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BASIC PRINCIPLES OF JURISDICTION IN PRIVATE INTERNATIONAL LAW: THE EUROPEAN UNION, THE UNITED STATES AND ENGLAND

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Abstract This article consists of a comparative study of the basic principles underlying the rules of jurisdiction in private international law in commercial cases in the law of the European Union, the United States and England. It considers the objectives which these rules seek to achieve (protection of the rights of the parties and respect for the interests of foreign States) and the extent to which these objectives are attained. It takes tort claims, especially in the field of products-liability, as an example and considers which system has the most exorbitant rules. It suggests explanations for the differences found.

Keywords: private international law, international jurisdiction, EU law, US law, English law.

I. INTRODUCTION

This is a comparative study of three legal systems: those of the European Union, the United States and England. The object is to ascertain the basic principles underlying each system and to determine the extent to which they are given practical effect. We will consider only jurisdiction *in personam* and only as regards commercial cases, not family law or succession. In the case of the European Union, we will consider only the jurisdictional rules contained in the Brussels I Regulation (2012),¹ even though these rules (generally speaking) apply only to defendants domiciled in another Member State, not to defendants domiciled in a non-Member State, like the UK.

In the case of the United States, we will consider only the constitutional rules laid down by the US Supreme Court under the Due Process Clause in the Fourteenth Amendment to the Constitution.² In this regard, it should be explained that, in the US, jurisdiction (for both state and federal courts) is

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¹ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1.

² This reads ‘nor shall any state deprive any person of life, liberty, or property, without due process of law’. This applies only to state courts, but a similar provision applies to federal courts under the Fifth Amendment.

generally a matter of state law.³ However, since the epoch-making case of *International Shoe Co v Washington*⁴ in 1945, the US Supreme Court has made use of the Due Process Clause to impose an outer limit on such jurisdiction. Since this is an outer limit, plaintiffs must also comply with the jurisdictional rules (generally known as ‘long-arm statutes’) laid down by the states, though in practice the outer limit may also become the rule. Unlike in the European Union, in the US these limits apply to *all* defendants, not just those domiciled in another state. Thus, a Frenchman is given the same protection in a California court as a Texan.

With regard to the United Kingdom, we will consider only the rules applied in English courts—not Scottish or Northern Irish courts—and only those rules concerning international cases, not those applied in intra-UK cases, that is cases concerning conflicts of jurisdiction among the three UK jurisdictions:

- England and Wales (one unit for these purposes)
- Scotland
- Northern Ireland.

The rules applicable in intra-UK cases are quite different from those applied in international cases. They are modelled on the rules in the Brussels Regulation though since they apply as UK law—not EU law—they are unaffected by Brexit.⁵

³ In the United States, there exist two separate court systems in every state: state courts and federal courts. Each system is complete in itself. In the federal system, the trial-level courts are called ‘federal district courts’, the intermediate appeal courts are the various circuits of the Federal Court of Appeals, and at the apex stands the US Supreme Court. The state systems differ from state to state, but there will also be trial-level courts, intermediate appeal courts and a state supreme court. There is no appeal from the highest state court to the US Supreme Court unless a question of federal law—including constitutional law—is involved. Subject to minor exceptions, common law is state law. Most areas of civil law—for example, contracts, torts, property, succession, marriage and divorce—are largely governed by state law. The decisions by the US Supreme Court which we are about to discuss all came to the US Supreme Court on appeal (by way of certiorari) from a state supreme court. This was possible because a question of constitutional law was involved: whether assertion of jurisdiction by the courts of the state in question was consistent with the Fourteenth Amendment. The question whether a case can be brought in a state court or a federal court depends on what Americans call ‘subject-matter jurisdiction’. This is quite separate from the kind of jurisdiction we are going to discuss. Generally speaking, all cases can be brought in a state court unless there is a rule giving the federal courts exclusive jurisdiction with regard to the subject-matter of the case. However, a case can be brought in a federal court only if a specific rule so provides. The two most important situations in which federal courts have subject-matter jurisdiction are where the case is based on federal law and where there is diversity of citizenship. Diversity of citizenship exists where the parties are citizens of different US states or one party is a citizen of a US state and one is a citizen of a foreign State. If both parties are citizens of foreign States, there is no diversity. In multi-party cases, there must be *complete* diversity. This means that no party on the one side must be a citizen of the same state as *any* party on the other side. If both state and federal courts have subject-matter jurisdiction, the plaintiff chooses in the first instance, but if he decides to bring the case in a state court, the defendant can (subject to certain conditions) have it removed to the federal courts if he so wishes.

⁴ 326 US 310 (1945).

