1) PRELIMINARY REMARKS ON FORUM NON CONVENIENS DOCTRINE

1.1) THE TRADITIONAL GENERAL RULE OF JURISDICTION

Traditionally, the defendant’s domicile is the basis for the general rule of jurisdiction at least in the vast majority of the countries belonging to the Western legal tradition.

1.1a. EUROPE


- Article 2 (general rule): persons domiciled in a contracting state shall, whatever their nationality, be sued in the courts of that state (defendant’s domicile rule)
- Article 5(1) and (3) provides that a defendant 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, and, in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred (jurisdictions alternative to the one indicated by the general rule and based on the plaintiff’s choice)

1.1.b. UNITED STATES

Also in the USA, jurisdiction is based on the residence of a defendant within a state1. Foreign plaintiff's can gain access into US courts through several statutes. The most popular one, at present, is the Alien Torts Claims Act (ATCA) 28 U.S.C Section 1350. This Act grants jurisdiction (Fed. Courts) to hear “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”.

… therefore, the doctrine of forum non conveniens developed as and is an exception to the traditional general rule:

- EUROPE. It is true that the doctrine of forum non conveniens first manifested itself in Europe, in particular in Scottish law. It appeared in its most complete form at the end of the 19th century, and then it became established, in various forms, in other countries, mainly the common law countries, in particular England and Ireland. In English law, the forum non conveniens doctrine has developed constantly and significantly, and its final version was finally established by the House of Lords in the case of Spiliada Maritime Corporation v Cansulex Ltd [1987] 1 A.C.460. However, forum non conveniens in civil law nations it is unknown: the doctrine in question is for the most part alien to the Member States of the civil law tradition, that is to say those which negotiated the Brussels Convention that does not contain any provision relating to the doctrine in question. Moreover, in 2005 the ECJ finally rejected the possibility of applying the FNC doctrine.

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1 Jurisdiction may apply to non-residents under what is called “Federal due process”. Due process requires that a non-resident defendant must have certain minimum contacts with the state (or do business in it) such that the maintenance of a suit does not offend traditional notions of fair play and substantial justice: see International Shoe Co. v. Washington, 326 U.S. 310 (1945).
- USA. Even in instances where the defendant, under the general rule, is subject to the jurisdiction of the US court, the defendant can object to jurisdiction by relying on the doctrine of *forum non conveniens*.

### 1.2) THE BAD SIDE OF FNC DOCTRINE

Once upon a time *forum non conveniens* doctrine could be regarded as providing a good rule, since—from the 1936 *St. Pierre* case in the UK—the principle was that a court could not refuse to consider a case within its jurisdiction unless the plaintiff’s choice of forum was: “… oppressive or vexatious to the defendant or would be an abuse of process in some other way” ([1936] 1 KB 383 at 398)\(^2\). “The rationale of the old rule was to stop a vindictive plaintiff deliberately harassing a defendant through legal action in a remote and inconvenient location. Since taking a company to court in its own country could not amount to harassment, local corporations had no escape from their home courts under the traditional rule”\(^3\).

However, the doctrine in question then developed into a different direction, becoming much less exceptional and showing several pernicious effects.

In *Spiliada Maritime Corp. v Cansulex Ltd*\(^4\) and in *Connelly v RTZ Corp. plc*\(^5\) the House of Lords, through Lord Goff, summarized the new English approach to the doctrine of *forum non conveniens* stating the following rules:

