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Richard G. Fentiman*

Jurisdiction, Discretion and the Brussels Convention

In December 1990 the Court of Appeal in London addressed an issue of cardinal importance for European private international law. The question was whether an English court has the power to stay or dismiss proceedings, in which it has jurisdiction under the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments,¹ on the basis that a court in a non-Convention country is the forum conveniens. The case was Re Harrods (Buenos Aires) Ltd.,² and the Court of Appeal's answer was that such a power exists.

Despite the complexity of the legal point in issue, the facts of Harrods are simply stated. A Swiss corporation, the minority shareholder in Harrods (Buenos Aires) Limited, began proceedings in the English courts, claiming that the company's affairs had been conducted in a manner unfairly prejudicial to the minority shareholder's interests.³ The primary relief sought was an order that the majority shareholder should, in effect, compensate the minority shareholder for the diminution in the company's value caused by the alleged mismanagement. This was to be done by ordering the majority shareholder to purchase the minority holding at a price reflecting the alleged loss. In the alternative, the court was asked to dissolve the company, not because it was insol-

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2. [1991] 3 W.L.R. 397 (Eng. C.A.). Curiously, the point at issue in Harrods was never addressed in Banco Atlantico S.A. v. British Bank of the Middle East [1990] 2 Lloyd's Rep. 504 (Eng. C.A.), in which an English-domiced corporation sought to defend English proceedings by claiming (unsuccessfully) that Sharjah was the forum conveniens.


26 CORNELL INT'L L.J. 59 (1993)
vent, but because to do so would be "just and equitable." 4 The majority shareholder, another Swiss corporation, replied by inviting the English court to exercise its discretion to stay the action, on the basis that Argentina, not England, was the *forum conveniens*. The essence of this defense was that the company operated entirely in Argentina, having only the most formal connection with England by virtue of its incorporation there. Argentina, therefore, was the place where the case could be tried "more suitably for the interests of all the parties and for the ends of justice." 5

In many cases this defense would be unexceptional. English courts commonly stay proceedings on the basis that a court elsewhere is the *forum conveniens*. In *Harrods*, however, the plea encountered an immediate difficulty. The company, effectively the defendant in the proceedings, was considered domiciled in England, pursuant to the Brussels Convention, by the mere fact that it was incorporated and had its registered office there. 6 This in turn conferred jurisdiction on the English court because Article 2 of the Convention provides that "[s]ubject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State."

Given that the "defendant" company was domiciled in England, and caught by the Convention's jurisdictional regime, any attempt to stay the proceedings was seriously impeded. The Convention, unlike English national law, contains no doctrine of *forum non conveniens*. Nor, indeed, does it provide at all for the staying of actions in cases where the alternative forum is in a non-Convention country like Argentina. In such circumstances how was an English court to treat the majority shareholder's move to stay the petition? Was the court permitted to resort to its traditional rules for the staying of actions, which are curtailed by the Convention but not abolished, regardless of the fact that it enjoyed jurisdiction under the Convention? Or was it required to take Article 2 at face value and simply accept jurisdiction on the Convention's terms?

This stark choice was given focus by Section 49 of the Civil Jurisdiction and Judgments Act 1982, ch. 27, § 42(3) (Eng.). The Convention was implemented in the United Kingdom (U.K.) by the Civil Jurisdiction and Judgments Act 1982, and amended (in the U.K.) by The Civil Jurisdiction and Judgments Act 1982 (Amendment), S.I. 1990, No. 2591.

5. *Spiliada Maritime Corp. v. Cansulex Ltd.* (The *Spiliada*), [1986] 3 W.L.R. 972, 991 (Eng. H.L.) (per Lord Goff). Strictly speaking, the majority shareholder in *Harrods* raised two procedural defenses, not one. Insofar as the proceedings were against the company, over which the court clearly had jurisdiction, they sought a stay of the petition. But, insofar as it involved the majority shareholder, the court was asked to refuse to allow service of the petition on the majority shareholder in Switzerland under Order 11 of the Rules of the Supreme Court. Although both issues turned on the location of the *forum conveniens*, the latter begs distinct questions with which the present article is not concerned. It is apparent from the questions referred to the E.C.J. that the majority shareholder has assumed the role of co-defendant in the House of Lords proceedings; *infra* note 8 (question 3).
6. *See* Civil Jurisdiction and Judgments Act 1982, ch. 27, § 42(3) (Eng.).
tion and Judgments Act 1982,\(^7\) the statute which implements the Brussels Convention in the United Kingdom. This provides that "[n]othing in this Act shall prevent any court in the United Kingdom from staying, sisting, striking out or dismissing any proceedings before it, on the ground of forum non conveniens or otherwise, where to do so is not inconsistent with the 1968 Convention." Everything turned, therefore, on what the Convention itself required. The Court of Appeal, taking a robust view of an elusive problem, held that the Convention did not prevent an English court from utilizing *forum non conveniens* in order to stay proceedings against a non-Convention country.

