Neutral Citation Number: [2020] EWHC 3394 (Comm)

Case No: LM-2020-000064

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**LONDON CIRCUIT COMMERCIAL COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 December 2020

**Before**:

**Mr Stephen Houseman QC sitting as a Deputy Judge of the High Court**

- - - - - - - - - - - - - - - - - - - - -

**Between:**

| | |
|---|---|
| **NESS GLOBAL SERVICES LIMITED** | **Claimant** |
| **- and -** | |
| **PERFORM CONTENT SERVICES LIMITED** | **Defendant** |

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**Anna Dilnot** (instructed by **Cleary Gottlieb Steen & Hamilton LLP**) for the Claimant
**Ricky Diwan QC** (instructed by **Addleshaw Goddard LLP**) for the Defendant

Hearing dates: 30 November & 1 December 2020
Draft Judgment circulated on 8 December 2020

- - - - - - - - - - - - - - - - - - - - -

# Approved Judgment

**Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to Bailii.**

.....

## STEPHEN HOUSEMAN QC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

## INTRODUCTION

1. This is an application by the Defendant ("**Perform**") under CPR Part 11 seeking to stay these proceedings brought against it by the Claimant ("**Ness**").

2. The stay is sought pursuant to Article 33, alternatively Article 34, of Regulation (EU) No.1215/2012 of 12 December 2012 - referred to variously as the 'Recast Brussels Regulation' or 'Brussels Recast Regulation' or 'Recast Brussels I' ("**Regulation**") - on the basis of prior-commenced proceedings pending in New Jersey, USA. I refer to the stay application as the "**Jurisdiction Application**".

3. Both Perform and Ness are UK-registered companies with offices in London. It is common ground that Perform is domiciled in this jurisdiction for the purposes of the Regulation. The present proceedings were commenced by Ness and served upon Perform in this jurisdiction as of right, i.e. as a defendant domiciled within this jurisdiction, on 9 April 2020.

4. Five weeks or so prior to commencement of these proceedings, Perform commenced proceedings against both Ness and its parent company, Ness Technologies Inc. ("**Ness Inc**"), before the Superior Court of New Jersey by Complaint filed on 4 March 2020 ("**NJ Proceedings**"). As addressed further below, the subject-matter of the NJ Proceedings and this subsequent action overlap substantially. Ness accepts, so far as relevant, that the NJ Proceedings involve the same cause of action (save for the addition of non-contractual claims) and are between the same parties (save for the addition of Ness Inc as co-defendant) as the present proceedings.

5. Both sets of proceedings are based on the same facts and matters that are said to constitute the basis for termination by both sides of a written agreement called the Development Center Agreement dated 28 February 2019 ("**DCA**"). The parties to the DCA are - or, in so far as terminated, were - Perform, Ness and Ness Inc (as guarantor of Ness). Clause 20(f) of the DCA contains an express choice of English law and a non-exclusive submission by all parties to the jurisdiction of the Courts of England and Wales.

6. It is by reference to the NJ Proceedings, being 'first seised' in this comparative procedural context, that Perform sought a stay of this action pursuant to Article 33 or Article 34 of the Regulation. These provisions confer power on a 'second seised' court of a Member State to stay proceedings before it by reference to prior-commenced proceedings pending before the courts of a "*third State*", i.e. a Non-Member State.

7. Ness resists the Jurisdiction Application on a number of grounds. Prominent amongst these is the threshold issue as to the applicability of Article 33 or Article 34 in circumstances where (as it says) the jurisdictional basis of the 'second seised' proceedings against a local-domiciled defendant is founded (also or instead) upon a

non-exclusive jurisdiction agreement covering the relevant dispute by operation of Article 25 of the Regulation.

8. Article 25 acknowledges the existence of a distinction between exclusive and non-exclusive jurisdiction agreements, or more accurately the corresponding prorogated jurisdiction conferred upon the courts of a Member State by such agreements. English private international law also, perhaps notoriously, draws its own domestic distinction between these different types of jurisdiction agreements. This distinction featured heavily in the parties' legal analysis. I use 'EJA' and 'Non-EJA' as convenient labels, recognising that the latter embraces different forms of agreement the proper characterisation and effect of which depends upon the contractual language according to the relevant applicable law.

9. The issues were identified and analysed with conspicuous skill and clarity by both counsel. I am grateful to them. At my request, they supplied an agreed form of wording used as the basis of the final paragraph of this judgment.

## RELEVANT BACKGROUND

10. The background that matters is relatively brief and uncontentious.

11. Perform is an English-registered company which provides products and services in the sports data and analytics sector. Ness is an English-registered company which provides software development services, including the design and construction of offshore software and development centres.

12. Both Perform and Ness belong to corporate groups with significant international operations that are each headquartered in the USA. Perform is part of the Stats Perform group with global headquarters in Chicago, Illinois. Ness is part of the Ness Group with global headquarters in Teaneck, New Jersey.

13. Pursuant to the DCA, and summarising for present purposes, Ness undertook to set up and operate an offshore extended development centre in Kosice, Slovakia (defined in the DCA as the "EDC") and to provide a range of services during the term of the DCA. As noted above, Ness Inc guaranteed the liabilities of its subsidiary, Ness, pursuant to the DCA (clause 19).

14. Clause 20(f) of the DCA provides as follows:

> "***Governing Law and Jurisdiction.*** *The Agreement shall be governed by and construed in accordance with the laws of England and Wales and the parties hereby irrevocably submit to the non-exclusive jurisdiction of the Courts of England and Wales as regards any claim, dispute or matter arising under or in connection with this Agreement.*"

15. Pausing there, the parties to the DCA appear to have made an informed and mindful choice of "*non-exclusive*" jurisdiction for the purposes of their mutual and respective irrevocable submissions to the jurisdiction of the Courts of England and Wales. By doing so, they embraced the possibility of more than one set of legal proceedings being lawfully commenced and pursued in different jurisdictions in relation to their

relationship or any dispute between them. They consensually legitimised multi-jurisdictional litigation.

16. A dispute emerged between the parties in late 2019 or early 2020, following an inspection by Dr Sun (Group CTO of Stats Perform) of the EDC in Slovakia in mid-December 2019 and subsequent "commit data" analysis performed by Stats Perform engineers (based in the USA) as to various performance criteria or indicia within the scope of the DCA. Perform stopped paying invoices submitted by Ness.

17. Perform sent a formal notice on 15 January 2020 to Ness requiring various identified (alleged) breaches to be remedied pursuant to clause 15 of the DCA. Ness retaliated by sending a Notice of Dispute on 21 February 2020 to Perform in respect of unpaid invoices totalling €1,023,227.70 and threatening the commencement of legal proceedings in accordance with clause 20(f). This letter/notice was signed and sent by Mark L. Shwartz, Chief Legal Officer and Corporate Secretary of the Ness Group, on Ness Inc branded paper.

18. Perform's next move was to commence the NJ Proceedings. On 4 March 2020 it filed a complaint in the Superior Court of New Jersey against both Ness and Ness Inc seeking damages (including punitive damages) and declaratory relief. Damages are sought on the basis of breach of the DCA, common law fraud and negligent misrepresentation on the part of Ness as regards the provision of services and rendering of invoices. The non-contractual claims are advanced on the basis of local legal principles, not English law. The declaratory relief sought is to the effect that Perform is entitled to terminate the DCA for "Cause" pursuant to clause 15(c) thereof.

