remains only to say that it remains there because the Member States wish it to remain: in the proposals to reform the Brussels I Regulation, the Commission had proposed measures which would have moved towards harmonisation of the jurisdictional rules for claims against defendants domiciled in non-Member States. This would have gone a considerable way to remedy a flaw in the Regulation; it was apparently ahead of its time.

CHAPTER 2

Jurisdiction under the Brussels I Regulation

INTRODUCTORY MATTERS

2.01 General

When a case is brought or to be brought in the courts of the United Kingdom, and a question of jurisdiction arises, the point of departure will be the impact of the Brussels I Regulation. For proceedings commenced before 10 January 2015 this will mean Regulation 44/2001,[1] the basic jurisdictional provision for all proceedings instituted on or after 1 March 2002.[2] For proceedings commenced on or after 10 January 2015, this will mean the recast Regulation 1215/2012,[3] the jurisdictional rule for all proceedings in civil and commercial matters instituted on or after that date.[4]

The Brussels I Regulation was the successor in title to the Brussels Convention,[5] and save where there are obvious and apparently deliberate alterations to the text found in the Convention, it is intended to reproduce, and will be interpreted as though it reproduced, the law established by the Convention.[6] The same will be true where the recast Regulation 1215/2012 reproduces the text of Regulation 44/2001.[7]

In any case in which jurisdiction is an issue there are, in broad terms, four possibilities. The first is that the Regulation does not apply at all, because the claim falls outside its domain: this may be because the claim is outside the material, or the subject matter, or the temporal, scope of the Regulation. In such a case, the traditional jurisdiction rules as set out in this book in Chapter 4[8] will govern. The second is that the claim is within the domain

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1 [2001] OJ L12/1.
2 Articles 66 and 76.
3 [2012] OJ L351/1.
4 Article 81.
5 Civil Jurisdiction and Judgments Act 1982, Sch. 1 (as amended).
6 It became a boilerplate paragraph in judgments in 2009: C-533/07 *Falco Privatstiftung v. Weller-Lindhorst* [2009] ECR I-3327; C-167/08 *Draka NK Cables Ltd v. Omnipol Ltd* [2009] ECR I-3477; C-180/06 *Ilsinger v. Schlank & Schick GmbH (in liq)* [2009] ECR I-3571; C-111/08 *SCT Industri AB (in liq) v. Alpenblume AB* [2009] ECR I-5565; C-198/08 *Zuid-Chemie BV v. Phillippo's Mineralenfabriek NV/SA* [2009] ECR I-6917; C-298/08 *German Graphics Graphische Maschinen GmbH v. Holland Binding BV (in liq)* [2009] ECR I-8421. It continues to be: C-533/08 *TNT Express Nederland BV v. AXA Versicherung AG* [2010] ECR I-4107; C-478/12 *Maletic v. lastminute.com GmbH* EU:C:2013:735, [2014] QB 424; C-548/12 *Brogsitter v. Fabrication de Montres Normandes EURL* EU:C:2014:148, [2014] QB 753; C-302/13 *flyLAL-Lithuanian Airlines AS v. Starptautiskā lidosta Rīga VAS* EU:C:2014:2319, [2015] I-L pr 28.
7 Recital (34) to Regulation 1215/2012, second sentence.
8 But if there is some other legislative scheme, it will apply instead. In relation to insolvency and matrimonial causes, for example, Regulations 1346/2000, and 2201/2003 (replacing Regulation 1347/2000) will apply their special rules, and these will also displace the rules of the common law.

of the Regulation but the Regulation provides that the traditional jurisdictional rules, as set out in this book in Chapter 4, are to be applied, by incorporating them by reference within the broader framework of the Regulation where they operate as residual jurisdictional rules. The third is that the claim falls within the domain of the Regulation, and the Regulation identifies, by the rules set out in its Chapter II, the specific court (as distinct from merely identifying the Member State), which is to have jurisdiction; and if this is so, there is no need to look any further. The fourth is that the claim falls within the domain of the Regulation, but the Regulation specifies, by means of the jurisdictional rules set out in its Chapter II, that the courts of a Member State are to have jurisdiction. If that Member State is the United Kingdom, a further set of rules, internal to the United Kingdom, will be needed to identify the particular part (England and Wales, Scotland, Northern Ireland) of the United Kingdom whose courts have jurisdiction. It is the third and fourth of these cases, and the rules which apply to them, which are examined in this chapter.

The third category of case is more complex than it seems for, though the Regulation is the most important, it is not the only instrument which governs the jurisdiction of the courts in civil and commercial matters. In other words, the Regulation has a territorial scope as well. It yields to the Brussels and Lugano Conventions, which continue to apply principally where there are jurisdictional connections with States and territories which were covered by these Conventions but which are not, for various reasons, bound by the Regulation. Until 2007 these non-Regulation States and territories included Denmark, which had opted out of the Regulation and in relation to which the Brussels Convention rather than the Brussels I Regulation continued to govern.[9] On 1 July 2007, Denmark became bound by Regulation 44/2001;[10] it agreed to be bound by Regulation 1215/2012 by a declaration to this effect.[11] Non-Regulation territories still include the non-European possessions of France,[12] the Netherlands,[13] and the United Kingdom,[14] to which the Brussels Convention may apply but the Regulation does not.[15] Iceland, Norway, and Switzerland remain outside the European Union, and in relation to them, the Lugano Convention[16] applies. So today, when there is a possible jurisdictional connection with Iceland, Norway, or Switzerland, or to the non-European territories of the Member States, there may be need to refer to the rules of these Conventions. For the sake of completeness, it should be noted that Gibraltar counts as part of the United Kingdom for the purposes of the Regulation,[17]

9 Recital (22) to the Regulation.

10 The 'parallel agreement' is at [2006] OJ L120/22; it was given effect in the United Kingdom by SI 2007/1655. So far as the Brussels Convention was concerned, it was never extended to Greenland or the Færoe Islands.

11 [2013] OJ L79/4.

12 Neither Convention nor Regulation applies to Monaco or to Andorra. The *Regulation* applies in Guadeloupe, French Guiana, Martinique and Réunion, which are overseas departments of France. The *Brussels Convention* applies in the French Overseas Collectivities (formerly Territories) of New Caledonia, French Polynesia (which includes Tahiti), Mayotte, the Wallis & Futuna Islands, and in St Pierre & Miquelon.

13 The *Regulation* applies in the Netherlands; the *Brussels Convention* in Aruba; neither instrument applies in the Netherlands Antilles.

14 The *Regulation* applies to Gibraltar; neither the Regulation nor the Convention applies to the Isle of Man, the Channel Islands, the Sovereign Bases on Cyprus, or any non-European territory of the United Kingdom.

15 Recital (23) of Regulation 44/2001.

16 Regulation 1215/2012, Art. 73.

17 Article 60 of the Brussels Convention permitted the United Kingdom to extend it to Gibraltar, but the Spanish courts, in an exhibition of anarchy, refused to recognise Gibraltar judgments as judgments from the courts of the United Kingdom: see the note of the decision in [2003] ILPr 9.

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albeit that it was not within the Brussels Convention. But the Isle of Man and the Channel Islands are outside the territorial scope of the Regulation, just as they were, and are, outside the territorial scope of the Conventions; the same is true for Monaco, Andorra, San Marino, the Vatican City and Liechtenstein: for jurisdiction and judgment purposes they are just about as foreign as China or Peru.

For the purposes of exposition, it makes most sense to deal with the jurisdictional regime established by Regulation 1215/2012, and to reserve to Chapter 3 the examination of those particular details in which the rules of the Brussels and Lugano Conventions (and Regulation 44/2001), diverge from the corresponding provisons of the Regulation. If this leaves the impression that the result is more complex than it should be, the impression is entirely accurate: but the world has become a complex place, and the law reflects this. Even though in most cases the enquiry can begin and end with the Brussels I Regulation, the continuing, if diminished, survival of these earlier instruments may make the determination of jurisdiction trickier than the ideal would have been.

The most problematic jurisdictional interface is the one between the Regulation and the jurisdictional rules of the common law which, as explained above, may be applicable for two quite distinct reasons but which also, for reasons also explained above,[18] understand jurisdiction and its exercise in very different ways. However, if the case falls within the scope of the Regulation, the Regulation, and it alone, governs the taking of jurisdiction. This will mean, among other things, that the traditional means of asserting jurisdiction, by serving the defendant with proceedings while he is within the jurisdiction, or by obtaining permission[19] to serve the defendant outside it, will no longer be applicable. Article 5 of Regulation 1215/2012 emphasises that these traditional rules for asserting jurisdiction may be resorted to only insofar as the Regulation permits it. The Regulation is therefore the point of jurisdictional departure in every civil or commercial case in which the jurisdiction of the courts of the United Kingdom is in question. It has mandatory effect. It obviously does not need to be pleaded; it is the law of England, even if it is not English law.

As a matter of English civil procedure, however, it is always *necessary* to serve the defendant with proceedings for the English court to have jurisdiction: it is not inaccurate to respresent the common law as proceedings on the basis that where there is service there will be jurisdiction.[20] But the Regulation is organised the other way around: where there is jurisdiction, there may be service. In cases where the defendant is within the jurisdiction, and the Regulation provides that there is jurisdiction, he may be served, and there is no more to be said. In cases where he is outside the territorial jurisdiction of the court, and the Regulation provides that the English courts have jurisdiction, he may be served: it is not necessary to seek the permission of the court to serve the defendant *ex juris*: rules 6.32[21] and 6.33[22] of the Civil Procedure Rules provide, in effect, that the defendant may be served as of right in a case where the Regulation provides the statutory basis for the jurisdiction of the court.[23]

18 At the beginning of this paragraph.

19 Under Part 6 of the Civil Procedure Rules 1998 (abbreviated hereafter as 'CPR'), as amended.

20 How and when service is lawful, and how a defendant may challenge service of process upon him, is examined in Chapter 5, below.

21 Service in Scotland and Northern Ireland.

22 Service outside the United Kingdom.

23 As long as he has a domicile in a Member State, or Arts 18(1), 21(2), 24 or 25 give the court jurisdiction over a defendant who is not so domiciled. The claimant must also file and serve a notice containing a statement of the grounds on which he is entitled to serve out of the jurisdiction: CPR r. 6.34(1). Practice Form N510 will

It is therefore no longer true that if the defendant is within the jurisdiction, he may be proceeded against as of right, or that, if he is outside the jurisdiction, the assertion of jurisdiction by the English courts is a matter controlled by judicial discretion. The Regulation defines the cases when a claimant has a right to sue the defendant, and the cases where he has no such right: and if he has the right to sue he has the right to serve. By and large, discretion has no part to play in the operation of the rules.

2.02 General principles of interpretation of the Regulation

The jurisdiction of English courts has been governed by European legislative texts, of one form or another, since 1 January 1987. Since then, a number of overriding general principles of interpretation applicable to those texts have emerged. It is convenient to identify four or five such general principles, though there are certainly others of narrower or of less precise operation.

The fundamental rule is clear enough: if the case falls within the provisions of the Regulation, the Regulation alone allocates jurisdiction over the defendant. It may do so by giving jurisdiction to the courts of the United Kingdom, or by giving jurisdiction to the courts of another Member State or States. If the Regulation, as properly interpreted, gives jurisdiction to the courts of the United Kingdom, those courts must exercise that jurisdiction when called upon to do so by the claimant, unless the rules of the Brussels I Regulation which deal with a situation of *lis alibi pendens*[24] are applicable, or unless the jurisdiction is founded on what is now Article 6 of the Regulation. If the Regulation allocates jurisdiction to the courts of another Member State, and also to the courts of the United Kingdom, either court, though generally not both courts at the same time,[25] may exercise jurisdiction. But if the Regulation allocates jurisdiction to the courts of another Member State and not to those of the United Kingdom, the courts of the United Kingdom do not have jurisdiction.[26] The Regulation must therefore be considered before the traditional rules of civil jurisdiction in English (and Scottish and Northern Irish) law.

2.03 The terms of the Regulation are given an equal and uniform interpretation

The substance of the preceding paragraph could (one imagines) equally be found in a book on private international law in other Member States. There is an obvious practical benefit in the provisions of the Regulation bearing, to the greatest extent possible, a meaning which is common and uniform across the Member States. It would rather diminish the

be used: see CPR PD 6B, para. 2.1. For the question of how certain or well-established must be the facts which confer jurisdiction under the Regulation, see para. 4.86, below. If the claimant is in doubt whether he can meet this standard, it makes practical sense to make a concurrent application for permission to serve out, just to be on the safe side: see further below, para. 5.20; see also *Mercury Communications Ltd v. Communication Telesystems International* [1999] 2 All ER (Comm) 33. It may be appropriate to explain in the witness statement in support of the application for permission to serve out the basis for the difficulty and the circumstances in which the application is made.

24 Articles 29 to 34 of Regulation 1215/2012, discussed in paras 2.260 *et seq.*, below.

25 Because the court seised second will in general be required to apply the rules of the Regulation on *lis alibi pendens*.

26 Article 5(1) of Regulation 1215/2012 states that persons domiciled in a Member State shall be sued in the courts of another Member State only in accordance with the provisions of the Regulation.

practical effect of the scheme for there to be a single text, but one which meant something different in every Member State of the European Union. This need for a uniform interpretation is met in two ways: first, by the power and the duty of certain national courts to make references to the European Court for a preliminary ruling on the proper interpretation of the Regulation, as described in the preceding chapter.[27] Second, it has been met by the development of autonomous, or independent, meanings for the basic definitional terms of the Regulation: this is, beyond doubt, the most characteristic feature of the jurisprudence of the Court.

The point may be illustrated by a simple example.[28] Suppose a German manufacturer sells goods to a French buyer, who sells them on to a French sub-buyer. Suppose the goods are not fit for the purpose for which they were originally sold, and that the sub-buyer wishes to sue the manufacturer. In German, as in English, law any action would lie in tort, whereas in French law the claim may be regarded as contractual.[29] If in the particular case jurisdiction is to be based on Article 7 of Regulation 1215/2012,[30] it is necessary to ask whether the action is one relating to a contract or to tort. Whatever the answer is, it is *not* 'contract if the claim is brought in France, but tort if it is brought in Germany'. Instead, the jurisdictional question has to be answered by use of an independent, or uniform, or autonomous, or anational, or delocalised, definition of the terms: not by recourse to national law.

To take another example, suppose a house buyer sues the surveyor who was negligent in reporting its condition to the mortgage lender, but who was well aware that the report could be shown to the intending buyer who had in any event paid for the survey. As a matter of English domestic law, such an action would be seen as lying in tort. But in other systems it may be seen as contractual in nature, on the footing that the contract between mortgage lender and surveyor was also made for the benefit of (and the service paid for by) the house buyer. It may, therefore, be wrong to assume too quickly that for special jurisdictional[31] purposes the action is not to be regarded as a 'matter relating to a contract' and as falling within Article 7(1).

To take a third example, if commercial partners fall out, one accusing the other of disloyalty and unfair competition, national law may permit a claim to be framed as one in tort or delict, from which it may be argued that special jurisdiction may be available under Article 7(2) of the Regulation. But if the complaint could have been pleaded as a claim for breach of contract, or if it is necessary to plead the contract in order to establish the

27 Paragraph 1.16, above.

28 See C-26/91 *Jakob Handte & Co GmbH v. Soc Traitements Mécano-Chimiques des Surfaces* [1992] ECR I-3967.

29 Warranties of quality being considered to pass with title to the goods on a transfer of the goods: not such a crazy idea, when you reflect on it. It is said that the French courts now accept that the claim of the sub-buyer is not contractual: *Soc Donovan Data Systems Europe v. Soc Dragon Rouge Holding* (Cass 6 July1999), [2000] Rev crit DIP 67. But the general point is still valid.

30 In other words, the defendant is sued in a Member State other than that in which he has a domicile.

31 Until very recently, there was no reason to suppose that if the claim were seen as relating to a tort for jurisdictional purposes it had to be resolved on the merits by the law of tort of the court seised. The reverse was true: a court with jurisdiction over a claim would then apply whatever substantive law its rules of the conflict of laws told it to: see C-26/91 *Jakob Handte & Co GmbH v. Soc Traitements Mécano-Chimiques des Surfaces* [1992] ECR I-3967, at [24] of the Opinion of the Advocate General (a view which was entirely sound, even in the absence of the explicit confirmation of the Court). But as the applicable law for contractual and for non-contractual obligations is now specified by Regulation (Rome I and Rome II, respectively), the relationship between the Regulations governing jurisdiction and the applicable law may be much closer than it was, and divergence acknowledged by the Advocate General will be less likely to result. For further consideration, see below, para. 2.163.

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unlawfulness of the acts complained of, the matter will be one relating to a contract for the purposes of special jurisdiction over a defendant domiciled in another Member State, and hence within Article 7(1), despite the view taken by domestic law.[32]

2.04 The nature of autonomous interpretation

Autonomous meanings have been (or will be, as soon as the opportunity arises) given to practically all the definitional terms used in the Regulation. In earlier editions of this book a lengthy and lengthening list was given, but it now makes no sense, for the point is general and perfectly clear, and it is made and illustrated on practically every page of this chapter. Indeed, the Court has recently expressed the view that the need to proceed on the basis of uniform interpretations is, if anything, more entrenched than ever. As it said in *Re Roda Golf & Beach Resort SL*:[33]

> 'The objective pursued by the Treaty of Amsterdam of creating an area of freedom, security and justice, thereby giving the Community a new dimension, and the transfer, from the EU Treaty to the EC Treaty, of the body of rules enabling measures in the field of cooperation in civil matters having cross-border implications to be adopted testify to the will of the Member States to anchor such measures firmly in the Community legal order and thus to lay down the principle that they are to be interpreted autonomously.'

The road to a completed dictionary of definitional terms and uniform meanings for terms of art in the Regulation will be long. The road is paved with rulings from the European Court, but there is much paving still to be done. But the direction of legal development is clear, and to put forward an argument in a case which relies upon a term in the Regulation being given a meaning which is derived from the idiosyncrasy of national law is to advance an argument which exposes itself to attack.

2.05 A purposive interpretation of the Regulation

The Regulation is the latest incarnation of a legislative text designed and drafted by civil lawyers trained in the continental legal tradition, and subject to authoritative interpretation by judges who are almost all civilian lawyers. It was made, and has to be understood, to be interpreted according to the European canons of construction, at least if it is to be understood in a way which will conform to the views of the European Court.

The English approach of interpreting, more or less literally, the precise relevant words, following the prior decisions of earlier courts, is not exactly the European way.[34] Instead, the Regulation must be interpreted purposively, or 'teleologically'; that is to say, with a view which gives predominant weight to achieving the overall purposes of the instrument as a whole, as distinct from seeking to ascertain the natural meaning of a single provision taken in isolation from the rest of the text. This is important: in the paragraphs which follow attention is given to principles which apply to the interpretation of the individual

32 C-548/12 *Brogsitter v. Fabrication de Montres Normandes EURL* EU:C:2014:148, [2014] QB 753.

33 C-14/08, [2009] ECR I-5439. The case concerned the interpretation of the Service Regulation, Regulation 1348/2000; the passage from which the quotation is taken is [48]. This observation appeared first in C-433/03 *Götz Leffler v. Berlin Chemie AG* [2005] ECR I-9611, [45].

34 Indeed, it is not the approach taken to the construction of international treaties by the English courts.

Article; but the framework within which all of this is done is the purpose or purposes of the instrument as a whole. The point may be made by reference to a recent judgment, in which the Court put it this way:[35]

> 'By its questions, which should be examined together, the referring court asks, in essence, how, in the case where a manufacturer faces a claim of liability for a defective product, Article 5(3) of Regulation No 44/2001 is to be interpreted for the purpose of identifying the place of the event giving rise to the damage. In order to answer that question, it should be borne in mind, first, that, according to settled case-law, the provisions of Regulation No 44/2001 must be interpreted independently, by reference to its scheme and purpose.'

The fourth-from-last word in the passage shows that the interpretation, which will yield a uniform interpretation of the particular provision in respect of which the national court has sought a ruling, is to be found by reference to the scheme and purpose of the Regulation as a whole. The Court did not say that it was concerned to find the scheme and purpose of the particular Article or sub-Article which had been of concern to the referring court and in relation to which it had made its reference. The Court was instead required to make a broader and more comprehensive assessment of the scheme and purpose of the entire Regulation.[36] It is this approach which will guide the Court to its answer, and which will be manifested in more particular ways in the principles of interpretation discussed below.

