

(Br)exit Strategy: The Future of the *Forum Non Conveniens* Doctrine in the United Kingdom After ‘Brexit’

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We are going to be a fully independent, sovereign country—a country that is no longer part of a political union with supranational institutions that can override national parliaments and courts. And that means we are going, once more, to have the freedom to make our own decisions . . . We will do what independent, sovereign countries do. . . . [W]e will be free to pass our own laws. . . . And we are not leaving only to return to the jurisdiction of the European Court of Justice.¹

- Prime Minister Theresa May

Introduction

In 2016, the United Kingdom voted in a historic national referendum to withdraw from the European Union (“EU”).² In the following year, the British government passed legislation and utilized the appropriate European mechanisms to trigger its withdrawal from the EU.³ Despite discontent with the referendum’s results,⁴ former Prime Minister Theresa May had quipped, “Brexit means Brexit.”⁵ Since the referendum, former Prime Minister May had faced resounding opposition and an overwhelming rebuke to the deal her government negotiated with the EU.⁶ Nonetheless, she had remained committed to the Brexit process.⁷ The opposition to

1. Theresa May, then-Prime Minister, United Kingdom, Address at the 2016 Conservative Party Conference (Oct. 2, 2016).

2. Alexandra George, *Restructuring Intellectual Property Jurisdiction Post-Brexit: Strategic Considerations for the European Union and Britain*, 43 BROOKLYN J. INT’L L. 131, 132 (2017). See also *infra* Section III(A) (discussing the 2016 Brexit referendum).

3. See *infra* Section III(B).

4. See Anna Petherick, *Referendums are Supposed to Make People Happy. Why are Even Leave Voters Upset?*, GUARDIAN (June 30, 2016, 1:31 PM), <https://www.theguardian.com/lifeandstyle/2016/jun/30/eu-referendum-fallout-britain-happiness-leave-voters-violence> [<https://perma.cc/EN88-CLJ8>].

5. Mark Maddell, *What Does ‘Brexit Means Brexit’ Mean?*, BBC (July 14, 2016), <http://www.bbc.com/news/uk-politics-36782922> [<https://perma.cc/VER6-5QCA>]. Cf. Philip Stephens, *Merkel’s Message to Theresa May: Brexit Means Brexit*, FINANCIAL TIMES (Sept. 14, 2017), <https://www.ft.com/content/33f3d722-97d1-11e7-b83c-9588e51488a0> [<https://perma.cc/Z5RF-CQ3X>] (“To borrow an unfortunate phrase, Ms. Merkel’s message to Mrs. May is that Brexit means Brexit: Britain cannot leave the EU and expect to escape its consequences. For Germany, the integrity of the union depends on preserving the rules. Those who step outside cannot keep the benefits.”); *but cf.* Helen Mountfield, *Brexit: Can the United Kingdom Change its Mind?*, BRIT. INST. INT’L & COMP. L., Jan. 2018, at 12 (“If the political mood changes, as a matter of law, Parliament can change its mind.”); Rhodri Thompson, *Brexit Means Brexit: But Can the UK Change its Mind?*, 2019 J. INT’L BANKING & FIN. L. 83, 83 (2019) (“A legal issue that has been debated ever since the referendum is whether a notification can be revoked and, if so, whether revocation can be made unilaterally.”).

6. See Heather Stewart, *May Suffers Heaviest Parliamentary Defeat of a British PM in the Democratic Era*, GUARDIAN (Jan. 15, 2019, 8:58 PM), <https://www.theguardian.com/politics/2019/jan/15/theresa-may-loses-brexit-deal-vote-by-majority-of-230> [<https://perma.cc/D28J-TQMA>].

7. Kylie MacLellan & William James, *UK’s May Seeks More Time to Find Brexit Deal, Tells Lawmakers: Hold Your Nerve*, REUTERS (Feb. 12, 2019), <https://www.reuters.com/article/us-britain-eu/uks-may-seeks-more-time-to-find-brexit-deal-tells-lawmakers-hold-your-nerve-idUSKCN1Q10NK> [<https://perma.cc/6GPP-YBX5>] (“Prime Minister Theresa May told lawmakers on Tuesday to hold their nerve over Brexit and give her more time to negotiate a deal acceptable to both the European Union and the British parliament.”).

May's Brexit deal and leadership during the withdrawal process, however, finally became insurmountable; she announced her resignation on May 24, 2019.⁸ Following her resignation, Boris Johnson became the new Prime Minister and continued Theresa May's commitment to leave the EU.⁹ After a resounding 2019 General Election victory, Boris Johnson has vowed to "get Brexit done."¹⁰ In the midst of the seemingly disastrous withdrawal and exit strategy,¹¹ it comes as no surprise that pervasive uncertainty concerning the United Kingdom's future—including that of its legal system—persists.¹² The application of the *forum non conveniens* doctrine has been especially vulnerable to the lingering legal uncertainty in the United Kingdom.

Traditionally, beginning with Scottish courts in the Nineteenth Cen-

8. Eliza Mackintosh & Tara John, *Brexit Failure Forces British Prime Minister Theresa May to Announce Resignation*, CNN (May 24, 2019), <https://www.cnn.com/2019/05/24/europe/theresa-may-resigns-brexit-gbr-intl/index.html> [<https://perma.cc/BEW4-XWLD>].

9. See Heather Stewart, *Boris Johnson Elected New Tory Leader*, GUARDIAN (July 23, 2019, 8:27 AM), <https://www.theguardian.com/politics/2019/jul/23/boris-johnson-elected-new-tory-leader-prime-minister> [<https://perma.cc/YLS6-DTHD>] (“[Johnson] reminded his audience of ministers and party staff of his campaign mantra: ‘Deliver Brexit, unite the country and defeat [Labour Party leader] Jeremy Corbyn.’”).

10. See John Henley, *Boris Johnson Wins Huge Majority on Promise to ‘Get Brexit Done’*, GUARDIAN (Dec. 13, 2019), <https://www.theguardian.com/politics/2019/dec/13/bombastic-boris-johnson-wins-huge-majority-on-promise-to-get-brexit-done> [<https://perma.cc/45EL-YMSY>].

11. See Denis Staunton, *Theresa May Ambushed by Her Own Disastrous Brexit Strategy*, IRISH TIMES (Sept. 21, 2018), <https://www.irishtimes.com/news/world/uk/theresa-may-ambushed-by-her-own-disastrous-brexit-strategy-1.3637002> [<https://perma.cc/4E5D-MMDS>]; Simon Wren-Lewis, *Idée Fixe: Theresa May's Disastrous Brexit Strategy*, VOX (June 7, 2018), <https://voxeu.org/content/id-e-fixe-theresa-mays-disastrous-brexit-strategy> [<https://perma.cc/3LTM-J9G9>]. See also Frances Coppola, *Theresa May's Latest Humiliation Makes Chaotic Brexit More Likely*, FORBES (Feb. 15, 2019), <https://www.forbes.com/sites/francescoppola/2019/02/15/theresa-mays-latest-humiliation-makes-chaotic-brexit-more-likely/#4c2d18914775> [<https://perma.cc/RGD7-EXSK>] (“Undeterred, Mrs. May is off to Brussels again on her quest to reopen negotiations on the Withdrawal Agreement. You have to admit she has guts. But her chances of doing so now are even worse than they were before. Why would Brussels agree to renegotiate anything at all when it has no idea whether she will be able to get it through Parliament?”); Tom Kibasi, *Boris Johnson's Blustering Strategy Has Fallen at the First Hurdle*, GUARDIAN (Sept. 3, 2019, 6:15 PM), <https://www.theguardian.com/commentisfree/2019/sep/03/boris-johnsons-blustering-strategy-has-fallen-at-the-first-hurdle> [<https://perma.cc/JR8Z-K9ZF>] (“Johnson has no viable negotiating strategy for Brexit itself and yet he invested all his political capital in meeting the October deadline.”).

12. See *infra* Section III(C). See also Tom McTague, *Inside Theresa May's Mind*, POLITICO (Feb. 11, 2019, 1:18 AM), <https://www.politico.eu/article/inside-uk-prime-minister-theresa-may-mind-brexit-deal-cliff-edge/> [<https://perma.cc/4ZFG-Y6T9>] (speculating about what Britain may look like on Friday, March 22, 2019 if Theresa May fails to secure a deal with the EU); Adam Payne, *Boris Johnson Will Not Be Able to ‘Get Brexit Done’ by the End of 2020*, BUSINESS INSIDER (Jan. 13, 2020), <https://www.businessinsider.com/why-brexit-will-not-be-done-by-this-year-2020-1> [<https://perma.cc/3E8E-UGSR>]; Therese Raphael, *Roll Up for Boris Johnson's Mystery Brexit Tour*, BLOOMBERG (July 19, 2019, 6:50 AM), <https://www.bloomberg.com/opinion/articles/2019-07-19/boris-johnson-s-brexit-mystery-tour> [<https://perma.cc/F4AP-5GTL>] (“Support for no deal has grown as voters become more frustrated with the current state of uncertainty.”).

tury,¹³ courts in the United Kingdom have applied the *forum non conveniens* doctrine to decline jurisdiction and dismiss cases in favor of a more convenient and appropriate forum.¹⁴ This doctrine later spread to other countries that subscribe to the Anglo-common law legal system.¹⁵ The United States Supreme Court has long recognized the doctrine.¹⁶ In the historic *Gulf Oil v. Gilbert* case, Justice Jackson identified the *forum non conveniens* doctrine and described the doctrine as: “The principle . . . that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute.”¹⁷ The doctrine has been well-established in United States courts ever since.

While the *forum non conveniens* doctrine or some variant of the doctrine has been well-established in the United States and throughout the common law world, the doctrine is foreign to the civil law world—including most of Europe.¹⁸ Indeed, civil law countries and their legal systems do not permit their courts to discretionarily decline jurisdiction.¹⁹ Accordingly, in 2005, the European Court of Justice (“ECJ”) held that British courts could not apply the *forum non conveniens* doctrine to cases involving an international element.²⁰ Instead, the ECJ concluded, the Brussels I Regulation²¹—an instrument negotiated by civil law states—controlled, and the provisions of the Regulation mandated that the British courts not decline jurisdiction in favor of a different forum.²² This ECJ decision severely limited the application of the *forum non conveniens* doctrine in the United Kingdom. With the United Kingdom’s withdrawal from the EU—and presumably the ECJ—the United Kingdom and its courts have the opportunity to reinstitute the *forum non conveniens* doctrine.

13. Some legal scholars have described the origins of the *forum non conveniens* doctrine as “obscure” and “murky.” See *American Dredging Co. v. Miller*, 510 U.S. 443, 449 (1994) (“[T]he origins of the [*forum non conveniens*] doctrine in Anglo-American law are murky”); Edward L. Barrett, Jr., *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380, 386 (1947) (“The origins of the doctrine of *forum non conveniens* are obscure.”). But the phrase apparently first appeared in Nineteenth Century Scottish cases. See *American Dredging Co.*, 510 U.S. at 448 (citing *Macmaster v. Macmaster* (1833) 11 Sess. Cas. 685, 687 (2d Div. Scot.); *McMorine v. Cowie* (1845) 7 Sess. Cas. (2d. Ser.) 270, 272 (1st Div. Scot.) (1845); *La Societe du Gaz de Paris v. La Societe Anonyme de Navigation “Les Armateurs Francais,”* [1926] Sess. Cas. (HL) 13). See also *Piper Aircraft v. Reyno*, 454 U.S. 235, 248 n.13 (1981) (“The doctrine of *forum non conveniens* has a long history. It originated in Scotland and became part of the common law of many States.”).

14. See *infra* Section II(C).

15. See *infra* Sections II and III(C). See also Ivan Ovchinnikov, Owusu, Lis Pendens and the Recent Recast of the Brussels I Regulation, 19 TRINITY COLL. L. REV. 40, 43 (2016).

16. See *infra* Section I.

17. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947).

18. Ovchinnikov, *supra* note 15, at 43.

19. JAMES FAWCETT, DECLINING JURISDICTION IN PRIVATE INTERNATIONAL LAW 10 (1995).

20. Case C-281/02, *Owusu v. Jackson*, 2005 E.C.R. I-01383, at para. 46.

21. Council Regulation (EC) No. 44/2001 of December 22, 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 012) [hereinafter Brussels I Regulation].

