

# TULANE JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW

---

VOLUME 31

WINTER 2023

No. 1

---

## Comparing Essential Components of Transnational Jurisdiction: A Proposed Comparative Methodology

Anna Conley\*

I.	INTRODUCTION .....	2
II.	ESSENTIAL COMPONENTS METHODOLOGY—A PROPOSAL .....	4
	A. <i>Guideposts Instead of Borders</i> .....	4
	B. <i>A Synthesis of Existing Methodologies</i> .....	5
	1. Tracing Historical Sources of Legal Rules.....	5
	2. Cultural Comparison and Essential Components.....	6
	3. Essential Components Manifested in Legal Reasoning.....	9
	4. Essential Components and Harmonization.....	10
III.	FLEXIBILITY AND PREDICTABILITY AS DIVERGING ESSENTIAL COMPONENTS .....	11
	A. <i>Historical Analysis of Flexibility as an Essential         Component of the Common Law</i> .....	11
	B. <i>History and Predictability in the Civil Law Tradition</i> .....	14

---

\* © 2023 Anna Conley. Assistant Professor at the Alexander Blewett III School of Law at the University of Montana. This Article is an updated and condensed version of the author's dissertation for her Doctor of Civil Laws in Comparative Law from the McGill Faculty University of Law. Thank you to Professor, now Honourable, Frédéric Bachand for his invaluable advising. Thanks also to Stacey Gordon and Phil Cousineau (in memorial), and Diane Yancy at the University of Montana Law Library for their assistance.

C.	<i>Flexibility and Predictability Lead to Divergent Legal Reasoning and Legal Cultural Values</i> .....	16
IV.	FLEXIBILITY AND JUDICIAL DISCRETION IN COMMON LAW	
	TRANSNATIONAL JURISDICTION RULES .....	22
A.	<i>Personal Jurisdiction in U.S. Courts as the Apex of Judicial Discretion</i> .....	22
B.	<i>Concurrent Proceedings in U.S. Courts and Judicial Discretion</i> .....	23
C.	<i>Forum Non Conveniens and Judicial Discretion</i> .....	25
D.	<i>Flexibility and the Fact-Specific Nature of Anti-Suit Injunctions</i> .....	29
V.	PREDICTABILITY AND JURISDICTION RULES IN THE CIVIL LAW ...	32
A.	<i>Historical and Philosophical Reasons Why the Civil Law Rejects Discretionary Jurisdiction Doctrines</i> .....	32
B.	<i>Civil Law Approaches to Jurisdiction and Predictability</i> ....	33
C.	<i>Civil Law Approaches to Lis Pendens and Concurrent Proceedings</i> .....	35
D.	<i>Civil Law's Rejection of Forum Non Conveniens</i> .....	37
E.	<i>Civil Law's Rejection of Anti-Suit Injunctions</i> .....	40
VI.	FAILED ATTEMPTS TO HARMONIZE TRANSNATIONAL JURISDICTION RULES .....	41
A.	<i>When Things Fall Apart—The Choice of Court Convention Negotiations</i> .....	41
B.	<i>Not On Our Continent—The ECJ and UK Jurisdiction Rules</i> .....	47
VII.	CONCLUSION.....	55
I.	INTRODUCTION	

Despite vast harmonization across many areas of private international law, approaches to transnational jurisdiction have proved resistant to harmonization. For example, the Choice of Court Convention started as large-scale attempt to unify transnational jurisdiction rules and enforcement of judgments and ended up with a significantly limited scope focused on forum selection clauses. During negotiations, deep rifts between the United States and EU delegates unearthed an unwillingness by the United States to forego common law discretionary jurisdiction doctrines such as forum non conveniens and anti-suit injunctions, and a

refusal to allow such doctrines by the EU. Other examples are the European Court of Justice's (ECJ) repeated interpretations of Brussels instruments regarding jurisdiction to strictly prohibit the United Kingdom's use of discretionary jurisdiction doctrines.

The difficulty in harmonizing civil law and common law approaches to jurisdiction in transnational cases can be explained by looking at different essential components underlying the rules in the two traditions. These doctrines developed in the common law to ensure that litigants receive equitable fact-specific justice from judges, while the civil law rejection of them is tied to a rejection of unpredictable and overt judicial power over litigants untethered by statutory mandates. This Article explores a new comparative law methodology focused on the essential components underlying legal rules in different systems. With transnational jurisdiction rules, the common law rules are tied to flexibility and fact-specific justice, while the civil law rejection of those rules are rooted in predictability as a protection for litigants. The incompatibility between these underlying essential components stymied harmonizing of transnational jurisdiction rules.

Part II sets forth this essential components methodology used to compare transnational jurisdiction rules and analyze why harmonization has proved so difficult. Part III discusses flexibility as an essential component of the common law tradition and predictability as an essential component in the civil law tradition, focusing on the roots of equity in the common law and rejection of overt judge-made law in the civil law. Part IV provides a background on transnational jurisdiction doctrines used by U.S. courts, including "doing business" jurisdiction, forum non conveniens and anti-suit injunctions. This Part illustrates the link between these doctrines and flexibility as a value in the common law tradition. Part V discusses predictability as an essential component of the civil law tradition, provides an overview of jurisdiction approaches by French courts pursuant to the French Civil Code, then links these approaches to predictability as a fundamental tenet. Part VI highlights difficulties in harmonizing transnational jurisdiction rules with a focus on the negotiations that led to the U.S. withdrawal of the Choice of Court Convention negotiations and reduction in the scope of that treaty and discusses the ECJ cases rejecting UK jurisdiction doctrines within the Brussels regime.

## II. ESSENTIAL COMPONENTS METHODOLOGY—A PROPOSAL

Various comparative law methodologies focus on unique aspects of legal rules being compared, including the rules' functions, the legal culture surrounding the rule, legal history, or epistemology and legal reasoning used in application of the rule. At the macro-level, the legal family taxonomy is being replaced by more nuanced attempts to understand legal rules and systems. The essential components methodology attempts to synthesize these approaches while continuing to move away from the legal systems taxonomy. Legal rules are linked to underlying essential components, which are philosophical tenets of a legal tradition based on its unique history, valued by its legal community, and manifested in legal reasoning structures. Searching for essential components gives a comparatist relatively stable guideposts for defining a legal tradition and juxtaposing aspects of legal systems. When comparing rules across legal systems, the comparatist identifies the essential components underlying each rule. This allows a deeper understanding of each rule and how it interrelates with the legal system it is in. It also assists in analyzing whether legal rules are capable of harmonization based on the assumption that legal rules with fundamentally different underlying essential components cannot be harmonized.

### A. *Guideposts Instead of Borders*

In recent years, comparatists have collectively rejected viewing “legal systems and families as static and isolated entities.”<sup>1</sup> Scholars embrace the fuzziness of borders and the dynamic nature of legal systems as constantly interacting and overlapping with others and experiencing inner change and contradiction.<sup>2</sup> Scholars have attempted to identify

---

1. Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671, 677 (2002).

2. See, e.g., Esin Öricü, *Family Trees for Legal Systems: Towards a Contemporary Approach*, in EPISTEMOLOGY AND METHODOLOGY OF COMPARATIVE LAW 363 (Mark Van Hoecke, ed., 2004) (regarding “all legal systems as mixed and overlapping, overtly or covertly”) [hereinafter VAN HOECKE]; H.P. GLENN, *LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW* 261 (5th ed. 2014) (“[t]he common law, though identifiable, is a weak identifier. It can float around the world, but in doing so it provides little reinforcement for national identities”).

“constituent elements”<sup>3</sup> in place of increasingly inaccurate classifications in the legal families taxonomy.

A legal tradition can never be *wholly* understood because it is not static, but constantly changing.<sup>4</sup> A tradition’s essential components change more slowly and, therefore, are more constant. This approach builds on the concept of a legal tradition, which sees legal systems more as mosaics of various threads of normative information as opposed to artificially static closed entities.<sup>5</sup>

### B. *A Synthesis of Existing Methodologies*

The essential components methodology synthesizes several comparative theoretical approaches, and emphasizes cultural comparison, epistemology, and legal history as important aspects of comparison.<sup>6</sup>

#### 1. Tracing Historical Sources of Legal Rules

Many comparatists emphasize legal history in the comparative process.<sup>7</sup> It is indisputable that “research on historical lines is one of the

---

3. Öricü, *supra* note 2, at 363 (advocating analysis of “constituent elements” of legal systems, and “regroup[ing] legal systems on a much larger scale according to the predominance of the ingredient sources from whence each system is formed”).

4. See Mark Van Hoecke, *Deep Level Comparative Law*, in VAN HOECKE, *supra* note 2, at 173.

5. H. Patrick Glenn, *Comparative Legal Families and Comparative Legal Traditions*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW § II, at 425-26 (Mathias Reimann & Reinhard Zimmermann, eds., 2d ed. 2019) [hereinafter REIMANN & ZIMMERMAN]; JOHN H. MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA 2 (3d ed. 2007).

6. See Geoffrey Samuel, *Common Law*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 170 (Jan M. Smits ed., 2d ed. 2012) (using “[h]istory, method, mentality and taxonomy” to explain the common law tradition) [hereinafter SMITS].

7. See, e.g., James Gordley, *Comparative Law and Legal History*, in REIMANN & ZIMMERMAN, *supra* note 5. See also ALAN WATSON, THE EVOLUTION OF LAW I (1985) (“one cannot understand legal development in general without a new look at the history of individual legal changes”); Joachim Zekoll, *Comparative Civil Procedure*, in REIMANN & ZIMMERMAN, *supra* note 5, § II.1, at 1308 (“a historical examination of the specific structure of a procedural system, or, by extension, of the differences between procedural systems that continue to exist, remains a particularly useful tool for understanding the procedural features and preferences of any given regime”).

indispensable tools of a comparative lawyer.”<sup>8</sup> History facilitates understanding of a legal culture’s various aspects, as legal communities are trained to accept historically-derived normative values.<sup>9</sup>

Legal history highlights the dynamic ever-changing nature of legal systems that support a normative-based legal tradition approach. As one scholar explained: “The law of a given country [] is not a unified system but an amalgam of solutions to problems faced in the past.”<sup>10</sup> In discussing legal traditions, H.P. Glenn asserted that “pastness” is an essential element of legal traditions because traditions necessarily require transmission of information from the past.<sup>11</sup> The epistemology-based approach to comparative law also acknowledges that a legal system’s essence is the transmission of legal knowledge from one generation to another.<sup>12</sup> Cultural comparatists interested in understanding a legal culture, and how that culture views its laws, also emphasize the importance of legal history, as “[i]nner perspectives develop over time.”<sup>13</sup> Because the essential components of a legal system have historical origins, historical analysis is central to uncovering them.

## 2. Cultural Comparison and Essential Components

Comparatists interested in legal culture situate a legal system’s rules within a larger context that considers “a more general consciousness or experience of law that is widely shared by those who inhabit a particular

---

8. H. C. GUTTERIDGE, *COMPARATIVE LAW: AN INTRODUCTION TO THE COMPARATIVE METHOD OF LEGAL STUDY & RESEARCH* 28-29 (1946). *See also* KONRAD ZWEIGERT & HEIN KÖTZ, *AN INTRODUCTION TO COMPARATIVE LAW* 8 (Tony Weir trans., 3d ed. 1998).

9. *Accord* John C. Reitz, *How To Do Comparative Law*, 46 *AM. J. COMP. L.* 617, 632 (1998) (“[i]n-depth knowledge of the history of the country and its peoples and its philosophical and religious traditions is necessary to understand the indigenous forms of legal reasoning and value judgments”).

10. Gordley, *supra* note 7, § II(2), at 762 (“[t]he corresponding mistake for comparative lawyers is to assume that the law of each modern jurisdiction forms a coherent system rather than an amalgam of solutions developed over time”).

11. GLENN, *supra* note 2, at 5-6.

12. *See* GEOFFREY SAMUEL, *EPISTEMOLOGY AND METHOD IN LAW* 83 (2003) (codes are “the means by which legal knowledge is transmitted from one generation to another”).

13. James Q. Whitman, *The Neo-Romantic Turn*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 329 (Pierre Legrand & Roderick Munday, eds., 2003) [hereinafter *LEGRAND & MUNDAY*].

legal environment.”<sup>14</sup> Cultural comparatists believe that “much more than legal rules needs to be subjected to comparison.”<sup>15</sup> They look at “identifying elements” of a legal culture, including legal institutions and players, legal behavior, and “more nebulous aspects of ideas, values, aspirations and mentalities.”<sup>16</sup> This approach emphasizes difference over similarity by utilizing the presumption that “different categories [of thought] undergird each legal culture.”<sup>17</sup> In short, “[t]he comparativist should understand not merely rules but also underlying principles.”<sup>18</sup>

Cultural comparatists assert that “those who participate in law, especially lawyers, look out at the world from inside a legal culture that shapes all their legal perceptions and differentiates these from the perceptions of people who are not a part of the same culture.”<sup>19</sup> These comparatists see many aspects of a legal tradition as important, including “a vast store of passively acquired familiarity with our history, society, economy and institutions of government.”<sup>20</sup> These factors “shape the individual’s mentalité,”<sup>21</sup> that is, the fundamental way actors within that tradition conceive of the law.

When comparing common law and civil law traditions, cultural comparatists emphasize “[c]ommon law is not a deviation from the civilian tradition which will be reabsorbed into it; rather it represents a separate legal culture that reflects distinctive national traditions, a culture formed from a collective will to express a unique and complex historical

---

14. Roger Cotterrell, *Comparative Law & Legal Culture*, in REIMANN & ZIMMERMAN, *supra* note 5, § I, at 711.

15. *Id.* § I, at 711. *See also* Annelise Riles, *Comparative Law and Socio-Legal Studies*, in REIMANN & ZIMMERMAN, *supra* note 5, § VI(6), at 791 (cultural comparatists “have made an important contribution to comparative legal theory and methodology by dislodging functionalist, instrumentalist understandings of law . . . and by emphasizing instead a highly contextual, interpretive approach”); Nikolas Roos, *NICE Dreams and Realities of European Private Law*, in VAN HOECKE, *supra* note 2, at 215 (“[b]ecause of their instrumentalist view of law, legal functionalists tend to ignore differential cultural values ‘behind’ the law (or its absence)”).

16. David Nelken, *Legal Culture*, in SMITS, *supra* note 6, at 482 (citations omitted).

17. Vivian Grosswald Curran, *Cultural Immersion, Difference and Categories in U.S. Comparative Law*, 46 AM. J. COMP. L. 43, 45 (1998). Also discussed at Cotterrell, *supra* note 14, § II, at 711-13.

18. Cotterrell, *supra* note 14, § V, at 721-22.

19. *Id.* § V, at 722.

20. JOHN HENRY MERRYMAN, *THE LONELINESS OF THE COMPARATIVE LAWYER AND OTHER ESSAYS IN FOREIGN AND COMPARATIVE LAW* 10 (1999).

21. JOHN BELL, *FRENCH LEGAL CULTURES* 15 (2001).

and social experience in law.”<sup>22</sup> For example, Pierre Legrand argues that the civil law and common law are fundamentally different, and asserts that a “primordial cleavage” between the two traditions exists, made up of “radical differences in the nature of legal reasoning, the significance of systematisation, the character of rules, the role of facts, and the meaning of rights.”<sup>23</sup>

Cultural comparatists reject the functionalist presumption that harmonization or unification “is a self-evidently good thing,”<sup>24</sup> and celebrate diversity in law.<sup>25</sup> Some cultural comparatists in particular reject the functionalist comparatists’ “traditional obsession with, and concomitant search for, similarity in laws.”<sup>26</sup> They view law as a part of culture, much like a country’s language, monuments, architecture, and, therefore, as something to be preserved and celebrated as unique.<sup>27</sup> An essential component of a legal system is highly prized by the legal culture in which it is located, and therefore, analyzing the views and values of participants in a legal systems assists in unearthing essential components.

---

22. Cotterrell, *supra* note 14, § VI(2), at 727.

23. BELL, *supra* note 21, at 15 (summarizing Legrand’s views).

24. Cotterrell, *supra* note 14, § II(2), at 712; Pierre Legrand, *The Same and the Different*, in LEGRAND & MUNDAY, *supra* note 13 at 265 (explaining that accurate and nuanced comparative law “is greatly facilitated as the anticipation of sameness geared to an examination conducted on the surface level of the posited law recedes into the background to make way of receptivity to the radical epistemological diversity that undergirds the posited law’s answers across legal communities and legal traditions”). See also Günter Frankenberg, *Critical Comparisons: Rethinking Comparative Law*, 26 HARV. INT’L. L. J. 411, 453 (1985) (“[a]nalogies and the presumption of similarity have to be abandoned for a rigorous experience of distance and difference”).

25. See, e.g., GLENN, *supra* note 2.

26. Reimann, *supra* note 1, at 681. See also Fabio Morosini, *Globalization & Law: Beyond Traditional Methodology of Comparative Legal Studies and an Example from Private International Law*, 13 CARDOZO J. INT’L. & COMP. L. 541 (2005) (discussing “convergence” and “non-convergence” approaches to comparative law); Pierre Legrand, *Book Review: Torts, Edited by Walter Van Gerven*, 58 CAMBRIDGE L. J. 439, 440 (1999) (“[t]he comparatist must . . . represent a legal culture in ways which have greater hermeneutic power than is offered by the traditional rule-based model . . . .”); Gerhard Dannemann, *Comparative Law: Study of Similarities or Differences?*, in REIMANN & ZIMMERMAN, *supra* note 5, § II.2(a), at 389.

