Department of Law, Spring Term 2015
Master’s Thesis in Private International law
30 ECTS

The doctrine of *forum non conveniens* and its suitability within the application of the Brussels I instruments

Author: Karolina Markgren
Supervisor: Professor Maarit Jäntherä-Jareborg
Table over the most important rules of jurisdiction discussed and their position in the Brussels I instruments:

|-----------------------|-----------------------------|-----------------------------|
| **Forum of the defendant’s domicile** | Article 2  
1. Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State.  
2. Persons who are not nationals of the State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State. | Article 2  
1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.  
2. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State. | Article 4  
1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.  
2. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that Member State. |
| **Forum solutionis** | Article 5  
A person domiciled in a Contracting State may, in another Contracting State, be sued:  
1. in matters relating to a contract, in the courts for the place of performance of the obligation in question; | Article 5  
A person domiciled in a Member State may, in another Member State, be sued:  
1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;  
   (b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:  
   - in the case of the sale of goods, the place in a Member State where, | Article 7  
A person domiciled in a Member State may be sued in another Member State:  
(1) (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;  
   (b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:  
   - in the case of the sale of goods, the place in a Member State where, under the contract, the goods |
under the contract, the goods were delivered or should have been delivered,
- in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided,
(c) if subparagraph (b) does not apply then subparagraph (a) applies;
were delivered or should have been delivered,
- in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided;
(c) if point (b) does not apply then point (a) applies;

| Forum Delictii | Article 5 (3) | A person domiciled in a Contracting State may, in another Contracting State, be sued: in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred; | Article 5 (3) | A person domiciled in a Member State may, in another Member State, be sued: in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur; | Article 7 (2) | A person domiciled in a Member State may be sued in another Member State: in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur; |

List of abbreviations:

ECJ – European Court of Justice
EC – European Communities
EU – European Union
ECHR – Convention for the Protection of Human Rights and Fundamental Freedoms (commonly known as the European Convention on Human Rights)
HCCH – Hague Conference on Private International Law
PCIJ – Permanent Court of International Justice (now the International Court of Justice)
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1 Introduction

1.1 The problem

As the national economies of the world become increasingly interconnected, corporations are no longer foreign to the idea of conducting business abroad. In fact, such business transactions can avail greater economic advantages to corporations than business transactions in only one state does. An increased amount of business transactions between actors does however also lead to an increased number of disagreements between the actors. Thus, increased global business can result in the corporations operating in many countries potentially finding themselves drawn into disputes and lawsuits in any of the states where they do business. This could be a large number of states and, consequently, an even larger number of substantive and procedural laws to adhere to during litigation. Granted that multinational transactions come both with economic advantages and structural obstacles, the resulting disputes can involve a large number of actors with different national connections. This development causes the disputes to be increasingly complex, which, in turn, increases the demands on the national justice system to properly handle the resulting disputes. This could pose a problem, as such difficulties ensure that proceedings become increasingly expensive and intellectually challenging to all actors within the system which might hinder economic growth.

The notion that transnational business creates economic growth seems to be recognised in the world today.\(^1\) As a union founded with an aim to increase economic growth, the European Union (EU) has also taken significant steps towards minimizing the impact of differing national procedural laws on the internal market. For commercial disputes, the Brussels I Regulation of 2012\(^2\) contains rules on jurisdiction in cross border disputes between private entities within the union. The mentioned Regulation became applicable starting 10 January 2015.

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2015. It follows that its predecessors, the Brussels I Convention (1968)\textsuperscript{3} and the Brussels I Regulation (2001)\textsuperscript{4}, determines the allocation of jurisdiction between the member states before that date. This intricate and comprehensive system has been adopted despite the fact that the member states come from different legal traditions and have different opinions on both the grounds for jurisdiction and the right to decline to exercise it. Ever since the United Kingdom joined the European Communities (EC) in 1973, the question of a judge’s right to decline to exercise jurisdiction in a dispute has been subject to discussions. The right to stay proceedings in the domestic forum in favour of litigation in another, more appropriate, court is called the doctrine of *forum non conveniens*. Most of the civil law states in the EU lack this mechanism. They thus tend to be critical of the doctrine as it is considered to offer the individual judge an undesirably high level of discretion and as it is considered to have a negative impact on legal certainty. *Forum non conveniens* has therefore not been included in previous conventions and regulations of the EU concerning commercial procedure, causing the Brussels I instruments to contain relatively inflexible rules of jurisdiction. However, in other areas of EU private international law an increased willingness to utilize the doctrine can be noticed.\textsuperscript{5}

The benefits of *forum non conveniens* that have motivated such use are of a rather general nature and involve increased flexibility and allowing the court that is closest connected to the dispute to try the case. This could have benefits on the ability to call witnesses and present evidence as well as solving linguistic difficulties otherwise faced by the courts. However, the doctrine as outlined in British law may pose problems to the theory of equal state sovereignty and the right to a fair trial in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Despite these issues, certain elements of the Brussels I Regulation of 2012 suggest that there is an increased interest in increased flexibility of

\textsuperscript{3} Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters.


jurisdiction within commercial litigation as well.\textsuperscript{6} Such a change regarding the doctrine of *forum non conveniens* for disputes relating only to EU countries would have a considerable impact on legal cooperation within the EU.

If the instruments could allow for an increased use of the doctrine of *forum non conveniens* within the application of the Brussels I instruments, it could be of great interest to corporations acting within the system. Such a change would allow the defendant, in the absence of a choice of court agreement, to exercise control over the choice of venue to a greater extent. This could in turn could potentially serve to minimize forum shopping and ‘the race to the courts’, an otherwise well-known phenomenon in civil and commercial cases.\textsuperscript{7} If the EU opinion on *forum non conveniens* was to be reconsidered it could potentially have wide ramifications on international legal cooperation. During the 1990s there were ongoing negotiations to create a jurisdiction, recognition and enforcement convention within the Hague Conference on Private International Law (HCCH). While this eventually led to the adoption of the 2005 Convention on Choice of Court Agreements, the initial purpose of the negotiations was to create a much more comprehensive Convention. The negotiations failed partly due to the differing views on *forum non conveniens* of the participating states.\textsuperscript{8} A change of the EU approach could, thus, potentially facilitate renewed negotiations in the future.

1.2 The purpose

This thesis was written to fulfil several purposes. The main purpose is to determine whether there are problematic aspects to the current exercise of jurisdiction under the Brussels I Instruments and whether the doctrine of *forum non conveniens* could be introduced as a solution to them. Due to the aim of the Brussels I instruments to be foreseeable and legally

\textsuperscript{6} Regulation 1215/2012, art. 33.
\textsuperscript{7} An actor might be less motivated to forum shop and choose the forum that possesses a very slim connection, if that court can decline to exercise jurisdiction and transfer it to a closer connected court for continued litigation.
\textsuperscript{8} Stuckelberg, M. “Lis Pendens and Forum non conveniens at the Hague Conference”, (26 Brooklyn J. Int'l L. 949), p 950.
certain, I want to examine whether the rules of jurisdiction actually fulfill this goal at present and in the future. If this is questionable, I want to examine whether the *forum non conveniens* doctrine could be used to increase legal certainty and foreseeability in the Brussels I instruments but also whether the doctrine of *forum non conveniens* could be considered to be legally certain in itself. I will analyze the *forum non conveniens* test as applied in the law of the United Kingdom to provide a foundation for a discussion on which aspects that could suitably be included in the interpretation of the jurisdictional rules of the Brussels I instruments.

Given that the purpose is to evaluate the compatibility between a common law doctrine and civil law instruments of jurisdiction, certain other aims have been developed in order to support and lead up to the larger purpose. As the doctrine of *forum non conveniens* is approached quite differently in civil and common law states, the thesis aims to clarify these approaches and explain the differences between them. *Forum non conveniens* is intimately connected to the methods and ideologies that motivate a state to assert jurisdiction in internationally connected cases. Therefore, a thesis devoted to discussing the doctrine of *forum non conveniens* ought to be based in the differences between civil and common law as regards the assertion of jurisdiction. Given these differences, it is also important to touch upon whether a common law doctrine could successfully be applied in a civil law context. As the main source of criticism of the doctrine of *forum non conveniens* from within the civil law comes from its perceived discretionary nature, the thesis strives to determine the degree of discretion actually offered to judges through the doctrine. This will be done through an analysis of the *forum non conveniens* doctrine as developed in British law and in the latest Brussels II Regulation. The result from the investigation on British law will therefore be contrasted with an examination of the effect of some of the forum rules in the Brussels I instruments through case law.

If this investigation would show that the doctrine could be used within the Brussels I instruments, the thesis will analyze the compatibility between the doctrine and selected
principles of public international law. I will then take both the demands on the states specific to the EU area and more general principles of public international law into account in order to investigate potential negative effects and how they could be minimised. As an acceptance of forum non conveniens would allow member state courts to direct litigants to other member states’ courts, the international impact of its use is important to evaluate. The thesis thus aims to lay a foundation for a continued discussion on the connection between commercial private international law and public international law.

1.3 The method

The method of research through which current law has been established is highly focused on case law. This is inevitable given the focus on a British legal principle, and the research is thus founded on a common law methodology. The cases chosen in relation to the law of the United Kingdom are ones of great importance to the development of the doctrine of forum non conveniens. Not all cases of significance have been studied, but I have analysed the ones that brought new aspects to precedents and that have been highlighted by common law scholars. When establishing and discussing the law of the EU, the Brussels Convention as well as both Brussels I Regulations will be used. In this respect, the paragraphs in the preambles of the instruments have been significant as they show the motives and the prioritisation of the EU in these matters. Case law will however be used to further explain the instruments and the practical effect that they have in relation to jurisdiction. The focus on case law is also motivated by the fact that cases can illustrate the sometimes problematic aspects of the rules of jurisdiction in the Brussels I instruments. To establish the attitude of the EU towards the doctrine of forum non conveniens in commercial disputes, the ECJ judgment in Owusu v. Jackson as well as the opinion in the case by Advocate General Léger have been used.

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9 The principles that will be discussed are the right to a fair trial as outlined in The Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 5, (ECHR), Art. 6(1), comity, the principle of equal state sovereignty and the impact of the doctrine on dení de justice.

The case analysis in Chapter five is made up of a small selection of cases that I believe provide good examples of the potential obscurities and negative effects of the practical application of the rules for jurisdiction in the Brussels I instruments. These might not be of great international significance, but they illustrate the problem of rigidity and interpretational difficulties that may arise in the Brussels I instruments. One of the cases chosen, while relevant to the discussion, has connections to a third state, being a country outside of the EU. While this is technically outside the scope of the thesis, I decided to use it because it provides a good picture of the use of the rule of the forum of the defendant’s domicile. It also suits the discussion as the result of the Court’s determination in the issue of jurisdiction would not have been different in a context where the only connections were to EU member states.

The thesis aims to critically evaluate a potential application of the doctrine of *forum non conveniens* within the Brussels I instruments. The conclusions made in this regard will be of a general nature, as they must be considered with regard to the new Regulation’s predecessors that are applicable to disputes and contractual obligations arising before January 10 2015.\(^\text{11}\) Through the transitional provisions of the instruments, the interpretations and previous instruments are and will remain important within future case law. During the discussions I will therefore not speak of the Articles in themselves, but rather the rules that they embody.\(^\text{12}\) This has motivated the consideration of both the original Convention and the subsequent Regulations, but in different ways. As the Brussels I Convention can be applied to this day following the transitional provisions, it remains relevant and I have chosen to use it as a foundation for the discussion of the attitude of the EU towards *forum non conveniens*. In the discussion of the current application of the instruments in relation to case law, I will discuss cases relating to the Regulation of 2001. This has been motivated by its applicability to disputes arising after 1 March 2002 but before the 10 January 2015, which ensures its current and future relevance in the EU. Given that the latest Regulation did not become applicable

\(^{11}\) Regulation 1215/2012, art. 66.

\(^{12}\) By this I mean that I will speak of “*forum solutionis*” instead of “Article 5” or “Article 7”. This will allow me to remove the focus from the numbering of the Articles, which is actually irrelevant to the discussion, and instead focus on the substance of the rules.
to legal proceedings and court settlements approved or concluded on or after 10 January 2015, there is yet no case law that could be used to analyse its application. Granted that the rules of jurisdiction discussed have not been subjected to changes, the conclusions made in relation to the Regulation of 2001 and its applicability will also apply to the latest Regulation.

Literature has been used to provide a valuable foundation or a perspective that ought to be considered in the application of forum non conveniens within the scope of EU legal cooperation. In the choice of literature, three main works have been used. Russell A Brand’s book Forum Non Conveniens: History, Global Practice, and Future under the Hague Convention of Choice of Court Agreements has been used as it provides a good illustration on the historical development of the doctrine in the United Kingdom as well as its current application. I have also used Nicholas Rafferty’s book Private International Law in Common Law Canada. Texts, cases and materials. This could be considered a strange choice given the focus of the thesis, but the fact is that Rafferty discusses the development of private international law in the United Kingdom to a large degree, and the book has been beneficial in this sense. The third work of great importance is an article by researcher Ardavan Arzandeh entitled Should the Spiliada test be revised?. The article has provided a good overview of the forum non conveniens test as applied in the United Kingdom and the problems that may arise from its application in both a domestic and an international setting.

1.4 Demarcations

The thesis will only contain conclusions of relevance to the Brussels I instruments, with a main focus on the forum of the defendant’s domicile and the forum solutionis.¹³ Jurisdiction over matters concerning immoveable property is typically always asserted by the forum rei sitae and there is little ability to shift this using discretionary methods. It will therefore be left outside of the scope of research.¹⁴ The thesis will briefly compare the use of forum non

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¹³ As this thesis aims to discuss the jurisdictional rules, other rules of jurisdiction will be touched upon but they will not be the main focus for discussion.

¹⁴ Immoveable property fall under the exclusive rules of jurisdiction within the Brussels I instruments, see Regulation 1215/2012 art. 24 (1). Within the common law, jurisdiction in matters concerning immoveable property cannot be exercised by a court outside the state where the property is located. See British South Africa Co v Companhia de Moçambique, [1893] AC 602, p 681, Lord Halsbury.
conveniens in the Brussels II Regulation regarding parental responsibility with the British doctrine and the future development of the doctrine within the Brussels I Regulation. This discussion will however not result in a comprehensive analysis of forum non conveniens in the Brussels II Regulation. Instead I intend to use the conclusions thereof for comparative purposes to deepen the discussion on the potential use of the doctrine in the commercial law instruments of the EU. As the Brussels II Regulation is an instrument created within the EU, it can provide valuable suggestions to how one could potentially structure a forum non conveniens rule within the EU civil law oriented context.

The conclusions will focus on the legal cooperation within the EU-area and whether the doctrine of forum non conveniens can be used within Brussels I instruments. For this reason, the law of the United Kingdom will be of special relevance to the research, as it was there that the doctrine originated in Europe. I will use the definition of forum non conveniens as developed in British law as a definition of the doctrine and thus the basis for the discussion on its status in the Brussels I instruments. I will not touch upon the doctrine of forum non conveniens as it has developed in common law jurisdictions outside the EU as it is not equally relevant to the internal market. I have also chosen to disregard the doctrine as applied in the Republic of Ireland from my research. This was motivated by the greater influence of British law on the EU as well as it being more frequently discussed by scholars. As I believe that it is important to understand the development of the doctrine and its current application, the discussion in this regard will be relatively extensive.

In describing forum non conveniens and its development, I will not discuss all British case law that has shaped the doctrine, as this would not be possible given the scope of the thesis. As my focus remains on an EU level rather than on a national level, I will not analyse the domestic legal systems of the civil law member states. I will instead focus my analysis on the Brussels I Instruments and allow them to represent the civil law legal tradition. This is motivated through the large similarities between the now applicable Regulation, the original

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Brussels Convention (1968) which was created by civil law states, and the Regulation of 2001.\textsuperscript{16} Through this approach I hope to obtain valid conclusions on the differences between the civil and common law approaches to the doctrine of \textit{forum non conveniens} and why they differ. The thesis will also contain a case analysis. The selected cases are encompassed by the rules of the Brussels I Regulation (2001), they concern the application of the rules of \textit{forum solutionis} and jurisdiction on the basis of the defendant’s domicile. As previously mentioned, the cases are still relevant and display the interpretation of the jurisdictional rules of the instruments as they could be said to be applicable in a parallel manner.

