

CREATION OF SUBSIDIARY JURISDICTION RULES IN THE RECAST OF BRUSSELS I: BACK TO THE DRAWING BOARD?

LORNA GILLIES*

A. INTRODUCTION

“Private international law, properly understood, is about determining the most ‘just’ distribution of regulatory authority.”¹

Much has been written about the inception and development of the first² and second³ waves of European private international law rules. From the incep-

* Lorna Gillies, Senior Lecturer in Law, University of Leicester, School of Law, Leicester LE1 7RH. An earlier draft of this article was presented at the Fourth Journal of Private International Law Conference, Milan, April 2011. The author is grateful to the conference organisers. The research for this article was undertaken during a period of research leave granted by the University of Leicester, which is also gratefully acknowledged. The author is also grateful to Professor Paul Beaumont and the two anonymous referees for their helpful comments. The usual disclaimer applies. This article is dedicated to Eilidh, Emma and Rachael.

¹ A Mills, *The Confluence of Public and Private International Law, Justice, Pluralism and Subsidiarity in International Constitutional Ordering of Private Law* (Cambridge University Press, 2010), 18; 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” (Study JLS/C4/2005/07-30-CE), 6 July 2007, para 135, 107 referring to C-281/02 *Owusu v Jackson* [2004] ECR I-1383 and Opinion 1/03 of the Court on the competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2006] ECR I-1145 (hereinafter “the Lugano Opinion”).

² GAL Droz, *Compétence judiciaire et effets des jugements dans le Marche Commun* (Librarie Dalloz, 1972); IF Fletcher, *Conflict of Laws and European Community Law* (North-Holland Publishers, 1982); P Stone, *EU Private International Law*, (Edward Elgar Publishing, 2006 and 2010).

³ PR Beaumont, “European Court of Justice and Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters” (1999) 48 *International and Comparative Law Quarterly* 223; J Israël, “Conflict of Law and the EC after Amsterdam. A Change for the Worse?” (2000) 7 *Maastricht Journal of European and Comparative Law* 81; J Basedow, “The Communitarisation of the Conflict of Laws under the Treaty of Amsterdam” (2000) 37 *Common Market Law Review* 687; O Remien, “European Private International Law, the European Community and its Emerging Area of Freedom, Security and Justice” (2001) 38 *Common Market Law Review* 53; SM Nott, “For Better or Worse? The Europeanisation of the Conflict of Laws” (2002) 24(1) *Liverpool Law Review* 3; Lord Mance, “The Future of Private International Law” (2005) 1 *Journal of Private International Law* 185; TC Hartley, “The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws” (2005) 54 *International and Comparative Law Quarterly* 813; A Dickinson, “European Private International Law: Embracing New Horizons or Mourning the Past?” (2005) 1 *Journal of Private International Law* 197; A Fiorini, “The Codification of Private International

tion and eventual application of the Brussels Convention 1968, to the second wave of “Communitarised”⁴ private international law by the Treaty of Amsterdam and the introduction of Regulation EC 44/2001 (hereafter the Brussels I Regulation) ten years ago, the traditional “landscape”⁵ of private international law has undergone much redevelopment in the pursuit of a “planned and orderly legal parkland”.⁶ This paper seeks to explore how recent proposals to approximate⁷ subsidiary jurisdiction rules in the Brussels I Regulation illustrate Hay, Lando and Rotunda’s concept of the “conflict of laws as a technique of legal integration”.⁸ A quarter of a century ago, these learned authors argued that differences in Member States’ substantive laws – juridical pluralism – was not only “inevitable but to some extent also desirable”.⁹ They were correct in highlighting the challenge of applying national laws grounded upon national traditions and cultures to “trans-frontier transactions”.¹⁰ They also argued that in the event such laws hindered the Four Freedoms, the European Community would be justified in either replacing such laws or, in the alternative, providing common rules of jurisdiction and applicable law.¹¹

The EU has and continues to exert considerable influence on the conflicts process in both a theoretical¹² (ie the formation and external impact of Euro-

Law in Europe: Could the Community Learn from the Experience of Mixed Jurisdictions?” (2008) 12 *European Journal of Comparative Law* www.ejcl.org/121/art121-7.pdf (accessed 19 April 2012); M Czepelak, “Would We Like to Have a European Code of Private International Law?” [2010] *European Review of Private Law* 705.

⁴ O Lando, “Lex Fori in Foro Proprio” (1995) 2 *Maastricht Journal of European and Comparative Law* 359; M Warrington, “European Private Law and Comparative Legal Theory: Problems of Europeanisation for Comparative Law” in C Joerges and O Gerstenberg (eds), *Private Governance, Democratic Constitutionalism and Supranationalism* (Office for Official Publications of the European Communities, Luxembourg, 1998); Beaumont, *supra* n 3; J Basedow, “The Communitarisation of The Conflict of Laws under the Treaty of Amsterdam” (2000) 37 *Common Market Law Review* 687; BJ Rodger, “The Communitarisation of International Private Law: Reform of the Brussels Convention by Regulation” [2001] *Juridical Review* 59, 69.

⁵ A term, it would appear, originally coined by Fletcher, *supra* n 2 ; Dickinson, *supra* n 3, 231; A Fiorini, “The Evolution of European Private International Law” (2008) 57 *International and Comparative Law Quarterly* 969.

⁶ Fletcher, *supra* n 2, 273 ; Dickinson, *supra* n 3, 200.

⁷ Arts 81 and 114 TFEU; Tampere Council Recommendations 1999, para 39; P Hay, O Lando and RD Rotunda, “Conflict of Laws as a Technique of Legal Integration” in M Cappelletti, M Secombe and J Weiler (eds), *Integration Through Law, Europe and the American Federal Experience* (Walter de Gruyter, 1986), 161; R Zimmerman, “Savigny’s Legacy – Legal History, Comparative Law and the Emergence of a European Legal Science” in TG Watkin (ed), *The Europeanisation of Law* (Committee of Comparative Law and the British Institute of International and Comparative Law, 1998), 8; C Twigg-Flesner, *The Europeanisation of Contract Law* (Routledge, 2008), 168.

⁸ Hay, Lando and Rotunda, *ibid.*

⁹ *Ibid.*, 161.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² Dickinson, *supra* n 3, 199; S Barriatti, *Cases and Materials on EU Private International Law* (Hart Publishing, 2011), 51.

peanised private international law rules) and practical (ie interpretative) sense. At EU level, the move towards approximation of private international law rules has been illustrated through the logic of the Treaties and the means, method and extent to which approximated rules have been proposed and interpreted¹³ by the EU Institutions.¹⁴ Such an approach to law-making, in the absence of a distinct EU Constitution, is indicative of a form of “constitutional ordering”,¹⁵ designed to correct¹⁶ national and international divergences¹⁷ in private international law rules. Four decades ago, the first generation or wave of Europeanised private international law hinted at the harmonisation of private international law. However, such measures were limited to reducing formalities in the recognition and enforcement of foreign judgments between the Member States.¹⁸ At that time, the EU undertook an approach which focused on securing common,¹⁹ but not entirely exclusive, rules of jurisdiction and applicable law. The “second generation” of European private international law rules emerged as a result of the Treaty of Amsterdam. According to Nott, the objective of communitarisation via the Treaty of Amsterdam reflected “the long-term benefit of the Community rather than . . . the internal coherence of the conflicts systems of individual Member States”.²⁰ The current *legal* process of Europeanisation has continued to “penetrat(e) national systems of governance”.²¹ The EU has sought to secure a unified position for

¹³ Art 329 TFEU; A Fiorini, “Harmonising the Law Applicable to Divorce and Legal Separation – Enhanced Cooperation as the Way Forward?” (2010) 59 *International and Comparative Law Quarterly* 1143, 1154.

¹⁴ For a reflection on recent case-law of the CJEU and a overview of the proposed Recast, see B Hess, “The Brussels I Regulation: Recent Case Law of the Court of Justice and The Commission’s Proposed Recast” (2012) 49 *Common Market Law Review* 1075.

¹⁵ Mills, *supra* n 1, 182.

¹⁶ C Joerges, “Sozialstaatlichkeit in Europe? A Conflict-of-Laws Approach to the Law of the EU and the Proceduralisation of Constitutionalisation” (2009) 10 *German Law Journal* 335; H Muir Watt, “The Role of the Conflict of Laws in European Private Law” in Twigg-Flesner, *supra* n 7; Mills, *supra* n 1.

¹⁷ Fiorini, *supra* n 3, 1.

¹⁸ Barriatti, *supra* n 12.

¹⁹ A Furrer, “European Law without Peak and Centre? Observations on the Europeanization Process in Private Law Towards a Supranational Multi-level System” in C Joerges and O Gestenberg (eds), *Private Governance, Democratic Constitutionalism and Supranationalism* (Office for Official Publications, Luxembourg, 1998), 167.

