THE NEW *LIS PENDENS* REGIME IN THE REGULATION BRUSSELS I *BIS* AND THE CHALLENGE MET BY CHINESE JURISDICTION

EL NUEVO RÉGIMEN DE LA LITISPENDENCIA EN EL REGLAMENTO BRUSELAS I BIS Y EL RETO AFRONTADO POR LA JURISDICCIÓN CHINA

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Summary: I. INTRODUCTION. II. THE REGIME OF *LIS PENDENS* IN THE BRUSSELS I REGULATION AND ITS SUCCESSOR. III. THE REGIME OF *LIS PENDENS* IN CHINESE LAW AND THE CHALLENGE MET BY CHINESE JURISDICTION AFTER THE RECAST OF BRUSSELS REGULATION. IV. A POSSIBLE BILATERAL INTERNATIONAL CONVENTION REGARDING *LIS PENDENS* BETWEEN CHINA AND THE EU. V. CONCLUSION

ABSTRACT: The new regime of *lis pendens* in Regulation Brussels I *bis* has extended its application to the third states including China. This may be a challenge to Chinese jurisdiction since it has not established a uniform criterion to deal with *lis pendens*. However, the provisions regarding the relation with third states in the new regime of *lis pendens* still need further examination. Besides, the unilateral statement in the Regulation may be unfair from the Chinese perspective. In this way, it may be relevant for the Chinese and the EU legislators to seek a solution through the establishment of a bilateral Convention that is specialized at dealing with the regime of *lis pendens*.

RESUMEN: El nuevo régimen de la litispendencia en el Reglamento Bruselas I bis extiende su aplicación a los terceros países, entre los que se incluye China. Esta extensión constituye un reto para la jurisdicción china a causa de la ausencia de un criterio uniforme en cuanto a la litispendencia en el Derecho chino. La aplicación de las normas en el Reglamento Bruselas I bis merece una atenta consideración ya que el tratamiento unilateral que realiza este Reglamento puede considerarse injusto desde la perspectiva china. Es por esto que se propone como solución el establecimiento de un convenio bilateral entre la UE y China en materia de la litispendencia.

KEYWORDS: Regulation Brussels I *bis*; *lis pendens*; reflexive effect; exclusive jurisdiction; choice of forum agreement; the EU-China Convention

PALABRAS CLAVES: Reglamento Bruselas I bis; litispendencia; efecto reflejo; competencia judicial internacional exclusiva; pacto de elección de foro; Convenio entre la UE y China

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I. INTRODUCTION

1. *Lis pendens* deals with the conflict of jurisdiction in which several proceedings involving the same actions between the same parties are brought before different states. In order to provide more safety to the parties and the judicial systems and avoid irreconcilable judgments, Regulation Brussels I (RBI) has established its own system trying to coordinate the judicial relations between the Member states. Recently, the new Regulation Brussels I *bis* (Regulation 1215/2012, RBI*bis*) has revised the regime of *lis pendens*, in which its application has been extended to third states.

However, it seems that Chinese jurisdiction has not been well prepared to accept this challenge. First of all, there remain very few provisions regarding the regime of *lis pendens* in Chinese legislation, and provisions related to *lis pendens* are mostly seen in conventions concluded by China with other states. Secondly, Chinese legislators adopted different criteria upon the stay of proceedings with regard to different states, which we will mention in this article. And the absence of a uniform criterion to *lis pendens* will leave more difficulties for the Chinese nationals to apply the international conventions. Thirdly, parties of different Member states may be subject to the same criterion established by RBI*bis* before courts of the Member states, while they may be treated differently before Chinese courts. Therefore, the new regime of *lis pendens* in RBI*bis* may be a challenge to Chinese jurisdiction.

In this Article, in the first part, we will present the recent reform to the regime of *lis pendens* that was newly adopted in RBI*bis*, and also try to analyse the difficulties that may arise on its extension of application to third states. In the second part, we will present the ambiguity existing in Chinese PIL, and the judicial conflict that may arise on the application of different legal documents, through which will will analyse the challenge that Chinese jurisdiction would confront with before the uniformed EU regime of *lis pendens*. As a conclusion, we will try to give some suggestions to a possible revision in Chinese regime of *lis pendens* by referring to that of RBI*bis*, and also try to find a judicial solution in order to harmonize the conflict of jurisdiction between the Member states and China in terms of parallel proceedings.

II. THE REGIME OF *LIS PENDENS* IN THE BRUSSELS I REGULATION AND ITS SUCCESSOR

2. Articles 27 of RBI only deals with the issue of irreconcilable proceedings commenced in different Member states. However, the recent revision of RBI has extended the scope of application to third states[1]. The proposal to the new Regulation introduced a discretionary *lis pendens* rule for disputes on the same subject matter and

[1] See *Proposal for a regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)*, COM (2010) 748 final, p. 8. This document is available on the website: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0748:FIN:EN:PDF.

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between the same parties which are pending before the courts in Member states and in a third country. It was accepted in RBI*bis* while certain amendments were made in order to delimit its scope of application. Pursuant to RBI*bis*, a stay of proceeding in favour of a third state can only be permitted on the basis that the jurisdiction of a Member state is seized when the defendant is domiciled in a Member state, or when it concerns special issues such as contractual or non-contractual liabilities[2]. In this regard, the Member states courts may not be able to decide a stay of proceedings when its jurisdiction is established on the basis of the existence of a clause of choice of court, or of exclusive issues, or to protect the weaker parties (jurisdictions in relation to insurance, consumer and employment)[3].

However, this assertion may need further examination and consideration, since it is doubtful whether *"effet réflexe"* (reflexive effect) may be applied to Article 22 in a case where the courts of third states have exclusive jurisdiction. The theory of "reflexive effect" is based on reciprocity, self-restraint and comity. It encourages the EU courts to decline jurisdiction that they theoretically have under RBI where there exists a stronger or hierarchically higher basis for jurisdiction in a third state[4]. The discussion of the application of "reflexive effect" was originally concentrated on the case where the immovable property is situated in third states, while it has later been extended to the whole Article 22[5]. Normally, Article 22 is only applicable to the courts within the Member states. In the case where a proceeding is brought before a third state court that has exclusive jurisdiction, Article 22 cannot be available. Meanwhile, ECJ rejected a stay of proceedings in favour of a third state in the case *Owusu*[6] when the defendant is domiciled in a Member state and ruled that the common law doctrine of *"forum non conveniens"* is incompatible with the mandatory nature of the jurisdictional rule in Article 2[7]. In a recent English case *Ferrexpo*[8] it was held that a so-called "reflexive effect" should apply to the exclusive jurisdictional rules of Article 22 of RBI since the core dispute (in this case shareholder resolution of a Ukraine company) was located outside the EU[9]. The judge held that the conclusions in *Owusu*, which prohibited a

[2] See Articles 33 and 34 of RBI*bis*.

[3] DI NOTO, R., "De quelques apports de la refonte du règlement « Bruxelles I » au règlement des conflits internationaux de procédures", 21/05/2013, the Article is available on the website: http://www.gdr-elsj.eu/2013/03/21/cooperation-judiciaire-civile/de-quelques-apports-de-la-refonte-du-reglement-bruxelles-i-au-reglement-des-conflits-internationaux-de-procedures/.

[4] KRUGER, T., *Civil Jurisdiction Rules of the EU and their Impact on Third States*, Oxford, Oxford University Press, 2008, pp.188-189.

[5] In this sense, see ARENAS GARCÍA, R., *El control de oficio de la competencia judicial internacional*, Madrid, Eurolex, 1996, pp. 117-119. Also see ARENAS GARCÍA, R., "De nuevo sobre el efecto reflejo de las competencias exclusivas", the article is available on http://blogs.uab.cat/adipr/2009/12/24/de-nuevo-sobre-el-efecto-reflejo-de-las-competencias-exclusivas/.

