MULTINATIONAL CORPORATIONS FACING THE VARYING CONCEPTS OF JURISDICTION: "FORUM NON-CONVENIENS", CONTRASTS BETWEEN THE ANGLO-AMERICAN AND THE EUROPEAN LAW SYSTEMS

by

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(Under the direction of Professor Wilner)

ABSTRACT

This thesis compares the rules of jurisdiction applicable to multinational corporations within two legal systems. The Anglo-American system favors *forum non conveniens*, whereas, the European applies European Regulation (EC) No. 44/2001. The difference between the two approaches permits litigants to practice forum shopping. The focus of the paper is to give an overview of the two approaches and to contrast them.

INDEX WORDS: Jurisdiction, multinational corporation, *forum non conveniens*, European Regulation (EC) No. 44/2001, forum shopping.

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CHAPTER 1

INTRODUCTION

"This century has seen the development of the large-scale multinational corporation ("MNC")"[1]. According to Wildhaber, a business is a MNC "if it has a certain minimum size, if it controls production or service plants outside its home state and if it incorporates these plants into a unified corporation strategy".[2] Thus, by their very nature, MNCs are subject to the different legal systems of the countries in which they are implanted, each with a different interest. Sometimes, these interests, and the legal control of each country over a corporation, do not coincide engendering the overlapping of the countries' jurisdictions or a jurisdictional lacuna where the corporation does not fall under any law.[3] Because of the increasing number of commercial transactions worldwide, international litigation has taken a prominent place.

One of the first and main issue arising from the dispute of two businesses from different countries is forum selection or "forum shopping." Most of the time, international business disputes are based on contracts; so the parties usually refer to the text of the contract in order to decide the issue governing international forum selection.[4] The discussion concerning the choice of forum clauses will later be addressed in this

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[1] *See* Daniel J. Dorward, *The Forum Non Conveniens Doctrine and the Judicial Protection of Multinational Corporations from Forum Shopping Plaintiffs*, 19 U. PA. J. INT'L ECON. L. 141, 141 (1998).
[2] L. Wildhaber, *Some Aspects of the Transnational corporation in International Law*, 27 NETH. INT'L L. REV., 79 at 80 (1980).
[3] *See* Saman Zia-Zarifi, *Suing Multinational Corporations in the U.S. for Violating International Law*, 4 UCLA J. INT'L L. & FOR. AFF. 81 (1999).

paper. So, when jurisdiction for claims concerning a dispute exist in several places, each party may be tempted to start litigation in the forum most favorable to her; this practice is called forum shopping.[5] Because of many elements in U.S. courts favoring plaintiffs, such as the existence of civil juries, high damages and many others, the U.S. jurisdictions are attractive to foreign and resident plaintiffs.[6] Although, the U.S. jurisdictional system is rather liberal, since a mere showing of "minimum contacts" is sufficient,[7] the doctrine of *forum non conveniens* constitutes a counter-balance in that it allows a court the discretion to refuse to hear a case. The European system contrasts with the *forum non conveniens* in providing that where a court has jurisdiction, it is bound to decide it. This paper will focus on the contrasts existing between the Anglo-American jurisdictional approach on one side and the European jurisdictional system on the other side. Chapter 2 of this paper describes the rules of jurisdiction in the U.S. from an international point of view. Chapter 2 further focuses on the advantages of U.S. courts and the problems raised by forum shopping in the U.S. In chapter 3, the paper gives a comprehensive and detailed overview of the scope, origin and evolution of the doctrine of *forum non conveniens*. It then considers the current status of the doctrine in the federal and state courts and its implications. Next, chapter 4 introduces the rules of jurisdiction of the Brussels and the Lugano Conventions as applied in Europe and makes a brief comparison with the *forum non conveniens* doctrine. Chapter 5 considers *forum non conveniens* in the United Kingdom. It then analyzes the impact of the adoption by U.K. of the Brussels and Lugano

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[4] *See* Donald C. Cowling, Jr., *Forum Shopping and Other Reflections on Litigation Involving U.S. and European Businesses*, 7 PACE INT'L L. REV. 465, 467 (1995).
[5] BLACK'S LAW DICTIONARY 666 (7th ed. 1999) (defining forum shopping as "the practice of choosing the most favorable jurisdiction or court in which a claim might be heard").
[6] Alan Reed, *To Be or Not to Be: The Forum Non Conveniens Performance Acted Out on Anglo-American Courtroom Stages*, 29 GA. J. INT'L & COM. L. 31, at 31-32 (2000).
[7] *See infra* chapter 2.

conventions. Finally, this paper concludes with a summary of the different approaches of the law on jurisdiction taken in Europe and in the common law systems.

CHAPTER 2

INTERNATIONAL FORUM SHOPPING IN U.S. COURTS

The first part of this chapter will deal with the generous *in personam* jurisdiction provisions that attract plaintiffs to recover large damages in suits against MNCs. Then, the second part will examine the advantages underlying international forum shopping in suits brought against MNCs in the U.S. courts. Finally, the third part lists some problems arising from forum shopping in the U.S.

A. The Expansion of *In Personam* Jurisdiction: the "Minimum Contacts" Rule

Historically, the courts used to rule that a defendant found within the territory of a state was automatically subject to the exercise of personal jurisdiction by the courts of that state.[8] However, over time, territoriality was found to be inflexible for a developing national economy. Actually, with the new century, interstate communications and transportation were made more easily.[9] So, a plaintiff could travel a long distance to find a proper forum, even though the injury resulted in her home state. A new test was required to respond to the needs of a system in which corporations incorporated in one state yet were operating in others.[10] Thus in 1945, the Supreme Court held that personal

[8] *See* Pennoyer v. Neff, 95 U.S. 714, 720 (1877).
[9] *See* McGee v. International Life Ins. Co., 355 U.S. 220, 222-23 (1957) (acknowledging "the fundamental transformation of our national economy over the years" and explaining: "Today many commercial transactions touch two or more States and may involve parties separated by the full continent. … At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.").
[10] See Jacqueline Duval-Major, *One-Way Ticket Home: the Federal Doctrine of Forum Non-Conveniens and the International Plaintiff*, 77 CORNELL L. REV. 650, at 664 (1992) (saying that " this is due in part to

jurisdiction could be asserted if the defendant has "certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'."[11] In order to establish minimum contacts, the Court distinguished between corporations with a "continuous and systematic presence" in the state and those with merely a "casual presence or isolated activity" within the state that was not connected to the cause of action.[12] The determination of "minimum contacts" depends largely upon the "quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to ensure".[13] The Court focused on the benefits and protections a corporation receives from a state as well as the obligations it owes to that state:

> [T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.[14]

Physical presence as a jurisdictional concept, however, did not die with the *International Shoe* decision. The Court said the term "physical presence" merely symbolizes those activities that are significant enough to satisfy due process principles.[15] Through the new focus on "minimum contacts", *International Shoe* provided flexibility to the doctrine of personal jurisdiction, while simultaneously assuring that individual defendants would not

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the ability of a corporation to have citizenship in one state, yet conduct business in many. These same changes brought about by industrialization also resulted in advances in technology and communications, making it much less likely that any given forum is inconvenient for a defendant").

[11] International Shoe v. Washington, 326 U.S. 310, 316 (1945) (emphasis added). *See also* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 287 (1980) (emphasizing that merely placing merchandise in stream of commerce did not satisfy minimum contacts test; foreseeability that the merchandise would be used in forum state was not sufficient to fulfill traditional notions of fair play and justice).

[12] 326 U.S. at 317.

[13] *Id.* at 319.

[14] *Id.*

be subject to arbitrary personal jurisdiction that did not comport with "fair play and substantial justice."[16] Thus, with the new approach, the emphasis is not made on the mere "presence"[17] or "implied consent"[18] of a corporation within any given state, but rather on the degree to which that corporation benefited from the forum state.[19]

In 1980, the Supreme Court included in the "minimum contacts" inquiry a notion of "reasonableness". [20] In *World-Wide Volkswagen Corp. v. Woodson*, the Supreme Court held that a New York car dealer was not subject to personal jurisdiction in Oklahoma for injuries stemming form a car accident when the only contact it had with that state was the foreseeable use of its product on the roads of Oklahoma.[21] The Court stated that the foreseeability that a car would travel through other states was not sufficient to extend the reach of personal jurisdiction.[22] Instead, the corporation must "purposefully avail itself of the privilege of conducting activities within the forum State."[23] The Court noted, however, that if the distributor of a product made efforts to serve markets in other states, directly or indirectly, it would not be "unreasonable to subject in one of those States if its allegedly defective merchandise has there been the source of injury."[24] In fact, the Court found that the only contacts between Oklahoma and the defendants were created by the 'unilateral' actions of the plaintiffs, which were insufficient for jurisdiction.[25] It added that if the contacts with the forum state had arisen not out from the actions of the

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[15] *Id*. at 316-17.
[16] *See* Duval-Major, *supra* note 10, at 665 (citing 326 U.S. at 316).
[17] Pennoyer v. Neff, 95 U.S. 714 (1877).
[18] Hess v. Pawloski, 274 U.S. 352 (1927).
[19] *See* Duval-Major, *supra* note 10, at 665.
[20] World-Wide Volkswagen, 444 U.S. at 298.
[21] *Id.* at 295-96.
[22] *Id.*
[23] *Id.* at 297 (citing Hanson v. Denckla, 357 U.S. 235, 253 (1958)).
[24] *Id.* at 297.
[25] *Id.* at 298.

consumer, but rather "from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its products in other states," such contacts would have sufficed for jurisdiction.[26] After the defendants purposeful availment of the benefits and protections of the forum state's law, five factors determine the reasonableness of the forum state's exercise of jurisdiction.[27] Theses five factors are: (1) the burden on the defendant to litigate in the forum state;[28] (2) the forum state's interest in adjudicating the dispute;[29] (3) the plaintiff's interest in obtaining convenient and effective relief;[30] (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies;[31] and (5) the shared interest of the several States in furthering fundamental substantive social policies.[32] Moreover, the Court stated that the forum state could assert jurisdiction over a corporation that "delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state."[33]

The Court further addressed the stream of commerce theory in *Asahi Metal Industry Co. v. Superior Court*.[34] Applying the five-factor test, it found that placing a product in the stream of commerce, without more, is not enough for the 'minimum contacts' requirement.[35] Activities, which indicate a purpose to serve the market of a state, include advertising in the state, marketing through a distributor, and providing channels for

[26] *Id.* at 297.
[27] *See* Burger King, 471 U.S. at 473, 476-77.
[28] World-Wide Volkswagen, 444 U.S. at 292.
[29] *Id.* (citing Mc Gee v. International Life Ins. Co., 355 U.S. 220, 223 (1957)).
[30] *Id.* (citing Kulko v. Superior Court, 436 U.S. 84, 92 (1992); Shaffer v. Heitner, 433 U.S. 186, 211 n.37 (1977)).
[31] *Id.*
[32] *Id.* (citing Kulko, 436 U.S. at 93,98).
[33] *Id*. at 297-98.
[34] 480 U.S. 102 (1987).
[35] *Id.* at 112.

regular customer service.[36] "No opinion in *Asahi* commanded a majority regarding what level of contact is required by a defendant for the forum state to exercise jurisdiction under the stream of commerce theory."[37] Therefore, the circuit courts apply different approaches of the stream of commerce analysis.[38] Because *Asahi* did not provide any guidance on how to define a purposeful contact under the stream of commerce test, *World-Wide Volkswagen* is still the most logical answer.[39]

B. Advantages of U.S. Courts for Plaintiffs

Certain procedural features of the U.S. legal system encourage plaintiffs in international disputes to bring their cases in the United States.