²⁰ Nott, *supra* n 3, 7.

²¹ “‘Europeanization’ . . . is at heart about the consequences of European integration for domestic political systems” in K Dyson and KH Goetz, “Living with Europe: Power, Constraint, and Constestation” in K Dyson and KH Goetz (eds), *Germany, Europe and the Politics of Constraint* (Oxford University Press, 2003), 12; A Stone Sweet, “Constitutional Dialogues in the European Community”, EU Working Paper RSC No 95/38, 1; S Bulmer, “Theorizing Europeanization” in P Graziano and MP Vink (eds), *Europeanization New Research Agendas* (Palgrave, 2007), 47 (word modified for syntax); T Flockhart, “Europeanization or EU-ization? The Transfer of European Norms across Time and Space” (2010) 48 *Journal of Common Market Studies* 787. The Opinion of the Economic and Social Committee on the Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments

the benefit of the internal market, as illustrated in the most recent proposals for common contract laws²² and optional rules for (currently) cross-border sales contracts.²³ In the field of conflict of laws, the EU has sought to approximate Member States' laws through the introduction of applicable law rules for contractual obligations, non-contractual obligations, succession, and divorce and separation.²⁴ The "pressure [for Member States] to participate"²⁵ in these EU law-making processes is indicative of the future form and basis of EU private international law.

On 1 March 2012, the Brussels I Regulation on jurisdiction in civil and commercial matters (EC 44/2001) became ten years old. A process of review of that Regulation began five years after its introduction. One of the key aspects that arose out of the review of the Regulation was the appropriateness of Member States' subsidiary jurisdiction rules.²⁶ As readers of this journal will appreciate, under the current Regulation, Member States' subsidiary (or residual) jurisdiction rules apply to a civil or commercial matter in broadly two ways. These rules may apply either in their entirety, for example if a Member State originally opted out of Title IV TEU.²⁷ Alternatively, they may apply in part, for example if a cross-border dispute was outside the scope of the Regulation *rationae materiae*, or if the defendant was not domiciled in an EU Member State and an EU court does not have exclusive jurisdiction by virtue of Articles 22 or 23 of the Brussels I Regulation.²⁸ As Hess affirms, the Brussels I Regulation permits the application of all subsidiary jurisdiction rules, even those which are exorbitant.²⁹ On 14 December 2010, the European Commission released a proposal for the replacement of the Brussels I Regulation

in Civil and Commercial Matters, COM (2010) 748 final/2-2010/0383 (COD), 5 May 2011, para 3.1 states that "[T]he revision should also help to create the necessary legal environment for the European economy to recover."

²² C von Bar and E Clive, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Oxford University Press, 2010).

²³ "Regulation of The European Parliament and of the Council on a Common European Sales Law", Brussels, 11.10.2011, COM(2011) 635 final. See further H Schulte-Nölke, "The Way Forward in European Consumer Contract Law: Optional Instrument instead of Further Deconstruction of National Private Laws" in Twigg-Flesner, *supra* n 7; M Kenny, L Gillies and J Devenney, "The EU Optional Instrument: Absorbing the Private International Implications of a Common European Sales Law" (2011) 13 *Yearbook of Private International Law* 315.

²⁴ The first area to be subject to the enhanced co-operation procedure for matters external to the EU *acquis*; Editorial, "Enhanced Cooperation: A Union à taille réduite or à porte tournante?" (2011) 48 *Common Market Law Review* 317.

²⁵ Fiorini, *supra* n 5, 980 (words added for syntax); or as "commitment to the institution"; K Featherstone, "Introduction: In the Name of 'Europe'" in K Featherstone and CM Radaelli (eds), *The Politics of Europeanization* (Oxford University Press, 2003), 3, 6.

²⁶ As a set of "secondary" national rules; Mills, *supra* n 1.

²⁷ Nott, *supra* n 3, 10. Denmark did this but became party to the Brussels I Regulation on 1 July 2007 through an international agreement between the EU and Denmark, see [2006] OJ L120/22 and P Beaumont and P McEleavy, *Anton's Private International Law* (SULI, 2011), 213.

²⁸ Art 4, Brussels I Regulation.

²⁹ Hess, *supra* n 14, 1105.

(known and referred to as the “Recast”).³⁰ The proposed Recast highlights that, as far as the Commission is concerned, the continued willingness to respect and facilitate judicial pluralism and by implication, exorbitant bases of jurisdiction, is tangential to *approximating* conflicts justice³¹ in fulfilment of Treaty objectives, social welfare and the “respect for fundamental rights”.³² As far as the Commission is concerned, the desire to achieve uniformity of decision in furtherance of continued integration of the EU *acquis*³³ has overridden the willingness to continually accommodate national divergences³⁴ in subsidiary jurisdiction rules, where they remain.

Far from being an “inward looking organisation”,³⁵ the EU Commission’s original proposal highlights the EU’s objective (in fulfilment of the Stockholm Programme) by *extending* the EU *acquis*³⁶ through the approximation of subsidiary jurisdiction not previously within the remit of the Brussels I Regulation. Accordingly, the aim of this paper is twofold. First, the paper will examine the Commission’s original proposal to replace Member States’ subsidiary jurisdiction rules in the Recast³⁷ of the Brussels I Regulation; and second, it will assess how that aspect of the proposal highlights the continuing objective towards Europeanised private international law rules.³⁸ It should be observed at the outset that on 24 October 2012 the Council of the European Union rejected that aspect of the Commission’s proposal. On 20 November 2012 the European Parliament overwhelmingly approved the amended version of the proposed Recast.³⁹ Despite the *current* lack of endorsement, a key ques-

³⁰ COM(2010) 748 final COD 2010/0383, 14 December 2010.

³¹ Mills, *supra* n 1, 16 alludes to the “European regime” as a “collective enterprise”.

³² K Lenaerts, “The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice” (2010) 59 *International and Comparative Law Quarterly* 255. Hess, *supra* n 14, 1078–79.

³³ A Weiner, “The Embedded Acquis Communautaire: Transmission Belt and Prism of New Governance” (1998) 4 *European Law Journal* 294 (word in brackets removed for syntax).

³⁴ COM(2010) 748 final, 3; *cf* in preference of pluralism see Fiorini, *supra* n 5.

³⁵ Nott, *supra* n 3, 11.

³⁶ R Petrov and P Kalinichenko, “Europeanization of Third Country Judiciaries through the Application of the EU *Acquis*: The Cases of Russia and the Ukraine” (2011) 60 *International and Comparative Law Quarterly* 325.

³⁷ COM(2010) 748 final; Justice and Home Affairs Council, 3135th Council Meeting, Press Release 18498/11, PRESSE 11-49, Background, Brussels, 12 December 2011, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=PRES/11/491&format=HTML&aged=0&lg=en&guiLanguage=en> (accessed 26 March 2012), 11.

³⁸ Dickinson, *supra* n 3, 200; Fiorini, n 5, 969; J Weber, “Universal Jurisdiction and Third States in the Reform of the Brussels I Regulation” (2001) 75 *Rechts Zeitschrift* 620. Hess, *supra* n 14.

³⁹ As reported by Professor Andrew Dickinson to the BIICL Private International Law Discussion Forum, 22/11/12 ; Council of the European Union, “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)”, A7-0320/2012, 15 October 2012. See also the earlier Council of the European Union, Report “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” 2010/0383 (COD), JUST-CIV 209, 1 June 2012. Hess, *supra* n 14, 1112.

tion deriving from the Commission's proposal is what *values* inherent to private international law were sought to be replaced⁴⁰ by the original proposal and – going forward – what values should be ascribed to approximated, European private international law rules?⁴¹ As Fentiman reminds us,

“the *evolving* European regime is subservient to the higher goal of European integration. It is not intended to provide optimal conflicts results, but optimal integration.”⁴²

B. APPROXIMATING CONFLICT-OF-LAWS RULES AS A TECHNIQUE OF EUROPEAN INTEGRATION

In the tradition of Savigny, the pursuit of conflicts justice has been focused on a “uniformity of result”⁴³ approach. This approach has sought to secure favourable outcomes with regard to the “process of justice in the foreign court”⁴⁴ via rules of jurisdiction and applicable law drafted to ensure certainty for litigants in the management of perceived or actual “litigation risk”.⁴⁵ Mills has defined conflicts justice as meaning fairness through “the international system of rights protection”.⁴⁶ The theoretical foundations of the conflict of laws and conflicts justice are twofold. First, conflicts justice provides the normative basis whereby sovereign nations determine and assert the limits of their legislative power to prescribe laws and their authoritative⁴⁷ jurisdictional competence in cross-border matters through the application of internalised or *commonly agreed* second-order rules. Second, such “standards of [conflicts] justice”⁴⁸ are established by sovereign nations via the *values* embedded in their substantive laws, which are then *in turn* supported by second-order rules. The values of conflicts justice, and thereby conflicts rules, are traditionally focused on securing

⁴⁰ *Ergo* the corresponding impact on the “underestimated . . . role and importance of national law”, Furrer, *supra* n 19, 175 (punctuation removed for syntax).