It should not be thought that the European Court does not regard itself as bound by its own decisions, though no doubt this is correct. It does routinely refer to previous judgments, but what it draws from these tends to be a recitation of general principles of interpretation, rather than the ratios of individual judgments which it then proceeds to apply to the matter before it. The general principles of interpretation represent the continuing force of the judgments of the Court; the answers given to questions referred for a preliminary ruling are presented as the logical consequence of those principles.

For this reason, attention to the general principles underpinning the Regulation, as the European Court has declared them and as set out above, is the proper first step in the interpretation of any individual provision: they must be taken as read in all cases in which a question of construction arises for decision. Where they point in different directions, an argument which is well founded by reference to the purpose of the Regulation as a whole has the greatest prospect of being found to be correct.

2.06 Where the Regulation has general rules and exceptions, the latter are construed narrowly

In previous editions of this book, the 'construction of exceptions' principle stated that exceptions to the principle of domiciliary jurisdiction were to be construed restrictively. This version of the principle remains good law: almost from the beginning, the Court has said that provisions of the Regulation which allow a defendant to be sued, against his will, in a Member State other than that of his domicile are to be construed narrowly, or, at any

35 C-45/13 *Kainz v. Pantherwerke AG* EU:C:2014:7, [2015] QB 34, [18]–[19]. The same point is made in any number of judgments, including those cited in that case; also in C-548/12 *Brogsitter v. Fabrication de Montres Normandes EURL* EU:C:2014:148, [2014] QB 753.

36 See further, C-533/08 *TNT Express Nederland BV v. AXA Versicherung AG* [2010] ECR I-4107, [44].

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rate, no more broadly than is required to give effect to the purpose of the provision.[37] In other words, the principle that a defendant may expect[38] to defend himself at home is the fundamental principle of civil or commercial jurisdiction. Other jurisdictional rules are to be seen as exceptions, to be given no wider an interpretation than is necessary to achieve the purposes of the Regulation in general and the individual Article in particular.

A claimant who, for example, wishes to rely on Article 7 of Regulation 1215/2012 to sue the defendant in a Member State other than that of the latter's domicile, may find it less easy than may be suggested by the first reading of the text.[39] While many of the individual provisions of the Regulation prevail over the domiciliary principle, the protection of the primacy or centrality of the domiciliary rule, by the narrowing of these other provisions, is a clear trend. On occasion, the narrow construction of exceptions to the domiciliary principle appears to have been applied without proper reflection, especially where the consequence of adopting a narrow interpretation of a particular provision increases the risk of inconsistent adjudications and irreconcilable judgments.[40]

The principle that exceptions to the rule of domiciliary jurisdiction are construed narrowly makes sense within the Regulation. Indeed, the Court has even interpreted the relationship between what is now Article 7(1)(a) and 7(1)(b) as being one of general principle and particular exception: part of the justification for the conclusion that a licensing agreement was not within Article 7(1)(b) was that this provision was to be seen as an exception to Article 7(1)(a).[41] There is, so far as can be ascertained, no suggestion that the legislator intended this to be the nature of the relationship between the two provisions, though it may be assumed that those drafting the Regulation were aware of this canon of construction.

It has been suggested, and is probably correct, that the exceptions to the material scope of the Regulation which are stated in Article 1(2) are to be construed restrictively, on the footing that they constitute subject-specific exceptions for certain civil and commercial matters which derogate from the more general scheme for jurisdiction and judgments in civil and commercial matters established by the Brussels I Regulation.[42] Such an approach is defensible when the material question is whether a matter is a 'general civil or commercial' one, or one of the 'special civil or commercial' matters listed in Article 1(2).

37 Under Art. 24, see C-115/88 *Reichert v. Dresdner Bank* [1990] ECR 27; C-261/90 *Reichert v. Dresdner Bank (No 2)* [1992] ECR I-2149. Under Article 7, see 189/87 *Kalfelis v. Bankhaus Schröder Münchmeyer Hengst & Co* [1988] ECR 5565; C-220/88 *Dumez France SA v. Hessische Landesbank* [1990] ECR I-49; C-68/95 *Shevill v. Presse Alliance SA* [1995] ECR I-415; C-364/93 *Marinari v. Lloyds Bank plc* [1995] ECR I-2719. As to Art. 8, where it is less obvious that a restrictive interpretation should be adopted, see paras 2.223 *et seq*., below.

38 It would be possible to represent the same point in terms of the defendant having a *right* to defend himself at home. But for reasons explained below, at para. 2.21, it is misleading to use the terminology, and to draw conclusions which depend on the terminology, of rights.

39 On the other hand, it has been acknowledged that Arts 7(1) and 7(2) are, as they have been interpreted, not especially narrow in material scope: see C-27/02 *Engler v. Janus Versand GmbH* [2005] ECR I-481. The restrictiveness has been supplied within, rather than to, the operation of these Articles: see below, para. 2.188. A claimant seeking to interpret a provision of the Regulation so as to allow him to sue in his home court should expect to find the law particularly unaccommodating: C-88/91 *Shearson Lehmann Hutton Inc v. TVB* [1993] ECR I-139, [17]; C-364/93 *Marinari v. Lloyds Bank plc* [1995] ECR I-2719; C-220/88 *Dumez France SA v. Hessische Landesbank*; C-168/02 *Kronhofer v. Maier* [2004] ECR I-6009.

40 Especially in relation to Art. 8: see further below, para. 2.223.

41 C-533/07 *Falco Privatstiftung v. Weller-Lindhorst* [2009] ECR I-3327.

42 C-292/08 *German Graphics Graphische Maschinen GmbH v. Holland Binding BV (in liq)* [2009] ECR I-8421; C-157/13 *Nickel & Goeldner Spedition GmbH v. Kintra UAB* EU:C:2014:2145, [2015] QB 96; C-295/13 *H v. HK* EU:C:2014:2410.

This principle would, however, not justify giving a broad interpretation to the expression 'civil and commercial', on the pretended basis that matters which are not civil or commercial are exceptions to the Regulation which must, for that reason, be given a narrow scope: any such reasoning would be fundamentally flawed. Matters which are not civil or commercial in the first place were never within the scope of the Regulation. They are not excluded from the Brussels Regulation by being relocated to a separate Regulation, at least not in the sense in which this explains the function of Article 1(2), because they were not even potentially within it in the first place. Not until the end of 2014 did the Court say anything to cast doubt on this; but its decision in *flyLAL-Lithuanian Airlines AS v. Starptautiskā lidosta Rīga VAS*[43] that 'civil and commercial' must be interpreted broadly so as to ensure that the scope of 'not civil and commercial' is made narrow, as befits an exception, does not appear to be based on careful reflection on the development of the law. If it ever matters, it should not be taken as correct.

2.07 Interpretation must help keep the risk of irreconcilable decisions to a minimum

The Brussels I Regulation seeks to facilitate the easy, almost automatic, enforcement of judgments across the Member States. It is therefore necessary to prevent, as far as possible and from the outset, the existence of concurrent proceedings in the courts of two or more Member States. This has led the European Court to deliver forceful judgments[44] insisting upon a broad and purpose-driven application of the provisions for dealing with *lis alibi pendens*. It has also meant that the Court will not favour an interpretation of a rule which would lead to the conclusion that there was an unavoidable multiplicity of courts with jurisdiction over a claim, or over parts of a claim.

2.08 Interpretation should promote legal certainty, predictability and proximity

The principle of 'legal certainty' means that the interpretation adopted should be one which contributes, or is not damaging, to the idea of legal certainty. There are several aspects to the principle of legal certainty, of which five in particular call for mention.

First, legal certainty is the basis for objection to the common law's approach to questions of jurisdiction in general, and to its understanding that judicial discretion is a necessary or desirable element of jurisdictional law in particular.[45] For this reason, arguments which seek to show that a jurisdictional rule, otherwise applicable, should not be applicable because its underlying purpose does not apply to the instant case will be unprofitable.[46] More generally, a definition of a term such as 'consumer' which was liable to require the court to decide whether a person deserved that privileged status, by reference to a variety of socio-economic factors, is unlikely to be favoured.[47]

Second, and rather more justifiably, the principle will tell against a proposed construction of the Articles which would have the effect of leaving an intelligent claimant uncertain

43 C-302/13, EU:C:2014:2319, [2015] ILPr 28.

44 144/86 *Gubisch Maschinenfabrik KG v. Palumbo* [1987] ECR 4861; C-351/89 *Overseas Union Insurance Ltd v. New Hampshire Insurance Co* [1991] ECR I-3317; C-406/92 *The Tatry* [1994] ECR I-5439.

45 For the most obvious example, see C-281/02 *Owusu v. Jackson* [2005] ECR I-1383, [38]–[46].

46 C-288/92 *Custom Made Commercial v. Stawa Metallbau GmbH* [1994] ECR I-2913.

47 See further, para. 2.101, below.

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about where he will be able to sue, or a well-informed defendant unable to predict where he may be liable to be called to account. The existence of autonomous definitions of the terms used in the Regulation contributes to this certainty, but approaches to interpretation, put forward especially in relation to special jurisdiction, may find that they are measured against the requirement that they also make an individual contribution to legal certainty. Accordingly, the Court has declared itself in favour of interpretations of the special jurisdiction provisions, in particular, which would tend to prevent the multiplication or fragmentation of jurisdiction where claims arise within a single legal relationship; it has also rejected approaches which would require a national court to conduct an investigation of issues of applicable law in order to decide whether it had jurisdiction.[48] It has also used this as a justification for excluding the national law of the court seised from adding to or otherwise contradicting the jurisdictional rules set out in the Regulation.[49]

Third, the Court may invoke objectives of 'proximity and predictability',[50] which are perhaps best seen as particular manifestations of the general principle of legal certainty. The 'proximity' component of this, especially in relation to the rules of special jurisdiction in Article 7, may be used to support an interpretation of a particular provision which will tend to mean that, generally,[51] the court with special jurisdiction is one which will have a close and foreseeable connection, a close link, to the facts which give rise to the dispute. This will, at least in principle, tend to improve the quality of the adjudication. Even so, it is important to appreciate the abstract nature of the reasoning at this point. A court will not have special jurisdiction simply because it has a close link to the dispute; and a court will not lack special jurisdiction if, on the facts of the instant case, the application of Article 7 gives jurisdiction to a court which, atypically perhaps, does not have a close connection to the facts.[52]

Fourth, the interpretation and application of the rule of European law must conform to the principle of effectiveness. Or, to put it another way, rules of national procedural law may not encroach on a rule of European law in such a way as will undermine the application and intended effect of the rule of European law: where European law has laid down a rule, the rule must be effective. The principle of effectiveness is probably separate and distinct from the principle of legal certainty, but they are undoubtedly linked, and together they militate against clever or creative (or self-serving) readings of European law which are designed to give advantage to one side or the other in litigation at the expense of the clarity and effectiveness of rules and principles of European law.

And fifth, the Court has made it clear that there is to be continuity of interpretation as between the Brussels Convention and the Regulation: unless it is plain that a change in the wording of the two instruments was meant to produce a different outcome, the answers and

48 C-269/95 *Benincasa v. Dentalkit Srl* [1997] ECR I-3767; C-381/08 *Car Trim GmbH v. KeySafety Systems Srl* [2010] ECR I-1255.
49 150/80 *Elefanten Schuh GmbH v. Jacqmain* [1981] ECR 1671.
50 For the recent examples, see C-204/08 *Rehder v. Air Baltic Corp* [2009] ECR I-6073; C-157/13 *Nickel & Goeldner Spedition GmbH v. Kintra UAB* EU:C:2014:2145, [2015] QB 96.
51 Without prejudice to the specific case: C-288/92 *Custom Made Commercial v. Stawa Metallbau GmbH* [1994] ECR I-2913.
52 C-288/92 *Custom Made Commercial v. Stawa Metallbau GmbH* [1994] ECR I-2913 (a case decided on an earlier version of Art. 5(1)).

interpretations given in relation to the Convention continue to be reliable for the purposes of the Regulation.[53]

2.09 All national courts are of equal authority, and none has institutional superiority

The court of one Member State may not speak ill of a court in another Member State: *de iudice nil nisi bonum*, as one might say. The Court has become increasingly emphatic that it is impermissible for a court in one Member State to find fault with the proceedings or process before the courts of another Member State, and to draw the conclusions which might be thought to follow from such a finding of fault.

Insofar as there is a textual basis for this principle, it is elusive:[54] it would not be helpful, in this context, to repeat the mantra of obviousness and authority being in inverse relation to each other. A court called upon to recognise the judgment of a court in another Member State is absolutely forbidden to review the substance of the judgment.[55] So far as the exercise of jurisdiction by the other court is concerned, the court called upon to recognise a judgment may not review the jurisdiction of the court which gave the judgment; and where jurisdiction has been based on Article 6, it may not find this rule of jurisdiction, or its exercise, to be contrary to its public policy.[56]

From this statutory basis, an intermediate principle was deduced by the Court: that a court in one Member State is forbidden to review the jurisdiction of a court in another Member State outside the context of the recognition of judgments; and that it follows that a court may not take any step or make any order which is predicated on its having reviewed the jurisdiction of the courts of another Member State: it may not adjudicate as a consequence of its conclusion that the courts of the other Member State do not have or should not exercise jurisdiction, because that conclusion is one which involves a judgment which the court is almost always forbidden to make.[57] The justification is that the Regulation is part of the law of all 28 Member States, and as there is no reason to suppose that any national court is blessed with superior skills in the art of interpretation, a court may decide whether it has jurisdiction, but may not decide whether another court had or has it.

This led to the final and definitive statement of the principle: to the proposition that the courts of the Member States were required to repose and demonstrate trust in each other's legal systems and judicial institutions.[58] Not only did that explain the intermediate principle mentioned above, but 'mutual trust' was the principal reason why the grant of an anti-suit injunction, ordered to restrain a person from bringing proceedings before the courts of another Member State whose only purpose was to undermine the jurisdiction of the English

53 For a recent example, see C-548/12 *Brogsitter v. Fabrication de Montres Normandes EURL* EU:C:2014:148, [2014] QB 753, [19]. But the point is now made as a matter of routine.
54 An attempt to isolate the source of the principle in the broader scheme of European law was made by Blobel and Späth (2005) 30 Eur LR 528, but the truth really is that there is no better source than that identified here.
55 Article 52 of Regulation 1215/2012.
56 Article 45 of Regulation 1215/2012. It has also been suggested that the duty imposed by Art. 4(3) TFEU, of 'sincere cooperation', may contribute to the principle, but this is not really persuasive.
57 C-351/89 *Overseas Union Insurance Ltd v. New Hampshire Insurance Co* [1991] ECR I-3317; C-163/95 *Von Horn v. Cinnamond* [1997] ECR I-5451; Opinion C-1/03 *Lugano Convention* [2006] ECR I-1145, [163].
58 C-116/02 *Erich Gasser GmbH v. MISAT Srl* [2003] ECR I-14693.

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fundamental general principle that each party should be sued in the courts of its domicile, and that what is now Article 25 could not prejudice its validity. It is also clear that it gave rise to no uncertainty: if G wished to sue M it was clear which single court had jurisdiction, and vice versa. It was a wholly rational decision.

The principle said to be derived from *Meeth* may validate a clause which purports to give exclusive jurisdiction to the courts of two or more Member States concurrently. Had the clause in *Meeth* provided that actions could, without other restriction, be brought in the courts of France or Germany, its effectiveness would have been only marginally less certain. There are arguments which tend to oppose the validity of such a clause: it will not be clear in advance which court is to be competent; the clause no longer gives effect to the principle that defendants should be sued where they are domiciled; and to give exclusive jurisdiction to two courts is inelegant, even self-contradictory. On the other hand, a choice of concurrent exclusive jurisdictions may be taken as a case in which the parties have agreed that the jurisdiction should not be exclusive, as Article 25(1) accepts that they may. It will still be perfectly clear which courts have been derogated from and, in that sense, excluded from jurisdiction. And in any event, if the purpose of what is now Article 25 is to embody the principle that the parties have autonomy, and that the Article should respect the common intention of the parties so far as it is not clearly overridden by other rules of law, then if this is what the parties agreed to there is no good reason to withhold effect from it. This perspective, reinforced by Article 25(1), must be correct. Such an agreement will clearly exclude the jurisdiction of any non-chosen courts which would have had jurisdiction derived from provisions lower in the hierarchy of the Regulation, and the intention of the parties is not clearly contrary to the policy of the law.

However, the agreement of the parties for the jurisdiction of two courts cannot be allowed to call into question the application of the *lis alibi pendens* rule in what is now Article 29 of the Regulation. It is not uncommon to find a term in a contract to the effect that one party – typically a bank – is allowed to bring proceedings against the defendant in more than one court concurrently. There is no reason why the parties should not make that agreement if they wish, but they cannot expect a court in a Member State, seised second in time but in respect of the same cause of action as the court seised first, to give effect to it. What is now Article 29 of Regulation 1215/2012 makes no provision for the parties to agree that it shall be inapplicable to litigation between them, and in this respect, party autonomy has its limits.

2.139 Content of the jurisdiction agreement: non-exclusive jurisdiction

A little history is unavoidable. Prior to Regulation 44/2001, it was not clear that the Brussels and Lugano Conventions gave legal effect to an agreement which was expressed to indicate non-exclusive jurisdiction in the courts of the particular State. The problem was created by the wording of the then rule which provided for the chosen court to have exclusive jurisdiction, and which, therefore, provided a rather awkward basis for the conclusion that a designated court might have non-exclusive jurisdiction. Despite this, the English courts managed to persuade themselves that such an agreement should be given effect according to its terms.[848] Indeed, it was possible to simulate a non-exclusive jurisdiction

848 *Kurz v. Stella Musical Veranstaltungs GmbH* [1992] Ch 196; *Gamlestaden v. Casa de Suecia SA* [1994] 1 Lloyd's Rep 433.

clause by drafting an exclusive jurisdiction agreement but expressing it to be for the benefit of only one of the parties: the Brussels Convention, by a provision not reproduced in the Regulation, allowed the benefiting party to hold the other to the agreement, but to depart from it if he chose.[849]

It was clear that the idea of non-exclusive jurisdiction was more familiar in some Member States than others; and that its uncertain status was unsatisfactory. As far as the Member States were concerned, the difficulties were swept away by what is now the second sentence of Article 25(1) of the Regulation, which provides that the jurisdiction of the court nominated 'shall be exclusive unless the parties have agreed otherwise'. The alteration is beneficial, even though no indication is given to explain how 'agreement otherwise' is to be demonstrated. The answer must presumably be that the language in which the parties have expressed their agreement is construed in accordance with the law which governs the substance of the agreement.[850] This, being a matter for the national, including conflicts, rules of the court seised, and not one of European law, is best examined in Chapter 4. It does not appear helpful to read the Regulation as imposing a presumption of exclusivity on an exercise which depends on national law, save in the case in which the parties offer no evidence as to their actual intention. Where that evidence is put before the court, the determination of what the parties actually agreed is a matter of substantive law which a court will determine in the usual way; as to this it is clear that national laws are not uniform on the construction of jurisdiction agreements as exclusive or otherwise. It would, of course, be different if the construction of a jurisdiction agreement were held to be a matter for uniform rules, but that does not yet appear to be the case.

Of course, once a court has been seised in accordance with a non-exclusive jurisdiction clause, Article 29 of the Regulation will transform its jurisdiction so that it will become indistinguishable from exclusive jurisdiction.

2.140 Content of the jurisdiction agreement: lop-sided agreements

As has been noted above, it is not uncommon for a contract to provide that in litigation between A and B, A must bring proceedings against B in a designated court, whereas B may bring proceedings against A in that court or in any other court which has jurisdiction over A. An English court has rarely encountered any difficulty in giving effect to such a provision. Where the Brussels Convention applied, this would be an exclusive jurisdiction agreement for the single designated court which by its express words was for the benefit of B which therefore had the option of bringing proceedings elsewhere. Where the Regulation applied, the clause would be exclusive to the extent that A sued B, and non-exclusive where B sued A, as that was the extent to which the parties had agreed on something other than exclusive jurisdiction, plain and simple.