[6] See Judgment of the Court of 1 March 2005, Case C-281/02, *Andrew Owusu v. N. B. Jackson, trading as "Villa Holidays Bal-Inn Villas", Mammee Bay Resorts Ltd, Mammee Bay Club Ltd, The Enchanted Garden Resorts & Spa Ltd, Consulting Services Ltd, Town & Country Resorts Ltd*.

[7] P. COOK, J. "Pragmatism in the European Union: Recasting the Brussels I Regulation to Ensure the Effectivene ss of Exclusive Choice-of-Court Agreements", pp. 1-17, pp. 6-7, the article is available on the website: http://www.abdn.ac.uk/law/documents/Pragmatism_in_the_European_Union.pdf.

[8] See *Ferrexpo AG v. Gilson Investments Limited and others* [2012] EWHC 721 (Comm), 03 April 2012.

[9] VAN CALSTER, G. "Reflexive application of exclusive jurisdiction rules: The High Court in

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defendant to challenge the jurisdiction of the court of his domicile in favour of the jurisdiction of a third state, do not apply to a case where the subject matter of the jurisdiction is within Article 22[10]. The case was made before the revision to RBI, even though its decision was greatly criticized, it reflected the EU trend on judicial development to some extent. In this case, before RBI*bis*, whether Articles 27 and 28 had reflexive effect was also greatly discussed during a long time[11]. And the recast of RBI has introduced a new regime (Articles 33 and 34) to deal with the parallel proceedings existing between the courts of Member and non-Member states[12]. In accordance with Articles 33 and 34 of RBI*bis*, national judges may go beyond the limits imposed by *Owusu* and decide a stay of proceedings, even if the defendant is domiciled in a Member state[13]. It is possible that a Member state court which establishes jurisdiction based on the connecting factors of the defendant's domicile, the contractual or non-contractual obligations could decide a stay of proceedings for a third state court if the third state court was firstly seized, regardless of the fact that it has exclusive jurisdiction or not. Besides, Recital 24 (2) of RBI*bis* has also stated that the assessment to a stay of proceedings may also include consideration on whether the court of the third state has exclusive jurisdiction in circumstances where a Member state court would have exclusive jurisdiction[14]. In this sense, the new Regulation tends to involve the considerations of the exclusive jurisdiction of a third state into the regime of *lis pendens*, but it should be further clarified by future ECJ cases or EU regulations[15].

If a court in a third state with exclusive jurisdiction is second seized, the court of a Member state could also consider its stay of proceedings under certain circumstances. In this case, the GEDIP (European Group for Private International Law) has proposed an Article 22 *bis* stating that if the court of a third state has commenced its proceeding and if a judgment would be given within six consecutive months, the court of Member state

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Ferrexpo", the article is available on the website: http://gavclaw.com/tag/2012-ewhc-721-comm/.

[10] CHALAS, C., "L'affaire Ferrexpo : baptême anglais pour l'effet réflexe des articles 22, 27 et 28 du règlement Bruxelles I", *Revue critique de droit international privé*, 102 (2), 2013, pp. 359-393, p. 364.

[11] See MALATESTA, A., BARIATTI, S., *The External Dimension of EC Private International Law in Family and Succession Matters*, Assago, Wolters Kluwer Italia, 2008, p. 233. On the doctrine of *"effet rélexe"* also see, with particular to Article 27 of RBI (Article 21 of the Brussels Convention), DROZ, G., *Compétence judiciaire et effets des jugements : étude de la Convention de Bruxelles du 27 septembre 1968*, Paris, Dalloz, 1972, pp. 198-199. NUYTS, A., *L'exception de forum non conveniens : Etude de droit international privé comparé*, Bruxelles/Louvain-la-Neuve/Paris, Bruylant, 2003, pp. 268 and ss. GAUDEMET-TALLON, H., "Les frontières extérieures de l'espace judiciaire européen : quelques repères", in A. L. DROZ, G., BORRÁS RODRÍGUEZ, A., (eds.), *Epluribus unum: Liber Amicorum Georges A.L Droz: o the Progressive Unification of Private International Law*, The Netherlands, Kluwer Law International, 1996, pp. 95 and ss.

[12] In this sense, see CHALAS, C., "L'affaire Ferrexpo…", *loc. cit.*, p. 381.

[13] SUDEROW, J., "Nuevas normas de litispendencia y conexidad para Europa: ¿El ocaso del torpedo italiano? ¿Flexibilidad versus previsibilidad?", *Cuadernos de Derecho Transnacional* (Marzo 2013), Vol. 5, Nº 1, pp. 184-198, p. 195. Also see ROGERSON, P., "Lis pendens and third states: The Commission's Proposed Changes to the Brussels I Regulation", in LEIN, E., *The Brussels Review Proposal Uncovered*, London, British Institute of International and Comparative Law, 2012, pp. 103-124, p. 118.

[14] See Recitals 24 (2) of RBI*bis*.

[15] In this sense, see NUYTS, A.,, "*Le refonte du règlement Bruxelles I", Revue critique de droit international privé*, 102 (1), 2013, pp. 8-9.

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first seized may decline jurisdiction[16]. However, it should be noticed that if the court of third state has exclusive jurisdiction pursuant to Article 22, while the proceedings has not been commenced and are also unlikely to commence within a short time, it may be ridiculous if the courts of Member states have decided to stay its proceedings but the respective non-Member state did not claim exclusive jurisdiction pursuant to its own law[17]. Therefore, even if the stay of proceedings in favour of a third state court is legitimate through the application of the "reflexive effect" of Article 22, the requirements of Articles 33 and 34 of RBI*bis* should be followed as well.

3.The same discussion regarding Article 23 may also be relevant. Under general circumstances, Article 23 is only applicable when the parties submit the dispute to a court of a Member state. Article 25 (old Article 23) of RBI*bis* has withdrawn the requirement that one of the parties should be domiciled in a Member state[18]. In this sense, RBI*bis* only requires that the court "elected" is a court in a Member state, regardless of where the parties are domiciled.

However, it may be criticized that Article 25 tends to include third state citizens into its application but excludes its application when the choice of forum refers to a court in a third state. In a *lis pendens* between the Member states, it is incumbent for the court first seized to verify the existence of the agreement of choice of forum and to decline jurisdiction if it could be established, while in the ECJ case *Gasser* it is held that the court second seized cannot proceed even if it considers that it has been exclusively chosen by the parties to determine any dispute between them by an agreement meeting the formal requirements of Article 23 (now Article 25)[19]. However, it may happen if the parties have agreed on a court to resolve disputes that may arise between them but one, fearing being sued and found to be in breach of contract, brings proceedings before a court with lower efficiency on litigation (so-called "Italian torpedoes")[20]. RBI*bis* has noticed that this kind of abusive litigation tactics may impair legal justice and the due expectations of the parties, and thus tried to avoid it by introducing a new provision (Article 31(2)) stating that if a court is seized in accordance with an agreement of choice of forum pursuant to Article 25, any court in another Member state should stay the proceedings until the court seized on the basis of the agreement declares that it has no

[16] See Article 22 *bis* of the *Proposed amendment of Chapter II of Regulation 44/2001 in order to apply it to external situations* made by GEDIP, available on the website: www.gedip-egpil.eu/documents/gedip-documents-18pe.htm/.

[17] MAGNUS, U., MANKOWSKI, P., "Joint response o the green paper on the review of the Brussels I Regulation", University of Hamburg, pp. 1-46, pp. 3-4. The article is available on the website: http://ec.europa.eu/justice/news/consulting_public/0002/contributions/civil_society_ngo_academics_others/prof_magnus_and_prof_mankowski_university_of_hamburg_en.pdf.

