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THE DOCTRINE OF FORUM NON CONVENIENS

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Overview

The primary objective of this thesis is not to question or investigate the existence of this doctrine but it attempts to illustrate the application of the doctrine of *forum non conveniens* in different jurisdictions, namely South Africa and the United Kingdom, as well as the position if the Brussels I Regulation applies. The objective is also to provide a comprehensive relative review of the doctrine of *forum non conveniens*, looking into both the history of the doctrine as well as the possibilities for the future development of the doctrine.\(^1\) A further aim is to see whether the doctrine is being applied correctly in the right situations and that, when it is applied, it does not lead to judicial abuse.

The doctrine of *forum non conveniens* is applied exclusively in the common law countries such as the United States, the United Kingdom, Australia and Canada; it is not recognized in most civil law countries.\(^2\) The doctrine is applied differently in these nations.\(^3\) This doctrine applies between courts in different countries and between courts in different jurisdictions in the same country.\(^4\) It provides a flexible device to serve the forum states policy objectives and, in practice, it has been rather resistant to abuse.\(^5\)

Introduction

*Forum non conveniens* is a Latin word for an inconvenient court.\(^6\) The doctrine of *forum non conveniens* can be defined as the discretionary power of the court to decline to exercise jurisdiction where another court is more convenient to hear the matter.\(^7\) It must not be seen as a connecting factor or a jurisdictional rule, but it involves jurisdictional discretion in which the court may decline to hear a matter.\(^8\) It can also be defined as forum not coming together.\(^9\) It is a legal doctrine that is mostly used when the jurisdiction chosen by the plaintiff is not convenient and

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\(^1\) Brand *Forum Non Conveniens* (2007), it is found in the preface.
\(^3\) Brand (n 1), it is found in the preface.
\(^5\) Svantesson *In Defence of the Doctrine of Forum Non Conveniens* (1- 2005),
\(^6\) *Forum Non Conveniens*, [http://www.law.cornell.edu/w.](http://www.law.cornell.edu/w.)
\(^7\) *Forum Non Conveniens*, [http://www.law.cornell.edu/w.](http://www.law.cornell.edu/w.)
\(^8\) Van Lith *International Jurisdiction and Commercial Litigation* (2009 )47.
creates undue hardships to the defendant. For a court to dismiss the case according to this doctrine there must be an alternative court or a much more convenient court to hear the matter.

What is the appropriate court?

The doctrine attempts to establish the most appropriate forum. The appropriate court is the forum in which the dispute is closely connected or the forum to which it can be resolved most conveniently. According to Briggs and Rees, “the point of departure must be that the national court does indeed establish, as a matter of its procedural law, the standard of jurisdictional certainty which must be met for it to proceed to hear the case on its merits.”

The test for appropriateness of the court was brought in the case of Spiliada, which is the two-stage test. Firstly, it was said that it must be the most clearly and distinctly appropriate forum and secondly, allocation of jurisdiction should be in accordance with the requirements of justice. There are several factors which will be discussed below which should be taken into account to determine the appropriateness of the court. After taking all the factors into consideration, the second question is of the efficiency of justice. The focus will be on the requirements of justice, the court to consider if it will be unjust if the claimant is to be sent to the available natural forum.

In Lubbe v Cape Plc, it illustrates the importance of the substantial justice element were the Lords refused a stay on the ground that substantial justice would not be resolved in the more appropriate forum (South Africa) because exercise of jurisdiction in the South African High Court would lead to the violation of rights which

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12 Van Lith (n 8) 186.  
15 Spiliada Maritime Corp v Consulex Ltd 1987 AC 460.  
16 See n 15 186.  
17 See n 15 186.  
18 See n 15 187.  
19 See n 15 187.  
20 Lubbe v Cape Plc 2000 1 WLR 1545.
were guaranteed by Article 6 of the European Convention on the Human Rights (ECHR) being caused by lack of funding and legal representation in South Africa.\(^{21}\)

**Historical background**

Jurist and scholars find a Scottish origin before the American used the concept.\(^ {22}\)

This doctrine of *forum non conveniens* was firstly manifested in Scotland in the seventeenth century as *forum non competens* where parties were aliens and litigating in Scotland.\(^ {23}\)

The Scots rule is that the court may decline to exercise jurisdiction, after a careful consideration to the interest of parties and requirements of justice, on the ground that the case cannot be suitably tried in Scotland but only in another court.\(^ {24}\)

It was later adopted by the United Kingdom in the nineteenth century.\(^ {25}\)

Some writers are of the view that the doctrine developed earlier of *forum non competens*\(^ {26}\), however the doctrine may ultimately have a civil law origin, as many writers assert.\(^ {27}\)

Although the doctrine originated in Scotland, it largely developed in the United States of America.\(^ {28}\)

**Objectives of the doctrine of forum non conveniens**

The objective of this doctrine is that a matter must be heard in the forum that is most closely connected with the matter and likely to lead to the most just and best results.\(^ {29}\)

This doctrine is also aimed at preserving judicial efficiency.\(^ {30}\)

Other objectives of the doctrine of forum non conveniens are:

- fairness in the individual cases\(^ {31}\)
- reduction of court’s case loads\(^ {32}\)
- protection of the interests of domestic litigants\(^ {33}\)

\(^{21}\) Van Lith (n 8) 189.

\(^{22}\) Svanteesson (n 5).

\(^{23}\) Burke *The European Legal Forum* (E) (3-2008), 121-126.

\(^{24}\) Collins (ed) Dicey, Morris and Collins on the *Conflicts of Laws* (2012) 538.

\(^{25}\) Burke (n 23) 121.

\(^{26}\) Svantesson (n 5).

\(^{27}\) Svantesson (n 5).

\(^{28}\) Svantesson (n 5).

\(^{29}\) Burke (n 23) 122.

\(^{30}\) Mullins & Kokoruda *Forum Non Conveniens-Defendant’s Toolbox* 1.

\(^{31}\) Markus (n 2) 5.

\(^{32}\) Markus (n 2) 14.
protection of defendants against abusive forum selection

**General information on the doctrine of *forum non conveniens***

When applying this doctrine, the question of jurisdiction and choice of law overlaps. Mostly the plaintiff chooses the forum to institute a claim in the jurisdiction that seems to be more advantageous to him or her but this choice can be denied by the application of the doctrine of *forum non conveniens*. A plaintiff who goes for forum shopping will inevitably run the risk of encountering the stumbling block of the doctrine of *forum non conveniens*, leading to a waste of resources.

The court must consider various points of contact between the suit and the forum as will be discussed below. The onus for the removal of the case from one court to another rest on the party applying for the removal and must convince the court that it is not a convenient court. Application for the staying of proceedings to the court must be done on time; otherwise the court may refuse to grant the stay if the defendant delayed to argue that the court is inconvenient.

Nothing was suggested on whether forum shopping is a bad thing which needs to be discouraged or prevented. One school of thought is of the view that forum shopping is not something which merits condemnation. Therefore, the dismissal of the case under the doctrine of *forum non conveniens* does not mean that the plaintiff is prevented from filing his or her case in the more appropriate forum. However, allowing the plaintiff to proceed in the forum that does not have a substantial connection with the matter may

- lead to injustice to the defendant,

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33 Markus (n 2) 15.
34 Markus (n 2) 12.
35 Siew “Choice of Law in Forum non conveniens analysis” 2010 Singapore Academy of Law Journal (SAcLJ) 22
37 *Jurisdiction in International Cases under European Law and English Law* 46.
40 Fawcett (n 13) 276.
41 Fawcett (n 13) 276.
42 http://www.law.cornell.edu/w.
43 Fawcett (n 13) 276.
44 Fawcett (n 13) 277, the forum shopping will put pressure on the defendant to conclude a matter on the grounds that are more favourable to the claimant other than would have been if the matter was brought in an appropriate forum.
be contrary to the public policy\(^{45}\) and
be incompatible with the principle of comity.\(^{46}\)

Thus the doctrine can be invoked by either the defendant or by the court.\(^{47}\) The defendant may apply for a declaration that the court has no jurisdiction.\(^{48}\) The doctrine needs to protect the defendant taking into account distance, travel expenses, travel restrictions and linguistic barriers.\(^{49}\) If the plaintiff brought the matter in an inconvenient court, a court would not be allowed to dismiss the matter based on the *forum non conveniens* doctrine if there is no other alternative forum that could hear the matter.\(^{50}\)

The doctrine arises and is applied in two different but related situations, that is when it is used to resist the jurisdiction when the defendant is not resident in the jurisdictional area of the court where the plaintiff instituted claim and where the defendant is in the jurisdictional area but not in the appropriate court.\(^{51}\) Meaning, although the defendant is in the jurisdictional area of the court, it is not the convenient court to hear the matter.