1. Jury Trial and Jury Awards

First, the seventh and fourteenth amendments give the plaintiffs the right to trial by jury in most civil suits.[40] In fact, American jurors are usually sympathetic to the cause of the plaintiff suing large MNCs, compared to professional judges. Moreover, they allocate damages more generously than do foreign courts.[41] Thus, for example, in the case about the industrial accident in Bhopal, India, the estimated value of the suit in India was not exceeding $75 million.[42] In contrast, experts had foreseen that American jurors would allocate compensatory damages of $235 million and a greater amount for punitive

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[36] *Id.* at 112.
[37] Kristin R. Baker, Comment, *Product Liability Suits and the Stream of Commerce after Asahi: World-Wide Volkswagen is still the Answer,* 35 TULSA L.J. 705, 711-12 (2000).
[38] *Id.* at 731.
[39] *Id.* at 732.
[40] *See* FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE 65 (4th ed. 1992), at 411-13.
[41] *See* Doward, *supra* note 1, at 146.
[42] *See* Douglas J. Besharov, *Forum-Shopping, Forum-Skipping, and the Problem of International Competitiveness*, *in* New Directions in Liability Law 139, 141 (Walter Olson ed., 1988).

damages.[43] In fact, the U.S. is the only country where one can find such a size of possible recovery. One British judge observed that " in the United States the scale of damages for injuries of the magnitude sustained by the plaintiffs is something in the region of ten times what is regarded as appropriate by the courts of [England]."[44] The difference is even more dramatic with Third World countries. Additionally, the plaintiff's attorney has the task to select the jury, thus, choosing a more receptive jury to the plaintiff.[45]

2. Contingency Fees

Contingent fees are the fees "charged for a lawyer's services only if the lawsuit is successful or is favorably settled out of court. They are usually calculated as a percentage of the client's net recovery."[46] Litigants generally see the contingency fee concept as advantageous. In other legal systems, like France, India or England, for example, these fees are viewed suspiciously.[47] Their main criticism is that the plaintiff's recovery is reduced substantially. But on the other hand, indigent plaintiffs cannot afford representation and most of the time, the award for damages is as important as the one in U.S. courts. In countries where a system of legal aid exists, it is not always really successful since the filing fees can be very expensive.[48] So, thanks to contingent fee representation, plaintiffs have a form of insurance that they will not support the risks of

[43] *See id.*
[44] Castanho, [1980] 1 W.L.R. at 859 (Shaw, L.J.).
[45] *See* JAMES, *supra* note 40, at 65.
[46] BLACK'S LAW DICTIONARY 315 (7th ed. 1999).
[47] *See* David Boyce, Note, *Foreign Plaintiffs and Forum Non Conveniens: Going Beyond Reyno*, 64 TEX. L. REV. 193, 197 (1985).
[48] *Id.* at 198-99.

the suit and that they will get damages, however lessened by the contingency fee, greater than what they were entitled to in another forum.[49]

3. U.S. Procedural Rules

Another factor that encourages plaintiffs to have their claim heard in U.S. courts is the broad scope of discovery. Under the Federal Rules of Civil Procedure and most state rules,[50] the scope of discovery is considerably more extensive than that authorized by other legal systems. Actually, in civil law countries, the trial proceedings are conducted by judges who proceed to the proof taking, preventing even the lawyers from conversing with a prospective witness before trial.[51] On the other hand, plaintiffs can bring vague claims in U.S. courts to comply with the liberal pleading rules.[52]

Moreover, there are very broad pre-trial discovery rules allowing plaintiffs to bring a claim with little evidence and to gain evidence that might have been unavailable otherwise.[53] Additionally, plaintiffs have greater bargaining power in settlement negotiations with defendants that should support heavy costs of litigation during the discovery. Plaintiffs are allowed to have a class action, which is usually forbidden in other legal systems. Thus, although they have little monetary interests, they can bring the suit against the defendant.[54]

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[49] *Id.*
[50] 28 U.S.C. § 1404 (a) (1990).
[51] *See* Boyce, *supra* note 47, at 200.
[52] *See* GARY B. BORN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 4 (3d ed. 1996) (discussing procedural aspects of U.S. litigation that favors plaintiffs).
[53] *See* Doward, *supra* note 1, at 148-49.
[54] *Id*. at 149.

4. The Choice of Substantive Law

Besides the procedural advantages of the U.S. system, the plaintiff will choose a state law whose choice of law rules provide that foreign law will not govern the claim. Because of the broad choice of states, plaintiffs can be sure not to have a foreign law ruling their suit. There are usually three reasons for which a foreign litigant will want to have its claim heard in U.S. courts: the possibility to have strict tort liability, punitive damages and choice of law.[55] In many countries, like India for instance, strict products liability does not exist.[56] Usually in personal injury cases, U.S. jurisdictions allow for punitive damages the recovery of, which is really exceptional in other common law countries. However, in civil law countries, when the plaintiff can show the intent or recklessness of the defendant, she is entitled to the reparation of her moral damage, which is a non-pecuniary loss. As far as the federal courts are concerned, as they sit in diversity, they must apply the choice of law rules of the state in which they sit.[57] Thus, all these rules lead the plaintiffs to choose whatever state law is the most favorable to them and disadvantageous to the MNC.

Because the U.S. is a pro-plaintiff forum, many criticisms have arisen out the U.S. courts.

C. Problems Raised by Forum Shopping

As was said in chapter 1, forum shopping is a way for the plaintiff to choose a forum with favorable substantive or procedural rules. In international litigation, because of all

[55] *See* Boyce, *supra* note 47, at 201.

[56] In contrast, the European Community, Directive 85/374/EEC provides for strict product liability against manufacturers, sellers, or importers of defective products (s*ee* 28 O.J. EUR. COMM. (No. L 210) 29 (1985)).

the advantages of the U.S. system, the United States is most of the time chosen by the plaintiffs even for a case arising in foreign countries, especially for torts suits against MNCs.[58]

1. Docket Congestion

After World War II, international trade and business increased with the improvement of means of transportation and communication.[59] This created more and more international litigation that crowded the U.S. judiciary. So, domestic suits were delayed and expedited, whereas U.S. residents needed speedy trials to face the internal market. Therefore, U.S. courts wanted to find a remedy permitting them to exclude foreign plaintiffs seeking a suit in the U.S.

2. Interference with the Foreign Forum's Interest in Deciding Matters of Local Concern

As far as the Court is concerned, the fact that it applies the plaintiff's request to have the litigation in the U.S illustrates a situation of imperialism, "another situation in which an established sovereign inflicted its rules, its standards and values on a developing nation."[60] In the *Bhopal*[61] case, the judges dismissed the case in favor of the Indian judiciary in order not to interfere with judicial comity between foreign nations. The

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[57] *See* Doward, *supra* note 1, at 149-50.
[58] *See* Sheila L. Birnbaum & Douglas W. Dunham, *Foreign Plaintiffs and Forum Non Conveniens,* 16 BROOK. J. INT'L L. 241, 243 (1990) ("In an effort to take advantage of the less stringent burden of proof under American products liability law... an increasing number of foreign plaintiffs are instituting products liability suits in the United States").
[59] David W. Roberston, *Forum Non Conveniens in America and England: A Rather Fantastic Fiction*, 103 LAW Q. REV. 398, 419.
[60] *See* Reed, *supra* note 6, at 67.
[61] In re Union Carbide Corp., 634 F. Supp. 842.

judicial origins of the concept of comity can be found in *Hilton v. Guyot*.[62] The Court defined comity as "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws."[63] In fact, U.S. courts see international comity as non-interference in foreign legal systems.[64] Thus, in the *Bhopal*[65] case, the Court stated that "[t]o deprive the Indian judiciary of this opportunity to stand tall before the world and to pass judgment on behalf of its own people would be to revive a history of subservience and subjugation from which India has emerged."[66]

3. Consequences of Forum Shopping

One result of forum shopping is that the application of the law is less predictable, making businesses invest a lot of money to determine what law will rule their behavior.[67] This is particularly true since legal outcomes are totally different from one legal system to another. Besides, the litigation costs increase because parties prefer spending money to get a favorable forum. Additionally, courts have to decide the jurisdiction and choice of law matters before considering the merits of the case; this can waste of lot of money but it does not systematically solve the dispute.[68] Another consequence of forum shopping is that it can result in the application of an inefficient outcome, since the law can be

[62] Hilton v. Guyot, 159 U.S. 113 (1895).
[63] *Id.* at 164.
[64] *See* Reed, *supra* note 6, at 69.
[65] In re Union Carbide Corp., 634 F. Supp. 842.
[66] *Id.* at 865-67.
[67] *See* Doward, *supra* note 1, at 153 (1998) (*citing* Joseph H. Sommer, *The Subsidiary: Doctrine Without a Cause?*, 59 FORDHAM L. REV. 227, 254 (1990)).
[68] *See id.*

appropriate to local matters but not to international ones.[69] For example, means of citizens from less developed country may not be adapted to greater security created by strict liability.[70] Finally, even though a forum allows generous awards, the plaintiff can be prevented from recovering them because of the absence or the inefficacy of recognition and enforcement of judgments laws in the country where the plaintiff wishes them to be applied.

So a court has to first establish personal jurisdiction by establishing sufficient contacts in order. But because of the many disadvantages raised by this doctrine and by forum shopping, the litigation of a case in the U.S. could be clearly inconvenient.

[69] Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677 (1990), at 1692.
[70] *See* Harrison v. Wyeth Lab, 510 F. Supp. 1, 4-5 (E.D. Pa. 1980).

CHAPTER 3

THE COMMON LAW APPROACH: THE *FORUM NON CONVENIENS* DOCTRINE

In the field of international dispute, foreign plaintiffs injured abroad by products or actions of U.S. corporations often seek recovery in U.S. courts because of the many advantages that were shown in chapter 2. Besides, U.S. strict liability law substantially favors the plaintiff. Therefore, defendants in international litigation are reluctant to be sued in the United States; so they use *forum non conveniens* as a defense.[71] The doctrine of *forum non conveniens* is a common law discretionary power that allows a court to refuse the imposition of a plaintiff's action upon its jurisdiction.[72] Section A of this paper retraces the scope and origin of the doctrine. Then, sections B and C show the differences of application of the same concept by federal and state courts. Section D deals with the case of choice of forum clauses. Section E gives the reasons argued by the plaintiff for its choice of forum. Finally, section F states the implications of *forum non conveniens*.

A. Scope and Origin

Nowadays, the doctrine of *forum non conveniens* provides discretionary powers to courts to decline existing jurisdiction when the convenience of the parties concerned, as

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[71] *See* David W. Robertson & Paula K. Speck*, Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 TEX. L. REV. 937, 938 (1990).

[72] Black's Law Dictionary defines "*forum non conveniens*" as the "dicretionary power of court to decline jurisdiction when convenience of parties and ends of justice would be better served if the action were brought and tried in another forum." BLACK'S LAW DICTIONARY 665 (7th ed. 1999). The rule of *forum non conveniens* has also been stated as when "[a] state will not exercise jurisdiction if it is a seriously

well as the ends of justice, could be better served in an alternative forum. In such a case, the judge declares the forum inconvenient or *non conveniens*.[73] This doctrine gives an uncontested discretion to the common law judges.[74] It applies to national and international cases of concurrent jurisdiction. So the availability of two fora in which the defendant is amenable to process is a prerequisite.[75] Besides, the plaintiff should be able to bring a suit in the alternative forum without being barred by technical matters such as service of process or statute of limitations problems.[76] In the case where bars exist or the alternative forum does not allow the subject matter of the suit to be brought in its courts, judges should not theoretically dismiss such a suit.[77]

One can find the origin of the doctrine *forum non conveniens* mainly in Scottish law, which provided for dismissal of actions under the term of *forum non competens* as early as the eighteenth century.[78] Scottish courts used the term, in spite of its literal meaning, in order to decline existing jurisdiction.[79] Therefore, by the end of the nineteenth century, the doctrine was renamed *forum non conveniens*.[80] The Scottish created the doctrine "to balance undue hardship arising out of arrestment *ad fundadam* jurisdiction, which existed when Scotland attached and seized foreign assets in order to force foreigners into Scottish courts."[81] In *Sim v. Robinow*,[82] Lord Kinear stated the foundation for Scotland's

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inconvenient forum for the trial of the action provided that a more appropriate forum is available to the plaintiff." Restatement (Second) of Conflict of Laws 84 (1971).
[73] *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947).
[74] *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257 (1981).
[75] *Gilbert*, 330 U.S. at 507; *Piper,* 454 U.S. at 254.
[76] *See* Hughes v. Fetter, 341 U.S. 609 (1951).
[77] *Piper*, 454 U.S. at 251-52.
[78] ALAN DASHWOOD ET AL., A GUIDE TO THE CIVIL JURISDICTION AND JUDGMENTS CONVENTION 425 n. 76 (1987).
[79] Robert Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908 (1946-47).
[80] Edward L. Barrett, *The Doctrine of Forum Non Conveniens*, 35 CAL. L. REV. 380, 389 (1947).
[81] Alexander Reus, *Judicial Discretion: A Comparative View of the Doctrine of Forum Non Conveniens in the United States, the United Kingdom, and Germany*, 16 LOY. L.A. INT'L & COMP. L.J. 455, at 459 (1994) (*citing* A. Gibb, THE INTERNATIONAL LAW OF JURISDICTION IN ENGLAND AND SCOTLAND 220 (1926)).

application of the *forum non conveniens* doctrine: "The plea [for staying proceedings on the ground of for*um non conveniens*] an never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice." [83]

Prior to 1892, courts decisions dealing with "most suitable forum" matters were not uniform and were rather unpredictable.[84] The inconsistency of the decisions resulted from the existence in parallel of the "abuse of process" approach, according to which the judge could take discretionary decision only in oppression or vexation matters.[85] Despite that, after the statement of Lord Kinnear confirmed by *Société du Gaz de Paris v. S.A. de Navigation, "Les Armateurs Français,"*[86] the "most suitable forum" prevailed over the "abuse of process" standard.[87] The leading British decision, which was *Logan v. Bank of Scotland*[88] was only considered as an exception of the strict rule of *'Judex tenetur impertiri judicium suum'*; that is to say a judge must exercise jurisdiction in every case in which he is seized of it.[89] Nevertheless, during this period the courts did not use the doctrine too much because it was not applied in favor of domestic defendants until 1978 in the English case of *MacShannon v. Rockware Glass Ltd*.[90]

Besides, British and American courts did not have the same conception of jurisdiction and venue. So the British and Scottish approaches of *forum non conveniens* could not fit

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[82] 1892 Sess. Cass. 665 (Scot. 1st. Div.).
[83] *Id*. at 668.
[84] Reus, *supra* note 81, at 459.
[85] *Id.* at 460.
[86] 1926 Sess. Cas. 13 (Scot.).
[87] Robertson*, supra* note 59, at 412.
[88] [1906] 1 K.B. 141.
[89] See Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, at 796 (1985) (*citing* A. Gibb, THE INTERNATIONAL LAW OF JURISDICTION IN ENGLAND AND SCOTLAND 220 (1926)).
[90] 1978 App. Cas. 795 (appeal taken for Q.B.).