In *Soc Banque privée Edmond de Rothschild Europe v. X*,[851] the French Supreme Court disagreed. A contract between bank and customer contained an agreement on jurisdiction

849 On service of suit clauses taking effect as non-exclusive jurisdiction clauses, see *Ace Insurance SA-NV v. Zurich Insurance Co* [2001] EWCA Civ 173, [2001] 1 Lloyd's Rep 618; also *Excess Insurance Co Ltd v. Allendale Mutual Insurance Co* [2001] Lloyd's Rep IR 524.

850 *British Sugar plc v. Fratelli Babbani di Lionello Babbani* [2004] EWHC 2560 (TTC), [2005] 1 Lloyd's Rep 332.

851 Cass I civ, 26 September 2012, [2013] ILPr 181, [2013] JDI/Clunet 175 (note Brière). For further comment, see [2013] LMCLQ 137. The judgment appealed from had purported to find a basis for its decision

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by which the customer agreed to bring proceedings against the bank only in Luxembourg, while the bank was to be permitted to sue in any court which had jurisdiction over the customer. The customer sued the bank in France; the French Supreme Court refused to dismiss the proceedings on the basis that the jurisdiction agreement was wholly void: a principle of French and probably of Luxembourg law,[852] meant that a provision which imposed obligations on one party but not on the other was not legally enforceable. It is doubtful that the decision is consistent with the Regulation, for the content of the agreement appeared to fit the template presented by the second paragraph of what is now Article 25(1). On the other hand, if it is correct that the meaning of the agreement has to be understood and construed by reference to its governing law, if that law decided that the agreement is empty of content, no agreement at all, then there is nothing to which Article 25 can apply.

The immediate solution is to ensure that any such lop-sided agreements on jurisdiction are contained in contracts governed by laws which do not share the doctrine which was applied by the French Supreme Court, in the hope that a court called upon to give effect to such an agreement will not look to the law governing the contract to find a basis for invalidating it. But in the light of the final part of the first sentence of Article 25(1), it may now be dangerous to designate a court which finds fault with such agreements, as it now appears that some Member States do. This does make it appear that the law has taken a big step backwards.

It may also be necessary to reconsider whether the construction of jurisdiction agreements by reference to national laws is, after all, such a good idea, for not all national laws are a good idea. If it were possible to regard the second sentence of Article 25(1) as a complete statement of the principles of construction necessary to deal with this individual point,[853] the opportunity for idiosyncratic or maverick principles of national law to undermine an agreement otherwise clear and precisely expressed would be reduced. The risks associated with that are, however, considerable.

2.141 Content of the jurisdiction agreement: non-geographical designation of court

It is not uncommon for a agreement on jurisdiction to identify the country, the courts of which are to have jurisdiction, not by name but by description. A common one is to nominate 'the courts of the country in which the carrier has[854] its principal place of business'. According to the Court in *Coreck Maritime GmbH v. Handelsveem BV*,[855] this may be effective as an agreement on choice of court; and it will be if the wording used identifies

to the same effect in the fact that the provision of the Brussels Convention which has been referred to was not reproduced in the Regulation. The point that it did not need to be because the Regulation had made better provision of its own does not appear to have been appreciated.

852 The court did not indicate which, if either, of the two national laws it was applying. It is possible, though not very likely, that it thought it was applying an autonomous interpretation of 'have agreed' in the first line of Art. 25(1).

853 Questions of material scope would also need to be dealt with; on this it is very hard to see how recourse to national law can be avoided or substituted.

854 No attention was given to the issue which might arise where the carrier's principal place of business is moved between the making of the agreement on jurisdiction and the institution of proceedings.

855 C-387/98, [2000] ECR I-9337.

objective factors which are sufficiently precise to allow the court to determine whether it has jurisdiction: *id certum est quod certum reddi potest*.[856] In *Coreck Maritime* itself, a case on carriage of goods by sea, it appears[857] that there was no dispute as to which party was the carrier, nor as to the place which counted as its principal place of business. There, words used to designate the court with jurisdiction were sufficiently precise to allow the national court to determine its jurisdiction.

But the facts may not always be so accommodating. It is clear that national laws may disagree as to who actually is the carrier,[858] and may disagree as to which of the places in which it has a presence represents the principal place of its business.[859] Had these matters been in dispute in *Coreck Maritime*, the national court might have concluded that it was unable to ascertain the effect of the agreement on jurisdiction. The issue of interpretation is, so far as is known, still one for reference to national law, including conflicts rules, of the court seised.[860] But in *Coreck Maritime*, the agreement in question provided that any disputes 'shall be decided in the country where the carrier has his principal place of business and the law of such country shall apply except as provided elsewhere herein'. In other words, the governing law was to be defined by reference to the principal place of business, but the principal place of business may have to be identified by reference to the governing law. Though there may be ways for a national court to cut the circle of argument, none is particularly convincing; and it may be that the answer is that the agreement on choice of court is not, in the circumstances, sufficiently intelligible to be accepted as clear, precise, or effective. Despite the evident attraction which these clauses appear to have for certain draftsmen, a jurisdiction provision which is set out in the form of a riddle has little to be said in its defence, because it risks failing to do the very thing which it is supposed that such clauses are intended to accomplish.

An agreement on jurisdiction may be found to have been made in very short form. A provision in a contract which stated 'Court: DK-6100 Haderslev, Denmark' was held to be an agreement on jurisdiction validated by what is now Article 25.[861] For the court to approach the construction, or interpretation, of the provision from the vantage point of the professional reasonable man was sensible enough; the fact that the terse wording did not make it clear whether the court designated was to have exclusive or non-exclusive jurisdiction, and that no evidence appears to have been placed before the court, may mean that the presumption of exclusivity resolves the issue.[862]

2.142 Content of the jurisdiction agreement: the courts of the United Kingdom

A jurisdiction agreement for the courts of the United Kingdom is not straightforward. Article 25 of the Regulation would appear to be satisfied, but the question of what effect it has is more involved.

856 It is certain if it is capable of being ascertained.

857 The issue was one for the national court to determine, and not for the European Court.

858 The party who undertakes with the shipper to carry, or the owner of the ship which does the physical carriage.

859 See *The Rewia* [1991] 1 Lloyd's Rep 69 (overruled on other grounds): [1991] 2 Lloyd's Rep 325.

860 See the answer to the fourth question submitted to the Court.

861 *Nursaw v. Dansk Jersey Eksport* [2009] ILPr 263. 'DK-6001' is a postcode.

862 See above, para. 2.139.

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As there are no courts 'of the United Kingdom' as such,[863] there appear to be two broad possibilities. The first, suitable if the agreement is expressed as a term of a contract, would be that the law governing the contract must construe the language by which the parties have expressed their intention.[864] If the contract is governed by English law,[865] the parties may be taken as meaning the English courts are to have jurisdiction, on the footing that the courts of England, as distinct from the courts of Scotland or Northern Ireland, were in all probability what they had in mind.[866]

The second possibility would be to start from the proposition that Article 25 requires the wording of the agreement to be taken at face value and (in the absence of evidence to the contrary)[867] to mean that the defendant will not be in a position to complain, so far as the Regulation is concerned, if proceedings are instituted in the courts of any law district within the territory of the United Kingdom. It would then be up to the claimant to decide which court within the United Kingdom to elect to seise.[868] And if he then seises the English court, there is no problem.

It is submitted that, notwithstanding *The Komninos S*,[869] the latter is the better view.[870] It operates by treating the clause as binding and as taking effect according to, or as close as possible to, the letter of its drafting. It will also mean that other choices of court which may be founded on an erroneous assumption, such as a choice for the courts of Switzerland,[871] can be given effect. The difficulty with the former possibility would be that the law which governs the contract may have no reliable means of imposing a meaning upon such a clause. Certainly, English law does not have a reliable statutory rule to achieve this end, and the assumption that if parties elected the courts of the United Kingdom what they really meant was England is, however accurate it may be, an uncomfortable proposition to defend within the United Kingdom itself.[872]

863 On the footing that the House of Lords did not have, and the Supreme Court of the United Kingdom does not have, trial jurisdiction in civil and commercial matters.

864 Which would be the general approach to the interpretation of a choice of court clause.

865 But if the question of which law governs is affected by the question of how the clause is to be interpreted, this will not much help. *Cf The Komninos S* [1991] 1 Lloyd's Rep 370, where a reference to 'British courts' was assumed, in the context and without reference to any particular law, to mean 'English courts', and this was used as a pointer to the applicable law of the contract. There is a chicken-and-egg quality to this reasoning process. Even so, people still use these unhelpful expressions. For further support for reading 'UK law' as 'English law', see *Downing v. Al Tameer Establishment* [2002] EWCA Civ 721, [2002] 2 All ER (Comm) 545.

866 *Cf The Komninos S* [1991] 1 Lloyd's Rep 370, 374, where the reasoning is wholly sound, but the delicacy of putting it into print is undeniable.

867 If the law which governs the contract would allow the contract to be rectified, no doubt that would be permitted to resolve the issue.

868 If, as is submitted, the answer to the question of how this clause operates, is governed wholly by Art. 25 of the Regulation, there is no more to be said. If the clause gives jurisdiction to the courts of the United Kingdom, a defendant who is domiciled in another Member State, or in no Member State, is certainly liable to be sued in accordance with the clause. For completeness, however, there is a possible gloss upon this approach where the defendant is domiciled in the United Kingdom.

869 [1991] 1 Lloyd's Rep 370, where the identity of the chosen court was relevant only for the purpose of identifying the law applicable to the contract.

870 It is believed that the question is otherwise free of authority.

871 Although Switzerland is not bound by the Regulation, it is party to the Lugano II Convention, the corresponding provisions of which are, for practical purposes, identical. Original civil jurisdiction in Switzerland is believed still to be a cantonal matter. Accordingly 'the Swiss courts' is believed to pose the same problems as 'the British courts' or 'the courts of the United Kingdom'.

872 The more so if the identification of the chosen court is thought to indicate the applicable law. And this assumption would create special difficulty in the Supreme Court of the United Kingdom.

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2.143 Content of the jurisdiction agreement: the courts of a non-Member State

Article 25 does not apply to an agreement for the courts of a non-Member State.[873] The Member States cannot legislate for the jurisdiction of courts in non-Member States, and have therefore left the issue untouched. The Schlosser Report[874] observed that agreements for the jurisdiction of a non-Member State will be enforced, or otherwise, according to the national procedural law of the court which has been seised with the dispute.[875] This makes perfect sense. If the claimant, party to such an agreement, were to invoke the jurisdiction of the courts of the defendant's domicile, Professor Schlosser supposed that the court would apply its own rules of private international law to decide whether to adjudicate or to dismiss the proceedings by reference to the clause. The European Court agreed. In *Coreck Maritime GmbH v. Handelsveem BV*[876] it observed that an agreement for the courts of a non-Member[877] State fell to be assessed by the conflicts rules of the court seised. It follows – for what otherwise would be the point of assessing its validity by any law? – that the court seised would give such effect to the agreement for the courts of a non-Member State as is allowed by its own rules of private international law. As a result, an English court will be entitled, but will not be bound, to give effect to a choice of court agreement for the courts of a non-Member State, by staying its proceedings, even if it might otherwise have jurisdiction from (say) Article 4 of the Regulation.

The principle of the matter is plain, and the observation of the Court is clear and uncomplicated. Yet others have managed to persuade themselves that it is actually more complicated than that, and that an agreement for the jurisdiction of the courts if a non-Member State is void of legal effect before a court which would otherwise have jurisdiction under the Regulation. It is nonsense, of course, but it will be necessary to say more about it as part of a broader analysis of the impact of connections with a non-Member State.[878]

2.144 Content of the jurisdiction agreement: the disputes falling within its scope

The examination of jurisdiction agreements has dealt with several issues, but has touched only incidentally on that of material scope. A very simple example may be taken. Suppose that an agreement on jurisdiction provides that 'this contract is governed by English law, and the English courts shall have exclusive jurisdiction over disputes arising from it', and that proceedings are brought which allege that a wrong was committed prior to the making

873 This passage was referred to with approval in *Winnetka Trading Corp v. Julius Baer International Ltd* [2008] EWHC 3146 (Ch), [24]. A choice for the courts of Iceland, Norway, or Switzerland will be validated and given effect by the Lugano Convention; a choice for a court in a territory to which the Brussels Convention still applies will be validated by that Convention.

874 [1979] OJ C59/71, [176].

875 Schlosser does not say whether such a clause would be required to comply with the formal requirements of Art. 25 before it could be given effect. The answer will depend on whether there is a remission of the question to national law, or the strict application, by reflexive effect, of Art. 25: see further below, para. 2.307. But to the extent that the effect of it is to prevent any Member State court from exercising jurisdiction, it may follow that the formal safeguards contained in Art. 25 would be held to apply here as well. See also *Ultisol Transport Contractors Ltd v. Bouygues Offshore SA* [1996] 2 Lloyd's Rep 140.

876 C-387/98, [2000] ECR I-9337.

877 It said 'non-contracting', for the case was governed by the Brussels Convention, not the Regulation.

878 See below, para. 2.307. For *lis pendens* in a non-Member State designated by agreement, see below, para 2.289 *et seq*.

of the contract, and that relief is sought in respect of it. This raises a question of scope – breadth or width – of the agreement; and requires an answer to the question of which rules determine that breadth or width.

Article 25 describes the issue, but the introduction of the Article with 'If the parties... have agreed that...' means that whether they have must be decided before the remainder of the Article can be applied to confirm or to remove the jurisdiction of the court in which the proceedings are to be brought. As said above, in *Powell Duffryn plc v. Petereit*[879] the Court simply said that the task of interpreting the agreement, to ascertain whether the proceedings in question fell within it, was a matter for the court seised. As the Court said no more than this, and did not explain whether this should be done by reference to the court's own rules of law, including private international law, the explanation for its silence is not clear. It may be that it saw no need to state the obvious; it may be that it considered no question of law to be involved, as a court would simply need to read Article 25, the words of the jurisdiction agreement, and see the answer. It is quite possible that the Court has never had to confront the issue directly; has never been made to appreciate that the interpretation of an agreement which parties have made does on occasion require recourse to rules of law.

Until the European Court gives clearer guidance, it appears that the English courts will and should construe the language of a jurisdiction agreement by reference to the substantive law which they consider to govern it. If the agreement is made as a term of a contract, it will be rare for the law governing the contract not also to be the law governing the interpretation of the jurisdiction agreement. If the agreement is not made as the term of a contract, but is freestanding, it will presumably be necessary for the court to ascertain the law by reference to which it was made, or if not, the law with which it has its closest and most real connection.[880]

2.145 Challenges to the formal sufficiency of the jurisdiction agreement and the (non-) role of national law

It is well established that a court, in dealing with a jurisdiction agreement, is not permitted to hold it unenforceable by reason of its failure to satisfy a requirement of a formal kind otherwise imposed by national law. The Court ruled in *Elefanten Schuh GmbH v. Jacqmain*[881] that a Belgian court was not entitled to hold an agreement invalid on the ground, well founded as a matter of Belgian law, that it was not written in the Dutch language.[882] The Court considered that what is now Article 25 of the Regulation established conditions relating to form which were necessary and sufficient to establish the validity of the agreement.

879 C-214/89, [1992] ECR I-1745.

880 In other words, by applying the choice of law rules applicable to contractual obligations, wills, etc., of the common law rules of private international law. The Rome I Regulation does not apply to jurisdiction agreements, so the answer to this particular question must be left to be answered by common law rules.

881 150/80, [1981] ECR 1671. See also *Denby v. Hellenic Mediterranean Lines Co Ltd* [1994] 1 Lloyd's Rep 320.

882 To this extent, the decision opposes the contention that an agreement on jurisdiction which is written in unintelligible writing should not be one to which a person may be held. The explanation may be that in *Elefanten Schuh* there was not the slightest doubt that the agreement on jurisdiction was perfectly well understood, and that the reliance on a rule of Belgian law was simply opportunistic.

The decision in *Sanicentral GmbH v. Collin*[883] is consistent with this. A provision of French employment law which would have invalidated an agreement on jurisdiction which purported to oust the jurisdiction of the French courts in employment cases was held to be inapplicable to a case where an agreement on jurisdiction, otherwise compliant with the requirements of what is now Article 25, selected the courts of Germany. The issue was seen by the Court as being one on which the formality rules of what was the Brussels Convention were exhaustive, and overrode those of national law,[884] even where the rule of national law in question was not a rule ostensibly concerned with the formal validity of agreements. There is no reason to suppose that the Brussels I Regulation will be treated any differently. Even so, though a court may not apply its own national law rules about the language, clarity of type, and so on, to the issue of validity of jurisdiction agreements, it may still be open to it to decide that the clause written in a language which it is plain one party could not read or understand is, one way or another, ineffective. But in the light of these authorities it may have to rest this conclusion on a refined interpretation of 'in writing', or on the principle that it may exhibit bad faith for the party responsible for the clause to take the point.[885] For all other purposes, satisfaction of the formal requirements set out in Article 25 is necessary and sufficient to establish the formal validity of the agreement.

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2.146 Challenges to the substantive validity of the jurisdiction agreement: national law

Different considerations may arise where the clause is impugned upon grounds which are more obviously substantive, though it must be said at the outset that in *Sanicentral GmbH v. Collin*[886] the European Court drew no obvious distinction between formal and substantive objections to legal validity. It may therefore be argued that where these objections are derived from rules of national law they are excluded by Article 25 itself; but it may also be said that the law has moved on since the decision in that case.

Yet the distinction drawn between formal and substantial validity or invalidity is not so easily erased. For example, if one party alleges that the agreement on jurisdiction was procured by misrepresentation or duress, or that persons under the age of 18 have no capacity to bind themselves to an agreement on jurisdiction, it is far from obvious that the court should regard the contention as inadmissible, or look only at the presence of writing.

One may start by eliminating one argument which has no foundation. If it is alleged by one of the parties that the substantive contract in which the agreement was allegedly contained is itself invalid or void, this allegation, even if apparently well-founded, does not by itself invalidate the agreement on jurisdiction.[887] The point was made by the Court

883 25/79, [1979] ECR 3423.

884 It is thought that, although this wording of the explanation is at variance with later statements (such as in C-365/88 *Hagen v. Zeehaghe* [1990] ECR I-1845) to the effect that the Brussels Convention (now, Brussels I Regulation) does not affect procedure, the reasoning is still correct. It would also follow that such a clause could not be denied effect in England on the ground that it was rendered ineffective by virtue of Employment Rights Act 1996, s. 203; similarly, Consumer Credit Act 1974, s. 141, Carriage of Goods by Sea Act 1971, Sch. 1, art. III.8.

885 See above, para. 2.131.

886 25/79, [1979] ECR 3423.

887 See the substantial analysis of the Advocate General in C-288/92 *Custom Made Commercial Ltd v. Stawa Metallbau GmbH* [1994] ECR I-2913.

in *Benincasa v. Dentalkit Srl*,[888] accords with common sense (part of the reason to have an agreement on jurisdiction is to know in advance which court will have the task of deciding whether the contract was valid or invalid as a source of legal obligations), and it is now underpinned by Article 25(5). No more needs to be said about it.

But to say that arguments which challenge the validity of the substantive contract do not *ipso facto* challenge the agreement on jurisdiction is not to say that the jurisdiction agreement must always be taken to be valid if it appears in a form which complies with Article 25(1). It cannot be the law that a meritorious plea, that the agreement was procured by fraud or duress, or that the writing of consent to it is in fact a forgery, or that the person who assented to the jurisdiction had no authority to bind or commit another (company, principal, partner) to the jurisdiction, is inadmissible. Unless the issue is considered as one which can be dealt with without reference to rules of law,[889] which must be doubtful, it must be referred to a law or legal system for its assessment. As to that, there are two possibilities.[890]

The first would be to make reference to the law which the court seised considers as governing the agreement, as though it were a contract. This would mean the *lex contractus* if the agreement was made as part of a contract; its own, separate, governing law if it was not. After all, Article 25(1) says that if the parties 'have agreed'; and if one of them pleads that he did not agree, or that the law allows him to be treated as though he had not agreed, then the provisions of a law are needed to provide the apparatus for testing the contention that there was no agreement and nothing for Article 25(1) to apply to. The case for the *lex contractus* is, therefore, plausible. If that law were English law, it would be likely that an agreement obtained by fraud, or a voidable agreement, will be seen as an agreement for the purpose of Article 25(1), but an 'agreement' derived from a forgery, or a 'void agreement' will not.[891] The trouble with this is, though, that it may allow a party to lead the court into the maze of choice of law, so making a jurisdictional decision vastly more complex and costly than it needs to be.