**General factors to consider when applying the doctrine of forum non conveniens**

A court when deciding whether to apply the doctrine of *forum non conveniens*, is to take into account the following factors:

- The residence of the parties;\(^{52}\)
- Where the cause of action arose;\(^{53}\)
- The location of evidence and witnesses;\(^{54}\)
- The cost of gathering and tendering such proof;\(^{55}\)
- The applicable law.\(^{56}\)

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\(^{45}\) Fawcett (n 14) 277, it will waste time of the witnesses, money as well as dragging the proceedings.

\(^{46}\) Fawcett (n 14) 277, bringing the matter under English law will lead to judicial chauvinism which was replaced by judicial comity. The change was supported in the case of The Abidin Daver.

\(^{47}\) http://www.law.cornell.edu/w.

\(^{48}\) Markus (n 2) 65.

\(^{49}\) Markus (n 2) 2.

\(^{50}\) http://www.law.cornell.edu/w.

\(^{51}\) Mikis, N.J. Vermette & Hungerford (n 36) 3.

\(^{52}\) http://www.law.cornell.edu/w.

\(^{53}\) Mikis, Vermette & Hungerford (n 36) 8.

\(^{54}\) http://www.law.cornell.edu/w.

\(^{55}\) Mikis, Vermette & Hungerford (n 36) 5.
• Public policy,\textsuperscript{57}
• The relative burdens on the court systems,\textsuperscript{58}
• The plaintiff’s choice of forum,\textsuperscript{59}
• How changing the forum would affect each party’s case,\textsuperscript{60}
• Hardships on the defendant,\textsuperscript{61} and
• Enforceability of the judgment.\textsuperscript{62}

The court, after taking all this factors into consideration, could decline jurisdiction in favour of the appropriate court.\textsuperscript{63}

\textbf{Forum non conveniens and the Brussels I Regulation}

\textbf{Objectives of the Brussels I Regulation}

The general aim of the Regulation is a high degree of uniformity and low degrees of discretion characterizing the scheme,\textsuperscript{64} as well as regulating jurisdiction between the Member States and the consideration of efficiency.\textsuperscript{65} The preamble to the Regulation gives considerable weight to the principle of legal certainty in that the rules of jurisdiction must be highly predictable.\textsuperscript{66}

The European Court of Justice (ECJ) is of the view that discretionary powers will undermine the predictability of the jurisdictional scheme of the Regulation as well as the principle of legal certainty.\textsuperscript{67} The ECJ went further saying that the principle of legal certainty is by itself an objective of the Brussels Regulation.\textsuperscript{68} They say that the benefit of legal certainty in European transitional relations outweighs the need for a flexible approach on a case to case basis.\textsuperscript{69} On different occasions the ECJ favoured

\textsuperscript{56} Mikis, Vermette & Hungerford (n 36) 10, see n 39.
\textsuperscript{57} http://www.law.cornell.edu/w.
\textsuperscript{58} http://www.law.cornell.edu/w.
\textsuperscript{59} http://www.law.cornell.edu/w.
\textsuperscript{60} http://www.law.cornell.edu/w.
\textsuperscript{61} Mikis, Vermette & Hungerford (n 36) 5.
\textsuperscript{62} Mikis, Vermette & Hungerford (n 36) 5.
\textsuperscript{63} Mikis, Vermette & Hungerford (n 36) 5.
\textsuperscript{64} Briggs & Rees (n 14).
\textsuperscript{66} Van Lith (n 8 ) 58.
\textsuperscript{67} Van Lith (n 8) 58
\textsuperscript{68} Van Lith (n 8) 319.
\textsuperscript{69} Van Lith (n 8) 319.
considerations of legal certainty above the principle of close connection between a
court and the matter.  

The Regulation’s aim is not to harmonise rules of procedure, if the national court of
the Member State under the Regulation are allowed or obliged to apply their own
procedural rules which affect the exercise of the jurisdiction, there will be absolute
lack of uniformity between member states.  

According to the English common law
authors and the English Court of Appeal, the primary purpose for the Brussels Model
is the allocation of jurisdiction among the Member State. The other objective of the
Brussels I Regulation is to strengthen the legal protection of persons established in
the European Community by laying down common rules for jurisdiction to be
followed by every member.

**Brussels I Regulation**

**Application of the doctrine**

The Brussels I Regulation sets out the rules of jurisdiction which limit and define the
jurisdiction of the courts in the Member States. The set of jurisdictional rules under
the Brussels Regulation are mandatory. Therefore jurisdictional discretion plays a
smaller part within this legislative system. Civil law jurisdictions mostly base their
jurisdiction on the residence of the defendant as well as choice of law rules, thus,
favouring the habitual residence of the parties, the lex situs and the lex loci
solutionis, which is not different from Brussels I and English common law. In other
words it reflects that the defendant should be sued at his or her own courts.

According to article 2 of the Brussels I Regulation, “subject to the provisions of this
Regulation, person domiciled in a Member State shall, whatever their nationality, be
sued in the courts of that Member State”. This means that the courts of a Member

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70 Van Lith (n 8 ) 319.  
71 Briggs & Rees (n 14) 220.  
72 Briggs & Rees (n 14) 71.  
73 Van Lith (n 8 ) 58.  
74 Collins (ed) Dicey, Morris (n 24) 541.  
75 Van Lith (n 8) 47.  
76 Hill (n 39).  
77 Svantesson (n 5).  
78 Svantesson (n 5)  
79 Regulation (EC) NO 1215/2012 ON Jurisdiction and the Recognition and Enforcement of Judgments in Civil and
State, where the defendant is domiciled, will have automatic jurisdiction pursuant to article 2, unless any of the specific exceptions to article 2 are applicable.  

In the case of *Group Josi Reinsurance Co v Universal General Insurance Company*, UGIC brought the proceedings in the French Court whilst Group Josi argued that the French court lack jurisdiction and that the Belgium court would have jurisdiction, pursuant to the Brussels Convention, based on the fact that the defendant had a registered office in Belgium. According to Article 60(1)(a)-(c) of the Brussels I it states that “for the purpose of Regulation, a company or other legal person or association of a natural or legal person is domiciled at the place where it has its statutory seat, central administration and principal place of business”. However, the French court rejected the submission and stated that the French court had jurisdiction by virtue of French domestic law and that the Brussels Convention did not apply.

In its judgment on appeal the court came to the conclusion that article 2 sets out the general rule that persons domiciled in a contracting State are to be sued in the courts of that state regardless of their nationality. Also the court found that it is only in exceptional cases that the domicile of the plaintiff is decisive in conferring jurisdiction. The domicile of the plaintiff is not usually important when determining jurisdiction pursuant to the Convention. Thus the domicile of the defendant is important in terms of the convention. The conclusion was that the rules of jurisdiction of the convention are applicable to a dispute between a defendant domiciled in a Contracting state and a plaintiff domiciled in a non-member state. However, in *Group Josi* the court found that the conflict was between the two

80 Verneuil, Lasserson and Rymkieniwicz Reflections on Owusu: The Radical Decision in Ferrexpo vol 8 JPIL 389.
81 *Group Josi Reinsurance Co v Universal General Insurance Company* 2000 ILPr 549 (ECJ).
82 Bougen Time to Revisit Forum Non Conveniens in the UK. *Group Josi Reinsurance Co v UGIC* 707.
83 See (n 79) Article 60(1)(a)-(c).
84 See n 81 707.
85 *Group Josi* (n 81).
86 *Group Josi* (n 81).
87 *Group Josi* (n 81).
88 Bougen (82) 708, *Group Josi* (n 81).
89 *Group Josi* (n 81), Christopher (n 82).
Contracting States, which is France and Belgium, therefore, it is no surprise that the ECJ found that the Convention is applicable.\textsuperscript{90}

