

## OPTIMAL RULE-SELECTION PRINCIPLES IN ANGLO-AMERICAN CONTRACTUAL JURISDICTION

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### I. INTRODUCTION

Dyspeptic individuals and corporate entities are frequently engaged in multistate litigation as a concomitant of the growing body of activity at an international and interstate level. Litigants, like moths to a flame, are increasingly drawn towards the adventitious benefits of suit before a U.S. Court, and have sought to invoke jurisdiction over non-forum residents. As a consequence the court system has striven manfully, but arguably in vain, to propagate effective substantive principles, which are distilled casuistically in a commercial arena to identify sufficient nexus between a forum state and defendant, satisfying the constitutional standards of due process.<sup>1</sup> A legitimate blue litmus paper template for this important venue resolution conundrum has been difficult to achieve. Interpretative problems are evident in the assimilation of relevant methodological principles. In this context it is substantive principles relating to personal jurisdiction that operate as the fulcrum for a court entering a binding judgment against an impacted party.<sup>2</sup> A defendant will be haled before an alien court to defend an action as a consequence of state level empowerment, through adoption of long-arm statutes. It is vital, however, that the seized court's exercise of jurisdiction comports with the due process clause of the Fourteenth Amendment to

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<sup>1</sup> See U.S. CONST. art. 1, § 10; *Lakeside Bridge & Steel Co. v. Mountain State Constr. Co.*, 445 U.S. 907, 910-11 (1980) (White & Powell, JJ., dissenting), *denying cert. to* 597 F.2d 596 (7th Cir. 1979). It is significant that the "certainty of result" discussed by Justice White has assumed heightened awareness. *Id.* at 910-11. By way of illustration consider the U.S. Constitution which aims to protect the settled expectations that arise out of contractual relationships by prohibiting any "[state] law impairing the [o]bligation of [c]ontracts...."; U.S. CONST. art. 1, § 10; see also 2 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 456-57 (Foundation Press 2000) (1978). The concomitant is that certainty of contractual result ought, as Justice White identifies, enjoy primordial importance and deleterious precedents on jurisdictional venue resolution derived from ad-hoc or solipsistic intuition should be anathema to beneficial aims and objectives. *Id.*

<sup>2</sup> LEA BRILMAYER, *CONFLICT OF LAWS* 267 n.2 (2d ed. 1995) ("Personal jurisdiction is used here as a contrast to legislative jurisdiction (choice of law) or subject matter jurisdiction. Sometimes the term is used, instead, as a contrast to adjudicative jurisdiction based on the presence of property (in rem jurisdiction)....").

the Constitution, and is efficaciously decided.<sup>3</sup> Jurisdictional propriety must be satisfied, and must not only be achieved, but also transparently viewed as such. An unavoidable consequence of this is that, for well over a century, relevant principles have been solipsistically distilled through the almost exclusive judicial aegis of the Supreme Court.<sup>4</sup> An erratic course has been circumnavigated, and on many occasions the Court's opinions seem more the product of under-attention to practical consequences than to "over-attention to grand theory."<sup>5</sup>

By way of contrast, the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968,<sup>6</sup> which has become supererogatory in regulating jurisdiction and enforcement of judgments among member states of the European Union, is essentially predicated on practical grounds; after a period of contemplation and reflection it has undergone careful reinterpretation with the revisionist new regulation.<sup>7</sup> The effect was that a pragmatic governing document was successfully promulgated, written on a "clean slate", and based predominantly by article 2 on the maxim *actor sequitur forum rei*, by which the law leans in favour of the defendant. The concept of domicile is a key central element to the ascription of jurisdiction under the Brussels Convention. Pursuant to article 2, persons domiciled in a contracting state must,

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<sup>3</sup> U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law....").

<sup>4</sup> See Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again*, 24 U.C. DAVIS L. REV. 19, 87-101 (1990). See generally Friedrich Juenger, *Judicial Jurisdiction in the United States and in the European Communities: A Comparison*, 82 MICH. L. REV. 1195 (1984); David S. Welkowitz, *Going to the Limits of Due Process: Myth, Mystery and Meaning*, 28 DUQ. L. REV. 233 (1990) (noting that most state long arm statutes either expressly incorporate the constitutional limits or have been interpreted in this manner).

<sup>5</sup> See generally Patrick J. Borchers, *Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform*, 40 AM. J. COMP. L. 121 (1992); Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 8 SUP. CT. REV. 331 (1996).

<sup>6</sup> European Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Brussels, Sept. 27, 1968, 1968 J.O. (C 27)1, updated Jan. 26, 1998 (consolidated and updated version of the 1968 Convention and the Protocol of 1971, following the 1996 accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden) [hereinafter Brussels Convention]. On May 1, 1999, the Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts became effective for the European Union Member States, and competence for co-ordination of internal rules on jurisdiction and recognition of judgments now lies with the Community institutions. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1 [hereinafter Treaty of Amsterdam].

<sup>7</sup> Juenger, *supra* note 4, at 1195 ("[W]e should not overlook the fact that the Communities present the most impressive experiment in supranationalism the world has seen."). The genesis and nature of the Regulation are discussed in note 203, *infra*.

in general, be sued in the courts of that State, regardless of their nationality.<sup>8</sup> By adopting the domicile of the defendant as a connecting factor, the Committee of Experts widened the scope of the Convention by extending the rules of jurisdiction to all persons whatever their nationality domiciled within the European Union.<sup>9</sup>

A vital feature of the Brussels Convention (now Regulation) is the drawing of a particularistic bright-line test of domicile, which is the central tenet of the impacted jurisdictional scheme. The template inculcates policy desiderata of legal certainty, harmonisation, and functionality. The question of whether a person is domiciled in the United Kingdom, for the purposes of the Brussels Convention, is to be determined in accordance with the Civil Jurisdiction and Judgments Order 2001.<sup>10</sup> He is so domiciled if and only if “(a) he is resident in the U.K. and (b) the nature and circumstances of his residence indicate that he has a substantial connection with the U.K.”

The second requirement above is rebuttably presumed to be satisfied if that person has been resident in the UK for the last three months or more. The requirement of substantial connection appears to be understood in terms of duration of the residence, and therefore need not be more than minimal, provided that the individual is effectively resident in the U.K. A person will be regarded as resident in a particular part of the UK if that place is his settled or usual place of abode.<sup>11</sup>

The basic approach of the new Brussels Regulation, effective from March 1, 2002, is not radical. No definition of domicile of individuals is provided, so that this remains a matter for each member state to apply to determine whether the defendant is domiciled in that state. However, article 60(1) introduces a new autonomous definition of the domicile of corporations. It provides that a company or other legal person or association of natural or legal persons is domiciled at the place where it has its (a) statutory seat; or (b) central administration, or (c)

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<sup>8</sup> See generally C.M.V. CLARKSON & JONATHON HILL, *THE CONFLICT OF LAWS* 52-96 (3d ed. 2006).

<sup>9</sup> See PETER KAYE, *CIVIL JURISDICTION AND ENFORCEMENT OF FOREIGN JUDGMENTS* 254 (1987).

<sup>10</sup> See Statutory Instrument 2001 No. 3929, *The Civil Jurisdiction and Judgments Order 2001*, available at <http://www.opsi.gov.uk/SI/si2001/20013929.htm> (noting that if domiciled in the United Kingdom consider section 1, para. 9(2) & (6), and if domiciled in England consider section 1, para. 9(5)).

<sup>11</sup> See generally *Bank of Dubai Ltd. v. Abbas* [1997] 2001 A.C. 308.

principal place of business.<sup>12</sup> The statutory seat means, for the purpose of the UK and Ireland, the registered office, or where there is no such office, the place of incorporation, or the place under the law of which the formation took place. This has replaced the UK's definition of corporate domicile contained in section 42, Civil Jurisdiction and Judgments Act 1982, but does not appear significantly to affect the substantive criteria. The concept of domicile as a jurisdictional touchstone, both for individuals and corporation, lies at the heart of the apparent success of the European approach.

In Lando's view, the general rule of *actor sequitur forum rei* draws its rationale from the presupposition that the defendant, as the party being pursued by the claimant, should be able to fight on "home ground" where she can most easily conduct her defense.<sup>13</sup> This maxim is particularly important in the international sphere, notably where, for example, a person receives a claim form to appear in the courts of a foreign country, but has no knowledge of the foreign system of law involved or the foreign language. Evidently, that person must either go to a great deal of trouble and expense to defend herself, or run the risk of incurring an unfair judgment in default. Hence the primary basis of jurisdiction must be the norm and should only be derogated from in limited situations.<sup>14</sup> The practical nature, however, of the Brussels Regulation allows for explicit jurisdictional preferences to be given to consumers and insurance policyholders in the contractual jurisdiction scenario, on the premise that these groups are weaker from a socio-economic perspective, and consequently require special protection. The articulated concern here is that courts should be solicitous of their perceived

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<sup>12</sup> See generally King v. Crown Energy Trading A.G. [2003] EWHC (Comm) 163, 2003 Q.B. 489.

<sup>13</sup> Lando, "The Task of the Court of Justice and the System of the Brussels Convention" in Court of Justice of the European Communities (ed.), *Civil Jurisdiction and Judgments in Europe* (Butterworths, 1992) at 26-27.

<sup>14</sup> See generally PETER STONE, *THE CONFLICT OF LAWS* 129 (I. H. Dennis et. al. eds., 1995)

[T]he rationale for this preference for defendants over plaintiffs, a preference which has deep historical roots, goes beyond mere convenience in the conduct of litigation. Rather, it is linked with such general rules as that which places on the plaintiff the burden of proving his claim, and reflects a primordial legal assumption that complaints are presumptively unjustified, and that it is better, where the truth cannot be ascertained with reasonable certainty, that the courts should not intervene; that failure to rectify injustice is more tolerable than positive action imposing it. In the present context, this gives rise to a general rule that the plaintiff must establish his case to the satisfaction of the court in whose goodwill towards him the defendant would presumably have most confidence.

*Id.*

economic vulnerability. A feature of this article will be to explore the explicit deployment of these extant principles, operating as a cathartic panacea to some of the incumbent problems in the United States over effective contractual jurisdiction principles, which were revealed in the leading cases of *McGee v International Life Insurance Co.*<sup>15</sup> and *Burger King Corp. v Rudzewicz*,<sup>16</sup> that continue to dominate the landscape. The article considers policy desiderata that ought to govern the contractual jurisdiction arena in Anglo-American jurisprudence and charters proposals for a Universalist solution predicated on a mechanical bright-line test. The concluding section of the article propounds optimal reform derived from extrapolation of existing precedential authorities and “legislative” templates.

As Juenger has stated, whereas American state legislators have had to take into account somewhat vacillating and inconsistent Supreme Court pronouncement, the drafters of the Brussels Convention could obversely rely on their own best judgments.<sup>17</sup> The result is a more harmonised jurisdictional scheme that is more “functional and precise”.<sup>18</sup> Appropriate rules, subject to some exceptions, were explicitly created and moulded to deal with multi-party practice, and significantly to fashion cogent jurisdictional privileges within defined confines; these provisions although empathetically valid would presumptively have fallen foul of the Supreme Court’s constitutional safeguards for in personam jurisdiction.

The general structure in the United States evidences the development of personal jurisdiction principles as an issue of constitutional law.<sup>19</sup> This was not always the case as early on jurisdictional precepts were enunciated by the Supreme Court to be a matter of common law, identifiable from international law; it was not until the decision in *Pennoyer v Neff*<sup>20</sup> that transmogrification occurred of the Supreme Court’s role from indirect to direct regulator of jurisdiction.<sup>21</sup> In keeping with traditional English common law principles, it was possible for a court to be

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<sup>15</sup> *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220 (1957).

<sup>16</sup> *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

<sup>17</sup> Juenger, *supra* note 4, at 1207.

<sup>18</sup> *Id.*

<sup>19</sup> *See, e.g.*, *Burnham v. Superior Court*, 495 U.S. 604 (1990).

<sup>20</sup> 95 U.S. 714 (1877) (detailing an ejectment action regarding the ownership of a parcel of land in which a default judgment was entered as a result of failure to serve notice effectively).

<sup>21</sup> A significant aspect of the decision in *Pennoyer v. Neff* was conjoined jurisdictional principles of the Fourteenth Amendment Due Process Clause that has become enshrined in historical lore in a

seized either through physical presence of a defendant within the territory, or through voluntary submission to court processes.<sup>22</sup> In similar vein, the execution of a judgment could be effected through appurtenant seizure of property or person.<sup>23</sup> It was from this predicate that American courts developed a territorial approach to jurisdiction, which recognised jurisdiction only if the defendant received service of process within the geographic territory of the court<sup>24</sup> or if he consented to the exercise of jurisdiction.<sup>25</sup> The ascription of jurisdiction, following historical lore from England, embodied a traditional prerogative type perspective: as Juenger has cogently stated, “jurisdiction could only be acquired by a symbolic exercise of sovereignty: personal service of process within the state to proceed in personam and the attachment of local assets for actions quasi in rem”.<sup>26</sup>

It became apparent, however, during the early decades of the twentieth century, that the *Pennoyer* test suffered defects in its failure to provide a forum for meritorious actions where neither the individual defendant nor identifiable property could be found within the state. It was a doctrine that was both over- and under-inclusive in allowing the fortuitous location of individual or property to

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similar manner to a service of a writ in English law, which is exercisable through sovereign authority.

<sup>22</sup> See *McDonald v. Mabee*, 243 U.S. 90 (1917); *Michigan Trust Co. v. Ferry*, 228 U.S. 346 (1913); see generally E. Merrick Dodd, Jr., *Jurisdiction in Personal Actions*, 23 ILL. L. REV. 427 (1929); Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The “Power” Myth and Forum Conveniens*, 65 Yale L.J. 289 (1956).

<sup>23</sup> A dissection of the judgment in *Burnham* identified support for transient jurisdiction for dissonant reasons. 495 U.S. 604 (1990). The nub of the plurality opinion, relying explicitly upon tradition, obviated the requirement for any independent fairness test in the context of transient jurisdiction. *Id.* at 638-39. In addition, Justice Brennan, stated that the invocation of the forum by the defendant on a previous occasion led the concurrence to contend that as adventitious benefits of visiting or doing business there were prevalent, consequently it would not be inequitable or vexatious to require him to revert back for litigious purposes. *Id.* (Brennan, J., concurring).

<sup>24</sup> See *Milliken v. Meyer*, 311 U.S. 457, 462 (1940). The Supreme Court expanded this territorial scope beyond mere presence, holding that, “[d]omicile in the state is alone sufficient to bring an absent defendant within the reach of the state’s jurisdiction for purposes of a personal judgment...” *Id.*

<sup>25</sup> Juenger, *supra* note 4, at 1197.

*Pennoyer* prompted process servers to hound hapless travellers, if need be in airplanes, and to lure defendants away from their home state to gain an unfair advantage. Similarly, by attaching assets in remote locations unscrupulous plaintiffs could put defendants to the choice of either litigating in an inconvenient forum or losing their property. Up to a point, the courts could curb the most egregious abuses of such tag jurisdiction by inventing antidotes, such as the *forum non-conveniens* doctrine and defenses premised on fraud principles. But it proved difficult to cope with the obverse defect of *Pennoyer*, i.e. its failure to provide a forum for meritorious causes where neither the defendant nor sufficient property could be found within the state.

*Id.*

govern.<sup>27</sup> Special hurdles were presented by corporate defendants. A fiction of “implied consent” developed whereby foreign corporations that failed to appoint local agents for service of process were determined to be amenable to jurisdiction via the “consent” and “presence” of such entities adduced from the very business they transacted in the impacted state.<sup>28</sup>

Against this indeterminate and convoluted background of personal jurisdiction doctrine and habitual practice, the Supreme Court set forth the modern requirement for in personam jurisdiction in *International Shoe Co v Washington*,<sup>29</sup> where although not explicitly overruling *Pennoyer*, the Court tacitly abrogated the territorial theory of jurisdiction and substituted it with a more open-textured regime derived from minimum contacts doctrine.<sup>30</sup> The Supreme Court determined that the existence of personal jurisdiction depended on whether the defendant had an appropriate connection with the state whose courts entertained the litigation. In essence, due process prohibits a court from depriving a litigant of his or her property unless the litigant has “minimum contacts” with the state

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<sup>26</sup> Juenger, *supra* note 4, at 1196. See also Borchers, *supra* note 5, at 124.

<sup>27</sup> See Freidrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 554-55 (1989); Freidrich K. Juenger, *Supreme Court Intervention in Jurisdiction and Choice of Law: A Dismal Prospect*, 14 U.C. DAVIS L. REV. 907, 908 (1981).

<sup>28</sup> See Philip B. Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts, From Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569, 584-85 (1958); see also *Saint Clair v. Cox*, 106 U.S. 350 (1882).

<sup>29</sup> *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945). The facts in this important case are well known. The State of Washington sued a Delaware corporation to obtain unpaid contributions from a state unemployment compensation fund. *Id.* at 312. Although the Delaware corporation sent salesmen within the territory of Washington to gain new business and solicit orders, it did not maintain any permanent residence or office space in the State of Washington. *Id.* at 313. If any orders were received they were commuted to another state, St. Louis, Missouri, where they were acted upon by the corporation subsequently, and any goods purchased by the sales mechanism would be shipped directly to Washington where the customers resided. *Id.* at 314.

<sup>30</sup> See *Hanson v. Denckla*, 357 U.S. 235 (1958). *Hanson* explained that before a state court can have in personam jurisdiction that “[t]here be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” *Id.* at 253. The decision in *Hanson* was on the slimmest of margins, with a five to four outcome. The salient facts involved establishment by the defendant domiciled in Pennsylvania of a trust fund, with specific nomination of a Delaware trust company as trustee. *Id.* at 239. Subsequent to the establishment of the trust fund, the defendant relocated to Florida where she spent the latter eight years of her life. *Id.* at 239. The Delaware trust company’s only contact with Florida was through its communication with the settlor of the trust. *Id.* at 251. Nineteen years later, the Supreme Court, in *Shaffer v. Heitner*, determined that the “minimum contacts” test was all-embracing because it covered both *in rem* and *in personam* jurisdiction. 433 U.S. 186, 207 (1979). The Supreme Court, subsequent to the hiatus, had the taste for this arena with *Kulko v. Superior Court*, 436 U.S. 84 (1978), impacting interstate child support disputes. For inculcated social policy and conciliatory divorce procedures it was asserted that personal jurisdiction was not necessarily invoked where an ex-spouse allowed child visitation rights to the other spouse in a different jurisdiction. *Id.* at 94.

sufficient to satisfy “traditional notions of fair play and substantial justice”.<sup>31</sup> By adoption of this test, arguably a wholly nebulous standard, the Supreme Court contended that the corporation had sufficient contacts with Washington to ensure comportation with jurisdictional touchstones.<sup>32</sup> The intrinsic difficulty was that the opaque language used in *International Shoe*, whilst patently expanding the scope of in personam jurisdiction, was so subject to particularistic judicial intuitionism, that no concrete parameters on the expansion were discernible.

There has been a palpable lack of clarity in distinguishing which “minimum contacts” suffice to arrogate in personam jurisdiction. Dilemmatic choices are implicated as to the constituents and sufficiency of any causative nexus between the litigants and the court of origin. It is self-evident that an appropriate connection must be identified, but less certain any positivistic template of relevant factors. As Brilmayer and others have identified, “there are three essentially different ways of looking at the due process problem, based on physical power, convenience, and sovereignty, respectively.”<sup>33</sup> Since *International Shoe*, the Supreme Court has decided a substantial number of cases attempting to explain the phrase “minimum contacts” and what constitutes “fair and reasonable” notice under the second limb of the test, but attendant difficulties still prevail over this amorphous legal terminology.

The Supreme Court in *World-Wide Volkswagen v. Woodson*<sup>34</sup> highlighted that principles attendant to minimum contacts theory serve two distinct, but inter-

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<sup>31</sup> *Int'l Shoe*, 326 U.S. at 316.

<sup>32</sup> *Id.* at 320.

<sup>33</sup> See LEA BRILMAYER, CONFLICT OF LAWS 268-70 (1995); Ronald A. Brand, *Tort Jurisdiction in a Multilateral Convention: The Lessons of the Due Process Clause and the Brussels Convention*, 24 BROOK. J. INT'L L. 125 (1998); Lea Brilmayer, *Jurisdictional Due Process and Political Theory*, 39 U. FLA. L. REV. 293 (1987).

<sup>34</sup> *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). The plaintiffs, New York residents, purchased a car in their home state. *Id.* In the course of moving from New York to Arizona they were injured in Oklahoma in a road accident. *Id.* The plaintiffs commenced a products liability action in that state against the wholesaler and retailer of the vehicle. *Id.* Could Oklahoman jurisdiction be invoked against the car retailer in this scenario? The Supreme Court responded in the negative. *Id.* The retailer did not purposefully avail itself of the benefits and protections of Oklahoman laws, services, or activities of any kind in that jurisdiction. *Id.* at 286-87. The Supreme Court also rejected the contention that jurisdiction could simply be predicated upon foreseeability of usage within that state. *Id.* at 287. The Court further opined:

This is not to say, of course, that foreseeability is wholly irrelevant. But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.



connected duties. They are important in terms of equal treatment between States by delimiting the spatial reach of courts, legitimately so in that in a federal system they are of equal status.<sup>35</sup> Moreover, the theory operates cathartically as a detumescent bulwark and shield for defendants against the hazards of litigation in an inapt or inappropriate forum. By focusing on consideration of whether specific acts have been carried out by the defendant within the impacted forum state it becomes vital to consider ideals of ‘purposeful availment’. It is only when this ‘purposeful availment’ within the forum state has occurred, in the sense of invoking the benefits and protections of its laws, that legitimate jurisdictional reach is impacted.

