

Is a Global Regime Regulating the Exercise of Jurisdiction  
in Civil and Commercial Cases a Feasible Reality or a  
Utopian Dream? A Comparative Perspective.

By Nichola Jarvis.

Submission for PhD, April 2007.

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# **'Is a Global Regime Regulating the Exercise of Jurisdiction in Civil and Commercial Cases a Feasible Reality or a Utopian Dream? A Comparative Perspective.'**

## **Abstract:**

The purpose of this thesis is to evaluate whether it is possible to create a global jurisdiction and judgments convention governing civil and commercial matters in light of the recent inability at The Hague to produce an acceptable text on the subject. In order to ascertain whether this failure means that it is impossible to achieve a worldwide convention, this thesis compares the jurisdictional regimes of the United States, the Brussels Regime and the traditional rules of England to determine whether the differences operating under these systems are irreconcilable. It is revealed that litigants often exploit divergences stemming from these systems, altering the balance between the parties and causing unfairness. These revelations highlight the benefits to be gained from a unified, solitary jurisdiction and judgments system. This raised the question as to whether these benefits carry sufficient weight to procure a text on the subject after these advantages failed to tempt the delegations at The Hague after a decade of work on the project. From these discussions, this thesis identifies several factors that contributed to the downfall of the project at The Hague, which include the United States' insistence that the provisions operate within constitutional restrictions, an inappropriate methodology based on compromise and discontent with the provisions and general approach of the suggested text. The strict adherence to using the Brussels Regime as a 'model' for the text also substantially contributed to the downfall of the project. It is also apparent that the problems stemming from the reconciliation of the civil and common law traditions had little effect on the outcome. The overall conclusion is that these dominant reasons for the failure of the project are surmountable, should the task be reattempted in the future, although this is dependent on a different methodology towards the task being taken.

By Nichola Jarvis.

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## Chapter One: An Introduction to This Thesis:

In 1992 the delegation of the United States of America put forward a proposal that the Hague Conference on Private International Law should attempt to draft a global convention on jurisdiction and the recognition and enforcement of foreign judgments in civil and commercial matters.<sup>1</sup> This was in turn recommended by a Special Commission of the Hague Conference on Private International Law and was accepted and placed on the agenda of the Nineteenth Session of the Conference. Over the next decade, the delegations worked on producing a draft that represented a compromise among the very culturally and legally different systems of the participants.

In 1999 a Preliminary Draft Convention was produced but was quickly rejected as unacceptable, particularly by the United States. A redrafting ensued but the 2001 Interim Text did not secure sufficient agreement and thus the project fell into disarray. However, the delegates were able to agree on a much more specific, and narrow, topic. In 2005 the Choice of Court Convention opened for ratification. Although the project was partly salvaged by this event, the majority of the information and proposals prepared for the creation of a global jurisdiction and judgements regime, which spanned more than a decade, was in vain. Whilst it is true that the task facing the negotiators was a colossal one, more fruits of their labour were expected than actually delivered. The task of this thesis is to analyse whether the failure of The Hague to construct a convention regulating jurisdiction and judgements in civil and commercial matters conclusively substantiates the view that is impossible to construct a global regime on this subject.<sup>2</sup>

In order to ascertain whether the above position is correct, this thesis examines the actual differences between three of the systems involved in the discussions at the

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<sup>1</sup> 'Conclusions of the Special Commission of June 1994 on the Question of Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters', Preliminary Document 2, prepared by the Permanent Bureau (available at [www.hcch.net](http://www.hcch.net)) p.10.

<sup>2</sup> Due to a restriction on space, this thesis will only consider the regulation of jurisdiction, although references will be made from time to time to recognition and enforcement for the sake of completeness. This limitation was chosen because the majority of the concerns expressed related to jurisdiction rather than recognition and enforcement, see chapter 5, pp.163-182 below.

Hague Conference. These three regimes are the civil law-natured Brussels Regime, which operates throughout Europe whenever the defendant is domiciled in a member state to the exclusion of national law; the common law-natured traditional rules of England, which only operate when the action is not within the scope of the Brussels Regime; and the regime operating in the United States.

These systems were selected for several reasons. The Brussels Regime was chosen because it is based on the civil law tradition, which can be compared to the other common law regimes to highlight the inherent differences in approach between the two types of system. Secondly, it is also a successful regional regime, incorporating both civil and common law countries, and formed part of the basic model for the 1999 Preliminary Draft Convention. How it operates is thus important because, had this been implemented, the global regime would have operated in a very similar manner.<sup>3</sup> The traditional rules of England were selected because they encapsulate the very essence of the common law approach to the assertion of jurisdiction and also because they provide a stark contrast to the rules of the Brussels Regime, to which the UK is a member state. The United States was chosen because it is a hybrid-system. Jurisdiction is regulated by the state courts, through state statutes that are similar to the provisions of the Brussels Regime. However, as will be seen in chapter two, the United States also makes use of the common law doctrine of *forum non conveniens* and offers anti-suit injunctions, another common law tool, to aggrieved parties. Further, the Due Process Clause contained in the United States' Constitution, as interpreted by the Supreme Court of the United States, must also be considered before jurisdiction can be regarded as constitutional. This case-by-case analysis in the United States is consistent with the common law tradition, as the civil law approach is one of absolute adherence to the jurisdictional provisions in order to generate certainty and predictability.

This 'mixed' approach of the United States is also a necessary part of the evaluation because the United States' delegation suggested that it had serious

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<sup>3</sup> This is explored in chapter four, where the provisions of the Interim Text are compared to the three regimes discussed in chapter two. Further, an examination of the problems of utilising the Brussels Regime as a 'model' for the worldwide convention is contained in chapter five, pp.195-201.

misgivings about the content of the provisions of the 1999 Preliminary Draft Convention and 2001 Interim Text. Electing to include the United States in the analysis therefore permits an investigation into why the Interim Text was so unattractive to the United States and also allows a consideration of the effect of politics in the attempt to draft a worldwide regime.

The assessment of the three regimes provides insight into whether a particular provision favours a particular party, revealing the underlying aims behind the jurisdictional rules in each regime. The examination of the variation in approach, nature and scope of the three regimes selected is contained in chapter two; it acknowledges the differences and similarities of the three systems and thus demonstrates the extent to which the delegations were likely to struggle to secure agreement on the subject of a global jurisdiction and judgments regime.

The comparison of the three regimes in chapter two enables an accurate assessment of the benefits to be gained from the creation of a global regime. The disparities between the regimes demonstrate the extent to which the parties can exploit these differences to their advantage and why current recognition and enforcement of judgments is inefficient, and often denied, in transnational cases. These benefits are discussed in chapter three.

Chapter four analyses the provisions of the 2001 Interim Text and compares them to the three regimes discussed in chapter two. Chapter four then goes on to consider the Choice of Court Convention of 2005, the only aspect of the project upon which the participants could agree, in order to assess how extensive the agreement was between the delegations. It also considers how the new convention will affect previous conclusions regarding the three systems discussed in chapter two regarding jurisdiction agreements. It remains to be seen, however, whether all the delegations will ratify the convention.

Chapter five attempts to determine the reason for the failure of the project. Several possible theories are outlined and considered. The inability of the United States to enter into a convention that exceeds the restrictions imposed by due process requirements and discontent with the content of the provisions of the proposed text

are submitted as predominant reasons for the failure of the project. It is argued that the civil-common law tension was not a primary reason for the failure, if indeed one at all, although it is later suggested that the use of the Brussels Regime as the ‘model’ for the basic structure and content of the convention was inappropriate. It is submitted though that this is not due to the fact that the civil and common law traditions are irreconcilable but rather the fact that the Brussels Regime is designed to further economic and social goals. The provisions of the Brussels Regime are defined and guided by these underlying principles, thereby rendering it an inappropriate ‘model’ for a global regime not founded on such aims.<sup>4</sup> It is also advocated that the compromise-based methodology of the delegations was unsuitable in the circumstances, causing conceptual difficulties and discontent with the overall nature, scope and content of the provisions. This is suggested to be the primary reason for the inability to achieve consensus. The chapter then considers whether these problems can be conquered and the failure turned into a success. The overall view of this thesis is that a global regime is not an impossible dream but several extensive alterations, and sacrifices, would be necessary for the project to succeed. The overall findings of this thesis are then summarised in chapter six.

Finally, it should be noted here that just as this thesis is focused on jurisdiction, not recognition and enforcement, it is likewise concerned only with the general jurisdictional bases. Consumer contracts, employment contracts, insurance contracts, indemnity and counterclaim actions and intellectual property and e-commerce disputes are excluded from the thesis on account of space.<sup>5</sup> Also excluded is any discussion of in rem jurisdiction (over property, not individuals) and quasi-in rem jurisdiction, where jurisdiction is exercised over the defendant because of the presence of assets belonging to the defendant in the forum. Any references throughout this thesis to ‘non-natural defendants’ relates only to the position of a company. Sole traders and partnerships are also excluded from this thesis due to space restrictions.

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<sup>4</sup> This thesis will not discuss the scope of the Brussels Regime in relation to defendants not domiciled in a member state due to space restrictions. However, reference to this may be made at times for the sake of completeness. Internal allocation between regions in the same country, such as Scotland and England, is also excluded for the same reasons.

<sup>5</sup> Also excluded are ‘class actions’ where multiple claimants pursue a defendant.



## Chapter Two: To What Extent Are the Jurisdictional Regimes of the United States, the Traditional Rules of England and the Brussels Regime Different?

### **1. Introduction:**

The Brussels Regime<sup>1</sup> provides a rigid set of jurisdictional bases. The general rule is that suit should be at the defendant's domicile. This must not be derogated from unless one of the special jurisdictional provisions applies.<sup>2</sup> The list of jurisdictional bases is exhaustive enabling the parties to foresee exactly where the dispute may be heard.

Just like the Brussels Regime, the traditional rules of England are exhaustive. Jurisdiction may be founded on the defendant's presence in the territory or the defendant's submission to the court's jurisdiction. Although this may seem far-reaching, the courts' width of jurisdiction is significantly curbed by the discretionary doctrine of *forum non conveniens*, which will be explored below. The English courts may also be provided with specific jurisdiction where a claimant successfully convinces the court that the matter falls within a limited range of bases available and that England is the natural forum for the dispute.

The range of jurisdictional bases available in the United States far exceeds those of the Brussels Regime and England's traditional rules. This is a result of the federal system in the United States. Each state regulates through statute the

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<sup>1</sup> In this thesis, 'Brussels Regime' refers to the jurisdiction and judgments system operating under Council Regulation (EC) 44/2001, OJ 2001 L12/1 (the 'Brussels Regulation', in force March 1<sup>st</sup> 2002). Originally, the Brussels Convention of 1968 (OJ 1978, L 304/77, to which the UK became a party in 1978) regulated jurisdiction and judgments among the EC states and the almost identical Lugano Convention applied throughout the EFTA states but, with the exception of Denmark, the Brussels Regulation now governs the jurisdiction of all EU member states. The 19<sup>th</sup> Recital of the Brussels Regulation demands consistency, through continuity in interpretation, between the Regulation and the Convention. Consequently, many comments throughout apply equally to the Convention but for the sake of simplicity all discussions are limited to the Brussels Regulation.

<sup>2</sup> Contained in Articles 5-7 inclusive.

conditions it imposes upon the state courts in the exercise of jurisdiction.<sup>3</sup> The nature and extent of the provisions are entirely for each individual state to decide.

As statutes providing the rules for the exercise of jurisdiction vary from state to state, and there is no federal regulation of this, there is no 'national jurisdictional standard'. However, the Supreme Court's interpretation of the Due Process Clause in the United States' Constitution requires that all assertions of jurisdiction comply with the two-part 'due process test'.<sup>4</sup> As this brings uniformity to the area, a 'single approach' is thus found and it is this stage of the jurisdictional evaluation with which this chapter is concerned. Like England's traditional rules, a doctrine of forum non conveniens is also used by the federal courts. The United States' due process requirements and the federal forum non conveniens doctrine will be contrasted with the approach of the Brussels Regime and England's traditional rules in order to compare the scope of each country's jurisdictional rules. This chapter will also analyse whether the three regimes serve the same 'interests' in each ground for

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<sup>3</sup> State courts may exercise jurisdiction over any matter that is not exclusive to a federal court. Exclusive federal jurisdiction is known as 'limited subject matter jurisdiction' and includes, for example, any issue arising under the Constitution, federal law, treaties and international law and certain actions such as admiralty and bankruptcy proceedings. See 28 U.S.C. §§ 1331, 1333-34, 1351, 1355, 1364 (2000)). Unless 'exclusive' to the federal courts, a state court is ordinarily the proper place for a civil or commercial matter. However, where the parties are citizens of different states in the United States or one party is citizen of that state and another is an 'alien' (not a citizen, domiciliary or resident in the United States as a whole), the federal courts are also competent to hear the case provided the amount in question is over \$75,000. See 28 U.S.C. §1332. This is known as 'diversity' jurisdiction. If a 'diversity' case is commenced in a state court, it may be transferred to a federal court under 28 U.S.C. § 1441 but a case initiated in a federal court cannot be transferred to a state court. This chapter is concerned only with the exercise of jurisdiction in federal courts. This is for several reasons. Ordinarily, transnational litigation involves 'diversity' jurisdiction. Secondly, each state court is free to develop its own doctrine of forum non conveniens, whereas the federal courts must conform to one single federal standard. As a result, a comparison with the other regimes to be analysed in this chapter would be unduly complex if the federal courts were not selected. This thesis will not exclude reference to state courts altogether, however, because federal courts refer to the law of the state in which they sit in order to ascertain whether jurisdiction may be exercised over the defendant (see §4(k)(1)(A) of the Federal Rules of Civil Procedure). Consequently, reference to state statutes containing the conditions for the exercise of jurisdiction must be made. It should, however, be presumed throughout that all comments made refer to a federal court exercising jurisdiction unless specified otherwise.

<sup>4</sup> *International Shoe v Washington* (1945) 326 U.S. 310. There are two Due Process Clauses in the United States' Constitution. The Fourteenth Amendment applies to state courts and the Fifth Amendment concerns federal courts. The decision in *International Shoe* concerned the exercise of jurisdiction by a state court but the language of both provisions is identical and is presumed to have an identical meaning.

jurisdiction. There are three primary ‘interests’ operating in the sphere of jurisdiction.<sup>5</sup> These are those of the defendant, the claimant and the forum.

The defendant’s ‘interests’ may be served by the guarantee that the defendant will only be sued in a limited number of fora: for example, that she will only be subject to suit in fora with which she has a substantial connection or in fora that are within her contemplation. The jurisdictional rules may serve the claimant’s ‘interests’ by providing her with as many potential fora as possible so that she may choose the forum that provides the best practical advantages in her circumstances. Jurisdiction at the claimant’s home forum would also prevent her sustaining substantial costs and inconvenience in pursuing the defendant elsewhere. Finally, the forum may have an ‘interest’ in the dispute itself. For example, if a tortious incident occurred within its borders, the forum would have a significant ‘interest’ in not only being the relevant applicable law to the dispute but also in seeing justice done in its courts. Further, the forum may have an ‘interest’ in the dispute because one of the litigants is a citizen, domiciliary or resident there or because witnesses and evidence are located there.

These three ‘interests’ may coincide or oppose each other at any given time and it may be that the regulation of jurisdiction seeks to accommodate all interests, or two of the three, rather than being dominated by one particular ‘interest’. It may also be the case that a regime does not aim to serve any particular ‘interest’ but rather this is the incidental effect of its regulation of jurisdiction. Each of the three regimes will be analysed to determine whose ‘interests’ are purposefully, or indirectly, served by each regime’s regulation of jurisdiction.

## **2. The Regulation of General Jurisdiction: The Brussels Regime:**

The Brussels Regime requires that only the courts of the defendant’s domicile assert general jurisdiction<sup>6</sup> over the defendant, regardless of whether the defendant is

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<sup>5</sup> Grolimund, P, ‘Human Rights and Jurisdiction: General Observations and Impact on the Doctrines of Forum Non Conveniens’ (2002) 4 Eur. J.L. Reform 87, p.93.

<sup>6</sup> This being jurisdiction over any cause of action within the scope of the Brussels Regime.

a natural or artificial person.<sup>7</sup> Such a rigid rule provides the predictability and certainty desired by the participating states.<sup>8</sup>

## 2.1. *When is a Natural Defendant Domiciled in the Forum?*

Article 59 of the Brussels Regulation provides that the forum shall apply its own law in order to determine whether the defendant is domiciled in a member state.<sup>9</sup> As the common law concept of domicile is different to that applied by most civil law countries,<sup>10</sup> the common law definition was eschewed to avoid deeply inconsistent interpretations that could undermine the Regime as a whole. A defendant is regarded as domiciled in England if she is ‘resident’ there and ‘the nature and circumstances’ of her residence indicate that she has a ‘substantial connection’ with England.<sup>11</sup> Domicile is presumed if the defendant has been resident in England for three months or more, unless proven to the contrary.<sup>12</sup> The ability to rebut this presumption provides a safety net for those who have an insufficient connection to the forum to justify jurisdiction, such as visitors and tourists. However, under this definition a defendant may have multiple domiciles, thereby enabling general jurisdiction to be exercised over the defendant in more than one member state.

## 2.2. *When is a Non-Natural Defendant Domiciled in the Forum?*

Article 60(1) of the Brussels Regulation provides a uniform definition of when a non-natural legal person may be regarded as ‘domiciled’ in a member state. Accordingly, a company, other legal person, or association of natural or legal persons

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<sup>7</sup> Article 2 of the Brussels Regulation. Article 3 provides that, where the matter is within the Regime’s scope, an EU domiciliary must be sued in accordance with the jurisdictional provisions of the Brussels Regime, thereby excluding national jurisdictional rules altogether. A dispute is within the Regime’s territorial scope where it is ‘international’ in nature. This, according to the European Court of Justice (referred to as the ‘ECJ’ throughout) in C-281/02 *Owusu v Jackson & Others* [2005] I.L. Pr. 25, requires that the facts are connected to more than one territory but the other territory need not be another member state.

<sup>8</sup> *Owusu v Jackson*, *ibid*, para 42.

<sup>9</sup> The claimant’s domicile is irrelevant, even if the claimant is from a non-member state. See C-412/98 *Group Josi Reinsurance Company SA v UGIC* [2000] ECR I-5925.

<sup>10</sup> Schlosser Report [1978] OJ C59/71, paras 95-97.

<sup>11</sup> S.41(2)(a) and (b) of the Civil Jurisdiction and Judgments Act 1982 (hereinafter ‘CJJA 1982’).

<sup>12</sup> *Ibid*, s.41(6).

is domiciled at the place where it has its statutory seat, its central administration or its principal place of business.

Article 60(2) then goes on to clarify 'statutory seat' for the purposes of the United Kingdom and Ireland. If the defendant has its registered office in the forum, or it is the company's place of incorporation or place under the law of which formation took place, the defendant is domiciled there. This is clearly very wide in scope. It provides plenty of opportunities for courts to find the defendant domiciled there and also offers scope for multiple fora to exercise general jurisdiction over the defendant.

### **3. The Regulation of General Jurisdiction: The Traditional Rules of England:**

Where the Brussels Regime does not apply because the defendant is not 'domiciled' in a member state or the matter is outside the scope of the Brussels Regime, the traditional rules of England govern the English courts' exercise of jurisdiction.<sup>13</sup>

#### ***3.1. Natural Defendants:***

'Whoever is served with the King's writ<sup>14</sup> and can be compelled consequently to submit to the decree made is a person over whom the courts have jurisdiction.'<sup>15</sup> Provided the defendant is physically present in the jurisdiction at the time the claim

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<sup>13</sup> Article 4, Brussels Regulation.

<sup>14</sup> A writ is now called a 'claim form'.

<sup>15</sup> *John Russell & Co Ltd v Cayzer, Irvine & Co Ltd* [1916] 2 AC 298, p.302.

form is served,<sup>16</sup> it does not matter if the presence there is merely fleeting.<sup>17</sup> Service of the claim form via this method provides the courts with general jurisdiction.<sup>18</sup>

### 3.2. *Non-Natural Defendants:*

An artificial concept of presence has been formulated to ascertain when general jurisdiction may be exercised over a non-natural defendant. A company is regarded as present in the jurisdiction where it is registered in England.<sup>19</sup>

#### 3.2.1. Foreign Companies:

Should the company be incorporated under another country's laws or registered abroad, it is regarded as a foreign company for the purposes of jurisdiction. However, it will not necessarily escape the courts' jurisdiction. A claimant may serve a claim form on a foreign company in one of two ways. The Companies Act 1985 provides one method while the Civil Procedure Rules, introduced in 1999, provide the other.

Under the Companies Act 1985, if the foreign company has a branch operating in England, it is required to register the names and addresses of those entitled to accept service of a claim form on its behalf.<sup>20</sup> Should a company fail to provide this information or, for whatever reason, service cannot be made at the registered address, service may be made at 'any place of business *established* by the company'.<sup>21</sup> Similar

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<sup>16</sup> See the Civil Procedure Rules 6.2 (hereinafter 'CPR') for the acceptable methods of service. Under CPR 6.8 the courts may authorise service by a method not prescribed in the rules.

<sup>17</sup> *Carrick v Hancock* (1895) 12 TLR 59, p.60. See also *HRH Maharanee Seethaderi Gaekwar of Baroda v Wildenstein* [1972] 2 All ER 689.

<sup>18</sup> Provided the defendant did not enter the forum through the fraud or the improper conduct of the claimant. See *Colt Industries Inc v Sarle* [1966] 1 WLR 440, pp.434-44.

<sup>19</sup> S.725(1) of the Companies Act 1985 (hereinafter 'CA 1985'). See CPR 6.2-6.4 inclusive for methods by which the claim form may be served (for example by fax, document of exchange) For the rules regarding service of a claim form on a partnership, see CPR 6.4(5) and CPR 50, schedule 1.

<sup>20</sup> S.690A CA 1985.

<sup>21</sup> *Ibid*, s.694A(3). For interpretations of when a place of business is 'established' see *Re Oriel Ltd* [1985] 3 All ER 216 and *South India Shipping v Export-Import Bank of Korea* [1985] 1 WLR 585.

rules apply where the foreign company conducts business in the forum but does not have a branch therein.<sup>22</sup>

The Civil Procedure Rules remove the need for service to be effected at an 'established' place of business, requiring only that service be made at a 'place of business' in the forum.<sup>23</sup> Unlike under the Companies Act 1985, the claimant need not establish the permanency of the place of business or the degree of continuity of the presence in the forum. Any place of business, no matter how infrequently used, is acceptable for service.<sup>24</sup> Although it is still possible to serve a defendant foreign company with a claim form at 'a place of business established by the company', it is unlikely that this now has any practical effect.<sup>25</sup> This is because the removal of the word 'established' in the Civil Procedure Rules widens the ability to effectively serve a claim form.<sup>26</sup> The Civil Procedure Rules do not require that the cause of action arises out of the activities of the defendant in the forum, unlike their counterpart in the Companies Act 1985.<sup>27</sup> The Civil Procedure Rules therefore provide the court with general jurisdiction, as opposed to specific jurisdiction prescribed by their 'predecessor'.

### *3.3. The Effect of the Doctrine of Forum Non Conveniens on the English Courts' Jurisdiction:*

The doctrine of forum non conveniens has a substantial impact on whether a case proceeds to trial under England's traditional rules. The court may decline to exercise jurisdiction,<sup>28</sup> despite having prima facie jurisdiction, because there is a more

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<sup>22</sup> See ss.690B and 691 CA 1985, which similarly requires registration of names and addresses and also s.695(2) CA 1985, providing for service at an established place of business.

<sup>23</sup> CPR 6.5(6).

<sup>24</sup> Enonchong, R, 'Service of Process in England on Overseas Companies and Article 5(5) of the Brussels Convention' (1999) 48 ICLQ 921, p.922.

<sup>25</sup> The claimant may choose whichever method she sees fit. See *Sea Assets Ltd v PT Garuda Indonesia* [2000] 4 All ER 371.

<sup>26</sup> As a result, references will only be made, and conclusions drawn, in relation to the Civil Procedure Rules.

<sup>27</sup> S.694A CA 1985. The dispute must be partly related to activities in the forum according to *Saab v Saudi American Bank* [1991] 1 WLR 1861.

<sup>28</sup> The action is 'stayed'. This effectively brings an end to the action but this can be lifted should the claimant be unable to sue in the alternative forum.

appropriate forum for that action elsewhere.<sup>29</sup> Once the defendant is served in the territory with a claim form, she must make an application for the action to be stayed, otherwise she will be deemed to have submitted to the courts' jurisdiction. It is therefore common practice for defendants automatically to contest jurisdiction. This in turn means that the doctrine is effectively considered every time a defendant is served with a claim form in the forum. Consequently, the doctrine is as much a part of jurisdictional process, and just as important, as the bases upon which jurisdiction is exercised. An evaluation of general jurisdiction would not be complete without reference to the doctrine and, as such, a comparison with other jurisdictions is not accurate without its inclusion.

The House of Lords case of *Spiliada Maritime Corp'n v Cansulex Ltd*<sup>30</sup> provides guidance as to the approach the courts must take, and the factors to be considered, during a forum non conveniens analysis. According to this case, proceedings will not be stayed unless the defendant can establish that another available<sup>31</sup> forum is 'distinctly more appropriate' for the trial than the English courts.<sup>32</sup> It is not enough to show that, on the balance of probabilities, the foreign

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<sup>29</sup> There is no scope for use of the forum non conveniens doctrine within the Brussels Regime, according to C-281/02 *Owusu v Jackson & Others* [2005] I.L. Pr. 25, paras 25-28. Consequently, it can only be considered where jurisdiction is based on England's traditional rules. It has been argued that, as Article 4 of the Brussels Regulation authorises the use of a member state's traditional rules where the Brussels Regime does not apply, Article 4 controls the member states' jurisdictional regimes in every respect. It follows from this that, as *Owusu* declared the doctrine of forum non conveniens incompatible with the Brussels Regime and Article 4 controls member states' jurisdiction absolutely, resort to forum non conveniens is prevented altogether. See Briggs, A, and Rees, P, *Civil Jurisdiction and Judgments* (London, LLP, 3<sup>rd</sup> ed, 2002) para.2.217. This does not correspond with significant commentary on this point. See, for example, Harris, J, 'Stays of Proceedings and the Brussels Convention' (2005) 54 ICLQ 933, pp.948-949 and Peel, A, 'Forum Non Conveniens and European Ideals' (2005) 32 LMCLQ 363, pp.370-71. Cases supporting these articles include *Sarrio SA v Kuwait Investment Authority* [1997] 1 Lloyd's Rep 113 and *The and AN Kang Jiang, The Xin Yang* [1996] 2 Lloyd's Rep 217. Advocate-General Léger also took this view in *Owusu*, *ibid*, para.AG235.

<sup>30</sup> [1987] AC 460. ('*The Spiliada*' throughout).

<sup>31</sup> 'Available' means the foreign forum has jurisdiction 'as of right'. For a discussion of this see Merrett, L, 'Uncertainties in the First Limb of The Spiliada Test' (2005) 54 ICLQ 211 and also Peel, E, 'Forum Non Conveniens Revisted' (2001) 117 LQR 187. In *Lubbe v Cape* [2000] 1 WLR 1545, the House of Lords accepted that a forum is 'available' when the defendant undertakes to submit to jurisdiction.

<sup>32</sup> *The Spiliada*, n.30 above, p.476.



forum is more appropriate.<sup>33</sup> In light of the burden on the defendant, this creates a presumption of trial before the English courts.

In order to determine whether the foreign forum is distinctly more appropriate, the courts concern themselves with finding the forum with which the action has the ‘most real and substantial connection’.<sup>34</sup> In searching for the ‘centre of gravity’ of the dispute, relevant considerations include:

*‘[T]he nature of the dispute, the legal and practical issues involved, such questions as local knowledge, availability of witnesses and their evidence and expense.’*<sup>35</sup>

Other factors include the location of any tortious injury,<sup>36</sup> the residence of the parties<sup>37</sup>, any jurisdiction clauses in favour of England or the foreign forum<sup>38</sup> and the law governing the transaction between the parties.<sup>39</sup> If issues of English public policy will be raised during the trial, a stay may be refused because the English courts are far better equipped to deal with such issues than another jurisdiction applying English law through its choice of law process.<sup>40</sup>

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<sup>33</sup> Ibid, p.474.

<sup>34</sup> Ibid, pp.477-8. The term ‘natural forum’ has been used synonymously with ‘real and substantial connection’. See *Rockware Glass Ltd v MacShannon* [1978] AC 795, p.812, confirmed in *The Spiliada*, ibid, pp.477-8.

<sup>35</sup> *Amin Rasheed Corp’n v Kuwait Insurance Co* [1984] AC 50, p.72.

<sup>36</sup> The location of the tortious injury is normally the most appropriate forum. See *Rockare Glass*, n.34 above.

<sup>37</sup> *The Spiliada*, n.30 above, p.478.

<sup>38</sup> A jurisdiction agreement selecting England as the forum for trial is a strong indication that it is the most appropriate forum. See *Dimskal Shipping Co SA v International Transport Workers Federation, The Evia Luck* [1986] 2 Lloyd’s Rep 165, p.179. In *S & W Berisford plc v New Hampshire Insurance Co* [1990] 1 Lloyd’s Rep 454, p.463 the court found that a non-exclusive jurisdiction clause in favour of the English courts created a presumption that England was the appropriate forum. In *Aratra Potato Co Ltd v Egyptian Navigation CO, The El Amria* [1981] 2 Lloyd’s Rep 119, p.124, the court suggested that an exclusive foreign jurisdiction clause creates a presumption of a stay unless the claimant is able to show strong cause for not doing so. However, in *Evans Marshall & Co Ltd v Bertola SA* [1973] [1973] 1 WLR 349, pp.349-354 (a case concerning forum conveniens but equally applicable here) the strong factual connection to England and the lack of interlocutory relief in the alternative forum weighed more heavily than an exclusive jurisdiction agreement nominating a foreign forum.

<sup>39</sup> Should the applicable law be disputed, this factor will not be given any weighting, see *Lubbe v Cape plc* [1999] 1 WLR 1545.

<sup>40</sup> *El du Pont de Nemours & Co v Agnew & Kerr* [1987] 2 Lloyd’s Rep 585, p.595.

It is clear that there are indications as to the type of factors to be considered by the courts through previous case law. However, the House of Lords refused to specify whether some factors should be given more weight than others.<sup>41</sup> The only thing that is clear is that the weighing of such factors is a matter for the trial judge.<sup>42</sup>

If no alternative more appropriate forum abroad exists, the courts will refuse to stay proceedings.<sup>43</sup> Similarly if there is no 'natural forum' for the dispute, the English courts, having been seised of the matter, will proceed to trial.<sup>44</sup> Ordinarily, if it appears that another forum is more appropriate for the trial, the court will grant a stay. However, even if a more appropriate forum does exist a stay may nevertheless be denied where there are circumstances by reason of which justice demands that the stay should be refused.<sup>45</sup> The burden then shifts from the defendant to the claimant to demonstrate why the courts should refuse to stay the action.

Ordinarily the claimant must 'take that forum as [she] finds it, even if it is in certain respects less advantageous to [her] than the English forum.'<sup>46</sup> Thus the claimant's loss of a legitimate 'personal or juridical advantage' in England is unlikely to generate sympathy sufficient to result in a refusal to stay proceedings. These advantages in England may include better procedures of discovery<sup>47</sup> and awards of costs<sup>48</sup> and interest.<sup>49</sup> Though legitimate, these are not of great significance because expecting the foreign forum to mirror the English court's procedures and substantive laws would infringe principles of comity.<sup>50</sup> This would also ensure that almost all actions were heard by the English courts.

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<sup>41</sup> *The Spiliada*, n.30 above.

<sup>42</sup> *Ibid.*

<sup>43</sup> *European Asian Bank AG v Punjab and Sind Bank* [1982] 2 Lloyd's Rep 356, p.369. The same is true if England is the 'natural forum' for the dispute. See *OTM Ltd v Hydronautics* [1981] 2 Lloyd's Rep 211.

<sup>44</sup> See *The Vishva Abha* [1990] 2 Lloyd's Rep 312, p.314.

<sup>45</sup> *The Spiliada*, n.30 above, p.478.

<sup>46</sup> *Connelly v RTZ Corp plc* [1998] AC 854, p.872.

<sup>47</sup> *Amin Rasheed Shipping Corp*, n.35 above, p.67. See also *The Traugutt* [1985] 1 Lloyd's Rep 76, pp.79-80.

<sup>48</sup> *The Vishva Ajay* [1989] 2 Lloyd's Rep 558, p.560.

<sup>49</sup> *The Spiliada*, n.30 above, p.482.

<sup>50</sup> See *Herceg Novi v Ming Galaxy* [1998] 4 All ER 238.

Similarly, delay is not normally sufficient to warrant a refusal to stay.<sup>51</sup> However, where the delay is exceptional, the courts may consider it fit to do so.<sup>52</sup> A substantial difference between the damages available in the two fora may also prompt a refusal to stay.<sup>53</sup> Normally, the lack of legal aid or financial assistance for the trial abroad is insufficient.<sup>54</sup> However, if the trial is so complex that its costs are likely to be extremely high, so that the claimant may be prevented from proceeding with the action abroad, the courts may permit suit in England so that the claimant is not denied the ability to sue at all.<sup>55</sup> Further, if the claimant is time-barred in proceedings abroad, a stay is inappropriate where the claimant did not act unreasonably or with great delay in commencing proceedings in England.<sup>56</sup>

If the claimant is to be successful in demonstrating justice would not be achieved abroad, the claimant must adduce evidence supporting this.<sup>57</sup> In order to respect global differences, the House of Lords has stressed that the courts should avoid comparing the quality of justice between the two fora.<sup>58</sup> The inexperience of the alternative forum in that particular area does not mean that justice will not be achieved. Something much more, like the lack of independent judiciary,<sup>59</sup> is required before the courts think it fit to refuse to stay proceedings.

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<sup>51</sup> *Rockware Glass*, n.34 above.

<sup>52</sup> *The Vishva Ajay*, n.48 above, p.560. In this case, the court refused to stay because the trial abroad would have taken between six and ten years.

<sup>53</sup> *BMG Trading Ltd v A S McKay* [1998] IL Pr 691. In *Roneleigh Ltd v MII Exports Inc* [1989] 1 WLR 619 a stay was refused because any damages awarded would have been diminished by costs in the alternative forum.

<sup>54</sup> See *Connelly v RTZ*, n.46 above, p.873 and *Lubbe v Cape*, n.31 above.

<sup>55</sup> *Ibid.*

<sup>56</sup> *The Spiliada*, n.30 above, p.483.

<sup>57</sup> *Ibid.*, p.478.

<sup>58</sup> *The Abidin Daver* [1984] AC 398, p.424.

<sup>59</sup> *Ibid.*, p.411. The courts are wary of declaring another judiciary unfit. See *Mohammed v Bank of Kuwait and the Middle East KSC* [1996] 1 WLR 1483, p.1496.

#### 4. The Regulation of General Jurisdiction: The United States:

No state of the United States 'shall deprive any person of life, liberty or property without due process of law'.<sup>60</sup> In *Pennoyer v Neff*<sup>61</sup> the Supreme Court confirmed that this Due Process Clause of the United States' Constitution requires that a court's jurisdiction is exercised in accordance with current notions of 'due process'. Until the 'revolutionary' case of *International Shoe v Washington*,<sup>62</sup> the list of acceptable jurisdictional bases was exhaustive. *Pennoyer v Neff* dictated that jurisdiction was only constitutional in three situations.<sup>63</sup> These included jurisdiction based on the defendant's consent or residence in the forum<sup>64</sup> and where the defendant was served with notice of process in the territory.<sup>65</sup>

Preceding *International Shoe*, both the states and the courts demonstrated their dissatisfaction with the exhaustive list of jurisdictional bases by distorting the concepts of 'consent' and 'presence' in order to expand their jurisdictional reach. This enabled the courts to exercise jurisdiction in circumstances that a literal reading of the traditional bases would deny. For example, if a natural defendant had been involved in a motor accident in the forum but did not fall within any of the four permissible jurisdictional bases, the courts might find the defendant 'impliedly consented' to jurisdiction as a condition of being permitted to use that state's roads.<sup>66</sup> Another creative fiction was to deem a non-natural defendant as 'present' in the forum in which the defendant continually engaged in business, notwithstanding the

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<sup>60</sup> The Fourteenth Amendment of the United States' Constitution, §1. As noted above at p.6, n.4, the Fifth Amendment is identical to this.

<sup>61</sup> (1877) 95 U.S. 714, pp.720-22.

<sup>62</sup> (1945) 326 U.S. 310.

<sup>63</sup> Known as the 'traditional bases'.

<sup>64</sup> The Supreme Court did later authorise the exercise of jurisdiction over a defendant domiciled in the territory, on account of its similarity to 'residence', in *Milliken v Meyer* (1940) 311 U.S. 457. This means that there are four 'traditional bases'.

<sup>65</sup> These bases were acceptable because they complied with notions of 'territorial sovereignty' operating within the field of public international law at the time. It has been suggested that a review of pre-*Pennoyer* and pre-*International Shoe* cases reveals that many treated due process as a defence to recognition in sister-states cases and did not provide the defendant with the right to challenge jurisdiction. See Borchers, P, 'The Death of the Constitutional Law of Personal Jurisdiction: From *Pennoyer* to *Burnham* and Back Again', (1990) 24 U.C. Davis L. Rev. 19, p.58. This may be correct but *International Shoe* later interpreted *Pennoyer v Neff* as providing the defendant with a right at both the jurisdiction and recognition stages.

<sup>66</sup> See, for example, *Hess v Pawloski* (1927) 274 U.S. 352.

fact that the defendant had no office, agent or presence in the forum. This became known as the ‘doing business’ doctrine.<sup>67</sup>

These anomalous creations of states desperate to increase their jurisdictional capabilities demonstrated that the archaic approach of *Pennoyer v Neff* was inappropriate for a modern society that was becoming increasingly mobile. It was this frustrated environment that sowed the seeds for the mammoth overhaul of due process in *International Shoe*.

#### 4.1. The ‘Due Process Revolution’:

In 1945 the Supreme Court revolutionised jurisdictional thinking in the case of *International Shoe v Washington*,<sup>68</sup> by removing the ties between the Due Process Clause and the exhaustive traditional jurisdictional bases advocated in *Pennoyer v Neff*.<sup>69</sup> Any basis for jurisdiction is acceptable provided that it conforms to current interpretations of the Due Process Clause.<sup>70</sup> Accordingly, due process demands that the courts engage in a two-stage inquiry into the facts. First, the courts must assess whether the defendant has the necessary ‘minimum contacts’ with the forum.<sup>71</sup> Secondly, the courts must address whether the pre-litigation contacts with the forum are ‘such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.’<sup>72</sup> Only upon satisfaction of both these limbs will the exercise of jurisdiction be constitutional.<sup>73</sup>

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<sup>67</sup> This was the basis of the appeal to the Supreme Court in *International Shoe*.

<sup>68</sup> (1945) 326 U.S. 310.

<sup>69</sup> (1877) 95 U.S. 714.

<sup>70</sup> N.68 above, p.316.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

<sup>73</sup> *International Shoe* concerned a non-present defendant from another state in the United States. It was not clear for some time whether due process applied to transnational defendants (where the defendant is not a citizen and is not present, domiciled or resident in the United States. These are often called ‘alien’ defendants by the Supreme Court). In *Perkins v Benguet Consolidated Mining Co* (1952) 342 U.S. 437, *Insurance Corp of Ireland v Compagnie des Bauxities de Guinee* (1982) 456 U.S. 694, *Helicopteros Nacionales de Columbia SA v Hall* (1984) 466 U.S. 408 and *Ashai Metal Industries v Superior Court of California* (1987) 48 U.S. 102 the Supreme Court presumed, without question, that due process applied to ‘alien’ defendants. Thus all sister-state cases apply equally to ‘alien’ defendants.

## 4.2. Defining Due Process:

The aftermath of *International Shoe v Washington*<sup>74</sup> was immense. This case cleared the path for the development of jurisdictional bases. States began legislating and experimenting with ‘long arm statutes’ where jurisdiction reached far beyond their territorial boundaries, something unthinkable prior to *International Shoe*. Jurisdictional freedom had arrived through the saviour of due process, repackaged for modern society.

Several questions remained, however. In the judgment, the Court provided little guidance as to nature and frequency of pre-litigational ‘contacts’ sufficient to satisfy the first limb of due process and what was required under the second limb. The Court also failed to specify if either of the two limbs should be regarded as dominant. Furthermore, it was unclear whether the four traditional jurisdictional bases still equated to due process, as *Pennoyer v Neff* had specified,<sup>75</sup> or were subject to the two-stage due process analysis. These ambiguities remained unresolved for many years.

### 4.2.1. Clarifying the Ambiguity of *International Shoe v Washington*: Is One of the Limbs of Due Process More Prevalent?

In *McGee v International Life Insurance Co*<sup>76</sup> and *Hanson v Denckla*,<sup>77</sup> the Supreme Court failed to clarify which, if any, of the two limbs of due process should prevail. In *McGee*, the Supreme Court stressed the importance of the second limb of due process,<sup>78</sup> whereas in *Hanson v Denckla* greater emphasis was placed on the need for ‘minimum contacts’.<sup>79</sup> Despite the confusion and difficulty in reconciling these

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<sup>74</sup> (1945) 326 U.S. 310.

<sup>75</sup> (1877) 95 U.S. 714.

<sup>76</sup> (1957) 355 U.S. 220.

<sup>77</sup> (1958) 357 U.S. 235.

<sup>78</sup> N.76 above, p.234.

<sup>79</sup> N.77 above, p.250.

contradictory judgments,<sup>80</sup> there was a period of silence on the matter for almost twenty years.

In *Shaffer v Heitner*,<sup>81</sup> the Supreme Court stressed, relying on the judgment of *Hanson v Denckla*, the need for the defendant to have ‘purposefully availed’ itself of conducting activities in the forum to satisfy the ‘minimum contacts’ limb of due process. The Court’s paramount concern with ‘minimum contacts’ implied that it was the key provision. For three years this seemed certain, although it remained unclear what role the second limb should play. The case of *World-Wide Volkswagen v Woodson*<sup>82</sup> was expected to clarify the role of the second limb but instead it appeared to undermine the implications of *Shaffer v Heitner*.

In *World-Wide Volkswagen v Woodson*, the Supreme Court stressed that the ‘minimum contacts’ limb was a primary concern in any due process analysis because it protected the defendant ‘against the burdens of litigating in a distant or inconvenient forum’.<sup>83</sup> However, the Court then emphasised the need to consider this burden in light of the other relevant factors contained in the second limb of due process.<sup>84</sup> The Court appeared to envisage an equally strong role for the second limb in a due process examination. The certainty brought by this judgment did not last long. The case of *Burger King v Rudzewicz* reintroduced confusion to the subject.<sup>85</sup>

#### 4.2.1(a) *The Reintroduction of Confusion? Burger King v Rudzewicz:*

In *Burger King Corp v Rudzewicz* the Supreme Court said that upon an obvious satisfaction of the ‘minimum contacts’ limb, the defendant must ‘present a compelling case that the presence of some other considerations would render

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<sup>80</sup> In *Hanson v Denckla*, *ibid*, pp.250-1, the Supreme Court unsuccessfully attempted to distinguish *McGee*.

<sup>81</sup> (1977) 433 U.S. 186, p.216. It should be noted that due process does not relate to ‘in rem’ cases where jurisdiction is exercised over the res (the thing). However, quasi-in-rem jurisdiction, providing jurisdiction over the defendant on the basis of the presence of her assets in the forum, was later confirmed to be subject to the Due Process Clause because of its in personam implications in *Shaffer v Heitner*.

<sup>82</sup> (1980) 444 U.S. 286.

<sup>83</sup> *Ibid*, p.292.

<sup>84</sup> *Ibid*. The Court provided a list of factors to be considered, see p.24 below.

<sup>85</sup> (1985) 471 U.S. 462.

jurisdiction unreasonable.’<sup>86</sup> This presumption is not consistent with the ‘equal weighting approach’ advocated in *World-Wide Volkswagen v Woodson*. As the burden the defendant must meet is ‘compelling’, this would be difficult to rebut. As a consequence, it is highly likely that the exercise of jurisdiction is compliant with due process on the sole basis of the defendant’s ‘minimum contacts’ with the forum. This indicates that ‘minimum contacts’ is of paramount importance, reducing the practical significance of the second limb to a minimum unless there are strong reasons to find otherwise.

It is likely that this ‘new approach’ merely regurgitated what had already occurred, and still does occur, in practise. According to Silberman, the second limb of due process adds little to the ‘minimum contacts’ limb because the courts ‘almost always find the assertion of jurisdiction to be reasonable’ solely on the basis of the defendant’s ‘contacts’ with the forum.<sup>87</sup> This conclusion appears to be supported by *Ashai Metal Industries v Superior Court of California*.<sup>88</sup> Decided just two years after *Burger King*, the Supreme Court stated:

*‘When minimum contacts have been established, often the interests of the [claimant] and the forum in the exercise of jurisdiction will justify even the serious burden placed on the ....defendant.’*<sup>89</sup>

This is further supported by the fact that Justice Brennan suggested that the decision in *Ashai Metal Industries* was ‘one of those *rare* cases’ where jurisdiction was unconstitutional because it violated the second limb of due process.<sup>90</sup> This ‘presumptive approach’ indicates that, in most cases, the second limb is merely a formality rather than an active control on the exercise of jurisdiction.<sup>91</sup>

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<sup>86</sup> Ibid, p.478.

<sup>87</sup> Silberman, L, ‘Judicial Jurisdiction in the Conflict of Laws Course: Adding a Comparative Dimension’, (1995) 28 Vand. J. Transnat’l L 389, p.393.

<sup>88</sup> (1987) 480 U.S. 102.

<sup>89</sup> Ibid, p.114. These quotations are taken from the majority opinion.

<sup>90</sup> Ibid, p.116. This statement is obiter but shows consistency in approach towards the second limb.

<sup>91</sup> Even if the second limb is considered, it often has little effect on the outcome due to the way it is defined. See pp.23-5 below.



#### 4.2.2. Clarifying the Ambiguity of *International Shoe v Washington*: What Satisfies Each Limb of the Due Process Test?

After *International Shoe v Washington*,<sup>92</sup> it soon became apparent that the Supreme Court had failed to clarify the content of the two limbs of due process sufficiently. Several subsequent cases attempted to address this.

##### 4.2.2(a) Defining 'Minimum Contacts':

In *World-Wide Volkswagen v Woodson*<sup>93</sup> the Supreme Court emphasised the need for the defendant to 'purposefully avail' itself of the privilege of conducting activities within the forum State.<sup>94</sup> The introduction of the words 'purposeful availment' presented two possibilities. The first possibility was that an additional hurdle had to be overcome before the exercise of jurisdiction was acceptable. Alternatively, it could be construed as adding relatively little, as it was an example of satisfactory 'contacts.' If 'purposeful availment' was an explanation of 'minimum contacts', it failed to clarify the matter. This issue faced the Supreme Court in *Ashai Metal Industries Company Ltd v Superior Court*.<sup>95</sup>

In this case, the defendant company did no business, and had no office, agent or other physical presence in the United States. However, its product, which involved the manufacture and assembly of inner tubes and valves utilised for motorbike tyres, was fitted to motorbikes that were sold in the United States. The defendant did not send its product to the United States but it was taken there through the 'stream of commerce'. The Supreme Court had to decide whether placing a product into the stream of commerce, without further contacts with the forum, satisfied the 'minimum contacts' limb of due process. The Supreme Court failed to reach a majority decision on this matter, leaving confusion and uncertainty to reign.

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<sup>92</sup> (1945) 326 U.S. 310.

<sup>93</sup> (1980) 444 U.S. 286.

<sup>94</sup> Ibid, pp.292 and 296-298. This term was first used in *Hanson v Denckla* (1958) 357 U.S. 235 and reiterated in *Shaffer v Heitner* (1977) 433 U.S. 352.

<sup>95</sup> (1987) 480 U.S. 102.

Four of the nine judges thought that merely placing a product into the stream of commerce could not be construed as an act ‘purposefully directed toward the forum’,<sup>96</sup> even if the defendant is aware that the stream of commerce may, or will, sweep it there. ‘Additional conduct’, indicating an intention to serve that forum’s market, was necessary.<sup>97</sup> Four of the nine justices disagreed with this proposition, agreeing with Justice Brennan who stated that:

*‘The stream of commerce refers not to unpredictable current... but to the regular anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum...the possibility of a lawsuit there cannot come as a surprise.’<sup>98</sup>*

The remaining judge refused to comment, leaving the Supreme Court without a majority decision on this point. It was apparent, however, that ‘purposeful availment’ was an essential part of the evaluation of the first limb rather than an example of ‘minimum contacts’.

#### 4.2.2(a)(i) The Two Judgments in *Ashai Metal Industries*: Which Interpretation is Most Likely to Represent the Correct Position?

It seems that the interpretation most easily reconciled with previous case law is Justice Brennan’s opinion, which favours ‘awareness’ of the product entering the forum state. In *World-Wide Volkswagen* the Supreme Court stated, obiter, that an assertion of jurisdiction over a defendant that ‘delivers its products into the stream of commerce’ and expects that they will be purchased in the forum did not violate due process.<sup>99</sup> This clearly corresponds with Justice Brennan’s judgment.

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<sup>96</sup> Ibid, p.112

<sup>97</sup> Ibid. Justice O’Connor gave several examples of when intent could be ascertained. These included designing a product for that forum’s market, advertising or providing regular advice to consumers there and utilising sales agents in the forum.

<sup>98</sup> Ibid, p.117

<sup>99</sup> N.93 above, pp.297-298.

This liberal interpretation also seems to be consistent with the Supreme Court's decision two years earlier in *Burger King v Rudzewicz*.<sup>100</sup> In this case the Supreme Court suggested a 'presumptive approach' towards due process.<sup>101</sup> This apparent loss of restriction on the exercise of jurisdiction sits neatly with a more liberal approach towards 'purposeful availment', demonstrating a more relaxed approach generally towards the exercise of jurisdiction.

On the other hand, a restrictive interpretation of 'purposeful availment' would counteract the potentially greater reach of a court's jurisdiction through the new 'presumptive approach' towards due process. However, in light of the suggestion of a less restrictive concept of purposeful availment in *World-Wide Volkswagen*, a failure to contradict it by a majority of the Supreme Court in *Ashai Metal Industries* suggests that Justice Brennan's statement should, for the moment, be regarded as the authoritative judgment.

Practise demonstrates deep confusion as to which of the two opinions to apply. Some courts have insisted upon compliance with Justice O'Connor's judgment, requiring some intentional conduct on the part of the defendant.<sup>102</sup> In *World-Wide Volkswagen v Woodson* it was stressed that the 'minimum contacts' limb ensures that the defendant is not subject to a court's jurisdiction unless she can reasonably anticipate suit there.<sup>103</sup> According to Justice Brennan in *Ashai Metal Industries* the 'stream of commerce' is predictable, thereby satisfying the expectation of reasonable foresight enshrined in the 'minimum contacts' limb.<sup>104</sup> Those in favour of the lax 'stream of commerce' approach use these two collaborating statements to support use of Justice Brennan's approach.<sup>105</sup>

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<sup>100</sup> (1985) 471 U.S. 462.

<sup>101</sup> See pp.19-20 above.

<sup>102</sup> See, for example, *Topps Co v Gerrit J. Verburg Co* (1997) 961 F.Supp. 88 (D.C.N.Y) and *Polymers Inc v Ultra Flo Filtration Systems Inc* (1998) 33 F.Supp.2d 1008 (D.C.Fla).

<sup>103</sup> N.93 above, p.297

<sup>104</sup> In *Anderson v Sportmart Inc* (1998) 179 F.R.D. 236 (D.C.Ind), mere awareness of the product's destination was sufficient provided the defendant did not attempt to restrict access to the forum state.

<sup>105</sup> In *Irving v Owens-Corning Fiberglas Corporation* (1989) 864 F.2d 383 (C.A. 5<sup>th</sup>), p.386, the court refused to apply either of the opinions in *Ashai Metal Industries*, choosing to assess whether the defendant could reasonably anticipate suit in the forum. Others have attempted to apply both opinions. See, for example, *Pennzoil Products Company v Colelli Associates Inc* (1998) 149 F.3d 197 (C.A. 3d), p.207. Satisfaction of the stricter standard would

#### 4.2.2(b) Defining 'Traditional Notions of Fair Play and Substantial Justice:

In *International Shoe v Washington*,<sup>106</sup> the Supreme Court made it clear that any exercise of jurisdiction must satisfy 'traditional notions of fair play and justice' but failed to elaborate any further on what this meant. Although it took thirty-five years to formulate, the Court eventually explained that the burden of defending litigation in the forum must be weighed against factors such as:

*'[T]he [forum's] interest in adjudicating the dispute [and]...the [claimant's] interest in obtaining convenient and effective relief...at least when that interest is not adequately protected by the [claimant's] power to choose the forum;...the interstate judicial system's interest in obtaining the most efficient resolution of the controversies; and the shared public interest of the several States in furthering fundamental substantive social policies'*<sup>107</sup>

This remains authoritative today, although the 'presumptive approach' advocated in *Burger King* has watered down the effect of this limb.<sup>108</sup> However, practise reveals that whilst the courts still operate under a 'presumptive approach' it is easier for the defendant to rebut this where the defendant's 'contacts' with the forum, although sufficient to satisfy the 'minimum contacts' limb, are tenuous.<sup>109</sup>

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automatically satisfy Justice Brennan's lesser requirements so this, in effect, adheres to the stricter approach.

<sup>106</sup> N.74 above.

<sup>107</sup> *Worldwide Volkswagen v Woodson*, n.93 above, p.292. The latter two considerations relate to sister-state cases, as they concern each territory's ability to regulate disputes connected to it in an inter-state system.

<sup>108</sup> Although the second limb may play a special role in relation to the protection of 'alien' defendants. See pp.25-27 below.

<sup>109</sup> Some courts take a 'sliding scale' approach to this issue. See, for example, *Gray v St Martin's Press Inc* (1996) 929 F.Supp. 40 (D.C.N.H) and *Sheridan v Ascutney Mountain Resort Services* (1996) 925 F.Supp. 872 (D.C.Mass)

#### 4.2.2(b)(i) A Change in Emphasis in the Definition of the Second Limb: Does *Burger King v Rudewicz* Advocate Considering the Claimant's Interests Twice?

In *Burger King v Rudezwicz*<sup>110</sup> the Supreme Court stated that the forum's interest in the dispute included a state's 'manifest interest in providing its resident with a convenient forum for redressing injuries inflicted by out-of-state actors.'<sup>111</sup> The interest of a claimant resident in the forum is thus considered twice in the weighing process, once as a separate entity and then in relation to the forum's interest in the trying that case. This results in a change in emphasis, producing a pro-claimant bias under this limb.

This position was indirectly confirmed in *Ashai Metal Industries v Superior Court of California*<sup>112</sup> where the Supreme Court said, referring to the facts of the case, that 'because the [claimant] is not a Californian resident, California's legitimate interests in the dispute have considerably diminished.'<sup>113</sup> This clearly accepts and applies without question the 'double weighting' to be given to the claimant. This also corresponds with *Keeton v Hustler Magazine* where the Supreme Court suggested, obiter, that a claimant's residence may 'enhance' a defendant's contacts with the forum, reducing the burden on the defendant of litigating there.<sup>114</sup>

This introduction of considering the claimant's interests twice supports the proposition that the second limb is of little practical effect.<sup>115</sup> It makes sense to operate under a 'presumptive approach' of founding jurisdiction on 'minimum contacts' alone because the double weighting accorded to resident claimants virtually guarantees that jurisdiction will be deemed reasonable under the second limb of due process.