Declining jurisdiction in favour of another more appropriate forum within or outside the EU territory is not allowed.\textsuperscript{91} Allowing the doctrine of forum non conveniens to be used in cases falling under Brussels I or transferring of proceedings to non-contracting countries will be inconsistent with the principle of legal certainty.\textsuperscript{92} Between the Member States the doctrine has no application, courts must comply with the provisions of the Regulation when determining jurisdiction, mostly the courts of the State in which the defendant is domiciled will have jurisdiction to hear the claim.\textsuperscript{93}

Article 23 of the Regulation states that where one party is domiciled in a Member State and the other in a non-member state agreed to the jurisdiction of the court to settle their dispute, the chosen court will be exclusive unless the parties agreed otherwise.\textsuperscript{94} It permits the parties to enter into an agreement giving a court or the courts of a member state exclusive or other jurisdiction to settle the issue arising in connection with a particular legal relationship.\textsuperscript{95} Thus, the Regulation respects the choice or the decision of the parties to resolve a matter in an agreed forum.\textsuperscript{96} If the parties agree to a forum there is no point in deciding whether there is an alternative court.\textsuperscript{97}

In situations where the matter falls under the Regulation and the defendant is not domiciled in a member state or the dispute not connected to a Member state, article 4 applies.\textsuperscript{98} According to Article 4 of the Regulation it provides that “if the defendant is not domiciled in the Member State, the jurisdiction of the courts of each member state shall, subject to Articles 22 and 23, be determined by the law of that Member State”.\textsuperscript{99} If article 22 or 23 applies it has to be decided whether the court of the member state assigned jurisdiction by the Regulation will resolve the matter and if it

\textsuperscript{90} Group Josi (n 81) 710.
\textsuperscript{91} Verneuil, Lasserson and Rymkieniwicz (n 79).
\textsuperscript{92} Review of the Brussels 1 Regulation Regulation (EC 44/2001).
\textsuperscript{93} Van Lith (n 8) 47
\textsuperscript{94} Collins (ed) Dicey, Morris and Collins (n 24).
\textsuperscript{95} Bell Forum Shopping and Venue in Transitional Litigation 56.
\textsuperscript{96} Bell (n 95) 56.
\textsuperscript{97} Bell (n 95) 56.
\textsuperscript{98} Fawcett & Carruthers (n 65) 329.
\textsuperscript{99} Bell (n 95) 82.
will resolve the matter, staying the proceedings will be inconsistent with the Regulation.\textsuperscript{100} Therefore the common law rules continued to apply to the situation where the defendant is not domiciled in the Member State.

Mance J in the Court of Appeal in the case of \textit{Sarrio},\textsuperscript{101} concluded that what article 2 provide, the doctrine of \textit{forum non conveniens} can operate in cases where Article 4 applies, even in cases where the alternative forum is another contracting state.\textsuperscript{102} Advocate General Leger in \textit{Owusu},\textsuperscript{103} case support the view above by saying that in the cases where jurisdiction of a contracting State is established by Article 4 of the Regulation, it does not prevent the court in question from declining jurisdiction to exercise its jurisdiction, in accordance with the doctrine of \textit{forum non conveniens}, on the ground that a court of a non-contracting state would be more appropriate to deal with the matter.\textsuperscript{104} He went on saying that Article 4 cases should be treated differently from Article 2 cases, and to that extend it can be said he supported the \textit{Sarrio} case.\textsuperscript{105} Thus the decision of Sarrio,\textsuperscript{106} case remains as binding authority until it is challenged or there is such a decision from the Supreme Court.\textsuperscript{107} I also come to the conclusion that Article 4 cases are different to Article 2 cases after following the reasoning of the \textit{Sarrio} case.\textsuperscript{108}

Article 5(1)(a)-(b) states that “a person domiciled in a Member State may, in another Member State, be sued: in matters relating to a contract, in the courts of a place of performance of the obligation in question unless otherwise agreed the place of performance shall be the place of a member state in case of sale of goods, the place were goods delivered or should be delivered, in case of provision of service, the place where service were provided or should have been provided”.\textsuperscript{109}

\begin{itemize}
\item \textsuperscript{100} Fawcett & Carruthers (n 65) 321.
\item \textsuperscript{101} Sarrio SA v Kuwait Investments Authority 1997 133.
\item \textsuperscript{102} Fawcett & Carruthers (n 65) 330.
\item \textsuperscript{103} Owusu v Jackson 2005 1-383.
\item \textsuperscript{104} Fawcett & Carruthers (n 65) 330.
\item \textsuperscript{105} Fawcett & Carruthers (n 65) 330.
\item \textsuperscript{106} See n 101.
\item \textsuperscript{107} Fawcett & Carruthers (n 65) 330.
\item \textsuperscript{108} See n 101.
\item \textsuperscript{109} Forsyth (n 38).
\end{itemize}
However this is subject to the substantial exceptions contained in article 16 which grants the exclusive jurisdiction to specified jurisdiction as the lex situs of immovable property and a res and the enforcements of judgments.\textsuperscript{110}

Brussels I represents a harmonized set of rules for the determination of all questions of jurisdiction throughout the EU, prima facie the doctrine of \textit{forum non conveniens}.

\textbf{Reflexive effect of the Regulation}

However, there is a view that the doctrine of \textit{forum non conveniens} can be applied even where the Brussels I Regulation applies in specific situations. Continental lawyers have argued that the power to decline jurisdiction is available in certain limited situations on the basis that the Brussels Regulation should have reflexive effect.\textsuperscript{111} It is said the Regulation does not bind non-Member States in its internal world.\textsuperscript{112} Therefore non-Member States can refuse to stay its proceedings or to take jurisdiction.\textsuperscript{113} Thus the Brussels I rules are not absolute; there are certain circumstances where the doctrine of \textit{forum non conveniens} can be applied even if the matter falls between the member states.

It is said that, the doctrine can be applied when the case falls under or where the jurisdiction has been taken under the Regulation, but the parties have agreed to the jurisdiction of the non-Member State.\textsuperscript{114} The other questions which were raised in \textit{Owusu}\textsuperscript{115} were what the position would be if the parties agreed to the jurisdiction of the courts of non-member State and where the dispute involving the immovable property situated in a non-Member State.\textsuperscript{116}

The other situation is when the link connecting the dispute with a non-Member State is of a kind referred in Article 22 of the Regulation concerning the respectively exclusive jurisdiction.\textsuperscript{117} Meaning the member state that has seized the matter can stay the proceeding in favour of a non-member state. Article 22(1) provides that in cases relating to rights in rem, or tenancies of immovable property, are within the

\textsuperscript{110} See n 79 Article 16.
\textsuperscript{111} Fawcett & Carruthers (n 65) 333.
\textsuperscript{112} See n 79.
\textsuperscript{113} See n 79.
\textsuperscript{114} Fawcett & Carruthers (n 65) 333.
\textsuperscript{115} See n 103.
\textsuperscript{116} Briggs Agreements on Jurisdiction and Choice of Law 2008.
\textsuperscript{117} Fawcett & Carruthers (n 65) 333.
exclusive jurisdiction of the courts of the member States where the property is situated. Therefore, the Brussels I Regulation does not apply where the property is not situated in a member state.\textsuperscript{118} Thus Articles 22, 23 and 27 of the Regulation gives implied authority to decline jurisdiction if, one of the three specific situations occur.\textsuperscript{119}

There are specific situation under the Brussels I Regulation where a court seized must or may decline jurisdiction in favour of another court.\textsuperscript{120} When another court has exclusive jurisdiction in terms of Article 23, a court must decline jurisdiction on its own motion, unless the court with exclusive jurisdiction declined jurisdiction.\textsuperscript{121} In terms of Article 27, in respect of \textit{lis pendens}, it establishes that a court which was seized last must decline the jurisdiction to a court that was first seized of the matter.\textsuperscript{122}

No cases of abuse of the doctrine of \textit{forum non conveniens} has been reported in cases where the Brussels I apply because the Regulation sets out the rules of jurisdiction which limit the jurisdiction of member states and this rules are mandatory. Even though the doctrine of \textit{forum non conveniens} can be applied in certain circumstances it is not subject to abuse since it is only applicable to limited situations.