27. See, e.g., Cotterrell, *supra* note 14, § VI, at 724-730.

### 3. Essential Components Manifested in Legal Reasoning

Epistemologists emphasize the legal reasoning structures underlying a legal system.<sup>28</sup> Legal reasoning includes both the actual and formal mental processes involved in legal decision-making and “argumentation by means of which a legal conclusion is supported.”<sup>29</sup> These scholars look to the reasoning models of legal systems to understand them, as opposed to the rules that such reasoning produces.<sup>30</sup> Epistemologists seek to move away from a rule-based understanding of law and see rule-based comparisons as fundamentally lacking. William Ewald argues that “the comparative study of the intellectual conceptions that underlie the principal institutions of one or more foreign legal systems” is more helpful than isolated rules.<sup>31</sup>

Essential components are manifested in “internal structures of legal knowledge” used in a legal system.<sup>32</sup> This approach assumes that “[l]egal systems are systems founded on normative beliefs and those beliefs serve as guides to actions,” hence, “[a] description of any system that was not also a system of its ‘inner’ justificatory beliefs could accordingly never be fully adequate.”<sup>33</sup> To get to a legal culture’s “legal consciousness,” one must get to a “set of premises about the salient features of the legal order, especially the historical background of the legal process, the institutional apparatus, and the conceptual tools devised by lawyers, judges and commentators.”<sup>34</sup> Hence, analyzing legal reasoning structures in which a

---

28. Whitman, *supra* note 13, at 343 (“‘Law’ is best thought of as an activity that aims at normative justification of certain human acts and of the exercise of the authority of some humans over others”).

29. Jaap Hage, *Legal Reasoning*, in SMITS, *supra* note 6, at 521.

30. See, e.g., William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 U. PA. L. REV. 1889, 1947, 1949 (1995) (a legal system’s “cognitive structure” is very important and “what gives meaning to the legal enterprise across cultures and over time—is not so much the black-letter solutions as the cognitive struggle itself and the efforts by jurists, over time, to deepen their understanding of law and what it requires”); Samuel, *supra* note 12, at 15.

31. Ewald, *supra* note 30, at 2114.

32. See Geoffrey Samuel, *Comparative Law and Jurisprudence*, 47 INT’L. & COMP. L. Q. 817, 817 (1998); Van Hoecke, *supra* note 4, at 191 (“comparative law research may only be carried out meaningfully if it also includes the deeper level of underlying theories and conceptions”).

33. Whitman, *supra* note 13, at 335.

34. Ugo Mattei, *Comparative Law and Critical Legal Studies*, in REIMANN & ZIMMERMAN, *supra* note 5, § III(4), at 818.

legal rule operates elucidates the essential components to which the rule is tied.

#### 4. Essential Components and Harmonization

Legal rules with incompatible underlying essential components cannot be harmonized. Reception of a foreign legal rule requires that the rule must be integrated into the receiving country's legal culture's values and legal reasoning structures. This cannot occur if the receiving system's essential components are incompatible with the essential components underlying the foreign rule. We will either see outright rejection, as we did in the examples discussed below, or at a minimum, the receiving system will morph the rule into something that looks very different than the foreign rule prior to reception.

Many theories have emerged regarding how traditions harmonize with each other.<sup>35</sup> "Legal autonomists," including Alan Watson and William Ewald, believe that laws transfer freely across legal systems with little to no impact on economic and social contexts of the receiving state.<sup>36</sup> Other theorists use concepts such as "legal irritants" or "legal translations" to highlight difficulties in transferring legal rules based on differing social or cultural contexts in which the rules must function. These theorists emphasize connections between laws and the receiving state's economic and social landscape and legal reasoning structure.<sup>37</sup> Where a rule is more closely connected to societal, economic, political, or cultural values, transfer of such a rule from one legal system to another is increasingly difficult.

Harmonization of civil procedure rules is particularly difficult given civil procedure rules' close link with court structures,<sup>38</sup> legal traditions' philosophies regarding the judge's role and fundamental tenets regarding

---

35. See Michele Graziadei, *Comparative Law, Transplants, and Receptions*, in REIMANN & ZIMMERMANN, *supra* note 5.

36. See, e.g., WATSON, *supra* note 7, at 77-89; William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 489 (1995).

37. Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MODERN LAW REVIEW 11, 12, 19 (1998). See also Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L. L. J. 1 (2004).

38. See C.H. (Remco) van Rhee and Remmee Verkerk, *Civil Procedure*, in SMITS, *supra* note 6, at 149.

the administration of justice generally.<sup>39</sup> Where a rule represents ideological roots of a legal tradition, it is not likely to harmonize with a rule that is tied to fundamentally different ideological roots of another legal tradition. Joachim Zekoll posits that some procedural rules are “central principles of a judicial system” and, therefore, relatively “entrenched” in their respective legal systems and less resistant to change than less central legal rules.<sup>40</sup>

### III. FLEXIBILITY AND PREDICTABILITY AS DIVERGING ESSENTIAL COMPONENTS

Flexibility and an emphasis on fact-specific justice is an essential component of the common law tradition manifested in history, culture, and legal reasoning of the U.S. legal system. Conversely, the civil law tradition values predictability as a way to protect litigants, as evidenced by the history, culture, and legal reasoning of the French legal system. This Part explores the presence of these conflicting essential components in the United States and France.

#### A. *Historical Analysis of Flexibility as an Essential Component of the Common Law*

In the late eleventh century, the Norman conquerors of England established a centralized administration of justice that included judicial procedures, substantive law and remedies applicable to “all Englishment,” i.e., the common law.<sup>41</sup> This “common law” eventually replaced feudal courts and rules present during the early period of English legal history (approximately 1066-1258).<sup>42</sup> Common law courts initially had “wide discretionary powers” as offshoots of the crown’s broad and

---

39. See Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union*, 7 COLUM. J. EUR. L. 63, 81 (2003) (“the differing roles of procedure in the civil and common-law systems are sufficiently embedded in their respective legal cultures as to make a change of stature for procedure in civil-law legal culture likely either to be profoundly upsetting to substantive civil-law tenets, or else likely to overlook much of what might be categorized as procedural”); Lorna E. Gillies, *Appropriate Adjustments Post Brexit: Residual Jurisdiction and Forum Non Conveniens in UK Courts*, J.B.L. 2020, 3, 161-183, 164 (“residual jurisdiction rules reflect national values”).

40. Zekoll, *supra* note 7, § III.3, at 1328-29.

41. MERRYMAN & PÉREZ-PERDOMO, *supra* note 5, at 50.

42. *Id.*; David Raack, *A History of Injunctions in England Before 1700*, 61 IND. L. J. 539, 541 (1986).

flexible power.<sup>43</sup> However, common law courts eventually developed rigid and inflexible rules.<sup>44</sup> The writ system required each case to fall within a certain category of writ, thereby confining the scope of adjudication.<sup>45</sup> Common law courts were void of judicial discretion and used “fixed” and “iron” rules.<sup>46</sup>

Parties often lost in common law courts because of “technical errors, because witnesses had been bribed, because of tricks of procedure, or because of the opponent’s political influence.”<sup>47</sup> Losing parties could petition the crown “for an order compelling his adversary to do as morality and good conscience, if not the strict rules of the Common Law, required.”<sup>48</sup> The crown transmitted these petitions to the chancellor, “his highest administrator officer,” also termed “keeper of the King’s conscience.”<sup>49</sup> Chancellors were usually bishops, who decided petitions much like ecclesiastic courts that existed at the time, by searching and acting upon the defendant’s conscience.<sup>50</sup> Eventually, “the term ‘conscience’ [] became associated with equity,” petitions were addressed directly to chancellors, and in the fourteenth century, equity courts were born.<sup>51</sup>

Equity courts’ hallmark was flexible substantive and procedural law, largely developed to conform to each case before the chancellor and ensure justice was done. Equity courts were not tied down by rigid rules but utilized “rules of equity and good conscience,” which resulted in vast judicial discretion.<sup>52</sup> Chancellors possessed extraordinary remedial

---

43. *Id.* at 544.

44. THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 145-46 (2d ed. 1936); Raack, *supra* note 42, at 551-553; George Burton Adams, *The Origin of English Equity*, 16 COLUMBIA L. REV. 87, 96 (1916).

45. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 915-16 (1987).

46. F. MAITLAND, EQUITY, ALSO THE FORMS OF ACTION AT COMMON LAW 298 (1926). *See also* Subrin, *supra* note 45, at 917-18.

47. ZWEIGERT & KÖTZ, *supra* note 8, at 187. *See also* Subrin, *supra* note 45, at 917.

48. ZWEIGERT & KÖTZ, *supra* note 8, at 187.

49. *Id.*

50. Subrin, *supra* note 45, at 919; ZWEIGERT & KÖTZ, *supra* note 8, at 187.

51. *See* Subrin, *supra* note 45, at 919; Adams, *supra* note 44, at 89.

52. ROSCOE POUND & THEODORE F. T. PLUCKNETT, READINGS ON THE HISTORY AND SYSTEM OF THE COMMON LAW 210 (1927); Lambarde, *Archeion*, 74-75 (1635), *cited in* MILSOM, S.F.C. HISTORICAL FOUNDATIONS OF THE COMMON LAW 94, n.1 (2d ed. 1981); HAROLD POTTER, A SHORT OUTLINE OF ENGLISH LEGAL HISTORY 259-60 (3d ed. 1933) (“it is thought as hard a thing to prescribe to *Equitie* any certaine bounds, as it is to make any one generall Law to be a meet

powers, including the power to order a defendant to do or not do an act.<sup>53</sup> Equity's use of equitable principles and ability to order flexible injunctive remedies were based on the principle that "[t]he aim of the equity courts was to make the [defendant] *do* what was right."<sup>54</sup>

The Judicature Act of 1873 merged equity and common law courts into a single high court.<sup>55</sup> The Act required that judges of all divisions apply both law and equity, and in the event of a conflict, the Act directed courts to apply equity.<sup>56</sup> By the time of U.S. independence in 1776, English common law was the basis for the substantive and procedural law applied to disputes in the colonies. Lawyers and judges in the colonies were trained in England, and relied upon English treatises, caselaw, and legal principles.<sup>57</sup> A dual system of federal common law and equity courts arose in the United States, which was abolished in 1938. The Federal Rules of Civil Procedure established "[t]here is one form of action—the civil action," which included "actions at law or suits in equity."<sup>58</sup> Judges in the merged courts retained the power to make and apply equitable law and principles and equitable remedial powers.<sup>59</sup> Equity's influence prior to the 1938 merger is still seen today in underlying assumptions regarding

---

measure of *Justice* in all particular cases"); FREDERIC W. MAITLAND & FRANCIS C. MONTAGUE, A SKETCH OF ENGLISH LEGAL HISTORY 125 (1915). See MERRYMAN & PÉREZ-PERDOMO, *supra* note 5, at 51; J. A. JOLOWICZ, ON CIVIL PROCEDURE 25 (2000).

53. Earl of Oxford's Case (1615) 21 Eng. Rep. 485, 487 (Ch.) ("When a judgment [of the Common Law Courts] is obtained by oppression, wrong and a hard conscience, the Chancellor will frustrate and set it aside, not for any error or defect in the judgment, but for the hard conscience of the party").

54. FREEMAN OLIVER HAYNES, OUTLINES OF EQUITY 22 (1858).

55. Supreme Court of Judicature Act 1873, 36 & 37 Vict., c. 66 (Eng.).

56. *Id.* § 25(II); POTTER, *supra* note 52, at 127-129. See, e.g., *Harris v. Beauchamp Bros* [1894] 2 Q.B. 648 (Eng.).

57. ZWEIGERT & KÖTZ, *supra* note 8, at 220; Herbert Pope, *The English Common Law in the United States*, 24 HARV. L. REV. 6 (1910). See also *Poor v. Green*, 5 Binney 554, 558 (Pa. 1813) (describing U.S. law as "composed partly of the Common Law of England and partly of our own usages."); Graham Hughes, *Common Law Systems*, in FUNDAMENTALS OF AMERICAN LAW 12, 13 (Alan B. Morrison ed., 1996) ("[t]he content and method of the common law were absorbed into American social culture and have never been displaced" and although there are differences in English and U.S. common law, "[w]hat is more important is the continued uniformity of common law techniques of litigation and decision-making").

58. Fed. R. Civ. P. 2 1937 advisory committee note 2.

59. See *Fischer v. Excess Ins. Co. of Am.*, 31 F. Supp. 651, 654 (D.C. Iowa 1940) ("[u]nder the Rules of Civil Procedure this Court may now in any 'civil action' exercise its full equity powers, and might possibly under either of two hypotheses grant relief").

the need for judicial discretion and broad remedial powers to ensure equitable results in specific cases.<sup>60</sup>

The common law values judicial discretion as protecting litigants' rights. As stated by one American scholar: "the judiciary can, as lawmaker, serve vitally important functions, [including] the protection of individuals and minorities" and "[t]he judiciary cannot protect the interests of the individual common man unless it can redefine the protections of the Constitution and the common law."<sup>61</sup> Judicial discretion is a highly prized value in the common law. "Americans, as well as Britons, point with pride to the judicial creativity represented by accretions of case law centuries old that gradually have evolved and adapted to the changing requirements of a modern economy and society."<sup>62</sup>

#### B. *History and Predictability in the Civil Law Tradition*

Prior to the French Revolution, French courts were localized arms of the aristocracy. Judges wielded immense power and viewed their office as a "property right, a part of their estate' owned by them 'by the same title as they held their houses and lands.'"<sup>63</sup> Judgeships were bought, sold, inherited and even rented out; the result being exploitation of the office to the detriment of litigants.<sup>64</sup> The French Revolution was based on the idea that the individual was paramount and sought to replace the aristocratic hierarchy with liberty and equality of individuals.<sup>65</sup> To this end, only the elected legislature could make law, keeping the creation of law in the peoples' hands.<sup>66</sup> "When the Revolution came, the aristocracy fell, and

---

60. See, e.g., *Kansas v. Colorado*, 206 U.S. 46, 97 (1907) ("the common law is but the accumulated expressions of the various judicial tribunals in their effort to ascertain what is right and just between individuals in respect to private disputes").

61. LOUIS L. JAFFE, *ENGLISH AND AMERICAN JUDGES AS LAWMAKERS* 32, 33 (1969).

62. ARTHUR T. VON MEHREN & PETER L. MURRAY, *LAW IN THE UNITED STATES* 275 (2d ed. 2007).

63. MAURO Cappelletti, *THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE* 125 (1989) (citations omitted).

64. *Id.*; Vernon Valentine Palmer, *From Embrace to Banishment: A Study of Judicial Equity in France*, 47 *AM. J. COMP. L.* 277, 280-81 (1999).

65. MERRYMAN & PÉREZ-PERDOMO, *supra* note 5, at 16.

66. See John Henry Merryman, *The French Deviation*, in MERRYMAN, *supra* note 20, at 168 ("The popularly elected legislature make the law, which the courts accepted and applied without question"); *Déclaration des droits de l'homme et du citoyen de 1789*, Article VI ("[l]a loi est l'expression de la volonté générale").

with it fell the aristocracy of the robe.”<sup>67</sup> This included abolishing the judiciary’s ability to make law in the absence of any legislative boundaries.<sup>68</sup>

As explained by John Dawson “[t]he leaders of the French Revolution soon undertook the urgent task of subjugating the judiciary.”<sup>69</sup> Hence, “the function of the judge would be limited to selecting the applicable provision of the code and giving it its obvious significance in the context of the case.”<sup>70</sup> The code was designed to “be general in order to cover all sorts of situations but detailed enough so that the intervention of the courts was as little necessary as possible.”<sup>71</sup> The doctrine of *stare decisis*, which requires courts to follow previous caselaw as a primary source of law, was rejected in Article 5 of the French Civil Code, which states: “The judges are forbidden to pronounce, by way of general and legislative determination, on the causes submitted to them.”<sup>72</sup>

One consequence of this prohibition stripping judge’s lawmaking power was the death of overt judicial equity.<sup>73</sup> In contrast to the motivations behind the French code, in England, the development of the common law was an *embrace* of past practices and the court as an organ

---

67. MERRYMAN & PÉREZ-PERDOMO, *supra* note 5, at 16.

68. See Jacqueline Lucienne Lafon, *France*, in THE GLOBAL EXPANSION OF JUDICIAL POWER 289-91 (C. Neal Tate & Torbjorn Vallinder eds., 1995) (a judge was “not to criticize the law, he was not to interpret it. Should he consider it not precise enough, he had to refer it to the legislative power, that is, the national assembly . . . Hence, the judge was not to create law”); JOHN DAWSON, THE ORACLES OF LAW 376 (1986) (“[c]ourts were denied all power ‘to make regulations’ (*réglements*) but were ‘to address themselves to the legislature whenever they think it is necessary either to interpret a law or to make a new one’ . . . distrust of the judiciary played as large a part as the dictates of Montesquieu’s logic in producing this strict separation of government powers, which was to remain a basic feature of French judicial organization”) (citing Law of Aug. 16-24, 1790, Title II, art. 12); CAPPELLETTI, *supra* note 63, at 126 (the judge “performed the sole task of applying the letter of the law in individual cases—a task conceived as purely mechanical and in no way creative. The legislature, therefore, as the voice of popular sovereignty, was seen as the best guarantor of fundamental rights”).