[18] See Article 25 of RBI*bis*.

[19] See Case C-116/02, *Erich Gasser GmbH v MISAT Srl* [2003] ECR I-14693. Also see DICKSON, A., "The revision of the Brussels I Regulation (Surveying the proposed Brussels I bis Regulation: solid foundations but renovation needed)", *Yearbook of Private International Law*, Vol. XII, 2010, pp. 247-309, p. 286. Also see GAUDEMET-TALLON, H., *Compétence et exécution des jugements en Europe (Règlement 44/2001, Convention de Bruxelles et de Lugano)*, Paris, L.G.D.J., 2010, pp. 355-356.

[20] BRIGGS, A., "What should be done about jurisdiction agreements", *Yearbook of Private International Law*, Vol. XII, 2010, pp. 311-332, p. 315.

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jurisdiction[21]. This provision may to some extent harmonize the parallel proceedings concerning an agreement of choice of court between Member states. However, again, RBI*bis* leaves a lacuna to the case of *lis pendens* in which a non-Member state is conferred jurisdiction by such an agreement.

In the case where there exist parallel proceedings between a Member state court and a third state court which has competence by a choice of forum agreement, ECJ in *Coreck*[22] has already indirectly admitted a discretionary power of the court of the Member state to evaluate the choice of forum agreement in favour of the third state in accordance with its national law [23]. Although Article 33 enables a Member state court the jurisdiction of which is based on the connecting factors of the defendant's domicile, the contractual or non-contractual obligations to decide the stay of proceedings in favour of a third state first seized the jurisdiction of which is conferred by a choice of forum agreement, it leaves for the Member states to examine whether the agreement of choice of court of a third state is valid in accordance with its national rules, and Article 33 (4) of RBI*bis* also states that "the courts of Member states shall apply this Article of its own motion where possible under national law"[24].

However, even if such an agreement may be admitted and the court of a Member state may stay its proceedings in accordance with its own national law, the parties (while possibly Member states citizens) may still suffer from possible risk of different treatments deriving from the divergent criteria adopted by national laws. In fact, the virtues of certainty and party autonomy should not be abandoned only for the fact that the jurisdiction clause is for the courts of a non-EU Member state[25]. Furthermore, it may harm the expectation of the defendant to be summoned before court of a third state, while it may be contrary to the requirement that Community law shall respect the human rights conferred by the European Convention on Human Rights[26].

As we have mentioned, since the national practices of the Member States upon *lis pendens* involving third state elements vary, a proper EU consideration will prove to be highly necessary[27], in which the recognition of the "reflexive effect" of Article 25 may

[21] See Article 31(2) of RBI*bis*.
[22] See Judgment of the Court of 9 November 2000, Case C-387/98, *Coreck Maritime GmbH V Handelsveem BV and Others*.
[23] See paragraph 19 of Case C-387/98. Also see C. VILLATA, F., "Choice-of-court agreements in favour of third states in light of the suggestions by members of the European Parliament", in POCAR, F., VIARENGO, L., C. VILLATA, F., (eds.), *Recasting Brussels I*, Assago, Cedam, 2012, pp. 219-233, p. 221.
[24] See Article 33 (4) of RBI*bis*.
[25] HARRIS, J., "The Brussels I Regulation and the Re-Emergence of the English Common Law", *The European Legal Forum (E)*, 4-2008, pp. 181-189, p. 185.
[26] FENTIMAN, R., "Arts. 27-30", in MAGNUS, U., MANKOWSKI, P., *Brussels I Regulation: European Commentaries on Private International Law (Second Edition)*, München, Sellier European Law Publishers, 2012, pp. 557-582, p. 569. Also see HARDING, M., *Conflict of Law*, Fifth Edition, Oxon/New York, Routledge, 2014, p. 68.
[27] Issue 107 Working Group of Financial Markets Law Committee, *Legal assessment of problems associated with the Brussels I Regulation and suggested solution to Brussels I Regulation Article 23 Cases*, July 2008, p. 9. The document is available on the website:

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be preferred. In this respect, some English case law has suggested that it may be appropriate to decline jurisdiction in favour of third states if the parties have agreed to the jurisdiction of a third state, and has held that Article 23 has reflexive effect[28]. Besides, the GEDIP has also proposed an Article 23 *bis* regarding a stay of proceedings in favour of a court in a third state under an agreement of choice of court[29]. However, in order to justify the application of "reflexive effect" and keep the well functioning of the Regulation, several conditions should be satisfied. Firstly, the reflexive or mirror effect must require that the examination on whether such an agreement of the choice of forum is valid or not rely on the interpretation of the EU law than "*renvoi"* to national rules[30]. As we have mentioned, the "*renvoi"* would be an obstacle to the efficient functioning of the EU internal market since it may lead to "*forum shopping"* deriving from the different criteria adopted by national laws regarding the international *lis pendens*[31]. Secondly, only a flexible "reflexive effect" rather than a strict "reflexive effect" is allowed, which means that certain conditions should be retained in admitting the application of "reflexive effect" in favour of a court of the third states. For example, the court of a Member state must not immediately decline to exercise jurisdiction but must wait until such time as the judge of the selected court declares to have jurisdiction, for the fear that there may be no courts to deal with the parties' dispute, and the choice by the parties to a court in a third state should have no effect if all the other elements relevant to the situation at the time of the choice of court are located in this Member state rather than the selected third state, for the fear that the parties may select a third state court in order to evade the overriding rules of the Member states[32]. Thirdly, as well as the "reflexive effect" of Article 24 (old Article 22), the court of a Member state should take into account the conditions imposed by Article 33, for example, whether the proceedings are likely to be concluded within a reasonable time, whether the judgment made by the court of the third state is capable of recognition in Member states, and whether such a stay is necessary for the proper administration of justice. Only when these requirements are followed could the Member state court consider the stay of proceedings in favour of the court in that third state.

4. It is also relevant to examine the applicability of the Hague Convention on the Choice of Court Agreement in this case. The European Commission has adopted a proposal on behalf of the EU on the approval of the Hague Convention on 30 January 2014[33]. In this

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www.fmlc.org/Documents/Issue107assessment.pdf.

[28] FENTIMAN, R., "Arts. 27-30", *loc. cit.*, p. 581. Also see the English cases, *Arkwright Matual Inc. v. Branston Ince* [1990] 3 WLR 705, 721; *Konkola Copper Mines v. Coromin* [2005] EWHC 896; *Winnetka Trading Corp v. Julius Baer International Ltd.* [2009] Bus L. R. 109

[29] See Article 23 *bis* of the *Proposed amendment of Chapter II of Regulation 44/2001 in order to apply it to external situations.*

[30] CHALAS, C., "L'affaire Ferrexpo…", *loc. cit.*, p. 379.

[31] In this sense, see SALVADORI, M., "El convenio sobre acuerdos de elección de foro y el Reglamento Bruselas I: Autonomía de la voluntad y procedimientos paralelos", *Anuario Español de Derecho Internacional Privado*, t. X, 2010, pp. 829-844, p. 843.

[32] BORRÁS, A., "Application of the Brussels I Regulation to external situations: From studies carried out by the European Group for Private International Law (EGPIL/GEDIP) to the proposal for the revision of the Regulation", *Yearbook of Private International Law*, Vol. XII, 2010, pp. 333-350, p. 343.

[33] European Commission, *Proposal for a Council Decision on approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements*, COM (2014) 46 final.

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sense, the contracting party of the Hague Convention will be the EU rather than every single Member state, and it will be relevant to address the coordination between the Hague Convention and RBI*bis*, because RBI*bis* has strengthened party autonomy and may also apply to extra-EU situations, as we have mentioned[34].