If they are to allow the use of the doctrine forum non conveniens in all situations where the Brussels I apply it will conflict with the principle of legal certainty. As said above, discretionary powers will undermine the predictability of the jurisdictional scheme. Member states will apply the doctrine uncontrollably in a different way leading to lack of uniformity of rules among all member states. Basing on the \textit{Owusu},\textsuperscript{123} decision allowing use of the doctrine of \textit{forum non conveniens} would be a wrong move and will be against justice.

\textbf{United Kingdom}

\textbf{Development of the doctrine of \textit{forum non conveniens} in the United Kingdom}

\begin{itemize}
  \item \textsuperscript{118} Briggs (n 116) 136.
  \item \textsuperscript{119} Fawcett & Carruthers (n 65) 333.
  \item \textsuperscript{120} Van Lith (n 8) 55.
  \item \textsuperscript{121} Van Lith (n 8) 55.
  \item \textsuperscript{122} Van Lith (n 8) 55.
  \item \textsuperscript{123} See n 103.
\end{itemize}
The only crucial difference between the jurisdiction of the English court under its traditional law and of that under the Brussels I Regulation is that jurisdiction is mandatory under Brussels 1 and discretionary under English traditional law.\textsuperscript{124} During the twentieth century the court could only stay the proceedings brought against the defendant present in England if it was vexatious or oppressive, and if there was proof that its purpose was to harass the defendant.\textsuperscript{125} Internal English law of jurisdiction still applies today in certain circumstances.

If the plaintiff is of the view that English law would have advantages for him he can bring the matter in the English court even if both parties are foreigners. All that is required is the presence of the defendant within the jurisdiction. According to Lord Denning, in the case of the \textit{Atlantic Star},\textsuperscript{126} the plaintiff must serve the defendant in England when he is there for a short visit or arrest his ship when it puts into an English port for a few hours.\textsuperscript{127} The fact that the claimant will enjoy advantages in an English court should not be decisive.\textsuperscript{128}

During that period, even if the parties were not domiciled in England and the dispute had no connection with England, the claimant could sue in England if process was served to the defendant in England and if believed that there will be advantages to be enjoyed by suing in an English court.\textsuperscript{129} The traditional way of England led to forum shopping leading Lord Denning to conclude that, “if the forum is England, it is a good place to shop in, both quality of the goods and the speed of service”.\textsuperscript{130}

\textbf{Application of the doctrine of forum non conveniens in the United Kingdom}

Referring back to what I have discussed above briefly, the United Kingdom and other European Union countries the doctrine of \textit{forum non conveniens} is acknowledged but the application is seriously restricted.\textsuperscript{131} Most of the civil law countries do not recognise the doctrine of \textit{forum non conveniens}. It has been limited significantly as a result of the accession of the UK to the Brussels I Regulation 44/2001. The ECJ has

\begin{flushleft}
\textsuperscript{124} Clarkson & J Hill The Conflicts of Laws (2011) 122.
\textsuperscript{125} Clarkson & Hill (n 124) 122.
\textsuperscript{126} The Atlantic Star 1973 1 QB 364.
\textsuperscript{127} Bell (n 95) 83.
\textsuperscript{128} Hill (n 39).
\textsuperscript{129} Clarkson & Hill (n 124) 122.
\textsuperscript{130} Clarkson & Hill (n 124) 122.
\textsuperscript{131} http:www.wisegeek.com/wh.
\end{flushleft}
clarified that the doctrine of *forum non conveniens* is incompatible with the regime established under the Brussels I.\(^{132}\)

In the United Kingdom, before the accession of Brussels I, the rules in relation to the assumption of the jurisdiction were governed exclusively by rules of court and a body of common law principles that had been built around those rules.\(^{133}\) The rules continue to play a crucial role but the accession of the Brussels I has affected multiplication of the English rules of the jurisdiction in that the Brussels I sets out mandatory rules to be followed by all member states.\(^{134}\) The Brussels I exclude the application of the doctrine of *forum non conveniens* and it affect the discretionary powers of the members states.

The United Kingdom is a member of the European Union signed the Brussels 1 Regulation.\(^{135}\) If the defendant is domiciled in the member state all the cases falls under the scope of the Regulation, and the courts may not invoke this doctrine of *forum non conveniens*.\(^{136}\) Article 27 does not allow the court of the member state to begin proceedings whilst the matter is pending in another court (*lis pendens*) over the same cause of action.\(^{137}\) Therefore, in situations where United Kingdom had discretion to stay the proceedings, it could not stay proceedings in favour of a court of another member state.\(^{138}\)

The court has a mandatory duty to exercise jurisdiction upon the application of the claimant.\(^{139}\) This is so because of equal and uniformity application of the Regulation, therefore, it requires all member states to act in a similar way when deciding whether to exercise jurisdiction.\(^{140}\) It will not be right for the claimant who has sued in a court where the Regulation applies and confirms that it had jurisdiction to be sent away, it will lead to the waste of time and cost, on the basis of such discretion.\(^{141}\)

\(^{132}\) Markus (n 2) 2.

\(^{133}\) Bell (n 95) 82.

\(^{134}\) Bell (n 95) 82.

\(^{135}\) Swantesson ( n 5)

\(^{136}\) Fawcett & Carruthers (n 65) 321.

\(^{137}\) Briggs & Rees (n 14) 219.

\(^{138}\) Briggs and Rees (n 14) 219.

\(^{139}\) Briggs & Rees (n 14) 119.

\(^{140}\) Briggs & Rees (n 14) 119.

\(^{141}\) Briggs & Rees (n 14) 119.
The continental lawyers are of the view that any court of the member state that have jurisdiction under the Brussels I must try the case in accordance with the Brussels I rules. The United Kingdom courts cannot use their *forum non conveniens* discretion in such situation. However the problem arises if the alternative forum is a non-member state, but this problem was solved in many cases.

In the case of *Spiliada Maritime Corporation v Consulex Ltd*, the decision served as a bench mark in the application of the doctrine of *forum non conveniens* in England. Application of the Spiliada case best shows the English approach to the doctrine where the other forum is a non-member state. The doctrine of *forum non conveniens* was accepted in English law and the courts were given discretionary powers when the defendant is served within the jurisdiction. The decision also decides on the interest of justice when applying the doctrine of forum non conveniens. In this case two test were determined that is the most clearly and appropriate forum should be identified and that jurisdiction should be allocated in accordance with the requirement of justice. The importance of the *Spiliada* case is that it constituted a final move away from the superior attitude previously adopted by English courts.

In the case of *Lubbe v Cape plc*, the House of Lords held that if there is a more appropriate forum the defendant takes the forum as he find even if less advantageous to him other than the English courts. The court also decides that when deciding the application of the doctrine of *forum non conveniens* public interest or public factors should not be considered. The court did not weigh the public

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142 Fawcett & Carruthers (n 65) 321.
143 *Spiliada Maritime Corporation v Consulex* 1987 1 AC 460.
145 Burke (n 23) 122.
146 Van Lith (n 8) 185.
147 Van Lith (n 8) 185.
148 Van Lith (n 8) 186.
149 See n 143.
150 http://www.law.cornell.edu/w.
151 *Lubbe v Cape plc* 2000 1 WLR 1545.
152 Jurisdiction in International cases under-European Law 200.
153 Van Lith (n 8) 187.
factors in the  *forum non conveniens* doctrine and held that the *Spiliada* left no room for consideration of the public interest.\(^{154}\)

In the case of *S & W Berisford plc v New Hampshire Insurance Co*\(^{155}\) and *Arkwright Mutual Insurance Co v Bryanston Insurance Co Ltd*\(^{156}\) it was stated that there was no general discretionary power to stay proceedings where jurisdiction had been allocated to England under article 2 of the Brussels I Regulation even if the alternative forum is a non-member state.\(^{157}\)

In the case of *Re Harrods (Buenos Aires) Ltd*\(^{158}\) the court of appeal disagreed with what is discussed above and held that there was power to stay the English proceedings on the ground of  *forum non conveniens* and stay was granted.\(^{159}\) Thus in this case an important distinction was made between cases where an alternative forum was a non-member state and cases where it was in a member state.\(^{160}\) It was decided that discretion to use the doctrine of *forum non conveniens* can be exercised when the alternative court is a non-member state.\(^{161}\) Court of Appeal accepted that the Regulations intention is to regulate jurisdiction between member states and not on non-member states.\(^{162}\) Therefore exercising of the discretion in cases involving non-Contracting State is not inconsistent with the Regulation.\(^{163}\)