1.5 Outline

The second chapter of this thesis will describe and evaluate the theories of jurisdiction present within public international law. I will discuss how these theories can relate to jurisdiction over private actors. I will then evaluate the bases for asserting jurisdiction within private international law and why they are different from the principles of public international law. In this section I will contrast the civil law approach as shown in the Brussels I Regulation (2012) with the approach of the common law United Kingdom relating to jurisdiction. This is done to increase the understanding of the reasons behind the development of \textit{forum non conveniens} in the United Kingdom. The subsequent Chapter will discuss the development of current \textit{forum non conveniens} in the United Kingdom. I will also outline the effects that the doctrine may have on the parties to the dispute and on forum shopping. Chapter four will discuss the EU opinion on \textit{forum non conveniens} as illustrated by the European Court of Justice (ECJ) case in \textit{Owusu v. Jackson}, in relation to the then applicable Brussels Convention (1968). I will also discuss the view on \textit{forum non conveniens} in the current Brussels II Regulation, and compare and contrast these opinions with the British expression of the doctrine of \textit{forum non conveniens}.

\textsuperscript{16} Originally the Convention only applied to six civil law states, namely France, Germany, Belgium, the Netherlands, Luxembourg and Italy. See http://ec.europa.eu/enlargement/policy/from-6-to-28-members/index_en.htm, 2015-01-25 (\textit{European Neighbourhood Policy and Enlargement Negotiations, from 6 to 28 members}, The European Commission)
The case analysis which aims to discuss the use of *forum solutionis* and the forum of the defendant’s domicile is placed in Chapter five of the thesis. As mentioned, the cases have been selected as they illustrate the application of the forum rules of the Brussels I Regulation of 2001. Given the parallel applicability of the Brussels I instruments and the unchanged wording and interpretation of the rules, the discussion will provide accurate conclusions regarding the current and future application of the instruments. In the subsequent chapter I will discuss whether the problems displayed in the case law in Chapter five could be solved through an inclusion of the doctrine of *forum non conveniens* in the Regulation. I will also discuss how the *forum non conveniens* doctrine could increase legal certainty of the Regulation at large. In Chapter seven I will critically analyse the doctrine of *forum non conveniens*, using Article 6 of the ECHR and the theory of equal state sovereignty. In this way I hope to be able to conclude whether an increased use of the doctrine is desirable within the Brussels I system, or whether there are problems related to the original application of the doctrine of *forum non conveniens* from a perspective of public international law.
2 Jurisdiction and its assessment

2.1 Jurisdiction in Public International Law

The theories of jurisdiction in private international law largely arise from the same assumptions of connecting factors between a case and a forum as in the public international law domain.\(^{17}\) This makes a discussion on public international law and jurisdiction relevant in order to discuss the development of the private international legal doctrine of \textit{forum non conveniens}, as it relates to the appropriateness of exercising jurisdiction in internationally connected cases. The principles governing the assertion of jurisdiction in public international law largely follow the development in state relations. One of the tenets of international political theory that has resonated in the field of public international law is the principle of equal state sovereignty. The effect of the principle is that one state cannot legally infringe the sovereignty or independence of another. The consequence of this is that states exist in a horizontal setting rather than one marked by hierarchy.\(^{18}\) As states are equal in the international sphere, instances where state jurisdiction collide in public international law can become difficult to resolve.

The most famous international judgment dealing with jurisdiction in public international law is the \textit{Lotus} judgment decided by the Permanent Court of International Justice (PCIJ) in 1927.\(^{19}\) The case dealt with a collision between a Turkish and a French ship on international waters and the jurisdiction over a subsequent criminal trial. Following the collision, Turkish authorities arrested a French lieutenant and attempted to have him tried in a Turkish court.\(^{20}\) Turkey’s assertion of jurisdiction was contested by France that claimed that the Convention of Lausanne of 1923 encompassed the dispute at hand. This, France argued, precluded the Turkish claim to jurisdiction and Turkey had thus acted in breach of international law.\(^{21}\) The

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\(^{17}\) \textit{The case of the S.S. “Lotus”, (France v. Turkey)} (1927) PCIJ Rep Series A, No 10, p 17. The court claims that “principles of international law are to determine questions of jurisdiction – not only criminal but also civil – between the contracting parties”. International law and jurisdiction between states becomes a relevant basis in regards to matters of private international law.

\(^{18}\) See Fogdestam Agius, M, \textit{Interaction and Delimitation of International Legal Orders}, 2013, p 51.

\(^{19}\) \textit{The case of the S.S. “Lotus”, (France v. Turkey)} (1927) PCIJ Rep Series A, No 10.

\(^{20}\) Ibid, p 11. Had all actors been commercial, one can assume that there might have been less interest on behalf of France to dispute Turkish jurisdiction.

\(^{21}\) Ibid, p 6.
Court initially noted that the Convention did not encompass disputes like the one at hand. In the absence of treaty law it thus followed that, if no solution was found in the principles of customary international law, both states would have jurisdiction. The PCIJ established that jurisdiction could legally be exercised by the state where the injury occurred. This assumption is not in itself problematic. It does however not solve the problem created by the fact that the incident occurred on international waters. The PCIJ thus had to look more closely at the principles of international law concerning jurisdiction rather than established treaty law.

It is important to note that while the PCIJ rendered a judgment resolving the case at hand through the principle of territoriality, one issue still remains. The judgment only goes to show that Turkey’s claim to jurisdiction was valid as there was no treaty to the contrary. This leads to two essential conclusions that can be drawn regarding jurisdiction. The first of these is that unless there is international law created that has limited state jurisdiction, a state is able to exercise its jurisdiction freely so long as it does not infringe on the sovereignty of another state. As international law is made either through state treaties or accepted practice, limitations in this regard would essentially follow from state consent. The second conclusion that can be drawn is that there is nothing in the Lotus judgment suggesting that French jurisdiction over the case is precluded after Turkey was found to possess jurisdiction. If France would have wished to assert jurisdiction over the defendant they could have done so, on the basis of the principle of the defendant’s domicile, which is a recognised connecting factor for jurisdiction in international cases. What can be rendered from the Lotus judgment is thus that the decision of one state to pursue a case does not preclude another state, possessing a similar interest in the procedure, from doing the same. This is related to the first

22 The Case of the S.S. “Lotus” (France v. Turkey), p 18-20.
23 Ibid, p 16.
24 Walter, G., “Lis Alibi Pendens and Forum Non Conveniens: from Confrontation via Co-ordination to collaboration”, 2002, (4 Eur JL Ref 69), p 69. Historically, national legislation has not been forced to take international concurrent jurisdiction and lis pendens into account when constructing its laws on jurisdiction. The boundaries of national law when it comes to internationally connected cases then ought to follow from international principles. See also below.
25 It is a direct consequence of the principle of sovereignty that a state should be able to assert jurisdiction over its own citizens, see Bring, O., and others, Sverige och Folkrätten, 2014, p 102. See also, Van Loon, H., “The Hague Conference – Its origins, organization and achievements”, (Svensk Juristtidning, 1993), p 294.
principle; that the only legal hindrance to a state exercising jurisdiction in the absence of a treaty would come from principles of international law.26 And as international law is created by states, the limitations placed by international law upon state exercise of jurisdiction largely follow from the state’s own will to limit its jurisdiction. If Turkey would have chosen not to proceed despite possessing jurisdiction, nothing would have stopped France from pursuing a case against the defendant if so was deemed desirable.27 Both states involved could have had legitimate interests of asserting jurisdiction over the case. This case thus illustrates that one state’s claim to jurisdiction cannot in itself be subordinate to another state’s claim, but also that the problems arising from conflicting claims to jurisdiction is might not be permanently solved through the rules of international law in themselves.28

2.2 Jurisdiction in Private International Law

2.2.1 Initial considerations regarding private international law

The above conclusions are relevant in relation to private international law as well, given the importance of the principle of equal state sovereignty. If the dispute in the Lotus case would have been a private law dispute however, the situation would have been different. As a private law dispute takes place between actors subject to a state’s exercise of power, their disputes would be solved within the national justice system. The national actor is allowed to organise its exercise of power in whatever way it chooses due to its national sovereignty. This is also true considering the Lotus judgment. States’ decisions as to how to exercise their jurisdiction are binding on private entities but not on other states. Given the binding nature of the law and its enforcement over private entities, it is important to regulate the assertion of power over private entities so that they would know under what conditions such power would be used. This has created the idea that the exercise of power would need to be foreseeable and

26 The case of the S.S. “Lotus”, (France v. Turkey), p. 19, “all that can be required of a state is that it should not overstep the limits which international law places upon its jurisdiction”. This statement might not only be taken to include that one would only determine this through jurisdictional rules and principles, but also other related legal principles.
27 The territorial principle could legitimise both states’ claims for jurisdiction in the Lotus case, see Crawford, J., Brownlie’s Principles of Public International Law, 2012, p 459. This also goes in line with the principle of sovereignty, in the sense that the existence of Turkish jurisdiction does not preclude French jurisdiction.
fulfil requirements of legal certainty, both in theory and in practice. As private international law developed within the national systems and as a means to exercise jurisdiction over private entities, the rules did not initially take into account the interests of other states. As long as a state did not infringe on another state’s sovereignty through exercising jurisdiction in that state’s territory, it was free to enact whatever jurisdictional rules it considered to be suitable.

Limitations in this regard could be set by the doctrine of comity.\textsuperscript{29} As cases of private international law differ from strictly national cases due to their connections to other fora, a judgment could be of interest to other states and it might have to be enforced elsewhere in order to have an effect. For this to be possible, other states would have to recognise the judgment state’s exercise of jurisdiction as acceptable in the first place. The doctrine of comity developed as an attempt to promote international harmony through accommodating the interests of other sovereigns. It involves showing respect for another state’s judgments as well as their jurisdictional interests. To make recognition of another state’s exercise of jurisdiction difficult could potentially prompt the other state to make it equally difficult to recognise judgments rendered in the first state in return.\textsuperscript{30} Also, if the judgment state would exercise its jurisdiction in an exorbitant manner, this exercise could be seen both as an encroachment on the sovereignty of the other states and as maltreatment of their nationals. States are thereby motivated to keep their jurisdictional rules more limited and to only assert jurisdiction in cases where it is suitable to do so both from its own perspective and from the perspective of other states. This could in turn prompt other states to show an equal respect for that state’s jurisdictional interests. As international trade has increased and as private entities are not acting within only one national setting, the doctrine has become increasingly relevant and has motivated international cooperation and regulations to settle the questions arising from the multinational endeavors of private entities.

\textsuperscript{29} The doctrine was developed as a form of international courtesy, and extended to the use of foreign law when such was considered to be applicable to the case at hand. Bogdan, M., \textit{Svensk Internationell Privat- och processrätt}, 2014, p 22.

As a private law case involves a legal relationship separated from the identity of the state and instead involves the interests of private actors, other interests than the traditional state interests tend to be present to motivate a state’s claim for jurisdiction. From the perspective of the state, assertion of jurisdiction over foreign nationals or a foreign dispute must be motivated through interests on behalf of the parties or the subject matter. There must be a degree of proximity between the state and the situation at hand. This is necessary both to justify the exercise of jurisdiction in relation to the parties but also to other interested states. The previously discussed principles of territoriality and domicile are important, but they can be complemented by a perspective of economic interests, procedural economy and other legal principles that the state has a duty to uphold in a national procedural setting. It is also noteworthy that the importance of these principles in the justification of a state’s jurisdiction tend to vary in different states.

2.2.2 Jurisdiction in the Brussels I Regulation (2012)

Within the civil law tradition, the main generalisation that can be made is the fixed nature of the rules regarding jurisdiction. This is also true for the rules of jurisdiction in the Brussels I instruments. The instruments are applicable when the dispute is qualified as involving commercial law. Bankruptcies are excluded from the scope, as are disputes that are subjected to arbitration through the choice of the parties. The Regulation thus only has a bearing on litigation in public tribunals. The Regulation is applicable to internationally connected cases in the EU-area. If the defendant is domiciled in a non-member state, the Regulation is not generally applicable. The main rule is that jurisdiction can generally always be exercised in the forum of the defendant’s domicile. Domicile thus functions as the main connecting factor to consider when determining jurisdiction over a case in a national jurisdiction.

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31 The private law relationship does not include disputes arising from the exercise of public powers of the parties, if they even possess such powers. Thus, as the state is not involved as such, there are other interests than state sovereignty that motivate the exercise of jurisdiction. See Eirini Lechouritou and others. v. Dimosio tis Omospondiakis Dimokratias tis Germanias, C-292/05, [2009], ECR I-01519, point 34, 37 and 39.
33 This argument will be developed in this chapter.
34 Regulation 1215/2012, art. 1 (1).
35 Ibid, art. 1 (1) c) and d).
36 Ibid, art. 3.
37 Ibid, point 14 of the preamble.
court of an EU member state.\textsuperscript{38} The factors used to determine the domicile of a natural person are not defined in the articles of the Brussels I Regulation. It follows that the domicile should then be determined through the national legislation of the court in question.\textsuperscript{39} However, when the defendant is a company, its domicile is determined through a definition in the instruments. The domicile of a company follows from the state where it is registered, has its central administration or main place of business.\textsuperscript{40} A branch or establishment of a company that is active in another member state than where the main corporation is incorporated is eligible for suit within the country of business as long as the subject matter relates to the forum chosen.\textsuperscript{41} Litigation in the defendant’s domicile is thus generally always an option for the plaintiff.\textsuperscript{42} An exception from this is the exclusive grounds for jurisdiction that cover claims related to, for instance, immoveable property and patent registrations and these rules do not allow for proceedings anywhere else.\textsuperscript{43} The exclusive rules preclude the jurisdiction of the defendant’s domicile. The choice of having a rule as broad as the domicile rule can be motivated through economic incentives, such as the tendency of a legal person to have the largest amount of assets in its place of domicile.\textsuperscript{44} It also has the benefit that a judgment in favour of the plaintiff is immediately enforceable, which could facilitate the functioning and efficiency of the internal market.\textsuperscript{45}

In order to preserve a balance between the parties, other grounds for jurisdiction than the defendant’s domicile are available within the Brussels I instruments. When choosing another ground for jurisdiction, it is proscribed that one must be able to detect a close link between the action and the chosen forum, and that this choice must follow from the sound

\textsuperscript{38} Bogdan M., \textit{Concise introduction to EU Private International Law}, 2012, p 19. Within the EU, due to the four freedoms, nationality is irrelevant as a connecting factor.
\textsuperscript{39} Regulation 1215/2012, art. 62 (1).
\textsuperscript{40} Ibid, art. 63 a), b) and c).
\textsuperscript{41} Ibid, art. 7 (5).
\textsuperscript{43} Regulation 1215/2012, art. 24 (1) and 24 (4). I will not discuss these articles more in depth as they are outside the scope of research, however they must be mentioned in order to draw a complete picture of the Brussels I system.
\textsuperscript{44} Note that Art 4 does not confer jurisdiction to a specific court within the member state, but that it only determines jurisdiction on a national level. Magnus & Mankowski, p 78.
\textsuperscript{45} See http://ec.europa.eu/justice/civil/index_en.htm, (2015-01-02), (Civil Justice, the European Commission)
administration of justice. The alternative rules of jurisdiction in the Brussels I instrument point out the fora that are competent in specific cases and provide an alternative to the main rule of litigation in the place of domicile of the defendant. Jurisdiction over a dispute in relation to a contract can be exercised by the forum of the place of performance of the contract. This place is further defined as the place of delivery or sale of goods or services, when the contract can be qualified to regard such transactions. The chosen construction in such cases allows the plaintiff to choose between litigation in the place of performance and the domicile of the defendant. The interpretation of the place of performance has been left undefined in the instruments, but the meaning has been developed by the case law of the ECJ. In the absence of a contracted place of performance, economic considerations in the case at hand are to determine the forum solutionis.

When a dispute is classified as regarding torts, jurisdiction lies with the court in the place of injury. The place of injury is determined as the place where the harmful act originally occurred or may occur. A connection motivated on the basis of a territorial connection is then justified in certain instances within the Brussels I instruments, potentially where a view of the premises of injury might be required. Another explanation for the existence of this rule is that the forum delictii may sometimes be more closely connected to the case than the domicile of the defendant.