22. *Id.*

This Note's principle contribution is prescriptive: It argues that the United Kingdom and its courts should reject the ECJ's preclusive model of the *forum non conveniens* doctrine and instead look to either its own common law model or the American common law model of the doctrine.²³ In particular, the *Iragorri* sliding scale model of the doctrine is particularly attractive. The *forum non conveniens* doctrine is beneficial to legal systems because it is conducive to judicial economy, guards against forum shopping, and is entirely discretionary.²⁴ The doctrine is particularly apt in the United Kingdom given foreign parties' proclivity for adjudicating international commercial contracts as well as marital agreements in the United Kingdom's jurisdiction. Furthermore, the United Kingdom has experience and history applying the doctrine and has conformed to the Brussels I Regulation—which precluded the doctrine's application—only in recent decades.

This Note unfolds in six subsequent Sections. In Section I, this Note reviews the significant *forum non conveniens* jurisprudence in the United States. In addition to *Piper Aircraft v. Reyno*, the Section also discusses the Second Circuit's *Iragorri* case, which presented a novel sliding scale approach to the pre-existing jurisprudence. Section II examines the *forum non conveniens* doctrine in Europe and reviews the *Owusu v. Jackson* case. The Section also discusses the United Kingdom's domestic *forum non conveniens* doctrine. Section III provides background on the Brexit referendum and the process of withdrawing from the European Union under Article 50 of the Lisbon Treaty. Section IV describes the relationship between the United Kingdom and the European Court of Justice since the Brexit referendum. This Note accepts Boris Johnson's and Theresa May's promises to leave the European Court of Justice and examines the legal landscape once the United Kingdom officially leaves the Court's jurisdiction. Section V proposes that the United Kingdom readopt the common law *forum non conveniens* doctrine—and specifically the *Iragorri* sliding scale approach. The doctrine is particularly attractive for the United Kingdom, where forum shopping by foreign litigants is pervasive.

I. The Modern *Forum Non Conveniens* Doctrine in the United States

A. *Piper Aircraft v. Reyno*

The *forum non conveniens* doctrine was not explicitly adopted in the United States until the Supreme Court used the doctrine in two 1947 companion cases: *Gulf Oil Co. v. Gilbert*²⁵ and *Koster v. American Lumbermens*

23. This Note is not the first to prescribe the adoption or rejection of a particular legal doctrine “[i]n the event of a no-deal Brexit.” See, e.g., Sarah Gabriel et al., *Brexit: A New Era for Recognition and Enforcement of English Judgments in Europe or Turning Back the Clock?*, 13 DISPUTE RESOLUTION INT’L 81, 94 (2019) (discussing judgment recognition and enforcement and arguing for adopting the relevant provisions of the Lugano Convention).

24. See *infra* Sections I(B) and V.

25. 330 U.S. 501 (1947).

*Mutual Casualty Co.*²⁶ Even before these two cases, however, many U.S. courts applied reasoning that mirrored the *forum non conveniens* doctrine.²⁷ This was especially true for cases involving federal admiralty law.²⁸ The modern iteration of the *forum non conveniens* doctrine, however, is best illustrated in the seminal case, *Piper Aircraft v. Reyno*.²⁹ In concluding that the *forum non conveniens* doctrine applied, the Supreme Court expanded on its previous iterations of the doctrine, as articulated in *Canada Malting, Gulf Oil*, and *Koster*.³⁰

Piper involved a plane crash that occurred in Scotland and killed the pilot and five passengers, all of whom were Scottish citizens.³¹ The deceased Scottish citizens' estates brought a wrongful termination claim against the aircraft's manufacturer and the propellers' manufacturer in California probate court.³² The suit eventually was transferred to the federal district court in the Middle District of Pennsylvania.³³ The district court granted the defendants' motion to dismiss on the ground of *forum non conveniens*, applying the balancing test articulated in *Gulf Oil* and *Koster*.³⁴ The Supreme Court then granted certiorari to determine "the proper application of the doctrine."³⁵

In reversing the Third Circuit and affirming the district court's decision, the Court concluded that the district court did not abuse its discretion when it dismissed the case on the ground of *forum non conveniens*.³⁶ The Court first noted that merely showing a change in the substantive law to be applied will not bar a district court from declining jurisdiction under the *forum non conveniens* doctrine.³⁷ The Court further explained that the doctrine involves flexibility and discretion and that no specific circum-

26. 330 U.S. 518 (1947).

27. See, e.g., *Gardner v. Thomas*, 14 Johns. 134, 138 (N.Y. 1817) ("The plaintiff . . . ought to have been left to seek redress in the courts of his own country, on his return.").

28. See, e.g., *The Maggie Hammond*, 76 U.S. 435, 450 (1869) ("[I]n controversies wholly of foreign origin, and between citizens and subjects of the same foreign country, the admiralty courts of the United States will not, in general entertain jurisdiction to enforce the maritime lien or privilege . . ."); *Mason v. Ship Blaireau*, 6 U.S. 240, 264 (1804) (noting that the "preliminary question" is whether "this court ought not to take cognizance of a case entirely between foreigners"); *Willendson v. Forsoket*, 29 F. Cas. 1283, 1283 (D. Pa. 1801) ("It has been my general rule not to take cognizance of disputes between the masters and crews of foreign ships. I have commonly referred them to their own courts."). See also ALBERT A. EHRENZWEIG, *THE CONFLICT OF LAWS* 123 (1962) ("Admiralty courts have administered . . . a doctrine of *forum non conveniens* much longer than land courts."); Alexander Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 CORNELL L.Q. 12, 13 (1949) (describing the "device of *forum non conveniens*" as "[a]n admiralty practice of long standing.").

29. 454 U.S. 235 (1981).

30. *Id.* at 261.

31. *Id.* at 238-39.

32. *Id.* at 239-40.

33. *Id.* at 240-41.

34. *Id.* at 241-44.

35. *Id.* at 246.

36. *Id.* at 261.

37. *Id.* at 247-50.

stances will require a court to grant or deny a motion to dismiss on the ground of *forum non conveniens*.³⁸ The doctrine is “committed to the sound discretion of the trial court,” which may only be reversed “when there has been a clear abuse of discretion.”³⁹

Additionally, the Court affirmed the district court’s *Gilbert* analysis.⁴⁰ Not only did the district court give appropriate deference to the plaintiff’s choice of forum, but the court also properly weighed the private and public interests.⁴¹ The district court correctly acknowledged that a plaintiff’s choice of forum will generally not be disturbed unless the public and private interests suggest another forum is more convenient and appropriate.⁴² The presumption favoring the plaintiff’s choice of forum, according to the Court, is diminished when the plaintiff is foreign.⁴³

In conducting the *Gilbert* analysis, the district court will analyze and balance factors corresponding to both the private and public interest factors.⁴⁴ The Court will consider private interest factors such as: the connections with an alternative forum, the relative ease of access to sources of proof in an alternative forum, the ability to join other parties in the alternative forum, and the undue hardship for the defendant.⁴⁵

The *Piper* Court approved of the district court’s analysis of the private interest factors.⁴⁶ First, the Court agreed that the connections with Scotland were “overwhelming” and most of the evidence was located in Scotland.⁴⁷ Second, most of the relevant witnesses and potential third-party defendants were also located in Scotland.⁴⁸ Although the defendants could implead potential Scottish third-party defendants, convenience favored resolving all of the claims in a single trial.⁴⁹ Thus, the district court did not abuse its discretion when it considered the private interest factors and concluded that they support dismissing the case in favor of a more convenient forum.⁵⁰

The Court also considered public interest factors and approved of the district court’s analysis.⁵¹ The Court will consider public interest factors such as: the judicial efficiency and economy, the application of choice-of-law rules, and other public policy concerns.⁵² The *Piper* Court determined that the public interest factors supported dismissing the case in

38. *Id.* at 249.

39. *Id.* at 257.

40. *Id.* at 255.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 257.

45. *Id.* at 257-59.

46. *Id.*

47. *Id.* at 257-58.

48. *Id.* at 258-59.

49. *Id.* at 259.

50. *Id.* at 257-59.

51. *Id.* at 259-60.

52. *Id.* at 260-61.

favor of a more convenient forum.⁵³ First, the Court noted the uncertainty concerning whether to apply Pennsylvania law or Scottish law as well as the district court's lack of familiarity and expertise applying Scottish law.⁵⁴ Second, regardless of the outcome of the first inquiry, the Court maintained that Scotland, rather than the United States, had a strong interest in the litigation.⁵⁵ Thus, the commitment of American judicial resources to the litigation could not be justified by the insignificant American interest in the case.⁵⁶

Since the Supreme Court decided *Piper* in 1981, the case has been cited in over 5,000 published cases.⁵⁷ A plurality of the cases that analyze *Piper* do so positively and approvingly. As recently as 2007, the Supreme Court has approved of *Piper*'s conception and iteration of the *forum non conveniens* doctrine.⁵⁸ Moreover, the Supreme Court recently cited *Piper* for the proposition of considering the private interest and public interest factors related to a particular forum.⁵⁹

B. *Iragorri v. United Technologies*

Two decades after *Piper*, in *Iragorri v. United Technologies*, the *en banc* Second Circuit encountered an important issue related to the *forum non conveniens* doctrine: “[W]hat degree of deference should the district court accord to a United States plaintiff’s choice of a United States forum where the forum is different from the one in which the plaintiff resides[?]”⁶⁰ The case involved a naturalized U.S. citizen domiciled in Florida who fell to his death in Cali, Colombia.⁶¹ His family brought suit against the allegedly negligent elevator companies in federal court in Connecticut.⁶² The elevator companies filed a motion to dismiss based on the ground of *forum non conveniens*, arguing that the more appropriate forum was Colombia.⁶³ The district court granted the motion.⁶⁴

In vacating the prior decision and remanding the case back to the district court, the *en banc* Second Circuit concluded that the district court did

53. *Id.* at 261.

54. *Id.* at 260.

55. *Id.*

56. *Id.* at 261.

57. Shepardizing *Piper* on Lexis Advance returns over 5,500 citing decision results (as of April 2020). Similarly, over 5,500 cases cite to *Piper* on Westlaw Edge’s Citing References (as of April 2020).

58. See *Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*, 549 U.S. 422, 429–30 (2007).

59. See *Atlantic Marine Constr. Co. v. United States Dist. Ct.*, 571 U.S. 49, 63–64 (2013). Additionally, in a case involving the application of the presumption against extraterritoriality to the RICO statute, Justice Ginsburg approvingly cited *Piper* in her dissenting opinion. See *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2115 (2016) (Ginsburg, J., dissenting).

60. *Iragorri v. United Techs.*, 274 F.3d 65, 69 (2d Cir. 2001).

61. See *id.* at 69–70.

62. See *id.* at 70.

63. See *id.*

64. See *id.*

not provide appropriate deference to the plaintiffs' selected forum.⁶⁵ The court noted that courts will afford a plaintiff's choice of forum great deference when it is her home forum.⁶⁶ This is, in part, because the plaintiff's choice of forum is presumed to be convenient.⁶⁷ But courts will afford a plaintiff's choice of forum far less deference when the plaintiff is foreign.⁶⁸ This is, in part, because courts seek to guard against forum shopping and efforts to secure a tactical advantage stemming from local law.⁶⁹ Evaluating the plaintiff's choice of forum, however, is only the first step in the *forum non conveniens* inquiry.⁷⁰ The court also proceeded to consider the alternative forum and conduct the analysis of private and public interest factors.⁷¹

When the *en banc* Second Circuit undertook the *Gilbert-Koster-Piper* analysis, it employed a reimagined, sliding-scale version of the analysis.⁷² The court explained:

As implicit in the meaning of “deference,” the greater the degree of deference to which the plaintiff's choice of forum is entitled, the stronger a showing of inconvenience the defendant must make to prevail in securing *forum non conveniens* dismissal. . . . District courts should . . . arm themselves with an appropriate degree of skepticism in assessing whether the defendant has demonstrated genuine inconvenience and a clear preferability of the foreign forum. And the greater the degree to which the plaintiff has chosen a forum where the defendant's witnesses and evidence are to be found, the harder it should be for the defendant to demonstrate inconvenience.⁷³

This new conception of the *Gilbert-Koster-Piper* analysis continues to balance the private and public interest factors associated with the plaintiff's chosen forum and the alternative forum,⁷⁴ but with greater formulaic structure adjusted to the facts of the particular case.⁷⁵ This sliding-scale approach fills the void left by the Supreme Court's failure to “provide lower courts with guidance on how to determine the appropriate level of defer-

65. See *id.* at 75.

66. See *id.* at 71 (citing *Koster v. American Lumbermens Mutual Casualty Co.*, 330 U.S. 518, 524 (1947) and *Piper Aircraft v. Reyno*, 454 U.S. 235, 255-56 (1981)).

