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STUDENT NOTE

Forum Can Non Save Us Now

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Abstract

Tactical litigation is a reality of the adversarial litigation framework that is currently in place. However, there is a difference between the tactical litigation of choosing a forum which may have more favorable law or be more convenient and choosing a forum with the intent to drive the opposing party to failure. The latter has been the issue with some of the tactical litigation that has occurred under the European Union's framework of lis pendens. While the Recast Brussels I Regulation has alleviated some of those issues, it has not addressed all of them. While some scholars have argued that these issues of lis pendens may be answered by introducing the common law doctrine of forum non conveniens to these proceedings, that is not the case. This Article explores the pitfalls of lis pendens and forum non conveniens and ultimately finds that forum non conveniens is unable to solve the issues lis pendens creates in tactical litigation. Furthermore, the Article finds that forum non conveniens, inherently and acting as it should, has its own problems which echo lis pendens' own issues in the European Union. Furthermore, forum non conveniens is simply incompatible with the policies the European Union implemented with lis pendens. Ultimately, forum non conveniens is unable to answer the problems lis pendens has created and solutions must be found from within the European Union's own civil system.

Keywords: Civil Procedure; Lis Pendens; Forum Non Conveniens; Tactical Litigation; Fairness

A. Introduction

In a globalized world, today's lawyers often face the prospect of transnational and foreign litigation. Attendant to this rise in frequency of complex cross-border disputes are procedural questions regarding the proper forum and venue to resolve said disputes. The doctrine of lis pendens[1] emerged from the prioritization of mutual respect between the European Union's member states, resulting in substantive decisions which overly emphasize the power of lis pendens to the detriment of contractual freedom to decide on a forum and judicial efficiency. Along with efforts to deal with the specific issue of contractual choice of court clauses, some scholars have proposed that the doctrine of forum non conveniens[2] could be a method for addressing the remaining issues with the lis pendens doctrine in Europe.

[1]Council Regulation No 1215/2012, 2012 O.J. (L 351) § 9. Commonly referred to as "Brussels I Regulation" or "Recast Brussels Regulation." [Hereinafter it is "Brussels I Regulation" for the original and "Recast Brussels Regulation" for the 2012 change.]

[2]Forum non conveniens is a common law doctrine which gives courts the discretion to dismiss a case based on a multi-factor analysis on whether the court is an inappropriate forum for the dispute. The analysis is based off the Supreme Court of the United States' open-ended analysis provided in Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947) which provided a variety of public and private factors to consider. In cases of where the alternative forum was a foreign court, Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981) used the same factors but offered into consideration two points: 1. The strong presumption in favor of the

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This note argues that forum non conveniens, as it is applied in the United States, is incapable of solving the issue of lis pendens in the European Union. Furthermore, neither of the doctrines as currently applied truly address the issue at the core of both procedural doctrines, which is a distinct lack of justice for the non-moving party. Section B of this note will discuss the two procedural doctrines and their history. Section C will address the failures of lis pendens and forum non conveniens and how each fail to account for fundamental fairness for the parties of the litigation. In Section D, I will propose a possible solution to these procedural matters and how the application of each doctrine may be changed.

B. Background

I. Forum Non Conveniens in the US

Forum non conveniens is a common law doctrine which developed in the Anglo-American legal tradition out of concerns for judicial economy.[3] Forum non conveniens is the grounds for which a defendant can argue, in their motion to dismiss, that the plaintiff has brought suit in a forum which is unsuitable.[4] Forum non conveniens cannot be invoked in a motion to dismiss or a motion for transfer unless there is already jurisdiction and venue in the forum the plaintiff has selected.[5]

In the United States, forum non conveniens allows courts and judges to decide that the forum in which the plaintiff has brought suit is unsuitable to hear the case based on inconvenience, difficulty, or foreign law.[6] At the federal level, forum non conveniens is often used in determining whether the domestic forum the plaintiff has selected or the foreign forum the defendant has proposed is more appropriate to hear the case at issue.[7] Specifically, the court must determine that the current domestic forum is inappropriate or inconvenient to hear the suit, then find an alternative forum which is more convenient. While the burden is on the defendant to prove that the alternative forum is adequate, courts have decided in favor of the alternative forum as long as it offers some sort of remedy or does not subject the plaintiff to unfair treatment.[8] The plaintiff may counter by alleging the alternative forum is inadequate for reasons of corruption or delay but courts have often found such arguments to be uncompelling without a direct allegation of harm to the specific issue or parties.[9]

Interestingly, the United States also has the doctrine of lis pendens in its common law. Much like forum non conveniens, the doctrine is not regulated by legislation but dictated by common law.[10] However, the lis pendens doctrine in the United States takes a much more discretionary approach than the European Union, and allows the judge to determine if they should stay proceedings due to a parallel proceeding.[11] The analysis is weighed heavily in favor of staying

plaintiff's forum choice was less for foreign plaintiffs and 2. The defendant had to show that there was an "available and adequate forum" at the beginning of the forum non conveniens analysis.

[3]*See* Andrew Filpour, *Forum Non Conveniens and the "Flat" Globe*, 33 Emory Int'l. L. Rev. 587, 599–600 (2019).

[4]*Id.*

[5]*See Gilbert*, 330 U.S. at 504.

[6]*See* Filpour, *supra* note 3, at 599.

[7]*Id.*

[8]*See* Indusoft Inc. v. Taccolini, 560 Fed. App'x. 245, 248–49 (5th Cir. 2014).

[9]*C.f.* Daventree Ltd. v. Republic of Azerbaijan, 349 F. Supp.2d 736 (S.D.N.Y. 2004) (finding that the sovereign defendant's extensive control over the judiciary to the extent that they could dictate the outcome was sufficient to find the alternative forum inadequate), *with* Carijano v. Occidental Petrol. Co., 643 F.3d 1216 (9th Cir. 2011) (finding an affidavit by a Peruvian attorney and professor that the Peruvian judiciary systematically abstains from discrimination cases was insufficient to block the forum non conveniens motion to dismiss).

[10]*See* Gary B. Born & Peter B. Rutledge, International Civil Litigation in United States Courts 549 (Vicki Been et al. eds., 5th ed. 2011).

[11]*Id.* at 549–50.

