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

Jared Ham†

Introduction ..................................................... 718

I. The Modern Forum Non Conveniens Doctrine in the United States ............................................. 721
   A. Piper Aircraft v. Reyno .............................................. 721
   B. Iragorri v. United Technologies .......................... 724

II. Owusu v. Jackson and Forum Non Conveniens in the United Kingdom ................................................. 726
   A. Owusu v. Jackson ...................................... 727
   B. Owusu’s Progeny ............................................. 729
   C. Domestic Forum Non Conveniens in the United Kingdom ...................................... 730

III. Brexit .................................................... 732
   A. The Referendum ...................................... 732
   B. Initiating Withdrawal from the EU ..................... 733
   C. Post-Brexit Uncertainty ................................ 739

IV. The United Kingdom and the European Court of Justice After Brexit ............................................. 741
   A. Remaining in the European Court of Justice’s Jurisdiction ........................................... 741
   B. Initiating Withdrawal from the EU ..................... 742

V. Adopting the Common Law Forum Non Conveniens Doctrine ................................................. 742
   A. The Specialness of Forum Non Conveniens .......... 744
   B. Applicability in the Post-Brexit United Kingdom ...... 744

Conclusion ...................................................... 746

† B.A., Cornell University, 2015; J.D., Cornell Law School, 2019; Notes Editor, Cornell Law Review, Vol. 104. Thank you to my family, especially my parents, for their unconditional love and support. Thank you to my friends for their unwavering encouragement and loyalty. Thank you to Professor Zachary Clopton for his guidance in the composition of this Note. Finally, thank you to the staff of Volume 52 of the Cornell International Law Journal and Sue Pado for their tireless work and professionalism in preparing this Note for publication.

52 CORNELL INT’L L.J. 717 (2020)
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.  

- Prime Minister Theresa May

Introduction

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

1. Theresa May, then-Prime Minister, United Kingdom, Address at the 2016 Conservative Party Conference (Oct. 2, 2016).
3. See infra Section III(B).
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 Century

---


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. This doctrine later spread to other countries that subscribe to the Anglo-common law legal system. The United States Supreme Court has long recognized the doctrine. 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.” 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. Indeed, civil law countries and their legal systems do not permit their courts to discretionarily decline jurisdiction. 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. Instead, the ECJ concluded, the Brussels I Regulation—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. 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.

---


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.


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.

Even before these two cases, however, many U.S. courts applied reasoning that mirrored the *forum non conveniens* doctrine. This was especially true for cases involving federal admiralty law. The modern iteration of the *forum non conveniens* doctrine, however, is best illustrated in the seminal case, *Piper Aircraft v. Reyno*. 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*.

*Piper* involved a plane crash that occurred in Scotland and killed the pilot and five passengers, all of whom were Scottish citizens. The deceased Scottish citizens’ estates brought a wrongful termination claim against the aircraft’s manufacturer and the propellers’ manufacturer in California probate court. The suit eventually was transferred to the federal district court in the Middle District of Pennsylvania. 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*. The Supreme Court then granted certiorari to determine “the proper application of the doctrine.”

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*. 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. The Court further explained that the doctrine involves flexibility and discretion and that no specific circum-

---

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”); *Willendon 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 shops. 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.”).
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*. 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.”

Additionally, the Court affirmed the district court’s *Gilbert* analysis. 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. 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. The presumption favoring the plaintiff’s choice of forum, according to the Court, is diminished when the plaintiff is foreign.

In conducting the *Gilbert* analysis, the district court will analyze and balance factors corresponding to both the private and public interest factors. 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.

The *Piper* Court approved of the district court’s analysis of the private interest factors. First, the Court agreed that the connections with Scotland were “overwhelming” and most of the evidence was located in Scotland. Second, most of the relevant witnesses and potential third-party defendants were also located in Scotland. Although the defendants could implead potential Scottish third-party defendants, convenience favored resolving all of the claims in a single trial. 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.