67. See *id.* at 71 (citing *Piper*, 454 U.S. at 255-56).

68. See *id.*

69. See *id.* at 72.

70. See *id.* at 73.

71. See *id.*

72. See *id.* at 74-75.

73. *Id.*

74. Cf. *In re Ski Train Fire in Kaprun Austria*, 499 F. Supp. 2d 437, 442 (2007) (“The degree of deference to be accorded the plaintiff's choice of forum is not determinative of the final outcome; rather, [the *Iragorri* sliding-scale approach] merely *re-calibrates the scales* for the remaining two steps of the analysis.”) (emphasis added).

75. The greater formulaic structure will help lower courts balance the private and public interest factors in a more systematic and predictive way. This approach is superior to haphazardly and formalistically considering a myriad of factors. For example, a California state court established an extensive list of 25 factors for the *forum non conveniens* inquiry. See *Great N. Ry. v. Superior Court*, 12 Cal. App. 3d 105, 113-15, *cert. denied*, 401 U.S. 1013 (1970).

ence to give to a foreign plaintiff's choice of forum."⁷⁶ And the approach is not a novel one; the approach mirrors the one courts use to balance minimum contacts and reasonableness in the context of personal jurisdiction.⁷⁷

II. *Owusu v. Jackson* and *Forum Non Conveniens* in the United Kingdom

Prior to the landmark ECJ case *Owusu v. Jackson*,⁷⁸ the United Kingdom employed the standard common law approach to the *forum non conveniens* doctrine.⁷⁹ Upon hearing the case, however, the ECJ held that the Brussels I Regulation effectively precluded the application of the *forum non conveniens* doctrine in cases falling within the scope of the Regulation—i.e., in cases involving an international element.⁸⁰ Indeed, the ECJ's ruling "significantly restricted the ability of the English courts to refuse jurisdiction over an English-domiciled defendant, even where there is clearly a more appropriate jurisdiction in which to hear the case."⁸¹ Along with the "highly controversial"⁸² limitation imposed on the English courts by the ECJ came uncertainty surrounding the doctrine.⁸³ As one commentator remarked, *Owusu* "has left numerous unanswered questions on the scope of the Brussels I Regulation and the future is deeply uncertain."⁸⁴

76. Jeffrey Baldwin, *International Human Rights Plaintiffs and the Doctrine of Forum Non Conveniens*, 40 CORNELL INT'L L.J. 749, 756 (2007). Additionally, federal courts outside of the Second Circuit have also adopted the *Iragorri* sliding-scale approach. See, e.g., *In re Ford Motor Co.*, 344 F.3d 648, 653 (7th Cir. 2003); *Miller v. Boston Sci. Corp.*, 380 F. Supp. 2d 443, 449–50 (D. N.J. 2005); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1134, 1141 (C.D. Cal. 2005).

77. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 300 (1980) (Brennan, J., dissenting) ("Surely *International Shoe* contemplated that the significance of the contacts necessary to support jurisdiction would diminish if other consideration helped establish that jurisdiction would be fair and reasonable."); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985) ("The[] considerations [discussed in *World-Wide Volkswagen*] sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. On the other hand, where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.") (internal citations omitted).

78. See generally Case C-281/02, *Owusu v. Jackson*, 2005 E.C.R. I-01383.

79. See *Owusu v. Jackson* [2002] EWCA Civ 877, para. 29 ("So far as the issue of *forum conveniens* is concerned, we are satisfied that the judge's conclusion on this point was well within the wide ambit of his discretion."). The England and Wales Court of Appeals ("EWCA"), however, asked for review from the ECJ. *Id.* at para. 60 ("We respectfully request the Court of Justice to give consideration to the acceleration of its preliminary ruling in this case.").

80. See *Owusu*, 2005 E.C.R. I-01383, at para. 46.

81. Andrew Waters, 'Forum Shopping' in *Fraud Actions Following Owusu v. Jackson*, 2010 J. INT'L BANKING & FIN. L. 359 (2010).

82. *Id.*

83. C.J.S. Knight, *Owusu and Turner: The Shark in the Water?*, 66 CAMBRIDGE L.J. 288, 289 (2007) ("This article is concerned with the continuing uncertainty, and with its impact on the grant of anti-suit injunctions. . . . It will be argued here that the combination of *Owusu* and *Turner* could mean the removal of the possibility of anti-suit injunctions when jurisdiction is taken under the Regulation").

84. *Id.* at 288.

Although Owusu's progeny helped clarify the legal landscape of the *forum non conveniens* doctrine, "it is [still] deeply unclear how the law will progress."⁸⁵ Furthermore, Brexit has only exacerbated the lack of clarity and certainty.⁸⁶

A. *Owusu v. Jackson*

In *Owusu v. Jackson*, the ECJ concluded that the Brussels I Regulation bars courts in the United Kingdom—and every member state⁸⁷—from declining jurisdiction on the ground of convenience or appropriateness, so long as the court has jurisdiction under the Regulation.⁸⁸ This is true even if the proceedings lack any connection to another member state or if jurisdiction is inappropriate in all other member states.⁸⁹ The case involved the claimant, Mr. Owusu, a British national with domicile in the United Kingdom, claiming that Mr. Jackson, another British national with domicile in the United Kingdom, breached their contract.⁹⁰ Owusu alleged that their contract permitted him to use the private beach at a holiday villa in Jamaica and included an implied warranty that the beach would be "reasonably safe or free from hidden dangers."⁹¹ But while using the beach, Owusu dived into the water and fractured one of his vertebrae when he hit his head against a submerged sand bank.⁹² The accident rendered all four of Owusu's limbs paralyzed.⁹³ Owusu also brought a separate tort claim against Jamaican companies that were responsible for owning and operating the beach.⁹⁴

Owusu brought both of these claims in the England and Wales High Court, rather than in the courts of Jamaica.⁹⁵ Jackson and some of the other defendants asked the court to decline jurisdiction in favor of Jamaican courts because the case had closer links with Jamaica.⁹⁶ The court determined both that he lacked the power to refer the question to the ECJ and that the Brussels I Regulation bound him from dismissing or staying the case under prior precedent.⁹⁷ Jackson and some of the other defendants subsequently appealed to the EWCA.⁹⁸ The EWCA noted that the two competing jurisdictions were the United Kingdom, a member state, and

85. *Id.* at 300.

86. *See infra* Section III(C).

87. The ECJ and the Brussels I Regulation use the terms "Contracting State" and "Non-Contracting State." *See* Case C-281/02, *Owusu v. Jackson*, 2005 E.C.R. I-01383, at para. 35. This Note instead uses the terms "member state" and "non-member state."

88. *Id.* at para. 46.

89. *Id.*

90. *Id.* at para. 11.

91. *Id.*

92. *Id.* at para. 10.

93. *Id.*

94. *Id.* at para. 12.

95. *Id.* at para. 14.

96. *Id.* at 15.

97. *Id.* at paras. 16-17 (citing Case C-412/98, *IGIC v. Group Josi*, 2000 E.C.R. I-5925, at paras. 59-61).

98. *Owusu v. Jackson*, 2005 E.C.R. I-01383, at paras. 17-19.

Jamaica, a non-member state, and that the Brussels I Regulation is silent on this issue.⁹⁹ The court then stayed the proceedings and referred the two questions to the ECJ.¹⁰⁰ The ECJ accepted the case to answer the referred questions and recognized the implications the case would have on the *forum non conveniens* and *lis pendens* doctrines.¹⁰¹

The ECJ first determined that Article 2 of the Brussels I Regulation and the jurisdiction rules therein apply and control in Owusu's case.¹⁰² The jurisdictional rules of the Regulation require an international element, but the rules do not require the involvement of multiple member states.¹⁰³ The involvement of a member state and a non-member state, the ECJ held, is sufficient to satisfy the international element—thus triggering the application of the Brussels I Regulation.¹⁰⁴ Indeed, the purpose of the Regulation is to enable the effective operation of the single market¹⁰⁵ by providing legal certainty, uniformity, and predictability, as well as removing barriers to recognizing and enforcing judgments throughout the member states' territory.¹⁰⁶ The Regulation, however, according to the ECJ, can accomplish this if it applies to cases involving an international element—including those lacking connections to multiple member states.¹⁰⁷ Applying the *forum non conveniens* doctrine would undermine and frustrate the policies and purposes which the Regulation seeks to establish.¹⁰⁸

Furthermore, the Brussels I Regulation is “mandatory in nature” and “there can be no derogation from the principle[s]” the Regulation sets forth unless it explicitly states an exception.¹⁰⁹ And the Regulation, the ECJ

99. *Id.* at para. 19.

100. *Id.* at para. 22. The two referred questions queried:

(1) Is it inconsistent with the Brussels Conventions, where a claimant contends that jurisdiction is founded on Article 2, for a court of a [member] State to exercise a discretionary power, available under its national law, to decline to hear proceedings brought against a person domiciled in that State in favour of the courts of a non-[Member] State: (a) if the jurisdiction of no other [member] State under the 1968 Convention is in issue; (b) if the proceedings have no connecting factors to any other [member] State?

(2) If the answer to question 1(a) or 1(b) is yes, is it inconsistent in all circumstances or only in some and if so which?

101. *Id.* at paras. 1-2, 8-9, 19-23.

102. *Id.* at para. 35.

103. *Id.* at paras. 24-26.

104. *Id.* at para. 26. *Cf.* Case C-190/89, *Marc Rich & Co. v. Societa Italiana Impianti*, [1991] E.C.R. I-3855 (interpreting jurisdictional rule for cases involving a claimant not domiciled in a member state and a defendant domiciled in a member state); Case C-406/92, *The Owners of the Cargo Lately Laden on Board the Ship 'Tatry' v. The Owners of the Ship 'Maciej Rataj'*, 1994 E.C.R. I-5439 (same); Case C-412/98, *IGIC v. Group Josi*, 2000 E.C.R. I-5925 (same).

105. The ECJ and the Brussels I Regulation use the term “common market.” See *Owusu v. Jackson*, 2005 E.C.R. I-01383, at para. 33. This Note uses the term “single market.”

106. *Id.* at paras. 33-34, 38-40 (citing Case C-398/92, *Mund & Fester v. Hatrex Int'l Transport*, 1994 E.C.R. I-467) (emphasizing the single market's interest in removing barriers to recognizing and enforcing judgments throughout the member states' territory).

107. *Id.* at para. 34.

108. *Id.* at paras. 41-43.

109. *Id.* at para. 37.

notes, does not provide an exception for the *forum non conveniens* doctrine.¹¹⁰ The court therefore concluded that the Brussels I Regulation “precludes a court of a [member] State from applying the *forum non conveniens* doctrine and declining to exercise jurisdiction conferred on it by [the Regulation].”¹¹¹ Finally, the ECJ then declined to answer the second referred question.¹¹²

B. Owusu’s Progeny

Following the ECJ’s decision in *Owusu*, the English courts sought to limit its influence by distinguishing its facts from those of subsequent cases.¹¹³ In *Konkola Copper Mines v. Coromin*,¹¹⁴ the “first significant decision to consider the application of *Owusu*,”¹¹⁵ the England and Wales High Court (“EWHC”) reaffirmed its authority and discretion to stay proceedings in favor of the Zambian courts—that is, a non-Member State’s courts.¹¹⁶ Additionally, some of the defendants were domiciliaries of the United Kingdom.¹¹⁷ The facts of *Konkola* were quite similar to those of *Owusu*.¹¹⁸ The court’s discretionary analysis is “not dissimilar to a *forum non conveniens* analysis.”¹¹⁹ Although the contract between the parties included an exclusive jurisdiction clause and the Brussels I Regulation had a mandatory jurisdiction requirement, the court concluded that it may exercise discretion “where the party autonomy principle must yield to the wider interests of justice.”¹²⁰

The *Konkola* Court also noted that “*Owusu* has not disturbed the [discretionary analysis] of foreign jurisdiction clauses.”¹²¹ Therefore, despite explicitly stating that *Owusu* foreclosed the application of *forum non conveniens* in cases arising under the Brussels I Regulation,¹²² the court began the effort to restrict *Owusu*’s influence and applicability in the United Kingdom.¹²³ Many British legal commentators quickly defended the court’s

110. *Id.*

111. *Id.* at para. 36. See also *id.* at para. 46 (“[T]he Brussels Convention precludes a court of a [member] State from declining the jurisdiction conferred on it by [the Convention] on the ground that a court of a non-[member] State would be a more appropriate forum for the trial of the action even if the jurisdiction of no other [member] State is in issue or the proceedings have no connecting factors to any other [member] State.”).