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proceedings in the case of a domestic parallel proceeding[12] while it is often weighed in favor of continuing when it is a foreign parallel proceeding.[13] Part of the motivation for continuing foreign proceedings seems to be the idea that a plaintiff may simply continue proceedings, see which court finishes first, and apply res judicata to whichever one is not complete.[14] It should also be noted that the major difference between lis pendens and forum non conveniens in the United States is that lis pendens requires a parallel proceeding while forum non conveniens does not.[15]

Additionally, the analysis regarding foreign proceedings seems to be very differently weighed when the consideration of foreign jurisdictions comes into play.[16] The common practice seems to be avoiding an analysis in the adequacy of a foreign judicial system when it is forum non conveniens. In contrast, there does not seem to be any consideration of the adequacy of the forum when it is lis pendens. Admittedly, a party may choose to file a motion under either of those doctrines.[17]

II. Lis Pendens in the EU

The doctrine of lis pendens originates in the Brussels I Regulation of the European Union.[18] Functionally, Brussels I Regulation's aim, with lis pendens and a variety of other frameworks and doctrines, was to create a system capable of operating detached from the conceptual constructs of the member states.[19] While limited by the document's scope and federalism, Brussels I Regulation needed to address a wide range of issues in cross-border parallel proceedings with very few tools.[20] Lis pendens was one such tool.

Under lis pendens, any court other than the one first seized is meant to stay its own proceedings until the jurisdiction of the court first seized is established.[21] Essentially, when proceedings with the same cause of action and between the same parties are brought to courts of different Member States, the second court should stay proceedings until the first court finishes determining jurisdiction.[22] In determining jurisdiction, the European Union courts look at factors such as the residence of the defendant, where the accident at issue took place for tort claims, or where a contract was to be performed in contract disputes.[23] The transnational element of this determination comes into play where the parties are residents of two different European Union member states, if one party is part of the European Union and one is not, or when there are two non-member citizens but the incident took place in the European Union.[24] If the court first seized decides that it has jurisdiction, any subsequent courts are meant to decline jurisdiction over the case that it had previously stayed.[25] Actions are considered to be the "same proceedings" if they are

[12]*See* Quakenbush v. Allstate Ins. Co., 517 U.S. 706, 707 (1996) (finding a federal court has an "unflagging obligation" to exercise the jurisdiction conferred to them by Congress).

[13]*See* Born & Rutledge, *supra* note 10, at 552.

[14]*Id.* at 558–59.

[15]*Id.* at 558.

[16]*Id.*

[17]*Id.* (choosing between motion to dismiss for forum non conveniens or motion to stay or dismiss proceedings under lis pendens).

[18]Recast Brussels Regulation Arts. 27–32.

[19]*See* Marta Requejo Isidro, *Lis Pendens and Res Judicata Under the ELI/UNIDRIOT Model European Rules of Civil Procedure*, EAPIL (Nov. 25, 2021), https://eapil.org/2021/11/25/lis-pendens-and-res-judicata-under-the-eli-unidroit-model-european-rules-of-civil-procedure/.

[20]*Id. See also* Shiyun Li, *Lis Pendens or Forum Non Conveniens: Balance Between Stability and Flexibility*, 25 N.Y.U. J. of Int'l L. & Pol. 967, 972–73 (2020).

[21]Recast Brussels Regulation Art. 29.

[22]*Id.*

[23]"Competent Courts in Cross-Border Disputes," European Commission (last visited Dec. 22, 2022), https://commission.europa.eu/law/cross-border-cases/competent-courts-cross-border-disputes_en.

[24]Recast Brussels Regulation Arts. 29, 33.

[25]*Id.* at Arts. 29, 30.

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"so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."[26]

The Brussels I Regulation did not leave much room for a court to exercise discretion on lis pendens.[27] The required elements of lis pendens are: (1) The case arises from the same cause of action and (2) the court first seized.[28] The interpretation of "identical claims" and "court first seised" are quite universal with codification of "first seised" in Article 32 of the Brussels I Regulation.[29] The interpretation of "related claims" is also quite strict in European Court of Justice interpretations due to the desire to "avoid risk of irreconcilable judgments resulting from separate proceedings" under Article 30 of the Brussels I Regulations.[30]

Overall, lis pendens is in place to regulate parallel proceedings and prevent irreconcilable judgments;[31] this doctrine is also based on the idea of respect and equality of member states of the European Union.[32] By making the choice of forum absolute following the determination of the court first seized, there is uniformity and harmonization of cases between member states.[33] The lis pendens doctrine as construed by Brussels I Regulation applied in a uniform and rigid manner, even against choice-of-court clauses—requiring a stay until the lack of jurisdiction was determined[34]—and without regard to excessive delays in proceedings.[35]

The strict application of lis pendens in the European Union allowed for unscrupulous plaintiffs to engage in frustrating tactical litigation or "torpedo"[36] actions against the defendant. A number of cases showed the unfairness of lis pendens and how it could be utilized by "unscrupulous defendants" to either prevent a true adjudication of the case on its merits or to force a settlement. One of the major ways in which lis pendens was used in tactical litigation was through deliberately filing cases in judicial systems with a reputation for slow proceedings to force the parties into a settlement or to simply force long, costly litigation.[37] This would occur even for contractual issues that had specific choice-of-court clauses built into the contract.[38] Despite the European Union's strong stance on contractual freedoms[39] and its participation in the Hague Choice of Court Convention,[40] the strict adherence to lis pendens meant that parties with choice-of-court clauses

[26]*Id.* Art. 30(3).

[27]*See* Li, *supra* note 20, at 971.

[28]Recast Brussels Regulation Arts. 27–32.

[29]*Id.* Art. 32 ("For purposes of this Section, a court shall be deemed to be seised: (a) at the time when the document instituting the proceedings or an equivalent document is lodge with the court, provided that the claimant has not subsequently failed to take the steps he was required to take or have service effect on the defendant; or (b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the claimant has not subsequently failed to the steps he was required to take to have the document lodged with the court.").

[30]*Id.* Art. 30.

[31]*See generally* Li, *supra* note 20 *and* Isidro, *supra* note 19.

[32]*See* Li, *supra* note 20, at 969–70.

[33]*See* Case C-281/02, Owusu v. Jackson, 2005 E.C.R. I-01383, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62002CC0281.

[34]*See* Case C-116/02, Erich Gasser GmbH v. -MISAT- Srl, 2003 E.C.R. I-14693, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62002CJ0116 *and* Case C-185/07, Allianz SpA v. West Tankers Inc., 2009 E.C.R. 1-0063, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62007CA0185.

[35]*See generally Gasser*, Case C-116/02.

[36]*See generally* Mario Franzosi, *Worldwide Patent Litigation and the Italian Torpedo*, 7 EIPR 382 (1997). The use of the word "torpedo" or the phrase "Italian torpedo" was popularized by Franzosi. The term refers to cases in which plaintiffs file in courts well known for procedural delays in hopes to force a settlement or drive the other party to bankruptcy.

[37]*See* Chrispas Nyombi & Moses Oruaze Dickson, *Tactical Litigation in the Post-Recast Brussels Regulation Era*, 38(10) E.C.L.R. 457, 464 (2017) (pointing to litigation in Belgium and Italy for their slow jurisdictional proceedings which were preyed upon by unscrupulous parties).