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<sup>110</sup> N.100 above.

<sup>111</sup> Ibid, pp.2124-25.

<sup>112</sup> N.95 above

<sup>113</sup> Ibid, p.114.

<sup>114</sup> (1984) 465 U.S. 770, p.778.

<sup>115</sup> As discussed above, pp.19-20.

#### 4.2.3. *Ashai Metal Industries*: Does Due Process Offer Special Protection for 'Alien' Defendants?

In *Ashai Metal Industries v Superior Court of California*,<sup>116</sup> the Supreme Court stated:

*'The unique burdens placed upon one who must defend oneself in a foreign legal system...should have significant weight in assessing the reasonableness... of personal jurisdiction.'*<sup>117</sup>

In light of this broad statement, Silberman argues that this case can be read as establishing a 'specialised jurisdictional standard' that protects 'alien' defendants.<sup>118</sup>

However, inconsistency in Supreme Court decisions as to whether special regard should be had to the 'alien' status of the defendant is apparent.<sup>119</sup> Juenger notes, for example, that in *Helicopteros Nacionales de Columbia SA v Hall*,<sup>120</sup> the Supreme Court failed to draw any distinction between the applications of due process to inter-state defendants and 'alien' defendants.<sup>121</sup> This illustrates, at the very least, that *Ashai Metal Industries* was not merely clarifying an accepted position.

Furthermore, it may be that the Supreme Court only operated in a 'defendant-protective manner' under the second limb because the status of the claimant was also 'alien'. Accordingly, on interest-balancing, the Court was unwilling to find the 'minimal interests on the part of the [claimant] or the forum' outweighed the burden on the defendant in those circumstances.<sup>122</sup> Thus the deciding factor was not the 'alien' status of the defendant but rather the fact that the normal claimant-bias experienced under the second limb of due process was not present. The alleged

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<sup>116</sup> (1987) 48 U.S. 102.

<sup>117</sup> Ibid, p.116.

<sup>118</sup> Silberman, L, 'Judicial Jurisdiction in the Conflict of Laws Course: Adding a Comparative Dimension' (1995) 28 Vand. J. Transnat'l L 389, p.392.

<sup>119</sup> Juenger, F, 'A Shoe Unfit for Globetrotting' (1995) 28 U.C. Davis L. Rev. 1027, pp.1034-6.

<sup>120</sup> (1984) 466 U.S. 408.

<sup>121</sup> Juenger, n.119 above, p.1035.

<sup>122</sup> N.116 above, p.115. This statement is from the majority opinion.

protection of the ‘alien’ defendant may not have been available had the claimant been ‘resident’ in California, particularly as a resident claimant receives ‘double weighting’ under the second limb of due process. It therefore remains unclear, and quite doubtful, whether the second limb offers additional protection for ‘alien’ defendants where other factors point to trial in the claimant’s chosen venue.

Indeed, it seems that the ‘reasonableness’ inquiry enshrined in second limb of due process offers much less protection to an ‘alien’ defendant than Silberman suggests. When weighing the factors under the second limb, the lower courts often utilise the ‘burden’ of suit to justify jurisdiction. The courts have stressed that ‘modern advances’ in technology and transportation have reduced the burdens associated with defending in a foreign forum.<sup>123</sup> Justifying jurisdiction by this positive assessment<sup>124</sup> of the burden on the defendant causes a further reinterpretation of the second limb in the claimant’s favour and contradicts the position Silberman suggests the Supreme Court was taking in *Ashai Metal Industries*.<sup>125</sup> In fact, even if ‘special consideration’ is given to the ‘alien’ defendant by viewing the defendant’s burden in a negative manner, a review of the case law reveals that it almost never alters the outcome.<sup>126</sup>

#### 4.2.4. The Federal Courts’ Approach to an ‘Alien’ Defendant’s ‘Minimum Contacts’:

Where no state is able to exercise jurisdiction over an ‘alien’ defendant, the United States’ federal courts may assert jurisdiction on the basis of an ‘aggregation of contacts’.<sup>127</sup> Even if the defendant has weak pre-litigation ‘contacts’ with the state in which the federal court sits, it may still be able to exercise jurisdiction over the

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<sup>123</sup> See, for example, *Mutual Service Insurance Co v Frit Industries Inc* (2004) 358 F.3d 1312, p.1320 (11<sup>th</sup> Cir) and *Harris Rutsky & Co Insurance Service v Bell & Clements Ltd* (2003) 328 F.3d 1122, pp.1132-33 (9<sup>th</sup> Cir). In practise it seems that the second limb is interpreted as altering the due process outcome only where the claimant is also ‘alien’, which consequently confines *Ashai Metal Industries* to its facts.

<sup>124</sup> If the burden on the defendant could only restrict the exercise of jurisdiction then it would operate in a ‘negative’ manner.

<sup>125</sup> Parrish, A, ‘Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants’ (2006) 41 Wake Forest L. Rev. 1, pp.21-24.

<sup>126</sup> *Ibid*, p.24.

<sup>127</sup> Fed. R. Civ. P.4(k)(2). This applies only to federal courts.

defendant where the defendant's contacts with the nation as a whole are sufficient to satisfy the requirements of the first limb of due process.<sup>128</sup> This anomaly means that it is much easier to establish jurisdiction over a defendant in the federal courts than the state courts. As a consequence, an 'alien' defendant with some familiarity with the United States is unlikely to escape the federal courts' jurisdiction.

#### 4.3. *The Reach of Due Process: Does It Apply to All Jurisdictional Bases?*

Prior to *International Shoe v Washington*,<sup>129</sup> the 'traditional bases' of jurisdiction were compliant with due process by their very nature, without inquiry into the facts.<sup>130</sup> The question arose as to whether the status of these 'traditional bases' remained unqualified by *International Shoe* or whether they must also undergo the two-stage due process examination.<sup>131</sup> In *Shaffer v Heitner* the Supreme Court stated obiter that 'all assertions of state-court jurisdiction must be evaluated according to the criteria set forth in *International Shoe* and its progeny.'<sup>132</sup> This implied that the 'traditional bases' were also subject to the due process evaluation. However, it is far from clear that this is the accepted position.

##### 4.3.1. Jurisdiction Based on a Non-Natural Defendant's Presence in the Forum:

As discussed above, prior to the landmark decision of *International Shoe v Washington*,<sup>133</sup> the lower courts found it particularly difficult to cope with the exhaustive dogma of *Pennoyer v Neff*<sup>134</sup> in relation to non-natural defendants. The

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<sup>128</sup> See, for example, *Warfield v KR Entertainment Inc (In Re Fed. Fountain Inc)* (1999) 165 F.3d 600 (8<sup>th</sup> Cir), p.610 and *SEC v Carrillo* (1997) 115 F.3d 1540 (11<sup>th</sup> Cir), pp.1543-4. See Lowenfeld, A, 'Nationalising International Law: Essays in Honour of Louis Henkin' (1997) 36 Colum. J. Transnat'l L.121, p.139, who argues for a 'national contacts' approach generally.

<sup>129</sup> (1945) 326 U.S. 310.

<sup>130</sup> The 'traditional bases' are residence, domicile, presence and consent according to *Pennoyer v Neff* (1877) 95 U.S. 714. See p.16 above.

<sup>131</sup> Consent to jurisdiction will be analysed under 'Specific Jurisdiction'. See pp.63-4 below

<sup>132</sup> (1977) 433 U.S. 186, p.212.

<sup>133</sup> (1945) 326 U.S. 310.

<sup>134</sup> (1877) 95 U.S. 714.



states and their courts developed distorted definitions of existing concepts inherent in the traditional bases to obtain a greater jurisdictional reach.<sup>135</sup> The most expansive of these was the ‘doing business’ doctrine.

The ‘doing business’ doctrine not only survived the ‘due process revolution’, it was actually confirmed in *International Shoe* itself.<sup>136</sup> However, the Supreme Court clarified that an assessment of the facts would be necessary in individual cases to ensure compliance with the two limbs of due process. Further, the Court expected the activities in the forum to be ‘systematic and continuous’ before the court could infer that ‘minimum contacts’ had been satisfied and the non-natural defendant could be regarded as present in the territory.<sup>137</sup> Consequently, non-natural defendants are entitled to the full protection of both limbs of due process even though this jurisdictional basis pre-dates *International Shoe*.<sup>138</sup>

#### 4.3.2. Jurisdiction Based on a Natural Defendant’s Presence in the Forum:

In *Burnham v Superior Court*<sup>139</sup> the Supreme Court considered whether jurisdiction exercised on the basis of a natural defendant’s presence in the forum is subject to the two-stage due process inquiry. In this case, the Court swept away with notions that the concept might, by its very nature, be inconsistent with due process. The Court stated:

*‘Nothing in International Shoe or the cases that have followed it...offers support for the...proposition...that a defendant’s presence in the forum is...no longer sufficient to establish jurisdiction.’*<sup>140</sup>

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<sup>135</sup> See pp.15-16 above.

<sup>136</sup> See p.17 above.

<sup>137</sup> N.133 above, p.317.

<sup>138</sup> Note that an individual acting in a business capacity may also be found to be ‘doing business’ in the forum and due process must be met in order for the exercise of jurisdiction to be constitutional. See, for example, *Core-Vent Corp v Nobel Industries AB* (1993) 11 F.3d 1482 (CA 9<sup>th</sup>).

<sup>139</sup> (1990) 110 S.Ct 2105.

<sup>140</sup> *Ibid*, p.2116.

Justice Scalia believed that, on account of its ‘historical pedigree’, jurisdiction established through the defendant’s presence in the forum would always be compliant with due process.<sup>141</sup> In contrast, Justice Brennan preferred the view that the defendant’s presence automatically satisfied the ‘minimum contacts’ limb but the facts of each case should be assessed according to the second limb of due process.<sup>142</sup>

Both camps in the Supreme Court were agreed that jurisdiction based on a natural defendant’s presence in the forum satisfied the ‘minimum contacts’ test. This effectively removes this limb from any analysis. As a result, the only protection offered to a natural defendant from litigating in a faraway and unfamiliar forum is the second limb of due process and even this protection is conditional upon Justice Brennan’s opinion representing the correct position. Nevertheless, Justice Brennan thought that the second limb would seldom interfere with this ‘traditional basis’ of jurisdiction. Further, as *Burger King v Rudewicz*<sup>143</sup> appears to have watered-down the effect of the second limb in a due process examination,<sup>144</sup> it offers little protection from suit to a natural defendant temporarily present in the forum. This is further exacerbated by the fact that, under the second limb, the burden of defending there is often ignored unless both parties are ‘aliens.’<sup>145</sup> Due process offers very little extra to this ‘traditional basis’ to that provided during the *Pennoyer v Neff* era, in contrast to the protection offered to a non-natural defendant.

#### 4.3.3. Jurisdiction Based on the Defendant’s Residence or Domicile in the Forum:

As discussed above, residence and domicile were acceptable grounds for the exercise of jurisdiction prior to *International Shoe v Washington*<sup>146</sup> and are still utilised by most states today.<sup>147</sup> However, it is not known whether these bases are immediately compliant with due process because of their ‘historical pedigree’, as

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<sup>141</sup> Ibid, p.2110-16.

<sup>142</sup> Ibid, pp.2124-5. The Court was split 4:4 with one Justice failing to decide either way.

<sup>143</sup> (1985) 471 U.S. 462.

<sup>144</sup> See pp.23-24 above.

<sup>145</sup> See pp.25-26 above.

<sup>146</sup> (1945) 326 U.S. 310. See pp.15-17 above.

<sup>147</sup> *Restatement of the Law Second: Conflict of Laws*, adopted by the American Law Institute (St Paul American Law Pubs, Washington DC) (1969) §30.

Justice Scalia suggested in *Burnham v Superior Court*<sup>148</sup> regarding jurisdiction based on the defendant's presence in the forum. Alternatively, following Justice Brennan's opinion in *Burnham*, these traditional bases of jurisdiction could be held to satisfy the 'minimum contacts' limb of due process but factual compliance with the second limb would still be required.<sup>149</sup> No Supreme Court case has confirmed the position but practise reveals that there is a presumption<sup>150</sup> that these jurisdictional bases are automatically compliant with due process, which can be rebutted by demonstration that the contacts are 'attenuated'.<sup>151</sup> This presumption may not, however, be the result of the 'historical pedigree' of the subject but rather on account of the fact that these jurisdictional grounds are, in reality, unlikely to offend due process at all. Residence and domicile ordinarily provide a significant defendant-forum connection, which should automatically satisfy the 'minimum contacts' limb. The second limb of due process should not be offended because the defendant is sued at 'home' and will not incur the burdens associated with defending in a foreign forum. Even if due process is applicable, the extent of its role in relation to these traditional bases is minimal and does not appear to alter the position of the parties within these jurisdictional rules.

#### 4.4 The Due Process Test in Operation:

As a result of the fact that due process involves deep factual inquiry, inconsistency in application is often found and this is further exasperated by the fact that the requirements of the two limb of due process, and their relationship to each other, have been inadequately defined by the Supreme Court. For example, purchase of products by the defendant in the forum seems to be insufficient for the purposes of the 'minimum contacts' test.<sup>152</sup> 'Purposeful availment' seems to require that the defendant 'benefit' from the activities within the forum and that jurisdiction there is necessary to prevent the non-present defendant gaining an 'unreserved competitive

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<sup>148</sup> (1990) 110 S.Ct 2105, p.2116.

<sup>149</sup> Ibid, p.2119-20.

<sup>150</sup> N.147 above.

<sup>151</sup> In light of the ability to rebut the presumption that jurisdiction based on residence complies with due process, it seems likely that the states do not regard Justice Scalia's 'historical pedigree' explanation in *Burnham* as the correct position concerning the 'traditional bases'. No rebuttal would be possible if due process were automatically satisfied.

<sup>152</sup> *Helicopteros Nacionales de Columbia SA v Hall* (1984) 466 US 408, p.418. This was so even though the helicopter pilots involved in the crash (the dispute concerning death resulting from that crash) were provided with training in the forum.

advantage' if it were permitted to escape the courts' jurisdictional reach.<sup>153</sup> Consequently, the sale of products in the forum will be sufficient where the sales are 'systematic and continuous'.<sup>154</sup> Drawing the line between those cases where the sales in the forum are sufficiently 'systematic and continuous' and those that are inadequate appears to be difficult. For example, in *Purde Pharma LP v Impax Labs Inc*,<sup>155</sup> sales amounting to 3.6% of the company's total profit in the forum meant that it could be regarded as 'doing business' in the forum but in *Injen Technology Co Ltd v Advanced Engine Management Inc*<sup>156</sup> receipt of 2% of the company's profits from the forum was insufficient. It appears that advertising in the forum may also satisfy the 'minimum contacts' limb and thereby result in the exercise of jurisdiction over the defendant on the basis of the 'doing business' doctrine, provided that the local forum is consistently and specifically targeted and the company benefits from this.<sup>157</sup>

The use of an agent, or the nomination of an agent, upon whom service of process can be made, in the forum may also be consistent with due process and thus the 'doing business' doctrine.<sup>158</sup> Although, some cases require 'control' of the agent before 'presence' will be imputed.<sup>159</sup> Some cases suggest that a subsidiary company present, or 'doing business', in the forum may also be regarded as an 'agent' of the non-present parent company<sup>160</sup> but others seem to require that a high degree of control is exercised over the subsidiary before the defendant is deemed to be 'present' through it.<sup>161</sup>

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<sup>153</sup> See, for example, *IDS Life Insurance Co v Sun America Life Insurance Co* (1998) 136 F.3d 537 (CA 7<sup>th</sup>), pp.540-51.

<sup>154</sup> See, for example, *Corry v CFM Majestic Inc* (1998) 16 F.Supp.2d 660 (DC Va).

<sup>155</sup> (2003) WL 22070549 (DC NY).

<sup>156</sup> (2003) 270 F.Supp.2d 1189 (DC Ca).

<sup>157</sup> *Gormond v Grand Casino of Louisiana Inc* (1998) 1 F.Supp.2d 656 (DC Tex).

<sup>158</sup> *Schwarz v National Van Lines Inc* (2004) 317 F.Supp.2d 829 (DC Ill). Although in *Reynolds and Reynolds Holdings Inc v Dara Supplies Inc* (2004) 301 F.Supp.2d 545 (DC Va) this was found to be insufficient.

<sup>159</sup> See, for example, *Polymers Inc v Ultra Flo Filtration System Inc* (1998) 33 F.Supp.2d 1008 (DC Fla).

<sup>160</sup> *SIG Air Holdings II LLC v Novartis International AG* (2003) 239 F.Supp.2d 1161 (DC Colo).

<sup>161</sup> See, for example, *Purdue Research Foundation Corp v Sanofi-Synthetics SA* (2003) 338 F.3d 773 (CA 7<sup>th</sup>).

#### 4.5. The United States' Federal Forum Non Conveniens Doctrine:

Unlike England's traditional rules, there is no one unitary, consistent forum non conveniens doctrine operating in the United States. Courts and states were free to develop and utilise a doctrine of forum non conveniens however they saw fit. In light of the sporadic and differential use of the doctrine, the Supreme Court attempted to set down one compulsory standard in the federal courts in *Gulf Oil v Gilbert*<sup>162</sup> and *Piper Aircraft v Reyno*.<sup>163</sup> However, this case law does not require the same of state courts, which are still capable of developing and amending their own forum non conveniens doctrines.<sup>164</sup> Some states have chosen to mimic closely the criteria provided for federal court dismissals<sup>165</sup> or have modified the doctrine.<sup>166</sup> The differences in application of the forum non conveniens doctrine in state courts causes controversy and uncertainty. A lack of consistency also makes it difficult to make a comparison with the approach of the English courts, despite the legal heritage shared by the two countries. For this reason, only the federal doctrine of forum non conveniens will be compared to the traditional rules of England.

The Supreme Court first gave the federal courts guidance concerning the forum non conveniens analysis in *Gulf Oil v Gilbert*.<sup>167</sup> This was further developed by the Supreme Court in *Piper Aircraft v Reyno*.<sup>168</sup> Under this approach, the first issue the federal court must consider is whether an adequate alternative forum

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<sup>162</sup> (1947) 330 U.S. 501.

<sup>163</sup> (1981) 454 U.S. 235.

<sup>164</sup> The federal forum non conveniens doctrine only operates where the alternative forum is outside the United States. This is because §1404(a) provides that there shall be a 'venue transfer' to another forum within the United States where it is more appropriate than the court seised. This only concerns transfers from one federal court to another in different jurisdictions. State courts are not involved in this procedure.

<sup>165</sup> More than half of the states in the United States have closely followed the Supreme Court's criteria. See Robertson, D, and Speck, P, 'Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Anti-Suit Injunctions', (1990) 68 Tex. L. Rev 937, p.940.

<sup>166</sup> For example, Florida permits such dismissals only in very limited circumstances. See Miller, L, 'Forum Non Conveniens and State Control of Foreign Plaintiff Access to U.S. Courts in International Tort Actions', (1991) 58 U. Chi. L. Rev 1369, pp.1373-4.

<sup>167</sup> N.162 above. This was a sister-state case but *Piper Aircraft v Reyno*, n.163 above, confirmed its application to 'alien' defendants.

<sup>168</sup> N.163 above.

exists.<sup>169</sup> If so, the ‘private interests’ explained in *Gulf Oil v Gilbert* should be analysed,<sup>170</sup> which include:

*‘[T]he relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises....and all other practical problems that make trial of any case easy, expeditious and inexpensive.’*<sup>171</sup>

Should this not be determinative as to whether a dismissal is appropriate, the court must then consider the ‘public interests’, which include:

*‘[T]he local interest in having localised controversies decided at home...the avoidance of unnecessary problems in the conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.’*<sup>172</sup>

Accordingly, unless the balance of the factors favours dismissal, the choice of forum by the claimant should not be disturbed.<sup>173</sup>

## **5. Which Interests Are Served by the Regulation of General Jurisdiction in the Manner Utilised by Each Regime?**

The exercise of general jurisdiction is, *prima facie*, claimant-orientated because a forum-shopping claimant is able to gain the advantages of that forum even where that forum has little, or no, connection to the dispute. This section will examine how the jurisdictional regimes operating in the United States, the Brussels

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<sup>169</sup> It appears from research that the court can consider the doctrine of its own motion; it is not dependent on the defendant pleading *forum non conveniens*. See Fawcett, J, *Declining Jurisdiction in Private International Law: Reports to the XIVth Congress of the International Academy of Comparative Law, Athens 1994* (Clarendon Press 1995) p.16.

<sup>170</sup> Confirmed in *Piper Aircraft v Reyno*, n.163 above, pp.242-44 and 255 (footnote 22).

<sup>171</sup> *Gulf Oil v Gilbert*, n.162 above, pp.508-9. This list is not exhaustive, merely illustrative.

<sup>172</sup> *Ibid.*

<sup>173</sup> *Ibid.*

Regime and under England's traditional rules respond to this. Do the three regimes attempt to restore the balance between the parties through their jurisdictional rules and, if so, how successful are they at achieving this?

### *5.1. The Brussels Regime:*

It is reasonable to assume that the defendant, whether natural or non-natural, can anticipate suit regarding any cause of action at the place where her connection to the forum is strongest, this being identified as the place of the defendant's domicile. Despite the fact that this rigid rule has no room for discretion and requires no connection between the cause of action and the forum, the defendant is not disadvantaged. This is because the defendant does not incur the cost or inconvenience of travelling to a foreign forum. Nor does the defendant incur additional costs on account of the need to prepare a defence in a foreign forum, with which the defendant is unlikely to be familiar. It seems that allocating general jurisdiction according to a strong geographic factor such as domicile results in the accommodation of the defendant's interests over and above the interests of both the claimant and any potential fora.<sup>174</sup> The claimant's interests in terms of the cost and inconvenience of having to travel to the defendant's home forum, rather than being able to bring the defendant to her, are discounted. Identifying domicile as the necessary factor for the exercise of general jurisdiction reduces many of the defendant's burdens and procures the conclusion that the Brussels Regime's approach in this respect is defendant-orientated.<sup>175</sup> Consequently, the claimant-favour resulting from the claimant's ability

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<sup>174</sup> Domicile is 'geographic' in nature because the defendant must have some physical contact with the forum at some time in order to be 'domiciled' there. It is a 'strong' factor because it requires physical contact that is more significant than, for example, presence. The definition of a non-natural entity's domicile reflects this by requiring that the forum be its 'principal place of business' or 'central administration'. This is also reflected in the definition of a natural person's domicile, as s.41 CJA 1982 provides that the defendant must have 'substantial' contact with that forum to be domiciled there.

<sup>175</sup> Apart from where 'domicile' of the defendant is established through the incorporation of the company in the forum. If the defendant has no further contact whatsoever with the forum, the burden on the defendant of litigating there is increased because the defendant is unfamiliar with the forum and the defendant's business is physically established elsewhere. See Kennett, W, 'Forum Non Conveniens in Europe' (1995) 54 CLJ 552, p.567. This provides a weak defendant-forum nexus and provides a claimant-orientated focus, which significantly alters the balance struck between the parties. However, in choosing to form the company there, the defendant is aware that it will be subject to the court's jurisdiction. As the defendant

to choose the venue coupled with the lack of dispute-forum nexus is counterbalanced. This produces a substantial balance between the parties.

## *5.2. The Traditional Rules of England:*

Even though, like the Brussels Regime, England's traditional rules require a physical connection between the forum and the defendant, the English courts have the capability to exercise jurisdiction in a much wider range of circumstances. This difference is a consequence of the utilisation of a geographic concept more relaxed in nature. The physical connector of 'presence' fails to ensure a substantial defendant-forum relationship and, as a connection between the forum and the cause of action may be lacking, the forum may have no interest whatsoever in hearing the dispute. Further, England's traditional rules show no signs of reducing the reach of general jurisdiction. As discussed above, the introduction of the Civil Procedure Rules resulted in the removal of the need for the claim form to be served at an 'established' place of business, thereby ensuring that jurisdiction is available in a wider range of circumstances.<sup>176</sup> On the basis of the above, England's traditional rules appear to be claimant-orientated because the extensive scope of jurisdiction assists a 'forum shopping' claimant.<sup>177</sup> However, this is merely one half of the story. The width of general jurisdiction is not controlled by the content of the provision, as is the case in the Brussels Regime, but through the doctrine of *forum non conveniens*. A true assessment of the interests served by England's traditional rules could not be ascertained without reference to this doctrine.

The doctrine of *forum non conveniens* plays a considerable role in countering the extensive reach of the courts' jurisdiction under the traditional rules. Where there is no dispute-forum connection, the courts are likely to decline jurisdiction unless there are other factors associated with England. For example, where a tortious injury has occurred abroad, there is a presumption of trial there unless there are significant

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effectively consents to jurisdiction, this exception should not affect the overall determination that the Brussels Regime provides a balance between the parties.

<sup>176</sup> See p.11 above.

<sup>177</sup> See pp.94-8 below for a discussion of the disadvantages of forum shopping.



factors pointing towards trial in England.<sup>178</sup> Further, where there is an insignificant defendant-forum nexus, the courts are likely to find forum non conveniens. This is especially true where both the parties have little connection with England.<sup>179</sup>

In reviewing all the factors in an attempt to find the ‘centre of gravity’ of the dispute, the forum non conveniens doctrine seeks to balance all the actors’ interests. The appropriate forum for trial directly benefits from this approach because it ordinarily provides the forum most closely connected to the dispute with the opportunity of hearing the case. Neither party can claim that it is unfairly disadvantaged by suit in the most appropriate forum. Although this may indirectly benefit one of the parties because, for example, that party lives in the forum where the tort occurred, this is not an intentional or automatic consequence. The objective is to send the dispute to the most appropriate forum so that neither party incurs additional costs, such as bringing witnesses or evidence to another forum. On this basis, it is fair to assume that the forum non conveniens doctrine is a ‘mixed’ approach towards jurisdiction, balancing all the actors’ interests and generally offsets the claimant-orientated approach of the general jurisdiction provision. On the other hand, one should bear in mind that the burden of showing a distinctly more appropriate forum elsewhere results in a presumption of trial in England and is detrimental to the defendant. This, combined with the fact that the claimant has ‘two bites at the cherry’,<sup>180</sup> slants the ‘mixed’ approach towards a resolution in the claimant’s favour.

In conclusion, it seems that the forum non conveniens doctrine does compensate for the claimant bias in the jurisdictional provisions to some degree. The overall approach of the traditional rules of England can perhaps be labelled as a ‘mixed’ approach’. As any of parties, or indeed the forum, may gain to the detriment of another at the courts’ discretion, the true character of England’s traditional rules is dependent entirely upon the facts of each case. The fact-specific nature of this approach is likely to produce a just, individual outcome but as a general rule it can be concluded that England’s traditional rules present a mixed approach with a ‘twist’ in the claimant’s favour.

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<sup>178</sup> See p.13 above.

<sup>179</sup> See pp.13-14 above.

<sup>180</sup> Clarkson, C, and Hill, J, *Jaffey on the Conflict of Laws* (Butterworths, 2<sup>nd</sup> ed, 2002) p.129.

### 5.3. The United States' Approach:

In the United States, the scope for the exercise of general jurisdiction is extensive because of the number of jurisdictional bases that may be applicable, which unpredictably vary from state to state. This clearly serves the claimant by providing multiple 'forum shopping' opportunities. However, due process considerations, which appear to be necessary in most cases,<sup>181</sup> and the federal doctrine of forum non conveniens affect the outcome.

#### 5.3.1. Whose Interests Does the 'Minimum Contacts' Limb Serve?

Brand argues that the 'minimum contacts' test is 'jurisdiction-defeating' in nature, designed to protect the defendant.<sup>182</sup> This is true if one has regard to the facts of *World-Wide Volkswagen v Woodson*,<sup>183</sup> where it was held that the exercise of jurisdiction was unconstitutional because the defendant had insufficient 'contacts' with the forum, even though the claimant was injured in the forum. However, 'minimum contacts' does not always serve the defendant well because it does not always limit the number of fora able to exercise general jurisdiction in the way that a physical defendant-forum relationship would.

Failure to clarify the role to be played by the term 'purposeful availment' in *Ashai Metal Industries v Superior Court of California*<sup>184</sup> has the potential to further remove protection offered to the defendant in the first limb of due process. If Justice Brennan's opinion in that case is the correct approach, the defendant need not have engaged in intentional economic 'contacts' with the forum. Accordingly, placing the product into the stream of commerce, aware that it may reach a particular forum, is sufficient. The effect of this is that, in some instances, foreign defendants with no office, or other presence, and doing no business, in the United States would be

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<sup>181</sup> The word 'most' is used here because jurisdictional bases in existence prior to *International Shoe v Washington* (1945) 326 U.S. 310 may be exempt from due process on account of their 'historical pedigree'. See p.29 above.

<sup>182</sup> Brand, R.A., 'Due Process, Jurisdiction and a Hague Judgments Convention' (1999) 60 U. Pitt. L. Rev 661, p.695.

<sup>183</sup> (1980) 444 U.S. 286.

<sup>184</sup> (1987) 480 U.S. 102.

amenable to suit in every state because the chain of distribution took the product into those fora and despite the defendant's lack of intention to serve those markets. This, of course, indirectly benefits the forum because the courts may hear a greater number of cases. The advantage is indirect because the forum may also have no connection to the litigants or dispute. The true beneficiary is the claimant, as it provides ample 'forum shopping' opportunities in which she can engage. Indeed, the 'minimum contacts' limb may be regarded as having role-reversed, giving paramount concern to the interests of the claimant, to the detriment of the defendant. This clearly does not correspond with the 'defendant-protective' label Brand attaches to the 'minimum contacts' test.

Should the courts approach the 'minimum contacts' test on the basis that purposeful conduct is needed to satisfy the 'minimum contacts' limb, the protection offered to the defendant would be heightened. Consequently, a forum with a legitimate interest in the dispute may be denied the opportunity to try the case. Furthermore, the advantages to the claimant would be severely reduced because it would be much more difficult to ascertain jurisdiction over 'alien' defendants.

As discussed above, it is likely that Justice Brennan's interpretation of the term 'purposeful availment' represents the correct position. This would therefore move the first limb of due process from a strict focus on the defendant's interests to a more relaxed one that may, in certain instances, become substantially weighted in the claimant's favour.<sup>185</sup>

### 5.3.2. The Second Limb: Whose Interests are Served?

A multitude of factors are considered when determining whether the assertion of jurisdiction complies with 'traditional notions of fair play and substantial

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<sup>185</sup> Rees argues that the focus on the defendant in the 'minimum contacts' inquiry denies the claimant 'due process' in Rees, R, 'Plaintiff Due Process Rights in Assertions of Personal Jurisdiction' (2003) 78 N.Y.U.L. Rev. 405, pp.405-07. This suggestion ignores the fact that, although not expressly mentioned in the 'minimum contacts' test, its definition often provides the claimant with multiple forum shopping opportunities.

justice'.<sup>186</sup> This limb of due process essentially reduces down to a weighing of the three, often competing, interests of the two parties and the forum.

One could argue that this approach is truly a 'mixed' approach, the outcome being fact-specific because the three vested interests are weighed in a similar manner to the English forum non conveniens doctrine. However, as explained previously, in *Burger King v Rudewicz*<sup>187</sup> the Supreme Court effectively introduced a consideration of the claimant's interests twice where she is a resident of the forum. This change of emphasis means that a resident claimant's interests often dominate the second limb.

It should be remembered that in *Burger King* the Supreme Court made it clear that a 'presumptive approach' may be taken, finding jurisdiction constitutional on satisfaction of the 'minimum contacts' test alone. This 'presumptive approach' means that the second limb will rarely interfere with the assertion of jurisdiction. This consequently causes the interests of the claimant and the forum to dominate the second limb of due process. The need for the defendant to present a 'compelling case' as to why these interests should be disturbed strengthens this conclusion further and warrants the determination that the second limb offers the defendant little protection from suit.

The second limb cannot truly be regarded as 'mixed'. It can be labelled as 'mixed' because it may consider all three vested interests at the same time but its nature is not 'mixed', as it does not engage in attempting to find any balance between these competing interests. It is dominated by the claimant's concerns, followed by the interests of the forum.

#### 5.3.2(a) *Ashai Metal Industries: Special Protection for Alien Defendants:*

As mentioned previously, it is possible that *Ashai Metal Industries* advocates a different weighing of the facts under the second limb of due process where the defendant is 'alien'.<sup>188</sup> If this is the case, the natural gravitation towards the claimant

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<sup>186</sup> See *World-Wide Volkswagen v Woodson* (1980) 444 U.S. 286, p.292.

<sup>187</sup> (1985) 471 U.S. 462. See pp.24-25 above.

<sup>188</sup> See pp.25-27 above.

explained in preceding sections does not prevail. The approach is arguably more 'mixed' in character, as the claimant's interests are still considered twice where she is a resident of the forum but the status of the defendant provides the defendant with greater weight in the interest-balancing process. The only loser in such a situation is the forum, as its weighting remains the same.

However, as argued earlier, the better view is that *Ashai Metal Industries* should not be read as establishing special protection for 'alien' defendants.<sup>189</sup> *Ashai Metal Industries* is an illustration that due process does involve deep factual inquiry and that sometimes the facts can justify a result contrary to the norm but this is likely to be a rare occurrence. Parrish's research confirms this, concluding that the second limb offers little assistance to 'alien' defendants when the 'minimum contacts' test has been satisfied.<sup>190</sup> As a result, the only possible conclusion that can be reached here is that this limb of due process significantly favours the claimant over the defendant, regardless of whether the defendant is an 'alien', although this prioritising of the claimant is often even greater where she is a resident of the forum.

### 5.3.3. If the 'Traditional Bases' are Not Required to Meet Due Process Notions, Whose Interests Are Served?

If the 'traditional bases' of presence, residence and domicile are not required to satisfy due process, the defendant is not protected by the requirements of the 'minimum contacts' limb. As the 'doing business' doctrine is not exempt from due process considerations,<sup>191</sup> only a natural defendant will feel the implications of this.

Jurisdiction based on the defendant's presence in the forum, without a consideration of due process, would undoubtedly be claimant-orientated in nature. There would be no protection for the defendant whatsoever, except for jurisdiction being restricted to the actual physical presence of the defendant. As there is no guarantee that this jurisdictional ground will bring to the forum a cause of action with

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<sup>189</sup> See p.26 above.

<sup>190</sup> Parrish, A, 'Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants' (2006) 41 Wake Forest L. Rev. 1, pp.21-24.

<sup>191</sup> See pp.28-30 above.

which it has a substantial affiliation, the only benefit the forum will gain from this non-applicability of due process is an increase in judicial business. Thus the true benefactor of such an approach is the claimant.

Residence and domicile, however, are a different matter. Provided that the concepts of residence and domicile are not based on an insignificant or trivial period in the forum, a defendant-forum nexus is inherent within these jurisdictional bases. It is fair to assume that the defendant faces few burdens in being sued, regardless of the cause of action, in her place of residence or domicile. This does not substantially benefit a claimant who wishes to forum shop or pursue an action in her home forum unless the defendant has more than one residence or domicile. The forum is also indirectly served by being able to adjudicate disputes concerning one of its residents or domiciliaries. However, the true winner is the defendant. One can conclude that, by their very nature, these jurisdictional grounds are defendant-orientated. It therefore seems that the defendant is not disadvantaged by the potential lack of role for due process in relation to these 'traditional bases' of jurisdiction, although this is certainly not the case as far as jurisdiction based on the defendant's presence is concerned.

#### **5.3.4. The Impact of the Federal Doctrine of Forum Non Conveniens on Litigation:**

As discussed above, the doctrine of forum non conveniens operating under England's traditional rules can be labelled a 'mixed approach', although there is some gravitation towards the claimant in some respects and this can affect the protection offered to the defendant against the excessive width of general jurisdiction. This section will compare the federal forum non covneniens operating in the United States with its equivalent under England's traditional rules. An examination of their differences will enable an assessment to be made as to the extent the doctrine impacts upon the positions of the parties before the United States' federal courts.

#### 5.3.4(a) *The Effect of the 'Public Interest' Factors on the Parties' Positions:*

Federal courts are obliged to consider 'public interests' if consideration of the 'private interests' does not lead to a decisive conclusion.<sup>192</sup> In *Lubbe v Cape* Lord Bingham stressed that England's forum non conveniens doctrine does not mirror the United States' federal doctrine in this respect.<sup>193</sup> This is not strictly accurate. Similarities are evident. For example, federal courts consider the advantage of having 'localised controversies decided at home'.<sup>194</sup> Taking a tortious injury as an example, the English courts would place great emphasis on the need for the dispute to be resolved at the place where the injury was sustained. Therefore, the English courts are seeking to ensure that the 'local' forum, connected to the dispute through its direct connection to the cause of action, hears the case. The English courts also consider 'localisation' from the parties' perspectives. If both parties were English residents, the court may be convinced to proceed to trial even though the injury occurred abroad.<sup>195</sup> The more 'domestic' the facts, the more keen the English courts will be to hear the case. Issues that stem from localisation are an inherent part of the weighing process of the English forum non conveniens doctrine. In this respect, the parties' positions are similar under both doctrines.

The federal forum non conveniens doctrine also includes the reasonableness of imposing jury duty on the citizens of that state.<sup>196</sup> Jury trials are only available for defamation suits in England, thus jury duty does not impact upon British citizens and, as a result, this is not a concern of the English courts.<sup>197</sup> This means that the claimant's choice of forum is more likely to be upheld under the English forum non conveniens doctrine, whereas the federal doctrine shields the defendant.

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<sup>192</sup> See pp.33-4 above.

<sup>193</sup> [2000] 1 WLR 1545, p.1561.

<sup>194</sup> See p.34 above.

<sup>195</sup> Provided that the trial in England would not be unduly difficult or expensive as a result.

<sup>196</sup> See p.34 above.

<sup>197</sup> Fawcett argues that jury duty is a necessary 'public interest' factor because the width of jurisdiction in the United States brings a significant amount of 'forum shopping' claimants. Thus when the connection to the United States is based upon such activity, the imposition of jury duty on citizens is distasteful. See *Declining Jurisdiction in Private International Law Report to the XIVth Congress of the International Academy of Comparative Law, Athens, 1994* (Clarendon Press, 1995) p.20

Considerations of ‘public interests’ under the federal doctrine also include ‘administrative ease’, which enables the courts to have regard to their caseload. This is primarily because the United States’ courts are overwhelmed with cases due to the benefits obtained from suit there.<sup>198</sup> In contrast, the English courts do not consider whether they are overburdened with litigation. In rare circumstances the English courts will consider whether the appropriate forum can adequately deliver justice in light of its excessive caseload.<sup>199</sup> As such considerations feature rarely in the English courts’ forum non conveniens evaluation, and they are never self-reflective, the claimant is much more likely to secure trial in England than in the United States.<sup>200</sup> It is also apparent that the federal forum non conveniens doctrine considers issues other than those that identify the strength of the forum’s relationship to the cause of action and the litigants and the impact a forum non conveniens determination may have on the parties’ access to justice.

#### *5.3.4(b) Discrimination in the United States where the Claimant is not a Resident of the Forum: How Does this Impact on the Position of the Parties?*

England’s forum non conveniens doctrine does not openly discriminate against foreign claimants. Residence of the parties is just one of the relevant considerations.<sup>201</sup> Under the United States’ federal forum non conveniens doctrine, the reverse is true. The Supreme Court has openly admitted that a foreign claimant’s choice of forum should be given less deference than a ‘domestic’ claimant’s choice.<sup>202</sup> It appears that this discriminatory approach has disturbed the balance within the federal forum non conveniens test, shifting the focus from ‘rarely disturbing’ the

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<sup>198</sup> Including, inter alia, high damages and excellent pre-trial discovery rules. See pp.93-6 below.

<sup>199</sup> See p.34 above. The United States’ courts also consider delay in the foreign forum but this is part of determining the ‘adequacy’ of the alternative forum. See pp.45-47 below.

<sup>200</sup> Nico labels the forum non conveniens doctrine a quick ‘docket-clearing device’ in ‘From Local to Global: Reform of Forum Non Conveniens Needed to Ensure Justice in the Era of Globalisation’ (2005) 11 Sw. J.L. & Trade Am. 345, p.350.

<sup>201</sup> See pp.12-13 above.

<sup>202</sup> *Piper Aircraft Co v Reyno* (1981) 454 U.S. 235, pp.255-6. Some federal courts take a ‘sliding scale’ approach so that the less ‘contacts’ a foreign claimant has with the forum, the less emphasis is placed on her choice. This is obviously not as harsh as the *Piper Aircraft* decision but still demonstrates defendant-bias and claimant-discrimination. See *Iragorri v United Techs Corp* (2003) 285 F.Supp. 2d 230 (D.Comm) and *Pollux Holding Ltd v Chase Manhattan Bank* 329 F.3d 64 (2d Cir).



claimant's choice to readily disregarding it where the claimant is not a resident of the forum. This factor clearly operates in a defendant-protective manner in the right circumstances.

#### *5.3.4(c) The Appropriateness of the Alternative Forum:*

Under the English forum non conveniens doctrine, it is essential that the defendant convince the court that the alternative forum is 'distinctly more appropriate' than the English courts.<sup>203</sup> Similarly, in *Gulf Oil v Gilbert* the Supreme Court stressed that jurisdiction should only be dismissed in 'exceptional circumstances',<sup>204</sup> and that the balance had to be 'strongly in favour of the defendant',<sup>205</sup> indicating a strong presumption of trial at the claimant's choice of venue. However, the requirements of the federal forum non conveniens doctrine evolved and now it seems that the defendant need only establish upon the balance of probabilities that the alternative forum is more appropriate.<sup>206</sup> Although this distinction may seem small, it has the potential to cause great impact upon the parties' positions. This is because the much higher burden of proof required by the English forum non conveniens doctrine results in a greater likelihood of trial in England than in the United States' federal courts. This means that the English doctrine is more advantageous to the claimant.

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<sup>203</sup> See pp.12-13 above.

<sup>204</sup> *Gulf Oil v Gilbert* (1947) 330 U.S. 501, p.504.

<sup>205</sup> *Ibid*, p.508.

<sup>206</sup> For example, in *Aguinda v Texaco* (2001) 142 F.Supp.2d 534 (S.D.N.Y), p.544 the court decided that 'more factors than not' indicated Ecuador was appropriate for trial. In light of this recent tendency for operating on a 'balance of probabilities', it seems that the principle of deference to the claimant's choice of forum has little influence in practice. There is some suggestion in federal case law that where the defendant is a 'home defendant' from the forum state, the indications that the foreign forum is more appropriate must be substantial. See, for example, *Reid-Walen v Hansen* (1991) 933 F.2d 1390 (8<sup>th</sup> Cir), pp.1395-6. It is unclear whether this rule applies where the claimant is not a resident. If a 'home defendant' faces a heavier burden of proof than the 'balance of probabilities' test, this would favour the claimant.

5.3.4(d) *The Claimant's Two Bites at the Cherry under England's Forum Non Conveniens Doctrine: How Does This Compare to the Federal Doctrine?*

The English doctrine of forum non conveniens permits the claimant 'two bites at the cherry' through its two-stage analysis of the facts. Even though a more appropriate forum exists, a stay may nevertheless be refused if the claimant can adduce evidence that it would be contrary to justice to stay the proceedings.<sup>207</sup> The United States' federal doctrine does not take this formulaic approach in its forum non conveniens assessment but recent practise reveals that the federal doctrine does make such considerations a necessary part of the inquiry. The federal courts consider such matters when determining whether an alternative 'adequate' forum exists.<sup>208</sup> Considerations include, for example, substantial delay<sup>209</sup> and bias of the alternative forum's judiciary.<sup>210</sup> Just like the English courts,<sup>211</sup> the federal courts are also reluctant to rule on the adequacy of the alternative forum unless substantial evidence supporting this exists.<sup>212</sup>

Under England's forum non conveniens doctrine, the claimant must ordinarily take the forum as she finds it. A reduction in the amount of damages available or the loss of other similar personal or juridical advantages should be discounted unless the disadvantages to the claimant are so severe that she would be deprived of justice.<sup>213</sup> Similarly, under the federal forum non conveniens doctrine, a forum is 'adequate' when the parties 'will not be deprived of all remedies or treated unfairly even though they may not enjoy the same benefits as they might receive in an American court.'<sup>214</sup> Taking a change in the applicable law, which may alter the amount of damages available, as an example, the Supreme Court stressed in *Piper Aircraft v Reyno* that the remedy available in the foreign forum must be 'so clearly inadequate or

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<sup>207</sup> See pp.14-15 above.

<sup>208</sup> *Torres v Southern Peru Copper Corporation* (1996) 965 F. Supp. 899 (S.D. Tex), p.902. This is considered before the 'private' and 'public' interests.

<sup>209</sup> *Bhatnagar v Surrendra Overseas Ltd* (1995) 52 F.3d 1220 (3d Cir), p.1228.

<sup>210</sup> See *Cabiri v Assasie-Gymiah* (1996) 921 F. Supp. 1189 (S.D.N.Y) and *Rasoulzadeh v Associated Press* (1983) 574 F. Supp. 854 (S.D.N.Y).

<sup>211</sup> See p.15 above.

<sup>212</sup> *Leon v Millon Air Inc* (2001) 251 F.3d 1305 (11<sup>th</sup> Cir), p.1312 and *Aguinda v Texaco Inc* (2002) 303 F.3d 470 (2d Cir), p.478.

<sup>213</sup> See p.14 above.

<sup>214</sup> *Torres v Southern Peru Copper Corporation*, n.208 above, p.902. See also *Piper Aircraft*, n.202 above, pp.254-5.

unsatisfactory that is no remedy at all' before it may impact upon the evaluation.<sup>215</sup> The same is true under the English doctrine.<sup>216</sup> It seems that, in these respects, the difference between the two doctrines is one of technicality rather than content.

However, two distinct differences do exist. The first is that the English forum non conveniens doctrine will refuse to stay proceedings if the claimant proves that the damages available in the foreign forum are wholly inadequate.<sup>217</sup> In contrast, the Supreme Court said in *Piper Aircraft v Reyno* that unjust changes in the applicable law should only be given 'substantial weight' as a factor in the forum non conveniens evaluation.<sup>218</sup> A refusal to dismiss does not necessarily result under the federal doctrine, as the outcome depends on the other factors analysed. In this respect, the traditional rules of England are more claimant-protective. However, this seems to be unique to changes in the substantive law because other factors, such as severe delay can only result in a refusal to dismiss the action. Although the federal case law is not as extensive as the English courts' guidance on what amounts to an 'inadequate' forum, it is apparent that there is significant correlation between the two doctrines.

A second, and important, distinction can be identified. Under the federal forum non conveniens doctrine the defendant must prove that the alternative forum can be deemed 'adequate' whereas the English doctrine requires the claimant to prove that foreign forum is inadequate to such an extent that justice will be denied. On this basis, the English doctrine steers more towards the defendant because it presumes the alternative forum is adequate.

#### *5.3.4(e) Federal Dismissals v. English Stays: Does this Provide Additional Advantages to a Party?*

The English courts will stay proceedings on a finding of forum non conveniens. This provides the English courts with the possibility of lifting the stay should, for some reason, the claimant find that suit in the more appropriate forum is

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<sup>215</sup> (1981) 454 U.S. 235, pp.247 and 254.

<sup>216</sup> See pp.14-15 above.

<sup>217</sup> Ibid.

<sup>218</sup> N.202 above, pp.254-5.

impossible. In comparison, dismissal of the action normally results in the United States' federal courts. However, the defendant may be required to give several undertakings relating to suit in the alternative forum.<sup>219</sup> These are often designed to take into account the fact that suit may be more difficult abroad than in the claimant's chosen venue. For example, the defendant may undertake not to raise any issues concerning a statute of limitations in the foreign forum<sup>220</sup> or question the foreign forum's jurisdiction.<sup>221</sup> The federal courts may also require the defendant's agreement to move straight to an assessment of damages in the foreign forum.<sup>222</sup>

Taken to its logical conclusion, this may represent claimant-bias and a cunning claimant, armed with a conditional dismissal from the United States' courts, may be able to proceed straight to damages in the more appropriate forum, which might not have found in her favour if she had originally commenced suit there. Aiming to provide the claimant with a replica trial in the appropriate forum not only infringes principles of comity but, more importantly, gives the claimant all the advantages of forum shopping she sought. It also means that the federal courts' insistence that the claimant take the foreign forum as she finds it<sup>223</sup> is inaccurate. The claimant is compensated for many of the disadvantages of suit in the appropriate forum through the 'conditions' the federal courts may impose. By generally denying the claimant the ability to complain about the personal and juridical advantages she would have obtained in England, the English forum non conveniens doctrine operates in a defendant-orientated manner. The capability of the federal courts to provide wide-ranging conditional dismissals leaves the scales severely tipping in the claimant's favour under the guise of a dismissal in favour of the defendant.

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<sup>219</sup> See Bies, J, 'Conditioning Forum Non Conveniens', (2000) 67 U. Chi. L. Rev 489 for a full discussion of conditional dismissals.

<sup>220</sup> See *Mercier v Sheraton International Inc* (1992) 981 F.2d. 1345 (1<sup>st</sup> Cir.) p.1352.

<sup>221</sup> See *El-Fadl v Central Bank of Jordan* (1996) 75 F.3d. 668 (DC Cir). The English courts may also require the defendant to undertake that she will submit to the foreign forum before the proceedings will be stayed. See Merrett, L, 'Uncertainties in the First Limb of *The Spiliada* Test' (2005) 54 ICLQ 211, p. 218. In *The Spiliada* [1987] AC 460, pp.483-4, it was stated that where the limitation period had expired in the appropriate forum, a stay should not ordinarily be granted unless the defendant undertakes to waive this in the foreign proceedings. Although this demonstrates they are utilised, undertakings are rare and appear only to be required in limited circumstances. In contrast, they are available in vast range of circumstances in the federal courts.

<sup>222</sup> See *Pain v United Technologies Corp* (1980) 637 F.2d 775 (DC Cir).

<sup>223</sup> In *Torres v Southern Peru Copper Corp* and *Piper Aircraft v Reyno*, see n.214 above.

#### *5.3.4(f) Conclusion: How Do the Two Doctrines Compare in their Treatment of the Parties?*

There are many similarities between the two doctrines but divergences on important issues do exist. The federal doctrine's consideration of 'public interest' factors may procure significantly different results to the English courts, creating a defendant-bias. This bias in the federal courts is heightened by a laxer burden of proof, particularly where the claimant is foreign. The English doctrine primarily searches for the most administratively convenient place for the trial, in the hope that such a location will not disadvantage either party but this is not the guiding principle of the federal *forum non conveniens* doctrine. The defendant-protective manner in which the federal doctrine operates illustrates that counteracting the width of the courts' jurisdictional reach is the predominant concern. Viewed in this manner, the federal doctrine could be said to be seeking to find balance between the parties by negating the claimant-focus of its jurisdictional approach with defendant-bias. However, this conclusion is qualified by the fact that the federal doctrine re-establishes claimant-bias through providing the claimant with conditional dismissals in a wide range of circumstances.

#### *5.4 Conclusion:*

Due process is a two-stage inquiry and both stages advocate a consideration of different interests. The first limb of due process is labelled as 'defendant-protective', but it is likely that *Ashai Metal Industries* eroded some of this protection. This limb of due process fails to counter the fact that jurisdiction is likely to be available to the claimant in numerous fora under various differing general jurisdiction provisions. Any dominance of the defendant's concerns inherent in 'minimum contacts' is further counteracted by the dominance of the claimant in the second limb. The second limb of due process is predominantly claimant-orientated, the defendant's interests being the least favoured in all but the most exceptional cases. Considerations of the forum's interest appears to operate so as to help gravitate the second limb in the claimant's favour, under the guise of being an independent concern.

Notwithstanding the fact that each party has a limb of due process that falls in their favour, the party most likely to lose this battle is the defendant. This is particularly the case in relation to jurisdiction based on a natural defendant's presence in the forum, where it is likely that due process does not affect the outcome at all. The fact that jurisdiction may be available on the basis of the defendant's 'economic contacts' with the forum is not counteracted by the due process test. This 'magnitude of contacts' approach provides much wider scope for the exercise of jurisdiction than under both England's traditional rules and the Brussels Regime, which utilise geographic connecting factors that are, by their very nature, more restrictive. The due process doctrine is often unsuccessful in protecting the defendant from 'forum shopping claimants'. This is predominantly the result of the fact that the 'minimum contacts' test is defined by the parameters of the 'doing business' doctrine. As there is no additional hurdle to overcome, the reach of the 'magnitude of contacts' approach within this jurisdictional basis is often not reduced.

The only jurisdictional bases that compensate for the claimant-bias inherent in general jurisdiction are those founded on the defendant's residence or domicile in the territory, which provides the defendant with the benefit of suit at home. Curiously, despite due process, and particularly the 'minimum contacts' test, being labelled as a defendant-protective mechanism, due process is not the reason for the defendant-bias in these rules. Due process is either inapplicable to these 'traditional bases' or it fails to add anything because a significant defendant-forum relationship is inherent within these jurisdictional bases. This demonstrates that, as far as the United States is concerned, reducing the width of the provision through its content, rather than through an independent constitutional test, is the most successful method of balancing the respective position of the parties.

Upon review, the approach of the United States towards the exercise of general jurisdiction is 'mixed' in nature. The 'minimum contacts' limb attempts to be defendant-protective but this is unsuccessful in reducing the claimant-focus of its general jurisdiction provisions. The forum non conveniens doctrine tends to favour the defendant. The benefit to the defendant is, however, mitigated by the courts' ability to impose conditional dismissals on the defendant, which arguably pulls the balance of interests back towards being 'mixed' in nature. This 'mixed' approach,

which is very fact-specific, can serve any number of interests and sometimes counteracts to some extent the scope of the court's jurisdiction but it is inefficient at doing so, requiring two secondary doctrines to achieve this.<sup>224</sup>

Of the two common law regimes, it seems that the preference for dismissal inherent in the United States' federal doctrine is more defendant-protective in nature. This results in the conclusion that the approach of the United States is a double-edged sword of defendant-protection and claimant favouritism. Despite the willingness of the federal courts to dismiss an action on *forum non conveniens* grounds, England's traditional rules are generally more successful at protecting the defendant from wide-ranging jurisdiction than the United States' approach because the inherent restrictions in the concept of 'presence' deny claimants access to the forum that the jurisdictional bases of the United States would, at the very least, entertain. The Brussels Regime still reigns in terms of defendant-protection on account of its predictability for all concerned but primarily because its restrictive approach towards the necessary connecting factor that establishes jurisdiction ensures that general jurisdiction is available in a very narrow range of circumstances.

## **6. The Regulation of Specific Jurisdiction:**

Specific jurisdiction is, by its very nature, more restrictive than general jurisdiction because it requires a connection of some kind between the forum and the dispute. The precise details of each regime will be discussed below. This will be followed by a comparison of the differences in the scope of, and the interests served by, the regulation of specific jurisdiction in each regime.