The Court also considered public interest factors and approved of the district court’s analysis. 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. 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).
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.\textsuperscript{65} The court noted that courts will afford a plaintiff’s choice of forum great deference when it is her home forum.\textsuperscript{66} This is, in part, because the plaintiff’s choice of forum is presumed to be convenient.\textsuperscript{67} But courts will afford a plaintiff’s choice of forum far less deference when the plaintiff is foreign.\textsuperscript{68} This is, in part, because courts seek to guard against forum shopping and efforts to secure a tactical advantage stemming from local law.\textsuperscript{69} Evaluating the plaintiff’s choice of forum, however, is only the first step in the \textit{forum non conveniens} inquiry.\textsuperscript{70} The court also proceeded to consider the alternative forum and conduct the analysis of private and public interest factors.\textsuperscript{71}

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

\begin{quote}
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 \textit{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.\textsuperscript{73}
\end{quote}

This new conception of the \textit{Gilbert-Koster-Piper} analysis continues to balance the private and public interest factors associated with the plaintiff’s chosen forum and the alternative forum,\textsuperscript{74} but with greater formulaic structure adjusted to the facts of the particular case.\textsuperscript{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-

\begin{itemize}
\item\textsuperscript{65} See id. at 75.
\item\textsuperscript{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)).
\item\textsuperscript{67} See id. at 71 (citing Piper, 454 U.S. at 255–56).
\item\textsuperscript{68} See id.
\item\textsuperscript{69} See id. at 72.
\item\textsuperscript{70} See id. at 73.
\item\textsuperscript{71} See id.
\item\textsuperscript{72} See id. at 74–75.
\item\textsuperscript{73} Id.
\item\textsuperscript{74} Cf. \textit{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, \textit{[the \textit{Iragorri} sliding-scale approach] merely re-calibrates the scales for the remaining two steps of the analysis.”) (emphasis added).
\item\textsuperscript{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 formally considering a myriad of factors. For example, a California state court established an extensive list of 25 factors for the \textit{forum non conveniens} inquiry. \textit{See Great N. By. v. Superior Court}, 12 Cal. App. 3d 105, 113–15, \textit{cert. denied}, 401 U.S. 1013 (1970).
ence to give to a foreign plaintiff’s choice of forum.” 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.

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

Prior to the landmark ECJ case Owusu v. Jackson, the United Kingdom employed the standard common law approach to the forum non conveniens doctrine. 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 involving an international element. 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.” Along with the “highly controversial” limitation imposed on the English courts by the ECJ came uncertainty surrounding the doctrine. As one commentator remarked, Owusu “has left numerous unanswered questions on the scope of the Brussels I Regulation and the future is deeply uncertain.”


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.”).


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 breach 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.
Jamaica, a non-member state, and that the Brussels I Regulation is silent on this issue.\textsuperscript{99} The court then stayed the proceedings and referred the two questions to the ECJ.\textsuperscript{100} The ECJ accepted the case to answer the referred questions and recognized the implications the case would have on the \textit{forum non conveniens} and \textit{lis pendens} doctrines.\textsuperscript{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.\textsuperscript{102} The jurisdictional rules of the Regulation require an international element, but the rules do not require the involvement of multiple member states.\textsuperscript{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.\textsuperscript{104} Indeed, the purpose of the Regulation is to enable the effective operation of the single market\textsuperscript{105} by providing legal certainty, uniformity, and predictability, as well as removing barriers to recognizing and enforcing judgments throughout the member states’ territory.\textsuperscript{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.\textsuperscript{107} Applying the \textit{forum non conveniens} doctrine would undermine and frustrate the policies and purposes which the Regulation seeks to establish.\textsuperscript{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.\textsuperscript{109} And the Regulation, the ECJ