with the federal system.[91] In order to determine the *situs* of trial, American law utilizes two different concepts, jurisdiction and venue, whereas there is no clear distinction at common law.[92] Personal jurisdiction in the American approach, is a limitation on the territorial reach of a court's power. In England, however, as the king's arm reached around the world,[93] this was not really an issue: even though a defendant was not absent, the British courts had a power to compel her attendance through distraint of property or even a declaration of 'outlawry' if the defendant did not possess any property capable of confiscation.[94] As to the venue issue, after the king delegated its power of lawsuits resolution, the rule originated with the jury system. For some 'local' actions, a specific venue was required with jury members familiar with the facts at issue: either where the cause of action arose or where the evidence was located.[95] Later, as the function of the jury changed and did not need its knowledge about the matter, the venue became the place where the defendant was found.[96] However, these British rules could not be transposed to the United States because of the sovereignty of each state.[97] When a suit was more appropriate outside the state, the courts could only decline jurisdiction. So an interstate unit was needed in order to resolve the conflicts between the fora in different states: the due process clause.[98] Therefore, venue was replaced by the concept of jurisdiction to determine the place of a suit involving more than one state and venue

[91] Stein, *supra* note 89, at 797-98.
[92] *Id.* at 798.
[93] *See* Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The 'Power' Myth and Forum Conveniens*, 65 YALE L. J. 289, 297-98 (1956).
[94] *See* Blume*, Place of Trial of Civil Cases*, 48 MICH. L. REV. 1, 11-12 (1949).
[95] *See* R. BOOTE, AN HISTORICAL TREATISE ON THE PRINCIPLE OF AN ACTION OR SUIT AT LAW 97 (London 1766), *cited in* A. EHRENZWEIG, TREATISE ON THE CONFLICT OF LAWS 104 n.11 (1962).
[96] 4 & 5 Ann., ch. 16, § 6 (1705) (transitory actions may be brought in any country), *cited in* A. EHRENZWEIG, *supra* note 95, at 105.
[97] State boundaries were apparently relevant in limiting the assertion of jurisdiction over foreign defendants. *See* A. GIBB, *supra* note 89, at 23-26, 193.

became only used within the state.[99] At the federal level, Congress limited the reach of the federal trial courts to that of the state courts. Many amendments followed: in 1858, a rule provided that the plaintiff had to sue in the district of the defendant's residence;[100] then in 1888, plaintiffs in diversity cases could choose to sue either in their place of residence or in the defendant's. Finally in 1966, a last amendment authorized the parties to have the venue in the judicial district where the claim arose. However, *International Shoe Co. v. Washington* [101] expansively reinterpreted the statutory venue requirements, as shown in Chapter 2. As this situation led to forum shopping, a need of limitation on choice of forum was urged.

Both federal and state legal system developed different doctrines of *forum non conveniens*; that is what will be analyzed in the next two paragraphs.

B. The Federal Approach of *Forum Non Conveniens*

Courts have applied *forum non conveniens* for over a century in admiralty cases involving foreign parties.[102] In order to decide whether equity courts would exercise jurisdiction over a case, they took into account many factors such as citizenship, domicile of the parties, place of registration of ships, availability of compulsory process for witnesses, place of contracting, place of cause of action like a collision and the central point of relationship.[103]

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[98] *See* Pennoyer v. Neff, 95 U.S. 714 (1877).
[99] Stein, *supra* note 89 at 799.
[100] *See* Act of May 4, 1858, ch. 27, § 1, 11 Stat. 272 (codified as amended at 28 U.S.C. § 1391 (1982)).
[101] 326 U.S. 310 (1945).
[102] *See* The Belgenland, 114 U.S. 355, 361-63 (1885); *see also* Canada Malting Co. v. Paterson Steamships, Ltd., 285 U.S. 413, 421 (1932) (noting that courts traditionally have had discretion, under American law, to decline jurisdiction in admiralty cases between foreigners even if the action arose in the United States).

1. The First Applications in the U.S.

a. Development in the Federal Courts

In 1947, the Supreme Court finally acknowledged expressly the doctrine of *forum non conveniens* in the leading case of *Gulf Oil Corp. v. Gilbert*.[104] The parties in this case were U.S. citizens and the action was in federal court on the basis of diversity jurisdiction. A resident of Virginia brought suit in the federal district court of New York against a Pennsylvania corporation qualified to do business in both Virginia and New York. The suit was to recover damages for the destruction of its Virginia warehouse and its contents by fire resulting from the defendant's negligence.[105] Although New York court had jurisdiction over the parties,[106] defendants sought to move the action form New York under the *forum non conveniens* doctrine, arguing that Virginia constituted the appropriate forum to hear the case.[107] The defendant argued that Virginia was where (i) the plaintiff lived; (ii) the defendant did business; (iii) all events in the litigation had taken place; (iv) most of the witnesses resided; and both state and federal courts were available to the plaintiff and able to obtain jurisdiction over the defendant.[108] The New York Supreme Court upheld the case dismissal of the district court and agreed that Virginia, not New York, qualified as the appropriate forum in which the suit could be brought.[109] Although *Gilbert* involved only domestic elements and parties, it became a

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[103] *See*, e.g., Canada Malting, 285 U.S. at 423-24.
[104] 330 U.S. 501 (1947).
[105] *Id.* at 502.
[106] The Supreme Court recognized that the doctrine of *forum non conveniens* is inapplicable unless there are at least two jurisdictions in which the defendant is amenable to process, one of which is the plaintiff's chosen forum. *See id*. at 504-07. The factors associated with the doctrine are designed to help the court decide whether it is appropriate to decline jurisdiction and allow the litigation to proceed in an alternate forum.
[107] *See id.* at 503.
[108] *See id.*
[109] *Id.* at 509-10, 512.

leading decision for all federal *forum non conveniens* dismissals involving admiralty, domestic, or international matters.[110]

In *Gilbert*, the Supreme Court instituted a two-step analysis for deciding when to dismiss a case under *forum non conveniens* grounds in a federal court. First, a court has to determine whether an alternative forum exists.[111] Provided that it does, the court proceeds with the second step in deciding in which forum the litigation would best serve the private interests of the litigants and the public interests of the forum in question.[112] Private interests include the ease of access to evidence, the availability of compulsory procedures for forcing attendance of unwilling witnesses, the cost of obtaining attendance of unwilling witnesses, the cost of action, the enforceability of judgments abroad, and all other practical problems that would promote an easy, expeditious and inexpensive trial.[113] Public factors incorporate: administrative difficulties flowing from court congestion ("crowded dockets"), the public interest in having local controversies decided at home, the public interest in having the trial of a diversity case in a forum familiar with the applicable law; difficulties in the application of foreign law; avoidance of extensive forum shopping; and the unfairness of burdening citizens in an unrelated forum with jury and tax duties.[114] The Court employed a balancing test of all the enumerated factors from both sides without listing specific circumstances that might justify a ruling for or against dismissal.[115] Nevertheless, the Court created a presumption in favor of the plaintiff by stating that "unless the balance [of the public and private factors] is strongly in favor of

[110] Robertson*, supra* note 59, at 400.
[111] G*ilbert,* 330 U.S. at 507.
[112] *Id.* at 509. *See generally*, Reed, *supra* note 6, at 47.
[113] *Gilbert*, 330 U.S. at 508.
[114] *See id*. at 508-09.
[115] *Id*. at 507.

the defendant, the plaintiff's choice of forum should rarely be disturbed."[116] In spite of this deference to the plaintiff's choice, the Court dismissed the case; in fact, the burned house warehouse and the witness were in Virginia, the plaintiff was a Virginia resident and confessed to sue in New York in order to get higher awards for damages.[117] Moreover, there was no element to connect the cause of action to the New York forum.[118] As the Court did not provide for an exhaustive list of factors, trial courts have unlimited discretion to determine which considerations to weigh.[119] Additionally, this discretion is further protected from appellate review by the *Gilbert* case that requires the appellate court to find a clear abuse of the trial court's discretion.[120] Thus, for similar cases, the outcome may be different because of the difficulty for the appellate court to reverse a dismissal decided on *forum non conveniens* grounds.[121]

b. Evolution Within the Congress: the Section 1404(a) Transfer

The federal application of *forum non conveniens* was then developed when Congress enacted the Section 1404(a)[122] change of venue transfer in 1948. Intended to provide for a

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[116] *Id*. at 508. According to Professor Robertson, the strong presumption favoring the plaintiff's choice of forum could only be overcome by showing the choice constituted an 'abuse of process.' *See* Robertson, *supra* note 59, at 399. The Court subsequently eroded the 'abuse of process' standard by adopting the 'most suitable forum' approach. *Id.* at 402. This change compromised the original purpose of *forum non conveniens* to filter out only 'vexatious' or 'oppressive' suits, which constitute an abuse of the judicial process. *Id*. at 399.

[117] *Gilbert,* 330 U.S. at 502-03, 510.

[118] *Id*. at 509. The only reason the Court found for the plaintiff's choice was the potential for securing a higher damage award in New York venue, whereas a Virginia juror would be 'staggered' by the magnitude of the damages requested. *Id.* at 510.

[119] See Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, at 754 (criticizing Court's approval in *Piper* of broad discretion granted to district courts in *Gilbert* as unhealthy "rule of obeisance in the extreme form").

[120] *See Gilbert,* 330 U.S. at 508 (stating that the doctrine leaves "much to the discretion" of trial court).

[121] *See* Peter J. Carney, *International Forum Non Conveniens: "Section 1404.5" – A Proposal in the Interest of Sovereignty, Comity, and Individual Justice*, 45 AM. U.L. REV. 415, at 428 (1995) (citing Allan R. Stein, *Forum Non-Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, at 838-40 (1985).

[122] 28 U.S.C. § 1404(a) (1990).

response to the Supreme Court's decision in *Gilbert*, it states: " For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."[123] This statute made the *forum non conveniens* almost unnecessary since cases were no longer dismissed if there was an alternative forum within the United States federal court system; rather the case were now transferred to this forum.[124] Moreover, contrary to *the forum non conveniens* doctrine for which only defendant can invoke a dismissal, both plaintiff and defendant can invoke this section to move a case.[125] Because of the less serious result of the section, transfer instead of dismissal, the threshold of inconvenience is much lower than the one required for *forum non conveniens*.[126] The Section 1404(a) is, however, limited since it only operates when the alternative forum is another United States district court.[127]

2. A Distinctive *Forum Non Conveniens* Approach for Foreign Plaintiffs

In *Piper*,[128] the Court applied the doctrine of *forum non conveniens* when the alternative forum was a foreign country. This case is the first decision on *forum non conveniens* after the *Gilbert*[129] case.

[123] 28 U.S.C. § 1404(a) (1990).
[124] *See generally* Duval-Major, *supra* note 10, at 655-56.
[125] Ferens v. John Deere Co., 494 U.S. 516, at 519 (1990).
[126] Norwood v. Kirkpatrick, 349 U.S. 29, 32 (1955). *See also* Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981) (discussing Norwood and the lower standard afforded: 1404(a) transfers).
[127] The statute states that the court may transfer the case "to any other district court or division where it might have been brought." 28 U.S.C. § 1404(a) (1990).
[128] 454 U.S. 235 (1981).
[129] 330 U.S. 501 (1947).

a. Background of *Piper Aircraft Co. v. Reyno*

The representative of the estate of five Scottish citizens killed in an airplane crash in Scotland brought wrongful death actions in a California state court against the manufacturer of both the plane, a Pennsylvania corporation, and the propeller, an Ohio corporation.[130] Plaintiffs alleged that the airplane was defective and sought recovery on the basis of negligence and strict liability. Later, they removed the action to a federal district court of the same state, which transferred the proceedings to the Middle District of Pennsylvania, pursuant to the defendant's 1404(a) motion.[131] After the transfer, the defendants moved to have the case dismissed on *forum non conveniens* because they alleged that Scotland provided for a more convenient forum. The district court dismissed the action on grounds of *forum non conveniens* because: (1) at the time the accident occurred, the plane was owned and operated by a Scottish air-taxi company in Scotland; (2) all victims, in whose names the suit was brought, were Scottish; and (3) investigations had been conducted by English and Scottish officials.[132] Besides, the court found that the plaintiffs only chose the American forum to get higher damage awards and benefit from the extensive American pretrial discovery procedure.[133] The Court of Appeals reversed the district court rejecting its balancing of the *Gilbert* factors and remanded the case. It held that an unfavorable change in substantive law might prevent a f*orum non conveniens* dismissal.[134] At last, the Supreme Court reversed again, holding that the weight of public

[130] For the facts, see *Piper*, 454 U.S. at 238-41.
[131] *Id.* at 240.
[132] Piper Aircraft Co. v. Reyno, 479 F. Supp. 727 (M.D. Pa. 1979).
[133] *Id.*
[134] Reyno v. Piper Aircraft Co., 630 F.2d 149 (3d Cir. 1980).