Articles 5 ad 6 of the Hague Convention state that the court of a Contracting state designated by an exclusive choice of court agreement shall have jurisdiction while the courts in other Contracting states shall suspend or dismiss proceedings in favour of the chosen court[35]. However, in conformity with the Article 26(6)(a) of the Convention, it may not affect the application of Brussels Regulation if none of the parties is resident in a Contracting state that is not a EU Member state either[36].

Taking the example of *Gasser*, if a contract between an Austrian party and a party resident in Mexico (the current unique Contracting state of the Convention) provides that any dispute shall be heard in the courts of Austria, while the Mexican party brings proceedings in the courts of Italy, the Convention should prevail over RBI pursuant to Article 26(6)(a). Conversely, if we change the Mexican party to a party resident in China (the current non-Contracting state of the Convention), Brussels Regulation so applies as indicated in the same Article[37]. In this sense, the Hague Convention on the Choice of Agreement seems to be a solution to *lis pendens* involving a Member state and a third state concerning a choice of forum clause. However, the Hague Convention still remains to be ratified both by the EU and China. Since there is no timetable for China to become a contracting state until now, a serious lacuna residing in the international *lis pendens* cannot wait to be resolved until then. Besides, albeit the Convention may eventually be ratified, it would not resolve all the difficulties. This is because the Hague Convention on the Choice of Court Agreement precludes its application from many subject matters relating to the choice of court agreements[38]. The current Hague Convention on the Choice of Court Agreement is the inheritor of the proposed Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters[39], in which the wide scope and great ambitions of the "judgment project" have proven impossible[40]. For this reason, "the judgment project" was replaced by a much more narrow convention specializing in the aspect of choice of forum[41]. Nevertheless, as we know, international *lis pendens* not only deals with a case involving

[34] FRANZINA, P., "The EU prepares to become a party to the Hague Convention on Choice of Court Agreements", this article is available on http://conflictoflaws.net/2014/the-eu-prepares-to-become-a-party-to-the-hague-convention-on-choice-of-court-agreements/.

[35] See Articles 5 and 6 of the Convention on Choice of Court Agreements (concluded 30 June 2005), Hague Conference on Private International Law.

[36] See Article 26(6)(a) of the Convention.

[37] In this sense, see FENTIMAN, R., *International Commercial Litigation*, Oxford, Oxford University Press, 2010, pp. 97-99.

[38] DICKSON, A., "The revision of…", *loc. cit.*, p. 302.

[39] See *Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, this document is available on: http://www.hcch.net/upload/wop/jdgmpd11.pdf.

[40] SVANTESSON, D. J., "An Update on the proposed Hague Convention on Exclusive Choice of Court Agreements", *Law Papers*, 2005, pp. 1-12, p. 1. This article is available on: http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1059&context=law_pubs.

[41] SVANTESSON, D. J., "An Update on…", *loc. cit.*, p. 1.

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a choice of forum agreement but also includes other civil and commercial matters. In this regard, we believe that relying on the current Hague Convention to solve the difficulties deriving from *lis pendens* needs further consideration.

5. In order that the courts of the Member states could decide a stay of proceedings in favour of the court in a third state, several conditions should be satisfied. Firstly, under general circumstances, a court of a third state should commence the proceedings earlier than a court of a Member state. However, we may also allow two exceptions. On one hand, if a court of a third state has already commenced its proceedings, even if later than the proceedings before the court of a Member state, the judges of a Member state may still consider a stay of proceeding in favour of that court. In this case, the "reflexive effect" of Articles 24 and 25 should be admitted in order to avoid possible tactical litigation before the Member states widely perceived as abusive when the jurisdiction is due in a third state[42]. In this sense, we may indirectly admit the "reflexive effect" of Article 31(2) of RBI*bis*. On the other hand, if the proceedings due to be commenced before the court of a third state are still absent and are unlikely to be initiated in a short time, it may make no sense for the court of a Member state to dismiss its proceedings, since no confirmed schedule of the third state court to deal with the parties' dispute may impair their expectations and foreseeability in the proceedings, and may also exert adverse effects on the normal functioning of Brussels Regulation.

Secondly, the judges of the Member states should estimate to what extent a judgment adopted by a third state court would be recognized in the territory of Member states. This includes an examination on the defendant's ability to mount a defence before the court of third states, the fairness or procedural regularity of the court, and the consideration of the public policy of the mentioned Member state[43]. Unlike the rules of *lis pendens* in RBI which is clearly based on a great deal of confidence and mutual trust[44], judges of the Member states always adopt a more cautious attitude towards third states' jurisdictions.

Thirdly, judges of the Member states should also examine whether the proceedings in third states could be concluded within a reasonable time and whether the continuation of the proceedings is required for a proper administration of justice. By commencing proceedings first, a claimant will ensure that a dispute is heard in his preferred forum[45]. Therefore judges of the Member states should make sure that the parties are not stuck in a third State torpedo and the defendant is not sued in a disadvantageous forum.

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[42] HESS, B., PFEIFFER, T., SCHLOSSER, P., *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))*, München, Verlag C.H. Beck, 2008, p. 106. In this case, we should make distinction with the ECJ decision in *Gasser* in which it held that the *lis pendens* rules in RBI cannot be derogated from where, the duration of proceedings before the courts of Member states in which the court first seized is established is excessively long. The ECJ decision was made on the basis of mutual trust between Member states, but it cannot apply in the relations with third states.

[43] FENTIMAN, R., *International Commercial Litigation, op. cit.*, pp. 702-707.

[44] BOGDAN, M., "The Brussels/Lugano Lis Pendens Rule and the 'Italian Torpedo'", *Scandinavian Studies in Law*, 2007, pp. 90-97, p. 92.

[45] FENTIMAN, R., "Arts. 27-30", *loc. cit.*, p. 564.

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Meanwhile, despite that an autonomous interpretation of "a proper administration of justice" is preferred, for the moment, due to the absence of such a uniform definition, maybe the test should be based on the examination whether the jurisdiction of the third state court could ensure legal certainty or whether there exists a sufficient degree of proximity between that court and the disputed matter concerned rather than a transient, occasional or superficial link[46]. Besides, it is suggested that such a test may be carried out by making consultation to the academics of law profession, or through different national or international reports on the human right record of the third state court[47], or by referring to the necessity to the protection of public interests or the application of mandatory rules.

Nevertheless, as we have mentioned, if RBI*bis* may inevitably include the consideration on the relations with the third states, the EU legislators should give up imposing so many conditions on admitting the jurisdiction of third states, because the unilateral statement in RBI*bis* may seem to be unfair and unbearable from the perspective of third states. Instead, they should treat the third states in a way that is equitable with regard to the treatment to its own Member states. However, if the EU legislators fear that the stability of the Brussels framework binding the relations of Member states will be impaired after recognizing the "reflexive effect" in RBI*bis* to a general extent, they should reject the application of the doctrine of "reflexive effect" in Article 33 and 34. In this sense, the EU legislators should strictly confine the application of RBI*bis* within the Member states. The difficulties arising out of the application of RBI*bis* may give room to a bilateral or multilateral convention elaborated by the EU and third states in terms of *lis pendens*[48], which should be concluded on the basis of mutual consensus. It may seem to be the optimal solution in order to eliminate the legal uncertainty in RBI*bis*. In this case, we will take the example of China in the next part in order to examine the possibility of concluding such a convention between the EU and China.