The second possibility is that the issue, though not properly dealt with in Regulation 44/2001, has now been addressed in Regulation 1215/2012, and is referred to the law, including the rules of private international law, of the court whose jurisdiction has been agreed to.[892] It is undeniable that this offers a solution, in that it points to a system whose rules will be available for use to determine whether arguments of the kind considered at this point undermine the agreement which will otherwise be given effect. The strength of this solution is that it is not dependent on the view, and does not appear to assume, that an agreement on jurisdiction is a contractual creature, a contractual act. If it is accepted, as the scheme of the Regulation may appear to accept, that an agreement on jurisdiction is a formal unilateral acceptance of the jurisdiction of a court, or a formal unilateral waiver of the jurisdiction of a court, given in either case to the other party, it would be slightly jarring for it to be referred to a contractual governing law, or to a law identified as though it were

888 C-269/95, [1997] ECR I-3767.

889 By arguing, for example, that 'have agreed' has an autonomous or uniform meaning which is not assessed by reference to any rules of national law.

890 The third option, that it is not referred to any national law, is discussed in relation to Regulation 44/2001, below.

891 The argument is derived from *Fiona Trust & Holding Corp v. Privalov* [2007] UKHL 40, [2007] Bus LR 1719.

892 Article 25(1), as amplified by Recital (20) to the Regulation.

a contractual governing law. By contrast, a link to, and reference to the law of, the jurisdiction selected means that there will be reference to a law the identity of which is predictable, at least outside cases of alleged forgery.

It may be that this aspect of Article 25(1) provides a rule of reference which is open to criticism,[893] but it is justifiable on the basis that it gives a clear indication that so far as the Regulation is concerned, agreements to jurisdiction are *not* contracts. They are formal prorogations of the jurisdiction of a court; and the law with the greatest claim to determine whether that prorogation may be impugned on substantive grounds and shown to be a nullity, is the law of that jurisdiction. As to whether it should have been the law of the jurisdiction prorogated or the law of the jurisdiction derogated from, the answer is that the latter would be a much less sensible rule, as a jurisdiction agreement may derogate from the jurisdiction of several courts. True, an agreement which prorogates the jurisdiction of more than one Member State will be a little more problematic. But it will be relatively rare; and when it happens, the sensible reference will be to the court in which the proceedings are proposed to be brought. It is therefore considered that arguments which are based on the substance or substantive validity of the agreement, are to be referred to the law of the designated Member State, including its rules of private international law if it is shown that this is how the designated court would answer the question.

In the light of this, it is possible to deal rather briefly with the difficulties which face a court in having to assess arguments which challenge the legal basis for the agreement in cases which fall under Regulation 44/2001 rather than Regulation 1215/2012. Though there is a case to be made for alternatives, and despite the reservations expressed above, it is or was most likely that an autonomous or uniform conception of what comprises an effective 'agreement' will be held to apply in the context of Article 23(1) of Regulation 44/2001. Article 23 of that Regulation does *not* require that the parties have made a contract for the courts of a Member State to have jurisdiction, only that they *have agreed*. An agreement in contractual form is one form of agreement, but an agreement certainly does not need to be embedded in a contract. So, for example, where parties have exchanged drafts of a substantive contract, every version of which contained an unopposed provision that the English courts should have jurisdiction, there should be no particular difficulty in holding that the parties agreed on the jurisdiction of the English courts, even though there is dispute as to whether the terms of the substantive agreement were ever settled.[894]

The elements of a uniform definition of 'agreement' would, no doubt, include a requirement of consent, and will exclude duress and fraud; but the proper analysis of arguments as to the effect of the various kinds of mistake, or lack of personal capacity,[895] or misrepresentation (or non-disclosure) falling short of fraud, or illegality or the lack of consideration, for example, would be harder to forecast.[896] The laws of Member States may all agree that,

893 It does half-assume that the agreement on jurisdiction is effective, for it identifies the law to which the question will be referred from the agreement itself; it is liable to be complicated if a party invites or requires a court to apply the private international law rules of the Member State whose courts have been designated, in order to locate the rules of domestic law by which the validity of the designation will be tested.

894 For excellent illustration, see *Maple Leaf Macro Volatility Master Fund v. Rouvroy* [2009] EWHC 257 (Comm), [2009] 1 Lloyd's Rep 475, esp. [200].

895 It may be contended that Art. 1(2)(a) serves to exclude this question from the ambit of the Regulation, and that a national court may apply its own law to the issue of the contractual age of capacity.

896 On the other hand, the number of cases in which an English court has applied its doctrine of severability and yet held the agreement on jurisdiction or arbitration to be invalid is extremely small; and after *Fiona Trust &*

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for example, the victim of duress should not be bound to an alleged agreement on jurisdiction, but not be as one on the precise edges of these concepts. As ever with autonomous definitions, devils lurk in the detail; and the prospect that the wording added into Article 25(1) may avoid this difficulty, by pointing to the law which should deal with objections on grounds of substance, makes the imperfection of that rule a cost worth bearing.

2.147 Agreements on jurisdiction in trust instruments

Article 25(3) of the Brussels I Regulation provides that, where a trust instrument confers jurisdiction upon the courts of a Member State, that court has exclusive jurisdiction in actions brought against a settlor, trustee or beneficiary within the (internal) scope of the trust relationship. No requirement as to form (though in a trust instrument this will not be a major concern) is imposed by this provision. Such agreements are not permitted,[897] however, to prevail over exclusive jurisdiction where this is conferred by Article 24, nor over Articles 15, 19 and 23.

Where the trust deed stipulates a choice of court for the courts of a non-Member State, there is authority[898] that this is irrelevant to a claim that the trust be varied in matrimonial proceedings: the financial matrimonial jurisdiction of the court is not ousted by an agreement on choice of court. In principle the same will be true when the trust instrument contains a provision giving jurisdiction to the courts of a Member State, as matrimonial matters fall outside the domain of the Brussels I Regulation and are not, therefore, prejudiced by its provisions.

2.148 Jurisdiction by agreement derived from other contractual terms

A contractual device, said to be more frequently used in civilian systems than it is seen in English cases, is to stipulate in the contract for a place of performance, and then to rely on what is now Article 7(1) of Regulation 1215/2012 to establish special jurisdiction in the courts of that place. It is clear that such a sensible provision should be respected for it allows the parties to work out where they stand in terms of jurisdiction; and in *MSG v. Les Gravières Rhénanes Sarl*,[899] the Court duly held that such a term did not need to satisfy the particular formalities specified for agreements on the jurisdiction of a court.[900] But such a freedom from the constraints of formality may be used abusively if the contract stipulates for a place of performance which is manifestly unrealistic, or 'abstract',[901] and which is stated only for the purpose of creating jurisdiction in the courts of that place. If the term is open to criticism in those terms, it will be regarded, notwithstanding its form, as in

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Holding Corp v. Privalov [2007] UKHL 40, [2007] Bus LR 1719 will be smaller still: see, for confirmation in (or extension to) the context of what is now Art. 25, *Deutsche Bank AG v. Asia Pacific Broadband Wireless Communications Inc* [2008] EWCA Civ 1091, [2008] 2 Lloyd's Rep 619. There is therefore a slight risk of appearing to make much ado about next to nothing, though the European Court has not yet approved the approach of the Court of Appeal in *Deutsche Bank AG v. Asia Pacific Broadband Wireless Communications Inc* and may, if this is seen as an exception to the general domiciliary rule of what is now Art. 4, pause before doing so.

897 Article 25(4).

898 *C v. C (Ancillary Relief: Nuptial Settlement)* [2004] EWCA Civ 1030, [2005] Fam 250.

899 C-106/95, [1997] ECR I-911.

900 56/79 *Zelger v. Salinitri* [1980] ECR 89.

901 Such as where a place for delivery is mentioned, but delivery there is impossible (for example, because it is not on the river and the contract provides for carriage by river only).

substance an agreement on jurisdiction, and required to comply with the formal and other requirements of Article 25.[902]

One might object that the decision in *MSG* involved a slight over-reaction, for the identification of the term as a sham, or as 'abstract' or 'fictitious', may not be straightforward; and in any case, as jurisdiction under what is now Article 7(1) is not in any sense exclusive, it seems unwarranted to force a clause of this type into the straitjacket of Article 25, and then to regard it as creating[903] an exclusive[904] jurisdiction because the parties have not agreed otherwise.

When the United Kingdom acceded to the Brussels Convention, provision was made that the courts of the United Kingdom might exercise jurisdiction over a contractual claim when that contract was made before 1 January 1987 and contained an express written term that English law was to govern.[905] This provision must have reached the end of its useful life; it does not appear in the Regulation.

2.149 Conclusion

If the rules on agreements on jurisdiction give the English courts jurisdiction, service out (if needed) is available as of right.[906] If they exclude the jurisdiction of the English courts, that is the end of the matter. But if there is no agreement upon jurisdiction to which Article 25 applies, the next question has to be addressed.

(9) GENERAL JURISDICTION OVER DEFENDANTS DOMICILED IN THE UNITED KINGDOM

2.150 General

Article 4 of Regulation 1215/2012 provides that:

> *(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.*

Article 2 of Regulation 44/2001 was identical.

2.151 Scope and effect of general jurisdiction

It is often said that the fundamental jurisdictional rule of the Brussels I Regulation is that those with a domicile in a Member State may expect to be sued and to defend claims against them in their home courts. The jurisdiction of the courts of the defendant's domicile is sometimes referred to as 'general jurisdiction', that is, jurisdiction which is not specific to

902 C-106/95 *MSG v. Les Gravières Rhénanes Sarl* [1997] ECR I-911. See *7E Communications Ltd v. Vertex Antennentechnik GmbH* [2007] EWCA Civ 140, [2008] Bus LR 472, which would have applied the reasoning in *MSG* had it been necessary to decide the point.

903 Or if it fails to comply with the formal requirements, to fail to create.

904 Unless on a true construction it may be held to be non-exclusive, which seems plausible.

905 Article 35 of the Treaty of Accession; Sch. 3 to the 1982 Act.

906 CPR r. 6.33.

particular subject matter of relationships, or special to certain kinds of claim. The provisions of the Brussels I Regulation examined so far have been exceptional in that they operate regardless of domicile,[907] or constitute variations upon, but also prevail over, the ordinary domiciliary principle.[908] But if none of the prior rules is applicable, the courts of the United Kingdom will have general jurisdiction if the defendant has a domicile in the United Kingdom.[909]

As to the person being sued, it is not usually difficult to identify who is the defendant. But in a number of cases it is different. For example, in the case of an Admiralty action *in rem*, the traditional analysis is that the action is brought against the vessel upon which the claim form was served, event though the action may later continue as one *in rem* and *in personam* if a person with an interest in the action steps forward to enter an appearance and so become a defendant. However, for the purposes of what is now Article 4 of the Regulation, the English courts have held that the person being sued, whose domicile was decisive, was the person with an interest in the vessel, and not the vessel itself.[910] If this is what is required – that the 'reality' of the matter must be investigated and the 'real' defendant identified – there may sometimes be imperfect alignment between the claim and the jurisdictional rule which applies in relation to it. After all, in proceedings brought by a minority shareholder under Part 30 of the Companies Act 2006, the named defendant is the company,[911] though in some sense the target of the complaint is the majority shareholder. One imagines that the defendant is the company, not the majority shareholder; but the position is not entirely clear.

As to what it means to be sued, it may be that the expression excludes proceedings brought to seek some forms of relief, and in which contexts the defendant or respondent is not being sued. It has been suggested that in order to be sued, and therefore to have the advantage of the general jurisdictional rule in Article 4, it is necessary that the defendant is summoned to answer a claim by an opponent who advances a substantive cause of action; it is not sufficient that the defendant is summoned only to respond to an application for orders ancillary to substantive proceedings pending before a particular court.[912] If that were to be accepted, an application against a person who was not party to substantive proceedings, for an order that he pay all or some of the costs ordered to be paid to the winner by a losing party, would not involve his being sued. This would be so even though, as one must suppose, such an order gives rise to a judgment enforceable under Chapter III of the Regulation. It would also follow that on an application for post-judgment relief in the form of an application that a person be required to give evidence about the whereabouts of assets of a judgment debtor, the person summoned being an officer of that judgment debtor, is not being sued, and has no right to invoke the Brussels I Regulation by way of asserting a jurisdictional protection from the summons of the court.[913] There are liable to be problems with this analysis if taken

907 Articles 24 and 25 (and in some instances 18(1) and 21(2)); and possibly also Art. 26.

908 Sections 3, 4, 5 and 7 of Chapter II.

909 Of course, the Regulation refers only to the defendant being domiciled in the United Kingdom. It is a matter of internal national law to determine whether he is domiciled in England, or in another part.

910 *The Deichland* [1990] 1 QB 361; *The Indian Grace (No 2)* [1998] AC 878, 909–910.

911 See for illustration, *Re Harrods (Buenos Aires) Ltd* [1992] Ch 72: on the basis of the law as it then stood, the company was domiciled in England by virtue of being incorporated under English law; the majority shareholder was Swiss.

912 *The Ikarian Reefer (No 2)* [2000] 1 WLR 603, 615–616.

913 This was the analysis in *Masri v. Consolidated Contractors International Co Sal (No 4)* [2008] EWCA Civ 876, [2009] 2 WLR 699 (reversed without reference to this point: [2009] UKHL 3, [2010] 1 AC 90. Of course, the person against whom the order is sought may have no jurisdictional defence if either the application is seen as one

too far. A more realistic answer would accept that a person who is summoned to court as respondent to an application, and who stands at risk of being ordered by the court to pay money or perform an act unless he can persuade the court not to so order, is being sued.[914]

Article 4 contains the rule. The reference to nationality underlines the irrelevance of this fact or factor in the jurisdictional[915] scheme of the Brussels I Regulation. The statement that such persons *shall* be sued in these courts cannot, of course, be read as elevating Article 4 to the status of a mandatory provision. It means that they are liable to be sued in these courts if no provision of the Regulation says otherwise, but it also means that this is the central jurisdictional tenet of the Regulation.

If, therefore, the defendant is[916] domiciled in the United Kingdom according to the law of the United Kingdom, he may be sued in the United Kingdom. In order to determine where, more precisely, within the United Kingdom he may be sued, recourse must be had to the internal scheme of rules contained in section 16 of, and Schedule 4 to, the 1982 Act.[917] The basic principle of the domestic law of the United Kingdom in this area is that the defendant is entitled to be sued in the part of the United Kingdom in which he is domiciled. These rules are set out in detail in section 16 of, and Schedule 4 to, the 1982 Act. They will apply when the Brussels I Regulation confers international jurisdiction on the courts of the United Kingdom, but also when the case is wholly internal to the United Kingdom and the Regulation has no part to play in answering the jurisdictional questions which arise.

2.152 The determination of a defendant's domicile

Article 62 of Regulation 1215/2012 provides, in effect, that the question whether an individual (as distinct from a company, or other legal person, or association of legal persons) has a domicile in the United Kingdom is determined by the law of the United Kingdom. The question whether he has a domicile in France is determined by French law, and so on. Article 62 contains no provision to deal with whether a person is domiciled in a non-Member State, because that fact does not affect[918] the taking of jurisdiction under the Regulation: domicile within a Member State or Member States, and only that, is of jurisdictional significance.

for relief from a court which has substantive jurisdiction over the claim, or if it is seen as part of the enforcement of a judgment in England. However, the Civil Procedure Rules do not extend to allow an order to be applied for against a person who is physically out of the jurisdiction: *Masri v. Consolidated Contractors International Co Sal (No 4)* [2009] UKHL 43, [2010] 1 AC 90. The impact of European law was, in that case, irrelevant to the eventual decision of the House of Lords to set aside the order made by the Court of Appeal and considered wrongly by it to be capable of being served out of the jurisdiction.

914 In *The Ikarian Reefer (No 2)* it may have been preferable to see the case as one in which the respondent was being sued, but the English court had exclusive jurisdiction under what is now Art. 24(5).

915 And judgment recognition scheme, as is shown in Chapter 7.

916 The date for the determination of domicile is that of the institution of proceedings, which in England means by the issue of a claim form: *Canada Trust Co v. Stolzenberg (No 2)* [2002] 1 AC 1. For a slightly different approach, see the decision of the German Supreme Court in *Re Jurisdiction Based on Domicile of Defendant* (Case XI ZR 48/10), [2012] ILPr 12.

917 Schedule 4 to the 1982 Act was amended by Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch. 2, para. 4.

918 Except under Art. 72 of the Regulation, dealing with treaties for the non-recognition of certain judgments against persons domiciled in a specific non-Member State, where the jurisdiction asserted by the court was founded upon one of the rules of (arguably exorbitant) national jurisdiction to which Art. 5 of Regulation 1215/2012 refers: see para. 7.10, below.

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It is a further consequence of Article 62 that a person may, contrary to the position which obtains under the common law rules of private international law, have a domicile in more Member States than one. Within the context of the Regulation, domicile is a factual connection of sufficient strength to justify the exercise of general jurisdiction by the courts of that Member State; and an individual may have such a connection with more than one Member State at the same time. The rules of the common law of domicile are wholly irrelevant to the determination of domicile for the purposes of the Regulation.[919]

For the purposes of the Brussels and Lugano Conventions, the 1982 Act set out the definition of domicile in the United Kingdom and under English law, with separate provision being made for individuals,[920] corporations and associations,[921] the deemed domicile in insurance and consumer cases,[922] trusts[923] and the Crown.[924]

But for cases to which the Brussels I Regulation (original and recast) apply, the corresponding definitions were provided by Civil Jurisdiction and Judgments Order 2001,[925] Schedule 1. Though these followed the provisions of sections 41 to 46 of the 1982 Act, they differ in some points of detail. In particular, section 42 of the 1982 Act, which provided for the determination of the domicile of a corporation, is largely superseded, as what is now Article 63 of Regulation 1215/2012 established a uniform definition of the domicile of corporations, legal persons and associations of persons. And the domicile of the Crown, dealt with by section 46 of the 1982 Act, has no counterpart in the Regulation, as this will also fall within the scope of Article 63 of the recast Regulation.

2.153 Domicile in the United Kingdom: individuals

Paragraph 9 of Schedule 1 to the 2001 Order[926] sets out the rules which determine whether an individual has a domicile in the United Kingdom. Paragraph 9(2) defines domicile in the United Kingdom; paragraph 9(3) defines domicile in a part of the United Kingdom in terms which are practically identical to it. For an individual to be regarded as being domiciled in the United Kingdom, two conditions must be satisfied: (a) he must reside there; and (b) the nature and circumstances of his residence must indicate he has a substantial connection with the United Kingdom.[927] For those individuals who satisfy condition (a), and who have been so resident for the last three months or more, condition (b) is deemed to be satisfied unless the contrary is proved.[928]

For an individual who is domiciled in the United Kingdom to be regarded as being domiciled in England (or in some other part of the United Kingdom), an identical test,

919 *Ministry of Defence and Support of the Armed Forces of Iran v. FAZ Aviation Ltd* [2007] EWHC 1042 (Comm), [2007] ILPr 538, [32].

920 Section 41 of the 1982 Act, which at s. 41(7) deals also with whether a person has a domicile in a non-Member State.

921 See below, for detail of where a corporation or association is domiciled.

922 Section 44.

923 Section 45.

924 Section 46.

925 SI 2000/3929. This instrument was amended by SI 2014/2947, but at this point the amendments are minor and technical only.

926 As immaterially (*sic*) amended by SI 2014/2947, Sch. 2, para. 11.

927 Paragraph 9(2). See *Bank of Dubai Ltd v. Fouad Haji Abbas* [1997] ILPr 308 (residence requires a settled place of abode); *Petrotrade Inc v. Smith* [1998] 2 All ER 346 (residence by force of bail conditions does not qualify).