19. There is no suggestion that Perform commenced the NJ Proceedings as an act of 'forum shopping' or in a way that is vexatious or oppressive. Perform did not breach clause 20(f) by commencing and pursuing the NJ Proceedings.

20. As noted above, Ness commenced these proceedings against Perform some five weeks later on 9 April 2020. Mr Shwartz signed the statement of truth on the Claim Form and the Particulars of Claim. Ness brings a debt claim, with damages in the alternative, in respect of unpaid invoices pursuant to the DCA totalling €1,284,134.70 plus contractual or statutory interest. Ness also seeks declaratory relief to the effect that (a) Perform gave notice to terminate without cause triggering a liability to pay a Termination Amount of €884,559.66 pursuant to clause 15 of the DCA and (b) Ness is entitled to terminate the DCA at common law for Perform's repudiation thereof.

21. As already observed, there is substantial overlap between the claims advanced in each set of proceedings such that it is fair to describe them as flipsides of the same coin or mirror image claims. The invoices alleged in the NJ Proceedings to have been fraudulently or negligently submitted by Ness are essentially the same as those founding the debt claim pursued by Ness in this action. The parties' respective claims for declaratory relief form the kind of tit-for-tat termination tussle that is familiar to commercial litigators within the context of a single set of proceedings. It is on this basis that Ness realistically accepts that the NJ Proceedings involve the same cause of action and are between the same parties for the purposes of Article 33 of the Regulation, if found to be applicable.

22. The current position in the NJ Proceedings is that there is a pending motion on the part of the defendants, Ness and Ness Inc, for reconsideration of the decision of the Honourable Gregg A. Padovano dated 2 November 2020 dismissing the defendants' renewed motion to dismiss for lack of personal jurisdiction in respect of Ness. The motion for reconsideration was filed on 12 November 2020 and anticipates an oral hearing on/about 18 December 2020.

23. The original motion to dismiss brought by the defendants in the NJ Proceedings was dismissed without prejudice and on the basis that so-called jurisdictional discovery would be provided. This led to the taking of deposition evidence during the middle part of this year, transcripts of which are exhibited to witness statements in evidence before me and to which I was taken during the hearing.

24. Judge Padovano dismissed the renewed motion to dismiss on 2 November 2020. The judge found that Perform had established personal jurisdiction in respect of both Ness and Ness Inc, there being no basis for staying or dismissing the claim on the basis of *forum non conveniens*. The motion to reconsider this decision is confined to the question of personal jurisdiction in respect of Ness.

25. Neither the NJ Proceedings nor these 'second seised' proceedings have advanced beyond the stage of jurisdiction challenges.

## LEGAL FRAMEWORK

26. The relevant legal framework is the Regulation itself, including 41 numbered recitals intended to assist with its interpretation. There are no *travaux preparatoires* or formal legislative records in respect of the Regulation.

27. The Regulation superseded and re-stated Council Regulation (EC) No.44/2001 dated 22 December 2000 on jurisdiction and the recognition and enforcement of judgments on civil and commercial matters ("**Brussels I**") which had itself, in effect, superseded or replaced the 1968 Brussels Convention.

28. The provisions in Brussels I regulating *lis pendens* as between Member States (Articles 21 and 22) were reproduced with some revisions as Articles 29 and 30 and augmented by new Articles 31 and 32 within Section 9 of the Regulation. Two new provisions were included within Section 9 in order to regulate *lis pendens* involving Non-Member States, namely Articles 33 and 34. These new provisions (re-)introduced some flexibility in the approach of a 'second seised' court as a consequence of or response to the ECJ decision in *Owusu v. Jackson*, Case C-281/02 [2005] 1 CLC 246.

29. The relevant provisions of Chapter II of the Regulation are as follows:

***SECTION 1***

***General provisions***

***Article 4***

*1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.*

*[…]*

***Article 5***

*1. Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.*

*[…]*

***SECTION 7***

***Prorogation of jurisdiction***

***Article 25***

*1. If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be either:*

*(a) in writing or evidenced in writing;*

*(b) in a form which accords with practices which the parties have established between themselves; or*

*(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.*

*2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'.*

*3. The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between those persons or their rights or obligations under the trust are involved.*

*4. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 15, 19 or 23, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 24.*

*5. An agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.*

*The validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid.*

### *Article 26*

1. *Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 24.*

[…]

## *SECTION 9*

## *Lis pendens — related actions*

### *Article 29*

1. *Without prejudice to Article 31(2), where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.*

2. *In cases referred to in paragraph 1, upon request by a court seised of the dispute, any other court seised shall without delay inform the former court of the date when it was seised in accordance with Article 32.*

3. *Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.*

### *Article 30*

1. *Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.*

2. *Where the action in the court first seised is pending at first instance, any other court may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.*

3. *For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.*

***Article 31***

1. *Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.*

2. *Without prejudice to Article 26, where a court of a Member State on which an agreement as 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.*

3. *Where the court designated in the agreement has established jurisdiction in accordance with the agreement, any court of another Member State shall decline jurisdiction in favour of that court.*

4. *Paragraphs 2 and 3 shall not apply to matters referred to in Sections 3, 4 or 5 where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee is the claimant and the agreement is not valid under a provision contained within those Sections.*

***Article 33***

1. *Where jurisdiction is based on Article 4 or on Articles 7, 8 or 9 and proceedings are pending before a court of a third State at the time when a court in a Member State is seised of an action involving the same cause of action and between the same parties as the proceedings in the court of the third State, the court of the Member State may stay the proceedings if:*

   (a) *it is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in that Member State; and*

   (b) *the court of the Member State is satisfied that a stay is necessary for the proper administration of justice.*

2. *The court of the Member State may continue the proceedings at any time if:*

   (a) *the proceedings in the court of the third State are themselves stayed or discontinued;*

   (b) *it appears to the court of the Member State that the proceedings in the court of the third State are unlikely to be concluded within a reasonable time; or*

   (c) *the continuation of the proceedings is required for the proper administration of justice.*

3. *The court of the Member State shall dismiss the proceedings if the proceedings in the court of the third State are concluded and have resulted in a judgment capable of recognition and, where applicable, of enforcement in that Member State.*

*4. The court of the Member State shall apply this Article on the application of one of the parties or, where possible under national law, of its own motion.*

***Article 34***

*1. Where jurisdiction is based on Article 4 or on Articles 7, 8 or 9 and an action is pending before a court of a third State at the time when a court in a Member State is seised of an action which is related to the action in the court of the third State, the court of the Member State may stay the proceedings if:*

*(a) it is expedient to hear and determine the related actions together to avoid the risk of irreconcilable judgments resulting from separate proceedings;*

*(b) it is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in that Member State; and*

*(c) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice.*

*2. The court of the Member State may continue the proceedings at any time if:*

*(a) it appears to the court of the Member State that there is no longer a risk of irreconcilable judgments;*

*(b) the proceedings in the court of the third State are themselves stayed or discontinued;*

*(c) it appears to the court of the Member State that the proceedings in the court of the third State are unlikely to be concluded within a reasonable time; or*

*(d) the continuation of the proceedings is required for the proper administration of justice.*

*3. The court of the Member State may dismiss the proceedings if the proceedings in the court of the third State are concluded and have resulted in a judgment capable of recognition and, where applicable, of enforcement in that Member State.*

*4. The court of the Member State shall apply this Article on the application of one of the parties or, where possible under national law, of its own motion.*