⁴¹ Hess, *supra* n 14, 1111–12.

⁴² R Fentiman, “Choice of Law in Europe: Uniformity and Integration” (2008) 82 *Tulane Law Review* 2021, 2051 (word in italics for emphasis). See also M Everson and J Eisner, *The Making of a European Constitution, Judges and Law Beyond Constitutive Power* (Routledge-Cavendish, 2007), 17, who allude to the “notion of ‘supranationality’ [which] include[s] a political ideal that sovereign national polities should always be constrained in exercising their sovereign powers by the interests and values of other sovereign polities, represents Europe’s greatest normative achievement” (words added and modified for syntax).

⁴³ Fentiman, *supra* n 42.

⁴⁴ L Collins, A Briggs, J Harris, JD McClean, C McLachlan and CGJ Morse (eds), *Dicey, Morris and Collins, The Conflict of Laws* (Sweet and Maxwell, 14th edn, 2006), 7.

⁴⁵ R Fentiman, *International Commercial Litigation* (Oxford University Press, 2010), 4.

⁴⁶ Mills, *supra* n 1, 209.

⁴⁷ Everson and Eisner, *supra* n 42, 6.

⁴⁸ AE Jaffey, *Topics in Choice of Law* (The British Institute of International and Comparative Law, 1996), 18 (word in brackets added for syntax).

legal certainty⁴⁹ for parties involved in cross-border disputes⁵⁰ in fulfilment of “predictable”⁵¹ outcomes (by the application of certain and predictable jurisdiction rules and approximated choice-of-law rules). Party autonomy to select the jurisdiction and applicable law provides a degree of legal certainty required to alleviate transaction and litigation risk.⁵²

When a dispute contains foreign aspects, a forum is required to balance competing interests⁵³ in determining on what basis it may assert jurisdiction and what law should apply. The idea of traditional conflicts justice is underpinned by a “self-contained”⁵⁴ pluralist approach which seeks to “normative[ly] apprais[e] . . . foreign concepts”⁵⁵ (ie laws) and co-ordinate⁵⁶ them within national rules. Despite such “flexible and subtle”⁵⁷ approaches, a pluralist approach has been partially replaced by both international and regional unification as “the most effective means to achieve uniformity of result”⁵⁸ and limiting exorbitant bases of jurisdiction. The unification of private international law has progressed by way of bilateral conventions between states and multilateral conventions between groups of states. Whilst participating in and acceding to such unification techniques, Member States have – until the EU’s external competence was affirmed by the Court of Justice’s Lugano Opinion⁵⁹ – largely retained authority and competence to implement and interpret conflict-of-laws rules applicable to cross-border disputes external to the EU. However, as Fentiman,⁶⁰ Muir-Watt⁶¹ and Mills⁶² have all recently remarked, efforts by the European Union at *internal* codification of those laws have shifted

⁴⁹ G Kegel, “Fundamental Approache,” in K Lipstein (ed), *International Encyclopedia of International Law*, Vol III/1, *Private International Law* (Mohr Siebeck/Martinus Nijhoff Publishers, 2011).

⁵⁰ APMJ Vonken, “Balancing Processes in International Family Law. On the Determination and Weighing of Interests in the Conflicts of Laws and the ‘Openness’ of the Choice of Law System” in Th M De Boer (ed), *Forty Years On: The Evolution of Post War Private International Law in Europe, Symposium in Celebration of the 40th Anniversary of the Centre of Foreign Law and Private International Law, University of Amsterdam, on 27 October 1989* (Kluwer, 1990), 178.

⁵¹ *Ibid.*, 176.

⁵² Fentiman, *supra* n 45, 5, 7.

⁵³ Furrer, *supra* n 19, 169, who refers to “parties interests, transaction interests and regulatory interests”; for a discussion of the “market function” of private international law, see Muir Watt, *supra* n 16, 54.

⁵⁴ Furrer, *supra* n 19, 169.

⁵⁵ *Ibid.*, 168–69 (words modified and removed for syntax).

⁵⁶ Mills, *supra* n 1, 32.

⁵⁷ TM de Boer, “The Relation between Uniform Substantive Law and Private International Law” in AS Hartkamp, MW Hesselink, EH Hondius, CE du Perron and JBM Vranken (eds), *Towards a European Civil Code* (Martinus Nijhoff Publishers, 1994), 63.

⁵⁸ *Ibid.*

⁵⁹ The Lugano Opinion, *supra* n 1 and see also CT Kotuby Jr, “External Competence of the European Community in the Hague Conference on Private International Law: Community Harmonization and Worldwide Unification” [2001] *Netherlands International Law Review* 1, 17–18.

⁶⁰ Fentiman, *supra* n 42, 2021.

⁶¹ Fentiman, *supra* nn 42 and 45.

⁶² Muir Watt, *supra* n 16.

from a respect for national pluralism and a desire for international unification towards the approximation of such rules at *regional* level. The objective of this *new layer* of private international law is to further an approach focused on horizontal uniformity of decision across the Member States and the enforcement of mutual trust necessary for supporting the “Community order”⁶³ and “the external congruity of decisions”.⁶⁴

Article 81 of the Treaty on the Functioning of the European Union reinforces the continued progression towards harmonised judicial co-operation in civil and commercial matters in pursuit of two broad, and inherently intra-Community, objectives. First, the Treaty seeks to regulate the legal effect of intra-Community relations by ensuring the compatibility of private international law rules between the Member States. The second objective is to facilitate greater access to justice and *ergo* greater access to EU laws.⁶⁵ This objective requires Member States’ private international laws to be approximated. Whilst the principles of subsidiarity and proportionality legitimise only that which the EU is permitted to regulate in accordance with the Treaties, Denmark, the United Kingdom and Ireland still retain their ability to “opt in”⁶⁶ or maintain their own “brand” – *ergo* their own *value* – of conflicts justice. Consequently, the Europeanisation of private international law by way of approximation still⁶⁷ remains positioned between convergence and full harmonisation.

The emphasis on necessity reflects the timeliness for “reconceptualising” national private international laws as a fully fledged “sub-category”⁶⁸ of EU private law.⁶⁹ Whilst the Treaty goes some way to shed light on the transfer of competence from the Member States to the EU by permitting the “elimination of obstacles to the proper functioning of civil proceedings”,⁷⁰ there is an opinion that a “third level” of private international law rules is *quantitatively*⁷¹ necessary for two reasons. First, where national laws have failed to take into account diverging approaches to the allocation of jurisdiction over non-Mem-

⁶³ Mills, *supra* n 1, 201.

⁶⁴ Furrer, *supra* n 19, 169 (word italicised for emphasis).

⁶⁵ COM(2010) 748 final, 3.

⁶⁶ Majone describes this as an example of “selective exit”: G Majone, *Europe as the Would-Be World Power: The EU at Fifty* (Cambridge University Press, 2009), 35. The United Kingdom and Ireland have elected to participate in the replacement of the Brussels I Regulation; European Parliament Draft Report at 12. Denmark can only opt in, under the present Treaty regime, to the Brussels I Regulation and the Service Regulation through international agreements with the EU but under a new Protocol agreed with the Lisbon Treaty it could give itself the power to opt in to any Art 81 TFEU instrument on the same legal basis as Ireland and the UK: see Beaumont and McEleavy, *supra* n 27, 20.

⁶⁷ Fiorini, *supra* n 5, 984.

⁶⁸ Dickinson, *supra* n 3, 200.

⁶⁹ Something not entirely novel to the subject when one considers its theoretical development; on which see Mills, *supra* n 1, ch 2.

⁷⁰ Art 81(2)(f) TFEU; *cf* T Kruger, *Civil Jurisdiction Rules of the EU and Their Impact on Third States* (Oxford University Press, 2008), 10.