Since the Court of Appeal's decision, the question at issue in *Harrods* has been appealed to the House of Lords, England's highest court. The House of Lords, however, has adjourned its proceedings, as it was bound to do. It has done so in order to refer the matter to the European Court of Justice ("E.C.J.") in Luxembourg which, though not a court of appeal, is charged with providing definitive rulings on the interpretation of the Convention. Of the six questions identified for the European Court by the House of Lords, two, in particular, touch the nerve of the case:

1. Does the 1968 Convention apply to govern the jurisdiction of the courts of a Contracting State in circumstances where there is no conflict of jurisdiction with the courts of any other Contracting State?
2. (a) Is it inconsistent with the 1968 Convention where jurisdiction is founded on Article 2 for a court of a Contracting State to exercise a discretionary power available under its national law to decline to hear proceedings brought against a person domiciled in that State in favour of the courts of a non-Contracting State, if the jurisdiction of no other Contracting State under the 1968 Convention is in question?
   (b) If so, is it inconsistent in all circumstances or only in some and, if so, which?\(^8\)


\(^8\) House of Lords, Minutes of Proceedings, July 13, 1992 (reproduced by permission of Her Majesty's Stationery Office). The other questions were:

3(a) If the answer to question (2) is Yes, is it nevertheless consistent with the 1968 Convention for the court of a Contracting State to exercise a discretionary power available under its national law to decline to hear those proceedings against a co-defendant not domiciled in a Contracting State in favour of the courts of a non-Contracting State?
   (b) Is the answer to question (3) different if the effect of declining to hear those proceedings against a co-defendant is that the claim against the domiciled defendant would have to be dismissed?

4 Do proceedings in which a member of a company having its seat in a Contracting State claims relief on the ground that the affairs of the company are being or have been conducted in a manner which is unfairly prejudicial to the interests of some of the members (including the claimant member) or whether any actual or proposed act or omission of the company is or would be so prejudicial, such as a claim under Part XVII of the UK Companies Act 1985, fall within Article 16(2) of the 1968 Convention.

5 Do proceedings in which a claim is made that a company having its seat in a Contracting State should be dissolved in the alternative to such a claim as
Such questions are dramatic in their import. They address the very purpose of the Brussels Convention and its territorial scope. They also expose fundamental questions of policy and justice concerning English law's distinctively discretionary approach to jurisdiction. The European Court is unlikely, however, to answer the questions posed in *Harrods* before the end of 1993, or even later. That being so, it is timely to open discussion of the fundamental issues exposed in *Harrods*. And it is appropriate to do so by examining the Court of Appeal's treatment of the matter and its challenging implications.

I. The Problem in Context

To grasp the full significance of the issue exposed in *Harrods*, it is first necessary to discuss the background of the case. In particular, it is important to outline English law's approach to matters of international jurisdiction and to explain precisely why the outcome of the *Harrods* litigation is so significant.

A. The English Approach to Jurisdiction

Two features of the English law of international jurisdiction require special attention. First, it should be noted that, depending on the case, no fewer than three different sets of jurisdictional rules are available to English courts, two of them contained in international conventions, the third enshrined in the common law. Secondly, it must be emphasized that the common law position on jurisdiction is profoundly different from that provided for by international agreement.

1. Three Regimes

Depending on the case, an English court may be obliged to apply one of three mutually exclusive jurisdictional regimes. First, there are the rules of the 1968 Brussels Convention. In force in the United Kingdom since 1987, the Convention substantially harmonizes the national laws of European Community ("E.C.") countries concerning jurisdiction and the enforcement of judgments. Mandatory in effect, the Convention ensures that, in a situation in which an English court has jurisdiction under the Convention, it must assume jurisdiction as the Convention provides and not pursuant to its traditional rules of competence.

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Id.