III. THE REGIME OF *LIS PENDENS* IN CHINESE LAW AND THE CHALLENGE MET BY CHINESE JURISDICTION AFTER THE RECAST OF BRUSSELS REGULATION

6. Obviously, the new *lis pendens* regime of Regulation Brussels I *bis* will exert great influence on jurisdiction of the third states including China as well. In fact, current Chinese PIL still remains unclear upon the matters in relation to parallel proceedings. In Chinese Law, the Chinese Civil Procedure Law has not formally incorporated provisions regarding the international *lis pendens*. The regime of *lis pendens* was mentioned only in two legal documents. Firstly, the issue of international *lis pendens* was mentioned in the *Opinion of the Supreme People's Court on some issues concerning the application of the Chinese Civil Procedure Law*[49]. According to the

[46] FRANZINA, P. "*Lis pendens* involving a third country under the recast Brussels I Regulation: an overview", Rivista di diritto internazionale privato e processuale, 2014, nums. 1-7, num. 4.
[47] Christelle CHALAS, "L'affaire Ferrexpo…", *loc. cit.*, p. 368.
[48] BOSCHIERO, N., "Las reglas de competencia judicial de la Unión Europea en el espacio jurídico internacional", *Anuario Español de Derecho Internacional Privado*, t. IX, 2009, pp. 35-65, p. 54.
[49] See the *Opinion of the Supreme People's Court on some issues concerning the application of the*

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point 306 of this Opinion, the Chinese legislators have indicated their attitudes to encourage the Chinese courts to exercise jurisdiction in the case where both the Chinese and foreign courts have jurisdiction. As long as one of the parties sues before a Chinese court, the Chinese court may be able to deal with their dispute[50]. Secondly, the *Circular of the Chinese Supreme People's Court on the Issuance of the "Minutes of 2nd National Foreign-related Commercial Maritime Trial Work Meeting"*[51] mentioned that the Chinese judges have a limited discretion to decide whether or not to deal with the dispute[52]. However, it is obvious that the Chinese legislators give a positive attitude and encourage the courts to establish the jurisdiction and attend to the parties' dispute, and this encouragement has also been extended to foreign judgments. If the parties apply to a Chinese court to recognize or execute a foreign judgment in which they were involved, the court may refuse the recognition or execution of the foreign judgment on the absence of bilateral conventions or international comity with the mentioned foreign state. Instead, the parties are encouraged to commence another proceedings before the Chinese court to deal with the same cause of action[53].

However, this solution is not sufficient to keep in pace with the development of EU regulations in terms of *lis pendens*, since the excessive extension of jurisdiction may lead to unreasonable *"forum shopping"*, and usually a judgment made by a Chinese court in this way may hardly get recognized by the EU Member states[54]. Before the revision of the Chinese Civil Procedural Law in 2012, there was a chapter regulating the conflict of jurisdiction rules concerning foreign-related affairs while it was reduced to only two provisions after the revision. The Chinese legislators tended to equal the treatment of international litigation with national litigation thus they have abolished most of the conflict of jurisdiction rules in the Civil Procedural Law[55]. However, there do indeed exist significant differences respecting international and national litigations. National litigation does not affect the applicable procedural and substantive law, what is principally at stake is where the litigation proceeds at a national dimension; while international litigation determines which court will be more appropriate to deal with the controversy, and the application of both the procedural and substantive laws can be affected in fundamental ways by choice of conflict-of-jurisdiction rules[56]. In this sense,

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Chinese Civil Procedure Law, Fa Fa [1992] No. 22.

[50] See point 306 of the *Opinion*. Also see LI, S., *Private International Law*, Beijing, Peking University Press, 2011, p. 367.

[51] See the *Circular of the Chinese Supreme People's Court on the Issuance of the "Minutes of 2nd National Foreign-related Commercial Maritime Trial Work Meeting"*, Fa Fa [2005] No. 26. This circular is a legal notice reporting the celebration of a meeting held in November 2005 in Nanjing, China by the Chinese judges and the consensus reached by them at the meeting, regarding the implementation of some judicial experience in foreign-related commercial maritime trials, in which the doctrine of *"forum non conveniens"* and *lis pendens* were mentioned.

[52] See point 10 of the *Circular*.

[53] See point 318 of the *Opinion*.

[54] In respect of this theory, see J. FAWCETT, J., (Editor), *Declining Jurisdiction in Private International Law*, Oxford, Clarendon Press Oxford, 1995, pp. 301 and ss.

[55] LI, J., "The study on the improvement of conflict of jurisdiction rules concerning foreign affairs in China", *Politic Science and Law Review*, 2013 (08), pp. 139-145, pp. 141 and ss.

[56] Regarding the distinction between international and national litigations, see VON MEHREN, A. T., "Theory and practice of adjudicatory authority in private international law: a comparative study of the

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the absence of international litigation rules may give preferential treatment to the litigation of local states, and a distinction of treatment on national and international litigations merits reconsideration in Chinese Law.

In spite of the absence of the rules concerning international *lis pendens* in Chinese Civil Procedural Law, in recent years, Chinese courts have started to accept some aspects of the doctrine of *"forum non conveniens"* under strict conditions[57]. However, the principles of *"forum non conveniens"* adopted by Chinese courts do not show many similarities with the original doctrine invented by Anglo-Saxon law systems. In Chinese legal system, the courts do not enjoy such a great discretion to decide a stay of proceedings as in Anglo-Saxon law countries. According to the *Circular* that we just mentioned above, in order to decline the jurisdiction in favour of a foreign court, the Chinese judges should follow several requirements. For example, it should be the defendant to request for the application of *"forum non conveniens"*, or at least he raises an objection to the Chinese jurisdiction so the court at issue may consider the application of *"forum non conveniens"*; Chinese courts should have jurisdiction on the dispute; no agreement on the choice of a Chinese court for jurisdiction is made by the parties; the dispute is not under the exclusive jurisdiction of Chinese courts; the dispute involves no interests of Chinese citizens or legal persons; the main dispute do not occur within the Chinese territory and Chinese law will not be applicable to this dispute; Chinese courts will encounter great difficulties in determining the facts and applicable laws to the dispute if they establish jurisdictions; foreign courts have jurisdiction over the dispute and are more convenient in dealing with the case[58].

In this sense, Chinese courts should take into account the reason of the claimant to sue before the foreign court, the due process interests of the defendant and whether it is convenient for the defendant; the place where the relevant elements are situated and whether the foreign courts have stronger connections with the case; the existence of exclusive jurisdiction and choice of forum clause on Chinese courts; the enforcement of mandatory rules and protection of public interests; the possibility of the judgment made by the foreign court to be recognized in China and the judicial efficiency of the foreign court[59]. As long as these conditions are satisfied, Chinese judges may decline its jurisdiction on the basis of international comity in favour of a foreign court. Although the rules adopted by the Supreme Court shall apply to its subordinate courts, the publication of a notice made by the Supreme Court is not the same as introducing the principle of *"forum non conveniens"* formally into the Chinese Civil Procedural Law. Besides, the doctrine of *"forum non conveniens"* in common law still shows many

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doctrine, policies and practices of common- and civil-law systems: general course on private international law (1996)", *Recueil des Cours*, Vol. 295, The Hague/Boston/London, Martin Nijhoff Publishers, 2002, pp. 9-431, pp. 173 and ss.

[57] TU, G., "The Doctrine of *Forum Non Conveniens* in China: Revisited", *International Law Review of Wuhan University*, Vol. 16, No. 1, 2013, pp. 105-126, pp. 119-120.

[58] See point 11 of the *Circular*.

[59] In this sense, see TU, G., "The Doctrine of …", *loc. cit.*, p. 114. Also see XI, X.,"Several reflections on the regime of '*forum non conveniens*'", *Chinese Journal of Law*, No. 1, 2002, pp. 81-92, pp. 88 and ss. Also see Li, F., "Study on the application pattern of the principle of '*forum non conveniens*'", *Legal system and Society*, No. 6, 2011, pp. 24-25, p. 25.