### **6.1. *The Brussels Regime:***

The Brussels Regime's paramount provision provides for general jurisdiction at the place of the defendant's domicile. In recognition of the fact that there may be many instances in which the connection between the forum and the cause of action

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<sup>224</sup> 'Secondary doctrines' are not contained within the provision providing jurisdiction but are designed to reduce jurisdictional width.

may be significant, the Brussels Regime allocates specific jurisdiction to the courts, despite a weaker defendant-forum nexus. Such rules are derogations from the general rule and are therefore interpreted restrictively.<sup>225</sup>

#### 6.1.1. Jurisdiction Regarding a Contractual Issue:

Provided the cause of action can be characterised as contractual in nature,<sup>226</sup> the claimant may sue in the courts of the country where the place of performance of the obligation in question was, or was due to be, performed.<sup>227</sup> Article 5(1)(b) of the Brussels Regulation clarifies that, as regards the sale of goods or provision of services, the performance of the obligation in question takes place in the country where the goods or services were, or should have been, provided.<sup>228</sup> If, for any reason, Article 5(1)(b) does not apply, then the court should revert to the ‘principal obligation’ approach under Article 5(1)(a).<sup>229</sup>

#### 6.1.2. Specific Jurisdiction Regarding a Tortious Issue:

If the action is classified as tortious, Article 5(3) of the Brussels Regulation provides the courts of the place where the harmful event occurred, or may occur in the future, with jurisdiction. The place where the act giving rise to the effects took place also has jurisdiction.<sup>230</sup> Regarding libel actions, where the newspaper was distributed in more than one forum, the claimant is restricted in each forum of injury to

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<sup>225</sup> C-198/87 *Kalfelis v Bakhaus Schroder, Munchmeyer, Hengst & Co* [1988] ECR 5565.

<sup>226</sup> *Kalfelis*, *ibid*, provides a definition for contractual and tortious actions. An action can only be classified as either tortious or contractual, not both. How national law classifies the cause of action is irrelevant, as they are autonomous concepts. According to C-26/91 *Jakob Handte & Co GmbH v Traitements Mecano-chimiques des Surfaces SA* [1992] ECR-I 3967, para 15, a contractual dispute involves a freely assumed obligation by one party towards the other.

<sup>227</sup> Art.5(1)(a). The ‘relevant obligation’ is normally the obligation that is the subject of the suit. See C-288/92 *Custom Made Commercial Ltd v Stawa Metallbau GmbH* [1994] ECR I-2913. If there is more than one obligation, the predominant obligation should be used, according to C-266/85 *Shenavai v Kreischer* [1987] ECR 239.

<sup>228</sup> This provision presupposes that the parties failed to nominate a place of performance. If the parties have nominated a place, those courts have jurisdiction. See C-56/79 *Zelger v Salinitri* [1980] ECR 89. If, however, the place nominated by the parties has no connection whatsoever to the contract, this is to be regarded as a jurisdiction agreement and therefore subject to the requirements of such agreements. See p.53 below for jurisdiction agreements.

<sup>229</sup> Art.5(1)(c).

<sup>230</sup> This provision implemented the ECJ’s decision in C-21/76 *Handelskwekerij GJ Bier BV v Minesd’Alsace SA* [1976] ECR 1735 into the Brussels Regulation.



recovering for the loss of damage to her reputation in that particular forum. The claimant's loss in its entirety may only be recovered in the forum where the publisher is established, as the forum of the event giving rise to the damage.<sup>231</sup>

#### 6.1.3. Specific Jurisdiction Regarding the Activities of a Branch, Agency or Other Establishment:

Article 5(5) of the Brussels Regulation states that the claimant may pursue an action in the place where the defendant's branch, agency or other establishment is situated provided that the dispute arises out of the operations of that branch, agency or other establishment. The branch, agency or other establishment must be subject to the control of the principal and be able to contract with third parties on its principal's behalf. Furthermore, the relevant premises must have a degree of permanency to fall within this provision.<sup>232</sup>

#### 6.1.4. Multiple defendants:

The Brussels Regime regards it as administratively advisable to consolidate claims against multiple defendants into one action. Under Article 6(1) the claimant may pursue all the defendants in any forum where just one of them is domiciled. This provides the claimant with a large range of fora from which to choose where the defendants are all from different member states.<sup>233</sup> This provision is restricted by the need for claims to be 'so closely connected' that it is 'expedient to hear and determine them together' so to avoid irreconcilable judgments, which are likely to emanate from multiple proceedings.<sup>234</sup>

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<sup>231</sup> C-68/93 *Shevill v Press Alliance SA* [1995] ECR I-415. Of course the claimant may also recover for the full amount at the defendant's place of domicile, as it provides the courts with general jurisdiction.

<sup>232</sup> C-14/76 *Ets A de Bloos SPRL v Societe en commandite par actions Bouyer* [1976] ECR 1497. A parent company may appear to be acting for one of its subsidiaries. Consequently, it may be regarded as a 'branch' of one of its subsidiaries. See C-218/86 *SAR Schotte GmbH v Parfums Rothschild SARL* [1987] ECR 4905.

<sup>233</sup> If proceedings have been commenced against a non-EU domiciliary a defendant domiciled in a member state may not be joined to those proceedings. See C-51/97 *Reunion Europeenne SA v Spieltoff's Bevechtungskantoor BV* [1998] ECR I-6511, para.46. Similar rules apply for third party claims and counterclaims, see Articles 6(2) and (3).

<sup>234</sup> Art.6(1). To avoid claimants exploiting this provision a claimant cannot join a defendant unless the claimant has an arguable case on the merits against the first defendant. See *The*

### 6.1.5. Jurisdiction Clauses:

Provided that one of the parties is domiciled in a member state, an agreement between the parties to confer jurisdiction on the courts of a particular member state must be respected by both the member state upon which jurisdiction is conferred as well as other member states, even if they would have jurisdiction under one of the Regime's other jurisdictional provisions.<sup>235</sup> If neither party is domiciled in a member state the clause may be overridden but this may only be done after the nominated forum has had the opportunity to decline jurisdiction and has done so.<sup>236</sup> Agreements conferring jurisdiction on two different member states are acceptable and effective<sup>237</sup> but the prorogation of jurisdiction is presumed to be exclusive unless otherwise stated in the agreement.

The jurisdiction agreement, to have the effect anticipated under Article 23, must comply with certain formalities. The agreement must be either in writing or evidenced in writing;<sup>238</sup> or alternatively, is in accordance with a practice the parties have established between themselves;<sup>239</sup> or accords with the usage regularly observed in that particular international trade or commerce of which the parties were, or should have been, aware.<sup>240</sup> If the jurisdiction agreement is contained in standard terms on the back of a written contract, the text of the signed contract must make reference to the clause for it to be valid.<sup>241</sup> Whether the jurisdiction clause would be valid under national law is irrelevant.<sup>242</sup> Similarly, if the agreement in which the jurisdiction clause is contained is invalid, this does not necessarily mean that the jurisdiction

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*Xing Su Hai* [1995] 2 Lloyd's Rep 15. Different types of actions, such as tort and contract, are not sufficiently close to warrant the joining of a defendant, according to *Reunion Europeenne*, n.233 above.

<sup>235</sup> Article 23(1).

<sup>236</sup> Art.23(3).

<sup>237</sup> C-23/78 *Meeth v Glacetal Sarl* [1978] ECR 2133.

<sup>238</sup> Art.23(1)(a). Communication by electronic means, which provides a 'durable record of the agreement', is regarded as 'writing' under Article 23(2).

<sup>239</sup> Art.23(1)(b).

<sup>240</sup> Art.23(1)(c).

<sup>241</sup> See C-24/76 *Colzano v Růwa* [1976] ECR 1831. See also Case C-159/97 *Trasporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpi SpA* [1999] ECR I-1517.

<sup>242</sup> C-150/80 *Elefanten Schuh GmbH v Jacqmain* [1981] ECR 1671 and C-25/79 *Sanicentral GmbH v Collin* [1979] ECR 3423 and C-269/95 *Benincasa v Dentalkit Srl* [1997] ECR I-3767.

clause is ineffective.<sup>243</sup> Provided all the necessary elements above are complied with, the member state nominated has jurisdiction to determine any issues that have arisen, or may arise, between the parties in relation to the particular legal relationship upon which agreement was made.

#### 6.1.6. Submission:

Article 24 of the Brussels Regulation provides the court before which the defendant enters an appearance with jurisdiction regardless of the dispute involved and whether any other forum has jurisdiction.<sup>244</sup> Accordingly, a defendant will not be regarded as having submitted to the courts' jurisdiction where the defendant makes an appearance to contest the courts' jurisdiction, even if the defendant provides a defence on the merits in the alternative, provided that the claimant and the court is able to ascertain from the outset that the defendant wished to contest jurisdiction.<sup>245</sup>

### 6.2. *The Traditional Rules of England:*

Where a defendant is not present in the forum<sup>246</sup> and has not submitted to the courts' jurisdiction,<sup>247</sup> the courts may permit the claimant to serve a claim form on the defendant abroad. The English courts approach this ability with caution. In *Seaconsar Far East Ltd v Bank Markazi Jomhuri Islami Iran*, the House of Lords specified that several requirements must be met before permission to serve the claim form out of the jurisdiction would be granted.<sup>248</sup> First, it is essential that the claimant demonstrate to the court that there is a 'serious issue to be tried' on the merits. It is therefore essential that the facts reveal a foundation for a cause of action.<sup>249</sup> The claimant must provide written evidence that the claim has a reasonable prospect of

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<sup>243</sup> *Benincasa v Dentalkit*, *ibid*.

<sup>244</sup> Submission does not override Article 22, which provides that where proceedings have as their object rights in rem in immovable property or tenancies of immovable property, the courts where the property is situated shall have exclusive jurisdiction.

<sup>245</sup> See *Elefanten Schuh*, n.242 above.

<sup>246</sup> Presence founds general jurisdiction, see pp.9-10 above.

<sup>247</sup> Submission will be considered below, p.58.

<sup>248</sup> [1994] 1 AC 438. (These requirements are now also in CPR 6.21(1)(a) – (c)).

<sup>249</sup> *Ibid*, p.452. There must be a substantial question of fact or law to be resolved.

success.<sup>250</sup> The claimant must then show that there is a good arguable case that the cause of action fits within one of the ‘paragraphs’<sup>251</sup> contained in the Civil Procedure Rules,<sup>252</sup> which provide the basis upon which service out of the jurisdiction may be made. And, finally, the claimant must convince the court that it is the forum conveniens for the action.

### 6.2.1. The Headings under which the Cause of Action Must Fall:

As Lord Goff has stated,<sup>253</sup> the available headings under which the claimant’s action may fall vary a great deal in nature and scope. As such, the willingness of the courts to permit service out of jurisdiction will differ considerably, depending on the heading relied upon by the claimant.

The paragraphs of primary concern in relation to this chapter are those providing jurisdiction in relation to contractual issues, tortious issues, multiple defendants, submission and jurisdiction clauses. It is these jurisdictional bases that will be contrasted with the regulation of specific jurisdiction under the Brussels Regime and the United States’ system.<sup>254</sup>

#### 6.2.1(a) CPR 6.20(5): Jurisdiction Based on a Contractual Issue:

Service out of jurisdiction may be permitted where the claim is made in respect of a contract which was either: made within the jurisdiction;<sup>255</sup> made by an agent trading or residing in the jurisdiction;<sup>256</sup> is governed by English law;<sup>257</sup> contains a jurisdiction agreement in favour of the English courts;<sup>258</sup> involves a claim in respect

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<sup>250</sup> Ibid.

<sup>251</sup> Also referred to as ‘headings’ throughout this chapter.

<sup>252</sup> See CPR 6.21(1)(a).

<sup>253</sup> *The Spiliada* [1987] AC 460, p.481 (stated in relation to Order 11, the predecessor of the Civil Procedure Rules but equally applicable here).

<sup>254</sup> Other heads under which the claimant can seek service out of jurisdiction include claims about trusts; claims by the Inland Revenue; claims for a costs order in favour or against third parties under CPR 6.20(11) to (18). These headings are not within the scope of this thesis.

<sup>255</sup> CPR 6.20(5)(a).

<sup>256</sup> CPR 6.20(5)(b).

<sup>257</sup> CPR 6.20(5)(c).

<sup>258</sup> CPR 6.20(5)(d).

of a breach of contract committed within the forum;<sup>259</sup> or the claimant seeks a declaration that no contract exists provided that, if the contract did exist, it would comply with the conditions set out in CPR 6.20(5).<sup>260</sup>

It is sufficient that the contract was made in England but later amended elsewhere.<sup>261</sup> An agent need not have entered into the contract in the forum on behalf of its principal to invoke the application of this paragraph.<sup>262</sup>

*6.2.1(b) CPR 6.20(8): Jurisdiction Based on a Tortious Issue:*

Under CPR 6.20(8) a claim form can be served abroad where damage was sustained within the jurisdiction or where damage sustained elsewhere resulted from an omission or act committed within the jurisdiction.<sup>263</sup> It is not essential that the claimant show that all the damage was sustained in the forum, just that some significant damage was sustained therein.<sup>264</sup> If trying to establish jurisdiction based on an act within the forum, the claimant need only demonstrate that substantial acts have been committed there.<sup>265</sup> Indirect damage, such as financial loss, in the forum is sufficient for the purposes of this provision.<sup>266</sup>

*6.2.1(c) CPR 6.20(3): Multiple Defendants:*

Where the first defendant has been properly served with a claim form (or will be served), the claimant can seek the court's permission to serve a claim form on a foreign defendant out of the jurisdiction if she can establish that there is a real issue between the claimant and the first defendant to be tried and the second defendant is a

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<sup>259</sup> CPR 6.20(6).

<sup>260</sup> CPR 6.20(7).

<sup>261</sup> *BP Exploration Co (Libya) Ltd v Hunt* [1976] 1 WLR 788 (decided prior to the introduction of CPR but is equally applicable here).

<sup>262</sup> *National Mortgage and Agency Co of New Zealand Ltd v Gosselin* (1922) 38 TLR 832. Again this case can be assumed to represent the position as regards CPR. This is the case even if the agent does not have the principal's authority to enter into a contractual relationship.

<sup>263</sup> CPR 6.20(8)(a) and (b) respectively.

<sup>264</sup> *Metall und Rohstoff AG v Donald Lufkin and Jenrette Inc* [1988] 3 All ER 116.

<sup>265</sup> *Ibid.*

<sup>266</sup> *Booth v Phillips* [2004] 1 WLR 3292. Accordingly, damage should be given its 'natural meaning'.

‘proper party’ to the claim,<sup>267</sup> even if ordinarily jurisdiction would be unavailable over that defendant.<sup>268</sup>

### 6.2.2. The Doctrine of Forum Conveniens: Its Role in Granting Permission to Serve Claim Forms Out of the Jurisdiction:

The final requirement specified in *Seaconsar* is that the claimant must show that England is the ‘proper place’ in which to bring the claim.<sup>269</sup> This involves the claimant demonstrating that England is the forum conveniens, or in other words the appropriate and natural forum, for the action.<sup>270</sup> Should the claimant be unable to establish this, the court will refuse permission to serve the claim form abroad.

Apart from a reversal of the burden of proof, the forum conveniens doctrine is almost identical to the forum non conveniens doctrine, which controls general jurisdiction.<sup>271</sup> Just like forum non conveniens, the court must consider all the facts in order to determine the forum most appropriate for the dispute. It should be noted, however, that the strength of the obligation on the claimant to prove forum conveniens is different to the defendant’s forum non conveniens plea. The claimant must show that England is *the* natural forum for the dispute, whereas forum non conveniens only requires the existence of a forum more appropriate for the action than England. It is thus more difficult to convince the court that it is the forum conveniens than to successfully plead forum non conveniens.<sup>272</sup>

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<sup>267</sup> The proceedings against the defendant must be bona fide, not commenced for the sole purpose of joining the second defendant to the proceedings. See *The Berge Sisar* [2001] Lloyd’s Rep 663.

<sup>268</sup> Under CPR 6.20(3A), the court may also permit service out of the jurisdiction if a party wishes to add a third party to the proceedings.

<sup>269</sup> [1994] 1 AC 438. The defendant is absent from this process.

<sup>270</sup> *The Spiliada*, n.253 above, p.481. Where there is no alternative forum available, provided the first two requirements are met, service out of jurisdiction should normally be granted.

<sup>271</sup> See pp.13-15 above.

<sup>272</sup> In relation to multiple party suits, there is a strong dislike for service out of jurisdiction on account of the lack of connection between the forum and the parties and also, usually, the cause of action and the forum. See *Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd* [1983] Ch 258.

The ‘two bites of the cherry’ principle also operates in relation to the doctrine of forum conveniens.<sup>273</sup> Even if the claimant is unable to show that England is the natural forum, she still has the opportunity to convince the court, with evidence, that justice cannot be attained abroad and, as such, the matter should be brought within the English courts’ jurisdiction.

### 6.2.3. Jurisdiction Based on the ‘Consent’ of the Defendant: Through Submission or Jurisdiction Clause:

It has been consistently held under England’s traditional rules that appearing before the English courts merely to contest jurisdiction does not amount to submission.<sup>274</sup> The defendant is deemed to have submitted to the courts’ jurisdiction if she does not contest jurisdiction.<sup>275</sup> A defendant may also submit to the courts’ jurisdiction by providing the address of a solicitor instructed to accept service on behalf of the defendant.<sup>276</sup>

The parties can agree that the English courts have jurisdiction to determine any dispute arising between them, even if the forum has no connection to the dispute or the parties. This consent to jurisdiction will be regarded as submission provided that the parties have specified the method by which the claim form is to be served.<sup>277</sup> If no method of service is provided, the courts must consider whether to allow service of the claim form outside the jurisdiction, under CPR 6.20(5),<sup>278</sup> which authorises jurisdiction on the basis of a choice of court agreement. A consideration of the doctrine of forum conveniens must then follow before permission is granted. Cases such as *The Chaparral*<sup>279</sup> illustrate that the English courts are keen to hold the parties to their bargain. As a result, failure to specify a service method for the claim form is seldom fatal to the trial being held in England.

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<sup>273</sup> See pp.14-15 above.

<sup>274</sup> *Williams and Glyn’s Bank Plc v Astro Dinamico Cia Naveria SA* [1984] 1 All ER 760.

<sup>275</sup> CPR 11.4.

<sup>276</sup> CPR 6.4(2).

<sup>277</sup> CPR 6.15. If the parties have specified the method for the service of the claim form, the defendant may make an application to the court to stay proceedings on the grounds of forum non conveniens but the courts are unlikely to stay proceedings.

<sup>278</sup> If the defendant were present in the jurisdiction, service there would provide general jurisdiction.

<sup>279</sup> [1968] 2 Lloyd’s Rep 158.

Such provisions concerning submission by the defendant only operate where the Brussels Regime does not. Thus, such rules are only operative where the dispute is not a civil or commercial matter or where neither party is domiciled in an EU member state. This means that the scope for operation of these rules concerning agreements to submit is very narrow.

### *6.3. The Regulation of Specific Jurisdiction in the United States:*

The courts in the United States must engage in a two-stage approach before jurisdiction may be exercised. The first is to determine whether state statutes provide the court with jurisdiction in the relevant circumstances. Then the court must entertain due process notions in order to determine whether the exercise of jurisdiction would be constitutional.

In the United States, there are three principal methods by which the states have prescribed jurisdiction.<sup>280</sup> The first method involves the state enacting a detailed code-like provision, which provides the specific circumstances that must be met for the court to be provided with statutory jurisdiction.<sup>281</sup> The second method is for the state briefly and vaguely to detail the specific instances in which the courts would be provided with jurisdiction. Thirdly, the state may provide that its state courts are entitled to assert jurisdiction to the extent permitted by the due process clause.<sup>282</sup> The first and second category may result in the facts of a case not falling within the scope of the statutory provisions, regardless of due process implications. On the other hand, the third method will always provide adjudicatory jurisdiction provided that due process requirements are met.<sup>283</sup> Examples of specific jurisdictional provisions commonly found in state statutes are detailed below.

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<sup>280</sup> More do exist but only the three most common are discussed here.

<sup>281</sup> See, for example, New York's Civil Practice Laws and Procedure Rules.

<sup>282</sup> California takes this approach. See Cal. Civ. Proc. Code § 410.10.

<sup>283</sup> Some states have taken a mixed approach of providing a list of jurisdictional bases combined with a 'default clause' of permitting jurisdiction to the full extent permitted by due process.



### 6.3.1. Tort and Contract Jurisdiction:

Most statutes listing a catalogue of bases upon which the state courts may exercise jurisdiction provide for jurisdiction in the forum when the tortious act was committed, or injury sustained, within its borders.<sup>284</sup> Statutes failing to provide jurisdiction where injury is sustained in the forum but the tortious act is committed outside it are normally interpreted to include this.<sup>285</sup>

The ‘little sister’ of the ‘doing business’ doctrine, known as the ‘transacting business’ doctrine, is also utilised by some state legislatures. Under this approach, the non-present defendant may be sued in the forum provided she was engaged in activities there and the dispute arises out of those activities.<sup>286</sup> Where the tortious injury occurred is thus irrelevant. The advertising of a defective product in the forum, for example, may be sufficient to provide the courts with jurisdiction over the non-present defendant under the doctrine.<sup>287</sup> The ‘transacting business’ doctrine is even more extensively used in relation to contractual disputes.<sup>288</sup> This could typically provide jurisdiction over a defendant who has entered into a sales contract in the forum with the claimant, provided the dispute arises out of that contract.

However, just as general jurisdiction is limited by due process considerations, so too is specific jurisdiction. Thus the defendant’s ‘contacts’ with the forum must be ‘systematic and continuous’ enough that the suit does not ‘offend traditional notions of fair play and substantial justice’.<sup>289</sup> It should also be remembered that, based on the development of due process since *International Shoe v Washington*,<sup>290</sup> satisfaction

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<sup>284</sup> See, for example, the Uniform Interstate and International Procedure Act, §1.03(3), which was adopted by several states in the United States.

<sup>285</sup> In *Gray v American Radiator & Standard Sanitary Corp* (1961) 22 Ill 2d 432, for example, the jurisdictional statute was interpreted to include injury in the forum, even though the negligent manufacture occurred outside the state.

<sup>286</sup> The courts are thus provided with specific, rather than general, jurisdiction.

<sup>287</sup> *Sigros v Walt Disney World Co* (2001) 129 F.Supp.2d (DC Mass).

<sup>288</sup> An example of this can be found in New York where §302(3)(i) of the Civil Practice Laws and Procedure Rules, which states that the court may exercise jurisdiction over a non-domiciliary that ‘regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state.’

<sup>289</sup> See p.17 above.

<sup>290</sup> (1945) 326 U.S. 310.

of the requirement of ‘purposeful availment’ in the ‘minimum contacts’ limb is also necessary.<sup>291</sup>

However, in relation to specific jurisdiction, weaker ‘contacts’ with the forum are normally acceptable because the nature of specific jurisdiction limits the courts’ jurisdiction.<sup>292</sup> Where the claimant utilises the ‘transacting business’ doctrine, the defendant is likely to have the necessary pre-litigation contacts with the forum because this ground for jurisdiction requires the defendant to have engaged in business in that forum that led in some way to the suit.<sup>293</sup> It is unclear what nature, scope and frequency of contacts are required to satisfy due process where specific jurisdiction is exercised. All that is clear is that it is easier to establish specific jurisdiction than general jurisdiction. A single, isolated act may be sufficient for the ‘minimum contacts’ limb but this is not absolute, as it depends on the facts.<sup>294</sup> The ‘contacts’ with the forum must still be sufficient so that the defendant can reasonably anticipate litigation there, as is the case with general jurisdiction.<sup>295</sup>

The court must then ensure that the suit does not offend traditional notions of fair play and substantial justice. As discussed above, this often adds little to the jurisdictional inquiry<sup>296</sup> and, as jurisdiction is based on specific jurisdiction, it can be presumed that the burden on the defendant is justifiable. The forum’s interest under this analysis may also be stronger than where general jurisdiction is asserted because of its relationship with the cause of action, justifying suit there. Some courts view the burden of litigation in the forum as more substantial where the non-present defendant is an individual rather than a company.<sup>297</sup> Thus the second limb may prevent the exercise of jurisdiction if it would be unfair to the natural defendant in the

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<sup>291</sup> See pp.21-22 above.

<sup>292</sup> *Helicopteros Nacionales de Columbia SA v Hall* (1984) 466 U.S 408, pp.415-416.

<sup>293</sup> Although if jurisdiction is based on, for example, the claimant’s injury in the forum then the defendant may not have the necessary pre-litigation ‘contacts’, thereby preventing the courts exercising jurisdiction over the defendant.

<sup>294</sup> *Burger King v Rudzewicz* (1985) 471 U.S. 462. See also *Marsin Medical International Inc v Bauharia Ltd* (1996) 948 F.Supp. 180 (DCNY).

<sup>295</sup> *Ex Parte Puccio* (2005) WL 2175449 (Ala)

<sup>296</sup> See pp.23-25 above.

<sup>297</sup> *Miller Press Factory Inc of Puerto Rico v Douglas* (1974) 385 F.Supp 874 (DC Puerto Rico).

circumstances although this has not been explored by case law in any great depth. Such interference with due process is therefore likely to be a rare occurrence.

Cases in the lower courts reveal that negotiation of a contract in the forum may be sufficient for both the 'transacting business' doctrine and due process limitations provided that the contract advanced the commercial relationship between the parties.<sup>298</sup> Some courts have insisted upon negotiation coupled with further weak 'contacts' such as further correspondence or telephone contact with the other party in the forum.<sup>299</sup> Concluding a contract in the forum may also be sufficient.<sup>300</sup>

#### 6.3.2. Consent to Jurisdiction: Through Submission or Jurisdiction Agreement:

Even if the court could not ordinarily assert jurisdiction over the defendant because the due process test was not met, the court may still do so if the defendant 'waives' this right to due process by voluntary appearance before the court.<sup>301</sup> Under federal law the defendant does not submit to the jurisdiction of a federal court if the defendant files an objection to jurisdiction but also enters a defence on the merits.<sup>302</sup>

In relation to jurisdiction agreements, O'Hara notes that courts in the United States have 'moved from nearly universal non-enforcement of these clauses to fairly uniform enforcement.'<sup>303</sup> This is largely the result of *The Bremen v Zapata Off-Shore Co.*,<sup>304</sup> which was later confirmed by the Supreme Court in *Carnival Cruise Lines Inc v Shute*.<sup>305</sup> In *Carnival Cruise v Shute* a jurisdiction clause contained in a contract between a consumer and the defendant, which had not been negotiated, was upheld. Borchers notes that a 'forum selection clause [has the] effect of preventing any party

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<sup>298</sup> *SAS Group Inc v Worldwide Inventions Inc* (2003) 269 F.Supp. 2d 543 (DC NY).

<sup>299</sup> *Levisohn, Lerner, Berger and Langsam v Medical Taping Systems Inc* (1998) 10 F.Supp.2d 334 (DCNY).

<sup>300</sup> *ALTA Analytics Inc v Muiss* (1999) 75 F.Supp.2d 562 (DC Va).

<sup>301</sup> *Insurance Corporation of Ireland Ltd v Compagnie des Bauxities de Guinee* (1982) 456 U.S. 694.

<sup>302</sup> Federal Rules of Civil Procedure, §12(b).

<sup>303</sup> O'Hara, E, 'The Jurisprudence and Politics of Forum Selection Clauses', (2002) 3 Chi. J. Int'l L. 301, p.302.

<sup>304</sup> (1972) 407 U.S. 1.

<sup>305</sup> (1991) 499 U.S. 585.

from suing in any forum besides [that specified],<sup>306</sup> requiring any other court seised to dismiss on forum non conveniens grounds.<sup>307</sup>

There are some apparent limitations on the ability of parties to conclude a valid choice of court agreement. Inequality of bargaining power is, however, irrelevant to the validity of the clause.<sup>308</sup> In *The Bremen* the Supreme Court suggested that a jurisdiction agreement could be held invalid where it was 'so gravely difficult and inconvenient' that a party would be deprived of justice.<sup>309</sup> It is not clear whether the later case of *Carnival Cruise Lines* has altered this approach towards jurisdiction agreements. It appears that 'if the party seeking enforcement [of the clause] had some cogent reason for choosing the contractual forum at the time that the contract was formed, the choice will be honoured.'<sup>310</sup> Indeed, many of the lower courts appear to reject any 'inconvenience' arguments concerning the forum nominated in the contract.<sup>311</sup> It is also clear that the invalidity of a contract will not necessarily invalidate the jurisdiction agreement.<sup>312</sup>

#### *6.4. The Regulation of Specific Jurisdiction: The United States vs. the Brussels Regime and England's Traditional Rules:*

This section of the chapter will compare the provisions of each of the three regimes examined in the preceding section in order to determine the extent to which the content, scope and ideals pursued by each regime vary.

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<sup>306</sup> Borchers, P, 'Forum Selection Agreements in the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform', (1992) 67 Wash. L. Rev 55, p.78.

<sup>307</sup> It appears that some courts presume jurisdiction agreements non-exclusive unless expressly stated. See, for example, *Hull 753 Corp v Elbe Fitzzeugwerke GmbH* (1999) 58 F.Supp.2d 925 (ND Ill).

<sup>308</sup> In *National Equipment Rental Ltd v Szukhent* (1964) 375 U.S. 311, the Supreme Court held that the nomination of an 'agent' in a contract upon whom the claimant was entitled to serve the defendant with notice of process conferred jurisdiction upon the forum. This was so even though the defendant had no knowledge of the clause.

<sup>309</sup> N.304 above, pp.12 and 18.

<sup>310</sup> Borchers, n.306 above, p.91.

<sup>311</sup> Ibid. Although others do consider convenience and justice arguments. See, for example, *Investors Guaranty Fund Ltd v Compass Bank* (2000) 779 So.2d 185 (Ala Supreme Court).

<sup>312</sup> Borchers, n.306 above, p.91.

#### 6.4.1. Tort Jurisdiction:

It seems, *prima facie*, that England's traditional rules can be said to mimic closely the scope of the Brussels Regime, as both provide suit at the place of commission and the place of injury. These allocations of jurisdiction provide very little protection for the defendant. Where the act and injury occur in different places, nothing prevents the claimant's choice between the two fora. This assists the claimant. Further, no additional connection between the defendant and forum is required. For example, jurisdiction may be available where the injury was sustained even though the defendant has never been physically present there. In such circumstances, the forum's only connection to the dispute is a forum-cause of action nexus. It is fair to say, however, that an indirect beneficial interest to both parties exists because there will be a reduction in evidentiary costs and inconvenience at the location of the injury. However, this allocation of jurisdiction appears to be primarily designed to accommodate the interest of the forum resulting from its close proximity to the cause of action.

As England's traditional rules merely require that indirect damage be sustained in the forum, the traditional rules are wider in operation in this respect. However, the English courts may not regard themselves as the *forum conveniens* for the dispute where indirect damage is the only connection to the forum. The traditional rules would appear to be similar to the Brussels Regime, although this is achieved through the doctrine of *forum conveniens* rather than through the content of the jurisdictional provision. Should the courts, in rare cases, hold that indirect damage is sufficient to found jurisdiction, the forum's connection to the cause of action is weaker. This benefits the claimant further as jurisdiction becomes more expansive. As long as the courts require other substantial connections to the forum to satisfy the *forum conveniens* doctrine, this apparent weakening of the forum-dispute connection is unlikely often to be substantially beneficial to claimants. As a consequence, the traditional rules cannot be regarded as substantially more claimant-biased than the Brussels Regime in this regard.

It should be noted that England's traditional rules have the potential to operate more narrowly than the Brussels Regime because considerations of *forum conveniens*

may convince the court to refuse service of the claim form out of jurisdiction even where the Brussels Regime would provide jurisdiction. This is likely to be a rarity though, as the courts ordinarily presume England is the forum conveniens when the act was committed, or the injury was sustained, in the territory.<sup>313</sup> In practice there seems to be little between the two regimes.

Professor Brand believes jurisdiction in tortious disputes is narrower in the United States than under the Brussels Regime and uses the facts of *World-Wide Volkswagen v Woodson*<sup>314</sup> to justify this conclusion.<sup>315</sup> In this case, the claimant purchased a car in his home state but then drove it through Oklahoma where it was involved in a car accident. Due to an alleged default in manufacture, the car blew up when hit from behind. On the facts, the ‘unilateral act’ of the claimant taking the product to the forum did not satisfy ‘minimum contacts’ limb of due process. The Brussels Regime, in contrast, would permit specific jurisdiction at the place of injury.

Prima facie, it appears that Brand is correct. Brand also argues that the decision to restrict tortious jurisdiction in the Brussels Regime to the place of direct injury illustrates that the ECJ recognised that tortious jurisdiction should be as limited as possible because it does not insist on a defendant-forum nexus.<sup>316</sup>

It is submitted that the approach of the United States is not as restrictive as it first seems or, indeed, as Brand suggests. Although it is true that due process may operate in a protectionist manner to deprive the court of jurisdiction where the defendant has little contact with the forum, due process is an inconsistent defendant-protective mechanism, especially where the defendant engages in multi-state business. Ignoring the implications of general jurisdiction, suppose that the claimant purchases a defective product in forum A and is injured in forum B. The claimant lives in forum C, where she suffers indirect injury, through the inability to work. The defendant engages in economic activity in every state but manufactured the defective product in

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<sup>313</sup> *Cordoba Shipping Co Ltd v National State Bank, Elizabeth, New Jersey, The Albaforth* [1984] 2 Lloyd's Rep 91, p.96.

<sup>314</sup> (1980) 44 U.S. 289.

<sup>315</sup> Brand, R, ‘Due Process, Jurisdiction and a Hague Judgments Convention’ (1999) 60 U. Pitt. L. Rev 661, p.695.

<sup>316</sup> Brand, R, ‘Tort Jurisdiction in a Multilateral Convention: The Lessons of the Due Process Clause and the Brussels Convention’ (1998) 24 Brook. J. Int'l L 125, p.153.

forum D. The fora open to the claimant under the Brussels Regime would be B and D.<sup>317</sup> The claimant's residence, forum C, is irrelevant and the place of purchase of the product, forum A, is also unavailable. Under the traditional rules of England, forum D and B would also have jurisdiction. Forum C, the claimant's residence and place of indirect injury, could exercise specific jurisdiction. Under the approach of the United States, the issue turns on the defendant's contacts with the forum. Assuming the defendant's multi-state business provides the necessary 'minimum contacts', states B, C and D would be able to assert jurisdiction just as is possibly the case under England's traditional rules. However, state A may also have jurisdiction under the 'transacting business' doctrine because the cause of action arose out of the activities of the defendant, the selling of the product, in that forum.<sup>318</sup> The United States' approach towards specific jurisdiction can sometimes be wider than the Brussels Regime despite requiring the forum to have a relationship with both the dispute and the defendant. The facts are everything to the conclusion as to which has the greatest scope, on account of the fact-dependent nature of due process.

In the United States, unlike the other two regimes, the defendant's interests are still essential in the jurisdictional inquiry. The 'transacting business' doctrine, however, is able to provide greater forum shopping opportunities than the limited scope of the provisions under the Brussels Regime and England's traditional rules. This benefits the claimant, although the fact that the cause of action must arise out of the activities of the defendant in the forum negates to a degree the potential effect of only requiring an economic connection to the forum. This apparent claimant-focus also serves the forum, which arguably has an interest in regulating economic activity in the forum that is connected to a tortious dispute. It seems fair to say that the alleged defendant-protective mechanism of due process is substantially negated by the scope of the transacting business doctrine. The inevitable consequence of this is that it assists the claimant to a greater degree than the defendant. As a result, the United States' regime, which is self-declared to be defendant-protective, is often wider in

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<sup>317</sup> This example presupposes that the claimant is not a 'consumer' for the purposes of the Brussels Regulation, which provides jurisdiction at the claimant's home state in most instances. See Articles 15-17.

<sup>318</sup> See, for example, *Williamson v Petroleum Helicopters Inc* (1998) 31 F.Supp.2d 548 (DC.Tex, 5<sup>th</sup> Cir).

operation than the Brussels Regime and England's traditional rules, both of which, ironically, do not set out to serve this purpose in the same way as the United States.

#### 6.4.2. Contractual Jurisdiction:

As seen above, there are several different methods by which a court may ascertain jurisdiction over a contractual dispute under England's traditional rules.<sup>319</sup> In order to make a fair comparison, several of those bases will be examined below.

##### *6.4.2(a) Which Regimes Provide for Jurisdiction at the Place of Negotiation or Conclusion of the Contract?*

An illustration here will help reveal the differences and similarities between the three regimes. Assume, for example, that the defendant has its principal place of business in state A and negotiates a contract with the claimant in state B. The defendant later enters into the agreement in state C, where the claimant has its principal place of business. The goods are to be delivered to the claimant's manufacturing plant in state D. The defendant has no offices, and has conducted no business, in forum B or C before. The claimant wishes to sue the defendant for breach of contract in failing to deliver the goods but wishes to sue in its home state for convenience.<sup>320</sup> Would the courts of state C be able to exercise jurisdiction over the defendant?

In the United States the answer would be yes, provided that state C's statute provided for jurisdiction on the basis of a 'single isolated act' in the forum under the 'transacting business' doctrine.<sup>321</sup> In the example outlined, the dispute (breach of contract) arises out of the activities in the forum. As the contract was entered into in the forum, the 'minimum contacts' test should be satisfied because fewer substantial 'contacts' are needed where specific jurisdiction is exercised. The court would then have to decide whether the requirements of the second limb of due process are met. The claimant is a 'resident' of the forum and, according to *Burger King v Rudzewicz*

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<sup>319</sup> See p.56-59 above.

<sup>320</sup> This example ignores the potential exercise of general jurisdiction.

<sup>321</sup> See pp.60-2 above.



should be given 'double weighting'. Further, the 'presumptive approach' also means that, unless the defendant can put forward a compelling case as to why this should be rebutted, jurisdiction is likely to be regarded as constitutional.<sup>322</sup>

Assuming that England is now the forum wishing to exercise jurisdiction over the defendant, under CPR 6.20(5)(a) the court could grant permission to the claimant to serve the defendant with a claim form abroad on the basis of the conclusion of the contract in the forum. The court would then weigh the relevant facts in order to ensure that England was the 'natural forum' for the dispute. The claimant's place of business in the territory, coupled with the conclusion of the contract in the forum, may convince the court to permit service out of the jurisdiction. In direct contrast with the approach of the United States and the traditional rules of England, the Brussels Regime would not permit suit in the forum where the contract was concluded. Jurisdiction would only be available at the place of performance, state D, under the Brussels Regime.

Under both common law regimes the conclusion of the contract in the forum provides the court with a preliminary presumption that it has jurisdiction, which may only be rebutted by the secondary doctrines of due process and forum conveniens. As they are fact-dependent, they will not always adequately protect the defendant. It does, however, seem fair to say that jurisdiction is more likely to be assumed in the United States than in England. This is because there is a significant claimant-bias in the second limb of due process. The doctrine of forum conveniens, although difficult to predict, does add to the jurisdictional inquiry. The burden on the claimant to demonstrate forum conveniens is likely to be more effective in denying litigation in these circumstances than due process.

As regards the interest of the forum in regulating the dispute where the contract was concluded within its borders, one could argue that this should be seen as equivalent to a forum's interest in a dispute where the tortious act was committed, or the injury sustained, therein. However, this argument is blinkered. The tortious act or injury in the territory constitutes the actual cause of action, whereas the conclusion of

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<sup>322</sup> As discussed above, pp.19-20.

the contract in the forum, unless the parties are arguing about whether the contract exists, is not the direct cause of the suit between the litigants. As this is a causal link away from the issue between the parties, the place where the conclusion of the contract took place has a weaker interest in hearing the case.

The forum's interest in the dispute is even weaker where its sole connection to the dispute is that it was the place of negotiation of the contract. The Brussels Regime denies access to such a forum. The assertion of jurisdiction under England's traditional rules is also quite unlikely unless further connections to the forum exist. Such jurisdiction would not be available in the United States either because negotiations alone are insufficient to meet satisfy the 'minimum contacts' limb of due process.<sup>323</sup> However, if one were to suppose that the negotiation and conclusion of the contract took place in the same state, both England's traditional rules and the United States' system may permit the exercise of jurisdiction based on an aggregation of several of the connecting factors. Jurisdiction is perhaps more likely to be acceptable in the United States because the type and nature of contacts the defendant has, particularly where specific jurisdiction is concerned, is not a primary concern. In the absence of other factors that indicate England is the 'natural forum' for the dispute, the English courts are unlikely to be willing to exercise jurisdiction.

Article 5(1) of the Brussels Regime aims to allocate jurisdiction only to the forum most closely connected to the cause of action itself. The approaches of England's traditional rules and the United States can sometimes operate so as to serve fora with weaker interests because they are not preoccupied with the dispute-fora connection in the same manner as the Brussels Regime. This truly benefits the claimant because she has the opportunity to utilise these jurisdictional bases to her advantage.

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<sup>323</sup> Although negotiations and the conclusion of the contract in the same state may provide that forum with specific jurisdiction. See *Sky Valley Ltd Partnership v ATX Sky Valley Ltd* (1991) 776 F.Supp. 1271 (D.C.Ill, 7<sup>th</sup> Cir).

#### 6.4.2(b) *The Law of the Forum Applies to the Dispute: A Base for Jurisdiction?*

In *Hanson v Denckla*, the Supreme Court of the United States suggested that the fact that the law of the forum applied to the dispute was insufficient to satisfy the ‘minimum contacts’ limb of due process in isolation.<sup>324</sup> The Brussels Regime, as discussed above, gives no weighting to such factors. Such jurisdiction is a ‘heading’ under the Civil Procedure Rules, however.<sup>325</sup> However, unless concerns of English public policy are invoked in relation to the contract or the forum has further connections to the dispute, the English courts will ordinarily regard themselves as a *forum non conveniens*.

This would produce the same defendant-protective result as that encountered in the United States, although through the different method of the ‘forum conveniens hurdle’ rather than the ‘minimum contacts hurdle’. Overall the regimes appear to be in agreement that the possibilities for exploitation under this jurisdictional basis are too extensive to permit jurisdiction to be founded on this basis alone. This is because the forum has a weaker nexus to the dispute and the claimant can exploit this substantially.

#### 6.4.2(c) *The Place of Performance:*

In the United States jurisdiction over the defendant on the basis of a failure to deliver, or defective delivery, would probably fail to satisfy the ‘minimum contacts’ test.<sup>326</sup> In contrast, this forum is available under both the Brussels Regime and England’s traditional rules. In light of the fact that there is a strong forum-dispute connection, *forum conveniens* is unlikely to prevent the exercise of jurisdiction unless other substantial factors point away from trial there. Here then, the Brussels Regime is widest in providing unequivocal access to this forum and the United States’ approach is the narrowest in scope. The true benefactor of the availability of jurisdiction at the place of performance is the forum because its direct interest in the

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<sup>324</sup> (1958) 357 U.S. 235.

<sup>325</sup> CPR 6.20(5)(c).

<sup>326</sup> This is because the defendant is not ‘purposefully availing’ itself of the forum’s benefits. See pp.21-23 for a definition of ‘purposeful availing’.

dispute is satisfied. However, neither party is intentionally favoured over the other in this allocation, as there are administrative advantages to suit there. For example, the defective goods may have to be examined by an expert. In contrast, the United States' approach operates in a defendant-protective manner by preventing jurisdiction unless a defendant-forum nexus exists.

#### *6.4.2(d) Conclusion:*

By taking just one approach towards the exercise of jurisdiction in contractual disputes, the Brussels Regime operates in a more restrictive context than the two common law regimes. The only exception to this is where jurisdiction is based on the place of performance. Without further connections, the United States' approach is the narrowest. However, the discussion above demonstrates that, although the potential for the exercise of jurisdiction is much greater under the common law systems, they generally operate so as to deny jurisdiction unless the forum has significant connection to the facts, although this may be based upon an aggregation of weaker factors rather than a strong, single dispute-forum nexus.

#### **6.4.3. The Branch, Agency or Other Establishment Exception under the Brussels Regime:**

Article 5(5) of the Brussels Regulation clearly finds only some similarity with the traditional rules of England because the English courts may also establish jurisdiction over a defendant on the basis of a branch or established place of business in the forum. However, if the Civil Procedure Rules are utilised, the courts have general jurisdiction over the defendant where the claim forum is served on a defendant's place of business in the forum. Although this latter method is initially wider than the Brussels Regime, forum non conveniens would ordinarily prevent trial on this basis. This secondary doctrine therefore curtails the jurisdictional reach of the courts to a similar level to the specific jurisdiction provided under the Brussels Regime.

Ignoring the fact that the courts in the United States sometimes exercise general jurisdiction where an agent, branch or other establishment is present in the

forum,<sup>327</sup> specific jurisdiction is also available in most states under the ‘transacting business’ doctrine. As the defendant has the necessary contacts with the forum through its presence there, due process is unlikely to interfere with the assertion of jurisdiction. In such circumstances, jurisdiction would be available in the same circumstances under the ‘transacting business’ doctrine as would be available under the ‘branch, agency or other establishment’ provision of the Brussels Regime.

Although the ‘transacting business’ doctrine appears to be the twin of the ‘branch, agency or other establishment’ provision in the Brussels Regulation, they are certainly not identical. Jurisdiction may be asserted under the ‘transacting business’ doctrine where it would not be available under the Brussels Regime. In the United States, economic activity is sufficient to invoke the ‘transacting business’ doctrine. This means that jurisdiction may be exercised over the defendant even though the defendant has no physical presence in the forum whatsoever. This means that directing activity at that state without entering the forum, or using an agent, would found jurisdiction. For example, a marketing campaign directed at that forum may in itself be sufficient even though the defendant has no physical presence there. It is clear that, when compared to Article 5(5) of the Brussels Regime and the insistence of England’s traditional rules on physical presence in the forum, the burden on the defendant imposed by the ‘transacting business’ doctrine is significantly higher. As economic activity can be widespread, the number of potential fora increases. The claimant and forum are those that benefit from this extension of jurisdiction.

#### 6.4.4. Jurisdiction Based on the ‘Consent’ of the Defendant: Through Submission or Jurisdiction Clause:

In all three regimes the defendant is protected from being regarded as having submitted to a court’s jurisdiction when appearing before the court to contest its jurisdiction. Providing a court with general jurisdiction on the defendant’s submission, no matter how tenuous the forum’s connection to the dispute or the litigants, actually serves both parties’ interests. The claimant wishes for suit there and the defendant does not object to the court’s jurisdiction, fulfilling both parties’

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<sup>327</sup> Zekoll, J, ‘The Role and Status of American Law in the Hague Judgments Convention Project’ (1998) 61 Alb. L. Rev. 1283, p.1294.

expectations. Both parties' interests are also met where jurisdiction is assumed on the basis of a jurisdiction agreement, as the parties have the opportunity to select the forum of their choice during negotiations. In both scenarios, the forum indirectly benefits from the ability to go beyond its jurisdictional restrictions.

Under both the Brussels Regime and England's traditional rules the forum may assert jurisdiction through a jurisdiction clause even where the forum is inconvenient for the action. However, it is not clear whether this is true in the United States.<sup>328</sup>

Under England's traditional rules, should the parties fail to specify a method for service of the claim form in their jurisdiction clause,<sup>329</sup> the court must have regard to forum conveniens principles before permitting service abroad. This is, in principle, similar to the convenience considerations in which the courts may be required to engage in the United States. However, such jurisdiction is highly unlikely to be refused, whereas it may defeat jurisdiction in the United States' courts.

In conclusion, it seems that there is a great deal of similarity between the three regimes concerning the consent of the defendant to the courts' jurisdiction. This demonstrates that, in some cases, the three systems have the same underlying objectives and principally aim to accommodate and serve the same interests.

## *6.5. Conclusion:*

On the basis of the above, jurisdiction seems to be available in similar circumstances in all three regimes. However, the extent to which it is available depends on the provision utilised. The scope of the three systems and the extent of the similarities between them fluctuate depending on which jurisdictional basis is selected for comparison. This does not prevent an overall assessment being made, however.

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<sup>328</sup> Borchers, P, 'Forum Selection Agreements in the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform', (1992) 67 Wash. L. Rev 55, p.78.

<sup>329</sup> Assuming the Brussels Regime does not apply to the jurisdiction agreement selecting the English courts as the place of trial.

Even though the ‘minimum contacts’ test is supposed to provide the defendant with the ability to foresee where she might be sued so that she can restructure her conduct to avoid suit in a particular forum, the level of foreseeability it provides in relation to contractual disputes is inferior to the rigid approach of the Brussels Regime. This lack of predictability provides a more claimant-orientated focus. This is true in relation to both tort and contract jurisdiction as well as in situations where the ‘branch, agency or other establishment’ provision of the Brussels Regime would operate. Further, this cost to the defendant, and corresponding advantage to the claimant, is not justified on the basis of the need to provide fora with legitimate interests in the dispute with jurisdiction because often the forum allocated with jurisdiction only has an indirect interest in the case.

Although both England’s traditional rules and the United States’ approach use secondary doctrines to counter their courts’ jurisdictional reach, this is not as effective as the Brussels Regime’s restriction of jurisdiction through the content of the relevant provision. The Brussels Regime does not intentionally aim to provide a maximum level of appropriateness by searching for the ‘most appropriate’ forum like England’s traditional rules. Instead, the Brussels Regime intends to provide a minimum level of appropriateness but the rigid content of those rules ensures that the Regime produces a similar approach to the more complex, fact-specific approach of England’s traditional rules.

## **7. Litigational Tools: Anti-Suit Injunctions and Lis Alibi Pendens:**

Anti-suit injunctions and lis alibi pendens rules have the potential to impact significantly upon a court’s jurisdiction. As there is no scope for the use of anti-suit injunctions within the Brussels Regime,<sup>330</sup> this section will only compare the use of this litigational tool in the United States and under England’s traditional rules. Subsequent to this, the methods by which the three regimes deal with parallel proceedings will be analysed.

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<sup>330</sup> See C-1159/02 *Turner v Grovit* [2005] 1 A.C. 101.

## 7.1. The Grounds for Anti-Suit Injunctions under the Traditional Rules of England:

The anti-suit injunction, a child of England's common law courts, dates back to the fifteenth century. Its usage has adapted over the years and is now granted to prevent a litigant from pursuing an action in a foreign court. Anti-suit injunctions are approached on a case-by-case basis and the discretionary nature of the concept enables the court to refuse an injunction where it would normally grant one.<sup>331</sup> The court may only issue an anti-suit injunction where the court has personal jurisdiction over the respondent, which means that the respondent must be adequately served with a claim form.

In *Airbus Industrie GIE v Patel*,<sup>332</sup> Lord Goff appeared to suggest that there were three situations in which an injunction could be granted. The first of these three 'categories' is where the conduct of a party is regarded as 'vexatious or oppressive'. The second is where the action abroad is 'unconscionable'. The third 'category' is where the pursuit of the action in the foreign forum is in breach of an exclusive jurisdiction agreement in favour of the English courts.

Where the applicant seeks an anti-suit injunction that falls within either the first or second 'category', England must also be the natural forum for the dispute before the court will enjoin the respondent.<sup>333</sup> This additional hurdle ensures that the English forum has 'a sufficient interest in, or connection with, the matter in question to justify the indirect interference with the foreign court'.<sup>334</sup>

### 7.1.1. Injunctions Granted on the Basis of 'Vexatious or Oppressive' Conduct:

The appeal courts have failed to define 'vexatious or oppressive' conduct, making this category potentially very wide in scope. The only apparent limitation on

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<sup>331</sup> *Aggeliki Charis Compania Maritima SA v Pagnan SpA, The Angelic Grace* [1995] 1 Lloyd's Rep 87, p.96.

<sup>332</sup> [1999] 1 AC 119.

<sup>333</sup> *Société Nationale Industrielle Aérospatiale v Lee Kui Jak* [1987] AC 871, p.896.

<sup>334</sup> *Airbus Industrie*, n.332 above, p.138.



this is previous cases furnishing examples of what does or does not amount to such conduct. Bringing an action abroad that is doomed to fail, as a means of harassing the defendant, amounts to ‘vexatious or oppressive’ conduct.<sup>335</sup> Briggs suggests that where there is very little connection between the foreign forum and the cause of action, this may indicate that the action is ‘vexatious or oppressive’.<sup>336</sup>

An anti-suit injunction should not normally be granted where it would be unjust to deny advantages available in the foreign forum, even though it is not the ‘natural forum’.<sup>337</sup> The court then faces the difficult task of ascertaining whether the advantage should be characterised as ‘unfair’ and can thus be regarded as ‘vexatious or oppressive’ conduct. If the only true advantage in the foreign forum is the use of a contingency fee system or the broader operation of discovery, these may be regarded as unfair advantages.<sup>338</sup> In *Société Nationale Industrielle Aérospatiale v Lee Kui Jak* the Privy Council enjoined the respondent from pursuing an action in Texas because the applicant was unable to claim an indemnity from a third party in Texas, whereas this was possible in the dispute’s ‘natural forum’. It seems fair to conclude that the advantages to be gained or lost by both litigants may be relevant in deciding whether conduct is ‘vexatious or oppressive’.

#### 7.1.2. Unconscionable Conduct Warranting an Injunction:

According to the House of Lords in *British Airways Board v Laker Airways Ltd*,<sup>339</sup> if the suit in the foreign forum is so unconscionable that it can be regarded as ‘an infringement of an equitable right of the applicant’, the courts may grant an anti-suit injunction.<sup>340</sup>

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<sup>335</sup> *SCOR v Eras EIL (No 2)* [1995] 2 All ER 278.

<sup>336</sup> Basing this comment on the decision of the Court of Appeal in *Midland Bank plc v Laker Airways Ltd* [1986] QB 689. See Briggs, *The Conflict of Laws* (Oxford University Press, 2002) p.109.

<sup>337</sup> *Société Nationale*, n.333 above, p.896.

<sup>338</sup> *Simon Engineering plc v Butte Mining plc (No 2)* [1996] 1 Lloyd’s Rep 91, p.98-100. See also *Smith Kline and French Laboratories Ltd v Bloch* [1983] 1 WLR 730.

<sup>339</sup> [1985] AC 58.

<sup>340</sup> *Ibid*, p.95.

Although the House of Lords failed to define what amounts to ‘unconscionable conduct’, it confirmed that it could include conduct that is ‘oppressive or vexatious or which interferes with the due process of the court.’<sup>341</sup> Bringing an action in a foreign forum where the other party has a right not to be sued, on account of a defence such as promissory estoppel, waiver or laches under English law, is an example of ‘unconscionable conduct.’<sup>342</sup>

### 7.1.3. Proceedings in Breach of a Jurisdiction Agreement:

Some cases appear to suggest that an anti-suit injunction can only be granted if the litigation abroad, which breaches an exclusive jurisdiction clause nominating the English courts, can be categorised as ‘vexatious or oppressive’.<sup>343</sup> Others have justified anti-suit injunctions without reference to ‘vexatious or oppressive’ conduct.<sup>344</sup> The House of Lords chose to leave this point open in *Airbus Industrie GIE v Patel*.<sup>345</sup> The fact that England need not be the natural forum under this category suggests that this category receives differential treatment to the other two categories. This divergence implies that it is not necessary for the court to view the respondent’s conduct as ‘vexatious or oppressive’.<sup>346</sup>

The courts appear to be much more flexible in their approach towards exercising their discretion under this category. The Court of Appeal, for example, has suggested that less caution needs to be exercised where the applicant seeks to ensure that an exclusive arbitration or jurisdiction agreement is not violated.<sup>347</sup> Indeed, it seems that in such circumstances the respondent must demonstrate good reason why

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<sup>341</sup> *South Carolina Insurance Co v Assurantie NV* [1987] AC 24, p.41. It thus seems that ‘vexatious or oppressive’ conduct is a sub-division of the ‘unconscionable’ category rather than a category in itself.

<sup>342</sup> *British Airways Board v Laker Airways*, n.339 above, p.81.

<sup>343</sup> See *Continental Bank NA v Aeakos* [1994] 1 WLR 588 and *Sohio Supply Co v Gatoil* [1989] 1 Lloyd’s Rep 588, p.592.