[38]*See Gasser*, Case C-116/02 *and West Tankers*, Case C-185/07.

[39]*See generally* Jurgen Basedow, *Freedom of Contract in the European Union*, 16(6) Euro. Rev. of Priv. L. 901 (2008). *See also* 2000 O.J. (C 364/1) Charter of Fundamental Rights of the European Union [hereinafter C.F.R.], Arts. 6–9, 27–28.

[40]*See European Community Signs Hague Choice of Court Convention*, Hague Conf. on Priv. Int'l L. (Apr. 2, 2009), https://www.hcch.net/en/news-archive/details/?varevent=163.

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were still obligated to wait for the court first seized, even if it was not the agreed upon court, to decide on jurisdiction. Two major cases that exemplified the issues in jurisdiction when lis pendens conflicted directly with the European Union's principles on contractual freedom, including the freedom to contractually choose a forum to resolve any issues, were Erich Gasser GmbH v. MISAT Srl ("Gasser")[41] and Allianz SpA v. West Tankers Inc. ("West Tanker").[42] These two cases clearly showed how plaintiffs may choose to file cases despite contractual clauses directed elsewhere; they also show the inflexibility of the Brussels Regulation I's idea of scope within "cause of action."[43]

Gasser was a case in which Erich Gasser GmbH, a company incorporated under Austrian law, and MISAT Srl, a company incorporated under Italian law, brought proceedings concerning a sale contract with a choice of court clause. First, MISAT brought proceedings in Italy seeking a ruling that the contract had been terminated, that MISAT had not failed to preform, and that Gasser had to pay the damages. Few months later, Gasser brought action against MISAT in Austria for the payment of outstanding invoices claiming not only that Austria was the court for the place of performance in the contract but also that the Austrian court was the court designed in the choice-of-court clause in all the invoices sent. Austria then referred the case to the Court of Justice for a determination on the lis pendens and choice of court conflict. The Court of Justice found that the court second seized still had an obligation to stay proceedings until the court first seized declared that it had no jurisdiction and that lis pendens does not fail to apply because the court first seized is seen to have excessively long proceedings.

West Tankers concerned a vessel, owned by West Tankers and chartered by Erg Petroli SpA, which collided with a jetty owned by Erg in Italy and caused damage. The charterparty was governed by English law and had a clause for arbitration in London. Erg claimed compensation against its insurers, Allianz and Generali then commenced arbitration in London against West Tankers for the remainder. After paying the insurance policies, Allianz and Generali brought proceedings against West Tankers in Italy to recover the amount they had paid to Erg. West Tankers denied liability for the collision and stated that there was a lack of jurisdiction due to the arbitration agreement. The parallel proceeding began about a year later in the United Kingdom as West Tankers sought an injunction against Allianz and Generalli as well as a declaration that the suit had to be settled by arbitration according to the agreement. The United Kingdom determined that Brussels I Regulation could not cover arbitration as that was outside its scope but referred the case to the Court of Justice. The Court of Justice found that it was incompatible for a member state to restrain proceedings in another member state on the grounds that such proceedings would be contrary to an arbitration agreement; essentially, the court found that an arbitration agreement would not be outside the scope of Brussels I Regulation and that the United Kingdom acted incorrectly by granting the injunction.

In each case, the scope and inflexibility of lis pendens is illustrated. In *Gasser*, despite the contractual choice-of-court clause that the parties had both agreed to, lis pendens was found to supersede the previous valid and consensual agreement to fit within the constraints of European Union procedural decision. In *West Tankers*, consensual and valid agreement to arbitrate rather than litigate is superseded by the doctrine of lis pendens. In both, despite parties having agreed to the terms ahead of time, unscrupulous plaintiffs were able to try and avoid their contractual obligations by applying an inflexible procedural doctrine.

In an effort to address these problems, the Recast Brussels Regulation was finalized in December 2012 and took effect in January 2015.[44] One of the most significant changes this recast

[41]*See Gasser*, Case C-116/02.

[42]*See West Tankers*, Case C-185/07.

[43]*See Gasser*, Case C-116/02 (comparing one suit for the enforcement of a contract and the other for the invalidation of the same contract) *and West Tankers*, Case C-185/07 (concerning an arbitration clause).

[44]*See generally* Recast Brussels Regulation.

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implemented was to accommodate choice-of-court agreements. Specifically, the recast stated in Article 31(2) that:

> Where a court of a Member State on which an agreement referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.[45]

The recast regulation reversed the priority, making the contractually agreed upon court have first call, even if it was not the first court seized.[46] Theoretically, this would prevent the torpedo action which previously frustrated litigants and reduce the scope of tactical litigation.

The Recast Brussels Regulations solves some of these problems and does establish stricter guidelines for the purposes of contractually agreed forums. As previously stated, the Recast Brussels Regulation confers exclusive jurisdiction to agreed upon forums.[47] This agreed upon jurisdiction is exclusive unless the parties have agreed otherwise; this agreement needs to be in writing and in accordance to practices the parties have established.[48] The validity of this grant of exclusive jurisdiction cannot be solely contested by the contract's validity and is treated as an independent agreement to the rest of the contract.[49] Furthermore, Article 31 states that a court of a member state "shall" decline jurisdiction if the agreement designated court has established jurisdiction or "shall" stay until the agreed upon court once seized declares it has no jurisdiction under the agreement.[50] Shall is defined as an imperative which means this is an action the court must take.[51] Therefore courts cannot ignore choice of court agreements and the prioritized and agreed upon court does not need to wait for the first seized jurisdiction to acknowledge its exclusive jurisdiction.[52]

While the recast regulation has solved the issues for previously agreed exclusive choice-of-court issues, there are still gaps which frustrate the intentions of the recast. Most of the confusion or gaps have to do with either what the Recast Brussels Regulation does not address or a lack of clarity in its scope. First, Article 31's reference to exclusive jurisdiction means that hybrid or asymmetric jurisdiction clauses may not be covered.[53] Second, there is no way to determine whether Article 31 applies to a case; there are no specifics on the limits of how a court should or should not apply Article 31 and under which circumstances.[54] Third, there is no consideration for bad faith actors who may still file a parallel proceeding to deliberately delay proceedings or force the other party to incur costs.[55] Fourth, there is no clarification on related claims compared to identical claims which