The articles granting jurisdiction in relation to the specific legal areas or claims are alternative grounds of jurisdiction within the instrument and thus allows the applicant to exercise a limited forum shopping. The construction of the articles granting jurisdiction in the Brussels I Instruments is highly motivated by foreseeability. It is claimed to be of high value to the parties to know where proceedings can be initiated and thus which state has a right to exercise power over the dispute. The rules do not allow for diversions in cases not specified in the

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46 1215/2012, point 16 of the preamble.
47 Industrie Tessili Italiana Como v. Dunlop AG, Case C-12/76, [1976] ECR 1473, point 12. Note that this case was based on article 5 of the predecessor to the current Regulation, now article 7 (1) a) and b). The changes made have not changed the interpretation of the Article greatly.
48 Case C- 386/05, point 15.
49 See for instance, Regulation 1215/2012, Art. 7 (2).
instruments, which makes them rigid, but also extensive in that their wording could potentially encompass any situation. The intention of the rules to be able to encompass a large number of cases have motivated them to be formulated in an open manner with limited guidance given in the instruments themselves so as to their interpretation.

2.2.3 Jurisdiction in the common law tradition
In order to properly discuss the doctrine of *forum non conveniens* it is necessary to discuss the connection between jurisdiction and the service of writ, and their relation to the doctrine of *forum non conveniens*. Within traditional common law, jurisdiction could only be asserted over those present in the territory of the forum as it was then that one could guarantee the ability to properly serve the defendant.\(^{50}\) Given that jurisdiction would follow from the ability to guarantee the service of writ, sometimes even the temporary presence of the defendant could justify the assertion of jurisdiction. A change in the procedural laws of the United Kingdom in the 1850s enabled the English court to serve a defendant abroad, when the parties or the cause of action had a connection to the forum that would make it desirable to try the case in the United Kingdom.\(^{51}\) However, so long as the service of the writ could be conducted within the United Kingdom, exercise of jurisdiction would only be hindered by discretionary measures of the court.\(^{52}\)

The traditional approach of jurisdiction is perhaps best exemplified in the case of *the Maharanee Seethadevi Gaekwar of Baroda v. Wildenstein*.\(^{53}\) In this case, the Maharanee of Baroda had been granted leave to serve a writ on the defendant upon his temporary stay in the United Kingdom. The defendant, Wildenstein, then requested the court to withdraw the writ.\(^{54}\) The facts of the case showed that both the Maharanee and Mr. Wildenstein were residents of Paris, France.\(^{55}\) The act giving rise to the dispute had occurred in France. The

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\(^{50}\) Rafferty, p 207.
\(^{51}\) Ibid.
\(^{52}\) Longworth v. Hope [1865], 3 M 1049 (Sess. Cas.), p. 1053, Lord President. The main connections of the parties and the injury were to England. Only the temporary presence of the plaintiff in Scotland was sufficient to grant jurisdiction to Scottish courts.
\(^{53}\) H.R.H Maharanee Seethadevi Gaekwar of Baroda v Wildenstein, [1972] 2 W.L.R 1077
\(^{54}\) Rafferty, p. 204.
\(^{55}\) Ibid.
presence of the claimant in the United Kingdom was, like the presence of the defendant, seemingly of a temporary nature. The defendant’s presence in the United Kingdom consisted of occasional business conducted through an office in London. This office was however not connected to the transaction at the heart of the dispute. The House of Lords accepted that the connection between the case and the United Kingdom was slim. However they argued that as long as the defendant had been properly served in the United Kingdom and there was a valid case on the merits, the plaintiff did no wrong in filing suit in the United Kingdom.

This case illustrates that the common law has exercised jurisdiction in a rather exorbitant manner in the past, and that the system is heavily influenced by the principle of territoriality. The presence of an individual on the territory of the forum gave the state a right to control the individual, on the condition that the individual could be properly served. Rather than foreseeability through domicile, the premise seems to be that once an individual enters a state, he or she ought to foresee that said state will possess jurisdiction over him or her. Such an approach is however not unproblematic. Allowing a large number of disputes to be tried in the courts without demanding a great connection between the case and the forum also requires more resources for the judiciary. This shows why it must come natural to a common law court to require limitations to allow for a smaller number of cases to actually be tried at local courts and to avoid docket congestion. Noticeable in general within the common law systems, is that it is based on the idea that jurisdictional rules cannot alone place the case in the most appropriate forum. As the focus lies on whether it is considered appropriate to exercise jurisdiction, it is natural that a case that should not be tried in a forum can be turned away from the court.

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56 Rafferty, p 204-206.
57 Ibid, p 205.
58 Ibid, p 206.
59 It clearly illustrates the meaning of an “open system” used in C. Schulze, “Forum Non Conveniens in Comparative Private International Law”, 2001, (118 SALJ) p 823. See also Rafferty, p 204.
60 Rafferty, p 204
3 The doctrine of *forum non conveniens*

3.1 The concept

As *forum non conveniens* has been outlined very briefly so far, a more in-depth explanation of the doctrine is required to understand it. *Forum non conveniens* is the right of a court that has been seized by a plaintiff to decide that while it does possess jurisdiction that would allow it to try the case, it is not practically desirable for it to do so. Therefore, the court is entitled to decline to exercise jurisdiction in favour of another court that is more suited to try the case. Thus, the existence of another alternative forum is of highest importance. The result of an approved request of *forum non conveniens* is that the proceedings are stayed in the court first seized and to be resumed in the alternative court. In the alternative court, a judgment on the merits could be rendered in a manner more suitable to achieve practical justice in the case. *Forum non conveniens* has been used in the internal setting of the United Kingdom and other common law states, as well as in favour of fora outside of the country. Typically, if used between two common law states, the second court would accept the transfer of jurisdiction and issue a verdict on the merits. However, it can become problematic when used in an international context as it requires the other state’s court to accept the approach. This could prove to be unacceptable to a court of another legal tradition.\(^63\)

3.2 *Forum non conveniens* in the United Kingdom

3.2.1 Historical development

The doctrine of *forum non conveniens* developed in the law of Scotland in the 1800s. Originally called *forum non competens* it was considered a part of the court’s determination of its jurisdiction in a particular case.\(^64\) Through the 1865 *Longworth v. Hope*\(^65\) judgement, the Scottish judiciary cemented that the court had an inherent right to decline jurisdiction when trial in another forum would be more appropriate in the dispute at hand.\(^66\) The Scottish test for *forum non competens* was a one-step determination. The other forum was an


\(^{64}\) Brand, p. 7.

\(^{65}\) *Longworth v. Hope*, [1865], (Sess. Cas), 3\(^{rd}\) series, no. 194.

\(^{66}\) Ibid, p.1056, Lord Curriehill. See also Brand, p 8.
alternative if a change of venue would serve the ends of justice and the interests of the parties.\textsuperscript{67} Thus, the analysis simply consisted of the question of whether a trial in another jurisdiction would serve the ends of justice better than a trial in Scotland. The factors to be taken into account in the determination were if there would be an unfair advantage to the defendant in the natural forum and respectively, whether the defendant would be unduly burdened if tried in the Scottish forum.\textsuperscript{68} The balancing between the two considerations was however not completely equal as it was recognised that the plaintiff must choose a forum to have his or her case tried at all. Thus the plaintiff had to be able to choose a forum of convenience to him or her.\textsuperscript{69} This choice would therefore only be modified by the court when the defendant was unduly burdened by the plaintiff’s choice. For a \textit{forum non conveniens} request to be granted, the defendant was ideally to show that the plaintiff was to gain an unfair advantage at the expense of the defendant if Scottish jurisdiction was maintained over the case, and that the plaintiff would not be unduly burdened in the other forum.\textsuperscript{70} A change of venue would thus place the parties in a more equal standing, which would benefit the procedure at large and the creation of justice between the parties. The analysis had to display more than that declining jurisdiction would be convenient to the first court.\textsuperscript{71} If the \textit{forum non conveniens} request was accepted by the court, the proceedings would be stayed in Scotland and it was for the parties to resume the case in the alternative forum.

Subsequent case law of importance is the Scottish judgment from 1926 in the case of \textit{La Société du Gaz de Paris v. La Société Anonyme de Navigation “Les Armateurs Français”}.\textsuperscript{72} The court granted a \textit{forum non conveniens} request seemingly not due to the disadvantages of the Scottish forum, but rather due to the advantages of the alternative forum located in France.\textsuperscript{73} The court ruled in favour of the defendant’s plea of \textit{forum non conveniens} as the
parties had no connection to Scotland and as all evidence available was in French. This fact was considered by the court as a hindrance to the defendant’s ability to organize a proper defence, whereas the few English speaking witnesses could be heard in France to less costs and less inconvenience to the Courts as well as the parties. The earlier traits of the doctrine, such as the determination of an unfair advantage, did however remain a part of the appropriateness test. If the defendant would get an unfair judicial advantage in the other forum, it would still not be an alternative court despite that the factors of the case would show it to be a more natural forum. Société du Gaz shows an increased consideration of factors that influence the litigation rather than the focus on determining justice in a case, which can be quite abstract.

The above mentioned cases display the development of the doctrine in Scotland. The English judiciary remained sceptical towards forum non conveniens until the mid-1900s. It was not until the 1978 judgment in MacShannon v. Rockware Glass Ltd. that the House of Lords fully incorporated forum non conveniens into English law. The judgment also changed the forum non conveniens test to become a two-step test. The first part of the test incorporated the connecting factors displayed in the Société du Gaz case to determine the natural forum, here the onus remained with the defendant. In the second step the burden of proof was shifted to lay on the plaintiff to prove the existence of an injustice in the other forum. Both the 1979 judgment in The Atlantic Star and the judgment in Amin Rasheed Shipping Corp. v. Kuwait Ins. Co. of 1984 show that the forum non conveniens doctrine of the United Kingdom became more adapted to the requirements of comity. It also showed that comity should also apply to other legal systems than those of common law tradition. In consequence of this, the interests of the parties increased but the focus on injustice to the


Brand, p 10.


Brand, p 19.

See the Amin Rasheed Shipping Corp. v. Kuwait Ins. Co. [1984] A.C. 50, p 239, Judge Donaldson. “I have been given no reason to doubt that a Kuwaiti judge would set himself thoroughly and justly to determine the truth in this case.”

Ibid. See also Rafferty. p. 281.
plaintiff in the alternative forum. These cases in the 1970s and 1980s increasingly made English *forum non conveniens* more similar to the Scottish doctrine.

3.2.2 Modern approaches to *forum non conveniens*

Noteworthy at the outset of this discussion is the entry into force of the Brussels I Convention followed by the first Brussels I Regulation of 2001, and the most recent Brussels I Regulation. This has meant that the doctrine of *forum non conveniens* cannot be used where a defendant is domiciled an EU member state. However, the modern application of the doctrine ought to be outlined, so as to enable a discussion on whether the doctrine could have a place within the EU. The House of Lord’s decision that best displays the modern requirements of the doctrine is the judgment in *Spiliada Maritime Corp. v. Cansulex Ltd.* from 1986. The case involved several jurisdictions and was rather complex, but the central claim was one of damage to a ship that was leased by Cansulex for the transport of sulphur. The plaintiff claimed that the sulphur had been improperly stored on the ship by Cansulex, causing leakages which had permanently damaged the metal surface of the ship. The plaintiff thus requested financial compensation for this damage. The two most important jurisdictions involved were England and British Columbia, Canada, where Cansulex carried on business as well as the place from which the shipping commenced. The claimants brought the case in an English forum and thus had to request for leave to serve the defendant in British Columbia. The Court of Appeals had set aside the leave to serve the defendants. The House of Lords had to examine the possibility to have the proceedings take place in England and whether the defendant’s claims of *forum non conveniens* in favour of British Columbia were justified. Lord Goff’s judgment laid out the requirements of the doctrine as it, at the time of the ruling, was to be understood in English law. There he created a slightly different test than the one in *MacShannon* for determining if a *forum non conveniens* request made by the

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80 Brand, p 14.
81 Ibid, p 15.
82 Case C-281/02, concluding comments of the court, p.1464.
84 Ibid. p 460.
85 Brand, p 21.
86 Ibid. See also *Spiliada Maritime Corp. v. Cansulex Ltd.* p 466, Lord Goff of Chively.
87 See *Spiliada Maritime Corp. v. Cansulex Ltd.* p 460 and 467. See also Arzandeh, p 89.
defendant was to be granted. The determination of forum non conveniens is made up of two different steps, to find the natural forum of the case and to determine whether the natural forum is adequate and able to try the case in a just manner.

The first part of the test concerns the availability of another forum that could be able to try the case and is the natural forum of the case. Primarily it is required that the defendant proves that another forum also possesses jurisdiction which enables it to try the case on its merits, and that it is presumed that it could do so in a just manner. This forum must also be more closely connected to the case than the forum chosen by the plaintiff so as to constitute the natural forum of the case. In the Spiliada case, the defendant claimed that British Columbia would be the natural forum for the dispute. Cansulex therefore requested the British court to stay proceedings in the UK in order for the case to be tried in Canada. This first part of the test tends to be quite unproblematic in cases of an international nature. The factors to be included in the determination of the natural forum typically includes the location of the events giving rise to the claim, the law governing the dispute in question as well as the parties connections to the forum. Other factors of importance are the availability of witnesses, the place of residence or business of the parties as well as the relevant law governing the transaction. The determination of the Court is then made through a balancing between the factors to see whether litigation in the other forum is better motivated.

If the defendant has managed to convince the court that another forum is the natural forum and that there could be a trial conducted on the merits there, the onus changes to lay on the plaintiff to prove that a trial there would in fact not satisfy the parties’ needs in relation to the greater aim of reaching a just verdict. This makes up the second step of the Spiliada test, which is the adequacy determination of the natural forum. Despite Lord Goff’s evaluation of

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88 Rafferty, p 287.
90 Arzandeh, p 92.
91 Case C-281/02, p 28.
92 Spiliada Maritimes Corp. v. Cansulex Ltd., p 460 and 478.
93 Arzandeh, p. 92.
the steps to be taken in the Spiliada case, the factors to be included in the second step of the determination remained slightly obscure. In the Abidin Daver94, Lord Diplock clarified some of the factors to be taken into account herein. The court was to consider the:

“risk that justice will not be obtained by a foreign litigant in particular kinds of suits whether for ideological or political reasons, or because of inexperience or inefficiency of the judiciary or excessive delay in the conduct of the business of the courts or the unavailability of appropriate remedies”95.

Ordinary claims that have been made in the second step are danger to life and health, corruption of the courts and the legal professionals acting within the other legal system, fraudulent behaviour that would be accepted in the foreign court as well as the politicisation of that court.96 These factors, it has been argued, would ensure that the judgment obtained in the natural forum would not allow for the rendering of a fair and equitable judgment on the merits of the case.97 As indicated, there is a wide range of factors that could be considered in the second-limb of the test. This allows the Spiliada test to be sensitive and adaptable to the circumstances in a case-by-case basis.98 As the determination of the adequacy of another forum in relation to the parties must be based on factors individual to each case, it is difficult to create an exhaustive list of factors to consider. The consequence of the finding of affirmative answers to both parts of the Spiliada test is that the English proceedings are stayed in favour of proceedings in the other court.99 It is then up to the plaintiff to resume the case in the other forum where it can be tried on the merits.100 If the alternative forum for some reason cannot render a verdict on the merits, the case may be resumed in England.101

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95 Ibid, p 411, Lord Diplock. See also Arzandeh, p 92.
96 Arzandeh, p 94-95.
97 Ibid, p 94-95.
98 Ibid, p 93-95.
99 Case C-281/02, p. 8.
101 Case C-281/02, p. 9.
3.3 The problems with the adequacy determination

In order to understand the reason for *forum non conveniens* being successful in the common law world aside from the reasons of limiting jurisdiction, I will discuss the benefits and disadvantages of using the doctrine in general. Whilst the two-folded test of the *Spiliada* case has clarified the factors to consider in the *forum non conveniens* doctrine, it has been criticised for not going far enough. The first step of the test has been relatively safeguarded from critique both in academia and in the courts, however, the second step of the test has proven to be more problematic.\(^{102}\) It is clear that the determination within the second limb of the test is to be based on the concrete achievement and maximisation of the quality of justice for the parties. What is not equally clear are which factors that are decisive in that regard. Lord Diplock’s attempted clarification in *the Abidin Daver* sheds some light to the factors to be considered, but they do remain slightly obscure. The claimant can technically use any factor at any stage of the proceedings to show injustice as well as the situation in the state at hand, however they must be supported by cogent evidence.\(^{103}\) Due to this, the test invites to posing criticism to the entire judicial process in the natural forum. This leaves the parties with the task of scrutinizing each step of the process and providing evidence to its adequacy or inadequacy, which ultimately leads to a potential over-burdening of the court with factors and evidence to consider.\(^{104}\) As each case is different and previous case law is never exhaustive, close adherence to precedents is not a permanent solution to the problem. It is also safe to assume that a legal professional would rather submit more evidence to prove his or her argument than risk it being refuted.