<sup>344</sup> *The Angelic Grace* [1995] 1 Lloyd’s Rep 87, pp.94-98. The Court of Appeal followed this approach in *DVA v Voest Alpine* [1997] 2 Lloyd’s Rep 279, p.286 and *Toepfer v Société Cargill* [1998] 1 Lloyd’s Rep 379, p.384.

<sup>345</sup> [1999] 1 AC 119.

<sup>346</sup> *Donohue v Armaco Inc* [2000] 1 Lloyd’s Rep 579.

<sup>347</sup> *Continental Bank v Aeakos*, n.343 above, p.598.

the injunction should not be issued.<sup>348</sup> *Ultisol Transport Contractors Ltd v Bouygues Offshore SA* illustrates this.<sup>349</sup> In this case, the court issued an anti-suit injunction preventing the respondent from continuing proceedings in South Africa, brought in disregard of a jurisdiction clause in favour of the English courts, notwithstanding the fact that the South African action involved a third party not amenable to the English courts' jurisdiction. This is interesting when compared with *Société Nationale Industrielle Aérospatiale v Lee Kui Jak* where an anti-suit injunction was provided to ensure that the applicant could pursue an action in Brunei against a third party not subject to the jurisdiction of the courts of Texas.<sup>350</sup> One can infer from this that the English courts regard an attempt to avoid the English court's jurisdiction as of primary importance.

It emerges that the only situation in which the courts are unlikely to act is where the applicant failed to make an application for an anti-suit injunction in a reasonable amount of time.<sup>351</sup> In rare situations, the courts have refused an injunction where the English forum was clearly inappropriate for the action.<sup>352</sup> Such arguments are unlikely to be successful frequently, as holding the parties to their agreement is of paramount importance to the English courts.

#### 7.1.4. A Fourth Category? The Rare Cases:

In *Airbus Industrie v Patel* the House of Lords referred to a 'fourth category'.<sup>353</sup> Accordingly, there may be instances where there is no or little connection to the English forum but nevertheless an injunction could be granted in the interests of justice.<sup>354</sup> Unfortunately the Court failed to provide any further guidance on the issue and it remains a mystery as to exactly how limited this exception is.

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<sup>348</sup> If the applicant submitted to the foreign court's jurisdiction, an injunction will be refused, as the applicant should have contested jurisdiction on the basis of the jurisdiction agreement. See *A/S D/S Svendborg v Wansa* [1996] 2 Lloyd's Rep 559.

<sup>349</sup> [1996] 2 Lloyd's Rep 140.

<sup>350</sup> [1987] AC 871.

<sup>351</sup> *Toeffer International*, n.344 above.

<sup>352</sup> *Bouygues Offshore SA v Caspian Shipping Co (Nos 1,3,4 and 5)* [1996] 2 Lloyd's Rep 140.

<sup>353</sup> N.345 above, p.140.

<sup>354</sup> *Ibid.*

## 7.2. *The Grounds for Anti-Suit Injunctions in the United States: How Do They Compare to England's Traditional Rules?*

Unlike the exercise of jurisdiction over a defendant, the issuance of an anti-suit injunction is not subject to any constitutional limitations in the United States. The law of each state governs the situations in which the granting of an anti-suit injunction is permissible. As a consequence, there is great variation in their usage, although some common themes can be identified.<sup>355</sup> Originally, anti-suit injunctions were utilised primarily in an attempt to halt parallel proceedings in another state in the United States. Most courts now make use of anti-suit injunctions in an international setting,<sup>356</sup> although the courts generally exercise greater restraint where the proceedings are outside the United States on account of the impact this may have on foreign relations.<sup>357</sup>

Bermann's research suggests that most issuances could be classified in one of three ways. The first is where the action is 'vexatious, highly oppressive or inconvenient'. The second category is where the action abroad is 'in violation of a prior and independent obligation not to sue' and the third is where the action is 'a threat to the enjoining court's own jurisdiction or otherwise contrary to local public policy.'<sup>358</sup> Bermann's research also reveals that, in most instances, courts insist on proof that serious or irreparable harm would flow from the maintenance of proceedings elsewhere.<sup>359</sup>

It is immediately apparent that both countries permit the granting of an anti-suit injunction where the conduct of a party is 'vexatious or oppressive' and where there has been a breach of an exclusive jurisdiction agreement by commencing proceedings in the foreign forum. The common law heritage shared by the two

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<sup>355</sup> Bermann, G, 'The Use of Anti-suit Injunctions in International Litigation' (1990) 28 Colum. J. Transnat'l L. 589, p.594.

<sup>356</sup> See, for example, *Cargill Inc v Hartford Accident & Indem. Co* (1982) 531 F. Supp. 710 (D. Minn) and *Western Elec. Co v Milgo Elec Corp* (1978) 450 F. Supp. 835 (S.D. Fla).

<sup>357</sup> Bermann, n.355 above, p.605.

<sup>358</sup> *Ibid*, p.595. These categories are primarily based on anti-suit injunctions issued against sister-states but most states appear to have applied their sister-state rules to transnational cases.

<sup>359</sup> *Ibid*.

countries dictates that there is similarity in the language used. It is therefore necessary to determine the extent to which these categories are similar and whether the three 'categories' encountered under the traditional rules of England incorporate the wide-ranging categories of the United States.

#### 7.2.1. Injunction on the Basis of 'Vexatious or Oppressive' Conduct: Same Words, Same Application?

When considering whether to grant an injunction on the basis of 'vexatious or oppressive' conduct, the courts of the United States look for fraud in the foreign proceedings or an actual intent to cause hardship. These requirements severely inhibit the use of anti-suit injunctions and thus their ability to interfere with foreign proceedings.<sup>360</sup>

Hardship to the defendant is relevant when considering whether the proceedings abroad are 'vexatious or oppressive' under England's traditional rules. Unlike the United States though, the English courts consider issues other than this. Although England's traditional rules seem wider in this respect, the approach of the English courts is also narrower because it is essential that England is the 'natural forum' for the dispute. Both countries therefore appear to restrict the availability of this category, although via different means.

#### 7.2.2. A Prior Obligation Not to Sue in that Forum:

Under the United States' approach, the applicant must ordinarily convince the court that the foreign forum cannot be relied upon to give effect to the obligation not to sue before an anti-suit injunction is granted. An injunction of this type tends to be utilised to a much greater extent in the international context than in sister-state cases.<sup>361</sup>

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<sup>360</sup> *Paramount Pictures Inc v Blumenthal* (1939) 256 App.Div 756, p.760. See Bermann, n.355 above, p.596.

<sup>361</sup> *Ibid.*

It is apparent that the courts of both the United States and England insist upon holding the parties to their bargain and are prepared to issue injunctions to ensure this. If the English courts still require that there be ‘vexatious or oppressive’ conduct, the United States would be less restrictive than the English courts in such circumstances.

Two points should be noted here. The first is that ‘oppressive or vexatious’ conduct may not be required, in which case the approach of both regimes is identical. The case of *Ultisol Transport Contractors Ltd v Bouygues Offshore*<sup>362</sup> discussed above, demonstrates how keen the English courts are to ensure compliance with jurisdiction agreements. Secondly, even if the English courts do require that there is ‘vexatious or oppressive’ conduct, it may be that breaching a jurisdiction agreement without good cause amounts to such conduct anyway. It seems fair to conclude at this point that the two systems appear to approach the violation of jurisdiction agreements in the same manner and are likely to grant an injunction in the same circumstances. Just one notable difference exists between the two countries: some courts in the United States feel that they can issue an injunction even though it is not the nominated forum.<sup>363</sup>

### 7.2.3. Threat to Jurisdiction or Contrary to Public Policy:

This category is the most controversial because it is unclear what facts are sufficient to warrant an injunction of this type. Anti-suit injunctions have been issued by United States’ courts where they view the applicable law selected by the foreign forum as substantially less favourable to the applicant than the applicable law it would select.<sup>364</sup> If the issuing forum believes that the alternative forum will not conduct a fair hearing or will provide inadequate relief, the trial abroad may be regarded as contrary to ‘public policy’ and an anti-suit injunction necessary.<sup>365</sup>

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<sup>362</sup> [1996] 2 Lloyd’s Rep 140.

<sup>363</sup> Bermann, G, ‘The Use of Anti-suit Injunctions in International Litigation’ (1990) 28 Colum. J Transnat’l L. 589, p.621.

<sup>364</sup> Note, ‘When Courts of Equity Will Enjoin Foreign Suits’ (1942) 27 Iowa L. Rev 76, pp.94-95.

<sup>365</sup> See for example *Monumental Savings Ass’n v Fentress* (1903) 125 F. 812 (C.C.E.D Va).

Unlike the United States, England's traditional rules do not have a 'public policy' category. However, the 'vexatious or oppressive' requirement is broader in scope than in the United States and may include enjoining the parties in similar circumstances to those falling within the 'public policy' category. One of the Court of Appeal's main grounds for issuing an anti-suit injunction in *Airbus Industrie v Patel* was its belief that the application of principles of strict liability under product liability laws in Texas was unfair when the natural forum would not apply strict liability.<sup>366</sup> In the *Midland Bank v Laker* litigation the extraterritorial effect of the antitrust legislation of the United States warranted an anti-suit injunction. These decisions, although framed in the language of 'vexatious or oppressive' conduct, could perhaps be classified as decisions based on 'public policy' concerns. The differences between the two regimes appear to be merely one of terminology, rather than nature, although requiring that England is the natural forum infers that the United States courts are less reserved about granting anti-suit injunctions.

However, the United States' courts also use anti-suit injunctions to prevent interference with their jurisdiction by anti-suit injunctions obtained elsewhere. Injunctions are also available where the likely outcome in the foreign forum is unacceptable.<sup>367</sup> There appears to be no support for such an approach under England's traditional rules. The disadvantages from suit in the alternative forum must cause hardship to the applicant before an anti-suit injunction is provided. It is not enough that the courts abroad would not, under their laws, find in favour of the applicant. It is also not commonplace to provide a pre-emptive injunction, ensuring that other fora do not interfere with jurisdiction via an anti-suit injunction.

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<sup>366</sup> [1999] 1 AC 119. The House of Lords revoked the anti-suit injunction on appeal because England was not the natural forum and therefore lacked a sufficient interest in the case. It is not clear how the English courts will react in similar circumstances when England is the natural forum. It may be that the English courts would regard the unfavourable change in the law to be 'vexatious and oppressive', as is the case when a party pursues higher damages abroad when England is the natural forum. It is, however, also possible that, in light of the fact the House of Lords stressed regard to principles of comity, this change in the applicable law might not be regarded as sufficiently severe.

<sup>367</sup> Bermann, n.363 above, p.624.

#### 7.2.4 Inconvenience of the Foreign Forum warranting an Injunction: Just a U.S Phenomenon?

In the United States, it appears to be routine that the severe inconvenience of the foreign forum is enough on its own to warrant an injunction.<sup>368</sup> In England, it is of paramount importance that England is the ‘natural forum’, except for where there has been a breach of a jurisdiction clause.

However, it seems that in *Midland Bank v Laker Airways* the Court of Appeal felt it could act to restrain the inconvenient foreign proceedings even though England was not the ‘natural forum’.<sup>369</sup> Should this approach be entertained, both countries would, in effect, be ‘policing’ the jurisdiction of other countries. This is an unlikely occurrence because the English courts have refused to act when the foreign forum could not dismiss the highly inconvenient action before it.<sup>370</sup> In light of the fact that the House of Lords stressed the need for absolute respect for comity and for England to be the ‘natural forum’ it seems very unlikely that the Court of Appeal’s approach will become commonplace. Should this assumption be correct, regulating the inconvenience of another court through an anti-suit injunction is likely to be a phenomenon unique to the United States in all but the most exceptional circumstances.

#### 7.2.5. To What Extent is Comity Considered by the Courts?

In the United States, comity is left to the discretion stage. Some courts in the United States have stressed that anti-suit injunctions should be ‘used sparingly’<sup>371</sup> and resorted to ‘only in the most compelling circumstances’.<sup>372</sup> This emphasis on caution is not as strong as that stressed by the House of Lords in *Airbus Industrie v Patel*,<sup>373</sup> where it was emphasised that, as a result of the indirect impact an anti-suit injunction

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<sup>368</sup> Although it is important to note that some states do not consider convenience as a reason for granting an anti-suit injunction. See Bermann, *ibid*, pp.614-5.

<sup>369</sup> [1986] QB 689.

<sup>370</sup> See *Airbus Industrie v Patel* [1999] 1 AC 119.

<sup>371</sup> See *Seattle Totems Hockey Club v National Hockey League* (1981) 652 F.2d 852 (9<sup>th</sup> Cir.) at 855.

<sup>372</sup> *Laker Airways v Sabena, Belgium World Airlines* (1984) 731 F.2d 909 (D.C.Cir.), p.927.

<sup>373</sup> N.370 above.



might have on the foreign forum's jurisdiction, England must be the natural forum for the dispute for an anti-suit injunction to be permissible.<sup>374</sup>

#### 7.2.6. The English Courts Provide Injunctions on the Basis of 'Unconscionable Conduct': Is This a Unique Characteristic of the Traditional Rules?

The English courts may issue an anti-suit injunction where there is 'unconscionable conduct', which involves the violation of a legal or equitable right of the other party. There appears to be no counterpart of this in the United States. However, Bermann anticipates that equity-based restrictions on the right to sue, such as 'equitable or promissory estoppel...[and] waiver', may result in the courts issuing an anti-suit injunction.<sup>375</sup> Should this conclusion be accurate, similarity is found between the United States and England. Even if the majority of the courts in the United States do not use this as a basis for enjoining parties, the difference between the two regimes is slight because this basis is unlikely to be used frequently by the English courts.

#### 7.2.7. Providing the Foreign Forum with an Opportunity to Decline Jurisdiction:

In *Barclays Bank plc v Homan*<sup>376</sup> Hoffman J commented that the foreign court should be given the opportunity to decline jurisdiction itself before an anti-suit injunction is granted. Providing the foreign forum with the opportunity to find itself an inappropriate place for the action of its own accord would show greater respect for that forum.<sup>377</sup> The courts of the United States likewise sometimes exercise restraint and provide the foreign forum with an opportunity to decline jurisdiction. This avoids interference with proceedings in other fora where possible.

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<sup>374</sup> Ibid, p.133.

<sup>375</sup> Bermann, n.363 above, p.624.

<sup>376</sup> [1993] BCLC 680, pp.686-7. See also *Re Maxwell Communication Corp plc (No 2)* [1992] B.C.C 757.

<sup>377</sup> Briggs disapproves of such a position. He argues that waiting to see if the foreign forum will decline jurisdiction means the English courts sit as an appeal court from the foreign forum. See Briggs, A, *The Conflict of Laws* (Oxford University Press, 2002) p.110. This writer disagrees with this because an injunction without providing the foreign court with the opportunity to decline jurisdiction results in a 'policing' of the foreign forum's jurisdictional approach anyway. Waiting appears to be the lesser of two 'comity evils'.

### 7.2.8. Injunction Denies Suit Altogether:

In *Midland Bank plc v Laker Airways*,<sup>378</sup> the courts issued an anti-suit injunction even though the claimant would be unable to sue elsewhere because the action was only possible because the United States' antitrust laws applied extraterritorially. This injunction, if obeyed, would have had the effect of denying the claimant of a forum altogether. As all the relevant connections were with England and the applicant conducted no business in the United States, the court held the action in the United States was 'vexatious and oppressive'. The respondent was accordingly denied the ability to utilise such wide-reaching laws to her advantage.<sup>379</sup> *Midland Bank plc v Laker Airways* should be regarded as exceptional on its facts; the court only issued the injunction because of extraterritorial implications of antitrust laws. The House of Lords has stressed the need to proceed with caution when issuing an anti-suit injunction that would halt proceedings in the only forum for the action.<sup>380</sup>

There is no clear authority on this point in the United States, although Bermann notes that caution is of the utmost concern in such instances.<sup>381</sup> Whether the courts of the United States would deny the claimant an opportunity to sue altogether, as the English courts did in *Midland Bank v Laker*, because the claimant is relying on the extraterritorial application of a foreign law over a domestic defendant, remains to be seen.

### 7.3. *Lis Alibi Pendens: The Approach of England's Traditional Rules:*

*Lis alibi pendens* issues are normally an issue in the *forum non conveniens* analysis, according to which the defendant must establish that there is a distinctly more appropriate forum for the trial than England, regardless of proceedings pending

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<sup>378</sup> [1986] QB 689.

<sup>379</sup> *Ibid.*

<sup>380</sup> *British Laker Airways Bd v Laker Airways* [1985] AC 58, p.95.

<sup>381</sup> Bermann, G, 'The Use of Anti-suit Injunctions in International Litigation' (1990) 28 Colum. J. Transnat'l L. 589, p.626.

abroad.<sup>382</sup> It is irrelevant to the forum non conveniens analysis whether the English forum was first or second seised of the matter.<sup>383</sup> The courts will give less weight to foreign proceedings where they are still in their preliminary stages and greater weight where they are close to conclusion.<sup>384</sup> If there is a jurisdiction agreement between the parties in favour of the English courts, this is also likely to persuade the court to refuse to stay the proceedings commenced in England.<sup>385</sup>

This is not to say that the forum non conveniens inquiry is the sole method of dealing with the issue of parallel proceedings. Anti-suit injunctions may also operate as a litigation-controlling tool but they have the potential for greater mischief. This is because the foreign forum's proceedings are effectively stayed when the parties obey an anti-suit injunction; it is a direct attack on another court's jurisdiction. A forum non conveniens stay, in contrast, is self-reflective. In light of this, the courts proceed with caution when considering an anti-suit injunction and will consider all the surrounding circumstances. The court must also be convinced that England is the 'natural forum' and that the maintenance of the suit abroad would amount to 'oppressive or vexatious' conduct.<sup>386</sup> Where there is no indication of 'vexatious or oppressive' conduct, the matter is purely a forum non conveniens issue.<sup>387</sup> This provides a limited role for anti-suit injunctions in cases involving *lis alibi pendens*.

#### 7.4. The United States' Approach to *Lis Alibi Pendens*:

Ordinarily, the courts of the United States permit parallel proceedings in an international context.<sup>388</sup> Very few states apply principles of *lis alibi pendens*, which

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<sup>382</sup> *De Dampierre v De Dampierre* [1988] AC 92, p.108. Where there is no natural forum, a stay will ordinarily be refused despite parallel proceedings. See *The Coral Isis* [1986] 1 Lloyd's Rep 413.

<sup>383</sup> *El du Pont de Nemours & Co v Agnew and Ker* [1987] 2 Lloyd's Rep 585, p.593.

<sup>384</sup> See *Arkwright Mutual Insurance Co v Bryanston Insurance Co Ltd* [1990] 2 Lloyd's Rep 70 and *De Dampierre*, n.382 above.

<sup>385</sup> See *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90.

<sup>386</sup> *Société Nationale Industrielle Aérospatiale v Lee Kui Jak* [1987] AC 871, p.896.

<sup>387</sup> *Barclays Bank plc v Homan* [1993] BCLC 680, pp.700-01.

<sup>388</sup> Note, 'Injunctions Against the Prosecutions of Litigation Abroad', (1984) 37 Stan. L. Rev 155, p.163.

were developed purely for inter-state use, to international cases.<sup>389</sup> Consequently, this increases the use of anti-suit injunctions. Anti-suit injunctions are a prime parallel proceedings control tool in the United States.<sup>390</sup> If a court is first seised, it will not trust the court second seised to stay proceedings in its favour and will issue an anti-suit injunction to ensure its jurisdiction is not threatened.<sup>391</sup> Anti-suit injunctions can be used as a form of attack to provide the court with jurisdiction where the court would not ordinarily have jurisdiction. In contrast to this offensive use of injunctions, some courts attempt a comparison of the merits between the two competing fora and will only issue an injunction where it is the more convenient of the two.<sup>392</sup>

Some cases before state courts have indicated that issues such as the waste of judicial resources, cost and the burden of litigation in two fora should largely be disregarded as grounds for the issuance of an anti-suit injunction.<sup>393</sup> There is, however, a tendency throughout the courts in the United States to presume that *severe* inconvenience of the alternative forum is a sufficient ground.<sup>394</sup> Further, these courts also ‘treat the test for the issuance of anti-suit injunctions...as essentially the same as for dismissal of a local action on forum non conveniens grounds.’<sup>395</sup>

A trend appears to be emerging, utilising anti-suit injunctions as both a *lis alibi pendens* tool and an ‘affirmative forum non conveniens tool’.<sup>396</sup> Using them in such an unpredictable and wide-ranging manner has the potential to cause significant mischief in an international context and may even lead to further complications.<sup>397</sup>

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<sup>389</sup> See for example, *Medtronic Inc v Catalyst Research Corp* (1981) 664 F.2d 660 (8<sup>th</sup> Cir.) and *Canadian Filters (Harwich) v Lear-Siegler Inc* (1969) 412 F.2d 577 (1<sup>st</sup> Cir.)

<sup>390</sup> Fawcett, J, *Declining Jurisdiction in Private International Law: Reports to the XIVth Congress of the International Academy of Comparative Law Athens August 1994* (Claredon Press 1995) p.65.

<sup>391</sup> If no anti-suit injunctions are granted, a race to judgment may occur on grounds that the first judgment may be entitled to *res judicata* effect.

<sup>392</sup> Bermann, n.381 above, p.613-4.

<sup>393</sup> See for example, *China Trade & Dev Corp v M.V Choong Yong* (1987) 837 F.2d 33 (2d Cir), *Gannon v Payne* (1986) 706 S.W.2d 304 (Tex.) and *Laker Airways v Sabena, Belgian World Airlines* (1984) 731 F.2d 909 (D.C Cir.), pp.926-28.

<sup>394</sup> See for example, *Medtronic v Catalyst Research*, n.389 above and *American Home Assurance Co v Insurance Corp of Ireland* (1984) 603 F.Supp. 636 (S.D.N.Y).

<sup>395</sup> Bermann, n.381 above, p.615.

<sup>396</sup> *Ibid*, p.619.

<sup>397</sup> This is discussed further at pp.101-102 below. The ‘Laker Airways’ actions caused a crisis in judicial relations. See *British Laker Airways Bd v Laker Airways*[1985] AC 58 and *Laker Airways v Sabena, Belgium World Airlines* (1984) 731 F.2d 909 (D.C.Cir.).

### 7.5. *Lis Alibi Pendens: The Brussels Regime:*

Where the dispute before a court second seised involves the same cause of action, the same parties and has the same subject matter,<sup>398</sup> Article 27 of the Brussels Regulation demands that the court second seised stay the action until the jurisdiction of the court first seised is established. If the court first seised finds it has jurisdiction over the dispute, the court second seised must dismiss the action. This ‘first come, first served’ rule governs both courts seised without exception. Alternatively, Article 28 might apply to the court second seised if the actions are deemed to be ‘related’, which is termed as actions that are ‘so closely related that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments.’<sup>399</sup> This can cover cases where the two states are likely to reach differing conclusions on questions of fact. Should the proceedings be related, the court second seised may stay its proceedings, this being entirely at that court’s discretion,<sup>400</sup> although the court second seised should be mindful of the degree of risk of irreconcilable judgements if the action were permitted to continue therein.<sup>401</sup>

### 7.6. *A Comparison of the Lis Alibi Pendens Approach of the Three Jurisdictional Regimes:*

Neither common law regime concerns itself with the issue of which fora was seised first, in direct contrast to the Brussels Regime, which makes this factor the focal point of its provisions. Regarding anti-suit injunctions as a *lis alibi pendens* mechanism, the varied approach of the United States results in some states demanding that the issuing forum be more appropriate for trial than the alternative forum, whereas others disregard such matters and issue an injunction to protect their own jurisdiction. As the English forum must be the ‘natural forum’ for the dispute before

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<sup>398</sup> C-14486 *Gubisch Maschinenfabrik KG v Palumbo* [1987] ECR 4861 added this latter requirement. This narrows the scope of the provision, as both sets of proceeding must have at their core the resolution of the same matter. Note that this provision does not apply where the court first seised is a non-member state (ie New York). This is presumably governed by the traditional rules of the member state seised second of the dispute.

<sup>399</sup> Art.28(3).

<sup>400</sup> Art.28(1).

<sup>401</sup> *The Marciej Rataj* [1991] 2 Lloyd’s Rep 458.

an injunction may be granted, one can conclude that the English courts are much more restrictive in their use of injunctions to control *lis alibi pendens*. This is further evidenced by the fact that *lis alibi pendens* concerns are normally part of the *forum non conveniens* inquiry under the traditional rules of England. The United States may also consider parallel proceedings under a federal *forum non conveniens* examination but such issues are generally given less weight than under the English doctrine.<sup>402</sup>

The most rigid and restrictive approach is the Brussels Regime because of its ‘first come, first served’ rule. An undesirable effect of this rule is that it can encourage a race to the courthouse, as only the first action filed can proceed under the rules.<sup>403</sup> The inconsistent approach of the United States, and its regular use of anti-suit injunctions, which when utilised freely infringe principles of comity,<sup>404</sup> is equally unattractive. These negatives are not bettered by England’s traditional rules. Although anti-suit injunctions are seldom used, the *forum non conveniens* analysis also presents the opportunity for a ‘race to judgment’ where parallel proceedings are permitted to continue. The only merit in the English approach is the fact that the English courts have the opportunity to consider all the surrounding circumstances, thus providing the court with the ability to reach a just conclusion appropriate to the facts.<sup>405</sup> This is not matched in the Brussels Regime, where the court second seised must stay proceedings even if it is possible that there will be severe delay in the court first seised.<sup>406</sup> Under England’s *forum non conveniens* doctrine a real possibility of substantial delay would probably convince the court to refuse to stay the action.<sup>407</sup>

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<sup>402</sup> Fawcett, J, (ed) *Declining Jurisdiction in Private International Law: Reports to the XIVth Congress of the International Academy of Comparative Law Athens August 1994* (Clarendon Press 1995), p.30

<sup>403</sup> The defendant may commence an action for a negative declaration in one forum to prevent the claimant having access to another or to cause delay.

<sup>404</sup> Comity is offended because, by issuing the injunction, it is implied that the other forum cannot reach a fair conclusion on the matter.

<sup>405</sup> There is a presumption that the action will be stayed. This is not mirrored under the traditional rules.

<sup>406</sup> In C-116/02 *Erich Gasser GmbH v MISAT Srl* [2005] Q.B. 1 the ECJ felt that the *lis alibi pendens* rule was absolute and could not be derogated from. Delay issues were accordingly a matter for the European Court of Human Rights.

<sup>407</sup> See *The Vishva Ajay*, [1989] 2 Lloyd’s Rep 558 for an illustration of this. See p.15 above.

This inherent flexibility enables England's traditional rules to avoid any tactical exploitation of such practical problems.<sup>408</sup>

## 8. Conclusion:

It is apparent that the nature of the approach pursued by the common law systems is very different to that of the Brussels Regime. The rigidity of the Brussels Regime leaves no room for consideration of the parties' actual positions; it is presumed that justice is adequately achieved through the content of the provisions and the certainty they provide.<sup>409</sup> In this sense the Brussels Regime only provides 'generalised justice'. In contrast, the fact-dependent approaches of the United States and the traditional rules of England can be termed as attempting to provide 'individualised justice',<sup>410</sup> in that the focus is solely on finding the appropriate solution in the circumstances. It is really only England's traditional rules that sometimes bridge the gap between these two extremes. It achieves this through the extensive guidance given in the *forum non conveniens* (and *forum conveniens*) cases whilst maintaining an ability to move away from this outcome if the justice of the case demands it. Although the due process test operating in all courts in the United States lays down two requirements that must always be met, the case law lacks the consistency and direction of England's traditional rules and often fails to provide the extensive protection it claims to offer.

The disparities do not end there. Both England's traditional rules and the United States' rules are still inextricably linked to notions of 'territorial sovereignty'. England's traditional rules have moved somewhat away from this in relation to

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<sup>408</sup> Sir Anthony Clarke, Master of the Rolls, 'The Differing Approach to Commercial Litigation in the European Court of Justice and the Courts of England and Wales', a Speech Delivered to the Institute of Advanced Legal Studies, London on 23<sup>rd</sup> February 2006 (available at <http://www.dca.gov.uk/judicial/speeches/2006/sp060223.htm>), p.4.

<sup>409</sup> This is due to the influence of Savigny's writings on civil systems that determine the applicable rules *ex ante*, without regard for the specific facts of the case. See Gardella, A, and Radicata di Brozolo, L, 'Civil Law, Common Law and Market Integration: The EC Approach to Conflicts of Jurisdiction' (2003) 51 *Am. J. Comp. L.* 611, p.613.

<sup>410</sup> The common law approach has been described as 'practice-driven' and the civil law approach as 'theory-driven' in Hartley, T, 'The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws' (2005) 54 *ICLQ* 813, p.814.

specific jurisdiction and through the limitation of *forum non conveniens* on general jurisdiction. In contrast, every exercise of jurisdiction in the United States is linked to such concepts because the first limb of the due process test is based upon a fictional concept of presence. This, combined with an unlimited range of bases for jurisdiction in the United States, provides the potential for jurisdiction to be much more extensive than in the two European regimes. Similarity is found between the traditional rules and the Brussels Regime because jurisdiction is not only more restrictive in both these regimes but also because it is attained through the use of the similar, or sometimes matching, connecting factors. Furthermore, both the traditional rules of England and the Brussels Regime search for a strong cause of action-forum nexus in most instances although the traditional rules sometimes rely on the doctrine of *forum conveniens* rather than the content of the jurisdictional provisions to achieve this. The United States, however, diverges greatly from this in always requiring a defendant-forum relationship regardless of whether a dispute-forum nexus exists. However, as the nature of jurisdiction is specific, the defendant-forum connection is often of little use and, as the cause of action-forum relationship required is weaker than in the other two regimes, specific jurisdiction is generally wider in the United States.

Notwithstanding the differences noted above, similarity does exist in the *de facto* results that the three regimes procure. Although this is achieved by different means, this provides a basis for the harmonisation of the three regimes in a global jurisdiction and judgments regime. The possible benefits that such a reconciliation would bring will be discussed in the following chapter, in order to determine the extent to which such action is necessary.



## Chapter Three: Should the Creation of a Global Regime Regulating Jurisdiction be Attempted?

### **1. Introduction:**

As has been demonstrated above, there is a great deal of difference between the regulation of jurisdiction in the United States, the Brussels Regime and under England's traditional rules. In light of the fact that the Brussels Regime successfully provides one consistent jurisdictional approach on a regional scale, should the international community pursue a global regime? In order to determine the benefits a worldwide regime may bring, it is first necessary to evaluate the problems that arise from the inherent differences in both the content and approach of the jurisdictional rules identified in chapter two.

### **2. What Problems Arise from Differences in the Regulation of Jurisdiction in an International Context?**

There are three primary problems associated with broad-ranging differences in jurisdictional regulation. The first is the parties' pursuit of 'forum shopping', which is the exploitation of jurisdictional differences to a party's advantage and often to the other party's great disadvantage. The second is the unpredictability that results from such substantial differences in the content and ideals of the rules regulating jurisdiction. The third is the impact upon comity and foreign relations a particular action might have. From these three predominant problems flow a number of additional troubling consequences, such as the difficulty in enforcing a judgment outside the rendering forum. The cause and effect of each of the principal problems will be explored below.

## 2.1. Forum Shopping:

‘Forum shopping, which used to be a favourite indoor sport of international lawyers, has developed into a fine art.’<sup>1</sup> According to Lord Simon, forum shopping is where the claimant, presented with a choice of fora, chooses the forum with which she thinks her case can be ‘most favourably presented’.<sup>2</sup>

The ‘most favourably presented’ forum could be the forum in which the claimant is likely to receive the greatest procedural, substantive or jurisdictional advantages, for example. It is, of course, perfectly natural to pursue as many litigational advantages as possible. Indeed, it is implicit in the mandate of a lawyer to provide the claimant with the best opportunity for success. The development of forum shopping into a ‘fine art’ is not, however, really the consequence of the lawyer and claimant’s pursuit of the most advantageous forum. Their pursuit is only a product of the global divergence in jurisdictional, procedural and substantive rules. Should these differences not exist, forum shopping would be a pointless exercise.

### 2.1.1. What Benefits Are Obtained from Forum Shopping?

Practical issues concerning the trial proceedings may be relevant in the claimant’s choice of forum. These can include the mode of trial; legal costs; speed of trial; costs of filing the action; the availability of legal aid or access to contingency fee lawyers; the quality of legal services provided by the lawyers in a particular forum and also the experience and capabilities of the judiciary.

A lack of consistency in the procedural law of global fora encourages forum shopping. This is because certain procedural advantages, such as wider discovery laws, the availability of interlocutory relief, an ability to recover costs and a requirement the defendant file security for any relief may be the outcome of such

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<sup>1</sup> Lowenfeld, A, ‘Forum Shopping, Anti-Suit Injunctions, Negative Declarations and Related Tools of International Litigation’ (1997) 91 Am. J. Int’l L. 314, p.314.

<sup>2</sup> *Motor Vessel Atlantic Star (Owners) v Motor Vessel Bona Spes (Owners)*, *The Atlantic Star* [1974] AC 436, p.471 (hereinafter ‘The Atlantic Star’)

activity.<sup>3</sup> Differences in the rules of pleading may reduce the chance of the case being dismissed summarily and trial by jury and damages awards may also be at the forefront of the claimant's mind when selecting the venue. Procedural law is governed by the *lex fori*. Thus the greater the number of issues the forum characterises as procedural, as opposed to substantive, the greater the likelihood of forum shopping.<sup>4</sup>

In fact, the access of the media to discovery and the possibility of media or governmental interference may force a multinational corporation into early settlement. High costs associated with trial in the United States, for example, encourage abuse of the system to produce early settlement. One of the ways this is achieved is through the production of a large volume of documents for discovery so the other side will incur substantial costs going through them.<sup>5</sup> Trial in the United States may be particularly advantageous because juries often assess damages according to the defendant's financial resources, which in the case of multinational corporations are extensive. They also tend to include contingency fees in their assessment and can sometimes impose punitive awards that are treble that normally awarded.<sup>6</sup> Even where it is likely that the parties will eventually settle the action, the choice of venue will still be disputed and litigated in the United States in order to find the parameters of the claim.<sup>7</sup>

Differences in the substantive law to be applied to the dispute will obviously affect the outcome of the case and, as a result, the claimant may drag the defendant to a far away, less appropriate forum in pursuit of the preferred outcome.<sup>8</sup> Even consistent choice of law rules applying throughout several countries can still present

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<sup>3</sup> Bell, A, *Forum Shopping and Venue in Transnational Litigation* (Oxford University Press, 2003), p.24.

<sup>4</sup> Because the law of the forum may produce a different outcome to the *lex cause* and each forum may have different rules of procedure. See Bell, *ibid*, pp.26-8.

<sup>5</sup> Carrington, P, 'Moths to Light: The Dubious Attractions of American Law' (1998) 46 U. Kan. L. Rev. 673, pp.685-6.

<sup>6</sup> Bell, n.3 above, p.31.

<sup>7</sup> Silberman, L, 'Developments in Jurisdiction and Forum Non Conveniens in International Litigation' (1993) 28 Texas Int. L. J. 501, p.502.

<sup>8</sup> For example, the United States product liability laws are attractive because they are thought to be more favourable to claimants than elsewhere. See Parrish, A, 'Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants' (2006) 41 Wake Forest L. Rev. 1, pp.44-45.

an opportunity for forum shopping. For example, derogations from these rules because they conflict with a mandatory rule of the forum or raise public policy issues, lead to inconsistent rules that may greatly benefit a claimant's case.<sup>9</sup> The choice of law advantage is especially true where the United States is concerned because the choice of law process is not governed at a regional level. As states have developed their own choice of law rules, the law applicable to the dispute may vary considerably depending on the forum selected.<sup>10</sup>

A claimant may also select a forum on the basis of recognition and enforcement considerations. The Brussels Regime is an ideal place for such forum shopping. Any judgment rendered by a member state, including where jurisdiction was asserted under that state's traditional rules, is entitled to automatic recognition and enforcement in any other member state, subject to a few very limited exceptions.<sup>11</sup> Taking the English courts as an example, if the defendant is not domiciled within a member state, the claimant can obtain recognition and enforcement of a judgment rendered by the English courts throughout Europe even though the jurisdiction was based on the defendant's transitory presence in the forum under England's traditional rules. This is very useful if the defendant's assets are located in another member state but the claimant is unable to sue the defendant there because no jurisdictional ground is available in the circumstances. The claimant can effectively superimpose the exorbitant English traditional jurisdictional bases on that member state through the mandatory recognition principles of the Brussels Regime.

The multiple parties provision of the Brussels Regime also permits jurisdiction to be asserted over every defendant, irrespective of whether the forum would have jurisdiction otherwise, provided one of those defendants is domiciled in that forum.<sup>12</sup> The ability of the claimant to enjoin all the defendants in one action, in terms of time

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<sup>9</sup> Bell, n.3 above, pp.38, 40, 42 and 46.

<sup>10</sup> Many states in the United States prefer to apply the law of the forum rather than foreign law. If the claimant chooses wisely she can avoid the application of foreign law that is likely to be detrimental to the suit. See Whitten, R, 'U.S. Conflict-of-Laws Doctrine and Forum Shopping, International and Domestic (Revisited)' (2002) 37 Tex. Int'l L.J. 559, p.560.

<sup>11</sup> Simplified recognition and enforcement is governed by Chapter III, Articles 32-52. The limited exceptions to this are contained in Articles 34 and 35.

<sup>12</sup> Every defendant joined to the action must be domiciled in a member state. See p.53 above.

and cost, is highly beneficial and may be yet another reason for resort to a trial in the European Union.

Finally, it should be noted that one might also encounter forum shopping on the part of the defendant, known as ‘reverse-forum shopping’.<sup>13</sup> A defendant may forum shop to find a forum that will permit her speedily to obtain a declaration of non-liability, or successfully counter-sue, so that her judgment is given *res judicata* effect and the claimant’s judgment is effectively worthless. In the Brussels Regime negative declarations are a particularly advantageous tactical tool. If the defendant becomes aware that the claimant intends to sue, she can significantly delay the resolution of the dispute by commencing proceedings for a negative declaration before the claimant has the opportunity to initiate proceedings elsewhere. The defendant’s forum will be ‘first seised’ of the matter and under the strict *lis alibi pendens* rule, the claimant’s chosen forum must stay the action unless and until the forum ‘first seised’ has declined jurisdiction.<sup>14</sup> This is true even if the parties have an exclusive jurisdiction agreement nominating the forum ‘second seised’ by the claimant.<sup>15</sup> If the defendant is wise enough to select Italy, it could be several years before the Italian courts decline jurisdiction and before the claimant has access to the forum selected by the parties in their agreement.<sup>16</sup> Even if the defendant does not want, or expect, the full trial to take place there, this has the benefit of causing severe inconvenience and harassment to the claimant.<sup>17</sup> It seems that, rather than acting as a disincentive to parallel proceedings, the ‘first come first served’ rule of the Brussels Regime actually encourages such activity.<sup>18</sup>

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<sup>13</sup> Bell, n.3 above, p.12. This action by the defendant is designed to block the claimant’s action in some way. It is a response to the claimant’s actions, or intended actions.

<sup>14</sup> Which, of course, it might not.

<sup>15</sup> C-116/02 *Erich Gasser GmbH v MISAT Srl* [2005] Q.B. 1, paras 46-47 and 70-73.

<sup>16</sup> The European Commission of Human Rights has condemned Italy in over 1400 reports. In 2000 more judgments were given against Italy than all the other states put together on all questions. See Hartley, T, ‘The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws’ (2005) 54 ICLQ 813, pp.816-7.

<sup>17</sup> Franzosi labelled such action the ‘Italian torpedo’ in ‘Worldwide Patent Litigation and the Italian Torpedo’ [1997] 7 EIP Rev 382.

<sup>18</sup> Fawcett, J, (ed) *Declining Jurisdiction in Private International Law: Reports to the XIVth Congress of the International Academy of Comparative Law, Athens 1994*, (Claredon Press 1995) p.35

Alternatively, should such reverse-forum shopping opportunities be unavailable, the defendant may search for a forum that will provide her with an anti-suit injunction that will either effectively stay proceedings in the claimant's choice of forum or prevent the claimant from re-litigating the issue when judgment has already been given in the defendant's favour.<sup>19</sup> However, as a litigant can no longer obtain an anti-suit injunction where the matter is within the Brussels Regime to prevent, for example, the respondent commencing proceedings elsewhere,<sup>20</sup> this may affect the attractiveness of litigation within the Brussels Regime.<sup>21</sup>

The reasons for forum shopping vary extensively and are not exhaustive. They often depend on the party's motivations, resources, needs and potential benefits to be gained. It is clear, however, that the differences between the three regimes contribute significantly to the creation of an environment in which extensive forum shopping can occur.

#### 2.1.2. Is Forum Shopping an 'Evil' Product of Differing Jurisdictional Regulation?

Lord Simon suggested in *The Atlantic Star* that forum shopping should be a matter 'neither for surprise or indignation'; accordingly it is the natural consequence of global differences and should not be regarded as a 'dirty word'.<sup>22</sup> Furthermore, even if the claimant does engage in forum shopping, it does not mean that the claimant's claim will be successful or that the forum shopping will produce the desired effect. Indeed, it seems that the ability of the defendant to utilise litigational tools in the international arena has counteracted some of the advantages gained by forum shopping claimants.<sup>23</sup> The defendant may reverse-forum shop to prevent the action continuing in the forum preferred by the claimant or obtain a judgment with res

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<sup>19</sup> Bermann, G, 'The Use of Anti-Suit Injunctions in International Litigation', (1990) 28 Colum. J. Transnat'l L. 589, pp.613-4.

<sup>20</sup> C-1159/02 *Turner v Grovit* [2005] 1 A.C. 101.

<sup>21</sup> Mance, J, 'Exclusive Jurisdiction Agreements and European Ideals' (2004) 120 LQR pp.357, pp.359-61.

<sup>22</sup> [1974] AC 436, p.471.

<sup>23</sup> Lowenfeld, A, 'Forum Shopping, Anti-Suit Injunctions, Negative Declarations and Related Tools of International Litigation' (1997) 91 Am. J. Int'l L. 314, p.314.

judicata effect, making the claimant's judgment worthless.<sup>24</sup> The doctrine of forum non conveniens, particularly that operating under England's traditional rules, is designed to deny the claimant of access to the forum unless there is a substantial connection between the forum and the facts of the case, thus limiting the claimant's scope to forum shop. It seems that the ability of the claimant to exploit the divergences of judicial systems is not as grossly favourable to the claimant as may first appear to be the case.

However, it is also true that these countermeasures may not always be available and are also often costly and inconvenient to pursue. It is perhaps not the concept of forum shopping that is 'dirty' but rather the extent of it. The more extensive the claimant's ability to forum shop, the more distasteful it becomes. This is because fora with an interest in regulating the dispute may be denied the opportunity to try the case, even though the claimant's chosen fora has little or no interest in the action. It also becomes increasingly distasteful the further the suit is away from the defendant's home and the more unfamiliar she is with the chosen forum, particularly where an unconnected forum is chosen unfairly to harass and cause inconvenience.

Furthermore, forum shopping can have various implications for the justice system as a whole. A party engaging in forum shopping may be able to obtain a greatly different result in one forum compared to other more appropriate fora. Inconsistent decisions on identical or related matters and the exploitation of these variations 'hardly encourages respect for the rule of law and the role of courts in a civilised society.'<sup>25</sup>

## *2.2. Unpredictability:*

Predictability is of paramount importance in international litigation. There are several reasons for this. The first is that it promotes efficiency. It ensures that a party

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<sup>24</sup> Wilson, J, 'Coming to America to File Suit: Foreign Plaintiffs and the Forum Non Conveniens Barrier in Transnational Litigation' (2004) 65 Ohio St. L.J. 659, p.662.

<sup>25</sup> Bell, A, *Forum Shopping and Venue in Transnational Litigation* (Oxford University Press, 2003), p.24, p.12.

can select a forum from a range of available jurisdictions that is certain to exercise jurisdiction. A potential forum non conveniens dismissal or stay is costly because both parties incur the costs of litigation in that forum as well as the costs of pursuing the action from its very beginning elsewhere. Indeed, it may effectively deny the claimant of an ability to sue at all where the claimant's means are limited.<sup>26</sup> A change in venue can prompt strategic warfare to the extent that parties may elect to 'litigate each other into the ground' in order to prompt settlement in their favour.<sup>27</sup> Parallel proceedings, a result of inadequately consistent and coherent *lis alibi pendens* doctrines, are costly because they waste time, duplicate judicial resources and also congest the courts unnecessarily.<sup>28</sup> It can also cause severe harassment to a litigant.<sup>29</sup>

Secondly, predictability makes settlement easier. Certainty allows the lawyers to find the parameters of the claim without resort to debates or litigation in order to determine the availability of a controversially uncertain jurisdictional basis.<sup>30</sup> Thirdly, parties engaging in multinational business are able to predict the fora likely to be able to exercise jurisdiction, which allows these parties to construct their business activities around potential suits in those fora in the manner they think fit. Fourthly, predictability encourages reciprocal trust and this avoidance of suspicion will encourage the free-flow of judgments. This benefits claimants wishing to trace the defendant's assets to fora other than where the judgment was rendered. Finally, an inconsistent approach of the global community as a whole may also significantly affect a party's access to justice. In the *Laker Airways* fiasco, for example, the Court

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<sup>26</sup> Duval-Major, J, 'One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff' (1992) 77 Cornell. L. Rev. 650, p.671.

<sup>27</sup> Bell, n.25 above, p.15. *Lacey v Cessna Aircraft Co* (1994) 849 F.Supp. 394 (W.D.Pa) illustrates how costly forum non conveniens litigation can be. It took seven years for the court to reach a conclusion on the matter and the decision was appealed twice.

<sup>28</sup> Andrieux, G, 'Deciding Jurisdiction in a Future International Convention on Jurisdiction and Judgments – How Can We Benefit from Past Experiences in Conciliating the Two Doctrines of Forum Non Conveniens and Lis Pendens?' (2005) 27 Loy. L.A. Int'l & Comp. L. Rev. 323, p.349.

<sup>29</sup> Gardella, A, and Radicata di Brozolo, L, 'Civil Law, Common Law and Market Integration: The EC Approach to Conflicts of Jurisdiction' (2003) 51 Am. J. Comp. L. 611, p.624.

<sup>30</sup> Silberman, L, 'Developments in Jurisdiction and Forum Non Conveniens in International Litigation' (1993) 28 Texas Int. L. J. 501, p.502.



of Appeal provided the applicant with a jurisdiction-stripping anti-suit injunction even though no forum other than the United States was available.<sup>31</sup>

### 2.2.1. What Causes the Inconsistency?

There are several reasons why there is international uncertainty. The first is the content of the jurisdictional provisions and the mechanisms that control the width of jurisdiction. Due process requirements operating in the United States and the doctrine of forum non conveniens, operating in both the United States and under England's traditional rules, are approached on a case-by-case basis, making litigation unpredictable. Although the courts have provided guidance on how to apply these concepts to the facts, problems of line drawing still remain. It is difficult for a lawyer presented with a case with novel facts, or facts that differ considerably from previous cases, to determine authoritatively whether the venue will be open to the claimant.

Even exclusive jurisdiction agreements, which are designed to provide certainty by their very nature, fail to ensure the predictability the parties sought when contracting. This is caused by the differential treatment they receive before the courts. Some courts refuse to recognise jurisdiction agreements at all. Other countries may declare an agreement ineffective if it concerns a particular party or subject matter. Differences in translation may also be exploited. Some presume an agreement is non-exclusive, entitling the parties to sue elsewhere, unless exclusivity is specified in the contract. Where it later becomes apparent that the forum chosen might not be beneficial, a party is likely to challenge the clause.<sup>32</sup> The exploitation of such diversity can create uncertainty, which is compounded in a transnational setting.

A third reason why there is international uncertainty is the use of litigational tools such as anti-suit injunctions. There is no consistent global, or even regional, approach towards their issuance.<sup>33</sup> Notwithstanding the substantial impact upon

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<sup>31</sup> [1986] QB 689. The House of Lords revoked this on appeal, see *British Airways Board v Laker Airways Ltd* [1985] AC 58.

<sup>32</sup> Haines, A, 'Choice of Court Agreements in International Litigation: Their Use and Legal Problems to which they Give Rise In the Context of the Interim Text, Preliminary Document 18 (available at [www.hcch.net](http://www.hcch.net)) p.10.

<sup>33</sup> See pp.75-80 above.

litigation, the approach of the United States' courts towards anti-suit injunctions is diverse.<sup>34</sup> Furthermore, only an analysis of each case is sufficient to determine whether an anti-suit injunction should be granted, which causes further unpredictability for litigants. Fourthly, incoherent *lis alibi pendens* doctrines on a global scale have the effect of permitting parallel proceedings that encourage races to judgment and produces global inconsistency.

### *2.3. The Impact Upon Comity and Foreign Relations:*

Jurisdiction is inherently linked to notions of territoriality. All states are co-equal. As such, this brings about the idea that each state has the exclusive sovereign right to determine the laws applicable within its territory. The corollary of this is that no state should impact upon another sovereign's right to do the same.<sup>35</sup> In a utopian world, no complications or contradictions are associated with such restraints upon the nations. However, in light of the growth of multinational business, transport and travel, it is not possible to 'pigeon-hole' all disputes that arise from such activities as falling within just one state's territorial reach. For example, a company may release pollution into a river in country X but this damages the property of the claimant in country Y. Country X and country Y both have an interest in regulating the cause of action that has arisen. To compensate for this growth in global activities, and in light of the fact that many activities have cross-border implications, concurrent jurisdiction developed. The only problem with this 'necessity' was that it brought with it the potential to offend co-equal sovereigns. It also leads to parallel proceedings and a range of fora being open to exploitation by the claimant. Judgments may also be refused enforcement because the state addressed does not approve of the jurisdiction exercised over the defendant.

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<sup>34</sup> See p.83 above, discussing how inconvenience of the alternative forum is sometimes thought to justify an anti-suit injunction.

<sup>35</sup> This is known as the doctrine of 'territorial sovereignty'. In the Brussels Regime this doctrine has been abandoned in pursuit of common objectives. See pp.203-4 below.

### 2.3.1. When Might Comity or a Foreign Forum Be Offended?

There are two distinct circumstances in which comity or a foreign forum, or both, may be offended by the necessary movement away from adherence to strict principles of territorial power. The first is where a court issues an anti-suit injunction that in some manner impacts upon the other court's jurisdiction and the second is where the reach of a particular jurisdictional provision is so extensive it is deemed unreasonable by other countries.

#### *2.3.1(a) How Might Anti-Suit Injunctions Offend?*

Anti-suit injunctions are a useful but controversial litigational tool. There are two types of anti-suit injunctions. An anti-suit injunction can be offensive in nature in that it effectively stays the other court's proceedings.<sup>36</sup> An anti-suit injunction can also be defensive in nature. This is where an anti-suit injunction is drafted narrowly so that it only prevents interference with the issuing court's own proceedings.

There are numerous circumstances in which a party may request an anti-suit injunction. For example, a defendant may wish to use an anti-suit injunction to prevent proceedings initiated by the claimant in another forum from going ahead.<sup>37</sup> A claimant may obtain an injunction to prevent the defendant from obtaining a jurisdiction-stripping injunction elsewhere or from obtaining an injunction that will interfere with the proceedings in any way. An applicant may seek an anti-suit injunction to prohibit the other party from enforcing a judgment obtained in parallel proceedings so as to ensure the res judicata effect of the applicant's judgment.<sup>38</sup> A party may also pursue an anti-suit injunction because the proceedings brought elsewhere have, as their sole purpose, the desire to harass the other party or because the other party has breached an exclusive jurisdiction clause by suing elsewhere.

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<sup>36</sup> Also known as a 'jurisdiction-stripping injunction'.

<sup>37</sup> Such action can be classified as 'reverse-forum shopping' because the defendant must find a forum with jurisdiction over the claimant that is willing to issue a jurisdiction-stripping injunction.

<sup>38</sup> Rausenbush, R, 'Anti-suit Injunctions and International Comity' (1985) 71 Va.L. Rev 1039, pp.1041-2.

Offensive anti-suit injunctions impact upon the autonomy of another court to determine its own jurisdiction.<sup>39</sup> This infringement of the principles of comity can have several ramifications. ‘Retaliatory non-cooperation’ may result, whereby the offending court finds that certain fora refuse to recognise its judgments or other fora begin readily to use anti-suit injunctions in return. This produces high costs and inconvenience for all subsequent actions.<sup>40</sup>

Jurisdiction-stripping anti-suit injunctions also make statements about the actions and the fora that they are intended to affect. For example, some courts in the United States issue anti-suit injunctions where they believe that the alternative forum is inappropriate, or not as convenient, and thus effectively stays that forum’s proceedings on its behalf. This effectively implies that the alternative forum is incapable of deciding whether it is appropriate for the trial and possibly produces unjust results. This can have a damaging effect on foreign relations.<sup>41</sup> Indeed, the issuing of anti-suit injunctions may even invoke the political involvement of the government. In the *Laker Airways* fiasco, the British government made it apparent that it thought that the proceedings in the United States, based on an alleged inappropriate extraterritorial extension of antitrust jurisdiction, should be stayed.<sup>42</sup> The root of this standoff was the ‘fundamentally opposed’ social and economic policies of the two countries regarding the ‘desirability, scope and implementation of legislation controlling anticompetitive business practices.’<sup>43</sup> A court does not have ‘the institutional resources to weigh policy and political factors that must be evaluated’ in such circumstances.<sup>44</sup> The political branches are much more apt in

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<sup>39</sup> The German Court of Appeal in Düsseldorf regarded an anti-suit injunction as interference with the autonomy of the court and the state’s sovereignty in *Re Enforcement of an English Anti-Suit Injunction* [1997] I.L. Pr. 320. In contrast, in *Turner v Grovit* (2002) 1 All ER 960, paras 22-23, Lord Hobhouse stated that, as anti-suit injunctions are addressed to the parties, they do not deny or pre-empt the competence of the other forum. This, of course, ignores the practical reality that an anti-suit injunction of this kind will effectively stay the other forum’s proceedings.

<sup>40</sup> Raushenbush, n.38 above, p.1065.

<sup>41</sup> Schimek, D, ‘Anti-Suit Injunctions and Anti-Anti-Suit Injunctions: A Proposed Texas Approach’ (1993) 45 Baylor L. Rev 499, pp.505-6.

<sup>42</sup> Two directives were issued under the Protection of Trading Interests Act 1980 prohibiting any person in the UK from complying with, inter alia, discovery requirements in the United States without the Secretary of State for Trade and Industry’s express permission.

<sup>43</sup> *Laker Airways Ltd v Sabena, Belgian World Airlines* (1984) 731 F.2d 909, p.955 (D.C. Cir) (United States’ litigation). *British Airways Board v Laker Airways Ltd* [1985] AC 58.

<sup>44</sup> Raushenbush, n.38 above, p.1065

dealing with such issues.<sup>45</sup> The warfare caused by the *Laker Airways* litigation testifies to the need for a restrictive approach to anti-suit injunctions where the infiltration of political considerations is likely.

Even defensive anti-suit injunctions are often disrespectful to the courts of another country. An anti-suit injunction designed to give *res judicata* effect to the judgment rendered by the issuing forum denies other fora the potential to evaluate that judgment with a judgment rendered in parallel proceedings according to its own principles of recognition. It may be that the judgment of the issuing forum is contrary to public policy in the recognising forum or that one judgment does not adequately cover all the issues determined in the other so that both are capable of co-existing. To deny that forum the opportunity to review the judgments is a statement about that forum's capability to deliver fair recognition. It is also parochial in that it assumes that all fora should have the same recognition and enforcement principles, or indeed the same jurisdictional principles, as the forum issuing the anti-suit injunction.