and private interests made Scotland a better forum and that no single factor of the *Gilbert* approach, regarded alone, could be given determinative significance.[135]

b. The *Piper* Test

Representing the first application of the *forum non conveniens* doctrine to a foreign plaintiff, this case followed the two-step analysis set forth by the *Gilbert* court. First, the Court required the existence of a suitable forum within another country.[136] Second, finding such a forum, the Court considered four factors of interests.[137]

i. The Presence of an Alternative Foreign Forum

Piper relied on the first prong of the *Gilbert* procedure for *forum non conveniens* dismissal by, first, requiring that the reviewing court establish the existence of another forum in which the action could be heard.[138] The determination of an alternative forum represents a logical step since it would be unfair for the court having jurisdiction to deprive the plaintiff barred by limitation and procedural barriers from bringing the case elsewhere.[139] *Piper* introduced a two-prong consideration: the courts should consider both the amenability of the defendant to service and the availability of an adequate remedy in the alternative forum.[140] First, as to the amenability of process, courts do not

[135] Piper Aircraft Co. v. Reyno, 454 U.S. 235, 249 (1981).
[136] *Id*. at 254.
[137] *Id.* at 263. The Court added that if the central emphasis were placed on any single factor, the doctrine would lose much of the flexibility that makes it valuable. *Id.* at 249-50.
[138] *Id.* at 242-44, 254 n.22 (noting that district court properly began inquiry by asking whether alternative forum existed).
[139] *Id.* In *Piper*, the Court emphasized that dismissing litigation under the rationale that it would be better heard in another forum required that: "At the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum". *Id.*
[140] *Id.* at 254-55 n.22.

have problems showing it.[141] Courts often ask the defendant to agree to service of process in that jurisdiction[142] or to waive the foreign limitations period.[143] Those conditions are fair because it is the defendant who seeks dismissal. In case of non-obeyance to the conditions by the defendant, the court can threaten him with contempt of orders.[144] Judges consider a second prong in their inquiry about an alternative foreign forum: if "the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative."[145] The Court made the precision that such a finding would happen only in "rare circumstances," such as when the alternative forum "does not permit litigation on the subject matter of the dispute."[146] The question of adequacy is given substantial attention as foreign plaintiffs try to gain access to U.S. courts. Commentators usually emphasize six advantages of the U.S. legal system that attract foreign plaintiffs: (1) encouragement by the U.S. plaintiffs' bar for litigants to bring suit in the U.S.;[147] (2) contingency fee arrangements;[148] (3) extensive pre-trial discovery;[149] (4) advantageous substantive law;[150] (5) availability of trial by jury;[151] and (6) the U.S. tendency for large awards.[152] So from the plaintiff's point of view, the forum may appear not as adequate as

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[141] *See generally* William L. Reynolds, *The Proper Forum for a Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in the Federal Courts*, 70 TEX. L. REV. 1663, at 1666 (1992).
[142] *See, e.g.,* De Melo v. Lederle Lab., 801 F.2d 1058, 1061 (8th Cir. 1986).
[143] *See, e.g.,* Sussman v. Bank of Israel, 56 F. 3d 450, 460 (2d Cir. 1995) (requiring defendant to waive statute of limitations defense as condition of *forum non conveniens* dismissal).
[144] Reynolds, *supra* note 141, at 1666.
[145] *Piper,* 454 U.S. 235, 254 n. 22 (1981).
[146] *See* Boyce, *supra* note 47, at 196 (stating that in connection with Union Carbide litigation, U.S. counsel worked with local attorneys in India to divert foreign controversy to American courts).
[147] *See* Boyce, *supra* note 47, at 196 (stating that in connection with Union Carbide litigation, U.S. counsel worked with local attorneys in India to divert foreign controversy to American courts).
[148] *Id.*
[149] *Id.*
[150] *Id.* at 201.
[151] *Id.* at 196.
[152] *Id.* at 203(noting that United States is considered "in a class of its own" with regard to large damage awards).

being in the U.S. courts.[153] However, courts generally focus on the capability of the legal system rather than on the advantages for the plaintiffs. U.S. courts found most fora adequate: for example, a mere reduction in the possible reward,[154] lack of access to a jury in the alternative forum,[155] distinct procedures[156] and the possibility of extensive delay in litigation[157] are not sufficient grounds for dismissal in themselves. A famous example of the adequacy inquiry is *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984*.[158] The plaintiffs raised five inadequacies. They argued that the Indian court and legal system were not sophisticated enough for such a complex litigation,[159] that there would be extensive delays,[160] that Indian attorneys would not be specialized enough to represent their clients,[161] that the substantive law of India is underdeveloped[162] and that there were limited pretrial discovery restrictions.[163] However, the Court did not think India was an inadequate forum.[164]

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[153] *Id.* at 204 (stating that United States is "better choice for those foreign litigants who have a choice).
[154] *Piper,* 454 U.S. 235, at 255.
[155] *See* Lockman Found. v. Evangelical Alliance Mission, 930 F. 2d 764, 768 (9th Cir. 1991) (stating that foreign forum is not adequate even though there is no right to jury trial).
[156] *Id.* at 768 (rejecting contention that distinct pretrial discovery features in Japan made it inadequate forum).
[157] *See* Broadcasting Rights Int'l v. Société du Tour de France, S.A.R.L., 708 F. Supp. 83, 85 (S.D.N.Y. 1989) (noting that delays in the alternative forum's judicial system do not prevent dismissal on *forum non conveniens* grounds).
[158] 634 F. Supp. 842 (S.D.N.Y. 1986), modified, 809 F. 2d 195 (2d Cir.), cert. denied, 484 U.S. 871 (1987). The action was brought in the district court of the Southern District of New York as the consolidation of 145 separate actions, including one by the government of India. *Id.* at 844. In December 1984, a chemical gas plant in Bhopal, India released a deadly gas cloud of methyl isocyanate that killed more than 2000 people, injured more than 20,000 and destroyed crops and livestock. *Id.* The plant was owned by Union Carbide India Limited, a subsidiary of Union Carbide Corporation, a New York corporation. *Id.*
[159] *Id.* The plaintiff's expert argued India was still rooted in its 'colonial origins' and could not handle the litigation due to its lack of broad-based legislative activity, inaccessibility of legal information and legal services, and burdensome court filing fees. *Id.* The defendant, however, convinced the court otherwise with examples of prior competent handling of complicated litigation within the Indian system. *Id.*
[160] *See id*. at 848.
[161] *See id*. at 849.
[162] *See id*. at 848-49 (rejecting contention of deficiency of substantive law and noting that because of British case law of Rylands v. Flechter, 19 C.T.R. 220 (H.L. 1868), strict liability was applicable).
[163] *See id*. at 849-50 (noting that some limits on discovery are applied in England and conceded that it would limit victim's access to sources of proof).
[164] *Id.* at 850.

ii. The Relevance of Choice of Law

Piper held that "[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry."[165] If it were otherwise, the Court held that the doctrine would be "virtually useless" because plaintiffs always choose the most favorable law.[166] That is why the *Piper* Court rejected the court of appeals' conclusion that *forum non conveniens* should be denied on the grounds that Scottish law did not recognize the more pro-plaintiff strict liability law in Pennsylvania.[167] However, the choice of law is relevant for two reasons. First, the *Piper* Court made the precision that "substantial" weight shall be given to the unfavorable change in law "if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all."[168] Second, courts use this analysis when they consider the "public interest" aspect of *Piper*.[169]

iii. Balancing Private Interests

Once an adequate alternative forum has been identified, the Court, as in *Gilbert*, balanced "all relevant private and public interests."[170] Private interest factors concern the parties and the conduct of the case. The private interests to be weighed after *Piper* are the same three proposed by *Gilbert*: the litigation concerns, the feasibility of accommodating

[165] *Piper*, 454 U.S. 235, at 247 (1981).
[166] *Id*. at 250.
[167] *Id.* at 247.
[168] *Id.* at 254.
[169] *See infra* Subpart A (iv).
[170] *Piper,* 454 U.S. at 257.

third parties, and the enforceability of the decision.[171] The convenience of the parties is usually not an important factor as the parties argue against their own convenience.[172]

First, courts usually focus on how the place of the trial will affect the course of the litigation. They are concerned with the location of the witnesses and documents,[173] the location of the physical evidence,[174] the cost of producing the evidence at trial,[175] the cost of translating the documents and testimony,[176] the relative effect of extensive travel on the parties,[177] and the possibility that the court will need to view or have access to the site of the cause of action in order to resolve the litigation.[178] A second inquiry into relevant litigation factors focuses on pretrial discovery or compulsory process.[179] Compulsory process can be a problem where the live testimony and demeanor of a hostile witness may be essential to the plaintiff's case and the foreign forum does not provide for any means to compel attendance.[180] As explained above, this can be solved by conditioning dismissal upon the approval of the defendant to service of process.

The court must consider the ease with which third parties may bring their claims pertaining to the litigation in order to have the litigation tried as a whole.[181] In *Piper,* the

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[171] *Gilbert*, 330 U.S. at 508.
[172] *See* Stewart v. Dow Chem. Co., 865 F. 2d 103, 106 (6th Cir. 1989) (noting that "[b]oth parties seem almost particularly willing" to "be inconvenienced by having to proceed in a court in a foreign jurisdiction").
[173] *Piper,* 454 U.S. at 258.
[174] *Id.*
[175] *See Union Carbide*, 634 F. Supp. at 858 n.20 (noting that victims and their medical records were located in India).
[176] *See id*. at 858-59 (stating that it would be easier to review documents in India because translations problems would be avoided).
[177] *See* Liossatos v. Clio Shipping Co., 350 F. Supp. 1053, at 1056 (noting that all parties and witnesses would have to travel significant distances to attend trial).
[178] *See Union Carbide*, 634 F. Supp. at 860 (stating that viewing of plant where accident occurred would be appropriate at later stage in litigation).
[179] *See id*. at 850. (overruling plaintiffs' objection that lack of pretrial discovery procedure in India would prevent discovery of necessary safety and maintenance documents regarding Bhopal plant operation).
[180] *Id.* at 859 (noting that availability of compulsory process for ensuring attendance of unwilling witnesses was important factor).
[181] *Piper*, 454 U.S. at 257.

concern was that if the case was heard in the U.S., it would force the defendant to file an indemnity action in the alternative forum of Scotland;[182] therefore, there was a risk of an inconsistent outcome if the case was not heard in its entirety in Scotland.[183]

Although *Piper* did not address the interest of enforcing the judgment, it has become an important consideration to base a dismissal on grounds of *forum non conveniens*.[184] Usually this aspect is solved with a conditional dismissal. Besides, the U.S. courts have a reputation as the "most generous in the world in enforcing foreign judgments".[185]

iv. Public Interests

In *Piper*, the Court showed that public interest factors are given more attention than the private ones when the plaintiff is foreign.[186] There are three public interest factors.

First, the *Piper* Court required that choice of law be given "substantial weight", although it should not be the sole argument for the dismissal.[187] In the *Piper* case, the Court noted that the district court had expressed concern over jury confusion and "its own lack of familiarity with Scottish law."[188] Not only is the difficulty to understand foreign

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[182] *See id*. at 259.
[183] The Court noted that it would be fairer "to all the parties and less costly if the entire case was presented to one jury", in a unified manner. *Id.* at 243. The Court stressed that if the trial was held in the United States, Piper and Hatrzell would still be entitled to file indemnity actions against the Scottish defendants, and such approach would pose "a significant risk of inconsistent verdicts due to different law of Scottish forum." *Id.* at 243.
[184] *See Gilbert*, 330 U.S. at 508.
[185] Carney, *supra* note 121, at 446 (citing Jay L. Westbrook, *Theories of Parent Company Liability and the Prospects for an International Settlement,* 20 TEX. INT'L L.J. 321, 327 (1985)).
[186] *See Piper*, 454 U.S. at 260 (noting that even though not all public interest factors militated for dismissal, strong interest of foreign forum in adjudicating local controversies at home tips balance against factors weighing against dismissal).
[187] *See id*. at 260.
[188] *Id*.

law a factor for dismissal,[189] but also the cost of getting an expert testimony on that law.[190]

Then, the forum's interests constitute a second branch of factors. This inquiry was referred to in *Gilbert* as "a local interest in having localized controversies decided at home."[191] In *Piper*, the Court considered the burden on courts through the reference to the "enormous commitment of judicial time and resources" involved in the litigation.[192] The *Piper* Court drew attention to the "onerous burden" of jury duty[193] and the general impact on the docket and resources of the courts.[194] In deciding dismissals on the grounds of *forum non conveniens,* courts take into account 'floodgates' arguments and decide that there is a public interest in deterring foreign plaintiff forum shopping from crowding U.S. dockets.[195]

Finally, the third public interest is the domestic burden. In *Piper*, the Court balanced the interests of the United States with the Scottish interests and found that the latter weigh more heavily for a dismissal.[196] This decision was swayed by the *Gilbert* Court that found that there is "a local interest in having localized controversies decided at home."[197] So the *Piper* Court decided that, although the U.S. had an interest in dissuading

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[189] *See* Early v. Travel Leisure Concepts, Inc., 674 F.Supp. 1199, 1201 (E.D.Va.1987) (noting that "the court does not have ready access to the applicable substantive Jamaican law").
[190] *See* Interpane Coatings, Inc. v. Australia & N.Z. Banking Group, Ltd., 732 F. Supp. 909, 917 (N.D.I11.1990) (observing that the need for an expert on the applicable Australian law would waste judicial resources and increase the private expense of the litigation).
[191] 330 U.S. at 509.
[192] *Piper*, 454 U.S. at 261.
[193] *See* Cornell & Co. v. Johnson & Higgins of Va., Inc., No. CIV.A94-5118, 1995 WL 46618, at 7 (E.D. Pa. Feb. 6, 1995) (noting as valid factor unfair burden on jury of hearing litigation from unrelated forum (citing *Piper*, 454 U.S. at 241 n.6)).
[194] *See, e.g.,* Windmere Corp. v. Remington Prods., Inc., 617 F. Supp. 8, 11 (S.D. Fla. 1985) (considering docket congestion as factor).
[195] Reus, *supra* note 81, at 455, 471 (noting that although docket crowding is "irrelevant" in most cases, it is accepted justification in *forum non conveniens* cases).
[196] *Piper,* 454 U.S. at 260-61.
[197] *Gilbert*, 330 U.S. at 509.