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at para. 19.
\item \textit{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?
\item \textit{Id.} at paras. 1–2, 8–9, 19–23.
\item \textit{Id.} at para. 35.
\item \textit{Id.} at paras. 24–26.
\item The ECJ and the Brussels I Regulation use the term “common market.” \textit{See} Owusu v. Jackson, 2005 E.C.R. I-01383, at para. 33. This Note uses the term “single market.”
\item \textit{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).
\item \textit{Id.} at para. 34.
\item \textit{Id.} at paras. 41–43.
\item \textit{Id.} at para. 37.
\end{enumerate}
\end{footnotesize}
notes, does not provide an exception for the forum non conveniens doctrine. 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]." Finally, the ECJ then declined to answer the second referred question.

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. In Konkola Copper Mines v. Coromin, the “first significant decision to consider the application of Owusu,” 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. Additionally, some of the defendants were domiciliaries of the United Kingdom. The facts of Konkola were quite similar to those of Owusu. The court’s discretionary analysis is “not dissimilar to a forum non conveniens analysis.” 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.”

The Konkola Court also noted that “Owusu has not disturbed the discretionary analysis of foreign jurisdiction clauses.” Therefore, despite explicitly stating that Owusu foreclosed the application of forum non conveniens in cases arising under the Brussels I Regulation, the court began the effort to restrict Owusu’s influence and applicability in the United Kingdom. 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.
115. Waters, supra note 81.
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.
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. After the EWHC’s decision, courts and legal scholars preferring the discretionary analysis of the *forum non conveniens* doctrine have favored the *Konkola* approach. The EWHC and EWCA followed the *Konkola* approach in subsequent cases and continued to limit *Owusu*’s influence and applicability.

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

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. And, as in the

---


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).


129. Id. at 476.

130. Id. at 460–61.

131. Id.


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


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.
140. See Ovchinnikov, supra note 15, at 44.
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. 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. After much criticism of the Harrods case, British courts began to acknowledge that the issue of applying the forum non conveniens doctrine needed clarification by the ECJ. The ECJ ultimately accepted reference from the British courts and rejected the approach of Harrods in the Owusu case.

III. Brexit

A. The Referendum

For decades, many Britons have opposed the United Kingdom’s membership in the European Communities and the European Union. 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. 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. Further succumbing to pressure from

---


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. Worslade 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/politi-
Conservative eurosceptics, Cameron soon after declared that the Conservative government would hold an in-our 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
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-

163. George, supra note 2, at 132–33.
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.

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. 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. Indeed, the DUP had even refused to back the withdrawal deal in its current form.

Within weeks of striking the deal, May went to Parliament to begin selling her government’s Brexit deal to members of Parliament. 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. 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. In January 2019, May held a vote on the Brexit deal. In the largest defeat for a sitting government in modern history, Parliament voted overwhelmingly to reject May’s Brexit deal. This included more than 100 members of May’s governing coali-

---


tion rejected her deal. 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. Even though she survived, Theresa May and the Conservative Party-led governing coalition continued to be in a “weak position.”

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. 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. 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. The proposal garnering the most votes, however, was the proposal to withdraw from the EU but implement a “customs union.” Although Theresa May promised to resign if Parliament approved her Brexit deal, the members of Parliament again rejected her deal.

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. Soon thereafter, Theresa May asked for another extension beyond the initial April 12 extension after no progress had been made.


Two months after Theresa May’s resignation, the Conservative Party...
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 advan-
tage 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 Par-
liament, he lost a governing majority in the House of Commons.199 This
included a member defecting in the middle of the Prime Minister address-
ing 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 proroga-
tion was unlawful.202

As members returned to Parliament after the Supreme Court’s ruling
effectively ended the prorogation, Johnson stated that he remained commit-
ted 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
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, 4:38 PM), https://www.washingtonpost.com/world/
b9dd7b0a-cf23-11e9-a620-0a91656d7db6_story.html [https://perma.cc/T3QY-B935].