Arguments for the maintenance of anti-suit injunctions because they can be issued to protect the defendant from 'vexatious or oppressive' conduct<sup>46</sup> ignore the fact that the foreign forum may have procedures to counteract such abuse and that the defendant should make her appeals of such conduct to that forum.<sup>47</sup> If that forum has already ruled on the matter, it is offensive to comity to overrule that forum. Should the foreign forum not have the capability to make determinations as to the claimant's conduct, it is not for another forum to counteract what it sees as its inadequacies because this represents an attempt to 'police the world'. In such circumstances, principles of *res judicata* generally ensure that only one of the judgments is effective and the recognising forum may take into account the harassing conduct. Further, recognising fora are unlikely to enforce default judgments over judgments rendered with both parties present, thus a combination of *res judicata* and a default in appearance by the harassed party in the forum where the conduct is vexatious is likely to lead to the acceptance of the two judgments being recognised. Monetary fines or

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<sup>45</sup> Paul, J, 'Comity in International Law' (1991) 32 Harv. Int'l L.J 1, p.76.

<sup>46</sup> See pp.76-77 above for a discussion of such conduct.

<sup>47</sup> Rausenbush, n.38 above, p.1069.

threat of dismissal of an action could also be utilised by courts to resolve some of the complaints of the applicant without resorting to granting an anti-suit injunction.<sup>48</sup>

Although anti-suit injunctions can be seen as protecting certain interests and hence necessary, their potential impact upon foreign relations, comity and the operation of the justice system on a global scale is of great concern. This is especially true on account of the lack of consistency in their granting.<sup>49</sup>

### *2.3.1(b) When Might Bases for the Exercise of Jurisdiction Offend?*

It is now internationally recognised and accepted that jurisdiction is not restricted to the confines of a territory. The modern expansion of multinational conduct justifies the potential interferences with other jurisdictions that concurrent jurisdiction may bring. Notwithstanding this, there are some exercises of jurisdiction that are regarded as ‘exorbitant’ by most in the international community.<sup>50</sup> The ‘doing business’ doctrine operating in the United States and the founding of jurisdiction on the defendant’s presence in the forum are both ear-marked as ‘exorbitant’.<sup>51</sup> This is because the introduction of long-arm jurisdiction is really only excusable where some connection between the forum and the cause of action exists to warrant the exercise of jurisdiction and these jurisdictional grounds do not guarantee this. If no such nexus exists the courts become ‘open to the world’, promoting forum shopping and burdening defendants.

It is true to say that part of this problem has been remedied by the doctrine of forum non conveniens, which operates in both the United States and under England’s traditional rules, curtailing the availability of these bases and guaranteeing a dispute-forum nexus. However, inconsistencies in application of the doctrine do not totally

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<sup>48</sup> Najarian, H, ‘Granting Comity Its Due: A Proposal to Revive Comity-Based Approach to Transnational Anti-Suit Injunctions’ (1994) 68 St. John’s L. Rev 961, p.983.

<sup>49</sup> This is not to say that anti-suit injunctions are never acceptable or appropriate. This serves only to illustrate the problems that currently stem from the diversity in their usage among co-equal sovereigns.

<sup>50</sup> Clermont, K, ‘Jurisdictional Salvation and the Hague Treaty’ (1999) 85 Cornell L. Rev. 89, p.96.

<sup>51</sup> Ibid. See pp.130-132 below for the ‘exorbitant’ jurisdictional bases the delegations at The Hague placed on the ‘prohibited’ list.

eradicate wide-ranging jurisdictional bases overburdening defendants. This, of course, creates the perfect environment for refusals to recognise and enforce foreign judgments, encourages forum shopping and denies fora with a legitimate interest in the dispute the opportunity to try the case. It can also cause crises in diplomatic and trade relations.<sup>52</sup>

### **3. Why Draft A Global Regime Regulating Jurisdiction to Resolve These Problems?**

Forum shopping is the exploitation of jurisdictional, procedural, substantive or practical differences to a party's advantage. This misuse is the direct product of inconsistent access to venues for litigation across the globe. Further, unpredictable access to litigational tools, trial venues and variations in approaches to *lis alibi pendens* exacerbate the uncertainty involved in transnational litigation. As demonstrated above, comity and foreign relations are also detrimentally affected. An increase in globalisation has exasperated these negatives.<sup>53</sup> The problems encountered in transnational litigation will continue to grow as interdependency and cooperation expand.

It appears that the most useful and efficient route to mitigating the extent of these problems is to develop a consistent jurisdictional regime that is acceptable to the international community as a whole. In light of the significant impact of subsidiary matters, such as forum non conveniens and anti-suit injunctions, on litigation, jurisdictional regulation could not be effective or efficient without also specifically dealing with these issues.

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<sup>52</sup> In *Ashai Metal Industries v Superior Court of California* (1987) 480 U.S. 107, pp.115-16 the Supreme Court suggested that, on the facts, an exercise of jurisdiction over the Japanese defendant might put a 'strain' on foreign relations between the United States and Japan. Some countries have responded to 'excessive' jurisdiction by permitting 'retaliatory' jurisdiction, authorising their courts to exercise jurisdiction over defendants from the offending forum whenever the offending forum would utilise such jurisdiction. See Parrish, A, 'Sovereignty, Not Due Process: Personal Jurisdiction over Non-resident Alien Defendants' (2006) 41 Wake Forest L. Rev. 1, p.49

<sup>53</sup> Preliminary Document 16, 'Some Reflections on the Current State of Negotiations on the Judgments Project in the Context of the Future Work Programme of the Conference', prepared by the Permanent Bureau (available at [www.hcch.net](http://www.hcch.net)) p.6.

### 3.1. *The Beneficial By-Products:*

Although the three paramount problems associated with the divergence in jurisdiction are justification alone for an attempt to draft a global regime, there are further benefits to be gained from such a project.

#### 3.1.1. Sorting Out the United States' Jurisdictional Mess:

As has been demonstrated in the analysis of the jurisdictional law of the United States in chapter two, the current rules are messy, irrational and inconsistent. The nature of general jurisdiction is sometimes too wide and at other times narrower than the two European regimes considered. This is further aggravated by the fact that each state regulates its own jurisdiction, subject only to due process limitations. Further, due process is inherently unpredictable, not only because of the need for a factual evaluation, but also because of the discretionary nature of the second limb, of doubtful use, and problems of quantification concerning the quality of contacts with the forum arising under the first limb. Litigational tools such as anti-suit injunctions and the doctrine of forum non conveniens are also problematical in the jurisdictional sphere. These problems, coupled with the confusion as to the underlying aims of the jurisdiction rules and the due process test, could be mitigated to a significant extent with the implementation of a global convention.

According to Clermont a multinational treaty regulating jurisdiction is likely to bring much greater uniformity to the United States, as federal law would then regulate jurisdiction as opposed to state law.<sup>54</sup> Indeed, Clermont suggests that Congress should federalise the law even where the global regime did not apply.<sup>55</sup> It could perhaps be possible instead to implement the global regime into sister-state cases through an interstate compact or through legislation from Congress so that just one logical, consistent approach to jurisdiction exists irrespective of whether the

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<sup>54</sup> Clermont, K, 'Jurisdictional Salvation and the Hague Treaty' (1999) 85 Cornell L. Rev. 89, p.90.

<sup>55</sup> Because the matter was domestic or the defendant was from a non-contracting state, for example.



litigation is within the scope of the global jurisdiction convention.<sup>56</sup> At the very least, the discussions concerning a global regime would foster a move towards the adoption of a federal standard or greater cooperation among the states, reducing some of the disparities encountered across the United States.

As a consequence of the current due process definition, modifications to the jurisdictional structure have been ‘clumsy and costly, necessitating complicated doctrinal adjustments to stretch or shrink jurisdictional reach’, creating an inability to adapt to the changes in modern society.<sup>57</sup> Clermont argues that a worldwide convention containing predictable and agreeable jurisdictional bases that are limited in scope will assist with jurisdictional evolution generally in the United States, encouraging a redefinition of due process and permitting appropriate evolution in a simple manner where necessary.<sup>58</sup>

### 3.1.2. A Resolution of the Enforcement Problem:

The global recognition and enforcement of foreign judgments outside the operation of the Brussels Regime is unpredictable and often dependent upon each country reviewing the exercise of jurisdiction before confirming whether the judgment should be recognised and enforced. This is not only costly to the parties but a duplication of judicial resources. Further, recognition and enforcement may be denied on grounds that would be regarded as unacceptable bases for refusal of recognition under the efficient Brussels Regime. As the Brussels Regime procures almost automatic recognition and enforcement of judgments rendered in Europe, regardless of the jurisdictional ground utilised, with few problems, the reluctance to recognise and enforce judgments on a global scale is unjustifiably detrimental to both litigants. This is especially true as far as the United States is concerned. Although the United States generally enforces most judgments rendered elsewhere, its judgments are often denied recognition.<sup>59</sup> This is normally because the jurisdictional bases used,

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<sup>56</sup> Clermont, n.54, pp.90 and 97. See p.122 of this article as to why it is unlikely that an interstate compact or action from Congress regarding sister-states will be proposed.

<sup>57</sup> Ibid, p.102.

<sup>58</sup> Ibid, pp.127-129.

<sup>59</sup> Uniform Foreign Money-Judgments Act (1962) 13 U.L.A. 261, adopted by a majority of states in the United States, ensures that non-US judgments receive similar treatment to the full

or the damages awarded, are substantially different to other fora across the world.<sup>60</sup> A global regime would remedy this by guaranteeing the free circulation of judgments and a restrictive construction of exceptions to quasi-automatic recognition so that a country could not deny effect to a judgment it, for whatever reason, did not like.

#### **4. Conclusion:**

As discussed above, there is much to be gained by the introduction of a global regime. Although it is impossible to provide a comprehensive regime that will remove all litigational doubts concerning transnational litigation, the potential for great improvement exists. As a consequence of this, parties, international business and comity will all benefit. The reduction in forum shopping created by a consistent approach towards jurisdiction will help 'level out the playing field' so that the claimant cannot exploit the differences in jurisdiction that currently exist. However, the claimant will sometimes benefit too, as this provides the defendant with less ability to reverse-forum shop and ensures that weaker claimants are protected from a defendant exploiting litigational tools, such as the forum non conveniens doctrine, to deny the claimant suit altogether. A jurisdiction and judgments convention should encourage cooperation and avoiding damaging representations about the other fora's capabilities. It will also become a case and resource management tool because it will decrease the number of multiple suits and reduce the caseloads of overburdened fora by denying access to the courts unless appropriate in the circumstances. Although the development of a worldwide regime is not the remedy to the problems associated with transnational litigation, it does provide a guarantee of a much more coherent conceptual framework that will provide greater stability, consistency and fairness to all involved. The benefits appear to outweigh the costs of contracting states losing the width of their current jurisdictional reach and the complications that will arise from the need to find international agreement. It will not be an easy task, on account of the significant differences across the globe, but it is certainly worth pursuing.

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faith and credit afforded to sister-state cases. See Andrieux, G, 'Deciding Jurisdiction in a Future International Convention on Jurisdiction and Judgments – How Can We Benefit from Past Experiences in Conciliating the Two Doctrines of Forum Non Conveniens and Lis Pendens?' (2005) 27 Loy. L.A. Int'l & Comp. L. Rev. 323, p.326.

<sup>60</sup> Ibid.

## Chapter 4: The Attempt to Draft A Global Convention at The Hague:

### **1. Introduction:**

In light of the benefits that are likely to result from the creation of a global convention regulating both jurisdiction and judgments in civil and commercial matters,<sup>1</sup> the Hague Conference decided to embark upon the project. The idea was first suggested by the United States in 1992<sup>2</sup> and, in 2005, a text was finally accepted by the delegations but this was not the global regime anticipated thirteen years earlier. The text only governed choice of court agreements, a small fraction of the project's initial aim. It seems that the crucial diversion away from this occurred in April 2002 when it became apparent that consensus was unascertainable.<sup>3</sup> It was at this point that the deliberations were restricted to those areas on which there was agreement in principal.<sup>4</sup> It was hoped that this would provide a foundation for negotiations concerning a global regime but this never eventuated.<sup>5</sup> The dream of a global regime was deemed too complicated to achieve.<sup>6</sup> The Conference abandoned its hope of ever accommodating all the opposing schemes and views in one convention.

This chapter compares the provisions of the 2001 Interim Text<sup>7</sup> to the three regimes discussed in chapter two. It is hoped that ascertaining the extent of the

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<sup>1</sup> Discussed in chapter three above.

<sup>2</sup> 'Conclusions of the Special Commission of June 1994 on the Question of Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters', Preliminary Document 2, prepared by the Permanent Bureau (available at [www.hcch.net](http://www.hcch.net)) p.10

<sup>3</sup> Schulz, A, 'Reflection Paper to Assist with the Preparation of a Convention on Jurisdiction and Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters', Preliminary Document 19 (available at [www.hcch.net](http://www.hcch.net)) p.7.

<sup>4</sup> In April 2002, the project was sent to a committee of experts charged with the task of producing a more limited convention. See 'Some Reflections on the Present State of Negotiations on the Judgments Project in the Context of the Future Work Programme of the Conference', Preliminary Document 16, prepared by the Permanent Bureau (available at [www.hcch.net](http://www.hcch.net)) p.15.

<sup>5</sup> Ibid, p.14.

<sup>6</sup> Within the timeframe and financial resources available. Deliberations had, by this point, spanned a decade. See Preliminary Document 16, *ibid*, p.14.

<sup>7</sup> In 1999 a Preliminary Draft Convention was produced but the delegates rejected it. In 2001, after substantial negotiations, an 'Interim Text' was produced, which is contained in 'Summary of the Outcome of the Discussion in Commission II of the First Part of the

differences between the three regimes and the Interim Text will reveal the reasons for the failure of the delegations to secure agreement on the jurisdiction and judgments project. The Choice of Court Convention will also be examined in order to determine the extent to which consensus could be achieved.<sup>8</sup>

## **2. The Provisions of the Interim Text:**

The Hague Conference has attempted to draft a convention concerning the recognition and enforcement of foreign judgments before. However, the 1969 Convention<sup>9</sup> was ratified by just a few states, resulting in it never having any practical effect. This was a ‘single convention’, as it only regulated the recognition and enforcement of foreign judgments; it contained no provisions on jurisdiction. Based partly on the lessons from the past and partly on the fact that the successful regional Brussels Regime governs both jurisdiction and recognition and enforcement, the delegations deemed it necessary to proceed on the basis of a ‘double convention’.<sup>10</sup> A ‘double convention’ regulates jurisdiction by providing a list of ‘required’ jurisdictional bases and a list of those that are ‘prohibited’. Under a ‘double convention’, only the utilisation of those bases falling under the ‘required’ list<sup>11</sup> would be entitled to simplified recognition and enforcement and those that are ‘prohibited’ must not be used when the matter is within the regime’s scope. States would be obliged to refrain from recognising and enforcing judgments rendered under a ‘prohibited’ basis for jurisdiction.

However, the United States protested against the use of a ‘double convention’. It asserted that a regime containing only ‘prohibited’ (‘black’) and ‘required’ (‘white’) bases of jurisdiction did not take into account different ‘jurisprudential and cultural

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Diplomatic Conference 6 – 20 June 2001: Interim Text’, prepared by the Permanent Bureau (available at [www.hcch.net](http://www.hcch.net)). It is this latest text with which this chapter is concerned.

<sup>8</sup> The reasons for the failure of the project will be the subject of the next chapter.

<sup>9</sup> Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, 1 February 1971, 1144 UNTS 249.

<sup>10</sup> Nygh, P and Pocar, F, ‘Report of the Special Commission on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters’, Preliminary Document 11 (available at [www.hcch.net](http://www.hcch.net)) p.28.

<sup>11</sup> A state was obliged to make any ‘required’ basis available to claimants even if its national did not provide that jurisdictional ground.

backgrounds'.<sup>12</sup> A 'convention mixte',<sup>13</sup> containing three categories under which a state's jurisdictional rules could fall, was suggested by the United States. It contained 'required' and 'prohibited' lists just like a 'double convention' and operated in the exact same manner as the initial suggestion. However, it also contained a 'permissive' ('grey') list of jurisdictional bases. The grounds falling within the 'permissive' list were not entitled to simplified recognition and enforcement but permitted the contracting states to determine according to their national law whether they wished to recognise and enforce the judgment. This proposal was accepted and so the project evolved into a 'mixed convention'.<sup>14</sup> The Conference thus faced the task of categorising all jurisdictional rules into one of three groups.

Until the decision to utilise a 'mixed convention' was taken, the text clearly followed the same system as the Brussels Regime.<sup>15</sup> However, it later became both a 'double convention', retaining all the qualities of the Brussels Regime's approach, but also a type of 'single convention'. This latter characteristic was unprecedented in all previous similar conventions. It was a totally new and unfamiliar idea.

## *2.1. The Scope of the Interim Text:*

Similarities between the Interim Text and the Brussels Regime are evident.<sup>16</sup> Both regimes concern civil and commercial matters to the exclusion of administrative matters, revenue matters, issues of succession, insolvency, social security matters and arbitration, amongst others.<sup>17</sup> The Interim Text also approached the exercise of jurisdiction through strict, rigid rules just as the Brussels Regime does, rather than on a case-by-case basis like the common law systems.<sup>18</sup>

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<sup>12</sup> O'Brien, W, 'The Hague Convention on Jurisdiction and Judgments: The Way Forward' (2003) 66 MLR 491, p.498.

<sup>13</sup> A 'mixed convention'.

<sup>14</sup> Preliminary Document 11, n.10 above, p.28.

<sup>15</sup> See the 1999 Preliminary Draft Convention (available at [www.hcch.net](http://www.hcch.net))

<sup>16</sup> Preliminary Document 11, n.10 above, p.28 acknowledges that provisions were borrowed from the Brussels Regime although the drafters attempted to accommodate the lessons learnt from it.

<sup>17</sup> See Art.1(1) and (2) for all excluded matters.

<sup>18</sup> Von Mehren, A, 'Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable Worldwide: Can the Hague Conference Project Succeed?'

Article 2 of the Interim Text provided that, if both parties were resident in the same contracting state, the regime did not apply save in the exceptional circumstances listed.<sup>19</sup> In contrast, the ECJ confirmed in *Owusu v Jackson*<sup>20</sup> that, as long as the facts are connected to two or more countries, it does not matter if the parties are from the same state. Thus the territorial scope of the Interim Text would have been narrower than the Brussels Regime.

## 2.2. The Required Bases: 'General' Jurisdiction:

Article 3 of the Interim Text provided general jurisdiction at the place of the defendant's 'residence'.<sup>21</sup> Unlike the Brussels Regime, this was not intended to be the central provision of the regime<sup>22</sup> but, in practice, it would have operated as 'default jurisdiction' in the same manner as the Brussels Regime. 'Residence' was thought to be a more appropriate connecting factor than domicile because it is a more flexible concept. As a result, it would have been more successful at accommodating the varying legal systems involved.<sup>23</sup>

Under Article 3(2), a forum could exercise general jurisdiction over the defendant if it were her sole residence. If the defendant had more than one residence, then jurisdiction could have only been exercised at her principal place of residence. If no principal residence existed, jurisdiction would have been available at each and every residence.<sup>24</sup> A non-natural defendant's 'residence' was defined as the place of its statutory seat, the place of its incorporation, the place of its central administration

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(2001) 49 Am. J. Comp. L 190, p.194. A limited discretion to decline is permitted but determining jurisdiction *ex ante* is the basic premise of the Interim Text.

<sup>19</sup> The regime would have applied regardless of the parties' residence where the dispute concerned choice of court agreements, rights in rem in immoveable property or the *lis alibi pendens* or *forum non conveniens* provisions applied (contained in Articles 4, 14, 21 and 22 respectively). See Art.2(1)(a)-(c).

<sup>20</sup> C-281/02 [2005] I.L. Pr. 25.

<sup>21</sup> It was not agreed whether 'residence' or 'habitual residence' should be used. See Art.3, footnote 17.

<sup>22</sup> Nygh, P and Pocar, F, 'Report of the Special Commission on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters' (2000), Preliminary Document 11 (available at [www.hcch.net](http://www.hcch.net)), p.28.

<sup>23</sup> *Ibid*, p.39.

<sup>24</sup> It was left to the national courts to determine what amounted to 'residence'. This obviously presented the possibility for disparity among the contracting states and opportunities for several fora to exercise general jurisdiction over the defendant.

or its principal place of business.<sup>25</sup> As these definitions could have overlapped at any one time, this would have presented the opportunity for multiple fora to exercise general jurisdiction over the non-natural defendant.<sup>26</sup> This is almost identical to the methods by which the Brussels Regime determines the domicile of a non-natural defendant.<sup>27</sup>

Both England's traditional rules and the United States' approach permit the exercise of jurisdiction on the basis of the defendant's physical presence in the forum. The common law systems thus have the potential to assert jurisdiction over many more defendants than the Interim Text would have allowed.<sup>28</sup> Further, as economic 'contacts' with the forum are sufficient to found general jurisdiction in the United States, the Interim Text would have severely reduced the current jurisdictional reach of the United States' courts. Although doctrines do exist in both common law countries to counteract the extent of the courts' jurisdictional reach, the lack of consistency in their application means that the potential to exercise general jurisdiction under the common law regimes is greater. Although arguably not as strong as the concept of 'domicile', used by the Brussels Regime, the Interim Text's utilisation of the concept of residence would have guaranteed a stronger defendant-forum nexus existed than the approaches of the common law regimes.<sup>29</sup>

### *2.3. The Required Bases: Specific Jurisdiction:*

The specific jurisdictional bases categorised as falling within the 'white' list were contained in Articles 4 to 16 inclusive.<sup>30</sup> It is apparent from the footnotes, appendixes and bracketed language of the Interim Text that some provisions found

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<sup>25</sup> Art.3(3).

<sup>26</sup> O'Brien, W, 'The Hague Convention on Jurisdiction and Judgments: The Way Forward' (2003) 66 MLR 491, p.499.

<sup>27</sup> See pp.8-9 above.

<sup>28</sup> The United States also permits the exercise of general jurisdiction at the place of the defendant's residence but, unlike the Interim Text, wider bases are also available.

<sup>29</sup> Indeed, under England's traditional rules the dispute-forum nexus could be strong enough to provide the courts with general jurisdiction even though the defendant's presence in the forum was only temporary. The Interim Text's requirement of 'residence' would have prevented the exercise of jurisdiction in such circumstances.

<sup>30</sup> Provisions not discussed in this chapter include Articles 7 (consumer contracts), 8 (employment contracts), 11 (trusts), 12 (rights in rem and tenancies in rem in immoveable property) and 13 (interim and protective measures).

little agreement among the delegations. The range of alternatives offered will be explored in this section.

### 2.3.1. The Choice of Forum Exception:

Article 4(1) provided the forum chosen by the parties with jurisdiction over any dispute that ‘has arisen or may arise in connection with that particular legal relationship’. The choice of court agreement was presumed to be exclusive unless expressly stated otherwise.<sup>31</sup> Where jurisdiction was exclusive, all contracting states other than the state chosen were required to decline jurisdiction unless and until the chosen forum had determined that it did not have jurisdiction over the matter, even if the nominated forum was a non-contracting state outside the scope of the regime.<sup>32</sup>

Like the requirements of the Brussels Regime, the Interim Text required that the agreement complied with certain formalities as to its form.<sup>33</sup> To be effective, the agreement had to be either in writing;<sup>34</sup> concluded orally but confirmed in writing;<sup>35</sup> in conformance with a usage regularly used by the parties or in accordance with a method that parties in the same industry concluding similar contracts would employ, of which the parties should have been aware.<sup>36</sup>

Every regime analysed in chapter two permits jurisdiction in the forum nominated by the parties. This acknowledges that party autonomy is beneficial to the parties because it ensures certainty. Further, jurisdiction cannot be regarded as overburdening either party where that party freely agreed to suit there. The delegates

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<sup>31</sup> This would have reduced litigation concerning exclusivity. Haines, A, ‘Choice of Court Agreements in International Litigation: Their Use and Legal Problems to which they Give Rise in the Context of the Interim Text’, Preliminary Document 18 (available at [www.hcch.net](http://www.hcch.net)) p.10.

<sup>32</sup> There was no agreement as to whether lack of consent and incapacity should be left to a state’s national law to determine. Alternative provisions were suggested on the substantive validity of the jurisdiction clause. See Art.4(1), footnote 24 and also Art.4(4) and Art.4(5), footnote 28.

<sup>33</sup> This prevented the application of national law on the matter, reducing the likelihood of inconsistent results. See Preliminary Document 18, n.31 above, p.11.

<sup>34</sup> Or a method of communication that is accessible.

<sup>35</sup> Or a method of communication that is accessible.

<sup>36</sup> Article 4(1)(a)-(d). A proposal was put forward whereby a jurisdiction agreement would have been ineffective if it conflicted with the principles set out in Articles 7, 8 and 12 on account of their overriding importance. See Article 4(5), footnote 29.



clearly foresaw a prominent role for choice of court clauses, subject only to ‘weaker party’ scenarios.<sup>37</sup> This predominant position is evidenced by the absolute obligation on the courts to stay in favour of the chosen forum. This requirement exceeds that expected under all three regimes analysed in chapter two.

England’s traditional rules are perhaps the closest to the Interim Text, as they insist upon holding the parties to their bargain even if a more appropriate forum for trial exists. Even where the parties have concluded a non-exclusive agreement, there is a strong presumption of trial in the selected forum. However, the opportunity for suit in a non-chosen forum exists, in contrast to the exclusive nature of the Interim Text. As noted above, the United States’ approach is arguably the weakest in enforcing choice of court agreements because an ability to argue that the nominated forum is ‘inconvenient’ for the action results in the agreements having a weaker practical effect. Consequently, unlike all the other systems, the United States’ approach evaluates the interest of the forum in resolving the dispute.

The obligation on the parties to adhere to their contractual agreement is also less onerous under the Brussels Regime than the Interim Text. This is because the practical significance of jurisdiction agreements has been watered-down somewhat by the ECJ’s decision in *Erich Gasser GmbH v MISAT Srl*.<sup>38</sup> As explained above, this case enables the parties to exploit the ‘first-seised’ approach of the *lis alibi pendens* provision to prevent the forum nominated from being able to exercise jurisdiction unless the forum first seised has declined jurisdiction.<sup>39</sup> The position of the Interim Text appears to be the most stringent of all the regimes, requiring that all states refuse to hear the case and that the parties are unable to deviate from their agreement.

This basis for the exercise of jurisdiction clearly found some agreement amongst the participants, as it was the subject the delegations chose to focus on after it became apparent that consensus on a worldwide regime could not be achieved. The

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<sup>37</sup> Where the weaker party’s ‘consent’ to anything onerous is questionable. This is outside the scope of this chapter. See Preliminary Document 18, n.31 above, p.13 for further information on this.

<sup>38</sup> C116/02 [2005] Q.B. 1

<sup>39</sup> See p.97 above.

actual content of the agreed text for the Choice of Court Convention will be explored below.<sup>40</sup>

### 2.3.2. The Appearance by the Defendant Exception:

After some debate over the content of the provision concerning submission by the defendant, it was decided that the defendant should only be deemed as having submitted to the courts' jurisdiction where the defendant 'expressly' accepts jurisdiction.<sup>41</sup> Article 5 provided that a defendant had the right to contest jurisdiction, without submitting to the courts' jurisdiction, at least until a defence on the merits was filed.<sup>42</sup> As with jurisdiction agreements, this provision strikes an adequate balance between the parties because a defendant that submits is clearly happy to be sued in the court seised, as she has rejected her opportunity to contest the courts' jurisdiction. As a result she is not forced to litigate there against her will. The claimant's interests are also satisfied because the claimant's choice of forum is upheld through the defendant's submission. As with choice of court agreements, the only 'interest' not accommodated in this provision is that of the forum, which may be entirely unconnected to the dispute.

When compared to England's traditional rules and the Brussels Regime, it is clear that the Interim Text is very similar. The United States' federal courts provide a greater level of protection than the Interim Text guaranteed, as the defendant may appear to contest the courts' jurisdiction and file a defence on the merits.<sup>43</sup>

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<sup>40</sup> See pp.138-145 below.

<sup>41</sup> Art.4(3). It was not settled whether the defendant's submission would have to be in writing or evidenced in writing in order to override a jurisdiction agreement concluded earlier by the parties. See Art.4(3), footnote 26.

<sup>42</sup> As this was a 'minimum requirement', states could have provided further rights to defendants but could not have reduced the time provided. There was no consensus on whether the right to contest jurisdiction should be included at all within the convention and there was also a lack of agreement as to the time-frame in which the defendant should be able to contest jurisdiction. See Art.5, footnotes 31 and 32. Note also that under Art.27A if the defendant appeared without contesting the courts' jurisdiction, this could not be raised as a defence to recognition and enforcement.

<sup>43</sup> Although such protection is not guaranteed in state courts where levels of protection vary.

### 2.3.3. The Exception in relation to Contractual Issues:

One of the most controversial issues at The Hague was the exercise of jurisdiction over a contractual dispute. This culminated in the production of two alternatives in the Interim Text, neither of which was agreed upon.<sup>44</sup> ‘Alternative A’ clearly authorised the use of a ‘magnitude of contacts’ approach, similar to the United States’ ‘transacting business’ doctrine.<sup>45</sup> It provided that a claimant may sue in the place in which the defendant has ‘conducted frequent [and] [or] significant activity’ and the claim is based on a contract directly related to that activity.<sup>46</sup> The presence of the square brackets indicates that the delegations were undecided as to whether both significant and frequent activity in the forum should be necessary.<sup>47</sup> Requiring either frequent or significant activity, rather than both together, would have reduced the protection offered to the defendant because a weaker defendant-forum nexus would have established jurisdiction. As a consequence, a greater number of fora would have been available to the claimant.

‘Alternative A’ also provided that the forum into which the defendant had ‘directed frequent [and] [or] significant activity’ could have exercised jurisdiction.<sup>48</sup> This further expands the jurisdictional reach of the relevant forum, as the defendant need not have physically entered the territory and conducted business there in order for the provision to be invoked. This would naturally benefit the claimant by providing further opportunities to forum shop, to the defendant’s disadvantage. As discussed in the preceding paragraph, if jurisdiction could be founded on either frequent or substantial activity in the forum, the provision would offer less protection to the defendant than where both conditions had to be met.

A definition of ‘activity’ for the purposes of ‘Alternative A’ was attempted. Two alternative definitions were proposed. The first, called ‘Variant 1’, provided that

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<sup>44</sup> Art.6, footnote 33.

<sup>45</sup> See pp.60-2 above.

<sup>46</sup> It was suggested that this provision be subject to Articles 7 and 8. See Art.6, Alternative A(1), footnote 34.

<sup>47</sup> Art.6(1)(a), footnote 35.

<sup>48</sup> Art.6(1)(b).

‘activity’ meant one or more of the following:

- ‘a) [regular and substantial] promotion of the commercial or professional ventures of the defendant for the conclusion of contracts of this kind;
- b) the defendant’s regular or extended presence for the purpose of negotiating contracts of this kind, provided that the contract in question was performed at least in part in that State.<sup>49</sup>
- c) the performance of a contract by supplying goods or services, as a whole or to a significant part.’

This definition offers very little protection to the defendant. For example, paragraph (a), in permitting the forum where the defendant promotes such contracts to exercise jurisdiction, would have enabled fora with only an indirect interest in the case to assert jurisdiction. The insistence on ‘regular and substantial’<sup>50</sup> promotion would have reduced the courts’ jurisdictional reach to a degree, as this would have ensured that the forum had a stronger relationship with the defendant’s activity that had given rise to the dispute than that required in its absence.

Paragraph (b) provides a stronger cause of action-forum nexus because it requires part performance in the territory as well as negotiation there. In some respects, this could be viewed as implementing a ‘forum conveniens’ provision, similar to the approach of England’s traditional rules, into the text. Jurisdiction might be available under England’s traditional rules in such circumstances because two connecting factors, of differing importance, could be regarded as providing a sufficient forum-dispute connection when the case is viewed as a whole. Similarly, the ‘contacts’ approach of the United States is likely to view such cumulative contacts as sufficient for the purposes of specific jurisdiction. The Brussels Regime would ignore the negotiation of the contract in the forum. The Brussels Regime focuses on the place of performance in contractual disputes but requires a much stronger

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<sup>49</sup> Provided that the performance is non-monetary (for example, performance must be part-delivery in the forum). The presence of square brackets around this proviso demonstrates that this was not agreed upon by the delegations. See ‘Variant 1’ (b), footnote 39, Interim Text.

<sup>50</sup> It was not agreed as to whether these conditions should be required. If not required, it would have been easier for the claimant to utilise this provision and would have increased the number of fora among which she could forum shop.

relationship between the forum and the cause of action because the forum must be the place of performance of the obligation breached. Consequently, the forum is directly linked to the actual breach of contract and any evidence flowing from it. In contrast, paragraph (b) in the Interim Text would have only guaranteed that the forum-dispute nexus was indirect because the performance in the territory could have been unconnected to the breach of contract.

Paragraph (c) reflects a forum's interest in a dispute that has been substantially performed in its borders. However, the forum of performance may not be the forum of breach where the defective goods were, for example, delivered elsewhere. As with paragraph (b) above, this provides a weaker nexus between the forum and the cause of action. However, this is not as burdensome on the defendant because the parties might ordinarily expect to be sued in the forum where substantial performance is due. This therefore illustrates that defining the boundaries of 'activity-based' jurisdiction does not ensure a strong dispute-forum nexus and provides inconsistent levels of protection to the defendant.

'Variant 2' provided an alternative definition of 'activity'. Accordingly, it included 'inter alia, the promotion, negotiation and performance of a contract.' This is a more expansive definition than 'Variant 1'. Negotiation of the contract in the forum would have been sufficient on its own and promotion in the forum need not have been accompanied by part-performance there. These unrestricted provisions provide the forum with a weaker connection to the cause of action and the words 'inter alia' would have provided the courts with the ability to expand this definition further to the detriment of the defendant. The reach of this provision goes far beyond that of England's traditional rules where negotiation in the forum alone would be regarded as an insufficient basis for the exercise of jurisdiction.<sup>51</sup> This would also contravene 'minimum contacts' requirements under the United States' due process test. It represents a very expansive approach towards the exercise of jurisdiction and provides the claimant with a great number of forum shopping opportunities than 'Variant 1'.

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<sup>51</sup> On this basis, alone, it would fail to satisfy the forum conveniens test.

Agreement had not been reached as to whether ‘Alternative A’ (regardless of whether Variant 1 or 2 defined ‘activity’) should also require that the exercise of jurisdiction be ‘reasonable’ in light of the defendant’s ‘overall connection’ to the forum.<sup>52</sup> This appears to accommodate the second limb of the United States’ due process test into the text.<sup>53</sup> Prima facie, this appears to introduce into the text a defendant-protective mechanism designed to counterbalance the claimant-bias of the provision, which is caused by permitting the exercise of jurisdiction on the basis of weak dispute-forum connections.

However, it is difficult to see when this provision might actually operate to protect the defendant. In the United States the second limb of due process rarely interferes with the exercise of jurisdiction where the defendant not only has sufficient ‘contacts’ with the forum but the dispute is also ‘directly’ connected to the defendant’s activities there. In fact, the only possible application of this limitation appears to be where the facts are similar to *Ashai Metal Industries v Superior Court of California*<sup>54</sup> where both the parties are ‘alien’. In such circumstances, due process might interfere because the forum’s interest in the dispute is defined by reference to a ‘home’ claimant’s interests. If neither party is resident there, jurisdiction may be unreasonable because the forum has no interest in the dispute. Transposing this into the Interim Text would have meant that the courts could discriminate on the basis of the parties’ residence. As the forum non conveniens provision of the Interim Text prohibited discrimination on the grounds of the parties’ residence, it was unlikely that a discriminatory approach would have been incorporated into the Interim Text. As a result, the role for this condition on the exercise of jurisdiction was unclear. Even though its practical significance was likely to be minimal, this restriction on jurisdiction refocused the provision so that it was largely defined by reference to the forum-defendant connection rather than the forum’s relationship with the dispute.

A different method of determining the courts’ jurisdiction over the defendant was proposed. ‘Alternative B’ provided a more conventional approach towards

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<sup>52</sup> Art.6, footnote 37.

<sup>53</sup> See p.17 for the due process requirements.

<sup>54</sup> (1987) 48 U.S. 102. Although this concerned a tortious cause of action, this does not affect the point being made.

jurisdiction over contractual disputes, similar to that of the Brussels Regime. Accordingly, the claimant could have sued at the place where the goods or services were supplied in whole or in part.<sup>55</sup> If the goods or services were supplied in more than one country, the claimant had the right to sue in both and could have elected which one she preferred.<sup>56</sup> This clearly represents a conscious decision on the part of the delegates to opt out of the 'principal place of the obligation in question' suggestion, which is the method utilised in the Brussels Regime in such circumstances.<sup>57</sup> The principal obligation approach was not abandoned altogether though. Where the contract was for both the provision of services and the supply of goods, the forum where the principal obligation was provided in whole or in part would have had jurisdiction over the dispute.<sup>58</sup> It should be noted that none of the paragraphs of the provision provided the forum where the goods or services should have been provided with jurisdiction. A total failure to perform would have meant that this jurisdictional basis was unavailable to the claimant.

By opting out of this approach, 'Alternative B' did not attempt to ensure that the forum was the one most closely connected to the dispute. The forum of delivery might not have been the forum of breach. However, this provision provides a greater degree of certainty and a lesser range of potential fora than 'Alternative A'.

England's traditional rules permit suit at the place of breach but, in contrast to the Interim Text, this can include the place where payment should have been made. The scope of the traditional rules is wider in this respect. Ignoring the United States' 'transacting business' doctrine, which is clearly wider than the more conventional

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<sup>55</sup> Such a provision is not satisfactory for the world of e-commerce, which has the potential of involving a number of different transactions and services provided from and/or to different parts of the world. This issue is beyond the scope of this thesis.

<sup>56</sup> Nygh, P and Pocar, F, 'Report of the Special Commission on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters', Preliminary Document 11 (available at [www.hcch.net](http://www.hcch.net)) p.50.

<sup>57</sup> The principal obligation theory provides suit only at the place most principally connected to the dispute. The delegations chose to adopt a different approach because they wanted to avoid suit at the place where payment was due (when the breach of contract was non-payment). See Kessedjian, K, 'Synthesis of the Work of the Special Commission of March 1998 on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters', Preliminary Document 9 (available at [www.hcch.net](http://www.hcch.net)) p.32.

<sup>58</sup> Ordinarily, the principal obligation would be the provision of goods, Preliminary Document 11, n.56 above, p.51.

approach towards contractual jurisdiction,<sup>59</sup> the United States also permits jurisdiction at the place of delivery, where this is not the place of breach, and the place where breach of contract occurred provided the due process test is satisfied. Due process is unlikely to interfere in such circumstances because the defendant is connected to the forum through these actions in the territory.<sup>60</sup> Consequently, it seems that 'Alternative B' is the most harmonious with the three regimes analysed in chapter two. This is because it provides similar levels of protection to the defendant and similar benefits to the claimant through its restrictive scope. The 'activity-based' approach of 'Alternative A', however, offers very different levels of protection to the European regimes, corresponding only with the United States' approach towards the exercise of specific jurisdiction in contractual disputes.

#### 2.3.4. The Branch, Agency or Other Establishment Exception:

The countries in which the defendant has a 'branch, agency or any other establishment' would also have had jurisdiction over the dispute if the dispute related directly to the activities of that branch, agency or other establishment.<sup>61</sup> This mimics the approach of the Brussels Regime.<sup>62</sup> England's traditional rules also provide specific jurisdiction in the forum when the dispute arises out of the operations of the place of business established by the defendant. However, it should be noted that both England's traditional rules and the United States' approach provide jurisdiction at the defendant's places of business even when the dispute does not arise out of the activities of that place of business. This provides the courts with general jurisdiction over the defendant, which significantly increases the benefits provided to the claimant.<sup>63</sup>

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<sup>59</sup> See pp.60-62 above.

<sup>60</sup> Although note that if the defendant fails to perform altogether (as opposed to tendering inadequate performance) and has no further 'contacts' with the forum the 'minimum contacts' requirement will not be met.

<sup>61</sup> Art.9.

<sup>62</sup> See pp.52-3 above.

<sup>63</sup> Although the forum non conveniens doctrine operating in both the United States' courts and under England's traditional rules might interfere with the exercise of jurisdiction, thereby reducing the burden on the defendant. However, the defendant still has to appear to contest jurisdiction, which itself causes inconvenience to the defendant. The United States' due process test is very unlikely to prevent jurisdiction where the defendant is physically present in the forum, providing defendants with no protection against forum shopping claimants.



In conformity with the Brussels Regime's approach, the corporate veil would only be lifted where the non-present parent company exercised control over, or confusion existed as to the identity of, the subsidiary company physically present in the forum.<sup>64</sup> This provision would have also required that the branch be an integral part of the company.<sup>65</sup>

The United States challenged this provision, arguing that it was not wide enough.<sup>66</sup> Incorporating this criticism into the text, it was proposed that jurisdiction should be available if the defendant had 'carried on regular commercial activity' by means other than through a branch, agency or other establishment in the forum and the dispute arose out of those activities. 'Regular' means more than an isolated transaction, or series of isolated transactions, in the forum.<sup>67</sup> It was suggested that advertising in the forum without a fixed base there would be insufficient for this provision unless details of where orders could be placed were also provided in the campaign.<sup>68</sup> This is very similar to case law from the United States on this point.<sup>69</sup> It was also noted that, should this have been implemented, there might have been no need for an activity-based approach in the tort and contract provisions.<sup>70</sup> This rule required that the dispute only 'arise out of' the activities of the defendant in the forum, whereas the contractual provision only provided jurisdiction for disputes 'directly related' to such activity.<sup>71</sup> The former is clearly wider, enabling it to incorporate many of the disputes that would have fell within the contractual activity-based jurisdictional rule.

The implementation of 'activity-based' jurisdiction into the provision adheres to the more expansive approach of the United States towards jurisdiction. In contrast, jurisdiction is not available under the Brussels Regime or England's traditional rules

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<sup>64</sup> Kessedjian, K, 'Synthesis of the Work of the Special Commission of March 1998 on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters', Preliminary Document 9 (available at [www.hcch.net](http://www.hcch.net)) pp.36-7.

<sup>65</sup> Nygh, P and Pocar, F, 'Report of the Special Commission on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters', Preliminary Document 11 (available at [www.hcch.net](http://www.hcch.net)) pp.56-7.

<sup>66</sup> See pp.167-182 below for a discussion of the delegates' unhappiness with the text.

<sup>67</sup> See Preliminary Document 11, n.65 above, p.58

<sup>68</sup> Ibid.

<sup>69</sup> See pp.60-2 above.

<sup>70</sup> Preliminary Document 11, n.65 above, p.57.

<sup>71</sup> Ibid, p.56.

if the defendant has no physical affiliation with the territory. This extension of jurisdiction would have significantly benefited the claimant to the defendant's cost.

### 2.3.5. The Tort Exception:

Just like the Brussels Regime, Article 10(1)(a) of the Interim Text provided that the forum of the omission or commission of the act had jurisdiction over the tortious dispute. The forum of injury also had jurisdiction under Article 10(1)(b) provided that it was 'reasonably foreseeable' that the act or omission could result in injury of the same nature there.<sup>72</sup> Although providing the claimant with limited 'forum shopping' capabilities, the availability of both types of fora were thought to be necessary to ensure balance between the alleged wrongdoer and the injured party.<sup>73</sup> However, to protect the defendant from facing an indirectly interested forum, only the place of direct injury could have asserted jurisdiction under this rule.<sup>74</sup> This follows the Brussels Regime's more rigid approach towards such issues.<sup>75</sup>

The condition of 'reasonable foresight', unknown to both the Brussels Regime and England's traditional rules, would have operated as a defendant-protective mechanism in certain circumstances. For example, if the defendant manufactured a product solely for the French market and the claimant bought it in France whilst on holiday and then took it home to Australia where she was injured, the Australian courts would be unable to hear the case. This is because it would not be reasonably foreseeable that the product would end up in Australia when the Japanese manufacturer only supplied the French Market. This 'reasonable foresight' proviso was added to appease the United States because the original text, which provided suit at the place of injury unconditionally, prevented a defendant from being able to avoid

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<sup>72</sup> Article 10(4) also provided the forum where the act, omission or injury may occur with jurisdiction. There was no consensus on this point.

<sup>73</sup> Nygh, P and Pocar, F, 'Report of the Special Commission on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters', Preliminary Document 11 (available at [www.hcch.net](http://www.hcch.net)) pp.61-62.

<sup>74</sup> Ibid, p.60.

<sup>75</sup> Compare with England's traditional rules, which only require indirect injury in the forum, p.57 above.

a particular forum by restructuring its activities.<sup>76</sup> Notwithstanding this addition, this provision may still have violated the United States' due process test where the defendant had the necessary foresight but insufficient 'contacts' with the forum to satisfy the 'minimum contacts' test.<sup>77</sup>

Under Article 10(5), if the injury had occurred in more than one forum, as might be the case with a defamatory statement published worldwide, jurisdiction was only available over the injury sustained in that forum. The Interim Text therefore followed the Brussels Regime in this manner.<sup>78</sup> Where the forum of injury was also the place of the claimant's residence, that forum had jurisdiction over all the injuries sustained.<sup>79</sup> Limiting full recovery in this manner reduced the claimant's ability to choose among multiple fora for the most tactically advantageous for her case, thereby creating an unfair advantage to the claimant. However, in permitting the claimant full recovery in one forum, this rule prevented the claimant suffering the inconvenience of having to engage in multiple actions in order to obtain full recovery.<sup>80</sup> The Brussels Regime also permits full recovery in one forum but this is the forum of the defendant's domicile, which is entitled to exercise jurisdiction over the entire dispute as the forum provided with general jurisdiction. This is more defendant-protective than the Interim Text because no additional forum is able to provide the claimant with full recovery. Providing full recovery for injuries at the claimant's habitual residence would have enabled the claimant to engage in limited forum shopping by allowing her to choose the better of the two fora for her action.

An 'activity-based' approach towards jurisdiction was again proposed for claims in tort. According to Article 10(2), the claimant would have been able to sue

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<sup>76</sup> Kessedjian, K, 'Synthesis of the Work of the Special Commission of March 1998 on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters', Preliminary Document 9 (available at [www.hcch.net](http://www.hcch.net)) p.34

<sup>77</sup> See *Worldwide Volkswagen v Woodson* (1980) 444 U.S. 286 as an example. In this case, it was foreseeable that the defendant would drive an automobile, which is designed for travel, into another state in the United States but, as the defendant had no 'contacts' with that forum, jurisdiction was unavailable there. See pp.164-5 below for the impact this controversial provision may have had on the negotiations at The Hague.

<sup>78</sup> See p.52 above.

<sup>79</sup> There was no consensus on this provision.

<sup>80</sup> As the claimant is most likely to sue in the forum of full recovery, this prevented the possibility of conflicting judgments, a likely occurrence if the claimant had to sue in several fora.

in the forum in which the defendant engaged in ‘frequent or significant activity’.<sup>81</sup> This corresponds with the United States’ approach towards specific jurisdiction, whereby a significant single ‘contact’ with the forum can sometimes satisfy due process requirements. As noted above, although the lack of ‘contacts’ with the forum may sometimes defeat jurisdiction, an activity-based approach is generally much wider reaching than the more conventional tort provision in Article 10(1). No geographical connection between the defendant and the forum was necessary, as ‘directing activity’ at the forum would have been sufficient where the dispute arose out of the activity directed at that forum. Specific use of the word ‘directed’ suggests that the more restrictive interpretation of ‘purposeful availment’ in *Ashai Metal Industries v Superior Court of California*<sup>82</sup> was implemented into the text. This means that only a direct intention to serve the forum market would have been sufficient to establish jurisdiction. Awareness that the defendant’s product might enter the forum would have been insufficient under a literal interpretation of the word ‘directed’. This would have reduced the scope of this ‘activity-based’ provision to some extent but the most defendant-protective option would have been to exclude the wider reaching ‘activity-based’ provision altogether. A further restriction on the exercise of ‘activity-based’ jurisdiction was that its exercise was conditional upon the defendant’s ‘overall connection’ to that forum making it reasonable that the defendant be subject to suit there.<sup>83</sup> As with contractual jurisdiction, this seems to implement the second limb of due process into the text. Again, this may sometimes have operated as a jurisdiction-reducing mechanism, protecting the defendant from jurisdiction in certain situations. This would have redressed some of the bias towards the claimant provided by ‘activity-based’ jurisdiction but the most effective method of protecting the defendant would have been to exclude this from the Interim Text altogether. This would have prevented the provision operating so as to provide fora with less significant connections to the dispute with jurisdiction.

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<sup>81</sup> Provided the dispute arose out of that activity there.

<sup>82</sup> (1987) 480 U.S. 102. See pp.22-3 above.

<sup>83</sup> There was no consensus on this point. See Art.10(2), footnote 67.

## *2.4. Jurisdictional Bases on the 'Permitted' List:*

The 'permitted' list of jurisdictional bases contained all national jurisdictional grounds that did not fall within the 'required' or 'prohibited' lists.<sup>84</sup> It would have also contained any of the jurisdictional bases originally placed on the 'white' list that the delegations rejected during the course of negotiations<sup>85</sup> as well as any jurisdictional bases the delegations decided to remove from the 'black' list. In this sense, the 'grey' list was a 'catch all' provision.

The 'multiple parties' provision was relegated to the 'grey' list by its deletion from the 'white' list.<sup>86</sup> As the proposed 'multiple parties' rule provided a forum with jurisdiction over each co-defendant on the sole basis of one of the defendant's residence there, it would have violated the requirement of the United States' due process test that each defendant's pre-litigation 'contacts' with the forum be assessed individually. This transferral from the 'white' list to 'grey' list meant that the United States' courts would not have been obliged to exercise jurisdiction in this manner and nor would they have been compelled to recognise or enforce judgments based on this jurisdictional ground.

As noted above, there is a great deal of similarity between the way the doctrine of forum non conveniens considers issues of 'multiple parties' and the approach of the Brussels Regime, although the obligation on the English courts under the traditional rules is somewhat less strict.<sup>87</sup> As this basis of jurisdiction is readily accepted throughout the Brussels Regime's member states, it is likely that the demotion of this provision would have had very little effect overall on its use. Those states familiar with such jurisdiction would have continued to use such jurisdiction and would have freely recognised and enforced the judgments of other states that did the same. Only countries such as the United States, to which such an approach is unknown, would have denied recognition or enforcement. As a result, several

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<sup>84</sup> It was undecided whether this article should be limited by Articles 4, 7, 8, 11, 12 and 13. See Art.17, footnotes 101-103.

<sup>85</sup> Unless it was subsequently placed on the 'black' list.

<sup>86</sup> Art.14. Art.16, concerning third party claims, was also deleted from the 'white' list for the same reasons.

<sup>87</sup> See p.57 above.

contracting states would have regarded it as a 'grey' list basis with 'white' list characteristics.

## *2.5. The 'Prohibited' List: The 'Exorbitant' Jurisdictional Bases:*

The delegations failed to reach any agreement as to the content of the 'prohibited list'.<sup>88</sup> As anything not falling within the 'white' or 'black' lists would be regarded as on the 'grey' list, it became very important to define the 'black' list accurately so as to avoid inappropriate jurisdictional bases being classified as 'permitted' rather than 'prohibited'.<sup>89</sup> The jurisdictional grounds that the delegations agreed should be prohibited under the global regime included the nationality of the defendant or claimant;<sup>90</sup> the domicile, habitual residence or temporary presence of the claimant in the forum<sup>91</sup> and the service of process on the defendant present in the forum.<sup>92</sup> Jurisdictional bases not agreed upon, but listed as exorbitant for the time-being, included jurisdiction based on the presence of the defendant's property in the forum;<sup>93</sup> the claimant's 'unilateral designation of the forum';<sup>94</sup> the defendant's temporary residence or presence in the forum;<sup>95</sup> the signing of the contract in the forum;<sup>96</sup> the 'carrying on... of commercial or other activities' by the defendant in the forum<sup>97</sup> and the location of the defendant's subsidiary or 'other related entity' in the state.<sup>98</sup>

Clearly the drafters foresaw the need to prohibit the availability of specific jurisdiction at the place of conclusion of the contract, removing its potential

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<sup>88</sup> See Art.18, footnote 104. These bases were prohibited only where the defendant was resident in a contracting state.

<sup>89</sup> Nygh, P and Pocar, F, 'Report of the Special Commission on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters', Preliminary Document 11 (available at [www.hcch.net](http://www.hcch.net)) p.28.

<sup>90</sup> Art.18(2)(b) and (c).

<sup>91</sup> Art.18(1)(d).

<sup>92</sup> Art.18(2)(f).

<sup>93</sup> Unless the dispute was 'directly related' to that property. Thus this prohibited quasi-in-rem jurisdiction but not in rem jurisdiction. See Art.18(2)(a), footnote 110.

<sup>94</sup> Art.18(2)(g), footnote 113.

<sup>95</sup> Art.18(2)(i), footnote 116.

<sup>96</sup> This is prohibited even if the dispute arose out of that contract. See Art.18(2)(j), footnote 117.

<sup>97</sup> Art.18(2)(e).

<sup>98</sup> Art.18(2)(k). See footnote 118.

application in the United States and under England's traditional rules. Jurisdiction based on the service of the defendant whilst present in the forum was also prohibited. This was so even where the defendant had a branch, agency or other establishment in the forum.<sup>99</sup> These provisions would have severely curtailed the current jurisdictional reach of both the United States' courts and England's traditional rules. Of the two common law regimes, the United States would be the most severely affected because the far-reaching 'doing business' doctrine was also banned.

Article 18(1) also contained a 'catch all' provision, which stated that any national jurisdictional basis that provided 'no substantial connection' between the dispute and the forum was prohibited where the defendant was resident in a contracting state.<sup>100</sup> This would have restricted significantly contracting states' abilities to use national rules providing general jurisdiction.<sup>101</sup> It was also proposed in the alternative that a national jurisdictional basis was prohibited if the forum had no substantial connection with either the dispute or the defendant.<sup>102</sup> This alternative would have further expanded the ability to use national jurisdiction provisions. As the United States' 'doing business' doctrine provides a substantial defendant-forum nexus by requiring that the defendant have 'systematic and continuous' contacts with the forum, this more relaxed approach would have effectively transported the 'doing business' doctrine to the 'grey' list. If this more relaxed approach were taken, the amendment or deletion of Article 18(2)(e), which prohibits jurisdiction based on the 'carrying on of commercial or other activities' in the forum, would have been necessary to prevent conflict between the two provisions.<sup>103</sup>

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<sup>99</sup> Art.18(1)(e). Only specific jurisdiction where the dispute is 'directly related to those activities' was authorised.

<sup>100</sup> It was proposed that this provision should be deleted in its entirety. See Art.18(1), footnote 106.

<sup>101</sup> It was not clear whether jurisdiction could be exercised where it was 'general' in nature but on the facts a substantial dispute-forum nexus did exist.

<sup>102</sup> Art.18(1), footnote 105.

<sup>103</sup> Unless the delegates intended to prohibit 'doing business' but authorise other jurisdictional bases that provided a defendant-forum nexus, such as jurisdiction based on domicile.