The decision of the court in Harrods took an abrupt turn in the decision of Owusu v Jackson.\(^{164}\) In the Case of *Owusu v Jackson*\(^{165}\) the decision was of precluding a court of a Member State from declining jurisdiction in favour of a non-Member State under the Brussels Regulation.\(^{166}\) Both Mr Owusu and Mr Jackson were domiciled in England where the action was brought on the basis of the defendant’s domicile criteria under Article 2.\(^{167}\) The dispute had no connection with any other Member

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154 Van Lith (n 8) 187.
157 Fawcett & Carruthers (n 65) 321.
158 *Re Harrods (Buenos Aires) Ltd* 1992 Ch 72.
159 Fawcett & Carruthers (n 65) 321.
160 Fawcett & Carruthers (n 65) 321.
161 Fawcett & Carruthers (n 65) 321.
162 Fawcett & Carruthers (n 65) 322.
163 Fawcett & Carruthers (n 65) 322.
164 Brand (n 1) 28
165 2005 ECR 1-1383.
166 Van Lith (n 8) 50.
167 Van Lith (n 8) 50.
State but the issue occurred in a non-member state.168 The defendant Jackson was against the English jurisdiction and requested to stay proceedings on the basis of the forum non conveniens arguing that the case had a closer link to Jamaica.169

In addition to the above, although the case deals with the applicability of the Brussels 1 Regulation, the question was whether the court could exercise its discretionary powers available under its national law, to decline to hear the matter brought to it on the basis of Article 2 in favour of a non-member state.170 However, “the mandatory nature of Article 2 and set of jurisdictional rules in general, the uniform application of those rules and the principle of legal certainty, led the ECJ to exclude the forum non conveniens doctrine in favour of a non-member state under the scope of the Brussels Model.171

According to the ECJ “applying the doctrine of forum non conveniens would undermine the predictability of the set of jurisdiction rules and the principle of legal certainty requires that a normally well-informed defendant must be reasonably able to foresee before which courts, other than those of the state in which he is domiciled, he may be sued.”172 Also it was held that no exception was given on the basis of forum non conveniens by the author of the Regulation.173 According to Advocate General Leger he states that applying the doctrine of forum non conveniens will impair the effectiveness of the Regulation since the doctrine is a procedural rule.174

**Forum non conveniens under internal UK law**

Under the English Law, a court has discretionary powers to decline the exercise of jurisdiction on the ground that a court in another State, which also has jurisdiction, would objectively be a more appropriate forum, in which case may be tried more suitably for the interests of all the parties and the ends of justice.175 Thus the doctrine functions as a correction mechanism to the result of the statutory jurisdictional rules once the court seized the matter view another court as an

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168 Helene Van Lith (n 8) 50.
169 Owusu v Jackson 2005 ECR 1-1383.
170 Helene Van Lith (n 8) 50.
171 Helene Van Lith (n 8) 51, see also Cuniberti and Winker, Note: Owusu at 1189-1190 or Briggs.
172 Van Lith (n 8) 51.
173 Fawcett & Carruthers (n 65) 324.
174 Fawcett & Carruthers (n 65) 324.
175 Van Lith (n 8) 47.
appropriate court it still has the discretionary powers to decline to hear the matter.\textsuperscript{176} A common law jurisdictional discretion to decline a case can be invoked when certain conditions are met.\textsuperscript{177} It is not the convenience of the court that is appreciated, but the appropriateness of conferring jurisdiction on it.\textsuperscript{178}

According to Civil Jurisdiction and Judgments Act 199 “nothing in this Act shall prevent any court in the UK from staying, stopping process, summoning a party or dismissing any proceedings brought to it on the ground of \textit{forum non conveniens} or otherwise, it is inconsistent with the Brussels 1.”\textsuperscript{179} In cases where Brussels I does not apply the courts in United Kingdom will be able to apply their rules and allow the stay of action based on \textit{forum non conveniens} as well as their traditional bases of jurisdiction.\textsuperscript{180} However the English court must not act in a manner inconsistent with the Brussels 1 Regulation.\textsuperscript{181}

The doctrine of \textit{forum non conveniens} only survives in those rare cases that are not governed by the Regulation.\textsuperscript{182} In terms of the English internal law the doctrine of \textit{forum non conveniens} is still available. Stay will be allowed based on the ground of \textit{forum non conveniens} if the defendant satisfies the court that there is another forum available that have jurisdiction which more appropriate than English court.\textsuperscript{183} If the defendant contests the jurisdiction of the court in terms of Civil Procedure Rules (CPR) rule 6.36 the burden to prove the appropriateness of the English forum shifts to the claimant.\textsuperscript{184}

There must be an alternative forum, if there is no alternative forum for the claimant to proceed with the matter the court may refuse to allow the stay of proceedings.\textsuperscript{185} If it happens that there is another court that is appropriate the court applies the two-stage test to find if English court or the alternative forum is more appropriate.\textsuperscript{186} Clarkson and Hill state that the first stage is when the judge considers whether the

\begin{footnotesize}
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  \item \textsuperscript{176} Van Lith (n 8) 48.
  \item \textsuperscript{177} Briggs (n 116)
  \item \textsuperscript{178} Van Lith (n 8) 48.
  \item \textsuperscript{179} Civil Jurisdiction and Judgments Act 1991.
  \item \textsuperscript{180} Fawcett & Carruthers (n 65) 320.
  \item \textsuperscript{181} Fawcett & Carruthers (n 65) 320.
  \item \textsuperscript{182} Markus (n 2) 33.
  \item \textsuperscript{183} Clarkson & Hills (n 124) 124.
  \item \textsuperscript{184} Clarkson & Hills (n 124) 124.
  \item \textsuperscript{185} Clarkson & Hill (n 124) 124.
  \item \textsuperscript{186} Clarkson & Hill (n 124) 124.
\end{itemize}
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foreign court or the English court is the prima facie appropriate. If there is no other appropriate forum and the matter was brought before English court because of the defendants presence there the court may refuse to stay the proceedings.

The factors that need to be taken into account are that have most real and substantial connection with the matter. Factors to consider are not closed they only depend with the case, and most decided cases suggest that the court should at least look at this six factors:

- Territorial connections,
- Lis alibi pendens,
- Multiple parties,
- The applicable law,
- The Cambridgeshire factor,
- Documentary evidence.

**Territorial connections**

Territorial connection of the parties as well as location of evidence is always important in every case so the court should always consider it, it does not make sense to conclude that England is the appropriate forum if all the evidence can be found outside England and the parties are not resident in England. The principle of most closely connected forum cannot be found. Therefore I agree with Clarkson and Hill, there must be close connection between the matter and the forum.

**Lis alibi pendens**

If the matter between same parties and arising out of the same cause of action is before the court and still pending no other court can hear the matter, thus England
will not be the appropriate court.\footnote{Clarkson & Hill (n 124) 125.} If it is allowed to let courts to decide on the same issue at the same time it will lead to conflict of decisions,\footnote{Clarkson & Hill (n 124) 125.} which will lead to problems of enforcement.\footnote{Hill (n 39) 301.} Also it will lead to additional inconvenience and unnecessary expenses if the matter is being pursued concurrently in two different courts where there are similar facts and testimony of same witnesses.\footnote{Hill (n 39) 301.} However if the proceedings are instituted a few days before the commencement in the England court and nothing much was done staying of proceeding maybe allowed.\footnote{Clarkson & Hill (n 124) 126.} Therefore courts should avoid this by favouring an appropriate court to deal with the matter.\footnote{Hill (n 39) 304.}

**Multiple parties**

Where the matter that is in dispute involve a lot of parties and the parties are in different jurisdictions, English law desire the matter to be resolved in one set of proceedings in one forum.\footnote{Clarkson & Hill (n 124) 125.} It is pointless to let each party to sue in the forum which they want in cases of multiple parties. Therefore if an English court have jurisdiction to hear the matter of all claims in multi-party proceedings it is the appropriate court to deal with the matter.\footnote{Hill (n 39) 304.}