⁵ See the Civil Jurisdiction and Judgments Act 1982, Schedule 4.

Rules of jurisdiction determine when a court can hear a case. We are concerned with international jurisdiction—when a court is precluded from hearing a case because of international (or, in a federation, interstate) elements. The important considerations in framing rules of jurisdiction are fairness to the claimant and defendant, and respect for the rights of other countries.⁶ The claimant must be given the opportunity to bring his claim in *some* reasonable court; otherwise he would be denied the right to have his claim heard. On the other hand, the defendant must not be forced to defend the claim in an unreasonable court. In addition, if a court in another country can legitimately claim that it has a prior right to hear the case, that too must be taken into account. The trick is to find some way of balancing these different considerations. This is usually done by weighing up the connections or links between the forum and the defendant (sometimes also the claimant), on the one hand, and, on the other hand, the events giving rise to the claim.

Most countries divide jurisdiction into two categories: general jurisdiction (sometimes called ‘all-purpose jurisdiction’ in the US) and special jurisdiction (‘specific jurisdiction’ in the US). The former is based solely on links between the defendant and the forum: it is not necessary for the facts of the claim to have any connection with the forum. As will be appreciated, this is justified only if the links between the defendant and the forum are very strong. It is normally said that only the defendant’s home country can exercise this kind of jurisdiction. Special jurisdiction is based on links between the facts of the claim and the forum. In EU and English law, it is based *solely* on such links; in the US, links between the defendant (and sometimes even the plaintiff) are also relevant.

In the EU, links between the facts giving rise to the claim and the forum are regarded as an *alternative* to links between the defendant and the forum; in the US, on the other hand, there must always be links between the defendant and the forum, even if—where these are not strong enough—they may be supplemented by links between the facts of the claim and the defendant’s activities in the forum. The basic idea of the US theory of jurisdiction is that it is wrong—contrary to due process—to subject a defendant to the jurisdiction of the courts of a state unless he has done some voluntary act by which he might reasonably be regarded as submitting himself to that jurisdiction.

II. GENERAL JURISDICTION

In the EU, the criterion for general jurisdiction is the domicile of the defendant.⁷ Nationality is irrelevant. In the case of a natural person (individual), domicile is determined by the law of the Member State in which it is claimed that the person is domiciled.⁸ In the case of companies and other legal persons, there is a uniform (EU-law) concept of domicile. It means either the company’s

⁶ By ‘countries’ is meant other independent States or, in a federation, other federal units (states, provinces, etc). ⁷ Brussels I (2012) art 4(1). ⁸ Brussels I (2012) art 62.

statutory seat, its central administration or its principal place of business.⁹ The term ‘statutory seat’ is something of a misnomer: it does not mean the seat as laid down in some statute (legislation), but the seat as laid down in the *statut* (constitutive document) of the company. According to the Brussels Regulation, in the two (remaining) common-law Member States, Ireland and Cyprus, this means the registered office of the company.¹⁰ The central administration is the administrative headquarters of the company, the place where the most important decisions are taken. The principal place of business is the place where the most important business activities are carried out.

In the United States, it is still the law that a court may obtain general jurisdiction over a natural person if he is served with a writ within the territory of the state in question, even if he is only there on a temporary visit.¹¹ This ought to be reconsidered one day: this form of jurisdiction (transient jurisdiction, sometimes also called ‘tag jurisdiction’) should be limited to claims arising out of, or related to, the defendant’s activities in the state in question—in other words, to cases of specific jurisdiction.

In the case of corporate defendants, it has now been settled that general jurisdiction lies only in a state where the defendant is ‘essentially at home’.¹² Save in exceptional cases, this means either the place of incorporation or the principal place of business.¹³ So the test for corporate defendants is much the same as in the European Union.

It might be thought that the place of incorporation could be too tenuous a connection to justify general jurisdiction, since companies are sometimes incorporated in ‘corporate havens’ like Panama, Liechtenstein or Delaware, even where all the company’s activities will take place in somewhere entirely different. However, a company can hardly complain, if they choose to incorporate in such a place, that claimants take them at their word and sue them in their chosen corporate home.

In England, the rule for individuals is still that general jurisdiction may be obtained by serving a writ (now called a ‘claim form’) on the defendant when he is present within the country, even if this is only on a fleeting visit.¹⁴ This is the traditional rule of the common law and it was carried from England to the United States when the latter country was settled from Britain. Again, the claim does not have to be related to the defendant’s activities within the jurisdiction. It thus confers general jurisdiction. For corporate defendants, the rule is very different from the present-day US rule. In addition to taking jurisdiction if the company is incorporated in England,¹⁵ the English courts can also take *general* jurisdiction if the company has a place of business in England. This is interpreted widely. In a case decided at the beginning of the twentieth

⁹ *ibid* art 63(1).