In *World-Wide Volkswagen* the defendants had done nothing that would make it foreseeable that they would be haled into Oklahoma’s Courts. The minimum contacts test in *World-Wide Volkswagen*, as subsequently considered in *Burger King*, has been re-evaluated by Courts and academicians. In this re-evaluation the primordial interest has been over the ‘sufficient contacts’ test.<sup>36</sup> More specifically, whether a sufficient causative nexus prevails between these contacts and the impacted jurisdictional venue. There has been a beguiling obfuscation of substantive contractual jurisdiction principles, which have not been logically distilled or interpreted. Schultz has cogently highlighted that in U.S. contract cases the essential argument has concentrated around a number of quintessential issues. The panoply of identified factors have included: whether the contract applied the choice of law rules of the forum state; whether initial negotiations were prompted by the defendant; whether the defendant was a buyer or seller of goods; whether contractual terms were F.O.B., and whether the defendant had a constant presence in the forum state.<sup>37</sup> There has been, self-evidently, a lacuna in establishing on much wider grounds, particularistic bright-

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*Id.* at 297.

<sup>35</sup> *Id.* at 292.

<sup>36</sup> See generally Mark J. Gentile, *Long-Arm Jurisdiction in Commercial Litigation: When is a Contract a Contract?*, 61 B.U. L. REV. 375 (1981); Mark P. Gergen, *Constitutional Limitations on State Long Arm Jurisdiction*, 49 U. CHI. L. REV. 156 (1982); Matthew Schultz, *Minimum Contacts in Contract Cases: A Forward-Looking Reevaluation*, 58 NOTRE DAME L. REV. 635 (1983); Lynne F. Siegel, *Lakeside Bridge & Steel Co. v. Mountain State Construction Co.: Inflexible Application of Long-Arm Jurisdiction Standards to the Nonresident Purchaser*, 75 NW. U. L. REV. 345 (1980).

<sup>37</sup> Schultz, *supra* note 36, at 640-41; see generally Kenneth F. Ripple & Mollie A. Murphy, *World-Wide Volkswagen Corp. v. Woodson: Reflections on the Road Ahead*, 65 NOTRE DAME L. REV. 65, 75-77 (1980).

line contractual jurisdiction tests to promote systematic interests derived from sustainable pedagogical values. The minimum contacts tests postpones considering whether the claimant or defendant would be unduly burdened by litigating in the other party's forum and whether the state has an interest in enforcing its laws or providing relief for the litigant. These factors only become part of the balancing equation after finding the necessary minimum contacts.<sup>38</sup>

It is suggested in this article that a brave new world is required for Anglo-American contractual jurisdiction principles, establishing on basic methodological grounds, precise and concrete assumptions to guide private individuals and commercial enterprises on multi-state dispute resolution. Unlike other areas of private international law,<sup>39</sup> it is propounded that the optimal solution, promoting overriding policy concerns of certainty, predictability and practical commercial convenience, is the universal effectuation of bright-line tests, and mechanical rule-selection principles established to the benefit of all concerned in this discrete arena. Indeed, it is a particularly apt time to reflect on optimal solutions for this particular area of personal jurisdiction. As previously stated, after protracted discussions<sup>40</sup> the Regulation on Jurisdiction and Enforcement of Judgments in Civil and Commercial matters has now been adopted ("the Brussels Regulation").<sup>41</sup> This replaces the Brussels Convention for these states bound thereby. It has introduced some legislative amendments after a period of reflective consideration, into the original Convention. These alterations include significant developments to relevant principles on contractual jurisdiction and

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<sup>38</sup> See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987) (allowing the Court to address truly transnational situations). In each, the Court refused to find sufficient activities to justify jurisdiction over a foreign department.

<sup>39</sup> See generally Alan Reed, *Essential Validity of Marriage: The Application of Interest Analysis and Depechage to Anglo-American Choice of Law Rules*, 20 N.Y.L. SCH. J. INT'L & COMP. L. 387 (2000) (suggesting that different optimal principles should be applicable to discrete areas of private international law such as marriage capacity, divorce recognition, and choice of law in tort).

<sup>40</sup> *Commission for a Regulation on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*, COM (1999) 0348 final (Dec. 28, 1999). *Opinion of the Economic and Social Committee* 2000 O.J. (C 117) 6. The Opinion of the European Parliament was delivered on September 21, 2000. *Commission Proposal for an Amended Council Regulation*, COM (2000) 0689. The Regulation itself was preceded by a proposed major rewrite of the Brussels Convention which was never brought into force because it was superseded by the advent of the Treaty of Amsterdam. See *supra* note 6. On proposed future developments, the Action Plan of the Council and Commission on how best to implement the provisions of the Treaty of Amsterdam establishing an area of freedom, security and justice was adopted on December 7, 1998. See *Commission Regulation 2001/12, Measures for Implementation of the Principle of Mutual Recognition of Decisions in Civil and Commercial Matters*, 1999 O.J. (L 19) 1.

<sup>41</sup> See *supra* note 6; see also the statement by the U.K. contained in 2001 C 13/1.

consumer contracts. It came into force on March 1, 2002<sup>42</sup>, and thus, after five years of gestation it is an apt time to review the success, or otherwise, of the special jurisdiction provisions for contract contained in Article 5. Beyond the European perspective there have been initiatives towards the promulgation of a World-Wide Convention on jurisdiction and foreign judgments in civil and commercial matters, which unfortunately appear to have stultified over the last year.

Negotiations on a worldwide convention have spanned over a decade at the Hague Conference on Private International Law.<sup>43</sup> In the course of that decade, and beyond, one of the key difficulties has been to try to square the circle over the alternative rationales that exist to judicial authority in various legal systems of the world. In the worldwide convention negotiations these differences have come to be identified by the *Scylla* on one side of the scales of the rules of jurisdiction in the Brussels Regulation (reflective of civil law systems in general). On the other side, the *Charybdis*, there are the jurisdictional rules in the United States (a common law system with the additional complication of constitutionally required due process analysis).<sup>44</sup> At a basic level one may identify distinctions here as between a focus largely upon the connection between the court and the claim (the focus of the special jurisdiction rules of the Brussels Convention), and a focus on the connection between the court and the defendant (the essence of U.S. due process analysis). The primary concentration in the latter context has been upon an activity-based conceptual analysis of jurisdiction. This distinction between the Brussels Convention perspective, as revised in the Regulation, and that of the United States, is helpful in establishing a test for the draft provisions on jurisdiction. As Harris has stated, interesting times lie ahead for Anglo-American private international law as we move towards a tiered system of jurisdiction

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<sup>42</sup> See Paul Beaumont, *European Court of Justice and Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*, 48 INT'L & COMP. L.Q. 223 (1999).

<sup>43</sup> In May of 1992, the United States proposed that the Hague Conference on Private International Law take up the negotiation of a multilateral convention on the recognition and enforcement of judgments. See Letter from Edwin D. Williamson to George Droz (May 5, 1992), in *The Hague Conference on Private International Law*, distributed with Hague Conference Doc. LC ON No. 15 (92). In October of 1992 a Working Group of The Hague, "unanimously recognized the desirability of attempting to negotiate multilaterally through the Hague Conference a convention on recognition and enforcement of judgments." *Conclusions of the Working Group Meeting on Enforcement of Judgments*, Hague Conference on Private International Law, Doc. LC ON No. 2 (93).

ascription and enforcement dependent upon United States common law, the European rationale, and a potentially revisionist multinational Convention.<sup>45</sup>

In the second section of the article there is an evaluation of the confusion in U.S. jurisprudence over how to deal with single contract cases, embodied by the decision of the Supreme Court in *McGee*, and its progeny of vacillating and confused decisions which are symptomatic of difficulties infecting this whole muddled branch of law. The essence of a single contract case is that a contested breach occurs between respective parties who are residents of alternative states.<sup>46</sup> No contact exists between the litigants, within the context of the spatial ambit of the other party's home state, other than the immolated contractual touchstone itself. This raises the jurisdictional specter of whether sufficient touchstones exist for contractual jurisdiction over the non-resident defendant. This tautologous conundrum has produced opaque and irreconcilable judicial precedents that are delineated more by mud than by crystal; the likelihood of successful prediction is as likely as tattooing soap bubbles. Fortunately the court in *McGee* was itself on the side of the angels in according contractual jurisdiction to the state of the insured policy-holder (small individual) against the corporate entity (large insurance company) domiciled elsewhere. But, this particularistic judicial intuitionism may not always be so successful in effecting an efficacious outcome; capricious decisions are prevalent elsewhere through adoption of an amorphous "minimum contact" standard.<sup>47</sup> Many vacuous bromides exist for assessing the reasonableness or otherwise of such provisions. It remains for courts, judges and academicians generally, to evaluate their normative acceptability and outline their normative foundations.

A similar concern to effect an optimal solution to contractual jurisdiction issues presented by consumer contracts between private individuals and commercial enterprises or businesses themselves, is a feature of the third section of this article. It considers the significant Supreme Court decision in *Burger King*,

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<sup>44</sup> See generally Paul R. Beaumont, *A United Kingdom Perspective on the Proposed Hague Judgments Convention*, 24 BROOK. J. INT'L L. 75 (1998); Brand, *supra* note 33.

<sup>45</sup> See generally Jonathan Harris, *The Brussels Regulation*, 20 Civ. Just. Q. 218 (2001).

<sup>46</sup> See Timothy Brewer, *Jurisdiction in Single Contract Cases*, 6 U. ARK. LITTLE ROCK L. J. 1 (1983).

<sup>47</sup> See *Calder v. Jones*, 465 U.S. 783 (1984); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984). See generally Alan Reed, *The Anglo-American Revolution in Tort Choice of Law Principles: Paradigm Shift or Pandora's Box?*, 18 ARIZ. J. OF INT'L & COMP. L. 876 (2001); Alan

still determinative some twenty-two years later, and evaluates the implications of the case for in personam jurisdiction in the contractual sphere in the United States. This addresses the cogency of developing specific and concrete rules in the United States for the discrete category of consumer contracts. An evaluation is made as to whether separate principles should govern dependent upon whether the contract is formed with a private individual or between commercial enterprises themselves. There is an examination of minimum contacts theory and revisited effects principles as an appropriate test for ascription of contract jurisdiction. The flexibility and ad hoc nature of the American theoretical perspective is contrasted with the certain and harmonized template provided by the Brussels Regulation at a European level. Explicit preferences in favor of the latter, and underlying policy desiderata, are addressed.

It would be a mistake, however, to create the impression that all the legislative provisions of the Brussels Convention have proved enduringly successful. In the fourth section of the piece there is a detailed extirpation of article 5(1) of the Brussels Convention that relates specifically to special jurisdiction for contract cases. The landscape here is deeply flawed in places, with problems of teleological interpretation engendered by the confused legislative drafting and problematic interpretation by the European Court of Justice and higher English courts. This was revealed in sharp focus by the House of Lords decisions in *Kleinwort Benson v. Glasgow City Council*<sup>48</sup> and *Agnew v. Länsförsäkringsbolagens AB*.<sup>49</sup> Like the proverbial unwanted dog at Christmas, restitutionary claims predicated on quasi-contract concerns, are apparently left untouched by the Convention provisions and this has caused severe interpretative difficulties. They are unfortunately left unremedied in the Brussels Regulation. The section considers in detail attendant difficulties where contractual obligations are performable in a number of contracting states; contextual problems on characteristic obligation theory; and the lacuna in the Regulation template to effectively deal with accessory contractual jurisdiction and the bifurcatory division

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Reed, *To Be or Not to Be: The Forum Non Conveniens Performance Acted Out on Anglo-American Courtroom Stages*, 29 GA. J. INT'L & COMP. L. 31 (2000).

<sup>48</sup> [1999] 1 A.C. 153 (H.L.) (appeal taken from C.A.) (U.K.) [hereinafter *Kleinwort II*]. See J.D. MCLEAN & J.H.C. MORRIS, *THE CONFLICT OF LAWS* 100-02 (5th ed. 2000); PETER M. NORTH & JAMES J. FAWCETT, *CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW* 202-203 (13th ed. 1999).

<sup>49</sup> [2001] 1 A.C. 223 (H.L.) (appeal taken from C.A.) (U.K.).

between specific and main contractual obligations as the focal epicenter of disputed claims. Contrary to frequently expressed shibboleth, the optimal solution to prevent the existing Hobson's Choice for dyspeptic litigants, may be to totally abrogate article 5(1) jurisdiction at a European level, and rely simply on jurisdiction being arrogated in accordance with the principle of *actor sequitur forum rei*, within the purview of article 2 general jurisdiction.

In the concluding part of this article the new initiatives for reform of European contractual jurisdiction principles are evaluated, but summarily rejected as an effective panacea to incumbent teleological interpretative difficulties. There is a comparative analysis of prevailing Anglo-American contractual jurisdiction principles in light of the proposed worldwide convention and final views on legitimate steps that are required to meet optimal policy desiderata concerns in light of the *McGee* and *Burger King* decisions. It is submitted that whilst both jurisdictional systems suffer from the vagaries of inconsistency and lack of clarity, in a number of respects the Brussels Regulation is preferable.<sup>50</sup> First, the design of the schematic articles, and pre-eminent aim of harmonisation allowed for compartmentalised issues to be addressed on a macroscopic, rather than a microscopic level. In contrast, the experience in the United States has been piecemeal, with the constitutional standard propagated by the Supreme Court meaning that many issues have been left up in the air, with no standardisation on the horizon.

Second, the Brussels Regulation has legitimately skewed contractual jurisdiction principles in favour of economically weaker groups, in particular, the employee,<sup>51</sup> the insured or the consumer, with general comportation to the principle that they sue or be sued in their own domicile (at home), with

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<sup>50</sup> See generally Borchers, *supra* note 5; Juenger, *supra* note 4.

<sup>51</sup> As far as the Brussels Regulation is concerned a new section on jurisdiction over individual contracts of employment is added to the Regulation (section 5, containing Articles 18-21). This is largely a tidying-up exercise, grouping existing Convention provisions on employees into a separate section. Jurisdiction clauses are only valid if entered into after the dispute arose, or if they are for the employee's benefit by conferring on him a right to sue elsewhere than the courts already identified by this section. An employer may be sued either (i) in the courts of the Member State where he is domiciled or (ii) in the courts of the place where the employee habitually carries out his work, or the last place where he did so, or, if he does not habitually carry out his work in any one state, in the place where the business which engaged the employee was situated. In contrast, the employer may sue only in the courts of the employee's domicile. This last rule may modify the Convention position, where it appeared that either employer or employee might sue in the employee's habitual workplace under Art. 5(1). See generally Case 383/95, *Rutten v. Cross Medical Ltd.*, 1997 E.C.R. 57; *Swithenbank Foods Ltd. v. Bowers*, (2002) 2 All E.R. (Comm.) 974.

consequential adjectival advantages. No such express jurisdictional preferences apply under the minimum contacts test. Although, by chance, good instincts were revealed in *McGee* in that the outcome allowed the policyholder to sue in her domicile, the jurisprudence is not always on the side of the angels. As *Burger King* revealed, in hard cases, the “purposefulness” test engendered is not always a detumescent bulwark against unfortunate implications in future cases. Efficacious outcomes under the minimum contact test are affected by solipsistic judicial sleight of hand, rather than simple application of logical principles grounded in policy desiderata. Additionally, the holistic nature of the Brussels Convention allows for legislative rectification over defined time frames of substantive articles. This process of reflective amendment has occurred through new interpretations propagated in the Regulation, but if subsequently are revealed to be flawed, as it is suggested herein in relation to the convoluted meaning attached to “contract”,<sup>52</sup> then further rectification can occur relatively expeditiously. It is significantly more difficult in the United States to achieve an effective response to counteract unsatisfactory results. The constitutional nature of U.S. jurisdiction principles, distilled through the auspices of the Supreme Court, seems to present insurmountable difficulties to much needed reform. Of course, its decisions are subject to academic scrutiny, which, on occasions, can border on the intemperate, but outside of this implicit reform program there is no explicit legislative reform program or established process of reflective amendment. It is argued that this is an essential tool to achieve an optimal solution for contractual jurisdiction principles.

## II. SPECIFIC JURISDICTION IN U.S. CONTRACT ACTIONS

### a. The Decision In *McGee v. International Life Insurance Co.*

The Supreme Court in *International Shoe*<sup>53</sup>, rejecting the traditional English law concept of vested territorial power,<sup>54</sup> established instead a modern requirement for minimum contacts as a jurisdictional touchstone between an impacted forum state and a non-resident defendant. In constitutional due process

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<sup>52</sup> See *infra* text accompanying notes 172-83.

<sup>53</sup> See *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

terms the standard set out by minimum contacts theory remains supererogatory in determining venue resolution.<sup>55</sup> However, a widened interpretation, beyond legitimate parameters in some eyes, was reached in *McGee*.<sup>56</sup> The decision had a profound impact on the legal topographic landscape.

The factual basis of the claim in *McGee* has been well documented. A Texas insurance company had taken over the obligations of an Arizona company, and part of this myriad of obligations incorporated a policy owned by a California resident. This individual resident was notified in writing of the subrogation and a new policy document was specifically issued to him in California. Insurance premiums were paid directly, and continually, from the insured's home in California. This proved to be the only 'single contact' which the Texas insurance company had with California. However, relying on a Californian statute, the California court iterated that it did have jurisdiction over foreign insurance companies in these matters. Legislative content allowed suit in California brought by an insured individual resident.<sup>57</sup>

The Supreme Court was in accord that venue in California was impacted, focused upon prevalent isolated contacts within the territory.<sup>58</sup> At the cornerstone of the decision are underlying policy considerations. It was contended that the Californian court had a manifest interest in protecting its citizens, as otherwise they would be deleteriously affected if required to seek compensation in a distant forum.<sup>59</sup> This has a subliminal policy resonance which is the very obverse of *actor sequitur forum rei* principles within the purview of the Brussels Convention. The Supreme Court expressly articulated that physical presence of a defendant, embodied within vested territorial rights theory, was not required for ascription of

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<sup>54</sup> *Pennoyer v. Neff*, 95 U.S. 714 (1878).

<sup>55</sup> See generally John J. Carey, Note, *Asserting In Personam Jurisdiction Over Parties to a Contract: Burger King Corp. v. Rudzewicz*, 31 ST. LOUIS U. L.J. 453 (1987).

<sup>56</sup> See *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957).

<sup>57</sup> CAL. INS. CODE §§ 1610-1620 (West 2005).

<sup>58</sup> See *McGee*, 355 U.S. at 222-23. The defendant insurance company had no office or agent in California and did not solicit business in California. *Id.* at 222. The only California policy the defendant had issued was the one in dispute. *Id.* The Court stated in part, "[i]t is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State." *Id.* at 223.

<sup>59</sup> *Id.* at 223 (finding the connection to be substantial the Court considered several relevant factors: the defendant solicited the contract with a California resident; the California resident accepted the contract and mailed premiums from his home; the defendant would effectively be judgment proof if California plaintiffs were forced to litigate small claims in distant forums; and the state had an interest in providing its citizens with a means of redress). See Gentile, *supra* note 36, at 375-76.



jurisdiction, and postal contact could be adequate.<sup>60</sup> Additionally, the outcome seemed to indicate, as Brewer has stressed, that the interests of the defendant are deferential to those of the claimant when identifying venue resolution. Although the Supreme Court identified an implicated burden on the defendant in defending a suit before an alien forum, nonetheless to deny jurisdiction would place an egregiously higher threshold on the individual plaintiff.<sup>61</sup>

To the extent that the Court was on the side of the weaker party, the insured, in according jurisdiction, the result in the case is to be applauded. The rationale, however, raises more troublesome questions than are answered. A laudable interpretation of *McGee* would be that it facilitated the grant of a strictly delineated jurisdictional privilege in favor of consumers of insurance services, but this viewpoint is underscored by the fact that in the Court's other main decision in the contractual jurisdiction arena, that of *Burger King*, it was expressly articulated that the corresponding bargaining strength of the litigants is not outcome decisive. The relief in *McGee* over weaker party jurisdictional privileges, akin to the kind a patient (insured) feels when the dentist tells her to sit up, have a gargle, and return in six months, was counteracted in *Burger King*. It equated to a patient (consumer) being told subsequently that treatment was required over a root filling. Hardly a pleasant future course to be chartered.

The law here seems to be subject to an unwelcome degree of vacillation; relief occasionally on an ad hoc premise, but pain inflicted down the line. It seems to be self-evident that in the United States at least some discrete types of contracts, which cut across state lines, give rise to the arrogation of in personam jurisdiction, provided elements of "substantial connection" can be adduced. This meant, for instance, in *McGee*, that the domicile of the policyholder in California (the forum actoris) ensured that jurisdictional touchstones were adequately established; this was replicated in *Burger King* where the franchiser's Florida headquarters, wherein the organization was immolated, was enough to seise the forum's courts.

The question that remains unanswered, however, is whether the above principles are operative in the counter-direction. To this a negative response is

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<sup>60</sup> See generally Miriam Lee, Note, *Jurisdictional Analysis in Commercial Litigation-The Single Contract Case*, 7 MISS. C. L. REV. 87 (1986).

<sup>61</sup> Brewer, *supra* note 46, at 4-5.

arguably elicited. Suppose, for instance, a situation in which the *McGee* insurance company had commenced a declaratory relief action against the individual insured in the courts of their particularistic domicile, in Texas. Would jurisdiction have been properly established? Beyond this question, if the claimant had been a mail order business, and the defendant a consumer, then would jurisdiction before the Californian courts have been legitimate? The outcomes in these posited scenarios remain opaque, but as Borchers identifies,<sup>62</sup> the impact of the preferred solutions have a significance that is more than merely rhetorical. In essence, although permitting long-distance jurisdiction to be arrogated against consumers and policyholders is intrinsically egregious, the “minimum contact” goalpost does not articulate any simple mechanism to blunt such a fierce result. The crucial focus of the test is bound up with evaluating whether a defendant has “knowingly” or “purposefully” established a connection with the forum state to allow venue resolution.<sup>63</sup> It is, thus, equally logical to enunciate that the *McGee* insurer “knowingly” established a relationship with California, or indeed that the *Burger King* franchisee might have “purposefully” selected an out-of-state mail order seller. What is needed here is an approach that crosses the Rubicon between judicial particularistic interpretation and a schematic code that is legislatively certain in application, governing insurance matters. This code should not be unmediated and policy-content neutral, but selective jurisdictional preferences should be operative, derived from optimal policy desiderata.

b. The Single Contact Alone As Minimum Contacts And Ensuing Disarray In The Lower Courts

The question at issue is one of considerable importance to contractual dealings between purchasers and sellers located in different States. The disarray among federal and state courts noted above may well have a disruptive effect on commercial relations in which certainty of result is a prime objective. That disarray also strongly suggests

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<sup>62</sup> Borchers, *supra* note 4, at 98 n.514.