If the case involving multi-parties, if some are domiciled in a member state and some are not domiciled in a member state, the English court may refuse to grant a stay on the basis of *forum non conveniens*.\footnote{Hill (n 39) 304.} Jurisdiction of defendants domiciled in the Member State will be governed by the Brussels 1 Regulation and it cannot grant a stay of proceedings, thus the English court will have to assume jurisdiction under its traditional rules for defendants not domiciled in a Member State for the matter to be resolved in a single set of proceedings.\footnote{Hill (n 39) 304. According to J Hill he is of the view that “the fact that an English court may by virtue of CPR 6.36 exercise a wider and flexible jurisdiction than the courts of many other countries does not mean that England is always the appropriate forum in cases where litigation involves a number of foreign defendants, these rules must not be abused.”}

\footnotesize{\begin{itemize}
  \item Clarkson & Hill (n 124) 125.
  \item Clarkson & Hill (n 124) 125.
  \item Hill (n 39) 302.
  \item Hill (n 39) 301.
  \item Clarkson & Hill (n 124) 125.
  \item Hill (n 39) 302.
  \item Clarkson & Hill (n 124) 125.
  \item Clarkson & Hill (n 124) 126.
  \item Hill (n 39) 304.
  \item Hill (n 39) 304. According to J Hill he is of the view that “the fact that an English court may by virtue of CPR 6.36 exercise a wider and flexible jurisdiction than the courts of many other countries does not mean that England is always the appropriate forum in cases where litigation involves a number of foreign defendants, these rules must not be abused.”
\end{itemize}}
The granting of stay of proceedings would affect the efficient conduct of the litigation in a case of multiple defendants when one defendant apply for the stay of proceedings and the other did not, it will lead to two separate sets of proceedings, thus the further consequence will be the inconsistent judgments being reached by the two courts.\textsuperscript{209} Therefore, the claimant who has a legitimate interest in the matter must try to consolidate the claim in one set of proceedings.\textsuperscript{210}

**The applicable law**

The private international law of England states that the English court has the power to order a stay of proceedings on the grounds of *Forum non conveniens* if the defendant shows that there is a competent court which is more appropriate and not unjust.

The matter should be heard by a court that will apply law that is closely connected to the case or which its law governs the dispute.\textsuperscript{211} Therefore if it’s a contractual dispute and the contract is governed by English law, English forum will be an appropriate forum. If a matter is brought under the English court but foreign law governs the dispute it is preferable for the matter to be heard by the foreign court which have experience in dealing with such matter and a stay of proceedings in an English court will be allowed.\textsuperscript{212}

If the contract is governed by English law it means English law is applicable therefore the court is prepared to place very considerable emphasis on the fact that English judges are better placed than others to rule on the questions of English law.\textsuperscript{213} But Dicey and Morris concluded that if the legal issue is straight forward or if the competing courts have domestic law which is similar governing law or of less significance staying of proceedings will not be necessary.\textsuperscript{214}

**The Cambridgeshire factor**

\begin{itemize}
\item \textsuperscript{209} Collins (ed) Dicey, Morris and Collins (n 24) 560.
\item \textsuperscript{210} Hills (n 39) 303.
\item \textsuperscript{211} Clarkson & Hill (n 124) 126.
\item \textsuperscript{212} Clarkson & Hill (n 124) 126.
\item \textsuperscript{213} Hill (n 39) 306.
\item \textsuperscript{214} Collins (ed) Dicey, Morris and Collins (n 24).
\end{itemize}
If a court has under its court a dispute with different parties but similar facts with that one under English Law England can be the appropriate court to balance the convenience.\footnote{Clarkson & Hill (n 124) 126.} A court with special expertise should resolve the matter so that it would be in the interest of justice.\footnote{Collins (ed) Dicey, Morries and Collins (n 24) 558.} Dicey and Morris are of the view that there is a risk that justice might not be obtained in a foreign court because of the inexperienced and inefficiency judiciary or quite a great delay in the conduct of the business of the courts, or unavailability of appropriate remedies.\footnote{Collins (ed) Dicey, Morris and Collins (n 24) 559.}

In the \textit{Spliliada} case\footnote{See n 143.} the House of Lords concluded that the English Courts were not appropriate courts since both the facts and parties were not connected to English court.\footnote{Hill (n 39) 305.} The House of Lords went further to say it was right to take into account the fact that an advantage is there in the terms of efficiency, expedition and economy by having available experienced team of lawyers and experts who were familiar with the legal and factual matters raised to deal with the matter.\footnote{Clarkson & Hill (n 124) 127.}

**Documentary evidence**

It is pointless to allow a court to deal with a matter where there is no documentary evidence and it is located in a foreign country. This will lead the parties to incur unnecessary cost trying to locate evidence. Therefore, if documentary evidence is crucial to the case, the language in the documents is crucial too.\footnote{Hill (n 39) 305. “In subsequent cases the so called ‘cambridgeshire factor’ has been advanced, albeit with very little success, as a relevant consideration in the context of both applications for a stay of proceedings and applications for permission to serve out of the jurisdiction.” By Hill.} Clarkson and Hill gave an example that if in a dispute England or Mexico is the appropriate forum and documents are important and are drawn in Spanish, Mexican court will be the appropriate court and if drawn in English, England will be the appropriate court.\footnote{Clarkson & Hill (n 124) 127.}

After considering all the factors and the court is satisfied that there is prima facie evidence that the alternative forum is available which is more appropriate, staying of proceedings will be allowed unless it will be against the justice.\footnote{Hills (n 39) 283.} Then the burden of
proof shifts to the claimant to show that there are special reason why the stay of proceeding should not be stayed and to continue to be heard by the court that was first approached that is England where justice will be done.\textsuperscript{224}

Dicey and Morris concluded that since 2009 claimants have been more successful in resisting stays of proceedings, or even obtaining permission to serve out on the basis that the foreign courts cannot be trusted to do justice, the case should be allowed to proceed in England.\textsuperscript{225} They continue to say that evidence that is required for the court not to grant a stay, although might be persuasive should not be of the claimant claim but should be based on more general grounds of evidence that is judicial failure or misconduct in relation to claims of the same type.\textsuperscript{226}

In the case of \textit{MacShannon v Rockware Glass Ltd} Lord Diplock\textsuperscript{227} was of the view that court should not grant a stay if it would lead to deprivation of the claimant legitimate personal or juridical advantage which would be available if the jurisdiction of English court is invoked.\textsuperscript{228}

Therefore if they are to allow the discretionary power on the member state consequences discussed above will occur, it will be contrary to the principle of legal certainty and justice. There will be no uniformity in the European courts.

Also in the United Kingdom no cases of abuse of the doctrine of \textit{forum non conveniens} has been reported since the application of the doctrine is restricted by mandatory rules of Brussels I. In terms of the internal UK law abuse of the doctrine has not been shown because of certain factors that need to be considered before staying the proceedings to determine the appropriateness of the court.

\textbf{South Africa}

In terms of South African law, in the case of \textit{Estate Agents Board v Lek’s},\textsuperscript{229} it was held that the unitary judicial system of having one Supreme Court with different divisions, convenience and common sense are valid considerations in determining

\begin{itemize}
\item \textsuperscript{224} Hill (n 39) 283,
\item \textsuperscript{225} Collins (ed) Dicey, Morris and Collins (n 24) 561.
\item \textsuperscript{226} Collins (ed) Dicey, Morris and Collins (n 24) 562.
\item \textsuperscript{227} \textit{MacShannon v Rockware Glass Ltd} 1978 AC 795.
\item \textsuperscript{228} Hill (n 38) 301.
\item \textsuperscript{229} \textit{Estate Agents Board v Lek’s} 1979 (3) SA 1048 (A).
\end{itemize}
the jurisdiction of a court to hear the matter.\textsuperscript{230} In this the judge weighed the convenience to both parties since the respondent place of business and residence was Cape Town, he concluded that the CPD had jurisdiction.\textsuperscript{231}