928 Paragraph 9(6).

mutatis mutandis, is applied. In respect of those who are resident in a part of the United Kingdom, but whose residence, even with the benefit of the presumption applicable to residence of three months or more, fails to satisfy condition (b), their domicile is simply the part of the United Kingdom in which they reside.

At first sight, it may be thought that three months' residence in the United Kingdom is capable of establishing (and may well be sufficient to establish) the domicile of an individual in the United Kingdom, or, as the case may be, in England. This is indeed true. But in a number of cases involving very rich individuals,[929] mainly of Russian nationality or extraction, the courts have had to take a more detailed view of the legislation. Though the following are no more than indications, none of which is decisive, of whether the connection with the United Kingdom is sufficient to indicate that the defendant has a *substantial* connection with the United Kingdom, the court may be asked to look at, among other things: whether the individual has indefinite leave to remain or requires a visa and immigration clearance to enter the United Kingdom; whether HMRC[930] regards him as resident for tax purposes; the fraction of the year for which the individual is in the United Kingdom; whether he has places of residence elsewhere; the balance-sheet value of his United Kingdom assets in relation to the whole of his assets worldwide; whether it may actually be realistic to regard him as having such widely-scattered business interests that it may be said that he is not really resident anywhere. It is apparent that the court before which the question first arises will, in practice, have power to determine the issue with which an appellate court will be slow to find fault.

In the final analysis, the true meaning of 'substantial' is gathered from its consequences. A connection to the United Kingdom is 'substantial' if it suffices to make it appropriate that the courts of the United Kingdom exercise general jurisdiction, without the possibility of being able to stay proceedings in favour of a *forum conveniens* elsewhere, in any and all civil and commercial proceedings brought against the defendant.[931] Bearing in mind the formidable consequences of a finding that an individual has a domicile in the United Kingdom, the word 'substantial' is not to be interpreted as though it means 'not a lot more than minimal'.

2.154 Domicile of corporations and associations: scheme and purpose

By contrast with the rule laid down by what is now Article 62 in respect of individuals, the domicile of companies, other legal persons or association of legal persons is determined differently. Article 63 of Regulation 1215/2012 provides that a company, or other legal person, or association of natural or legal persons, is domiciled at the place[932] where it has its statutory seat, or its central administration or its principal place of business. Though Article

929 *High Tech International AG v. Deripaska* [2006] EWHC 3276 (Comm), [2007] EMLR 15; *Cherney v. Deripaska* [2007] EWHC 965 (Comm), [2007] 2 All ER (Comm) 785; *OJSC Oil Co Yugraneft v. Abramovich* [2008] EWHC 2613 (Comm).

930 Her Majesty's Revenue and Customs, formerly the Inland Revenue Commissioners.

931 *Ministry of Defence and Support of the Armed Forces of Iran v. FAZ Aviation Ltd* [2007] EWHC 1042 (Comm), [2007] ILPr 538; *OJSC Oil Co Yugraneft v. Abramovich* [2008] EWHC 2613 (Comm) (in this latter case, ownership of several large houses and the Chelsea Football Club did not amount to a sufficient connection to the jurisdiction to establish domicile. The conclusion is pleasingly dismissive of the national significance of the Chelsea Football Club, though whether it was influenced by the foreign ownership and largely foreign playing staff of the club was not made clear).

932 The reference is to a place, not to a Member State. The place, or one of the places, must be in a Member State, though, for the Regulation is not concerned to locate a domicile in a non-Member State.

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the opening of more obviously adversary proceedings. Article 62 of the Convention gives a definition of 'court' which is more illuminating than anything found in the Brussels I Regulation.[22] This is likely to mean that a dispute, which has been subjected to a conciliation process which is recognised in the Contracting State concerned as being sufficiently (or even necessarily) part of the process of civil dispute resolution, will be pending in the State in question from the date of institution of the conciliation, rather than only from the date of judicial proceedings instituted after the failure of conciliation;[23] and the 'courts' of that country will remain seised, without hiatus, if the dispute moves from conciliatory body to regular court in the manner and within the time frame prescribed by the law of that State.

3.19 (Q15) *Lis pendens* in a State in which the Lugano II Convention does not apply; and other points of contact with such a State

There is nothing in the Lugano II Convention which corresponds to Articles 33 and 34 of the recast Brussels I Regulation 1215/2012. If the question has to be addressed whether a court which has jurisdiction on the basis of the Lugano II Convention should take account – and if so, what account – of points of connection with a State in which the Lugano II Convention does not apply, it will require a court to consider the extent to which it may, for example, apply the provisions of the Convention by analogy, or with reflexive effect.

However, this is far more likely to be an issue for the courts of Iceland, Norway and Switzerland than it is for the courts of the United Kingdom, and there is no need to say any more than was said in Chapter 2.

3.20 (Q16) International jurisdiction given by the Conventions to the courts of the United Kingdom

Where the Lugano Convention gives international jurisdiction to the courts of the United Kingdom, it is for the law of the United Kingdom to specify the part of the United Kingdom whose courts have jurisdiction in the particular case. As with the case where international jurisdiction is conferred by the Brussels I Regulation, this is governed by Schedule 4 to the 1982 Act as amended by Schedule 2 to the 2001 Order.

22 The Lugano II Convention states as follows: 'Article 62: *Definition of the term "court"*. For the purposes of this Convention, the expression "court" shall include any authorities designated by a State bound by this Convention as having jurisdiction in the matters falling within the scope of this Convention.'

23 *Deutsche Bank AG v. Petromena ASA* [2013] EWHC 3065 (Comm); *Lehman Brothers Finance AG v. Klaus Tschira Stiftung GmbH* [2014] EWHC 2782 (Ch): Norwegian and Swiss conciliation procedures, respectively. It may be different if the conciliatory body appears to be less independent but more like a process before a civil servant in a government ministry.

CHAPTER 4

The Common Law Rules of Jurisdiction

INTRODUCTORY MATTERS

4.01 Introduction

In this chapter we examine what are sometimes called the traditional,[1] or common law,[2] rules of jurisdiction.[3] Whatever they are called, they apply in two discrete areas which must be thought about separately: in cases which fall wholly outside the domain of the Brussels I Regulation,[4] where they may be called 'common law rules', and in cases where their application is required by Article 6 of the Brussels I Regulation 1215/2012, in which context they may be called 'residual rules'.

Suppose that, in the light of the material looked at in Chapters 2 and 3, the direct rules set out in Chapter II of the Regulation do not determine the jurisdiction of the court. This may be because the subject matter of the claim lies outside the scope of the Regulation, or because even though the subject matter of the claim falls within the scope of the Regulation, Article 6 directs the court to use its own traditional rules on the taking of jurisdiction.[5] In the former case, the Regulation makes no claim at all to regulate the jurisdiction of courts, and the jurisdictional rules set out in this chapter apply without modification, though if the reason for the matter falling outside the scope of the Brussels I Regulation also means that the matter falls within the domain of (say) the Insolvency Regulation[6] or the Matrimonial Regulation,[7] the rules in those instruments will apply in place of the rules which will be examined in this chapter.[8]

But in the latter case, the result of taking up and incorporating jurisdictional rules from national law into the Regulation is that the rules undergo certain modifications, and their

1 Except for the fact that much of the law is modern.

2 Except for the fact that much of the law is statutory, or at least contained in Civil Procedure Rules.

3 For the proposition that 'jurisdiction' is a word with many meanings, and that care needs to be taken to identify the particular sense in which it is being used – a warning which has been issued on many occasions – see for example *Fourie v. Le Roux* [2007] UKHL 1, [2007] 1 WLR 320, [25].

4 Regulation 1215/2012. In fact, the common law rules apply to cases which fall outside the domain of the Regulation, and to cases which fall within it in accordance with what is now Art. 6 of Regulation 1215/2012 (the same is true for Regulation 44/2001 and the Lugano II Convention, where Art. 4 does the job which Art. 6 now does in Regulation 1215/2012).

5 There is no need to consider the third possibility, that the matter falls outside the temporal scope of the Regulation, because, if it does, it will fall within the temporal scope of the original Regulation 44/2001.

6 Regulation (EC) 1346/2000.

7 Regulation (EC) 2201/2003 ('Brussels II'), replacing Regulation (EC) 1347/2000.

8 They also may provide, in residual cases, for the application of the jurisdictional rules of the common law.

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character is slightly changed, most obviously in that they become subject to the provisions of the Regulation on *lis alibi pendens*.[9]

This chapter examines these jurisdictional rules. It does not examine the provisions of the Insolvency or Matrimonial Regulations, as these particular instruments are more appropriately examined in specialist works. It therefore limits itself to the traditional rules of the common law.

THE COMMON LAW PRINCIPLES OF JURISDICTION

4.02 General

The rules themselves can be summarised very simply: the jurisdiction of the court depends upon service of process. Whereas the scheme of the rules examined in Chapter 2 is that where the Regulation provides that there is jurisdiction the claimant is entitled to serve the claim form, the common law views the issue in mirror image: where the claimant has served the claim form, with permission where this is needed, the court will have jurisdiction.

The question then becomes one of how and when the claimant may serve process upon a defendant. If the defendant is present within the territorial jurisdiction of the court, the claimant has a right to serve him. If the defendant is not within the territorial jurisdiction of the court, and has not appointed an agent within the jurisdiction to accept service of process on his behalf, the claimant has no right to serve him. Instead, permission must be obtained from the court for service to be made out of the jurisdiction, unless legislation[10] provides that the claim is one in which service out of the jurisdiction may be made without prior permission.

A defendant who submits to the jurisdiction of the English court confirms the court's personal[11] jurisdiction over him:[12] any points which might have been raised to dispute that jurisdiction, aside from the points of subject matter jurisdiction examined below, are made redundant by the defendant's personal submission to the jurisdiction of the court. Submission may take several forms. The most obvious is by acknowledging service of process and not invoking the procedure to dispute the jurisdiction of the court, which is examined in the following chapter. A person who has been served may fail to tick the box which indicates that he intends to dispute the jurisdiction, though the box-ticking is not decisive (many people fail to tick boxes, by oversight) and its absence is not conclusive. A defendant may still dispute the jurisdiction within the timeframe given by the rules so long as he has done nothing unequivocal to waive his privilege to dispute the jurisdiction; and a failure to tick a box on a form is not an unequivocal act.[13] On the other hand, a defendant

9 See above, para. 2.310.
10 There is rather little such legislation; see below, para. 4.56.
11 An absence of subject matter jurisdiction, however, cannot be cured (is not affected) by the purported submission of the parties: see below, para. 4.05.
12 *Derby & Co Ltd v. Larsson* [1976] 1 WLR 202 (HL); *Republic of Liberia v. Gulf Oceanic Inc* [1985] 1 Lloyd's Rep 539; *Balkanbank v. Taher (No 2)* [1995] 1 WLR 1067; *SMAY Investments Ltd v. Sachdev* [2003] EWHC 474 (Ch), [2003] 1 WLR 1973.
13 *IBS Technologies (Pvt) Ltd v. APM Technologies SA (No 1)* (unrep.), 7 April 2003.

who ticks the box to indicate his intention to dispute the jurisdiction but who fails to follow with an application to that effect may be held to have submitted after all.[14]

A party who appoints a solicitor with authority[15] to accept service of process within the jurisdiction submits to the jurisdiction.[16] A litigant who had previously invoked the jurisdiction of the court will usually be taken to have submitted generally to the jurisdiction of the court: he will not be heard to say that he submitted for some purposes convenient to him, but not for others which he finds to be somewhat less congenial,[17] though common sense places limits on the argument.

Matters stand differently for the defendant who has been served out of the jurisdiction but who objects to the jurisdiction of the English court, and who seeks to have service on him set aside. To begin with, such a defendant may dispute the jurisdiction of the court, and may do so on a claim-by-claim basis, for the court's grant of permission to serve out is assessed separately for each distinct claim made.[18] However, once a defendant has submitted to the jurisdiction, only in rare cases will he be permitted to have second thoughts and withdraw the submission. In *Somportex Ltd v. Philadelphia Chewing Gum Corp*[19] an American company was served out of the jurisdiction, and did the equivalent[20] of acknowledging service without indicating an intention[21] to dispute the jurisdiction. In due course it applied to be allowed to withdraw the appearance, to be treated as though it had made no response whatever to the writ served on it.[22] The Court of Appeal considered that as the original decision had been taken on the basis of professional advice, a change of heart or professional advice was not sufficient to allow the appearance to be withdrawn. The courts have since followed the same general line, refusing to allow a party who has submitted to the jurisdiction, but who now sees some perceived advantage in subsequently changing its mind, to be treated as not having submitted after all. Indeed, in a number of cases it has expressed its refusal in notably strong terms.[23]

14 *Maple Leaf Macro Volatility Master Fund v. Rouvroy* [2009] EWHC 257 (Comm), [2009] 1 Lloyd's Rep 475, [186]–[187]. If it is contended that the defendant ticked the box to indicate an intention to dispute the jurisdiction but then acted in such a way as to show that he had abandoned that position, the conduct to which the claimant points will need to be 'wholly unequivocal': *SMAY Investments Ltd v. Sachdev* [2003] EWHC 474 (Ch), [2003] 1 WLR 1973, [41]; *Pacific International Sports Clubs Ltd v. Soccer Marketing International Ltd* [2009] EWHC 1839 (Ch), [29]; *Zumax Nigeria Ltd v. First City Monument Bank Ltd* [2014] EWHC 2075 (Ch).
15 But the extent of the submission must be limited by the scope of the authority given.
16 *Sphere Drake Insurance plc v. Gunes Sigorta AS* [1987] 1 Lloyd's Rep 139. Questions of construction of the authorisation will be dealt with objectively, as though the document were a commercial contract: *Actavis Group HF v. Eli Lilly & Co* [2013] EWCA Civ 517, [2013] RPC 37.
17 *Republic of Liberia v. Gulf Oceanic Inc* [1985] 1 Lloyd's Rep 539; *Balkanbank v. Taher (No 2)* [1995] 1 WLR 1067; *Glencore International AG v. Exter Shipping Ltd* [2002] EWCA Civ 528, [2002] 2 All ER (Comm) 1; *Marketmaker Technology Ltd v. CMC Group plc* [2008] EWHC 1556 (QB).
18 *Glencore International AG v. Exter Shipping Ltd* [2002] EWCA Civ 528, [2002] 2 All ER (Comm) 1: it is impermissible to obtain service out in respect of a claim which, standing alone, would not have justified a grant of permission by the device of including it in a claim form which does contain a claim or claims for which permission is available.
19 [1968] 3 All ER 26. In due course the US courts held that the English default judgment, which was entered when the defendant walked away from the English proceedings, was entitled to be enforced in the US: *Somportex Ltd v. Philadelphia Chewing Gum Corp* 453 F 2d 435 (1971).
20 That is to say, it entered a conditional appearance, but which it later sought to withdraw altogether.
21 In fact, it did give that impression to begin with, but then changed its mind.
22 Evidently the reason had to do with the enforceability of any English judgment in the United States.
23 *Glencore International AG v. Exter Shipping Ltd* [2002] EWCA Civ 528, [2002] 2 All ER (Comm) 1; *CNA Insurance Co Ltd v. Office Depot International (UK) Ltd* [2005] EWHC 456 (Comm), [2005] Lloyd's Rep 658, [2007] Lloyd's Rep IR 89 (the judgment appears to have been reported twice).

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4.03 Consequences of service effected within the jurisdiction

Where jurisdiction is asserted under the rules of the common law, a significant question is whether service of process was made in accordance with the how-and-when-and-where rules which govern such service: these are examined in brief in Chapter 5. If service has taken place in apparent accordance with these procedural rules, the jurisdiction of the court may still be disputed on the ground that there was no lawful basis for service to have been made, but unless the defendant is able to say that the Brussels I Regulation, or Lugano II Convention, or some other statute, provided that he was not subject to the jurisdiction of the English court in respect of the claim, and that the claimant therefore had no right to serve him, there is little scope for such arguments to be advanced.

If an application to dispute the jurisdiction succeeds, the court will declare that it has no jurisdiction, and service will necessarily be set aside. However, even though a defendant may not be able to dispute the propriety of service and the existence of jurisdiction, if the defendant wishes the court to not exercise the jurisdiction it has, and to decline to hear the case on the basis that the proper forum lies elsewhere, he may apply for a stay of the proceedings.[24] If this application succeeds, the court will remain seised of the case,[25] but will suspend the hearing of it, leaving[26] the claimant to bring proceedings elsewhere. In cases where it is appropriate to do so, the court may lift the stay at a later date and allow the case to proceed; alternatively, it may resume the proceedings after judgment has been given in the foreign court. But in most cases the stay of proceedings is never lifted and the case does not proceed in England.

The power to grant a stay of proceedings is part of the court's inherent power to control its own procedure.[27] As the jurisdiction of the High Court based on service within the jurisdiction is an inherent jurisdiction, not created by or dependent on any statute,[28] the inherent power to control the exercise of that jurisdiction is a natural adjunct to it.[29]

4.04 Service out of the jurisdiction

If service has to be made out of the jurisdiction, and the case is not one of the relatively rare[30] ones in which a statute provides that service may be made out of the jurisdiction of England and Wales[31] without the need to obtain permission in advance, the claimant must obtain an order granting him permission to make that service,[32] and he must then serve

24 See paras 4.16 *et seq.*, below.

25 *The Alexandros T* [2013] UKSC 70, [2014] 1 Lloyd's Rep 225.

26 Not *require* as the court generally has no power to order proceedings to be brought, whether in a foreign jurisdiction or elsewhere.

27 Senior Courts Act 1981, s. 49(3).

28 Senior Courts Act 1981, s. 19.

29 The significance of this is plain when considering the inherent power to stay proceedings founded on a jurisdiction conferred and defined by statute or by international instrument.

30 Though always remembering that where the Brussels I Regulation gives the court jurisdiction, service out may be made without the need to obtain permission. It is outside the context of the Regulation that this is rare.

31 In cases in which service may be made out of England without the need to obtain permission, the Civil Procedure Rules draw a further distinction between service in Scotland and Northern Ireland (CPR r. 6.32), and service out of the United Kingdom (CPR r. 6.33). For present purposes, the two cases may be treated alike.

32 In cases where the Brussels I Regulation or the Brussels or Lugano Convention give the court direct jurisdiction, service out is permitted as of right: CPR r. 6.33(1), (2). Other statutes may allow service to be made out of the jurisdiction without permission, under CPR r. 6.33(3), on which see further below, para. 4.56, but it

in the manner prescribed for such a case.[33] If permission is granted, it is the service made pursuant to that order which gives the court jurisdiction over the defendant in respect of the claim set out in the claim form.

The defendant may, however, challenge the grant of permission to serve, and therefore the service made pursuant to it, on either or both of two broad grounds. First, he may contend that the court had, on the facts of the case, no basis in law for granting the claimant permission to serve process out of the jurisdiction. If this argument is sustained, the court will declare that it has no jurisdiction, will set aside the order for permission to serve out, and will set aside service of the claim form. Second, he may argue that, even though the court had a basis in law to grant permission to serve out, the case was not a proper one for the exercise of that power, and that the order should, in all the circumstances, not have been made. If this argument is sustained, the outcome will be the same: the court will declare that it has no jurisdiction, and will set aside the order granting permission, together with service of the claim form. And the defendant-applicant will frequently advance both arguments in support of his application, as there is no inconsistency between them.

4.05 Cases where jurisdiction at common law does not and cannot exist

There are some persons who are entitled to immunity from the jurisdiction of the English courts.[34] There are also matters in which the common law considers that the court has no jurisdiction over the substance of the claim, on the approximate basis that such cases are not justiciable in an English court;[35] and where that is so, there is no question of submission conferring jurisdiction.

4.06 Claims which depend on showing title to foreign land: the *Moçambique* rule

At common law, an English court has no jurisdiction to adjudicate a claim whose substance depends on establishing title to foreign land. The rule is sometimes put in terms of the court having no jurisdiction to resolve a dispute over title to foreign land, but that is inaccurate: the House of Lords confirmed that if the claim depends on title to foreign land, the court has no jurisdiction to try it as a matter of common law, whether or not title is in dispute.[36]

was held that the predecessor provision would not apply unless the enactment in question makes it plain that it specifically contemplates proceedings being brought against persons out of the jurisdiction, as distinct from persons generally: *Re Harrods (Buenos Aires) Ltd (No 2)* [1992] Ch 72, 116; *Re Banco Nacional de Cuba* [2001] 1 WLR 2039. It is assumed that this is still the position.