<sup>63</sup> See *Burger King v. Rudzewicz*, 471 U.S. 462, 478-80 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

that prior decisions of this Court offer no clear guidance on the question.<sup>64</sup>

An examination of lower federal and state court judicial precedents in the contractual jurisdiction substantive arena reveals a significant degree of vacillation and perplexing disagreement. Justice White asserted these concerns in his dissent in *Lakeside Bridge and Steel Co. v. Mountain State Construction Co.*, highlighted above.<sup>65</sup> Goodman, and other commentators, have cogently identified that the level of uncertainty is exponentially increased, by confusion surrounding the continued viability of the *McGee* decision.<sup>66</sup> On one side of the coin are courts that view *McGee* as engendering a rule specific liberal approach, based upon the merest lightest touch of contacts, and consequently they are more amenable to arrogate in personam jurisdiction.<sup>67</sup> Quite separately, those courts that see *McGee* as a blot on the escutcheon of effective principles, as an aberration, are more dogmatic in their requirement of further contacts.<sup>68</sup> It is instructive to examine these judicial precedents in terms of their causative nexus for venue resolution, acknowledging that a range of jurisdictional touchstones on ‘contact’ are adopted and not discrete templates.

As previously stated, the core of a single contact case is that a contested breach occurs between respective parties who are residents of alternative states.<sup>69</sup> No focal epicentre exists between the parties, or with the other’s home state, apart from the single contract itself. The dilemmatic issue presented in this typical commercial venture is whether the home resident can legitimately seize his home state in a claim brought against the non-resident party. A vignette of the vagaries of approach by lower courts, and beguiling Hobson’s Choice for advisors trying to represent commercial clients, is presented by contrasting two conflicting decisions

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<sup>64</sup> *Lakeside Bridge & Steel Co. v. Mountain State Constr. Co.*, 445 U.S. 907, 909-10 (1980) (White, J., dissenting).

<sup>65</sup> For general discussion of these lower federal and state court cases prior to the Supreme Court’s decision in *Burger King*, see Terrence L. Goodman, *Minimum Contacts and Contracts: The Breached Relationship*, 40 WASH & LEE L. REV. 1639 (1983); Schultz, *supra* note 36.

<sup>66</sup> See Goodman, *supra* note 65; Schultz, *supra* note 36.

<sup>67</sup> See, e.g., *Gold Kist Inc. v. Baskin-Robbins Ice Cream Co.*, 623 F.2d 375 (5th Cir. 1980); *Pedi Bares, Inc. v. P & C Food Mkts., Inc.*, 567 F.2d 933 (10th Cir. 1977); *Prod. Promotions, Inc. v. Cousteau*, 495 F.2d 483 (5th Cir. 1974); *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220 (6th Cir. 1972).

<sup>68</sup> See, e.g., *Vencedor Mfg. Co. v. Gougler Indus., Inc.*, 557 F.2d 886 (1st Cir. 1977); *Anderson v. Shiflett*, 435 F.2d 1036 (10th Cir. 1971); *S. Mach. Co. v. Mohasco Indus., Inc.*, 401 F.2d 374 (6th Cir. 1968).

<sup>69</sup> Brewer, *supra* note 46, at 1.

of the Seventh Circuit Court of Appeals, those of *Lakeside Bridge*<sup>70</sup> and *Wisconsin Electrical Manufacturing Co v. Pennant Products, Inc.*<sup>71</sup>, identified by Goodman and other notable commentators.<sup>72</sup>

In *Lakeside Bridge*, the claimant, a Wisconsin corporation, entered into a contract with the defendant West Virginia corporation to supply them with structural assemblies for a dam to be constructed by the defendant in Virginia.<sup>73</sup> Contractual acceptance was contained in a purchase order sent by mail from West Virginia to the claimant's office in Wisconsin.<sup>74</sup> Typically, as in many commercial engagements of this nature, during the interim negotiation period numerous phone calls and letters were exchanged between the corporations. In common parlance a jostling for position and best overall terms occurred before final agreement. Subsequently, the structural assemblies required to be manufactured within the contractual terms, were constructed at the Wisconsin corporation's home plant, then shipped to West Virginia for direct incorporation within the dam project.<sup>75</sup> It was alleged that the goods were sub-standard, and hence payment was correspondingly withheld. The Wisconsin corporation sought to seize their *forum actoris* to recover the unpaid balance they contended was legitimately due under the contract. The case was transferred to the U.S. District Court in Wisconsin, and at this juncture the West Virginia corporation (the defendant) intervened in an effort to have the matter dismissed for lack of in personam jurisdiction on any acknowledged predicate. The motion filed on behalf of the defendant was rejected by the district court that entered summary judgment in the plaintiff's favor. However, the Seventh Circuit, contrary to the earlier posited outcome, reversed and remanded the case with instructions to either dismiss the case or transfer it to another district.<sup>76</sup> In essence, the Seventh Circuit relying on the judicial circumnavigation of principle contained in *Hanson v.*

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<sup>70</sup> *Lakeside Bridge & Steel Co. v. Mountain State Constr. Co.*, 597 F.2d 596 (7th Cir. 1979).

<sup>71</sup> *Wis. Elec. Mfg. Co. v. Pennant Prods., Inc.*, 619 F.2d 676 (7th Cir. 1980).

<sup>72</sup> See Goodman, *supra* note 65; Schultz, *supra* note 36.

<sup>73</sup> See *Lakeside Bridge & Steel Co.*, 597 F.2d at 597-98. The plaintiff corporation's principal place of business was in Milwaukee, Wisconsin. *Id.* at 597. The plaintiff originally approached the defendant at its principal place of business in Charleston, West Virginia. *Id.* at 597-98. The defendant did not have an office in Wisconsin nor any other contacts with Wisconsin other than the actions, which gave rise to the lawsuit. *Id.* at 598.

<sup>74</sup> *Id.* at 598.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 604.

*Denckla*,<sup>77</sup> determined that the acts of the West Virginia corporation did not manifest an intent to “purposefully avail itself of the privilege of conducting activities” in Wisconsin.<sup>78</sup> Further, the court opined that the decision to manufacture the structured assemblies in Wisconsin was unilaterally taken, and not an incumbent requirement under the contract. The plaintiff could not “piggy-back” in personam jurisdiction in their forum actoris, derived from their own individual choice of manufacturing venue. Unilateral activity, without any *consensus ad idem* on this point with the defendant, was an unsustainable point of reference for ascription of contractual jurisdiction.<sup>79</sup>

Within the course of the next year, the Seventh Circuit, in a single contract case, reached a fundamentally different result than that of *Wisconsin Electrical*,<sup>80</sup> as Goodman and others highlight. In light of this *volte-face* it is hardly surprising if litigants feel the need to seek recourse in some form of judicial divining rod. This case involved an alleged breach of a contract to purchase a computer system. A New York corporation, Pennant, was in negotiation with Wisconsin Electrical, a Wisconsin corporation, over acquiring the system. In similar vein to the factual scenario presented in *Lakeside*, neither respective party maintained either offices or agents in the other’s *forum actoris*, and the contract provided the focal epicentre of party inter-action. Even in this respect the linkage was minimal, amounting simply to pre-contractual negotiations via post, or telephone, and two perambulatory visitations to the state of Wisconsin by agents of Pennant corporation. Hardly a significant nexus on any kind of deductive syllogism! However, subsequent to adoption of contractual terms, Wisconsin Electrical was unable to perform these terms in a timely fashion. Lack of timeliness became part of a wider dispute, and a claim was fashioned by Wisconsin Electrical seeking to invoke home state jurisdictional touchstones. This, perhaps surprisingly given overall equiparity with the earlier *Lakeside ratio decidendi*, received positive affirmation from the Seventh Circuit.<sup>81</sup> The tautologous reasoning engaged a home plaintiff ‘legitimately’ bringing a claim before an alien defendant on flimsy incantations. An apparent point of demarcation existed between the two cases.

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<sup>77</sup> 357 U.S. 235, 253 (1958).

<sup>78</sup> *Lakeside Bridge & Steel Co.*, 597 F. 2d at 603 (quoting *Hanson*, 357 U.S. at 253).

<sup>79</sup> *Id.*

<sup>80</sup> *Wis. Elec. Mfg. Co. v. Pennant Prods., Inc.*, 619 F.2d 676 (7th Cir. 1980).

<sup>81</sup> *Id.* at 679.

The ‘two perambulatory visitations’ into the seized territory from agents operating on behalf of the defendant corporation were regarded as significant. Not simply an enhanced contact, but categorized as ‘purposeful availment of the benefits and protections of Wisconsin law’, within the parameters set out by the Supreme Court in the *Hanson* decision.<sup>82</sup>

The divergent results in *Lakeside* and *Wisconsin Electrical*, both delivered by the Seventh Circuit, is illustrative of the problems that U.S. courts have encountered in adopting a systematic rationale to deal with single contract cases. It mirrors to a large extent the facilitative difficulties engendered before the European Court of Justice, and higher English courts, over restitutionary claims and the flawed perspective of contractual jurisdiction principles. These perplexing dilemmatic choices seem no closer to efficacious resolution. As Gentile and other leading commentators have stressed, we are left on occasion with simply the positivistic and functional counting of contacts.<sup>83</sup> In *Wisconsin Electrical* this was tantamount to basic visitations within the *forum actoris* on two occasions by representative agents. This is an ineffectual manner to solve venue resolution in the important commercial law arena. It is a truism that hard cases may make bad law, but ritualistic and positivistic counting of myriad contacts in an unstructured fashion, simply facilitates the unfortunate process of incorrect decision-making. A requirement exists for judicial decisions to be more reflective of a unificatory approach to deciding jurisdiction in single contract cases, and a more specific and holistic perspective is needed urgently.<sup>84</sup> This need, to avoid a rigid incantation of assessing limited touchstones to found jurisdiction, and adopt instead a more harmonised perspective, is particularly evident in relation to buyer/seller applications.

A number of precedents have concentrated upon characterization of plaintiff/defendant and their co-terminus nexus. The story here has been one of

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<sup>82</sup> *Id.* at 677-78.

<sup>83</sup> Gentile, *supra* note 36, at 384-401.

<sup>84</sup> See generally *Mouzavires v. Baxter*, 434 A.2d 988 (D.C. 1981); *Sw. Offset, Inc. v. Hudco Pub'g Co.*, 622 F.2d 149 (5th Cir. 1980). But see *Jadair, Inc. v. Walt Keeler Co.*, 679 F.2d 131 (7th Cir. 1982); *Aaron Ferer & Sons Co. v. Am. Compressed Steel Co.*, 564 F.2d 1206 (8th Cir. 1977). Interestingly, in this regard, the U.S. Court of Appeals for the Tenth Circuit in *Pedi Bares, Inc. v. P & C Food Markets, Inc.*, 567 F.2d 933 (10th Cir. 1977), accorded jurisdiction in Kansas despite solicitation therein by the resident claimant to incite the non-domiciliary defendant. Deductive syllogism on a grand scale reigns supreme!

solipsistic determinations and incremental developments.<sup>85</sup> On occasion primordial significance has been attached to the demarcation of the alien defendant as either a buyer or seller. Obversely, conflicting decisions have propagated a focus upon whether a litigant may be identified as either hostile or submissive over contract formation.<sup>86</sup> As Gentile and others have stated,<sup>87</sup> in a typical buyer/seller relationship the contract will be underpinned by differing “quality of contacts.” More generally, this “quality” is underscored by respective obligations and duties within the actual contractual terms. In general, the traditional *obligatio* imposed upon a seller will be delivery of goods or services, to be effected within the home state of the buyer. If this obligation transcribes itself to physical performance and actual presence within the territory, presumptively *forum actoris* contacts are multiple and arrogation of jurisdiction comports with due process.<sup>88</sup> The ‘purposeful availment’ test is constitutionally satisfied and the threshold level appears unarguable in arrogating *in personam* jurisdiction. This accords with the presumptive revision to article 5(1) of the Brussels Convention, contained within the Brussels Regulation, after a period of quiet reflection and appropriate consideration. Moreover, even in the scenario where the seller performs contractual duties outwith the impacted venue state, omits to directly engage in actual presence or delivery therein, but transfers merchandise indirectly to the state, the relevant impacted contacts normally suffice for venue resolution. The due process mechanism is similarly engaged.<sup>89</sup>

International market penetration by a non-resident seller is often the trigger to solving venue resolution in favor of a dyspeptic buyer. Due process constraints

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<sup>85</sup> See, e.g., *Rath Packing Co. v. Intercontinental Meat Traders, Inc.*, 181 N.W.2d 184 (Iowa 1970); *Darby v. Superior Supply Co.*, 458 S.W.2d 423 (Tenn. 1970).

<sup>86</sup> See, e.g., *Am. Cont’l Import Agency v. Superior Court*, 30 Cal. Rptr. 654 (Cal. Ct. App. 1963); *Compania de Astral, S.A. v. Boston Metals Co.*, 107 A.2d 357 (Md. 1954).

<sup>87</sup> Gentile, *supra* note 36; see generally Carey, *supra* note 55.

<sup>88</sup> See *Taubler v. Giraud*, 655 F.2d 991 (9th Cir. 1981) (upholding jurisdiction over a wine importer who traveled to the forum state in order to promote his product); *Nat’l Gas Appliance Corp. v. AB Electrolux*, 270 F.2d 472 (7th Cir. 1959) (allowing jurisdiction when defendant’s agents entered the state).

<sup>89</sup> Gentile, *supra* note 59; see *Electro-Craft Corp. v. Maxwell Elec. Corp.*, 417 F.2d 365 (8th Cir. 1969) (arguing home state was legitimately seized despite limited tangential touchstones and explaining the buyer had “purposefully availed” himself of obligations within the sellers *forum actoris* in assuming the risk of shipment, initiating negotiations, and continued presence therein). Compare *Ajax Realty Corp. v. J.F. Zook, Inc.*, 493 F.2d 818 (4th Cir. 1972) (arguing that the foreseeability of impacted consequences is a crucial determinant notably in cases involving a manufacturer and distributor), with *John G. Kolbe, Inc. v. Chromodern Chair Co.*, 180 S.E.2d 644 (Va. 1971).

are traditionally circumnavigated, and ‘purposeful availment’ doctrinal principles are invoked. More opaque, as Ripple and Murphy and others highlight, are the relevant contacts appurtenant to establishing jurisdiction over a purchaser from a non-resident seller.<sup>90</sup> Similar difficulties apply in the context of English substantive law. The causative nexus in such a scenario is predicated upon payments sent from territory A to B, and whether the latter forum is constitutionally seized. Intrinsicly, our judicial processes are consequently activated upon a quiescent and sentient search over the issue under what circumstances does this contact, alone or in addition to other contacts, create jurisdiction. In replying to this dilemma, courts in buyer/seller disputes have clung to a particularistic template and arguably, “assume the model of aggressive seller and passive buyer, and find that a non-resident buyer’s act of entering into a contract, without more, falls short of establishing the level of purposeful availment that would satisfy the minimum contacts test.”<sup>91</sup> More widely, in the demarcation of aggressive/passive venue resolutions, the courts preponderantly, “look beyond the labels of buyer and seller and focus instead upon the actual relationship between the parties and their activities in preparation for entering into the contract.”<sup>92</sup> Stephens has cogently articulated that the functionality of such an extirpative approach is to ensure congruence with the *Hanson* test on purposeful availment of the seized forum.<sup>93</sup> It explicitly concentrates on foreseeability and due process requirements.

Stephens has also identified that a plethora of other jurisprudence in this sphere engage in an examination of the focal epicenter of the contract, and are not fixed within the confines of a single determinative factor straight jacket.<sup>94</sup> Incidental and tangential contractual factors are embraced within this investigation, encompassing diverse contingencies such as offer, acceptance, pre-contract negotiations, invitation to treat, performance and identified breach. A myriad of determinants can be significant in ensuring that due process standards have been met, and constitutionality satisfied. Stephens provides the following non-exhaustive list of determinants, beyond individual party characterisation,

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<sup>90</sup> See Ripple & Murphy, *supra* note 37, at 79.

<sup>91</sup> Pamela Stephens, *The Single Contract as Minimum Contacts: Justice Brennan “Has it His Way,”* 28 WM. & MARY L. REV. 89, 96 (1986).

<sup>92</sup> *Id.* at 96-97.

<sup>93</sup> *Id.* at 97.



which may or may not be significant before different courts: payments to be made by the claimant within the *forum actoris*;<sup>95</sup> express choice of law provisions in favour of forum application,<sup>96</sup> postal and telephone communications within the state, as in *Lakeside* and *Wisconsin Electrical*;<sup>97</sup> legitimate expectations over contractual performance within the impacted forum;<sup>98</sup> and agent/representative visits for purposes of interim negotiation.<sup>99</sup> To this non-exhaustive list may be added other factors such as facsimile/e-mail communications, distribution rights, solicitation, and battle of the forms interim correspondence. The lesson is one of particularistic judicial intuitionism as bywords for outcome determinativeness, with a stark lack of any indicative template to allow certain prediction of minimum contacts. *Ad-hocery* has prevailed with a trend in favor of quantitative rather than qualitative appreciation of isolated touchstones. In effect, a process of deontological bean counting has occurred with the derivation an extirpation of the defendant's activities, or otherwise, within the prevalent forum. Recourse, once again, has been made to our judicial divining rod.

Schultz and others have cogently articulated that certain factors ought to be significant in skewing the balance against the exercise of jurisdiction and impose the need for additional touchstones. First, in accordance with reciprocity principles, a claimant ought to be made on notice that contractual activities engaged in the defendant's home state are likely to invoke *actor sequitur forum rei* doctrine.<sup>100</sup> Due process is likely to be satisfied where the claimant affects reciprocal duties, and limited engagement in return is promulgated by the defendant within the *forum actoris*. Second, is consideration of successful reparation of the claimant within the defendant's home forum<sup>101</sup> if particular difficulties exist in this regard, or if onerous burdens are in place against effective contractual remedies, this may militate against venue resolution within the

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<sup>94</sup> *Id.*; see generally Ripple & Murphy, *supra* note 37.

<sup>95</sup> Stephens, *supra* note 91; see Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985).

<sup>96</sup> Galgay v. Bulletin Co., 504 F.2d 1062, (2d Cir. 1974); O'Hare Int'l Bank v. Hampton, 437 F.2d 1173 (7th Cir. 1971).

<sup>97</sup> See, e.g., Wis. Elec. Mfg. Co. v. Pennant Prods., Inc., 619 F.2d 686 (7th Cir. 1980); see generally Carey, *supra* note 55.

<sup>98</sup> See Prod. Promotions, Inc. v. Cousteau, 495 F.2d 483 (5th Cir. 1974); In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220 (6th Cir. 1972); see generally Schultz, *supra* note 36.

<sup>99</sup> See Whittaker Corp. v. United Aircraft Corp., 482 F.2d 1079 (1st Cir. 1973); see generally BRILMAYER, *supra* note 33.

<sup>100</sup> See Schultz, *supra* note 36, at 650-51.

<sup>101</sup> *Id.* at 650.

defendant's home state? The corollary is that the defendant ought to foresee, in an objective sense, that outcome determination before an alien forum comports to reasonable foreseeability in this regard<sup>102</sup> The test herein is predicated upon what the defendant 'should have foreseen', set against an amorphous standard. Schultz has highlighted this objectivity:

When the defendant enters into a contract, he should realize the burden the plaintiff will face if a cause of action arises from the contract. If the plaintiff will face a heavy burden if forced to litigate in the defendant's forum, then the defendant can foresee a suit in the plaintiff's forum. A slight burden on the plaintiff can reduce the defendant's foresight and increase the contacts necessary to create jurisdiction. Thus, when a non-resident defendant promises to pay money to a plaintiff who is slightly burdened, courts will look for additional contacts between the defendant and the forum such as initiating negotiations, assuming the risk of damage, and entering the state to supervise performance.<sup>103</sup>

The disarray perpetuated by lower court decisions is indicative of the need for the promulgation of fixed and immutable rules for specific types of contract, beyond the flexibility engendered by "minimum contacts", and a "fair and reasonable" standard. Indeed, Justice White on numerous occasions, sounded a clarion call for review of jurisdiction principles in the single contract case to aid befuddled commercial entities seeking more certain pathways towards venue resolution.<sup>104</sup> This call was finally answered by the Supreme Court in *Burger King Corp v Rudzewicz*, when an opportunity was taken for reflective consideration. However, as the following section discusses, no cathartic panacea was found to this important branch of private international law. The prevailing uncertainty created ought to have hastened the momentum towards fixed and concrete rule-selection for specific types of contract, especially those involving private individuals dealing as a consumer with commercial enterprises.

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<sup>102</sup> *Id.*; see also Goodman, *supra* note 65.

<sup>103</sup> See Schultz, *supra* note 36, at 650; see generally Lee, *supra* note 60.

<sup>104</sup> *Baxter v. Mouzavires*, 455 U.S. 1006 (1982) (White & Powell, JJ., dissenting from denial of certiorari); *Chelsea House Publishers v. Nicholstone Book Bindery, Inc.*, 455 U.S. 994 (1982) (Burger, C.J., White & Powell, JJ., dissenting from denial of certiorari); *Lakeside Bridge and Steel Co. v. Mountain State Constr. Co.*, 445 U.S. 907, 909 (1980) (White & Powell, JJ., dissenting from denial of certiorari). See generally Schultz, *supra* note 36; Stephens, *supra* note 91.