112. *Id.* at paras. 47–52.

113. Waters, *supra* note 81. See generally R.G. Fentiman, *Civil Jurisdiction and Third States: Owusu and After*, 43 COMMON MARKET L.R. 705 (2006) (describing the post-*Owusu* legal landscape); Barry J. Rodger, *Forum Non Conveniens Post-Owusu*, 2 J. PRIV. INT’L L. 71 (2006) (same).

114. *Konkola Copper Mines v. Coromin* [2005] EWHC 898 (Comm.).

115. Waters, *supra* note 81.

116. *Konkola*, [2005] EWHC at paras. 85, 102.

117. *Id.* at para. 7.

118. See *id.* at para. 86.

119. *Id.* at para 85. The court considered both public interest factors and private interest factors in its discretionary analysis. See *id.* at paras. 106–11.

120. *Id.* at para. 107.

121. *Id.* at para. 101 (citing *The El Amria* [1981] 2 Lloyd’s Rep 119).

122. See *Konkola*, [2005] EWHC at para. 50.

123. See Waters, *supra* note 81.

decision to retain discretion and apply national law—rather than the Brussels I Regulation—to cases involving non-Member State courts.¹²⁴ After the EWHC's decision, courts and legal scholars preferring the discretionary analysis of the *forum non conveniens* doctrine have favored the *Konkola* approach.¹²⁵ The EWHC and EWCA followed the *Konkola* approach in subsequent cases and continued to limit *Owusu's* influence and applicability.¹²⁶

C. Domestic *Forum Non Conveniens* in the United Kingdom

The development of the *forum non conveniens* doctrine in the United Kingdom paralleled the development in the United States.¹²⁷ The modern articulation of the *forum non conveniens* doctrine in the United Kingdom was set forth in *Spiliada Maritime Corp. v. Cansulex, Ltd.*¹²⁸ The court fashioned a discretionary practice of staying proceedings in favor of a “more appropriate forum,” thus formally establishing the *forum non conveniens* doctrine.¹²⁹ The case involved Liberian plaintiffs, who owned a ship named “*Spiliada*,” filing suit against Canadian defendants in the British courts.¹³⁰ The plaintiffs claimed that the defendants caused corrosion to their ship.¹³¹ The district court determined that Britain was the appropriate forum for the plaintiffs' actions, which the House of Lords affirmed.¹³²

Much like the U.S. Supreme Court, the House of Lords established specific private and public interest factors that courts would have to balance when conducting the *forum non conveniens* analysis.¹³³ And, as in the

124. See, e.g., E. Peel, *Forum Non Conveniens and European Ideals*, 2005 LLOYD'S MAR. & COMMERCIAL L. QUARTERLY 363 (2005) (commending the *Konkola* Court's decision to retain discretion and apply national law in cases involving non-Member states); A. Briggs, *Forum Non Conveniens and Ideal Europeans*, 2005 LLOYD'S MARITIME & COMMERCIAL L. Q. 378 (2005) (same).

125. Anthony Clarke MR, *The Differing Approach to Commercial Litigation in the European Court of Justice and the Courts of England and Wales*, 18 EUR. BUS. L.R. 101 (2007); Knight, *supra* note 83.

126. See, e.g., *Pacific Int'l Sports Clubs Ltd. v. Soccer Marketing Int'l Ltd.* [2009] EWHC 1839 (Ch) (applying *forum non conveniens* principles to the claims against non-EU defendants and recognizing the Brussels Regulation compelled the court to accept jurisdiction over the claims against EU defendants); *Choudhary v. Bhattar* [2009] EWCA (Civ) 1176 (declining jurisdiction on the grounds of *forum non conveniens* where no defendant to the proceedings was domiciled in a Member State but the claims involved the affairs of a company registered in England).

127. See Alexander Reus, *Judicial Discretion: A Comparative View of the Doctrine of Forum Non Conveniens in the United States, the United Kingdom, and Germany*, 16 LOY. L.A. INT'L & COMP. L.J., 455, 477-79 (1994).

128. *Spiliada Maritime Corp. v. Cansulex, Ltd.* [1987] AC 460 (HL).

129. *Id.* at 476.

130. *Id.* at 460-61.

131. *Id.*

132. *Spiliada*, [1987] AC at 486-87.

133. *Id.* The specific factors that the court set forth include: (1) the location and convenience of parties and witnesses, (2) avoidance of a multiplicity of proceedings, (3) the existence of another similar action, (4) the place where the cause of action arose, (5) the location of documentary evidence, (6) the interference with the business of the defendant, (7) possible savings of cost and time, and (8) the applicable national law. See

United States, the burden of proof rests upon the defendant to demonstrate to the court that another available forum exists and that forum is more appropriate for the action.¹³⁴ If the defendant satisfies that burden of proof, the burden shifts to the plaintiff to show that the case involves special circumstances for which justice compels the action to be adjudicated in the United Kingdom.¹³⁵ The *Spiliada* decision satisfied the “need for a countervailing discretion to decline excessive jurisdiction,”¹³⁶ especially since the United Kingdom does not have venue transfers.¹³⁷ The *forum non conveniens* doctrine, as articulated in *Spiliada*, has been adopted in several other jurisdictions.¹³⁸

After the United Kingdom joined the Brussels Convention,¹³⁹ there was still uncertainty concerning whether the Brussels I Regulation precluded employing the *forum non conveniens* doctrine in cases that did not implicate any interest of the European Community.¹⁴⁰ Many British lawyers contended that the Brussels I Regulation only applied to cases in which the European Community had an interest in the exercise of jurisdiction.¹⁴¹ The Court of Appeal of England and Wales agreed with the British lawyers in *In re Harrods (Buenos Aires) Ltd.*¹⁴² The Court of Appeal concluded that the Brussels Convention did not preclude employing the *forum non conveniens* doctrine in cases that did not concern any other Member State.¹⁴³ The court reasoned that the Convention was merely an agreement between Member States and that Article 2 of the Convention did not mandate retaining jurisdiction where the apparent conflict was between the British courts and the courts of a non-Member State.¹⁴⁴ The British

E. Edinger, *Recent Developments in the English Law of Conflicts: The Spiliada and Aerospa-tiale*, 23 UNIV. BRIT. COLUM. L.R. 373, 382 (1989).

134. *Spiliada*, [1987] AC at 486–87.

135. *Id.*

136. Reus, *supra* note 127, at 481.

137. The United Kingdom does not have an analogue to 28 U.S.C. § 1404(a). Reus, *supra* note 127, at 481.

138. See, e.g., *Amchem Prods. Inc. v. B.C. (Workers Comp. Bd.)*, [1993] 1 S.C.R. 897 (Can.) (adopting *Spiliada* in Canada); *Club Mediterranee N.Z. v. Wendell* [1987] NZCA 120 (N.Z.) (adopting *Spiliada* in New Zealand); *SPH v. SA, FACV 22/2013* (adopting *Spiliada* in Hong Kong); *CIMB Bank Bhd v. Dresdner Kleinwort Ltd* [2008] SGCA 36, [2008] 4 SLR 543 (C.A.) (adopting *Spiliada* in Singapore). But the Australian courts have rejected *Spilada*. See *Oceanic Sun Line Special Shipping Company, Inc. v Fay* [1988] HCA 32.

139. The Brussels Convention was signed by six countries in 1968. See generally 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1972 O.J. (L 299). The Convention was superseded by the Brussels I Regulation in 2001. See generally Brussels I Regulation, *supra* note 21.

140. See Ovchinnikov, *supra* note 15, at 44.

141. See, e.g., PETER KAYE, CIVIL JURISDICTION AND ENFORCEMENT OF FOREIGN JUDGMENTS 1244–45 (1987); see generally Richard Fentiman, *Jurisdiction, Discretion and the Brussels Convention*, 26 CORNELL INT’L L.J. 59 (1993).

142. *In re Harrods (Buenos Aires) Ltd.*, [1992] Ch 72 at 96–98 (Eng.)

143. *Id.* at 72, 96.

144. *Id.* at 96–98.

courts subsequently followed the *Harrods* precedent.¹⁴⁵ When the case involved a Member State, however, the British courts followed the mandate of the Brussels Convention and the Brussels I Regulation: the affirmative duty to exercise and retain jurisdiction.¹⁴⁶ After much criticism of the *Harrods* case,¹⁴⁷ British courts began to acknowledge that the issue of applying the *forum non conveniens* doctrine needed clarification by the ECJ.¹⁴⁸ The ECJ ultimately accepted reference from the British courts and rejected the approach of *Harrods* in the *Owusu* case.¹⁴⁹

III. Brexit

A. The Referendum

For decades, many Britons have opposed the United Kingdom's membership in the European Communities and the European Union.¹⁵⁰ In 2012, Conservative Prime Minister David Cameron faced immense pressure from many of his MPs and the Conservative Party's base voters to take a stronger stance on the United Kingdom's membership in the EU.¹⁵¹ In response, David Cameron backtracked on his defense of the United Kingdom's membership in the EU and expressed some openness to holding an in-out referendum on the issue.¹⁵² Further succumbing to pressure from

145. See, e.g., *Anton Durbeck GmbH v. Den Norske Bank ASA* [2003] EWCA 147 at 48; *Ace Ins. S.A.-N.V. v. Zurich Ins. Co.* [2001] EWCA (Civ) 173 at 39, 42, [2001] 1 Lloyd's Rep. 618; *Sarrjo S.A. v. Kuwait Inv. Auth.* [1997] 1 Lloyd's Rep. 113 at 122-24; *Hamed el Chiaty & Co. v. The Thomas Cook Group Ltd. (The Nile Rhapsody)* [1994] 1 Lloyd's Rep. 382 at 391-92; *The Po* [1991] 2 Lloyd's Rep. 206 at 213.

146. See, e.g., *Mahme Trust Reg. v. Lloyd's TSB Bank* [2004] 2 Lloyd's Rep 637 at para. 25.

147. See, e.g., PETER NORTH & JAMES FAWCETT, *CHESHIRE, NORTH AND FAWCETT: PRIVATE INTERNATIONAL LAW* 264 (13th ed. 1999); PETER STONE, *EU PRIVATE INTERNATIONAL LAW* 57 (2d ed. 2010).

148. See, e.g., *Lubbe v. Cape Plc.* [2000] 4 All ER 268, 282; see also *Inter Metal Group Ltd. v. Worlslade Trading Ltd.* [1998] 2 IR 1 (Ir.), at 40 (same for Irish courts).

149. See *supra* Section II.A.

150. In 1993, the United Kingdom Independence Party ("UKIP") formed to advocate for the United Kingdom's withdrawal from the European Union. Over the course of the next twenty years, the UKIP grew its support. This rise in support coincided with a marked skyrocket in "euroscepticism," according to a poll. See John Curtice, *How Deeply Does Britain's Euroscepticism Run?*, BRITISH SOC. ATTITUDES (2016), <http://www.bsa.natcen.ac.uk/media/39024/euroscepticism.pdf> [<https://perma.cc/FLM9-W23M>] (reporting that Euroscepticism increased from 38% in 1993 to 65% in 2015). In the 2014 European Parliament elections, the UKIP won the greatest number of votes. This marked the first time since 1910 in which neither the Conservative Party nor the Labour Party won the greatest number of votes. See Rowena Mason, *10 Key Lessons from the European Election Results*, GUARDIAN (May 26, 2014, 3:29 AM), <https://www.theguardian.com/politics/2014/may/26/10-key-lessons-european-election-results> [<https://perma.cc/K6W5-PXHY>].