33 If he does not manage to serve, however, because the defendant manages to evade (or perhaps even only avoid) service, it will be usual to make an order deeming such steps as have been made to be sufficient: *Abela v. Baaradani* [2013] UKSC 44, [2013] 1 WLR 2043.

34 Paragraph 4.11, below.

35 If according to these rules the court has no jurisdiction, it is not open to the claimant to contend that the defendant is estopped from taking the point: *J & F Stone v. Levitt* [1947] AC 209; *R Griggs Group Ltd v. Evans* [2004] EWHC 1088 (Ch), [2005] Ch 153, [20].

36 *Hesperides Hotels Ltd v. Aegean Turkish Holidays Ltd* [1979] AC 508. In that case, despite appearances, title to land was not in dispute, because if the court ignored the pretended laws of the occupation forces in the north of Cyprus as illegal, as it was bound to do, there was no dispute as to whose the land was.

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The fundamental statement and theoretical justification of the rule is made in *British South Africa Co v. Companhia de Moçambique*.[37] Theory aside, it also reflects the practical[38] fact that only at the *situs* of the land can there be an effective determination of title. Even if an English court were to hear the case, and were to apply the law which a court at the *situs* would itself have applied, it is likely that its judgment will be ignored at the *situs*, on the ground that it was still a judgment given by a court with, as it appears to the judge at the *situs* of the land, no jurisdiction to adjudicate on the issue at all. It is this fact which provides the pragmatic reason why the court has no jurisdiction to try questions which dispute title to foreign land. It might have been argued that where there is no real dispute as to title, but damages are claimed, for example for trespass, this rationale does not apply. But the House of Lords refused to draw such a distinction, and that was that so far as the common law was concerned.[39] And because the issue is one where the court has no jurisdiction over the subject matter of the claim, the purported personal submission of the defendant to the jurisdiction of the court is irrelevant: what the court lacks is subject matter jurisdiction, not personal jurisdiction. The point is underscored by the fact that in *Hesperides Hotels Ltd v. Aegean Turkish Holidays Ltd*,[40] claims for damages for trespass, and for conspiracy to trespass, on foreign land were struck out; by contrast, the claim for damages for trespass to chattels on the land was unaffected and remained in the writ.

In addition to the two exceptions, examined below, to the absolute character of the *Moçambique* rule, it is evident that some consider the rule to have outlived its usefulness. The Supreme Court exhibited little obvious enthusiasm for it when it expressed the view that it had been 'undermined', that it had no application to cases founded on the infringement of foreign copyright in any event, and that its application to patents was not before them for decision.[41] More recently, the Court of Appeal went out of its way – out of its way, because the rule plainly had no application to the claim before it – to suggest that the rule had become narrower than it had been, and that it was in some sense analogous to the rule now in Article 24(1) of the Brussels I Regulation 1215/2015, which applies only when proceedings have as their object rights *in rem* in immovable property in another Member State.[42] Neither case gives any reason to question the rule. As will be seen,[43] in making a statutory exception to the rule, Parliament legislated against the background of a unanimous decision of the House of Lords on which the ink was barely dry. It is to be assumed that it knew precisely how and how far it wished the common law exclusionary rule to be pruned.

37 [1893] AC 602; approved and applied in *Hesperides Hotels Ltd v. Aegean Turkish Holidays Ltd* [1979] AC 508.

38 In truth, it reflects a historical decision that actions concerning title to foreign land were local and not transitory, and therefore had to be brought where the land was. This may be historically interesting, but is of no practical significance today.

39 *Hesperides Hotels Ltd v. Aegean Turkish Holidays Ltd* [1979] AC 508.

40 [1979] AC 508.

41 *Lucasfilm Ltd v. Ainsworth* [2011] UKSC 39, [2012] 1 AC 208: on the point concerning patents, see [102], [107].

42 *Hamed v. Stevens* [2013] EWCA Civ 911, [2013] ILPr 623. The judgment, at [11], is plainly wrong, as in *Hesperides Hotels Ltd v. Aegean Turkish Holidays Ltd* [1979] AC 508 Lord Wilberforce is clear that the decision of the court in that case does not involve any extension of the exclusionary rule. The fact that this was simply lifted from *Lucasfilm Ltd v. Ainsworth*, at [72], does not make it any more right. The statement of the common law in Dicey & Morris, 9th edn (Stevens, London,1973) does not confine the exclusionary rule to cases in which title to land was in dispute.

43 Paragraph 4.08, below.

4.07 Exceptions to the *Moçambique* rule (1): enforcing personal obligations ancillary to the land

The non-statutory exception to the *Moçambique* rule is so ancient that it pre-dates by over a century the case which has given its name to the common law rule. It is equitable in origin, and very useful in application.[44]

According to the principle laid down in *Penn v. Lord Baltimore*,[45] though a court may have no jurisdiction to try a question based on title to land situated outside the territorial jurisdiction of the court, this does not affect its jurisdiction to adjudicate on and enforce a contract, or fiduciary or other equitable obligation, made between and binding on the parties to it, even though the obligation relates to that foreign land. In the case itself the court ordered specific performance of a contract to settle a boundary dispute by proceeding to arbitration, even though the question where the boundary between Maryland (owned by Lord Baltimore) and Pennsylvania (owned by Mr Penn) was to be drawn was not one which the court had jurisdiction to determine for itself. It certainly could enforce a contract, and could deal with the consequences of any disregard of its order in the usual fierce way, and that was enough.

For the principle in *Penn v. Baltimore* to apply, there must be, or be alleged to be, a pre-existing personal relationship between the parties which the court may be asked to enforce,[46] such as a contractual duty to sell,[47] or the fiduciary duty of a trustee to convey land to a beneficiary. By contrast, a claim for equitable relief[48] in the form of a 'remedial constructive trust' to reverse an enrichment resulting from trespass to foreign land neither relies on nor seeks the enforcement of the rights and obligations of a voluntary and pre-existing relationship, and does not fall within the *Penn v. Baltimore* exception.[49]

The bare fact that there is a claim made for equitable relief is therefore insufficient to take the claim outside the *Moçambique* rule. But a contractual claim which has foreign land as its subject matter, and a suit to enforce rights created under a trust of foreign land, fall within this exception to the *Moçambique* rule, and are within the subject matter jurisdiction of the court. The 'contract or other equity' rule, which allows jurisdiction to be taken despite the fact that the broader subject matter of the claim is foreign land, fastens or relies on a pre-existing relationship between the parties. In cases in which the land comes into the hands of a third party, and it is asserted that he too falls within the *Penn v. Baltimore* principle, difficulty is bound to arise. For the obligations of the third party, if they exist at all, are not based on a voluntary relationship with the other, but on notice of that relationship (say, the estate contract) in relation to the property acquired. It has been suggested that this is enough to bring the third party within the principle, but the point is open to further question.[50]

It is worth pointing out that the principle in *Penn v. Baltimore* is of more general application than its peculiar historical context might suggest. It may apply in the context of the

44 See, for example, *Pattni v. Ali* [2006] UKPC 51, [2007] 2 AC 85.

45 (1750) 1 Ves Sen 444.

46 *Minera Aquiline Argentina SA v. IMA Exploration Inc* [2008] 10 WWR 648; *cf Catania v. Giannattasio* [1999] ILPr 630, in which the Ontario Court of Appeal declined to apply the exception to a case concerning the validity of a deed of grant.

47 Including a claim is for the rescission of a contract for the sale of land and the repayment of sums paid under it: *Hamed v. Stevens* [2013] EWCA Civ 911, [2013] ILPr 623.

48 Assuming for the sake of argument that there is such a principle of equity in English law.

49 *Re Polly Peck International plc*. In fact, the Court considered that there was no basis in English law for the imposition of such a trust in any event.

50 *R Griggs Group Ltd v. Evans* [2004] EWHC 1088 (Ch), [2005] Ch 153.

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enforcement of foreign judgments when it is alleged that the judgment may not be enforceable on the ground that it was a judgment *in rem*, and that the *res* in question was not within the territorial jurisdiction of the foreign court.[51] If the judgment may (also) be seen as one which imposes obligations on the defendant *in personam*, it may be recognised and enforced on that basis instead. And as will be seen more generally in relation to foreign judgments,[52] it is aligned with, or may even be, the theoretical basis on which an English court enforces a judgment from a court within whose territory the defendant was not present when proceedings were begun.

4.08 Exceptions to the *Moçambique* rule (2): claims based on tort or trespass to foreign land

There is usually no contractual or equitable relationship between tortfeasor and victim, with the consequence that *Penn v. Baltimore* will not give the court jurisdiction to enforce the obligation allegedly owed by a tortfeasor or trespasser to a landowner.[53] Judging that this particular impediment to the jurisdiction of an English court was unsatisfactory, Parliament enacted Civil Jurisdiction and Judgments Act 1982, section 30(1), which provides that the court may entertain proceedings for trespass or other torts to foreign land 'unless the proceedings are principally concerned with a question of title to, or the right to possession of that land. The practical[54] justification for the exception is that, if there is no real dispute over title to the foreign land, and the claim is only for personal relief in respect of a tort, there is no compelling need for a court with personal jurisdiction to be prevented from adjudicating: the possibility, or even the fact, that the courts at the *situs* of the land would take no notice of a damages judgment is of limited practical importance.

One way of looking at section 30 of the 1982 Act is that it creates for relationships governed by the law of tort a jurisdictional rule roughly analogous to that established by *Penn v. Baltimore* for those personal claims arising from voluntary obligations. But where the court would have to make a genuine investigation of title to foreign land, whether to determine the validity of the claim or (it is to be supposed) to assess such damages as depend on the nature or extent of title to land, section 30(1) is inapplicable and the *Moçambique* rule will apply.

In *Re Polly Peck International plc (in administration) (No 2)*,[55] it was held that section 30(1) of the 1982 Act gave the court jurisdiction unless the 'real issue' raised by the claim[56] was that of title to the land, and all other issues could be said to be merely incidental thereto.[57] The claimant asked the court to impose a 'remedial constructive trust', to reverse enrichment unjustly derived from the illegal use of land in the occupied territory in the northern part of Cyprus, licence to use which having purportedly been granted by the regime which was carrying on business as the 'Turkish Republic of Northern Cyprus'. The court held

51 *Pattni v. Ali* [2006] UKPC 51, [2007] 2 AC 85.
52 Paragraph 7.62, below.
53 *Hesperides Hotels Ltd v. Aegean Turkish Holidays Ltd* [1979] AC 508; *Re Polly Peck International plc (in administration) (No 2)* [1998] 3 All ER 812.
54 There is nothing in the way of *travaux préparatoires*, and little in the Parliamentary debates.
55 [1998] 3 All ER 812.
56 This is probably more accurate than saying 'the claimant': if an issue of title is raised by the defendant so that its resolution can be seen to be the real issue in the case, the court should conclude that it lacks jurisdiction.
57 At 829.

that the case was not principally concerned with title to the disputed land, and that if the claim had been arguable on its facts, section 30(1) would have given the court jurisdiction to adjudicate it. That seems perfectly correct. For as a matter of English law, the pretended laws of the regime were not recognised, and once that was appreciated there was no issue, still less a principal issue, of title. By contrast, the issues of trusts law and remedies which the court would have been[58] required to address would be formidable. It is not helpful to gloss the words of the Act, or to propose tests which (it seems) do not reflect what the case actually decided:[59] the court is required to ask itself, in effect, whether the matter before it for decision is 'more about this or more about that'.[60]

4.09 Jurisdiction over claims which turn on the validity of foreign intellectual property rights

Until recently it was not controversial that an English court had no jurisdiction to adjudicate claims involving the validity of foreign intellectual property rights. The English authorities may not have been strong, but they agreed that the *Moçambique* rule, or something resembling it, excluded jurisdiction to adjudicate on the validity of foreign patents,[61] copyrights[62] and trademarks. Quite apart from that, even if the claim were framed in tort, as a claim for damages for infringement of the particular foreign right, the common law rules of choice of law rules for claims in tort[63] would have meant that an action before the English courts, founded on infringement of a foreign intellectual property right, would fail. This was because acts infringing such foreign rights would not have given rise to liability as a tort even if committed in England, for a foreign right was territorial and had no effect in England. There was, therefore, no incentive for a claimant to challenge the application of the *Moçambique* rule in this area.

That settled understanding, or misunderstanding, of the law was questioned by the Court of Appeal in *Pearce v. Ove Arup Partnership Ltd*,[64] which held that in proceedings founded on an alleged infringement of a Dutch copyright by a defendant over whom the Brussels Convention (as it then was) gave the court personal jurisdiction, it was incompatible with the Convention for a common law jurisdictional rule to prevent the jurisdiction of the court. But rather than confine its attention to the impact of the Brussels Convention, the court considered the broader question whether the *Moçambique* rule had any proper application to intellectual property disputes at all, and concluded that no English authority required it to hold that it did apply. It took the view that the early authority of the High Court of

58 In fact, the claim was substantively hopeless, and the claim was struck out.
59 The suggestion in Dicey Morris & Collins, *The Conflict of Laws*, 15th edn (Sweet & Maxwell, London, 2012), para. 23–040, is, it is submitted, not reliable. It was originally formulated as a suggestion well before the decision in *Polly Peck* (see Dicey & Morris, 11th edn (1987), 927) and does not appear to have been reconsidered in the light of that decision which, on the face of it, did not adopt it but said something rather different.
60 It may be a difficult question to answer: see *The Bodo Community v. Shell Petroleum and Development Co of Nigeria Ltd* [2014] EWHC 1973 (TCC).
61 *Potter v. Broken Hill Pty Ltd* (1906) 3 CLR 479; *Norbert Steinhardt & Son v. Meth* (1961) 105 CLR 440; *Mölnlycke v. Procter & Gamble Ltd* [1992] 1 WLR 1112. But on the correct reading of *Potter v. Broken Hill*, see *Habib v. Commonwealth of Australia* (2010) 183 FCR 62; *Lucasfilm Ltd v. Ainsworth* [2011] UKSC 39, [2012] 1 AC 208.
62 *Tyburn Productions Ltd v. Conan Doyle* [1991] Ch 75.
63 The rule of 'double actionability' in *Boys v. Chaplin* [1971] AC 356.
64 [2000] Ch 403.

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Australia on the point was not, or was no longer, persuasive,[65] and that the rule, at least in a broad formulation, was and ought to be inapplicable in the context of intellectual property disputes in the twenty-first century. It might have been different if an issue of validity were squarely raised, for in such cases the court of the country under which the property right had been granted or arose would alone have jurisdiction to determine it. But where there was no such issue of validity, there was no need to conclude that the *Moçambique* rule was applicable in the context of infringement claims.

The approach of the Court of Appeal was generally approved by the Supreme Court in *Lucasfilm Ltd v. Ainsworth*,[66] which held that if there was a common law exclusionary rule applicable to issues of foreign intellectual property, it had no application to cases founded on the infringement of foreign copyright, or perhaps to copyright at all; and the question whether or how it applied to patents was not one which the court needed to determine. A fair reading of the judgment, though, would suggest that where a genuine dispute as to the validity of a patent is raised, whether as a claim or as a defence to an allegation of infringement, the exclusionary rule may still apply. The grant of a patent right is closer to an act of sovereign power than many; if a court considers that a patent should be held to be invalid and cancelled as a result, it is hard to see how this can be done and made effective by a court other than at the place where the patent was granted and must now be cancelled. Moreover, as the Brussels I Regulation reserves proceedings which have as their object the validity of a patent to the courts of the Member State under which it was granted, it would be difficult to attack a rule of the common law which was built on the same foundation.

To the extent that the *Moçambique* rule still applies to disputes concerning the validity of a foreign patent, it is also modified by the rule in *Penn v. Baltimore*, with the consequence that the court will have jurisdiction to enforce a contract, or other equity, between the parties which relates to the foreign patent.[67] It is, however, more difficult to see that the wording of section 30 of the 1982 Act is apt to allow it to apply to foreign intellectual property rights in the way that it applies to foreign land.

4.10 Jurisdiction over claims which require a court to enforce a foreign penal, revenue or public law of an analogous kind

According to Rule 3 of Dicey, Morris and Collins, *The Conflict of Laws*, and by long tradition, the English courts have no jurisdiction to enforce, directly or indirectly, a foreign penal law, or a foreign revenue law, or other[68] foreign public laws.

It is clear that there is a principle which prevents enforcement of such laws in an English court. But it is less clear that it is illuminating to describe this as a rule which goes to the jurisdiction of the court if this means that, even if the defendant does not take the point, the court has no legal power to adjudicate the claim. In *Re State of Norway's Application (Nos 1*

65 To the same effect: *R Griggs Group Ltd v. Evans* [2004] EWHC 1088 (Ch), [2005] Ch 153, doubting that there was an exclusionary rule for copyright, but in any event applying the rule in *Penn v. Baltimore* to conclude that the court had jurisdiction to adjudicate the claim.

66 [2011] UKSC 39, [2012] 1 AC 208.

67 *R Griggs Group Ltd v. Evans* [2004] EWHC 1088 (Ch), [2005] Ch 153.

68 It is customary to qualify the reference to 'other public laws' with the explanation that the authority for and scope of such a third category is less well established. The correct position today is that there is no doubt that such a rule exists, but that the identification of 'other public laws', and the application of a rule that these may not be enforced, as distinct from having an effect other than enforcement, is more problematic.

and 2),[69] Lord Goff of Chieveley acknowledged that the editors of Dicey and Morris, as it then was, had questioned the proposition that the rule was to be understood as one which went to the jurisdiction of the court. He suggested that the better analysis may be that the jurisdiction of the court is not exercised, as distinct from its being legally non-existent. It is implicit in this that the defendant may apply for the claim to be struck out as non-justiciable, but that, if he chooses not to, the court will not be prevented from adjudicating.

Some observations made by the Privy Council in *Equatorial Guinea v. Royal Bank of Scotland*[70] may suggest that the issue is one which does go to jurisdiction, and that where submissions are not addressed to the court on the issue of whether the court has jurisdiction to entertain a claim which will require it to enforce a foreign public law, there is a risk that the court will be led into making an error of law, but the decision of the Privy Council was that, as the point had not been taken by the defendant below, it could not be taken before the Judicial Committee, and the order made at first instance was upheld. If that is correct, then the objection is not one which goes to jurisdiction properly so called, but is one by reference to which a defendant may invite a court not to exercise the jurisdiction it has.

4.11 Jurisdiction denied by general principles of public international law

Apart from these cases where an English court lacks, or may lack, subject matter jurisdiction as a matter of private international law, properly so called, the principles of public international law may operate to deny or remove the jurisdiction of the court over the defendant in relation to the claim made.

In some instances the defendant will have personal immunity from the jurisdiction of the English courts: if the defendant has such personal immunity, the courts will have no jurisdiction to adjudicate the matter set out in the claim.[71] The most important of these exceptions to the jurisdiction of the court lies in the field of State and sovereign immunity. The detail of the law on sovereign immunity is beyond the scope of this book. It is sufficient to say that it is governed in large part by the common law as now restricted by the State Immunity Act 1978, and by international Convention.[72] This grants immunity to a foreign State,[73] to the sovereign of the State in his public capacity, to the Government of the State, and to any department of its Government.[74] Such immunity is extended to a 'separate entity' which acts in, and is sued in relation to, the exercise of sovereign authority where, if it had so acted, a State would have been immune.[75] Questions of state immunity must be decided as a preliminary issue, even if the State does not appear. But a State may put aside

69 [1990] 1 AC 723, 807–808 for examination of the true basis for the exclusionary rule as defined in *Government of India v. Taylor* [1955] AC 491.

70 [2006] UKPC 7 (PC, Guernsey), esp. at [23].

71 See for a recent example, *Grovit v. De Nederlandsche Bank* [2007] EWCA Civ 953, [2008] 1 WLR 51 (applying the rule in a case in which the defendant was subject to the personal jurisdiction of the English court according to the Brussels I Regulation.