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differences with the civil law legal system, for example, the "anti-suit injunction" seems to be an alien concept in the countries with a civil law tradition[60]. Thus, the elaboration of bilateral treaties or conventions may be highly expected.

7. In fact, China has concluded bilateral treaties with several Member states in order to enforce civil judicial cooperation, in which *lis pendens* was also mentioned. However, the solution in these conventions does not lie in dealing with the existence of parallel proceedings directly, but dealing with the existence of parallel judgments. In accordance with these conventions, China will only recognize a foreign judgment under three conditions[61]. Firstly, if China has not adopted a judgment or has not recognized a judgment of another third state yet (the bilateral treaty with France)[62]; secondly, if China has not adopted a judgment or has not recognized a judgment of another third state yet, or no proceeding is pending in China (the bilateral treaty with Spain)[63]; thirdly, if China has not concluded a judgment or has not recognized a judgment of another third state, or the proceeding was first seized by the foreign state (the bilateral treaty with Italy)[64]. Although *lis pendens* was not directly mentioned, we can image that if there is a judgment, there will have existed a proceeding, and the existence of two judgments suggests that there exist two proceedings and one of them often have been commenced earlier than the other one. In this sense, we will return to the discussion of *lis pendens* again.

Firstly, take the example of the bilateral Treaty between China and France. If France is the state before which a Chinese judgment is asked for recognition, while a proceeding involving the same parties and the same cause of action is pending before the French court and a judgment has not been adopted yet, then the Chinese judgment could be recognized in accordance with the Treaty. However, if the French court recognizes the judgment made by a Chinese court then it would be meaningless to continue its proceeding[65]. In this sense, RBI*bis* may have given a solution since under its provision, the court of a Member state should examine whether a judgment of a court in third state may be recognized or not in Member states in order to decide the stay of the proceedings.

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[60] Anita ALIBEKOVA, Robert CARROW (Editors), *International Arbitration and Mediation: From the Professional's Perspective*, New York, Yorkhill Law Publishing, 2007, p. 126. Koji TAKAHASHI, "Damages for Breach of a Choice-of-court Agreement", *Yearbook of Private International Law*, Vol. X, 2008, pp. 57-91, p. 89.

[61] ZHAO, S., ZHAO, F., "Study on the issues related to parallel proceedings", Journal of Harbin Institute of Technology (Social Science Version), Tome 8, Vol. 5, 2005, the article is available on the website: http://article.chinalawinfo.com/Article_Detail.asp?ArticleId=30647.

[62] See Article 22(6) of the *Bilateral Treaty between China and France on the judicial assistance in civil and commercial matters [1987]*.

[63] See Article 22(6) of the *Bilateral Treaty between China and Spain on the judicial assistance in civil and commercial matters [1993]*.

[64] See Article 21(5) of the *Bilateral Treaty between China and Italy on the judicial assistance in civil and commercial matters [1992]*.

[65] In this sense, see LI, W., *The coincidence of international proceedings*, Beijing, Chinese University of Political Science and Law Press, 2002, pp. 162 and ss.

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Secondly, take the example of the bilateral Treaty between China and Spain, if Spain is the state before which a Chinese judgment is asked for recognition, the Spanish judge may reject it if a judgment with the same parties and the same cause of action has been rendered by a Spanish court or a proceeding is pending before a Spanish court. In this sense, the Spanish court may indirectly deny the Chinese jurisdiction no matter its proceeding was first or second seized. If the Spanish court was first seized, it is reasonable that it should have jurisdiction. And such a decision is consistent with both Brussels Regulation and the Treaty. However, when it refers to a proceeding second seized in Spain, the retaining of Spanish jurisdiction may be consistent with the Treaty while it is contrary to the rules in RBI*bis* in which a stay of proceedings in favour of the court of a third state first seized may be permitted. It may lead the Spanish courts to be stuck in a dilemma that different treatments may be given to states with which Spain has concluded conventions and those not.

Thirdly, take the example of the bilateral Treaty between China and Italy. In spite of the fact that they have agreed that the court first seized in a state is able to reject the judgment of the other state, they may also have to consider the case where the court in the other state has exclusive jurisdiction or has been conferred jurisdiction by a choice of forum agreement. As we have mentioned above, the rule "first-come, first served" may to some extent avoid the risk of conflicting judgments, but it may also lead to some *"forum shopping"* since sophisticated litigants may explore it to perform this abusive strategy [66].

Fourthly, from the perspective of Member states, the different criteria adopted in these bilateral treaties may be incompatible with the intention to protect the interests of their citizens. For example, the courts in France, Spain and Italy may apply the rules of RBI*bis* on the absence of a bilateral convention with third states, in this sense its citizens will be subject to the same criterion under RBI*bis*. However, since RBI*bis* has held that its application shall not affect the application of bilateral conventions between a Member state and a third state which were concluded before RBI entered into force[67], all the three treaties that we have mentioned will continue to be applicable to the matter of *lis pendens* between China and these Member states. However, Article 351 of TFEU requires the Member states to take every appropriate step to eliminate the incompatibilities between this kind of bilateral treaties and the EU law. In this sense, even if these bilateral treaties could continue to be applicable in the mentioned Member states in accordance with Article 73 (3) of RBI*bis*, ECJ has held that this provision cannot be interpreted as meaning that it may lead to results which are less favourable for achieving a well functioning operation of the internal market[68]. Besides, not only the

[66] EISENGRAEBER, J., "*Lis alibli pendens* under the Brussels I Regulation –How to minimize 'Torpedo litigation' and other unwanted effects of the 'first-come, first-served' rule", *Exeter Papers in European Law*, No. 16, pp. 1-63, pp. 43 and ss. This Article is available on the website: http://law.exeter.ac.uk/cels/documents/papepr_llm_03_04_dissertation_Eisengraeber_001.pdf. Also see FRANZINA, P. "*Lis pendens* involving…", *loc. cit.*, num. 4.

[67] See Article 73 (3) of RBI*bis*.

[68] See paragraphs 51 and ss of Judgment of the court (Grand Chamber) of 4 May 2010, Case C-533/08, *TNT Express Nederland BV v. AXA Versicherung AG*. Also see DE MIGUEL ASENSIO, P. A.,"Convenios internacionales y unificación del Derecho internacional privado de la Unión Europea", in

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citizens of these Member states should be subject to different criteria before their national courts due to the existence of such conventions, but also the Chinese nationals may be treated differently in the courts of these Member states as well. The bilateral treaties will be applicable to the Chinese nationals in the mentioned three states but they must be subject to RBI*bis* in Germany due to the absence of such a bilateral treaty. Obviously, this treatment will also be contrary to a well functioning judicial administration as well. In this sense, instead of allowing a harmonization to *lis pendens* between China and these Member states, these treaties may make the Member states and Chinese citizens suffer from the divergence deriving from the national laws and prevent them to benefit from a uniform application of RBI*bis*.

IV. A POSSIBLE BILATERAL INTERNATIONAL CONVENTION REGARDING *LIS PENDENS* BETWEEN CHINA AND THE EU

8. Deriving from what we have discussed above, the revision to these bilateral treaties seems to be urgent and the incorporation of the new legal improvement of RBI*bis* into these treaties may be necessary. However, it may be impossible under the actual EU legal framework. After the promulgation of RBI, the Member states are now no longer entitled to amend an existing agreement or to negotiate or conclude international treaties within the exclusive competence of the EU in RBI[69]. Although the EU has conferred to its Member states the powers to negotiate their own treaties with third states in terms of conflict-of-law rules relating to contractual and non-contractual obligations and the maintenance and family law jurisdiction matters (respectively Regulation 662/2009 and Regulation 664/2009, which refer to the scope of Rome I, Rome II and 2201/2003 Regulations) under strict substantive and procedural condition[70], the EU retains exclusive competence to negotiate and conclude conventions with third states in the aspects falling within the framework of RBI[71].