[45]*Id.* Art. 31(2).
[46]*Id.*
[47]*Id.* Art. 25.
[48]*Id.*
[49]*Id.* Art. 25(5).
[50]*Id.* Art. 31.
[51]*Shall*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("1. has a duty to; more broadly, is required to.").
[52]Recast Brussels Regulation Recital 22 ("In order to enhance the effectiveness of exclusive choice-of-court agreements and to avoid abusive litigation tactics, it is necessary to provide for an exception to the general lis pendens rule in order to deal satisfactorily with a particular situation in which concurrent proceedings may arise. This is the situation where a court not designated in an exclusive choice-of-court agreement has been seised of proceedings and the designated court is seised subsequently of proceedings involving the same cause of action and between the same parties."). *See also* David Kenny & Rosemary Hennigan, *Choice-of-Court Agreements, the Italian Torpedo, and the Recast of the Brussels I Regulation*, 64/1 INT'L. & COMPAR. L. Q. 197, 202 (Jan. 2015) ("Essentially, Member State courts no longer have to wait for Italian courts—or anyone else—to acknowledge the fact of their exclusive jurisdiction to hear a matter under a choice-of-court agreement.").
[53]Chrispas Nyombi & Moses Oruaze Dickson, *Replacing Lis Pendens with Forum Non Conveniens: A Viable Solution to Tactical Litigation in the EU?*, 38(11) E.C.L.R. 491, 494 (2017).
[54]*Id.*
[55]*Id.* at 495.

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still allow individuals to negotiate around a choice of court agreement through technicality.[56] In general, while the recast has settled a massive issue regarding choice-of-court agreements, lis pendens still has no determination on what court is more appropriate a forum to hear a case.

Ultimately, scholars continue to find gaps in the reform which tactical litigants can rely on to continue torpedo actions. One of the issues that have been pointed out is the lack of criteria on which to make a determination of jurisdiction.[57] Another is the lack of clarity on what are the limits and scope of "related action" under the Recast Brussels Regulation.[58] In general, scholars' concerns with the vagueness of the Recast Brussels Regulation and what specifically the recast regulations apply to have led to continued debate on lis pendens and whether torpedo actions have truly been remedied.

III. The Issue of Lis Pendens

While lis pendens does limit what the defendant can do if they believe the court first seized to be inappropriate for the case, it does increase the predictability, efficiency, and uniformity of forum decisions.[59] Much like forum non conveniens, lis pendens is intended to prevent the clogging of the judiciary of that member state from frivolous or repeated lawsuits. There is also merit to forcing an equal consideration and respect of judicial proceedings in a federalist system which includes many sovereign nations.[60] Additionally, the doctrine provides a firm structure for a system with multiple legal systems and various standards.[61] This predictability allows parties to plan for their transnational litigations when international business transactions fall through. However, it is exactly this predictability mixed with the difference in timing which allows litigants to abuse lis pendens.

Under the Charter of Fundamental Rights of the European Union, Chapter VI Article 47, a citizen of the European Union has the right to an effective remedy and to a fair trial. Specifically, everyone is entitled to "an effective remedy before a tribunal in compliance with the conditions laid down in this Article" as well as a "fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law."[62] Additionally, the article states that legal aid will be made available "in so far as such aid is necessary to ensure effective access to justice."[63]

While "reasonable time" and "effective remedy" are all vague terms which have varying definitions, it is difficult to consider procedural delays which force settlements[64] or the lack of clarity on a related action which may pause or terminate one case[65] to be an effective remedy. Considering that the entitlement to a fair and effective remedy was a right important enough to be included in the Charter of Fundamental Rights of the European Union, infringement of that right

[56] *Id.*

[57] *See* Nyombi & Dickson, *supra* note 37, at 466.

[58] *Id.* at 466–67.

[59] *See* Li, *supra* note 20, at 970.

[60] *See* Kenny & Hennigan, *supra* note 52, at 200 ("The Brussels Regime is founded on the bedrock of cooperation, mutual trust and mutual respect between courts. Any measure that results in the courts of one Member States questioning the processes of another is incompatible with the general scheme of the Regulation."), *and* Chrispas Nyombi & Moses Oruaze Dickson, *Replacing Lis Pendens with Forum Non Conveniens: A Viable Solution to Tactical Litigation in the EU?*, 38(11) E.C.L.R. 491, 492 (2017) ("Essentially, lis pendens is premised on the notion of respect rather than justice.").

[61] *See* Li, *supra* note 20, at 972.

[62] *See* C.F.R. Art. 47.

[63] *Id.*

[64] *See generally* Nyombi & Dickson, *supra* note 53, at 492 (discussing unscrupulous filing in court with undue procedural delays).

[65] *See e.g.* Websense Int'l Tech. v. ITWAY SpA [2014] IESC 5 (Ir.).

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by inflexible procedure seems fundamentally unfair.[66] Additionally, while the reality of tactical litigation in the world of transnational litigation is inevitable, tactics which actively weaponize undue delays through procedural doctrines rather than substantive issues do not seem to be conducive to a fair hearing within a reasonable time. In civil suits where the weapon of time and inaction can lead to European citizens losing their businesses and livelihood, losing the opportunity to remedy the factual and legal issues of a matter and avoiding the matter entirely with inflexible procedure feels wrong.

This is not to say that there are no standards with lis pendens. Even before the recast, Brussels I Regulation required that the litigation have a connection with the forum either through parties' domicile or a connection with the cause of action.[67] It should also be noted that the "choice of forum by a plaintiff" aspect of tactical litigation is not in and of itself an infringement of the right to effective remedy and access to justice.[68] The problem is in the motivation the moving party has in selecting the forum. While some parties may very well select a forum based on efficiency and expediency, the strict requirement that the court first seized must decline its jurisdiction in the face of choice-of-court contractual clauses has also allowed for unscrupulous tactical litigation. Before the recast, specific jurisdictions were targeted due to their reputation of being overworked, thereby slowing proceedings.[69] While these chosen and first seized jurisdiction may very well be connected with the case and therefore have reasonable basis to exercise jurisdiction, it may also be a less convenient forum with only a tenuous connection to the issue or parties. Additionally, even if the court first seized does decline jurisdiction or proceed quickly through the trial proceeding, the moving party can still delay proceedings by tying up the second party in long appeals processes in an unfamiliar court.[70]

C. Analysis

I. How Might Forum Non Conveniens Help?

Theoretically, forum non conveniens, as a doctrine which determines which forum is more appropriate to hear a case, should be perfect to solve lis pendens' issue. If an issue of hybrid or asymmetrical choice of court clause is before a forum, it can choose to stay or proceed in the litigation depending on if it is the more convenient forum to litigate in. If the court believes the filing of the action is based on unscrupulous tactical litigation, the court can choose to stay proceedings by weighing a variety of factors on where the litigation makes more sense and add a sanction or fine to disincentivize bad faith litigation. If a related claim is before the court first seized but not the court contractually chosen, the court first seized may choose to stay or dismiss proceedings as the contractually agreed upon court is more convenient a forum. Theoretically, forum non conveniens and a related balancing factor test may solve some of the gaps scholars are concerned about in lis pendens.