The convenience factors and policy to be considered for the forum have been considered in \textit{Longman Distillers Ltd v Drop Inn Group};\textsuperscript{232} were it was held that where the other requirements were satisfied the Court had no discretion to refuse an order of attachment to found jurisdiction on the grounds that the local court is not a convenient court in which to bring the action.\textsuperscript{233} According to s 9(1) of the Supreme Court of Appeal any civil proceedings instituted in a provincial or local division, if it appears to court that the matter is closely connected, more conveniently or determined in other division, the court seized the matter may on application by any party order the removal to another court.\textsuperscript{234}

In the case of \textit{Bid Industrial Holdings (Pty) Ltd v Strang and Others}\textsuperscript{235} it states that jurisdiction to be generally exercised on the basis of presence and adequate connection, and if the plaintiff decides in favour of suing here it is open to the defendant to contest, among other things, whether the South African court is the \textit{forum non conveniens} and whether there are sufficient links between the suit and this country to render litigation appropriate here rather than in the court of the defendant's domicile.\textsuperscript{236}

In its view the court would take cognisance of the suit if the defendant were served with the summons while in South Africa and, in addition, there were an adequate connection between the suit and the area of jurisdiction of the South African court concerned from the point of view of the appropriateness and convenience of its being decided by that court.\textsuperscript{237} Appropriateness and convenience are elastic concepts which can be developed from case by case.\textsuperscript{238} The strongest connection

\begin{thebibliography}{9}
\bibitem{230} Forsyth(n 38) 185.
\bibitem{231} Forsyth (n 38) 185.
\bibitem{232} \textit{Longman Distillers Ltd v Drop Inn Group} 1990 (2) SA 906 (A).
\bibitem{233} Forsyth (n 38) 185, Longman Distillers Ltd v Drop Inn Group 1990 2 SA 906 (A).
\bibitem{234} Forsyth (n 38) 185, Van der Sandt 1947 1 SA 259 (T).
\bibitem{235} \textit{Bid Industrial Holding (Pty) Ltd v Strang and Others} 2008 3 SA 355 (SCA).
\bibitem{236} Forsyth (n 38) 185.
\bibitem{237} Forsyth (n 38) 185.
\bibitem{238} Forsyth (n 38) 185.
\end{thebibliography}
would be provided by the cause of action arising within that jurisdiction.\textsuperscript{239} Thus in the Supreme Court of Appeal the court held that it is open for the defendant to contest that the South African court was the \textit{forum non conveniens} and if there was sufficient link between the suit and court to hear the matter rather than in the court of defendants domicile.\textsuperscript{240}

Schulze is of the view that South African High Courts are creatures of the statute, therefore they have inherent jurisdiction.\textsuperscript{241} In terms of s 19(1)(a) of the Supreme Court Act,\textsuperscript{242} jurisdiction is determined over all persons residing or being in its jurisdiction and in relation to all causes arising within its geographical area of jurisdiction.\textsuperscript{243} Parties to an international transaction are free to choose a court of their choice should a dispute arise between them.\textsuperscript{244} Thus in their agreement they can incorporate a choice-of-forum clause.\textsuperscript{245} Mostly parties choose a court that has closer connection to the case because if there is no connection between the matter and the forum choice-of-forum choice will not be effective.\textsuperscript{246} If the matter is not closely connected to the forum \textit{lex fori} will be applied to the case.\textsuperscript{247}

In cases where one of the parties is not resident or domiciled in South Africa, the court has to attach the property of the foreigner to confirm or found jurisdiction unless the party has submitted to the jurisdiction of the court.\textsuperscript{248} If the foreign party is domiciled or resident in South Africa and carries its business in the area of that court, South African court will have jurisdiction over that foreign party.\textsuperscript{249}

Also because of the plea of \textit{lis pendens} the defendant must also be able to satisfy the court on balance of justice and \textit{conveniens} that the matter should be left to court that is adjudicating the matter; therefore, one of the courts may stay the proceeding in favour of another court that is convenient.\textsuperscript{250} Thus the court of a member state can

\begin{footnotesize}
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  \item \textsuperscript{239} Forsyth (n 38) 185.
  \item \textsuperscript{240} Bid Industrial Holdings (Pty) Ltd v Strang 2008 3 SA 355 (SCA).
  \item \textsuperscript{241} Van Niekerk & Schulze The South African Law of International Trade: Selected Topics (2011) 322.
  \item \textsuperscript{242} S (19)(1)(a) of the Supreme Court Act.
  \item \textsuperscript{243} See (n 241) 322.
  \item \textsuperscript{244} See (n 241) 322.
  \item \textsuperscript{245} See (n 241) 322.
  \item \textsuperscript{246} See (n 241) 322.
  \item \textsuperscript{247} See (n 241) 322.
  \item \textsuperscript{248} See (n 241) 322.
  \item \textsuperscript{249} See (n 241) 322.
  \item \textsuperscript{250} Buchbinder v Wolf (1901) 18 SC 93.
\end{itemize}
\end{footnotesize}
ignore the fact that the defendant is sued on the basis of Article 2 and pursue the proceedings in the non-member state in respect of the same matter. The doctrine of continetia states that courts must deal with matter to which they are peripherally concerned and also a court when exercising its admiralty jurisdiction to decline jurisdiction when the action can be more appropriately heard elsewhere.

According to section 7(1)(a) of the Admiralty Jurisdiction Regulation Act 1983 “a court may decline to exercise its admiralty jurisdiction in any proceedings instituted or to be instituted, if it is of the opinion that any other court in the Republic or any other court or any arbitrator, tribunal, or body elsewhere will exercise jurisdiction in respect of the said proceedings, and that it is more appropriate that the proceedings be adjudicated upon by any such other court or by such arbitrator, tribunal or body.” This section encourages the use of doctrine of forum non conveniens.

In the case of Laden and Another Mv Dimitris, the appellants contend that they have claims against Astromando, in contract, or in delict, or both; and they were saying that such claims are enforceable in the appropriate court of South Yemen, which has jurisdiction to hear them; that such court will in fact exercise its jurisdiction to adjudicate upon the claims; and that the Yemeni court is a more appropriate and convenient forum than either a South African or a Japanese court. The respondent contended that he will in any event, Astromando will not be able to obtain a fair hearing in any court of South Yemen.

On appeal the court stated that if security were to be furnished on the basis of such an order, and the claimant were to institute an action in a court of his choice somewhere in the world, it would be possible for the defendant in such action to raise the contention that the chosen court was not a "competent court" as envisaged in the order, and that the security furnished accordingly did not apply to it. It went further saying a claimant applying for an order in terms of section 5(3)(a) should be

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252 Admiralty Jurisdiction Regulation Act 1983, s 7(1)a.
253 See (n 238).
254 See (n 255) 436.
256 See (n 255) 436.
257 See (n 255) 436.
258 See (n 255) 436.
required, in addition to nominating the forum of his choice, to show prima facie that his claim is enforceable in that forum.\(^{259}\) This requirement is closely allied to the requirement that the claimant must satisfy the court that he has a prima facie case on the merits against the person against whom he wishes to institute.\(^{260}\)

The respondent’s fear that Astromando will not have a fair hearing in any court in South Yemen but it was pointed out that Yemen are independent and apply the applicable laws fairly.\(^{261}\) The claimant asserts that the standard of the judiciary in South Yemen is considered to be among the best in the Middle East.\(^{262}\) Therefore the South Africa court was not the competent court.

In South Africa the doctrine of forum non conveniens is available. There are various factors that need to be considered for the court to have jurisdiction. Also in South Africa no cases of abuse of the doctrine on forum non conveniens has been reported. High Courts can have jurisdiction as long as there is connection between the matter and the forum and property of the foreign parties can be attached to confirm or found jurisdiction or if the defendant submitted to the jurisdiction of the court.