ESPLUGUES MOTA, C.,PALAO MORENO, G., Manuel PENADÉS FONS, *Nuevas fronteras del Derecho de la Unión Europea*, València, Tirant lo Blanch, 2012, pp. 57-77, pp. 74-75.

[69] Only Regulation 662/2009 and Regulation 664/2009 establish a procedure for the amending of existing agreement or negotiating and conclusion of agreements between Member states and third states in the aspects of matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, the law applicable to matters relating to maintenance obligations; and the law applicable to contractual and non-contractual obligations. See Pedro A. DE MIGUEL ASENSIO, "International conventions and European instruments of private international law: interrelation and codification", in DE MIGUEL ASENSIO, P. A. and S. BERGÉ, J., "The Place of International Agreements and European Law in a European Code of Private International Law", Fallon, M., Lagarde, P., POILLOT PERUZZETTO, S., (eds.), *Quelle architecture pour un code européen de droit international privé*, Frankfurt am Main, Peter Lang, 2011, pp. 185-212, pp. 196-197. Also see MAGNUS, U., "Introduction", in MAGNUS, U., MANKOWSKI, P., *Brussels I Regulation: European Commentaries on Private International Law (Second Edition), op. cit.*, 2012, pp. 1-46, pp. 23 and ss.

[70] PEERS, S., *EU Justice and Home Affairs Law (Third Edition)*, Oxford, Oxford EU Law Library, 2011, p. 652. Also see DE MIGUEL ASENSIO, P. A., "Cooperación judicial civil en la UE y convenios con terceros Estados", 01/09/2009, this article is available on the website: http://pedrodemiguelasensio.blogspot.com.es/2009/09/cooperacion-judicial-civil-en-la-ue-y.html.

[71] See ECJ Opinion 1/03 of 7 Febrary 2006. Also see ESPINIELLA MENÉNDEZ, A., "La autorización comunitaria para la negociación y celebración de acuerdos de Derecho internacional privado entre estados miembros y terceros países [Comentario a los Reglamentos (CE) núm. 662/2009 y núm. 664/2009]",

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In fact, since RBI contains the civil and commercial matters to a large scale, and RBI*bis* was just been promulgated, it makes no interest for the EU to confer to its Member states the power to negotiate international treaties with third states in all the aspects of RBI within a short period of time. In this sense, it may be more workable to conclude a bilateral treaty between China and the EU specializing at the issue concerning the international *lis pendens*, just as the Hague Convention which only deals with the issue of choice of court, as we have mentioned above. Besides, TEU and TFEU have stated that the EU has the power to conclude international agreements with third states, and the agreements concluded by the EU are binding upon its Member states[72]. As we have mentioned, the EU does not allow its Member states to negotiate and concluded agreements with third states on jurisdiction in civil and commercial matters, in which the regime of *lis pendens* is included. Therefore, neither the agreement signed by the Member states with third states nor a mixed agreement signed by both the EU and its Member states with third states regarding the *lis pendens* would be allowed[73]. Instead, the EU can exercise exclusive external competence over this field, and the Member states should be bound by these agreements signed by the EU[74].

9. In order to conclude such a bilateral convention, several elements should be taken into account. Firstly, China should express its attitude towards the international *lis pendens*. Its different treatment of parallel existence of judgments and proceedings in the mentioned bilateral treaties may make its judgment less persuasive before the foreign courts. In this sense, the *Model Law of Private International Law of China* [2000] made by the Chinese Association of PIL may give us some guidance though it has no mandatory effect[75]. In accordance with its provisions, Chinese court may decide a stay of proceedings in favour of a foreign court if the foreign court was first seized, and if the Chinese judges have estimated that a judgment made by this foreign court could be recognized by a Chinese court[76]. In this sense, the Chinese doctrine also supports the main principles of *lis pendens* that were adopted in RBI*bis*. However, the Chinese doctrine insists that Chinese court have jurisdiction if the Chinese court was first seized or if the Chinese judges have estimated that a foreign court may not provide sufficient protection to the parties [77]. It is logical since RBI*bis* only represents the will

Diario La Ley, Nº 7252, 2009, Año XXX, Ref. D-304, pp. 1-18, pp. 1 and ss.

[72] See Article 37 of TEU and Article 216 of TFEU. Also see Inglis, K., "European Union Competences and Actions in International Environment Law: Recent Developments and Current Challenges", in HERRMANN, C., PHILIPP TERHECHTE, J., *European Yearbook of International Economic Law* 2011, Berlin/Heidelberg, Springer, 2011, pp. 265-296, p. 291.

[73] In respect of the "mixed agreement", see JAN KUIJPER, P., WOUTERS, J., HOFFMEISTER, F., DE BAERE, G., RAMOPOULOS, T., *The Law of EU External Relations (Cases, Materials, and Commentary on the EU as an International Legal Actor)*, Oxford, Oxford University Press, 2013, pp. 105 and ss.

[74] DE MIGUEL ASENSIO, P. A., "Convenios internacionales y…", *loc. cit.*, pp. 66 and ss.

[75] Chinese Association of PIL is an academic association consisting of famous Chinese PIL scholars. And this Model Law is only academic in nature and intends to be served for legislative reference or legal science research. Also see XU, W., "Comment on Forum Non Conveniens Article of Model Law of Private International Law", *Wuhan University Journal (Philosophy & Social Sciences)*, Vol. 57, No. 3, May 2004, pp. 392-397, pp. 393-394.

[76] See Article 54 of *Model Law*.

[77] LUO, C., "The study on the principle of recognition prognosis in international parallel proceedings",

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of the EU in regard of its relations with third states, while Chinese legislators, on the basis of international comity, should guarantee its public interests as well[78]. In this sense, as we have mentioned, the international *lis pendens* in RBI*bis* is far away enough to satisfy the international obligations. Thus, harmonization in this field should count on the collaboration of a bilateral convention between China and the EU.

Secondly, with the view to the evolution from Regulation 44/2001 to Regulation 1215/2012, and to the recent Chinese case law and the opinion of the Chinese Supreme Court, we can find that some aspects of the doctrine of *"forum non conveniens"* are taken into consideration both by China and the EU. Such a treatment meets the trend of "exceptional circumstances for declining jurisdiction" adopted in the proposed Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters and could avoid the invidious discrimination in the ancient Brussels framework and in the ECJ's decision of *Owusu*[79]. However, it should be noticed that the *"forum non conveniens"* that we are discussing here should be distinguished from the doctrine in common law system. Neither the European nor Chinese legislators will directly adopt the traditional doctrine of *"forum non conveniens"* in common law system but only refer to some aspects of it when deciding a stay of proceedings. On one hand, the Chinese case law may admit a stay of Chinese proceeding in favour of a foreign court under the conditions that we have mentioned above. And Chinese Model Law (not a legislation) suggests that the rule of *"forum non conveniens"* could only be invoked on the application of the defendant in the case where other proceedings may be more convenient for the parties[80]. On the other hand, while certain elements of this theory have been introduced in RBI*bis*, a court of a Member state could only decline its jurisdiction in favour of a non-Member state court in conformity with the requirements of Articles 33 and 34 of the RBI*bis* at a very limited discretion.