¹¹ *Burnham v Superior Court of California*, 495 US 604 (1990).

¹² *Daimler AG v Bauman*, 571 US 117, 137 (2014).

¹⁴ *Colt Industries Inc v Sarlie* (No 1) [1966] 1 WLR 440 (CA).

¹⁵ Companies Act 2006, section 1139(1).

¹⁰ *ibid* art 63(2).

¹³ *ibid*.

century, a trade stand at a cycle show, occupied by a German company for nine days, was held to be sufficient.¹⁶ In this case, the trade stand was manned by employees of the company; however, if a foreign company does business in England through an independent agent, that can also confer general jurisdiction,¹⁷ though in this case there are further requirements mainly concerning the extent of the agent's authority.¹⁸

It will perhaps be noticed that the English-law concept of a place of business comes very close to the EU-law concept of a 'branch, agency or other establishment' in Article 7(5) of Brussels I (2012). The crucial difference, however, is that in EU law this confers only *special* jurisdiction: it applies only as regards 'a dispute arising out of the operations' of the branch, agency or other establishment. In English law, on the other hand, it confers general jurisdiction.

III. SPECIAL JURISDICTION

Special jurisdiction is jurisdiction to hear a particular kind of claim. It depends (at least in part) on a connection between the facts of the claim and the territory of the forum. In the EU and in England, it depends *solely* on such links: as long as the claim is connected with the territory of the forum, it does not matter if the defendant had no connection at all with that territory.

In the United States, on the other hand, the defendant must always have a connection with the state of the forum. In *International Shoe Co v Washington*,¹⁹ the US Supreme Court said that a court's jurisdiction depends on the defendant's having such contacts with the forum state that the maintenance of the suit is reasonable, in the context of the US federal system of government, and does not offend traditional notions of fair play and substantial justice.²⁰ The defendant's connections with the forum state must exist even in the case of specific jurisdiction: the defendant must perform some act by which he purposefully avails himself of the privilege of conducting activities within the forum state.²¹ In addition, the plaintiff's claims must arise out of or relate to the defendant's contacts with the forum.²²

A. Claims in Tort

The differences between these approaches may be illustrated by some examples drawn from the field of tort. The rule for special jurisdiction in tort under EU law is set out in Article 7(2) of Brussels I (2012). This gives jurisdiction, in matters relating to tort, delict or quasi-delict, to the courts for the 'place where the

¹⁶ *Dunlop Pneumatic Tyre Co Ltd v AG Cudell & Co* [1902] 1 KB 342 (CA).

¹⁷ *Saccharin Corporation v Chemische Fabrik von Heyden* [1911] 2 KB 516 (CA).

¹⁸ *Adams v Cape Industries* [1990] 2 WLR 657 (CA). ¹⁹ 326 US 310 (1945).

²⁰ *ibid* 316–17. ²¹ *Hanson v Denckla*, 357 US 235, 253 (1958).

²² *Helicopteros Nacionales de Colombia v Hall*, 466 US 408, 414 (1984).

harmful event occurred or may occur'. In *Bier v Mines de Potasse d'Alsace*,²³ the CJEU interpreted this as covering both the place where the damage occurred and the place of the event which gives rise to and is at the origin of that damage.²⁴ However, in the subsequent case of *Dumez v Hessische Landesbank*,²⁵ the CJEU held that this applies only to harm directly suffered as a result of the wrongful act. Consequential, indirect harm does not count. This means, for example, that if a person is injured in an accident in Member State X and he returns to his home in Member State Y and undergoes medical treatment there and suffers pain, he cannot sue under Article 7(2) in Member State Y. The harm he suffered there was only indirect.

The way this works out in products-liability cases is instructive. In *Kainz v Pantherwerke*,²⁶ a German bicycle manufacturer marketed its products in Austria. Kainz, an Austrian, bought one of its bicycles in Austria. While riding it in Germany, he had an accident which, he claimed, was due to a defect in the bicycle. Could he sue the manufacturer in Austria? The damage had occurred in Germany, but what about the event giving rise to the damage? Kainz said that this was in Austria, where he had purchased the bicycle. The CJEU rejected this: it held that the event giving rise to the damage in a products-liability claim is the place where the product in question was manufactured. This was Germany; so he could not sue in Austria. This seems unreasonable: if a manufacturer chooses to market its product in a particular country, it seems reasonable that it should be subject to the jurisdiction of the courts in that country for harm caused by a defect in the product, at least if the item in question was purchased there. In the United States, the manufacturer could be sued there.