U.S. MNCs from having harmful conduct abroad, the Scottish interest in hearing the matter was much more important.[198] Many courts followed this decision using the location of the cause of action as determinant of the interest of the alternative forum.[199]

C. State Courts and the *Forum Non Conveniens* Doctrine

As it is an interpretation of the federal *forum non conveniens* law, the *Piper* decision does not bind state courts.[200] However, the doctrine in state courts generally follows the federal standard with few changes.[201] Courts in Texas and Louisiana have held that the doctrine does not exist in those states' laws, at least one California court has chosen not to follow *Piper*, and Florida has conditioned *forum non conveniens* dismissal to limited factual circumstances. As an illustration, one should have a closer look at the California case, *Holmes v. Syntex Lab., Inc*.[202] British plaintiffs sued a U.S. drug company and its American affiliates in California in order to recover damages allegedly caused by the ingestion of Norinyl, an oral contraceptive.[203] Syntex argued that there should be a dismissal on *forum non conveniens* grounds and that it would agree to waive any statute of limitations defense if the British courts had jurisdiction. The California Court of Appeal overruled the dismissal granted by the California court, arguing that California

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[198] *Piper*, 454 U.S. at 260-61.
[199] *See, e.g*., Dowling v. Richardson-Merrell, Inc., 727 F.2d 608, 612 (6th Cir. 1984) (noting possibility of need to view site of cause of action); Dahl v. United Technologies Corp., 632 F.2d 1027, 1031 (3d Cir. 1980) (recognizing Norway's interest in case because crash occurred in Norway).
[200] *See* Linda J. Silberman, *Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard*, 28 TEX. INT'L L.J. 501, 502 (1993).
[201] For a discussion of state *forum non conveniens* doctrine, *see* Robertson & Speck*, supra* note 71, at 950. The authors maintain that 32 states have adopted something closely resembling the federal standard of *forum non conveniens*, and only three states (Louisiana, Georgia, and Texas) have rejected the doctrine. *Id*. at 950.
[202] 202 Cal. Rptr. 773 (Cal. Ct. App. 1984).
[203] *Id.* at 774.

was not a convenient forum to the defendant.[204] In fact, it found sufficient connection between California, where defendants had performed premarketing research and clinical trials for the drug and the litigation with the forum chosen by the plaintiff.[205] The court found three reasons for which its doctrine should differ from the federal one: first, California gives more deference to the plaintiff's choice of forum,[206] second, the state takes into account a greater weight to the likelihood that a dismissal would lead to the application of a choice of law less favorable to the plaintiff,[207] and finally, the criterion used for the alternative forum is not an adequate forum but a suitable one.[208]

Another significant case refusing to dismiss litigation on grounds of *forum non conveniens* is *Dow Chemical Co. v. Castro Alfaro*[209] decided by the Texas Supreme Court. Costa Rican employees of Standard Fruit were injured in Costa Rica by pesticides manufactured by American companies. The Texas Supreme Court reversed the trial court dismissal decided on *forum non conveniens* grounds. In fact, the Court relied on a Texas statute, which provided that an action for damages for the death of personal injury of a foreign citizen "may be enforced in the courts of this state... if the country has equal treaty rights with the United States on behalf of its citizens."[210] The Court found that this statute superseded a trial judge's discretion to dismiss litigation on *forum non conveniens* grounds.[211] Nevertheless, a short time after this decision, because of the strong lobbying of corporations, the Texas legislature enacted a bill overruling *Alfaro* and according to

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[204] *Id.* at 785.
[205] In the court's view, this conduct tended to support the plaintiff's claim that the defendants, through conduct in California, "caused and allowed" Norinyl to be distributed and marketed in the United Kingdom. *Id.* at 775.
[206] *See id.* at 778.
[207] *See id.* at 778.
[208] *See id*. at 780.
[209] 786 S.W.2d 674 (Tex. 1990).
[210] TEX.CIV.PRAC. & REM.CODE ANN. § 71.031(a) (West 1993).

which the doctrine of *forum non conveniens* was reestablished provided that there was no personal injury or wrongful death actions resulting from violations of Texas or U.S. law.[212]

An important question is asked to federal courts about the effect of *state forum non conveniens* doctrine in diversity of citizenship actions under the doctrine of *Erie Railroad Co. v. Tompkins*.[213] In fact, the Supreme Court has never really answered the question of whether a federal court, sitting in diversity, should apply the federal or state standard of *forum non conveniens*. The courts that have dealt with the issue have usually decided that the federal standard should apply.[214] For example, in *Sibaja v. Dow Chemical Co*.,[215] the Eleventh Circuit applied the federal standard although its application was changing the outcome of the case on the basis that a rule of venue was not a substantive law.[216] The Fifth Circuit Court of Appeals also applied the federal standard in *In re Air Crash Disaster near New Orleans, LA*.[217] The Court took into account the two aims of the *Erie* doctrine: deterrence of forum shopping for which the application of state law was more appropriate,[218] and deterrence of inequitable administration of the laws for which the application of federal law was more suitable.[219] Consequently, the court decided that the federal interest in self-regulation and administrative independence outweighed the

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[211] *Id*. §§ 71.051(a) and (g).
[212] The bill took effect in 1993 and applied to all actions files on or after that date. *See id.* § 71.051(a).
[213] 304 U.S. 64 (1938).
[214] In re Air Crash Disaster near New Orleans, LA, 821 F.2d 1147 (5th Cir. 1987), *cert. granted*, 490 U.S. 1032 (1989); Sibaja v. Dow Chem. Co., 757 F.2d 1215 (11th Cir. 1985), *cert. denied sub nom*. Pan Am. World Airways, Inc., 474 U.S. 948 (1985).
[215] 757 F.2d 1215 (11th Cir. 1985), *cert. denied*, 474 U.S. 948 (1985).
[216] *Id.* at 1219.
[217] 821 F.2d 1147 (5th Cir. 1987), *cert. granted*, 490 U.S. 1032 (1989).
[218] *Id.* at 1158.
[219] *Id.* at 1157.

"disruption of uniformity" between the state and federal courts that would result from application of the federal standard.[220]

D. Case of Choice of Forum Clauses

The choice of forum clauses is dealt totally differently by U.S. courts. In fact, after the Supreme Court's decision in *Bremen v. Zapata Off-Shore Co*.,[221] almost all federal[222] and state[223] courts have generally enforced the parties' choice of forum clauses.[224] In *Bremen*, the Court upheld a forum clause in a transaction completely unconnected with the chosen forum. However, it noted that a forum clause would not be enforced if it were invalid "for such reasons as fraud or overreaching," or if the enforcement would be "unreasonable and unjust," or contrary to a strong public policy of the forum.[225] Thus, *forum non conveniens* is not used by U.S. courts to void choice of forum clauses.

E. Implications of the *Forum Non Conveniens* Doctrine

With the enactment of section 1404(a) transfers, the *forum non conveniens* doctrine in federal courts is effectively limited to suits brought by foreign plaintiffs against U.S.-based MNCs. Usually, the litigation involves a personal injury claim for an accident that

[220] *Id*. at 1157.
[221] 407 U.S. 1 (1972).
[222] *See, e.g.,* Foster v. Cheesecake Ins. Co., Ltd., 933 F.2d 1207 (3d Cir. 1991); Spradlin v. Siegler Mgmt. Servs. Co., Inc., 926 F.2d 1207 (3d Cir. 1991).
[223] *See, e.g.,* ABC Mobile Sys., Inc. v. Harvey, 701 P.2d 137 (Colo. Ct. App. 1985).
[224] *See also* Scherk v. Alberto Culver Co., 417 U.S. 506 (1974), *reh'g denied*, 419 U.S. 885 (1974); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. 473 U.S. 614 (1985) (in both cases an arbitration clause was upheld); Carnival Cruise Lines v. Shute, 499 U.S. 585 (1991).
[225] *Bremen,* 407 U.S. at 15.

occurred in a foreign country concerning the MNC's product or service.[226] The defendant MNC then invokes the *forum non conveniens* dismissal and therefore is protected from any liability at least in the U.S.

1. Discrimination Against Foreign Plaintiffs

In *Piper*, the Court decided to give a diminished force to a foreign plaintiff's choice of a U.S. forum because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, and a foreign plaintiff's choice deserves less deference.[227] Before *Piper*, there was a strong presumption on the plaintiff's choice of forum, be it a foreign or domestic litigant. Now, the presumption is not applicable to foreign plaintiffs anymore. Another effect of *Piper* is that the outcome of a dismissal claim is easier to predicate.[228] Moreover when courts fail to recognize or examine the citizenship of the plaintiff, this constitutes an abuse of trial discretion.[229]

2. The Outcome Determinative Effect

Professor Robertson conducted an informal mail survey of 180 transnational cases dismissed from U.S. courts for *forum non conveniens*. Of the returned responses for eighty-five cases, eighteen cases were not pursued further in the foreign forum, twenty-two settled for less than half the estimated value, and in twelve, the U.S. attorneys had lost track of the outcome. None of the reported cases proceeded to a courtroom victory in

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[226] *See, e.g.*, Stewart v. Dow Chem. Co., 865 F.2d 103 (6th Cir. 1989) (Canadian plaintiffs file products liability suit against Michigan manufacturer of herbicide); De Melo v. Lederle Lab., 801 F.2d 1058 (8th Cir. 1986) (Brazilian citizen sues New York manufacturer of drug based on products liability theory).
[227] *Piper*, 454 U.S. at 255-56.
[228] *Id.* at 255-61.
[229] *See* Gates Learjet Corp. v. Jensen, 743 F.2d 1325, 1334-35 (9th Cir. 1984).

the foreign forum.[230] This shows that most of the times, U.S. MNCs are never held liable for their wrongful activities abroad.

3. Evasion of Responsibility of the U.S. MNCs (Economic Imperialism)

MNCs may easily be exempted from their harmful conduct by obtaining a *forum non conveniens* dismissal of claims by foreign plaintiffs. In fact, they can even distribute products that are banned or restricted for domestic use in the U.S.[231] For instance, a U.S. corporation did not comply with domestic regulation concerning the manufacture of children's sleepwear.[232] So it sent the products to countries whose regulation was not as strict.[233] Some judges feel that the United States has a strong interest in assuring the safe regulation of American industry, even when there is a strong effect in a foreign country.[234] Moreover, the Supreme Court has held that federal statutes do not apply extraterritorially in the absence of clear congressional intent to the contrary.[235] On the other hand, some courts have noticed a "paternalistic" attitude on the part of those wishing to hold MNCs liable in the United States for harms caused abroad.[236] They argue at the same time that these foreign countries can protect their citizens.[237] To counter the paternalistic argument, proponents of MNCs' liability in the U.S. have shown,

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[230] *See* Robertson, *supra* note 59,at 418-19.
[231] *See generally* Lairold M. Street, Comment, *U.S. Exports Banned for Domestic Use, But Exported to Third World Countries*, 6 INT'L TRADE L.J. 95 (1981).
[232] *Id.* at 97.
[233] *Id.*
[234] *See, e.g.,* Dahl v. United Technologies Corp., 632 F.2d 1027, 1033 (3d Cir. 1980) (national interest in regulation of aircraft industry not enough to tip scales to retain jurisdiction).
[235] *See* EEOC v. Arabian Am. Oil Co., 111 S. Ct. 1227 (1991).
[236] *See, e.g.,* Allin C. Seward III*, After Bhopal: Implications for Parent Company Liability*, 21 INT'L LAW 695, 705-06 (1987). *See also* DeMateos v. Texaco, Inc., 562 F.2d 895, 902 (3d Cir.1977) (exporting liberal U.S. tort policies is a form of "social jingoism"), *cert. denied*, 435 U.S. 904 (1978); In re Union Carbide Corp. Gas Plant Disaster, 634 F.Supp. 842, 867 (S.D.N.Y. 1986) (retaining suit in U.S. forum would be imperialism, when an established sovereign imposes standards and values on a developing nation), *aff'd,* 809 F.2d 195 (2d Cir.), *cert. denied,* 484 U.S. 871 (1987).

governments of less developed countries are willing to offer low regulation, low costs and high returns to MNCs in return for a plant in their country to develop the economy.[238] There has been a 'race to the bottom' in the competition between these governments to offer the least protective tort liability law.[239]

4. A Doctrine Totally at the Discretion of the Courts

In *Piper*, the Court emphasized that the *forum non conveniens* decision rests primarily with the trial court: when that court "has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference."[240] A dismissal on *forum non conveniens* grounds should be reversed only for a "clear abuse of discretion."[241] Thus, the judicial discretion is virtually unreviewable. In the U.S., a trial judge can usually immunize his or her decision only by enumerating the two sets of factors established in *Gilbert* and *Piper*.