### III. PERSONAL JURISDICTION IN U.S. CONTRACT CASES: A PROPOSED BRIGHT LINE RULE

#### a. The Decision In Burger King

The gestation period for this dispute commenced in 1978 when two private individuals, Rudzewicz and MacShara, both citizens of Michigan, attracted by the adventitious benefits of coalescing with Burger King's omnipresent activities, submitted a joint application for a franchise<sup>105</sup> This application was submitted to the District Office within their home locality. From that specification, in a circuitous route, it was levered forward to Burger King's Miami, Florida headquarters, and a preliminary agreement was concluded. On the cusp of final agreement, subsequent to four months of intense bartering, acrimony set in over defined contractual terms.<sup>106</sup> This type of dispute can be acknowledged as a common feature of many franchisee contracts, and by no means could it be characterised as atypical. A point of departure, however, involved the myriad of negotiations undertaken by Rudzewicz and MacShara with both the Miami headquarters of Burger King, as well as the Michigan District Office. These representations were intense and hotly contested. They were not immolated within the franchisees' home locality. Indeed, the Holy Grail, the conclusion of a final contract after four months of horseplay trading, had an express choice of Floridian law provision, relevant payments were to be paid to Burger King's Miami headquarters, and highlighted that the franchise relationship itself had its focal epicenter in Miami.<sup>107</sup> Cogent jurisdictional touchstones in favour of that particular forum were prevalent from the outset. A total payment obligation in excess of one million dollars was imposed upon the franchisees as a concomitant to a twenty-year franchise agreement. It seemed that calm waters prevailed for a lengthy relationship to the mutual benefit of all concerned.

Unfortunately a cloud arrived on the horizon after a brief honeymoon period. In 1979 the franchisees, circumnavigating monthly contractual payment obligations, omitted to pay due sums to Burger King's Miami headquarters. Another period of bartering recommenced. The disappointed franchiser, after a failure to broker a satisfactory compromise on their part via mail and telephone

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<sup>105</sup> Burger King Corp. v. Rudzewicz, 471 U.S. 462, 467 (1985).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 464-66.

communications, decided to draw a line in the sand, and abruptly ended the arrangement. In contumelious fashion they demanded that Rudzewicz and MacShara leave the premises forthwith and without further notice. The franchisees, outraged by this slight, and revealing flagrant disregard for the supposed notice termination, simply carried on trading as normal. In a stance, reflective of traditional British stiff upper lip, their stance reflected the venerable idiom of “crisis, what crisis?” They were not to be removed without a fight. The visceral reaction of Burger King was to sue in a Florida federal court for trademark infringement and breach of contract.<sup>108</sup> In some respects it appeared as though a sledgehammer was to be deployed in order to crack a nut. The district court asserted jurisdiction, but was reversed by the Eleventh Circuit Court of Appeals, which ruled that the district court did not have jurisdiction over Rudzewicz under the Florida long-arm statute.<sup>109</sup> Constitutional requirements of due process were not viewed as satisfactorily impacted for two articulated concerns: on one side the requirement of reasonable foresight of suit by Burger King against Rudzewicz in Florida was not met on a threshold test,<sup>110</sup> and also the franchisee had no financial assets to defend suit within the territory.<sup>111</sup> In terms of jurisdictional touchstones the following identified factors were viewed as significant: actual and contemplated performance in Michigan;<sup>112</sup> lack of employed personnel by the franchisee in Miami and no effective contact therein; quintessential services of Burger King vis à vis site selection, marketing and supervisory teams were all attached to Michigan; and the situational source of any direct contact at a personal level transpired within the Michigan locality.<sup>113</sup> This panoply of indicators led the court to opine that the franchisee lacked reasonable foresight that any causative nexus with Burger King involved the “distant and anonymous Florida headquarters”, and, moreover, no conscious advertence to the risk of defending suits in an alien foreign venue.<sup>114</sup> It was in Michigan, as *actor sequitur forum rei*, rather than Floridian jurisdiction, that conscious advertence

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<sup>108</sup> *Id.* at 468-69.

<sup>109</sup> *See* Burger King Corp. v. MacShara, 724 F.2d 1505, 1513 (11th Cir. 1984), *rev'd*, Burger King Corp v. Rudzewicz, 471 U.S. 462 (1985).

<sup>110</sup> *MacShara*, 724 F.2d at 1511.

<sup>111</sup> *Id.* at 1512.

<sup>112</sup> *Id.* (“To Rudzewicz, the Michigan office was for all intents and purposes the embodiment of Burger King.”).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

was impacted, in the sense of anticipation of legitimate suit therein.<sup>115</sup> A detumescent bulwark was constructed against extension of *in personam* jurisdiction.

This bulwark was rapidly deconstructed in favour of the franchisor. In a lengthy judgment, after granting *certiorari*, the Supreme Court reversed, six to two, the decision of the Eleventh Circuit, and upheld the district court's assertion of jurisdiction.<sup>116</sup> It is illuminating to examine the majority opinion of Justice Brennan, adding his imprimatur to this substantive arena, to identify the full range of relevant indicators that remain supererogatory *vis à vis* U.S. contractual jurisdiction doctrine.<sup>117</sup> The decision represents the antithesis of reducing the jurisdictional question in single contract cases to a simple mechanistic formula. It left the issue to be determined by weighing solipsistically the facts of each individual case. Lee has stressed that its analysis focused on elaboration of "the parties' prior negotiations, and actual course of dealings, the terms embodied in the contract documents, and the contemplated future consequences of their agreement."<sup>118</sup> Intrinsically, as Knudsen and other commentators have stated, the Supreme Court's opinion constituted a reiteration of established principles of extant personal jurisdiction perspectives, devolved from *International Shoe*, and propagating a minimum contacts threshold.<sup>119</sup> It arguably had a sanctification that resonated with the social Darwinism infecting the befuddled thinking on

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<sup>115</sup> *Id.*

<sup>116</sup> *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 487 (1985) (White & Stevens, JJ. dissenting).

<sup>117</sup> See Lee, *supra* note 60, at 97.

<sup>118</sup> *Id.*

<sup>119</sup> See William J. Knudsen, Jr., Keeton, Calder, Helicopteros and Burger King—International Shoe's Most Recent Progeny, 39 U. MIAMI L. REV. 809 (1985). Note the Supreme Court in *Burger King* quoted the *International Shoe* provision that the "Due Process clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful contacts, ties or relations." *Burger King* 471 U.S. at 470-73 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)). Interestingly, the Court in *Burger King* referred to its decision in *Insurance Corp. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982), to re-emphasize that "[a]lthough this protection operates to restrict state power, 'it must be seen as ultimately a function of the individual liberty interest preserved by Due Process Clause' rather than as a function of federalism concerns" *Burger King*, 471 U.S. at 472 n.13 (quoting *Ins. Corp.*, 456 U.S. 702-03 n.10). Additionally, the *Burger King* Court acknowledged once again the specific versus general jurisdiction dichotomy that had appeared in its recent cases. The requirement that individuals have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign," *id.* at 472 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring) (citation omitted)), is satisfied in the specific jurisdiction context if the defendant has "'purposefully directed' his activities at residents of the forum," *id.* at 472 (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)), ... and the litigation results from alleged injuries that 'arise out of or relate to' those activities," *id.* at 472 (quoting *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414 (1984) (citations omitted)).

ascription of *in personam* jurisdiction.<sup>120</sup> The Court, in an antediluvian approach, continued to predicate a template on a dual test of impacted touchstones for venue resolution: “Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice.”<sup>121</sup> In relation to the latter factor, the Court distilled once again the set of five criteria adduced in *World-Wide Volkswagen*, but also stressed that this evaluation does not transpire until after the fair warning mandate has been met.<sup>122</sup> The five consequential factors only become part of the balancing equation as a secondary item as part of a schematic portfolio.

The Court, expressly approving the *ratio decidendi* established by the district court, upheld the assumption of jurisdictional propriety against Rudzewicz, as franchisee, in Florida. What led to this outcome? As Knudsen and other commentators have cogently asserted, a number of intrinsic factors in relation to this specific franchise contract indicated that a Floridian venue provided the focal epicentre of the dispute.<sup>123</sup> In a number of respects a “substantial connection” existed with the state of Florida, beyond isolated and individual contacts on the part of the franchisee.<sup>124</sup> The paucity of Rudzewicz’s contact within the alien forum, never troubling himself to make a physical visitation, did not preclude *in personam* jurisdiction. On this concern Justice Brennan opined that by “[e]schewing the option of operating an independent local enterprise, Rudzewicz deliberately ‘reach[ed] out beyond’ Michigan and negotiated with a Florida Corporation for the purpose of a long-term franchise and the manifold benefits that would derive from affiliation with a nation-wide organisation.”<sup>125</sup> The conduct of Rudzewicz was viewed as capricious and

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<sup>120</sup> See generally Carey, *supra* note 55; Paul Eric Clay, *Quest for a Bright Line Personal Jurisdiction Rule in Contract Disputes*-Burger King Corp. v. Rudzewicz, 105 S. Ct. 2174 (1985), 61 WASH. L. REV. 703 (1986); Knudsen, *supra* note 119; Lee, *supra* note 60, at 807; Stephens, *supra* note 91.

<sup>121</sup> *Burger King*, 471 U.S. at 476 (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945)).

<sup>122</sup> *Id.*

<sup>123</sup> See *id.* at 478; Knudsen, *supra* note 119.

<sup>124</sup> *Burger King*, 471 U.S. at 478 (“If the question is whether an individual’s contract with an out-of-state party *alone* can automatically establish sufficient minimum contacts in the other party’s home forum, we believe the answer clearly is that it cannot.”).

<sup>125</sup> *Id.*

inequitable - he was not coming to court with clean hands. The franchisee had contumeliously disregarded legitimate demands for due contractual payments, and even after contractual notice termination had continued to malignantly utilise confidential trademark and secret business information attached to Burger King. Again, as Justice Brennan iterated, this led to the conclusion that Rudzewicz had “caused foreseeable injuries to the corporation in Florida.” By a multiplicand of these disparate reasons, at the lowest common denominator, there was a presumptive case on a minimum contacts rationale for the franchisee to answer. There were sufficient relevant factors for immolation of the claim within Floridian jurisdiction, and for the *forum actoris* to be legitimately seized.<sup>126</sup>

The Supreme Court rejected the contention that, “the Michigan office was for all intents and purposes the embodiment of Burger King.”<sup>127</sup> In a judgment representing the very obverse of the court of appeals perspective, no legitimate expectation prevailed in favour of Rudzewicz as a concomitant of his negotiations and correspondence with the Birmingham office of Burger King. Another important factor proved to be the evidence provided by the contractual documentation itself. A literal and purposive contractual analysis had to be applied. It was necessary to evaluate both the content and context of the agreed terms. Justice Brennan stated that a literal and purposive interpretation revealed that the franchisees had express and implied knowledge that the Miami office at Burger King made the fundamental decisions,<sup>128</sup> that enforceability of contractual notices and payment prevailed there, and development of site potentialities.<sup>129</sup> Interestingly, a focus on the content and context of stipulated terms revealed a choice of law clause. This was accorded heightened significance by the Supreme Court, and emphasis was given to, “provisions in the various franchise documents

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<sup>126</sup> *Id.*

<sup>127</sup> *Burger King Corp. v. Macshara*, 724 F.2d 1505, 1511 (11th Cir. 1984).

<sup>128</sup> *Burger King*, 471 U.S. at 481:

When problems arose over building design, site-development fees, rent computation, and the defaulted payments, Rudzewicz and MacShara learned that the Michigan office was powerless to resolve their disputes and could only channel their communications to Miami. Throughout these disputes, the Miami headquarters and the Michigan franchisees carried on a continuous course of direct communication by mail and by telephone, and it was the Miami headquarters that made the key negotiating decisions out of which the instant litigation arose.

*Id.*

<sup>129</sup> *Id.*

that provided that all disputes would be governed by Florida law.”<sup>130</sup> There was an unfettered choice of law provision agreed upon by the respective parties. By judicial sorcery a choice of law provision was transplanted and identified as important to the different arena of jurisdictional propriety. The language of the contract, its choice of law provision, and contextual terminology, supported the juxtaposition that the defendant had, “purposefully availed himself of the benefits and protections of Florida’s laws by entering into contracts expressly providing that those laws would govern franchise disputes.”<sup>131</sup> Due process considerations were satisfied in arrogating Floridian jurisdiction, and the Court stated in conclusion that Rudzewicz had not “pointed to other factors that can be said persuasively to outweigh the considerations discussed above and to establish the unconstitutionality of Florida’s assertion of jurisdiction.”<sup>132</sup> The dice had been cast in terms of minimum contacts and reasonable foreseeability. It has been for later days to explore the continued viability of a template distilled from deontological reasoning and value judgements.

b. The Implications Of The Decision In Burger King: Current Orthodoxy in American Contractual Jurisdiction Principles

The Court noted two other points raised by the court of appeals. First, the Court paid little attention to the disparity of wealth between Rudzewicz and Burger King. In fact, in negating this as a factor, the Court relegated this discussion to a mere footnote.

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<sup>130</sup> *Id.* at 481. The relevant part of the document stated:

This Agreement shall become valid when executed and accepted by BKC at Miami, Florida; it shall be deemed made and entered into in the State of Florida and shall be governed and construed under and in accordance with the laws of the State of Florida. The choice of law designation does not require that all suits concerning this agreement be filed in Florida.

*Id.* (quoting App. 72). The Court acknowledged that in *Hanson v. Denckla*, “the center of gravity for choice-of-law purposes does not necessarily confer the sovereign prerogative to assert jurisdiction,” but it denied that the language suggested that choice-of-law provisions should be ignored in determining purposeful availment. *Id.* at 481 (quoting *Hanson v. Denckla*, 357 U.S. 235, 254 (1958)).

<sup>131</sup> *Id.* at 482 (quoting *Macshara*, 724 F.2d at 1513).

<sup>132</sup> *Id.* at 482-87:

It is undisputed that appellee maintained no place of business in Florida, that he had no employees in that State, and that he was not licensed to do business there. Appellee did not prepare his French fries, shakes, and hamburgers in Michigan, and then deliver them into the stream of commerce ‘with the expectation that they [would] be purchased by consumers in’ Florida. To the contrary, appellee did business only in Michigan, his business, property, and payroll taxes were payable in that State, and he sold all of his products there.

*Id.* (Stevens, J., dissenting) (citation omitted).



Second, the Court likewise put to rest the lower court's fear that a finding of jurisdiction in this case might lead to a proliferation of suits "to collect payments due on modest personal purchases" from out-of-state consumers. Reminiscent of an earlier 'not ... while this Court sits' dictum, the majority opinion made clear that this decision in no way created any 'talismanic jurisdictional formulas'. Stressing that 'the facts of each case must [always] be weighed' in determining whether personal jurisdiction would comport with 'fair play and substantial justice', the Court concluded that 'these dangers are not present in the instant case.'<sup>133</sup>

The ramifications of the *Burger King* decision are particularly significant. A number of particularistic resonances may be distilled from the Court's prescribed *ratio decidendi*: the establishment of a multi-factored approach and propagation of a dual two-pronged test; the nihilistic reaction to pro-defendant bias in contractual jurisdiction and termination of any single contract rules; enhanced importance for choice of law provisions; the potential revitalisation of the effects test; problems of identification for buyer/seller relationships and implications for small debtors; and the requirement for novel and specific consumer contract rules. The decision, in a sense, is embodied by Durkheim's malady of infinite aspirations; hopes raised on the establishment of a workable formula were sadly to be built on an edifice of quicksand.<sup>134</sup> It is instructive to look further at these self-contained implications.

In the author's view the Court's test for contract cases, still determinative twenty two years subsequent, suffers from the same defect plaguing previous standards used in determining whether in personam jurisdiction can be constitutionally asserted. Arguably, the template provided is too subject to solipsistic determination to provide any certainty in judicial precedents, too opaque, and imbued with recalcitrant flexibility.<sup>135</sup> Although the decision is positivistic in eliminating part of the difficulties appurtenant to the due process jurisdictional test, notably in single contact cases, nonetheless in other doctrinal avenues we are left in a cul-de-sac, effected by a standard characterised as unduly nebulous and vague. On the clarity front, the decision in *Burger King* rejects the notion that was apparently perceived from *McGee* that jurisdiction may be

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<sup>133</sup> See Knudsen, *supra* note 119, at 842.

<sup>134</sup> See also *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1986).

predicated upon a single-contract contact alone. Arrogation of *in personam* jurisdiction requires enhanced consideration of a myriad of factors especially in the context of whether a non-domiciliary has established sufficient causative nexus with the impacted forum state. The template provided is multi-factored and multi-layered with a wide range of legitimate factors. A crucial factor will be foreseeability of suit on the part of the non-domiciliary, derived from their own purposeful activities, and encapsulated within the “fair notice” criterion. The focus is on affirmative conduct on the part of the non-resident, disregarding the claimant’s activities therein. As Lee has cogently asserted, the crux for the future was an examination centred upon, “the overall negotiations and course of dealing between the parties and to the agreement which came out of those negotiations to determine whether the defendant’s connection with the forum was such that he should have foreseen the litigation there.”<sup>136</sup> In culinary terms a number of contractual ingredients are mixed and baked together to produce a venue resolution cake. The Supreme Court made it explicit that, “courts ought to consider prior negotiations and future consequences surrounding a contract to determine whether the contract has a ‘substantial connection’ with the forum.”<sup>137</sup> There would be a comportment with due process requirements when a non-domiciliary defendant has participated in a contract that has a substantial connection with the forum. The implication of such vague terminology, and amorphous definition of relevant impacted touchstones meant, as the Court acknowledged, and Lee states, that clear-cut jurisdictional rules were precluded.<sup>138</sup>

It is self-evident that the open-ended texture of the language used by the Court is subject to *ad hoc* interpretation. What seems clear, however, is the termination of a pro-defendant bias stance, which stands in contradistinction to the underlying premise of the Brussels Regulation, dependent upon *actor sequitur forum rei* principles. Legal certainty and predictability in terms of effective legal advice has consequently been obfuscated. Schulz and others have convincingly argued that, “once a defendant has knowingly established minimum contacts with an impacted forum state then, in accordance with the two-pronged test (first,

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<sup>135</sup> The Supreme Court has time and again rejected mechanical tests in determining *in personam* jurisdiction questions. *Id.* at 478 (citing *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)).

<sup>136</sup> Lee, *supra* note 60, at 102.

<sup>137</sup> *Burger King*, 471 U.S. at 480.

<sup>138</sup> *Id.* at 485 n.29. See generally Lee, *supra* note 60, at 102-03.

demarcating *minimum contacts* then second, evaluating fairness and reasonableness), there is no compelling requirement to continue the jurisdictional bias in their favour.<sup>139</sup> This was a developmental trend, and altered judicial mindset, that had been previously articulated by Judge Friendly in *Buckley v New York Post*: when he said “[t]here has been a movement away from the bias favouring the defendant, in matters of personal jurisdiction ‘toward permitting the plaintiff to insist that the defendant come to him’ when there is a sufficient basis for doing so.”<sup>140</sup>

Interestingly, the Court also provided a new perspective on choice of law agreements between the respective parties.<sup>141</sup> An expressed preference by the parties in favour of a defined forum’s law, albeit in a different contact, nonetheless promoted an intentional and deliberate relationship with that forum, and consequently was also relevant to the jurisdictional analysis. The Court in *Burger King*, as Lee asserts, expressly articulated that, “a choice of law provision in the contract is one such term, and it should be a significant factor in support of asserting jurisdiction over a non-resident even though it should not be interpreted as express consent to jurisdiction and cannot independently confer jurisdiction as a choice of forum provision can.”<sup>142</sup> The implication is, however, that the Court’s test in practical terms places heightened significance on actual contractual terms, arguably in an undue fashion. The legitimate concern of Carey and others is that “overemphasis on the terms of a contract add an element of unfairness to the jurisdictional inquiry in that boilerplate language alone may determine if *in personam* jurisdiction may validly be asserted.”<sup>143</sup> The overarching metanarrative herein is that through different bargaining strengths of the respective parties, inefficacious choice of law clauses may illegitimately skew proper jurisdictional analysis. As a consequence the Court’s heavy reliance on the choice of law provision in *Burger King* is regrettable. Indeed, as Carey states, this phenomenon

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<sup>139</sup> Schultz, *supra* note 120; *see generally* Clay, *supra* note 120.

<sup>140</sup> *Buckley v. N.Y. Post Corp.*, 373 F.2d 175, 181 (2d Cir. 1967) (“[I]t would not be difficult to extrapolate from the McGee [sic] decision and opinion a general principle that the due process clause imposes no bar to a state’s asserting personal jurisdiction...in favor of a person within its borders who suffers damage from the breach of a contract the defendant was to perform there or a tort the defendant committed there. Once we free our minds from traditional thinking that the plaintiff must inevitably seek out the defendant, such a doctrine would not seem to violate basic notions of fair play....”).

<sup>141</sup> *Burger King*, 471 U.S. at 482; *see* Lee, *supra* note 60, at 102.

<sup>142</sup> *Id.*; *see* Lee, *supra* note 60, at 102-03.

was presaged by statements made by the Eleventh Circuit, that, “too great a reliance on boilerplate language in a contract, especially where disparity of bargaining power is prevalent, may lead to numerous default judgments if the cost of defending a small claim in a distant forum is in excess of the claim value itself.”<sup>144</sup> It is incontrovertible that an impact of the *Burger King* decision has been to accord precedence to choice of law provisions even within the venue resolution substantive arena. The effect, as Carey highlights, is that prior judicial precedents such as *Iowa Electric Light & Power Co. v Atlas Corp.*,<sup>145</sup> are no longer determinative in suggesting that the choice of law provision in a contract is irrelevant for arrogation of in personam jurisdiction. Hard cases may indeed make bad law, but in jurisprudential terms such cases have been assigned to simply gather dust on our library shelves. As noted at the outset of this section, the Supreme Court have rejected any specific ‘talismanic jurisdictional formulas.’<sup>146</sup> Nonetheless, as Carey and Knudsen have suggested, the net result of according precedence to incorporated choice of law provisions, is to multiply the ascription of jurisdiction vis à vis non-domiciliary contracting parties. They became subject to suit in a foreign venue through a choice of law impacted jurisdictional touchstone.