It is also interesting to consider what would have happened if Kainz had taken the bicycle to another Member State and the accident had occurred there. In such a case, the courts of that country would have had jurisdiction on the ground that that was the place where the damage occurred, even if the manufacturer had never marketed any of its products there. Again, this would be different in the United States.

In England, the rule for special jurisdiction in tort is the same as in the EU.²⁷ It gives jurisdiction to the English courts where the claim is made in tort and where (a) damage was sustained, or will be sustained, within the jurisdiction; or (b) damage has been or will be sustained which results from an act committed, or likely to be committed, within the jurisdiction. However, it has been interpreted more widely: indirect damage is also covered. In litigation arising from the tragic death of Sir Ian Brownlie, the UK Supreme Court held that his widow might bring proceedings in England against the hotel from which an excursion was booked and during which the accident resulting in loss of

²³ Case 21/76 [1976] ECR 1735. ²⁴ *ibid* para 25. ²⁵ Case C-220/88 [1990] ECR I-49.

²⁶ Case C-45/13, EU:C:2014:7.

²⁷ Civil Procedure Rules, Rule 6.36, with Practice Direction 6B, Rule 3.1(9).

life occurred, if she had suffered indirect loss in England upon her return there.²⁸ In the United States, that would never be possible unless the defendant had in some way targeted the state of the forum, perhaps by advertising there. The Americans are surely right that a person should not be subject to the jurisdiction of a foreign court simply and solely because of the act of another person. Yet this occurs if a victim of an accident in State X can confer jurisdiction on the courts of State Y by going there after the accident and undergoing medical treatment there.

In the United States, the law has developed through a number of cases. The first is *World-Wide Volkswagen Corporation v Woodson*.²⁹ This concerned an Audi car bought by the plaintiffs from Seaway, a car dealer in New York. Subsequently, the plaintiffs left New York to start a new life in Arizona. While they were passing through Oklahoma, the Audi was struck in the rear by another car. The result was a fire, which severely burned some of the family. The plaintiffs brought a products-liability action in a state court in Oklahoma, claiming that the fire was caused by the defective design of the fuel tank. The defendants were the German manufacturer of the car (Audi), the importer into the United States (Volkswagen of America), the regional distributor (World-Wide Volkswagen) and the retail dealer (Seaway). The manufacturer and the importer did not challenge the jurisdiction of the Oklahoma courts. They were marketing their product in the whole of the United States; so they could not complain if they were sued in Oklahoma.

World-Wide Volkswagen, on the other hand, did challenge the jurisdiction, as did Seaway. World-Wide was a separate company, not owned by Audi or by Volkswagen of America. It was incorporated in New York and distributed Volkswagen products to dealers in New York, New Jersey and Connecticut. Seaway, also an independent company, was one of those dealers. There was no evidence that either World-Wide Volkswagen or Seaway had any contacts with Oklahoma, or that any car they had sold—except the plaintiffs' vehicle—had ever gone there. The US Supreme Court held that the Oklahoma courts had no jurisdiction over either World-Wide or Seaway. In the course of its judgment, the court said:

Thus, the Due Process Clause 'does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations.' [*International Shoe*]. Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an

²⁸ *FS Cairo (Nile Plaza) LLC v Brownlie* [2021] UKSC 45. This judgment reaffirms the previous decision of the Supreme Court in *Four Seasons Holdings Inc v Brownlie* [2017] UKSC 80; [2018] 1 WLR 192. The earlier decision (on the same claim) was *obiter* because the claimant had sued the wrong defendant.

²⁹ 444 US 286 (1980).

instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment . . .

It was not enough, the court said, that it might have been foreseeable that the car sold to the plaintiffs might find its way to Oklahoma. To confer jurisdiction on the courts of Oklahoma, the defendant's conduct and connection with Oklahoma had to be such that he should reasonably anticipate being sued there. Since *World-Wide* and *Seaway* had no connections with Oklahoma, this requirement was not met. Under EU (and English) law, jurisdiction would exist.

The American theory that for the courts of a state to have jurisdiction over a defendant from another state (or a foreign country) the defendant must perform some act by which he purposefully avails himself of the privilege of conducting activities within the forum state is excellent as a starting point, but its application in practice needs clarification. The lack of clear rules has caused problems. For example, if *Asahi*, a Japanese manufacturer, sells some valves to *Cheng Shin*, a Taiwanese company, for insertion into the latter's motorcycle tyres, and the tyres are then fitted to motorcycles made by *Honda*, another Japanese company, is *Asahi* subject to the jurisdiction of the courts of California if one of the motorcycles is involved in an accident in California due to a defect in the valve?