It is not only the determination of the identity of the factors that is potentially problematic, but also the qualitative assessment of those factors. This difficulty has also been proven in previous cases, where one court has seen a particular factor as determinative at the same time as it being disregarded as irrelevant by another court.\(^{105}\) This shows that judges do enjoy discretion in both the selection of factors and the qualitative judgment of their relevance.

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\(^{102}\) Arzandeh, p 93.

\(^{103}\) Ibid, p 92.

\(^{104}\) Ibid, p 96.

\(^{105}\) Ibid, p 95.
under the second limb of the *Spiliada* test, which might leave the parties to a complex dispute uncertain of which factors they should emphasise. The second limb does then not render itself to be particularly foreseeable. This can be counter-productive in many ways, one being that one of the initial purposes of the *forum non conveniens* doctrine was to minimise docket congestion. Whilst this may be so if a claim is dismissed for not living up to the requirements of the first step of the *Spiliada* test, it does not necessarily hold true if the court must make a determination under the second step of the test. The unclear nature of the second limb of the test lends it to require substantial amounts of evidence to determine whether the natural forum is in fact inadequate. Also, given that the plaintiff must bring evidence to prove the problems of the natural forum in general as well as the problems in the specific case, the evidence required is substantial. Despite the plaintiff having the burden of proof in relation to this, the defendant will present evidence in favour of the request. This leaves the court with a large amount of evidence to consider and the English *forum non conveniens* test should be criticised in this regard.

### 3.4 Economic effects of *forum non conveniens*

Something often emphasised as inherently negative in *forum non conveniens* cases is that the plaintiff suffers extra costs as he or she is forced to continue to litigate in the natural forum. The second limb of the test includes considerations on whether the plaintiff can pursue the case in the natural forum in a timely manner and the ability of the plaintiff to benefit from legal aid schemes, but that does not mean that extra costs on the parties to the dispute would be determinative. However, this issue is not essentially one only laying on the plaintiff. The defendant would also have to remodel his or her defence in the natural forum should the request initially be granted. Whilst his or her costs would most likely be less than the plaintiff’s, they should also be taken into account. Another argument frequently brought is that the *forum non conveniens* determination prolongs the dispute between the parties, as the

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106 This discretion is bound to be problematic as the civil law legal orders generally consider the judge as unable to make law.
107 Arzandeh, p 96.
108 Case C-281/02, opinion of Advocate General Léger, p 33.
109 Arzandeh, p 99.
determination and the requirement of refiling the case in the natural forum is time consuming. Thus, a lot of time and resources are spent on the procedural aspects of the dispute rather than the merits of the case.

While I do believe it to be problematic, a change of venue might not only have negative effects on the procedure at large. In some cases it might make the procedure less costly if it is to take place in the natural forum. This is the case if there are witnesses to be heard and evidence that might not be particularly easy to transport. Thus, the costs related to the court of bringing witnesses and evidence to trial could decrease and allow the procedure in itself to become more efficient in the natural forum. Also, if the applicable legislation is the law of another state and the evidence is in another language, large resources would be required for translation services in the procedure in the chosen forum and it could probably take longer for a judge to deliver a judgment using another state’s law. It is also not certain that the resulting verdict would contain legal reasoning or application of the Lex causae that is in line with that particular law. Thus, to consider several factors of importance in a dispute can produce other benefits, such as increasing the effectiveness of the trial at the merits of the case but also ensure an appropriate application of the Lex causae.\textsuperscript{110} Whilst a change of venue admittedly would be problematic in some respects, it could also produce other benefits in relation to time spend on the judgment at its merits and from a linguistic point of view. A decrease in complexity and time of the procedure would tend to have positive economic impacts on the parties of the dispute, no matter their economic standing from the start. This extra cost is however not unique to forum non conveniens, as these consequences appear in cases where the court finds that it does not possess jurisdiction and dismisses a case.

3.5 The effects of forum non conveniens on forum shopping

As the crossing of international borders opens up for more fora than a national business endeavor, the potential fora possessing jurisdiction are several. Given differing procedural

\textsuperscript{110} In Société du Gaz, the court approved a forum non conveniens request taking into account that the majority of the available evidence was in French.
laws, the natural forum might not necessarily be the place where it is most favourable for the plaintiff to sue. This could, for instance, be due to evidentiary requirements, time limitations for the filing of a claim or size limitations of awarded damages. It is, thus, increasingly easy for the plaintiff to choose a forum based on its procedural and economic qualities rather than whether it possesses the objectively strongest connection to the case. This is known as forum shopping. \(^{111}\) As the nature of the *forum non conveniens* test allows a court to critically evaluate the connections to the chosen forum between the parties and the subject matter in the case at hand, it can also be used to dismiss actions that are obviously brought due to forum shopping. This was touched upon by Lord Reid in the *Atlantic star* case.

> “I would draw some distinction between a case where England is the natural forum for the plaintiff and a case where the plaintiff merely comes here to serve his own ends. In the former the plaintiff should not be ‘driven from the judgment seat’ without very good reason, but in the latter the plaintiff should, I think, be expected to offer some reasonable justification for his choice of forum if the defendant seeks a stay”. \(^{112}\)

Thus, Lord Reid seems to argue that the plaintiff should also be able to explain why it chose a particular forum for suit, in particular when faced with a *forum non conveniens* request. Such an explanation ought to be founded on the case as such, rather than self-serving interests of the plaintiff in relation to the forum at hand. Generally, forum shopping allows the plaintiff to take a case to a court with jurisdiction based on a light connection. It could be argued that forum shopping might not be conducive to justice as other factors than those of the dispute serve to motivate the choice of court. While the achievement of justice is an objectively difficult concept to discuss, it deserves some attention. If the majority of factors in a case speak in favour of litigation in one forum, the exercise of jurisdiction by another forum could produce results not motivated by the case in itself but rather the self-serving interests of one of the parties. Allowing that party to decide on the venue could disrupt the balance between the parties what is conducive to the creation of justice at large. With its focus on practical justice in the case at hand, a court could discretionally minimize the amount of claims brought

\(^{111}\) Bogdan, 2014, p 31.

\(^{112}\) *The Atlantic Star*, p 454, Lord Reid.
for reasons of forum shopping through the *forum non conveniens* test. If the plaintiff sues in the United Kingdom despite this not being the natural forum of the case, the defendant will most likely be able to prove this through the requirements by the first step of the *Spiliada*-test. If the plaintiff is unable to show that there are disadvantages in the natural forum serving as real obstacles to justice, the request for *forum non conveniens* should be approved and the case should be transferred.

In this context, it should also be recognised that a plaintiff that would appear to use forum shopping might not only be motivated by the advantages of the chosen forum but rather by the inadequacies of the natural forum. It might for instance be motivated to bring a claim in another jurisdiction than the natural forum due to severe docket congestion in the natural forum or a corrupt judiciary. While this would still technically be considered to be forum shopping, that is, choosing a forum on other attributes than the strength of its connection to the case at hand, the reasons behind it could make the behaviour more acceptable. As the initial aim of litigation is dispute settlement, turning away plaintiffs in favour of a court that is unable to create justice could be problematic from the perspective of the doctrine of state responsibility.\(^{113}\) This requirement is adhered to due to the second limb of the *forum non conveniens* test as laid out in the *Spiliada* case, with its focus on the qualities of the forum in relation to justice in the particular case.

\(^{113}\) The state responsibility doctrine requires a state to offer at least minimum standards of justice to foreigners and to try their civil liabilities and obligations, see Bring and others, 2014, p 102.
4  *Forum non conveniens*, the Brussels Convention and the Brussels II Regulation

4.1  *Forum non conveniens* and the Brussels Convention (1968)


In order to discern whether changes to the existing legislation of the United Kingdom were required upon the entry of the United Kingdom into the EC an investigation was conducted by Professor Peter Schlosser. This investigation on civil procedure was finished in 1978, but its conclusions were deemed continuously valid until quite recently. The report, known as the Schlosser report, concluded that the United Kingdom would not be able to use *forum non conveniens* in relation to other EU member state courts. It was also predicted that the *forum non conveniens* doctrine would lose its importance in the United Kingdom because of this.114

What Professor Schlosser did not touch upon however was the use of *forum non conveniens* in relation to states not members of the EU. Opinions on whether the *forum non conveniens* doctrine could be used in relation to third states differed, but use of the doctrine did continue in cases brought to a forum in the United Kingdom when a defendant was domiciled in a state outside of the EU, as in the case *Re Harrods*.115 The case involved a Swiss company filing charges in the United Kingdom regarding the shares of a British company. The defendant, another Swiss company, argued that as the British company did all of its business in Argentina the case should be brought there instead. The only connection to the United Kingdom was through the domicile of the company of the disputed shares. The defendant subsequently filed a motion to stay the case on the ground of *forum non conveniens* in favour of Argentine jurisdiction.116 The plaintiffs argued in favour of the case being tried in the United Kingdom by claiming that the court’s jurisdiction followed from Article two of the Brussels Convention, which could not be denied.117 The British Court of Appeals decided

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116  Case C-281/02, Opinion of Advocate General Léger, point 38.

117  Ibid, point 38. The jurisdiction would thus follow from the domicile of the defendant.
that when the other forum is in a non-member state of the EU, *forum non conveniens* would not be contrary to the Convention.\(^\text{118}\) The case was settled before the House of Lords had requested a preliminary ruling from the ECJ.

### 4.1.2 *Owusu v. Jackson* (C-281/02)

In a later judgment, the House of Lords considered *Re Harrods* to be bad law.\(^\text{119}\) The judgment then at hand was *Owusu v. Jackson*, where an English plaintiff sued multiple defendants in the United Kingdom. Only one of the defendants was domiciled in the United Kingdom whereas the majority were domiciled in Jamaica. The defendants argued that the English court ought to use its discretion to decline jurisdiction under the doctrine of *forum non conveniens* in favour of a Jamaican forum. They argued that as the dispute concerned torts where the initial injury occurred in Jamaica and as the majority of the defendants were domiciled there, Jamaica was the natural forum of the case. As the majority of the defendants would individually not be encompassed by the Brussels Convention, they argued that the Convention was not applicable to the case as a whole. The English court decided to stay the domestic proceedings and asked the ECJ for a preliminary ruling on the compatibility between the Convention and the doctrine of *forum non conveniens*.\(^\text{120}\)

The issue was thus a two-folded one. First of all it concerned whether the Brussels Convention was at all applicable when the alternative forum was one of a non-member state and when one of the defendants was domiciled in the same state as the plaintiff. Second, the House of Lords asked the ECJ whether the Convention precluded the use of *forum non conveniens* in all circumstances, thus making jurisdiction under the rule of forum of the defendant’s domicile mandatory when only one of multiple defendants was domiciled in the same EU member state as the plaintiff.\(^\text{121}\) In his opinion, Advocate General Léger argued that the Convention was applicable in cases with multiple defendants of whom only one was

\(^{118}\) Brand, p 26.

\(^{119}\) C-281/02, point 16.

\(^{120}\) Ibid, point 22. More questions were referred, but not all of them are relevant to the discussion.

\(^{121}\) Ibid.
domiciled within the EU. It did not matter that the domicile of one of the defendants in the case at hand corresponded to the domicile of the plaintiff, as the international connection required for the Convention’s applicability was given through the connection to Jamaica. The applicability of Article two was motivated by the lack of specificity regarding its scope in cases relating to foreign defendants.122

The question then became one of the compatibility between the Convention and the doctrine of *forum non conveniens*. Advocate General Léger argued that the use of *forum non conveniens* in a situation where the Brussels I system of jurisdiction applied would be contrary to the spirit of the Convention. He claimed that *forum non conveniens* would hinder the purpose of furthering procedural foreseeability within the internal market of the EU.123 He also claimed that this effect was inevitable due to the unclear nature of the Spiliada test.124 To allow for a use of *forum non conveniens* would also be contrary to the interest of furthering a uniform application of the Convention within the member states, as the majority of the other member states do not use *forum non conveniens* themselves. To allow the doctrine to be used by the courts of some member states was argued to lead to potential discrimination, even where the international connection was with a non-member state.125 The arguments used later by the ECJ was that the Brussels Convention is inherently based on the principles of foreseeability and legal certainty. To create a system based on those principles is also the goal of the Convention at large. The doctrine would then pose a hindrance to a normal defendant from knowing the place of suit beforehand as a case could be turned away from the chosen court, which would be contrary to the objective of the Convention. The doctrine of *forum non conveniens*, as applied in the UK, did not live up to the standards set by the Convention and would therefore not be suitable in an EU context.126 The doctrine’s use would harm the objective of foreseeability and lead to legal uncertainty.127

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122 Case C-281/02, point 29.
123 Case C-281/02, Opinion of Advocate General Léger, point 263-270.
124 Ibid, point 273. I would assume that the discretion afforded to the judge in the doctrine also impacted the argument of the Advocate General.
125 Ibid, point 276 and 279.
126 C-281/02, point 38.
127 Ibid, point 40 and 41.
A conclusion that can be drawn from the judgment is that it might not be based on an entirely accurate understanding of the doctrine of *forum non conveniens*. Following the precedents from English courts previously discussed, the parties ought to be able to reasonably calculate to which forum a potential dispute in a particular legal relation the case is connected, if exercising a normal standard of care and control over the business. The determination of the natural forum is made on the basis of pre-decided factors which must be considered to be clearly established. These are the availability of witnesses, the place of residence or business of the parties as well as the relevant law governing the transaction.\(^{128}\) Therefore, the potential fora which the determination would take into account are quite easy to determine. The *forum non conveniens* doctrine does not allow the court first seized to pass the case to just any court in the world, but only to one of which the case is inherently connected. In the *Owusu* judgment, the discretion described as offered to the judge in the *Spiliada* test is seemingly endless, which in my opinion is misleading in that it implies that a judge could transfer the proceedings to practically any forum.\(^{129}\) In fact, the determination of the forum is the outcome of a controlled process which considers the requirements of the case and the objective of justice. Thus, the ECJ’s interpretation of the doctrine as one offering so much discretion that it would lead to completely unforeseeable results is in my opinion slightly misguided.

If the argumentation of the Court in *Owusu* is scaled down to its very core, the following reasoning is unearthed. The jurisdiction based on the forum of the defendant’s domicile of the Brussels Convention is mandatory in nature and cannot be derogated from except for when expressly provided for by the Convention itself. Thus, as *forum non conveniens* is not provided for by the Convention, it cannot be used to justify a derogation from the Convention.\(^{130}\) This argument, while logical, goes to show that the Court in *Owusu* regarded the connections of the case in question as irrelevant, as long as one of the defendants was domiciled in the EU-area. This approach shows a remarkable rigidity in the Court’s reasoning.

\(^{128}\) For a list of the factors to consider, see Brand, p 33-35.

\(^{129}\) C-218/02, point 41.

The attempted justification of the reasoning seems to lie in the creation of legal certainty of the plaintiff as an independent aim of the Convention itself, rather than something furthered by the Convention in connection to the facts of the cases within its scope.\textsuperscript{131} It is also quite noteworthy that legal certainty, seen from the point of view of the defendants from Jamaica, was not discussed by the court. The principle, in relation to the plaintiff and the one defendant domiciled in the UK, was instead considered to possess such importance that it motivated the outcome of the case.\textsuperscript{132} In relation to this, the ECJ in \textit{Owusu} disregarded the factors that created difficulty for the defendants domiciled outside of the EU to conduct a proper defence in the United Kingdom. This is important for two reasons. First, these factors ought to be considered if the purpose of litigation overall is for the parties to come to a just settlement through court intervention. Second, the interests of all defendants ought to be considered because separation of the cases with one dispute in the United Kingdom and another in Jamaica would increase the risk of conflicting judgments. As the cases must be tried together, the issue then becomes which defendant’s domicile is the most relevant, the one of Mr. Jackson domiciled in the United Kingdom or the other plaintiffs domiciled in Jamaica. As the judgment then determined that the case could not be stayed in favour of Jamaican courts, the conclusion is that the domicile of the one EU defendant is more important than the domicile of the other defendants. Not only does this seem strange from a standpoint of the other defendants, it could also seem discriminatory as regards the right to conduct a proper defence. This could potentially be problematic to the Jamaican court that would have to recognise and enforce the judgment against the defendants domiciled there on a later date. From an economic point of view, proceedings in Jamaica would probably require less transport of evidence and witnesses as the relevant events of the case took place there.