⁷¹ Mills, *supra* n 1, 178.

ber State domiciliaries in their private international law' rules;⁷² and second, for the recognition and enforcement of third state judgments.⁷³ Despite the original objective of the Brussels I Regulation, the Commission in its proposal argued that continued divergences in Member States' subsidiary jurisdiction rules "create . . . unequal market conditions for companies engaged in transactions with parties outside the EU".⁷⁴ The Commission regards the elimination of these rules as being entirely compatible with the objectives of the internal market. A related objective is driven by economic considerations which seek to ensure that, *inter alia* through the abolition of *exequatur*, judgments are enforced effectively between the Member States in support of the internal market.⁷⁵

1. An Example of the "Purpose" of Approximation: Addressing Divergences in Subsidiary Jurisdiction Rules

It was recently remarked by Mills that "private international law rules are not part of the law of each state, not 'dependent merely upon the arbitrary determination of particular States,' but 'limitations belonging to the law of nations'".⁷⁶ Fresh criticisms have emerged of emphasis that private international law places on national considerations and application of conflicts justice. In the realms of choice of law, such criticisms have increasing significance, not just for commercial parties who use their knowledge of such rules in assessing transactional and litigation risks, but for private parties who wish to assert their right for a particular law other than the *lex fori* to apply to their dispute.⁷⁷ The emphasis on the (apparent) *need*⁷⁸ to correct deficiencies in national laws – including private international laws – is illustrated in Joerges' recent observations on the competing roles of national social policy and supranationalism in the constitutionalisation of EU law. Joerges demonstrates how the influence of social policy in the Europeanisation process has sought to maintain the beliefs and objectives of the Member States' legal systems.⁷⁹ The ability of Member States to retain their own brand of conflicts justice in jurisdiction rules for non-EU

⁷² Joerges, *supra* n 16; cf Kruger, *supra* n 70, 396, who questions the necessity for Member States' exorbitant jurisdiction rules.

⁷³ A point remarked on by Hess in his assessment of the Recast *supra* n 14, 1106–07.

⁷⁴ A point repeated more than once at COM(2010) 748 final, 3 and 11 (word modified for syntax).

⁷⁵ Muir Watt, *supra* n 16, 46, 54; Mills, *supra* n 1, 178.

⁷⁶ Mills, *supra* n 1, 60.

⁷⁷ Eg Case C-148/02 *Garcia v Belgium* [2003] ECR I-11613, Case C-353/06 *Grunkin and Paul* [2008] ECR I-7639 and *Radmacher v Granatino* [2010] UKSC 42.

⁷⁸ See EB Crawford and JM Carruthers, "Conflict of Loyalties in the Conflict of Laws: The Cause, The Means and The Cost of Harmonisation" (2005) 3 *Juridical Review* 251, 262 who have questioned the "need" for a supranational approach across "all areas".

⁷⁹ Giving resonance to Majone's observation that in "policy agenda(s) . . . in areas . . . such as justice and home affairs . . . national governments enjoy a comparative advantage in terms of expertise and material resources": Majone, *supra* n 66, 79 (word bracketed and words removed for syntax).

domiciled defendants is an example. By seeking to “reflect and replicate conceptions of global ordering”,⁸⁰ approximation techniques seek to ensure mutual trust between the Member States. Mutual trust is achieved (it would seem) by removing deficiencies⁸¹ in current national private international laws and replacing those rules with rules designed to facilitate uniformity of decision⁸² and, by implication, the extension of the EU *acquis*.⁸³

C. THE PROPOSAL TO HARMONISE MEMBER STATES’ SUBSIDIARY JURISDICTION RULES IN THE RECAST OF THE BRUSSELS I REGULATION (COM (2010) 748 FINAL)

On 14 December 2010, the European Commission released a proposal for the replacement of the Brussels I Regulation.⁸⁴ The proposal for revision of the Regulation has been eagerly anticipated since both the European Commission’s 2009 Report on the application of the Regulation and a Green Paper on its review.⁸⁵ Article 73 of the Brussels I Regulation confirmed that it was due for revision within five years of its introduction. The revision of the Regulation has been prompted by a number of recent cases, the majority of which have considered the internal impact of the Regulation’s application over Member States’ ability to assert jurisdiction in the face of previous jurisdiction or arbitration agreements, or to restrict proceedings in another Member State. The General study by Professors Hess, Pfeiffer and Schlosser⁸⁶ together with the “Residual Jurisdiction” study by Professor Nuyts⁸⁷ reviewed the operation of both the jurisdiction rules under the Regulation (the “internal impact”) and Member States’ subsidiary jurisdiction rules, respectively.⁸⁸ The point of the Nuyts’ Report was to consider whether “the absence of common rules determining jurisdiction against *defendants domiciled in Third States* could jeopardise the application of mandatory Community legislation, or the objectives of the Community”.⁸⁹ Recent decisions of the Court of Justice of the European Union (CJEU) have focused attention not just on acute aspects of the Regulation’s

⁸⁰ Mills, *supra* n 1, 28.

⁸¹ Eg, as Fentiman remarks on the incompatibility of the doctrine of FNC with Art 6 ECHR, *supra* n 45, 15 and the ensuing impact on comity (on which see the recent decision of the English Court of Appeal in *Star Reefers Pool Inc v JFC Group Co Ltd* [2012] EWCA Civ 14).

⁸² An example of Dyson and Goetz’s “adaptive pressures”: Dyson and Goetz, *supra* n 21, 15.

⁸³ Petrov and Kalichenko, *supra* n 36.

⁸⁴ COM(2010) 748 final COD 2010/0383, 14 December 2010.

⁸⁵ Report COM(2009) 174 final and Green Paper COM(2009) 175 final.

⁸⁶ 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)* (Verlag CH Beck, 2008).

⁸⁷ Nuyts, *supra* n 1.

⁸⁸ COM(2009) 174 final, *supra* n 85, 2.

⁸⁹ Nuyts, *supra* n 1, 177 (words italicised for emphasis).

scope and content⁹⁰ but crucially the fourth corner of Kruger's "cornerstone" analogy⁹¹ and the impact of Member States' subsidiary jurisdiction rules upon the Regulation.⁹² Whilst it is fair to say that the operation of the Regulation has largely been regarded as effective in its objective towards securing uniformity of decision,⁹³ one of the pivotal and highly contentious issues identified by the research in both the General and the Residual Jurisdiction Studies was to what extent Member States' subsidiary⁹⁴ jurisdiction rules and their analogous procedural mechanisms have conflicted with both the spirit of mutual trust as the internal component of the Regulation, and access to justice in the EU courts over disputes concerned with non-EU defendants.⁹⁵ Adopting the Jenard Report's approach and Kruger's analogy, the first cornerstone of the Regime applies the domicile of the defendant (*actor sequitur forum rei*). The Regulation is a pyramid structure, with the doctrine of *actor sequitur* being the central chamber (or "hinge"⁹⁶) of that structure. The Commission's proposal sought (*inter alia*) to harmonise subsidiary jurisdiction via an emphasis on the connection a non-EU defendant has with the jurisdiction of the Member State in which proceedings are brought.⁹⁷ If the process of approximation of private international law rules requires adaptation of the Regulation's underlying 'philosophy' (ie historically the systematisation of the original six Contracting States' rules on *recognition and enforcement*) and doctrine⁹⁸ by the replacement of Member States' subsidiary jurisdiction rules, on what basis could such an approach be justified?

1. The Treaty Basis for the Commission's Proposal

If this aspect of the proposal is to be reignited at a later date, a key issue that remains to be fully established is the basis upon which the proposal to replace Member States' subsidiary jurisdiction rules can be legitimised by

⁹⁰ See eg Case C-159/02 *Turner v Grovit* [2004] ECR I-3565, [2005] 1 AC 101; Case C-116/02 *Gasser v MISAT* [2003] ECR I-14693; and Case C-185/07 *Allianz SpA v West Tankers (The Front Comor)* [2009] ECR I-663; [2009] 1 AC 1138. For a brief overview of recent CJEU case-law, see Hess, *supra* n 14.

⁹¹ Kruger, *supra* n 70; Weber, *supra* n 38, 620.

⁹² J Newton, *The Uniform Interpretation of the Brussels and Lugano Conventions* (Hart Publishing, 2002), 21; Kruger, *supra* n 70; R Fentiman, "Civil Jurisdiction and Third States: *Owusu* and After" (2006) 43 *Common Market Law Review* 705; B Rodger, "Forum non Conveniens Post-*Owusu*" (2006) 2 *Journal of Private International Law* 71 and COM(2009) 174 final, *supra* n 85, 5, 6.

⁹³ According to the Parliament and the Council, the Regulation is "overall considered to work successfully" (COM(2010) 748 final, *supra* n 84, 3). The Commission, on the other hand regards the Regulation as "highly successful", COM(2009) 174 final, *supra* n 85, 3; Hess, *supra* n 14 (*cf* at 1100).

⁹⁴ COM(2009) 174 final, *ibid*, 2.

⁹⁵ COM (2010) 748 final, *supra* n 84, 3.

⁹⁶ Jenard-Moller Report, [1990] OJ C189/65; CMV Clarkson and J Hill, *The Conflict of Laws* (Oxford University Press, 2007), 65.

⁹⁷ Weber suggests and applies the term "universal jurisdiction" in her analysis: *supra* n 38, 621, 623.