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[237] DeMateos, 562 F.2d at 902.
[238] *See* Matthew Lippman, *Transnational Corporations and Repressive Regimes: The Ethical Dilemma*, 15 CAL. W. INT'L L.J. 542, at 545 (1985).
[239] *Id.*
[240] *Piper,* 454 U.S. at 257.
[241] *Id.* at 257 (emphasis added). A commonly given example of an abuse of discretion is a trial court's failure "to consider one or more of the important private or public interest factors." Reid-Walen v. Hansen, 933 F.2d 1390, 1394 (8th Cir. 1991).

CHAPTER 4

FORUM SELECTION WITHIN EUROPE: THE BRUSSELS AND LUGANO CONVENTIONS

After reviewing the history and the evolution of the Brussels[242] and Lugano[243] conventions in first section, this chapter will focus on the scope and the rule of jurisdiction of the conventions. Finally, it will compare the *forum non conveniens* with the European rules.

A. History and Evolution of the Conventions

Continental Europe's history of jurisdictional law has covered a much longer period of time than Anglo-American law.[244] Nevertheless, some European countries have exorbitant jurisdictional rules. For example, section 23 of the German Civil Procedure Code provides for *in personam* jurisdiction over nonresident defendants who own assets of any value in Germany, even though there is no connection between the litigation and Germany.[245] France has an even more exorbitant rule in article 14 of its Civil Code,

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[242] The European Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (O.J.E.C. No. L229/32 (1968) *reprinted in* 8 I.L.M. 229 [hereinafter Brussels Convention]).
[243] The Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (O.J.E.C. No. L 285/1 (1988), *reprinted in* 28 I.L.M. 620 [hereinafter Lugano Convetion].
[244] Friedrich Juenger*, Judicial Jurisdiction in the United States and in the European Communities: A Comparison*, 82 MICH. L. REV. 1195, at 1203 (1984) (saying that as early as the Justinian Code, the rule according to which the courts at the defendant's residence are entitled to exercise general personal jurisdiction existed already. He adds that Roman law recognized the concept of limited jurisdiction by permitting the plaintiff to sue in tort at the place of the wrongful conduct, to bring contract actions at the place of the execution or performance, and to vindicate property rights at the *situs*).
[245] See R. SCHLESINGER, COMPARATIVE LAW 363, 372-73 (4th ed. 1980).

which authorizes French plaintiffs to sue anyone in French courts whether or not the dispute has any connection with France. Article 15 states that French citizens can only be sued in France. In spite of the many criticisms in and outside France,[246] many European legal systems copied the French system. Moreover, none of these countries adopted the *forum non conveniens* doctrine,[247] so that, even when a suit is brought to harass a defendant, courts have to hear the case.

In order to mitigate the effects of this "law of the jungle," the original six Member States of the European Community (EC) signed the Convention on Jurisdiction and the Enforcement of Judgments of Civil and Commercial Matters (Brussels Convention) in Brussels on September 27, 1968. Its origins can be found in the Treaty of Rome, the founding treaty of the European Community.[248] Article 220 provides in pertinent part: "Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals [...] the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards." Despite the wording of this provision, the Brussels Convention goes far beyond judgment recognition, enforcement and the "simplification of formalities" governing reciprocity in recognition and enforcement. It provides for the foundation of a uniquely European body of procedural body of procedural law.[249] In a note sent to the Member States on October 22, 1959, inviting them to commence

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[246] *See, e.g.*, 2 H. BATTIFOL & P. LAGARDE, DROIT INTERNATIONAL PRIVE 483 (7th ed. 1983).
[247] *See* Schlosser, Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and to the Protocol on its Interpretation by the Court of Justice [hereinafter 1979 Schlosser Report], 22 O.J. EUR. COMM. (No. C 59) 71, 97 (Mar. 5, 1979).
[248] Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.NT.S. 11.

negotiations as envisaged in Article 220 of the founding treaty, the Commission of the EEC stated that:

> "a true internal market between the six States will be achieved only if adequate legal protection can be secured. The economic life of the Community may be subject to disturbances and difficulties unless it is possible, where necessary by judicial means, to ensure the recognition and enforcement of the various rights arising form the existence of a multiplicity of legal relationships. As jurisdiction in both civil and commercial matters is derived from the sovereignty of Member States, and since the effect of judicial acts is confined to each national territory, legal protection and, hence, legal certainty in the common market are essentially dependent on the adoption by Member States of a satisfactory solution to the problems of the recognition and enforcement of judgments."[250]

Thus, under the Brussels Convention, a judgment rendered in one Member State is automatically recognized and enforceable in all other Member States, with some exceptions. Hence, it outlawed the use against Common Market domiciliaries of article 14 of the French Civil Code, section 23 of the German Civil Procedure Code and the similar provisions of other European countries.[251] It has been described as the European equivalent of the United States Constitution's Full Faith and Credit Clause.[252]

In 1971, the original Member States of the EC signed a protocol granting the European Court of Justice the competence to interpret the Brussels Convention.[253] In this way, the signatories sought to eliminate the problem of varying interpretations of the

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[249] The Brussels Convention has been described as the "foundation of a 'European Law of Procedure.' " Christian Kohler, *Practical Experience of the Brussels Jurisdiction and Judgments Convention in the Six Original Contracting States*, 34 INT'L & COMP.L.Q. 563, 563 (1985).

[250] P. Jenard, Official Report on the Original Brussels Convention of 1968, 1979 O.J. (C 59) 1, 3.

[251] *See* Brussels Convention, art. 3.

[252] *See e.g.,* Lee S. Bartlett, *Full Faith and Credit Comes to the Common Market: An Analysis of the Provisions of the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*, 24 INT'L & COMP.L.Q. 44 (1975); *see also* Bruce M. Landay, *Another Look at the EEC Judgments Convention: Should Outsiders Be Worried?*, 6 DICK.J.INT'L L. 25, 25 (1987).

[253] Protocol on the Interpretation by the Court of Justice of the Convention of Sept. 27, 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, done June 3, 1971, 1975 O.J. (L 204) 28. The official English language version of the Protocol is published at 1978 O.J. (L304) 50. The original text of the Brussels Convention does not specifically address the subject of interpretation, although a joint

Convention, a significant issue because of the diverse legal traditions of the Member States.[254] Under the Protocol, entered into force on September 1, 1975, the courts of Member States may ask the European Court of Justice [hereinafter ECJ] to interpret the Brussels Convention and its various attendant treaties and agreements.[255]

One of the fundamental principles of the Brussels Convention is that "any State which becomes a member of the European Economic Community is required to accept the Convention as a basis for the negotiations necessary to ensure the implementation of Article 220 of the Treaty of Rome."[256] The United Kingdom, Ireland, and Denmark became members of the EC in 1973[257] and agreed in a separate act of accession to enter into negotiations with a view toward accession to the Brussels Convention.[258] Consequently, the Convention entered into force on June 1, 1988 among the six original Member States, the United Kingdom, Ireland, and Denmark. The Convention entered into force between Greece and the other parties on October 1, 1989. Spain and Portugal signed a convention of accession in 1989. By a 1996 accession convention, Austria, Finland and Sweden were the last countries to join the Brussels Convention.

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declaration appended to the Convention stipulates that the parties would examine the possibility of conferring interpretative authority upon the Court of Justice.

[254] The difficulty in interpreting the Brussels Convention was reinforced by the fact that the Convention was produced in four official languages: Dutch, French, German and Italian. *See* Brussels Convention, art. 68.

[255] The Court of Justice is without authority to interpret the Lugano Convention, the 1988 agreement signed by the Member States of the EC and the EFTA. *See infra* note 254. The Lugano Convention, however, provides for another mechanism to ensure the uniform interpretation of the text. *See infra* note 2560

[256] Report by Martinho de Almeida Cruz et al. on the Convention on Accession of the Kingdom of Spain and the Portuguese Republic to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and to the Protocol on Its Interpretation by the Court of Justice with the Adjustments Made to Them by the Convention on the Accession of the Kingdom of Denmark, of Ireland and, of the United Kingdom of Great Britain and Northern Ireland and the Adjustments Made to Them by the Convention on the Accession of the Hellenic Republic, 1990 O.J. (C 189) 35, 38, *reprinted in* 29 I.L.M. 1471, 1479.

[257] Treaty Concerning the Accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community (and to the European Atomic Energy Community), Jan. 22, 1972, 1972 O.J.SPEC.ED. (L 73) 5.

In 1988, the Member States of the EC and the Member States of the European Free Trade Association [hereinafter EFTA] concluded a convention in Lugano, Switzerland on jurisdiction and enforcement of judgments in civil and commercial matters. The Lugano Convention was intended to ensure the free movement of judgments among Member States of the EC and the EFTA. It is based substantially on the Brussels Convention. However there are still two separate conventions. According to article 54B of the Lugano Convention that deals with the interrelationship between the two conventions, the Lugano Convention "shall not prejudice the application" of the Brussels Convention, but it shall apply "in matters of recognition and enforcement, where either the State of origin or the State addressed is not a member of the European Communities." A protocol annexed to the Lugano Convention established a system designed to ensure the uniform interpretation of the agreement.[259]

Recently, it was decided that the Brussels Convention will be replaced by Council Regulation (EC) No. 44/2001, covering the same field and entering into force on March 1, 2002. Denmark does not take part in the adoption of the Regulation, which will not, therefore, be binding upon Denmark and is not applicable to it. Thus, the relations between Denmark and the other Member States bound by the Regulation are governed by the Brussels Convention and the 1971 Protocol. Despite this change, in order to simplify

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[258] Act concerning the Conditions of Accession and Adjustments to the Treaties, 1972 O.J.SPEC.ED. (L 73) 14.

[259] The drafters of the Lugano Convention were confronted with the danger that the courts of EFTA Member States might interpret the convention differently than the Brussels Convention. The signatories of the Lugano Convention agreed on a protocol designed to ensure the uniform interpreation of the treaty. Under this interpretation protocol, judgments delivered under the Brussels and Lugano Conventions are to be communicated to central authorities in each Signatory State. Additionally, meetings are to be held from time to time in which representatives of the various signatory States shall exchange their views on the functioning of the Lugano Convention. P. Jenard & G. Moller, Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters done at Lugano on September 16, 1988, 1990 O.J. (C 189) 58, at 89-93, *reprinted in* 29 I.L.M. 1481, at 1496-98.

our discussion, we will still refer to the Brussels Convention although we have to keep in mind that it is no longer applicable.

B. Scope of the Conventions: The Rejection of *Forum Non Conveniens*

The scope of the Brussels Convention is limited by its terms to "civil and commercial matters" whatever the nature of the court or tribunal.[260] However, the Convention does not give a definition of these terms. In an important decision, the European Court of Justice held that the definition should be a Community one, independent of Member State law; thus, it implicates a reference to the objectives and scheme of the Convention.[261] According to the Court, the purpose of this rule was to ensure the uniform application of the Brussels Convention to parties existing in diverse legal systems. The Convention expressly exempts from its scope four fields of law: (1) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession; (2) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings; (3) social security; (4) arbitration.[262] A subsequent amendment to the Brussels Convention added the provision that it "shall not extend, in particular, to revenue, customs or administrative matters."[263]

[260] Brussels Convention, art.1(1).
[261] Case 29/76, LTU Luftransportunternehmen GmbH & Co. KG v. Eurocontrol, 1976 E.C.R. 1541, 1 C.M.L.R. 88 (1977).
[262] Lugano Convention, art. 1; Brussels Convention, art. 1.

C. Rule of Jurisdiction

1. General Rule

The Convention establishes a basic rule that the defendant must be sued in the Contracting State in which he, she, or it is domiciled,[264] and can only be sued in the courts of another Contracting State to the extent that the Convention permits.[265] As a consequence, the application of certain rules of jurisdiction existing in the national law of Contracting States, which are considered to reflect an exorbitant exercise of jurisdiction may not be invoked against defendants who are domiciled in a Contracting State.