Of the several bases of jurisdiction provided by the Convention the most important in the present context is that contained in Article 2. As we have seen, this provides, subject to some exceptions, that "persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State." Each E.C. country may define domicile in its own way. In English law, at least for Convention purposes, an individual is domiciled in England if he or she is resident in, and has a substantial connection with, England. A corporation is domiciled in the United Kingdom if it is incorporated and has its registered office or other official address there, or if its central management and control is exercised there.

A second, quite distinct, jurisdictional regime is to be found in the 1988 Lugano Convention on Jurisdiction and the Enforcement of Judgments. It is similar in its terms to the Brussels Convention and, in effect, extends the Brussels regime to member states of the European Free Trade Area.

Thirdly, there are the traditional rules of jurisdiction in English law. These residual rules are allowed to operate in cases where neither the Brussels nor Lugano Convention applies. According to the traditional rules, a court may assume jurisdiction over any defendant on whom process may be served, either in England or overseas. But an arresting feature of English law's traditional approach, of central importance in the Harrods case, is that whether an English court will entertain proceedings is ultimately in the courts' discretion. An English court may, in its discretion, stay proceedings in which it has jurisdiction by virtue of the defendant's presence; it may also refuse to permit service of process upon a defendant located overseas.

The discretion whether or not to assume jurisdiction is governed by the doctrine of forum non conveniens, the function of which is to identify the forum in which the case may be tried "more suitably for the interests of all the parties and the ends of justice." In connection with the staying of actions, the search for the forum conveniens in a given case normally proceeds in two stages.

10. Id. § 41.
11. Id. § 42.
13. The "EFTA" states are Austria, Finland, Iceland, Norway, Sweden, and Switzerland. The issues described in the present article would be relevant mutatis mutandis as much to the Lugano Convention as to the Brussels Convention although the cases under discussion concern only the latter.
14. Brussels Convention, supra note 1, art. 4.
16. The Rules of the Supreme Court, Order 11 (Eng.).
18. Id. at 991 et seq.
First, a court is required to identify the natural forum for trial, judged in practical and economic terms. Some relevant factors are the convenience and expense of litigating in one place rather than another (such as the availability of witnesses and the ease of proof), the identity of the substantive governing law and the residence of the parties. Assuming that the natural forum is found to be abroad, a stay of the English proceedings will normally be granted.

It is, however, open to a plaintiff in such circumstances to invoke the second stage of the test and argue that it would be unjust to grant a stay. Justice in this sense usually means that the plaintiff would be deprived of some significant juridical advantage which is unavailable in the foreign forum. Examples of such a disadvantage which, if established, could cause an English court to decline a stay, might be: if the action were time-barred abroad;\(^\text{19}\) if an essential co-defendant were not subject to the foreign court's jurisdiction;\(^\text{20}\) if a successful plaintiff's costs are irrecoverable abroad;\(^\text{21}\) or if the plaintiff would be obliged to proceed by way of a jury trial in foreign proceedings.\(^\text{22}\) Such disadvantages are of an absolute nature - either a plaintiff's action is time-barred in the alternative forum or not; either it can recover its costs abroad, or not. There is, however, a tendency for English courts to downplay or discount the significance of juridical disadvantages which are merely matters of degree. Matters affecting the amount of financial recovery in the competing fora, for example, such as a difference in the level of damages, or the fact that interest is or is not recoverable, may not be relevant. Differences in the extent of pre-trial discovery usually will be considered irrelevant too.

The English doctrine of forum conveniens, therefore, seeks to reconcile the competing interests of plaintiffs and defendants as to the location of the forum. The first limb, focusing on the objective connection between a dispute and a given jurisdiction, tends to protect defendants from proceedings in an inappropriate or unconnected forum. The second limb, however, protects plaintiffs from any injustice that might follow from their being prevented from suing in their preferred court.

Thus depicted, the English approach to jurisdiction is discretionary, placing the onus upon the court to allocate jurisdiction in terms of justice, convenience and the parties' best interests. It is also pragmatic, defining jurisdiction purely in terms of the plaintiff's ability to serve process on the defendant. In these respects English law could not be more different from the approach adopted in the Brussels and Lugano Conventions.