Therefore, because of the fact that both China and most of the EU Member states follow civil law traditions, it may not be realistic for China and the EU to accept the common law doctrine of *"forum non conveniens"* directly in the bilateral convention but could consider including some aspects of the doctrine. In this respect, some similarities may be found between the EU and China when considering a stay of proceedings. For example, the stay of the proceedings should before its court, take into account the reason of the claimant to commence proceedings and the due process interests of the defendant, and whether the claimant has the abusive intention to push his adversary into an unfavourable situation. In this regard, the respect to the jurisdiction of the court first

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Western Law Review, 2010 (02), pp. 120-125, pp. 124-125.

[78] In this sense, see LIU, P., "An Analysis of the Reason and Strategy of the International Parallel Proceedings", *Heibei Law Science*, Vol. 22, No. 11, 2004 (11), pp. 84-87, pp. 86-87.

[79] In this sense, see Article 22 of the *Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*. Also see BURBANK, S. B., "Jurisdictional Equilibration, the Proposed Hague Convention and Progress in National Law", *49 Am. J. Comp. L. 203 (2001)*, pp. 203-247, pp. 240 and ss.

[80] See Article 51 of the Model Law. Also see GU, S., *A Study on Problems of Parallel Proceedings in International Civil and Commercial Litigation*, PhD Tesis of Dalian Maritime University, 2006, pp. 131 and ss.

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seized should rest on the basis of a good-faith start of litigation[81]. Besides, the court should take into account the place where all the relevant elements are situated at the time of deciding a stay of proceeding in order to examine whether a foreign court has a more significant connection with the case and whether the court itself is really an inconvenient forum to deal with such a dispute. And the possibility to recognize a foreign judgment by the court should also be taken into account before a final decision is made. Moreover, the estimation of the trial period of a court could also be relevant since a court with low procedural efficiency is less persuasive for another court to decline its jurisdiction, and litigation before such a court could hardly provide enough protection to the interests of the parties and hardly ensure a well functioning judicial administration.

Thirdly, as is always important, the Convention should also consider the existence of exclusive jurisdiction of a court or a choice of court agreement concluded by the parties. The "reflexive effect" of Articles 24 and 25 may give a reference to solve these exceptions in the Convention between the EU and China. In this regard, if the court first seized has exclusive jurisdiction stemming from its subject matter or mutual consensus, all the other courts should decline their jurisdiction for this court. If the court second seized has exclusive jurisdiction, the court first seized could decide a stay of proceedings under two exceptions: on one hand, if the litigation with the same cause of action is pending before the court second seized, for the purpose to avoid an "Italian Torpedo", the court first seized may suspend its proceedings until the court second seized establishes or declines its proceeding. On the other hand, if the court which is supposed to have jurisdiction has not commenced its proceedings and is unlikely to commence it within a reasonable time, the court first seized should not decline its proceedings in order to guarantee the protection of the interests of the parties and to avoid the risk that no court deals with their dispute. However, in some rare cases, it may be possible that both China and the EU Member states declare that they have exclusive jurisdiction pursuant to its own national law. In order to avoid such conflict, the EU and China may follow the pattern of Article 24 of RBI*bis* and establish an autonomous article in the convention in order to delimit the scope of subject matters in relation to exclusive jurisdiction and the criterion to the validity of a choice of forum clause, while the extension of the scope could be negotiated between EU and China in adaptation to their mutual civil or commercial necessities.

Fourthly, if such a bilateral Convention on *lis pendens* is concluded between the EU and China, RBI*bis* should continue to apply in dealing with *lis pendens* with other third states rather than China. In order to avoid possible conflict between RBI*bis* and the EU-China Convention, the experience of the Lugano Convention may be referred to. In conformity with this Convention, if there exist parallel proceedings between a Court of a contracting state that is not a Member state of the EU and a Court of a Member state, the application of the Lugano Convention should precede to that of the RBI[82]. Similarly,

[81] HAY, P., "Notes on the European Union's Brussels I 'Recast' Regulation: An American Perspective", *The European Legal Forum*, 2013/01, pp. 1-36, p. 4.

[82] See Article 64 (2)(b) of the Hague Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

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the application of RBI*bis* should surrender to that of the Convention in the case where there exist parallel proceedings between China and the EU. However, unlike parallel legal documents as RBI*bis* and the Lugano Convention, it should be noticed that the EU-China Convention, as is only specialized at the regime of *lis pendens*, can only be applied to the extent that "they are highly predictable, facilitate and sound administration of justice and enable the risk of concurrent proceedings to be minimized" in order not to exert any adverse influence on RBI*bis*[83]. In conclusion, maybe the success of this Convention may attract more third states to solve the difficulties deriving from *lis pendens* by adopting such a mechanism under RBI*bis*, and it may be the initiative for an international agreement in this field in the future.

V. CONCLUSION

10. As a conclusion, in order to achieve a better judicial cooperation between the EU and China in the field of *lis pendens*, two steps may be followed. Firstly, before the conditions to conclude such a EU-China Convention finally turn to be mature, from the EU perspective, it may be relevant to open up the application of the doctrine of "reflexive effect" of Articles 24 and 25 of RBI*bis* (respectively regarding the exclusive jurisdiction and the jurisdiction deriving from the choice of forum agreement). By applying the theory of "reflexive effect" of these provisions, the court of a Member state should also take into consideration the exclusive jurisdiction of the Chinese court before making a decision to a stay of proceedings. If a court in China is first seized and also has exclusive jurisdiction, the courts of the Member states should decline its jurisdiction in favour of the Chinese court. However, if a court in China is second seized and a proceeding is pending before it, the judges of the Member states should not suspend immediately their proceedings until they have found out that there are no tactical litigations before the Chinese court. If the court in China has not commenced its proceedings nor would it finish its trial within a reasonable time, the judges of the Member states would not be obliged to decline their proceedings in order to ensure that the parties can get enough protection and also ensure a well functioning of the administration of justice within the EU framework.

From the Chinese perspective, despite that China has already concluded bilateral treaties on judicial assistance in civil and commercial matters with several Member states, difficulties may still arise due to the divergence existing in these treaties and due to its attitude which is uncertain towards this issue. In fact, as we have explained, current bilateral treaties are not sufficient to provide protection to the Chinese nationals as well as the nationals in the mentioned Member states. In this sense, Chinese jurisdiction should act more positively to negotiate with the EU and establish a further mutual trust in preparation for such a convention.

[83] See paragraph 53 of Case C-533/08. Also see DE MIGUEL ASENSIO, P. A., "International conventions and…", *loc. cit.*, pp. 211-212.

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Secondly, as we have mentioned, the application of the theory of "reflexive effect" in RBI*bis* cannot bring all the actual difficulties to the end. Since the competence to negotiate and conclude agreements on *lis pendens* is exclusively centralized in the EU, the harmonization in the aspect of *lis pendens* through an international convention could be the optimal choice. In the Convention between the EU and China, the relation with RBI*bis* should be taken into account. In this respect, after the Convention enters into force, it should not disturb the relations between the Member states nor affect the application of the mentioned provisions in RBI*bis* to other third states. Besides, the EU-China Convention could refer to some aspects of the doctrine of "*forum non conveniens"* before deciding a stay of proceedings, in which the initiative of the claimant, the convenience of the defendant, the requirement of public order, the efficiency of the court dealing with the dispute, and the possibility of the recognition of its judgment before another court should all be taken into consideration. Furthermore, the existence of exclusive jurisdiction of a court or a choice of forum agreement to a court should also be taken into consideration before a final decision on the stay of the proceedings is adopted. We hope that such a bilateral international convention in terms of *lis pendens* between the EU and China can not only help eliminate the uncertainty in RBI*bis*, but also solve the difficulties deriving from the divergence in the current treaties concluded by China and the mentioned Member states. And its success may also attract other third states to conclude such kind of conventions with the EU and finally maybe a multilateral international agreement, for example, a Hague Convention on *lis pendens* would come on the scene in the future.

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