151. See Nicholas Watt, *Cameron Defies Tory Right Over EU Referendum*, GUARDIAN (June 29, 2012, 1:25 PM), <https://www.theguardian.com/politics/2012/jun/29/cameron-no-eu-referendum> [<https://perma.cc/N3MP-VRXN>] ("David Cameron placed himself on a collision course with the Tory right when he mounted a passionate defence of Britain's membership of the EU and rejected out of hand an 'in or out' referendum.").

152. David Cameron, *We Need to be Clear About the Best Way of Getting What is Best for Britain*, TELEGRAPH (Jun. 30, 2012, 3:30 PM), <https://www.telegraph.co.uk/news/polit->

Conservative eurosceptics, Cameron soon after declared that the Conservative government would hold an in-out referendum on EU membership before the end of 2017.¹⁵³

After the Conservative Party won an outright majority in the 2015 General Election,¹⁵⁴ it introduced the European Union Referendum Act of 2015 into Parliament.¹⁵⁵ This Act enabled the government to hold an in-out referendum concerning the United Kingdom's membership in the EU.¹⁵⁶ On June 23, 2016, the British people voted in the referendum established by the EU Referendum Act of 2015.¹⁵⁷ By a margin of 51.9% to 48.1%, the British people voted to "Leave" the EU.¹⁵⁸

B. Initiating Withdrawal from the EU

After the British people rejected Prime Minister David Cameron's plea to "Remain" by voting for Brexit, he announced his resignation.¹⁵⁹ Within a few weeks of Cameron's resignation, Conservative MP Theresa May became the new Prime Minister.¹⁶⁰ She quickly moved to trigger the Treaty of Lisbon's¹⁶¹ Article 50¹⁶² withdrawal mechanism.¹⁶³ But the

ics/david-cameron/9367479/David-Cameron-We-need-to-be-clear-about-the-best-way-of-getting-what-is-best-for-Britain.html [https://perma.cc/8UZZ-74LQ]. But many in his party were not impressed by Prime Minister David Cameron's statement. See Andrew Sparrow, *PM Accused of Weak Stance on Europe Referendum*, *GUARDIAN* (July 1, 2012, 9:56 AM), <https://www.theguardian.com/politics/2012/jul/01/david-cameron-europe-referendum-noncommittal> [https://perma.cc/DC59-GTW6] ("Conservative Eurosceptics on Sunday renewed calls for moves towards a referendum on Britain's membership of the [EU] after David Cameron's declaration that he was willing to consider one was criticized as too distant and non-committal.").

153. Nicholas Watt, *EU Referendum: In-Out Choice by End of 2017, Cameron Promises*, *GUARDIAN* (Jan. 23, 2013, 2:45 AM), <https://www.theguardian.com/politics/2013/jan/22/eu-referendum-2017-david-cameron> [https://perma.cc/DXG9-KV8R] ("David Cameron will . . . set a deadline to hold an in-out referendum on Britain's membership of the European Union by the end of 2017 as he hardens his position on the issue that has bedevilled Tory leaders for a quarter of a century.").

154. Laura Smith-Spark & Paul Armstrong, *UK Election Shock: David Cameron Defies Polls with Clear Victory*, *CNN* (May 8, 2015, 11:30 AM), <https://www.cnn.com/2015/05/08/europe/uk-general-election/index.html> [https://perma.cc/TQ36-ZJTZ].

155. European Union Referendum Act 2015, c. 36 (UK), <http://www.legislation.gov.uk/ukpga/2015/36/enacted/data.pdf> [https://perma.cc/4PEP-5QHH].

156. *Id.* § 1(1).

157. George, *supra* note 2, at 132.

158. *Id.*

159. Sheena McKenzie & Elliott McLaughlin, *Theresa May Becomes New British Prime Minister*, *CNN* (July 14, 2016, 4:23 AM), <https://www.cnn.com/2016/07/13/europe/theresa-may-david-cameron-british-prime-minister/index.html> [https://perma.cc/9GZF-RZ9T].

160. *Id.*

161. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, O.J. (C-306/1) [hereinafter *Lisbon Treaty*], <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:FULL:EN:PDF> [https://perma.cc/3CQW-52S9].

162. Article 50 of the Lisbon Treaty (in part) provides:

(1) Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements. (2) A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the

highest court in England held in January 2017 that Parliament must vote to approve triggering Article 50's withdrawal mechanism.¹⁶⁴ Within months, Parliament passed a bill to approve triggering Article 50's withdrawal mechanism.¹⁶⁵ Pursuant to Section 3 of Article 50,¹⁶⁶ the United Kingdom was supposed to be formally separated from the EU beginning in April 2019.¹⁶⁷ In November 2018, Theresa May and her government officially struck a deal and approved the text of a draft Brexit agreement with European negotiators.¹⁶⁸ Within days, May also secured approval of the draft Brexit agreement from her cabinet.¹⁶⁹

Although Theresa May and her government had struck a deal with the EU in Brussels, May also had to quell frustration and turmoil concerning the deal back home. The surprise resignation of the Transportation Minister, Jo Johnson, in November 2018 has added further uncertainty to the withdrawal process and has exposed a divide within Theresa May's Con-

guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

163. George, *supra* note 2, at 132-33.

164. R v. Sec'y of State for Exiting the European Union, [2017] UKSC 5 at paras. 121-25. See also Owen Bowcott, Rowena Mason & Anushka Asthana, *Supreme Court Rules Parliament Must Have Vote to Trigger Article 50*, *GUARDIAN* (Jan. 24, 2017, 5:45 AM), <https://www.theguardian.com/politics/2017/jan/24/supreme-court-brexit-ruling-parliament-vote-article-50> [<https://perma.cc/FFB9-75KR>] ("In a judgment that sets a . . . precedent and upholds parliamentary sovereignty, the court ruled . . . that MPs and peers must give their consent before the government can trigger article 50 . . .").

165. European Union (Withdrawal) Act of 2018, <http://www.legislation.gov.uk/ukpga/2018/16/contents/enacted/data.htm>. See also European Union (Withdrawal) Bill 2017-19 (UK), <https://services.parliament.uk/bills/2017-19/europeanunion-withdrawal/documents.html> [<https://perma.cc/CDF5-7VEE>]; Anushka Asthana, Rowena Mason & Lisa O'Carroll, *Parliament Passes Brexit Bill and Open Way to Triggering Article 50*, *GUARDIAN* (Mar. 13, 2017, 6:12 PM), <https://www.theguardian.com/politics/2017/mar/13/brexit-vote-article-50-eu-citizens-rights-lords-mps> [<https://perma.cc/LH2C-BHZU>] ("Theresa May's Brexit bill has cleared all its hurdles in the Houses of Parliament [T]he government has achieved its ambition of passing a "straightforward" two-line bill that is confined simply to the question of whether ministers can trigger article 50 and start the formal Brexit process.").

166. Section 3 of Article 50 of the Lisbon Treaty provides:

The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification . . . , unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

167. George, *supra* note 2, at 133.

168. Guy Faulconbridge & Elizabeth Piper, *Britain Agrees Brexit Divorce Deal with EU, May's Opponents Vow to Thwart it*, *REUTERS* (Nov. 13, 2018, 3:34 AM), <https://www.reuters.com/article/uk-britain-eu/britain-agrees-brexit-divorce-deal-with-eu-mays-opponents-vow-to-thwart-it-idUSKCN1NI0UN> [<https://perma.cc/BV2V-A697>].

169. Max Colchester, *U.K.'s May Gets Cabinet's Go-Ahead on Brexit Deal*, *WALL ST. J.* (Nov. 14, 2018), <https://www.wsj.com/articles/theresa-mays-brexit-deal-faces-first-crucial-hurdle-her-closest-allies-1542195881> [<https://perma.cc/AHW8-PQEF>].

servative Party.¹⁷⁰ Jo Johnson's resignation from the cabinet came just a few months after the resignations of his brother Boris Johnson as Foreign Minister and David Davis as Brexit Secretary.¹⁷¹ Moreover, the Northern Ireland Democratic Unionist Party ("DUP")—the political party which Theresa May and the Conservative Party had allied with to form a majority in the House of Commons—has expressed its staunch discontent and reservations with the Brexit withdrawal agreement.¹⁷² Indeed, the DUP had even refused to back the withdrawal deal in its current form.¹⁷³

Within weeks of striking the deal, May went to Parliament to begin selling her government's Brexit deal to members of Parliament.¹⁷⁴ But in early December, May and her government "suffer[ed] a series of defeats" when Parliament voted to both hold her government in contempt and retain the power to decide on a "plan B" if the Brexit deal is defeated.¹⁷⁵ In an attempt to give herself more time to garner support for her Brexit deal and avoid further defeat, Theresa May announced she would delay significant parliamentary votes on the deal.¹⁷⁶ In January 2019, May held a vote on the Brexit deal.¹⁷⁷ In the largest defeat for a sitting government in modern history, Parliament voted overwhelmingly to reject May's Brexit deal.¹⁷⁸ This included more than 100 members of May's governing coal-

170. See Stephen Castle, *Britain's Brexit Endgame is Close. Here's How it May Play Out*, N.Y. TIMES (Nov. 9, 2018), <https://www.nytimes.com/2018/11/09/world/europe/britain-brexit-endgame.html> [<https://perma.cc/L9D8-B3A7>].

171. See Billy Perrigo, *Boris Johnson's Resignation Over Brexit Could Lead to Major Shakeups in British Politics. Here's What to Know*, TIME (July 9, 2018), <http://time.com/5333305/boris-johnson-david-davis-resign-brexit/> [<https://perma.cc/5PXY-24PW>].

172. See Hatty Collier, *Turmoil for Theresa May as Brexiteers and DUP Warn They Will Vote Down her EU Withdrawal Plans*, EVENING STANDARD (Nov. 11, 2018, 10:28 AM), <https://www.standard.co.uk/news/politics/brexit-news-latest-turmoil-for-theresa-may-as-brexiteers-and-dup-threaten-to-vote-down-her-eu-a3986811.html> [<https://perma.cc/D94C-YLWR>]; Jessica Elgot & Heather Stewart, *Brexit: Ministers Trying to Win Over DUP in Talks on Legal Guarantees*, GUARDIAN (Mar. 15, 2019, 4:24 PM), <https://www.theguardian.com/politics/2019/mar/15/ministers-dup-democratic-unionist-party-talks-brexit-deal-support> [<https://perma.cc/SB7V-B6AA>].

173. See Jayne McCormack, *Brexit: DUP Confirms it Will Not Back Withdrawal Deal*, BBC NEWS (Mar. 28, 2019), <https://www.bbc.com/news/uk-northern-ireland-47718367> [<https://perma.cc/2JVW-KXGZ>].

174. Rachel Elbaum, *Brexit Vote Looms in Parliament, But May's Plan Appears Doomed. Then What?*, NBC NEWS (Dec. 5, 2018, 2:08 AM), <https://www.nbcnews.com/storyline/brexit-referendum/brexit-vote-looms-parliament-may-s-plan-appears-doomed-n942896> [<https://perma.cc/732Q-6XWQ>].

175. Jen Kirby, *UK Parliament Just Dealt a Blow to Theresa May. What's Next for Brexit?*, VOX (Dec. 5, 2018, 8:15 PM), <https://www.vox.com/world/2018/12/5/18127220/brexit-theresa-may-uk-parliament> [<https://perma.cc/5J9C-8YKC>].

176. See Alexander Smith, *Britain's Theresa May Delays Parliamentary Vote on Brexit*, NBC NEWS (Dec. 10, 2018, 12:48 PM), <https://www.nbcnews.com/storyline/brexit-referendum/britain-s-theresa-may-delays-parliamentary-vote-brexit-n945951> [<https://perma.cc/9BUX-A3EA>].

177. See Rachel Elbaum, *Theresa May's Brexit Plan Appears Doomed as Key Parliamentary Vote Looms*, NBC NEWS (Jan. 15, 2019, 11:50 AM), <https://www.nbcnews.com/storyline/brexit-referendum/theresa-may-s-brexit-plan-appears-doomed-key-parliamentary-vote-n958701> [<https://perma.cc/Z7UD-WBGD>].