As Lee and Knudsen have stressed, although the Court made explicit, “the jurisdictional significance of the negotiations between the parties which culminated in the agreement and the contemplated effects of that agreement”, it left opaque the relevance, if any, which should be inculcated to the defendant’s breach of that agreement. Is contractual breach a relevant factor to the due process test, and does it satisfy the threshold of any foreseeability test? An intuitive response to that dilemmatic question is that a breach is not an anticipated, consequential factor attached to formation of a contractual relationship. However, the position in *Burger King* itself was rather different. Rudzewicz had refused to make due contractual payments, and these payments were viewed as being deliberately and wilfully withheld. This raised the spectre that indirectly the

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<sup>143</sup> See Carey, *supra* note 55, at 469; see generally Clay, *supra* note 120.

<sup>144</sup> Carey, *supra* note 55, at 469.

<sup>145</sup> *Iowa Elec. Light & Power Co. v. Atlas Corp.*, 603 F.2d 1301 (8th Cir. 1979); see Carey, *supra* note 55.

<sup>146</sup> Knudsen, *supra* note 133.

breach of contract “caused foreseeable injuries to the corporation in Florida.”<sup>147</sup> Impressionistically, the breach of contract by Rudzewicz, with anticipatory consequences in Florida causing financial harm to the corporation, ought to have led him to objective foresight of legitimate suit therein. More surprising perhaps is the implication, which Lee and other commentators have identified, that this rationale “appears in reality to be a revitalisation of the effects test for jurisdiction, which the Court had cogently refuted under the facts of *Kulko Superior Court of California*, but did not expressly reject as an overall basis for jurisdiction in commercial litigation”.<sup>148</sup> In accordance with the effects test established by the Restatement, jurisdiction is accorded to a state “over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individual’s relationship to the state make the exercise of such jurisdiction unreasonable.”<sup>149</sup>

In truth, as Lee and Knudsen have cogently iterated, we are left with prevailing uncertainty as to whether an effects test, rising like Phoenix from the flames, has an enervating presence as a determining factor in venue resolution.<sup>150</sup> Contradiction prevails at every turn as at one juncture the court in *Burger King* appears to rule out foreseeability of causing harm in the forum as a sufficient benchmark for arrogating jurisdiction; elsewhere, as articulated above, objectively foreseeable financial loss to a dyspeptic claimant is adduced as relevant as part of the balancing equation. Many vacuous bromides seem to exist in the jurisdictional configuration. It is unfortunate that this conflicting and indecipherable terminology, without extirpation, has left uncertainty as to the importance of the causative effect of a non-domiciliary’s conduct in an alien forum as part of the jurisdiction enquiry.<sup>151</sup> Moreover, another unresolved

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<sup>147</sup> *Burger King*, 471 U.S. at 480; Carey, *supra* note 55; Clay, *supra* note 120; *see generally* Knudsen, *supra* note 133.

<sup>148</sup> Knudsen, *supra* note 133; *see* Lee, *supra* note 60, at 102-03; *see also* *Kulko v. Superior Court*, 436 U.S. 84 (1978).

<sup>149</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 (1971).

<sup>150</sup> *See Burger King*, 471 U.S. at 474 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980)). For an appraisal of the substantive legal issues surrounding the possible use of the First Amendment as a limitation on personal jurisdiction, *see* Frank W. Mitchell, Comment, *Minimum Contacts and the First Amendment: When Should They Meet?*, 35 BAYLOR L. REV. 467 (1983); Lee, *supra* note 60; *see generally* Knudsen, *supra* note 133; McDermott, *Personal Jurisdiction: The Hidden Agendas in The Supreme Court Decisions*, 10 VT. L. REV. 1 (1985).

<sup>151</sup> *See* Stephens, *supra* note 104. On this matter Stephens has also asserted:

This use of the effects test is of little consequence for contract cases, however. Contrary to statements in the literature, ‘effects,’

jurisdiction question remains outstanding, but still as pertinent today as over twenty two years ago when the decision in *Burger King* was promulgated, focused upon the impact of purchases within the locality of the forum. Do these purchases, at an individual or corporate level, represent a sufficient benchmark to arrogate jurisdiction in a distant forum over a non-resident? In terms of due process, fairness and ideals of causative potency, should they be sufficient? Intertwined here are ideals of public policy and objective legitimacy. The Court in *Burger King* articulated a negative response over simple purchases as an effective jurisdictional touchstone, but the wider issue remains. On this dilemma it has been asserted by Lee that, “[T]he Court rejected the notion that an ordinary consumer with no other contacts with the forum will be subjected to jurisdiction in a distant forum simply because of nominal purchases made there, but it did not expressly address the issue of commercial purchases and the effect of these purchases on determining whether the non-resident intended to establish a purposeful relationship with forum residents.”<sup>152</sup> The passage of time has not assisted us in resolving this postulation, and we await definitive clarity on this important issue.

As previously adumbrated, there are a significant number of prior case precedents addressing the appropriateness of jurisdiction establishment through a basic distinction between non-resident buyers and sellers, with the preponderance of jurisdiction ascription, as Schultz stresses, weighted against sellers.<sup>153</sup> Clay has gone further and suggested proposed benefits favoring a bright line rule in favor of adopting the buyer’s forum in business relationships. This is viewed as reflecting traditional practice as, “[I]t is the seller who customarily has control over the

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seem to represent only another type of contract. The effects test is not a substitute for the minimum-contacts test, but rather offers another way of demonstrating such contacts and the fairness and reasonableness of asserting jurisdiction over the absent defendant. In single-contract cases, harmful effects are only one of the circumstances surrounding the making and breaking of the contract that lead to litigation. Harmful effects supply the injury link, which allows the assertion of specific jurisdiction. That the defendant’s intended actions had such foreseeable effects also may tend to reinforce a finding of ‘foreseeability [sic]... that he [would be]...haled into court’ in that forum.

*Id.* at 113.

<sup>152</sup> *Burger King*, 471 U.S. at 466-67; see Lee, *supra* note 60, at 103; see also Gentile, *supra* note 59; Goodman, *supra* note 65; Ripple & Murphy, *supra* note 37.

<sup>153</sup> See Schultz, *supra* note 91.

terms of the contract and who can increase prices if the cost or risk of distant litigation is too high. Buyers do not have similar means of compensating themselves for distant litigation. Therefore, the realities of our economy provide a strong basis for a bright line rule presuming jurisdiction in the buyer's forum instead of the seller's forum."<sup>154</sup> Impressionistically the seller is identified as the dominant party to a transaction, and better able to defend themselves before an alien forum. However, the subtle nuances of the buyer/seller relationship were examined and rejected by the Court in *Burger King*. The decision sought to pierce the perceived veil between a dominant/weaker presumption and look to the true individual factual position. Subsequently, as a number of commentators have asserted, a wider all-encompassing test has been embraced, significantly beyond a party delineation focus, examining all perceived relevant factors which include: longevity of party inter-action; contractual reparation and financial indicia; effective engagement in contractual negotiations,<sup>155</sup> immolation of contractual terms; bargaining power differentials; and facilitative engagement and representations on either side. This non-exhaustive list represents the degree of vacillation in the flexible test; a factor may be promoted to crucial significance in one case, but downplayed in another. The implication, however, following the decision in *Burger King*, is that it is vital to identify the focal epicenter of the dispute, to search for passive involvement in the contractual agreement, and to search for touchstones related to objective foreseeability and sufficiency in causative nexus.<sup>156</sup>

In summary, the schematic approach to contractual jurisdiction articulated by the Court in *Burger King* necessitates comportment to legal outcomes on matters of "purposeful availment", a "continuing obligation" or a "substantial connection".<sup>157</sup> The consequential difficulty for a chastised potential defendant is that successful prediction of how a judge will solipsistically characterize a particular activity remains as likely as tattooing soap bubbles. It is as arcane as delineating how many angels can dance upon the head of a pin. Hence, parties engaging in contractual relationships have inadequate knowledge or information upon which they can soundly base the fundamental decision of where and when to

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<sup>154</sup> Clay, *supra* note 120, at 728.

<sup>155</sup> *Id.*; see generally Stephens, *supra* note 104.

<sup>156</sup> See generally Stephens, *supra* note 104.

effectuate their commercial engagements to avoid subjecting themselves to unpalatable suits in alien forums.<sup>158</sup> In effect, the Court's own analytical structure reveals a flagrant requirement for a bright-line rule for contract cases.

A systematic formulaic response is needed to effect an optimal recategorization of contractual jurisdiction principles. The analysis stresses fair warning to a defendant, but a defendant is more efficaciously warned by adoption of a mechanical rule-selection test. It is conceded, however, that jurisdictional rules may not completely eradicate the vagaries of uncertainty as there is the potential for a discretionary element, or definitional interpretative inconsistencies, in virtually any rationale suggested. However, it is submitted that the fair warning problem may be subjected to remedial action; the central cornerstone is avoidance of ambiguous balancing processes. The alternative provided by the special contractual jurisdictional provisions of article 5(1) of the Brussels Regulation ought to be considered as a cathartic panacea to incumbent interpretative difficulties within American jurisprudence.

#### IV. SPECIAL JURISDICTION IN MATTERS RELATING TO CONTRACT PURSUANT TO ARTICLE 5(1) OF THE BRUSSELS CONVENTION

##### a. Introduction

The primary ground of jurisdiction is that contained in article 2 of the Convention whereby defendants shall be sued in the courts of their domicile.<sup>159</sup> However, in certain situations special jurisdiction will exist under article 5, allocating jurisdiction in various categories of dispute, where relevant factors ascribe factual connections between the cause of action and the forum. In a commercial context the most important of these special jurisdictional rules are contractual matters under article 5(1), tort (article 5(3)), and disputes arising out of

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<sup>157</sup> *Burger King*, 471 U.S. at 473-77.

<sup>158</sup> See Stewart Jay, *Minimum Contracts as a Unified Theory of Personal Jurisdiction: A Reappraisal*, 59 N.C. L. REV. 429, 443 (1981). It is submitted that, although a valuable aid, precedent alone cannot be relied upon to determine whether a defendant's situation might lead to jurisdiction. A court would be forced to deny jurisdiction any time prior cases did not provide explicit approval of jurisdiction. A fair forum could be denied jurisdiction solely because there was no precedent. Jurisdiction would thus be locked into a "perpetual status quo." *Id.*

<sup>159</sup> For more information regarding the principle actor sequitur forum rei see supra notes 8-13. See also P. Jenard, *Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, 1979 O.J. (C 59) 1, 13, 18-19 [hereinafter *Jenard Report*]; Citadel



the operations of a branch, agency or other establishment (article 5(5)).<sup>160</sup> The effect of the article 5 derogations from the primary ground are to empower the plaintiff with the option to sue the defendant before the court of a contracting state other than that of the defendant's domicile. Since they represent a deviation from general principle they are to be restrictively interpreted, as was stated in *Etablissements Somafer S.A. v. Saar-Ferngas S.A.*,<sup>161</sup> by the Court of Justice:

Multiplication of the bases of jurisdiction in one and the same case is not likely to encourage legal certainty and the effectiveness of legal protection throughout the territory of the Community, and therefore it is in accord with the objective of the Convention to avoid a wide and multifarious interpretation of the exceptions to the general rule of jurisdiction contained in Article 2.<sup>162</sup>

It is important that when evaluating the jurisdictional provisions for contract and tort one is not blinkered to domestic English notions of obligations - they must be given an autonomous community-wide definition.<sup>163</sup> In this sense a dichotomy prevails between jurisdiction and substance. An English court must adjudicate on jurisdiction over a contractual dispute applying an autonomous definition<sup>164</sup> to the concept of "contract". Once jurisdiction has been established the court may then determine the merits of the dispute by applying its domestic rules of contract, or even tortious substantive principles if it determines that, applying its own choice of law guidelines, the claim is non-contractual.<sup>165</sup>

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Ins. Co. v. Atl. Union Ins. Co., (1982) 2 Lloyd's Rep. 543, 549 (Court of Appeal) (Eng.); S.A. Consortium Gen. Textiles v. Sun & Sand Agencies [1978] Q.B. 279, 295 (Court of Appeal).

<sup>160</sup> Note that this form of jurisdiction is justified on the basis that a court of a contracting state is only given jurisdiction under section 2 where it is an appropriate forum for trial. The claimant is left to decide whether she wishes to sue the defendant in the latter's domicile under article 2, or whether she wishes to sue him in another contracting state under Section 2. See *Custom Made Commercial Ltd. v. Stawa Metallbau GmbH*, 1994 E.C.R. I-2913; Case 34/82, *Martin Peters Bauunternehmung GmbH v. Zuid Nederlandse Aannemers Vereniging*, 1983 E.C.R. 987; Case 12/76, *Industrie Tessili Italiana Como v. Dunlop AG*, 1976 E.C.R. 1473; Case C-288/92; *Jenard Report*, *supra* note 159, at 22 (it may not be the state with the closest connection).

<sup>161</sup> Case 33/78, *Somafer S.A. v. Saar-Ferngas AG*, 1978 E.C.R. 2183.

<sup>162</sup> *Id.* at 2191.

<sup>163</sup> See, e.g., Case C-26/91, *Jakob Handte & Co. v. Traitements Mecano-chimiques des Surfaces S.A.*, 1992 E.C.R. I-3967; Case C-261/90, *Reichert v. Dresdner Bank AG*, 1992 E.C.R. I-2149; Case 189/87, *Athanasios Kalfelis v. Bankhaus Schroder, Munchmeyer, Hengst & Co.*, 1988 E.C.R. 5565.

<sup>164</sup> See generally *NORTH & FAWCETT*, *supra* note 48, at 280; *MCLEAN*, *supra* note 48, at 99.

<sup>165</sup> In essence, choice of law is not prejudiced by the initial determination of Article 5 jurisdiction. See, e.g., *ADRIAN BRIGGS, NORTON ROSE ON CIVIL JURISDICTION AND JUDGMENTS* 79 (Peter Rees ed., 1993); see generally *PETER KAYE, CIVIL JURISDICTION AND ENFORCEMENT OF JUDGMENTS* 488 (1987).

Indubitably, a court that acquires jurisdiction under article 5(1) is not prevented by the Convention from proceeding with the action on the basis that it is delictual, and a court that acquires jurisdiction under article 5(3) is not prevented by the Convention from proceeding with the action on the basis that it is contractual.<sup>166</sup>

b. Jurisdiction In Matters Relating To A Contract: Article 5(1)

The special contract rule contained within article 5(1)(a) states that a person domiciled in a Contracting State may be sued in another Contracting State “in matters relating to a contract, in the courts for the place of performance of the obligation in question”. This general principle is modified to an extent by subparagraph (b), which indicates how place of performance is to be determined in certain types of cases specifically contracts for the sale of goods and contracts for the provision of services. This particular section of the article focuses on the interpretation of such terminology by the Court of Justice, and recently by the English Courts. Unfortunately the plethora of cases has created a wholly anomalous and unsatisfactory state of affairs, suggesting that article 5(1) should be abrogated, on the ground that it causes more trouble than it is worth.<sup>167</sup> Jurisdictional rules should aim to meet three identifiable tenets - (i) their effect should be predictable; (ii) litigation should be conducted in an appropriate forum and (iii) disputes precipitated from one factual scenario ought to be settled by a single forum, not dispersed between the courts of different countries.<sup>168</sup> The special contract principles fail to fulfil any of these criteria, with the synergistic effect of recent decisions further violating aims of certainty, predictability and appropriateness of forum. In many respects an unfortunate position has been created and exacerbated by incumbent uncertainty over the relationship between contract and tort, and treatment of restitutionary claims derived from equitable assumptions.

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<sup>166</sup> See Case C-26/91, *Jakob Handte*, 1992 E.C.R. at I-3984.

<sup>167</sup> See, e.g., P.A. Stone, *Problems with the Forum Loci Solutionis*, 12 *ANGLO-AM. L.R.* 52, 60 (1983).

<sup>168</sup> See P.B. Carter, *Decisions of the British Courts During 1972-1973: Private International Law*, 46 *BRIT. Y.B. INT'L L.* 428, 430 (1972-1973); see, e.g., Jonathan Hill, *Jurisdiction in Matters Relating to a Contract Under the Brussels Convention*, 44 *INT'L & COMP. L.Q.* 591, 593 (1995).

As stated, an autonomous meaning must be given to the expression, “obligation in question”, within the ambit of article 5(1). It was established by the Court of Justice in *De Bloos SPRL v. Societe en commandite par actions Bouyer*<sup>169</sup> that where the action was based on a single contractual obligation, then the “obligation in question” for the purposes of article 5(1) is the contractual obligation upon which the plaintiff’s action is based.<sup>170</sup> In a claim, for example, against a building construction company who have failed to build in accordance with agreed specifications, it will be the obligation of the company to build in accordance with their instructions.<sup>171</sup>

However, many contractual disputes involve several different claims accruing out of different obligations under the contract. What approach should be adopted where, for example, it has been claimed that the defendant is in breach of a number of obligations under the same contract such as; defective performance in England; breach of specifications in Germany; and non-delivery in France? The matter of multiple broken obligations was addressed by the Court in *Shenavai v. Kreischer*,<sup>172</sup> albeit that such a ruling was not strictly needed for the case at hand. In *Shenavai*, a German architect brought a claim against a Dutch client for his professional fees in Germany. The European Court reiterated the general rule by asserting that the obligation in respect of which the action was brought was that identified by article 5(1), but stated also that, in the case of multiple broken obligations, the court seized should ascertain the principal obligation to which other broken obligations were accessory. Primacy rests in the ascertainment of the main obligation, as the Court stated:

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<sup>169</sup> Case 14/76, *A. De Bloos, SPRL v. Societe en commandite par actions Bouyer*, 1976 E.C.R. 1497.

<sup>170</sup> *Id.* ¶ 13.

<sup>171</sup> See also *AIG Europe (U.K.) Ltd. v. The Ethniki*, [2000] 2 All E.R. 566. There is a problem in identifying the obligation in question in cases where the claimant is seeking a negative declaration, i.e. a declaration that he is not liable to perform an obligation under the contract, on the basis that the other party has not performed a term of the contract. A claimant may, however, frame the claim carefully in order to obtain jurisdiction in the English court under art. 5(1). The claimant in this case sought a declaration of non-liability, alleging that the defendant's breach of contract excused the claimant from performance. The Court of Appeal held that the principal obligation that the reinsurer was relying upon in this case was the failure of the defendant to notify the reinsurer of a claim made against the defendant (under a claims control clause). As the notification was to be made in London the English court had jurisdiction. Lord Justice Evans refused to accept that the principal obligation giving rise to the claim was the failure to investigate the loss properly in Greece. The performance of a condition precedent to the liability of the other party could properly be described as fundamental, and its breach as the real ground of complaint.

<sup>172</sup> Case 266/85, [1987] E.C.R. 239.

[I]n such a case the court before which the matter is brought will, when determining whether it has jurisdiction, be guided by the maxim *accessorium sequitur principale*; in other words, where various obligations are at issue, it will be the principal obligation which will determine its jurisdiction'.<sup>173</sup>

The principle elaborated in *Shenavai* was subsequently applied by the House of Lords in *Union Transport v. Continental Lines*.<sup>174</sup> The plaintiffs contended that in December 1983, by means of an exchange of telexes, a charter of a vessel had been concluded with the defendant, the latter to nominate the vessel for the carriage of a cargo of telegraph poles from Florida to Bangladesh. The defendant, a Belgian company, denied that a contract had been concluded between the parties. The charterer sued the ship owner for breach of two obligations - to nominate and to provide a vessel. The House of Lords, the leading judgment that of Lord Goff, held that the principal of the two obligations was the obligation to nominate. Hence, the English court was jurisdictionally competent, since the obligation to nominate a vessel was to be performed in England (received by the charterer where it resided), even though it was in Florida that the vessel should have been made available for loading the cargo. The decision simply operates by way of confirmation that if there exists a principal and an accessory obligation, as was palpably apparent in *Union Transport*, the rule in *Shenavai* will be applicable.<sup>175</sup>

Similarly, in *Viskase Ltd. v. Paul Kiefel GmbH*<sup>176</sup> this division was replicated. The claimant tried to argue that the obligation to deliver machines that were fit for their purpose was to be performed in England where the machines were to operate. The Court of Appeal dismissed this argument to hold that the obligation was performed at the time the machines were delivered (even if the failure was only discovered afterwards while the machines were in operation).<sup>177</sup>

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<sup>173</sup> *Id.* ¶ 19.

<sup>174</sup> [1992] 1 All E.R. 161; see Adrian Briggs, *The Brussels Convention Reaches the House of Lords*, 108 L.Q. R. 186 (1992); see also *Source Ltd. v. T.U.V. Rheinland Holding A.G.*, [1980] Q.B. 54 (C.A.) (U.K.) (where the "principal obligation" test was applied by the Court of Appeal; English company prepared to grant credit on imported goods, subject to inspection in country of origin, principal obligation in that country).

<sup>175</sup> Briggs, *supra* note 174, at 186.

<sup>176</sup> [1999] 3 All E.R. 362. See generally Adrian Briggs, *Decisions of the British Courts in 1999: Private International Law*, 1999 Brit. Y.B. Int'l L. 319, 336.

<sup>177</sup> Adrian Briggs asserts on this issue that:

[T]o seek to illuminate the operation of Art[icle] 5(1) by asking where the obligation in question was broken is seriously misguided, for the place where performance

As these machines were delivered ex works in Germany,<sup>178</sup> the English courts had no jurisdiction.<sup>179</sup>

On a number of different levels the requirement of adopting an autonomous meaning for the “obligation in question” over contractual matters is eminently unsatisfactory. It is important to consider four identified difficulties: problems where contractual obligations are performable in a number of contracting states; contextual problems on characteristic obligation theory; problems over restitutionary claims and the flawed perspective of contractual jurisdiction principles; and accessory jurisdiction and division between specific and main contractual obligations.

*i. Obligation Performable in a Number of Contracting States*

There has been latent uncertainty over the correct jurisdictional ascription where the “obligation” in dispute is performable in a number of contracting states. Article 5(1)(a) refers to the *place* of performance, and it has been opaque as to whether jurisdiction in matters relating to a contract could be allocated by article 5(1) in a case where a single place of performance cannot be identified. The matter arose for consideration by the Court of Justice in *Besix S.A. v. Wasserreinigungsbau Alfred Kretzschmar GmbH & Co.*<sup>180</sup>, wherein a narrow and strictly purposive interpretation has been provided.