In this context it should be pointed out that the EU has chosen to include a \textit{forum non conveniens} rule when there is a case brought in the court of a third state in the latest Brussels

\textsuperscript{131} Dickinson, p 135-136.
\textsuperscript{132} Ibid, p. 130.
I Regulation of 2012. Some cases that have previously been considered to fall under the Owusu precedents would in the future fall under the new forum non conveniens rules. This means that the Owusu ruling could lose some of its importance in the future. There is thus a change in the EU opinion on forum non conveniens regarding third states. The seemingly negative opinion towards forum non conveniens persists, however, in relation to disputes that are strictly internal to the EU.

4.2 Forum non conveniens and the Brussels II Regulation

Whilst the approach of the ECJ to forum non conveniens within commercial law has been rather negative, as can be seen in the Owusu case, development in family law within the EU has proven to be quite different. In the 2010 judgment in the case JKN v JCN, the high court of the United Kingdom ruled that the Owusu ruling regarding forum non conveniens had no impact on the legal areas covered by the Brussels II Regulation. The court went on to grant the defendant’s request of forum non conveniens in favour of a court in United States, as that forum was more appropriate for the divorce proceedings in the case.

Regarding parental responsibility, jurisdiction generally lies in the member state in which the child has his or her habitual residence. Exceptions from this are however allowed. This is the case, for instance, both when the habitual residence cannot be determined and when another court is deemed to be better suited to hear the case. In Article 15 of the revised Brussels II Regulation there is thus a rule of forum non conveniens that is to be applied in exceptional circumstances where a court considers another member state court to be better suited to hear the case. The court in question must be one to which the child has a particular connection. This connection can either be the former or current habitual residence of the child.

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133 Regulation 1215/2012, art. 33 and 34.
134 JKN v. JCN, [2010], EWHC 843 (fam.) point 147 (vi).
135 See Regulation 2201/2003, Art. 3 and 8. Art. 3 relates to marriage and divorce and Art. 8 relates to matters concerning children and parental responsibility. Both these rules use habitual residence as the main connecting factor which grants jurisdiction to a court.
136 Ibid, art. 15.
child, a place where the child possesses property, the state of nationality of the child or the habitual residence of one of the parents.  

If one of those fora is found to be more closely connected to the case than the forum at hand, the court may stay the case and set a time limit for when the case is to be resumed in the other court. Within a time period of six weeks, the other court must have given an answer as to whether it would accept jurisdiction or not. If the second court accepts jurisdiction, the case is dismissed from the first court. It is important to note that the second court is then obliged to try the case and cannot transfer the case further. In the event that the other, more suitable forum is not seized, jurisdiction will be resumed in the original court.

Article 15 can only be applied if it is deemed to serve the best interests of the child. This was also the reason for the inclusion of the rule in the Regulation. In the application of the grounds of jurisdiction of the Brussels II Regulation, the court should also take into account the interests of equal treatment, the best interests of the child and the criterion of proximity. Whilst the habitual residence and nationality are factual concepts that could be easy to determine, it is not to say that they cannot be conflicting. It is also not evident that the habitual residence is to be easy to determine in the actual case. In harder cases where the child has several different connections, it might not be entirely evident which of the connecting factors in Article 15 that ought to be emphasised the most.

As can be seen, the motive behind this is not purely procedural, which might motivate a more flexible approach to jurisdiction and the rules themselves. This was considered acceptable in the area of family law as the objective of the rules at large is what is considered to be important, namely to achieve the most suitable outcome given the best interest of the child.

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138 Regulation 2201/2003, Art. 15 (3) a-e.
139 Ibid, art. 15 (5).
140 Ibid, point 13 of the preamble.
142 Ibid, point 13 of the preamble.
143 Ibid, point 12 of the preamble.
rather than to secure a procedural logic in the Regulation to enhance economic growth.\textsuperscript{145} The common law approach to jurisdiction, and that it should be exercised when so is appropriate thus seems to have inspired the construction of the rule in question. To justify the use of a rule allowing transfer of venue through the motivation of it being in the “best interests of the child” potentially gives the court a lot of discretion to determine whether a change of venue is appropriate in the specific case. As the Regulation does not give indication as to what a determination of the child’s best interests is to take into account, the result could be vastly different depending on the factors of the case and the weight attached to the factors by the judges themselves. Article 15 of the Brussels II Regulation can only be applied if the parties accept the transfer, which does ensure some foreseeability. The court is however free to use Article 15 at its own motion, which might make it less foreseeable than British \textit{forum non conveniens}, where a request must be brought by the defendant at the outset of the proceedings. If the reason for not including \textit{forum non conveniens} in commercial litigation under the Brussels I Convention is its lack of foreseeability, I am not convinced of the suitability of its inclusion in the Brussels II Regulation. Considering that the parties of the dispute also tend to have different perceptions on what the best interests of the child is, the rule renders itself to be less foreseeable that the \textit{Spiliada} test, where a more objective criterion can be set out in the determination. If the opinion of the EU in \textit{Owusu} as regards the unforeseeable nature of \textit{forum non conveniens} can be considered as entirely true, it is hard to argue that the use of the doctrine serves the best interest of the child.

In this context it is beneficial to compare the procedure outlined in Article 15 of the Brussels II Regulation with the \textit{Spiliada} test, to discern how much it has in common with the original doctrine of \textit{forum non conveniens}. As Article 15 is applicable in a specific legal area as opposed to the more general nature of the doctrine previously described, the factors to consider are different. The connecting factors of Article 15 of the Brussels II Regulation are based on the domicile and residence of the child and the parents. In relation to the determination of the connecting factors, I would say that there are similarities in that they are relatively easy to determine. One could perhaps also liken the determination of the best

\textsuperscript{145} Malatesta, p 147.
interests of the child to the adequacy determination of the Spiliada test, however, they are not clearly related. In Article 15, the case cannot be stayed if litigation in another court would be to the expense of the best interests of the child. In the Spiliada test, such a determination is based on the adequacy of the forum and its impact on the achievement of justice. The factors relating to Article 15 are thus fundamentally related to the dispute, the Spiliada test considers the alternative forum. In both determinations, the court first chosen indicates the more suited forum to the parties and it up to them to ensure that the case is refiled in the other forum. The first court cannot dismiss the case until jurisdiction is asserted by the second court. There are nevertheless significant similarities between the determinations made.

From the analysis of the forum non conveniens rule in the Brussels II Regulation, there are a few things of importance to the continued discussion. One of these things is the necessity of communication between the courts in the member states. According to Article 15 (5) of the Regulation, the second court has a time limit of six weeks to determine whether to exercise jurisdiction or not. If it chooses to do so, the case will be dismissed from the first court. It should also be noted that the first court cannot dismiss the case before the second court accepts jurisdiction. Combined with the inability for the second court to transfer the case in accordance with Article 15, the construction minimises the risk of deni de justice. This in turn shows the potential for a construction of a transfer mechanism between the member state courts. This should be kept in mind for the discussion on the potential for the doctrine’s inclusion in the Brussels I Instruments. I also believe that Article 15 shows that it is possible to combine the forum non conveniens doctrine with the EU private international law instruments in internal situations, despite the EU instruments being traditionally influenced by the civil law systems of continental Europe.
5 The application of the rules of jurisdiction under the Brussels I instruments in case law

5.1 Introductory remarks on the relationship between the rules of jurisdiction

The following section will discuss case law from within the scope of the Brussels I Regulation (2001). The cases selected concern both the forum of the defendant’s domicile, the *forum solutionis* and, very briefly, the *forum delictii*. The focus of the discussion will however lie on the domicile forum and the *forum solutionis*, but also how the use of those grounds for jurisdiction as displayed in the case law selected can impact the relationship between them and the Brussels I system overall. In order to discuss the cases in a more adequate manner I will outline the requirements of the jurisdictional rules a bit more thoroughly than before, as well as their intended relationship.

From the Brussels I instruments follows that a person domiciled in the EU can always be sued in the member state where the defendant is domiciled, unless there is exclusive jurisdiction granted to another forum.\(^{146}\) This member state is thus considered to be able to try almost any civil or commercial case involving the defendant. The creation of a forum rule this wide was motivated by the desire to create a highly predictable system.\(^{147}\) It was, however, to be flexible enough to allow for suit in another venue when so was considered to be required by the case at hand. The more precise requirements for the determination of suit in another venue were left relatively undecided. It is, however, likely to relate to the application of the alternative grounds for jurisdiction and it is thus based on the requirement of a close connection between the subject matter and the forum.\(^{148}\) The *forum solutionis* rule stipulates that disputes in relation to a contract can be brought in the forum at the place of performance of the contractual obligation. In the absence of a contracted place of performance as regards the sale of goods, it should be defined as the place where the goods were or should have been delivered.\(^{149}\) In a contract relating to services, the place of performance is defined as the place where the services were or should have been provided.

\(^{146}\) Regulation 1215/2012, Art. 4 and Art. 24.
\(^{147}\) Ibid, point 15 of the preamble.
\(^{148}\) Ibid.
\(^{149}\) Ibid, Art. 7 (1) b.)
If the above given clarification is insufficient or does not apply to the contract in question, the place of performance is to follow from the choice of law rules of the seized court, which is to determine the place of performance in contractual matters. A court should only exercise jurisdiction under the forum solutionis rule if so is considered to be in line with the sound administration of justice and if it enhances the effectivity of the process. Regarding torts, the court that can assume jurisdiction is the one located where the injury occurred or can occur. Thus, in both these cases, the EU has attempted to ensure that there is potential jurisdiction in another forum than the defendant’s domicile.

The intended relationship between the rules of jurisdiction is that they are to create and maintain a balance between the plaintiff and the defendant in a dispute. If the instruments had only allowed for exercise of jurisdiction in the domicile of the defendant; the defendant would be unduly favoured at the expense of the plaintiff. It was thus considered to be justified to allow the plaintiff to exercise forum shopping in this sense. Whereas the results and the wording of the forum solutionis rule have been labelled as both practically and methodologically disappointing, there has been no alteration of its wording in the latest Regulation. The limited change of the wording can be criticized for many reasons, but one that stands out to me is the essential nature and role that the rule is intended to fill within the Brussels I instruments. An adequately functioning forum solutionis is needed to strike the balance between the parties and to ensure that the exercise of jurisdiction in the defendant’s domicile does not become too rigid in its application. When viewing the rules and the relationship between them, they seem to be intended to fulfil a similar purpose as the doctrine of forum non conveniens, namely to allow for flexibility of the procedure, a balance between the parties and to ensure suit in the most appropriate venue in the case at hand. Thus, the

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150 Regulation 1215/2012, art. 7 (1) c. See also Case C-12/76, p 15.
151 Magnus & Mankowski, p 105.
152 Regulation 44/2001, art. 5 (3) and Regulation 1215/2012, art. 7 (2).
153 Magnus & Mankowski, p 106.
155 Ibid.
results of the use of the doctrine and the interaction between the jurisdictional rules of the Brussels I instruments can be compared.\textsuperscript{156}

5.2 Akpan v. Shell Petroleum Development Company and Royal Dutch Shell

5.2.1 The facts of the case

Decision by the District Court of The Hague, the Netherlands. January 30, 2013.

ECLI number: LJN BY9854

Plaintiffs: Friday Alfred Akpan, domiciled in Nigeria, and Vereniging Milieudefensie, organisation domiciled in the Netherlands. The claim against Shell was supported by said organisation, thus the claims only related to Mr. Akpan’s property, (hereinafter the plaintiffs).


The dispute concerned oil spills causing environmental damage to land in Nigeria owned and used by the plaintiff. The following suit related to a claim for damages on the grounds of negligence on behalf of SPDC. SPDC was a subsidiary of RDS and acted only in Nigeria, where the damage occurred. The claim against RDS was founded in its responsibility over SPDC. The plaintiffs brought the case to the District Court of The Hague as that is the forum of domicile for RDS. The interesting discussion of this case that is relevant to this thesis relates to the exercise of jurisdiction over RDS.

5.2.2 The reasoning of the Court

The Court decided that it possessed jurisdiction over RDS on the basis of the company’s domicile under the Brussels I Regulation of 2001.\textsuperscript{157} In relation to the external connections of the case, the Court declared that \textit{forum non conveniens} was not a doctrine of importance.

\textsuperscript{156} Gunnerstad & Ingvarsson, "Den komparativa rätten – värd en omväg?", (Svensk Juristtidning 1997), p 157.
\textsuperscript{157} Regulation 44/2001, Art. 2.
within the EU. The Court thus explained that it would continue to exercise jurisdiction over the defendants as the Regulation allowed for it to do so through it being the domicile of one of the defendants.\textsuperscript{158}

5.2.3 Analysis of the case

While most attention has been given to this case in relation to the established jurisdiction over the Nigerian daughter company, this case becomes interesting in relation to the Brussels I Regulation when critically considering the limited connections of the case at large to the Netherlands. While the domicile of the mother company permitted the District Court of The Hague to exercise jurisdiction over the case, one ought to question whether doing so is actually suitable in a larger context. As previously mentioned, a requirement for the applicability of the alternative rules of jurisdiction is that trying the dispute in that forum is in accordance with sound administration of justice and proximity. As these requirements are outlined in the Brussels I instruments, it is interesting to discuss them also in relation to the rule of jurisdiction at the defendant’s domicile. The requirements posed by the sound administration of justice ought to involve a requirement of cost efficiency, as it tends to be interpreted as relating to the balance between the parties to a litigation.\textsuperscript{159} If considering these factors in the case at hand, it becomes obvious that the cost efficiency of this procedure could be questioned. As the majority of the connections of the dispute were to Nigeria, a viewing of the damaged area and interviewing potential witnesses there were most likely hindered. Also, the documents relating to the clean-up and the damages in Nigeria were to be found in the domicile of SPDC in Nigeria. As the damages occurred in Nigeria, the law applicable to the dispute would be that of Nigeria.\textsuperscript{160} In view of these circumstances, I question whether it is actually suitable to grant an equally wide basis for jurisdiction as is done in this case and through the Brussels I instruments.

\textsuperscript{158} Regulation 44/2001, art 6 (1).
\textsuperscript{159} Forlati, S., The International Court of Justice. An Arbitral Tribunal or a Judicial Body?, 2014, p 78.
\textsuperscript{160} This would follow from the principle that the applicable law would be the Lex loci delicti.
The case thus displays the effects of the lack of considerations to the sound administration of justice and proximity in the rule of jurisdiction at the domicile of the defendant. The case thus displays the large scope of the rule, in that it can encompass a very large number of disputes without actually requiring a large substantial connection to the forum as such. This should be considered both from an economic perspective and from the perspective of the existence of jurisdictional interests of the states involved. If the forum has no other interest in a dispute other than through it being the domicile of the defendant, and the case is otherwise unconnected to the forum, one could question whether it is suitable from a perspective of comity to try the case in said forum. By not including an ability to limit the number of cases brought through the forum of the defendant’s domicile rule, one might also risk a large number of disputes being brought without there being a substantial interest of the forum in the dispute. This could also produce effects much like the ones causing forum non conveniens to develop in the United Kingdom.

Noting that this case concerned a third state, one could question its relevance to this thesis and the discussion. Despite this, I believe that it offers valuable insights to the use of the rule and the rigid nature of its application. Had this event occurred in another EU member state, there is nothing suggesting that the court would have declined to exercise jurisdiction. As there was no case pending in another court, a lis pendens situation would not have allowed for a dismissal. As the dispute in question did not fall under the exclusive forum rules, the court could not dismiss the case on that ground.\textsuperscript{161} Therefore, the case does illustrate the broad applicability of the rule of the defendant’s domicile, at the expense of economic considerations and the criterion of proximity. The conclusions drawn are thus valid also in relation to the cases only connected to states in the EU.

\textsuperscript{161} Regulation 44/2001, Art. 24 (1). The exclusive forum rule is applicable regardless of domicile.
5.3 Österströms Rederi AB v. Bellona Shipping Company Ltd. and Schulte &
Bruns GmbH & Co. KG.

5.3.1 The facts of the case


*Plaintiff:* Österströms Rederi AB, domiciled in Sweden. (Hereinafter the plaintiff).

*Defendants:* Bellona Shipping Company Ltd., domiciled in Cyprus and Schulte & Bruns
GmbH & Co. Kg, domiciled in Germany. (Hereinafter the defendants).