178. Heather Stewart, *May Suffers Heaviest Parliamentary Defeat of a British PM in the Democratic Era*, GUARDIAN (Jan. 15, 2019, 8:58 PM), <https://www.theguardian.com/>

tion rejected her deal.¹⁷⁹ The following day, after Leader of the Opposition and Labour Party leader, Jeremy Corbyn, tabled a motion of no confidence in Theresa May, Parliament narrowly voted to retain May as Prime Minister.¹⁸⁰ Even though she survived, Theresa May and the Conservative Party-led governing coalition continued to be in a “weak position.”¹⁸¹

In March 2019, May decided to hold a series of “indicative votes” in which Parliament voted on several different Brexit proposals, including her Brexit deal.¹⁸² These arrangements included: withdrawal from the EU without a deal, withdrawal from the EU with a “customs union,” revocation of the withdrawal agreement, a second Brexit referendum, among other proposals.¹⁸³ Ultimately, Parliament rejected each of the eight Brexit proposals; the series of “indicative votes” failed to find any consensus over how the United Kingdom would withdraw from the EU.¹⁸⁴ The proposal garnering the most votes, however, was the proposal to withdraw from the EU but implement a “customs union.”¹⁸⁵ Although Theresa May promised to resign if Parliament approved her Brexit deal, the members of Parliament again rejected her deal.¹⁸⁶

After the series of “indicative votes” failed to reach any consensus, EU granted Theresa May and her government a short extension for withdrawal until April 12.¹⁸⁷ Soon thereafter, Theresa May asked for another extension beyond the initial April 12 extension after no progress had been made

politics/2019/jan/15/theresa-may-loses-brexite-deal-vote-by-majority-of-230 [https://perma.cc/YRU2-LFPA].

179. Susan Rose-Ackerman, *Executive Rulemaking and Democratic Legitimacy: ‘Reform’ in the United States and the United Kingdom’s Route to Brexit*, 94 CHI.-KENT L. REV. 267, 274 (2019).

180. Ashley Cowburn, *Theresa May No-Confidence Vote Result: PM Survives Jeremy Corbyn Bid to Topple Conservative Government*, INDEPENDENT (Jan. 16, 2019, 8:16 PM), <https://www.independent.co.uk/news/uk/politics/theresa-may-no-confidence-vote-result-jeremy-corbyn-election-brexite-deal-conservative-labour-a8731331.html> [https://perma.cc/A9MD-XMZZ].

181. Rose-Ackerman, *supra* note 179, at 277.

182. Roger Aitken, *Brexit: Will British Parliament’s ‘Indicative Votes’ Process Yield Workable Path?*, FORBES (Mar. 27, 2019, 5:45 PM), <https://www.forbes.com/sites/rogeraitken/2019/03/27/brexit-british-parliaments-indicative-votes-process-may-yield-workable-path/#c7d14b94fc05> [https://perma.cc/EXT4-PL4Q].

183. See Lauren Said-Moorhouse & Bianca Britton, *British MPs Fail to Agree Alternative Brexit Plan*, CNN (Mar. 28, 2019, 7:50 AM), https://www.cnn.com/uk/live-news/brexit-parliament-latest-gbr-intl/h_212bc158a71b709be3a074dcf529f221 [https://perma.cc/QS8K-L7XR].

184. Laura Kuenssberg, *Brexit: No Majority for Any Options After MPs’ Votes*, BBC NEWS (Mar. 28, 2019), <https://www.bbc.com/news/uk-politics-47728333> [https://perma.cc/KQZ3-L2HF].

185. Maryam Ahmed, Daniel Dunford & John Walton, *How Did My MP Vote on Brexit Indicative Votes?*, BBC NEWS (Mar. 27, 2019), <https://www.bbc.com/news/uk-politics-47726787> [https://perma.cc/AKS6-PEA9].

186. Kate Lyons, *‘I’m Off’: How the Papers Covered May’s Resignation Offer and the Indicative Votes*, GUARDIAN (Mar. 28, 2019, 12:26 AM), <https://www.theguardian.com/politics/2019/mar/28/im-off-how-the-papers-covered-mays-resignation-offer-and-the-indicative-votes> [https://perma.cc/K98X-SMVR].

187. Titus Wu, *Juncker Draws Hard Line on April 12 Deadline for Brexit*, POLITICO (Apr. 4, 2019, 1:07 PM), <https://www.politico.eu/article/juncker-draws-hard-line-on-april-12-deadline-for-uk/> [https://perma.cc/2GMV-MZYJ].

on her Brexit deal in Parliament.¹⁸⁸ Although the EU's remaining 27 members initially wanted to delay the Article 50 withdrawal until December 31, 2019 or March 31, 2020,¹⁸⁹ the UK and EU eventually settled on an extension until October 31, 2019.¹⁹⁰

In early May 2019, Theresa May's Conservative Party suffered massive losses of council seats in the United Kingdom's local elections.¹⁹¹ In response to the Conservative Party's dismal showing in the local elections and her inability to pass her Brexit deal, Theresa May resigned as Prime Minister on May 24, 2019.¹⁹² Two days after May's resignation, the Conservative Party did even more poorly in the European Parliament elections in the United Kingdom than it had in the local elections.¹⁹³ Meanwhile, the Brexit Party, led by Nigel Farage, won the European Parliament elections by a wide margin.¹⁹⁴ But EU President Jean-Claude Juncker—responding to the Brexit Party's successes in the European Parliament elections and Conservative leadership candidates campaigning on reopening talks with the EU—reaffirmed that “[t]here will be no renegotiation [of the Brexit deal].”¹⁹⁵ Juncker made a similar statement in December 2018, after Theresa May lost several key votes on her Brexit deal.¹⁹⁶

Two months after Theresa May's resignation, the Conservative Party

188. See Jen Kirby, *The New Brexit Deadline is October 31*, VOX (Apr. 11, 2019, 8:22 AM), <https://www.vox.com/2019/4/11/18305082/brexit-news-deadline-october-31-eu-theresa-may> [<https://perma.cc/U265-K269>].

189. Alberto Nardelli, *The EU Wants the UK to Approve the Brexit Deal This Week or Face a Long Delay to Brexit*, BUZZFEED NEWS (Apr. 8, 2019, 1:56 PM), <https://www.buzzfeed.com/albertonardelli/european-council-brexit-delay-memo> [<https://perma.cc/7S4M-DKXX>].

190. Kate Lyons, Andrew Sparrow & Peter Walker, *EU Leaders Agree to Delay Brexit Until 31 October—As It Happened*, GUARDIAN (Apr. 10, 2019, 10:29 PM), <https://www.theguardian.com/politics/live/2019/apr/10/brexit-eu-to-decide-on-uk-extension-live-news> [<https://perma.cc/LT6P-MGBX>].

191. John Rentoul, *The Conservatives Lost Hundreds of Council Seats - But Their Collapse is Only Just Beginning*, INDEPENDENT (May 3, 2019, 3:00 PM), <https://www.independent.co.uk/voices/local-elections-loss-seats-tory-labour-lib-dem-brexit-second-referendum-a8898336.html> [<https://perma.cc/H65Z-KJXJ>].

192. Sam Meredith & David Reid, *Theresa May Resigns as UK Prime Minister Amid Brexit Crisis*, CNBC (May 24, 2019, 5:06 AM), <https://www.cnn.com/2019/05/24/theresa-may-step-down-as-uk-prime-minister.html> [<https://perma.cc/U73Q-Z3DS>].

193. Jill Lawless, *Brexit Party Wins, Conservatives Bashed in UK's EU Voting*, ASSOCIATED PRESS (May 26, 2019), <https://www.apnews.com/d553bd96d08f41349b6e2eab42406fbd> [<https://perma.cc/43YR-Y2ZY>].

194. Stephen Castle, *Nigel Farage's Populist Brexit Party Wins Big in European Parliament Elections*, N.Y. TIMES (May 26, 2019), <https://www.nytimes.com/2019/05/26/world/europe/farage-brexit-party-uk-elections.html> [<https://perma.cc/8ATK-M2RQ>].

195. Rebecca Speare-Cole, *EU President Warns Tory Leadership Candidates There Will Be No Brexit Renegotiation as May Arrives in Brussels After Euro Elections Disaster for Tories*, EVENING STANDARD (May 28, 2019), <https://www.standard.co.uk/news/politics/eu-president-warns-tory-leadership-candidates-there-will-be-no-brexit-renegotiation-a4153221.html> [<https://perma.cc/ZCD9-QNGR>].

196. See David Herszenhorn, *Jean-Claude Juncker: EU Won't Renegotiate Brexit Deal*, POLITICO (Apr. 19, 2019, 1:25 AM), <https://www.politico.eu/article/jean-claude-juncker-eu-wont-renegotiate-brexit-deal/> [<https://perma.cc/MRM4-ZJDS>].

selected Boris Johnson to be its new leader and the new Prime Minister.¹⁹⁷ In his victory speech, newly-elected Prime Minister Johnson declared, “We are going to get Brexit done on October 31, and we are going to take advantage of all the opportunities it will bring in a new spirit of ‘can do.’”¹⁹⁸ In early September 2019, as Boris Johnson scheduled key Brexit votes in Parliament, he lost a governing majority in the House of Commons.¹⁹⁹ This included a member defecting in the middle of the Prime Minister addressing the House and the Prime Minister later expelling members of his own party for supporting a procedural motion to block a no-deal Brexit.²⁰⁰ After Boris Johnson failed twice to trigger a general election, he resorted to prorogation—that is, suspending Parliament.²⁰¹ On September 24, 2019, the UK Supreme Court unanimously ruled that Boris Johnson’s prorogation was unlawful.²⁰²

As members returned to Parliament after the Supreme Court’s ruling effectively ended the prorogation, Johnson stated that he remained committed to delivering Brexit on October 31.²⁰³ On October 28, 2019, after it became evident that no deal could be reached by the October 31 deadline, Johnson accepted the EU’s offer to further extend Brexit until January 31, 2020.²⁰⁴ Additionally, Johnson and the Labour Party leader, Jeremy Cor-

197. Laura Kuenssberg, *Boris Johnson Wins Race to be Tory Leader and PM*, BBC NEWS (July 23, 2019), <https://www.bbc.com/news/uk-politics-49084605> [<https://perma.cc/R8NM-ZXLQ>].

198. Guy Faulconbridge & Elizabeth Piper, *Britain’s New Leader Johnson: ‘We are Going to get Brexit Done’*, REUTERS (July 22, 2019, 11:04 PM), <https://www.reuters.com/article/uk-britain-eu-leader/britains-new-leader-johnson-vows-to-get-brexit-done-idUSKCN1UH2JS> [<https://perma.cc/CNH7-BMMN>].

199. Patrick Smith, *Boris Johnson Faces Brexit Showdown in Parliament*, NBC NEWS (Sept. 3, 2019, 6:36 PM), <https://www.nbcnews.com/news/world/boris-johnson-s-brexit-faces-showdown-over-brexit-parliament-n1049021> [<https://perma.cc/JB48-DUCT>].

200. Laura Hughes, *How Boris Johnson Lost His Legislative Majority, and What It Means*, WASH. POST (Sept. 4, 2019, 4:58 PM), https://www.washingtonpost.com/world/how-boris-johnson-lost-his-legislative-majority-and-what-it-means/2019/09/04/b9dd7b0a-cf23-11e9-a620-0a91656d7db6_story.html [<https://perma.cc/T3QY-B93S>].

201. Ross McGuinness, *Boris Johnson Loses Second Commons Vote to Trigger Election as Parliament Suspension Begins*, YAHOO NEWS (Sept. 10, 2019), <https://news.yahoo.com/boris-johnson-loses-commons-vote-election-parliament-suspended-061414877.html> [<https://perma.cc/D3VH-QDY6>].

202. Benjamin Kentish & Lizzie Dearden, *Supreme Court Rules Boris Johnson’s Suspension of Parliament ‘Unlawful, Void and to No Effect’*, INDEPENDENT (Sept. 24, 2019, 11:42 AM), <https://www.independent.co.uk/news/uk/politics/supreme-court-decision-ruling-boris-johnson-suspension-prorogue-brexit-latest-today-a9117931.html> [<https://perma.cc/Y94Y-DHYD>]. See also *R (on the application of Miller) v. The Prime Minister* [2019] UKSC 41 at para. 69 (holding that prorogation was “unlawful, null and of no effect”); *Cherry v. Advocate General for Scotland*, [2019] UKSC 41 at para. 69 (same).