In *Besix* the claimant (a Belgian company) and the defendant (a German group) signed in Brussels an agreement drawn up in French whereby they undertook to submit a joint tender in response to a public invitation to tender for a project of the Ministry of Mines and Energy of Cameroon called “water supply in 11 urban centres in Cameroon” and, if their tender were accepted to perform the contract jointly. In purported breach of this negative exclusive undertaking the German group, had, in association with a Finnish undertaking, also taken part in the tender for the public contract in question. The elided question was whether

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was due is simply not the same as the place of the breach; and the identification of the latter does not reliably advance the search for the former.

*Id.* at 337.

<sup>178</sup> In the case of seven of the eight machines, delivery had taken place in Germany, but in the case of one machine, delivery was at the National Exhibition Centre in Birmingham, England. The English Court had jurisdiction only in respect of that machine.

<sup>179</sup> See *RPS Prodotti Siderurgici Srl v. The Sea Maas*, [1999] 1 All E.R. (Comm.) 945 (noting that in this case the complaint was that the ship owner did not provide a seaworthy vessel and this was to be performed at the place of loading); *MBM Fabri-Clad Ltd. v. Eisen-Und Hutten Werke Thale AG*, [1999] 2 W.L.R. 1181.

<sup>180</sup> [2002] ECR I-1699.

the place of performance of the defendants' contractual obligation to "act exclusively and not to commit themselves to other partners" was Belgium (where one of the contracting parties was domiciled)? A negative response was elicited on this occasion from the Court of Justice, asserting that article 5(1) is circumvented and excluded where the contractual place of performance cannot be determined because it consists in an undertaking not to do something which is not subject to any geographic limit and is, therefore, characterized by a multiplicity of places for its performance.<sup>181</sup> The rationale propounded, by extrapolation, applies not simply to negative obligations (to be performed without territorial limit), but similarly to cases engaging positive obligations to be performed in a number of states. This was subsequently affirmed by the English Court of Appeal in *Mora Shipping Inc of Monrovia, Liberia v. Axa Corporate Solutions Assurance S.A.*,<sup>182</sup> stating that a contract of average guarantee did not oblige the defendants to pay a contribution to general average in England. Hence, the English court did not have jurisdiction over the defendants, domiciled in other states of the EU and in Switzerland (a Lugano Convention country). The contract permitted the defendants to pay a contribution either to the shipowner or the average adjuster. The owners were domiciled in Norway or Liberia and the average adjuster in England.

The Court of Justice in *Besix* was mindful of a number of policy considerations reflecting on optimal contractual jurisdiction principles.<sup>183</sup> It was important to obviate the risk that a claimant would be able to unilaterally choose the place of performance which he judges to be most favourable to his interests, contrary to the tenor of the Convention on appropriate touchstones. The reason for the adoption of the jurisdictional rule in article 5(1) of the Brussels Convention was concern for sound administration of justice and efficacious conduct of proceedings. A single place of performance had to be identified in the court's perspective as, in principle, this will be the place presenting the *closest connection* between the dispute and the court having jurisdiction. It was contended that the principle of legal certainty requires, in particular, that the jurisdictional rules which derogate from the basic principle of *actor sequitur forum rei*, such as the rule in article 5(1), should be interpreted in such a way to enable a normally well-

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<sup>181</sup> *Id.* ¶ 34.

<sup>182</sup> [2005] EWCA (Civ) 1069, [2005] 2 Lloyd's Rep. 769 (C.A.) (U.K.).

informed defendant “reasonably to foresee” before which courts, other than those of the state in which he is domiciled, he may be sued.<sup>184</sup> The principle, in simple language terms, raises incantations to the minimum contact and foreseeability test evinced in *McGee*, albeit a different factual nexus. Finally, there was invocation of legal consistency concerns, avoiding a number of courts having jurisdiction in respect of one and the same contract, thus precluding the risk of irreconcilable decisions and facilitating recognition and enforcement of judgments in states other than those in which they were delivered.<sup>185</sup>

The nature of these policy desiderata are considered in the concluding section of the article as part of optimal reform proposals. Interestingly, a wholly different standpoint to multistate tort jurisdiction, as opposed to contractual obligations, was adopted by the Court of Justice in *Shevill v. Presse Alliance*,<sup>186</sup> which provides an important contrast to *Besix* and *Mora*. In *Shevill*, the Court had to determine the ambit of article 5(3) of the special jurisdictional provisions, relating to “place of the tort,” over multi-state libel. In a libel scenario where a newspaper article is distributed in several contracting states then, according to the Court of Justice, the place of the event giving rise to the damage (causal event), can only be where the miscreant publisher is established, that is the place where the harmful event originated and from where the libel was issued and put into circulation.

The certainty of this pronouncement in *Shevill* might surprise common law courts, which have long held that the act causing damage in a libel case is the communication of the defamatory statement to a third person. It was, however, consistent with the Court of Justice’s past practice as, in construing article 5(3), they opted for an interpretation independent of the national laws of the Convention’s contracting states. The court of the place where the publisher is established has jurisdiction to hear the whole action for all damage caused by the unlawful act. That jurisdiction will, as the Court noted, generally coincide in any event with the article 2 jurisdiction based on the domicile.<sup>187</sup> The Court reasoned

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<sup>183</sup> Case C-256/00, [2002] ECR I-1699, 1699.

<sup>184</sup> See generally Case C-440/97, *GIE Groupe Concorde v. The Master of the Vessel ‘Suhadiwarno Panjan,’* [1999] ECR I-6307.

<sup>185</sup> See generally Case C-383/95, *Rutten v. Cross Medical Ltd.*, [1997] ECR I-57; Case C-420/97, *Leathertex Divisione Sintectici SpA v. Bodetex BVBA*, [1999] ECR I-6747.

<sup>186</sup> *Shevill v. Presse Alliance SA*, [1995] 2 A.C. 18 (E.C.J.) (appeal taken from H.L.) (U.K.).

<sup>187</sup> *Id.* at 52.

that because the whole of the plaintiff's damage originated with the defendant's unlawful act, for jurisdictional purposes this forum has a "particularly close connection" with all of the consequences of that act, both within and without the geographical boundaries of the forum.<sup>188</sup>

By similar reasoning to the *Handelrkekerij G.J. Bier B.V. v. Mines de Potasse d'Alsace S.A.*<sup>189</sup> case on cross-border pollution, co-existent jurisdiction, at the option of the plaintiff, was also held to exist in the place where the damage occurred otherwise article 5(3) of the Convention would be rendered superfluous. Where does the damage occur in the case of an international libel, published, for example, throughout each individual Member State? The Court identified the place "where the damage occurred" as the place where the wrongful act "produced its harmful effects on the victim".<sup>190</sup> In this regard the *Shevill* Court did not equate that place with the location where the victim subjectively suffers the shame or humiliation associated with a defamatory attack, for this would be tantamount to conferring jurisdiction on the *forum actoris*.<sup>191</sup> Instead, the Court determined that defamatory publications "produce" their harms in each and every state in which both the victim is known (that is, has a reputation that can be affected) and the publication is distributed.<sup>192</sup>

There was, however, an attempt by the Court of Justice to limit a national court's power to exercise jurisdiction over a defamation action because it sits in the place where the damage occurred. In *Shevill*, it was determined that a national court vested with jurisdiction on this basis is competent to award compensation only for the harm suffered by the plaintiff within the borders of the state in which it presides; it cannot award damages for harms suffered in other countries.<sup>193</sup> A claimant, however, choosing to base jurisdiction on the distribution of the publication can, in theory, bring a separate action in each state in which the publication was distributed, so long as the claimant is "known" there. The underlying rationale for such a conclusion was founded by the European Court of

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<sup>188</sup> *Id.* at 27.

<sup>189</sup> Case 21/76, *Handelrkekerij G.J. Bier B.V. v. Mines de potasse d'Alsace SA*, [1976] E.C.R. 1735 (stating that the judgment concerned cross-border pollution, responsibility for which lay with an undertaking established in France, causing harm to a horticultural undertaking domiciled in the Netherlands).

<sup>190</sup> *Id.* ¶ 24-25.

<sup>191</sup> *Shevill*, 2 A.C. at 39.

<sup>192</sup> *Id.* at 62.

<sup>193</sup> *Id.* at 48.



Justice on the sound administration of justice in that the state in which the defamatory publication was distributed and in which the victim claims to have suffered injury to his reputation is best suited to assess and determine the corresponding damage, but is not competent to do so with regard to damage suffered in other states.<sup>194</sup>

The fundamental predicate for the outcome in *Shevill* is provided in the illuminating advisory opinion of Advocate-General Darmon. Significantly, he justified the limitation on the basis that there was “no close connecting factor” between the courts sitting in the place where damage arose and the damage that occurred in other countries. In making this delineation, Advocate-General Darmon approved the consistent line of French scholarship, and in particular the views of Professor Paul Lagarde:

[W]here an act gives rise to damage in more than one country, the courts of the place where the act was committed should hear and determine claims in respect of the whole of the damage caused by the act, wherever it may have arisen, since each instance of such damage is connected in its entirety to that act. On the other hand, a court in one of the places where the damage arose can only be competent to hear and determine claims in respect of the harmful consequences of the act in the country in which it sits, since there exists no connection between the damage caused in another country and that court, by virtue of either the place where it arose or the place where the wrongful act was committed.<sup>195</sup>

The result of the decision in *Shevill* is to create a multiplicity of competent fora having jurisdiction over international libels. By analogy, similar jurisdiction must apply over other intangible torts, encompassing negligent misstatement,<sup>196</sup> passing off,<sup>197</sup> infringement of intellectual property rights,<sup>198</sup> inducement of

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<sup>194</sup> *Id.* at 62.

<sup>195</sup> *Id.* at 42 (quoting Paul Lagarde, 63 REVUE CRITIQUE DE DROIT INTERNATIONALE PRIVÉ [R.C.D.I.P.] 700, 704 (1974) (Fr.)).

<sup>196</sup> See, e.g., *Domicrest Ltd. v. Swiss Bank Corp.*, [1999] Q.B. 548 (U.K.); see also *William Grant & Sons Int'l Ltd. v. Marie Brizard*, [1997] I.L.Pr. 391 (S.C.(H.L.)) (Scot.).

<sup>197</sup> *Modus Vivendi Ltd. v. British Products Sanmex Co.*, [1996] F.S.R. 790; *Mecklermedia Corp. v. D.C. Congress GmbH*, [1997] 3 W.L.R. 479.

<sup>198</sup> *Molnlycke AB v. Procter & Gamble Ltd.* (No. 4), [1992] All E.R. 47 at 54; *Pearce v. Ove Arup Partnership Ltd.*, [1999] 1 All E.R. 769; *Fort Dodge Animal Health Ltd. v. AKZO Nobel N.V.*, [1998] F.S.R. 222; see generally *Dutson*, [1998] 47 Int'l & Comp. L.Q. 659; [1997] J. Bus. L. 495; *Dutson*, [1997] J.B.L. 495; *Adrian Briggs, Private International Law*, 1999 Brit. Y.B. Int'l L. 319, 349.

breach of contract,<sup>199</sup> and other economic torts.<sup>200</sup> The direct corollary, however, as identified in *Besix* and *Mora*, is that contradictory treatment is accorded to multistate contractual obligations where the court should be guided by the maxim *accessorium sequitur principale*. In the contractual sphere, following *Besix*, where the parties agree that the obligation is required to be or could be performed in more than one jurisdiction then no article 5(1) special jurisdiction will be established.

A vivid illustration of the prevailing jurisdictional bifurcation over contractual obligations/tortious actions can be made by reference to the problem presented before the Irish Supreme Court in *Ferndale Films Ltd v. Granada Television Ltd*.<sup>201</sup> An undertaking was given by the defendant, an English company, to use its best endeavours to promote the movie *My Left Foot* throughout the whole world (distribution territory) with the exception of the United Kingdom and Ireland. As Ireland was not the place of performance of the obligation in question it was incumbent upon the Irish Supreme Court to decline jurisdiction under article 5(1).<sup>202</sup> What would have been the solution if the claimant had started proceedings in France, or in Germany, or in Italy or in any other contracting state? Which, if any of these countries would have had jurisdiction under article 5(1)? The outcome finagled from *Besix*, characterised by geographical limitation and avoidance of multiplicity of fora, is to decline jurisdiction in each respective state. If, however, actions had been commenced for multi-state tort jurisdiction, derived from negligent misstatement or infringement of intellectual property rights, and with harmful effects (damage) in each territory, then jurisdictional touchstones from *Shevill* would be raised. The validity, or otherwise, of a specific compartmentalized provision for contractual obligations is considered subsequently, set apart from jurisdiction in tort.

#### ii. Characteristic Obligation Theory and Attendant Problems

As previously discussed, after protracted negotiations the Regulation on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters has

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<sup>199</sup> *Kitechnology BV v. Unicor GmbH Plastmaschinen*, [1994] I.L.Pr. 568; *Saba Molnlycke As v. Procter & Gamble Scandinavia Inc.*, [1997] I.R. Pr. 704.

<sup>200</sup> *Schmidt v. Home Secretary*, [1997] 2 I.R. 121 (Nov. 22, 1994) (H.Ct.) (Ir.).

<sup>201</sup> [1993] 3 I.R. 363 (Ir.). See generally Jonathan Hill, *Jurisdiction in Matters Relating to a Contract Under the Brussels Convention*, 44 INT'L & COMP. L.Q. 591 (1995).

<sup>202</sup> *Id.*; Hill, *supra* note 201.

now been adopted (“the Brussels Regulation”).<sup>203</sup> This has replaced the Brussels Convention for those states bound thereby. It entered into force on March 1, 2002. The Regulation amends, but does not abrogate as suggested below, article 5(1) concerning “matters relating to a contract” in specific cases involving the sale of goods and the provision of services. An autonomous definition of the place of performance is now provided in those situations. The characteristic obligation theory, rightly or wrongly, has prevailed thereby immolating specific types of contract to textured provisions. In effect, jurisdiction is determined by reference to the place of performance of the obligation, which determines the nature of the contract, namely the seller’s obligation to deliver the goods (in a contract for the sale of goods) and the obligation to provide the services (in a contract for the provision of service). In cases where the proceedings relate to a contract for the sale of goods, the place of performance of the obligation in question is, unless otherwise agreed, the place in a member state where, under the contract, the goods were delivered or should have been delivered.

In contractual disputes where the proceedings relate to a contract for the provision of services, the place of performance is, unless otherwise agreed, the place in a member state where the services were or should have been provided. No solution is expressly mandated where, under the contract, goods are to be delivered to (or services provided in) more than one place. The imputation is that only goods that were (or should have been) delivered in England impacts upon the article 5(1)(b) provision, consequently raising potential for fragmentation of proceedings involving identical issues. The extant position under the Convention for contracts, other than those specifically referred to in article 5(1)(b) remains intact, and so existing difficulties of interpretation and treatment of restitutionary claims, remain applicable. The courts will still need to employ the vague and uncertain concept of “matters relating to a contract”, with all the attendant shortcomings this phrase has engendered.

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<sup>203</sup> See generally C.M.V. Clarkson and Jonathan Hill, *The Conflict of Laws*, 3rd ed., Oxford Press, 2006, at pp. 52-96; See Kaye, *Civil Jurisdiction And Enforcement Of Foreign Judgments*, (Professional Books) at 254. See SI 2001/3929, sch. 1, para 9(2),(6); and for domicile in England consider sch. 1, para. 9(5); see generally *Bank of Dubai Ltd. v Abbas*, [1997] ILPr. 308; see generally *King v. Crown Energy Trading AG*, [2003] Q.B. 163; O. Lando, “The Task of the Court of Justice and the System of the Brussels Convention” in *Court of Justice of the European Communities* (ed.), *Civil Jurisdiction and Judgments in Europe* (Butterworths, 1992) at 26-27.

The characteristic obligation theory for delivery of goods and supply of services may prove troublesome in practice. It may not ensure allocation of jurisdiction to a closely connected forum or the focal epicentre of the actual dispute.

First, it will often be the case that the obligation in question will not be the failure to deliver the goods, but rather the failure of the buyer, for example, to pay the purchase price. As this obligation may be due in a different state it is not obvious why the courts of the place of delivery should be available. A forum with only a tenuous link is inappropriate. Jurisdiction may be arrogated to an inappropriate forum under the new rules where, for instance, contracts for the sale of goods or supply of services or obligations arising therefrom are the subject-matter of contest.<sup>204</sup> Similar problems may occur where the dispute centres on the interpretation of a contractual provision and legal rules or on the performance of the seller or the provider of services. Set against this background the destination or intended contractual destination of goods, or indeed the intended contractual location of services, seems irrelevant.

Second, it may be opaque as to the location where the goods “should have been delivered.” Thus, there may be a necessity to refer back to the terms of the contract, and where still unclear, to the law applicable to the contract itself. This infers reference to the very law whose importance at the jurisdiction stage was intended to be suppressed by the new provision. In relation to payment of services, the relevant place is that where they were provided or should have been provided. Here again, the autonomous place definition may appear inappropriate where the issue in question is the payment for those services. Additionally, the place where those services should have been provided may be difficult to ascertain where the services are provided in more than one state. It is at least arguable, as stated, that contracts under which goods are deliverable to or services to be provided in more than one member state are excluded from the scope of the newly drafted article. This exclusion may result in discrimination between different

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<sup>204</sup> See generally C.M.V. CLARKSON AND JONATHAN HILL, *THE CONFLICT OF LAWS* 52-96 (Oxford Press 3rd ed. 2006); see Kaye, *Civil Jurisdiction And Enforcement of Foreign Judgments*, (Professional Books) at 254; see SI 2001/3929, sch. 1, para. 9(2),(6); and for domicile in England consider sch. 1, para. 9(5); see generally *Bank of Dubai Ltd. v Abbas*, [1997] ILPr. 308; see generally *King v. Crown Energy Trading AG*, [2003] Q.B. 163; O. Lando, “The Task of the Court of Justice and the System of the Brussels Convention” in *Court of Justice of the European Communities* (ed.), *Civil Jurisdiction and Judgments in Europe* (Butterworths, 1992) at 26-27.

claimants suing under one type of contract. There is an invocation here of the earlier critique of article 5(1) in that the new provision fails again to ascribe jurisdiction to the focal centre of gravity of the contract as a whole. The new panacea on offer is simply an *a priori* universal ascription of jurisdiction to types of contract with a regrettable lacuna in the failure to evaluate the precise nature of a dispute. In light of these perceived difficulties that are intrinsic to the re-drafted textual provisions of article 5(1) under the Brussels Regulation one cannot suggest warm enthusiasm or a quiet future for European contractual jurisdiction principles.

It is important to recognize the limits of article 5(1) (b). The provision is only impacted where goods are to be delivered, or services provided, in a member state. In the event that article 5(1)(a) is inapplicable then article 5(1)(b) applies. By way of illustration consider a scenario where *X Ltd.* an English provider of accountancy services, contracts with *Y Ltd.* a French company, to provide accountancy services on their behalf in Florida. If *Y Ltd.* refuses to pay for the services, article 5(1)(b) is inapplicable because the services are not to be provided in a member state. The obligation in question, in accordance with article 5(1)(a), will be the obligation to pay. If English law is applied to the issue of the place of performance of the obligation in question this means that the debtor must seek out the creditor at the latter's place of residence.<sup>205</sup> The consequence is that English courts would have jurisdiction under the Regulation. The impact of characteristic obligation theory has consequently been significantly distilled.

Moreover, on a number of occasions article 5(1) has been supplanted altogether or interpreted in a convoluted manner, to circumnavigate an unsuitable choice of forum that would be precipitated from a straightforward adoption of the provision. As Kennett<sup>206</sup> cogently suggests, a focus on underlying party interests may, for example, help to explain the surprising French decision in *Sté Adis v. Sté Agredis*.<sup>207</sup> The central issue in dispute involved a disagreement between the respective parties on ascertaining the place of delivery of goods under a sale of goods contract. The seller, suing for payment, had stipulated that the goods were to be delivered at his premises, but the buyer asserted that the goods ought to be

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<sup>205</sup> See *Rein v. Stein*, [1892] 1 Q.B. 753 (C.A.) (U.K.).

<sup>206</sup> See Wendy Kennett, *Place of Performance and Predictability*, 15 Y.B. EUR. L. 193, 201 (1995).

delivered to him before any payment ensued. The goods had not been collected. The court, obviating any doctrinal analysis of article 5(1) terminology relating to “obligation” or “place of payment”, merely concluded that article 5(1) could not be applied, and that the primary rule that the defendant must be sued in his domicile was governing. This approach had the merit of denying jurisdiction to an inappropriate forum, but demonstrated a patent disregard for the extant terms of the Brussels Convention.

Problems occur where the action of the claimant is based on the failure of the defendant to pay for the goods or services. The outcome may be that jurisdiction is conferred on a court with no factual connection to the issue, subverting the jurisdiction of the court most suitable and appropriate. Hill provides two clear illustrations of this pernicious result, both drawn from decisions rendered by the French Court of Appeal.<sup>208</sup> In *Société Eureco v. Société Confezioni Liviam di Crespi Luigi*<sup>209</sup> commission was claimed by a French plaintiff under an exclusive agency agreement made with an Italian company. The main agreement was expressly governed by French law. Indubitably, the nexus of the dispute both on factual and legal terms was with France, where one presumptively would have prescribed jurisdiction. Unbelievably such jurisdiction was denied because under French law it is provided that any commission due under an agency agreement must be paid at the registered office of the debtor company, and so Italy was the place of performance of the “obligation” claimed.<sup>210</sup> Such a perverse result was replicated in *Promac Sprl v. S.A. Sogeservice S.A.*<sup>211</sup> where French jurisdiction was unfortunately declined in relation to a claim to commission under an agency agreement brought by a French estate agent against a Belgian company.<sup>212</sup> Although in *Custom Made Commercial Ltd. v. Stawa Metallbau GmbH*<sup>213</sup> the Court stated, “the criterion of the place of performance of the obligation which specifically forms the basis of the applicant’s action ... may in certain cases have the effect of conferring jurisdiction on a court

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<sup>207</sup> Cours d’appel [CA] [regional courts of appeal] Dijon, Nov. 17, 1988, [1990], 150 (Fr.).