This was the issue in *Asahi Metal Industry v Superior Court of California*,³⁰ decided by the US Supreme Court in 1987. It was assumed that *Asahi* knew that some of its valves would find their way to California, but it carried on no activities in that state. It had no offices, property or agents in California, made no direct sales there and did not control the distribution system in California. All it did was to put its valves into the stream of commerce, knowing that some would end up in California. The US Supreme Court was badly split on this issue and no clear answer emerged from the decision.³¹ Four judges said that it would be sufficient for the defendant to put its products into the stream of commerce knowing that some would end up in California; another four said that more was needed. The ninth took an intermediate position.

In *McIntyre Machinery v Nicastro*,³² a British company marketed its product, a scrap-metal-recycling machine, in the United States through an independent

³⁰ 480 US 102 (1987).

³¹ The actual ruling (against jurisdiction) was based on the particular facts of the case. The original plaintiff, Gary Zurcher, was the person riding the motorcycle. He was injured in the accident and his wife (riding behind him) was killed. His complaint named, *inter alia*, *Cheng Shin*. *Cheng Shin* filed a cross-complaint seeking indemnification from its co-defendants and from *Asahi*. Zurcher's claims against *Cheng Shin* and the other defendants were eventually settled and dismissed, leaving only *Cheng Shin*'s indemnity action against *Asahi*. The US Supreme Court held that, since none of the remaining parties was a Californian and *Cheng Shin* could sue *Asahi* in Taiwan or Japan, the interests of *Cheng Shin* and of California in the exercise of jurisdiction over *Asahi* would be slight, and would be insufficient to justify the heavy burdens placed on *Asahi* to defend itself in a foreign court. However, the court went on to consider what the position would have been if Zurcher had still been a party. It was on this issue that they were split.

³² 564 US 873 (2011).

agent. It did not specifically target the state of New Jersey; nevertheless, one of its machines found its way there and caused injury to the person operating it. Did the courts of New Jersey have jurisdiction in the victim's action against the British company? The latter had attended conventions in the United States (but never in New Jersey); it held US patents for its recycling technology; its US distributor structured its advertising and sales efforts in accordance with its direction and guidance wherever possible; however, no more than four of its machines—perhaps only the one which caused the accident—had ended up in New Jersey.

Again the US Supreme Court was badly split, partly over the issue whether, in an international case, one should look only at the defendant's contacts with the state in question or whether one can consider the United States as one unit, and partly over the extent of the contacts needed. Of the nine judges on the court, four were clearly against jurisdiction, four were in favour of jurisdiction, and one came out against jurisdiction on limited and special grounds. Whatever one may think of the decision in *Asahi*, it is hard to accept that the victim in *Nicastro* could not sue the manufacturer in New Jersey. To require him to go to Britain to bring his claim would have been too burdensome. Under EU law or English law, his right to sue in the place of the injury would have been unquestioned.

Another question is the relationship between the claim and the defendant's activities in the state of the forum. It is not enough that the defendant has contacts with the forum state; the claim must also 'arise out of or relate' to those contacts. What does this mean in practice?

Two cases are important on this issue. The first is *Bristol-Myers Squibb Company v Superior Court of California, San Francisco County*.³³ Bristol-Myers Squibb ('BMS') was a US pharmaceutical company incorporated in Delaware with its headquarters in New York. It maintained substantial operations in both New York and New Jersey. The case concerned one of its products, a drug called Plavix. Some people who used Plavix claimed that it damaged their health. A group of plaintiffs—consisting of 86 California residents and 592 residents from 33 other states—began proceedings against BMS in a state court in California. BMS did not challenge the jurisdiction of the California courts with regard to the claims of the California residents, but it did challenge it with regard to the claims of the non-residents. The question, therefore, was whether the California courts had jurisdiction over BMS, a company not domiciled in California, with regard to the claims of plaintiffs who were not resident in California. The non-resident plaintiffs did not allege that they had obtained Plavix from a California source, that they were injured by Plavix in California, or that they were treated for their injuries in California. BMS had quite extensive contacts with California—for

³³ 582 US ___ (2017).

example, research facilities and sales representatives—but these were unrelated to the claim.

The California Supreme Court adopted a ‘sliding-scale approach’ under which the strength of the required connection between the forum and the specific claim at issue was relaxed if the defendant had extensive contacts with the forum, even if these were unrelated to the claim. On this basis, it held that jurisdiction existed with regard to the claims of the non-residents. The US Supreme Court rejected this approach, which it called ‘a loose and spurious form of general jurisdiction’. It held that the courts of California had no jurisdiction over the claims of the non-resident plaintiffs.³⁴ It also said that the mere fact that other plaintiffs were prescribed, obtained, and ingested Plavix in California did not allow the state to assert specific jurisdiction over the non-residents’ claims. This result seems unfortunate. Since the issue in all the claims must have been the same—whether Plavix was harmful—it is unreasonable that it should have to be re-litigated in every state in which potential victims resided.