30. The following recitals are potentially relevant:

*(15) The rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile. Jurisdiction should always be available on this ground save in a few well-defined situations in which the subject-matter of the dispute or the autonomy of the*

*parties warrants a different connecting factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.*

*(16) In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close connection between the court and the action or in order to facilitate the sound administration of justice. The existence of a close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen. This is important, particularly in disputes concerning non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.*

*(19) The autonomy of the parties to a contract, other than an insurance, consumer or employment contract, where only limited autonomy to determine the courts having jurisdiction is allowed, should be respected subject to the exclusive grounds of jurisdiction laid down in this Regulation.*

*(21) In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in different Member States. There should be a clear and effective mechanism for resolving cases of lis pendens and related actions, and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending. For the purposes of this Regulation, that time should be defined autonomously.*

*(23) This Regulation should provide for a flexible mechanism allowing the courts of the Member States to take into account proceedings pending before the courts of third States, considering in particular whether a judgment of a third State will be capable of recognition and enforcement in the Member State concerned under the law of that Member State and the proper administration of justice.*

*(24) When taking into account the proper administration of justice, the court of the Member State concerned should assess all the circumstances of the case before it. Such circumstances may include connections between the facts of the case and the parties and the third State concerned, the stage to which the proceedings in the third State have progressed by the time proceedings are initiated in the court of the Member State and whether or not the court of the third State can be expected to give a judgment within a reasonable time.*

*That assessment may also include consideration of the question whether the court of the third State has exclusive jurisdiction in the particular case in circumstances where a court of a Member State would have exclusive jurisdiction.*

31. It is common ground that the Regulation must be construed autonomously and teleologically, in a way that optimises predictability and legal certainty and promotes proximity. No citation is necessary for these familiar propositions. It is important to

bear in mind that the Regulation, whilst containing or reflecting a coherent scheme, is not an exhaustive or exclusive code. It is the product of a collective supranational legislative process. It is not perfect.

***Internal Hierarchy***

32. The Regulation contains or reflects what Professor Briggs describes as a "*hidden hierarchy*" of jurisdictional rules: see *Briggs: Civil Jurisdiction & Judgments (6th Ed.)* at 2.10 (pp.34-39); see also *Joseph: Jurisdiction and Arbitration Agreements and their Enforcement (3rd Ed.)* at 2.73.

33. This is a system of priority between jurisdictional bases within the Regulation. Its purpose is to allocate jurisdiction *as between* Member States, by resolving or reconciling any *conflict*, i.e. where different provisions of the Regulation would otherwise confer jurisdiction in respect of the same matter upon the courts of more than one Member State, thereby harmonising intra-EU jurisdiction in civil and commercial matters. This jurisdictional regime in Chapter II of the Regulation compliments and supports the regime for recognition and enforcement of judgments between Member States provided for in Chapter III.

34. The Regulation itself does not set out any such hierarchy. It has to be pieced together and inferred from certain provisions within Chapter II. An important provision in this context is Article 5(1) (quoted above) which operates in the nature of a 'junction box' at least as regards displacement of domiciliary jurisdiction (Article 4) as the default or basic rule of jurisdictional allocation within the scheme of the Regulation. It is well-established that all exceptions to the general rule of domiciliary jurisdiction are interpreted restrictively, irrespective of their place within the internal hierarchy: *Briggs* (above) at 2.06, 2.54. The importance of domicile as the foundation of jurisdiction within this scheme is emphasised by the Supreme Court in *Vedanta Resources plc & another v. Lungowe & another* [2019] UKSC 20; [2019] 1 CLC 619.

35. As the language of Article 5(1) suggests ("*may be sued in the courts of <u>another</u> Member State*", emphasis added) the rationale behind this system of priority or precedence between jurisdictional bases is resolving or reconciling *conflict*, i.e. where different rules allocate jurisdiction over the same dispute to different courts within the EU. Recital (15) is to similar effect. It indicates that jurisdiction should always be available on the basis of domicile "*save in a few well-defined situations in which the subject-matter of the dispute or the autonomy of the parties warrants a <u>different</u> connecting factor*" (my emphasis).

36. Other manifestations of this hierarchical dynamic within Chapter II of the Regulation include Article 25(4) (subordinating party autonomy in certain situations, including Article 24), the final thirteen words of Article 26(1) (giving superiority or precedence to Article 24 over a submission to jurisdiction) and Article 31 (exclusive prorogated jurisdiction irrespective of sequence of seisin). It can also be seen through use of phrases such as "*without prejudice to*" in various provisions (e.g. Articles 10, 14(1), 17(1), 20(1), 29(1) & 32(1)) as well as more direct or literal language of superiority and subordination in Article 24 ("*regardless of the domicile of the parties*") and Article 25 ("*regardless of their domicile*").

37. It is common ground, in so far as relevant, that Article 24 (exclusive jurisdiction) and Article 25 (prorogation in so far as conferring exclusive jurisdiction) rank above domiciliary jurisdiction (Article 4) within this hierarchy. This reflects the position summarised in both *Briggs* (above) at 2.10 (Q8 on p.36) and *Joseph* (above) at 2.73 sub-paragraph 2 (cross-referring to 2.34).

38. Unlike its predecessor in Brussels I (Article 23), Article 25 of the Regulation acknowledges the existence of the distinction between EJAs and Non-EJAs, at any rate in terms of the "*exclusive*" nature or quality of jurisdiction conferred by reason of the former: see the second sentence of Article 25(1). This distinction finds expression in Article 31(2) ("*an agreement* [which] *confers exclusive jurisdiction*") and Recital (22) (referring to "*exclusive choice-of-court agreement*") but not anywhere else. Article 29 expressly yields to Article 31(2).

39. There is no reference anywhere in the provisions of or recitals to the Regulation to "*non-exclusive*" jurisdiction, including the conferral of such jurisdiction through a Non-EJA by operation of Article 25. The existence of such concept is a matter of deduction given the distinction acknowledged within Article 25 and Article 31(2), as described above. If the internal hierarchy is "*hidden*" then is fair to say that the concept of non-exclusive prorogated jurisdiction is enigmatic and elusive. It is The Scarlet Pimpernel of the Regulation.

40. Some care needs to be taken when talking of "*exclusive jurisdiction*" in this context, as the Regulation uses that phrase in an autonomous sense. That said, the effect of Article 29 is to "*transform*" jurisdiction conferred by Article 25 upon a 'first seised' Member State into something "*indistinguishable from exclusive jurisdiction*" even in the case of a Non-EJA: see *Briggs* (above) at 2.139. This might be said to blur whatever distinction exists within the scheme of the Regulation between exclusive and non-exclusive prorogated jurisdiction.

41. For convenience, I refer to the two types of jurisdiction conferred by Article 25 as "non-exclusive prorogated jurisdiction" or "non-exclusive prorogation", on the one hand, and "exclusive prorogated jurisdiction" or "exclusive prorogation", on the other hand. These are just analytical labels. The key distinguishing adjectives in each case could just as easily be adverbs.

42. As might be expected from the absence of any reference to non-exclusive jurisdiction in the Regulation, no provision is made for its consequences or status within the internal hierarchy. The accepted or assumed position appears to be that non-exclusive prorogated jurisdiction ranks equally with domiciliary jurisdiction: see *Briggs* (above) at 2.10 (Q8 and fns.68 & 69 on p.36) and *Joseph* (above) at 2.73 sub-paragraph 4 (cross-referring to 3.15 - 3.17). However, no case appears to have addressed the point or decided that this is so: none was cited to me establishing this proposition and neither of these leading texts identifies any case to support the proposition. It appears to be a matter of inference or deduction based upon the scheme of the Regulation.