<sup>208</sup> See Hill, *supra* note 168, at 601.

<sup>209</sup> Cours d’appel [CA] [regional courts of appeal] Paris, Feb. 15, 1989.

<sup>210</sup> See Hill, *supra* note 168, at 601.

<sup>211</sup> Cours d’appel [CA] [regional courts of appeal] Paris, May 16, 1991.

<sup>212</sup> See Hill, *supra* note 168, at 601.

<sup>213</sup> Case 288/92, 1994 E.C.R. I-2913.

which has *no* connection with the dispute,”<sup>214</sup> it seems absurd to allocate jurisdiction to a wholly inapt forum, whilst denying the claims of the court of the closest connection. It is the result of failing to identify the main or characteristic obligation of the contract in toto.

iii. *Problems Over Restitutionary Claims and the Flawed Perspective of Contractual Jurisdiction Principles*

A dilemma prevails over the correct categorization of restitutionary claims under the Regulation. Conceptually they are claims for breach of fiduciary duty, *quantum meruit* payments, or meddling with trust property to be viewed as quasi-contractual within article 5(1), tortious under article 5(3), or totally *sui generis* merely ascribing jurisdiction under the article 2 primary rule of the defendant’s domicile? Unfortunately the classification of such equitable claims, alien to civilian law systems has not been addressed by the European Court. Recent domestic cases addressing the matter reveal a valiant but wholly unsuccessful attempt to reconcile Convention jurisprudence, English notions of restitution, applicable contractual choice of law principles, and national tenets of policy. Ultimately a wholly anomalous divergence has been created lacking in certainty of application or rationality.

The extent of the classification difficulties is highlighted by the decision in *Kleinwort Benson Ltd. v. Glasgow City Council*.<sup>215</sup> At the appellate level it was held that a claim for unjust enrichment could fall within the ambit of contract special jurisdiction principles. The House of Lords, however, in a majority decision contrary to the conclusion of the Court of Appeal, asserted that a claim for restitution of monies paid under a contract void *ab initio* was not in matters relating to a contract within article 5(1).<sup>216</sup> Two main arguments were propounded by Lord Goff for such a conclusion. First, it was enunciated that decisions of the European Court demonstrated that the “obligation” in article 5(1) was the contractual obligation on which the claim was based. It was in the courts of the

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<sup>214</sup> *Id.* at I-2956. See Kennett, *supra* note 206, at 194-96.

<sup>215</sup> *Kleinwort II*, [1999] 1 A.C. 153 (H.L.) (appeal taken from C.A.) (U.K.). See generally Paul A. McGrath, *Kleinwort Benson v. Glasgow City Council: A Simple Point of Jurisdiction*, 18 CIV. J.Q. 41 (1999).

place of performance of that obligation in which jurisdiction was vested. Hence it was difficult to see how a claim for restitution of sums paid under a contract accepted to be void ab initio fell within article 5(1).<sup>217</sup> It could only do so if it could properly be said to be based on a particular contractual obligation, the place of performance of which was within the jurisdiction of the court. Where the claim was for the recovery of money paid under a supposed contract that in law had never existed, it seemed impossible to say that it was based on a particular contractual obligation. Lord Goff rejected the earlier reasoning of Lord Justices Roch and Millett on the contextual ambit of article 5(1) and applied the following rationale:

With the exception of *Ivenel v. Schwab*, in no case cited to the Appellate Committee, either from the European Court of Justice or from the courts of this country, has the “obligation in question” been construed to mean anything other than the particular contractual obligation upon which the plaintiff’s claim is based, the performance or non-performance of which is relied upon to support the plaintiff’s claim. It is in my opinion plain that this principle can have no application in a case where the supposed contract in question is void ab initio and so has never had any legal existence. Furthermore, Article 5(1) specifies in clearly defined terms a particularly close connecting factor between the dispute and the court which will be called on to hear it, i.e. the place of performance of the contractual obligation in question. No such close connecting factor can, in my opinion, exist in a case where the contract is void ab initio and the only question at issue relates to the recovery of money paid under it on the ground of unjust enrichment. Furthermore, the approach of Millett L.J. offends, in my opinion, against the fundamental principle that the special jurisdiction in Article 5 is in derogation from the general jurisdiction in Article 2 and so falls to be construed restrictively; on the contrary, Millett

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<sup>216</sup> The majority comprised Lord Goff, Lord Clyde and Lord Hutton. A dissenting judgment was delivered by Lord Nicholls with which Lord Mustill agreed.

<sup>217</sup> Compare *Kleinwort II*, 1 A.C. at 169, 181, 183, 195-96, with *Kleinwort Benson Ltd. v. Glasgow City Council (Kleinwort I)*, [1996] Q.B. 678, 688-99.



L.J.'s approach constitutes an expansion of the special jurisdiction in Article 5(1).<sup>218</sup>

Secondly, it was evinced that a claim to restitution was in English law based on the principle of unjust enrichment. No express provision was made in article 5 in respect of claims for unjust enrichment as such, and it was considered to be legitimate to infer that this omission was due to the absence of any close connecting factor consistently linking such claims to any jurisdiction other than that of the defendant's domicile.<sup>219</sup> Article 2, therefore, provided the appropriate jurisdiction for these claims.<sup>220</sup> Moreover, it was submitted that article 5(3) was similarly inapplicable because a claim based on unjust enrichment did not, apart from exceptional circumstances, presuppose either a harmful event or a threatened wrong.<sup>221</sup> It seems, rather like the proverbial unwanted dog at Christmas, that no home exists for restitutionary claims under the Brussels Convention. A patent

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<sup>218</sup> *Kleinwort II*, 1 A.C. at 169.

<sup>219</sup> *Id.* at 169. Furthermore, his Lordship was of the view that it was not, in fact, clear that a claim for the recovery of money on the grounds of failure of consideration would necessarily be characterized as a claim in the law of unjust enrichment for the purposes of art. 5(1). *Id.* at 171. His Lordship noted in this regard that the European Court of Justice in *Ets. A. de Bloos S.P.R.L. v. Societe en commandite par actions Bouyer*, Case 14/76, [1976] E.C.R. 1497, had considered that a plaintiff's claim to be paid damages or to seek dissolution of a contract on the ground of the defendant's default fell within art. 5(1). *Kleinwort II*, 1 A.C. at 171. It may, thus, be possible to categorize a claim for failure of consideration of a contract, which arose under a valid but terminated contract, as being contractual for the purposes of the Convention.

<sup>220</sup> In his dissenting judgment Lord Nicholls expressed concerns that the restriction of art. 5(1) to matters relating solely to the performance of a contractual ambit would unduly restrict the reach of the section by removing from its scope many disputes normally regarded as contractual matters, e.g. a dispute over whether a contract complied with prescribed formalities, such as the need for writing. *Kleinwort II*, 1 A.C. at 173. Additionally, the decision in *Effer v. Kantner*, Case 38/81, [1982] E.C.R. 825, illustrated that the jurisdiction under article 5(1) was not ousted by a dispute between the parties over the existence of the contract sought to be enforced and these disputes covered an extremely wide range, e.g. whether the parties were *ad idem*, whether there was an intention to create legal relations, whether the parties had legal capacity, whether apparent agreement was vitiated by mistake or misrepresentation or undue influence, and whether the making of the contract was illegal. Lord Nicholls believed that for reasons of obvious good sense and convenience, those issues might fall within the competence of the court of the place of performance as much as a dispute focused more narrowly on failure of performance. *Kleinwort II*, 1 A.C. at 174.

<sup>221</sup> All their Lordships agreed that article 5(3) had no application to a claim such as that brought by *Kleinwort II*. It was submitted that, unlike a claim based on restitution for wrongs, where the wrong may well be a breach of contract or tort, a claim based on the subjective unjust enrichment is a freestanding cause of action, which is not to be subsumed within contract tort or equity. See generally Edwin Peel, *Jurisdiction Under the Brussels Convention*, in *RESTITUTION AND THE CONFLICT OF LAWS 1* (Francis Rose ed., 1995); Jonathan Riley, *Void Contracts, Restitution and Jurisdiction*, L.M.C.L.Q. 182-86 (1996); Graham Virgo, *Restitution and Private Law – Square Pegs and Round Holes*, *RESTITUTION L. REV.*, 109-16 (1996).

*lacuna* exists in the treatment of these claims, and this is left unremedied by the Brussels Regulation.<sup>222</sup>

We have already noted the English Court of Appeal in *Kleinwort Benson*,<sup>223</sup> prior to revision in the House of Lords, accepted that a claim for unjust enrichment did fit within the umbrella of Article 5(1). By force of argument the “obligation” in question need not necessarily be of a contractual nature to comport with article 5(1). Such a rationale was irreconcilable with the ruling of the Commercial Court in *Trade Indemnity Plc v. Försäkringsaktiebolaget Njord*.<sup>224</sup> The plaintiffs had entered into two reinsurance contracts with the defendant, a Swedish company, which wrote bond and credit insurance and reinsurance. Subsequently, the defendant went into liquidation, and on investigation of its affairs the Swedish authorities found evidence of gross mismanagement and dubious underwriting practices. The plaintiffs sought to avoid the contracts on the grounds of non-disclosure and misrepresentation, asserting jurisdiction in England under article 5(1) of the Convention. According to Judge Rix, the pre-contractual obligation not to misrepresent a risk under a reinsurance contract was not an “obligation” within the meaning of article 5(1) of the Lugano Convention because it gave no right to contractual performance or to damages in lieu.<sup>225</sup> It was, apparently, a “refrain running throughout the cases both in the Court of Justice and here in England that the obligation is a contractual one”.<sup>226</sup> This is directly contradictory to the appellate decision in *Kleinwort Benson* that restitutionary claims are within article 5(1) and, therefore, that the word “obligation” must have a meaning which is wider than “contractual obligation”.

Further doubts on apposite treatment of restitutionary claims were also raised by the House of Lords decision in *Agnew v. Lansforsäkringsbolagens AB*,<sup>227</sup> which was directly contradictory to the reasoning applied in *Trade*

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<sup>222</sup> With respect, the unfortunate outcome in *Kleinwort II* may have wider ramifications that go beyond the law of restitution. For example, consider an action for non-contractual breach of confidence. Under extant law it is evident that, unless this is classified as tortious, it must fall beyond the scope of art. 5(3). It is submitted that to avoid this confusion the ambit of art. 5(3) should be reconsidered, and redrafted, to make it apparent that it does indeed encompass all actions related to non-contractual obligations, hence embracing not just torts and delicts.

<sup>223</sup> See *Kleinwort II*, 1 A.C. 153.

<sup>224</sup> [1995] 1 All E.R. 796 (Q.B.) (U.K.).

<sup>225</sup> *Id.* at 820.

<sup>226</sup> *Id.* at 817.

<sup>227</sup> [2001] 1 A.C. 223 (H.L.) (appealed from C.A.) (U.K.). See Wendy Kennett, *Current Developments: Private International Law*, 49 INT'L & COMP. L.Q. 497, 504 (2000); Pippa Rogerson, *Conflict of Laws*, ALL E.R. ANN. REV. 93, 100 (2000).

*Indemnity.* The litigation took the form of an action to avoid a reinsurance contract for non-disclosure.<sup>228</sup> The defendant was a Swedish insurance company. The claimants were representative Lloyd underwriters and United Kingdom insurers. The defendant, inter alia, sought to contest the jurisdiction of the English court on the premise that the duty to make a fair presentation of the reinsurance risk could not constitute an “obligation” within the meaning of article 5(1).<sup>229</sup>

Before the House of Lords there was unanimous agreement that the dispute was a “matter relating to a contract”. The issue raised was the avoidance of a contract. The contract was not void ab initio as in *Kleinwort Benson*. The question whether an obligation to disclose material facts was a “contractual obligation” whose place of performance could determine jurisdiction proved more controversial, however, since the obligation arose prior to the conclusion of the contract rather than as a result of the contract. A majority of their Lordships (3-2 decision) concluded that it was consistent with the natural meaning of the language used by the Convention to view such an obligation as contractual. Policy consideration also favoured this approach. The majority was particularly influenced by the fact that the duty of utmost good faith could, in principle, be regulated by the terms of a reinsurance contract rather than left to the general law, that the duty of utmost good faith to some extent operated post-contractually, and that but for a plea of breach of duty there would be in existence a contract which was closely connected to the London market so that any disputes as to placement ought naturally to be tried in England. The dissenting speeches of Lord Hope of Craighead and Lord Millett took the line that pre-contractual duty to make a fair presentation could not amount to an “obligation in question” as there was no agreed time or place for its performance. The point, of course, remains open at the European Court of Justice level. Further words on the patent ambiguity, and uncertainty over treatment of restitutionary claims revealed by the split decisions

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<sup>228</sup> *Agnew*, 1 A.C. 223. Note that it was determined that reinsurance was not a matter relating to insurance so that jurisdictional issues in a case involving a defendant domiciled in a contracting state were to be resolved by reference to the ordinary jurisdiction rules in the Convention.

<sup>229</sup> *Id.* at 225. Within the same extant provisions of the Lugano Convention.

of the House of Lords in *Kleinwort Benson* and *Agnew*, are rendered superfluous.<sup>230</sup>

It is submitted that a template for treatment of restitutionary claims may be facilitated within the existing special jurisdiction provisions of the Brussels Regulation. Their Lordships, at appellate level, in *Kleinwort Benson* paid minimal regard to the applicability of Article 5(3), rejecting it summarily.<sup>231</sup> Lord Justice Leggatt asserted that a claim only falls within Article 5(3) if it is “based on tort or delict” and thus restitution was excluded.<sup>232</sup> It is a matter of regret that more attention was not paid to the Court decision in *Kalfelis v. Bankhaus Schröder*<sup>233</sup> to find a natural home for unjust enrichment within Article 5(3), at least until the Brussels Convention is revised to cover restitutionary claims. In *Kalfelis*, the appellant concluded with a bank established in Luxembourg, through the intermediary of the German affiliate of that bank, spot and futures stock-exchange transactions in silver bullion. The futures transactions resulted in a total loss and the appellant brought an action for payment of sums owed against Bankhaus in Luxembourg and its affiliate. The action was based both on contractual liability (infringement of obligations to provide information), and on tortious liability (conduct *contra bonos mores*). The action was also based on unjust enrichment on the ground that futures stock-exchange transactions, such as futures transactions in silver bullion, were not binding on the parties. Asked to interpret the expression “matters relating to tort, delict or quasi-delict” in article 5(3) of the Convention, the European Court of Justice held that “[that expression] must be regarded as an independent concept covering *all* actions which seek to establish the liability of a defendant and which are not related to a ‘contract’ within the meaning of Article 5(1).”<sup>234</sup>

The width of the above proposition undoubtedly covers claims for unjust enrichment derived from restitution. Certainly Advocate-General Darmon in *Shearson Lehman Hutton Inc. v. TVB Treuhandgesellschaft für*

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<sup>230</sup> The new version of Art. 5(1) under the Brussels Convention does not afford any assistance in dealing with the problem of interpretation. See *supra* text accompanying notes 8-13 & 203-14.

<sup>231</sup> Lord Justice Roch avoided referring to the art. 5(3) in any shape or form!

<sup>232</sup> *Kleinwort I*, [1996] Q.B. 678 (C.A.) (U.K.).

<sup>233</sup> Case 189/87, [1988] E.C.R. 5565. See Trevor Hartley, *Conventions Under Article 220 EEC: Jurisdictional Issues Under Articles 5(1), 5(3) and 6(1)*, 14 EUR. L. REV. 172 (1989); Adrian Briggs, 8 Y.B. EUR. L. 272 (1988).

<sup>234</sup> *Kalfelis*, Case 189/87, E.C.R. at 5585.

*Vermögensverwaltung und Beteiligungen mbH*,<sup>235</sup> had no doubts whatsoever that included under “matters relating to tort” are claims based on unjust enrichment.<sup>236</sup> Interpretation of article 5(3) allows the plaintiff to sue either at the place where the damage occurred or the place of the event giving rise to it.<sup>237</sup> By the correct application of article 5(3) the “place of the harmful event”, the keeping of the money belonging to the plaintiff, would have arguably occurred where the money ought to have been returned, which was of course in London. Thus, applying Lord Justice Roch’s forum conveniens test the apposite forum would legitimately have been determined by applying the tort test of closest connection. It is an invalid argument that the defendant should be allowed to defend themselves under their own domicile—Article 5 per se is a derogation from that, and can confer jurisdiction on the claimant’s domicile.

The correct ascription of restitutionary claims arose before the English courts in *Atlas Shipping Agency v. Suisse Atlantique Societe D’Armement Maritime S.A.*<sup>238</sup> The plaintiffs acted as brokers on behalf of the sellers but had no contractual relationship with the buyers. They sought to recover the commission they had earned in connection with the sale of two vessels. These two sales contracts had incorporated a clause by which the buyers had the right to deduct two percent sales commission.<sup>239</sup> The plaintiffs contended that it was a necessary implication of such a clause that, where the deduction was taken, the buyers had contracted with the sellers to pay the identified commissions to the brokers; that in such circumstances the buyers and sellers created a trust of which the buyers were trustees and the plaintiffs the beneficiaries. The buyers challenged the jurisdiction of the English Court on the ground that under article 2 of the Convention they must be sued in the courts of their domicile, namely in Switzerland.<sup>240</sup> Reliance was sought by the buyers upon article 5(1) as an exception to the prima facie domiciliary rule.<sup>241</sup> In reply, the defendants contended that article 5(1) was

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<sup>235</sup> Case 89/91, [1993] E.C.R. I-139.

<sup>236</sup> *Id.* at 178.

<sup>237</sup> See, e.g., *Bier v. Mines de Potasse d’Alsace*, Case 21/76, [1976] E.C.R. 1735.

<sup>238</sup> [1995] 2 Lloyd’s Rep. 189 (Q.B.) (U.K.).

<sup>239</sup> *Id.* at 190 (“The contracts provided for arbitration in London in accordance with English law.”).

<sup>240</sup> *Id.* at 191 (“Switzerland is a party to the Lugano Convention, which has been inserted into the Civil Jurisdiction and Judgments Act, 1982 ... by means of the Civil Jurisdiction and Judgments Act, 1991.”).

<sup>241</sup> *Id.* (as far as the material here is concerned, the art. 5(1) provisions are identical).

inapplicable in any event since they were not sued in contract, but by reason of a constructive trust created by the memoranda, and hence not sued, “in matters relating to a contract”.

The paradigm restitutionary claim was at issue in *Atlas Shipping*. If *A* (buyer) contracts with *B* (seller) to pay a sum of money to *C* (broker), and *C* sues *A* and *B* to enforce the trust created for his benefit by that contract, can *C* obtain jurisdiction over *A* in *C*'s forum under article 5(1) of the Brussels or Lugano Conventions? It was determined by Judge Rix in the commercial court that such a claim was subsumed within, “a matter relating to a contract”, according jurisdiction to English courts within article 5(1). By analogy with the Court of Justice's decision in *Martin Peters Bauunternehmung GmbH v. Zuid Nederlandse Aannemers Vereniging*<sup>242</sup> and *Jakob Handte & Co v. Traitements Mecanochimiques des Surfaces S.A.*<sup>243</sup> it was considered that the obligation in question was contractual. The obligation had been freely entered into by the parties, and the fact that performance of the obligation was to take place in the brokers' domicile was apparently exactly what the buyers must have anticipated. It was viewed as entirely foreseeable, appropriate and compatible with the principle of legal certainty.<sup>244</sup>

However, it is suggested that, as for the unjust enrichment claim in *Klenwort Benson*, an action for breach of constructive trust ought to find a home within article 5(3) and not article 5(1). The obligation can only be enforced via equitable principles. In no sense can it be characterised as contractual where *C* claims commission due as a consequence of an arrangement between *A* and *B*. The equitable action is constructed by *C* against *A* for breach of trust with *A* identified as constructive trustees; it is not contractual in any sense of the word but restitutionary with the creation of an irrevocable trust. Contrary to the view of Judge Rix, it seems eminently unforeseeable that *C* should seize the English courts against *A* predicated on a “contractual” obligation.

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<sup>242</sup> Case 34/82, *Martin Peters Bauunternehmung GmbH v. Zuid Nederlandse Aannemers Vereniging*, 1983 E.C.R. 987.

<sup>243</sup> Case C-26/91, *Jakob Handte & Co. v. Traitements Mecano-chimiques des Surfaces S.A.*, 1992 E.C.R. I-3967 (the ambit of the provision was extensively considered by the Court of Justice in this authority, albeit that the French court could not assume jurisdiction on the predicate that the claim was contractual when in essence, it was delictual).

<sup>244</sup> *Atlas Shipping Agency*, 2 Lloyd's Rep. at 194.

A solution to the problematic choice presented by restitutionary claims may be taken from the analysis made under French civilian law. A dichotomy is drawn under French principles between civil obligations, construed as accruing directly from the agreement (those are contractual), and those otherwise than by agreement (these are quasi-contracts, delicts and quasi-delicts).<sup>245</sup> The latter category constitutes events, whether or not voluntary, but the effect of which are independent of the will of the author.<sup>246</sup> According to Briggs:

[T]his view, founded upon an attempt to learn lessons from the French Civil Code, reflects the fact that the Convention was drafted by civilian lawyers, and must be read through their eyes, for the court with the ultimate power to interpret it is a court the judges of which are mainly civilian.<sup>247</sup>

It seems eminently logical. According to such a rationale the claim of Kleinwort Benson, not founded upon agreement, but derived from the law visiting consequences upon the conduct of the defendant, fits within article 5(3) not “contractual” obligations. The position is similar in *Atlas Shipping*, where *C*’s claim under a constructive trust derives as a consequence of the agreement between *A* and *B*, with the law visiting consequences upon *A*’s conduct as constructive trustee. Again the correct home should be article 5(3), and not article 5(1). Such a scheme would arguably provide a solution to the ascription of special jurisdiction over restitutionary claims, which, as recent evidence shows, has greatly troubled English courts.