The dispute of the case concerned the existence of a shipping contract and whether the parties
were bound by said contract. The plaintiff filed a case in the Swedish district court where it
was domiciled and requested that the court would determine the plaintiff not bound by the
contract. The defendants disputed the jurisdiction of the court and claimed that the contract
was binding to the plaintiffs.

5.3.2 The reasoning of the courts

The District court:

The district court claimed that the case concerned the subject matter covered by the Brussels
I Regulation and the Regulation would therefore be applicable to decide upon the jurisdiction
of the case. The *forum delictii* rule would not be applicable in the case as the question of
liability would come from the existence of the contract. The *forum solutionis* rule would
however not be applicable to the dispute either since the plaintiff requested the court to
determine that it was *not* a party to the contract. The *forum solutionis* rule would only be
applicable if the plaintiff would have requested the court to determine that the defendant was
party to the contract. The only remaining possibility for jurisdiction would thus be if the
district court was the domicile of any of the defendants.
The Court of Appeals:

The court initially recognised that the case concerned both the existence of a contract as well as a claim for economic compensation. As the plaintiff pleaded the court to establish that it was not a party to a contract, the first issue to decide upon was the establishment of jurisdiction on the basis of the *forum solutionis* rule. Contrary to what the District Court claimed, the Court of Appeals maintained that claims concerning the alleged inexistence of a contract were encompassed by the rule. Thus, the place of performance of the contract had to be determined. The alleged contract regarded the lease of a cruise ship and its staff to sail all over Europe and Turkey for an extensive period of time. The court thus qualified this as a contract on the provision of services, ensuring that the dispute was encompassed by the *forum solutionis* rule. As the contract did not relate to single instances of performance, the place of performance was said to occur in a large number of states. Due to this, the court decided that an application of the *forum solutionis* rule would render so many fora applicable that the result would be unforeseeable and the parties would not know which fora that were actually available to them. The court then re-qualified the dispute to consider whether the *forum delictii* rule was applicable to the claim for compensation, but decided that this was not the case and therefore dismissed the case.

5.3.3 Analysis of the case

In order to have a conducive discussion of this case in the current situation, one needs to place it within its context. As regards to interpretational guidance offered by the ECJ, two cases are of special relevance. These cases are *Color Drack GmbH, v. Lexx International Vertriebs GmbH*\(^\text{162}\) and *Wood Floor Solutions Andreas Domberger GmbH v. Silva Trade SA*\(^\text{163}\). Despite the fact that the *Color Drack* case involved the sale of goods rather than services, it sets important interpretational criteria also for the provision of services. The main conclusion drawn from the *Color Drack* case is that when there are several fora available as potentially possessing jurisdiction over a case in a member state, economic considerations are to determine the jurisdiction of the forum. If the economic considerations are equal in

\(^{162}\) *Color Drack GmbH v. Lexx International Vertriebs GmbH*, Case C- 386/05, I-03699.

\(^{163}\) *Wood Floor Solutions Andreas Domberger GmbH v. Silva Trade SA*, Case C- C-19/09, I-2121.
nature, the plaintiff can bring the case in any of the fora available. The consequences of this case are important to highlight. The first of these is that the approach opens up for forum shopping in cases where the economic considerations provide that the fora are equally competent. The second is that the Court does not further evaluate the meaning of “economic considerations”. While this can most likely be assumed to regard the income division between the fora, it is unclear whether more factors of an economic nature are able to be included. This approach can also be questioned as it does not allow for consideration of other connecting factors than economic factors of the dispute, whilst leaving the connecting factor that is to be considered relatively undefined. In this sense, one could argue that the statement of the Court is correct. There would be an unforeseeable results, but that could also be the result of the fact that the Court does not use the Color Drack case for inspiration or ask the ECJ how to interpret the Color Drack precedent in relation to services.

The second case of relevance is the Wood floor Solutions case. In this context, it should be noted that the Österströms case preceded the Wood Floor Solutions case, but a discussion of the case is nevertheless important for future reference. The case was set in a similar context as the Color Drack case, but related to the provision of services in several member states. In Wood Floor solutions, the ECJ took a significant amount of inspiration from the previous judgment in the Color Drack case and set the criteria of determination for the forum solutionis to be based on the location of the provision of the majority of services. In case such a forum could not be determined, jurisdiction was to be found in the place of the domicile of the service provider. Whereas this could prove to be beneficial in the sense that it provides clarity to the parties, it could also be problematic for many reasons. Instead of increasing and clarifying the amount of factors on which to base the interpretation of the rule, the court decides that the domicile forum should be used instead. This approach should be criticised for two reasons, the first being that the forum at the domicile of the defendant might not be the most connected forum to the dispute in question. Second, the case also limits the scope of use of the forum solutionis rule in that it avoids to further define the criteria of use. The

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164 Case C-386/05, point 40.
165 For an interesting discussion in relation to the application of the forum solutionis, see Bexell, O. Finns det ett fullgörelseforum för tvister om molntjänster? – En studie i internationell processrätt, Uppsala University, 2013, pp 44.
The use of the *forum solutionis* rule in complex disputes is thus limited, which could have an impact on the intended balance between the rules of jurisdiction in the Brussels I system. Instead of constituting an alternative to the domicile forum rule, the *forum solutionis* rule is used in a way that contributes to the perhaps unnecessarily broad basis of use of the rule of jurisdiction at the defendant’s domicile. Granted that the number of complex business transactions are not likely to decrease, the *Wood Floor Solutions* case could cause the number of disputes tried in the domicile of the defendant to increase even when the domicile forum is not connected to the case as such.

The Österströms case and the case law of the ECJ seen together raise a number of concerns. First and foremost, the court’s argument that the existence of multiple contractual fora would enable the jurisdiction of so many potential fora that the result would be unforeseeable is particularly interesting within the scope of this thesis. Suppose that the plaintiff had chosen another contractual forum to file a claim following the rejection in the Swedish court. The then chosen court could technically have considered itself to possess jurisdiction on the basis of the strength of the economic ties between the forum and the dispute. What would have stopped this is the requirement of proximity set by the preamble of the regulation, which has been said to mean that the court of the contractual forum must have the authority to hear all claims in relation to the contract.\(^{166}\) The court did not elaborate the effect of this criterion either, leaving the issue as one of seemingly little importance. As this was not touched on by the court, it remains unclear whether another court could possess jurisdiction as a *forum solutionis* as well as the reason for the denied jurisdiction on this ground.

\(^{166}\) Case C-19/09, p 27.
5.4 Critical comments

5.4.1 Jurisdiction at the domicile of the defendant

What the above selected cases have in common is that they both relate to the determination of whether jurisdiction should be exercised or not under the Brussels I Regulation (2001). They also display the constructional flaws of both the rule of jurisdiction at the defendant’s domicile and the forum solutionis in an equitable manner. As displayed in the Akpan case, the forum of the domicile of the defendant might not be the closest connected forum to the dispute. In fact, the Österströms case does not seem to be more closely connected to the fora of the domiciles of the defendants than, for instance, the forum of the plaintiff. Thus, arguing that suit should take place in said forum is seemingly based on a mechanical assumption rather than motivated through the case itself. This could render itself to be problematic from other perspectives. As the EU instruments value foreseeability, the rules of jurisdiction should be analysed from that approach as well. In my opinion, the practical nature of the concept of foreseeability must display a connection between the rule applied and the case. If the other connecting factors of importance in the case at hand are not discussed or have an impact on the outcome of the reasoning, then one can question both how foreseeable the result of the reasoning actually is but also how adequately the court has reasoned.

To only use the existence or inexistence of one factor as determinative increases the risk of neglecting other factors that differentiate a case from others, which increases the risk of unjust determinations. This method of applying law in a seemingly inconsiderate manner could also be questioned from a jurisdictional approach as a state should not exercise power in internationally connected cases unless so is carefully motivated through the case at hand. The suitability of a court that is largely unconnected to the dispute trying the case, when another more suited forum could do so in a more efficient manner, could be questioned. In this respect, it strikes me as odd that the exercise of jurisdiction in the forum solutionis is in some disputes considered to be alternative to the rule of jurisdiction at the defendant’s domicile, but that they are not to be considered using the same fundamental requirements. If

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167 Note that the conclusions in this regard are valid to all Brussels I instruments, as the wording and the interpretation of the Articles in question remain the same.
considering the Akpan case through the requirements of the principle of proximity and the sound administration of justice, the most suited forum to the dispute was not in the Netherlands. As the law and legal systems must be subject to critical analysis, it is therefore to be considered whether the Dutch forum should have tried the case.

5.4.2 The determination of decisive factors in the forum solutionis

As the forum of performance is an alternative ground for jurisdiction, the court must define the place of performance of the contract in order to determine whether it possesses jurisdiction in the case. The court is only to exercise jurisdiction if it is satisfied that doing so is in line with the sound administration of justice and the criterion of proximity.168 In the Österströms case, a contract stretching over a few years and a considerable geographical area was at the heart of the dispute. Thus, a large number of places of performance were opened up through the very nature of the contract if only considering the economic connections in the case. If these economic connections of the case to all the different fora are similar in size, the determination put forward regarding the sale of goods in the ECJ case Color Drack is not going to come to conclusive results. One would therefore, in the future, be required to revert to the use of the domicile forum rule instead, following the Wood Floor Solutions case. By not allowing for an increased amount of factors to consider within the determination of the rule and its scope one risks rendering the rule inapplicable to a large number of disputes and instead allowing for the domicile forum rule to be used even in cases more similar to the Akpan case.

While, at first glance, the provision has been formulated to encompass as many contracts as possible, the lack of identified factors of which to determine the applicability of the rule has clouded which kinds of situations that are actually covered and what strength the connections between the forum and the places of performance must possess. While it is stipulated that assertion of jurisdiction of the court should only be made when there is a substantial connection and that it must follow the sound administration of justice, such a determination

168 Magnus & Mankowski, p 105-106.
is based on discretion, as the factors to be considered in this determination are not essentially
defined. In fact, it could be questioned whether it is in line with the sound administration of
justice and proximity to only take the economic considerations into account, as opposed to
the other factors of relevance when otherwise considering a case. In the Swedish translation
of sound administration of justice, the requirement is to be based on increasing the effectivity
and simplifying the judicial process.\textsuperscript{169} It would therefore seem as though such considerations
need to be included when considering the jurisdiction of the court. The court does not give
arguments as to why it does not exercise jurisdiction nor what factors that are determinative
in this regard.\textsuperscript{170} This could be a consequence of the desire of the ECJ to ensure that the rule
is easier to apply, but the consequence seems to be limiting the scope of the rule in practice
rather than to allow for an increased clarity in the interpretation of it.

As previously mentioned, the intended relationship between the forum of the domicile of the
defendant and the forum \textit{solutionis} is to allow for flexibility in the application of the
jurisdictional rules of the Regulation and to allow for a balance between the plaintiff and the
defendant. The purpose of the intended balance, in turn, is to ensure that a rigid application
of the rule granting jurisdiction to the forum of the defendant’s domicile does not become
symptomatic to the instruments. Such a consequence could cause inequalities between the
parties. In this respect it becomes clear, that in cases where the contracts are extensive and
difficult, extra indications to the purpose and scope of the forum \textit{solutionis} are needed to
ensure that the intended balance is maintained. Otherwise, following the \textit{Wood Floor
Solutions} precedents, one would risk that the application of the domicile forum rule becomes
mechanical rather than motivated through the connecting factors of the individual case. This
combination of the lack of factors of relevance to consider in the forum \textit{solutionis} rule as well
as the lack of consideration given to the principles of proximity and the sound administration
of justice in the domicile forum rule creates a system where jurisdictional interest becomes
less motivated by the connecting factors of the case and potentially more motivated by
formalities. It is also evident that the forum of the defendant’s domicile is automatically

\textsuperscript{169} The Swedish translation of the phrase “sound administration of justice” is “underlätta rättsskipningen”. See
Regulation 44/2001, paragraph 12 of the Preamble.
\textsuperscript{170} RH 2010:23, p 4-5.
considered to possess jurisdiction in a case, regardless of the other connections of the case. This could also have a negative impact on the balance between the parties. In my opinion, clarifications like the ones discussed are needed to ensure that the Brussels I instruments remain dynamic and adaptable in the future. As international business is not likely to become less complex, more cases such as the ones discussed are likely to arise and contribute to the imbalance of the Regulation.
6  *Forum non conveniens* and the Brussels I Instruments

6.1  Suggested solution to the problems

The analysis contained in the previous Chapter indicates that the forum of the domicile of the defendant has become unnecessarily wide in its scope and that it can seemingly encompass cases that are unconnected to the forum in question. This development has partly come at the expense of making the *forum solutionis* unnecessarily narrow, and because the ECJ has refrained from further developing the scope of the rule in favour of the domicile of the defendant. The consequence of this development is that one risks to offset the balance between the rules of jurisdiction and the parties to a dispute and to create a rigid jurisdictional system. To solve these issues, one could consider taking inspiration from the doctrine of *forum non conveniens*, as it has been used to resolve similar issues. The problems should primarily be resolved using the current formal construction of the rules and consist of an interpretational change within the instruments. The ideas relate to the discussed rules separately, but put together they could produce a more flexible system. It is also necessary to consider whether the intended relationship between the rules of jurisdiction could be aided through an increased flexibility between the rules themselves, and thus allow for the transfer of jurisdiction between different fora under the Regulation. The two alternatives for transfer mechanisms that will be discussed are the inclusion of a feature more similar to the *Spiliada* test and the inclusion of a transfer mechanism between member state courts as seen in the Brussels II Regulation.

6.1.1  The forum of the defendant’s domicile and the sound administration of justice

The first proposed solution has already been touched upon, and it would relate to the application of the domicile forum rule and that it is to fall under the same requirements of use as the *forum solutionis*. By this I mean that the criterions of proximity to the dispute and the sound administration of justice should be incorporated in the determination of jurisdiction in the domicile forum as well. As it would be otherwise, domicile forum jurisdiction could be found regardless of the circumstances otherwise characterising the dispute.\(^{171}\) Suppose

\(^{171}\) Unless there is exclusive jurisdiction in the case, see Regulation 1215/2012, art. 24.
that there are no connections to the forum of the domicile of the defendant, other than the defendant’s domicile. The economic connections of the case and all other relevant factors that one could consider are to other member states. In such a situation one could perhaps consider to refer the case to another court that is more connected to the case. As the courts in such cases seem to shy away from the use of the *forum solutionis* rule, the use of the defendant’s domicile forum seems to become a final resort for the court. It thus becomes mechanically applied, not due to that it is the most closely connected forum but due to the uncertainties of the interpretation of the *forum solutionis* rule in difficult cases. I do not argue with the fact that the domicile of the defendant is an important connecting factor, and it should still be of importance, but perhaps it should not be attributed such substantial weight so as to be decisive in cases where there are no other connections to the forum. Maintaining the current system could create a more expensive procedure in the future, but also a rigidity in the application of the rules of jurisdiction discussed.

Instead of assuming that the case can be most properly solved in the forum of the defendant’s domicile, the emphasis of the Regulation and the rules could be placed on whether the exercise of jurisdiction in a case is in line with the sound administration of justice. This would ensure that the forum of the defendant’s domicile is not assumed to be automatically suited to try the case, but that a court should determine whether it is in the best possible position to try the case in comparison to other member state courts. As it is now, the at times rigid application of the rule of jurisdiction at the defendant’s domicile might not be in line with the creation of justice, which should be the goal of litigation at large.\(^{172}\) While the domicile of the defendant would still be a connecting factor of importance, consideration of the sound administration of justice and proximity in a case would ensure that the court trying the case is in fact an appropriate court. If the court finds that a trial would fulfil these rules, there would be no obstacles to conducting the trial there. To include the consideration of these factors under the domicile forum rule does however open up the ability to decline to exercise jurisdiction despite that not being specifically mandated through the Regulation. But, as the requirements that I am suggesting are not new to the Regulation, it could potentially be

encompassed by the interpretive prerogative of the ECJ. It could in fact be seen as part of the duty of the ECJ to clarify the interpretation of the legal acts of the EU.