43. Irrespective of the internal hierarchy, it is now clearly established that Article 25 operates mandatorily irrespective of whether there is an EJA or Non-EJA. In other words, both exclusive and non-exclusive prorogated jurisdiction are (equally or indistinguishably) mandatory, such that the court so chosen has no residual power or

discretion to stay the proceedings before it on domestic private international law grounds such as *forum non conveniens*: see *UCP plc v. Nectrus Ltd* [2018] EWHC 380 (Comm); [2018] 1 WLR 3409 at [39]; *Citicorp Trustee Co Ltd v. Al-Sanea* [2017] EWHC 2845 (Comm) at [49]-[50].

***Concurrent Jurisdiction***

44. The Regulation is silent as to any ranking or priority in the event that *more than one* provision confers jurisdiction over the same dispute to the courts of the *same* Member State. This situation often occurs, for example where Article 4 (domicile) and Article 7 (special jurisdiction according to the type of claim) and/or Article 25 (prorogation) each point to the *same* forum. Recital (16) (first sentence, "*In addition to…*") acknowledges the potential accumulation of jurisdictional grounds; as does the first sentence of Article 26(1) ("*Apart from jurisdiction derived from other provisions…*") The Regulation doesn't deal with this phenomenon, in the sense of making provision for its consequences, because it doesn't need to: there is no *conflict* to resolve.

45. The Regulation creates the potential for concurrent or coincident jurisdiction in this sense, i.e. concurrent bases or grounds for conferral of jurisdiction, but says nothing more about it. Perform submitted that there was no scope for concurrent jurisdiction (in this sense) within the Regulation. It placed emphasis on the word "*or*" used twice in the gateway language in Articles 33 and 34, to be contrasted with "*and/or*", a phrase so beloved of commercial litigators in certain jurisdictions. No example of the use of "*and/or*" was identified anywhere in the Regulation. Its absence in the gateway language in Articles 33 and 34 does not point to the impossibility or impermissibility of concurrent or cumulative bases of jurisdiction, in my view. As noted above, it is always possible that both Article 4 and one or more basis of special jurisdiction (Articles 7, 8 or 9) operate to confer jurisdiction on the relevant court in the same instance.

46. No case cited to me has addressed a situation in which it is necessary to understand the legal impact of such concurrent bases for conferral of jurisdiction within the Regulation. This only arises in the present context because of the opening words of Articles 33 and 34: "*Where jurisdiction is based on Article 4 or Articles 7, 8 or 9…*" (emphasis added). This phraseology appears nowhere else in Chapter II. There are references in other provisions to courts having jurisdiction "*by virtue of*" specific articles: see, for example, Articles 26(1) and 27 ("*exclusive jurisdiction by virtue of Article 24*") and, of course, Article 5(1). Article 28 uses the phrase "*derived from*". It is not clear why Articles 33 and 34 alone use the phrase "*based on*".

***Reflexive Application***

47. *Owusu v. Jackson* was decided in March 2005. Within a few years of that prominent decision, courts in this jurisdiction began applying a principle of interpretation derived from civilian law known as 'reflex' or 'reflexive' application in order to (re-)inject some flexibility into the court's jurisdictional position where relevant events in the dispute occurred or were located in a Non-Member State. Some support for this approach was gleaned from the ECJ decision in *Coreck Maritime GmbH v. Handelsveen BV*, Case C-387/98; [2000] ECR I-9337 in which article 17 of the Brussels Convention was construed to cover a jurisdiction agreement in favour of the

courts of a Non-Contracting State, suggesting a limitation upon the extent of *Owusu* that wasn't acknowledged or articulated in that subsequent decision of the ECJ.

48. Provisions in Brussels I have thus been held to apply reflexively, i.e. by analogy, to situations involving a Non-Member State, most notably the exclusive jurisdiction provision (Article 22) and *lis pendens* regime (Article 28 - related actions) in Brussels I: see, for example, *Ferrexpo AG v. Gilson Investments Ltd & others* [2012] EWHC 721 (Comm) concerning ownership of shares in a Ukrainian corporate entity and 'first seised' proceedings in Ukraine, as the case may be.

49. The Court of Appeal has recently applied the *lis pendens* regime in the Lugano Convention (Article 28 - related actions) reflexively in the context of 'first seised' proceedings in Ukraine: see *PJSC Commercial Bank Privatbank v. Kolomoisky & others* [2019] EWCA Civ 1708; [2020] 2 WLR 993. This case was decided after the introduction of Articles 33 and 34 in the Regulation, as a matter of historical chronology, unlike *Ferrexpo* and other decisions concerning Brussels I.

50. Some care needs to be taken around the concept of reflexive application in this sense, as observed by Mr John Kimbell QC (sitting as a Deputy Judge of the High Court) in another recent case, *Gulf International Bank BSC v. Aldwood* [2019] EWHC 1666 (QB); [2020] 1 All ER (Comm) 334. I asked counsel to identify for me any known instance of a court outside England and Wales applying a reflexive approach to interpreting any of the European jurisdiction regimes, i.e. regulations or conventions. There was a nil return.

51. Perhaps more pertinently for present purposes, no case decided in this jurisdiction (or, therefore, anywhere else) has been identified in which the reflexive application of any of the European jurisdiction regimes operated other than to extend a particular provision to a situation pertaining in or to a Non-Member State (or Non-Contracting State) notwithstanding the text of the relevant provision referring only to a Member State (or Contracting State) as the case may be. This represents the maximum territorial ambit of the reflexive approach, i.e. to apply the relevant regime 'extra-territorially' in certain circumstances by reading a provision *as if* reference in it to a Member State (or Contracting State) included a Non-Member State (or Non-Contracting State) and applying it *mutatis mutandis* in this way.

52. Mr Diwan QC brought to my attention the decision of Hoffmann J (as he then was) in *Kurz v. Stella Musicals Veranstaltungs GmbH* [1992] Ch 196. That case concerned prorogation of jurisdiction pursuant to Article 17 of the Brussels Convention in circumstances where the parties had entered into a Non-EJA in favour of England. The defendant challenged jurisdiction on the basis that a Non-EJA was not recognised by Article 17(1) which provided only that the courts so chosen "*shall have exclusive jurisdiction*". Hoffmann J rejected that submission and made observations as to the autonomous meaning of "*exclusive jurisdiction*" in such context. No reference was made to the concept of reflexive interpretation or application of the article by analogy. It was a simple question of interpreting and applying the words of Article 17(1).

53. No reference is made to *Kurz* in any of the decisions concerning reflexive application of any European jurisdiction regime cited by the parties before me, including *Ferrexpo* (above), *Kolomoisky* (above) and *Lucasfilm v. Ainsworth* [2010] Ch 503

(Court of Appeal). (I checked *JKN v. JCN* [2010] EWHC 843 (Fam) and Catalyst *Investment Group Ltd v. Lewinsohn* [2009] EWHC 1964 (Ch); [2010] 2 WLR 839 for good measure.) I am satisfied that *Kurz* does not involve or illustrate a reflexive approach to interpretation or application of the Brussels Convention.