203. Bianca Britton, *Lawmakers Return to Parliament After Court Rules Against Boris Johnson’s Prorogation*, CNN (Sept. 25, 2019, 8:33 AM), <https://www.cnn.com/2019/09/25/uk/mps-return-to-parliament-gbr-intl/index.html> [<https://perma.cc/U3NP-EM7L>].

204. Katya Adler, *Brexit: Johnson Agrees to Brexit Extension - But Urges Election*, BBC (Oct. 28, 2019), <https://www.bbc.com/news/uk-politics-50205603> [<https://perma.cc/FLU9-EFTS>].

byn, agreed to hold a general election on December 12, 2019.²⁰⁵ In the general election, the Conservative Party won a “big majority” and re-elected Prime Minister Boris Johnson declared a “mandate” to “get Brexit done.”²⁰⁶ In January 2020, the House of Commons passed Johnson’s Brexit deal, thus “paving the way for the United Kingdom to leave the European Union” and ending “three years of political wrangling following the 2016 Brexit referendum.”²⁰⁷

C. Post-Brexit Uncertainty

Following the initiation of the Brexit withdrawal process, there is a great deal of uncertainty in the United Kingdom. The uncertainty is not limited just to the British economy,²⁰⁸ but it extends into the British legal and political landscapes as well.²⁰⁹ For example, Brexit and the corresponding uncertainty has resulted in a sharp decline in the value of the UK currency,²¹⁰ an increase in private equity firms leaving the UK for Europe,²¹¹ larger numbers of European renationalization applications,²¹²

205. David Reid, *UK Set for a December Election as Opposition Labour Party Backs Call*, CNBC (Oct. 28, 2019, 10:23 AM), <https://www.cnbc.com/2019/10/28/boris-johnson-loses-vote-to-hold-uk-general-election-on-december-12.html> [<https://perma.cc/PVE7-TGDD>].

206. Nick Eardley, *Election Results 2019: Boris Johnson Returns to Power With Big Majority*, BBC NEWS (Dec. 13, 2019), <https://www.bbc.com/news/election-2019-50765773> [<https://perma.cc/SC2W-Q6MX>].

207. Angela Dewan, *UK Parliament Finally Rubber Stamps Brexit in No-Fuss Vote*, CNN (Jan. 9, 2020), <https://www.cnn.com/2020/01/09/uk/brexit-deal-uk-votes-gbr-intl/index.html> [<https://perma.cc/Z384-FDC3>].

208. See Chris Giles, *Brexit Uncertainty Hurting UK Economy, says IMF*, FINANCIAL TIMES (Dec. 20, 2017), <https://www.ft.com/content/1615ddc2-36dc-3aea-b077-04657dfd0a56> [<https://perma.cc/SL9W-S9PS>]; Charles Riley, *Business Sounds Alarm Over Brexit ‘Chronic Uncertainty’*, CNN MONEY (Feb. 8, 2018, 12:41 PM), <http://money.cnn.com/2018/02/08/news/economy/brexit-business-japan-uncertainty/index.html> [<https://perma.cc/3875-BWGA>].

209. See Graham Gee, Luca Rubini & Martin Trybus, *Leaving the EU? The Legal Impact of ‘Brexit’ on the United Kingdom*, 22 J. EUR. PUB. L. 51 (2016); Christof Roos, *The Brexit and EU Freedom of Movement: Legal Uncertainty on Both Sides of the ‘Border’*, INST. EUR. STUD., no. 7, Apr. 2016; Alexandra Gibbs, *Brexit Two Months On: Markets Recover but Political Uncertainty Lingers*, CNBC (Aug. 23, 2016, 11:21 AM), <https://www.cnbc.com/2016/08/23/brexit-two-months-on-markets-recover-but-political-uncertainty-lingers.html> [<https://perma.cc/4Y32-Y8V6>].

210. See Sarah Provan & Michael Hunter, *Sterling Touches Lowest Since February as Brexit Uncertainty Drags on*, FIN. TIMES (May 15, 2019), <https://www.ft.com/content/07649e18-7712-11e9-bbad-7c18c0ea0201> [<https://perma.cc/P4AC-X7S7>] (“The pound brushed its lowest level since mid-February as the UK currency tracked a deepening sense among investors that Westminster’s cross-party talks seeking a consensus on a Brexit agreement were faltering.”).

211. See Javier Espinoza, *The Brexit Effect: Private Equity Firms Shun UK for Europe*, FIN. TIMES (May 13, 2019), <https://www.ft.com/content/7dbefce0-6d92-11e9-80c7-60ee53e6681d> [<https://perma.cc/QM9Q-G54X>] (“[John Sinik, a private equity executive,] still thinks the UK is the place to be for private equity firms but he says political uncertainty about the country’s future relationship with Europe is pushing it close to ‘breaking point’. . . . At least in the short term, many firms are extremely wary about doing deals in the UK given so much that is unknown about the country’s political and economic future.”).

and a rise in mental health issues among British citizens.²¹³ One of the most controversial issues in the Brexit campaign was independence from the ECJ.²¹⁴ Several years after the referendum, it remains unclear whether the British courts will remain bound by the ECJ's rulings.²¹⁵ Although Boris Johnson and Theresa May had set forth tentative guidelines for separating from the ECJ,²¹⁶ some warn that the British legal system “could fall over” if British officials do not handle Brexit properly.²¹⁷

Of course, it should also be noted that the British government will likely prioritize other policy issues—immigration, freedom of movement, trade, the single market—over the ECJ, jurisdiction and enforcement of judgment issues, and *forum non conveniens*. How these issues are dealt with, however, will be a critical question for private international law. Thus, the issues should not be overlooked. In fact, the British government—to its credit—has been addressing these issues.²¹⁸ This Note seeks

212. See Ellie Drewry, *I'm Applying for German Renationalisation. Like Other British Jews, Brexit Has Put My Safety in Danger*, INDEPENDENT (Mar. 17, 2019), <https://www.independent.co.uk/voices/brexit-antisemitism-jewish-germany-eu-referendum-politics-uk-a8822401.html> [https://perma.cc/J4HG-RMV3] (“With no out, Brexit has driven over three thousand descendants of Jewish refugees to apply for German citizenship.”).

213. See Natasha Hinde, *Brexit Anxiety Is a Very Real Issue Right Now: 'It's Causing People to Snap'*, HUFFINGTON POST (Oct. 30, 2019), https://www.huffingtonpost.co.uk/entry/brexit-anxiety-very-real-issue_uk_5c51ba25e4b00906b26f92ba?guccounter=1&guce_referrer=AHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAALEDs8T76tcNHTA5Wp3i9rh3FL0Om0Jhm7Pocj5eP7-nZrtzD6joQwGGuc-EjfqtmPhh5ggDtmqVP4c48cuB2-Ikr6f9ONxiaPsQKvlj505o1j49vF3NbUesT4wn-ijTR6eRQ-Y5JemgYiKe6CTlO3mtO0rAlgXaT-FjnWcjAUP [https://perma.cc/Z88N-MXVA] (“One in three Brits feel that Brexit has had a negative impact on their mental health. . . . Mike Ward runs two anxiety clinics in Hampshire and London. Of the clients he saw in the space of two weeks, around half mentioned Brexit worries. . . . People are worried about job loss, the impact of Brexit on their family and travel, and, increasingly, how they will access food and medicine.”).

214. See Annabelle Dickson & Quentin Aries, *9 Reasons Why (Some) Brits Hate Europe's Highest Court*, POLITICO (July 26, 2017, 4:00 AM), <https://www.politico.eu/article/brexit-ecj-european-court-of-justice-9-reasons-why-some-brits-hate-europes-highest-court/> [https://perma.cc/U4YU-NEYQ].

215. Ryan Heath, *Britain Just Can't Shake the ECJ*, POLITICO (June 26, 2017, 4:38 PM), <https://www.politico.eu/article/britain-cant-shake-european-court-of-justice-ecj-post-brexit/> [https://perma.cc/T9D2-Z83S]; Judith Mischke, *Continued EU Court Oversight Means No Brexit, Says Former UK Minister*, POLITICO (Dec. 5, 2017, 1:17 PM), <https://www.politico.eu/article/continued-eu-court-oversight-means-no-brexit-says-former-uk-minister/> [https://perma.cc/X5S3-DS3J].

216. Elizabeth Piper, *Britain Outlines Plans to Break Free of European Court After Brexit*, REUTERS (Aug. 22, 2017, 5:41 PM), <https://www.reuters.com/article/us-britain-eu-court/britain-outlines-plans-to-break-free-of-european-court-after-brexit-idUSKCN1B22GU> [https://perma.cc/7E6Z-JLPP].

217. Faisal Islam, *European Court of Justice Has 'Ultimate Authority' on Article 50*, SKY NEWS (Nov. 30, 2016, 1:13 PM), <https://news.sky.com/story/european-court-of-justice-has-ultimate-authority-on-article-50-10677193> [https://perma.cc/UNF6-NEAW].

218. See Giesela Ruhl, *Judicial Cooperation in Civil and Commercial Matters After Brexit: Which Way Forward*, 67 INT'L & COMP. L.Q. 99 (2018) (“Building on two previously published White Papers, [the two newly-published Position Papers] sketch how the UK wants to deal with the core issues of choice of law, jurisdiction[,] and recognition and enforcement of foreign judgments after Brexit.”).

to inform the discourse surrounding these issues as well as the British government's decision-making process.

IV. The United Kingdom and the European Court of Justice After Brexit

A. Remaining in the European Court of Justice's Jurisdiction

In withdrawal negotiations with the EU, the British government must decide how the country will proceed concerning the jurisdiction of the ECJ. The British government essentially has two options: (1) remain in the ECJ's jurisdiction, or (2) leave the ECJ's jurisdiction. Some have described the former as a "soft Brexit," while describing the latter as a "hard Brexit."²¹⁹ Ultimately, however, Boris Johnson and Theresa May have unequivocally declared her intention to leave the ECJ's jurisdiction.²²⁰ Therefore, this Note assumes and stipulates that the United Kingdom will leave the ECJ's jurisdiction and will no longer be bound by its judgments.²²¹

There are signs that the British government is already considering leaving the ECJ's jurisdiction and reverting to British domestic law. In September 2018, the British government released a guidance document entitled "Handling Civil Legal Cases That Involve EU Countries If There's No Brexit Deal."²²² The guidance document suggests that the British government and courts "would repeal most of the existing civil judicial cooperation rules and instead use the domestic rules which each UK legal system currently applies in relation to non-EU countries" if no Brexit deal is reached.²²³ The document further explicitly mentions that the Brussels I

219. See, e.g., J.P., *How a Soft Brexit Differs From a Hard One*, *ECONOMIST* (June 25, 2018), <https://www.economist.com/the-economist-explains/2018/06/25/how-a-soft-brex-it-differs-from-a-hard-one> [<https://perma.cc/FF9K-2L6Z>] ("The debate over the right terms and conditions for Britain's departure from the European Union is often simplified into two clashing concepts: a soft Brexit and a hard one."); Stephen Castle, *Soft Brexit? Hard Brexit? How About Endless Brexit?*, *N.Y. TIMES* (Mar. 8, 2019), <https://www.nytimes.com/2019/03/08/world/europe/brex-it-uk-may-endless.html> [<https://perma.cc/BU2B-V9H9>] ("The low-risk option would be a softish Brexit keeping Britain close to European rules and standards to protect industries and jobs that rely on smooth, frictionless trade."). Cf. Timothy Garton Ash, *Soft or Hard Brexit? The EU, Not Britain, Has the Whip Hand*, *GUARDIAN* (Nov. 24, 2016, 2:44 PM), <https://www.theguardian.com/commentisfree/2016/nov/24/soft-hard-brex-it-eu-britain-uk> [<https://perma.cc/CX2S-MWH3>] ("There is something unreal in the current British debate about 'whether to go for soft Brexit or hard Brexit.' At the end of the day, whether we have a hard or soft Brexit will depend more on others than on us.").

220. See *supra* note 1 and accompanying text.

221. This includes the *Owusu* case. Therefore, the British courts will no longer be precluded from utilizing the *forum non conveniens* doctrine.

222. See United Kingdom Ministry of Justice, *Handling Civil Legal Cases That Involve EU Countries if There's No Brexit Deal* (Sept. 13, 2018), <https://www.parliament.uk/documents/lords-committees/eu-justice-subcommittee/JusticeforFamilies/attachment%20-%20CJC%20%20Insolvency%20-%20Published.pdf> [<https://perma.cc/HD2L-UK48>].