## 2.6. The Role of *Lis Alibi Pendens*:

Where proceedings between the same parties were ‘based on the same cause of action’, a court second-seised, regardless of whether it had jurisdiction under the ‘white’ or ‘grey’ list,<sup>104</sup> was required to stay proceedings in favour of the court first-seised.<sup>105</sup> When later presented with a judgment from the forum first-seised that complied with the recognition and enforcement criteria of the regime, the court second-seised was obligated to decline jurisdiction.<sup>106</sup> This clearly adopts the ‘first in time rule’ of the Brussels Regime. If, however, the court second-seised had exclusive jurisdiction under Articles 4 or 12, the strict priority accorded to these provisions revoked the obligation on the court second-seised to stay proceedings.<sup>107</sup>

However, in stark contrast to the Brussels Regime, this rule did not apply to negative declarations. In such cases, if the claimant in the court first-seised sought a negative declaration and the claimant in the court second-seised sought substantive relief, the Interim Text insisted that the court first-seised suspend its proceedings.<sup>108</sup> The Brussels Regime permits no such action, as jurisdiction is mandatory at all times. The jurisdictional rules of the Interim Text could thus be regarded as ‘conditionally mandatory’. The drafters were clearly taking into account the criticism directed at the Brussels Regime for procuring a ‘race to the courthouse’.<sup>109</sup>

Upon application by either party, a court second-seised that had stayed its proceedings could proceed with the case if the claimant in the court first-seised had not taken the necessary steps to bring the proceedings to a decision on the merits or the court first-seised had failed to render such a decision within a reasonable time.<sup>110</sup> This contradicts the ECJ’s decision in *Erich Gasser GmbH v MISAT Srl*,<sup>111</sup> avoiding

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<sup>104</sup> Art.21(4). See Article 21(5) for a definition of when a court is deemed to be ‘seised’.

<sup>105</sup> Under Art.21(1), footnote 128, the court first-seised must have exercised jurisdiction on the basis of a jurisdictional ground on the ‘white’ list.

<sup>106</sup> Art.21(2).

<sup>107</sup> Art.21(1). It was proposed that Article 11, concerning trusts, be added to this. See Art.21(1), footnote 130.

<sup>108</sup> Art.21(6). Under Art.21(7), this provision only operated where a party requested this.

<sup>109</sup> Walter, G, ‘Lis Alibi Pendens and Forum Non Conveniens: From Confrontation via Co-ordination to Collaboration’ (2002) 4 Eur. J. L. Reform 69, p.78.

<sup>110</sup> Art.21(3).

<sup>111</sup> C-116/02 [2005] 1 Q.B. 1.



the frequently cited criticism that the *lis alibi pendens* rules of the Brussels Regime enable a party to commence litigation in court renowned for lengthy delays for no reason other than to gain a tactical advantage over the other party.<sup>112</sup> This clearly acknowledges that such delays can alter the respective positions of the litigants and that this can be used to cause harassment to the other side.<sup>113</sup> In this sense, this provision seems to ensure ‘individualised justice’ does not suffer at the expense of ‘generalised justice’. It accommodates a similar stance on unfair tactical advantages to that of the common law systems where anti-suit injunctions are utilised to prevent harassment to a litigant.

## *2.7. The Role of Forum Non Conveniens:*

Burbank claims that the approach of the Interim Text towards *forum non conveniens* was ‘enlightened procedural lawmaking’ because it permitted use of the common law concept but also attempted to circumscribe strictly the ambit of the doctrine.<sup>114</sup> Nygh and Pocar suggested that, as a result of its inherent restrictions, it was more akin to the ‘transfer process’ of the United States’ federal courts.<sup>115</sup>

According to Article 22(1) of the Interim Text,<sup>116</sup> a court could have declined jurisdiction<sup>117</sup> on *forum non conveniens* grounds if it concluded that it was clearly an inappropriate forum for the dispute and that a different court was clearly more

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<sup>112</sup> ‘Note on the Question of Forum Non Conveniens in the Perspective of a Double Convention on Judicial Jurisdiction and the Enforcement of Decisions’, Preliminary Document 3, prepared by the Permanent Bureau (available at [www.hcch.net](http://www.hcch.net)) p.6. See p.97 above.

<sup>113</sup> Andrieux, G, ‘Deciding Jurisdiction in a Future International Convention on Jurisdiction and Judgments – How Can We Benefit from Past Experiences in Conciliating the Two Doctrines of Forum Non Conveniens and Lis Pendens?’ (2005) 27 *Loy. L.A. Int’l & Comp. L. Rev.* 323, p.350.

<sup>114</sup> Burbank, S, ‘Jurisdictional Equilibration, the Proposed Hague Convention and Progress in National Law’ (2001) 49 *Am. J. Comp. L.* 203, p.206.

<sup>115</sup> Nygh, P and Pocar, F, ‘Report of the Special Commission on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters’, Preliminary Document 11 (available at [www.hcch.net](http://www.hcch.net)) p.89.

<sup>116</sup> Art.22(1) required that the *forum non conveniens* application be made no later than at the time of the first defence on the merits. On account of their ‘mandatory’ nature, a *forum non conveniens* stay was not possible where the matter fell within Articles 4, 7, 8 or 12.

<sup>117</sup> This provision would have only applied where a jurisdictional basis on the ‘white’ list was used. If jurisdiction were on the ‘grey’ list, national law would have governed the question of declining jurisdiction. See Art.22(6).

appropriate.<sup>118</sup> The requirement that the alternative forum be ‘clearly more appropriate’ than the court seised resulted in a presumption of jurisdiction, adopting an approach much closer to the English *forum non conveniens* doctrine than the United States’ federal doctrine, which appears to favour a ‘balance of probabilities’ test. Although similar to England’s traditional rules in this respect, the method by which a decision to stay would have been reached was very different. This is because the English doctrine requires no proof regarding the inappropriateness of the English forum. In contrast, the test in Article 22(1) placed negative emphasis on the ‘appropriateness’ factor, requiring that the declining forum be, on self-reflection, ‘clearly inappropriate’. This negative emphasis meant that the circumstances in which jurisdiction could have been stayed were much narrower than under both common law *forum non conveniens* doctrines.<sup>119</sup>

Article 22(2) provided a list of specific factors to be taken into account. They included inconvenience to the parties in view of their habitual residence; the nature and location of any evidence;<sup>120</sup> limitation periods and the possibility of obtaining recognition and enforcement of any judgments.<sup>121</sup> In providing a list of factors, Article 22(1) adopts a similar methodology to the United States’ federal doctrine. The content of the list is, however, quite different. In Article 22(1) ‘public factors’, such as jury burden and caseload concerns, were not listed. Unlike the federal doctrine, which openly discriminates against foreign claimants, the Interim Text also prohibited a forum from discriminating on the basis of the nationality or habitual residence of the parties.<sup>122</sup>

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<sup>118</sup> Under Art.22(5)(b) the staying forum was obliged to proceed with the case if the alternative forum declined to exercise jurisdiction. Under Article 22(5)(a) the staying forum was obligated to decline jurisdiction where the alternative forum exercised jurisdiction or where the claimant did not pursue the action abroad within the time specified.

<sup>119</sup> This is confirmed by the fact that Article 22 is called ‘exceptional circumstances for declining jurisdiction.’

<sup>120</sup> Including documents, witnesses and the procedures for obtaining such evidence.

<sup>121</sup> This list is not exhaustive or hierarchical, according to Preliminary Document 11, n.116 above, p.96. Under Article 22, the defendant would have been required in some cases to post security for any judgment in the alternative court so that the defendant could not move his assets outside the scope of the regime in the time between the hearings. This is similar to the ‘conditional dismissal’ of the United States’ federal doctrine. However, no further types of ‘conditions’ were provided in the text.

<sup>122</sup> Art.22(3). According to Preliminary Document 3, ‘Note on the Question of Forum Non Conveniens in the Perspective of a Double Convention on Judicial Jurisdiction and the Enforcement of Decisions’, prepared by the Permanent Bureau (available at [www.hcch.net](http://www.hcch.net))

Although the forum non conveniens provision represented a significant attempt to reconcile the civil-common law tension brought about by the different cultural and historical backgrounds of the participants involved, the civil law system was the more dominant character in the Interim Text. Overall, resort to the doctrine of forum non conveniens would have been unusual, as it was much narrower in scope than traditional common law notions of the doctrine.<sup>123</sup> Its value, however, should not be underestimated, as its usage would help ‘reduce, if not eliminate, instances of courts issuing conflicting anti-suit injunctions’.<sup>124</sup> This was important, as the Interim Text did not address anti-suit injunctions at all. Anti-suit injunctions were left outside the competence of the proposed global regime and, as noted in chapter three, they can have a significant impact upon transnational litigation. A restriction in their usage, even through indirect means, would have been beneficial. A forum non conveniens provision would have also ensured ‘individualised justice’ where the rules providing ‘generalised justice’ failed to operate in a fair manner.

## *2.8. The Recognition and Enforcement of Judgments:*

Article 26 required a state to deny recognition or enforcement of any judgment where the courts had used a jurisdiction ground on the ‘prohibited’ list. The courts were also required to refuse recognition and enforcement of any judgment that conflicted with Articles 4, 5, 7, 8 and 12. This was thought necessary to maintain the stability of the regime.<sup>125</sup> As a ‘mixed convention’ approach was adopted, Article 24 provided that the national law of the forum addressed would govern recognition and enforcement of a judgment based on a jurisdictional basis found on the ‘grey’ list.<sup>126</sup> Article 25 required that all judgments based on jurisdictional grounds falling within

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p.12, residence could be a factor in the forum non conveniens determination but not the reason.

<sup>123</sup> See Wilson, ‘Coming to America to File Suit: Foreign Plaintiffs and the Forum Non Conveniens Barrier in Transnational Litigation’ (2004) 65 Ohio St. L.J. 659, p.692.

<sup>124</sup> O’Brien, W, ‘The Hague Convention on Jurisdiction and Judgments: The Way Forward’ (2003) 66 MLR 491, p.502

<sup>125</sup> Art.28 also provided a list of potential bars to recognition, such as public policy, inconsistency with earlier judgments and insufficient notice.

<sup>126</sup> In contrast to the strict approach of the Brussels Regime, Art.27 provided that the requested state must examine the jurisdiction of the state of origin. Art.27(2) provided that the court addressed was bound by the court of origin’s findings of fact but not law. Under Art.27(3) the recognising court could not decline to recognise the judgment because it believed that forum non conveniens should have been declared.

the 'white' list received simplified recognition and enforcement, just as is expected of the member states under the Brussels Regime.

Over thirty years ago, the United States attempted to negotiate a bilateral recognition convention with the United Kingdom<sup>127</sup> but the negotiations failed predominantly because the United Kingdom wanted to avoid being obliged to recognise judgments where the damages awarded in the United States were excessive in comparison to equivalent standards prevailing in the United Kingdom.<sup>128</sup> This problem was recognised in the Interim Text, which required that the requested state only recognise and enforce the judgment to the extent that comparable awards would have also been made there if the damages were viewed as 'punitive', 'exemplary' or 'grossly excessive'.<sup>129</sup> As this provision is a huge departure from the Brussels Regime's strict recognition approach, it is unclear just how unruly this provision would have been.

## *2.9. The Relationship of the Text with the Brussels Regime:*

Initially it was thought that the Brussels Regime would be completely unaffected by the proposed convention, this being compliant with the traditional approach of regarding earlier conventions as unaltered by new projects at The Hague.<sup>130</sup> This presumption was abandoned during the course of deliberations. However, the Interim Text contained four proposals regarding the application of the Brussels Regime where the matter was also within the scope of the purported convention.

The first prioritised the Brussels Regime over the Interim Text unless the Brussels Regime provided for the exercise of jurisdiction that had been 'black-listed'

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<sup>127</sup> This would be termed a 'single convention' today.

<sup>128</sup> Silberman, L, 'Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention be Stalled?' (2002) 52 DePaul L. Rev. 319, p.327.

<sup>129</sup> Art.33(1) and (2).

<sup>130</sup> Kessedjian, K, 'Synthesis of the Work of the Special Commission of March 1998 on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters', Preliminary Document 9 (available at [www.hcch.net](http://www.hcch.net)) p.15.

by the delegates.<sup>131</sup> This would have had little effect on the regional regime. The second alternative stated that the Brussels Regime's member states would apply the rules of the Brussels Regime unless the defendant was domiciled in a non-member state.<sup>132</sup> This scope was, however, further reduced where jurisdiction was exclusive, concerned consumers or employees, concerned prorogation of jurisdiction or raised *lis alibi pendens* or related actions issues. In such circumstances, the Brussels Regime would govern the matter. Thus the internal allocation of jurisdiction within the Brussels Regime would have been largely unaffected. Only where the matter concerned its external competence over non-EU domiciliaries would the impact of the Interim Text have been felt. However, four exceptions to the Brussels Regulation's application to defendants domiciled in the EU were listed. Where the court nominated in a jurisdiction agreement was in a non-EU state; the property concerning an *in rem* dispute was located in a non-member state or the alternative forum was a non-member state for the purposes of Articles 21 or 22 of the Interim Text, the EU member states were obliged to adhere to the content of the Interim Text. Nygh and Pocar described this as an attempt to find a workable balance between the two regimes.<sup>133</sup>

The third proposal provided that where both parties were habitually resident in an EU member state, the Brussels Regime would apply instead of the Interim Text unless the matter fell within Articles 4, 12, 21 and 22 of the Interim Text.<sup>134</sup> This suggestion clearly intends to provide the Interim Text with a wider scope than the previous proposal. For example, the convention would have been applicable even if the forum selected in a jurisdiction agreement were an EU member state, whereas the previous proposal would have only applied the convention where the nominated forum was outside the EU. Further, by requiring that both parties be 'resident' in an EU member state for the Brussels Regime to be applicable, defendants domiciled in the EU might still have fallen within the Interim Text. In contrast, the previous option

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<sup>131</sup> Art.37, Proposal 1.

<sup>132</sup> Proposal 2.

<sup>133</sup> Unless the Brussels Regime's member states entered a declaration to the contrary. Nygh, P and Pocar, F, 'Report of the Special Commission on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters', Preliminary Document 11 (available at [www.hcch.net](http://www.hcch.net)) p.124.

<sup>134</sup> This was a proposed amendment to Art.2, concerning the territorial scope of the Interim Text, rather than an independent provision.

provided a wider scope for the application of the Brussels Regime by requiring that only one of the parties be domiciled therein. The final option provided that the application of the Brussels Regime would remain unaffected provided that the 'rights and obligations' of any non-EU member state that is party to the global regime remained unaffected.<sup>135</sup>

The above proposals demonstrate that the delegations were actively seeking a method by which the two regimes could coexist but the great differences in the content of the above proposals illustrate that the delegates were far from reaching consensus on this point when the decision was taken to abandon the project.

### **3. The Choice of Court Convention:**

The Choice of Court Convention 2005<sup>136</sup> has been described as 'one of the most important jurisdictional advances of recent times'.<sup>137</sup> The preamble also stresses its importance, stating that its implementation will 'promote international trade and investment through enhanced judicial cooperation.' In some respects it has a similar economic objective to the Brussels Regime and contrasts with the common law approach to jurisdiction, which focuses on the interest of the forum and the parties in the dispute being litigated in particular forum. However, by deferring jurisdiction to the autonomous choice of the parties, both parties' interests are accommodated and balanced when the nominated forum asserts jurisdiction. Ordinarily, neither party can complain about suit in a forum they selected.<sup>138</sup> In this sense, the Choice of Court Convention<sup>139</sup> is also consistent with the general approach of the common law systems towards the regulation of jurisdiction. *Prima facie*, it can be harmonised with the rationale of both legal traditions.

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<sup>135</sup> Art.37A. A further proposal provided that the recognition and enforcement of judgments within the Brussels Regime would remain unaffected. See Proposal 3, Interim Text.

<sup>136</sup> This opened for signature on June 30<sup>th</sup> 2005.

<sup>137</sup> Hartley, T, 'The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws' (2005) 54 ICLQ 813, p.817.

<sup>138</sup> Although see pp.140-1 below for potential arguments a party may raise to subsequently prevent the use of a jurisdiction clause and how this is dealt with in the Convention.

<sup>139</sup> Referred to as 'the Convention' throughout the subsequent sections.

### 3.1. *The Scope and Application of the Convention:*

The Convention will not apply to a natural person acting as a consumer.<sup>140</sup> This limitation is probably due to an inability to agree on the extent to which jurisdiction agreements should be treated differently in a contract concluded with a consumer to a business-to-business contract. Also excluded from its scope is the status and capacity of natural persons,<sup>141</sup> maintenance obligations,<sup>142</sup> family law matters,<sup>143</sup> tort or delict claims,<sup>144</sup> insolvency,<sup>145</sup> contracts for the carriage of goods and persons,<sup>146</sup> anti-trust matters,<sup>147</sup> rights in rem in immoveable property<sup>148</sup> and arbitration,<sup>149</sup> amongst others. Again this finds similarity with the Brussels Regime, which also restricts the majority of the matters listed above from its scope.<sup>150</sup>

Article 1(1) states that the convention shall apply in ‘international cases’<sup>151</sup> to exclusive choice of court agreements concluded in civil or commercial matters’. An agreement is ‘exclusive’ when the parties have specified that only the courts of one contracting state, or one or more specific courts in one contracting state, will determine disputes that have arisen, or may arise, in connection with a particular legal relationship.<sup>152</sup> A choice of court agreement is presumed to be exclusive unless the agreement specifies otherwise or the parties have specified more than one contracting state.<sup>153</sup> If the agreement is not ‘exclusive’, the matter will fall outside the scope of

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<sup>140</sup> Art.2(1)(a). Likewise it does not apply to contracts of employment under Art.2(1)(b).

<sup>141</sup> Art.2(2)(a).

<sup>142</sup> Art.2(2)(b).

<sup>143</sup> Art.2(2)(c).

<sup>144</sup> Except where they arise out of the contractual relationship. See Article 2(2)(k). Personal injury claims are specifically excluded from the Convention’s scope under Article 2(2)(j).

<sup>145</sup> Art.2(2)(e).

<sup>146</sup> Art.2(2)(f).

<sup>147</sup> Art.2(2)(h). Termed ‘competition law’ in Europe.

<sup>148</sup> Art.2(2)(l). This also includes tenancies of immoveable property.

<sup>149</sup> Art.2(4).

<sup>150</sup> The Brussels Regime does apply to maintenance obligations and arbitration jurisdiction agreements, See Art.1, Brussels Regulation.

<sup>151</sup> Under Article 1(2), a case is presumed to be ‘international’ unless the parties are both resident in the same contracting state and all other elements relevant to the dispute, except the location of the nominated forum, are connected with just the contracting state in which they are resident. Thus a case will rarely be deemed as falling outside the scope of ‘international’. ‘Residence’ of a non-natural person is defined under Art.4(2) in the same manner as was proposed in the Interim Text.

<sup>152</sup> Art.3(a).

<sup>153</sup> Art.3(b).

the Convention. The convention does not prevent the parties from entering into a jurisdiction agreement before or after the dispute has arisen.<sup>154</sup>

Just like the Brussels Regime, Article 3(c) provides the requirements that must be satisfied before the agreement is regarded as valid. The choice of court agreement must be entered into, or evidenced in, writing or, alternatively, in any means of communication which renders information accessible for subsequent reference. Evidence of a jurisdiction agreement in email, for example, would validate the agreement, as it can be produced at a later date. The jurisdiction agreement cannot be challenged on the basis that the contract in which it is contained is invalid.<sup>155</sup> The agreement is thus severable from the contract. This prevents a party claiming the jurisdiction agreement is void because the contract in which it is contained is void under the relevant applicable law.

Unless the actual jurisdiction agreement is null and void under the law of the contracting state nominated in the agreement, that contracting state has exclusive jurisdiction over the dispute.<sup>156</sup> If valid, that court is not entitled to dismiss the action.<sup>157</sup> This guarantees the parties that a dispute will only be heard in their nominated forum.<sup>158</sup> Any court other than the court selected is likewise obliged to stay or dismiss proceedings commenced in breach of that agreement<sup>159</sup> unless the agreement is invalid by the law of the nominated court<sup>160</sup> or one of the parties lacked the capacity to enter into the agreement in the court seised.<sup>161</sup> A court seised may also

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<sup>154</sup> It is stressed in Dogauchi, M, and Hartley, T, 'Preliminary Draft Convention on Exclusive Choice of Court Agreements, Draft Report', Preliminary Document 26 (available at [www.hcch.net](http://www.hcch.net)) p.18, that submission to the court's jurisdiction is insufficient; the parties must designate a court. To submit the defendant must conclude a valid jurisdiction agreement that complies with the Convention (which is possible after the dispute has arisen).

<sup>155</sup> Art.3(d).

<sup>156</sup> Art.5(1). 'Null and void' refers to situations such as misrepresentation and duress.

<sup>157</sup> Art.5(2). Forum non conveniens and lis alibi pendens cannot operate with the scope of the Convention according to Preliminary Document 26, n.154 above, p.24.

<sup>158</sup> This does not affect the internal allocation rules of a contracting state. Consequently, a federal court may still transfer the case to another federal court in the United States but before doing so Art.5(3)(b) requires the court seised to give consideration to the parties' choice.

<sup>159</sup> This prevents courts other than that seised issuing anti-suit injunctions that might interfere with the nominated court's proceedings. This does not, however, prevent the chosen court from providing an anti-suit injunction. See Preliminary Document 26, n.154 above, p.28.

<sup>160</sup> Art.6(a)

<sup>161</sup> Art.6(b)



exercise jurisdiction in breach of the agreement where giving effect to it would cause ‘manifest injustice’ or would be manifestly contrary to principles of public policy there.<sup>162</sup> Finally, if, in exceptional circumstances, the agreement cannot reasonably be performed<sup>163</sup> or the nominated court has decided not to hear the case,<sup>164</sup> a previously non-chosen court may exercise jurisdiction.

### *3.2. Recognition and Enforcement under the Convention:*

A judgment<sup>165</sup> given in the court selected by the parties as the exclusive forum for the dispute must be recognised and enforced.<sup>166</sup> Recognition or enforcement can only be denied where one of the following exceptions listed in Article 9 applies:

- (a) the agreement was null and void under the law of the nominated forum (unless the court chosen has determined that the agreement is valid);
- (b) a party lacked capacity under the law of the requested forum;
- (c) the defendant had insufficient time in which to prepare a defence (unless the defendant entered an appearance without contesting the timing of the notice of proceedings)<sup>167</sup> or where the notification of the defendant of the proceedings violated fundamental principles in the requested state concerning the service of documents;<sup>168</sup>
- (d) the judgment was obtained by fraud in connection with a matter of procedure;
- (e) recognising or enforcing the judgment would be manifestly incompatible with public policy in the requested state (which includes violations of fundamental principles of procedural fairness there); or

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<sup>162</sup> Art.6(c).

<sup>163</sup> Art.6(d).

<sup>164</sup> Art.6(f). This is unlikely to occur in light of the obligation on the chosen court to exercise jurisdiction but it ensures that the exclusivity of the agreement does not prevent suit altogether if the chosen forum does decline jurisdiction.

<sup>165</sup> This includes settlement agreements where they have been concluded with the approval of the nominated court or have been concluded in the course of proceedings in the selected forum. See Art.12.

<sup>166</sup> Art.8(1). The judgment must be entitled to full effect in the state of origin to qualify for ‘automatic’ recognition and enforcement in another contracting state under Art.8(3).

<sup>167</sup> Art.9(1)(c)(i).

<sup>168</sup> Art.9(1)(c)(ii).

- (f) either the judgment is inconsistent with one rendered by the recognising forum between the same parties or, alternatively, is contrary to a judgment entitled to recognition rendered by any other contracting state concerning the same parties and the same cause of action.

The requested forum may not review the merits of the decision and is bound by the court of origin's findings of fact.<sup>169</sup> At the requested state's discretion, recognition and enforcement may be postponed or refused where an appeal has been lodged or where the time limit for an application for review has not yet expired.<sup>170</sup>

It should be noted that the above exceptions to the principle of simplified recognition and enforcement makes no mention of judgments rendered in violation of an exclusive jurisdiction agreement, in ignorance of the Convention. The contracting states are expected to refuse recognition or enforcement in such situations and they are expected to trust that other states will abide by the exclusive nature of the choice of court agreement.<sup>171</sup>

### 3.2.1. Compensation Awards:

Regarding damages awards, the Convention adopts a very similar approach to that suggested in the Interim Text. Presumably, non-compensatory damages remained a controversial issue and the provision was inserted as a compromise between the contracting states. Article 11 provides that the requested state may refuse to recognise or enforce a judgment if, and to the extent that, it awards damages that 'do not compensate a party for actual loss or harm suffered.'<sup>172</sup> The requested state is obliged to consider the extent to which the non-compensatory aspect of the judgment actually covers costs and expenses relating to the proceedings.<sup>173</sup> This acknowledges that

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<sup>169</sup> Art.8(2).

<sup>170</sup> Art.8(4). This does not prevent a later application for recognition and enforcement.

<sup>171</sup> Schulz, A, 'Report of the Meeting of the First Drafting Committee of 18-20 April in Preparation of the Twentieth Session of June 2005', Preliminary Document 28 (available at [www.hcch.net](http://www.hcch.net)) p.10. Accordingly, this also means that a state cannot recognise or enforce a judgment where jurisdiction has been asserted under its national law in violation of a principle of the Convention.

<sup>172</sup> Art.11(1).

<sup>173</sup> Art.11(2).

awards in the United States sometimes take into account the litigation costs of both sides.

### *3.3. The Need to Compromise: The Ability of the Contracting States to Enter a Reservation:*

In order to accommodate the vast range of jurisdictional systems among the contracting states, two articles provide the contracting state with the ability to enter a reservation.<sup>174</sup> Article 20 provides that a reservation can be entered which permits the requested forum to refuse recognition or enforcement where the parties are resident there and all the relevant elements of the dispute are connected with the requested state. This prevents the parties selecting another forum, despite it being a purely domestic dispute, to avoid a particular aspect of litigation in their 'home' state.

The second reservation a contracting state may enter authorises the nominated court to refuse to exercise jurisdiction where there is no connection between it and either the parties or the dispute.<sup>175</sup> This clearly attempts to accommodate concerns regarding the inappropriateness of the forum selected by the parties. Neither the Brussels Regime nor England's traditional rules are concerned with the appropriateness of the forum selected by the parties but some case law in the United States supports a *forum non conveniens* stay when the nominated forum is clearly inappropriate. If such a reservation were entered, it would increase the possibility of the jurisdiction agreement not being upheld by the chosen court. This would impact upon certainty. Parties would, where available, use such reservations so that they could forum shop for a more advantageous court. Article 19 should not, however, be regarded as an equivalent to the *forum non conveniens* doctrine because it is not concerned with finding a more appropriate forum for trial. There must be no connection to the nominated forum for it to be invoked. This inhibition would prevent a reservation usurping the parties' choice in most cases.<sup>176</sup>

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<sup>174</sup> Article 21 also permits a further reservation where a contracting state has a 'strong interest' in not applying the Convention to a particular subject matter (for example, contracting state X does not want it to apply to the carriage of goods).

<sup>175</sup> Art.19.

<sup>176</sup> See Schulz, A, 'Report on the Second Meeting of the Informal Working Group on the Judgments Project, January 6-9 2003', Preliminary Document 21 (available at [www.hcch.net](http://www.hcch.net))

Under Article 19, the United States could enter a reservation that prevents it having to assert jurisdiction over a defendant where the ‘minimum contacts’ test is not met because the defendant has no connection with the forum. However, it is doubtful that the United States will enter such a reservation because the defendant is deemed to have waived her due process rights by consent when she enters into a jurisdiction agreement. No defendant-forum nexus is therefore required, removing the need for the United States to enter a reservation on this matter.

It is also not clear what ‘connection’ means. This could potentially cause fragmentation towards the exceptional bases upon which a court could refuse to exercise jurisdiction. Overall, these provisions are unlikely to create a great deal of inconsistency because they are constructed so as to provide a very limited exception to the obligation to assume jurisdiction. However, it does mark a departure from the mandatory approach of the Brussels Regime towards such clauses and is an effort to ensure compromise among the diverse systems of the contracting states.

### *3.4. How Does the Choice of Court Convention Affect the Brussels Regime?*

Article 26 governs the relationship of the Choice of Court Convention with the regional Brussels Regime and other multinational conventions.<sup>177</sup> It provides that the Brussels Regime<sup>178</sup> remains unaffected where the nominated court is a member state of the Brussels Regime and all the parties are resident in a state in which the Brussels Regime is applicable (so it is effectively an ‘internal matter’).<sup>179</sup> This trims the reach of the Brussels Regime’s provision on jurisdiction agreements. Previously, if either

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p.8. The parties may want a neutral forum unrelated to the dispute or facts to hear the case. In such cases the parties must make sure they select a forum that has not entered this reservation.

<sup>177</sup> See Art.26(1)-(5) for the Convention’s relationship with current and future instruments (other than the Brussels Regime).

<sup>178</sup> Art.26(6) labels the Brussels Regime as the ‘rules’ of a ‘Regional Economic Integration Organisation’.

<sup>179</sup> Art.26(6)(a).

of the parties were ‘domiciled’ in a member state, this would be sufficient to bring the matter within its scope.<sup>180</sup>

Although it may be presumed that, because the rules of the Brussels Regime and the Convention are very similar, it does not matter which governs the dispute, it is thought that the parties will seek to ensure that the Convention applies to their dispute.<sup>181</sup> This is because the Brussels Regime’s ‘first-seised’ rule may block access to the nominated forum. As explained above, the first seised rule requires the second forum stay the action even where it is the nominated forum unless and until the forum first seised has determined that it has no jurisdiction over the matter and this can cause significant delay and expense. As the Convention contains no *lis alibi pendens* rules, the strict priority accorded to the nominated forum must be observed and the court selected may proceed with the case even if second seised.<sup>182</sup> The Convention thus provides the certainty of jurisdiction guaranteed by the Brussels Regime without the significant drawbacks.<sup>183</sup>

#### **4. Conclusion:**

From the above analysis of the Choice of Court Convention, it is clear that it follows closely the approach of the Brussels Regime. The Convention does, however, seek to take into consideration criticisms of the Brussels Regime. Chapter two revealed that, of the three regimes analysed, the United States’ approach is the least strict in its insistence that the parties keep to their bargain. However, apart from the inability to stay the action where the forum is clearly inconvenient, the Convention is harmonious with the approach of the United States’ courts towards jurisdiction agreements.<sup>184</sup> The Convention will thus have relatively little impact on any of the regimes analysed on account of its similarity to them.

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<sup>180</sup> Recognition and enforcement between the member states of the Brussels Regime is also unaffected under Art.26(6)(b).

<sup>181</sup> Hartley, T, ‘The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws’ (2005) 54 ICLQ 813, p.823.

<sup>182</sup> As the Convention does not prohibit the nominated forum from granting an anti-suit injunction, this litigational tool can be utilised to ensure the parties keep to their bargain.

<sup>183</sup> Hartley, n.181 above, p.823.

<sup>184</sup> It should be remembered that this can, to some extent, be mitigated by entering a reservation.

It is also obvious from the above analysis that very little of the Interim Text was successfully implemented into the Convention because it only concerns the discrete and narrow topic of exclusive choice of court agreements. The inability of the delegates to agree on many of the provisions after years of struggling to find a compromise demonstrates just how difficult the task at The Hague was. The reasons for this categorical failure will be the subject of the next chapter. This will assist in determining whether a global regime is a realistic project that should be reattempted in the future.

## **Chapter Five: Is a Global Regime Regulating Jurisdiction a Utopian Dream or Plausible Reality?**

### **1. Introduction:**

In 2005 it became apparent that the Hague Conference had failed to reach agreement on the content of a global regime designed to allocate jurisdiction and control the recognition and enforcement of judgments in civil and commercial cases. Instead, the delegates chose to draft in a much more restrictive context by limiting their task to jurisdiction agreements. What does this failure mean? Does it symbolise that a global regime is an impossible dream? Or does this failure merely illustrate that the task, although not impossible, is likely to cause many problems before it actually provides any remedies?

### **2. Is the Failure of the Hague Conference Proof that a Global Regime is Unachievable?**

This section of the chapter will attempt to ascertain whether the Hague Conference is symbolic of the impossibility of implementing a successful global jurisdictional regime. It is thus necessary to explore the possible reasons for the inability of the delegates to secure agreement on the proposed convention. From the documents produced by The Hague, three plausible explanations for the death of the project are apparent. The first is that the delegations found it impossible to reconcile adequately the differences between the common and civil law systems. The second possibility is that due process restrictions operating in the United States prevented the production of a satisfactory convention. The final possibility is that a lack of agreement concerning the content of the provisions existed, which did not stem merely from a civil-common law divide, but also the huge cultural, historical and systemic differences of all the participants. This section of the chapter will analyse if any of the above suggestions prevented the implementation of a worldwide convention and, if so, to what extent.

## 2.1. Theory One: Is the Failure Attributable to the Attempt to Mix Civil and Common Law Systems?

The Hague Conference clearly attempted to create a regime that incorporated both civil and common law approaches towards the exercise of jurisdiction. This is evident from the fact that the delegates chose to implement a rigid jurisdictional statute similar in nature to the Brussels Regime but also determined that use of the discretionary common law doctrine of *forum non conveniens* should be permitted.<sup>1</sup> Was the attempt to fuse the two approaches together into a sort of ‘hybrid’ system the reason the Hague Conference was unable to construct an acceptable and workable regime?

The Brussels Regime, which operates in both common and civil law countries throughout Europe, represents a successful regional example of the task that was attempted at The Hague. There is, however, very little about the Brussels Regime that is common law-like. It is clear that the Brussels Regime did not generate a reconciliation of the two systems’ approaches and nor was this intended.<sup>2</sup> The dominance of the civil tradition does not halt there. The ECJ has actively participated in ensuring that all common law concepts are excluded from the Regime.<sup>3</sup> In *Turner v Grovit*<sup>4</sup> and *Owusu v Jackson*<sup>5</sup> the ECJ declared both anti-suit injunctions and the *forum non conveniens* doctrine as incompatible with the Brussels Regime.

Why does the Brussels Regime reject common law in favour of a purely civil law approach towards jurisdiction? There are three possibilities here. The first is that the 1968 Brussels Convention, the first instrument to create the jurisdictional regime, was designed by countries of the Roman Law tradition. The UK and Ireland, of

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<sup>1</sup> Consensus was actually achieved on this point. The delegations clearly believed the two traditions were reconcilable. See ‘Some Reflections on the Present State of Negotiations On the Judgments Project in the Context of the Future Programme of the Conference’, Preliminary Document 16, drawn up by the Permanent Bureau, p.8.

<sup>2</sup> Advocate General Léger acknowledged this in C-281/02 *Owusu v Jackson & Others* [2005] I.L. Pr. 25, para AG262.

<sup>3</sup> Hartley, T, ‘The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws’ (2005) 54 ICLQ 813, pp.827-8.

<sup>4</sup> C-1159/02 [2005] 1 A.C. 101.

<sup>5</sup> N.2 above.



common law heritage, did not join the Brussels Convention until 1978. As the Regime was already successful, the common law countries may have had little bargaining power to argue that experimental alterations should be made. The second possibility is that the Brussels Regime is a product of the drive to create an internal market and is designed solely with this in mind. Should this be the case, it cannot be representative of incompatibility because its provisions and approach are moulded to fit this specific purpose. The final possibility is that the two systems are irreconcilable and the ECJ's refusal to permit the use of any common law tools in the decisions of *Owusu* and *Turner* is demonstrative of this.

### 2.1.1. A Civil Law Clone: The Result of a Lack of Bargaining Power?

According to the Schlosser Report, the United Kingdom did not press for a 'formal adjustment' of the Regime, requiring the incorporation of the doctrine of forum non conveniens into its application, when it joined the Brussels Convention in 1978.<sup>6</sup> Does this verify that civil and common law approaches cannot co-exist? The UK was obliged to join the Convention in order to be fully integrated into the European Community<sup>7</sup> and, as the Regime was already well established and successful, it can be inferred that the UK had little persuasive influence. Without significant bargaining power, there was no justification for risking interference with the smooth operation of the Convention that such a doctrine could potentially cause.

Article 3(2) of the Accession Act of January 22 1972 and Article 63 of the Brussels Convention did permit *necessary* 'adjustments' to the Regime's text to accommodate newcomers. The existence of this possibility and a failure to utilise it in respect of the doctrine of forum non conveniens does not indicate that the two systems are incompatible. Instead of demanding alterations to the nature of the Brussels Regime, the UK sought to use its restricted bargaining power to ensure amendments that accommodated concerns regarding areas such as insurance,<sup>8</sup> shipping and trusts.

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<sup>6</sup> [1978] OJ C59/71, para 78.

<sup>7</sup> Article 220EC.

<sup>8</sup> The UK initially proposed that insurance be excluded from the scope of the Brussels Regime. See Schlosser, n.6 above, para 136. Insurance had typically been a 'deal-breaker' for the UK. This had been a cause of the breakdown in negotiations in the proposed bilateral judgments treaty between the United States and the UK in 1980. See Gardella, A, and

Although the implementation of the *forum non conveniens* doctrine might have been desirable to the UK, it was not a ‘necessity’. The UK found itself in a ‘take it or leave it’ situation.<sup>9</sup> Further, by focusing its limited persuasive power on assuring that its integration into the Brussels Regime did not adversely affect business and industry, it was subsequently unnecessary to introduce common law concepts into the text.<sup>10</sup>

It should also be noted that no amendment was made when the rules of the Brussels Convention were transplanted, with minor amendments, into the Brussels Regulation at a time when the UK had been a member of the Convention for over 20 years. This suggests that a lack of bargaining power inadequately explains the failure to incorporate common law approaches into the civil-natured Regime. However, only the Netherlands, the UK and Ireland make use of such a doctrine. As only a minority of countries utilise this doctrine, its inclusion in the Regime would probably have caused great disruption and would have violated the ECJ’s reliance on the principle of uniformity<sup>11</sup> so it is likely that there was insufficient support to warrant its addition to the text.

The predominant reasons for the lack of amendment to the Brussels Convention when the UK became a party in the late 1970s seem to be the compulsion of the UK to join the Convention, resulting in a lack of negotiation power, and the reluctance to interfere with an already thriving civil regime. Which of these is the primary reason is unascertainable but this suggests that a lack of compatibility is not the reason for the civil law-nature of the Brussels Regime. Indeed, the fact that the Brussels Regime does not expressly exclude the *forum non conveniens* doctrine suggests that it does not threaten the Regime significantly; otherwise at the time that alterations were made or the Regulation was drafted, an express statement would have been inserted. It seems clear that the nature of the Brussels Regime is the result of a series of events, which commenced upon its conception by civil-natured countries, rather than incompatibility with the common law approach.

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Radicati di Brozolo, L, ‘Civil Law, Common Law and Market Integration: The EC Approach to Conflicts of Jurisdiction’ (2003) 51 Am. J. Comp. L. 611, p.618.

<sup>9</sup> Ibid, p.628.

<sup>10</sup> Ibid, p.619.

<sup>11</sup> See C-1159/02 *Turner v Grovit* [2005] 1 A.C. 101 for the ECJ’s strict adherence to principles of uniformity and equality.

### 2.1.2. A Civil Law 'Clone': Is the Brussels Regime Inadmissible because it is a Unique Prodigy of the Internal Market?

The ECJ has said that Article 220EC, the basis upon which the Brussels Regime was adopted, aims to:

*'[F]acilitate the working of the common market through the adoption of rules of jurisdiction...and through the elimination, as far as possible, of difficulties concerning the recognition and enforcement of judgments in the territory of the [Member] States'.<sup>12</sup>*

This statement infers that the reason d'être for the Regime is to advance the EC integration programme.

However, the Preamble of the 1968 Brussels Convention<sup>13</sup> suggests that the Brussels Regime is not moulded purely to fit an economic objective. It provides that one of its aims is to 'strengthen in the Community the legal protection of persons therein established',<sup>14</sup> indicating that both EC integration and the legal protection of persons in the Community were equally important at the time of drafting.

Article 293EC requires member states to negotiate to secure 'for the benefit of their nationals the simplification of formalities governing recognition and enforcement.'<sup>15</sup> There are two things to note here. The first is that the wording 'for the benefit of their nationals' is undefined. It is unclear whether this means for the economic benefit of nationals or beneficial to nationals as litigants. The former clearly suggests the purpose of the provision is to stabilise the position of nationals in the internal market, whereas the latter concerns the rights of the individual when party to litigation. The second thing evident in Article 293 is that there is no mention of the

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<sup>12</sup> C-398/92 *Firma Mund & Fester v Firma Hartex International Transport* [1994] I.L.Pr 261, para 11. Reiterated in C-281/02 *Owusu v Jackson & Others* [2005] I.L. Pr. 25, para 33.

<sup>13</sup> OJ 1978 C27/1. (In consolidated form at: 1998 OJ C/27/1).

<sup>14</sup> This was confirmed in *Owusu v Jackson*, n.12 above, paras 33 and 39.

<sup>15</sup> Article 293EC Treaty. Articles 61(c)EC and 65EC, which form the basis of the Brussels Regulation, expressly authorise action necessary to secure the 'proper functioning of the internal market'.

need to provide a national with protection from the exercise of jurisdiction by member states' courts. This obviously indicates that the Brussels Regime was not concerned with protecting the defendant from excessive jurisdiction but rather providing the claimant with efficient recognition and enforcement. The claimant is therefore of principal concern in this Article. The reason for this preference can only be attributable to the internal market. Simplified recognition means a speedier resolution of a dispute, which aids businesses operating across borders and spurs confidence in inter-Community exchanges, whether these be in goods, services, technology or otherwise. Although it is not initially clear what 'for the benefit of their nationals' means, one can reason from the above that the basis for the creation of the Regime was, indeed, to promote efficiency and certainty in an inter-Community market during its crucial developmental era.

However, it would be unwise immediately to assume that the efficacy of the internal market was the sole purpose of those drafting the Brussels Regime at a later date. Its structure indicates that the aims of the Regime had progressed somewhat. The Brussels Regime is 'discriminatory' by permitting the simplified recognition and enforcement of all judgments rendered by a member state, including those where the jurisdiction exercised over a non-EU domiciliary was on the basis of a state's traditional rules.<sup>16</sup> The fact that the Brussels Regime permits this unequal protection of defendants implies that there was a desire at the time of drafting to provide European nationals with additional jurisdictional protection over those from outside the territory, whilst still facilitating the internal market through the reduction of barriers to the free movement of judgments wherever possible. The single aim of supporting the internal market therefore became two-fold. So which of these two aims is the predominant concern? The answer seems to be the protection of the defendant. This is because it is 'precisely because of the guarantees granted to the defendant....that the [Brussels Regime] takes a very liberal approach regarding the recognition and enforcement of judgments.'<sup>17</sup> This was the price for which simplified recognition and enforcement was bought. The internal market is secondary to the needs of the defendant where the defendant is 'domiciled' in a member state.

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<sup>16</sup> Articles 33 and 38, Brussels Regulation.

<sup>17</sup> Per Advocate-General Léger in *Owusu v Jackson*, n.12 above, para AG170.

However, where the defendant is not domiciled in a member state, the Regime considers the desire to guarantee the free movement of judgments to be superior.

The Brussels Regime cannot be said to be the child of the internal market for this would ignore the nature and context of its creation. This also means that the Brussels Regime cannot be discounted, on account of its unique internal market status, from any evidence suggesting that the common and civil law traditions are irreconcilable.<sup>18</sup>

### 2.1.3. Is the Brussels Regime Representative of the Reconciliation Reality? The ECJ Decisions of *Owusu* and *Turner*.

Blobel and Spath suggest that there is an underlying competition as to whether legal certainty or flexibility and judicial discretion should be the governing principles of the European law of civil procedure.<sup>19</sup> This suggests that they are opposing values and, as they directly compete, cannot be reconciled. Is this true? As far as the ECJ is concerned they certainly are. The decisions of *Owusu v Jackson* and *Turner v Grovit* reveal that the ECJ regards common law concepts as irreconcilable with the Brussels Regime.

#### 2.1.3(a) *The Basis of the ECJ's Decision in Owusu v Jackson:*

In *Owusu v Jackson*<sup>20</sup> it was held that even where the only connection to the Brussels Regime is the defendant's domicile, the forum non conveniens doctrine is incompatible with the Regime,<sup>21</sup> as jurisdiction is mandatory. The Court also

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<sup>18</sup> Although see pp.160-62 where the reliability of this is challenged.

<sup>19</sup> Blobel, F and Spath, P, 'The Tale of Multilateral Trust and the European Law of Civil Procedure', (2005) 30 E.L.Rev 528, p.528.

<sup>20</sup> C-281/02 *Owusu v Jackson & Others* [2005] I.L. Pr. 25.

<sup>21</sup> This goes against previous opinion. In *Re Harrods* [1992] Ch 72, pp.97-8, the Court of Appeal stated that where the facts were not connected to two or more member states, the Brussels Regime was inapplicable. It was thought that, as the Brussels Regime is generally silent on matters of non-member states, a stay in favour of a non-member state would not be contrary to the Brussels Regime. See Hogan, G, 'The Brussels Convention, Forum Non Conveniens and the Connecting Factors Problem' (1995) 20 E.L. Rev 471, p.475. This has been the subject of much academic debate. See, for example, Briggs, A, 'Forum Non Conveniens and the Brussels Convention Again' (1991) LQR 180; Hartley, T, 'The Brussels Convention and Forum Non Conveniens' (1992) 17 E.L. Rev 553 and Collins, L, 'Forum Non

acknowledged that the Brussels Regime was designed to facilitate the internal market but denied that the logical conclusion from this was that the Regime did not apply where there was no involvement of two or more member states.<sup>22</sup> Apparently, the Regime only requires the matter to not be purely domestic, so any form of international connection is sufficient to invoke the rules.<sup>23</sup> The Court stressed that significant problems would result from regarding such matters as outside the scope of the Brussels Regime. If the action were stayed in favour of a non-member state, the resulting judgment from that forum outside the EU would be subject to a member state's traditional rules on recognition and enforcement. In contrast, if the English courts refused to stay an action and proceeded to trial, the judgment would be entitled to automatic recognition throughout Europe.<sup>24</sup> Due to the potential disparities that could result, the Court invoked the Brussels Regime.<sup>25</sup> This left the ECJ with the task of ascertaining whether the *forum non conveniens* doctrine was compatible with the Brussels Regime when the matter was within its scope.

The ECJ categorically held that the *forum non conveniens* doctrine could not be reconciled with the Brussels Regime.<sup>26</sup> This was attributable to the fact that the doctrine would 'undermine' the predictability of the jurisdictional rules and the

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Conveniens and the Brussels Convention' (1990) 106 LQR 535. It was also debated in the case law. In both *S&W Berisford Plc v New Hampshire Insurance Co Ltd* [1990] 2 QB 631 and *Arkwright Mutual Insurance Co v Bryanston Insurance Co Ltd* [1990] 2 QB 649 the opposite conclusion of *Re Harrods* was reached.

<sup>22</sup> N.20 above, para 34. Hartley believes the Brussels Regime has 'no Community interest' in regulating a dispute where both parties are domiciled in the same member state and the facts are connected with a non-member state. See 'The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws' (2005) 54 ICLQ 813, p.827. See also Fentiman, R, 'Civil Jurisdiction and Third States: *Owusu* and After' (2006) 43 CML Rev 705, p.717. The Jenard Report also suggests that the Brussels Regime is inapplicable (because the matter is 'domestic') where both parties are from the same state [1979] OJ C59/41, para 8.

<sup>23</sup> Ibid, paras 26 and 28-29. The Court of Appeal distinguished *Owusu* in *Konkola Copper Mines Plc v Coromin* [2006] EWCA Civ 5, where a jurisdiction agreement existed in favour of a non-member state, holding that the decision in *Owusu* only applied to declining jurisdiction generally. As the ECJ refused to confirm whether states could decline jurisdiction where jurisdiction agreements exist in favour of third states, the English cases do not, *prima facie*, conflict with *Owusu*. Whether they will be held to do so in the future and the implications of these decisions are outside the scope of this chapter. See Fentiman, R, 'Civil Jurisdiction and Third States: *Owusu* and After' (2006) 43 CML Rev 705 for further discussion.

<sup>24</sup> Articles 33 and 38, Brussels Regulation.

<sup>25</sup> N.20 above, paras 28-9.

<sup>26</sup> Ibid, para 42.

principle of legal certainty, which is the ‘basis’ of the Regime.<sup>27</sup> The Court also stated that the ‘legal protection of persons established in the Community would also be undermined’,<sup>28</sup> as the defendant would not be able ‘reasonably to foresee before which other court he may be sued’.<sup>29</sup> It was also thought that the doctrine would probably affect the ‘uniform application of the rules of jurisdiction contained therein’<sup>30</sup> because the doctrine was only utilised by a small minority of member states.<sup>31</sup> It is apparent from the foregoing that the ECJ clearly believed that it was impossible for the common law doctrine to exist within the civil-natured regime.

### 2.1.3(b) *The Basis of the Court’s Decision in Turner v Grovit:*

Regarding the use of anti-suit injunctions to prevent a litigant from pursuing an action in another member state the ECJ stated:

*‘A prohibition imposed by a court, backed by a penalty, restraining a party from commencing or pursuing proceedings before a foreign court undermines the latter court’s jurisdiction to determine the dispute....[and constitutes] interference with the jurisdiction of the foreign court which, as such, is incompatible with the system of the [Regime].’<sup>32</sup>*

The Court added that granting an anti-suit injunction involves ‘an assessment of the appropriateness of bringing proceedings before a court of another member state,’<sup>33</sup> which is contrary to the principle of ‘mutual trust’, which underpins the Brussels Regime.<sup>34</sup>

The ECJ clearly believes that this litigational tool cannot harmoniously exist within a civil-natured approach. The natural conclusion from this, when combined

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<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid, para 43.

<sup>31</sup> Ibid.

<sup>32</sup> C-1159/02 *Turner v Grovit* [2005] 1 A.C. 101, para 27.

<sup>33</sup> Ibid, para 28.

<sup>34</sup> Ibid.

with the implications of *Owusu*, is that that the project at The Hague was doomed to fail because of its mixture of provisions from the two traditions. The reliability of the two preceding cases as evidence of this overall determination shall now be considered.

### *2.1.3(c) Are the Conclusions of the ECJ in Owusu and Turner Supportable?*

An aim of the Brussels Regime has been defined by the ECJ as the desire to ‘strengthen the legal protection of persons established in the Community.’<sup>35</sup> This strengthening of the position of domiciliaries involves ‘enabling the claimant to identify easily the court in which [she] may sue and the defendant reasonably to foresee in which court [she] may be sued’<sup>36</sup> and this is accordingly achieved through the concept of certainty. One should note the use of the word ‘reasonably’ in the ECJ’s statement. Can it be argued that, under the ‘centre of gravity’ investigation in the *forum non conveniens* doctrine, there is a reasonable degree of certainty as to whether the court will continue to exercise jurisdiction? Although not rigid like the jurisdictional provisions of the Brussels Regime, the previous English appeal cases concerning *forum non conveniens* indicate the manner and extent to which the factors should ordinarily be weighed.<sup>37</sup> There is a sufficient body of case law in existence to provide extensive guidance to the courts as to how the doctrine should be considered. Arguably, this enables the parties reasonably to foresee whether the English courts will exercise jurisdiction under the traditional rules. On this basis, it would be relatively easy to reconcile the two traditions because the *forum non conveniens* doctrine provides a similar level of certainty, albeit by a different method.

However, the ECJ also uses the word ‘easily’ in relation to the claimant ascertaining where she can sue. This causes greater reconciliation problems than the words ‘reasonably foresee’ on account of the fact that ‘easily’ means ‘simply’, ‘effortlessly’ and ‘without doubt’. Determining whether the English courts will stay proceedings is not ‘effortless’ or ‘without doubt’, it is only reasonably foreseeable.

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<sup>35</sup> C-38/81 *Effer SpA v Kanter* [1984] 2 CMLR 667, para 6.

<sup>36</sup> *Ibid.*

<sup>37</sup> Briggs describes the *forum non conveniens* doctrine as ‘predictable, proportionate, rational and just’ in ‘The Death of Harrods: Forum Non Conveniens and the European Court’ (2005) 121 LQR 535, p.537.



An underlying tension as to what the parties are entitled to expect from the jurisdictional provisions is a likely result of these differing degrees of predictability, which would undermine the Brussels Regime. This difference in foresight appears to justify the result of *Owusu*.

Although this appears to be a reason for the failure of the Hague Conference's project, it should be noted that the forum non conveniens provision suggested by the delegations was restricted and guided.<sup>38</sup> The infiltration of discretion into the system would not have been extensive under that provision. On the other hand, the impact of the forum non conveniens doctrine in *Owusu* would not have been substantial either, as it would have only applied where the sole connection to the Brussels Regime was the defendant's domicile. This suggests that the ECJ believes that even a minor mixing of the two is inappropriate, supporting the conclusion that the attempt to mix the systems was a fundamental cause of the breakdown of negotiations at The Hague.

It must be remembered though that where related actions are pending in two different states, the Brussels Regime provides the court second seised with discretion as to whether to stay the action pending the outcome of the first.<sup>39</sup> There has been no suggestion by the ECJ that this discretion amounts, in any manner, to a lack of protection for those established in the Community or that there is insufficient certainty. How can discretion be so readily accepted and so strenuously rejected at the same time?

In *Owusu v Jackson*, even Advocate-General Léger admitted that the related actions provision may be 'compared to the doctrine of forum non conveniens.'<sup>40</sup> This is true where related proceedings exist elsewhere, as both regimes consider the impact that two conflicting judgments might have on the recognition and enforcement stage of the litigation. The doctrine of forum non conveniens, however, is also used in a different context to the related actions provision, as it is designed to mitigate the width of the courts' reach where general jurisdiction is exercised and there need not be any related actions pending for the doctrine to be invoked. However, the discretionary

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<sup>38</sup> See p.133-35.

<sup>39</sup> Article 28(1)-(3) Brussels Regulation.

<sup>40</sup> N.20 above, para AG252.

doctrine of forum conveniens is associated with far less extensive jurisdiction than that confronted by the forum non conveniens doctrine. The forum conveniens doctrine, which behaves in a similar manner to forum non conveniens, functions within the context of jurisdictional ‘headings’ that are very similar to those found in the special jurisdiction provisions in the Brussels Regime.<sup>41</sup> As the primary purpose of the forum conveniens doctrine is not to counter excessive jurisdiction, it seems that the context, scope and circumstances in which the related actions provision might operate is very similar to the discretionary forum conveniens doctrine. Indeed, in *Owens Bank Ltd v Bracco (No 2)*<sup>42</sup> Advocate General Lenz stated that, when determining whether to stay proceedings, the courts could consider the extent of the relatedness between the two actions, the stage reached in the proceedings elsewhere and the ‘proximity of each [court] to the subject-matter of the case.’<sup>43</sup> The reference to ‘proximity’ sounds very similar to the search for the appropriate forum under both common law doctrines.

Are the similarities proof that if discretion can exist under the related actions provision, the doctrine of forum non conveniens could successfully co-exist with a civil law regime? An answer in the affirmative would be premature. The reason for the existence of the forum non conveniens doctrine, and what it seeks to achieve, is very different to the related actions provision. Although the forum non conveniens doctrine does consider any related or parallel proceedings, this is not its exclusive task and nor is it the doctrine’s primary function. Indeed, Fentiman suggests that the Brussels Regime successfully accommodates the discretion in the related actions provision only because it assists in the achievement of its goals.<sup>44</sup> Forum non conveniens attempts to facilitate many different interests that are not central to the objectives of the Brussels Regime.<sup>45</sup>

Furthermore, as the forum non conveniens doctrine does not depend upon the existence of related proceedings, it has much more potential to infiltrate discretionary

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<sup>41</sup> See p.55-57 above for the ‘headings’ contained in CPR 6.20.