54. The concept of reflexive interpretation or application by analogy is, in my judgment, confined to situations where a provision is applied *as if* it refers to a Non-Member State (or Non-Contracting State) notwithstanding that it refers to a Member State (or Contracting State) as the case may be. It operates as a form of linguistic alchemy, effectively inserting or positing the antithetical prefix "Non-" before references to Member State(s) or Contracting State(s) in certain provisions. Its effect is to confer additional jurisdictional flexibility on the court of defendant's domicile which the relevant international regime does not permit as a matter of teleological interpretation. Where it applies, it operates as a further qualification to or derogation from the basic rule of domiciliary jurisdiction enshrined within the scheme or structure of the Regulation.

***Articles 33 & 34***

55. As noted above, Articles 33 and 34 were introduced for the first time in the Regulation. They have no predecessors or counterparts. Although the motivation for the introduction of these provisions is not known, it can be assumed that this was in some part a response to the adoption of reflexive interpretation by certain courts of the *lis pendens* regime in Brussels I (Articles 27 & 28) as summarised above.

56. Articles 33 and 34 were described during the course of argument as 'codified reflexivity'. Another example of this incremental legislative approach is found in the new words in Article 25(1) (formerly Article 23(1)) making it clear that neither of the parties to the relevant jurisdiction agreement need be domiciled in any Member State.

57. It is important to bear in mind for present purposes that Articles 33 and 34 themselves form part of the internal hierarchy within Chapter II of the Regulation. These new provisions represent an additional qualification to or derogation from the basic rule of domiciliary jurisdiction enshrined within the scheme or structure of the Regulation, allowing a court whose jurisdiction is "*based on*" domicile (for example) nevertheless to stay its proceedings in certain circumstances based on sequence of seisin.

58. Although Articles 33 and 34 correspond in certain ways to Articles 29 and 30, respectively, there are a number of obvious differences. First, Article 33 is discretionary whereas Article 29 is mandatory. The Regulation therefore accepts the risk of irreconcilable judgments more readily in the case of *lis pendens* involving Non-Member States (Article 33) as compared with Member States (Article 29). Secondly, unlike Article 29, Article 33 does not yield to Article 31(2), and therefore does not expressly embrace the distinction between exclusive and non-exclusive prorogated jurisdiction (see paragraph 38 above). Thirdly, Articles 33 and 34 contain specific jurisdictional gateway language concerning the basis of the 'second seised' court's jurisdiction under the Regulation. It is here and only here in Chapter II of the Regulation that any reference is made to jurisdiction "*based on*" any particular article or articles: cf. paragraph 46 above.

59. I have set out Articles 33 and 34 above in full, as well as Recitals (23) and (24). The researches of counsel identified no decision of the CJEU concerning either the applicability of these articles or the exercise of discretion pursuant to them. The meaning of the jurisdictional gateway language ("*based on Article 4 or Articles 7, 8 or 9*") has thus far evaded judicial scrutiny, it seems.

60. Whilst Recital (23) refers to a "*flexible mechanism*" to regulate *lis pendens* situations involving third States, this appears to be directed at the regime *within* Articles 33 and 34 as distinct from the jurisdictional gateway *into* such regime. At any rate there was no suggestion that these words in Recital (23) should inform the proper meaning of the jurisdictional gateway language.

61. Recital (24) provides guidance as to what may constitute the "*proper administration of justice*". Whilst the first sentence of the first paragraph of this recital refers to *"all the circumstances of the case*" (my emphasis), the remainder of that paragraph as well as the whole of the second paragraph are concerned with the 'first seised' Non-Member State only, vis. "*connections between the facts of the case and the parties and the third State concerned*" or "*whether the court of the third State has exclusive jurisdiction in the particular case*" by analogy to Articles 24, 25 or 26 of the Regulation, as the case may be.

62. It is noteworthy that this focusses upon connections with the 'first seised' Non-Member State, rather than the 'second seised' Member State which is applying Article 33 or Article 34. This is conspicuous notwithstanding the fact that the jurisdictional gateway language presupposes some connection between either the defendant (domicile) or the circumstances of the case (special jurisdiction) and the 'second seised' forum. Further, there is no obvious room in this wording for accommodating or giving effect to a Non-EJA in favour of the courts of the latter forum, and no warrant for affording it the significance that it would receive under English private international law principles, as noted below. In contrast, the second paragraph of the recital appears to contemplate the conferral of exclusive prorogated jurisdiction (albeit reflexively) in favour of the 'first seised' Non-Member State, as noted above.

***Non-EJAs as a matter of English Law***

63. So far the legal framework has focussed on the Regulation. The determination of whether the parties' agreement confers exclusive or non-exclusive jurisdiction under Article 25 is, however, a matter for national law. Here, that means English law, both as the law expressly chosen by the parties in (and, in turn, governing) clause 20(f) and the *lex fori* of the Member State tasked with determining the effect of such agreement for present purposes.

64. There is a great deal of case law in this jurisdiction as to the difference between EJAs and Non-EJAs as well as their respective significance in various jurisdictional contexts. It is not necessary for me to traverse that ground here. It suffices to say, as to the former aspect, that it is not always certain or predictable which type of agreement the parties have made as a matter of legal analysis; and, as to the latter aspect, modern private international law principles treat a Non-EJA as a significant feature of the jurisdictional matrix in so far as admissible or permissible in light of the Regulation.

65. Ness contends that Perform's application to stay these proceedings is itself a breach of clause 20(f) notwithstanding that its commencement and pursuit of the NJ Proceedings is not. I have some difficulty with that proposition, not least as it involves a defendant acting unlawfully by making an (unsuccessful) application that the CPR entitles him to make. In the event, Ms Dilnot did not press the point strongly at the hearing because, as she submitted, it was not essential to the analysis advanced on behalf of Ness. I agree. It is unclear how a breach analysis fits into the issues before the court, namely the applicability of Article 33 either directly or reflexively and (if applicable) the exercise of discretion pursuant to Article 33.

66. The key point, for present purposes, is that clause 20(f) operates to confer mandatory jurisdiction upon this court by virtue of Article 25 (see paragraph 43 above). This mandatory jurisdiction leaves no room for domestic discretionary principles, as is common ground. The first and main question for me to decide is whether the conferral of such non-exclusive prorogated jurisdiction precludes the application of Article 33 due to its specific jurisdictional gateway wording, notwithstanding the defendant's domicile.

## SUMMARY OF THE ISSUES

67. There are three issues potentially before the court as follows:

**(1) Does Article 33 apply where there are two potentially available bases for jurisdiction over the defendant in the 'second seised' proceedings, namely domicile (Article 4) and non-exclusive prorogation (Article 25)?** I refer to this issue for convenience as the "**Applicability Issue**".

**(2) If the answer to (1) is No, can Article 33 nevertheless be applied reflexively, i.e. by analogy and notwithstanding that the express basis for their applicability is not satisfied?** Some care needs to be taken to identify and preserve the premise for this issue in light of how Issue (1) is answered. I refer to this issue as the "**Reflexivity Issue**".

**(3) If the answer to (1) or (2) above is Yes, should the court grant a stay of these proceedings under Article 33, i.e. on the basis that the NJ Proceedings involve the same cause of action and same parties?** Either of the above routes into Article 33 suffices and it makes no difference which one is used. I refer to this issue for convenience as the "**Article 33 Discretion Issue**".

68. Issues (1) and (2) are pure questions of law concerning the court's statutory jurisdictional power to regulate and manage a *lis pendens* situation involving a 'first seised' Non-Member State pursuant to the Regulation. Issue (2) is an alternative to Issue (1), and must therefore incorporate the logic of the premise supplied by a negative answer to Issue (1).