2. Special Jurisdiction

The Brussels Convention has created alternative bases of jurisdiction to the one founded on domicile. Thus, a defendant domiciled in a Contracting State may be sued in the courts of another Contracting State "in matters relating to a contract", if the latter Contracting State is the "place of performance of the obligation in question."[266] In the same way, "in matters relating to a tort, delict or quasi-delict," the defendant may be sued in the Contracting State "where the harmful event occurred."[267] When a person domiciled in a Contracting State is one of a number of defendants, that person may also be sued in the courts for the place where any one of those defendants is domiciled.[268] As another

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[263] Convention Consolidated Text, art. 1. This provision was added by the 1978 Accession Convention. *Id.*
[264] Brussels Convention, art. 2. Curiously, the Convention does not define "domicile" in relation to individuals. The definition is expressly left to national law. *Id*. art. 52.
[265] Brussels Convention, art. 3.
[266] Brussels Convention, art. 5(1).
[267] Brussels Convention, art. 5(3). Article 5 also provides special rules for maters relating to maintenance creditors; civil claims for damages or restitution based on an act giving rise to criminal proceedings; and trusts and salvage.
[268] Brussels Convention, art. 6(1). Article 6(2) deals with third party proceedings. Article 6(3) addresses counterclaims and article 6(4) deals with contractual actions can be combined with an action against the same defendant, which relates to a right in rem in immovable property.

example, enterprises domiciled in a Contracting State that maintain a branch or other establishment in another Contracting State can be sued there on causes of action arising out of these local operations.[269] Certain classes of plaintiffs, i.e., consumers, policyholders and support claimants are accorded the jurisdictional privilege to litigate in the Contracting State in which they are domiciled.[270] The Convention authorizes joining and impleading parties not otherwise subject to the jurisdiction of the court in which the principal action is pending.[271] Additionally, by means of forum-selection clauses, the parties can stipulate to the jurisdiction of Contracting State courts.[272]

3. Exclusive Jurisdiction

Section 5 provides that in certain cases (specified in Article 16) the courts are to have exclusive jurisdiction irrespective of the domicile of the defendant. The policy basis of Article 16 is that the courts identified as having exclusive jurisdiction are so closely connected with the subject matter as to justify their being given sole control over the issue. The first of these 3 exceptions is proceedings relating to land, and more particularly to "rights *in rem* in, or tenancies of, immovable property". Here, exclusive jurisdiction is conferred by the Convention upon courts for the state where the property is situated.

The second area where the Convention confers jurisdiction exclusively on the courts of one state relates to proceedings concerning the validity of any constitution of a

[269] Brussels Convention, art. 5(5).
[270] Brussels Convention, art. 14 (consumer transactions, as defined in art. 13); art. 8 (2) (policyholders); art. 5(2) (support claimants); art. 9 (liability and real property insurers suable at place of harm) and art. 10(2) and (3) (direct actions).
[271] Brussels Convention, art. 6(1) and (2); art. 6(3) (counterclaims).
[272] Brussels Convention, art. 17. Articles 12 and 15 restrict the contractual designation of a forum in cases involving policyholders and consumers.

company, association or other legal person or its dissolution. Such proceedings must take place in the state where the company has its basis of operation.

The third area concerns intellectual property and proceedings relating to the registration or validity of patents, trademarks, designs or other registered intellectual property rights. These proceedings must be taken in the state where the registration was applied for or has taken place. The Convention recognizes that despite the attempt to confer exclusive jurisdiction on the courts of one Contracting State by virtue of Article 16, actions may nonetheless fall within the exclusive jurisdiction of the courts of more than one Contracting State. In such cases, any court other than the court first seized must decline jurisdiction.[273]

Article 17 allows parties to a contract or dispute to enter into a jurisdiction agreement confirming jurisdictions on the courts at whichever Contracting State they prefer. The agreement must be in writing or evidence in writing or capable of being inferred from an international trade or activity of which the parties were or should be aware (this does not apply to insurance or consumer contracts). It does not apply to determine the validity of a forum clause conferring jurisdiction on a court outside the contracting states.

Finally in accordance with Article 18, a defendant submits voluntarily to the jurisdiction of a foreign court irrespective of the terms of the Convention then that foreign court is in most cases entitled to deal with the case.

D. Implication for MNCs: The Notion of the Seat of the Corporation (Article 53)

Under the Convention, the domicile of a company is known as its seat. No uniform definition of seat/domicile is provided in the Convention. The determination of the seat of

a company for the purposes of the Convention is left to the private international law rules of the court of the Contracting State seized of the case.[274]

E. Comparison with the *Forum Non Conveniens* Theory

According to Professor Juenger, the provisions of the Brussels Convention can be compared to the long-arm statutes of the American system.[275] He found that foreign corporations doing business in the U.S. cannot be sure of the extent there are subject to general jurisdiction;[276] on the contrary, the Convention provides for specific rules according to which the cause of action can only be brought at a member state corporation's principal place of business.[277] Professor Juenger notices that, although the European approach seems to be in better position than the American approach, in one field it looks behind the U.S. concepts of jurisdictional propriety.[278] In fact under the fourteenth amendment and the due process clause protecting even nonresident aliens,[279] the American law on jurisdiction appears non-discriminatory.[280] On the other hand, the Convention does treat aliens equally with member state domiciliaries or corporations. In effect, articles 3 and 4 authorize the use of the member states' exorbitant jurisdictional provisions in two situations when parties domiciled outside the Common Market are

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[273] Brussels Convention, art. 23.
[274] Brussels Convention, art. 53.
[275] Juenger, *supra* note 244, at 1207.
[276] *See id.* (*citing* E. SCOLES & P. HAY, CONFLICT OF LAWS 297-302, 332-37 (1982)).
[277] Brussels Convention, art. 2 and 53, par.1.
[278] Juenger *supra* note 244, at 1210.
[279] Guessefeldt v. McGrath, 342 U.S. 308, 318 (1952) (dictum); Russian Fleet v. United States, 282 U.S. 481 (1931).
[280] According to Juenger, even federal courts, whose jurisdiction is limited by the due process clause of the fifth rather than the fourteenth amendment, consider it axiomatic that a nonresident alien's amenability to suit is controlled by International Shoe and its progeny. *See, e.g.,* American Land Program, Inc. v. Bonaventura Uitgevers Maatschappij, N.J., 710 F. 2d 1449, 1452 n.1 (10 th Cir. 1983) (diversity case); Wells Fargo & Co. v. Wells Fargo Exp. Co., 556 F. 2d 406, 416 n.7 (9th Cir. 1977) (trademark infringement).

involved.[281] So in those cases, article 14 of the French Civil Code and section 23 of the German Code of Civil Procedure or other unreasonable national jurisdictional provisions are applicable. However, this open discrimination does not seem to pose any practical problem.[282] In fact, the Court of Justice has never dealt with issues relating to article 4. Moreover, the protection of fundamental rights and the need for adequate procedural safeguards are essential for the Court of Justice; thus, if the matter arised, the European judges would find a solution to lessen these discriminations.

Professor Juenger concludes that despite of the discriminations of the European approach, it appears to be more functional and pragmatic than the American 'imprecise' test.[283]

[281] According to Juenger, such unequal treatment is not limited to jurisdiction; it permeates the entire Convention and affects the rules on recognition as well as such important safeguards as the right to be heard. *See generally* Juenger, *La Convention de Bruxelles du 27 septembre 1968 et la Courtoisie Internationale*, 72 R.C.D.I.P. 37 (1983).
[282] Juenger *supra* note 244, at 1212.
[283] Calder v. Jones, 104 S. Ct. 1482, 1487 (1984).

CHAPTER 5

THE PARTICULAR SITUATION OF UNITED KINGDOM

A. Historical Developments

Until 1906, English courts could use their discretionary power in jurisdictional issues under the *lis alibi pendens* doctrine, provided that the same controversy was pending in England and abroad and involved the same parties and subject matter.[284] In 1906, the English court, referring to Scottish law[285] and two U.S. *forum non conveniens* cases,[286] granted a stay of proceedings on the basis of "vexatious" and "oppressive" motives of the plaintiff that amounted to an "abuse of process."[287] In *St. Pierre v. South American Stores (Gath & Chaves), Ltd.*,[288] Lord Justice Scott summarized the jurisprudence in stating:

> "The true rule … may I think be stated thus: (1) A mere balance of inconvenience is not sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused. (2) In order to satisfy a stay two conditions must be satisfied, one positive and the other negative; (a) the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way; and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant."[289]

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[284] 1 DICEY & MORRIS, DICEY AND MORRIS ON THE CONFLICT OF LAWS 390, 396 (1987); G.C. CHESHIRE & P.M. NORTH, PRIVATE INTERNATIONAL LAW 205, 222 (11th ed. 1987).
[285] Logan v. Bank of Scotland, [1906] 1 K.B. 141, 142.
[286] Gardner v. Thomas, 14 Johns. 134 (N.Y. Sup. Ct. 1817); Collard v. Beach, 87 N.Y.S. 884 (A.D. 1904).
[287] Logan, [1906] 1 K.B. at 141.
[288] [1936] 1 K.B. 382 (C.A.).
[289] *Id.* at 398 (emphasis added).

As an effect, even though there was no connection between England and the cause of action, anybody could bring a suit in English courts.[290] Nevertheless, English courts developed a more restrictive *forum non conveniens* doctrine in 1974 in the *Atlantic Star*,[291] developed further in *MacShannon v. Rockware Glass, Ltd.*,[292] and in the *Abidin Daver* case.[293] In fact, the English courts were suddenly more concerned about judicial comity than judicial chauvinism.[294] A final case, *Spiliada Maritime Corporation v. Cansulex, Ltd.*,[295] standardized the *forum non conveniens* approach by English courts.

B. The *Spiliada* Case: Application of the *Forum Non Conveniens*

The *Spiliada* case sets forth an appropriateness test. Cansulex was an exporter of sulfur from British Columbia; Spiliada owned a ship, flying the Liberian flag. Plaintiffs brought suit in an English court in 1984, claiming damages for corrosion and other damages to the ship caused by the loading of wet sulfur cargo in British Columbia in November 1980. The plaintiffs obtained a "leave to serve a writ out of jurisdiction" according to Order XI, in order to obtain jurisdiction of an English court over the foreign company defendant.[296] The defendant unsuccessfully challenged the court's jurisdiction, and the court, holding that the determinative criteria for both the *forum conveniens* and

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[290] *See* Maharanee of Baroda v. Wildenstein, [1972] 2 Q.B. 283.
[291] [1974] A.C. 436. The House of Lords held that a stay should be granted in an action *in rem* between Dutch and Belgian ship owners which arose out of a collision on the River Scheldt leading to the port of Antwerp, and this occurred in the Belgian waters.
[292] [1978] A.C. 795. The House of Lords launched a de facto incorporation of *forum non conveniens* doctrine into English law in applying the "most suitable forum" approach to stays of proceedings. *Id.* at 812.
[293] [1984] A.C. 398. In this case, a Cuban vessel collided with a Turkish vessel in Turkish waters. An action was started by the Turkish owners in Turkish court in Istanbul. The Cuban owners began an action *in rem* in the English Admiralty Court. The Turkish owners asked for a stay of this action, and this was eventually granted by the House of Lords.
[294] *Id.* at 411.
[295] [1987] A.C. 460.
[296] *Id*. at 467.

the *forum non conveniens* were identical and inseparable,[297] declared itself to be the *forum conveniens*.[298] The English court took into account two factors in deciding on the convenient forum. First, there was an identical case already pending in an English court[299] in which both ships had the same insurance company, were represented by the same counsel and involved the same facts.[300] Second, the statute of limitations had already run in British Colombia, making a trial in this alternative forum impossible.[301]

There are two requirements under the *forum non conveniens* as developed by *Spiliada*. First, the defendant, who is sued as of right before the English forum, must show that there is another available forum, which is clearly or distinctly more appropriate than the English forum, in that the case may be tried more suitably there in the interests of all the parties and the ends of justice. Secondly, provided that the defendant can discharge this burden by showing that there is some other available forum that is *prima facie* more appropriate for the trial, the court will normally grant a stay unless the claimant can show that, even though there are factors connecting the proceedings with the foreign forum, substantial justice will not be obtained in the foreign jurisdiction. This burden goes beyond merely showing that the claimant will enjoy procedural advantages, or a higher scale of damages or more generous rules on limitation if he or she sues in England, even if in some respects the foreign forum is less advantageous than the English forum. The connecting factors include convenience or expense, the availability of witnesses, the residence of the parties to the litigation and the governing law. The plaintiff must

[297] Spiliada Maritime Corp. v. Cansulex Ltd., 1987 App. Cas. 460 (appeal taken from C.A.).
[298] *Id*. at 460-61.
[299] Cambridgeshire, Bibby Bulk Carriers Ltd. V. Cobelfret NV, [1982] Q.B. (unreported decision).
[300] *Spiliada,* 1987 App. Cas. at 460-61.
[301] *Id.* at 486-87.

establish that substantial justice will be done in the otherwise appropriate forum.[302] In accordance with this test, the question is not one of convenience, but it is one of the suitability or appropriateness of the relevant jurisdiction.[303] Thus, the old *St Pierre* test, according to which plaintiffs were deprived of the right to prosecute their action in an English court only in exceptional cases, has been replaced by a more liberal approach, allowing a stay where England is an inappropriate forum.

Whereas in the U.S. under the *Piper* test, the court examines the multiple private and public factors to decide whether or not there is dismissal of the case, in England, the court examines two distinct components relating to availability of a better forum and whether the plaintiff, not the forum, would be disadvantaged by dismissal. A major difference is that English courts do not favor home plaintiffs over alien plaintiffs, like the U.S. approach does. However, the doctrine is applied in both the United Kingdom and the United States as a discretionary procedural device for the determination and exercise of a court's jurisdiction. Actually, the *Spiliada* decision allows for appellate review of judicial discretion of the trial court in both *forum conveniens* and *forum non conveniens* cases. As a consequence and disadvantage, the doctrine gives rise to uncertainty.

