the UK post-Brexit.