⁹⁸ Jenard-Moller Report, *supra* n 96.

the EU Treaty?⁹⁹ Currently, the Treaty on the Functioning of the European Union affirms that competence may be either specific to the Union (Article 2(1)) or shared with the Member States (Article 2(2)). In accordance with the Lugano Opinion, the extent of the Union's exclusive competence may extend to, *inter alia*, "the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope".¹⁰⁰ What the proposal for the recast highlights is increasing "competence creep"¹⁰¹ of the Commission to propose legislation over matters regarded as being traditionally the remit of the Member States' internal rules and therefore external to the EU agenda.

According to the Commission's original proposal, the legislative basis for the proposal was grounded in accordance with Articles 67(4) and 81(2) (a), (c) and (e) of the Treaty on the Functioning of the European Union. Article 81 is especially instructive. The key difference between Article 81 and its predecessor Article 65 TEC is that the Union's objective is to

"develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States."¹⁰²

By relying on Article 81(2), the emphasis of the proposal to replace the Brussels I Regulation is fivefold. First, its purpose is "to develop judicial cooperation in civil matters having cross-border implications". Second, it is required to meet the need for the "proper functioning of the internal market" (Article 81(2)). Third, its objective is to support the "mutual recognition of judgments" (Article 81(2)(a)). Fourth, it seeks to ensure "the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction" (Article 81(2)(c)). Fifth, it also seeks to improve "effective access to justice" (Article 81(2)(e)). Building upon Dickinson's valuable examination of the (then) proposals for the Rome II Regulation in the first volume of this Journal, it is useful to consider the extent to which each of these requirements necessitated the elimination of divergences in Member States' subsidiary jurisdiction rules, by means of approximation of laws.

⁹⁹ Fiorini, *supra* n 5, 984.

¹⁰⁰ Opinion 1/03, *supra* n 1.

¹⁰¹ S Weatherill, "Competence Creep and Competence Control" (2004) 23 *Yearbook of European Law* 13 referred to in L Niglia, "The 'Rules' Dilemma—The Court of Justice and the Regulation of Standard Form Consumer Contracts in Europe" (2006/7) 13 *Columbia Journal of European Law* 125; MW Hesselink, "The Common Frame of Reference as a Source of European Private Law" (2009) 83 *Tulane Law Review* 919, 963; Czepelak, *supra* n 3, 718–19. This is also a matter of current concern *vis-à-vis* the proposal for a Common European Sales Law ((COD) 2011/0284), on which see Kenny, Gillies and Devenney, *supra* n 23, 315–44.

¹⁰² Art 81 TFEU (emphasis added).

(a) *Judicial Co-operation for Matters Having Cross-border Implications: Ensuring Compatibility through the “Internal Market Requirement”*

The application of Article 81 would appear to be non-contentious if it can be sufficiently demonstrated that the “aim and content of the measure”¹⁰³ proposed is required for the benefit of the internal market. The general aim of the proposed Regulation is, *inter alia*, to abolish Member States’ procedures for the recognition and enforcement of foreign judgments. The proposal explained, *inter alia*, the need to realign subsidiary jurisdiction rules, once external to the scope and objectives of the Community legal order, and approximate those rules with existing jurisdiction rules in the Brussels I Regulation.

In an article in this Journal, Dickinson examined the basis of the “internal market requirement”¹⁰⁴ for the proposed Rome II Regulation. In accordance with Article 65 TEC and the *Tobacco Advertising* decision on what is now Article 114 TFEU, a proposed measure has to *either* “remove . . . appreciable existing restrictions”, “prevent . . . likely future restrictions on the exercise of the . . . fundamental freedoms”, or “remove . . . appreciable distortions on competition within the internal market”.¹⁰⁵ Each of these requirements is subject to what Dickinson coins “an internal substantive proportionality requirement”,¹⁰⁶ *ergo* Stone’s “sufficient connection”¹⁰⁷ with the internal market. A shift in emphasis occurred after the Amsterdam Treaty as a result of Article 65 TEC/81 TEFU, bringing matters which would have potentially been dealt with under Article 95 TEC/114TFEU¹⁰⁸ firmly within the remit of the former. As Bariatti affirms, Article 81(2) TFEU is concerned with “guaranteeing th[e] effective implementation”¹⁰⁹ of measures for judicial co-operation in civil matters. Accordingly, the shift in emphasis moved from respecting pluralism and “promoting” compatibility of “divers[e]”¹¹⁰ rules to “ensur[ing]”¹¹¹ the compatibility of jurisdiction rules through the process of approximation.

Crucially Article 81 TFEU, unlike Article 65 TEC, does not require that any legislation made under that Article is “necessary for the proper functioning of the internal market”. The removal of the “necessity” of this condition

¹⁰³ Dickinson, *supra* n 3, 215; cf Fiorini, *supra* n 5, 977 who raised the point that “the lack of uniform definition may raise important difficulties in the practical application of related instruments”.

¹⁰⁴ Dickinson, *supra* n 3, 211.

¹⁰⁵ *Ibid*, 216 (words modified for syntax and emphasis added). Case C-376/98 *Germany v European Parliament and Council* [2000] ECR I-8419.

¹⁰⁶ Dickinson, *supra* n 3, 217.

¹⁰⁷ Stone, *supra* n 2 (2006 edn), 4.

¹⁰⁸ Israël, *supra* n 3 and Dickinson, *supra* n 3, 217.

¹⁰⁹ Bariatti, *supra* n 12, 7.

¹¹⁰ COM(2010) 748 final, *supra* n 84, 3.

¹¹¹ Draft Recital 3, COM(2010) 748 final, *ibid*, 13 (word modified for syntax and italicised for emphasis). M Bogdan, *Concise Introduction to EU Private International Law* (Europa Law Publishing, 2nd edn 2012), 12.

was achieved by the introduction of the words “particularly when” prior to “necessary”.¹¹²

(b) Is the Harmonisation of Subsidiary Jurisdiction Rules Necessary for Mutual Recognition and Access to Justice?

The objective of both the original Brussels I Regulation (and its predecessor) is that there ought to be the same approach to the recognition and enforcement of judgments across the Member States, to remove diversity of approach for the benefit of parties operating from within the internal market. As Kruger has advocated, whilst the “flaw” in these instruments was the “imperfect” approach in excluding subsidiary jurisdiction, “rectification” of the Brussels I Regulation in her view “should never be done at the expense of litigating parties . . . domiciled in other parts of the world, of courts of third states, or of comity and justice”.¹¹³ What requires to be demonstrated is the *economic necessity*¹¹⁴ of such proposals for the benefit of EU citizens and businesses contracting within and external to the EU.¹¹⁵ As alluded to earlier in this article, in order to justify a limitation on state sovereignty, measures such as those in the Commission’s proposal must – as Mills points out – arise as a consequence of the “‘natural’ evolution towards a common position”.¹¹⁶ Given the Council of the European Union’s recent rejection of the Commission’s proposal to create harmonised subsidiary jurisdiction rules, political convergence to a common position is a long way off. Nevertheless, the legal justification for such a proposal may be found in Article 81. Specifically, Article 81(2) TFEU allows for an argument that the creation of harmonised subsidiary jurisdiction rules is required for improving access to justice across the Internal Market. The initial proposal for the Brussels I Regulation was similarly based on access to justice grounds in order to “facilitate closer cooperation between the Member States”.¹¹⁷ During the negotiations for the original Brussels I Regulation, Beaumont highlighted that for the “sound operation of the Internal Market” to operate *vis-à-vis disputes internal to the EU*, “clear rules on jurisdiction . . . rapid procedures and

¹¹² See Beaumont and McEleavy, *supra* n 27, 73–74 and 607–08.

¹¹³ Kruger, *supra* n 70, 405. On the role of the English Court of Appeal to consider comity in determining whether an anti-suit injunction over proceedings in a third state should be overturned, see the recent decision *Star Reefers Pool Inc v JFC Group Co Ltd* [2012] EWCA Civ 14 analysed in R Fentiman, “Anti-suit Injunctions – Comity Redux?” (2012) 71 *Cambridge Law Journal* 273.

¹¹⁴ Mills, *supra* n 1, 178–79 (word in quote added).

¹¹⁵ Weber, in alluding to the question of the “desirability” of the proposals (*supra* n 38, 623) suggests a number of “possible benefits” including, *inter alia*, for consumer contracting with non-EU based businesses: *supra* n 38, 623–24 and 642.

¹¹⁶ Mills, *supra* n 1, 187.