<sup>42</sup> C-129/92 [1994] I-117.

<sup>43</sup> Ibid, para 76.

<sup>44</sup> Fentiman, R, ‘Civil Jurisdiction and Third States: *Owusu* and After’ (2006) 43 CML Rev 705, pp.728-30.

<sup>45</sup> Ibid.

concepts into the jurisdictional system as a whole. Also, when considering the connecting factors in order to find the ‘most appropriate forum’, a review and determination of the jurisdiction of the other available fora takes place. The Brussels Regime specifically prohibits any review of the jurisdiction of another court in any manner.<sup>46</sup> Furthermore, there is a strong underlying presumption of a stay under Article 28, which curtails discretion in a manner not experienced under the forum non conveniens doctrine. The conclusion to be drawn from these inherent differences is that while the two doctrines involve discretionary elements, it is acceptable to distinguish them. It does not, however, support the conclusion that the two traditions are polar opposites never to be reconciled. However, the question as to whether the ECJ was justified in its exclusion of the forum non conveniens doctrine in its entirety, and what this symbolises in relation to the civil-common law divide, still remains.

*2.1.3 (d) An Answer to Owusu: The Legal Protection Offered to the Claimant under the Forum Non Conveniens Doctrine:*

One of the reasons for the ECJ’s conclusion that forum non conveniens is incompatible with the Brussels Regime was the fact that it regarded the forum non conveniens doctrine as providing insufficient legal protection to the claimant.<sup>47</sup> This should not be viewed as conclusive evidence that the two systems are incompatible because that deduction was made on the following basis:

*‘[W]here a plea is raised on the basis that a foreign court is a more appropriate forum to try the action, it is for the claimant to establish that he will not be able to obtain justice abroad.’<sup>48</sup>*

The Court is clearly mistaken as to the demands of, and role played by, the doctrine of forum non conveniens under England’s traditional rules. It should be remembered from chapter two that the defendant must raise forum non conveniens otherwise she is deemed to submit to the court’s jurisdiction. However, the plea in itself is not sufficient to shift the burden to the claimant to convince the court that it should hear

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<sup>46</sup> This is to maintain ‘equality’ between the member states.

<sup>47</sup> *Owusu*, n.20 above, para 42.

<sup>48</sup> *Ibid.*

the dispute, as the ECJ clearly believes in the above paragraph. The defendant must prove that the ‘centre of gravity’ lies with a forum other than England. This burden is not easily surmountable. Indeed, it can be said that there is a presumption that the claimant’s choice of forum is the correct one.<sup>49</sup> The Court is mistaken in suggesting that legal protection is missing on these grounds. From chapter two it is apparent that the claimant only need adduce any proof that there will be a ‘denial of justice abroad’ if the defendant successfully convinces the court that the foreign forum is more appropriate. It is obvious that the ECJ has not fully understood the operation of the forum non conveniens doctrine and any conclusions stemming from that false observation are thus unsupported. This means that the suggestion that this ‘defendant-bias’ prevents reconciliation of the two traditions is unfounded.

*2.1.3(e) The Lack of Focus on Discretion: Were the ECJ’s Judgments in Owusu and Turner Tainted by Internal Market Concerns?*

As noted above, in *Owusu v Jackson*, the ECJ chose to interpret the meaning of ‘international’ widely, requiring only that a dispute be connected to two or more countries, regardless of whether those countries are member states. This path was selected because the ECJ thought that leaving such matters outside the scope of the Brussels Regime would impact upon the recognition and enforcement stage.<sup>50</sup> The concentration on how it might affect the movement of judgments across EU borders, and lack of focus on the merits and disadvantages of the forum non conveniens doctrine, has strong internal market undertones.<sup>51</sup>

In relation to *Turner v Grovit*, the ECJ’s main complaint was not the discretionary nature of the anti-suit injunction but that the regional regime was dependent on ‘mutual trust’ and an anti-suit injunction would breach this fundamental core principle.<sup>52</sup> In its judgment, the ECJ focused solely on the impact an anti-suit

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<sup>49</sup> See p.13 above.

<sup>50</sup> See p.154 above.

<sup>51</sup> Briggs suggests that classifying the matter as ‘international’ rather than ‘domestic’ was ‘intended to warn off’ arguments that might trim the scope of the Regime. See ‘The Death of Harrods: Forum Non Conveniens and the European Court’ (2005) 121 LQR 535, p.539.

<sup>52</sup> N.32 above, para 24.

injunction might have on the smooth operation of the Brussels Regime.<sup>53</sup> The ECJ stressed that ‘mutual trust’ enabled a ‘compulsory system of jurisdiction to be established’, which in turn enabled states to engage in a process of simplified recognition.<sup>54</sup> As speedy recognition was established for market integration purposes, the link between ‘mutual trust’ and the internal market is established. Further evidence to support this is found in the fact that the ECJ stressed the need for the system to maintain its underlying principles of ‘equality’ and ‘uniformity’.<sup>55</sup> ‘Equality’ means that no member state can review each other’s jurisdiction and ‘uniformity’ ensures that all member states apply and interpret the rules in the same manner. These concepts encourage absolute faith and trust among several individual states. In this sense they can be traced back to the principle of ‘mutual trust’. On the basis of the link between ‘mutual trust’ and economic objectives, it seems fair to conclude that the presiding norms of ‘equality’ and ‘uniformity’ and, principally, ‘mutual trust’ are mechanisms by which the Court can preserve the sanctity of market integration objectives.<sup>56</sup>

In both *Owusu v Jackson*<sup>57</sup> and *Turner v Grovit*<sup>58</sup> the ECJ failed to consider the effect that its decision would have on the interests of justice and the likely negative impact on the parties’ positions. In *Turner*, the Court focused solely on maintaining ‘mutual trust’ and ‘equality’ between member states, both of which are easily traced back to the economic objectives of the EU.<sup>59</sup> This demonstrates that the ECJ put the needs of the internal market first without a momentary pause for thought.<sup>60</sup> This is strange in light of the fact that ‘legal protection for persons established in the EC’ was *the* primary objective of the drafters.<sup>61</sup> In conclusion, although the ECJ has consistently held that the Brussels Regime is devised to offer a

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<sup>53</sup> Ibid, paras 25-28.

<sup>54</sup> Ibid, para 24.

<sup>55</sup> Ibid, paras 25 and 26.

<sup>56</sup> Sir Anthony Clarke, Master of the Rolls, ‘The Differing Approach to Commercial Litigation in the European Court of Justice and the Courts of England and Wales’, a Speech Delivered to the Institute of Advanced Legal Studies, London on 23<sup>rd</sup> February 2006 (available at <http://www.dca.gov.uk/judicial/speeches/2006/sp060223.htm>), p.18.

<sup>57</sup> N.20 above, paras 45-46.

<sup>58</sup> N.32 above, paras 24-30.

<sup>59</sup> Ibid, paras 24-30.

<sup>60</sup> See pp.197-9 below for a discussion as to whether the reasoning of the ECJ failed to meet the requirements of Article 6 of the European Convention on Human Rights.

<sup>61</sup> See pp.151-3 above.

greater degree of legal protection to those established within it, these cases demonstrate that its primary focus is the internal market.<sup>62</sup> As such, these decisions are not substantive evidence of irreconcilability because they are tainted by the specific and unique environment in which the Brussels Regime exists.

### *2.1.3(f) Conclusion:*

On the basis of the above analysis, it seems that it is impossible to find conclusive evidence that the civil-common law tension could have substantially affected negotiations and thus significantly contributed to the death of the jurisdiction and judgments project. Indeed, when one combines the fact that the ECJ overly concentrated on the effect the common law concepts would have on the internal market with the fact that the Brussels Regime was conceived to facilitate international business, one can suggest that it is absolutely essential that the Brussels Regime maintains its civil-natured form in order to meet the economic expectations that have developed from its application across Europe. Discretionary approaches towards jurisdiction are ‘less efficient in the context of regional market integration.’<sup>63</sup> Rigid rules can achieve this goal at less cost because a common law lawyer, unlike a civil lawyer, can only provide nearly precise advice.<sup>64</sup> Further, businesses expect absolute certainty from the Brussels system, especially in the context of a rapidly growing internal market. It was thus necessary that the ECJ did not depart from this and the introduction of an untested common law concept might have caused such deviation.

As a result, it seems that not only do the preceding paragraphs find insufficient evidence to support the conclusion that the civil and common law systems are irreconcilable but also that the Brussels Regime should be discounted as forming any part of the evidence suggesting that the two might be incompatible. This is because the specific goals of market integration have ‘significantly impacted on the structure and on the actual working of the [Regime]’.<sup>65</sup> As such, the Brussels Regime does not

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<sup>62</sup> Fentiman, R, ‘Civil Jurisdiction and Third States: Owusu and After’ (2006) 43 CML Rev 705, p.717.

<sup>63</sup> Gardella, A, and Radicata di Brozolo, L, ‘Civil Law, Common Law and Market Integration: The EC Approach to Conflicts of Jurisdiction’, (2003) 51 Am. J. Comp. L. 611, p.632.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid, p.636.

represent the reality of the difficulties that may arise from seeking to include both approaches into a global convention. Indeed, Quebec illustrates that a combination of both approaches is possible, as it permits *forum non conveniens* stays in its civil law system.<sup>66</sup> The French courts have also demonstrated that common law discretion can exist in a civil system by issuing, albeit by a different name, an anti-suit injunction.<sup>67</sup> However, the difficulties the resolution of these approaches might pose could mean that it was a contributory factor to the significant delay and overall unhappiness with the content of the text. There is, however, nothing to suggest that they are radically opposing and cannot be reconciled at all.

## *2.2. Theory Two: Constitutional Limitations Prevented Conclusion of a Comprehensive and Practicable Regime:*

The United States' delegation argued that constitutional restrictions prevented the conclusion of a convention that violated, or had the potential to violate, its due process test.<sup>68</sup> Even if the convention were ratified, many American commentators argued that the Constitution would 'trump' the treaty.<sup>69</sup> At the very least, this would render it inapplicable in individual cases where due process was not met. If the Supreme Court struck it down as incompliant with the United States' Constitution, it would be ineffective altogether.<sup>70</sup> In such circumstances it would seem prudent to ensure the negotiations did not provide for any jurisdictional bases that would violate the due process test.

As due process is an elusive concept, ensuring all the jurisdictional bases were compliant with due process was problematic. This makes it difficult to incorporate due process into the text let alone explain to contracting states and litigants the potential impact it would have upon litigation. For these reasons, it was unwise to

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<sup>66</sup> Article 3135 Civil Code of Quebec.

<sup>67</sup> *Banque Worms v Branchot*, Cass. 1re Civ, November 11 2002; (2003) Rev. Crit. 816. See also Briggs, A, 'Anti-suit Injunctions and Utopian Ideals' (2004) 120 LQR 529, p.530.

<sup>68</sup> See p.17 above for the 'due process test'.

<sup>69</sup> See, for example, Von Mehren, A, 'Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?' (1994) 57 Law & Contemp. Probs. 271, p.284 and Weintraub, R, 'Negotiating the Tort Long-Arm Provisions of the Judgments Convention' (1998) 61 Alb. L. Rev 1269, p.1270.

<sup>70</sup> It may be possible to reason around this problem. See pp.201-210 above.

subject all jurisdiction rules in the convention to a due process test. However, drafting each provision so that it was due process compliant was also conceptually problematic. The fact-based, discretionary nature of due process that depends on the specific actions of the defendant produces many differing conclusions. As a result, it is difficult to incorporate its limitations into each individual provision. It seems, therefore, that the due process test could neither be included nor excluded from the convention. As the United States insisted that the convention could not ‘overrule’ the jurisprudence of the Supreme Court, the stalemate resulting from this appears to have been instrumental in the difficulty in securing agreement on the content of the rules.

### 2.2.1. The Due Process Problem: A Provision-by Provision Approach:

In order for the deliberations at The Hague to progress, the delegations opted to accommodate due process concerns in ‘provision-by provision’ approach because this was more sympathetic to the structure and content of the text.<sup>71</sup> Several amendments were made to the text, which was originally very similar to the Brussels Regime,<sup>72</sup> to appease the United States by incorporating language identical, or similar, to that employed by the Supreme Court in its judgments. One such provision is that providing jurisdiction at the place of injury in tort actions. Many American commentators<sup>73</sup> expressed their discontent with this because it directly contravened *World-Wide Volkswagen v Woodson*.<sup>74</sup> To remedy this, the Interim Text made jurisdiction unavailable at the place of injury unless the defendant could have ‘reasonably foreseen that the act or omission could result in an injury of the same nature in that State.’<sup>75</sup> This introduction of a requirement of foresight was a marked departure from the approaches embodied in the Brussels Regime and England’s traditional rules. It clearly symbolised an attempt on the part of the European delegations to accommodate, as far as possible, the demands and needs of the United

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<sup>71</sup> Kessedjian, K, ‘Synthesis of the Work of the Special Commission of March 1998 on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters’, Preliminary Document 9 (available at [www.hcch.net](http://www.hcch.net)) p.38.

<sup>72</sup> See chapter four for a discussion of the Interim Text.

<sup>73</sup> See Silberman, L, ‘Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention be Stalled?’ (2002) 52 DePaul L. Rev. 319, p.330 and Borchers, P, ‘A Few Little Issues for the Hague Judgments Negotiators’ (1998) 24 Brook. J. Int’l L 157, pp.161-162.

<sup>74</sup> See p.17 for the ‘due process’ test.

<sup>75</sup> Article 10(b).



States. Although this alteration provided the defendant with additional protection to the previous text, it still might have failed to satisfy due process because it is unclear whether due process requires the intentional conduct or mere foresight of the defendant before jurisdiction is regarded as constitutional.<sup>76</sup> It appeared very difficult to reason around this problem without effectively adopting the judgment of *Worldwide Volkswagen* into the text.

Silberman also suggested that constitutional problems were raised regarding ‘multiple defendants’.<sup>77</sup> Based on the Brussels Regime, the Interim Text provided that a forum could exercise jurisdiction over multiple defendants, despite the fact that only one of them was ‘habitually resident’ there.<sup>78</sup> This, of course, meant that the court concerned could exercise jurisdiction in direct contravention to the ‘minimum contacts’ test. To accommodate this problem, this jurisdictional rule was moved from the ‘white’ list to the ‘grey’ list.<sup>79</sup> This action altered the compulsion upon a court to assert jurisdiction, releasing the United States from any obligation to act in contravention of due process.

For the European delegations, there were negative consequences flowing from this demotion. The first was that any judgment rendered by a European forum on this basis would not have been entitled to simplified recognition but subject to the national rules of the recognising forum. As the United States would have refused to recognise such judgments, the practical effect would have been to maintain the current status quo, providing no additional benefits to the litigants or contracting states. This contradicts the underlying objective of the unrestricted circulation of judgments. A two-tiered system would have perhaps resulted, whereby claimants would tend to pursue actions in Europe, if one of the defendants could be construed as ‘habitually resident’ there, to avoid the problems associated with the United States’ insistence on a due process analysis for each defendant. This would have prevented litigation in the United States even when it was the most appropriate place for the action. Furthermore, this jurisdictional ground prevents multiple actions, from which

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<sup>76</sup> See Silberman, n.73 above, p.330.

<sup>77</sup> Ibid, p.331.

<sup>78</sup> See p.53 above.

<sup>79</sup> Ibid.

irreconcilable decisions may result.<sup>80</sup> Thus the cost to the efficiency of the global regime would have been high but this was accepted in order to accommodate the United States.<sup>81</sup>

There is some debate as to whether the United States would be restrained by due process in the way it clearly envisaged it was. Whether this is the case, the fact that it was necessary to draft the text in accordance with such limitations meant that the project had little room to grow outside the scope of the United States' due process cases. This perhaps made a global regime impossible to achieve before it was even conceived unless the inability to contract outside the realms of due process was inaccurately perceived. A discussion of this issue will be the subject of a subsequent section.<sup>82</sup>

Even though several significant amendments were eventually made to the draft text to ensure compliance with due process requirements, this caused dissatisfaction with the overall project, leaving more issues in need of resolution and compromise than the first draft of 1999.<sup>83</sup> It also altered the focus of the provisions. An alteration to their content affected the interests served by the relevant provision and reduced the efficiency guaranteed by the previous drafts. This prompted the decision to narrow the scope of the convention to choice of court issues, where constitutional limitations were minimal<sup>84</sup> and a significant consensus existed. Despite the contribution of this conceptual difficulty to the inability to produce an acceptable text, it is not clear that this was the sole reason for the failure of the project. Although many of the 'provision problems', to be discussed in the subsequent section, were related to the due process problem in that their context was unsatisfactory to the United States, there was also general discomfort with the text that seems to have never really been resolved.

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<sup>80</sup> Preliminary Document 9, n.71 above, p.38.

<sup>81</sup> Article 16, governing indemnity actions was also transferred to the 'grey' list because it conflicted with *Ashai Metal Industries*, n.63 above, which requires that parties joined to actions for indemnity reasons must also satisfy due process.

<sup>82</sup> See pp.201-210 below.

<sup>83</sup> The Interim Text contained nearly one hundred passages in square brackets, indicating that those provisions had not yet been decided upon. See Silberman, n.73 above, p.325.

<sup>84</sup> This is because the defendant is deemed to 'waive' her right to due process where she consents to jurisdiction through a choice of court clause. See pp.63-4 below.

### 2.3. Theory Three: Lack of Agreement Concerning the Content of the Provisions:

There were two predominant reasons for the overall dissatisfaction with the Interim Text. The first was that the United States expressed concern that the text did not necessarily insist upon a defendant-forum connection where specific jurisdiction was exercised. The second reason was the methodology employed by the delegations to determine what the content of the jurisdictional provisions should be. By pursuing 'compromise' among the participants at whatever cost, significant amendments were made to the text and many proposals for amendments were put forward. Debate as to whether a particular national jurisdictional rule should be categorised as falling within either the 'white', 'grey' or 'black' lists then ensued and the text became littered with suggestions upon which there was no consensus. The extent to which these factors impacted upon negotiations will now be examined.

#### 2.3.1. The Forum-Cause of Action Connection vs. the Defendant-Forum Relationship:

Many of the rules of the Interim Text were very close in nature and scope to the Brussels Regime. Initially, specific jurisdiction was available on the sole basis of a cause of action-forum relationship. Brand objected to this approach, stating that, regardless of the type of jurisdiction being exercised, a defendant-forum relationship should be mandatory because it is 'the relationship on which the jurisdictional rules supported by the greatest consensus are built'.<sup>85</sup>

Although it is impossible to determine whether the majority of the delegations base their jurisdictional approach on the need for a defendant-forum connection without analysing the systems of all the countries involved,<sup>86</sup> it is clear that this

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<sup>85</sup> Brand, R, 'Current Problems, Common Ground, and First Principles: Restructuring the Preliminary Draft Convention Text' in Barcelo, J, and Clermont, K (eds), *A Global Law of Jurisdiction and Judgments: Lessons from The Hague* (Kluwer Law International 2002) p.77.

<sup>86</sup> Although note that both alternatives proposed in Art.18(1) of the Interim Text defined jurisdictional grounds as prohibited unless there was a sufficient dispute-forum connection. This demonstrates that there was agreement that this relationship was essential for the fair exercise of jurisdiction. In contrast, only one of the proposals in Art.18(1) suggested that

statement by Brand is only partially accurate. From chapter two above, it is apparent that only the United States makes a defendant-forum connection a pre-requisite in the assertion of specific jurisdiction.<sup>87</sup> As a result, it would be wrong to conclude that the Interim Text was flawed because it lacked this concept. This may have been the reason for the United States' dislike of the Interim Text but it certainly does not follow that the global regime could not have successfully operated, or have been implemented, without this nexus.

While it may be true that this meant the project was fatally flawed for the United States<sup>88</sup> and, as the delegations did not want to proceed without the United States, this resulted in an inability to move forward, this might not have been the sole reason for the failure. It is possible to reinterpret Brand's suggestions and find a potential reason for the death of the project. The Brussels Regime, which now controls an enormous proportion of the cases litigated within Europe, only applies where the defendant is 'domiciled' in a member state. The scope of the Brussels Regime would be potentially much wider if this restriction did not exist. Without this limitation a defendant from Japan, for example, could be sued in France, the place where the tortious injury was sustained. A defendant from a country as distant as Japan would face much greater expense and inconvenience than a defendant from a limited geographical area such as the EU. A forum shopping claimant could also utilise this to her advantage, as such distance could force the defendant to enter into a settlement more advantageous to the claimant than where the defendant need only defend in a neighbouring European country.

In light of this extended jurisdictional reach in this hypothetical scenario, it is perhaps necessary to have both a defendant-forum and dispute-forum relationship before the exercise of jurisdiction over the defendant were deemed to be acceptable. This would reduce the likelihood of suit in distant fora and rebalance the parties' positions to accommodate the impact the extension of jurisdiction beyond the regional

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jurisdiction should be prohibited unless a defendant-forum nexus existed. This suggests that the majority of the delegations viewed the dispute-forum nexus, rather than the defendant-forum connection, as essential. This suggests that Brand's statement is mistaken.

<sup>87</sup> See pp.64-73 above.

<sup>88</sup> Especially regarding a defendant-forum nexus. The United States felt that it could not contract outside this constitutional restriction.

regime would have on their respective positions. On this basis, Brand would be right in concluding that the reluctance of the drafters to insist upon a defendant-forum connection significantly affected the probability of the global regime being acceptable but this conclusion is reached for the wrong reasons. The underlying problem is that the Brussels Regime was used almost as a ‘model’ for the text without consideration of the fact that this regional regime is very internal-looking, refusing to stretch its jurisdictional reach beyond the territorial borders of Europe.<sup>89</sup> Of the three regimes analysed, only the United States consistently requires a defendant-forum nexus and its absence in the text is not indicative of a conceptual failure. It is the presumption that it is acceptable to implement a provision that effectively mimics the inward-looking Brussels Regime that is likely to have produced mistrust.<sup>90</sup>

It does not necessarily follow that the perfect mechanism to restrict the reach of the provisions based on a cause of action-forum relationship is an insistence upon a defendant-forum nexus. This is just one method by which the delegations might have limited the burden on the defendant from a far-reaching provision.<sup>91</sup> In this sense, Brand is again incorrect in presuming that the problems surrounding the Interim Text were substantially caused by the lack of defendant-forum relationship. The problem is that the only limitation on the provisions’ scope is the need for a dispute-forum relationship rather than the fact that the defendant-forum connection is missing. Further, even if insistence upon a defendant-forum relationship is the appropriate method to restrict specific jurisdiction, this does not mean that the jurisdictional provisions should be required to live up to the expectations of due process. As chapter two illustrates, different types of defendant-forum connections exist.<sup>92</sup> It is fair to say, however, that there was a failure to take into account the defendant’s position in a global regime where the rules were defined only by reference to a cause of action-forum nexus and this would have assisted the claimant to a much greater

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<sup>89</sup> Clearly this general point excludes where the claim is either related to rights in rem or subject to a jurisdiction agreement, where the defendant need not be domiciled in the EU.

<sup>90</sup> See pp.195-201 below for further problems associated with utilising the Brussels Regime as a ‘model’ for a global regime.

<sup>91</sup> For example, insisting that direct damage results from the tortious incident would reduce the provision’s scope by strengthening the type of dispute-forum connection required. Alternatively, an evaluation similar to the forum non conveniens doctrine could be included, requiring additional factual connections to the forum, such as the claimant’s residence there.

<sup>92</sup> Jurisdiction being conditional upon the defendant’s domicile, residence or presence there, for example.

extent in the context of a global regime than under the geographically restricted Brussels Regime.

### 2.3.2. The 'Compromise Philosophy':

The methodology employed by the delegations involved searching for compromise yet a decade of negotiations failed to produce an acceptable text. In February 2000, Jeffrey Kovar wrote:

*'The project as currently embodied in the October 1999 preliminary draft convention stands no chance of being accepted in the United States. Moreover, our assessment is that the negotiating process so far demonstrates no foreseeable possibility for correcting what for us are fatal defects in the approach, structure and details of the text. In our view there has not been adequate progress toward creation of a draft convention that would represent a worldwide compromise among extremely different legal system.'*<sup>93</sup>

It is clear from the Kovar letter that the United States' delegation believed that one of the predominant concerns of the participating states should be to found a global jurisdictional regime on the basis of a compromise. This means that the interests of those involved in litigation, namely the parties but also the forum, were not necessarily the primary focus of the drafters. Neither can it be said that the creation of certainty and simplified rules on jurisdiction and recognition were the central motivation for the content of the provisions. What impact did this approach towards the drafting of the global regime have upon its content and success?

The above statement clearly demonstrates that the United States viewed the political issues surrounding the creation of this global regime as just as important, if

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<sup>93</sup> Jeffrey Kovar, Head of the United State's Delegation to the Hague Conference and Assistant Legal Advisor of the United State's Department of State's letter on behalf of the United States to the Secretary General of the Hague Conference, J.H.A van Loon, in February 2000. See also Statement to the Subcommittee on the Courts and Intellectual Property Committee on the Judiciary of the House of Representatives on 29<sup>th</sup> June 2000, (available at <http://judiciary.house.gov/Legacy/kova0629.htm>).

not more so, than the content of the proposed worldwide convention. The spotlight was on ‘taking a little and giving a little’ by all concerned rather than drafting the provisions to meet particular aims.<sup>94</sup> By honing in on the need for ‘compromise’, the text envisaged by the United States, and any other such minded delegations, would include as many of their own jurisdictional rules as possible so that the worldwide regime would not significantly impact upon their existing territorial reach. Some casualties would be necessary, of course, but this was to be given in return for the abandonment of certain states’ rules disliked by that delegation.

Securing the United States’ approval of the worldwide convention was a fundamental desire of many of the delegations. As the European delegations already had their successful regional regime in place, they would gain relatively little from the project unless the United States agreed to implement the convention. Obtaining the endorsement of the United States would greatly increase the number of judgments recognised and enforced and would offer a higher level of protection for EU citizens when abroad.<sup>95</sup> As a result, appeasing the United States was a primary concern and in turn this would have incorporated the ‘compromise philosophy’ of the United States into the hub of the discussions during the negotiation and drafting processes. As the need to ‘compromise’ became a fundamental objective, the nature and content of the provisions adopted this aim.

Indeed, this ‘compromise philosophy’ is evident in many of the decisions made by the delegations. For example, the resolution to abandon the ‘double convention’ approach and follow Von Mehren’s suggestion of a ‘convention mixte’ clearly illustrates a desire to sustain the support of the United States for the project.<sup>96</sup> Alterations to pacify the United States included a narrowing down of the tort and consumer provisions, as well as the downgrading of the ‘multiple parties’ and ‘indemnity and contribution actions’ rules from the ‘white’ list to the ‘grey’ list.<sup>97</sup> The European delegations initially insisted that the Brussels Regime should remain unaffected where there was overlap between its scope and the proposed global

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<sup>94</sup> Such aims could include, for example, the facilitation of multinational growth, finding the most appropriate rules to protect a particular litigant or striking a balance between the parties.

<sup>95</sup> This is because the United States would not be able to use all its exorbitant provisions currently available vis-à-vis such defendants.

<sup>96</sup> See pp.112-3 above.

<sup>97</sup> See chapter four for the content and proposals of the Interim Text.

convention<sup>98</sup> but later considered several alternative proposals.<sup>99</sup> This was an attempt to avoid a stalemate because the United States had complained that United States' citizens would have received much less protection than the United States wanted to negotiate if the Brussels Regime were upheld as the primary system.<sup>100</sup> An illustration of the 'compromise philosophy' in action will be examined below.

### 2.3.2(a) *The 'Compromise Philosophy' in Action:*

As a result of the 'compromise philosophy', there were many more proposals and alternatives in the 2001 Interim Text than in the 1999 Preliminary Draft Convention.<sup>101</sup> Indeed, the text presented the possibility for the 'doing business' doctrine to be reclassified as being on the 'grey' list rather than the 'black' list,<sup>102</sup> notwithstanding the fact that the vast majority of the delegations were opposed to its use within the global regime.<sup>103</sup>

Trooboff asserted that the delegations of the Hague Conference did not 'furnish examples of [United States'] courts asserting general jurisdiction that was unwarranted' through the 'doing business' doctrine and that, without such proof, it should not be excluded from the global regime.<sup>104</sup> Its inclusion on the 'white' list would have radically altered the balance struck between the parties. General jurisdiction was only available at the defendant's habitual residence, which sought to

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<sup>98</sup> 'Conclusions of the Special Commission of June 1994 on the Question of the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters', Preliminary Document 2, drawn up by the Permanent Bureau (available at [www.hcch.net](http://www.hcch.net)) p.27.

<sup>99</sup> The importance of resolving this matter was emphasised in Preliminary Document 16, 'Some Reflections on the Present State of Negotiations On the Judgments Project in the Context of the Future Programme of the Conference', drawn up by the Permanent Bureau (available at [www.hcch.net](http://www.hcch.net)) p.8. At pp.4-6, it is noted that the European Union had several meetings on this point. The Interim Text contains four proposals on the relationship of the text with the Brussels Regime. See pp.136-8.

<sup>100</sup> Borchers, P, 'A Few Little Issues for the Hague Judgments Negotiators' (1998) 24 Brook. J. Int'l L 157, p.159.

<sup>101</sup> See chapter four for a discussion of the Interim Text and proposals.

<sup>102</sup> See Article 18(1), Interim Text.

<sup>103</sup> Kessedjian, K, 'Synthesis of the Work of the Special Commission of March 1998 on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters', Preliminary Document 9 (available at [www.hcch.net](http://www.hcch.net)) p.30.

<sup>104</sup> Trooboff, P, 'Ten (and Probably More) Difficulties in Negotiating a Worldwide Convention on International Jurisdiction and Enforcement of Judgments: Some Initial Lessons' in Barcelo, J, and Clermont, K (eds), *A Global Law of Jurisdiction and Judgments: Lessons from The Hague* (Kluwer Law International 2002) p.268.



counteract the claimant-bias inherent in general jurisdiction by providing suit at a place convenient to the defendant. Trooboff's comment ignores the fact that due process reduces the reach of the 'doing business' doctrine. Without this doctrine, the scope of this jurisdictional ground would have been far more extensive than the other provisions providing general jurisdiction, providing inconsistency in the global regime's approach. Including the due process test in the text to restrict the doctrine's extensive reach would have essentially incorporated the entire approach of the United States into the convention. This was undesirable on account of the difficulty in interpreting the due process test and the likelihood of inconsistency in its application. Further, the restricted application of the forum non conveniens doctrine in the Interim Text would also have meant that this secondary doctrine would have failed to counteract the reach of the courts under the 'doing business' doctrine to even the same extent as the United States' forum non conveniens doctrine does. This would not have adequately rebalanced the parties' position to correspond with the other provisions but would have provided excessive jurisdictional reach open to exploitation. In light of the benefits the United States would receive from a global system,<sup>105</sup> this reclassification of the 'doing business' doctrine is not necessarily an advantage to the United States let alone the delegations unfamiliar with this elusive concept. The difficulty experienced courts in the United States have in applying due process and determining the scope of the 'doing business' doctrine is evidence of the chaos that would result if transplanted into a worldwide regime.<sup>106</sup>

At the very least many commentators believed that the doctrine should be placed on the 'permissive list'.<sup>107</sup> Although this removes the obligation on the participants to provide this jurisdictional basis to claimants, this maintenance of the status quo denies the European delegations the protection for their citizens abroad they had initially actively sought.

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<sup>105</sup> See pp.108-9 above.

<sup>106</sup> Nygh, P and Pocar, F, Report of the Special Commission on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Preliminary Document 11 (available at [www.hcch.net](http://www.hcch.net)) p.77.

<sup>107</sup> Trooboff, n.104 above, p.268. See also Silberman, L, 'Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention be Stalled?' (2002) 52 DePaul L. Rev. 319, p.338. See also Brand, R, 'Current Problems, Common Ground, and First Principles: Restructuring the Preliminary Draft Convention Text' in Barcelo and Clermont, n.104 above, p.92.

The above discussion demonstrates that the United States was unwilling to compromise its expansive jurisdictional reach under the ‘doing business’ doctrine yet it is questionable whether this really was a fundamental cause for concern for the United States or merely a ‘bargaining chip’ it intended to use to secure other significant advantages in the text. For example, Clermont and Huang note that the removal of ‘doing business’ jurisdiction would block the ability of the United States’ courts to exercise jurisdiction over defendants only in a few cases in which it has a legitimate interest in providing a forum.<sup>108</sup> This is due to the fact that:

*‘The...[‘doing business’]...basis of jurisdiction arose to provide appropriate jurisdiction when specific jurisdiction was not yet fully available. Today, courts need to resort to it, albeit inappropriately, only when all appropriate bases of personal jurisdiction fail to reach the defendant.’<sup>109</sup>*

If the ‘doing business’ doctrine is used infrequently,<sup>110</sup> and only acts to provide the courts with inappropriate jurisdiction (which may later be dismissed on forum non conveniens grounds), why was the United States so keen to maintain it? The implication is that, as its categorisation on the ‘black’ list was something the European delegations were keen to secure, the United States utilised this as a negotiation tool. In an appearance before a subcommittee of the United States’ House of Representatives Jeffrey Kovar stated that:

*‘[The proposed global regime] must provide strong and clear benefits to outweigh the inevitable concerns about giving up some current litigation options.’<sup>111</sup>*

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<sup>108</sup> Clermont, K, and Huang, K-C, ‘Converting the Draft Hague Treaty into Domestic Jurisdictional Law’ in Barcelo III, J.J and Clermont, K.M (eds), n.104 above, p.205.

<sup>109</sup> Ibid.

<sup>110</sup> Preliminary Document 9, n.103 above, p.30 confirms this.

<sup>111</sup> Statement to the Subcommittee on the Courts and Intellectual Property Committee on the Judiciary of the House of Representatives on 29<sup>th</sup> June 2000, (available at <http://judiciary.house.gov/Legacy/kova0629.htm>) p.5.

The above implies that the United States' delegation was utilising the categorisation of its jurisdictional bases as a bargaining chip to be swapped for further other significant benefits.<sup>112</sup>

The United States did not just seek a re-categorisation of the 'doing business' doctrine.<sup>113</sup> Accordingly, the 'transacting business' doctrine had a rightful place on the 'white' list rather than the 'grey' list.<sup>114</sup> This illustrates that the United States was keen to retain as many of its current jurisdictional bases as possible. The United States warned that, should the delegations offer insufficient flexibility on this, it would not be a signatory to the convention.<sup>115</sup> Several suggestions were made to appease the United States' unhappiness with the text. This is evident in numerous alternatives offered in the Interim Text.<sup>116</sup> These proposals incorporate the 'transacting business' doctrine into the tort, contract and 'branch, agency and other establishment' provisions of the text. As noted in chapter four, these proposals altered the balance struck between the parties in the text. For example, the conventional tort provision permits jurisdiction at the place of injury. This was thought to strike an adequate balance between the parties by the delegations.<sup>117</sup> However, the delegates were willing to permit the use of the 'transacting business' doctrine to appease the United States. As the 'transacting business' doctrine provides fora with weaker connections to the dispute with jurisdiction, this would have increased the number of fora open to the claimant, thereby assisting in her 'forum shopping' escapades. As a consequence, the protection offered to the defendant is less than under the conventional approach, which was modelled on the Brussels Regime. Furthermore, it would have provided less predictability for the parties and room for factual interpretation, which the participants had been keen to avoid.<sup>118</sup> Indeed, the delegates were prepared to accept the 'transacting business' doctrine on the 'white' list in order

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<sup>112</sup> This is further confirmed by the fact that Jeffrey Kovar stressed that the United States' delegates were seeking to 'attempt to achieve a balance of the provisions', *ibid*, p.7.

<sup>113</sup> Silberman, n.105 above, p.333.

<sup>114</sup> *Ibid*.

<sup>115</sup> Statement to the Subcommittee on the Courts and Intellectual Property Committee on the Judiciary of the House of Representatives on 29<sup>th</sup> June 2000, (available at <http://judiciary.house.gov/Legacy/kova0629.htm>) p.5.

<sup>116</sup> See chapter four.

<sup>117</sup> Preliminary Document 11, n.106 above, p.60.

<sup>118</sup> Preliminary Document 9, n.103 above, p.32.

to secure agreement on the project, even though defining the nature, frequency and magnitude of ‘contacts’ with the forum sufficient for the provision was difficult.<sup>119</sup>

In Preliminary Document 3, the Permanent Bureau stated that the extent of the forum non conveniens provision would depend on the precise formulation of the ‘white’ list.<sup>120</sup> Yet chapter four reveals that the forum non conveniens provision had been drafted and agreed upon. As the width of jurisdiction available in the Interim Text would have altered significantly if the ‘transacting business’ doctrine was included on the ‘white’ list, the forum non conveniens rule might not have been appropriate for the extension of the courts’ jurisdictional reach that this transferral would have brought. It might then have been necessary to rewrite the forum non conveniens provision. The forum non conveniens provision might then need to be rewritten. This demonstrates how the ‘compromise philosophy’ can impact on even the non-contentious provisions, leaving the text in its entirety subject to doubt unless and until agreement on other controversial provisions can be secured.

On the basis of the above examples of the ‘compromise philosophy’ in action, three consequences from adopting a methodology based on compromise are apparent. The first is that the ‘compromise philosophy’ may lead to the inclusion of political ideals. Secondly, distinct practical difficulties stem from approaching the task in this manner. Thirdly, if political considerations are incorporated into the task, it is possible that a change in politics will impact severely on the ability to conclude a task acceptable to all the delegations.

### *2.3.1(b) The Dangers of the ‘Compromise Philosophy’: The Inclusion of Political Issues:*

As has been discussed above,<sup>121</sup> the Brussels Regime was originally conceived because simplified recognition and enforcement would assist in both maintaining and furthering economic integration. However, in order for speedy recognition to be

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<sup>119</sup> Ibid, p.32.

<sup>120</sup> ‘Note on the Question of Forum Non Conveniens in the Perspective of a Double Convention on Judicial Jurisdiction and the Enforcement of Decisions’, Preliminary Document 3, prepared by the Permanent Bureau (available at [www.hcch.net](http://www.hcch.net)) p.4.

<sup>121</sup> See pp.151-2 above.

acceptable, the drafters established a rigid jurisdictional structure so that the fairness of jurisdiction exercised over a defendant could not be doubted.<sup>122</sup> Consequently, at the system's conception there was an underlying tension between the political and economic desires of the member states and 'justice', preferably referred to as the 'rights' of the litigants.

Although the balance between the need to protect litigants and market integration concerns was adequately struck at first, subsequent interpretations of the regional regime have been a cause for concern. In both *Owusu v Jackson*<sup>123</sup> and *Turner v Grovit*<sup>124</sup> the ECJ failed to consider the effect that its decision were likely to have on the parties and put the needs of the internal market first without a momentary pause for thought.<sup>125</sup> As the primary objective of the creators of the Brussels Regime was the guarantee of 'legal protection for those established in the EC',<sup>126</sup> this disregard of the litigant's needs and focus on economic objectives demonstrates that it is very easy for political issues not only to infiltrate other aims but also eventually to dominate them.

These two cases illustrate the danger of incorporating political ideas or needs into a jurisdiction regime. On the basis of the foregoing, it seems likely that during the deliberations at The Hague, the political factors slowly began to penetrate every issue until a 'battle of the wills' emerged. Indeed, Preliminary Document 6 noted that the negotiations between the United States and Europe usurped the deliberations.<sup>127</sup> In the Brussels Regime, where the political objectives of the member states are all the same, the ECJ's radical lack of consideration of the parties' positions might have been distasteful but perhaps acceptable. In a global convention, however, there is no common overriding political objective.

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<sup>122</sup> See pp.152-3 above.

<sup>123</sup> C-281/02 [2005] I.L. Pr. 25, paras 45-46.

<sup>124</sup> C-1159/02 [2005] 1 A.C. 101, paras 24-30.

<sup>125</sup> See p.152 above. See also pp.197-199 below for a discussion as to whether the reasoning of the ECJ failed to meet the requirements of Article 6 of the European Convention on Human Rights.

<sup>126</sup> See pp.152-3 above.

<sup>127</sup> 'Conclusions of the Second Special Commission on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Preliminary Document 6, drawn up by the Permanent Bureau, available at [www.hcch.net](http://www.hcch.net), p.9.

The United States' insistence on maintaining its 'doing business' doctrine appears to be based on political considerations. This is because the United States seems to have used it as a 'bargaining tool' by refusing to reduce its jurisdictional reach until other substantial concessions could be obtained. As suggested above, if the doctrine has been removed from the 'prohibited' list, this would have impacted upon the underlying objects pursued by the convention. Even if it remained on the 'black' list, its utilisation as a negotiation device might have resulted in the United States obtaining other concessions that still impacted upon the aims pursued, and interests served, by the text. Consequently, it is suggested that not only did it become difficult to secure agreement as to the content of the text but the provisions were inherently tainted by political compromise and thus subject to an underlying competing tension between politics and justice. As a result, the delegations were unwilling to put their signature to the proposed provisions, which subsequently affected desires to conclude a jurisdiction and judgments convention.

### *2.3.1(c) The Dangers of the 'Compromise Philosophy': The Practical Problems:*

A further problem encountered with the 'compromise philosophy' is that this makes the task more daunting and complicated. As has been demonstrated in chapter two, there are clear differences in the approaches of the three regimes analysed towards jurisdiction.<sup>128</sup> The civil law-natured Brussels Regime centres around a cause of action-forum connection, subject to a limited defendant-forum relationship providing general jurisdiction, whereas the traditional rules of England clearly give no one relationship more weight than another through the search for the forum most factually connected to the dispute. Even the United States and England's traditional rules, both of common law heritage, show distinct differences.<sup>129</sup> If two common law countries can take such inconsistent approaches towards the exercise of general jurisdiction, finding compromise among huge jurisdictional variations is an overwhelming task. Further practical problems may also result from the 'compromise philosophy' such as the imputation of superiority where a country insists its jurisdictional rules are maintained and another system's approaches are ignored. Furthermore, the fact that agreed provisions might later become redundant and in need

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<sup>128</sup> See chapter two for this comparison.

<sup>129</sup> Ibid.

of redrafting to accommodate an alteration to the text as a result of compromise demonstrates a further danger of utilising a compromise-based methodology.

Although in theory compromise should provide a much greater likelihood of success, it depends on the individual participant's definition of compromise. A true balance would result in a country giving as much in return for what it received. But when one party holds many of the cards, this is not an objective and balanced compromise but a forced one. In this case the delegations needed the United States to participate because of the number of transnational cases it processes. If it withdrew from negotiations the global regime would have had a much more limited reach. This clearly assisted the United States in securing agreement concerning rules it wished to maintain. Of course, as with all negotiated compromises, there are limits to which one will allow the other side to take advantage of their power and it seems that the delegations, tired with their lack of progress, chose to abandon the project because there was no escape from the deadlock that had eventuated. Indeed, after a decade of negotiation, there were more issues in need of resolution than had previously been the case and, as it was not possible to reach agreement within a reasonable timeframe, this caused the project to be abandoned.<sup>130</sup> It can thus be assumed that this factor was significantly instrumental in the inability to draft an acceptable worldwide jurisdiction and judgments convention. The outcome might have been different, however, if the delegates had engaged in a thorough evaluation of the aims of the convention and how best to implement these objectives without reference to politics and incorporating 'compromise' as a central factor in their decisions.<sup>131</sup>

#### *2.3.1(d) The Dangers of the 'Compromise Philosophy': A Change in Politics:*

Unfortunately, the content of the global convention was not the only problem faced by the delegations. A lack of motivation for concluding the task became evident. The United States, a key player in the project, found it no longer had the same level of desire to secure a worldwide regime as it did when it first proposed the

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<sup>130</sup> See 'Some Reflections on the Present State of Negotiations on the Judgments Project in the Context of the Future Work Programme of the Conference', Preliminary Document 16, prepared by the Permanent Bureau (available at [www.hcch.net](http://www.hcch.net)) p.14.

<sup>131</sup> See pp.183-9 below for a discussion as to the methodology that should have been employed by the delegations.

task. Part of this ‘change in politics’ was a consequence of the success of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which meant that many of the litigants the United States sought to protect via a global regime were able to ‘avoid the judicial process altogether.’<sup>132</sup>

The United States had been initially fearful for American defendants sued in Europe. The assumption of jurisdiction against an American defendant is based on the traditional jurisdictional rules of the European member states but the resulting judgment is entitled to simplified recognition and enforcement throughout Europe.<sup>133</sup> This would accordingly put the American citizen’s assets at risk based on the assumption of jurisdiction on exorbitant grounds. This was a major reason why the United States was keen to seek a convention<sup>134</sup> but commentators later noted that this risk had not really materialised.<sup>135</sup> At a time when negotiations were still ongoing, Silberman suggested that the United States should be ‘reluctant to surrender’ its jurisdictional authority since an increasing number of foreign defendants have assets in the United States.<sup>136</sup> This practical reality meant that the political will for the conclusion of a worldwide regime was significantly affected. This created a vacuum whereby the desire to create a global scheme was not sufficient to encourage the participants to overcome the hurdles presented.<sup>137</sup>

The delegations’ search for ‘compromise’ inevitably incorporated the consideration of political issues, which altered the content of the provisions, producing a proliferation of objectives and underlying tension that frequently altered as and when political will did. These factors appear to have been a substantial blow to the project. It is clear that putting political issues, such as the desire to avoid a loss of jurisdictional power, before a methodology centred entirely around meeting the aims of the convention results in a distortion of the provisions and could even possibly

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<sup>132</sup> Borchers, n.100 above, p.159.

<sup>133</sup> Articles 33 and 38, Chapter III, Brussels Regulation.

<sup>134</sup> Borchers, n.100 above, p.159.

<sup>135</sup> Ibid.

<sup>136</sup> Silberman, L, ‘Can the Hague Judgments Project Be Saved?’ in Barcelo and Clermont, n.104 above, p.161.

<sup>137</sup> Baumgartner, S, ‘The Proposed Hague Convention on Jurisdiction and Foreign Judgments: Where We Are and the Road Ahead’ (2002) 4 European Journal of Law Reform 219, p.241.



create injustice. Such a philosophy certainly complicates finding provisions that all the delegates will deem as acceptable.

## **2.4. Conclusion:**

The overall conclusion from the above discussions is that there were several predominant reasons for the failure at The Hague. These included the adherence to the ‘compromise philosophy’ towards the task faced, the due process restrictions emphasised by the United States delegation and general unhappiness regarding the content of the Interim Text. Of course, these reasons are not exhaustive. It may be that the civil-common law divide created undue complications but it is not evident that this was a primary reason for the failure. It is also apparent that the principal reasons for the failure of the project were not independent factors but intertwined. For example, attempts to accommodate due process concerns in the text caused discontent with the content of the provisions.

However, the foremost reason for the downfall of the project has to be the use of a methodology built upon the need to secure compromise. It undermined the basis of the convention, and its provisions, from the very beginning, as it permitted tactics and politics and ‘forced compromises’ during the deliberations resulted in stand-offs concerning the content of the Interim Text. The ‘compromise philosophy’ is all about the extent to which the delegations can secure what they want. On this basis, coupled with the other fundamental difficulties listed above, this task was, in reality, inconceivable from the very beginning.

## **3. What Can Be Learnt from the Failure of The Hague’s Project? Is It All Doom and Gloom or Can the Utopian Dream Become A Reality?**

This section will attempt to explore if a worldwide convention is implausible. The reasons for the failure of the project will be analysed in order to determine whether these hurdles are insurmountable or merely representative of difficulties that

may be overcome if there is sufficient political will to construct a practicable, workable global regime.

### *3.1 The Hague's Methodology: Should the 'Compromise Philosophy' Be Abandoned?*

It is clear from the preceding sections that the methodology utilised by the delegations can have an impact upon the end product. The inability of the participants to produce an acceptable text is illustrative of the difficulties of using the 'compromise philosophy' where the members have different degrees of need for its implementation and thus have diverse persuasive power. So what methodology should be used instead? The answer to this question really depends on the aims and purpose of the global regime, which are now discussed.

#### *3.1.1. The Aims of the Project: Can the Infiltration of the 'Compromise Philosophy' into a Future Jurisdiction and Judgments Project be Avoided?*

The objectives of the project depend upon the views of the delegates regarding the relevant actors in international litigation. For example, if the delegations wanted to accommodate and encourage the growth of international business, in a business-to-business contract they must protect the defendant from the claimant's forum shopping, which a multinational corporation is likely to do with its army of legal advisers and large pockets, and also provide efficient enforcement of a judgment wherever a company's assets might be. The Brussels Regime is an example of such a balance being attempted. Alternatively, if the aim were to protect weaker parties from being exploited by large multinational corporations then this would have to provide exclusive jurisdiction at the forum most convenient for the weaker party to avoid abuse of the provisions by the wealthier and more experienced, large company. In contrast, if the focus were solely to ensure the efficacy of judgments and nothing more then the regulation of jurisdiction would not be necessary and all national jurisdictional bases should be recognisable under a 'single convention'. If predictability were the single aim of the drafters, then this should focus upon the jurisdiction and recognition rules, providing for their absolute restriction and

compulsory use in the same way as the Brussels Regime. The examples are endless. The point being made here is that if one focuses on any one aim to the exclusion of the other suggestions, this significantly affects the content, approach and nature of the global regime.

Although The Hague mentioned several aims throughout its endeavours,<sup>138</sup> the negotiations dissolved into an exhaustive search for a 'compromise' amongst the members. This resulted in the Interim Text not only containing many alternative provisions but also altered the objectives the text appeared to pursue. The move from a system similar to the Brussels Regime to a 'convention mixte' affected the balance that had originally been struck between the parties in the previous draft. The proposed addition of the 'transacting business' doctrine would have altered the parties' positions by offering less defendant-protection and increasing the claimant's ability to 'forum shop'. These alterations decreased predictability and provided fora with indirect interests in the dispute with the opportunity to hear the case.

Three important points stem from these observations. The first is that once the objectives are ascertained by the delegations, they should be ranked in order of importance. These aims should remain consistent throughout the task so that the principal reasons for the convention's creation are not lost in debate and remain the controlling factors in decisions regarding the content, structure and nature of the regime. The second point to note is that this approach may cost some more than others. It may eventuate that, for example, England's traditional rules lose several of their current jurisdictional bases whilst the United States maintains most of its grounds. Such is the nature of employing a methodology that focuses entirely upon the aims and objectives established before the drafting process begins. It is important to ascertain these purposes before any true negotiation commences because otherwise they will be readily altered and coloured by political decisions or influenced by

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<sup>138</sup> Predictability was an aim, see Kessedjian, K, 'Synthesis of the Work of the Special Commission of March 1998 on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters', Preliminary Document 9 (available at [www.hcch.net](http://www.hcch.net)) p.42. Finding balance between the injured person and the wrongdoer was mentioned. This implies that balance between the parties was also an objective. See Nygh, P and Pocar, F, Report of the Special Commission on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Preliminary Document 11 (available at [www.hcch.net](http://www.hcch.net)) Preliminary Document 11, pp.60-62.

developments as debate progresses. The final point is that it may be that none of the current national jurisdictional rules are appropriate for the task of achieving the aims defined by the delegates. It may therefore be necessary carefully to draft entirely new ones. Reference to existing bases should always be made, as there are plenty of lessons to be learnt from both the recent failure at The Hague and the national approaches of the participants, but it does not follow that they should be the basis of the new provisions. This would then make the task one that is very different to the project attempted at The Hague. Although some crossover of jurisdictional bases did eventually occur during deliberations, which created novel provisions,<sup>139</sup> these alterations were a result of either the failure to decide on the categorisation of a jurisdictional ground or to accommodate due process concerns. They did not represent original drafting to accommodate the aims of the convention established by the delegations at the very start.

With such a methodology at hand, the task is likely to produce what the delegations initially expected, rather than morphing into a tussle between the political heavyweights. However, this methodology is not foolproof, as selecting ‘compromise between the differing legal systems’ as an objective would automatically invoke the same problems encountered before. This is because the word ‘compromise’ would authorise the negotiators to swap benefits and disadvantages, and thus swap jurisdictional rules, without having regard to the alterations this could make to the overall content, structure and nature of the regime. None of the other aims would be adequately met because the ‘compromise philosophy’ would again take over the discussions. A replay would then ensue. To avoid such an occurrence, it is submitted that it is absolutely necessary that the primary objectives do not list ‘compromise’ among them.

### 3.1.2. What Aims Should the Drafters of a Global Regime Have?

With the exclusion of ‘compromise’, potential aims include predictability, protection of the defendant, assistance to the claimant, finding a balance between the parties, the protection of weaker parties, the facilitation of global business and

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<sup>139</sup> Such as the inclusion of a ‘foresight test’ into a tort provision that was originally very similar in approach to the Brussels Regime.

efficient litigation. Some of these benefits can successfully co-exist. For example, the speedy resolution of disputes facilitates the maintenance and development of international business. Others cannot subsist together and a selection of one aim would mean the abandonment of another. An illustration of this is the defendant-claimant tension. If the delegations select to facilitate the defendant's position, rather than striking a balance between the parties, the claimant would suffer because their respective benefits and disadvantages directly oppose each other in most cases.

It is submitted that the global regime should focus primarily on finding balance between the parties. Concentrating solely on one of the other aims might indirectly impact upon the balance between the parties, making the overall content of the convention undesirable. The facilitation of transnational business, for example, would significantly deny weaker parties protection from multinational businesses engaging in the exploitation of jurisdiction. On this basis, it is essential that the global regime seeks to find a balance between the rights and obligations of the opposing parties.

The Brussels Regime is evidence that efficient recognition and enforcement will stem from finding balance between the parties. This is because its recognition and enforcement provisions were conditional upon the member states achieving sufficient levels of protection for their nationals. If the worldwide convention creates an adequate balance, the contracting states are much more likely to be willing to recognise and enforce judgments. Further, as the rights and obligations of each litigant in each rule will have to be specifically defined, little will be left to the national courts to misinterpret and thus predictability will also result.

It seems that a range of aims will profit from the attempt to find balance between the parties, although other benefits could be additionally pursued where they do not directly contradict this approach. Such an approach also complies with the general overview of all the regimes analysed in chapter two. The central focus of the traditional rules of England and the Brussels Regime is a search for balance between the parties through allocating jurisdiction to a forum with a significant connection to the dispute, thereby ensuring neither party is overburdened with suit there. The traditional rules of England achieve this in a slightly different manner but the effect is

generally the same; neither party can complain when a forum with a direct interest in the dispute determines the case.<sup>140</sup> The United States would clearly oppose this, as it proclaims itself to be defendant-protective.<sup>141</sup> However, in practice, the effect of the overall approach of the United States towards jurisdiction is ‘mixed’ because its jurisdictional reach produces significant claimant-bias, which the secondary doctrines of due process and forum non conveniens attempt to counterbalance. Upon this realisation, perhaps the United States could be convinced that drafting the provisions of the global regime according to the underlying aim of finding balance between the parties would, in effect, be compatible with its regime, although achieved via a different, less confusing and complicated method to that currently employed.

### 3.1.3. The Necessary Methodology to Successfully Achieve Balance Between the Litigants:

If the predominant aim is to find balance between the parties, it is crucial that each provision is considered individually so that the delegations do not misguidedly introduce a provision that favours extensively one particular party over the other. The most logical approach is to analyse in a precise manner each provision according to the aims established by the delegations. The first step should be to determine *the necessary relationship* that provides the forum with jurisdiction in order to ascertain if it finds a sufficient balance between the parties. The drafters should therefore consider whether a forum-cause of action relationship or a defendant-forum nexus should be the pre-requisite, or both. This will obviously vary depending on the circumstances. For example, to find balance, the delegations may feel that where the claimant is a consumer the defendant need only have one of the two relationships with the forum but where both parties are economically matched in a business deal then perhaps both should be required to protect the defendant from extensive forum shopping by the claimant.