69. See DAWSON, *supra* note 68, at 375.

70. MERRYMAN & PÉREZ-PERDOMO, *supra* note 5, at 30.

71. JOHN BELL ET AL., PRINCIPLES OF FRENCH LAW 23 (2d ed. 2008).

72. Code civil [C. civ.] [Civil Code] art. 5 (Fr.) (“il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises”). See also BELL ET AL., *supra* note 71, at 29 (“article 5 of the Civil Code [] prohibits judges from making regulatory decisions [or] decisions with general legislative effect”).

73. See Palmer, *supra* note 64, at 293 (“the exorbitant legislative powers of the Parlements were cleanly guillotined . . . But they threw out the baby with the bathwater: judicial equity was eliminated too”).

of the Crown.<sup>74</sup> The common law views judicial discretion as protecting litigants' rights, the civil law views limiting judicial discretion as protecting them.<sup>75</sup>

C. *Flexibility and Predictability Lead to Divergent Legal Reasoning and Legal Cultural Values*

While the common law utilizes precedent-based reasoning, which emphasizes fact-specific equities over black letter law, the civil law uses syllogistic code-based formal legal reasoning. Although judges in both traditions consider fact-specific equities and are practically constrained by statute and precedent, formal presentation of reasoning remains divergent. Common law judges openly create binding precedent to account for fact-specific equities, while civil law judges formally work within the structure of statutory interpretation. Common law judges overtly contour law to fit the specific facts with judge-made multi-factor tests and utilize policy and equity arguments.<sup>76</sup> “Balancing is inherently consonant with the common law in much the same way as categorization is with the civil law. Balancing presents some methodological opportunities that suggest it to the common law mind. Balancing offers an opportunity for a judge to tailor the law to a particular litigation.”<sup>77</sup>

---

74. See MERRYMAN & PÉREZ-PERDOMO, *supra* note 5, at 26 (“[the common law] has deep historic dimensions and is not the product of a conscious revolutionary attempt to make or restate the applicable law at a moment in history”).

75. CAPPELLETTI, *supra* note 63, at 198 (“in contrast to *ancien régime* in France, there have been no deep popular feelings in England against the judiciary, whose historical role in protecting individual liberties has generally enjoyed widespread respect”); Charles H. Koch Jr., *Envisioning a Global Legal Culture*, 25 MICH. J. INT'L. L. 1, 56-57 (2003) (while “the civil law reflects a distrust of elitist courts,” “[U.S.] courts have more often been the vehicle of progress and protection of individual rights”); MITCHEL LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY 1 (1995) (“[i]n the United States, legal theory has long associated transparently reasoned individual opinions with judicial control and accountability, democratic debate and deliberation, and ultimately, judicial legitimacy itself”); JAFFE, *supra* note 61 at 32, 33.

76. VON MEHREN & MURRAY, *supra* note 62, at 40; Lord Goff of Chieveley, *The Wilberforce Lecture 1997: The Future of the Common Law*, 46 INT'L. & COMP. L. Q. 745, 753 (Oct. 1997) (“we tend to reason *upwards* from the facts of the cases before us where our continental colleagues tend to reason *downward* from abstract principles embodied in the code”).

77. Koch, *supra* note 75, at 44-45.

This can be described as “inductive” or “discursive” common law reasoning versus “deductive” or “syllogistic” civil law reasoning.<sup>78</sup> Precedent-based reasoning necessarily involves reasoning by analogy, which is incongruent with syllogistic formal legal reasoning.<sup>79</sup> Common law scholars and judges have abhorred certainty for certainty’s sake as both unrealistic and counter to the law’s natural evolution in response to societal changes. As stated by Justice Cardozo: “Overemphasis of certainty may carry us to the worship of an intolerable rigidity. If we were to state the law today as well as human minds can state it, new problems, arising almost overnight, would encumber the ground again . . . . The law, like the traveler, must be ready for the morrow. It must have a principle of growth.”<sup>80</sup>

The civil law’s code-based legal reasoning, stemming from a restriction on judicial discretion, reflects an emphasis on formalism and predictability.<sup>81</sup> In direct contradiction to the flexible unfettered equitable jurisdiction of common law judges, judges in the civil law tradition officially possess only the ability to apply statutory law to a case before them. Although both doctrine and precedent are functionally important in

---

78. See Robert S. Summers, *Precedent in the United States (New York State)*, in INTERPRETING PRECEDENTS: A COMPARATIVE STUDY 361 (D. Neil MacCormick & Robert S. Summers eds., 1997) [hereinafter MACCORMICK & SUMMERS]; H el ene Guademet-Tallon, *De quelques raisons de la difficult e d’une entente au niveau mondial sur les r egles de comp etence judiciaire internationale directe*, in LAW AND JUSTICE IN A MULTISTATE WORLD: ESSAYS IN HONOR OF ARTHUR T. VON MEHREN § 1B, at 62-63 (James A.R. Nafziger & Symeon C. Symeonides eds., 2002) (noting that in the common law, “[l]a m ethod e est inductive: on part de chaque esp ece pour trouver la solution correcte,” while in the civil law, “[l]a m ethod e est d eductive : on part de la norme pour l’appliquer  a telle ou telle affaire.”); BENJAMIN CARDOZO, GROWTH OF THE LAW 16-17, 22-23 (1924).

79. Samuel, *supra* note 6, 176-177. See also Curran, *supra* note 39, at 75 (“the common law perpetually is in flux, always in a process of further becoming, developing, and transforming, as it cloaks itself with the habits of past decisions, tailored to the lines of the pending situation . . . . The common law is the analysis of the particular because common-law rules derive from a series of unique life experiences, by definition not amenable to exact repetition.”); Lord Goff of Chieveley, *supra* note 76, at 753 (“[c]ommon lawyers tend to proceed by analogy, moving gradually from case to case”); LLOYD L. WEINREB, LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT (2005).

80. CARDOZO, *supra* note 78, at 19, 21. Konrad Zweigert & Hans-J urgen Puttfarcken, *Statutory Interpretation—Civilian Style*, 44 TUL. L. REV. 704 (1970).

81. See Samuel, *supra* note 6, § 2.5, at 152 (“[a]lthough the ideal of certainty has been used for a variety of purposes, its most important application is a reflection of the distrust of judges. Judges are prohibited from making law in the interest of certainty.”).

civil law systems, they are not formally recognized as sources of law.<sup>82</sup> Practically speaking, civil law judges utilize caselaw, and recognize the doctrine of “*jurisprudence constante*,” which allows judges to give weight to previous interpretations of a rule before the court, but does not require them to follow it.<sup>83</sup> Importantly, although civil law judges may utilize caselaw, they do not utilize the same *reasoning structure* when utilizing it.<sup>84</sup> The French term “*precedent*” “does not mean a binding decision because courts are never bound by precedents.”<sup>85</sup> It refers to either Cour de Cassation decisions that should be followed for the sake of consistency or lower court decisions in a similar case that may be referred to when determining a case.<sup>86</sup>

Civilian judges play an important role in creating law by interpreting code provisions, however, they situate decisions within legislative mandates.<sup>87</sup> Judicial discretion and equitable considerations occurs either privately outside the formal reasoning structure seen in the judicial

---

82. Bernard Rudden, *Courts and Codes in England, France and Soviet Russia*, 48 TUL. L. REV. 1010, 1012 (1974) (the Cour de Cassation “never, of course, openly admits to flouting [the rule against judge-made law], and [] the majority of French jurists still hold the view that the court is not a source of law”); BELL ET AL., *supra* note 71, at 14.

83. See Wayne R. Barnes, *Contemplating a Civil Law Paradigm for a Future International Commercial Code*, 65 LA. L. REV. 677, 725 (2005) (“[w]hereas a single court decision is no authority at all in a civil law system, but is rather only an illustration of that court’s opinion of the correct solution to be deducted from the code, a series of decisions which reach the same result by the same deductive process in the same or similar situation will eventually attain a much higher level of persuasiveness than that of a single decision. This is *jurisprudence constante*.”); Michel Troper & Christophe Grzegorzcyk, *Precedent in France*, in MACCORMICK & SUMMERS, *supra* note 78, at 128.

84. See Aleksander Peczenik, *The Binding Force of Precedent*, in MACCORMICK & SUMMERS, *supra* note 78, at 461 (“in countries of the European continent, precedent is not thus formally binding, yet it is a fact that precedents are regularly followed by the courts”).

85. Troper & Grzegorzcyk, *supra* note 83, at 127 (in France, “[p]recedent is never officially binding”).

86. *Id.* at 111.

87. See RENÉ DAVID, *FRENCH LAW: ITS STRUCTURE, SOURCES, AND METHODOLOGY* 155 (1972) (“judges . . . are statutorily required to state the grounds for their decisions and hardly ever fail to base them on legislative texts. They seldom rely on other sources of law. In reading their opinions, one therefore gets the impression that . . . legislation is the sole source of legal rules”); CAPPELLETTI, *supra* note 63, at 8 (“a judge who is bound to precedents and/or legislation must at the very least refer his arguments to such pre-established law”); Zenon Bankowski et al., *Rationales for Precedent*, in MACCORMICK & SUMMERS, *supra* note 78, at 484 (“[n]otwithstanding the early hopes of revolutionary codifiers, all codified systems have for long fully acknowledged the need for interpretation, for it is necessary to resolve emerging ambiguities, obscurities and indeterminacies in the provisions of the codes”).

opinion, or within the formal reasoning structure of statutory interpretation.<sup>88</sup> Civil law judges consider equitable and substantive arguments in pre-judgment judicial deliberations and through the use of scholarly works outside the four corners of the judicial opinion. Avenues for such considerations in the French judiciary include academic doctrine, such as the notes that accompany cases, as well as Advocate-Generals and reporting judges prior to the formal issuance of an opinion.<sup>89</sup> Advocate-Generals are judicial magistrates who appear before the Cour de Cassation in an “*amicus curiae* capacity . . . on behalf of the public welfare, society’s interest and the proper application of the law.”<sup>90</sup> The Advocate-General provides recommendations to the court after the parties have completed their arguments. The Cour de Cassation utilizes a reporting judge, “who is assigned primary responsibility, in any given case, to review the lower court records, formulate and research the legal issues, suggest a solution to the case, and draft the Cour’s judgment.”<sup>91</sup> For each case, the reporting judge provides a lengthy *rapport*, a document that includes a fact section and procedural history, legal analysis, including precedent, doctrine and legislation, and a proposed approach. The reporting judge submits one report in support of a decision affirming the appellate court decision and one in support of reversal.<sup>92</sup>

The reporting judge also drafts *projets d’arrêts*, draft judgments based on various approaches the court could take, representing the “innumerable interpretive roads not taken” in any given case.<sup>93</sup> These magistrates play a central role in the court’s deliberation, and show judicial discretion exercised in the weighing of various policy and legal concerns when deciding a case. Because these are generally private documents not available to the public, this process is “unofficial” and not part of the formal judicial reasoning.<sup>94</sup> Scholars’ interpretation of French judicial opinions, termed “doctrine” in the form of “notes” following

---

88. See CAPPELLETTI, *supra* note 63, at 51 (“this is not to say that the body of doctrines developed by higher court judges in civil law countries is not influential and creative. Yet their creativity is, on the whole, more hidden, anonymous, and diluted than that of higher court judges in the common law countries”).

89. See LASSER, *supra* note 75, at 61.

90. *Id.* at 47.

91. *Id.* at 48.

92. *Id.* at 49-50.

93. *Id.* at 52.

94. *Id.* at 48-49.

published opinions, also play a “central role” in French law.<sup>95</sup> French practitioners rely on these academic writings to “access and make sense” of terse French opinions.<sup>96</sup>

Although judicial discretion exists in the “unofficial portrait” of French law, the “official portrait” is one of syllogistic statutory interpretation without room for judicial discretion. In this way, the modern-day French judicial system represents the values underlying the French Revolution.<sup>97</sup> This is manifested in relatively short opinions with very few facts and little to no reasoning provided to justify the decision.<sup>98</sup> Cour de Cassation opinions “make[] no effort to present countervailing arguments or to address alternative points of view,” and are described as “intensely non-dialogic.”<sup>99</sup> The opinion, therefore, “effectively denies access to anything but the numerical citation and the syllogistic application of the codified law.”<sup>100</sup>

Many scholars point to a converging *in practice* of judicial discretion in the civil and common law as the use of precedent rises in the civil law, and codes and statutes proliferate in the common law.<sup>101</sup> A degree of judicial creativity and tacit reliance on precedent are

---

95. *Id.* at 40. *See also* Troper & Grzegorzcyk, *supra* note 83, at 129 (discussing importance of doctrine in examining trends in law, principles underlying precedent and influencing lawmakers and judges); Koch, *supra* note 75, at 32 (“[i]n a code system, judicial interpretations are overshadowed by the interpretations of the scholars and academic lawyers called ‘jurists.’ Scholars are a crucial source of interpretation.”).

96. LASSER, *supra* note 75, at 40, 47.

97. *See id.* at 60-61, 171, 181, 322 (“This image of the French judicial role has been scrupulously maintained for some two hundred years” and “[t]he core of the French judicial system lies in the establishment of a distinctly republican vision of elite and sheltered judicial debate and deliberation”). Regarding the structure of French judicial opinions, Lasser notes “[t]his paradigmatic form has existed unchanged since the Revolution” and “[t]he formal, single-sentence structure of the French judicial decision limits or constrains what can be written in the body of the judgment.” *Id.* at 33.

98. *See* Rudden, *supra* note 82, at 1022 (“[t]he very act of decision implies a choice; but the French grammatical technique enables the judge to conceal this”).

99. LASSER, *supra* note 75, at 33.

100. *Id.* at 34; Troper & Grzegorzcyk, *supra* note 83, at 106-107 (“[t]he character of the style of the opinions follows from the general conception of the French judge, who is supposed to exercise not ‘judicial power,’ but only a ‘judicial function’”).

101. *See, e.g.,* D. Neil MacCormick & Robert Summers, *Introduction*, in MACCORMICK & SUMMERS, *supra* note 78, at 12 (“the secular movement is toward convergence, not increased differentiation of [legal] systems”).

unavoidable aspects of a civil law judge's interpretation of the code.<sup>102</sup> Likewise common law judges' discretion is curtailed by legislative strictures and precedent. Regarding precedent in the two traditions, one scholar describes the common law and civil law approaches not as dichotomous, but on a "continuum," with both utilizing it and one emphasizing it more than the other.<sup>103</sup>

Despite the two traditions moving together in practice in some areas of law, a significant divide still exists between their differing legal reasoning.<sup>104</sup> Increased codification in areas of the common law and increased reliance on judicial discretion in the civil law have not yet permeated the fundamentally differing legal structures used in the two traditions.<sup>105</sup> We are dealing not with a *quantitative* difference in allowance of judicial discretion, but a *qualitative* difference in judicial reasoning as seen in "indisputable disparities regarding the respective conceptual tools and general structures."<sup>106</sup>

---

102. CAPPELLETTI, *supra* note 63, at 5 ("[j]udicial 'interpretation' is unavoidably creative"); Lucienne Lafon, *supra* note 68, at 293-295 (discussing practical reality that French civil judges' create of law and explaining methods they use); Pierre Legrand, *Judicial Revision of Contracts in French Law: A Case-study*, 62 TUL. L. REV. 963 (1988); VON MEHREN & MURRAY, *supra* note 62 at 40 ("factual distinctions are as important to the application of civil law principles as to the application or distinction of case law").

103. See CAPPELLETTI, *supra* note 63, at 5 ("[t]he real question is not one of a sharp contrast between (uncreative) judicial 'interpretation' on the one hand, and judicial 'law-making' on the other, but rather one of a *degree of creativity*, as well as one of the *modes*, the *limits*, and the *acceptability* of law-making through the courts"). See also Neil MacCormick & Robert Summers, *Further General Reflections and Conclusions*, in MACCORMICK & SUMMERS, *supra* note 78, at 532 ("the caricature picture of civil law systems free from the shackles of precedent in contrast to the common law enslaved in its own past . . . is certainly no longer remotely accurate, if ever it was. There is in fact no sharp dichotomy here, but a continuum").

104. See Koch, *supra* note 75, at 50 ("a sense of convergence in attention to the work of other judges does not affect the ideological distinction between judicial authority and judicial law making within the two systems"); MacCormick & Summers, *supra* note 103, at 536 ("there remain differences in the treatment of precedent of a highly important kind. Several of these are deeply engrained in the different textures of the system and especially in their styles of reasoning").

105. See Rudden, *supra* note 82, at 1019 ("[i]t is the actual words used by the judges which set the tone of the system and reveal the nature of law as a social institution").

106. Mathias Reimann, *Towards a European Civil Code: Why Continental Jurists Should Consult Their Transatlantic Colleagues*, 73 TUL. L. REV. 1337, 1342 (1999); Koch, *supra* note 75, at 40 ("[b]ecause the differences [between the common law and civil law] are so deep seated, surface convergence is not likely to relieve the basic tension between the two legal cultures").

#### IV. FLEXIBILITY AND JUDICIAL DISCRETION IN COMMON LAW TRANSNATIONAL JURISDICTION RULES

This Part illustrates that flexibility and fact-specific equity are essential components tied to common law jurisdiction rules as manifested in the U.S. courts.