¹¹⁷ H Kortenberg, “Closer Cooperation in the Treaty of Amsterdam” (1998) 35 *Common Market Law Review* 833, 845, quoting the then Commissioner Monti.

legal certainty [were] of the essence”.¹¹⁸ As the Nuyts Report demonstrated, the varied spectra of subsidiary jurisdiction rules are evidenced by numerous factors. For example, such factors may include the (exorbitant) basis for the particular jurisdiction rule and the interests¹¹⁹ represented by them. The influence of the Brussels I Regulation itself may be relevant factor.¹²⁰ Other factors include the form, scope and relationship of these rules with the internal laws of the Member State concerned, in particular their constitutional laws, procedural rules and (particularly in the case of new candidate countries) compliance with bilateral conventions. The effectiveness of subsidiary jurisdiction rules are also heavily influenced by the connecting factors used to establish jurisdiction (rendering them exorbitant or otherwise), any power vested in the court to grant jurisdiction over a non-EU defendant as well as their corresponding relationship with rules for the enforcement of judgments from third state. Despite a degree of influence of the Brussels I Regulation, the variety of subsidiary jurisdiction rules reignites the wider question of the appropriateness of those rules and of the double system of direct jurisdiction. Whilst the Nuyts Report affirmed the potential for subsidiary jurisdiction rules to restrict the application of EU law, it also acknowledged that concerns regarding the enforcement of EU law have been limited in practice. Nevertheless the need to ensure mutual recognition will, over time, require a permanent change in attitude¹²¹ towards law-making and interpretation¹²² of cross-border matters that remain, both in territorial and membership terms, inherently *external* to the EU.

2. Content of the Commission’s Original Proposal

(a) *Synopsis of the Green Paper*

A number of Recitals in the Green Paper set out the proposals for the replacement of Member States’ subsidiary jurisdiction rules. In seeking to extend the “close link between the court and the action”,¹²³ Recital 13 of the Green Paper stated that the defendant should still be able reasonably to foresee which court of a Member State can assert jurisdiction over him. Recital 16 of the Recast proposed by the Commission set out that “to promote the interests of claimants and defendants and promote the proper administration of justice within the

¹¹⁸ P Beaumont, “A United Kingdom Perspective on the Proposed Hague Judgments Convention” (1998) XXIV *Brooklyn Journal of International Law* 75, 91 (word modified for syntax).

¹¹⁹ Hartley, *supra* n 3, 814–15.

¹²⁰ EB Crawford and JM Carruthers, *International Private Law: A Scots Perspective* (W Green, 3rd edn, 2010) 178, where those authors provide the example of subsidiary jurisdiction rules in Schedule 8 to the Civil Jurisdiction and Judgments Act 1982 being “closer, than are the English residual jurisdiction rules, to those of the Brussels I Regulation”.

¹²¹ Hartley, *supra* n 3, 813–15.

¹²² Hartley, *ibid*, 828; Fentiman, *supra* n 42, 2029.

¹²³ Recital 134, Green Paper. The Parliament proposed replacing the word “link” with “connection”.

Union”,¹²⁴ only *Union rules* should apply to defendants domiciled in third States. Recital 17 of the Green Paper continued that the basis of the Regulation “should therefore establish a complete set of rules on international jurisdiction of the courts in the Member States”. The Recital continued: “[T]he existing rules on jurisdiction ensure a close link between proceedings to which this Regulation applies and the territory of the Member States which justifies their extension to defendants wherever they are domiciled.”¹²⁵ The reference to domicile in the proposal continued in line with the existing Articles 59 and 60, namely that the internal laws of the Member States determine whether a natural person is domiciled in a Member State for the purposes of the jurisdiction regime provided by the Regulation and a broad, uniform definition of domicile for legal persons is provided.¹²⁶

(b) Direct Jurisdiction Rules over Non-EU Defendants in an EU Instrument

The Commission’s proposal sought to extend the basis for Member States to assert jurisdiction over non-EU defendants in the scope of Brussels I. The starting point of this aspect of the proposal was Article 4(2) (ex Article 3, Brussels I Regulation). Article 4(2) proposed that a party who is not domiciled in a Member State could be sued in a Member State in accordance with sections 2–8 of Chapter II. With regards to section 2 of Chapter II, Article 5 proposed to allocate jurisdiction in matters relating to contract, tort, etc, irrespective of where a defendant was domiciled. With regard to Article 6, only a slight change of emphasis was offered which proposed that a defendant could be sued as a multiple party to proceedings brought in the courts of a Member State, provided he was domiciled in a Member State. The proposed Article 23 on exclusive jurisdiction agreements would have applied in exactly the same way regardless of where the parties were domiciled.¹²⁷

There were also two proposals which would have introduced specific categories of jurisdiction new to the Brussels I Regulation. Both categories were contained in section 8 of Chapter II. It is worth examining each in turn and considering the implications.¹²⁸ If a claimant was not able to bring a non-EU defendant into the Brussels Regime by virtue of the rules in Articles 2–24 (ie exclusive jurisdiction, submission, a jurisdiction agreement, by connection to a contract, tort, etc, or via a particular category of “protected”¹²⁹ contract), Arti-

¹²⁴ Recital 16, Green Paper, *ibid*.

¹²⁵ Recital 17, Green Paper, *ibid*.

¹²⁶ Case C-327/10 *Hypoteční banka, as v Udo Mike Lindner* [2011] ECR I-0000, judgment of 17 November 2011; Case C-292/10 *G v Cornelius de Visser* [2012] ECR I-0000, judgment of 15 March 2012.

¹²⁷ Art 23(1), COM(2010) 748 final, *supra* n 84, 32.

¹²⁸ Hess, *supra* n 14, 1106. Hess says that “the wording of the proposed articles [are] problematic” (word in brackets replaced for syntax).

¹²⁹ Stone, *supra* n 2 (2006 edn), 113.

cle 25 would have enabled the courts of a Member State to assert jurisdiction instead if the defendant had property located in a Member State.¹³⁰ The connecting factors required to establish jurisdiction under Article 25 were that the value of the property had to be proportionate to the value of the claim and that the dispute had to have a sufficient connection with the Member State. However, if the matter arose, who would have attested to the value of the property? In the interests of fairness and expediency (and to avoid speculative or vexation claims), a court-appointed expert would have been required. The criteria used to determine how a dispute was to be regarded as localised in a Member State also required clarification. In the absence of the use of both personal connecting factors such as domicile, habitual residence or nationality and a lack of jurisdiction under section 2 of Chapter II, a particularly defined, autonomously interpreted connecting factor based on economic criteria to ensure a close connection between the dispute and the defendant's (commercial) property would have been required in order to establish jurisdiction. Such a definition would have depended upon an appropriately constructed preliminary reference to the Court of Justice.

The proposed second category was contained in Article 26. This Article would have equipped Member States with a form of discretionary jurisdiction, applicable on an exceptional basis (*forum necessitatis*). Article 26 had similarities with the "escape clause" contained in Article 4(3) of the Rome II Regulation. Article 26 proposed that *by way of exception*, if no Member State court has jurisdiction (by virtue of the earlier provisions referred to) a Member State *may* assert jurisdiction. This proposed basis of jurisdiction was discretionary, and would have been subject to two conditions. The first condition required there to be a question of either "the right to a fair trial or the right to access to justice" to justify jurisdiction under Article 26. The second requirement was that the dispute must have "a sufficient connection with the Member State of the court *seised*" (emphasis added). At first reading, Article 26 might have offered some glimmer of hope to those Member States seeking to preserve an element of discretion in determining whether jurisdiction should be established over non-EU domiciled defendants. A number of key issues remained to be resolved. The subsequent deletion of this Article in the European Parliament's Report avoided having to address them.

The first key issue was the standard to apply. For example, if the approach of Article 4(3) of the Rome II Regulation was to be followed, Article 26 would have been subject to a high threshold test.¹³¹ The second issue concerned the wording of Article 26, which appeared to suggest that having already been "seised" of a dispute (supporting mutual trust between the Member States),

¹³⁰ *Ibid.*, 46–47.

¹³¹ JJ Fawcett and JM Carruthers, *Cheshire, North and Fawcett's Private International Law* (Oxford University Press, 14th edn, 2008), 799.

the underlying objective was to determine on what basis a Member State court should retain or decline jurisdiction? The third issue was how were the rights to a “fair trial” or to “access to justice” in a Member State, compared to a non-Member State, be objectively assessed? The “fair trial” option would tend to suggest a direct comparison between the EU *acquis* on the one hand and an objective, qualitative assessment of the public policy of a non-Member State on the other.¹³²

Even if an assessment of public policy of competing jurisdictions can and ought to be considered at the jurisdiction stage, how would fairness have been assessed? Was it to be assessed from the perspective of the claimant (EU based or otherwise) who seeks to establish Article 26 as a basis of jurisdiction? Alternatively, was it to be assessed from the perspective of the non-EU defendant who would have been potentially subject to Article 26 jurisdiction? Or, in the spirit of *forum conveniens*, would a balance-of-fairness test have been required? The “access to justice” option sought to support a right to access substantive EU law as opposed to the law of a third state. Such an option may have led to an (indirect) comparison between the potential application of the substantive rules of a non-Member State on the one hand and EU law on the other for the purposes of bringing a claim that might not have overcome the jurisdiction hurdle under subsidiary jurisdiction rules. There are two ways in which the fair-trial or access-to-justice requirement may have been satisfied. The requirement may have been satisfied if it was neither reasonable nor possible to bring proceedings in a third state. Alternatively, the fair-trial/access-to-justice requirement may have applied if it could be reasonably anticipated that a judgment from a third State “would not be entitled to recognition and enforcement in the Member State of the court seised under the law of that State”.¹³³ The justification for this was the preservation of the claimant’s rights.