- **a)** the English judges will have to decline jurisdiction when a trial is likely to be more suitable elsewhere for the interests of all the parties and for the benefit of justice;
- **b)** it is the defendant who must prove that there is a clear or distinctly more appropriate place to handle the trial;
- **c)** there is not a complete list of the factors that a court must take into account in deciding the question; however, some of the most important guidelines are the availability of witnesses, the law applicable to the transaction, the residence of the parties or the place where the parties carry on business and the possibility for the plaintiff to obtain justice in the foreign jurisdiction; also the special competence or expertise of a particular court must be taken into account in order to decide whether an alternative forum is more appropriate; the weight to be given to these factors is normally discretionary and it is for the court to decide on case-by-case basis;
- **d)** if there is any circumstance by reason of which a claimant could not obtain justice in a foreign country the court will not grant a stay; furthermore, in order to help the claimant to preserve some of the legal advantages of the English forum sometimes it is considered more appropriate to decline English jurisdiction on condition of a security posted by the defendant; for the same reasons the defendant might also be asked by the English court, for instance, to waive applicable limitation periods or to agree to other stipulations;
- **e)** the general absence of some kind of legal aid is not a sufficient justification for the refusal of a stay because financial assistance for litigation is not necessarily regarded as essential;
- **f)** the legitimate personal or judicial advantage for the plaintiff in proceeding in England is not considered a decisive factor: if a clearly more appropriate forum overseas has been identified, generally speaking the plaintiff will have to take that forum as he finds it, even if

\(^2\) See also *The Atlantic Star* [1973] Q.B. at 381-382, 384-385, 387-388. The case concerned two vessels from Holland that had a collision in Belgian waters. Due to the fact that the only way for a court to stay actions was in case of vexatious or oppressive litigation or abuse of process the Court of Appeal refused the stay finding that none of these situations arose
\(^3\) PETER PRINCE, Bhopal 20 years on: *forum non conveniens* and corporate responsibility, Law and Bills Digest Section, 8 February 2005.
\(^5\) *Connelly v RTZ Corp. plc* [1998] A.C. 854.
it is in certain respects less advantageous to him than the English forum; he may have to accept lower damages; the same must apply to court procedure, including the rules of evidence, applicable in the foreign forum; only if the plaintiff can establish that substantial justice cannot be done in the appropriate forum, will the court refuse to grant a stay.

Unfortunately, the case-law on FNC rule, especially in the United States, shows several bad points:

1) **FORUM NON CONVENIENS V. LEGAL CERTAINTY AND PREDICTABILITY:** differently from the traditional rule, under *forum non conveniens* a considerable amount of discretion is left with judges and, as a result, the doctrine of *forum non conveniens* lends itself to case by case decisions; *forum non conveniens* can actually lead to arbitrary decisions.

2) **FORUM NON CONVENIENS V. ACCESS TO JUSTICE:** as also noted by Amnesty International “the doctrine of *forum non conveniens* has been applied to restrict the access to courts by victims seeking reparations for violations of human rights, international criminal law or international humanitarian law”. It is certainly true that the doctrine in question tends to create obstacles to the claimant’s right to access to justice. Moreover, in the event of the claimant not succeeding in opposing the *forum non conveniens* defence, the only possibility that would remain if the claimant sought to pursue his claims would be to take all the steps needed to commence a new suit before the foreign court, and “it goes without saying that those steps have a cost and are likely considerably to prolong the time spent in the conduct of proceedings before the claimant finally has his case heard”. Furthermore, in the European context “the mechanism associated with the *forum non conveniens* doctrine could be regarded as incompatible with the requirements of Article 6 of the European Convention on the protection of human rights and fundamental freedoms” (Opinion of Advocate General LÉGER, delivered on 14 December 2004 in the case Andrew Owusu v. Jackson and others).

3) **FORUM NON CONVENIENS V. CLAIMANTS:** *forum non conveniens* has been routinely used by US corporations over the last two decades to block cases involving personal injury and/or environmental damage suffered overseas; UK companies have used the doctrine in a similar way.