C. The Conflicting Adoption of the Brussels Convention

The doctrine of *forum non conveniens* is known only to the courts of two of the Contracting States of the Brussels Convention.[304] According to the Schlosser Report, Title II of the 1968 Convention is based on the rationale that a properly seized court

[302] *Id*. at 476-82.
[303] *Id*. at 474.

under the jurisdictional rules must determine the dispute to which the action relates.[305] Thus, there is a clear contradiction with the *forum non conveniens* approach based on discretion and flexibility. In accordance with Title II of the Convention, Contracting States have the obligation to exercise jurisdiction.[306] Schlosser states that "[a] plaintiff must be sure which court has jurisdiction. He should not have to waste his time and money risking that the court concerned may consider itself less competent than another."[307] On the other hand, the application of *forum non conveniens* relates to the discretion of the courts and the characteristics of each case. So, this uncertainty conflicts with the mandatory rule according to which the plaintiff can sue in the place where the defendant is domiciled. Professor Schlosser did not address the problem as to whether the *forum non conveniens* doctrine is compatible with the Convention scheme where the other forum is that of the courts of a non-Contracting State.

The Convention has been incorporated into the law of Great Britain by virtue of the Civil Jurisdiction and Judgments Act of 1982.[308] Section 49 contains a provision authorizing the English courts to grant a stay under the *forum non conveniens* doctrine, insofar as it is not inconsistent with the principles of the Brussels Convention. Some authorities interpret such a provision as evidence that the signatory States originally intended to allow application of the doctrine in cases of: (1) "abuse of process"; (2) choice of forum agreements between parties; and (3) *"lis alibi pendens"* in non-

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[304] As the Schlosser Report observed: "The idea that a national court has discretion in the exercise of jurisdiction either territorially or as regards the subject matter of a dispute does not generally exist in Continental legal system." *See* 1979 Schlosser Report, *supra* note 247, at 79.
[305] *See id.* It states that "The idea that a national court has a discretion in the exercise of jurisdiction either territorially or as regards the subject matter of a dispute does not generally exist in Continental legal systems." *Id*. at 97.
[306] *Id.* at 97-98.
[307] *Id.*
[308] Civil Jurisdiction and Judgments Act of 1982 (effective Jan. 1, 1983) (Eng.) [hereinafter 1982 Act].

Contracting States, because these cases are not even covered by the Convention.[309] The leading English case on the compatibility of the Brussels Convention with the doctrine of *forum non conveniens* is *In re Harrods (Buenos Aires) Ltd*.[310] In this case, the company in question had been incorporated and had its registered office in England. For the purposes of article 2 of the Convention, it was plainly domiciled in England. However, the business of the company had always been exclusively carried out in Argentina and its central management and control was exercised there. Moreover, the principal activity of the company was to operate a department store in Buenos Aires. The company was controlled by two shareholders, both Swiss-domiciled companies. The minority shareholder brought a suit in the English courts. The question arose as to whether *forum non conveniens* could apply. The minority shareholder argued that the company had an English domicile binding the English courts to assume jurisdiction under article 2 of the Convention. The Court of Appeal held that while a stay on the grounds of *forum non conveniens* was not available in cases where two competing jurisdictions were both Contracting States (i.e. England and another Contracting State),[311] there was nothing to prevent a grant of a stay when the "conflict" is between the courts of England and the courts of a non-Contracting State.[312] The decision of the Court of Appeal has since been followed in a number of subsequent cases.[313] Commentators have shown that the difficulties arising from the *Harrods* case come from the fact that the Convention does not provide general guidance as to its application in cases where there is a substantial

[309] *See* TREVOR C. HARTLEY, CIVIL JURISDICTION AND JUDGMENTS 79, 80 (1984).
[310] In re Harrods (Buenos Aires) Ltd. [1992] Ch 72 [Harrods].
[311] *Id,* at 93.
[312] *Id*. at 97.
[313] *See, e.g.,*The Po [1991] 2 Lloyds Rep. 206 (CA); The Nile Rhapsody [1994] 1 Lloyds Rep. 382 (CA); Sarrio S.A. v. Kuwait Investment Authority [1997] 1 Lloyds Rep. 113 (CA); Haji-Ioannou v. Frangos [1999] 2 Lloyds Rep. 337 (CA).

non-Community involvement in the litigation, either when the plaintiff is not domiciled in a Contracting State or where the conflict of jurisdiction is between the courts of a Contracting State and a non-Contracting State.[314] So, the problem concerns the scope of application of the Convention. Recently, the ECJ clarified the extent of its scope.

D. Hope for Foreign Plaintiffs Against MNCs: The Recent Interpretation of the European Court of Justice

In the case of *Group Josi Reinsurance Company S.A. v. Universal General Insurance Company*,[315] the ECJ casts doubt on the validity of *Harrods*. In this case, the respondent, a Canadian insurance company, entered into a reinsurance contract with the appellant, a company domiciled in Belgium. The contract had been brokered by a French company, acting as an agent of the respondent. Group Josi had been informed by the French agent that the main shareholders in the reinsurance contract were two U.S. reinsurance companies. Immediately prior to the acceptance of the reinsurance offer by Group Josi, the two U.S. companies informed the French agent that they intended to pull out of the reinsurance contract. This information was not passed on to Group Josi. One year later, the French agent sent Group Josi a statement of account showing the amount owing in respect of Group Josi's share of the risk. However, Group Josi, which had learned of the decision of the two U.S. companies to exit the deal, refused to pay, claiming that it had been induced to enter into the reinsurance contract on the basis of information which subsequently proved to be false. Universal General Insurance Company brought

[314] *See, e.g.*, Adrian Briggs, *"Forum Non Conveniens and the Brussels Convention Again",* (April 1991) 107 LMCLQ 180, 182.
[315] Group Josi Reinsurance Company S.A. v. Universal General Insurance Company [2000] ILPr 549 (ECJ).

proceedings against Group Josi in France. Group Josi argued that the French courts lacked jurisdiction because the courts in Belgium had jurisdiction, pursuant to the Brussels Convention, based on the fact that the defendant's registered office was in Belgium. The French court rejected this argument, holding that the Brussels Convention did not apply in respect of a Canadian company, and that the French courts had jurisdiction by virtue of French domestic law.[316] Group Josi appealed this ruling to the Versailles Court of Appeal. The Court observed that the question of whether the specific rules of the Convention can be used against a plaintiff domiciled in a non-Contracting State involves the question of extending Community law to non-member countries. Recognizing that an answer to this question required an interpretation of the Convention, the Court referred the matter to the ECJ for a preliminary ruling. The ECJ was asked: "Does the Brussels Convention apply not only to intra-Community disputes but also to disputes which are integrated into the Community? More particularly, can a defendant established in a Contracting State rely on specific rules on jurisdiction set out in that Convention against a plaintiff domiciled in Canada?"[317] In its ruling, the Court started with article 2 of the Convention, as it sets out the general rule that persons domiciled in a Contracting State are to be sued in the courts of that State, irrespective of the nationalities of the parties.[318] There are two categories of cases for which this principle is derogated: where rules of special jurisdiction or of exclusive jurisdiction in relation to certain subject-matter apply, the defendant will be sued in a court other than the one where it is domiciled. None of these exceptions were held to be relevant in this case. The Court concluded on the basis of its analysis of the scheme of the Convention that as a general

[316] *Group Josi,* para. 26.
[317] *Group Josi,* para. 32.

rule the domicile of the plaintiff is not relevant for the purpose of determining jurisdiction pursuant to the Convention. Thus, for the Court, the application of the rules of jurisdiction as set forth in the Convention depends only on the criterion of the defendant being domiciled in a Contracting State.[319] So, this led to the conclusion that the Convention is applicable to a dispute between a defendant domiciled in a Contracting State and a plaintiff domiciled in a non-member country.[320]

After this decision, the opinion in England was split as to the implications of such finding.[321] Commentators considered that *forum non conveniens* could not be a ground to stay a case when it involved a defendant domiciled in England.[322] Some others questioned this effect. For the moment, the English courts still apply *Harrods* as a valid rule for *forum non conveniens*.[323] In deciding *Harrods*, the Court of Appeal agreed that the doctrine of *forum non conveniens* could not be applied where two competing jurisdictions were both Contracting States.[324] On the other hand, when the conflict was between a non-Contracting State jurisdiction and the courts of England, the doctrine could be applied.[325] But, in *Group Josi*, the conflict was between the courts of two Contracting States. So this case does not rule the second part of the *Harrods* ruling: whether or not the Convention should apply when a domiciliary of a non-Contracting

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[318] *Group Josi*, para. 34.
[319] *Group Josi,* para. 57.
[320] *Group Josi,* para. 59.
[321] For a study of the implications of *Group Josi* in England, *see generally*, Christopher D. Bougen*, Time to Revisit Forum Non Conveniens in the U.K.? Group Josi Reinsurance Co. v. UGIC*, [2001] 32 VUWLR 705.
[322] Douglas Peden, *"Litigator's View",* The Lawyer 4 September 2000, 13; John Melville Williams, *"Forum Non Conveniens, Lubbe v. Cape and Group Josi v. Universal General Insurance",* [2001] 1 JPIL 72, 77.
[323] *See, e.g.*, Ace Insurance SA-NV v. Zurich Insurance Company and Zurich America Insurance Company [2001] EWCA CIV 17" [Ace Insurance (CA] (the Court of Appeal applied Harrods and decided that the courts had still discretion to grant a stay of proceedings on *forum non conveniens* where the English court had jurisdiction by virtue of the Lugano Convention).
[324] *Harrods,* at 93.

State sues a domiciliary in a Contracting State, and the conflict of jurisdiction is between the courts of these two countries or a third country that is not a Contracting State. However, as D. Bougen explains, the reasoning of *Harrods* can be broken down.[326] If the English courts had to deal with a situation in which, although both parties were domiciliaries of Contracting States, they had agreed to submit their disputes to a jurisdiction of a non-Contracting State, would they apply article 2 of the Convention that the Court of Appeal in *Harrods* consider as mandatory, or would they apply the rules of exclusive jurisdiction? Theoretically, they would uphold the choice of forum clause even if there is a conflict between a jurisdiction of a Contracting State and a jurisdiction of a non-Contracting State.[327] One should keep in mind that the rules of jurisdiction as set forth in the Convention were designed to provide simplicity and predictability to disputes in relation with the European Union. This has been illustrated recently in the *Lube v. Cape plc* case,[328] which involved claims against a British company by employees of its Southern African subsidiaries suffering disease from working in its asbestos mine. The suit was brought into the English courts, so the defendant argued a stay on grounds of *forum non conveniens*. After three first instance hearings, two appeals to the Court of Appeal and at last a House of Lords decision, the defendant's argument was rejected and it was decided that the case would be heard in England. However, the House of Lords decision refused to deal with the question whether the *forum non conveniens* doctrine should be replaced by the general principle of domicile as set forth in the Convention.

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[325] *Id.* at 95.
[326] Bougen, *supra* note 321, at 711.
[327] In fact, this theory can be said according to the remarks of Longmore in Ace Insurance SA-NV v. Zurich Insurance Co. and Zurich America Insurance Co. [2000] 2 Lloyd's Rep 423, para 21, at 21 (QB) [Ace Insurance (QB)].
[328] Lubbe v. Cape plc [2000] 4 All ER 268 (HL).

Although *Group Josi* did not totally solve the matter, it represents an important step towards the right direction, in which the Brussels Convention would be the only determinant of jurisdiction disputes involving conflict of jurisdiction between the courts of a Contracting State and those of a non-Contracting State.[329]

[329] Bougen, *supra* note 321, at 713.

CHAPTER 6

CONCLUSION

The comparative study of the rules of jurisdiction in the U.S. legal systems and in Europe illustrates the two approaches that Professor Juenger qualified as "functional and pragmatic" in Europe and as an "imprecise inquiry" in the U.S.[330] The Brussels and Lugano conventions also assure greater legal certainty concerning jurisdiction within EFTA and the EC than does not the *forum non conveniens* doctrine in the U.S. Besides, U.S. MNCs have massively used the doctrine of *forum non conveniens* to avoid U.S. courts and to deprive plaintiffs of substantial damages for the tortious conduct of U.S. MNCs, whereas they are not prevented from acting as such abroad. In the U.S., some legal scholars have proposed some reforms that could be brought to the existing principles. For instance, Robertson stated:

> The [Civil Jurisdiction and Judgments] Act [of 1982] and the EEC Convention on which it is based contain carefully structured and detailed jurisdictional rules reflecting a decent but not hypersensitive regard for both comity and defendant' rights. With such rules in place, there is no need for broad jurisdiction-declining discretion, and the Convention seems to operate quite well without it. The Convention, which has been in force in the original Common Market countries since 1973, has been applied in more than 30 decisions of the European Court of Justice and in many decisions of national courts. The resultant approach to transnational jurisdictional issues has won scholarly praise as a "functional and pragmatic" demonstration "that multistate jurisdictional problems are amenable to rational solutions." It can be hoped that England's experience under the new Act will reinforce the lesson that jurisdictional rules can be made to do the work of allocating transnational cases; broad jurisdiction-declining discretion is unnecessary.[331]

[330] Juenger, *supra* note 244, at 1212.
[331] *See* Robertson, *supra* note 59, at 427.

Although neither system is perfect, each system having discriminatory features, they should be aware of each other and take into account each other's accomplishments.[332]

[332] Juenger, *supra* note 244, at 1212.

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