*iv. Accessory jurisdiction and division between specific and main contractual obligations*

Difficulties may pertain in that there may be a divorce between the obligation upon which the claim is based and the main obligation under the contract itself.<sup>248</sup> Let us suppose that an exclusive distribution agreement exists between an English manufacturer, *A* Ltd, and a German distributor, *B*, GmbH, with notice under an express contractual term to be given by *A* to *B* Belgium,

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<sup>245</sup> See, e.g., Adrian Briggs, *Jurisdiction over Restitutionary Claims*, 1992 L.M.C.L.Q. 283, 286 (discussing how French civil agreements arise).

<sup>246</sup> See generally Jacques Ghestin, *LES OBLIGATIONS: LE CONTRAT 1* (1980) (Fr.).

<sup>247</sup> Briggs, *supra* note 245, at 286.

<sup>248</sup> See generally Hill, *supra* note 201, at 599.

where *B*'s parent company operates. The distributor alleges that the manufacturer has wrongfully terminated the agreement. Under the jurisprudence of the appellate court in *Medway Packaging Ltd v. Meurer Maschinen GmbH*<sup>249</sup> the principal obligation involved in a repudiation of an exclusive distribution contract is the obligation to give reasonable notice of termination at the distributor's place of business. However, in *Vauth v. Lindig*,<sup>250</sup> the French Court of Appeal held that the place of performance of a manufacturer's obligation to continue, rather than terminate, a contract of exclusive agency is at the manufacturer's own domicile.<sup>251</sup> The simple fact of the matter is that where a dispute exists over interpretation of a contractual term, such as that imbued within notice provisions,<sup>252</sup> it is wholly inapt to isolate the obligation upon which the action is based, disregarding the factual centre of gravity of the main obligation of the contract.<sup>253</sup> As Hill states:

[W]ith regard to a dispute which centres on the interpretation of contractual provisions and legal rules—rather than the evaluation of material evidence and the testimony of witnesses—the jurisdictional relevance of the place of performance of the obligation on which the plaintiff's claim is based is highly questionable.<sup>254</sup>

It is widely optimistic to suppose that the isolation of a principal obligation will always be ascertainable. There is a pervading uncertainty with such a test, with no fusion of principal and attendant ancillary obligations. In this regard the European Court has been forced to acknowledge that there can be cases in which the claim concerns obligations of equal importance, where it is impossible to identify one as "principal" and the others as "accessory". In *Leathertex Divisione Sintetic SpA v. Bodetex BVBA*<sup>255</sup> there were two obligations in dispute, one to pay backdated commission and the other to give proper notice of termination of an

<sup>249</sup> *Medway Packaging Ltd. v. Meurer Maschinen GmbH*, [1990] 2 Lloyd's Rep. 112, 113-14.

<sup>250</sup> Cour d'appel [CA] [regional court of appeal] Versailles, June 2, 1988, E.C.C. 1989, 212, 213, author of case note (Fr.).

<sup>251</sup> The plaintiff was a commercial representative in France, of German nationality, suing to recover commission and for damages in relation to abusive termination of the contract. However, the court determined that the defendant manufacturer's only obligation in France was to deliver the products to the clients solicited by the plaintiff—an obligation alien to the relevant dispute. Apparently, the center of gravity of the relationship was Germany with emphasis placed upon the German origin of both parties, the fact that the contract was in German, and also it was Germany that any outstanding commission was due to be paid at the domicile of the debtor. *Id.* at 214-15.

<sup>252</sup> See *supra* text accompanying notes 172-74.

<sup>253</sup> See *infra* text accompanying notes 255-59.

<sup>254</sup> Hill, *supra* note 201, at 599.

<sup>255</sup> Case C-420/97, *Leathertex Divisione Sintetici S.p.A. v. Bodetex BVBA*, 1999 E.C.R. I-6747.



agency agreement. These both arose out of the same contract, but the former was to be performed in Italy and the latter in Belgium. In that case, which court could take advantage under article 5(1)? There are undoubted advantages to deciding all these matters in the same court. The Court of Justice held, however, that the Belgian court could only take jurisdiction over the notice claim and the commission claim could be heard in Italy. This splitting of the claims can lead to inconsistent results, for example, where the two claims are interdependent; the European Court though was not to be dissuaded from their restrictive view.

A problem highlighted within the *Leathertex* judgment is that the special jurisdiction principles relating to contract do not admit “accessory jurisdiction”. This lacuna has not been remedied in the Regulation template provisions. The Commission had submitted that the Court ought to allow claims to be heard together if there is such a *close relationship* between the claims that it is advantageous to hear and decide them at the same time in order to avoid the possibility of irreconcilable decisions if they were adjudicated separately. In parts the Regulation does provide for accessory jurisdiction, notably express terms in article 6(1) whereby a co-defendant may be sued in the courts for the place where any of the other defendants is domiciled and, under article 6(2) and 6(3), third parties and defendants to a counterclaim respectively may be sued in the courts which have jurisdiction over the original proceedings or claim. The Court, however, has consistently asserted the requirement for a textual basis for any accessory jurisdiction, and none exists for article 5(1). It is unfortunate that, as a consequence of no accessory jurisdiction or textual basis in contract, that a court seised is required to declare that it has jurisdiction to adjudicate upon certain applications but has no jurisdiction to hear certain other applications, even though they are closely related. The outcome of such a deficiency is delay, uncertainty, cost, and risk of irreconcilable judgments.

Alternatives need to be broached for such cases. It has been suggested that three possibilities seem appropriate:<sup>256</sup>

- (1) To strictly delineate the decision in *Shenavai* so that it is confined to those cases where principal and ancillary obligations are patent, such as occurred in *Union Transport*. If they are not patent then *Shenavai* becomes

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<sup>256</sup> Briggs, *supra* note 165, at 83-84.

inoperative. The proposition was endorsed by the Court of Appeal in *Union Transport*.<sup>257</sup>

- (2) Where there are multiple obligations but no main obligation then article 5 special jurisdiction may be rendered nugatory; the claim would *ex necessitate* be brought before the courts of the defendant's domicile.<sup>258</sup>
- (3) Alternatively, by analogy with the principles established in relation to article 5(3), it may be permissible for a plaintiff to sue in any of those places in which part of the obligations which form the cause of action were due to be performed.<sup>259</sup>

The above propositions only serve to exemplify the elliptical nature of the expression, "obligation in question". As interpreted by the Court of Justice it is vague, uncertain, allocates jurisdiction to inappropriate fora, and denies jurisdiction to courts more closely connected to the factual and legal context of the dispute. In a commercial context the total abrogation of the article 5 special provisions would be beneficial.

## V. CONCLUSIONS

It is important that we achieve encomium solutions to personal jurisdiction in the contractual sphere. These optimal responses need to be addressed at macroscopic levels with new legislative responses proposed for the United States shifting away from particularistic judicial distilled through the aegis of the Supreme Court. At a European level there needs to be reform of article 5(1) provisions, to counter-balance the difficulties that are described in section 4, and evaluation is needed of the new Brussels Regulation text. On a worldwide level there needs to be revived consideration of a new proposed convention to achieve effective responses for arrogation of contractual jurisdiction.

### a. The Primacy of Actor Sequitur Forum Rei

Jurisdictional rules should aim to satisfy the tenets of certainty, predictability, appropriateness and avoid fragmentation.<sup>260</sup> Unfortunately the

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<sup>257</sup> *Union Transp. Plc. v. Cont'l Lines S.A.*, [1991] 2 Lloyd's Rep. 48, 51; *see also* Briggs, *supra* note 165.

<sup>258</sup> *Union Transp. Plc.*, 2 Lloyd's Rep. at 51.

<sup>259</sup> *Id.*

<sup>260</sup> Carter, *supra* note 168, at 430.

rulings of the Court of Justice and domestically vis à vis article 5(1) have totally failed to produce simple, clear and easily applicable principles. A radical but beneficial solution would be the abrogation of article 5(1), because the demerits outweigh the merits. It is impossible to disagree that, “parties to commercial contracts should not need special protection, and should not find it unduly difficult to sue in a member state other than their own domicile”.<sup>261</sup> The patent uncertainty of jurisdiction, as adumbrated, in relation to place of payment, accessory jurisdiction, characteristic performance and identification of the relevant “obligation” in question, could be ameliorated by a simple jurisdictional rule predicated on article 2. This would comport with the requirements of certainty and predictability laid down in the jurisprudence of the European Court:

[T]he objective of the legal protection of persons established in the Community which the Convention seeks, *inter alia*, to attain means that the jurisdiction rules which derogate from the general principle of the Convention must be interpreted in such a way as to enable a normally well-informed defendant to make a reasonable prediction as to the court in which he may be sued, apart from the courts of the State where he is domiciled.<sup>262</sup>

The overt price for abrogating article 5(1), and relying purely on article 2 jurisdiction over contractual disputes, may be to achieve an inappropriate forum.<sup>263</sup> For example, consider a scenario where *A* in England is contracted to provide services in Belgium for *B*, a company domiciled in the latter country. In a claim for defective performance of these services it is patently Belgium that represents the factual centre of the dispute. To abrogate article 5(1) would necessitate the allocation of jurisdiction, on occasions, to a forum non-conveniens. Nevertheless, it is suggested that overall such a price is worth paying for the certainty and predictability provided by an article 2 rule. It must be remembered that wholly inappropriate forums are also prevalent by means of the Court’s interpretation of article 5(1), specifically regarding place of payment and restitutionary claims. A dichotomy exists between contractual and tortious claims.

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<sup>261</sup> Stone, *supra* note 167, at 60.

<sup>262</sup> Case C-26/91, *Jakob Handte & Co. v. Traitements Mecano-chimiques des Surfaces S.A.*, 1992 E.C.R. I-3967.

<sup>263</sup> *See, e.g.*, Hill, *supra* note 168, at 616.

The special jurisdiction tort provisions in article 5(3), based upon the place of the harmful event, does ensure that there is a close connection between the claim and the court jurisdictionally seised. For tortious actions there is certainty, predictability and appropriateness via the criterion of a close connection touchstone. By way of contrast, a “similarly one-dimensional rule in contractual matters is wholly inadequate”.<sup>264</sup> The abrogation of article 5(1) provides the best overall solution, and by predicating jurisdiction over contracts before the courts of the contracting state in which the defendant is domiciled, it ensures that certainty and predictability are achieved.

It is suggested that such an optimal recategorisation of contractual jurisdiction principles could beneficially impact upon American jurisprudence. As previously identified, adoption of a minimum contracts regime twinned together with a revivification of effects doctrine, has produced considerable uncertainty in the two leading cases of *McGee* and *Burger King*. Outcomes appear the by-product of judicial sorcery, akin to a magician pulling a rabbit from a hat, in terms of single and multiple contact contractual jurisdiction disputes. Ad-hocery and solipsistic judicial development has engendered flexibility at the price of consistent policy. The fair warning problem may be subjected to remedial action with the central cornerstone avoidance of ambiguous balancing processes. A mechanical rule-selection template could be built upon the edifice of article 2 jurisdiction under the Brussels Regulation, derived from the concept of *actor sequitur forum rei*, forcing claimants to bring contractual claims to the jurisdictional home of the defendant. The primordial rationale is that the defendant, as the party being pursued by the claimant, should be able to fight on “home ground” where she can most easily conduct her defense.

By extrapolation, an interesting analysis can be raised if *McGee* and *Burger King* were governed by the European concept of *actor sequitur forum rei*, and the U.K. definition of a defendant’s domicile. In *McGee*, at a basic level, a Texas-based company has assumed the obligation of an Arizona company, including a policy owned by a California resident. The Texas company’s only contact with California was mailed insurance payments under the reissued policy in favour of an individual person. The defendant company had no office or agent in California and did not solicit business in California. The only Californian

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<sup>264</sup> *Id.* at 615.

policy the defendant had issued was the one in dispute. Nonetheless the Supreme Court, in a pro-claimant (weaker party stance) found jurisdictional touchstones in California implicated based upon prevalent isolated connections, policy considerations, foresight and minimum contacts.

The surprising outcome in *McGee* would not stand up to an article 2 test derived from domicile principles. If, as suggested herein, a new optimal bright-line test is adopted then action could only proceed in Texas, the domicile of the defendant company. As regards the domicile of companies and other legal persons, the Brussels Regulation lays down a uniform rule. A company or other legal person (or association of natural or legal persons) is domiciled at the place where it has its statutory seat or its central administration or its principal place of business. In the United Kingdom the statutory seat means the registered office, or if there is no such office, the place of incorporation or, if there is no such place the place under which the formation took place. International Life Insurance Co., on such a basis, could legitimately be sued for breach of the insurance contract in Texas (their domicile), not in California the *forum actoris* of the claimant.

A different outcome would also be implicated in *Burger King*. The Supreme Court therein determined that a Florida-based corporation, with their main headquarters in Miami, could successfully take *in personam* jurisdiction in contract against individual persons who were citizens of Michigan. The opinion of the Supreme Court, the antithesis of reducing the jurisdictional question in contract cases to a simple mechanistic formula, reaffirmed the roots of its current personal jurisdiction approach by citing *International Shoe's* minimum contacts test. As previously identified, a number of beguiling factors weighed heavily in the Supreme Court's decision: the establishment of a multi-factored approach and propagation of a dual two-pronged test; the nihilistic reaction to pro-defendant bias in contractual jurisdiction and termination of any single contract rules; enhanced importance for choice of law provisions, the potential revitalization of the effects test; problems of identification for buyer/seller relationships and implications for small debtors; and the requirement for novel and specific consumer contract rules.<sup>265</sup>

A simpler, more certain, and effective outcome to future cases akin to *Burger King* can be effected in American jurisprudence through a mechanistic test

derived from *actor sequitur forum rei*. An obverse result would have been implicated, allowing in personam contractual jurisdiction in Michigan not Florida, derived from individual defendant(s) domicile. Within the purview of Brussels I Regulation “domicile” is given a special meaning, which is different from its meaning at common law and closer to the continental usage of this term. An individual, for the purposes of the Regulation, is domiciled in the United Kingdom if he is resident in the United Kingdom and the nature and circumstances of his residence indicate that he has a *substantial connection* with the United Kingdom, which will be presumed to be so (unless the contrary is proved) if he has been resident in the United Kingdom for the last three months or more. A person will be regarded as resident in a particular part of the United Kingdom if that place is his settled or usual place of abode. Moreover, if an individual is not domiciled in the forum state according to its law, then a court of that state must decide the question whether he is domiciled in another member state by applying the law of the latter state. The corollary is that in *Burger King* the individual defendants, Rudzewicz and MacShara, by application of *actor sequitur forum rei* principles, allied together with a bright-line test for domicile, should be sued for alleged breach of contract before a Michigan court—the jurisdiction of their specific domicile. The obverse conclusion to the Supreme Court decision is consequentially raised through adoption of inculcated policy concerns of fair warning and legal certainty.

A bright line mechanistic test for contractual jurisdiction, derived from principles of *actor sequitur forum rei* and independent meaning attached to domicile for individuals and corporations, has much to command it as an Anglo-American template. In terms of optimal policy desiderata it has adventitious benefits in terms of predictability, fair warning and avoidance of costly litigation. The demerits center around lack of flexibility in hard cases, and failure to isolate the focal epicenter of a contractual dispute. In *McGee* if proceedings did not transpire in the *forum actoris* they were unlikely to commence at all given the travel distance to Texas. However, the lessons from extirpation of article 5 of the Brussels Regulation reveal difficulties over identification of the epicenter of the “actual obligation in question.” Meretricious arguments prevail for a shift away

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<sup>265</sup> See *supra* text accompanying notes 133-34.

from minimum contacts and effects doctrine towards a new radical perspective enjoying certainty in application and consistency.

b. Internationalist Solutions to In Personam Jurisdiction

Beyond the European perspective there have been important developments towards the promulgation of a worldwide convention on recognition and enforcement of foreign judgments in civil and commercial matters. These negotiations have been continuing for over a decade at the Hague Conference on Private International Law.<sup>266</sup> A key problem has been rationalization of alternative approaches to the exercise of judicial authority: this debate has focused on tensions between the Brussels Regulation (civil law perspective) and the U.S. analysis, predicated upon activity-based jurisdiction, and constitutionally required due process criteria.<sup>267</sup>

In the sphere of contractual jurisdiction, the preliminary draft text contained in Article 6, adopted by the Special Commission on 30 October 1999, is set out below. It is self-evidently, largely based upon the Brussels Convention perspective subject to the reflective amendment contained in the Regulation. There is no invocation of activity-based jurisdiction and a lack of focus upon the connection between the court and the defendant (the underlying premise of the U.S. due process analysis). The primary test is an examination of the connection between the court and the claim (the focus of the special jurisdiction rules of the Brussels Convention). At the informal negotiations in Ottawa in February 2001, working groups addressed specific issues, each of which was related to the manner in which activity-based concepts would be dealt with in the Convention. The additional insertions to the text are set out in the square brackets below. It is apparent that the new language invokes the due process requirements of “minimum contracts” and “foreseeability”, all too familiar for U.S. lawyers, with explicit reference to “frequent activity” and “directed activity”:

Article 6 - Contract Jurisdiction.

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<sup>266</sup> See *supra* text accompanying notes 43-44.

<sup>267</sup> See generally Ronald A. Brand, *Tort Jurisdiction in a Multilateral Convention: The Lessons of the Due Process Clause and the Brussels Convention*, 24 BROOK. J. INT'L L. 125 (1998) [hereinafter Brand, *Tort Jurisdiction*]; Ronald A. Brand, *Understanding Activity-Based Jurisdiction*, A Report for the UIA Seminar, Edinburgh, on The Preliminary Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (Apr. 20-21, 2001) [hereinafter Brand, *Activity Based Jurisdiction*].

1. A plaintiff may bring an action in contract in the courts of a state in which—
  - (a) in matters relating to the supply of goods, the goods were supplied in whole or in part;
  - (b) in matters relating the provision of service, the services were provided in whole or in part;
  - (c) in matters relating both to the supply of goods and the provision of services, performance of the principal obligation took place in whole or in part.
2. A plaintiff may bring an action in contract in the courts of the State in which the defendant has engaged in frequent or significant activity, or has [intentionally] directed such activity into that State, for the purpose of promoting or soliciting [sic] business, or negotiating or performing a contract, provided that the claim is directly related to that activity.
3. The preceding paragraphs do not apply to situations where the defendant has taken reasonable steps to avoid entering into or performing an obligation in that State.<sup>268</sup>

From a United States perspective it has been asserted by Brand amongst others, a member of the U.S. delegation to the Special Commission, that the inclusion of activity-based concepts in the new Hague Convention will have threefold benefits.<sup>269</sup> First, they will facilitate the combination of court-claim and court-defendant connections in a manner that adds legitimacy to the resulting rules of jurisdiction. Second, as Brand identified, “it will provide a logical extension of the basic concept of general jurisdiction in the courts of the state of the defendant’s residence.”<sup>270</sup> It is propounded that, at a fundamental level, activity-based jurisdiction provides recognition in a modern world of corporate actors that a defendant should be subject to suit where that defendant is, particularly when the subject-matter of the suit is directly related to the local conduct of the defendant. Finally, as Brand cogently articulates, “activity-based concepts, by including a court-defendant nexus in important rules of jurisdiction, is viewed as adding legitimacy to the relationship between convention rules of jurisdiction and convention rules of recognition and enforcement.” Proponents assert that the presence of a court-defendant nexus in the jurisdictional rule is important in due process terms as it addresses rationality concerns that the court seized has appropriate jurisdictional touchstones to arrogate in personam jurisdiction against

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<sup>268</sup> See generally Brand, *Activity Based Jurisdiction*, *supra* note 267.

<sup>269</sup> *Id.* at 39-40; see also Russell J. Weintraub, *A Map out of the Jurisdictional Labyrinth*, 28 U.C. DAVIS L. REV. 531 (1995).

<sup>270</sup> See Brand, *Activity Based Jurisdiction*, *supra* note 267 at 39-40.



the respective litigants. It arguably ensures comportation with foreseeability criteria.

Clearly an activity-based perspective in discrete areas, may have its own particularistic merits.<sup>271</sup> Overall, however, it is suggested that, as discussed in section 3 of this article, it is inappropriate and too uncertain as an optimal desiderata policy choice for contract jurisdiction. The merits of mechanical rule-selection, bright-line tests, outweigh the attractions of a solipsistically deployed rationale predicated on “minimum contacts”. What is required is specific and concrete jurisdictional preferences in favor of consumers, employees and individually insured policyholders. The latter group were omitted from the proposed Hague Convention. There is also a danger that consumers may be quietly forgotten in the final text for signatures. More generally, overall contractual jurisdiction principles need to be developed to promote optimal desiderata in the commercial sphere of certainty, ease of application, but allowing limited flexibility to ensure justice in hard cases. At present, we have multi-tiered systems of jurisdiction; the United States common law experience and comportation to due process; the European perspective with jurisdictional preferences, special jurisdiction for contract cases, and certain grey areas of interpretation; and beyond this the opportunities for a super-internationalist solution presented by the Hague Convention.

Finally, it is submitted that what is needed is enhanced consideration of the practicalities of the relationship impacted, and a fresh appraisal of appropriate rule-selection tests, appropriate role of choice of law clauses, and a widened appreciation of identifying the importance of identifying the focal epicenter for the contract itself in discrete types of contract, specifically employment, insurance and consumer. What is certain is that fascinating developments are on the horizon for Anglo-American private international law in the sphere of personal jurisdiction. The Brussels Regulation, in conjunction with the range of private international law initiatives either planned or accomplished, indicates that a world of harmonized and communitarian European developments are likely to dominate. These changes, operating in tandem with a revived evaluation of a worldwide convention, will significantly change the landscape of the subject. It is vital that

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<sup>271</sup> For instance, in relation to environmental harm, breach of copyright, and patent infringement.

within this altered legal topographical map that individual consumers, employees and insured policyholders are adequately protected. Optimal policy desiderata of certainty, practicality, and ease of application should be supererogatory.