\(^{19}\) Id.
\(^{22}\) Berisford, [1990] 3 W.L.R. at 704.
2. Two Approaches

Although the Brussels and Lugano Conventions share a common philosophy, even a common terminology, the English approach to international jurisdiction is distinct from both. At its simplest, the bases of jurisdiction are quite different in English national law—domicile, for example, was never a ground for jurisdiction in England. But two further differences are even more important in the present context. On the one hand, the discretion which is the defining characteristic of the English approach is quite alien to both Conventions. A court which has jurisdiction under either Convention may only decline jurisdiction in the specific situations prescribed by the Conventions. Indeed, it must do so in such situations; it has no choice and no discretion. The most important of these situations is one in which another E.C. country’s courts are already seised of the same matter. In such a case, the second court must decline jurisdiction automatically.\(^2\)

The second important difference between English law and the Brussels and Lugano Conventions is the direct source of the problem presented in *Harrods*. Neither convention contains provisions which deal with the staying of proceedings between an E.C. (or E.F.T.A.) country’s courts and those in a non-Convention state. If an English court has jurisdiction pursuant to the Convention, therefore, and a court in New York also has jurisdiction (according to New York law) a problem arises: the Brussels Convention provides no mechanism for an English court to stay its proceedings in favor of proceedings in New York; the Convention makes no provision for allocating jurisdiction between E.C. countries and non-E.C. countries.

B. A Problem Revealed

The root of the problem in *Harrods* is the fact that the Brussels Convention lacks any mechanism for the staying of actions in cases in which the alternative forum is outside the E.C. It is a deficiency with troubling implications. Suppose that a New York corporation wished to sue an English-domiciled company in England. If the defendant is incorporated in England, it is domiciled there under the Brussels Convention and so is subject to the English courts’ jurisdiction. Imagine, however, that the defendant alleges that New York represents the *forum conveniens*. Perhaps the alleged default occurred in New York, such that the relevant witnesses and evidence are located there, or maybe the applicable law is that of New York, or possibly proceedings are substantially underway there, such that it would be pointlessly expensive to re-commence litigation in England. Alternatively, there might be an express agreement in a contract between the parties to submit their disputes exclusively to the New York courts. In any such case the defendant might have good reason to invoke English law’s traditional rules and have the English action

\(^2\) Brussels Convention, *supra* note 1, art. 21; Lugano Convention, *supra* note 12, art. 21.
stayed in favor of proceedings in New York. But, since the advent of the Brussels Convention, are the English courts in a position to entertain such a plea?

If, contrary to the Court of Appeal's view in Harrods, the answer is no, the implications are serious, both for litigants and for the sound administration of justice. If the English courts could no longer utilize their traditional staying rules in such cases, the proceedings could not be stayed at all because the Convention makes no alternative provision for such an eventuality.

If suddenly the staying of actions is no longer a feature of such cases, the balance of advantage between plaintiffs and defendants is to some extent reversed. Plaintiffs would face one less obstacle while defendants would be robbed of a valuable procedural defense. Moreover, a defendant's powerlessness to restrain the plaintiff in such circumstances could lead to injustice in some cases. Litigation in an inconvenient forum is likely to be needlessly expensive and, although the expense of inconvenient litigation will afflict both parties, its impact on the financially weaker party will be more decisive. It is, of course, a truism that the economic power of the parties tends to determine the outcome of litigation more than the merits of a case. But it is, perhaps, uniquely unfair to allow the outcome of a dispute to turn on inequality of economic bargaining power when the defendant is the weaker party and the forum is both substantially unconnected with the dispute and of the plaintiff's choosing. Moreover, such considerations are especially important in a system such as England's where the loser generally pays the winner's costs. Would it be right to allow a well-funded plaintiff to inflate needlessly the cost of a dispute by suing, inappropriately, in England, thus raising the stakes in the eyes of a poorer defendant for whom the potential exposure would be crippling?

Apart from such considerations of justice, a number of important policy objectives would be unattainable if the English courts were deprived of their power to stay proceedings in a case such as Harrods. First, their ability to police purely tactical forum-shopping would be seriously impaired. Courts would find it harder to prevent plaintiffs from commencing proceedings in England simply to disadvantage the defendant, a concern which touches upon public policy as much as fairness to the defendant.24

Second, the English courts would be unable to ensure the most cost-effective and time-efficient use of their own resources. They would have no means to control the overloading of the English legal system with proceedings which could be resolved as easily—or better resolved—elsewhere.