6.1.2 The factors to consider under the *forum solutionis*

In the previous Chapter, it is obvious that the relatively unclear interpretation of the *forum solutionis* can cause problems to the parties as regards the uncertainty of its applicability. This uncertainty should be considered in a broader context. Through article 267 of the Treaty of the European Union\(^{173}\), a member state court can request a preliminary ruling on the interpretation or when the application of a legal instrument is unclear. The *forum solutionis* rule has been subject to a substantial amount of preliminary rulings in the past due to its formulation and the lack of guidance given by the wording of the rule.\(^{174}\) The request of preliminary rulings is both time consuming and expensive, and it can involve years of waiting for the parties. Thus, the use of preliminary rulings might not occur as often as is motivated. This could cause problems in that it does not produce further clarification of the scope of the rule, but also ensures that the member state Courts might dismiss the case in favour of litigation in the forum of the defendant’s domicile. While this is in line with the *Wood Floor Solutions* precedents, my previous argumentation has shown that this case could instead contribute to the lack of balance within the instruments. As the wording of the *forum solutionis* rule has remained relatively unchanged, it is safe to assume that the interpretational difficulties will persist.\(^{175}\) This will in turn further ensure that the imbalance between the rules persist, perhaps leading to an increasingly rigid system.

The proposed solution as regards the *forum solutionis* rule is then that the ECJ, when faced with preliminary rulings in the future, should actively argue for a broadening of the amount of factors to consider in the determination of the applicability of the *forum solutionis* rule. An increase of the factors to consider is within the scope of the ECJ’s ability, and it would

\(^{173}\) Treaty of the European Union, art. 267 (b).
\(^{174}\) Magnus & Mankowski, p 106.
\(^{175}\) Bogdan, 2014, p 102. It is safe to assume that as the wording is unchanged, the intended application will be the same as before.
set precedents for future cases. I would argue that the majority of contract cases could possess similar connecting factors to consider, despite the contracts differing in their nature. If basing the determination on the more neural factors in the legal relationship, one would allow for the application of the rule to be flexible, whereas the ECJ could preferably establish the considerations to be given to the factors. Suggestions as to the factors that could be considered are similar to the forum non conveniens test, being the connections of the parties, the applicable law of the contract, the evidence brought by the parties and its geographical location, the ability to conduct a proper defence, the languages spoken by the parties and the evidence brought as well as the economic factors inherent in the dispute. If these, or some of the factors, were to be included under the determination made in the forum solutionis rule, member state courts as well as the parties themselves would be able to take more factors into account and thus get a better indication as to the adequate forum of litigation under the rule. To maintain the strict focus on the economic aspects of the dispute in question would cause unnecessary rigidity and perhaps not allow for a consideration of the full width of the dispute in the determination of jurisdiction. In my opinion, the inclusion of these factors could aid the court and the parties to determine whether litigation in a forum would follow from the sound administration of justice. This concept ought to include the consideration of an effective process, both in terms of time and money spend on the dispute.

If considering these suggestions together, the proposed connecting factors to be included in the rules are essentially the same considerations taken in the first step of the Spiliada test. The combination of the two solutions would ensure that the grounds for jurisdiction become alternative also in the sense that they must allow for a court to decline to exercise jurisdiction in favour of another forum. In order to find a complete solution, one should thus contemplate the inclusion of a transfer mechanism between the fora when the court seized is not the closest connected forum to the case. While this would constitute a large change from previous interpretation of the rules within the Regulation, it would most likely result in an improvement of the intended balance between the grounds of jurisdiction. In fact, a combination of the two solutions renders the outcome to be similar to the inclusion of a

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176 See Brand, p 33-35.
limited *forum non conveniens* doctrine in the Brussels I instruments. Both of the solutions could be encompassed within the scope of the interpretive prerogative of the ECJ, and they would thus not require a redrafting of the latest Regulation. Given its limited time of applicability, avoidance of a redrafting of the Regulation is desirable. As the solution could potentially resolve the problem of rigidity, one should investigate whether the inclusion of the doctrine would be in line with legal certainty as that is the main source of critique against the doctrine.

6.2 Remarks on the suggested solution from a perspective of legal certainty

As emphasised by Advocate General Léger in *Owusu*, the comparatively rigid rules of jurisdiction in the Brussels system have been motivated by the principle of legal certainty and the desire to create foreseeable rules.\(^{177}\) It was also for the same reasoning that he, and the ECJ, rejected the doctrine of *forum non conveniens* in *Owusu*. It is thus of interest to discuss the relationship between the previously identified rigidity of the Brussels I instruments and legal certainty, but also the legal certainty of the suggested improvements of the instruments and their interpretation. At the centre of the argumentation of the ECJ in relation to *forum non conveniens* lays a civil law definition of legal certainty.\(^{178}\) The court in *Owusu* seemed to claim that legal certainty was fulfilled by the structure of the rules of the Convention, and thus also the relationship between the rules of jurisdiction.\(^{179}\) It was seemingly regarded as a uniform, independent concept served by the structure of the regulation as a whole.\(^{180}\) Within the civil law tradition, legal certainty comes from the individual’s knowledge of how the legal rules are formulated. The precise nature of the rules then ensure certainty as to how they are applied.\(^{181}\) To ensure that legal certainty and foreseeability are achieved in the situations encompassed by the wording of the rule in question, one would require indications to the scope within the rule itself. One should then note that legal certainty is not a consequence of rigidity, but that it is rather a consequence of

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\(^{177}\) C-281/02, Opinion of Advocate General Léger, point 160.

\(^{178}\) Law that is formulated in a foreseeable manner, available and trustworthy is also in line with legal certainty. See Frändberg, Å., *Rättsordningens idé. En antologi i allmän rättshår*, 2005, p 289.

\(^{179}\) Case C-281/02, point 38-39.

\(^{180}\) Ibid, point 39.

clarity. It naturally follows that legal certainty is a fluid concept that can be applied to a changed framework, and the demands that are set up are not invariably tied to a particular format but rather to the application and clarity of the rules. This means that the proposed solution is not necessarily contrary to legal certainty.

As previously discussed, the *forum solutionis* rule of the instruments does not encompass clear points of reference for its applicability. It can thus not entirely guarantee a foreseeable reasoning or result in the situations that might be encompassed by its wording. It would also ensure that cases that in fact are vastly different are treated in the same way. In this respect, one could argue that a determination of jurisdiction made on a case-by-case basis but still using factors defined in an exhaustive manner would enhance the clarity of the application of the rule, which would create legal certainty within the system. While it should be clear that the rule should still be an alternative to the jurisdiction at the domicile of the defendant, one should further define it so to not lose the use and development of the rule. While the analysis should be focused on the contractual obligation as such, it is important to note that the contract has been made by parties and that one should also take them into consideration when asserting jurisdiction.

To incorporate the requirements following from the first step of the *Spiliada* test into the determination of jurisdiction of the court could lend itself to ensure increased clarity for both the parties and the court. While it would allow for consideration of a larger amount of factors, both of a procedural nature and in relation to the parties themselves, it would clarify the interpretation of the rule and its applicability would be more foreseeable. As business endeavours could become more complex with time, such an approach could be necessary both to ensure the smooth application of the instruments but also to ensure foreseeability in the future. Inclusion of a *forum non conveniens* determination would enable the *forum solutionis* to be used in more instances where it may be motivated, and it would thus ensure that the balance between the discussed rules of the Regulation is kept. If we were to subject the application of the defendant’s domicile rule under the same requirements of proximity and the sound administration of justice, the seemingly mechanical application of the rule that
is noticed in the *Akpan* case, would be avoided. This would in turn restore the desired balance between the rules. In this respect I also believe that it is important to recognise the fact that the common law approach to jurisdiction, that jurisdictional rules alone do not ensure appropriateness, is pragmatic and could be suitable in a global legal context. If the focus would lie on appropriateness so as the exercise of jurisdiction, rather than mechanical foreseeability, I would argue that the result would be more conducive to the creation of justice between the parties.\(^{182}\)

In this respect, I am not forwarding the inclusion of a wholly unregulated *forum non conveniens* doctrine, as that would hardly be suitable in the civil law context of the instruments at large. I instead argue that the other factors to be considered are to be identified by the ECJ in an exorbitant manner. I do not believe that the inclusion of a greater number of factors would stimulate forum shopping more than the existing system does, rather, it would enable the parties to determine the qualitative connections to the fora and to foresee where the connection is strong enough to warrant a suit. The main purpose of the doctrine of *forum non conveniens* is to hinder cases from being brought in inappropriate jurisdictions and to strike a balance between the parties to the dispute in order to create a just result. The main purpose of the Brussels I rules that have been discussed are of a similar nature, as regards the relationship between them. When two rules aim to fulfil similar purposes, their results can be adequately compared.\(^{183}\) I also believe that the rules could be combined.

The outcome of a ruling without *forum non conveniens* in cases like the *Österströms* case is that a *forum solutionis* explains that it does not have jurisdiction over the case. The consequence thereof is that the case would be dismissed. If *forum non conveniens* would be used, the result is that the court chooses to not exercise jurisdiction and stays the case. The similarities between the outcomes are striking, but the methods of reasoning differ. Another effect of the dismissal is that it might increase the risk of *deni de justice*, as the case could

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\(^{182}\) Brand, p 148. See also *Airbus Industries GIE v. Patel and Others*, paragraph 12, Lord Goff of Chievely.

\(^{183}\) Proven also through the inclusion of art. 33 and 34 in Regulation 1215/2012. See Gunnerstad and Ingvarsson, "Den komparativa rätten – värld en omväg?", (Svensk Juristtidning 1997), p 157. If the rules do not have the same purpose, their effects ought not to be compared to each other. Conversely, rules that aim to fulfil similar purposes can be adequately compared as relates to their achieved effects.
not be resumed in the first court should so be necessary for other reasons.\textsuperscript{184} This could potentially be aided through including \textit{forum non conveniens} as opposed to maintaining the current system. What has essentially not been adequately touched upon this far is whether the inclusion of a transfer mechanism is possible and how such a mechanism should be constructed. This will be subject to discussion in the following section.

\textbf{6.3 The transfer of cases between member state courts}

Within this context, I will attempt to discuss the previously mentioned inclusion of a transfer mechanism more in depth. The increase of the amount of factors to consider could in effect necessitate the creation of a transfer mechanism of some sort. In this respect, the two previously discussed expressions of \textit{forum non conveniens} found in the law of the United Kingdom and the latest Brussels II Regulation ought to be discussed.

The first alternative would create a system similar to the latest Brussels II Regulation’s Article 15. As this is implemented in another Regulation of the EU it would perhaps be the best solution in relation to the involved states and the existing order. This would mean that the court that has deemed itself to be poorly suited to try the case and identified another forum that would be more suited, could transfer the case to the other member state court.\textsuperscript{185} The court first chosen would then stay the case until jurisdiction has been seized in the other court. While the Brussels II Regulation is based on the assumption that a transfer of the case follows from the best interests of the child, the determination under the Brussels I Regulation should follow from the objective connecting factors of the case at hand and the requirements of a transfer being beneficial to the sound administration of justice and proximity. This could allow for a more flexible approach within the Regulation, which could create a more dynamic system at large. As the ability to transfer the case is based on the requirements of proximity and the sound administration of justice, one would essentially include the costs of trying the case in another forum in the determination. If such a transfer would not bring objective benefits to the solution of the case, a transfer would not be possible. If considering the

\textsuperscript{184} Reasons for this could e.g. be time limitations for bringing a dispute to court.\textsuperscript{185} Compare with Regulation 2201/2003, Art. 15.
potential ramifications of such a decision, I would be hesitant to argue that it could be included through the power of interpretation of the ECJ. The inclusion of such a mechanism would most likely require a renegotiation of the latest Brussels I Regulation as it would introduce a new arrangement to the instruments. Given the limited time of applicability of the Brussels I Regulation of 2012, that is not entirely suitable.

In this respect, it should be touched upon whether the law of the United Kingdom could serve as inspiration in this regard. As mentioned earlier, it is there up to the plaintiff to again resume the case in the other jurisdiction, and the court does not take any real facilitating measures in this respect. Such a solution would essentially be incorporated should the ECJ consider the inclusion of the previously discussed solution. While this would be the easiest solution, it should be questioned whether it is the most suitable one within the EU context. One could argue that an unregulated transferral between member state courts may seem foreign to the civil law nations of the EU, as they tend to be more used to a greater amount of written law. However, this solution is not essentially different from the dismissal seen in the Österströms case. In this context, one must discuss whether the determination should include the second limb of the Spiliada test and if that would be suitable within the EU context.
7  *Forum non conveniens* and public international law

What has not been touched upon above is whether an inclusion of these aspects of the doctrine of *forum non conveniens* in the EU instruments could be problematic from a perspective of public international law. In my opinion, the first step of the *Spiliada* test would most likely not be problematic from this perspective, as it involves an objective evaluation of the connections of the case. It is more probable that the assessment of the adequacy of another state’s exercise of jurisdiction would be problematic. In this discussion, the potential influence of the doctrine of *forum non conveniens* on the right to a trial, comity and the principle of equal sovereignty are of main importance. The discussion related to the right to a trial will be focused on the transfer of the case, in relation to whether the plaintiff’s right to trial could be hurt through the use of the institute as expressed in British law as well as in the Brussels II Regulation. The discussion on comity and the principle of equal sovereignty will mostly be related to the second limb of the *Spiliada* test. The purpose here is to discern whether an inclusion of the *forum non conveniens* test as laid out in British law could suitably be included in the Brussels I Regulation.

7.1  The right to a trial and *forum non conveniens*

As this thesis focuses on the EU area one should also touch upon the compatibility of the doctrine with Article 6 of the ECHR. This was briefly touched upon by Advocate General Léger in his opinion in the *Owusu* case, where he stated that the use of the *forum non conveniens* doctrine constitutes a breach Article 6 of the ECHR.\(^\text{186}\) Even if the Advocate General did not elaborate much on the reason for the breach, his statement ought to be clarified and discussed in order to gain a proper understanding of the issues of the doctrine and its compatibility in the greater context of the EU. Article 6 of the ECHR outlines the right to a fair and expeditious trial of an individual’s civil rights and obligations.\(^\text{187}\) It is applicable both in wholly domestic situations and sometimes in cases with a foreign connection. In foreign cases, it is considered that the right also has an indirect effect in the

\(^{186}\)Case C-281/02, Opinion of Advocate General Léger, point 270.  
\(^{187}\)ECHR, Art. 6.
sense that it is not the first convention state’s behaviour that is in breach of the requirements. Instead, the second state involved acts in a manner that is in breach of Article 6, but the behaviour is facilitated by the first state. The state is thus obliged to investigate whether the requirements of Article 6 are fulfilled in the second state.\textsuperscript{188} Regarding its potential inapplicability to the doctrine of forum non conveniens, it must be discerned what the more precise requirements of Article 6 are in relation to rules of jurisdiction.

Professor Peter Schlosser developed an argument relating to the possible incompatibility between Article 6 and the forum non conveniens doctrine in his lecture series published in the Kansas Law Review. The problem, according to Schlosser, could lie in it potentially hindering suit of the defendant in his or her domicile.\textsuperscript{189} To allow for the exercise of forum non conveniens in an EU context would therefore be in breach of the ECHR. In my opinion, this argument might fall short as the Brussels I Regulation does not place the defendant’s domicile as an exclusive forum.\textsuperscript{190} In a lis pendens situation with the forum of the defendant’s domicile being the second court seized, dismissal would still occur in favour of the first court if it possesses alternative jurisdiction. Schlosser seems to argue that Article 6 would require trial in a specific forum rather than in a forum where specific conditions are fulfilled. I am personally hesitant to grant the same amount of importance to Article 6 proscribing a right to a trial in the forum of the domicile of the defendant as Schlosser does. In the \textit{OT Africa Line Ltd. v. Hijazy and ors}\textsuperscript{191} from 2001, the commercial court of the United Kingdom granted a motion for a stay in a case, despite the plaintiffs’ argument that such a stay would deprive them of rights in relation to Article 6.\textsuperscript{192} The judge of the case explained that the crucial impact of Article 6 is that civil rights and liabilities must be determined before a tribunal in accordance with its provisions, but that this does not force the United Kingdom to exercise jurisdiction over the case.\textsuperscript{193} Article 6 does not give the plaintiff an unfettered right to be tried in any forum but the right to be tried in a forum. If there are many potential fora

\textsuperscript{188} Fawcett, J., “The Impact of Article 6(1) of the ECHR on Private International Law”, 2007 (1 ICLQ 56), p 3.
\textsuperscript{190} The very existence of Art. 5 or Art. 7 in the latest Brussels I Regulation denotes this assumption.
\textsuperscript{191} OT Africa Line Ltd. v. Hijazy and ors. [2001] 1 Lloyd's Rep 76.
\textsuperscript{192} Fawcett, p 6-7.
\textsuperscript{193} Ibid, p 7.