At the time of writing, the subsequent deletion of Article 26 from the proposed Recast¹³⁴ puts subsidiary jurisdiction rules firmly back in their place. A further question was what objective criteria would have been used to assess the extent to which a dispute had a sufficient connection with a Member State? In the absence of a connection via an exclusive jurisdiction, submission, a jurisdiction agreement, contract (protected or otherwise), agency, tort, or indeed the defendant having property in the jurisdiction, would the defendant’s presence at the issue of proceedings be both appropriate and sufficient? The final issue that arose from this proposal was what objective criteria were to be used in order to assess whether, under its current law, a Member State would not

¹³² Petrov and Kalichenko, *supra* n 36.

¹³³ Art 26 (word italicised for emphasis).

¹³⁴ COM(2010) 748 final, *supra* n 84; Justice and Home Affairs Council, 3135th Council Meeting, Press Release 18498/11, PRESSE 11-49, Background, Brussels, 12 December 2011, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=PRES/11/491&format=HTML&aged=0&lg=en&guiLanguage=en> (accessed 26 March 2012), 11.

recognise and enforce a third-state judgment, to permit jurisdiction by Article 26(b)? Again, even if such a proposal had been adopted (or if it is subsequently reintroduced), a high threshold test would have to be applied to maintain a reciprocal respect for values embedded in national conflicts rules.

3. Towards the Final Version of the Recast: The Status Quo for Subsidiary Jurisdiction Rules

(a) *The Views of the European Parliament and Council Expressed*

In its Draft Report on the proposal, the European Parliament recommended the deletion of Recital 16 of the Regulation, arguing that the “Commission has no mandate” to pursue this “premature . . . step without wide-ranging consultations and political debate”.¹³⁵ The European Parliament were also not in favour of the basis for Recital 17 of the Green Paper, arguing that in the absence of “quantitative evidence that the existing divergences between the national laws . . . lead[s] to distortions of competition [and] significant losses for consumers”,¹³⁶ the proposal “does nothing to improve the position of non-EU defendants”.¹³⁷ In comparison to other highly significant aspects of the proposals in the Recast (namely the abolition of *exequatur* and improving choice of court agreements),¹³⁸ the proposal to replace subsidiary jurisdiction remains on politically thin ground. Just as the Commission’s argument for the necessity of the Rome II Regulation was scrutinised by Dickinson, the arguments presented by the Commission *vis-à-vis* the proposal to amend subsidiary jurisdiction rules in line with the Brussels I Regulation must be scrutinised further.

(b) *Endorsement of the Council of the European Union and European Parliament’s Approach*

On 15 October 2012, the European Parliament’s Committee on Legal Affairs issued a further Report.¹³⁹ This Report contains the version of the Recast of

¹³⁵ Council of the European Union, “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) ((COD) 2010/0383), 1 June 2012, 8. The European Parliament issued a further amended report (footnoted hereinafter as “Amendment 121”) which contains the most recent version of the proposed Recast; 2010/0383(COD) 25 September 2012.

¹³⁶ European Parliament Draft Report, *ibid.* According to Furrer, *supra* n 19, 176: “[C]ommunity law acts as a catalyst on national law, which in turn represents its foundations and is applied in its respective form.” For example, on the point that the Brussels I Regulation required to be adapted to better protect consumers seeking to sue non-EU defendants in a Member State, see L Gillies, *Electronic Commerce and International Private Law* (Ashgate, 2008), 115–16; COM(2010) 748 final, *supra* n 84, para 3.1.2, 8.

¹³⁷ Council of the European Union Draft Report, *supra* n 135.

¹³⁸ For a review, see Hess, *supra* n 14.

¹³⁹ European Parliament, “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)”, *supra* n 39.

the Brussels I Regulation. The Report formed the basis of a first reading which received endorsement by the Council of the European Union in late October 2012. Significantly, the European Parliament's Report demonstrates a clear shift in rhetoric *vis-à-vis* subsidiary jurisdiction rules from imminent¹⁴⁰ to incremental change. For example, Recital I explains how "certain [provisions] . . . *in the interests of clarity*" required amendment to "further facilitate the free circulation of judgments [and] enhance access to justice".¹⁴¹ In Recital 2, reference is made to the "gradual establishment"¹⁴² of an area of freedom, security and justice. Recital 11(f) is also instructive. In that recital, both the Council of the European Union and the European Parliament seek to "introduce . . . *partial reflexive effect*",¹⁴³ by enabling EU consumers to bring proceedings under Article 16 in the courts of their domicile¹⁴⁴ regardless of the domicile of the defendant business. As far as subsidiary jurisdiction rules are concerned, subject to the introduction of such reflex effect for consumer and employment contracts, Article 4(a) of the final version of the Recast preserves the status quo. Article 88(1) of the most recent Amendment also proposes that Member States would be required to intimate which of their rules apply against defendants domiciled in a non-Member State.

Before (or indeed if) the proposal to approximate subsidiary jurisdiction rules is reignited, more research is required on the actual volume and economic value of cases brought before the courts of Member States on the basis of *both* the Brussels I Regulation and subsidiary jurisdiction rules. According to the Commission's earlier report in 2009 on the application of the Regulation throughout the EU, "the jurisdiction rules generally apply in a relatively small number of cases, ranging from less than 1% of all civil cases to 16% in border regions".¹⁴⁵ As far as the replacement of national subsidiary jurisdiction rules are concerned, two key questions persist. First, what is the inherent value of both the Brussels Regime and subsidiary jurisdiction rules to commercial litigation in the courts of Member States? Second, are subsidiary jurisdiction rules causing such problems for EU citizens in being able to access justice that approximation of such rules is necessary?

¹⁴⁰ Crawford and Carruthers, *supra* n 78, 261–62.

¹⁴¹ Amendment 121, *supra* n 135, 4 (words in brackets moved for syntax).

¹⁴² Amendment 121, *ibid*, 5.

¹⁴³ European Parliament Report, *ibid*, 139 (words italicised for emphasis); Gillies, *supra* n 136.

¹⁴⁴ European Parliament Report, n 39 *supra*, 44. Art 15 applies regardless of whether a contract was concluded in the consumer's domicile; see the recent decision C-190/11 *Daniela Mühlleimer v Ahmad Yusufi and Wadat Yusufi*, Judgment of the Court (Fourth Chamber), 09/09/12.

¹⁴⁵ COM(2009) 174 final, n 85 *supra*, 3.

D. CONCLUSIONS: BACK TO THE DRAWING BOARD?

1. The Harmonisation of Subsidiary Jurisdiction: A New Form of Justice Pluralism?

The Commission's original proposal to replace national subsidiary jurisdiction rules where the defendant is connected to a 'third' (non-EU Member) with approximated rules highlights the future potential for a much wider "reconceptualisation" of national private international law as EU law. As Furrer reminds us,

"[A]re we confronted with a new 'meta-level' in conflict of laws, or do we need special priority-based conflict of laws provisions in order to regulate the relationship between international and national law?"¹⁴⁶

The *gradual* approximation of private international law seeks to co-ordinate conflicts justice in a manner and purpose distinct from national notions of conflicts justice. It does so by different means and processes and for different political objectives. Having considered the original proposal to replace subsidiary jurisdiction in the Brussels I Regulation, Europeanisation by way of approximation (if politically desired) could have a larger impact. Such an impact may – *in the longer term* – result in the notion of conflicts justice shifting away from national interests and concepts of justice fostered through unity of result and justice pluralism to a more nuanced, particularised approach in pursuit of mutual trust achieved through "uniformity of decision". With the EU focusing on survival, the proposals for the revision of the Brussels I Regulation are relevant to the continued attractiveness of Member States' commercial courts to defendants located within and external to the EU. The approach at EU level is indicative of the preference to sustain mutual trust and the recognition and enforcement of private rights (at Mills' level of "secondary ordering").

2. Underlying Fundamental Concerns

In his recent monograph *International Commercial Litigation*, Fentiman indicates at least four key areas of concern which must continue to be considered "in the debate about the future of the regime".¹⁴⁷ Underpinning each of these questions is the emphasis on the practicalities¹⁴⁸ of cross-border litigation, ie what are the inherent risks and how can the modification of existing rules, *ergo* reconceptualisation of conflicts justice, sufficiently address those risks? The first – and overarching – question Fentiman poses is, in ensuring approximated

¹⁴⁶ Furrer, *supra* n 19, 182.