How would the case have been decided in Europe? The EU rule in Article 8 (1) of the Brussels Regulation (2012) (discussed below) would not have helped, because this applies only if there are multiple *defendants*, not multiple plaintiffs.³⁵ Since BMS was not domiciled in California, there would be no question of general jurisdiction. The only relevant provision would be Article 7(2) of Brussels I. This would give jurisdiction to the California courts in the case of plaintiffs who suffered harm there, but this is the same as the result under the ruling of the US Supreme Court. As we saw in the discussion of *Kainz v Pantherwerke*,³⁶ the other prong of Article 7(2)—the place of the event which gave rise to the damage—has been interpreted by the CJEU as giving jurisdiction in a products-liability action to the courts of the place where the product was manufactured. Since the product was not manufactured in California, this would not help. So it seems that the result would have been the same.

The *Bristol-Myers Squibb* case may be contrasted with a later products-liability case, *Ford Motor Co v Montana Eighth Judicial District Court*.³⁷ Ford, the well-known US car company, was incorporated in Delaware and had its headquarters in Michigan. It did substantial business in Montana, the state where the action was brought—among other things, advertising, selling, and servicing the model of vehicle which was claimed to be defective. The accident happened in Montana and the victim was a resident of Montana. However, though Ford sold the same model car in Montana, the particular car in question had been sold by Ford in another state to another purchaser.

³⁴ Justice Sotomayor dissented.

³⁵ The same applies with regard to the equivalent rule in England, Practice Direction 6B, Rule 3.1 (3), discussed below.

³⁶ Case C-45/13, EU:C:2014:7.

³⁷ 592 US ___ (2021).

The victim had subsequently bought it on the second-hand market. Ford admitted that it had substantial contacts with Montana but said that the accident did not arise out of or relate to those contacts. It argued that there must be a causal relationship between its contacts with Montana and the accident. It said that this would have been the case only if the car in question had been either designed or manufactured in Montana or sold to the plaintiff there. Since the car was neither designed nor manufactured there, and had not been sold to the plaintiff there, Ford claimed that the courts of Montana had no jurisdiction.

The US Supreme Court rejected this. It held that there are two alternatives: *either* the damage must arise out of the contacts—a causal test—*or* it must relate to them. This latter test is not causal. It was satisfied because, in addition to Ford's substantial contacts with Montana, the plaintiff was resident there and the accident occurred there. The difference between this case and the *Bristol-Myers Squibb* case is that in the latter case the plaintiffs were not resident in the state of the forum and they had not suffered injury there. This shows that, even in the United States, the place of the injury can be relevant. If the case had occurred in Europe, there would of course have been no problem: jurisdiction would clearly exist.

B. Multiparty Cases

In both the European Union and in England—but not in the United States—the rules concerning multi-party cases have an important effect on the way these jurisdictional rules apply in practice. In the EU, Article 8(1) of Brussels I (2012) provides:

A person domiciled in a Member State may also be sued ... where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

This means that, if one co-defendant (the 'anchor defendant') is sued in the courts of his domicile, those courts automatically gain jurisdiction over all the other defendants, provided that the claims against each of them are sufficiently closely connected, even if those other defendants have no connections *at all* with the forum.

Consider the following hypothetical situation. X, Y and Z are all domiciled in Germany, where Y and Z jointly commit a tort against X. After the tort is committed, Y becomes domiciled in Spain. It would seem that X could sue Z as well as Y in Spain. This is unfair to Z.

In England, the rule is similar, except that the anchor defendant does not have to be sued in the courts of his domicile. If the English courts have jurisdiction over the anchor defendant *on any ground*, the other defendants can be brought in

as necessary or proper parties. This follows from the Civil Procedure Rules and Practice Direction 6B, Rule 3.1(3), which permits a claimant to serve a claim form on the defendant out of the jurisdiction (with the permission of the court) where:

- (3) A claim is made against a person ('the defendant') on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and –
 - (a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and
 - (b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim.

Service of the claim form on the 'other person' gives the court jurisdiction over him.

In the United States, the position is different. The constitutional test must be applied separately and independently to *each* defendant. In the *World-Wide Volkswagen* case,³⁸ for example, the fact that the courts of Oklahoma undoubtedly had jurisdiction over two of the defendants (Audi and Volkswagen of America) did not mean that they also had jurisdiction over World-Wide and Seaway.