##### A. *Personal Jurisdiction in U.S. Courts as the Apex of Judicial Discretion*

Judicial approaches to jurisdiction in the United States represent the zenith of judicial discretion and flexibility.<sup>107</sup> The U.S. Supreme Court stated early on in its twentieth century jurisprudence regarding jurisdiction that “[w]e must be on our guard against depriving the processes of justice of their suppleness of adaptation to varying conditions.”<sup>108</sup> Under the “minimum contacts” analysis of *International Shoe v. Washington* and its progeny, “the threshold determination of personal jurisdiction has become one of the most litigated issues in state and federal courts.”<sup>109</sup>

U.S. courts distinguish between “general” and “specific” jurisdiction over a person. General jurisdiction is based on the defendant’s relationship with the forum, and allows jurisdiction on all types of claims, whether related to the contacts or not. It is usually established by domicile or habitual residence, by “systematic and continuous contacts” with the state,<sup>110</sup> or consent.<sup>111</sup> Specific jurisdiction is based on the defendant’s “contacts” with the forum, specifically a corporate defendant’s contacts.<sup>112</sup> Generally termed “doing business” jurisdiction, this allows jurisdiction over a corporation “in which the continuous corporate operations within a state were thought so substantial and of such a nature

---

107. See ARTHUR T. VON MEHREN, ADJUDICATORY AUTHORITY IN PRIVATE INTERNATIONAL LAW: A COMPARATIVE STUDY 79 (2007).

108. *Landis v. North American Co.*, 299 U.S. 248, 256 (1936).

109. *Int’l Shoe v. Washington*, 326 U.S. 310, 316 (1945). R. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 531 (1995).

110. *Int’l Shoe*, 326 U.S. at 320. See also ANDREW BELL, FORUM SHOPPING AND VENUE IN TRANSNATIONAL LITIGATION II.1.13, at 6-7 (2003) (discussing piercing the corporate veil and the American alter ego doctrine to determine personal jurisdiction over corporate defendants).

111. Arthur von Mehren and Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1138 (1966).

112. See, e.g., *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 115 N.E. 915 (N.Y. 1917); *Int’l. Shoe*, 326 U.S. at 318.

as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.”<sup>113</sup>

Personal jurisdiction is linked to a defendant’s due process right under the U.S. Constitution,<sup>114</sup> which renders every assertion of jurisdiction debatable. When analyzing whether jurisdiction exists, a court must ask whether the assertion of jurisdiction would “offend ‘traditional notions of fair play and substantial justice.’”<sup>115</sup> To determine this, a court must analyze a nonresident defendant’s contacts with the forum state, including the quality and quantity of the contacts; as well as whether jurisdiction is “reasonable,” and consider judicially-created issues such as “purposeful availment.”<sup>116</sup> A court must assess the defendant’s contacts with the forum state and engage in a fairness analysis, considering a myriad of factors, including the plaintiff’s interest in adjudicating in the forum, the burden on the defendant, the interest of the state, and the overall effect on the efficient administration of justice.<sup>117</sup>

State codes or rules of civil procedure generally adopt a list of situations in which jurisdiction over a defendant is proper,<sup>118</sup> or simply require that jurisdiction comport with the state and U.S. constitutions.<sup>119</sup> In either case, jurisdiction must meet the fairness standard espoused in *International Shoe* to ensure the defendant’s due process rights are not being violated.<sup>120</sup>

#### B. *Concurrent Proceedings in U.S. Courts and Judicial Discretion*

Concurrent proceedings occur when a proceeding in domestic court goes forward concurrently with a proceeding in a foreign court. The default rule in U.S. courts is that two courts with jurisdiction over the same defendant should concurrently try the case until one court renders a judgment. Once a judgment is rendered, the second court should stop its proceeding, and recognize the first judgment.<sup>121</sup> The discretionary

---

113. *Int’l Shoe*, 326 U.S. at 318; *BNSF Ry. Co. v. Tyrrell*, 137 S.Ct. 1549 (2017).

114. See VON MEHREN, *supra* note 107, at 79.

115. *Int’l Shoe*, 326 U.S. at 316 (citations omitted).

116. *Hanson v. Denckla*, 357 U.S. 235 (1958).

117. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

118. See, e.g., Mont. R. Civ. P. 4(b)(1).

119. See, e.g., Cal. Civ. Proc. Code § 410.10.

120. See *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982).

121. *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456 (1939).

doctrines of forum non conveniens and anti-suit injunctions are “extraordinary” measures that a court can take when the default rule of concurrent parallel proceedings would serve an injustice in a particular case.<sup>122</sup> The United States, as a federation of states, has federalism issues that complicate jurisdiction matters. Like most aspects of jurisdiction in the United States, courts have created multi-factor fact-specific tests largely drawn from domestic doctrines to determine how to handle parallel proceedings in transnational litigation.<sup>123</sup>

Both state and federal courts have broad discretion to prevent parallel proceedings in the interest of judicial economy, fairness and comity. The U.S. Supreme Court warned that the judicial analysis when faced with concurrent proceedings is not a “mechanical checklist” or a “hard-and-fast rule for dismissals,” but requires multiple factors to be carefully balanced “as they apply in a given case.”<sup>124</sup> These factors include the inconvenience to the federal forum, the “desirability of avoiding piecemeal litigation” and “the order in which jurisdiction was obtained by the concurrent forums.”<sup>125</sup>

Additionally, U.S. courts must consider comity in transnational cases, which is “mutual courtesy or civility” between sovereigns, including their “mutual and reciprocal respect, sympathy and deference, where appropriate” between courts.<sup>126</sup> “Since comity varies according to the factual circumstances surrounding each claim for its recognition, the absolute boundaries of the duties it imposes are inherently uncertain.”<sup>127</sup>

---

122. See *Gau Shan Co., Ltd. v. Bankers Trust Co.*, 956 F.2d 1349 (6th Cir. 1992); *Colo. River Water Conservation Dist.*, 424 U.S. 800, 813 (1976); *Airbus Industrie GIE v. Patel*, [1998] 2 W.L.R. 686, [1998] 2 All E.R. 257 (UKHL) (“There is . . . no embargo on concurrent proceedings in the same matter in more than one jurisdiction. There are simply two weapons, a stay (or dismissal) of proceedings and an anti-suit injunction.”).

123. See, e.g., *Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936), *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 14 (1983); *Herbstein v. Bruetman*, 743 F. Supp. 184, 187-89 (S.D.N.Y. 1990); *Royal and Sun Alliance Insur. Co. of Canada v. Century Int’l Arms, Inc.*, 466 F.3d 88 (2d Cir. 2006). See also Paul Dubinsky, *Is Transnational Litigation a Distinct Field? The Persistence of Exceptionalism in American Procedural Law*, 44 STAN. J. INT’L L. 301 (2008).

124. *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 15-16.

125. *Id.* (citations omitted).

126. *Royal and Sun Alliance Insur. Co. of Canada*, 466 F.3d at 94 (citations omitted); THOMAS RAPHAEL, *THE ANTI-SUIT INJUNCTION* 7 (2008). See, e.g., *Ingersoll Mill. Mach. Co. v. Granger*, 833 F.2d 680 (7th Cir. 1987).

127. *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (1984).

Comity has been used both to justify concurrent parallel proceedings,<sup>128</sup> and as a justification for dismissing a case pending in a foreign court.<sup>129</sup>

C. *Forum Non Conveniens and Judicial Discretion*

Forum non conveniens is a judge-made rule that allows judges to dismiss cases they may otherwise have jurisdiction over if it would be more convenient to hear the case in another forum where concurrent proceedings are not desirable or feasible. Forum non conveniens typifies the fact-specific, judge-made, multi-factor balancing test that is unacceptable to the civil law *mentalité*.

Forum non conveniens stems from the discretionary power of a judge to decline to exercise jurisdiction he possesses.<sup>130</sup> It arose in Scotland in the late 1800s as a tool Scottish judges used to temper the effects of Scottish courts' arrestment ad jundandam jurisdiction.<sup>131</sup> Using this arrestment jurisdiction, Scottish courts could attach and seize a foreigner's moveable assets while in Scotland to obtain jurisdiction over the foreigner.<sup>132</sup> This jurisdiction often resulted in Scottish courts hearing cases with little to no connection to Scotland save a ship anchoring in a Scottish harbor or a foreigner traveling through Scotland. Where another country's courts were clearly the more appropriate forum, Scottish courts utilized forum non conveniens as a discretionary tool to decline jurisdiction they possessed over the defendant.

---

128. *Id.*

129. *See, e.g.,* *Caspian Inv. Ltd. v. Vicom Holdings, Ltd.*, 770 F. Supp. 880 (S.D.N.Y. 1991).

130. For an example of the common law assumption that such discretionary powers exist, *see* Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1, 1 (1929) ("the doctrine [] involves nothing more than an appeal to the inherent powers possessed by every court of justice—powers, that is to say, which are uncontestedly necessary to the effective performance of judicial functions").

131. *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, 459 (1993); Julius Jurianto, *Forum Non Conveniens: Another Look at Conditional Dismissals*, 83 U. DET. MERCY L. REV. 369, 370-71 (2006); *Am. Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994).

132. *See, e.g.,* *Sheaf Steamship Co. Ltd. v. Compania Transmediterranea*, 1930 S.C. 660 (2d Div. Sheriff of Stirling, Dumbarton and Clackmannan 1930); *Societe du Gaz de Paris v. Societe Anon de Nav "Les Armateurs Français of Paris"* [1925] 21 Ll.L.Rep. 131, (1926) Sess. Cas. (HL) 13 (UKHL).

English courts formally adopted *forum non conveniens* in 1906.<sup>133</sup> The 1906 case *Logan v. Bank of Scotland* relied on judges' ability to "interfere to prevent vexatious proceedings which would have the effect of preventing the due administration of justice."<sup>134</sup> Discussing the doctrine, the court acknowledged that "English courts are freely open to persons foreign in this country," but that "we ought not to allow this hospitality to be abused."<sup>135</sup> The court considered several vexatious actions that may warrant court interference, such as frivolous actions and actions brought only to annoy or harass the defendant.

Throughout the 1800s and early 1900s, U.S. courts regularly declined to exercise their jurisdiction in a myriad of situations, including disputes between nonresidents, suits in admiralty between aliens, and suits where foreign corporations' internal affairs were involved.<sup>136</sup> When U.S. equity and law courts merged in 1938, courts continued utilizing *forum non conveniens*, although it was essentially an equitable power. In federal courts, *forum non conveniens* is federal common law, or "federal judge-made law,"<sup>137</sup> which is abolished except in a few discrete areas of law.<sup>138</sup> *Forum non conveniens* "derives from the court's inherent power, under article III of the Constitution, to control the administration of the litigation before it and to prevent its process from becoming an instrument of abuse, injustice and oppression."<sup>139</sup>

Although from the early 1800s through the 1920s, U.S. courts regularly declined jurisdiction over cases involving foreigners, they did not label this declination as "*forum non conveniens*." The Supreme Court first used the term in 1932 noting that "[c]ourts of equity and of law also occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or nonresidents, or where for kindred reasons the litigation can more appropriately be conducted in a foreign

---

133. *Logan v. Bank of Scotland & Others* (No. 2) [1906] 1 KB 141 (EWCA).

134. *Id.*

135. *Id.*

136. *See, e.g., Gardner v. Thomas*, 14 Johns. 134 (N.Y. Sup. Ct. 1817); *Canada Malting Co. v. Paterson S.S.*, 285 U.S. 413 (1932). *See also* Edward L. Barrett, Jr., *The Doctrine of "Forum Non Conveniens"*, 35 CAL. L. REV. 380, 387, 393-95 (1947).

137. Koen Lenaerts & Kathleen Gutman, "*Federal Common Law*" in *the European Union: A Comparative Perspective from the United States*, 54 AM. J. COMP. L. 1, 1 (2006).

138. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981); Lenaerts & Gutman, *supra* note 137.

139. *Sibaja v. Dow Chemical Co.*, 757 F.2d 1215, 1218 (11th Cir. 1985).

tribunal.”<sup>140</sup> Throughout the 1930s and 1940s, the Supreme Court regularly referenced the doctrine as an accepted tool for use by both state and federal courts.<sup>141</sup>

The seminal case defining the contours of modern U.S. practice regarding forum non conveniens was *Gulf Oil Corporation v. Gilbert*,<sup>142</sup> a case where concurrent jurisdiction between two state courts existed. *Gilbert* held “the proposition that a court having jurisdiction must exercise it, is not universally true” and that even where venue was proper, a case is often situated in an inconvenient forum solely to harass the defendant.<sup>143</sup> The Court cited to early forum non conveniens cases in English courts.<sup>144</sup> *Gilbert* set forth factors a court must consider when determining whether to decline jurisdiction based on forum non conveniens. The court distinguished between “private factors” that focused on the litigants’ interest, and “public factors,” that focused on administration of justice issues. Private factors included costs of obtaining witnesses and evidence, as well as other practical issues such as expense and expeditiousness, and the enforceability of an eventual judgment. *Gilbert* instructed the court to “weigh relative advantages and obstacles to fair trial,” including balancing the court’s interest in protecting the defendant from vexatious harassment and oppression against the plaintiff’s right to pursue his remedy and choice of forum.<sup>145</sup> The Court created a presumption favoring the plaintiff’s choice of forum “unless the balance is strongly in favor of the defendant.”<sup>146</sup>

“Public” factors that the court instructed lower courts to consider included administrative difficulties that come with congested courts, as

---

140. *Canada Malting Co.*, 285 U.S. at 414. Blair’s law review article, *supra* note 135, is recognized as the beginning of U.S. courts consciously applying forum non conveniens analyses. See, e.g., Robert Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908, 911-912 (1947); Barrett, *supra* note 136, at 388.

141. See, e.g., *Yarborough v. Yarborough*, 290 U.S. 202 (1933); *Broderick v. Rosner*, 294 U.S. 629 (1935); *Miles v. Ill. Cent. R. Co.*, 315 U.S. 698 (1942); *Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518 (1947).

142. *Gulf Oil Co. v. Gilbert*, 330 U.S. 501 (1947).

143. *Id.* at 504, 507 (citing *Canada Malting Co.*, 285 U.S. 41 and relying on early admiralty cases dismissing cases between foreigners).

144. *Gilbert* cited both *Logan v. Bank of Scotland (No. 2)* [1906] 1 KB 141 (EWCA) and *Societe du Gaz de Paris v. Societe Anon de Nav “Les Armateurs Français of Paris”* [1925] 21 Ll.L.Rep. 131, (1926) Sess. Cas. (HL) 13 (UKHL). *Gilbert*, 330 U.S. at 507, n. 6.

145. 330 U.S. at 508-09.

146. *Id.* at 508.

well as the jury's interest in only giving its time to hear "localized controversies," and not being burdened with deciding cases that have no relation to their community.<sup>147</sup> A final "public" factor was the "appropriateness" of federal courts sitting in diversity to decide cases by applying the state law of the forum state, "rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself."<sup>148</sup> In addition to the public and private factors, U.S. courts give varying weight to whether the plaintiff is a U.S. or foreign resident or corporation,<sup>149</sup> as well as choice of law considerations.<sup>150</sup> Additionally, the U.S. Supreme Court in *Piper Aircraft Company v. Reyno* held that a court must establish that an alternative forum is available before dismissing based on *forum non conveniens*.<sup>151</sup>

The U.S. Supreme Court and federal courts have been careful not to make any one private or public factor dispositive.<sup>152</sup> Instead, each case requires a balancing of the factors given the unique factual situation before the court.<sup>153</sup> As stated by *Gilbert*, "[t]he doctrine leaves much to the discretion of the court to which plaintiff resorts, and experience has not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses."<sup>154</sup> Similarly, in *Reyno*, the Court stated "[i]f central emphasis were placed on any one factor, the forum non conveniens doctrine would lose much of the very flexibility that makes it so valuable."<sup>155</sup> Federal courts emphasize the need for broad discretion and flexibility and limited appellate review for the doctrine to function properly.<sup>156</sup>

---

147. *Id.* at 508-09.

148. *Id.* at 509.

149. *Farmanfarmaian v. Gulf Oil Corp.*, 437 F. Supp. 910, 927 (S.D.N.Y. 1977).

150. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 251 (1981).

151. *Id.* See *Phoenix Canada Oil Co. Ltd. v. Texaco, Inc.*, 78 F.R.D. 445, 454 (D.C. Del. 1978); *Dole Food Co., Inc. v. Watt*, 303 F.3d 1104, 1118 (9th Cir. 2002); *Nat'l. Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club*, 166 F. Supp. 2d 1155, 1164 (E.D. Mich. 2001). See also Joel H. Samuels, *When Is an Alternative Forum Available? Rethinking the Forum Non Conveniens Analysis*, 85 IND. L. J. 1059 (2010).

152. See *Reyno*, 454 U.S. at 256, n. 23. See also *Sussman v. Bank of Israel*, 801 F. Supp. 1068, 1073 (S.D.N.Y. 1992).

153. See, e.g., *Hoffman v. Goberman*, 420 F.2d 423, 426 (3d Cir. 1970).

154. *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 508 (1947). See also *Boosey & Hawkes Music Pub. Ltd. v. Walt Disney Co.*, 145 F.3d 481, 491 (2d Cir. 1998).

155. 454 U.S. at 263.