¹⁴⁷ Fentiman, *supra* n 42, 26. The fourth question posed was how should the modified Regime recognise and enforce third-state judgments in response.

¹⁴⁸ M Storme, "Procedural Consequences of a Common Private Law for Europe" in Hartkamp et al, *supra* n 57, 86.

“access to justice” for claimants, whether (in the long term) the status quo should prevail (*combined approach*) or should subsidiary jurisdiction be excluded (*unified, minimised*¹⁴⁹ *approach*)? An answer to this holistic question has been sought by considering the necessity for approximation through the Treaty. Whilst Furrer questioned the “underestim[ation]”¹⁵⁰ of national law in supporting the application of EU law, in a post-Lisbon Europe, and until such approximation measures are complete, subsidiary jurisdiction rules remain inherently – and rightly – “directed by national interests”.¹⁵¹ Second, must the claimant be domiciled in a Member State? The answer to that depends on if and how the claimant’s domicile can be extended beyond special or exclusive jurisdiction. In accordance with the Brussels I Regulation,¹⁵² the Court of Justice’s decision in *Group Josi*,¹⁵³ the Commission’s proposal and the latest version of the Recast, the *claimant’s connection* to a Member State is applied as a connecting factor¹⁵⁴ rather than a discrete basis of jurisdiction.

Third, Fentiman questioned that if existing rules are to be adapted,¹⁵⁵ what changes are needed? The third question focuses on the changes to include non-EU defendants in sections 2 and 3 of the proposed Regulation. As discussed earlier, the shift from mutually expressed necessity to the approximation of laws appeared to provide the Commission with the necessary institutional justification for the changes it was proposing. To some extent light can be shed on the policy development of these questions in the Fourth and Fifth Options in the Nuyts Report and the Green Paper. The Nuyts Report commented that since the Jenard Report, the objective of the EU has shifted considerably, ie there is a need and a willingness to modify internal rules of jurisdiction, irrespective of the impact on “the (*domestic*) norms that [*national*] judges and lawyers are used to apply[ing]”.¹⁵⁶ Whilst the reference to “familiarity”¹⁵⁷ with EU law is insightful about the role and purpose of the Brussels I Regulation, it should not in itself form the basis of replacing national subsidiary jurisdiction rules.

¹⁴⁹ Fentiman, *supra* n 42, 27.

¹⁵⁰ Furrer, *supra* n 19, 175.

¹⁵¹ Editorial, “The Union, the Member States and International Agreements” (2011) 48 *Common Market Law Review* 1, 7.

¹⁵² Stone, *supra* n 2, 46–47 where he discusses, *inter alia*, that “the preference for defendants over plaintiffs, which has deep historical roots, may however have a rationale which does beyond mere convenience in the conduct of litigation . . . the plaintiff must establish his case to the satisfaction of the court in whose goodwill the defendant would presumably have most confidence” (words removed for syntax).

¹⁵³ Case C-412/98 *Group Josi v UGIC* [2000] ECR I-5925.

¹⁵⁴ Nuyts Report, *supra* n 1, para 138, 108; Recital 12 COM(2010) 748 final, *supra* n 84, 15 (ex Recital 11, Brussels I Regulation), termed “linking factors” in the Green Paper and “connecting factors” in the European Parliament’s Draft Report; Amendment 121, *supra* n 135, 28 (superceded by 2010/0383(COD), 15 October 2012, *supra* n 39).

¹⁵⁵ Nuyts Report, *ibid*, para 146, 115.

¹⁵⁶ *Ibid*, quoting the Jenard–Moller Report, *supra* n 96 (words in bracket added for syntax).

¹⁵⁷ *Ibid*, para 147, 115.

Instead, it is the extent to which the Treaty permits such adaptation, which is, in turn, reflected by the willingness of Member States to relinquish competence in support of the Union legal order. Furthermore, since “no tremendous change”¹⁵⁸ is likely to occur in the current EU political climate, it is submitted that at any level a change in the inherent *value of conflicts justice* will continue to take place in an incremental fashion. The Nuyts Report reminds us that just one Member State (Italy) has adapted its subsidiary jurisdiction rules to mirror the current version of the Brussels I Regulation. Again, this alone is not enough to justify wholesale replacement of subsidiary jurisdiction rules and traditions for the sake of the internal market and businesses operating in Europe. The Provisional Conclusion in the Nuyts Report affirmed that the “existing rules of jurisdiction usually ensure themselves a strong connecting link with the Union which justify their application to non-EU domiciliaries”.¹⁵⁹ However, it is submitted that the connection between the two aspects – link with the Community and application of existing rules to non EU domiciliaries – can only be justified on the grounds of legal necessity for optimal integration whilst ensuring that any future jurisdiction rule similar to one premised on *forum necessitatis* does not (highlighting Kruger’s concern) become an exorbitant rule at the supranational level.

The impact of Europeanisation has been attributed to “the *spread* of European *values*, in the sense of *unifying* European legal cultures”.¹⁶⁰ As Joerges has attested, the process by which Europeanisation has occurred necessitates – and thereby *facilitates* – increasing awareness¹⁶¹ of its impact upon both European citizens and parties external to Europe.¹⁶² Whilst the extent of structural change has created new forms of institutional governance and policy-making within the European Union, it is the second of Dyson and Goetz’s six forms of Europeanisation which has the most resonance for the future of national private international law rules. The most prevalent and far-reaching effect of Europeanisation is “as the exporter or transfer of European models outside Europe’s borders”.¹⁶³ During the stage of the proposal for the Brussels I Regulation, Justin Newton wrote that it was a “bold and decisive legislative statement”¹⁶⁴ and insightfully observed that

¹⁵⁸ *Ibid*, cf para 148, 116.

¹⁵⁹ *Ibid*, para 163, 126.

¹⁶⁰ ML Mannin, *British Government and Politics, Balancing Europeanization and Independence* (Rowman and Littlefield Publishers, 2010), 38 (words highlighted for emphasis).

¹⁶¹ Joerges, *supra* n 16.

¹⁶² Kruges, *supra* n 70.

¹⁶³ Dyson and Goetz, *supra* n 21, 1; Petrov and Kalichenko, *supra* n 36.

¹⁶⁴ Newton, *supra* n 92, 21.

“[T]he exact repercussions of this shift of legislative emphasis to a Regulation may be hard to predict: it may be imperceptible, or far-reaching, again depending on how the Brussels Convention was viewed.”¹⁶⁵

As recent events illustrate,¹⁶⁶ the final version of the proposed Recast of the Brussels I Regulation is not likely to replace Member States’ subsidiary jurisdiction. At this time, the extension of harmonised jurisdiction rules applicable to disputes involving a non-EU defendant remains “*incremental* rather than revolutionary”.¹⁶⁷ Despite lucid concerns about the effect of Europeanisation on litigation strategies and the “erosion”¹⁶⁸ of the “adjudicatory”¹⁶⁹ role of the national court as a consequence of the slight further erosion of national rules and the consequent changes to court procedures, national courts, and the CJEU in particular, will be take on an even greater “instrumental [and] institutional”¹⁷⁰ role in interpreting future provisions. All of us with an interest in international litigation have much to learn from both the emerging legislative process and interpretative approaches¹⁷¹ that will be applied (in the short and longer term) to the future regime. Given the lack of desire to achieve political uniformity and continuing economic crises in numerous Member States, political convergence remains an elusive concept. In its place, efforts at securing legal approximation of Member States’ laws via the Treaty remains the only form of Europeanisation broadly acceptable to (and thus far intended by most) Member States.¹⁷² However, it is clear that the Commission’s proposal fully to harmonise subsidiary jurisdiction rules, in the words of Lord Mance, goes beyond what is (currently) necessary to ensure “certainty, confidence and allegiance”.¹⁷³

¹⁶⁵ *Ibid.* For an assessment of *recent* case-law of the CJEU on the Brussels I Regulation, see Hess, *supra* n 14.

¹⁶⁶ European Parliament, Amendment 121, *supra* n 135.

¹⁶⁷ See further comments at <http://conflictoflaws.net/2009/brussels-i-review-online-focus-group/>. Nott, *supra* n 3, 4

¹⁶⁸ AE Anton with P Beaumont, *Private International Law* (W Green/SULI, 2nd edn, 1990), 33; Fentiman, *supra* n 42, 2046.

¹⁶⁹ Fentiman, *ibid.*, 2029.

¹⁷⁰ Fentiman, *supra* n 45, 20 (bracket and word added for syntax); Fentiman, *supra* n 42, 2046.

¹⁷¹ Fentiman, *supra* n 42, 2041.

¹⁷² Editorial, *supra* n 149, 7.

¹⁷³ Mance, *supra* n 3, 195; Hess, *supra* n 14, 1075.

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