69. Although analysed at the hearing in terms of both Articles 33 and 34, there being no material difference for these purposes, I approach these two issues by reference only to Article 33, as that became the sole basis of the Jurisdiction Application. References to Article 34 are included where justified by the context.

## ANALYSIS OF THE ISSUES

## (1) APPLICABILITY ISSUE

70. Both Article 33 and Article 34 start with the following gateway language: "*Where jurisdiction is based on Article 4 or Articles 7, 8 or 9 and an action is pending before a court of a third State…*"

71. Articles 7, 8 and 9 comprise Section 2 of the Regulation, entitled "*Special jurisdiction*". None of them is engaged in the present case. Article 4 is engaged by reason of Perform's domicile within this jurisdiction.

72. The nub of the parties' dispute on this threshold issue is whether the conferral of non-exclusive prorogated jurisdiction upon the 'second seised' court by operation of Article 25 means that jurisdiction is not "*based on Article 4*" notwithstanding the local domicile of the defendant. This is a narrow and untested point of interpretation. It doesn't turn on burden of proof/persuasion.

73. In summary, Perform says as follows: In order to answer this question, it is necessary to resort to the internal hierarchy within Chapter II of the Regulation. The Regulation acknowledges a distinction between exclusive and non-exclusive prorogated jurisdiction conferred by Article 25, reflecting the distinction between EJAs and Non-EJAs. Whilst exclusive prorogated jurisdiction out-ranks domiciliary jurisdiction, thereby ousting or displacing it, and therefore precludes the application of Articles 33 or 34, the same cannot be said of non-exclusive prorogated jurisdiction which ranks alongside and enjoys parity of status with domiciliary jurisdiction. Given such parity, there is no basis for saying that the 'second seised' court's jurisdiction is not "*based upon Article 4*" in such context. In other words, the concept of "*based upon*" is one that incorporates or respects the internal hierarchy, which in turn represents the scheme of the Regulation.

74. In response to this analysis, and in summary, Ness says as follows: Article 25 confers mandatory jurisdiction, irrespective of whether it is exclusive or non-exclusive in the sense under discussion. If the legislators had intended for Articles 33 or 34 to apply in circumstances where the court derived jurisdiction under Article 25, the enacted text would and could easily have said so. Instead it made these provisions applicable only where the court derived its jurisdiction under four identified articles of the Regulation. In other words, the concept of "*based upon*" ignores the internal hierarchy; alternatively, in so far as the internal hierarchy matters in this context, Article 25 out-ranks and therefore displaces Article 4 irrespective of whether it confers exclusive or non-exclusive prorogated jurisdiction upon the 'second seised' court.

75. Put another way and reflecting a theme of the parties' submissions at the hearing: Perform's analysis starts by positing important jurisdictional rights based on domicile (aka 'domiciliary rights') and requires a clear basis for their displacement or preclusion; whereas Ness' analysis starts by positing important jurisdictional rights based on contract (aka 'party autonomy') and requires a clear basis for their displacement or preclusion. On one level, this appears to pitch the policy of upholding party autonomy against the policy of minimising risk of irreconcilable decisions, and there was some discussion at the hearing about such an informal or philosophical hierarchy within the Regulation. As examined below, some care needs

to be taken with this approach, not least because Articles 33 and 34 (where applicable) operate to qualify or derogate from the basic rule of domiciliary jurisdiction within this jurisdictional regime.

76. In my judgment, and despite the ostensible complexity of analysis based upon the scheme of the Regulation, the answer is relatively straight-forward. The words "*based on Article 4 or Articles 7, 8 or 9*" mean what they say. They were included for a reason: both articles could have started "*Where an action is pending before a court of a third State…*" The inclusion of this specific gateway wording was obviously designed to narrow the application of Articles 33 and 34. That narrowing was achieved by reference to the jurisdictional foundation of the 'second seised' court under or within the Regulation.

77. It is a pre-condition to the applicability of Articles 33 and 34 that the foundation of the 'second seised' court's jurisdiction is provided by one of those four specified articles in the Regulation. If that is not the case, because jurisdiction is conferred by any other provision in the Regulation, then Articles 33 and 34 are not engaged. This is so even if jurisdiction is (also) or would (also) be conferred by any one of those four specified articles, including Article 4, constituting a concurrent or cumulative ground of jurisdiction. This is what "*based on*" means and requires, in my judgment.

78. Perform concedes that Articles 33 or 34 would not be available where the 'second seised' court's jurisdiction is derived from Article 24 or Article 25 (in the case of an EJA conferring "*exclusive jurisdiction*") even if Article 4 were (also or otherwise) engaged due to the defendant's local domicile. It is common ground that within the internal hierarchy Article 24 is superior to Article 25; indeed, there is no higher tier or status than Article 24, as underscored by Article 25(4), Article 26(1) (second sentence) and Article 27(1).

79. The confluence of this common ground has certain consequences. In particular, it suggests that the internal hierarchy is ignored or softened in respect of the gateway into Articles 33 and 34: where the jurisdiction of the 'second seised' court is derived from (i.e. "*based on*") exclusive prorogation pursuant to Article 25, that precludes any power to stay such proceedings under Article 33 or 34 even where a reflexive application of Article 24 would confer a hierarchically superior "*exclusive jurisdiction*" upon the courts of the 'first seised' Non-Member State. As noted above, Recital (24) (second paragraph) expressly contemplates the reflexive or analogous application of (at least) Article 24 in favour of the court of the 'first seised' Non-Member State. This is identified as a consideration in the assessment of "*proper administration of justice*" … but only if Article 33 or 34 is applicable in the first case. This cannot happen where the 'second seised' court has exclusive prorogated jurisdiction pursuant to Article 25, as conceded by Perform. In a sense, therefore, Article 25 trumps Article 24. This is contrary to the internal hierarchy.

80. On closer examination, it may well be that this point illustrates something more fundamental: that the internal hierarchy has no direct role to play in interpreting or applying the gateway language in Articles 33 or 34. As noted above, those articles are themselves part of such hierarchy and are themselves a derogation from the basic rule of domiciliary jurisdiction.

81. Perform's analysis assumes the notion of ouster or superiority inherent in the internal hierarchy. But, as addressed above, the internal hierarchy regulates *conflict* between bases for allocating jurisdiction, i.e. in order to allocate jurisdiction to the courts of *one* Member State. It is not concerned with situations involving concurrent or cumulative grounds of jurisdiction conferred upon the same forum.

82. There is no such conflict where more than one provision confers jurisdiction on the same Member State. There is, therefore, no need to resort to the internal hierarchy to ascertain which provision prevails when more than one confers jurisdiction on the 'second seised' court as in the present context. To speak of ouster or trumping or displacing in this context misses the point, in my judgment. Where a jurisdictional basis other than Article 4 (or Articles 7-9, although not engaged in the present case) confers jurisdiction, it cannot be said that the court's jurisdiction is "*based on Article 4*".

83. In so far as resort to the internal hierarchy is relevant to answer this threshold question at all, there is no good reason to distinguish between an EJA and Non-EJA in such context. Article 25 confers jurisdiction on a mandatory basis in either case. Unlike Article 29, Article 33 does not defer to Article 31(2) and does not, therefore, incorporate or yield to the (somewhat amorphous) distinction between exclusive and non-exclusive prorogated jurisdiction: see paragraph 58 above. It is, come what may, common ground that Article 4 does not out-rank non-exclusive prorogated jurisdiction under Article 25. Both are said to occupy the lowest rung on the ladder, at any rate relative to "*exclusive jurisdiction*" conferred by Article 24 or Article 25.