72 For immunity (or not) in relation to a claim for damages for torture committed within and on behalf of a foreign State, see *Jones v. Saudi Arabia* [2006] UKHL 26, [2007] 1 AC 270; *cf Belhaj v. Straw* [2014] EWCA Civ 1394; *Rahmatullah v. Ministry of Defence* [2014] EWHC 3846 (QB).

73 Section 1(1). For the interrelationship between the Act and the common law, see *Holland v. Lampen-Wolfe* [2000] 1 WLR 1573 (action for defamation against employee of US Government at military base in England stuck out on ground of immunity at common law).

74 Section 14.

75 Section 14.

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its immunity shield by submission to the courts. This may be done after the dispute has arisen, or by prior written agreement,[76] or by taking a step in the proceedings for purposes which go beyond seeking to establish or defend its immunity.[77] And in any event, there is no immunity in relation to a commercial transaction entered into by the State, or in relation to an obligation under any contract which fell to be performed wholly or in part within the United Kingdom.[78] Further cases in which there is no immunity include acts or omissions in the United Kingdom causing death or personal injury, or damage to or loss of tangible property,[79] and claims in relation to use or possession of immovable property in the United Kingdom.[80]

An English court does not have jurisdiction over a person entitled to immunity under the Diplomatic Privileges Act 1964 or the Consular Relations Act 1968. Finally, if an international organisation benefits from an Order made under the International Organisations Act 1968,[81] it will enjoy such immunity (if any) as may be conferred on it by that Order. In the absence of such an Order, an international organisation would enjoy no such immunity.[82]

There is a separate and reasonably distinct principle of non-justiciability, by reference to which a court may conclude that the matter raised is not one for a municipal court to try. One traditional explanation for the absence of jurisdiction, in some of these cases at least, is the 'act of State' doctrine, but the danger with using this particular label is that it distracts attention from the real basis on which the law is organised. Equality of respect for sovereign States, and the principles of international comity limit the judicial power of an English court to investigate and adjudicate upon the sovereign acts of States. The proper basis of the leading case of *Buttes Gas & Oil Co v. Hammer (No 3)*[83] was recently examined and clarified by the Supreme Court in *Shergill v. Khaira*,[84] to which reference may be made.

But in the same way that private law has long held that there is no confidence in iniquity,[85] it increasingly appears that English international law holds that there is no non-justiciability in barbarity. The boundaries of the exception to the rule of non-justiciability are somewhat fluid, as is inevitable. On the one hand there is a strong public interest in

76 *NML Capital Ltd v. Argentina* [2011] UKSC 31, [2011] 2 AC 495 (submission by contractual term to jurisdiction of court)

77 Section 2. See *Kuwait Airways Corp v. Iraqi Airways Co* [1995] 1 WLR 1147.

78 Section 3. Note that there is separate treatment for claims in relation to contracts of employment in s. 4.

79 Section 5.

80 Section 6. Other cases include succession and the winding-up of companies (s. 6), certain intellectual property rights governed by United Kingdom law (s. 7), certain cases of membership of a body corporate, or an unincorporated body (s. 8), proceedings in relation to an arbitration which has been agreed to (s. 9), certain admiralty proceedings (s. 10), certain taxes and levies (s. 11).

81 Or under analogous statutes making particular provision for an individual organisation, such as the Commonwealth Secretariat Act 1966.

82 Such Orders may be made under the Act only in respect of international organisations of which the United Kingdom is a member; and there is no immunity otherwise than under the Order: *Standard Chartered Bank v. International Tin Council* [1987] 1 WLR 641. The Act also allows legal capacity to be conferred on such organisations of which the United Kingdom is not a member but which maintain establishments in the United Kingdom: s. 4. See *JH Rayner (Mincing Lane) Ltd v. Department of Trade and Industry* [1990] 2 AC 418. An international organisation of which the United Kingdom is not a member, and which has no establishment in the United Kingdom, may still be recognised as having legal personality if it has legal personality under the domestic law of the State in which it had been incorporated: *Arab Monetary Fund v. Hashim (No 3)* [1991] 2 AC 114; but (of course) in such a case no question of immunity can arise.

83 [1982] AC 888.

84 [2014] UKSC 33, [2014] 3 WLR 1.

85 *Gartside v. Outram* (1856) 26 LJ (NS) 113.

respecting the sovereignty of States. It is proper for a court to avoid taking steps which will impair the public interest in the conduct of diplomatic and security relations between the United Kingdom and other States. On the other, there is an increasingly strong acceptance that the judicial protection of human rights is also a matter of public policy, and that for a claimant to be shut out of court by a plea that it will damage the interests of the United Kingdom if his claim is heard is unattractive, and the more barbarous the alleged behaviour of the foreign State, the less attractive it will be for the claimant to be denied a fair hearing of his claim. It appears that the court will conduct a balancing exercise, and that this is perfectly capable of taking account of the variable nature of the facts and matters complained of. It seems plausible that the more outrageous is the actual allegation of abuse of human rights, the less likely it is that the court will be receptive to contentions that it is inappropriate to shine a light on the conduct of a foreign State, or of those acting in its name.[86]

It is difficult to envisage a case in which the Brussels I Regulation would, apart from these rules, confer jurisdiction on the English courts; these jurisdictional immunities may be applied by an English court without regard to it.[87]

4.12 Jurisdiction in relation to multi-State defamation

The subject matter jurisdiction of an English court has recently been cut back in the context of defamation in which publication of a statement, to which the claimant takes exception, in England is part of a more substantial publication which has its centre of gravity overseas. Until very recently, certain opportunistic individuals with nothing better to do, who fancied themselves to have been traduced in the media, hit upon the wheeze of suing the defendant in England. The trick was to complain only of publication in England and of damage to their reputation resulting from English publication. So localised, the claim would be one over which it was practically impossible for the English court to refuse to exercise jurisdiction. English law would be applied to such a claim; and as this requires the defendant to justify what he had said, pressure and pain could be brought to bear in England in a way which – because its law has a rather different approach to free speech – might not be possible in the place where the lion's share of the publication had taken place.[88] This was thought in many quarters to be something of a scandal.

Rather than legislate to give or to confirm the power of an English court to stay such proceedings on the defendant's application, on the ground that whether or not the complaint was limited to publication in England, the appropriate forum was overseas where

86 See for example *Oppenheimer v. Cattermole* [1976] AC 249; *Kuwait Airways Corp v. Iraq Airways Co (No 2)* [2002] UKHL 19, [2002] 2 AC 883; *Yukos Capital Sarl v. OJSC Rosneft Oil Co* [2012] EWCA Civ 855, [2014] QB 458; *Belhaj v. Straw* [2014] EWCA Civ 1394; see also European Convention on Human Rights, Art. 6.

87 The reasons include the fact that there is no general immunity for commercial matters in any event; and in other cases, the immunity from the jurisdiction of the English courts derives from a Convention to which Art. 71 of the Brussels I Regulation will accord precedence.

88 For example (though there were plenty of others), see *Berezovsky v. Michaels* [2000] 1 WLR 1004, a case on service out of the jurisdiction, discussed further below, para. 4.90; see also *King v. Lewis* [2004] EWCA Civ 1329, [2005] ILPr 185; *Richardson v. Schwarzenegger* [2004] EWHC 2422 (QB) (affirmed [2005] EWCA Civ 25) (both applying the same principle to libel by material downloaded from the world wide web and complained about only insofar as there was an alleged English readership (and on all of this madness, see (2004) 75 BYBIL 565). But when the principle was pushed to the point that its use could be seen as an abuse of the process of the court, the action could be dismissed on the application of the defendant: *Dow Jones & Co Inc v. Jameel* [2005] EWCA Civ 75, [2005] QB 946.

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the totality of publication had its centre of gravity, the Defamation Act 2013 removed the subject matter jurisdiction of the English court. The effect of section 9 of the Act is that the English court does not have jurisdiction to hear and determine the action unless it is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement. The rule certainly appears to be one which removes the jurisdiction of the court, leaving no room for discretionary considerations or exceptions of any kind. The Act may be an effective remedy for some forms of abusive behaviour, but the possibility that an English victim will have been deprived of the only remedy which was within his reasonable means is not a happy one.

According to section 9, the new jurisdiction-denying rule does not apply to cases where the defendant is domiciled in a Member State. No doubt this was intended to mean that if the court has jurisdiction according to the Brussels I Regulation, the jurisdiction-denying provisions of the Act are inapplicable. This appears to suppose that where the defendant is not domiciled in a Member State, any jurisdiction over him would be based, and based only, on what is now Article 6 of the Regulation. That may not be correct: if a defendant submits to the jurisdiction by prorogation or voluntary appearance, Articles 25 and 26 appear to mean that the court has jurisdiction by virtue of the Regulation, no matter where the defendant may actually be domiciled. If that is correct,[89] Section 9 purports in part to remove a jurisdiction which the Regulation has conferred, which suggests that something has gone wrong with the drafting.

PROCEEDINGS COMMENCED BY SERVICE WITHIN THE JURISDICTION: APPLYING FOR A STAY OF PROCEEDINGS

4.13 General

As stated above, where proceedings may be instituted by making service upon the defendant within the jurisdiction, as a consequence of which service the court has jurisdiction, any disputing of the jurisdiction of the court will be based on whether the service was made in accordance with the law governing the manner and form of service of the document in question. These rules about how service may be made are examined in more detail in Chapter 5.

If it is established or conceded that service was effected lawfully, the defendant may still apply for a stay of the proceedings. If he succeeds, the court will remain seised of the proceedings,[90] but will suspend further consideration of them, usually *sine die*, leaving the claimant to prosecute his claim, if so advised, before the courts of another State. The power to order a stay is inherent: according to the Senior Courts Act 1981, section 49(3): 'Nothing in this Act shall affect the power of the Court of Appeal or the High Court to stay any proceedings before it, where it thinks fit to do so, either of its own motion or on the application of any person, whether or not a party to proceedings.' Civil Jurisdiction and Judgments Act

89 On whether Art. 26 of the Brussels I Regulation applies when a defendant does not have a domicile in a Member State, see above, para. 2.85.

90 *The Alexandros T* [2013] UKSC 70, [2014] 1 Lloyd's Rep 223, approving *ROFA Sport Management AG v. DHL International (UK) Ltd* [1989] 1 WLR 902.

1982, section 49, echoes this, providing that: 'Nothing in this Act shall prevent any court in the United Kingdom from staying, sisting, striking out or dismissing any proceedings before it, on the ground of *forum non conveniens* or otherwise, where to do so is not inconsistent with' the Brussels Convention (as it then was).[91] The remainder of this section examines the law which governs the granting of such stays of proceedings.

4.14 Legislative limitations on the general power to stay proceedings

Before examining the law on the staying of proceedings, it is necessary to ask whether Parliament has legislated, in a particular case or context, to remove the court's inherent power to stay from the claim with which the court is concerned.

This may be found to have happened, in particular, where a statute provides that a court shall have jurisdiction, and the court reaches the conclusion, from a construction of the Act as a whole, that it would be contrary to the intention of Parliament for that jurisdiction to be not exercised. For example, in *The Hollandia*,[92] the essential question for the court was whether exclusion clauses contained in a bill of lading should be subjected to the control provisions of the Hague-Visby Rules, as would have happened if the action were to proceed in England, or governed by the rather more lax provisions of the original Hague Rules, as they would have been if the dispute were to be brought before a Dutch court. The defendant applied for a stay of English proceedings, on the basis that the parties had expressly agreed on the jurisdiction of the Dutch courts. But the Hague-Visby Rules had been given the force of law in England by the Carriage of Goods by Sea Act 1971, and the Rules provided, in effect, that any contract term which lessened the liability of a defendant more than was permitted by the Rules was to be null and void. The House of Lords concluded that Parliament had prohibited a court from giving effect to a contractual agreement on jurisdiction, by way of a stay of proceedings, where the result of its doing so would be to prevent the Hague-Visby Rules from being applied to the case.[93] A stay of proceedings, in order to give effect to an agreement on jurisdiction, was therefore precluded by the 1971 Act.

Similar conclusions have been reached when the courts have had to consider other domestic legislation enacted to give effect to other international Conventions. It has been held that the implementing legislation forbade a stay of proceedings where the claim was

91 The Act was not amended to make reference to the Brussels I Regulation, for as the Regulation is directly effective, it is not open to the United Kingdom to legislate within the sphere of its operation, and the decision was evidently taken to refrain from even amending s. 49 in what would, surely, have been a helpful and wholly uncontroversial way. For a case on *forum non conveniens* as between Scotland and England in a matter falling outside the material scope of the Regulation in any event, see *Tehrani v. Secretary of State for the Home Department* [2006] UKHL 47, [2007] 1 AC 521.

92 [1983] 1 AC 565.

93 It does not follow that a stay would have been refused if the basis for its grant had been that the foreign court was the natural forum. The material question is whether Parliament has legislated to prevent a stay being ordered *on the ground advanced by the applicant*. In *The Hollandia*, the true construction of the 1971 Act and of the Hague-Visby Rules was that a term of the contract, which would have the effect of lessening the protection extended by the Rules, was null and void. The application for a stay, rested on a term of the contract, was therefore unsuccessful. Contrast *The Herceg Novi and the Ming Galaxy* [1998] 2 Lloyd's Rep 454, where the court refused to see the intention of Parliament as having been to remove the power to stay proceedings on the ground that the foreign forum was the natural forum. And *cf* also the approach of the Canadian Federal Court of Appeal in *OT Africa Line Ltd v. Magic Sportswear Corp* [2007] 1 Lloyd's Rep 85 (Can Fed CA), refusing to interpret mandatory legislation as precluding the power of the court to order a stay.

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one which the court was given jurisdiction to adjudicate by the Warsaw Convention,[94] the CMR Convention,[95] and by the European Patents Convention.[96] A still similar construction has been taken to the legislation governing jurisdiction to order matrimonial relief, in a case concerned with assets held in a trust which contained an exclusive jurisdiction clause.[97] A similar conclusion was reached in a case in which an English court would be required to apply the Commercial Agents' Regulations 1993 but where the agreed court, which was in a non-Member State, would not apply them.[98] In all cases it was possible to justify the conclusion by observing that the particular jurisdiction was a statutory one, not an inherent one; and for this reason there was perhaps no expectation that an inherent power to regulate procedure was to be associated with jurisdiction of that kind.

The provisions of the Brussels I Regulation may, or must, also be seen as a set of jurisdictional rules which, just as with these other international agreements, specify where proceedings may be brought. It is, once again, no surprise that there is no room, where statutory jurisdiction is conferred on a court in the United Kingdom by that Regulation, for an English court to exercise an inherent, or inherent-and-then-confirmed-by-statute discretion to decline to exercise that jurisdiction: the two forms of jurisdiction are very different.

But there is no reason to suppose that this exclusion of the inherent power to stay is confined to cases in which the legislation is made to enact an international agreement. It is, in principle at least, always possible to construe a statute as being sufficiently emphatic on the issue of its application that it excludes the possibility of its being defeated by a stay ordered under the inherent jurisdiction of the court. The difficulty is that statutory language is only very rarely that clear.

A particular aspect of this issue arises when a claimant, seeking to sue in England and to rely on a particular cause of action, is able to show that a court[99] overseas would not give effect, in proceedings before it, to the cause of action which would be available to him in an English court. In many cases, the English court will simply consider this along with all the other indications of what justice may require in deciding whether to order a stay of proceedings, and the fact that proceedings will follow a different path in a foreign court will be seen as insignificant and unremarkable. But on other occasions it may be contended that the English legislation is of mandatory application, in the sense that it must be applied by the English judge to the matter before him and that this leads to certain consequences which

94 Carriage by Air Act 1961; *Milor v. British Airways plc* [1996] QB 702.

95 *Royal & Sun Alliance Insurance plc v. MK Digital (Cyprus) Ltd* [2005] EWHC 1408 (Comm) (appeal allowed on other grounds: [2006] EWCA Civ 629, [2006] 2 Lloyd's Rep 110) (CMR Convention: power to stay excluded); *Hatzl v. XL Insurance Co* [2009] EWCA Civ 223, [2010] 1 WLR 470 (CMR Convention: agreed that power to stay was excluded).

96 *Sepracor v. Hoechst Marion Roussel Ltd* [1999] FSR 746; *Innovia Films Ltd v. Frito-Lay North America Inc* [2012] EWHC 790 (Pat), [2012] RPC 557.

97 *C v. C (Ancillary Relief: Nuptial Settlement)* [2004] EWCA Civ 1030, [2005] Fam 250.

98 *Accentuate Ltd v. Asigra Inc* [2009] EWHC 2655 (QB), [2009] 2 Lloyd's Rep 599 (which led to the refusal of a stay for arbitration, and to the disregarding of a choice of Ontario law: the decision goes as far as it is possible to go along this path, and then further. It was not followed in *Fern Computer Consultancy Ltd v. Intergraph Cadworx & Analysis Solutions Ltd* [2014] EWHC 2908 (Ch), [2015] 1 Lloyd's Rep 1, but as the jurisdiction of the court in the latter case required permission to serve out of the jurisdiction, for which no basis was found to be satisfied, the point was not precisely the same.

99 In principle the same argument could be made when the parties have agreed to arbitrate before a tribunal which will likewise not give effect to this cause of action. But the duty to stay proceedings for arbitration is statutory and derived from international Convention; and it will be much more difficult to see that duty overcome by other forms of legislation.

disrupt the usual structure of argument concerning stays of proceedings. It may lead to the conclusion that an agreement on choice of law made by the parties should be overridden; but it may also lead to the conclusion that an agreement on jurisdiction should be overridden as well.[100] If this argument does not find favour, it may be contended that the foreign court is not available for the trial of the action[101] (the first limb of the *Spiliada* test),[102] or that it cannot be seen as the natural forum for the trial of the action[103] (the first limb of the *Spiliada* test), or that it would be unjust to deprive the claimant of his reliance on the English cause of action (the second limb of the *Spiliada* test), or all of the above. As can be seen, the limbs of the test tend to slide into one another, and the drawing of rigid lines to demarcate them is sometimes difficult.

As a matter of simple observation, English judges in reported cases have been generally unimpressed by claimants who complain that the court has no power to deprive them of a cause of action which would be available in England: the prevailing attitude is that different legal systems establish their own rules for dealing with litigation, and it is wrong to harbour an institutional preference for causes of action or remedies[104] or measures of damages[105] offered by English law. By contrast, the approach of the Australian courts would appear to suggest a wider acceptance of the proposition that a cause of action created by an[106] Australian legislature should be available to a claimant, and that if it is shown that a foreign court would not or could not give effect to it, the action will be allowed to remain before the Australian courts.[107] This may be defended as giving effect to the intention of the legislature; and whenever it does arise in recognisable form, this expression of parliamentary intention certainly overrides the ordinary rules for the staying of proceedings. But in the absence of a legislative abrogation of the power to order a stay of proceedings, it is necessary to consider the general rules which govern this form of relief.

It is finally necessary to mention certain points which were made in Chapter 2 in connection with the analysis of the Brussels I Regulation for, as said above, the Regulation is a statute which prevents a court which has jurisdiction from ordering a stay of proceedings. If the proceedings are brought in a civil or commercial matter, and the jurisdiction of the English court is confirmed by Chapter II of the Regulation, apart from Article 6, there is no general power to order a stay of proceedings even though the courts of a non-Member State would be clearly more appropriate than England for the trial of the action;[108] it makes no difference whether the claimant is domiciled in a Member State or a non-Member State.[109] But if jurisdiction is founded on Article 6 of the Regulation, then the power of the court to

100 *The Hollandia* may also be seen as a case of this kind.

101 Below, paras 4.19 *et seq.*

102 The reference is to *Spiliada Maritime Corp v. Cansulex Ltd* [1987] AC 460, which is discussed in detail below.

103 Below, paras 4.20 *et seq.*

104 *Re Harrods (Buenos Aires) Ltd* [1992] Ch 72.

105 *The Herceg Novi and The Ming Galaxy* [1998] 2 Lloyd's Rep 454.

106 Commonwealth or State, as the case may be.

107 *Akai v. People's Insurance Co* (1997) 188 CLR 418 (effect of Insurance Contracts Act 1982 that jurisdiction agreement for London was a nullity); *Reinsurance Australia Corp Ltd v. HIH Casualty and General Insurance Ltd (in liq)* (2003) 254 ALR 29 (esp. at [293]: Australian court cannot be inappropriate, and therefore no stay will be granted, if it is the only one of the possible fora in which a claim under the Trade Practices Act 1974 (as it then was) could be fully and properly entertained).