Scholars have debated the merits of applying forum non conveniens to the European Union in order to promote fairness and justice. Admittedly, much of the literature concerning the application of forum non conveniens or the replacement of lis pendens with forum non

[66]Admittedly the idea of "fairness" is mixed. There is the idea of "fairness" as predictability in result. Some jurisdictions consider the issue of predictability and legal certainty to be the most valuable when it comes to the concept of fairness. Others consider "fairness" to place greater emphasis on individual justice. If legal certainty and predictability is the highest value for fairness, it naturally undercuts the possibility of individual justice due to a stricter application. *See* THOMAS LUNDMARK, CHARTING THE DIVIDE BETWEEN COMMON AND CIVIL LAW 122–30, (2012). Here, I will generally be speaking of the concept of "fairness" as individual justice rather than legal certainty or predictability.

[67]Council Regulation No. 44/2001, 2001 O.J. (L 12), Brussels I Regulation.

[68]*See* Nyombi & Dickson, *supra* note 53, at 492 (noting that the concern in tactical litigation stems from the way they operate contrary to contractual agreements).

[69]*Id.* (listing Italy, Greece, and Belgium as some of the targets due to their slow judicial proceedings).

[70]*Id.* at 464.

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conveniens is from English scholars.[71] The number of academics who are from the United Kingdom and debate in favor of forum non conveniens make sense; the doctrine is well favored in Scottish, English, and American law and based in such common law cultures.[72] Additionally, it is another aspect of tactical litigation in that the defendant has a chance to either limit the plaintiff's forum shopping or engage in their own reverse forum shopping.[73] While the scholars may be correct in arguing forum non conveniens is more expedient and allows for a case to be heard in the appropriate forum, that does not take into account the ways in which forum non conveniens fail plaintiffs when a court does opt to dismiss.

II. The Issues Not Answered

Even in application of forum non conveniens in the United States, there are issues of injustice. The United States has a colloquial and underlying principle in its legal system of an individual's "right to be heard" or access to justice. This can be seen in the United States' citizens' rather infamously litigious[74] nature as well as the various rights afforded to defendants.[75] Additionally, there is a general acknowledgment of the plaintiff's right, although not unlimited, to choose the forum to file and litigate in.[76] The doctrine of forum non conveniens turns the plaintiff's right around and creates a presumption of adequacy for the defendant's proposed alternative forum which is almost impossible for the plaintiff to overcome.[77] Considering that the role of the plaintiff in a litigation is that of an entity which is calling on the court to right a wrong or harm, this insurmountable presumption does not align with the principle of allowing the plaintiff to choose the forum.[78]

While there is nothing specifically wrong with this burden shifting, the differing burdens of proof levied upon the defendant and the plaintiff undermines the constitutional notions of fairness[79] and access to justice. To begin, it is "not a heavy [burden]"[80] for the defendant to "prove" that the alternative forum is adequate, particularly when it comes to foreign proceedings.[81]

[71]Most of the scholars of secondary sources I am citing for this article are writing from the United Kingdom. Nyombi is at the Canterbury Christ Church University in the United Kingdom. Beaumont is at the University of Aberdeen in the United Kingdom.

[72]As a common law doctrine, it is usually used in common law countries. There is, of course, a certain amount of tactical litigation calculation in pushing for forum non conveniens as well. It offers the defendant the opportunity to try and steer or completely change the forum that they litigate in which can be quite a powerful tool. There is also the reality that United Kingdom solicitors tend to prefer to practice United Kingdom law on behalf of United Kingdom parties.

[73]This once again falls under the idea of tactical litigation. As previously mentioned in footnote 58 and in text, the actual forum shopping is not an issue. It is only an issue when it is utilized in an unscrupulous manner (such as deliberating selecting slow forums to force parties into settlement or bankruptcy in the colloquial Italian torpedo) or when it is utilized to block off any form of relief for the plaintiff (such as arguing an alternative forum that very much isn't adequate or available to the parties like in *Daventree Ltd.*, 349 F. Supp.2d).

[74]*See* Paul H. Rubin, *More Money Into Bad Suits*, N.Y. TIMES, (Nov. 16, 2010, 4:44 PM), https://www.nytimes.com/roomfordebate/2010/11/15/investing-in-someone-elses-lawsuit/more-money-into-bad-suits ("The United States is already the most litigious society in the world. We spend about 2.2 percent of gross domestic product, roughly $310 billion a year, or about $1,000 for each person in the country on tort litigation, much higher than any other country.").

[75]*See generally* U.S. CONST. amends. 1–10. (also called "Bill of Rights"). *See also* U.S. CONST. amend. 6 (right to an impartial jury); *id.* amend. 8 (right to speedy trial), *id.* amend. 14 (right to procedural due process).

[76]*See* Paul Beaumont, *Forum Non Conveniens and the EU Rules on Conflicts of Jurisdiction: A Possible Global Solution*, 3 REV. CRIT. OF INT'L PRIVATE RIGHT 447, 454 (2018) ("The normal rule is that the plaintiff is entitled to be heard in the forum which the plaintiff has selected and which has [white list] jurisdiction.").

[77]*See* Richard Freer, *Venue in the District Courts*, *in* 14D FED. PRAC. & PROC. § 3829.3 (4th ed., 2022).

[78]*Id.*

[79]In this instance, I speak of fairness less in an individual justice manner and more in a procedural or substantive due process manner where individual justice may also come into play.

[80]*See* Banco Latino v. Gomez Lopez, 17 F. Supp. 2d 1327, 1331 (S.D. Fla. 1998).

[81]One thing to consider is the awkwardness of the United States judicial system making a determination or judgment on the "adequacy" of the foreign judicial systems and either running afoul of the executive branch's control of foreign affairs or having to hold a mini trial on the adequacy of this proposed court which would require a large amount of extrinsic evidence on

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While this is based on judicial efficiency and the aim to prevent an unmanageable backlog of cases in the court system, the burden does seem exceedingly low.[82] By comparison, the plaintiff must prove, against this tide, that the alternative forum is not adequate based on the public and private interests.[83] Usually, the alternative forum is only considered inadequate if there is a true deprivation of any opportunity to remedy the grievance asserted[84] or if specific facts support an inference that unfair treatment is likely in the other court.[85] This calculation of whether a theoretical remedy of some sort exists in an alternative forum ignores the realities of the litigation.