C. Forum Non Conveniens

It is often said by English lawyers that these problems do not matter very much because everything can be put right through the doctrine of *forum non conveniens*. However, *forum non conveniens* is no substitute for sound rules of jurisdiction. The principle on which it is based is that hard-and-fast rules should be avoided: all relevant circumstances must be taken into account and the court should do what justice requires. This is an admirable sentiment, but it has practical drawbacks. Because everything depends on the discretion of the court, the defendant cannot be certain in advance what the outcome will be. If he is served with a claim form, he has to appear before the English court and put his case, if necessary appealing to higher courts. Since London is—with the possible exception of New York—the most expensive venue in the world for litigation, he may not be able to afford to do this. Imagine a professional driver in Egypt, someone who drives tourists to see the pyramids, being sued in England after an accident in Egypt: how could he defend the claim by briefing counsel in England? Even a small, family-run hotel might be unable to do this. It might be argued that such defendants do not need to defend because the resulting default judgment would not be enforced in Egypt. This may be true, but it is a poor excuse for defective

³⁸ Discussed above.

rules of jurisdiction to rely on the fact that the judgment will not be enforced in other countries.

IV. UNILATERAL AND MULTILATERAL RULES OF JURISDICTION

In general, there is no doubt that, in the kind of cases we have been considering, the jurisdiction claimed by the English courts is more far-reaching than that permitted in either the European Union or the United States. However, it must be remembered that, in the case of the European Union, we have been considering only intra-EU cases—cases in which the defendant is domiciled in another Member State. The jurisdictional rules applicable in these cases (contained in the Brussels Regulation) are rules laid down by the legislature of *all* the Member States—the Parliament and Council of the European Union. Moreover, it is interpreted by the CJEU, which is the court of *all* the Member States. Thus, when an institution of the EU considers a rule of jurisdiction in the Regulation, its members know that the rule applies just as much to give jurisdiction *over* a defendant from a Member State as to confer jurisdiction *on* the courts of a Member State. If the CJEU has to decide whether a German is subject to the jurisdiction of the French courts, the CJEU would be just as much a German court as a French one. So the EU institutions have just as much an interest in safeguarding the rights of the defendant as in promoting those of the claimant.

In the case of the United States, we have been considering both interstate and international cases; however, the rules were framed initially in the interstate context and only subsequently applied internationally. The US Constitution applies equally to *all* states and to citizens of *all* states. When the Supreme Court interprets it in a case involving the jurisdiction of the states, it is just as much concerned with protecting the rights of a defendant being sued in the courts of another state as in protecting the rights of the plaintiff to bring the case. If the US Supreme Court has to decide whether a company incorporated in Delaware can be sued in Montana, it would regard itself as just as much a Delaware court as a Montana court.

In the case of the UK, on the other hand, the traditional rules of the common law, and subsequently the legislative rules supplementing them, have been framed in the international context. In this context, the bodies that made the rules, and the courts which interpret them, do not have any reason to concern themselves with the rights of defendants from outside the United Kingdom. In intra-UK cases, on the other hand, the relevant rules are laid down in a statute adopted by the UK Parliament,³⁹ a body that represents Scotland and Northern Ireland as well as England. They are interpreted, in the last instance, by the UK Supreme Court, a court of the whole United Kingdom. It is hardly surprising, therefore, that the present-day rules of jurisdiction in intra-

³⁹ The Civil Jurisdiction and Judgments Act 1982, Schedule 4.

UK cases are much more restrictive than those applied internationally. If we were to compare these rules with those laid down in the Brussels Regulation, we would find that they were very similar. This is hardly surprising since they were modelled on them.

The conclusion that one can draw from all this is that there is an important difference between a set of unilateral rules—rules that simply determine the jurisdiction of the courts of one country—and multilateral rules—rules that determine the jurisdiction of the courts of a whole group of countries. This is especially true if, as is the case in the EU⁴⁰ and the US,⁴¹ the multilateral rules also require judgments to be recognised and enforced within the group in question. Exorbitant rules of jurisdiction are often to be found in sets of unilateral rules, but rarely in sets of multilateral rules. The reason for this is obvious.

In view of this, it might be more appropriate to compare the English rules of international jurisdiction with the rules in force in the individual Member States of the EU, rules which do not apply when the defendant is domiciled in another Member State. If we do this, we will see that some Member States have rules of jurisdiction that are even more exorbitant than those in force in England. Article 14 of the French Civil Code is an example. This permits a French court to take jurisdiction over a defendant whenever the *claimant* is a French citizen.⁴² Similar rules are found in some other Member States. In view of this, it is even more remarkable that the constitutional restrictions imposed by the US Supreme Court apply to *all* defendants, even those domiciled in (or citizens of) a foreign State.