108 C-281/02 *Owusu v. Jackson* [2005] ECR I-1383.

109 C-412/98 *Universal General Insurance Co v. Group Josi Reinsurance Co SA* [2000] ECR I-5925.

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stay proceedings is still liable to be exercised, as part and parcel of the inherent jurisdictional rules which are picked up and incorporated into the Regulation, even where it is the court of another Member State which is clearly more appropriate than England.[110]

4.15 Staying proceedings: private interests and public interest

In some jurisdictions the doctrine of *forum non conveniens* takes account of certain matters of public interest or public policy, and weighs these alongside the private interests of the parties. In the United States,[111] in particular, the fact that there may be a long queue of cases waiting to get on before a judge has been held to entail a right and duty of a judge to bear this in mind in deciding whether to stay proceedings, and to respect the wishes of an American claimant to sue in his own courts more highly than the desire of a non-American claimant to invoke American jurisdiction;[112] though whether this is a matter or private or public interest is harder to say.

In *Lubbe v. Cape plc*,[113] the House of Lords held that considerations of this type were irrelevant to the analysis undertaken in an English court. It is possible, though, that there is marginally more to be said for the American approach, and for allowing it to be debated openly, than was publicly acknowledged in *Lubbe*. If justice delayed may be justice denied, the public interest in allowing international cases with small connection to England to proceed, and delaying cases involving those local litigants whose taxes fund the courts, is not so easily identified. And in terms of the overriding objective of the Civil Procedure Rules, it may well be that a case which has only a small connection to England is one to which rather fewer of the resources of the court should be allocated.[114] It may not be wholly desirable to limit the analysis to the claimed private interests of the parties, and to disregard any public interest. But, on the face of it at least,[115] this does not form part of the current approach of the English courts.

4.16 Staying proceedings commenced by service within the jurisdiction: general

Suppose that proceedings have been commenced in a case to which the Brussels I Regulation provides that a court shall exercise its own rules of jurisdiction, or in a case which falls outside the material scope of the Regulation. If the defendant has been served with process within the jurisdiction, the court has jurisdiction over the claim against him. Unless and until the service of the process is set aside on application, any argument that the court should not act upon its jurisdiction proceeds by way of an application for a stay of proceedings,

110 *Haji-Ioannou v. Frangos* [1999] 2 Lloyd's Rep 337.

111 *Piper Aircraft Co v. Reyno* (1981) 454 US 235; *Union Carbide Corporation Gas Plant Disaster at Bhopal* (1986) 634 F Supp 842.

112 *Gulf Oil Corp v. Gilbert* 330 US 501 (1947); *Piper Aircraft Co v. Reyno* 454 US 235 (1981); *Sinochem International Co v. Malaysia International Shipping Corp* 549 US 422 (2007); *Gullone v. Bayer Corp* 484 F 3d 951 (7th Cir, 2007); *SME Racks Inc v. Sistemas Mecanicos Para Electronica SA* 382 F 3d 1097 (11th Cir, 2004); *King v. Cessna Aircraft Co* 562 F 3d 1374 (11th Cir, 2009).

113 [2000] 1 WLR 1545, in the speech of Lord Hope.

114 CPR r. 1.1(2)(e).

115 The alternative may be that it is smuggled into an analysis of what the parties' private interests may be said to be.

which is made pursuant to CPR Part 11. For though CPR Part 11 may give the impression that it provides for jurisdiction to be disputed, rule 11.1 makes it clear that it also provides the framework for an application to be made for a stay of English proceedings.[116]

A stay of proceedings is a characteristic feature of many common law jurisdictions,[117] but is known in few[118] civil law systems. The English common law now acknowledges that, if the parties agree to English jurisdiction and adjudication, they may have it if they want it. Leaving aside cases in which there is no subject matter jurisdiction, the parties will not be driven away from the English court in the face of their common wish to resolve their dispute there. However, if the defendant is not content to have his case heard by the English courts, he is entitled to show the English court that it is a *forum non conveniens* because the natural forum lies elsewhere. If he does show this to the court, the court is likely[119] to stay its proceedings to leave the claimant to proceed against the defendant elsewhere.

The doctrine of *forum non conveniens*, though a relatively late arrival so far as the common law of England is concerned, naturalised very quickly and struck deep roots. A number of factors may have contributed to this. One is that the initial choice of court is effectively that of the claimant,[120] who issues the claim form, but that there is no convincing reason why the important, maybe critical, decision about where the trial should take place should be entirely under the control of only one of the parties. To put it another way: it may be the claimant's claim, but is also the parties' dispute. Clearly the selection of forum is important; it may load the dice substantially against the defendant if the selection of court to adjudicate is that of the claimant alone. In this regard, to fail to ensure that the parties are on an equal footing may contradict an important aspect of the overriding objective of the Civil Procedure Rules.[121] Another factor is the realisation that, no matter how effective and professional the English trial process may be, other courts are also effective and professional, and they are often significantly cheaper. Moreover, if the choice lies between an English court seeking to resolve a dispute by applying foreign law, or a foreign court applying that law as its own, it is far from obvious that the English court will do the job with greater ease, efficiency or accuracy, not least because appeals to correct mistakes made in the application of foreign law are not really possible in England. And if the fact that the dispute arose overseas means that factual matters relating to it can be more efficiently resolved there, the policy basis of the doctrine is clear. In short, the principle is civilised and sound and rational and right.

The rule, fashioned for English purposes almost entirely by the House of Lords, made its debut in *The Atlantic Star*.[122] That decision was followed and further refined by *MacShannon v. Rockware Glass Ltd*,[123] and *The Abidin Daver*.[124] The principle was restated in classic form

116 *Texan Management Ltd v. Pacific Electric Wire & Cable Co Ltd* [2009] UKPC 46. And also where the issue arises in the context of the Brussels I Regulation: *The Alexandros T* [2013] UKSC 70, [2014] 1 Lloyd's Rep 223.

117 Even if it has arrived fairly recently; its antecedents lie in Scottish law.

118 Though Scotland and Québec are notable and instructive exceptions.

119 But, of course, not certain: it has a discretion.

120 Though the 'defendant' may himself choose to bring his own proceedings in a court of his choice, either for substantive relief, or for a declaration of his non-liability to his opponent. See Chapter 5.

121 CPR r. 1(2)(a).

122 [1974] AC 436. Historically they grew out of a very restrictive power to stay domestic proceedings on the ground that they were oppressive or vexatious (*St Pierre v. South American Stores (Gath & Chaves) Ltd* [1936] 1 KB 382).

123 [1978] AC 795.

124 [1984] AC 398.

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in *Spiliada Maritime Corporation v. Cansulex Ltd.*[125] It was elaborated and further refined in *Connelly v. RTZ Corporation plc*[126] and *Lubbe v. Cape plc.*[127] It was most recently reviewed and refreshed in *VTB Capital plc v. Nutritek International Corp*,[128] but for most practical purposes, *Spiliada* is still the case to which attention needs to be directed, for it has worn extremely well and shows no sign of wearing out. Reference to the earlier decisions – aptly described as stepping-stones to the modern law – is appropriate only to throw light upon parts of the developed *Spiliada* doctrine;[129] and reference to the later decisions is necessary only to deal with points which have emerged as significant issues since the decision in *Spiliada*. In the most recent judgment of the Supreme Court, *Spiliada* was described as the '*locus classicus* in relation to issues of appropriate forum at common law'.[130] It is that, and more. It may have been a case which was directly concerned with the law on service out of the jurisdiction, but it is well understood, as *Spiliada* itself made clear and no one has doubted since, that it applies to the law on stays of proceedings just as directly.[131]

STAYING PROCEEDINGS ON THE GROUND OF *FORUM NON CONVENIENS*

4.17 General structure of the *Spiliada* test: two limbs to answer a single question

Two preliminary points need to be made and got out of the way. First, it is usual, even if it may not be strictly necessary,[132] to deal separately with the cases where the parties have, and have not, agreed in advance upon the court which is to have, as far as the parties are concerned,[133] jurisdiction to settle the dispute which has arisen.

Second, even if the parties have made a choice of court agreement for the English courts, or have made a contractual promise that neither will argue that the English court is a *forum non conveniens*, the court may still entertain an application for a stay of proceedings, albeit that it will be very hard for the applicant to persuade the court to allow him to obtain a stay by doing the very thing he has promised and bound himself not to do.[134] In effect, a promise not to challenge the jurisdiction of the English court is treated as though it were

125 [1987] AC 460. This will be referred to as the *Spiliada* test, and individual points identified as having been made by Lord Goff of Chieveley, or Lord Templeman: see further, paras. 4.19 *et seq*.

126 [1998] AC 854.

127 [2000] 1 WLR 1545. There have been more recent decisions, but none has established new law or improved on the formulation of the law as set out in *Spiliada*.

128 [2013] UKSC 5, [2013] 2 AC 337.

129 See, for example, *E.I. Du Pont de Nemours v. Agnew (No 1)* [1987] 2 Lloyd's Rep 585, 588.

130 *VTB Capital plc v. Nutritek International Corp* [2013] UKSC 5, [2013] 2 AC 337, [12].

131 Such differences as there may be, which suggest that the law on stays and service out are not exact mirror images, will be dealt with at the conclusion of examination of the law in relation to service out, at para. 4.92, below.

132 It is indeed true that if there is a choice of court agreement, the defendant's argument that the court should stay proceedings is not, at first sight, based upon the question of appropriateness, but upon the fact that the claimant is breaking his contractual promise to sue in the chosen court. The approach to such cases is set out separately at paras. 4.41 *et seq*., below.

133 Whether the agreement of the parties will establish the judicial jurisdiction of the court will be a matter for the public law of the court in question.

134 *UBS AG v. Omni Holdings AG* [2000] 1 WLR 916; *Marubeni Hong Kong & South China Ltd v. Mongolian Government* [2002] 2 All ER (Comm) 873.

an exclusive jurisdiction agreement for the English courts.[135] As the relief will be granted only in extreme cases, there is probably no difficulty in allowing an application which will rarely be successful; but if events have occurred which allow it to be argued that what has happened really falls outside what the parties must have had in mind, then in a proper case a stay may be ordered.

In the absence of any agreement on choice of court, the defendant[136] who wishes the court to stay proceedings commenced against him is required to show that the interests of justice favour a stay of proceedings. In order to make the plea good, the applicant is required to show that there is another available[137] forum, which is clearly or distinctly more appropriate than England for the resolution of the dispute: this is the *first limb* of the *Spiliada* test. If the applicant (defendant) succeeds in that task, the burden then passes to the respondent (claimant), to show why it would nevertheless be so unjust to prevent his suing in England and, in effect, to expect him to proceed in the natural forum overseas, that the English proceedings should not be stayed after all: this is the *second limb* of the *Spiliada* test. But if the applicant (defendant) does discharge the burden placed upon him at the first stage, the presumption in favour of a stay is a heavy one. The respondent (claimant) should expect to have a hard task to show, at the second stage, that there is still sufficient reason why the case should not be heard in the forum clearly more appropriate for it.

The test is, at least to begin with, constructed to operate sequentially: it has two limbs, operated one after the other, not two lists operating side by side. However, when the second stage is reached, and it is necessary to decide whether to allow the case to continue to be heard in England, notwithstanding that a more appropriate forum is overseas, the fact that the overseas forum is clearly or distinctly more appropriate than England will be a factor which bears on whether, overall, it would be just or unjust to stay the proceedings. With this in mind, it is correct to analyse the two limbs of the test separately, but it is important not to lose sight of the fact that the ultimate issue, or the overarching question, is whether the interests of justice require a stay of proceedings. This is an important point, because certain factors, such as the existence of an actual *lis alibi pendens*, or the possibility that other parties may join or be joined to the litigation at a later date, or the fact that an English judgment would not be recognised by a foreign court before which the defendant would need to claim over against a

135 *General Motors Corp v. Royal & Sun Alliance Insurance plc* [2007] EWHC 2206 (Comm), [2008] Lloyd's Rep IR 311. In *National Westminster Bank v. Utrecht-America Finance Corp* [2001] EWCA Civ 658, [2001] 3 All ER 733, it was thought that such an express promise was fatal to a stay application for a stay; the view of the Court of Appeal in *UBS AG v. HSH Nordbank AG* [2009] EWCA Civ 585, [2009] 2 Lloyd's Rep 272, [100], was probably not quite so pronounced.

136 The claimant may exceptionally apply to stay his own proceedings pending parallel proceedings in a foreign court if this is what good management of the litigation requires: *A-G v. Arthur Andersen & Co* [1989] ECC 224. If, for example, the claimant issues the claim form merely to save limitation, it may be proper to grant him a stay of the proceedings he has commenced if the natural forum is an overseas court and the application is made immediately after service of the claim form. See also *Deaville v. Aeroflot Russian International Airlines* [1997] 2 Lloyd's Rep 67; but *cf Centro International Handelsbank AG v. Morgan Grenfell* [1997] CLC 870, where the court was notably more sympathetic to the view that if the claimant had commenced proceedings, he was obliged to move them along and allow the defendant actively to defend them; see also *Insurance Co of the State of Pennsylvania v. Equitas Insurance Ltd* [2013] EWHC 3713 (Comm). The broad question will be one of what justice demands in the individual circumstances of the case.

137 Normally it will be available, because the defendant undertakes to submit to its jurisdiction. But if the court would not have jurisdiction, because there was a jurisdictional impediment which the defendant could not waive, or because the claimant's action is not admissible in that court, the case is one where there is not an available forum elsewhere; and an application for a stay will be rendered much more difficult. See below, para. 4.19.

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third party, do not fit neatly and tidily within only one but not the other of the limbs of the *Spiliada* test. It may also be that points of legitimate concern about the quality of adjudication available from the foreign court, which have assumed prominence in recent cases, do not neatly fit, either. It does not appear worthwhile to seek to force them to do so; it is more realistic to recognise that, although the *Spiliada* limbs are an excellent starting point, the goal in every case is to identify whether the interests of justice favour a stay. The two limbs of the test in *Spiliada* help to answer this question, but they do not constrain it. To use another idiom, they are 'pointers rather than boundary marks'.[138]

4.18 Nature and length of applications for a stay

It was said in plain terms in *Spiliada v. Cansulex*,[139] and has been reiterated on several occasions since, that the decision whether to stay proceedings is largely one for the evaluation[140] of the first instance judge, and that appeals against the decision, especially when given by a Commercial Court judge, should be rare. It was also said that the judge should be able to proceed by refreshing his memory of what was said in *Spiliada*, and that submissions of the parties' legal representatives should be measured in hours rather than days. Sage though this advice may have been, it represented the triumph of hope over experience. In some cases the hearings have been lengthy, and the evidence placed before the court very substantial. It is not surprising that this has provoked some courts to suggest that matters are getting out of control.[141]

But the issue of where a dispute will be tried will very often be the most significant factor in the parties' appraisal of the likely outcome of the case.[142] Not only does the determination of forum tend to determine which system of law or laws will be applied to the merits of the case, but it will also determine which system of procedural law will govern the pre-trial procedure. These factors, whose impact on the dispute may become clear as soon as any issue as to forum is settled, may be sufficient by themselves to encourage the parties to come to terms. A preliminary skirmish on the question of jurisdiction, even if expensive, may

138 *The Atlantic Star* [1974] AC 436, 468 (Lord Wilberforce, referring to the requirements of a predecessor test).

139 [1987] AC 460, 464–465.

140 As distinct from a discretion: *VTB Capital plc v. Nutritek International Corp* [2013] UKSC 5, [2013] 2 AC 337, [156].

141 There are many; a couple will do as samples (though for a highly colourful version, see *Friis v Colbourn* [2009] EWHC 903 (Ch)). In *Cherney v. Deripaska* [2009] EWCA Civ 849, [2010] 1 All ER 456, [7], in which the court said that the parties' money would have been better spent on a trial of the merits: a conclusion which was, in the circumstances of the particular case, more than a little challenging. In *AK Investment CJSC v. Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804, [7] (a service out case), the complaint was directed at the volume of material placed before the court ('wholly disproportionate to the issues of law and fact raised by the parties') rather than at the cost of the application, though there is probably a linear relationship between the two. A more measured comment, but to the same overall effect, is to be found in *VTB Capital plc v. Nutritek International Corp* [2013] UKSC 5, [2013] 2 AC 337, [81]–[94] (a service out case). If the parties see the question of where the trial will take place as the most vital factor in their assessment of how to bring the dispute to an end, it is hard to see why they should not litigate it as though it were a trial; but if it is believed that the defendant is taking every conceivable preliminary point and trying to break a claimant whose financial resources are under strain (for which the defendant may be responsible in the first place) the issue certainly looks very different. It may not be easy to persuade a court to make findings at so early a stage, but this is part of the calculation which the parties make in deciding whether to spend money on such a challenge.

142 But they may be quite wrong in their appraisal of likely outcome: see *UBS AG (London Branch) v. Kommunale Wasserwerke Leipzig GmbH* [2014] EWHC 3615, [922].

assist the early settlement of cases, and the occasional burdensome application, and judicial scolding, may be a price worth paying.[143] For similar reasons, the procedure to obtain a stay of proceedings may conduce to the overriding objective of the Civil Procedure Rules, namely that of dealing with a case justly by saving expense, ensuring that the case is dealt with expeditiously and fairly, and allotting to it an appropriate share of the court's resources while taking into account the need to allot resources to other cases.[144] Not everyone will agree, but this aspect of *Spiliada* should not be undersold: a significant number of the cases in which the issue of jurisdiction is fought at the preliminary stage appear to go no further. This almost inevitably means that they consume a smaller share of the resources of the court than they otherwise would.

The material date for the purposes of the evidence and other material to which the court may be taken on the application for a stay is the date of the hearing of the application for a stay, rather than the date on which the proceedings were instituted or the application notice was issued.[145] It was correctly explained in *Mohammed v. Bank of Kuwait and the Middle East KSC*[146] that this was the most practical solution, for by contrast with the case of an application to set aside an order granting permission to serve out, there is no prior act of the court which is being challenged.[147] The question whether another court is more appropriate than England may well be affected, for example, by the nature of the defence which the defendant may intend to run. This may be unknown at the date proceedings are issued, and may not be clear when the application notice is issued. No doubt it will be necessary to put in evidence as to facts and matters which may be expected to arise at trial; this evidence may not be served until very shortly before the hearing. The decision in *Mohammed v. Bank of Kuwait*, to look at all this material as at the date of the hearing, is rational. However, if the circumstances change materially after the hearing, this fact may furnish grounds for an application by the defendant to lift the stay, or justify a fresh application by the claimant for a stay, but does not give ground for an appeal, for it does not establish that there was anything wrong with the original order when it was made.[148]

4.19 First limb of the *Spiliada* test: the 'availability' of the foreign forum

The first requirement is that the forum which the defendant proposes as being clearly more appropriate than England for the trial be available for the trial of the action.[149] There are

143 For example, the Commercial Court Working Party, in commenting on the proposed Woolf reforms of civil procedure stated in its memorandum of 16 February 1996 that, so far as the Commercial Court was concerned, 'unlike other parts of the High Court, there are very many cases that involve "*forum conveniens*" issues. Many cases are principally concerned with this point, and are resolved by the parties once jurisdiction issues have been decided, even in favour of the English courts'. There is no reason to doubt the continuing truth of that observation.

144 CPR Part 1.

145 Implicitly approved in *Lubbe v. Cape plc* [2000] 1 WLR 1545, 1556, 1558. Contrast the relevant date for an application to set aside the order granting permission to serve out of the jurisdiction (the date is that of the order granting permission), or to set aside service where this was made where permission was not required (the date is the date of service).

146 [1996] 1 WLR 1483.

147 For confirmation, in a case of service out, see *Sharab v. Al-Saud* [2009] EWCA Civ 353, [2009] 2 Lloyd's Rep 160.

148 In such a case it is unlikely that the application could be made under CPR Part 11; but CPR r. 3.1(2) may be used instead, the application now being made in the context of the court's case management powers.

149 *Spiliada* at 477 (Lord Goff). Lord Templeman did not, in express terms, deal with this as a separate requirement.