III. Forum Non Conveniens Will Fail in the EU

The first and main issue in applying forum non conveniens to the European Union, regardless of whether it is a replacement of lis pendens, is the difference in law and culture. The European Union is a collection of countries that primarily use civil law rather than common law.[86] The only exception to this is Cyprus, especially since the exit of the United Kingdom from the European Union.[87] This means that it is incredibly unlikely that another country in the European Union wishes to apply a strange legal doctrine created in countries with a different legal culture to their own system. Additionally, and more pragmatically, forum non conveniens was explicitly, although not unreservedly, blocked in Owusu v. Jackson, a case before the Court of Justice of the European Union.[88]

First, the analysis must start by acknowledging the Court of Justice's explicit refusal to apply the doctrine of forum non conveniens. Based on the Brussels Convention, the Court of Justice of the European Union found that the doctrine of forum non conveniens undermined the intentions and principles of the Brussels Convention and therefore did not apply. Specifically, the court stated:

> In that regard, genuine as those difficulties may be, suffice it to observe that such considerations, which are precisely those which may be taken into account when forum non conveniens is considered, are not such as to call into question the mandatory nature of the fundamental rule of jurisdiction contained in Article 2 of the Brussels Convention, for the reasons set out above.[89]

The referral to the court also included a second question on whether, if forum non conveniens is precluded by the Brussels Regulations, forum non conveniens is ruled out in all circumstances or only certain circumstances.[90] To that question, the court stated:

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a non-collateral matter. The first is against the United States' principle of separation of powers and the second is against the Federal Rules of Evidence and its advisory committee notes.

[82]*See* Freer, *supra* note 77 ("The heavy docket pressure faced by many United States district courts occasionally encourages judges to use any reasonable means to eliminate cases from their calendars.) *See also* Chesley v. Union Carbide Co, 927 F.2d 60, 66 (2d Cir. 1991) ("It is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation. Such an approach would directly conflict with the principles of comity.")

[83]*See generally Gilbert*, 330 U.S. at 507–08.

[84]*See* Loya v. Starwood Hotels, 583 F.3d 656, 666 (9th Cir. 2009) ("[T]hat the law, or the remedy afforded, is less favorable in the foreign forum is not determinative. A foreign forum must only provide the plaintiff with 'some' remedy in order to for the alternative forum to be adequate.").

[85]*See* Change v. Baxter Healthcare Co., 599 F.3d 728, 736 (7th Cir. 2010) ("The alternative forum must provide the plaintiff with a *fair* hearing to obtain some remedy for the alleged wrong.") (emphasis added).

[86]*See* Nyombi & Dickson, *supra* note 53, at 495.

[87]*See* Nyombi & Dickson, *supra* note 53, at 495.

[88]*See Owusu*, Case C-281/02 (blocking it and not answering if non-member state or specific circumstances may allow for flexibility).

[89]*See Owusu*, Case C-281/02 at para. 45.

[90]*See Owusu*, Case C-281/02 at para. 47.

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> [T]he justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute. . . . In the present case, it is common ground that the factual circumstances described in paragraph 48 of this judgment are not the same as those of the main proceedings. Accordingly, there is no need to reply to the second question.[91]

Essentially, the court did not answer the question as it was not applicable to litigating Owusu v. Jackson. However, based on its answer to the first question, that the Brussels Regulations precluded forum non conveniens in any point of conflict, forum non conveniens seems blocked in the European Union.

A second point of note is that forum non conveniens, or at least a discretionary dismissal for inappropriate forum as a concept, was proposed in the original Brussels Regulation and ultimately rejected.[92] The Schlosser Report included a proposed Article 22 on exceptional circumstances for declining jurisdiction which stated:

> 1. In exceptional circumstances, when the jurisdiction of the court seised is not founded on an exclusive choice of court agreement valid under Article 4, or on Article 7, 8 or 12, the court may, on application by a party, suspend its proceedings if in that case it is clearly inappropriate for that court to exercise jurisdiction and if a court of another State has jurisdiction and is clearly more appropriate to resolve the dispute. Such application must be made no later than at the time of the first defence on the merits.
>
> 2. The court shall take into account, in particular—
>
> a. Any inconvenience to the parties in view of their habitual residence;
>
> b. the nature and location of the evidence, including documents and witnesses, and the procedures for obtaining such evidence;
>
> c. applicable limitation or prescription periods;
>
> d. the possibility of obtaining recognition and enforcement of any decision on the merits.[93]

However, the proposed language was ultimately rejected and a compromise was reached where lis pendens was applied but jurisdiction could be declined in certain circumstances.[94]

Second, while forum non conveniens could be a possible solution to Article 31's exception toward asymmetrical and hybrid jurisdiction clauses, it is preempted by lis pendens. If the choice-of-court agreement is not exclusive, then the Recast Brussels Regulation's caveat does not apply. Because Article 31 does not apply, the procedure reverts to lis pendens and the first court seized must decide on the propriety of its jurisdiction before any other courts can act. This circular burden shifting simply turns the substantive question of justice into a game of speed and cannot be true access to justice or effective remedy.

Furthermore, the issues lis pendens has in delays of litigation would simply be the other side of a similar burden with forum non conveniens. Pragmatically, the main issue with lis pendens tends

[91]*See Owusu*, Case C-281/02 at paras. 50–52 (citations omitted).

[92]Schlosser Report (19790) O.J. C 59/71, para. 78. *See also* Beaumont, *supra* note 76, at 449.

[93]*Compare* Beaumont, *supra* note 76, at 452 (quoting the text of the preliminary draft Convention of October 1999), *with Gilbert*, 330 U.S. at 507–08 (stating that the private interest factors include ease of access to sources of proof, the availability of compulsory process of unwilling witnesses, the cost of obtaining attendance of willing witnesses, the possibility of view of premises if appropriate, all other practical problems for a trial, and the enforceability of judgment if one is obtained; the public interest factors include administrative difficulty and court congestion, conflicts of law considerations, and the undue burden of a jury made up of a community unrelated to the litigation.).

[94]*See* Beaumont, *supra* note 76, at 453.

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to be a delay in proceedings or an inappropriate forum. In the instance of a delay in proceedings, the delay would still exist regardless of whether the plaintiff and defendant are waiting for the trial to begin, or the plaintiff and defendant are waiting for a preliminary trial so that the defendant may request a determination on the inadequacy of the forum. If the court does allow that argument to proceed, then the defendant—even after making their case—will still have to wait the time necessary for the plaintiff to respond to the burden shift. The burden of the cost of litigation would still exist. In the instance that the defendant's motion for dismiss based on forum non conveniens is granted, the plaintiff may still slow litigation by filing an appeal of that decision. The application of forum non conveniens would still not solve this issue; the same issue can be stated for the issue of bad faith actors who deliberately try to delay proceedings or force litigation costs.

Third, the application of forum non conveniens to the confusion of when Article 31 should be applied is not a solution. Forum non conveniens is for judicial efficiency and appropriate forums to hear a suit. The application of Article 31 and the scope in which it can be applied is very much a European Union civil law issue. The scope of Article 31's application will likely take a number of years to determine as parallel proceedings refer their cases to the Court of Justice for a preliminary determination.