**COMMENT**

After a careful consideration it looks like most continental European systems and Brussels I leave no room for discretionary powers of the courts, thus domicile of the defendant determine jurisdiction. In all cases I have seen that the domicile of the defendant is very important. Some authors state that Article 2 forms the cornerstone of the Regulation’s jurisdictional scheme.\(^{263}\) They went further stating that the domicile of ‘the defendant provides for a just and reasonable criterion of jurisdiction because of its relative simplicity and foreseeability’.\(^{264}\)

Schlosser states that under the Brussels Regulation courts are not entitled to exercise jurisdiction but they are obliged to do so.\(^{265}\) “This mandatory nature along

\(^{259}\) See (n 255) 436.
\(^{260}\) See (n 255) 436.
\(^{261}\) See (n 255) 436.
\(^{262}\) See (n 255) 436.
\(^{263}\) A Bell (n 38) 57.
\(^{264}\) Bell(n 39) 57.
\(^{265}\) Van Lith (n 8 ) 332.
with the exhaustive set of jurisdiction rules makes Brussels Regulation a particularly closed model with a strict legal framework in which no discretionary powers are needed and might even jeopardise the uniform treatment of cases regards jurisdiction within the Regulation’s territory”\textsuperscript{266} Once the claimant chooses the correct court to deal with the matter the court must exercise jurisdiction.\textsuperscript{267}

If the doctrine of \textit{forum non conveniens} is allowed to be used between all Member States it will lead to lack of uniformity of decisions after its application.\textsuperscript{268} Therefore there is the advantage is clarity and predictability of legal rules if the doctrine is not applied in cases falling under Brussels I.\textsuperscript{269} The ministry of justice proposed that if we are to introduce the doctrine of forum non conveniens in the Brussels I Regulation and reverse the judgment of the European Court of Justice in \textit{Owusu v Jackson}\textsuperscript{270} will be conflict of decision and would lead many cases to denial of justice.\textsuperscript{271} Thus this mechanism has already found a place in the preliminary draft of Hague Judgments Convention and is misleading.\textsuperscript{272} They continue to say that the principle of legal certainty and access to justice underpin the judgment of \textit{Owusu} and the reversal of that decision or a weakening of the protection which it affords would lead in many cases to a denial of justice.\textsuperscript{273}

However, it is very difficult to predict the future use of this doctrine. There is hope that more complete knowledge of both the history and current status of the \textit{forum non conveniens} doctrine will facilitate a better understanding of global efforts to improve litigation and it will lead to greater predictability as well as more uniform outcomes.\textsuperscript{274}

Article 5(2) of the Hague Convention expressly requires a court in a convention state that has jurisdiction under the convention to enforce an exclusive choice of court agreement.\textsuperscript{275} It continues saying that court is not allowed decline the exercise of jurisdiction on the ground that the dispute should be decided in a court of another

\textsuperscript{266}\textit{Van Lith} (n 8) 332.
\textsuperscript{267}\textit{Van Lith} (n 8)332.
\textsuperscript{268}\textit{Svantesson} (n 5) 410.
\textsuperscript{269}\textit{Burke} (n 23) 126.
\textsuperscript{270}\textit{Owusu v Jackson} 2005 ECR 1-1383.
\textsuperscript{271}\textit{Review of the Brussels 1 Regulation} (EC 44/2001).
\textsuperscript{272}\textit{See} (n 240) 355.
\textsuperscript{273}\textit{See} (n 240) 355.
\textsuperscript{274}\textit{Brand} (n 1) 6.
\textsuperscript{275}Peter Trooboff \textit{Ensuring jurisdiction over treaty party’s judgments} (2012)
Therefore Ronald Brand and Paul Herrup concluded that Article 5 will eliminate the declining of jurisdiction on the basis of *forum non conveniens* for exclusive choice-of-court agreements within scope of the convention.  

In most cases in which the proceedings are stayed on the basis of the *forum non conveniens*, for the defendant to win a dismissal for *forum non conveniens*, the defendant must show that an alternative forum exists that is both available and adequate, as well as that private and public interest factors favour dismissal.

**CONCLUSION**

In conclusion, this article clearly shows that the application of the doctrine of *forum non conveniens* varies from jurisdiction to jurisdiction. Legal certainty is a precious commodity in international commercial arbitration than elsewhere. Legal certain and predictability are used to exclude the use of discretionary power as set out by ECJ in *Owusu* case. The doctrine of *forum non conveniens* does not have a role in the Brussels I jurisdictional system because if it applies it will be inconsistent with the principle of certainty.

At present UK courts still regards Harrods as being law. Thus a stay on the grounds of *forum non conveniens* is no longer available whenever the defendant is domiciled in the UK were the cases falls under Brussels I. Also the doctrine of *forum non conveniens* is now treated strictly in United Kingdom because of the accession of the Brussels I. According to ECJ it state that both should be protected, thus, the plaintiff to identify the court before instituting proceedings and the defendant to reasonably foresees the court before he may be sued. Plaintiff must

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276 Peter Trooboff (n 75)
277 Peter Trooboff (n 275)
278 Mullins, Kokoruda (n 29) 14.
279 Svantesson (n 5) 418.
281 Van Lith (n 8) 58.
282 Burke (n 23) 126.
283 Bougen (n 82) 708.
284 Bougen (n 82) 708.
285 Van Lith (n 8) 59.
be sure which court has jurisdiction, he or she should not waste his time and money by bringing the matter in a court that is not convenient.\textsuperscript{286}

In cases where the doctrine of \textit{forum non conveniens} applies, this doctrine provides flexibility where it is needed and it is not subject to abuse.\textsuperscript{287} In the United Kingdom internal law cases the doctrine of \textit{forum non conveniens} still applies, they have the discretion to stay proceedings on the basis of \textit{forum non conveniens} without concern themselves with whether this is inconsistent with the Brussels I.\textsuperscript{288} The stay will be only granted if there is an alternative forum.\textsuperscript{289}

In cases where the Brussels I is applicable, application of the doctrine of \textit{forum conveniens} will be inconsistent with the Brussels I.\textsuperscript{290} Thus the doctrine of \textit{forum non conveniens} is available in cases where the Brussels I does not apply.\textsuperscript{291} The Regulation does not bind non-member states, the non-member state to adopt their own law when deciding whether to take jurisdiction or not over a dispute.\textsuperscript{292} They can either refuse to take jurisdiction or stay the proceedings.\textsuperscript{293} Some are in favour of the reflex approach which removes the problem of automatic displacement of jurisdiction in favour of a non-Member State.\textsuperscript{294}

\begin{thebibliography}{99}
\item Van Lith (n 8) 59.
\item Svantesson (n 5) 419.
\item Fawcett and Carruthers (n 65).
\item Fawcett and Carruthers (n 6).
\item Smith, Lasserson and Rymkiewicz (n 251) 392.
\item Smith, Lasserson and Rymkiewicz (n 251) 392.
\item Smith, Lasserson and Rymkiewicz (n 251) 397.
\item Smith Lasserson and Rymkiewicz (n 251) 397.
\item Smith Lasserson and Rymkiewicz (n 251)397.
\end{thebibliography}
BIBLIOGRAPHY

CASES

Arkwright Mutual Insurance Co v Bryanston Insurance Co Ltd 1990 2 QB 64

Bid Industrial Holdings (Pty) Ltd v Strang 2008 3 SA 355 (SCA)


Laden and Another Mv Dimitris (534/1987) ZASCA 76; [1989] 2 All SA 436 (A) (1 June 1989)

Lubbe v Cape plc 2000 1 WLR 1545

Owusu v Jackson 2005 ECR 1-1383.

S & W Berisford plc v New Hampshire Insurance Co 1990 2 QB 631

Spiliada Maritime Corporation v Consulex Ltd 1987 1 AC 460

LEGISLATION

Admiralty Jurisdiction Regulation Act 105 of 1983


S 19 of the Supreme Court Act

TEXTBOOKS

Adrian Briggs Agreements on Jurisdiction and Choice of Law 2008


Brand, R A Forum Non Conveniens (2007)

A Bell Forum Shopping and Venue in Transitional Litigation 56


Forsyth *Private International Law* (2012)


Collins (ed) *Dicey, Morris and Collins on The Conflicts of Laws* (2012)


**JOURNALS**

Siew “Choice of Law in Forum non conveniens analysis” 2010 *Singapore Academy of Law Journal* (SAcLJ) 22

*Smith, Lasserson and Rymkiewicz “Reflections on Owusu: the radical decision in Ferrexpo”* 2012 *Journal of Private International Law* 389

**INTERNET SOURCES**

Fedaral Forum Non Conveniens Doctrine: Still problematic after Sinochem

http://www.respondeat.wordpress.com/

http://en.wikipedia.org/wiki/Forum_non_conveniens

http://www.law.cornell.edu/w

Markus *A Critique of the Doctrine of Forum Non Conveniens* (2011) 2