156. See, e.g., *Sussman*, 801 F. Supp. at 1071 ("[a] district court has broad discretion in deciding whether to dismiss an action on the ground of forum non conveniens"); Am. Dredging

U.S. courts sometimes dismiss or stay cases based on forum non conveniens only if the defendant agrees to abide by various conditions, which can include defendants' willingness to consent to suit in the alternative forum's courts.<sup>157</sup> Dismissal conditions can range from the defendant making discovery concessions or posting of a bond, to the foreign proceeding moving forward within a given number of months.<sup>158</sup> Forum non conveniens is often justified as a manifestation of "the equitable powers of courts of law over their own process, to prevent abuses, oppression, and injustice" similar to the contempt power.<sup>159</sup> U.S. courts have explicitly recognized this equitable power as "inherent and equally extensive and efficient" for over 100 years.<sup>160</sup>

*D. Flexibility and the Fact-Specific Nature of Anti-Suit Injunctions*

Anti-suit injunctions order defendants not to proceed in pending or potential foreign court proceedings and are used in transnational cases in the UK and the United States. Anti-suit injunctions are equitable remedies that require judges to apply a multi-factor test to facts before the court.

Early in the chancery courts' existence, chancellors began enjoining parties from pursuing actions in the common law courts, as well as enjoining parties from executing common law court judgments. Common law courts were unable to consider equitable defenses such as fraud, accident, and mistake, which opened the courts up to abuses by parties seeking to take advantage of the court's inability to consider such defenses.<sup>161</sup> Common law courts' increasing rigidity resulted in more

---

Co. v. Miller, 510 U.S. 443, 455 (1994); *Reyno*, 454 U.S. at 237, 257; *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1143 (9th Cir. 2001) ("[a] forum non conveniens determination is committed to the sound discretion of the district court"). *See also* *Borden, Inc. v. Meiji Milk Prod. Co., Ltd.*, 919 F.2d 822, 827 (2d Cir. 1990).

157. *See, e.g.*, *Lambiris v. Neptune Maritime Co.*, 38 A.D.2d 528 (N.Y. Sup. Ct. 1971).

158. *See, e.g.*, *Garis v. Compania Maritima San Basilio, S.A.*, 386 F.2d 155, 157 (2d Cir. 1967); *Reyno*, 454 U.S. at 258, n. 25. Both U.S. and English courts stay or dismiss based on forum non conveniens on the condition that defendant submit to the alternative forum's jurisdiction, waive defenses, or submit to discovery. *See, e.g.*, *Spiliada Maritime Corp. v. Cansulex Ltd.* [1986] 3 All ER 84 3 (UKHL); *Islamic Arab Insur. Co. v. Saudi Egyptian American Reinsurance Co.* [1987] 1 Lloyd's Rep. 315 (Ct. App. Civ. Div.).

159. *Sibaja v. Dow Chemical Co.*, 757 F.2d 1215, 1218 (11th Cir. 1985).

160. *Gumel v. Pitkin*, 124 U.S. 131, 144 (1888).

161. *See* *Haynes*, *supra* note 54, at 22; WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW, A.L. GOODHART AND H.G. HANBURY 457 (A.L. Goodhart and H.G. Hanbury eds., 7th ed. 1956); *Raack*, *supra* note 42, at 555.

petitions for redress addressed to the Crown, who delegated them to the chancellor.<sup>162</sup> The chancellor “evolved from a purely administrative institution into one that was also judicial” in order to handle the increase in petitions that resulted from common law courts’ inability to consider equitable circumstances and provide a wide range of remedies.<sup>163</sup> Unlike common law courts, equity courts could order specific performance.<sup>164</sup> Not only could equity courts order a party to do or not do a specific act, but they could hold an individual in contempt of court for disobeying an order, which could lead to imprisonment.<sup>165</sup>

Anti-suit injunctions were issued to “protect an equitable right” or “where the ends of justice required interference, for example to put an end to vexatious and oppressive litigation or a multiplicity of suits.”<sup>166</sup> Chancery courts’ practice of enjoining proceedings in and judgments by common law courts caused considerable friction between the two courts during the fifteenth to eighteenth centuries. Equity courts’ injunctions enjoining parties from pursuing actions at law gave rise to an inevitable and protracted conflict between the two courts that peaked in the early seventeenth century,<sup>167</sup> and ultimately led to a set of rules issued by the equity court as to when it could issue anti-suit injunctions. During the seventeenth century, the law applied by chancery courts became more uniform and precedent-based, and common law courts improved, causing a decrease in anti-suit injunctions.<sup>168</sup> As a result of the merger of equity and law in England in 1873,<sup>169</sup> common law judges were granted many

---

162. See William Barbour, *Some Aspects of Fifteenth-Century Chancery*, 31 HARV. L. REV. 834, 834-35 (1918).

163. Raack, *supra* note 42, at 553-54.

164. See *id.* at 554-556; Holdsworth, *supra* note 161, at 456; JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA § 1184 (14th ed. 1918).

165. See Holdsworth, *supra* note 161, at 458.

166. RAPHAEL, *supra* note 126, at 42.

167. See Raack, *supra* note 42, at 570-586; HOLDSWORTH, *supra* note 161, at 461; STORY, *supra* note 164, § 1184.

168. See David W. Robertson, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 TEX. L. REV. 937 (1990).

169. Supreme Court of Judicature Act 1873, 36 & 37 Vict., c. 66 (Eng.). See Willis B. Perkins, *The English Judicature Act of 1873*, 12 MICH. L. REV. 277 (1914); JOLOWICZ, *supra* note 52 at 23-28; MAITLAND, *supra* note 46, at 15; R.E. MEGARRY AND P.V. BAKER, SNELL’S PRINCIPLES OF EQUITY 19 (26th ed. 1966).

of the tools that chancellors had used, and many equitable tools, including anti-suit injunctions, not only survived, but flourished.<sup>170</sup>

U.S. federal judges utilize anti-suit injunctions to enjoin defendants from proceeding in a foreign court in transnational cases. A circuit split exists with some circuits applying a “liberal” standard for anti-suit injunctions and others using a “restrictive” standard. The liberal approach applies the standard test used by U.S. courts to determine whether to issue preliminary injunctions in a myriad of situations.<sup>171</sup> This approach focuses on the “unnecessary delay and substantial inconvenience and expense to the parties and witnesses,” as well as the chance that “separate adjudications could result in inconsistent rulings or even a race to judgment.”<sup>172</sup> The restrictive approach emphasizes comity when deciding whether to issue a foreign anti-suit injunction and allows anti-suit injunctions only for two reasons: to protect its jurisdiction and to enjoin proceedings contrary to U.S. public policy.<sup>173</sup> The restrictive approach acknowledges that although injunctions “operate only on the parties within the personal jurisdiction of the courts,” “they effectively restrict the foreign court’s ability to exercise its jurisdiction.”<sup>174</sup>

Anti-suit injunction standards emerged from judges’ equitable powers and correspondingly rely on principles of equity and judicial discretion. As stated by the Second Circuit, “There are no precise rules governing the appropriateness of antisuit injunctions. The equitable circumstances surrounding each request for an injunction must be carefully examined to determine whether . . . the injunction is required to prevent an irreparable miscarriage of justice.”<sup>175</sup> The standard has slowly

---

170. RAPHAEL, *supra* note 126, at 47.

171. *Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc.*, 412 F.2d 577 (1st Cir. 1969); *Compagnie des Bauxites de Guinea v. Insur. Co. of North Am.*, 651 F.2d 877 (3d Cir. 1981); *Seattle Totems Hockey Club, Inc. v. Nat’l Hockey League*, 652 F.2d 852 (9th Cir. 1981); *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624 (5th Cir. 1996); *Medtronic, Inc. v. Catalyst Rsch. Corp.*, 664 F.2d 660 (8th Cir. 1981).

172. *Seattle Totems Hockey Club, Inc.*, 652 F.2d at 856.

173. *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 927 (D.C. Cir. 1984). *See* *China Trade and Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33 (2d Cir. 1987); *Gen. Elec. Co. v. Deutz AG*, 270 F.3d 144 (3d Cir. 2001); *Gau Shan Co., Ltd. v. Bankers Tr. Co.*, 956 F.2d 1349 (6th Cir. 1992); *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11 (1st Cir. 2004).

174. *Laker Airways Ltd.*, 731 F.2d at 927.

175. *See id.* *See also*, *Philp v. Macri*, 261 F.2d 945, 947 (9th Cir. 1958) (“[t]he remedy [of an anti-suit injunction], of course, being an equitable one, is discretionary with the trial judge”);

evolved from its inception in wholly different circumstances in English Chancery courts. With little statutory involvement and no Supreme Court guidance, a myriad of approaches have developed.

#### V. PREDICTABILITY AND JURISDICTION RULES IN THE CIVIL LAW

In keeping with the French prohibition on judge-made law and overt judicial discretion, French approaches to jurisdiction are void of overt judge-made equitable remedies and discretionary doctrines.<sup>176</sup> French jurisdiction rules are legislatively-mandated code provisions that guarantee litigants access to a judge where one of the stated bases for jurisdiction exists. As discussed below, the EU Brussels paradigm largely adopted the French approach.

##### A. *Historical and Philosophical Reasons Why the Civil Law Rejects Discretionary Jurisdiction Doctrines*

A party's right to predictable application of straightforward statutory provisions reigns as paramount over all other concerns, including case-specific justice. In both the civil law and common law traditions, this right is important. In the common law, however, this concern is tempered with many other concerns, including the court not condoning vexatious litigation practices, a party's right to litigate in a convenient forum and efficient use of judicial resources.<sup>177</sup> In the civil law, however, no norm is more important or fundamental than the plaintiff's right to litigate disputes in the court upon which the legislature has vested jurisdiction. A judge cannot deprive a plaintiff of this right because to do so would result in judges stripping individuals of legislatively-mandated rights. Such a situation is counter to the philosophies behind the French civil code, and codes that sprang from this parent code.

Legal formalism and an emphasis on predictability and certainty are essential components linked to civil procedure rules, including jurisdiction analyses. The French *mentalité* requires specific and

---

Crosley Corp. v. Hazeltine Corp., 122 F.2d 925 (3d Cir. 1941) (linking anti-suit injunction power with the English Chancery Courts' equitable powers).

176. See Gregoire Andrieux, *Declining Jurisdiction in a Future International Convention on Jurisdiction and Judgments – How Can We Benefit from Past Experiences in Conciliating the Two Doctrines of Forum Non Conveniens and Lis Pendens?*, 27 LOY. L.A. INT'L. & COMP. L. REV. 323, 328 (2005).

177. MARY KEYES, JURISDICTION IN INTERNATIONAL LITIGATION 227 (2005).

predictable civil procedure rules to ensure litigants' rights to adjudicate claims.<sup>178</sup> When the legislature gives courts jurisdiction over certain categories of cases, the court has no choice but to exercise such jurisdiction.<sup>179</sup> This represents a “fundamental difference” from discretionary jurisdiction doctrines, which “leave considerable discretion to the courts as to whether to affirm or deny jurisdiction.”<sup>180</sup> Civil law judges cannot utilize discretionary jurisdiction doctrines because to do so would undermine the code-based logic structure that is deeply important to the civilian identity. Accordingly, judges tacitly consider fact-specific equities regarding jurisdiction, and must justify their decisions by reference to a statutory ground for jurisdiction.<sup>181</sup>

### B. *Civil Law Approaches to Jurisdiction and Predictability*

The default jurisdiction rule in civil law systems is *actor sequitur rei forum*, that is, “the proper court for adjudication of personal claims is that of the domicile or residence of the defendant.”<sup>182</sup> The principle is rooted in Roman law and generally agreed upon in both the civil law and common law as the most equitable, preferable, and least problematic exercise of jurisdiction.<sup>183</sup> It is the rule from which all other bases for

---

178. See CHRISTOPHE LEFORT, *PROCÉDURE CIVILE*, Introduction §§ 2A.12 & 2A.13 (5th ed. 2014) (“le formalisme est donc de l’essence même de la procédure parce qu’il procure sécurité et garantie, tandis que son absence engendre l’arbitraire”); GÉRARD COUCHEZ & XAVIER LAGARDE, *PROCÉDURE CIVILE* 164 (17th ed. 2014) (“le droit d’agir en justice, compris comme le droit d’accéder à une juridiction et d’obtenir de celle-ci une réponse à la question don’t on la saisit, a la nature d’un droit fondamental”).

179. See RONALD A. BRAND & SCOTT R. JABLONSKI, *FORUM NON CONVENIENS: HISTORY, GLOBAL PRACTICE, AND FUTURE UNDER THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS* 121 (2007) (noting that in civil law systems, “when an action has been filed and jurisdiction exists, that jurisdiction must be exercised”).

180. Hans-Jachim Preiss, *Germany: Anti-suit Injunctions*, INT. T.L.R. 1996, 2(4), S62.

181. See ARNAUD NUYTS, *L’EXCEPTION DE FORUM NON CONVENIENS* 640 (2003) (“selon [la conception légaliste de la compétence], qui est traditionnellement préférée par les juristes de tradition romano-germanique, le principe de proximité doit être pris en compte, mais uniquement au stade de l’élaboration par le législateur des règles de compétence internationale”).

182. Hans Smit, *Common and Civil Law Rules of In Personam Adjudicatory Authority: An Analysis of Underlying Policies*, 21 INT’L. & COMP. L.Q. 335, 335 (1972).

183. Kevin M. Clermont & John R.B. Palmer, *Exorbitant Jurisdiction*, 58 ME. L. REV. 474, 486 (2006); COUCHEZ & LAGARDE, *supra* note 178, at 89; LEFORT, *supra* note 178, at Chapitre 1, Section 2, § 1.A.152; VON MEHREN, *supra* note 107, at Chapter IV(A).

jurisdiction, such as place of contract or tort, and exorbitant bases for jurisdiction discussed below, are viewed as exceptions.<sup>184</sup>

Generally, the French term for jurisdiction is “competence.” A French court’s ability to assert adjudicatory authority over a specific civil dispute and parties is a two-tiered inquiry.<sup>185</sup> First, it must be determined what category of case the dispute falls within to determine which type of court has jurisdiction to hear the dispute (*la compétence d’attribution*).<sup>186</sup> This inquiry is governed by Articles 33 to 41 of the French Code of Civil Procedure and is largely concerned with the amount of money at issue. Second, the appropriate regional court must be established by determining territorial jurisdiction (*la compétence territoriale*).<sup>187</sup> This tier establishes whether, for example, a court in Paris or Marseille has jurisdiction over a case. When transposing this prong to international cases, the question becomes whether a French court or foreign court possesses jurisdiction, which implicates the French state as a whole, and whether a French court can render justice in the name of France in the dispute.<sup>188</sup>

Article 42 of the French Code of Civil Procedure sets forth the default rule *actor sequitur forum rei* discussed above, stating “[t]he territorially competent court is, unless otherwise provided, that of the place where the defendant lives”<sup>189</sup> and Article 43 defines where natural and corporate defendants live.<sup>190</sup> Article 44 requires disputes relating to real property be heard in the court where the property is located. Article 45 sets forth special rules for succession matters. Article 46 allows a plaintiff to choose between bringing a case in the court of the defendant’s residence, or “in contractual matters, the court of the place of actual delivery of the chattel or the place of performance,” “in tort matters, the

---

184. See VON MEHREN, *supra* note 107, at 155.

185. COUCHEZ & LAGARDE, *supra* note 178, at 59 (“[i]l existe deux séries de règles de compétence; lesquelles correspondent à deux types de questions que l’on doit en principe résoudre successivement”); Lefort, *supra* note 178, at 120-21.

186. See COUCHEZ & LAGARDE, *supra* note 178, at 59, ¶ 48; PIERRE MAYER & VINCENT HEUZÉ, *DROIT INTERNATIONAL PRIVÉ* 197 (12th ed. 2019).

187. COUCHEZ & LAGARDE, *supra* note 178 at 59 (“[l]es règles de compétence territoriale sont destinées à permettre d’isoler au sein de la catégorie retenue la juridiction précisément compétente eu égard à son ressort géographique et à la localisation de l’affaire”).

188. See MAYER & HUEZÉ, *supra* note 186, at 197.

189. Code de procédure civile [C.P.C.] [Civil Procedure Code] art. 42 (Fr.) [hereinafter C.P.C.].

190. *Id.* at art. 43.

place of the event causing liability or the one in whose district the damage was suffered,” and in “mixed” matters, the court of the “place where real property is situated.”<sup>191</sup>

On their face, French rules of competence presume both parties are French, and do not contemplate situations involving foreign parties or courts. The Cour de Cassation, however, has long held that these rules apply equally to domestic and international disputes.<sup>192</sup> The court extended statutory provisions quite matter-of-factly to transnational cases by simply stating “la compétence internationale se détermine par extension des règles de compétence interne.”<sup>193</sup>

In French law, jurisdiction is established over a dispute, not a defendant. Unlike the United States’ “doing business” approach, which aggregates a non-resident defendant’s contacts with the forum, the French approach looks at domicile, place of contract, or place of tort, among other bases for jurisdiction over the *dispute*. Jurisdiction in a particular case does not implicate the defendant’s constitutional rights or trigger any sort of fairness balancing test. The most exorbitant basis for jurisdiction is Article 14, discussed below, which gives French courts jurisdiction over disputes brought by French nationals against non-resident defendants.<sup>194</sup>

### C. Civil Law Approaches to *Lis Pendens* and Concurrent Proceedings

*Lis pendens* is a non-discretionary rule requiring judges to decline jurisdiction where the same matter between the same parties is pending before another court. The French Code of Civil Procedure governs *lis pendens*.<sup>195</sup> Article 100 makes it mandatory for a judge to decline jurisdiction if another court at the same level possesses jurisdiction at the

---

191. *Id.* at art. 46.