223. *Id.* The document acknowledges that failing to reach a deal is unlikely, noting that the government "expect[s] to negotiate a successful deal with the EU." *Id.*

Regulation would no longer apply in the United Kingdom.²²⁴ While the document does not specifically address the *forum non conveniens* doctrine, refusing to enforce the Brussels I Regulation and reverting to domestic law would likely result in reinstating the doctrine—even in cases involving parties from EU Member States.

B. Initiating Withdrawal from the EU

Once the United Kingdom leaves the ECJ's jurisdiction, it will have several additional choices. Presumably, the United Kingdom could negotiate with the EU to join the Brussels I Regulation as a non-Member State.²²⁵ Doing so, however, seems quite unlikely and entails “potential difficulties and pitfalls.”²²⁶ Even though the United Kingdom will no longer be a Member State of the EU, rejoining the Brussels I Regulation would likely subject the United Kingdom to the jurisdiction of the ECJ.²²⁷ Given Boris Johnson's and Theresa May's public statements and the stipulation this Note has made,²²⁸ this represents an unlikely scenario. Commentators have also suggested other options for the United Kingdom, including but not limited to: (1) joining the Lugano Convention, (2) joining the Hague Convention, and (3) negotiating a new treaty with the EU.²²⁹ Absent a treaty, agreement, or other special arrangement with the EU, the British courts will have to resort to British national law and British common law.²³⁰ At common law, the British courts have recognized the *forum non conveniens* doctrine and implemented it prior to the *Owusu* decision in 2005.

V. Adopting the Common Law *Forum Non Conveniens* Doctrine

After Brexit, the United Kingdom is afforded the opportunity to break away from the severely limiting view that the ECJ and Brussels I Regulation proscribe. Thus, this Note argues that the United Kingdom and its courts

224. *Id.*

225. See Sara Masters QC & Belinda McRae, *What Does Brexit Mean for the Brussels Regime?*, 33 J. INT'L ARB. 483, 485 (2016). Denmark signed an agreement with the European Community in 2005 to join the Brussels Regulation. See *id.* Also between 1999 and 2004, Poland, a non-Member State, joined the Brussels Regulation. See Ishfaq Ahmed & Andrew Dinsmore, *The Strengthening of Jurisdiction Agreements Following Brussels Regulation (Recast) and the Impact of Brexit*, 2017 J. INT'L BANKING & FIN. L. 476 (2017).

226. Masters & McRae, *supra* note 225, at 487.

227. See *id.* Additionally, the EU Member States would have to consent to the United Kingdom rejoining the Regulation. Further yet, the United Kingdom would have no right to participate in any amendment proceedings that may take place in the future. See *id.* See generally Consolidated Version of the Treaty on the Functioning of the European Union, 2012 OJ (C 326) 47; Agreement Between the European Community and the Kingdom of Denmark on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2005 O.J. (L 299) 62.

228. See *supra* Section IV(A).

229. See, e.g., Ahmed & Dinsmore, *supra* note 225; Masters & McRae, *supra* note 225, at 488-96.

230. Ruhl, *supra* note 218, at n.78.

would be wise to deviate from the preclusive model of the *forum non conveniens* doctrine articulated in *Owusu v. Jackson*. Although there is no “right” formulation of the doctrine, there are several different models to which the British government could look. The most obvious model is its own common law model, as articulated in *Spiliada*.²³¹ *Spiliada* essentially instructs courts to balance the private and public interest factors to determine if the defendant has shown that a more appropriate forum exists.²³² Although subsequent cases have further explained and expanded on *Spiliada*, its articulation of the doctrine may require some refinement and modernization.

Alternatively, the United Kingdom could look to the American common law model of the doctrine for guidance when deciding how to structure its post-Brexit jurisdictional rules and procedure. This is especially true for the *forum non conveniens* doctrine. The U.S. Supreme Court established the current form of the American doctrine in *Piper*, which set forth an inquiry exceedingly similar to *Spiliada*'s. One difference between the *Spiliada* and the *Piper* conceptions of the doctrine is that *Spiliada* instructs courts to stay the case in favor of the more appropriate forum, whereas *Piper* instructs the court to dismiss in favor of a more appropriate forum. Additionally, unlike the United Kingdom, the United States has a federal venue transfer statute that simulates the *forum non conveniens* inquiry.²³³ Rather than dismissal, this federal statute affords defendants the ability to transfer their case to a more appropriate federal court without dismissal.²³⁴ Some legal commentators posit not only that this addition to the common law model not only adds very little but also that the statute further confuses the doctrine.²³⁵ Therefore, the United Kingdom, which currently does not have a venue transfer statute,²³⁶ may be better off without adopting an analogue of § 1404(a).

Perhaps the best model of the *forum non conveniens* doctrine, however, is the sliding-scale formulation set forth by the *en banc* Second Circuit in *Iragorri*.²³⁷ The *Iragorri* court reformulated the *Piper* articulation to consider the same private and public interest factors, but with greater formulaic structure adjusted to the facts of the particular case.²³⁸ As the appropriateness of the plaintiff's chosen forum decreases, so too does the burden on the defendant to demonstrate inconvenience.²³⁹ The sliding-scale approach not only provides the court with better guidance concerning the interest balancing but also better accounts for modern-day concerns that the *Spiliada* and *Piper* courts did not consider. The rise in

231. See *supra* Section II(C).

232. See *Spiliada Maritime Corp. v. Cansulex, Ltd.* [1987] AC 460 (HL) at 476.

233. See 28 U.S.C. § 1404(a) (2012).

234. *Id.*

235. See Daniel Sternberg, Note, *Res Judicata and Forum Non Conveniens in International Litigation*, 46 CORNELL INT'L L.J. 191, 210-12 (2013).

236. See *supra* note 137 and accompanying text.

237. See *supra* III(B).

238. See *Iragorri v. United Technologies*, 274 F.3d 65, 74-75 (2d Cir. 2001).

239. *Id.*

technological advances and globalization, for example, have lessened the inconvenience to defendants. Therefore, under the *Iragorri* sliding-scale model, the defendant will have to show a greater level of inconvenience than in the past.

A. The Specialness of *Forum Non Conveniens*

One of the main virtues of the *forum non conveniens* doctrine is that it is discretionary. Courts may, but are not required to, stay or dismiss a case in favor of a more appropriate jurisdiction. The presiding judges may consider the circumstances of the case and determine whether exercising jurisdiction over the case is appropriate or whether another forum is more appropriate to adjudicate the case.

Additionally, the *forum non conveniens* doctrine also vests British courts with the power to guard against forum shopping. Many foreign parties choose to adjudicate their claims in the United Kingdom to take advantage of British law. The discretion to stay or dismiss cases provides the British courts the ability to guard against parties taking advantage of favorable law for their own personal gain. Guarding against forum shopping also prevents claims from being determined solely by the law applied to the case. Similarly, the doctrine guards against plaintiffs pursuing vexatious or harassing claims against defendants.

Finally, the *forum non conveniens* doctrine also reduces administrative costs, increases judicial economy, and decreases docket clogging. By staying or dismissing cases in favor of a more appropriate forum, courts relieve themselves of the administrative and financial burden of hearing cases that have no connection with their jurisdiction. This, in turn, saves resources and time for hearing cases that have a connection with their jurisdiction. Relatedly, when a case is stayed or dismissed, the parties are incentivized to settle the case before expending more resources pursuing the case in a more appropriate forum. This aids judicial economy interests and screens out cases that lack merit.

B. Applicability in the Post-Brexit United Kingdom

The United Kingdom has historically employed the *forum non conveniens* doctrine. The doctrine originated in Scotland and the courts in England and Wales have applied the doctrine since the Twentieth Century. Thus, there is longstanding precedent and judicial experience applying the doctrine which can guide the British courts if the British government decides to reinstate the doctrine. Even if this were not true, however, the British courts could look to the American common law model for guidance. Furthermore, the United Kingdom will soon no longer be a member of the EU. Therefore, it may be inappropriate for the British courts and the British legal system to continue to adhere to the norms and rules of the EU.

The United Kingdom is a country particularly ripe for the *forum non conveniens* doctrine given the preference for British law and British courts

in a variety of contexts. One particular context is “international high-value litigation” and matters involving international financial contracts.²⁴⁰ A disproportionate number of international financial and commercial contracts “contain a jurisdiction agreement in favour of [Britain], even where neither party is domiciled in [Britain,] or even Europe.”²⁴¹ In fact, parties to international commercial transactions prefer Britain or Switzerland as the governing jurisdiction three times more often than other jurisdictions.²⁴² This, in part, is because British and Swiss laws serve the interests of parties to international financial and commercial contracts.²⁴³ Additionally, the British regulatory system imposes only a “light touch” on corporations and commercial actors.²⁴⁴ Thus, parties to international contracts—who may or may not have a connection to the United Kingdom—choose the jurisdiction, at least in part, to take advantage of the favorable law and regulatory system.

In the process, the parties expend judicial resources, increase administrative costs, and clog the British courts’ dockets. Despite the costs, however, the United Kingdom may prefer that international actors choose the jurisdiction to govern their international financial and commercial contracts. Litigation involving international financial and commercial contracts is likely to be quite profitable for the British legal community. Therefore, given the discretionary nature of the *forum non conveniens* doctrine, the British courts can choose to exercise jurisdiction over a case even if another forum might be more appropriate. But there is also no obligation to do so.

As with financial contracts, parties also prefer to litigate marital agreement in the United Kingdom. Foreign parties seeking a divorce “flock to [British] courts to take advantage of the country’s laws, which generally favor the party seeking to invalidate a marital agreement.”²⁴⁵ This reflects a recent and growing trend in which parties seeking a divorce deliberately file divorce actions in jurisdictions with law that favors their desired outcome.²⁴⁶ Foreign parties’ preferences for British courts and forum shopping stem from the British courts’ longstanding antipathy to marital agreements.²⁴⁷ In other words, parties from around the world with no connection to the United Kingdom ask British courts to divorce them. This expends judicial resources, increases administrative costs, and clogs the British courts’ dockets to adjudicate actions involving foreign parties. But,

240. Gabriel et al., *supra* note 23, at 81.

241. Ahmed & Dinsmore, *supra* note 225, at 476.

242. Gilles Cuniberti, *The International Market for Contracts: The Most Attractive Contract Laws*, 34 NW. J. INT’L L. & BUS. 455, 472, 475 (2014).

243. *Id.* at 475.

244. *Id.* at 499.

245. Karina Van Houten, Note, *Have Prenup, Will Travel: Why England’s Law on Marital Agreements Has Attracted Forum Shoppers and How the Courts Can Fight Back*, 42 BROOK. J. INT’L L. 807, 807 (2017).

246. *See id.* at 811 (citing Mark Harper & Brett Frankle, *An English Practitioner’s View on Pre-Nuptial, Post-Nuptial and Separation Agreements*, in *MARITAL AGREEMENTS AND PRIVATE AUTONOMY IN COMPARATIVE PERSPECTIVE* 122, 124 (Jens M. Scherpe ed., 2012)).

247. *See id.* at 815-17.

unlike actions involving financial contracts, actions involving divorce proceedings and marital agreements are unlikely to be lucrative for British barristers. Thus, British courts, under the *forum non conveniens* doctrine, can—but not are obligated to—decline jurisdiction in favor of a more appropriate forum.

In sum, the British courts can discretionarily hear as many or as few actions involving international financial and commercial contracts where another forum is more appropriate. And they can discretionarily hear as many or as few actions involving marital agreements where another forum is more appropriate.

Conclusion

In conclusion, the United Kingdom's decision to withdraw from the EU has resulted in a great deal of uncertainty. This is true not only for the economic realm but also for the legal realm. In particular, Boris Johnson and Theresa May have declared that the United Kingdom will leave the jurisdiction of the ECJ. By doing so, the United Kingdom will no longer be precluded from applying the *forum non conveniens* doctrine to cases involving an international element. Thus, the United Kingdom is presented with the opportunity to reinstate the doctrine. Although there is no "right" formulation of the doctrine, the British government could look to either its own common law model or the American common law model. The *Iragorri* sliding-scale model is particularly appealing because it restates the typical interest balancing in a more structured and formulaic way. Furthermore, the *forum non conveniens* doctrine not only is a beneficial doctrine in its own right, but also particularly applies to the United Kingdom.