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where the case could be tried, they are not all obliged to do so. A trial must however take place in one of these competent courts. I believe this interpretation to be more in line with the actual requirements of Article 6, as the interpretation by Professor Schlosser would give the rule a very wide scope to dictate both the forum rules of the states and the aspects surrounding the trial itself.

Article 6, interpreted in accordance with the Hijazy case, poses two different concerns in relation to forum non conveniens. These different concerns are that forum non conveniens might involve a delay in the trial and a potential breach of the right to a fair trial in the other forum. Advocate General Léger mentioned that the doctrine of forum non conveniens would cause an unacceptable delay in the trial but without discussing this argument more thoroughly. What an unacceptable delay would be is not clearly defined in this context. Previous case law of the ECJ regarding lis pendens requests however seem to indicate that there is a high tolerance in this regard. It is also questionable whether a granted forum non conveniens request always leads to an unacceptable delay. Such an effect must be seen on a case by case basis. One could also argue that denied access to a court due to lack of jurisdiction or a granted lis pendens referral could have similar effects, especially if the case is brought in countries with longer times of procedure, however that seems to be deemed acceptable. The problematic aspect should really lie in the factor of time of process rather than what caused it, which is why I am not entirely convinced so to the strength of the Advocate General’s statement.

When the doctrine of forum non conveniens is applied so that the stay is granted in the English court in favour of another state’s court, it is of interest to discuss whether the events in the second forum can be attributed to the English forum and thus pose problems in relation to

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194 Fawcett, p 9.
195 Case C-281/02, Opinion of Advocate General Legér, point 270.
196 For more details, see Case C-116/02, Erich Gasser GmbH v. Misat Srl, [2003], ECR I-14693. As the Court did not touch upon the time consumed for procedure in the Italian court, one must assume that it did not consider it to be problematic.
the indirect effect of Article 6.\textsuperscript{197} The question of interest is thus whether a granted \emph{forum non conveniens} request would potentially deprive the parties a fair trial abroad.\textsuperscript{198} This is what actualises the second step of the \textit{Spiliada} test; whether the injustice faced in the natural forum can impact the creation of objective justice between the parties in the case and how this could be attributed to the court granting the request. What ought to be required within the application of Article 6 is that the first forum is allowed to grant a stay if the natural forum is proven to be able to conduct a trial that is just and fulfils the requirements in Article 6.\textsuperscript{199} For this to be possible, the standards of justice set by the adequacy determination ought to be equal to the ones required in Article 6.\textsuperscript{200}

Within an EU context, this would be especially relevant as all states are parties to the ECHR and thus have an obligation to ensure that their procedures are in line with the requirements of Article 6. Given the existing obligation of the member states to ensure that the requirements of Article 6 are fulfilled, it should thus not be problematic to connect the second limb of the \textit{Spiliada} test to the requirements of Article 6. If the doctrine of \emph{forum non conveniens} resulted in a referral of the proceedings to another member state and those proceedings did not live up to the requirements set by Article 6 of the ECHR, the first state could also bear a responsibility for the breach.\textsuperscript{201} Therefore, from this perspective, the second limb of the \textit{Spiliada} test could beneficially be included in a potential \emph{forum non conveniens} test in the Brussels I Regulation.\textsuperscript{202}

\begin{thebibliography}{99}
\bibitem{197}In \textit{Pellegrini v. Italy}, 30882/96, ECHR 2001-VIII, point 47, the ECHR decided that the state of Italy had breached its obligations under Article 6 as the Court had recognised and enforced a judgment without properly ensuring that the first procedure was in line with the requirements of Article 6. This case thus shows the indirect application of Article 6, and its impact on private international law. This judgment could hold importance in the case of an inclusion of the doctrine of \emph{forum non conveniens} in the EU and the obligations of the involved states in relation to the procedures of each other.
\bibitem{198}Fawcett, p. 9-10.
\bibitem{199}Ibid, p 10.
\bibitem{200}Arzandeh, p 105-108.
\bibitem{201}Fawcett, p 3 and 10.
\bibitem{202}The doctrine has been criticised from a human rights perspective on a more general level, and rightly so. These issues would mainly arise in relation to states outside of the EU, and they are thus not entirely relevant in the internal EU context discussed here. These issues could potentially arise through the inclusion of Art. 33 and 34 in Regulation 1215/2012. I believe that this impact should be further highlighted. The interested reader could in this respect turn to Amnesty International’s Report of 2014, \textit{Injustice Incorporated. Corporate Abuses and the Human Right to Remedy}.\end{thebibliography}
7.2  *Forum non conveniens* in the EU and international legal principles

7.2.1  *Forum non conveniens*, ‘judicial chauvinism’ and comity

An issue lifted by United Kingdom researcher Ardavan Arzandeh is that the second limb of the *Spiliada* test forces the court to engage in “judicial chauvinism”. By this he means that it enforces the evaluation of the differences between the other states judicial systems and the British system as being traits of inferiority in the foreign system. This notion would be problematic as the differences in the other systems might be carefully motivated through other rules in the other fora, rather than to be considered as faults. This would then set higher standards for the foreign court than the English court actually possesses and can reasonably demand. An attitude like the one described by Arzandeh could be problematic in an international setting and one can question its relation to comity. If the English court would regard the other systems to be inferior, the judgments originating from those states are less likely to be recognised and enforced, and the interest of a British court to exercise jurisdiction in the case is higher. Thus the international validity of judgments and respect would not heightened, which could pose issues to comity on an international level.

Lord Kinnear touched upon the relation between comity and the doctrine of *forum non conveniens* thoroughly in the *Atlantic Star* judgment. Lord Kinnear claimed that while the British legal system and especially the *forum non conveniens* determination had been marked by an attitude of superiority in the past, it was now outdated and should be abandoned. This has in turn led to the wider acknowledgement of the capabilities of foreign courts. The *forum non conveniens* test can thus be claimed to have become more sensitive to the requirements of comity. The initial standpoint of the court is that the court in the natural forum is capable to conduct a just trial, and this position is not rebutted unless evidence is produced to the contrary by the plaintiff. As claimed by Lord Collins of Mapesbury in *Altimo*

203 Arzandeh, p 98.
204 Ibid.
205 The Abidin Daver, p 411, Lord Diplock.
206 The Atlantic Star, p 453.
208 The Abidin Daver, point 411, Lord Diplock.
Holdings in 2012 however, comity does not require a court to accept all traits of all legal systems of the world. Comity does however require the court not to pass judgement on the standards or practice of other systems without sufficient proof thereof. Such evidence must also possess substantiated facts so as to the nature of the system and its impact in the case and cannot consist of generalised or anecdotal statements. Put simply, comity does not force a court to accept proven injustices in other states courts or legislation. If it did, I would argue that the public policy reservation which is generally included in conventions regarding private international law would not be acceptable between any states. Comity is also not a legally binding state obligation, but rather a gesture to create international harmony. The fact that there are legal systems in the world where a fair trial could not take place should, in my opinion, be recognised and incorporated in the forum non conveniens test to secure the original aim of creating justice for the parties. As the court cannot make a determination of inadequacy without sufficient proof and can take guidance from rather objective standards of justice, the problem posed by potential judicial chauvinism is less. Thus, the second step of the Spiliada seems to function as a safeguard in cases where the procedure in the foreign justice system is flawed, thus not encompassing mere differences. This is in line with the maximisation of justice which was one of the initial motives for the creation of the doctrine.

7.2.2 Forum non conveniens and the principle of equal sovereignty

As a last principle to discuss is the relationship between the second limb of the Spiliada test and the principle of equal state sovereignty. If two states involved in a lawsuit are regarded to be equals, the courts of one state cannot essentially judge the courts of the other state as inadequate. This follows from two reasons. First, a determination of inadequacy can be considered as an assertion of normative power and superiority over another state, which can be interpreted as overstepping the boundaries set by the principle of sovereignty. This argument is quite close to Arzandeh’s critique of the adequacy determination within forum non conveniens as creating a notion of superiority within British courts previously discussed.

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210 Ibid.
If the previously mentioned suggestion of the synchronisation of the second limb of the Spiliada test with Article 6 of the ECHR would be permitted, this must also be considered from a perspective of equal state sovereignty. Second, it cannot be regarded as desirable to allow the member state courts to determine each other’s adherence to Article 6 of the ECHR. This could pose two problems for public international law. First, traditional public international law does not permit another state to interfere in the internal situation of another state.211 This comes from the basic interpretation of the principle of equal sovereignty. Second, it could be problematic to allow for such a determination as no state actually possesses interpretive prerogative over another regarding Article 6 of the ECHR. If that was the case, there would be no necessity for a separate court in the ECHR system. To allow for such a development would also be very politically sensitive, and it would therefore be difficult to realise from a perspective of public international law.

Thus, it might not essentially be problematic to allow an inclusion of the first step of the Spiliada test in the Brussels I Regulation, but the second step of the test does seem to be potentially incompatible with the principle of equal sovereignty. While the inclusion of an adequacy determination could ensure greater adherence to Article 6 of the ECHR which would benefit the parties, it must be determined whether the negative effects on the states and their relations is worth it. As the impacts on the principle of equal sovereignty are serious, I would thus not include the second limb of the Spiliada test in the potential forum non conveniens rule in the Brussels I Regulation. If considering the doctrine of forum non conveniens as expressed in the Brussels II Regulation from the same perspective, one can quickly realise that the same problems might not arise as the transfer is not dependant on the quality of the alternative court. Instead, the focus would lie on the case itself and the suitability of a transfer in this regard. Therefore, if future considerations on whether to include a transfer mechanism within the Brussels I instruments were to be taken, it could favourably be constructed in a manner similar to the Brussels II Regulation.

211 See the Charter of the United Nations, Art. 2 (7).
8 Concluding remarks

The discussion held in this thesis and the suggestions put forward are radical. If implemented, they would create a fundamental change in the system of jurisdiction within the EU, something which could have global ramifications. Therefore, I would suggest further research to be made and suggestions put forward so as to enable a carefully motivated change. In my opinion, the problem of the Brussels I instruments is that the balance allegedly sought might not actually be achieved. The Brussels I system is based on the notion that the forum of the defendant’s domicile will always possess an interest in the dispute, and that such a forum will always achieve justice in a manner that is in line with the sound administration of justice. As modern commerce and trade become increasingly international, such a notion becomes more difficult to justify as the forum might not essentially be connected to the transaction other than by being the domicile of the defendant. As the intended balance and flexibility between the forum solutionis and the forum of the defendant’s domicile might not be achieved at present, it is unlikely that it will be achieved in the longer run. This will in turn create a mechanical application of the jurisdictional rules, which might not produce appropriate and just results.

I believe that the problem regarding the forum of the defendant’s domicile basically arises from the lack of consideration given to the sound administration of justice and the criterion of proximity within the domicile forum rule and the inadequate wording and interpretation of the forum solutionis. As the forum solutionis rule is seemingly adapted to simpler cases, where the international connections are fewer and thus comparatively greater in economic value, it might fail to encompass cases where there are multiple connections. To fall back upon the domicile of the defendant in such cases might be problematic, given that it will cause an inflexible and mechanical system that in the end might not produce results that are in line with the sound administration of justice.212 Therefore, the suggestion put forward in this thesis aims to resolve the issues through an inclusion of the doctrine of forum non conveniens within the jurisdictional rules of the Brussels I system. The inclusion of a greater, but not an unlimited, number of variables under the determination of jurisdiction under the

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212 Airbus Industries GIE v. Patel and Others, p 11, Lord Goff of Chively.
*forum solutionis* rule would allow the courts to use the rule in a way not producing inflexibilities in the system. As the instruments are constructed in a manner that is more adapted to the civil law approach to law and jurisdiction, the inclusion of variables to consider in the *forum solutionis* should be exhaustive. One should also carefully define the application of the factors, both in relation to their selection and importance in the analysis. Combined with the inclusion of the principle of proximity and substantial justice requirements within the use of the domicile forum rule, one could allow for greater flexibility, but also cost savings and greater equality between the expectations of the parties. Because truthfully, it might not be foreseeable to try a case at a forum unconnected to the dispute other than through it being one of the parties domicile. In fact, foreseeability can come from the case as such rather than the rigid application of a rule of jurisdiction, as foreseeability might be connected to appropriateness as well. These factors could well be the same as the ones in the *Spiliada* test, as those factors are of a general nature to many commercial disputes, but also in relation to contractual disputes.

If the *forum non conveniens* determination was to include an identification of another forum where trial could be held in a more appropriate manner, the parties would save both time and money in their procedure. This could have a positive impact on the internal market. The suggested changes could be encompassed by the interpretative prerogative of the legal acts of the EU possessed by the ECJ. There are thus several steps where the *forum non conveniens* doctrine could be incorporated the already existing rules of the Brussels I instruments. If the rules on jurisdiction were to include a greater number of variables, the results would be more in tune with the situation in the case at hand. By extending the requirements of proximity and the sound administration of justice inherent in the *forum non conveniens* test to the determination of jurisdiction at the forum of the defendant’s domicile as well, the system could handle the complex cases that may be brought in the future. If combining the more flexible rules with the requirement that the first court is to stay the case, instead of dismissing it in favour of another member state court, the risk of *dení de justice* that an unregulated flexibility may bring is minimised. But, as my argumentation has shown, it might be too great a change to include a transfer mechanism within the system without a reconstruction of the wording of the Regulation. As this might have potential benefits, it should be considered in
the future, but essential gains could be produced through the ECJ’s reinterpretation of the rules.

As the investigation into some selected principles and norms of public international law has shown, there is no essential hindrance to the inclusion of the *forum non conveniens* doctrine in the Brussels I instruments. In fact, an investigation of Article 6 of the ECHR indicates positive results. The results from the investigation into the principle of equal state sovereignty are not conclusive. It would most likely support an inclusion of a transfer mechanism even if it clashes with the second step of the *Spiliada* test. This clash is the result of the fundamental inability of one state to judge other states’ internal structure and actions, unless perhaps from a perspective of substantive violations to human rights. I therefore have doubts on whether it is suitable to include the adequacy determination of the *Spiliada* test within the Brussels I instruments. This conclusion is potentially also supported by the choice of not including this aspect of the test within Article 15 of the Brussels II Regulation, where, in my opinion, the most suitable model of a transfer mechanism can be found.

While this thesis has covered several issues, there are important questions that remain unanswered. These include the impact of *forum non conveniens* on the *lis pendens* rule, the doctrine’s relationship to the exclusive grounds for jurisdiction in the Brussels I instruments as well as the impact it would have on the *Tessili* method otherwise furthered in the instruments. During my research I also came across a great amount of literature discussing the doctrine of *forum non conveniens* in relation to multinational corporate activities and the effects that the doctrine has on the local population’s right to remedies. While this might not be immediately problematic within the EU given the mobility of judgments, the discussion should be highlighted especially in relation to the mentioned Articles 33 and 34 incorporated in the latest Brussels I Regulation. It is a topic that deserves more attention and its impacts should be evaluated, especially given the European focus on human rights. These mentioned questions could not be encompassed by this thesis as they could not be analysed in the manner they deserve on a limited number of pages. I do believe it is possible to solve these questions in a manner conducive to justice, but it has to be the subject of later research.
Sources

The European Union

Conventions and Regulations:

Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (Brussels I Convention).


Cases from the European Court of Justice:

C- 12/76, Industrie Tessili Italiana Como v. Dunlop AG, [1976], ECR 1473.


C-292/05, Eirini Lechouritou and others v. Dimosio tis Omospondiakis Dimokratias tis Germanias. [2009], ECR I-01519.

C-386/05, Color Drack GmbH v Lexx International Vertriebs GmbH., [2007], ECR I-03699.

C-19/09, Wood Floor Solutions Andreas Domberger GmbH v. Silva Trade SA, [2010], ECR I-02121.
Opinion of the Advocate General:


Reports and other material from the EU-institutions:


The United Kingdom

Cases from British Courts:

Longworth v. Hope [1865], 3 M. 1049 (Sess. Cas).
Sim v. Robinow, [1892], 19 R. 665 (Sess. Cas).
JKN v. JCN, [2010], EWHC 843 (fam.).
Aliomo Holdings v Kyrgyz Mobil Tel Ltd and others [2012] 1 WLR 1804.

Other Materials

Conventions:


Case law of the PCIJ:

Case law of the ECHR:


National Cases:

RH 2010:23. (Sweden)


Literature:


Stuckelberg, M., *Lis Pendens and forum non conveniens at the Hague Conference*, 26 Brooklyn Journal of International Law, 2001, p 949-981,