192. *See* Cour de Cassation [Cass.] 1e civ., Oct. 30, 1962, Bull. civ. I (Fr.); MAYER & HUEZÉ, *supra* note 186, at 197 (“[o]n traite en droit judiciaire privé de la compétence des tribunaux dans l’ordre interne, en supposant que tous les éléments du litige sont français . . . . Les questions de compétence interne se posent également dans les litiges internationaux”).

193. Cour de Cassation [Cass.] 1e civ., Oct. 30, 1962, Bull. civ. I (Fr.).

194. Code civil [C. civ.] [Civil Code] art. 14 (Fr.); Clermont & Palmer, *supra* note 183, at 488-491.

195. C.P.C., at arts. 100-107. *See* Cour de Cassation [Cass.] 1e civ., 26 novembre 1974 (Fr.) (“l’exception de litispendance peut être reçue devant le juge français, en vertu du droit commun français, en raison d’une instance engagée devant un tribunal étranger également compétent”). This case is available in BETRAND ANCEL & YVES LEQUETTE, *LES GRANDS ARRÊTS DE LA JURISPRUDENCE FRANÇAISE DE DROIT INTERNATIONAL PRIVÉ*, Case Number 54 (5th ed. 2001). *See also* Andrieux, *supra* note 176, at 333-336.

request of a party or sua sponte.<sup>196</sup> Hence, if a foreign court has exercised jurisdiction over a case, a French judge must decline jurisdiction.

Judicial discretion comes into this analysis when a judge determines whether, in fact, the foreign dispute is sufficiently similar to trigger *lis pendens*. Although a judge *must* dismiss a case where Article 100 applies and the competing court is French, judges have more discretion to decide whether to dismiss a case where the competing court is foreign. French caselaw has grafted a condition onto Article 100 in international cases that requires judges to consider whether a resulting judgment from the foreign court would be enforced in French court when deciding whether to dismiss a case on *lis pendens* grounds.<sup>197</sup> If yes, then the French court will dismiss the case before it. If no, then the French court will retain jurisdiction. In this analysis, “the French judge must forecast the legality of the decision rendered abroad,” “evaluate whether or not the decision given abroad could take effect,” and can decide to issue a stay based on this prognosis.<sup>198</sup> This “recognition prognosis” analysis requires a court to ask whether a French statutory provision gives French courts exclusive jurisdiction, whether the dispute is closely connected to the foreign forum, and whether bringing suit in the foreign court is arbitrary or fraudulent.<sup>199</sup>

The “recognition prognosis” requirement for foreign *lis pendens* analyses is formally and technically nothing more than statutory interpretation. The French judicial analysis is tied directly to the statutory authority of Article 100. The Article 100 analysis does not involve any balancing tests or multi-factor analyses but instead adds a straightforward condition.<sup>200</sup> Gaudemet-Tallon points out that the French rule requiring the second-seised court not to exercise jurisdiction “does not

---

196. C.P.C., at art. 100.

197. See Cour de Cassation [Cass.] 1e civ., Jan. 7, 1964, Bull. civ. I (Fr.). See, e.g., Cour de Cassation [Cass.] 1e civ., Jan. 18, 2017, Bull. civ. I (Fr.) (finding lower court erred by applying *lis pendens* in favor of Shiite Islamic council of Baadba in Lebanon because a resulting judgment “was not likely to be recognized in France”) (translation by author).

198. Hélène Guademet-Tallon, *France*, in J.J. FAWCETT, DECLINING JURISDICTION IN PRIVATE INTERNATIONAL LAW: REPORTS TO THE XIVTH CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW, ATHENS, AUGUST 1994 181 (1995).

199. See Cour de Cassation [Cass.] 1e civ., Feb. 6, 1985, Bull. civ. I (Fr.) (“le tribunal étranger doit être reconnu compétent si le litige se rattache d’une manière caractérisée au pays dont le juge a été saisi et si le choix de la juridiction n’a pas été frauduleux”); Gaudemet-Tallon, *supra* note 198, at 187.

200. See Guademet-Tallon, *supra* note 198, at 175 (describing both *lis pendens* pursuant to Article 100 and related actions pursuant to Article 101 as “the object of definite conditions”).

depend on the appropriateness or the ‘convenient’ character of the court first seised” and “the spirit presiding over the plea of *lis pendens* is not akin to the English attitude toward the plea.”<sup>201</sup>

Article 101 of the French Code of Civil Procedure addresses another *lis pendens* situation. Pursuant to this article:

If there exists between matters brought before two distinct courts a bond such as there is an interest of good justice to have them examined and determined together, one of the courts may be asked to decline its jurisdiction and to refer the matter as it stands to the other court.<sup>202</sup>

In international cases, this allows a French judge to stay a case when he determines it is closely connected to a foreign judicial proceeding. If applied in the presence of foreign proceedings, this provision looks very much like *forum non conveniens*.<sup>203</sup> This is as close to *forum non conveniens* as the French courts will get. It is telling that French courts do not utilize this power to stay based on related foreign proceedings.<sup>204</sup> One scholar suggests that French courts may have a “psychological resistance” to the application of Article 101 in favor of a foreign court.<sup>205</sup>

#### D. Civil Law’s Rejection of *Forum Non Conveniens*

The concept underlying *forum non conveniens*, that there is a forum that is the *most* appropriate and convenient to hear a dispute, is incompatible with the civil law conception of jurisdiction in transnational cases. The civil law accepts that more than one country’s courts may be competent to hear a dispute and does not require that the court that ultimately decides a case have the closest connection to the case.<sup>206</sup> It is

---

201. *Id.* at 180.

202. C.P.C., at art. 101.

203. See Gaudemet-Tallon, *supra* note 198, at 182 (discussing Article 101 in international cases and stating “[w]e are fairly close to *forum non conveniens* here”).

204. See VON MEHREN, *supra* note 107, at 295 (“[s]o far, the French courts have shown little inclination to extend Article 101 by analogy to international litigation and stay French proceedings where connexity exists”).

205. Gaudemet-Tallon, *supra* note 198, at 182.

206. See, e.g., Cour de Cassation [Cass.] 1<sup>e</sup> civ., June 24, 2020, Bull. civ. I, No. 19-11.714, 19-11.870 (Fr.) (lower court erred in finding no jurisdiction where a divorce proceeding had closer connection to Moldova because “le droit international privé français ne connaît pas la règle du *forum non conveniens* qui offre au juge du for de décliner sa compétence au profit des juridictions d’un Etat avec lequel le litige entretiendrait un lien plus fort ; qu’en se retranchant derrière des

only required that one of the bases of jurisdiction set forth in the applicable national code applies.<sup>207</sup>

France's code of civil procedure contains exorbitant jurisdiction provisions, much like those jurisdiction provisions in the common law that gave rise to *forum non conveniens*.<sup>208</sup> The presence of these exorbitant jurisdiction provisions, however, has not resulted in the emergence of *forum non conveniens*.<sup>209</sup> In the French legal paradigm, where the legislature has provided a plaintiff with a right to bring suit in a specific case, judges cannot deprive the plaintiff of that right.<sup>210</sup> Such deprivation would run counter to one purpose of the French Revolution by giving judges power that lies solely in the hands of the elected legislature.<sup>211</sup> Further, *forum non conveniens* as a judge-made doctrine would directly contravene Article 4 of the Civil Code, which prohibits judges from refusing to apply applicable code provisions.

If any aspect of the French civil code were to give rise to the doctrine of *forum non conveniens*, it would be Article 14, which gives French courts jurisdiction over cases brought by French plaintiffs against non-

---

motifs, inopérants, tirés de l'existence de liens plus forts entre le litige et la Moldavie, la cour d'appel a violé les principes régissant la compétence internationale des juridictions française").

207. BRAND & JABLONSKI, *supra* note 179, at 121 ("[t]he concept of *forum non conveniens* is generally inconsistent with civil law systems in which there is a belief in the predictability of comprehensive procedural codes created by the legislature and the absence of all but minimal discretion in the role of the judge").

208. See, e.g., Ralf Michaels, *Two Paradigms of Jurisdiction*, 27 MICH. J. INT'L. L. 1003, 1061 (2007) ("the need for *forum non conveniens* is reduced with increased specificity and quality for rules on jurisdiction: 'fine tuning' is unnecessary if jurisdictional rules are already finely tuned"); Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Non Conveniens*, 65 YALE L.J. 289, 312 (1956) ("[s]lowly and painfully, American courts are developing a common law of *forum non conveniens* as a corrective of the serious shortcomings in a law of personal jurisdiction based on mere personal service").

209. See Paul Beaumont, *A United Kingdom Perspective on the Proposed Hague Judgments Convention*, 24 BROOK. J. INT'L. L. 75, 76 (1998).

210. See, e.g., Cour de Cassation [Cass.] soc., Jan. 25, 2005, Bull. civ. V, No. 04-41.012 (Fr.) ("[l]'impossibilité pour une partie d'accéder au juge chargé de se prononcer sur sa prétention et d'exercer un droit qui relève de l'ordre public international constituant un déni de justice fondant la compétence de la juridiction française lorsqu'il existe un rattachement avec la France"); Gaudemet-Tallon, *supra* note 198, at 175 ("if [a judge] has jurisdiction, he must rule and cannot 'decline to exercise his jurisdiction'") (citations omitted).

211. See Gaudemet-Tallon, *supra* note 198 at 177, 178 (explaining French rejection of *forum non conveniens* as follows: "in France, it has always been thought that it was better to frame the power of legal authorities over questions of competence . . . according to the famous saying: Dieu nous garde de l'équité des Parlements").

French defendants. It is likely that cases brought pursuant to this provision are inconvenient in that the forum could have no connection to the underlying dispute beyond the plaintiff's French nationality.<sup>212</sup> A good example is a case in which the Cour de Cassation affirmed a lower court's assertion of jurisdiction pursuant to Article 14 even where the case involved an Algerian party to a charter party dispute arising out of events that occurred in Algeria and Ukraine, and required application of Algerian law.<sup>213</sup> In the common law, it is precisely these types of cases in which judges utilize *forum non conveniens* to decline jurisdiction.

It is telling that after over 200 years since the enactment of Article 14, *forum non conveniens* has not come into existence to temper use of this provision.<sup>214</sup> Instead, French judges have whittled away Article 14 through statutory interpretation limiting its application where a foreign court is first seised,<sup>215</sup> where real property located outside France or issues of extra contractual liability are involved,<sup>216</sup> and where no other basis for

---

212. French courts have heard cases pursuant to this provision with no link between the dispute and forum. *See, e.g.*, Cour de Cassation [Cass.] 1e civ., July 1, 2009, Bull. civ. I, No. 08-15.955 (Fr.). *See also* Martha Weser, *Bases of Judicial Jurisdiction in the Common Market Countries*, 10 AM. J. COMP. L. 323, 324 (1961); Clermont & Palmer, *supra* note 183 at 482 (French "courts have read the Civil Code's Article 14 as authorizing territorial jurisdiction over virtually any action brought by a plaintiff of French nationality . . . Thus, a French person can sue at home on any cause of action, whether or not the events in suit related to France and regardless of the defendant's connections and interests").

213. Cour de Cassation [Cass.] 1e civ, Mar. 22, 2007, Bull. civ. I, No. 04-14.716 (Fr.).

214. There is one instance scholars often point to of French courts utilizing *forum non conveniens*. In 1987, the Court of Appeal in Paris applied the doctrine to decline jurisdiction in favor of an Italian court, reasoning that the Italian court was "better placed than the French judge to rule on the temporary measures" requested. 14 December 1987 (JDI 1989, p. 96). This was case "highly criticized" by jurists and is the last time French courts attempted to apply *forum non conveniens*. It is often cited as the lone exception to the firm rule that "the *forum non conveniens* doctrine is unknown under French law." Gaudemet-Tallon, *supra* note 198, at 179.

215. *See* Cour de Cassation [Cass.] 1e civ, May 22, 2007, Bull. civ. I, No. 04-14.716 (Fr.) ("l'article 14 du code civil n'ouvre au demandeur français qu'une simple faculté et n'édicte pas à son profit une compétence impérative, exclusive de la compétence indirecte d'un tribunal étranger déjà saisi et dont le choix n'est pas frauduleux").

216. *See* Cour de Cassation [Cass.] 1e civ, May 27, 1970, Bull. civ. I, No. 68-13.643 (Fr.) ("l'article 14 du Code civil, attend qu ce text, qui permet au plaideur français d'attirer un étranger devant les juridictions françaises, a une portée générale s'étendant à toutes matières, à l'exclusion des actions réelles immobilières et demandes en partage portant sur des immeubles situés à l'étranger, ainsi que des demandes relatives à des voies d'exécution pratiquées hors de France, et s'applique notamment à tous litiges ayant pour fondement la responsabilité extracontractuelle").

jurisdiction in French courts exists.<sup>217</sup> Forum non conveniens has not evolved in France to temper Article 14 because this provision manifests the legislature's desire to provide French avenues of redress to French plaintiffs, and French judges do not have the power to second guess this legislative policy.<sup>218</sup>

*E. Civil Law's Rejection of Anti-Suit Injunctions*

Civil law judges and scholars reject anti-suit injunctions as judge-made remedies contrary to the civil law *mentalité*. Anti-suit injunctions inject judicial discretion and unpredictability into an otherwise relatively predictable administration of justice using the first seised rule. Regarding anti-suit injunctions, this unpredictability comes from the judicial discretion of a judge in *another* country enjoining a defendant from pursuing litigation it otherwise is entitled to bring. Courts cannot be ousted from their mandated jurisdiction by a foreign judge in the name of case-specific equity, because the individual's right to be heard in a court with jurisdiction is more important and fundamental.

The case-specific multi-factor analyses used by common law judges to determine whether to issue anti-suit injunctions are counter to the epistemological framework of civil law legal reasoning, which confines judges to the creation of law through statutory interpretation. Civil law judges resolve potential vexatious proceedings in a foreign court at the enforcement of foreign judgments stage. Instead of issuing an anti-suit injunction, civil law judges who do not approve of a foreign judicial proceeding can hear the case applying the recognition prognosis approach or applying an exception to the first seised rule.<sup>219</sup> French statutory provisions give judges wide discretion to decline enforcement of foreign

---

217. Cour de Cassation [Cass.] 1e civ, Nov. 19, 1985, Bull. civ. I, No. 84-16.001 (Fr.) ("l'article 14 du Code civil . . . qui donne compétence à la juridiction française, en raison de la nationalité française du demandeur, n'a lieu de s'appliquer que lorsqu'aucun critère ordinaire de compétence territoriale n'est réalisé en France").

218. The reason Article 14 has not triggered the evolution of forum non conveniens in France is because it is sparsely used as a basis for jurisdiction. See Clermont & Palmer, *supra* note 183, at 492.

219. See Clare Ambrose, *Can Anti-suit Injunctions Survive European Community Law*, 52 INT'L. & COMP. L. Q. 401, 414 (2003) ("[a]lternative means of dealing with wrongful proceedings in a foreign court would include trusting the other court to decline jurisdiction, refusing recognition of the foreign judgment, and awarding damages. The first two methods are the approach normally taken by civil law systems").

judgments by including a mandate that foreign judgments be excluded that are contrary to public policy or basic principles of law.

There are a few sparse examples of French courts affirming limited injunctive relief similar to anti-suit injunctions.<sup>220</sup> However, in the vast majority of cases, instead of considering an anti-suit injunction, a French court would allow the first seised court to determine jurisdiction. Likewise, instead of enjoining vexatious foreign judicial proceedings, a French judge could opt to refuse subsequent enforcement of any resulting judgment.

## VI. FAILED ATTEMPTS TO HARMONIZE TRANSNATIONAL JURISDICTION RULES

This Part analyzes the collapse of negotiations between the U.S. and EU delegates to what became the Choice of Court Convention (CoC Convention) with a focus on the parties' dialogue relating to parallel proceedings and transnational jurisdiction rules. This Part also discusses the ECJ's prohibition on English discretionary jurisdiction doctrines pursuant to the Brussels regime. Both case studies illustrate the fundamental incompatibility between the essential components of flexibility, overt judicial discretion, fact-specific equity in the common law, and predictability and a rejection of overt judge-made law in the civil law, which are linked to transnational jurisdiction rules in each tradition.

### A. *When Things Fall Apart—The Choice of Court Convention Negotiations*

The CoC Convention was adopted and opened for signature on June 30, 2005, after many years of negotiation and entered into force in 2015.<sup>221</sup> The convention initially was envisioned on a grand scale,

---

220. See, e.g., Cour de Cassation [Cass.] 1e civ., Nov. 19, 2002, Bull. civ. I, No. 00-22.334 (Fr.), discussed in *Injunctive Relief in the French Courts: A Case of Legal Borrowing*, 62 CAMBRIDGE L.J. 573, 575 (2003); VON MEHREN, *supra* note 107, at 280 (discussing case and ramifications of holding). Other cases include Cour de Cassation [Cass.] 1e civ., June 30, 2004, No. 01-03.248, 01/15.452 (enforcing Mareva injunction issued by an English court) and Cour de Cassation [Cass.], 1e civ., Oct. 14, 2009, No. 08-16.369, 08-16.549 (refusing to set aside a decision by the Versailles Court of Appeal enforcing an anti-suit injunction issued by a Georgia state court restraining a French court).