V. CONCLUSIONS

As regards England, the extensive reach of the English rules of international jurisdiction can be explained by their unilateral nature. However, it should be said that the rules of some other countries—for example, those applied in France when EU law is not applicable—are just as wide or even wider.

Turning to the other two systems, we can see that there is a significant difference of approach between US and EU law. There can be little doubt that the theoretical underpinning of the US system is more developed than that of the

⁴⁰ Brussels I (2012), Chapter III.

⁴¹ The Full Faith and Credit Clause of the Constitution (art IV, section 1).

⁴² The actual text of Article 14 appears to be limited to contracts. It reads: '*L'étranger, même non résident en France, pourra être cité devant les tribunaux français, pour l'exécution des obligations par lui contractées en France avec un Français; il pourra être traduit devant les tribunaux de France pour les obligations par lui contractées en pays étranger envers des Français.*' (A foreigner, even if not resident in France, may be sued before the French courts for the performance of obligations contracted by him in France with a French citizen; he may be sued in the courts of France for obligations contracted by him in a foreign country with regard to French citizens.) However, it has been interpreted by the French courts to cover almost all claims. Actions concerning foreign land are one of the few exceptions.

EU. The basic principle of the US system is that a person should not be subject to a state's jurisdiction (either general or specific) unless he has done some purposeful act by which he might reasonably be regarded as submitting himself to that possibility. This is a sound principle and the US Supreme Court has gone to considerable lengths to uphold it. Other notable features of the US system are that the constitutional restrictions on jurisdiction apply to protect *all* defendants, not just to those domiciled in another state; and that the protection given to defendants is not watered down in multi-party cases. There is much to admire in all this. However, the fact that temporary presence plus service of a writ can give the courts of the state in question *general* jurisdiction over a defendant is a defect. Moreover, more needs to be done to clarify exactly what constitutes purposeful availing in cases of specific jurisdiction.

It might be wondered why there is so much criticism of the American system by lawyers in Europe. The reason, it is suggested, is not that American rules of jurisdiction are excessively wide, but rather that the advantages enjoyed by plaintiffs under American civil procedure are so much greater than those in Europe. Compared to Europe, the US can be regarded as a plaintiff's paradise, especially in wrongful-death and personal-injury cases. As Lord Denning famously said, 'As a moth is drawn to the light, so is a litigant drawn to the United States.'⁴³ Although it may not be so easy to get your case into the United States, if you can do so, there are great advantages for plaintiffs.

The first advantage is the American system of contingency fees.⁴⁴ Someone who has suffered injury in a tort case, for example, can—if he has a strong case and stands to obtain significant damages—obtain the services of a first-class attorney even if he has no funds.⁴⁵ The second advantage is that the American system of pre-trial discovery, which is much more extensive than that in England or Europe, can make it much easier to obtain evidence. This is especially useful in products-liability cases. Thirdly, the fact that jury trials apply in civil cases can lead to much higher damages, particularly in personal-injury cases. For these reasons, plaintiffs in international cases will do all they can to get their case into an American court. Defendants, on the other hand, will fight tooth and nail to prevent this.

As regards the European Union, the basic principles on which the Brussels I Regulation (2012) is founded are, to some extent, set out in the Preamble. Thus, we are told that the rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile.⁴⁶ Predictability is enhanced by having written rules of

⁴³ *Smith Kline & French v Bloch* [1983] 2 All ER 72, 74 (CA).

⁴⁴ Under this, the attorney's fee will be a percentage of the damages awarded. If no damages are awarded, the attorney gets nothing.

⁴⁵ If he loses, the plaintiff will not normally have to pay the attorney fees of the other side. In the US, an award of 'costs' normally covers only court fees.

⁴⁶ Recital 15.

jurisdiction in the Regulation and by the fact that the CJEU generally interprets them according to what they appear to mean. Domicile is, as we have seen, the basis for general jurisdiction.

It is further stated, in Recital 16:

In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close connection between the court and the action or in order to facilitate the sound administration of justice. The existence of a close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen

This acknowledges the principle of a connection between the facts of the case and the forum, though it recognises an alternative, that of facilitating the sound administration of justice. This alternative may perhaps be regarded as referring to the rules in multi-party cases.

Finally, Recital 16 also emphasises the importance of legal certainty and states that it is desirable to avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen. As we have seen, in practice there can be situations in which this does in fact happen. All in all, it is probably fair to say that the EU does less to protect the defendant from the unfair assertion of jurisdiction than the United States, but it could also be said that the EU rules are clearer and give the parties greater certainty.