4) **FORUM NON CONVENIENS V. INTERNATIONAL MASS TORT LITIGATION IN USA:** the recent trend in the US is strongly against foreign plaintiffs suing there; as Professor Joseph pointed out, *forum non conveniens* remains a “daunting impediment to transnational human rights litigation in the US”. In the Piper Aircraft case, the US Supreme Court endorsed formal discrimination against foreign claimants, stating that a foreign plaintiff’s choice of the US for legal action “deserves less deference” (454 US 235 at

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6 AMNESTY INTERNATIONAL, JUSTICE FOR VICTIMS: Ensuring effective enforcement abroad of court decisions concerning reparations - Memorandum to the Hague Conference on Private International Law, Special Commission Meeting, 7 to 18 June 1999.
For example, according to the *International Business Law Review*, 470 lawsuits have been filed against US companies over the last 20 years for injuries allegedly caused by use of the pesticide DBCP on banana plantations in developing countries. Largely because of the US *forum non conveniens* doctrine, however no US court has yet heard a case on its merits, even though the first DBCP case was filed in 1984.

5) **FORUM NON CONVENIENS V. US CORPORATIONS’ GLOBAL RESPONSIBILITY/LIABILITY:** who benefits from the *forum non conveniens* doctrine? Clearly, defendants are the beneficiaries of FNC. Allowing foreign cases to be readily dismissed for *forum non conveniens* helps US corporations escape domestic standards in their overseas operations. In other words the US *forum non conveniens* doctrine means US multinationals are not held to account in the United States when things go wrong overseas. Under the US approach it is difficult for the liability of such companies to be tested in US courts. As Justice Deane of the Australian High Court pointed out, the US approach meant, for example, that in the *Piper Aircraft* case: “Pennsylvania was not a convenient forum in which to litigate a claim against a Pennsylvania company that a plane was defectively designed and manufactured in Pennsylvania” (1988) 165 CLR 197 at 254. Defendants lawyers are fully aware of the potentiality of FNC doctrine in granting a way out for US defendants before US courts.

Moreover, the question of “public policy”, which is one of the relevant aspects of FNC doctrine, raises an issue which seems to be exclusively of a political nature, namely whether foreign claimants should be permitted to bring mass tort claims in the court seised against a corporation operating in the State where the court sits: “the focus on the wider public policy implications of these cases may cause the courts to sideline and ignore the conduct of the particular defendant and the suffering of the individual claimants”.

1.3) **FORUM NON CONVENIENS: AFRICA, LATIN AMERICA, E.U. & EUROPEAN COURT OF JUSTICE V. FNC DOCTRINE**

That there is a relevant “bad side” of FNC doctrine is fully demonstrated not only by US case-law itself and some English precedents, but also by the strong opposition by the legislatures in Africa and Latin America (the so called “anti-*forum non conveniens* legislation”) by European legislature (see Council Regulation No. 44/2001) and, finally, by the European Court of Justice in the case *Andrew Owusu v. Jackson and others* 1 March 2005, concerning the compatibility of the *forum non conveniens* doctrine with the Brussels Convention.

**Andrew Owusu v. Jackson and others: Europe v. FNC doctrine**

On 10 October 1997, Mr Owusu, a British national domiciled in the United Kingdom, suffered a very serious accident during a holiday in Jamaica. He walked into the sea, and when the water was up to his waist he dived in, struck his head against a submerged sand bank and sustained a fracture

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of his fifth cervical vertebra which rendered him tetraplegic. Following that accident, Mr Owusu brought an action in the United Kingdom for breach of contract against Mr Jackson, who was also domiciled in that State. Mr Jackson had let to Mr Owusu a holiday villa in Mammee Bay (Jamaica). Mr Owusu claimed that the contract, which provided that he would have access to a private beach, contained an implied term that the beach would be reasonably safe or free from hidden dangers. Mr Owusu also brought an action in tort in the United Kingdom against several Jamaican companies, namely Mammee Bay Club Ltd, the owner and occupier of the beach at Mammee Bay which provided the claimant with free access to the beach, The Enchanted Garden Resorts & Spa Ltd, which operates a holiday complex close to Mammee Bay, and whose guests were also licensed to use the beach, and Town & Country Resorts Ltd, which operates a large hotel adjoining the beach, and which has a licence to use the beach, subject to the condition that it is responsible for its management, upkeep and control.