Fourth, the application of forum non conveniens to related claims involving the same parties may actually increase judicial economy. However, the issue in this application rests more on the lack of clarity on what exactly a related claim is within the European Union.[95] On one hand, a defendant may argue that the related claim is more convenient in the court designated by the agreement as the facts and issues are sufficiently related. This may also assist in the overall goals of judicial efficiency and economy. However, this determination would be discretionary and most member states of the European Union do not have the same culture of multi-factor balancing tests as the United States does.[96] On the other hand, the true issue is a lack of clarity on the scope of "related" claims under the Brussels I Regulation. Much like the scope of Article 31, the range on what should be considered related claims sufficient to be with the court first seized and related claims dissimilar enough to be a new proceeding will likely take multiple rulings by the Court of Justice.

IV. Fundamental Fairness in Litigation

Lastly and most importantly, forum non conveniens does not truly address the issues of fundamental fairness and access to justice that lis pendens introduces; forum non conveniens is still a procedural decision that muddles or prevents the non-moving defendant's access to justice. Both are procedural decisions with significant substantive impacts. While that may be par the course in conflicts of law litigations, the procedural decision being an ultimate bar to the judicial system or to an effective remedy goes against the ideals of fairness and justice.

Lis pendens is, in many ways, a more equitable system in accessibility to justice than forum non conveniens. The predictability and clarity in application regardless of the strength of the involved parties is one of lis pendens' strengths.[97] The issues in lis pendens are either built into the legal

[95]*See* Kenny & Hennigan, *supra* note 52, at 199.

[96]As any 1L in a Constitutional Law class in the United States can tell you, most issues relating to constitutional rights require some sort of a balancing test. Major examples include Equal Protection (Loving v. Virginia, 388 U.S. 1 (1967)), Due Process (Matthews v. Eldridge, 424 U.S. 319 (1976)), Personal Jurisdiction (International Shoe Co. v. Washington, 326 U.S. 310 (1945)), and of course Venue (*Gilbert*, 330 U.S.).

[97]*See* Li, *supra* note 20, at 972–73. *See also* LUNDMARK, *supra* note 66, at 74 ("The predictability of the law is considered to be one of the law's most treasured virtues . . . Legal predictability implies an absence of arbitrariness, which in turn promotes respect for legal institutions, including that of the legislature. Legal predictability can thus be seen as implicit in the concept of justice, so to speak.").

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system[98] or an inevitable part of judicial delays.[99] The actual loss of opportunity for a fair trial and effective remedy have to do with the misuse of judicial delays to force defendants in a difficult situation.[100] Unfortunately, this seems difficult to solve unless the European Union implements some standard in timeliness or greater uniformity in the judicial proceedings of its member states.

Forum non conveniens goes against the principles of justice due to its over-reliance on theoretical remedy. Despite being a doctrine based on convenience, its actual application operates in a much less practical and far more illusory manner.[101] A number of procedural and legal arrangements may make the practicality of pursuing a remedy that is theoretically available, near impossible to achieve.[102] Additionally, a study has found that despite this supposed available forum, the number of plaintiffs that actually refile in the alternative forum is extremely low.[103] Furthermore, even if the plaintiff does end up refiling the suit in the alternative forum, the defendant, having acquiesced to the alternative forum in their forum non conveniens argument, can still argue against the enforcement of that foreign judgment and therefore still dodge accountability.[104] Even accounting for the requirement of the defendant's showing that the present forum is inconvenient before proposing an alternative forum, the existence of a hypothetical forum that is theoretically more convenient does not offset the reality of bringing a suit. Even if the current forum has been proven inconvenient and the alternative forum hypothetically available, the practicalities of law, cost, remedies, and other restrictive realities will act to essentially bar the plaintiff from relief or access to justice in this proposed forum. As this is the result of forum non conveniens applied in the common law system that it was intended for, its application in the civil law system will not magically improve the statistics. Simply put, forum non conveniens has the exact same issues in its application that lis pendens currently does but simply with a reversed burden shift; a transfer of the burden of injustice, does not solve the injustice.[105] Taken further, an inconvenient forum may still provide better fairness and access to justice for both parties than a hypothetical forum that will never hear the case.

[98]The rush to file is because plaintiffs are entitled to choose the forum that they wish to file in. This is simply exacerbated by the strictness of lis pendens.

[99]Cases often take a long time regardless of the jurisdiction simply due to backlogs of cases and limited judges. Belgium, Italy, and Greece are more extreme examples.

[100]*See generally* Franzosi, *supra* note 36.

[101]*See* Freer, *supra* note 77. *See generally* Finity E. Jernigan, *Forum Non Conveniens: Whose Convenience and Justice?*, 86, TEX. L. REV. 1079 (2008).

[102]*See* Freer, *supra* note 77 (noting attorney's fees possibilities, class action procedures, discovery regimes, restrictive legal doctrines, and amounts recoverable to be some of these arrangements that change the practical availability of a remedy).

[103]*See* Dow Chemical Co. v. Castro Salfaro, 786 S.W.2d 674, 683 n5 (Tex. 1990) ("Professor David Robertson of the University of Texas School of Law attempted to discover the subsequent history of each reported transnational case dismissed under *forum non conveniens* from *Gulf Oil v. Gilbert* [1947 cases arising from Virginia facts that had been filed in New York] until the end of 1984. Data was received on 55 personal injury cases and 30 commercial cases. Of the 55 personal injury cases, only one was actually tried in a foreign court. Only two of the 30 commercial cases reached trial.").

[104]*See e.g.,* Chevron Co. v. Donziger, 990 F.3d 191 (2d Cir. 2021). This case was the latest in a series of cases between Chevron and Donziger which began over environmental damage allegedly caused by Texaco (now owned by Chevron) in Ecuador. The original suit was brought against Chevron in the United States, dismissed on Chevron's motion based on forum non conveniens. It was then filed in Ecuador and a multi-billion dollar judgment was given against Chevron. Chevron then sued Donziger in the Southern District of New York alleging under -RICO- that the judgment was procured through illegal means and could not be enforced in the United States.

[105]This is further the case for suits involving individual plaintiffs suing corporations as corporations are more able to handle the burdens and costs of litigation than individual plaintiffs. *Cf with* Nowak v. Tak How Investments, Ltd., 94 F.3d 708 (1st Cir. 1996), *cert denied* 520 U.S. 1155 (1997) (factoring in which party is more able to bear the burdens of litigation under consideration of the fair play and substantial justice factors in a personal jurisdiction analysis).