201. Ross McGuinness, Boris Johnson Loses Second Commons Vote to Trigger Election as
boris-johnson-loses-commons-vote-election-parliament-suspended-06144877.html
[https://perma.cc/D3VH-QDY6].

202. Benjamin Kentish & Lizzie Dearden, Supreme Court Rules Boris Johnson’s Suspen-
sion 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-DHVY]. 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

203. Bianca Britton, Lawmakers Return to Parliament After Court Rules Against Boris

204. Katya Adler, Brexit: Johnson Agrees to Brexit Extension - But Urges Election, BBC
FLU9-EFTS].
by, 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


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/07e49e18-7712-11e9-bbad-7c189c0a0201 [https://perma.cc/P43C-X757] (“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 Espinosa, The Brexit Effect: Private Equity Firms Shun UK for Europe, FIN. TIMES (May 13, 2019), https://www.ft.com/content/7dbefce0-6d92-11e9-80c7-60e0e36e681d [https://perma.cc/QM9Q-G54X] (“[John Simk, 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.\textsuperscript{213} One of the most controversial issues in the Brexit campaign was independence from the ECJ.\textsuperscript{214} Several years after the referendum, it remains unclear whether the British courts will remain bound by the ECJ’s rulings.\textsuperscript{215} Although Boris Johnson and Theresa May had set forth tentative guidelines for separating from the ECJ,\textsuperscript{216} some warn that the British legal system “could fall over” if British officials do not handle Brexit properly.\textsuperscript{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.\textsuperscript{218} This Note seeks

\begin{itemize}
\item \textsuperscript{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.”).
\item \textsuperscript{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_referer=AIHR0eHM6Iy93d3cuZ29wZ2xlMnvbSS8&guce_referer_sig=AQAAALedS8T76cNHHTA5Wp39rhm3FlO0m0Jhm7Pocj5eP7-nZrtzD6joQwGGuc-EjftqMPhh5ggDtmqVP4c8cuB2lkr6f9ONxiaPsQKVly50Soj1j49eF3NhUesT+wn-iTR6eRQ-Y5JemgYk6CIO3m0bALxAT-8jnWcjAUP [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.”).
\item \textsuperscript{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.”).
\end{itemize}
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.”

Ultimately, however, Boris Johnson and Theresa May have unequivocally declared her intention to leave the ECJ’s jurisdiction. 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.

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.” 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. The document further explicitly mentions that the Brussels I


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.


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.\textsuperscript{224} While the document does not specifically address the \textit{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.

\section*{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.\textsuperscript{225} Doing so, however, seems quite unlikely and entails “potential difficulties and pitfalls.”\textsuperscript{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.\textsuperscript{227} Given Boris Johnson’s and Theresa May’s public statements and the stipulation this Note has made,\textsuperscript{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.\textsuperscript{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.\textsuperscript{230} At common law, the British courts have recognized the \textit{forum non conveniens} doctrine and implemented it prior to the \textit{Owusu} decision in 2005.

\section*{V. Adopting the Common Law \textit{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

\textsuperscript{224} Id.
\textsuperscript{226} Masters & McRae, supra note 225, at 487.
\textsuperscript{227} \textit{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. \textit{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.}
\textsuperscript{228} \textit{See supra Section IV(A).}
\textsuperscript{229} \textit{See, e.g.,} Ahmed & Dinsmore, supra note 225; Masters & McRae, supra note 225, at 488–96.
\textsuperscript{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).
234. Id.
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. 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.” In fact, parties to international commercial transactions prefer Britain or Switzerland as the governing jurisdiction three times more often than other jurisdictions. This, in part, is because British and Swiss laws serve the interests of parties to international financial and commercial contracts. Additionally, the British regulatory system imposes only a “light touch” on corporations and commercial actors. 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 agreements 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.” 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. Foreign parties’ preferences for British courts and forum shopping stem from the British courts’ longstanding antipathy to marital agreements. 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.
243. Id. at 475.
244. Id. at 499.
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.