Mr Jackson and some other defendants applied to the court for a declaration that it should not exercise its jurisdiction in relation to the claim against them both. In support of their applications, they argued that the case had closer links with Jamaica and that the Jamaican courts were a forum in which the case might be tried more suitably for the interests of all the parties and the ends of justice.

The ECJ noted that according to the doctrine of forum non conveniens, at least as understood in English law, “a national court may decline to exercise jurisdiction on the ground that a court in another State, which also has jurisdiction, would objectively be a more appropriate forum for the trial of the action, that is to say, a forum in which the case may be tried more suitably for the interests of all the parties and the ends of justice (1986 judgment of the House of Lords, in Spiliada Maritime Corporation v Cansulex Ltd [1987], AC 460, particularly at p. 476)”. The court then pointed out that “Article 2 of the Brussels Convention is mandatory in nature and that, according to its terms, there can be no derogation from the principle it lays down except in the cases expressly provided for by the Convention (see, as regards the compulsory system of jurisdiction set up by the Brussels Convention, Case C-116/02 Gasser [2003] ECR I-0000, paragraph 72, and Case C-159/02 Turner [2004] ECR I-0000, paragraph 24)”. The ECJ adopted the following arguments:

- “respect for the principle of legal certainty, which is one of the objectives of the Brussels Convention (see, inter alia, Case C-440/97 GIE Groupe Concorde and Others [1999] ECR I-6307, paragraph 23, and Case C-256/00 Besix [2002] ECR I-1699, paragraph 24), would not be fully guaranteed if the court having jurisdiction under the Convention had to be allowed to apply the forum non conveniens doctrine”;
- “application of the forum non conveniens doctrine, which allows the court seised a wide discretion as regards the question whether a foreign court would be a more appropriate forum for the trial of an action, is liable to undermine the predictability of the rules of jurisdiction laid down by the Brussels Convention, in particular that of Article 2, and consequently to undermine the principle of legal certainty, which is the basis of the Convention”;
- “the legal protection of persons established in the Community would also be undermined”: 1) “first, a defendant, who is generally better placed to conduct his defence before the courts of his domicile, would not be able, in circumstances such as those of the main proceedings, reasonably to foresee before which other court he may be sued”; 2) “second, where a plea is raised on the basis that a foreign court is a more appropriate forum to try the action, it is for the claimant to establish that he will not be able to obtain justice before that foreign court or, if the court seised decides to allow the plea, that the foreign court has in fact no jurisdiction to try the action or that the claimant does not, in practice, have access to effective justice before that court, irrespective of the cost entailed by the bringing of a fresh action before a court of another State and the prolongation of the procedural time-limits”;
“moreover, allowing forum non conveniens in the context of the Brussels Convention would be likely to affect the uniform application of the rules of jurisdiction contained therein in so far as that doctrine is recognised only in a limited number of Contracting States, whereas the objective of the Brussels Convention is precisely to lay down common rules to the exclusion of derogating national rules”.

On those grounds, the Court (Grand Chamber) rules as follows: “The Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, precludes a court of a Contracting State from declining the jurisdiction conferred on it by Article 2 of that convention on the ground that a court of a non-Contracting State would be a more appropriate forum for the trial of the action even if the jurisdiction of no other Contracting State is in issue or the proceedings have no connecting factors to any other Contracting State”.

It is likely that the ECJ’s decision will mean the death of the forum non conveniens doctrine in the United Kingdom and that British corporations will no longer be able to use it to have cases removed from UK courts. As a recent article in a British industry journal noted: “A resolution of this issue bringing it in line with other European countries will make it impossible to stay claims on the grounds of ‘forum non conveniens’ in England. This is a scary possibility for multinational companies”.

2) GULLONE V. BAYER CORP.

This decision fully confirms the “bad points” and the pernicious effects of FNC doctrine.

The “court congestion” argument and the “jury” argument are definitively inconsistent. Firstly, there is a clear denial of access to American justice by foreign victims: these arguments unreasonably discriminate between American claimants and foreign victims. Secondly, the “jury” argument is in contrast with the right of trial by jury provided by Amendment VII of American Constitution.