84. Some support for this interpretation can be found in the judgment of Mrs Justice Cockerill in *UCP plc v. Nectrus Ltd* [2018] EWHC 380 (Comm); [2018] 1 WLR 3409. In that case, the claimant (UCP) brought a claim against the defendant (Nectrus) under an agreement containing a Non-EJA in favour of the English courts. Nectrus, a Cyprus-registered entity which was not domiciled within this jurisdiction, applied to dismiss or stay the proceedings on the basis of prior commenced proceedings pending between the parties in the Isle of Man, being UCP's place of domicile. The application was refused.

85. After quoting the introductory wording in Article 33 in [40], Mrs Justice Cockerill stated as follows at [41]:

> "… [*Articles 33 and 34*] *therefore proceed solely by reference to the domicile and special jurisdiction regime set out in article 4 and articles 7, 8 and 9. There is no mention of a reservation in the event jurisdiction is established under article 25. This carries with it, in my judgment, an inference that there is intended to be no discretion to decline jurisdiction in other cases, in particular where the jurisdiction is founded under article 25.*"

86. In the absence of applicability of Articles 33 or 34 in that case, Cockerill J proceeded to dismiss the jurisdiction challenge because there was no residual power or discretion to stay proceedings in such circumstances. Although the case did not involve or engage domiciliary jurisdiction, the learned judge's reasoning contra-indicates the applicability of Articles 33 or 34 in circumstances where Article 25 confers jurisdiction upon the courts of the 'second seised' Member State *irrespective* of

whether that is exclusive or non-exclusive prorogated jurisdiction. Article 25 is mandatory in its effect.

87. It might be said that this interpretation of the gateway wording in Articles 33 and 34 produces an odd result, because where contracting parties have chosen to confer only *non-exclusive* jurisdiction upon the courts of (what becomes) the 'second seised' forum, this is more likely to throw up a *lis pendens* scenario in practice, and that is when Articles 33 and 34 are needed. I can feel the pull of that point from the perspective of an English contract lawyer and commercial litigator. But it ignores the mandatory effect of Article 25 as well as the distinct basis of applicability of Articles 33 and 34 (Non-Member States) as compared with Articles 29 and 30 (Member States).

88. Perform's argument also assumes there is a lacuna in the gateway language of Articles 33 and 34. There is no reason for making that assumption. The words are specific and clear. As noted above, if it didn't matter which jurisdictional basis applied as a pre-condition, then no words to such effect would have been included in this way. But it clearly does matter, hence the specific gateway language adopted for Articles 33 and 34.

89. Testing it the other way round: assuming that Articles 33 and 34 cannot apply where there is prorogated jurisdiction, whether exclusive or non-exclusive, it is difficult to see why the existence of *additional* connections to (the courts of) the 'second seised' forum should activate a flexible discretionary power to stay such proceedings in favour of a 'first seised' forum where none otherwise exists via Article 25. If anything, the co-existence of jurisdictional basis under Article 4 or Articles 7-9 ought to diminish the need for such discretionary power rather than increase it where the parties have made such a choice for themselves.

90. Recital (24) might be indirectly or inferentially relevant in this context. As noted above, the purpose of this recital is to provide some colour to the phrase "*proper administration of justice*" in the preceding recital and as appearing in Articles 33 and 34 themselves. There is nothing in this language to suggest that a choice of jurisdiction in favour of the 'second seised' court of a Member State (whether exclusive or non-exclusive) has any relevance or role to play in that court's analysis under Articles 33 or 34, once engaged. This, in turn, might suggest that such a choice - operating as it does to confer mandatory jurisdiction under Article 25 - precludes the application of Articles 33 or 34 at the outset.

91. Further, if the gateway language in Articles 33 and 34 were to be read as silently embracing a situation where both Article 4 and Article 25 were engaged (the latter by reason of a Non-EJA) then this would potentially inject uncertainty and unpredictability into the applicability of such regime. The source of such uncertainty or unpredictability lies in what Mr Diwan QC acknowledged - by averring it in the context of Issue (3) - as the idiosyncratic approach of domestic legal systems. Why should the threshold applicability of these articles depend upon such idiosyncrasies?

92. The flaw in Perform's analysis is that it relies upon splitting Article 25 for the purposes of answering the simple and separate question of whether the court's jurisdiction is "*based upon*" domicile. In so far as such distinction forms part of the

internal hierarchy, there is no good reason to apply such hierarchy to the present situation in the absence of any conflict between provisions and in order to determine the application of a provision which itself forms part of such hierarchy.

93. It may be for this reason that no such distinction is drawn by Professor Briggs or David Joseph QC. Both assume that Articles 33 and 34 are not available where there is "*prorogated jurisdiction*" (*Briggs* (above) at 2.292), i.e. "*jurisdiction asserted on the basis of an art.25 jurisdiction agreement*" (*Joseph* (above) at 10.80), without invoking the distinction between exclusive and non-excusive prorogation and apparently without resort to the internal hierarchy.

94. This conclusion does not diminish so-called domiciliary rights, as suggested by Perform. Articles 33 and 34 themselves, where applicable, have that effect by allowing the 'second seised' court whose jurisdiction is "*based on Article 4*" to stay its own proceedings in favour of those pending before the courts of a 'first seised' non-EU forum. The reflexive application of the *lis pendens* regime also dilutes domiciliary rights. Articles 33 and 34 create a material qualification to or derogation from domiciliary rights. If anything, it might be said that this gateway conclusion protects and preserves such rights by removing such qualification or derogation where the parties have agreed to submit to the jurisdiction of the defendant's domicile.

95. For these reasons, I conclude that where Article 25 operates to confer prorogated jurisdiction upon the courts of the 'second seised' Member State, whether exclusive or non-exclusive, Articles 33 and 34 are not applicable. In such a case it cannot be said that the court's jurisdiction is "*based upon*" Article 4.

## (2) REFLEXIVITY ISSUE

96. Perform contends that this alternative route into Article 33 arises if the court has concluded under Issue (1) that its jurisdiction is not "*based on Article 4*" because it is also based on Article 25, i.e. there are concurrent bases or grounds for jurisdiction under the Regulation. In that event and on that premise, Perform says that Article 33 applies reflexively in the present situation: Article 4 remains engaged and is not displaced or eclipsed by Article 25.

97. Perform accepts that this alternative route into Article 33 is not available, however, if the basis for the court's conclusion under Issue (1) is that Article 4 is ousted or displaced by Article 25 in accordance with the internal hierarchy.

98. In my judgment, in light of the legal principles considered in paragraphs 47 to 54 above, neither scenario or premise would permit a reflexive application of Article 33 so as to make it available in such case. There is no precedent or principled basis for extending the concept of reflexivity beyond its established limits summarised above.

99. Articles 33 and 34 represent a form of 'codified reflexivity' themselves, in that they extend and adapt the original *lis pendens* regime to cover 'first seised' proceedings in Non-Member States. That being the case, there is no basis for extending the availability of such provisions so as to cover a situation in which the internal jurisdictional pre-conditions as to their applicability are not satisfied. If the process of autonomous and teleological interpretation does not provide the answer under Issue (1), I can see no coherent let alone compelling basis for stretching the doctrine of

reflexive interpretation to achieve such result by analogy. To do so would open the door too wide in the name of reflexivity, undermining the fundamental principles of predictability and legal certainty that underpin the Regulation. It would risk using the concept of an analogy analogously, in my view.