221. See Convention of 30 June 2005 on Choice of Court Agreements, Explanatory Report by Trevor Hartley and Masato Dogauchi, May 2007, Part I: Preface, available at <http://www.hcch.net> [hereinafter Explanatory Report].

establishing world-wide adherence to certain accepted and prohibited bases of jurisdiction in transnational cases and addressing enforcement of resulting foreign judgments. Ultimately, the convention was reduced to a very narrow convention not addressing enforcement of judgments and determining jurisdiction rules only where parties have entered into exclusive choice of court agreements in a limited number of commercial or civil matters.<sup>222</sup>

From the outset of negotiations it was clear that U.S. constitution-based fact-specific jurisdiction analyses and discretionary doctrines, such as *forum non conveniens* and anti-suit injunctions, would clash with the civil law's use of categorical bases for jurisdiction and *lis pendens*. In order to blend the U.S. constitutional approach to jurisdiction with the civil law categorical approach to jurisdiction, the U.S. delegation advocated for a "mixed" convention that would include (1) a "white list" of accepted bases of jurisdiction, such as defendant's domicile; (2) a "black list" of prohibited bases of jurisdiction; and (3) a "gray list" of unendorsed, yet not prohibited, bases of jurisdiction.<sup>223</sup>

Gray list bases of jurisdiction would be permitted, but may or may not result in an enforceable judgment, depending on the enforcing court's decision.<sup>224</sup> The gray list would enable "a signatory country [to] continue to utilize additional bases under its national law of jurisdiction, as long as those bases do not fall on the black list and do not contravene a forum selection agreement or the exclusive jurisdiction provisions."<sup>225</sup> The mixed convention model would allow "[s]harply divergent State practices which States are unwilling or unable to give up [to] continue [] with

---

222. The Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters was subsequently concluded on July 2, 2019, and has not yet entered into force. Article 7 addresses *lis pendens* in the enforcement context. See Joachim Zekoll, *The Role and Status of American Law in the Hague Judgments Convention Project*, 61 ALB. L. REV. 1283, 1320 (1998) ("this rather modest work product cannot be considered a success in light of the original ambitions").

223. See Arthur von Mehren, *Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable World-wide: Can the Hague Conference Project Succeed?*, 49 AM. J. COMP. L. 191, 197 (2001); Harold G. Maier, *A Hague Conference Judgments Convention and United States Courts: A Problem and a Possibility*, 61 ALB. L. REV. 1207, 1220-21 (1998).

224. See also Kevin M. Clermont, *An Introduction to the Hague Convention*, in JOHN J. BARCELÓ & KEVIN M. CLERMONT, *A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE 7* (2002).

225. *Id.*

respect to the assertion of adjudicatory authority . . . without putting into question the convention as a whole.”<sup>226</sup>

Non-U.S. delegates resisted the mixed convention approach and instead advocated a double convention, much like the Brussels Convention, in which categories of acceptable and prohibited bases of jurisdiction were directly linked to enforcement of judgment provisions.<sup>227</sup> European delegates felt “a mixed convention is inherently destructive of the Hague aims of predictability and certainty.”<sup>228</sup> European delegates expected Americans to give up “doing business” jurisdiction.<sup>229</sup>

In 1999, the first draft of the CoC Convention, which closely resembled the Brussels Convention, was rejected by the U.S. delegates. The double convention model worked well for the Brussels Convention, which is viewed as “one of the greater success stories for the harmonization of European law.”<sup>230</sup> However, transposing the Brussels model into a worldwide convention that must “accommodate the different interests of other nations” proved unsuccessful because of the “lack of homogeneity” across legal traditions.<sup>231</sup>

Subsequently, in 2000, delegates negotiated what became the 2001 draft. Despite delegates’ stated willingness to utilize a mixed convention model, the 2001 draft was, for all intents and purposes, a double

---

226. von Mehren, *supra* note 223, at 199; Zekoll, *supra* note 222, at 1286-1287 (from a U.S. perspective, “the due process test to which this country’s courts regularly put the question of their jurisdictional reach is here to stay” and “legal certainty . . . is but one value among others”).

227. See, e.g., Olivier Tell, *Tentative Draft on the Jurisdiction and the Enforcement of Foreign Judgments: Can a Mixed Convention Work?*, in BARCELÓ & CLERMONT, *supra* note 224, at 38 (“a broader Brussels/Lugano-kind of system would be perfectly viable among countries achieving similar business and economic development”).

228. Clermont, *supra* note 224, at 10. See, e.g., Tell, *supra* note 227, at 38 (“[t]he existence of a gray zone, especially if the whitelist is shortened as a consequence of applying the principle of the communicating vessels, would pervert the conventional framework of the Hague Conference”).

229. See, e.g., Tell, *supra* note 227, at 43.

230. Zekoll, *supra* note 222, at 1290.

231. *Id.*; John Barceló, *The Draft Hague Convention’s Judgments Provisions*, in BARCELÓ & CLERMONT, *supra* note 224 at 243 (“[t]he Brussels Convention fit well in a European context of strong commitment to economic union and shared jurisdictional and choice of law principles. It fits much less well in a global context where the participants’ practices and values diverge sharply – as they do in some areas as between the U.S. and Europe”).

convention.<sup>232</sup> The 2001 draft included several bases for jurisdiction, including, among others, the place where the defendant “is [habitually] resident,” the place of “significant activity” regarding a contract claim and the place of tort or tort injury.<sup>233</sup> The 2001 draft also listed prohibited bases of jurisdiction, including, among others, a plaintiff’s nationality (Article 14 of the French Civil Code) and “doing business” jurisdiction (U.S. general jurisdiction doctrine). With regard to “doing business” jurisdiction, French Delegate Olivier Tell’s critique illuminates the traditions’ diverging emphasis on flexibility versus predictability: “The thorniest issue is the completely unpredictable nature of this ‘doing business’ basis of jurisdiction . . . Such a measure could cause the implosion of the convention framework as it is today.”<sup>234</sup>

Article 21 of the 2001 draft codified *lis pendens* by requiring any court other than the court first seised to decline jurisdiction where the same parties attempt to resolve the same dispute pending in another court. Article 22 of the draft included a narrow *forum non conveniens* rule, which would have allowed courts to decline jurisdiction “in exceptional circumstances” if it is “clearly inappropriate for that court to exercise jurisdiction where an exclusive forum selection clause did not exist and another court has jurisdiction that is “clearly more appropriate to resolve the dispute,” taking into account multiple stated factors, such as habitual residence, location of evidence, and witnesses.<sup>235</sup>

Continental European delegates opposed the inclusion of a *forum non conveniens* provision citing unpredictability.<sup>236</sup> Delegate Tell posited that “the application of *forum non conveniens* doctrine to the defendant’s *forum* [is] in opposition to a predictable conventional system. This doctrine stands for the maximal perversion of a system based on predictable rules, which are available and provided for in advance, to vest

---

232. See RONALD A. BRAND & PAUL M. HERRUP, *THE 2005 HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS: COMMENTARY AND DOCUMENTS* 9 (2008) (discussing delegates’ vote to adopt a mixed convention model and the fact that the 1999 draft’s “words and concepts often were those of a double convention”).

233. Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6-20 June 2001, Commission II, Jurisdiction and Foreign Judgments in Civil Commercial Matters, available at <http://www.hcch.net> [hereinafter 2001 Draft].

234. Tell, *supra* note 227, at 40, 43. See also Gaudemet-Tallon, *supra* note 198, § 1B, at 63.

235. 2001 Draft, *supra* note 233, at art. 22.

236. Gaudemet-Tallon, *supra* note 198, § 1B, at 64; Tell, *supra* note 227, at 43, 44.

jurisdiction.”<sup>237</sup> Similarly, Gaudemet-Tallon noted that both European and Latin American delegates overwhelmingly rejected any introduction of forum non conveniens into the convention, while the U.S. delegates pushed to include a forum non conveniens provision.<sup>238</sup>

The United States was unwilling to accept such a radical shift in its approach to jurisdiction. Jeffrey Kovar, then Assistant Legal Adviser for Private International Law for the U.S. Department of State, sent a letter to J.H.A. van Loon, Secretary General of the Hague Conference on Private International Law, in which he voiced “major U.S. concerns with the current status of the [convention] draft” and advocated for suspension of the project.<sup>239</sup> Kovar pointed toward “bloc” or majoritarian voting in recent sessions that made EU and potential EU member state delegations’ votes and opinions much more powerful than their U.S. counterparts.<sup>240</sup> Kovar stated that the United States was unwilling to accept “disadvantages” of the convention as drafted, including “the loss of traditional litigation practices,” such as doing business jurisdiction.<sup>241</sup> Kovar stated “there has not been adequate progress toward the creation of a draft convention that would represent a worldwide compromise among extremely different legal systems.”<sup>242</sup> Kovar emphasized the importance of “flexibility” and criticized “rigid principles.”<sup>243</sup> The next several sessions resulted in an agreement by delegates to create a “less inclusive convention not addressing some of the controversial areas,”<sup>244</sup> with a drastically reduced scope covering only jurisdiction where the parties have agreed to a forum.

---

237. Tell, *supra* note 227, at 44.

238. Gaudemet-Tallon, *supra* note 198, § 1B, at 64.

239. February 22, 2000, Letter from Jeffrey Kovar to J.H.A. van Loon re: Preliminary Draft Hague Convention on Jurisdiction and the Enforcement of Civil Judgments, available at <http://www.cptech.org/ecom/hague/kovar2loon22022000.pdf> [hereinafter Kovar letter].

240. *Id.* at 2. See Russell J. Weintraub, *How Substantial Is Our Need for a Judgments-Recognition Convention and What Should We Bargain Away to Get It?*, 24 BROOK. J. INT’L. L. 167, 211 (1998). See also Zekoll, *supra* note 222, at 1298 (“[n]one of these attributes of the American litigation process [namely uncertainty, parallel proceedings and anti-suit injunctions,] are desirable ingredients of a worldwide convention . . . The expansive jurisdiction reach of American statutory rules, coupled with a potentially expansive and less-than-pellucid concept of due process, is apt to generate serious inconveniences”).

241. Kovar letter, *supra* note 239, at 3.

242. *Id.*

243. *Id.* at 5.

244. von Mehren, *supra* note 107, at 370.

Scholars writing about the CoC Convention's failed negotiations and drastically reduced scope point to "deep and pervasive" causes.<sup>245</sup> Scholars pointed to differing views on judicial discretion and formalism in the exercise of adjudicatory authority as the culprit.<sup>246</sup> Louise Ellen Teitz wrote:

In the end, many of the differences between the European Commission on one side and the United States on the other, reflected the theoretical divisions between common law and civil law approaches to personal jurisdiction. The civil law's rejection of broad discretion in the exercise of jurisdiction lends itself to detailed provisions covering all contingencies which will easily produce inconsistencies and hinder compromise.<sup>247</sup>

Matthew H. Adler and Michele Crimaldi Zarychata pointed to judicial discretion as the problem:

Civil law countries fear the type of discretion given to a court by *forum non conveniens* because it allows too much variety in application and because civil law countries do not trust individual courts the way the United States does . . . Similarly, civil law jurisdictions dislike the doctrine of *forum non conveniens* because it permits a trial court to exercise discretion in applying a multifactor balancing test . . . . Because civil law countries fear placing discretion in adjudicatory bodies, they prefer more rigid rules. In the context of *forum non conveniens* and *lis pendens*, these philosophical tensions created difficulty early in the Convention in procuring a provision acceptable to both types of legal systems.<sup>248</sup>

---

245. See von Mehren, *supra* note 223, at 194.

246. See, e.g., *id.* at 195.

247. Louise Ellen Teitz, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration*, 53 AM. J. COMP. L. 543, 549 (2005).

248. Matthew H. Adler & Michele Crimaldi Zarychata, *The Hague Convention on Choice of Court Agreements: The United States Joins the Judgment Enforcement Band*, 27 NW. J. INT'L. L. & BUS. 1, 21-23 (2006). See also von Mehren, *supra* note 107, at 365 ("[t]he degree of convergence and compromise required to make the projected convention broadly attractive had not been achieved"). See also BRAND & HERRUP, *supra* note 232, at 4; Gaudemet-Tallon, *supra* note 198, §§ 1, 1B, at 58, 62-63; Laurence Usunier, *Regulation International Jurisdiction: Toward a Global Answer*, in YEARBOOK OF PRIVATE INTERNATIONAL LAW, VOL. IX 543 (Petar Šarčević ed., 2008).

These failed negotiations are a clear example of the incompatibility between flexibility and predictability as essential components underlying transnational jurisdiction rules stymying harmonization.

*B. Not On Our Continent—The ECJ and UK Jurisdiction Rules*

Another example of the incompatibility of these essential components is the time period in which the United Kingdom was part of the EU. A series of ECJ cases rejecting England's use of *forum non conveniens* and anti-suit injunctions in transnational cases under the Brussels regime also highlight the incompatible essential components underlying discretionary jurisdiction rules. Three salient cases include *Turner v. Grovit*,<sup>249</sup> *Owusu v. Jackson*,<sup>250</sup> and the infamous "*West Tankers*."<sup>251</sup>

The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (Brussels Convention)<sup>252</sup> governed jurisdiction in transnational civil cases involving EU member states from 1968 until 2001, when the Brussels I Regulation, largely similar to the Brussels Convention, entered into force.<sup>253</sup> In 2012, Regulation (EU) No. 1215/2012 (Brussels Recast) entered into force to govern similar proceedings after January 10, 2015.<sup>254</sup> All three

---

249. Case C-159/02, *Turner v. Grovit*, 2004 E.C.R. I-03565.

250. Case C-281/02, *Owusu v. Jackson*, 2005 E.C.R. I-1445.

251. Case C-185/07, *Allianz SpA et al. v. West Tankers, Inc.*, ECLI:EU:C:2009:69 (E.C.J. February 10, 2009).

252. Brussels Convention on Jurisdiction and Recognition of Judgments in Civil and Commercial Matters, J.O. L 299/32 (1972), *amended by* O.J. L 304/77 (1978), *amended by* O.J. L 388/1 (1982), *amended by* O.J. L 285/1 [hereinafter Brussels Convention].

253. Council Regulation No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) [hereinafter Brussels I Regulation]. The Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters, commonly termed the "Lugano Convention," closely mirrors the Brussels Convention and Brussels I Regulation, and applies to members of the European Free Trade Association. After Brexit, the United Kingdom requested to join the Lugano Convention but the EU declined to allow the UK to accede.

254. Council Regulation No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), 2012 O.J. (L 351), *amended by* O.J. (L 163/1) and O.J. (L 54.1) [hereinafter Brussels Recast].

(collectively “the Brussels regime”) are paradigmatic of the civil law approach to jurisdiction.<sup>255</sup>

The United Kingdom joined the EU in 1973 and ratified the Brussels Convention in 1986. Upon accession, the United Kingdom unsuccessfully advocated for an amendment to the *lis pendens* provision that allowed “a court second seised not to decline jurisdiction in favour of the court first seised if the parties have given exclusive jurisdiction to the court second seised.”<sup>256</sup> A conflict arose between the Brussels regime and the UK’s transnational jurisdiction discretionary doctrines of *forum non conveniens* and anti-suit injunctions. The UK’s obligations to the Brussels regime ceased on January 31, 2020 as a result of Brexit. The period in which the UK was subject to the Brussels regime provided many examples of the conflict between the flexibility underlying common law transnational jurisdiction rules and the predictability underlying the traditional civil law approach.<sup>257</sup> This subpart highlights a few of these examples by focusing less on the underlying substance of the disputes that gave rise to conflicts, and more on how the legal stakeholders involved characterized the disputes.

The Brussels regime sets forth the *actor sequitur rei forum* rule as a default basis of jurisdiction, requiring that “persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State.”<sup>258</sup> This approach takes a strict *lis pendens* approach to parallel proceedings and follows the first seised rule, which requires that once one court is “seised” by the initiation of a civil action, the “second seised” court must stay or dismiss proceedings in all circumstances.<sup>259</sup> So,

---

255. See Usunier, *supra* note 248, at 544 (noting that the Brussels Convention’s jurisdiction rules “are [] highly typical of civil law countries’ rules of jurisdiction,” which is “only natural since the Brussels Convention was originally made among the founding States of the Community, all of which are civil law countries (Belgium, France, Germany, Italy, Luxembourg and the Netherlands)”; Anna Gardella & Luca G. Radicati di Brozolo, *Civil Law, Common Law, and Market Integration: The EC Approach to Conflicts of jurisdiction*, 51 AM. J. COMP. L. 611, 612-13 (2003).

256. Beaumont, *supra* note 209, at 100.

257. See Aude Fiorini, *Judicial Discretion in Light of the New European Rules on Jurisdiction in Civil and Commercial Matters: Reform or Continuity? Common Law Perspectives*, (2014) 1 HANYANG J. L. 67, 67, 74.

258. Brussels Recast, *supra* note 254, at art. 4; Brussels I Regulation, *supra* note 253, at art. 2; Brussels Convention, *supra* note 252, at art. 2.

259. Brussels Recast, *supra* note 254, at art. 29; Brussels I Regulation, *supra* note 253, at art. 27; Brussels Convention, *supra* note 252, at art. 21. See *Jurisdiction under the Brussels-*

for example, where a plaintiff files in Italy and the defendant commenced a related action in France, the French court is the “second seised” court and must stay or dismiss the case until the Italian court determines whether it has jurisdiction.