The denial of a local interest in having American defendants judged by an American judge is inconsistent too: the nexus between United States and the tortious conduct of the defendants is self-evident. More in general the link between defendants and American jurisdiction is clear: defendants are American companies; their contaminating products were designed and manufactured in United States; all relevant conducts and strategic decisions took place in America; the good name of American industry is under dispute.

The inconsistency of the above arguments together with the denial of a local interest seems to confirm that the application of FNC doctrine by US courts is strongly against foreign plaintiffs suing in USA.

Moreover, the particular application of the forum non conveniens doctrine in Gullone v. Bayer Corp. is likely to produce a result which is clearly ineffective: such an approach, by aiming at fragmenting the American action and the claimants’ unity represented by their common nexus (the defendants and their illegal conduct) and their American lawyers, bears the risk of leading to

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atomization of the litigation, splitting the action into hundreds (or even more) of courts across the foreign countries originally involved in the proceedings before US courts.

It should also be noted that Gullone case demonstrates that the FNC doctrine imposes on plaintiffs (the weaker party) a jurisdiction that did not choose, while defendants are fully free to decide whether to accept or not US jurisdiction (their home forum!): on one side the choice made by the plaintiffs is not taken into account, while defendants’ choice receives full consideration.

3) GULLONE V. BAYER CORP. AND THE ITALIAN VICTIMS

Following arguments applied by Judge Grady in relation to U.K. claimants are not valid for excluding jurisdiction in connection with Italian victims:

- **CAUSATION**: under Italian law the burden of proof of causation is on plaintiffs, although presumptions may apply; Decreto Presidente della Repubblica, 24 April 1988, no. 224, implementing the Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of Member States concerning liability for defective products, imposes on the consumers to prove causation; Article 8 of D.P.R. no. 224/1988 implements Article 4 of the directive providing that there is not a reversal of the burden of proof: “The injured person shall be required to prove the damage, the defect and the causal relationship between defect and damage”; furthermore, under Italian law and case-law there is not any rule comparable to the market share or alternative liability theories recognized in American jurisdictions or comparable to the English precedent Fairchild v. Glenhaven Funeral Services Ltd. [2002], that the Federal Court of Illinois considered relevant;

- **ATTORNEY’S FEES**: Italian law do not allow contingency fees agreements (USA model) nor conditional fees agreements (UK model)

- **EVIDENCE**: the circumstance that much of the discovery pertaining to the liability issues has already been done in the two generations of American litigation is not relevant under Italian law since: 1) under Italian law the work done by other courts does not count: all circumstances emerged outside the court seised must be proved in the course of the proceedings, which means that all depositions should be at least confirmed by witnesses to be heard by the Italian judge (with the difficulties of obtaining liability witnesses to appear before Italian courts; there is no subpoena power); 2) all documents written in English shall be translated into Italian and costs of translation, that are very high (about 20-30 euros each page), must be sustained in advance by the claimants;

- **LENGTH OF PROCEEDINGS**: undoubtedly, as also widely recognized by the European Court for Human Rights (Strasbourg Court) in a vast number of decisions and by the Italian legislator itself (legge 24 March 2001 no.89), the length of Italian proceedings is a relevant obstacle; the Italian victims, by suing in Italy, are likely to face, if everything goes right, a period of approximately 8-10 years before obtaining a final judgment.

Furthermore, under Italian law there are relevant issues concerning limitation: Article 11 of the Council Directive 85/374/EEC of 25 July 1985, implemented by Article 14 of Decreto Presidente della Repubblica, 24 April 1988, no. 224, provides that “Member States shall provide in their legislation that the rights conferred upon the injured person pursuant to this Directive shall be extinguished upon the expiry of a period of 10 years from the date on which the producer put into circulation the actual product which caused the damage, unless the injured person has in the meantime instituted proceedings against the producer”.