100. The Court of Appeal decision in *Kolomoisky* provides no material support for Perform's contentions in this context. It concerns the reflexive application of Article 28 of the Lugano Convention, albeit such analysis was conducted with the benefit of hindsight in light of the introduction of Articles 33 and 34 in the Regulation: see paragraphs [177]-[180].

101. The fact that the relevant jurisdictional regime is not an "*exclusive code*" does not in itself justify a reflexive application of one of its provisions in the manner now suggested by Perform. Whether or not the regime as a whole constitutes or contains an "*exclusive code*" is not the key point. The jurisdictional gateway wording in Articles 33 and 34 is itself an exclusive code as regards the basis for applicability of those provisions, as I have found in Issue (1) above. There is no room to subvert that position or re-write the language in the name of reflexivity. Not least where to do so would further erode the domiciliary rights that are said to justify an expansive or purposive interpretation, or so-called analogous application, of such gateway wording.

102. I therefore reject the suggestion that Article 33 can be interpreted or applied reflexively so as to make it available in circumstances where the 'second seised' court's jurisdiction is not "*based on Article 4*" as properly and purposively construed. To do so would be to introduce the same kind of jurisdictional uncertainty and unpredictability, by reference to the unregulated and enigmatic distinction between EJAs and Non-EJAs, that a purposive and teleological interpretation of such gateway language has precluded. There is no legitimate basis for applying the words "*based on*" to achieve something their true meaning does not support or permit, or otherwise to sidestep such pre-condition.

## (3) ARTICLE 33 DISCRETION

103. In light of my conclusions on Issues (1) and (2) above, this issue does not arise: Perform has failed to get into Article 33.

104. The point was fully argued on the contingent basis that Article 33 was engaged. It is in this sense and on this basis that Ness accepts that the pre-conditions in Article 33(1) are fulfilled, namely that the NJ Proceedings involve the same cause of action (save for the non-contractual claims) and same parties (save for the addition of Ness Inc as co-defendant); and, further, that the New Jersey Court is expected to give judgment capable of recognition and enforcement in this jurisdiction (Article 33(1)(a)).

105. Ness disputes that a stay is "*necessary for the proper administration of justice*". This is the battleground if Article 33 is engaged in the present case. The burden of proof/persuasion rests upon the party seeking a stay, here Perform.

106. So far as relevant, no point arises under Article 33(2)(a) or (b). The NJ Proceedings have not been stayed or discontinued and Ness does not suggest that such proceedings are unlikely to be concluded within a reasonable time. As noted above, the NJ

Proceedings were commenced by Perform on 4 March 2020, about five weeks before commencement of these proceedings by Ness on 9 April 2020. Neither set of proceedings has yet emerged from its preliminary jurisdictional cocoon.

107. There was some discussion as to the ambit and nature of the court's discretionary power under Article 33. There are recent suggestions at first instance that it is equivalent in practical terms to common law *forum non conveniens* principles: see *Gulf International Bank* (above) at [88]-[92]; *Município De Mariana v. BHP Group plc & others (Re Fundao Dam Disaster)* [2020] EWHC 2930 (TCC) at [204]-[207]. The editors of *Dicey* suggest that it accords with "*a broad international concept underlying the general principle of* lis pendens": *Dicey, Morris & Collins: The Conflict of Laws* (15th Ed.), Fifth Cumulative Supplement at 12-024.

108. As noted above, there is no obvious hook or home within Recital (24) for consideration of a Non-EJA in favour of the 'second seised' court tasked (on current assumptions) with exercising its discretionary power to stay proceedings. On the contrary, the connections that appear to matter are those with the 'first seised' foreign forum. Both sides' analysis under Issue (3) nevertheless proceeded on the basis that the court should look both ways.

109. If it had become necessary for me to determine whether to grant a stay of these proceedings pursuant to Article 33, I would on balance have declined to do so. Whilst there is undoubtedly a material connection between both parties and the relevant 'first seised' jurisdiction (i.e. New Jersey and/or the USA), the centre of gravity of the parties' dispute appears to be Slovakia as the place of performance of the DCA. This is not a US-centric dispute. Nor is it a UK-centric dispute.

110. I say this bearing in mind the (unchallenged) reasons given by Judge Padovano in his decision dated 2 November 2020 as to the convenience of New Jersey as a forum for the claims made in the NJ Proceedings. I have considered the evidence from both sides as to the location of corporate officers and key personnel, including those said to have some nexus to the dispute itself. None of this evidence is decisive.

111. Further, the contractual claims are governed by English law in accordance with clause 20(f) of the DCA. If the non-contractual claims were pursued by Perform by way of counterclaim (against Ness) in these proceedings, there is a strong argument for saying that they too would be governed by English law pursuant to applicable choice of law rules in light of the degree of connection between such claims and the parties' contractual relationship governed by English law. All things being equal, such claims are better determined in this jurisdiction.

112. Without engaging in a full granular balancing exercise, given that this is a hypothetical inquiry in the present case, I am not persuaded that it is or would have been *necessary* for the proper administration of justice to stay these proceedings in favour of the NJ Proceedings. The parties bargained for or at any rate accepted the risk of jurisdictional fragmentation and multiplicity of proceedings by agreeing clause 20(f). That risk has manifested, largely through the tactical choice made by Perform to commence proceedings pre-emptively in New Jersey. The continuation of these proceedings, notwithstanding the existence of the NJ Proceedings, is a foreseeable

consequence of the parties' free bargain and a risk that Perform courted by suing first elsewhere.

113. I reach this contingent conclusion without acceding to the primary contention of Ness in this context, i.e. that the most important circumstance or consideration to be taken into account in the court's exercise of discretion under Article 33 is the Non-EJA in favour of this court. The existence of that jurisdictional bargain nevertheless enables the court to sense-check its overall evaluation as to the proper administration of justice under Article 33.

## DISPOSITION

114. For the reasons set out above, the Jurisdiction Application is dismissed.

115. In summary:

(1) Article 33 is not applicable because this court's substantive jurisdiction is not "*based on*" Article 4.

(2) There is no precedent or principled basis for applying Article 33 reflexively in light of (1) above.

(3) Even if Article 33 had been engaged, I would not have been persuaded that it is necessary for the proper administration of justice to grant a stay.

116. I will hear the argument as to consequential matters following issuance of this judgment prior to the end of Michaelmas Term. At the end of this hearing I directed that schedules of costs should be filed and served before circulation of the draft judgment by any party intending to seek summary assessment or payment on account.

## Post Script

117. As regards the UK's imminent legal departure from the EU, the regime presently in force is prescribed by the Withdrawal Agreement dated 19 October 2019 (2019/C 384 I/01) entered into between the EU and the UK ("**Withdrawal Agreement**") as implemented by primary statute. By Article 67(1)(a) of the Withdrawal Agreement, the jurisdictional provisions of the Regulation apply in respect of legal proceedings instituted before the end of the transition period. Under Article 126 of the Withdrawal Agreement, the transition period ends at midnight CET on 31 December 2020. Accordingly, on the basis of these current arrangements, since the present legal proceedings were instituted before the end of the transition period, the Regulation will continue to apply to them after 31 December 2020. The jurisdictional position as regards proceedings commenced thereafter has yet to be finalised.