In *Turner*, the ECJ held that the Brussels regime prohibited English courts from issuing anti-suit injunctions against proceedings in member states. England’s pleadings highlighted the anti-suit injunction as a tool derived from equity to prevent unconscionable behavior by preventing defendants from filing vexatious lawsuits in other countries’ courts.<sup>260</sup> However, the ECJ rejected the importance of stopping vexatious litigant proceeding in bad faith and instead focused on the unpredictability of anti-suit injunctions as counter to the Brussels regime.<sup>261</sup> The Advocate General described anti-suit injunctions with terms like “chaos” and “counter to the philosophy of the [Brussels] Convention” that mandated jurisdiction approaches using “less flexible, but more objective, criteria,” noting that “only legal systems within the common law tradition allow[] such orders.”<sup>262</sup>

Common law scholars criticized *Turner*, emphasizing disdain for the ECJ’s preference for legal certainty at the expense of case-specific justice

---

*Lugano Regime*, in FAWCETT, *supra* note 198, § 17.37 (1995) (“[o]ne of the distinctive characteristics of the Brussels-Lugano regime is its strict rules of *lis pendens*, which have been applied with dogmatic inflexibility by the European Court of Justice”). Articles 33 and 34 of the Brussels Recast allow for a court in an EU member state to stay or dismiss a proceeding if a non-member state is first seised in a variety of circumstances, which introduces a modicum of judicial discretion where another member state court’s jurisdiction is not implicated. *See Fiorini*, *supra* note 257, at 83-88 (discussing Articles 33 and 34 and noting limited judicial discretion they allow as compared to common law forum non conveniens); *Nori Holding Ltd. v. Pub. Joint-Stock Co. Bank Otkritie Fin. Corp.* [2018] EWHC 1343 (Comm), [2018] 2 C.L.C. 9 (holding the Brussels Recast did not void *West Tankers* or allow anti-suit injunctions in support of arbitration). *But see* Case C-536/13, “Gazprom” OAO v. Lietuvos Respublika, ECLI:EU:C:2015:316 (E.C.J. May 13, 2015) (“Regulation No 44/2001 must be interpreted as not precluding a court of a Member State from recognising and enforcing, or from refusing to recognise and enforce, an arbitral award prohibiting a party from bringing certain claims before a court of that Member State, since that regulation does not govern the recognition and enforcement, in a Member State, of an arbitral award issued by an arbitral tribunal in another Member State”).

260. *Turner v. Grovit* [2001] UKHL 65, [2002] 1 W.L.R. 107 ¶ 24.

261. Case C-159/02, *Turner v. Grovit*, 2004 E.C.R. I-03565, ¶ 31.

262. Case C-159/02, *Turner v. Grovit*, 2004 E.C.R. I-03565, Opinion of Advocate General Ruiz-Jarabo Colomer, ¶¶ 33, 37.

that anti-suit injunctions are designed to address.<sup>263</sup> For example, Jonathan Mance opined: “[T]he suggested legal certainty is bought at the price of allowing a party who deliberately seeks to subvert an exclusive jurisdiction clause to do so by the simple device of ensuring that he gets to court first in a state other than that chosen.”<sup>264</sup>

In *Owusu v. Jackson*, Mr. Owusu, domiciled in the UK, was injured in Jamaica on holiday, rendering him a tetraplegic.<sup>265</sup> Owusu brought suit against six defendants in UK court, including five Jamaican companies and the individual, domiciled in the United Kingdom, who rented Owusu the house in Jamaica. After receiving a request to dismiss proceedings on forum non conveniens grounds, the English Court of Appeal referred to the ECJ the question of whether it could decline jurisdiction based on forum non conveniens in favor of Jamaican courts.<sup>266</sup> The ECJ held that the Brussels Convention precluded the United Kingdom from dismissing based on forum non conveniens, even though no other party to the Brussels Convention was included.<sup>267</sup>

Both Advocate General Philippe Léger and the ECJ relied heavily on the idea that forum non conveniens would undermine legal certainty as their justification for this holding.<sup>268</sup> The ECJ concluded that “[r]espect for the principle of legal certainty, which is one of the objectives of the Brussels Convention, would not be fully guaranteed if the court having jurisdiction under the Convention had to be allowed to apply the *forum*

---

263. See, e.g., Trevor C. Hartley, *The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws*, 54 INT'L. & COMP. L. Q. 813, 822 (2005) (“[t]hanks to [ECJ], bad-faith litigants can now go about their business without fear of antisuit injunctions, as long as they do not stray beyond the confines of the European Union”); Jonathan Harris, *Understanding the English Response to the Europeanisation of Private International Law*, 4 J. PRIV. INT'L. L. 347, 369 (2008) (“[w]hat most English writers cannot understand and accept [] is what they perceive to be the prizing of [mutual trust and legal certainty] above all other values”); Jan-Jaap Kuipers, *Party Autonomy in the Brussels I Regulation and Rome I Regulation and the European Court of Justice*, 10 GERMAN L. J. 1505 (2009); Adrian Briggs, *Case Comment: Anti-suit Injunctions and Utopian Ideals*, L.Q.R. 2004, 120, 529-533, 530 (2004).

264. The Right and Honorable Lord Mance, *The Common Law and Europe: Difference of Style or Substance and Do They Matter?*, Birmingham Law School Holdsworth Club Presidential Address, November 24, 2006, at 20.

265. Case C-281/02, *Owusu v. Jackson*, 2005 E.C.R. I-1445.

266. *Id.* ¶ 22.

267. *Id.* ¶ 26.

268. *Id.* ¶ 38; Case C-281/02, *Owusu v. Jackson*, 2005 E.C.R. I-1445, Opinion of Advocate General Léger, ¶¶ 160, 162 (citations omitted).

*non conveniens* doctrine.”<sup>269</sup> The ECJ’s reasoning that the “wide discretion” of *forum non conveniens* “is liable to undermine the [Brussels Convention’s] predictability,” which would further undermine “[t]he legal protection of persons established in the Community.”<sup>270</sup>

Léger made the telling observation that the Brussels Convention “is largely inspired within the civil law system, which attaches particular importance to the predictability and inviolability of rules on jurisdiction. That dimension has a lower profile in the common law system, since the application of the rules in force is approached in a somewhat more flexible manner and on a case-by-case basis.”<sup>271</sup>

The United Kingdom’s response to *Owusu* illustrates the incompatible essential components of predictability and flexibility.<sup>272</sup> Common law scholars voiced frustration with the ECJ’s need for predictable structure and order trumping considerations of case-specific justice. Trevor Hartley’s response is emblematic of the common law reaction:

This judgment is remarkable for its absolute refusal to consider the requirements of reasonableness. If the United Kingdom is a member of the European Union, we obviously have to make adjustments, just like everyone else. In the legal area, this includes giving up our traditional rules in favour of continental-style rules that we may regard as inferior. However, while we have to make sacrifices in order to protect the interests of our continental partners, they should allow us to go our own way where their interests are not affected . . . The crass insistence that common law rules must be abolished even where no Community interest is at stake is the feature of this judgment that will cause most difficulty for lawyers in England. It

---

269. Case C-281/02, *Owusu v. Jackson*, 2005 E.C.R. I-1445, ¶ 38.

270. *Id.* ¶¶ 41, 42.

271. Case C-281/02, *Owusu v. Jackson*, 2005 E.C.R. I-1445, Opinion of Advocate General Léger, ¶ 264.

272. See, e.g., *Review of the Brussels I Regulation (EC 44/2001)—Comments from the United Kingdom*, available at <https://www.business-humanrights.org/fr/dernières-actualités/pdf-review-of-the-brussels-i-regulation-ec-442001-comments-from-the-united-kingdom-scroll-to-para-12-15/> (“[t]he United Kingdom regrets the inflexibility inherent in the ECJ’s decision in *Owusu v. Jackson*. It has to a great extent disabled our valuable procedural mechanism of *forum non conveniens* which facilitates the transfer of cases which would be more appropriately dealt with by the courts in another jurisdiction.”).

seems that the continental judges on the [ECJ] want to dismantle the common law as an objective in its own right.<sup>273</sup>

*Owusu* led common law scholar Andrew Burrows to observe: “civilian hostility to the doctrine of *forum non conveniens* can seem almost pathological.”<sup>274</sup> *Owusu* has even given the civil law world pause.<sup>275</sup> Gilles Cuniberti, a scholar well-versed in both civil and common law international private law, called the ECJ’s reasoning in *Owusu* “formalistic” and “laconic.”<sup>276</sup>

Next came the notorious ECJ decision in *Allianz SpA v. West Tankers, Inc.*<sup>277</sup> An English court issued an interim injunction prohibiting a defendant from proceeding in Italian courts where an arbitration agreement existed obligating the parties to arbitrate in either New York or London, which was affirmed by the court of appeal and appealed to the House of Lords.<sup>278</sup> The House of Lords referred the following question to the ECJ: “Is it consistent with EC Regulation 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings in another Member State on the ground that such proceedings are in breach of an arbitration agreement?”<sup>279</sup> The ECJ held the UK court could not “restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement.”<sup>280</sup> In short, the ECJ held “an anti-suit injunction is always an anti-suit injunction, irrespective of the underlying reason for which it is issued, be

---

273. Hartley, *supra* note 263, at 828. See also Jonathan Harris, *Stays of Proceedings and the Brussels Convention*, 54 INT’L. & COMP. L. Q. 933, 939 (2005); Harris, *supra* note 263, at 354, 375; Goff, *supra* note 76, at 753. Gilles Cuniberti, *Forum Non Conveniens and the Brussels Convention*, 54 INT’L. & COMP. L. Q. 973, 979 (2005).

274. ANDREW BURROWS, ENGLISH PRIVATE LAW 20.78, 1551 (2d ed. 2007).

275. See European Parliament resolution of 7 September 2010 on the implementation and review of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2009/2140(INI).

276. Cuniberti, *supra* note 273, at 974, 975.

277. Case C-185/07, *Allianz SpA et al. v. West Tankers, Inc.*, ECLI:EU:C:2009:69 (E.C.J. February 10, 2009).

278. *West Tankers, Inc. v. Ras Riunione Adriatica di Sicurta SpA, et al.* [2005] EWHC (Comm) 454 [76], [2005] 2 All ER (Comm) 240 [76] (Eng.).

279. *West Tankers Inc. v. Ras Riunione Adriatica di Sicurta SpA, et al.* [2007] UKHL 4 [23], [2007] 1 All ER (Comm) 794 [23] (appeal taken from Eng.).

280. Case C-185/07, *Allianz SpA et al. v. West Tankers, Inc.*, ECLI:EU:C:2009:69, ¶ 34.

it the protection of an arbitration clause protection [] or the protection against bad faith proceedings.”<sup>281</sup>

Advocate General Kokott argued that the *lis pendens* rule in the Brussels regime required a court not first seised to stay proceedings pending the first-seised court’s jurisdiction determination, and this prohibited English courts from attempting to oust the first-seised Italian courts of jurisdiction by way of an anti-suit injunction. This strict *lis pendens* rule did not change in the face of an arbitration agreement.<sup>282</sup> Ultimately, she recommended that the Brussels I Regulation “precludes a court of a Member State from making an order restraining a person from commencing or continuing proceedings before the courts of another Member State because, in the opinion of the court, such proceedings are in breach of an arbitration agreement.”<sup>283</sup> The ECJ concluded that anti-suit injunctions directed toward member state courts prevent “the attainment of the objectives of unification of [jurisdiction] rules” and “prevent a court of another Member State from exercising the jurisdiction conferred on it.”<sup>284</sup> It agreed with Kokott that anti-suit injunctions were incompatible with the first-seised *lis pendens* rule<sup>285</sup> and the principle of mutual trust espoused in *Turner*.<sup>286</sup>

The common law world was incensed by the ECJ opinion in *West Tankers*.<sup>287</sup> Scholars criticized the ECJ’s reasoning as well as the brevity of its opinion.<sup>288</sup> A call to arms rallied to find ways to “restrict the ambit” of ECJ decisions voiding common law discretionary doctrines, and “reinvent the common law’s influence.”<sup>289</sup> Edwin Peel’s discussion of the post-*West Tankers* legal landscape noted “one can expect the creative

---

281. Haris Meidanis & Apostolos Giannakoulis, *Case Note: Case C-185/07*, 46 COMMON MARKET L. REV. 1709, 1716 (2009).

282. Case C-185/07, *Allianz SpA et al. v. West Tankers, Inc.*, ECLI:EU:C:2009:69 (E.C.J. February 10, 2009), Opinion of Advocate General Kokott, 4 Sept. 2008, ¶ 57.

283. *Id.* ¶ 74.

284. Case C-185/07, *Allianz SpA et al. v. West Tankers, Inc.*, ECLI:EU:C:2009:69, ¶ 24.

285. *Id.* ¶ 29.

286. *Id.* ¶ 30.

287. See Jacob Grierson, *Comment on West Tankers v. RAS Riunione Adriatica di Sicurtà S.p.A.*, 26 J. INT’L ARB. 891, 896 (2009) (“[m]uch ink has already been spilled, and considerable anger vented, about Kokott, A.G.’s opinion and the ECJ’s judgment in the *West Tankers* case”).

288. See, e.g., Edwin Peel, *Arbitration and anti-suit injunctions in the EU*, L.Q.R. 2009, 125(JUL) 365, 365 (2009) (“[t]here is little merit in detailed assessment of the reasoning of the court, and not only because, as is usually the case, there is not much of it”).

289. Harris, *supra* note 263, at 348.

process of the common law to swing into action, if it has not already done so.”<sup>290</sup> Similarly, Harris observes that “[i]t took the English courts only a matter of weeks after the decision in *Owusu* to state that the case did not restrict the application of [forum non conveniens] where proceedings were brought in England in breach of an exclusive jurisdiction clause for the courts of a non-Member State.”<sup>291</sup>

Likewise, Harris points to post-*Turner* English case law actually strengthening the reach of anti-suit injunctions.<sup>292</sup> Some other potential creative solutions include damages awards for stalling the jurisdiction of a chosen court or arbitral tribunal, expedited jurisdiction procedures that allow the first-seised court to quickly dispose of such cases, and “case-management” stays in which a court grants what is essentially a forum non conveniens stay packaged in another name.<sup>293</sup> The common law reaction illustrates that common law judges will use judicial discretion and their own independent law-making power to create these rules to ensure equitable results in varying fact-specific cases. It is not surprising, therefore, that the United Kingdom continued to use anti-suit injunctions throughout the period in which it was subject to the Brussels regime and will utilize such injunctions and forum non conveniens freely moving forward.<sup>294</sup>

---

290. Peel, *supra* note 288, at 368.

291. See Harris, *supra* note 263, at 382, referring to *Konkola Copper Mines Plc v. Coromin* [2005] 2 Lloyd’s Rep. 555 (Q.B.).

292. See Harris, *supra* note 263, at 386-87, referring to *Samengo-Turner v. J&H Marsh & McLennan (Serv.) Ltd.* [2007] EWCA (Civ) 723 [44], [2008] ICR 18 [44] (Eng.) (issuing an anti-suit injunction against New York proceedings to protect employer UK company’s right pursuant to the Brussels Convention to be sued in place of domicile). UK courts have continued to utilize anti-suit injunctions in cases not involving member state courts and are now free to utilize them in all cases.

293. See, e.g., Harris, *supra* note 263, at 388, 391 (discussing damages and “case management” stay possibility); Petr Briza, *Choice of Court Agreements: Could the Hague Choice of Court Agreements Convention and the Reform of the Brussels I Regulation be the Way out of the Gasser-Owusu Disillusion?*, 5 J. PRIV. INT’L L. 537, 549 (2009). The English Court of Appeal has held that “damages can be awarded for a loss incurred by the failure to comply with the terms of an exclusive jurisdiction clause.” *Sunrock Aircraft Corp. Ltd. v. Scandinavian Airline Sys. Denmark-Norway-Sweden* [2007] EWCA (Civ) 882 [37], [2007] 2 Lloyd’s Rep 612 [37] (Eng.).

294. See, e.g., *Ebury Partners Belgium SA/NV v. Technical Touch BV* [2022] EWCH 2927 (Comm) [134] (granting anti-suit injunction restraining Belgian party from proceeding in Belgian court based on forum selection clause specifying the Courts of England). See Gillies, *supra* note 39, at 161 (“UK courts’ application of the doctrine of forum non conveniens will also become more prevalent, regardless of the defendant’s domicile”).

## VII. CONCLUSION

The essential component methodology identifies and compares key tenets of legal traditions linked to rules being compared. Essential components are identified by analyzing history, legal culture, and legal reasoning related to the legal rules at issue. When using this approach with transnational jurisdiction rules, the difficulties in harmonizing these rules can be explained by the incompatibility between the flexibility underlying common law jurisdiction doctrines and predictability to which civil law jurisdiction rules are tied. These essential components are rooted in unique historical trajectories from the French Code of 1804 and the equity courts in early English legal history. They foster a wholly different cultural value of the role of the judge vis-à-vis the legislator and are manifested in divergent legal reasoning structures. This methodology can be particularly helpful in trying to determine whether legal rules are capable of harmonization and also highlights that legal rules must be understood in the larger context in which they are found and rooted to be meaningfully compared.