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<sup>140</sup> Although note the high burden on the defendant (or claimant in forum conveniens) may affect this conclusion slightly. Notwithstanding this, the attempt is to provide a balance between the parties albeit through a different method to the Brussels Regime.

<sup>141</sup> Although it is submitted here that the due process is ineffective at this. See chapter two for a comparison with the more rigid and predictable Brussels Regime.

After establishing the type of relationship required, the delegations must then determine the *type of connecting factor* that would be regarded as establishing that connection. This will severely affect the width of jurisdiction. As has been seen in chapter two, the ‘magnitude of contacts’ connecting factor provides a much wider jurisdictional reach in most cases than geographic connecting factors physical in nature. Such decisions should not be taken lightly, and should again be dependent on the relevant circumstances, to prevent a provision developing into a claimant or defendant-orientated rule.

The *extent of the connecting factor* will also vary a court’s jurisdictional reach, so if a ‘physical’ connecting factor were selected, the delegates would have to analyse how using the concepts of presence, domicile, habitual residence and other equivalent concepts affect the parties’ positions in order to determine which is the most appropriate in the circumstances. Other examples include analysing the respective positions of the litigants if ‘indirect’ or ‘direct’ injury provides the necessary connection to the forum.

Once the connecting factor has been decided upon, and its extent established, *mechanisms* that affect litigation should then be considered in order to ensure that they do not severely impact upon the balance struck between the parties in the provisions. For example, the effect a particular *lis alibi pendens* or *forum non conveniens* approach might have on the convention should be researched. The impact of litigational tools, such as anti-suit injunctions and the availability of negative declarations, should also be examined in order to determine the extent to which they impact upon the positions of the litigants in the global regime.

Throughout the entire process it may be necessary to examine the purported provisions in light of the implications they may have on the other purposes pursued by the project. Despite the possibility of the project moving away from guaranteeing equilibrium between the parties, the impact of the other objectives should be significantly less than adopting a compromise-based philosophy towards drafting the text. This is because many of the other objectives sit much more neatly with the ‘balancing the parties’ approach than a methodology that is based on finding a

workable regime amongst vastly different legal systems in a politically charged atmosphere.

### *3.2 Can a Worldwide Scheme be a Civil-Common Law Mix or is a Choice Necessary?*

It is apparent from the Interim Text that the delegations assumed that the civil and common law traditions could harmoniously coexist in a global regime.<sup>142</sup> There is no conclusive evidence in the previous section to suggest that this belief was wrong.<sup>143</sup> Indeed, chapter two highlights that many similarities exist between England's traditional rules and the Brussels Regime, suggesting that reconciliation is feasible. However, the Interim Text did select the civil tradition as the primary approach. Does this mean that any future attempt must also choose a dominant tradition?

There can be no doubt that the civil approach produces a greater degree of consistency than the common law tradition. Justice is achieved through the predictability that emanates from provisions detailing the precise rights and obligations of all litigants and can be labelled as providing 'generalised justice'.<sup>144</sup> In contrast, the fact-dependent conclusions of the common law approach ensure justice is reached between those two particular parties on those specific facts, thereby providing 'individualised justice'. If a choice must be made, is 'generalised' or 'individualised' justice the most appropriate approach for a global regime?

It may be that the 'generalised justice' approach sometimes denies justice on the facts.<sup>145</sup> A few examples will assist here. If, under England's traditional rules, the alternative forum were the place of injury, a stay of proceedings would ordinarily

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<sup>142</sup> See Articles 21 and 22 of the Interim Text.

<sup>143</sup> See pp.162-163 above.

<sup>144</sup> See pp.90-91 above.

<sup>145</sup> Gardella, A, and Radicata di Brozolo, L, 'Civil Law, Common Law and Market Integration: The EC Approach to Conflicts of Jurisdiction' (2003) 51 Am. J. Comp. L. 611, p.632. See also Hartley, T, 'The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws' (2005) 54 ICLQ 813, p.814.



result.<sup>146</sup> However, if the claimant could show that the trial abroad was going to be severely delayed, the court might refuse to stay the action to prevent injustice to the claimant. A civil law approach would not permit such deviation from the general rule of jurisdiction at the place of injury.<sup>147</sup> On this basis, it is fair to suggest that the ‘generalised justice’ can cause injustice to a litigant.

However, this does not mean that the ‘generalised justice’ approach is to be abandoned in favour of the case-by-case approach of the common law tradition. The problem with the latter approach is that it encourages parties to litigate about where to litigate in the hope of securing some advantage over the other side.<sup>148</sup> Such benefits can include moving the case to a more procedurally advantageous forum or forcing the other side into settlement through increased costs.<sup>149</sup> Delay and interference with the parties’ ability to plan for possible litigation may also result, demonstrating that the pursuit of ‘individualised justice’ might sometimes lead to a denial of ‘generalised justice’ through a lack of predictability and simplicity. Ironically, sometimes the ‘individualised justice’ approach may even deny that which it seeks to achieve because its approach is exploitable, encouraging parties to ‘litigate each other into the ground’ or attempt to secure unfair practical advantages.<sup>150</sup> Neither approach is thus without its negative consequences and commendable benefits.

Although the approaches appear to oppose each other, they also ‘fill in the void’ that the other cannot accommodate through its relevant inherent restrictions. Following these discussions to their logical conclusion reveals that neither approach is truly appropriate for a transnational regime where the stakes for the parties are extraordinarily high. Observing the flaws of the chosen approach could also cause the contracting states to lose faith in the system. If, however, they can be placed together

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<sup>146</sup> See p.13 above.

<sup>147</sup> In C-116/02 *Erich Gasser GmbH v MISAT Srl* [2005] Q.B. 1 the ECJ refused to permit the court second seised to proceed to trial because there was a likelihood of substantial delay in the court first seised, stressing reliance on the European Court of Human Rights to deal with such issues.

<sup>148</sup> See chapter three for the negatives associated with the exploitation of fora.

<sup>149</sup> See pp.94-99 above.

<sup>150</sup> In *Dow Chemical Co v Castro Alfaro* (1990) 786 S.W.2d 674, pp.680-81 Justice Doggett complained that often large corporations are motivated to argue suit in their ‘home forum’ should be dismissed on forum non conveniens grounds because the claimant would be unable to afford to sue elsewhere or because trial was considerably more favourable to the defendant abroad.

so that they interact and compliment each other, providing both 'generalised' and 'individualised' justice, rather than fighting for control, there seems to be no reason why the two cannot coexist.<sup>151</sup> The project would also be pleasing to all potential contracting parties if no choice had to be made between the two traditions.

In Utopia, it may be possible to match each approach perfectly to each jurisdictional rule so that neither tradition is more dominant in the global regime than the other unless absolutely appropriate in the circumstances. As all the potential scenarios in which a dispute might arise are unimaginable, it is impossible to find the answer to such a technical and intricate equation. On this basis, a more dominant systemic approach must be selected, with the other tradition responding to the inadequacies provided by the primary approach. The question then arises as to which of the two approaches should take the primary role.

The common law's tendency for fact-specific inquiry could overtake the convention and effectively deny the civil law tradition any role whatsoever. Such a reality can be seen in the United States where the concern for 'individual' justice for each defendant (through the due process test) has resulted in every case being subject to examination even where jurisdiction is based on a 'run of the mill' state statutory provision. The availability of the forum non conveniens doctrine (or forum conveniens), encourages jurisdiction to be examined even where the matter is not contentious, causing delay and cost. This is for two reasons. The first is that parties attempt to exploit the fact-specific approach because there is inherent scope to do so. It is natural that litigants will make the most of such advantages. Secondly, the appellate cases are not, in most cases, conclusive on a particular matter because the guidance is not specific enough so that a trial judge may decide on the matter without doubt.<sup>152</sup> A fact-based decision does not produce conclusive results. Guiding cases may be distinguished due to a differentiation in facts, whereas an interpretation of a provision under the civil law tradition by the ECJ would be the end of the matter. It seems that the ability of the common law approach to affect all aspects of jurisdiction,

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<sup>151</sup> Kaye, P, 'The EEC Judgments Convention and the Outer World: Goodbye to Forum Non Conveniens?' (1992) 47 Journal of Business Law 64, p.76. This point was made in relation to the Brussels Regime but is equally applicable here.

<sup>152</sup> Noted by Lord Templeman in *The Spiliada* [1987] AC 460, p.465.

regardless of how controversial a jurisdictional basis is, warrants the conclusion that it should not be the dominant approach in the worldwide convention.

By laying down a 'jurisdictional statute' similar to the civil law approach, the parties will be able to predict the likely forum, costs, delay and their odds of winning. These advantages justify the civil tradition playing the lead role in the convention because they have a greater significance in international litigation where the potential losses are much graver. Further, as has been shown in chapter two, the great similarity between the Brussels Regime and England's traditional rules concerning specific jurisdiction shows that the civil approach values the same factual connections to the forum as the forum conveniens evaluation does. It is thus possible that a substantial number of the global regime's provisions would reach the same conclusion as the discretionary approach of England's traditional rules without allowing the nature of the common law approach to dominate every assertion of jurisdiction. However, to ensure that in individual cases injustice does not result through exploitation of these civil-natured provisions, the common law 'individualised justice' approach should be able to intervene where necessary. This will not widen jurisdiction so as to deny 'generalised justice' of its role because the discretion provided will further reduce jurisdiction rather than expand it.<sup>153</sup> An approach similar to the one adopted by the drafters of the Interim Text should be employed in any future jurisdiction and judgments project, although whether its precise formulation should be the same as that of the Interim Text is another matter.

### *3.3. The Structure of the Global Regime: Single, Double or Mixed?*

The global regime must be 'hyper-rational' in the results that it procures.<sup>154</sup> This means that the participants must be sure that their own citizens are treated in the same manner in another forum as they would treat citizens from other countries. The drafters of the Brussels Regime foresaw this need for the regime to be self-affirming and thus introduced a system of compulsory jurisdiction to reinforce the belief that speedy recognition and enforcement was not established at the cost of fairness. It is

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<sup>153</sup> Gardella and Radicata di Brozolo, n.145 above, p.637.

<sup>154</sup> Blobel, F and Spath, P, 'The Tale of Multilateral Trust and the European Law of Civil Procedure' (2005) 30 E.L. Rev. 528, p.540.

for the above reasons, coupled with previous inability to secure a 'single convention',<sup>155</sup> that a 'double convention' was initially selected by the participants over a 'single' one. During deliberations the United States expressed concern over the inflexibility of a 'double convention' so the delegations attempted to draft a 'convention mixte', which maintained the 'required' ('white') and 'exorbitant' ('black') lists but also introduced the 'permitted' list ('grey').<sup>156</sup> It was thought that more extensive cooperation and wider recognition would result from such an approach. If, after an appreciable period of time, the vast majority of the states consistently recognised judgments based on a 'grey' list jurisdictional rule, that provision could have been transferred to the 'white' list. Its structure also enabled the global regime to evolve alongside advancements in society, technology and transportation, preventing difficulties similar to those that the United States currently faces through the inability of the due process test to adapt to social and economic change.<sup>157</sup>

If the task should ever be reattempted in the future, it is suggested that a 'double convention' is preferable because the parties would be able easily to ascertain the range of jurisdictional rules that might be applicable to them, as only bases on the 'white' list could be utilised. A 'grey' list provides uncertainty as to the reach of a court's jurisdiction, particularly as there is no obligation upon the court to utilise it. A 'double convention' would also provide greater stability and encourage belief and trust in the results that it procures. This is because contracting states would be content in the knowledge that their citizens would only be subject to those jurisdictional grounds that were agreed upon, reaffirming confidence in simplified recognition.

However, it should be remembered that a 'double convention' is static, inhibiting growth and preventing experimentation. In response to these defects, the 'mixed convention' argument seems meritorious but the problem with introducing a 'grey' list is that many delegates see this as an opportunity to preserve their national traditional rules. The objection to the classification of the 'doing business' doctrine as

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<sup>155</sup> See pp.112-113 above.

<sup>156</sup> Ibid.

<sup>157</sup> It is still based on the outdated 'territorial sovereignty' theory, which procures inappropriate results such as *Worldwide Volkswagen v Woodson* (1980) 444 U.S. 286 and *Burnham v Superior Court* (1990) S.Ct. 2105.

‘exorbitant’ is an illustration of the desire to preserve familiar rules. If objections to a classification result in the promotion of an ‘exorbitant’ jurisdictional ground to the ‘grey’ list, the majority of the delegations would then attempt to maintain their national rules and this would effectively eliminate the ‘black’ list. By transporting the majority of the jurisdictional bases to the ‘grey’ list, a principal aim of the project would not be achieved because this would not alter the current position of litigants vis-à-vis national jurisdictional bases. This means that delegations would not have guaranteed additional protection for their own citizens abroad.

The solution to this would be to demand that the ‘grey’ list only include those jurisdictional bases that receive the support of the majority. However, this then means that the ‘grey’ list becomes static in definition like the ‘white’ list. All bases other than those acceptable to a majority of the international community would be ‘black listed’. Any development of a new jurisdictional ground, which fits the overall objectives and approach of the scheme, could not be tested because it would not be on the ‘grey’ list. On the other hand, leaving the content of the ‘grey’ list open so as to include any jurisdictional rule not categorised as either ‘white’ or ‘black’ would open the regime up to exploitation, introducing unacceptable traditional rules via the backdoor. As the ‘white’ and ‘black’ lists are static, jurisdictional bases classified as ‘exorbitant’ could be tweaked and would thus suddenly no longer fall within the ‘black’ list. Although it might still have similar characteristics to those rules on the ‘black’ list, and may still defy the objectives and approach of the worldwide scheme, its usage would continue and would deprive citizens of the protection their delegations initially sought.

It appears that the type of ‘grey’ list utilised depends on the level of trust operating between the contracting parties. The more expansive ‘grey’ list approach can only be selected if the participants trust each other enough not to exploit the loophole created by static ‘white’ and ‘black’ lists. Having an exhaustive ‘grey’ list, however, brings the convention much closer to a ‘double convention’ but then raises questions as to the true benefits a ‘mixed convention’ could bring in such circumstances. It seems that an answer to this quandary is difficult to find amongst so many differing legal systems.

The above reasoning is based on the assumption that the delegations are attempting to take each and every jurisdictional rule operating in a contracting state and attempt to classify them as falling within one of the offered categories. As a result, the cataloguing of the traditional bases is negotiation-dependent. This flexibility ignores the potential impact a particular classification might have on the parties and the possibility that it may undermine the delegations', and the project's, aims. Should the methodology of the participants change, this would likewise have an impact upon the nature, structure and content of the proposed worldwide convention. For example, if the 'balancing of the parties' approach is taken towards the task, this would dramatically alter the structure of the convention.<sup>158</sup> Only a 'white list' would be necessary because the delegations would only authorise the use of jurisdictional bases that adequately struck the pre-requisite balance and any that failed to do so would be completely unavailable. Although this would produce stability, consistency and fairness between the litigants, the sacrifice of jurisdictional bases by the participants would be huge. However, further benefits of this approach are sustained. Determining the structure, nature and content of the convention would become a lot simpler and this would also eradicate any political influence over the deliberations.<sup>159</sup>

### *3.4. Should the Brussels Regime be used as a Model for the Global Regime?*

The ECJ has, on several occasions, declared that the Brussels Regime strengthens the position of those established in Europe.<sup>160</sup> This lack of specification of a party implies that a balance between the litigants is achieved. The search for the most administratively convenient forum supports this conclusion, as it does not intentionally favour either party.<sup>161</sup> As the methodology proposed above searches for balance between the litigants, is it appropriate to utilise the Brussels Regime as an archetype for the creation of a global regime?

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<sup>158</sup> See pp.185-88 above.

<sup>159</sup> See pp.170-180 above for the impact of politics on deliberations at The Hague.

<sup>160</sup> See, for example, C-281/02 *Owusu v Jackson & Others* [2005] I.L. Pr. 25, para 39, basing this comment on the Preamble to the Brussels Convention.

<sup>161</sup> Gardella and Radicata di Brozo state that the Brussels Regime is 'deemed to satisfy both the needs of the parties...and the interests of justice' in 'Civil Law, Common Law and Market Integration: The EC Approach to Conflicts of Jurisdiction' (2003) 51 Am. J. Comp. L. 611, p.614.

### 3.4.1 The ECJ Shows Its True Colours:

In *Turner v Grovit*<sup>162</sup> the ECJ categorically held that the use of anti-suit injunctions was incompatible with the Brussels Regime, even where their purpose is to shield the applicant from litigation that was designed to harass rather than settle a legitimate claim.<sup>163</sup> In both *Turner* and *Owusu v Jackson*<sup>164</sup> the Court focused on ensuring that the rigid operation of the system, encapsulated in underlying principles such as ‘uniformity’, was maintained.<sup>165</sup> In neither case did the ECJ make any specific reference to the consequences of its determination on the parties, its sole focus was on the effective operation of the system. This may, *prima facie*, seem acceptable because it is that very system that provides the participants with established rights and obligations. Thus permitting such devices to impact adversely on the functioning of the Regime might subsequently filter down to the parties and negatively affect them at a later time. This is akin to the ‘chicken and the egg’ question – what should the ECJ protect first: the parties or the system that created the protection for those parties? One might assume that, as there is no ‘right answer’ to this question, there is very little about the ECJ’s decision that is controversial. However, as discussed above, close analysis of both cases reveals that the ECJ’s conclusions can be traced back to internal market concerns.<sup>166</sup> Consequently, utilising the Brussels Regime as a ‘model’ for a global convention would be a mistake.

It may be that these decisions are the correct ones for the Brussels Regime and that any move away from the primacy of the system would have had a detrimental impact upon what was designed as an exhaustive, rigid regime. However, in a global regime internal market concerns would not exist. Neither would Europe’s social or political goals.<sup>167</sup> Selecting the Brussels Regime as the ‘model’ for the global system would thus lead to the incorporation of provisions that are inappropriate, serve ends

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<sup>162</sup> C-1159/02 [2005] 1 A.C. 101.

<sup>163</sup> *Ibid*, paras 25-28.

<sup>164</sup> C-281/02 [2005] I.L. Pr. 25.

<sup>165</sup> See pp.160-163 above for the impact the internal market had on these decisions.

<sup>166</sup> *Ibid*.

<sup>167</sup> Nygh, P and Pocar, F, Report of the Special Commission on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Preliminary Document 11 (available at [www.hcch.net](http://www.hcch.net)), p.30.

that do not focus on the aims pursued by the delegates and detract from the primary focus of achieving balance between the parties.

The Brussels Regime is also an inappropriate ‘model’ because it is restricted to the geographic territory of the member states. As the burden on litigating in a familiar, neighbouring forum is less significant than where the venue is situated on the other side of the world, any presumptions as to any fairness provided in the Brussels Regime would need to be evaluated in light of the far more expansive context in which the global jurisdictional regime would operate.<sup>168</sup> Thus, even if one discounts the fact that the approach of the Brussels Regime is tainted by internal market considerations, the Brussels Regime is still an inappropriate ‘model’ in light of the fact that it was crafted with a restricted geographic territory in mind.

### 3.4.2. Do the ECJ Cases Make the Brussels Regime Non-Compliant with Article 6 of the European Convention on Human Rights?

A further reason for not using the Brussels Regime as a model for the global regime may exist. Advocate-General Léger suggested in *Owusu v Jackson* that the structure and requirements of England’s forum non conveniens doctrine might not be compliant with Article 6 of the European Convention on Human Rights.<sup>169</sup> Ironically, it is possible that in *Turner v Grovit* the ECJ, in failing to acknowledge the problems likely to be encountered by litigants as a result of the decision, did not adequately consider the individual’s right to a fair trial.<sup>170</sup>

It has always been assumed that the provisions of the Brussels Regime comply with Article 6 of the European Convention on Human Rights.<sup>171</sup> As the rights and

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<sup>168</sup> See pp.169-170 above.

<sup>169</sup> This is based on a misunderstanding of the operation of the doctrine, see pp.159-60 above. The extent to which Article 6(1) does, or should, impact upon jurisdiction has not been explored in depth. See Grolimund, P, ‘Human Rights and Jurisdiction: General Observations and Impact on the Doctrines of Forum Non Conveniens and Forum Conveniens’ (2002) 4 Eur. J.L. Reform 87, p.87.

<sup>170</sup> It should be noted that the ECJ cannot violate the ECHR. However, the point being made here is not that there was an actual breach of the Convention but that the reasoning used would not comply with that of the European Court of Human Rights.

<sup>171</sup> In *C-7/98 Krombach v Bamberski* (concerning a refusal to recognise a judgment from a member state) the ECJ refused to analyse the relationship between Article 6(1) ECHR and the



obligations of the parties are not defined by Article 6 or any specific case law, they must be an integral part of the jurisdictional bases. In contrast, the United States' approach utilises an independent criterion from which the courts cannot deviate. As the parties' rights are defined in the Brussels Regime's provisions rather than through an autonomous standard, these provisions can be reinterpreted and thus the fairness to the parties established within the provision can be altered. This is exactly what happened in *Turner*.

The Court did not entertain a possible need to balance the 'collective goals' of the European Union with the right of a litigant to a fair trial. These 'collective goals' include, inter alia, the smooth functioning of the internal market, the reduction in national variations, an increase in trust and confidence in cross-frontier business and the financial and practical benefits provided by simplified recognition and enforcement. The prioritisation of these 'collective goals' without reference to 'individual rights' goes against the approach utilised by the European Court of Human Rights in relation to other Articles. An example of the tension between 'collective' and 'individual' rights is Article 8 of the European Convention. This states that 'everyone has the right to respect for his private and family life, his home and his correspondence', which are clearly 'individual rights'. These may be balanced with the 'collective rights' contained in Article 8(2), which provide, inter alia, that a public authority may interfere with these individual rights where it is necessary in the 'interests of national security', 'the economic well-being of the country' or for the 'prevention of disorder or crime.' The 'collective goal' of the prevention of crime might, therefore, override the right of the individual to privacy. Absolute equality between those rights is not demanded but balance within a 'margin of appreciation' should be implemented.<sup>172</sup>

Choosing to guarantee the maintenance of 'mutual trust', which ensures the attainment of the 'collective policy' of market integration, does not contravene the

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Brussels Regime's provisions. However, it did state that fundamental rights form an integral part of the general principles of Community law (paras 25-28), thereby indicating that the jurisdictional grounds are compliant with the right to a fair trial.

<sup>172</sup> See, for example, Appl. No 7215/75 *X v UK* (1980) D.R.66, para 145. *Sunday Times v United Kingdom* (no. 2) judgment of 26 November 1991, Series A no. 217 and *Vogt v Germany*, judgment of 26 September 2005, Series A no.323.

European Convention on Human Rights because this result is likely to fall within the 'margin of appreciation'. However, it is not the ECJ's conclusion that is the cause for concern here, it is the methodology the court employed that is questionable. The Court gave no due regard to the position of the parties or concerns of fairness.<sup>173</sup> This would surely breach the approach of the European Court of Human Rights towards such tensions, as the case law requires a consideration of both competing interests before embarking on finding a 'balance', if possible, between the two. A selection of one over the other without due consideration goes against the principle of valuing every distinct right in light of the surrounding circumstances.

### 3.4.3. Must the Global Regime Operate Under a Principle of 'Mutual Trust' like the Brussels Regime?

If 'mutual trust' is the keystone of the Brussels Regime, is this a necessity for the smooth operation of a global regime? If one ignores the fact that 'mutual trust' is related to the attainment of the fundamental freedoms of the EU, it is apparent that some degree of obligation is necessary in order to avoid the recognition and enforcement problems currently experienced.<sup>174</sup> The ECJ clearly thinks that 'mutual trust' is the only method by which its system can remain fluid and efficient.<sup>175</sup>

As the Brussels Regime has demonstrated, by placing individual justice in second place to the maintenance of 'mutual trust' principles, this will clearly have implications for striving to find balance between the parties. Furthermore, 'mutual trust' is not the only concept available for use in a global regime. The courts have been guided by the principles of reciprocity and comity under the traditional rules. The United States, operating under the Full Faith and Credit Clause, also has a regional judgment recognition system like the Brussels Regime. However, in direct contrast to the ECJ's decision in *Turner* states in the United States frequently issue anti-suit injunctions directed at a sister-state yet maintain an efficient system

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<sup>173</sup> Briggs, A, 'The Death of Harrods: Forum Non Conveniens and the European Court' (2005) 121 LQR 535, p536.

<sup>174</sup> See pp.109-110 above.

<sup>175</sup> Blobel and Spath suggest that the Brussels Regime was not feasible or reasonable without a high degree of trust and confidence among the participants in Blobel, F and Spath, P, 'The Tale of Multilateral Trust and the European Law of Civil Procedure' [2005] 30 E.L.Rev 528, p.530.

operating under principles of trust.<sup>176</sup> Principles of comity and reciprocity have been stressed as providing the foundation for such recognition, without demanding 'unquestionable faith' as the ECJ does.<sup>177</sup>

Indeed, it seems quite likely that the use of 'mutual trust', under the definition provided by the ECJ, is inappropriate for a worldwide regime. This is because the ECJ effectively required the member states to 'not only have respect, but also blind trust in each other's courts.'<sup>178</sup> If a court does not comply with a jurisdictional rule in the Brussels Regime the concept of 'mutual trust' demands that the other courts do not alter their response. Rather than allowing trust to evolve over time, it is 'imposed from above', demanding absolute unquestionable faith and acceptance of the unacceptable.

Suspicion and despondency might result in a global regime if trusting in the unacceptable were consistently forced. The convention, by combining a civil and common law approach into one regime, should be seeking to provide the parties with both 'individualised' and 'generalised' justice. In requiring that the participants unquestionably recognise judgments, there is a strong likelihood that 'individualised justice' will suffer. As a result, this could destroy the member states' belief in the system<sup>179</sup> and the trust that actually exists between them may lapse, meaning the global regime could fall into disrepute or cause fragmentation.

Furthermore, Spath and Blobel note that in international business transactions 'the realm of trust begins where certainty ends',<sup>180</sup> suggesting that 'trust' is not necessary to ensure 'certainty' as suggested by the ECJ in *Turner*.<sup>181</sup> In other words, once states begin to trust each other and engage in reciprocation of each other's

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<sup>176</sup> This should be contrasted with the ECJ's position on anti-suit injunctions in the regional Brussels Regime.

<sup>177</sup> See pp.160-162 above for a discussion of the link between mutual trust and economic integration.

<sup>178</sup> Kruger, T, 'The Anti-Suit Injunction in the European Judicial Space: *Turner v Grovit*' (2004) 53(4) I.C.L.Q 1030, p.1035. It should be noted here though that there is no accepted definition of the word 'comity'. See generally Weinberg, L, 'Against Comity' (1991) 80 Geo. L.J. 53 and Paul, J, 'Comity in International Law' (1991) 32 Harv. Int'l L.J. 1.

<sup>179</sup> Blobel and Spath, n.175 above, p.531. This comment concerned the Brussels Regime but is equally applicable in relation to a global regime.

<sup>180</sup> Ibid, p.538.

<sup>181</sup> Ibid, pp.538-9.

judgments, this creates a pattern. This eventually leads to certainty by reducing complexity and encouraging action that is mutually beneficial to the participants. To force the participants to trust each other without any experience as to the likely outcome of this requirement is unwise and unnecessary. Furthermore, as detailed above, 'mutual trust' is linked to equality between the states, a necessary element of 'market integration', and thus it can be discounted as essential for a global regime.<sup>182</sup>

On this basis, trust supporting mutual recognition and enforcement could be achieved without utilising the drastic approach of the Brussels Regime. This would maintain 'individualised justice' whilst providing efficient cross-border recognition in appropriate circumstances.<sup>183</sup> Although reciprocity seems to be part of the definition of mutual trust, it is clear that 'mutual trust' expects more and insisting upon such 'blind faith' would impose unrealistic and unnecessary aims upon the participants.

### *3.5 The Due Process Problem: Can This Conceptual Problem be Reasoned Around?*

Cox suggests that the Due Process Clause should always 'trump' any treaty provision that fails to live up to its expectations.<sup>184</sup> This conviction complies with the opinion expressed by the delegates at The Hague and was a crucial factor in the downfall of the project. Does this mean that crafting a convention that is not a replica of the United States' approach is an inconceivable dream unless the United States is not a signatory to the convention?

#### **3.5.1. The Prevention of 'Unreasonable Exercises of State Power' Theory: Would Due Process Override a Global Convention?**

According to Cox, the due process test is necessary to prevent unreasonable exercises of state power that might otherwise be authorised.<sup>185</sup> This accordingly

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<sup>182</sup> See pp.160-162 above.

<sup>183</sup> Blobel and Spath, n.175 above, p.537.

<sup>184</sup> Cox, S, 'Why Properly Construed Due Process Limits on Personal Jurisdiction Must Always Trump Contrary Treaty Provisions', (1998) 61 Alb. L. Rev. 1177, p.1177.

<sup>185</sup> Ibid, p.1178.

protects the defendant from excessive use of power by a state and ensures equality among the federal states. Two points stem from this.

The first is that it is difficult to see how the exercise of jurisdiction under a provision contained within a global treaty, which has been extensively negotiated by the international community, could be regarded as an ‘unreasonable exercise of power’. If the United States declared a provision to be unreasonable according to due process norms, the United States would expose itself as out of step with all the other contracting nations. Surely if a substantial consensus exists, this would merely demonstrate that the United States has not evolved with modern society, technology and industry? It was such criticism that precipitated the ‘due process revolution’ in *International Shoe v Washington*.<sup>186</sup> As the Supreme Court redefined due process under such circumstances before, due process evolution would not only be possible in such circumstances but appropriate.

Secondly, the United States ‘needs’ a due process test because there is no consistent or central control over the states’ jurisdictional reach. As the content and reach of the jurisdictional rules is within the realm of state competence, the due process test is the only method by which the United States’ Supreme Court can prevent overzealous assertions of jurisdiction. The due process test therefore does not seek to provide ‘horizontal balance’ between the parties but endeavours to provide ‘vertical balance’ by preventing the use of excessive power by a state over an individual. Ignoring the inadequacies of due process as a defendant-protective mechanism,<sup>187</sup> ‘vertical power’ of any kind would not exist under the global regime unless and until the facts fell within the provisions, which would be designed to provide a sufficient ‘horizontal balance’ between the parties. In this sense, the ‘horizontal balance’ between the parties would control the ‘vertical power’ a state could utilise. If jurisdiction is fair to both sides, it follows that it cannot be excessive or arbitrary. If it provides the defendant and the claimant with rights and obligations of a similar value it is difficult to see how the ‘power’ a state exerts when this condition is met falls within the mischief the due process test is, according to Cox, designed to prevent.

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<sup>186</sup> (1945) 326 U.S. 310.

<sup>187</sup> As it fails adequately to curtail the courts’ jurisdictional reach.

Due process is a jurisdiction-reducing mechanism.<sup>188</sup> However, it fails adequately to control the state-defendant power struggle, hence many transnational cases brought in the United States are dismissed not under the due process test but under the federal doctrine of *forum non conveniens*. It is difficult to imagine why the due process test should be maintained, if a global regime seeks to take into account the burdens on, and needs of, both litigants. Further, the very history of *International Shoe v Washington* indicates that believing that the due process test is designed to protect the defendant from unreasonable exercises of state power is unwise. In *International Shoe*, the focus was not on providing the defendant with an independent right (or list of rights) that could prevent the courts exercising jurisdiction but rather on confirming the expansion of the jurisdictional reach of the courts through an extension of the concept of presence. This case actually removed some of the protection that occurred naturally through the doctrine of ‘territorial sovereignty’.<sup>189</sup>

### 3.5.2. The Link between Due Process and ‘International Norms’:

Cases prior to *International Shoe v Washington* viewed due process as restricting a state’s jurisdictional reach only by reference to ‘international norms’ prevalent at the time.<sup>190</sup> *Pennoyer v Neff*<sup>191</sup> defined due process according to the doctrine of ‘territorial sovereignty’. Although *International Shoe* was allegedly a ‘due process revolution’, it still reinterpreted due process using characteristics that are intrinsic to the doctrine of ‘territorial sovereignty’.<sup>192</sup> Viewing the cases in this manner provides a simple method by which the due process test can be reasoned around. In the Brussels Regime the doctrine of ‘territorial sovereignty’ is ignored because the states have bonded together for a common cause, removing the need to respect each other’s control of a specific geographic territory. As the prescribed jurisdiction in the Brussels Regime is deemed to be acceptable by all the participants,

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<sup>188</sup> See Borchers, P, ‘Jurisdictional Pragmatism: International Shoe’s Half Buried Legacy’ (1995) 28 U.C. Davis L. Rev. 561, p.581.

<sup>189</sup> In *Pennoyer v Neff* (1877) 95 U.S. 714, pp.720-22.

<sup>190</sup> Borchers, P, ‘The Death of Constitutional Law of Personal Jurisdiction: From *Pennoyer* to *Burnham* and Back Again’ (1990) 24 U.C.Davis L. Rev. 19, pp.54-6.

<sup>191</sup> N.192 above.

<sup>192</sup> ‘Minimum contacts’ is tied to ‘territorial sovereignty’ because upon its satisfaction, the defendant is deemed to be ‘present’ there. Presence is a traditional jurisdictional base, see p.28 above.

this extension of jurisdiction into another state's territory is justified. A global regime could also be viewed in this manner. The contracting states, in joining together to guarantee certainty and fairness between the parties, have abandoned the restrictions encapsulated in the doctrine of 'territorial sovereignty' and co-operated beyond their geographic confines. Due process would thus have no role to play because the participants have impliedly consented to the extra-territorial reach over their citizens for the sake of transnational efficiency and justice. Another state could not be offended by a state reaching beyond its borders where they have agreed that this should be permitted in a range of defined circumstances. At the very least, this could prompt a reinterpretation of due process. The creation of a new global regime with definitive jurisdictional competence could be seen as creating a new 'international norm'. As the due process test appears from the case law to defer to 'international norms', a reinterpretation of the Due Process Clause by the Supreme Court would be necessary. The Court could then validate the jurisdictional bases that are problematic for the current due process test.

It appears, however, that this would not conform to the Supreme Court's current view of the purpose of due process. In *Insurance Corp of Ireland v Compagnie des Bauxites de Guinee*,<sup>193</sup> the Court said that due process 'represents a restriction on judicial power not as a matter of sovereignty but as a requirement of individual liberty'.<sup>194</sup> This suggests that the Due Process Clause exists solely to protect the defendant's human rights rather than to ensure the smooth, cooperative operation of jurisdiction among multiple territories through reference to 'international norms'. This would mean that it is impossible to reconcile the due process test with the new 'international norms' contained within a global regime.

This can be challenged. Although due process intends to be 'defendant-protective', the predominant limb is defined according to notions of 'territorial sovereignty'. This is evident from the fact that the 'minimum contacts' test requires contacts with the forum of a sufficient magnitude such that the defendant can be

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<sup>193</sup> (1982) 456 U.S. 694.

<sup>194</sup> Ibid, p.702. This was also repeated in *Burger King v Rudewicz* (1985) 471 U.S. 462, pp.471-2, footnote 13.

treated as ‘present’ there. It seems that in *International Shoe v Washington*<sup>195</sup> the components of the doctrine of ‘territorial sovereignty’ were used to define ‘minimum contacts’ and, through a reinterpretation of those concepts, they were also used to expand jurisdiction.<sup>196</sup> As a distortion of ‘territorial sovereignty’ is now deemed to provide the defendant’s ‘liberty interest’, the Supreme Court still pays homage to the doctrine of ‘territorial sovereignty’ and therefore still feels the need to confine due process within ‘international norms’.<sup>197</sup> This would enable either of the suggestions above to be implemented so as to avoid the need to accommodate the due process test within a worldwide jurisdiction and judgments regime.<sup>198</sup>

### 3.5.3. Does the U.S. Constitution Provide the Federal Government with the Power to Overrule Due Process via a Global Convention?

It has also been argued that, as the Executive and Congress have ‘foreign relations powers’ under the Commerce Clause,<sup>199</sup> the courts should not interpret the jurisdictional reach of the states over ‘alien’ defendants.<sup>200</sup> Under this suggestion, the relevant government branches should determine the court’s reach regarding the

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<sup>195</sup> (1945) 326 U.S. 310.

<sup>196</sup> Compare Stein who argues that *International Shoe* was a ‘break from the past’ in ‘Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction’ (1987) 65 Tex. L. Rev. 689, p.692. Although *International Shoe v Washington* did ‘break from the past’ by using concepts from the doctrine of ‘territorial sovereignty’ to expand jurisdiction, whereas previously it had operated as a significant restriction on the courts’ reach, the Court did not ‘revolutionise’ due process by utilising new concepts. The link between the doctrine of ‘territorial sovereignty’ and jurisdiction thus still exists.

<sup>197</sup> Parrish notes that cases still take ‘territorial sovereignty’ considerations into account even after *Insurance Corp v Compagnie des Bauxites de Guinee* in ‘Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants’(2006) 41 Wake Forest L. Rev. 1, p.15

<sup>198</sup> Indeed, the only possible argument for maintenance of the due process test because it protects the defendant’s ‘liberty interest’ is that the second limb of due process considers the burden on the defendant of litigating in the forum in light of the connection of the parties and facts to the forum. There are two points that stem from this. The first is that as ‘minimum contacts’ is almost always sufficient to establish jurisdiction, the second limb cannot later be deemed to be a legitimate restriction on the negotiations at The Hague. Secondly, it can be reconciled with the global regime because it seeks to find a forum substantially connected to the facts, which the specific jurisdiction provisions of the global regime would also seek to do. It would therefore fail to provide any additional benefit to a defendant. For these two reasons it should be disregarded as a limitation on the negotiators.

<sup>199</sup> Art.I, §8 of the United States’ Constitution. See also Art.II, §2, which gives the President the power to enter into treaties with the Senate’s advice and consent.

<sup>200</sup> See generally, Borchers, P, ‘The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again’, (1990) 24 U.C. Davis L. Rev. 19, pp.19-56.



citizens of other countries.<sup>201</sup> This would clearly exempt the content of a global regime from due process interference. Cox disagrees with this, arguing that if the President and Congress entered into an agreement authorising the transportation of slaves, this would not repeal the Thirteenth Amendment, which prohibits slavery in every respect.<sup>202</sup> On this basis, Cox argues that just because the government has negotiated and implemented a treaty under the Commerce Clause does not mean that it should be allowed to overrule the Due Process Clause.

Although this argument is persuasive, it is misconceived because it compares two unparallel situations. The slavery prohibition in the Thirteenth Amendment is an absolute restriction regardless of the circumstances and can thus be termed to be a static concept. In contrast, the Due Process Clause demands that the exercise of jurisdiction should be fair in the circumstances and is thus fact-specific. This difference could legitimately result in differential treatment and it seems that to expect the Due Process Clause to restrict government delegates in the same way as the slavery prohibition would take the Due Process Clause out of context. In fact, the Due Process Clause was not seen as a de facto limitation on state jurisdiction until some time after *Pennoyer v Neff*.<sup>203</sup> Cases decided at the time of *Pennoyer v Neff* held that non-compliance with the three bases for 'territorial sovereignty' could be challenged only at the recognition stage.<sup>204</sup> On this basis, it is not certain that this constitutional provision was intended to limit the states' jurisdictional powers. Furthermore, cases prior to *Pennoyer v Neff*, and some subsequent cases interpreting *Pennoyer v Neff*, suggested that full faith and credit at the recognition stage could

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<sup>201</sup> Cox, S, 'Why Properly Construed Due Process Limits on Personal Jurisdiction Must Always Trump Contrary Treaty Provisions', (1998) 61 Alb. L. Rev. 1177, p.1187. Alternatively, it has been argued that the Constitution offers no protection to those outside the geographic territory and so to apply the due process test to 'alien' defendants contravenes the approach of the courts in other areas. See, for example, *Zadvadas v Davis* (2001) 533 US 678, p.693 and *Demore v Kim* (2003) 538 U.S. 510, p.543. Parrish provides an in-depth analysis of this 'anomaly' in 'Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants' (2006) 41 Wake Forest L. Rev. 1, pp.28-30 and argues that the only restriction on the exercise of jurisdiction over 'alien' defendants is actually the doctrine of 'territorial sovereignty'.

<sup>202</sup> Ibid, p.1187

<sup>203</sup> N.189 above.

<sup>204</sup> See, for example, *Mills v Duryee* (1813) 11 U.S. (7 Cranch) 481, *Hampton v M'Connel* (1818) 16 U.S. (3 Wheat.) 234, *Elliott v Peirsol*, *D'Arcy v Ketchum* (1850) 52 U.S. 165 (11 How.), *Lafayette Insurance Co v French* (1855) 59 U.S. 404 (18 How.) and also *Galpin v Page* (1873) 85 U.S. 350 (18 Wall.). See Borchers, n.203 above, pp.26-52.

only be refused where the sister-state judgment violated notions of ‘territorial sovereignty’. No concerns of due process were raised where recognition was sought in the same state. This implies that due process has little to do with a state’s undue exercise of power over an individual but concerns a state’s power in relation to another state and is thus designed to maintain the states’ status as co-equals in a federal system. It appears that due process cannot be regarded as limiting a state’s power in the same manner as the Thirteenth Amendment and thus it should not restrict the power of the federal government to enter into a jurisdiction and judgments convention.

Furthermore, as due process is subject to interpretation, and the Supreme Court has notably altered its definition over the years, the federal government could enter into a convention within the limits of due process only to find that it later violates it. Further, even if the Supreme Court does not subsequently redefine due process, its fact-defined nature<sup>205</sup> means that the provisions of the treaty could violate due process in situations not envisaged by the drafters. Taking this to its logical conclusion, it is entirely possible that the power provided to the federal government under the Commerce Clause could become non-existent because a redefinition of the Due Process Clause could severely alter the courts’ jurisdiction and thus substantially restrict the government’s power to enter into a convention on any basis. The fact-defined nature of due process could thus ‘trump’ another provision in the Constitution. This would not occur with the slavery prohibition because the boundaries are clearly marked; the government can enter into any treaty on any subject and with any content whatsoever provided it does not permit slavery. To permit the Due Process Clause to effectively overrule the Commerce Clause would remove the power under the Commerce Clause that is unquestionably and legitimately provided to the federal government. This is illogical. Clearly protecting a defendant from being subject to procedural unfairness, such as biased tribunals or inadequate notice of proceedings, should be regarded as a fundamental human right and the federal government could not use the Commerce Clause to overrule this. However, the extent to which a court may exercise jurisdiction over the defendant should be

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<sup>205</sup> It is fact-defined because it is the defendant’s activities that determine how much protection the defendant should receive.

distinguished from procedural unfairness as a different kind of ‘due process’, concerning a court’s self-regulation rather than the fairness of the proceedings.<sup>206</sup>

As there is no clear guidance on how the due process principle interacts with other constitutional values, allowing it to interfere with negotiations would be inappropriate because this would impose suspected ideologies on to the deliberations that might later prove to be false.<sup>207</sup> There also seems to be little reason why the Due Process Clause should be treated similarly to other constitutional restrictions on federal government power when it differs substantially to the constitutional values Cox relies on to support his argument that a global regime that contravenes due process must be struck down.

#### 3.5.4. Permitting the United States to Comply with Due Process: The Reservation Option:

Perhaps the solution is to permit the United States to enter a reservation that allows it to refuse to exercise jurisdiction where the application of a provision fails to comply with current due process norms. This would, of course, provide less consistency for the litigants because they would have to be mindful of the fact that suit might not be available in the United States even though the relevant provision locates that as the appropriate forum. It would also mean that the delegates would be unable to secure a consistent level of protection for their own citizens in the United States. Furthermore, the balance between the parties would be affected by such a capability, causing the relevant provision to operate in a more defendant-orientated way than originally deemed appropriate by the delegations. It would thus have an impact on both ‘individualised’ and ‘generalised’ justice. However, if this secured the United States’ compliance without introducing a due process test into the text in any way, perhaps this is the most suitable solution.<sup>208</sup> The alternative is to proceed

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<sup>206</sup> Note that ‘procedural fairness’ provides a static right similar to the slavery prohibition. For example, a defendant should be entitled to X days notice. This would support the argument that ‘procedural due process’ cannot be derogated from but this does not apply to concerns over the jurisdictional reach of a court.

<sup>207</sup> For example, the Supreme Court could later hold that the Due Process Clause is subject to the Commerce Clause in a range of circumstances.

<sup>208</sup> However, in light of the fact that the United States expected the delegations to ‘swap benefits’ and its desire to maintain its current jurisdictional bases, the United States is likely

without the United States. This, however, does not provide the delegations with the assurance that the courts of the United States will have a much more restricted jurisdictional capability over non-United States defendants forced to litigate there.

If the United States insists that the due process restrictions cannot be reasoned around, then perhaps allowing the use of a reservation is the best possible outcome in the circumstances, although this thesis submits that such compromise detracts from the primary principle of drafting the provisions to guarantee balance between the litigants. It is debateable whether continuing without the United States or permitting it to enter a reservation is the better option.

### 3.5.5. Conclusion:

Cox implies that the failure of the Supreme Court to provide an adequate definition of due process should not prevent due process overriding a jurisdiction and judgments convention.<sup>209</sup> Unfortunately, this then leaves the negotiators in the position of having to wait for the United States to sort itself out. This also fails to take into account why jurisdiction deemed fair by many delegations from a range of countries should be viewed as violating 'fairness' norms allegedly entrenched in due process. If, however, the United States uses the due process issue as a means to secure the maintenance of its own jurisdictional bases but still ensuring greater recognition of its judgments, the due process argument is merely a guise for ruthless negotiation tactics. On such a basis, pandering to the attentions of the United States would then hark of the deadly 'compromise philosophy' and thus such due process concerns should be ignored to avoid the global regime turning into a mini-American model. It seems that, in light of the lack of historical protection of the defendant from 'unreasonable state power' and the fact that the global convention would provide new 'international norms', to which due process has historically had regard and from which its due process test has evolved, the due process problem can be reasoned around. There would thus be nothing preventing the implementation of a worldwide

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to be unwilling to enter into a reservation in the future. The United States will most definitely wish to achieve a compromise, which presents a difficult hurdle for any future project to overcome.

<sup>209</sup> Cox, S, 'Why Properly Construed Due Process Limits on Personal Jurisdiction Must Always Trump Contrary Treaty Provisions', (1998) 61 Alb. L. Rev. 1177, p.1189.

convention that pursues 'horizontal' balance between the parties except the stubbornness of the United States. It seems that the initial due process problems expressed at The Hague were either mistakenly perceived to be real or a negotiation tactic. If, for whatever reason, the United States still claims that its precious due process test, which fails to protect the defendant sufficiently and fails to strike an acceptable balance between the parties, must be maintained, the delegates should consider the 'reservation option'. However, in the circumstances, and under the new methodology, perhaps such an outcome is unwise and any future task should proceed without the United States.

#### **4. Concluding Thoughts:**

Although the failure of the project at The Hague does suggest that perhaps a worldwide convention is unattainable, it is not conclusive evidence that a global jurisdiction and judgments regime is impossible. There are, however, serious conceptual difficulties, which are evident from the reasons for the failure of The Hague's project. These include the alleged inability of the United States to extend its jurisdictional reach beyond its constitutional restrictions, uneasiness with the general approach of the text and inherent tensions in the content of the provisions. The use of the Brussels Regime as model was also an erroneous choice but the fundamental reason for the failure of the negotiations was the methodology employed to secure the convention. A change in the philosophy adopted will naturally bring many alterations to the nature, scope and content of a global regime and should bring about an appropriate and acceptable jurisdictional regime. Further, it is likely that the due process problems could be reasoned around, removing the effect of this restriction upon negotiations. A global convention regulating jurisdiction is not an inconceivable dream. In light of the previous lack of political will to continue with the project, there is a very real possibility that the task will not be reattempted. However, should the necessary motivation exist, it is clear that the global regime is a theoretical possibility and could become a practical reality.

# **Special Note**

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## Chapter Six: Conclusion: Is a Global Convention Regulating Jurisdiction and Judgements in Civil and Commercial Matters an Impossible Dream or Feasible Reality?

A comparison of the jurisdictional rules of the United States, the traditional rules of England and the Brussels Regime in chapter two revealed that there were many similarities between these legal systems. Even though not achieved through the same method, and sometimes via a very inefficient process, the common law rules often found a similar result to the Brussels Regime where specific jurisdiction was exercised over the defendant. This was an encouraging sign that a reconciliation of these jurisdictional regimes could be possible so that a global regime could be implemented. Some disparities do exist, however. Consequently, it was necessary for the delegations to surrender some of their jurisdictional authority so that the convention was acceptable to the international community as a whole. Surprisingly though this did not mean that an automatic civil-common law tension would result, as chapter two ascertained that England's traditional rules often operated in the same manner as the Brussels Regime. As the two European systems seemed reconcilable, this suggested that a global convention could be achievable.

A single, unitary and common approach towards jurisdiction would avoid many of the negative aspects associated with transnational litigation that stem from the exploitation of many national differences by the litigants. Chapter three highlighted a great many advantages to be gained from the creation of a worldwide jurisdiction and judgments convention. The indication from the findings of this chapter is that a global regime was not only necessary but also desirable because the states, as well as individuals, were likely to benefit from such a development. This is particularly the case as far as the United States is concerned, as it stood to gain the most in terms of recognition of its judgments and a possible method for resolving its jurisdictional problems. A consistent regime would have assured the members that their citizens were not subject to exorbitant jurisdiction abroad. The implementation of a global jurisdiction and judgments system would benefit litigants in several ways.

It would redress the balance between the parties that is often lost in litigation of a transnational nature where costs, delays and inconvenience levels are high. It would also provide simplified recognition, which would in turn facilitate the growth of multinational trade. Greater predictability would also result from a common approach. Indeed, the beneficial aspects of a global regime clearly prompted the work at The Hague, which is detailed in chapter four.

It is evident from the downsizing of the project into the pursuit of a convention operating only in the realms of jurisdiction agreements that, notwithstanding the benefits a global system would provide, many of the provisions and suggested approaches in the Interim Text produced remained controversial. The only areas upon which there was consensus were areas that were non-contentious anyway, as the result in all three regimes on these provisions were very similar.

The reasons for the inability to reach a compromise on some of the very basic principles of the regime is more extensively analysed in chapter five. The examination initially revealed two predominant reasons for the failure of the project. The first was the incorporation of the 'compromise philosophy' into the negotiations, which subsequently filtered into the content of the Interim Text. Some delegations, such as the United States, expressed concern over the categorisation of the jurisdictional bases and the specific approach of the proposed text being based on a dispute-forum connection rather than a defendant-forum nexus. These differences all boiled down to the delegations determination to secure a 'compromise'. Rather than finding the most appropriate jurisdictional bases that conformed to a pre-determined list of objectives, the delegations searched amongst pre-existing jurisdictional bases for those with majority support, altering them only if concerns were raised. These amendments meant that the underlying purpose or practical effect of the provision met any particular aims set by the delegations but were merely effected because of the need to 'give a little, take a little', which is enshrined in the 'compromise philosophy'. This meant that many of the provisions demonstrated conflicting approaches, sometimes being claimant-orientated and, at other times, defendant-biased without any structure or intention. This confusing rationale resulted in discontent and would have been an inappropriate basis for a global regime dependent on comity, reciprocity from trust in fact (rather than being 'forced from above', as is the case in the Brussels



Regime). Unreasoned and unprincipled conflict within the provisions could have brought about fragmentation or even rejection once the global regime was implemented. For these reasons, it is suggested that any new attempt to draft a jurisdiction and judgments regime should identify the chief guiding aims so that the delegations select only those provisions falling within the ambit of those objectives; this would prevent political issues clouding the resolution of the convention or altering the content of the provisions in an inappropriate manner.

Although it is submitted that this was the predominant reason for the failure of the project, it was not the sole reason. The United States' inability to contract beyond the realms of due process strictly restricted the ambit of the project. On this basis, many amendments to the text were made to accommodate the United States' conceptual restrictions. Unfortunately, the consequence of these amendments was that a general discomfort with the approach of the global regime, which had significantly moved away from its original ethos based on the Brussels Regime, resulted. The due process concerns thus directly impacted on the inability of the delegates to secure agreement, by moving the project in a direction deemed unacceptable by the delegations.

Interestingly, the civil-common law tension did not appear to affect negotiations to a significant extent, suggesting that the two systems are reconcilable. In *Turner v Grovit* and *Owusu v Jackson* the ECJ suggested that the inclusion of common law concepts into the Brussels Regime would threaten the Regime's very foundation. Upon analysis, however, it was revealed that this was not because the two were irreconcilably opposed but because the Court viewed 'mutual trust' as the foundation of the Brussels Regime, which is linked to the attainment of the fundamental freedoms of the EU. This link to economic integration prevented the use of anything likely to interfere with these internal market goals and thus prevented the use of these common law tools. These cases therefore cannot be taken as conclusively proving that the common and civil law traditions could not harmoniously subsist in a global regime. Indeed, it is later suggested that, because both traditions can coexist and make up for the aspects the other tradition lacks, the common and civil law approaches could actually compliment each other in a global regime.

Returning to the rejection of the common law by the ECJ, chapter five suggests that the method by which the ECJ dismissed the possible application of the common law doctrines to prevent injustice to a litigant could perhaps be seen as contrary to the methodology of the European Court of Human Rights. The approach of this Court is to balance the needs of a collective goal, such as the benefit a sturdy internal market will bring, with the right of the individual, in this case being the litigant's right to a fair trial under Article 6. The ECJ failed to undertake any form of balancing because it failed to acknowledge any negativity that might stem from its decision to favour political desires to facilitate the internal market. This is not to say that the actual decision of the European Court of Justice was wrong. It would be perfectly acceptable, within the 'margin of appreciation' approach of the European Court of Human Rights, to engage in the balancing and ultimately find in favour of the political needs and gains of the collective goal. The failure to consider the litigant within the judgments, however, demonstrates the 'true colours' of the ECJ and therefore not only shows that any suggestions of civil-common irreconcilability cannot be founded upon these cases but also demonstrates that the Brussels Regime is an inappropriate model for a global regime. It is an inappropriate model because the political ideologies behind the Brussels Regime would be incorporated into the global system notwithstanding the fact that no such market objectives exist within the mandate of a global regime. Utilising the Brussels Regime as a model for the proposed text in the initial stages of the deliberations at The Hague was a mistake and perhaps a contributory factor to the overall unhappiness with the text. Consequently, it is advisable that any future project does not base its approach and content on the Brussels Regime without a thorough evaluation of the provisions in order to determine whether they are appropriate for the task and whether a particular rule presents the infiltration of inappropriate aspects into the global regime that are unnecessary in the circumstances.

Although there is a great deal of evidence above to suggest that the project was doomed to fail, chapter five highlights a methodology that would prevent jurisdictional bases being used as 'bargaining chips' for further concessions and a method by which the due process test could perhaps be reasoned around. If reattempted in the future, the task would still be inherently complex and lengthy and would demand a great deal of sacrifice in terms of a state's current jurisdictional

reach, notwithstanding a new methodology. This does not mean that it is not worth pursuing. However, it is likely that the benefits a global regime would bring would not be sufficient to encourage the participants to abandon their politics, particularly as those most likely to gain from the global regime are not the states themselves but individual litigants. It is submitted here that the creation of a global regime is a theoretical possibility but it is a utopian pipedream unless and until the 'compromise philosophy' is abandoned and the delegations actively participate in adhering to the needs and expectations of the project and the requirements of the project's principal aims.

79, 845 words including footnotes.

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