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D. Solutions

The question then becomes, if forum non conveniens will not solve the remaining issues of lis pendens, what are the alternatives? One of the possible solutions is through the Model European Rules of Civil Procedure. The Model European Rules of Civil Procedure are a set of rules intended to design an ideal civil procedure that could be operational in any of the member states of the European Union.[106] It was designed and approved by the European Law Institute and International Institute for the Unification of Private Law ("UNIDROIT") in 2020.[107] The main goal of the model rules is to provide a complete and systematic body of procedure which increases coherence and comity among the member state judicial systems as they interact.[108]

Explicit standards on case management[109] and pre-commencement duties[110] may provide greater expediency for defendants. Even if lis pendens is adhered to,[111] standards on the sufficiency and completeness of pleadings, allegations, and claims would force unscrupulous plaintiffs to have a proper claim before they are able to annoy defendants with litigation.[112] The listed means of case management under Rule 49 as well as Rule 50's allowance for the court to issue case management orders can lead to greater cooperation in proceedings.[113] Under Rule 51 and 52, there is a duty for the parties to attempt to work together to settle or focus the litigation as much as possible.[114] There are also standards on what the plaintiff's statement of the claim must contain which include the relevant facts and legal grounds as well as the remedy requested.[115]

There is a concern of coercion based on the case management rules' emphasis on cooperation in situations of unequal power between parties; there is also a concern that court's issuing case management orders may very well cause an even greater backlog of cases than they currently have. Additionally, there is a concern that these rules may also cause European civil systems to adopt the more adversarial approach of the United States with an emphasis on settlement. While there may be flaws in the implementation of the Model European Rule of Civil Procedure and it currently only has the weight of soft law, it may still be a good starting point for the European Union to encourage a certain level of coherency and similarity in practices to reach the ultimate goal of limiting unscrupulous litigation tactics. Furthermore, as a civil law system, statutorily applied procedural efficiency rules may very well fit better into the legal culture of the European Union.

Importantly, the European Rules of Civil Procedure explicitly address the concern of access to justice. Under Section 2(D) there is a "right to be heard."[116] Under Rule 11 of this section, there is an explicit "fair opportunity to present claim and defence."[117] Specifically the rule says:

> The court must manage proceedings to ensure that parties have a fair opportunity to present their case and evidence, to respond to their respective claims and defences and to any court orders or matters raised by the court.[118]

[106] *See* Isidro, *supra* note 19.

[107] MODEL EUR. R. CIV. P. (EAPIL 2020) [hereinafter E.R.C.P.].

[108] *Compare* Isidro, *supra* note 19, *with* FED. R. CIV. P. in the United States (acting much like E.R.C.P.'s goal of uniformly implementing civil procedure for all federal courts)

[109] E.R.C.P. 47, 49, 50.

[110] *Id.* at 51.

[111] *Id.* at 133 (noting that one of the procedural requirements of judgments on the merits includes that "there are no pending proceedings involving the same parties and the same cause of action in another court unless an exception provided for in the Rules on lis pendens applies"). *See also Id.* at 142–46 (addressing explicitly the procedures to address lis pendens and related actions).

[112] *Id.* at 47.

[113] *Id.* at 49, 50.

[114] *Id.* at 51(2)–(3).

[115] *Id.* at 53(2).

[116] *Id.* at § 2(D).

[117] *Id.* at 11.

[118] *Id.*

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Additionally, while the interpretation of the word may be varied, Section 2 on principles also addresses procedural delays implicitly in its general rule that everyone should be working together to "promote the fair, efficient and speedy resolution of the dispute."[119] The role of the parties and their lawyer also requires that they "act in good faith and avoid procedural abuse when dealing with court and other parties."[120] Because the court also has the power to enforce these responsibilities,[121] combined with the court's ability to give sanctions,[122] the parties and attorneys are incentives to act without bad faith.

E. Conclusion

Forum non conveniens cannot solve the issues around lis pendens. First, it is a doctrine that was considered then explicitly abandoned by the European Union and its Council of Justice.[123] Second, forum non conveniens with its balancing test and multi-factor analysis is culturally common law and ill-suited for most of the judiciaries in the European Union. Especially considering the minority of common law systems in the European Union, there is no motivation for it to be implemented. Third, forum non conveniens simply shifts the unfairness of procedural postures with substantive impacts from the defendant, in lis pendens, to—even accounting for a showing that the present forum is inconvenient—the plaintiff, in forum non conveniens. It does not account for bad faith action and does not address the logistical difficulties in lis pendens. Finally, forum non conveniens simply has the exact same issues as lis pendens merely from the other side of the dispute.

Ultimately, the biggest issues with both forum non conveniens and lis pendens cannot be addressed due to surrounding policy motivations. While the biggest issues in both doctrines have to do with accessibility of justice for the non-moving party and an opportunity to be heard, they are also doctrines working exactly as they are intended. Lis pendens limits the defendant's ability to change the seized jurisdiction because of the European Union's recognition that the plaintiff is entitled to choose the forum[124] and because the European Union does not wish to allow member states to argue which member state is more just or appropriate than another.[125] Forum non conveniens limits the plaintiff's ability to maintain jurisdiction in the chosen forum because the federal court system of the United States is heavily backlogged and the doctrine was intended to promote judicial efficiency and lessen the workload.[126] Additionally, federal court judges also do not wish to make an assessment of foreign judicial systems and have their judgment either be incorrect or cause diplomatic issues.[127] Therefore, while both doctrines have their flaws, they are also working exactly as intended within the limitations of the system that they are active in.

Individuals and corporations will always try to find a forum and jurisdiction that will be more sympathetic to their argument; that is the natural process in a litigation.[128] Pragmatically, issues of lis pendens, much like the process behind the Recast Brussels Regulation, will likely come up as reports and cases referred to the Court of Justice until there is sufficient weight behind complaints

[119] *Id.* at 2.
[120] *Id.* at 3(e).
[121] *Id.* at 4.
[122] *Id.* at 27.
[123] *See generally Owusu*, Case C-281-02 and Schlosser Report (19790) O.J. C 59/71, Art. 22.
[124] *See* Beaumont, *supra* note 76, at 454.
[125] *See* Li, *supra* note 20, at 972–74.
[126] *See* Freer, *supra* note 77.
[127] *See Chesley*, 927 F.2d. at 66.
[128] I will also note that the point of having individuals and corporations paying money for attorneys to represent them in court is based on the idea of tactical litigation. Attorneys, or solicitors, are meant to have more information and knowledge about the judicial systems and the law to ensure their clients have the best possible chance of winning the litigation. Tactical litigation is essentially built into the legal system.

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to cause another recast. The adjustment of lis pendens as a doctrine will likely rely on compromise because there are so many sovereign nations involved. However, compromise and adjustments are practical and inevitable in a federalist system. In the end, I also very much doubt that the solution for lis pendens in the European Union, a doctrine used for purposes of respect and efficiency and utilized within civil law systems, will be found through common law scholars.

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