Third, deprived of the power to stay actions in cases involving alternative proceedings in non-E.C. courts, the English courts would be

24. It would still be possible to stay proceedings which amount to an abuse of process. See The Rules of the Supreme Court, Order 18.
unable to prevent the mischief caused by encouraging concurrent pro-
ceedings in different jurisdictions. Apart from the economic inefficiency
inherent in simultaneous actions, both English and non-English courts
would find themselves involved in an unseemly race to judgment. More-
over, an English court, unable to stay its own proceedings, might find
itself eventually having to choose which of two inconsistent judgments it
should execute, one English, the other foreign.

C. The Significance of Harrods

The Harrods litigation, therefore, has serious implications in terms of
practice, policy and principle, implications which are all the more
profound given how often such cases are likely to arise. It is true that
there are some situations in which an English court remains free to
assume jurisdiction under its traditional rules and in such cases the Har-
rods problem would not arise. If a defendant has transitory presence in
England, for example, and if none of the Convention's jurisdictional
grounds apply, a court could assume jurisdiction—and stay proceed-
ings—under its traditional rules. In the same way, if a case fell within
Order 11 of the Supreme Court Rules,\(^2\) then, assuming the defendant
were not E.C.-domiciled, an English court could exercise its time-
honoured discretion to assume jurisdiction over an overseas defendant.

Many cases, however, involve the issue whether an English court
may stay proceedings in which it has prima facie jurisdiction under the
Convention. In such cases jurisdiction is very likely to be founded on
domicile under Article 2 and the problem presented by Harrods will arise
directly. This is because of the breadth with which domicile is defined
for Brussels Convention purposes. It is a concept broad enough to
embrace all corporations incorporated in England,\(^2\) as well as some
which are not but have a "branch, agency or other establishment" there.\(^2\)
Moreover, when applied to individuals, the definition is notoriously inclusive, catching anyone who has been resident in England for
three months or more.\(^2\)

Against this background the significance of Harrods is revealed. The
case exposes the most urgent of all questions concerning the meaning of
the Brussels Convention: does it apply at all in cases where an alterna-
tive forum exists in a non-E.C. country? It also challenges the assump-
tion which most radically distinguishes the jurisdictional law of England
from that of its European neighbors: should judicial jurisdiction be
automatic or discretionary? At a more mundane level, however, Harrods
has more practical implications for potential litigants; if the European
Court of Justice finds that the Court of Appeal is wrong it would signal
open season for forum shopping in the English courts. The volume of
international litigation in England would increase, and litigants would

\(^{25}\) See supra note 16.
\(^{26}\) See supra note 11 and accompanying text.
\(^{27}\) Brussels Convention, supra note 1, art. 8 (relating to insurance contracts).
\(^{28}\) See supra note 10 and accompanying text.
find the balance of advantage between them radically altered. Indeed English law would be forced to move from a position in which the courts act as impartial umpires, balancing the interests of the parties, to one in which the odds are stacked dramatically in the plaintiff’s favour. Harrods, therefore, is of prime importance, not only for scholars and practitioners of European law, but for all those who might have business before the English courts.

II. The Harrods Controversy

The story which culminates in Harrods began with S & W Berisford v. New Hampshire Insurance Co.\textsuperscript{29} in which an English company sued its American insurer in England over a claim which the latter had refused to pay. The defendant was deemed domiciled in England under Article 2 of the Brussels Convention because it had a branch there and the court assumed jurisdiction on that basis.\textsuperscript{30} When the defendant sought a stay of the proceedings on the ground that New York, not London, was the forum conveniens, Hobhouse J. held that the doctrine did not apply to a case where a defendant is English-domiciled under the Convention. The same view was taken in Arkwright Mutual Insurance Co. v. Bryanston Insurance Co. Ltd.\textsuperscript{31} in which a Massachusetts insurance company sued its English reinsurer in London. Potter J. held that the latter was not entitled to seek a stay of the action under the forum conveniens doctrine on the ground that there was a \textit{lis alibi pendens}\textsuperscript{32} in New York. The English court had jurisdiction because the defendant was domiciled in England, so the case fell within the Brussels Convention’s regime where no such right existed.

In Harrods, the Court of Appeal emphatically disapproved of both Arkwright and Berisford. This was despite the fact that Harrods (Buenos Aires) Ltd., being incorporated in England, was undeniably domiciled there under the Convention. The Court of Appeal never doubted that the Brussels Convention prevents an English court from exercising its discretion under the doctrine of forum conveniens where the alternative forum is in a contracting state under the Convention. But they held that the Convention does not stop a court from employing the doctrine between the courts of England and those of a non-contracting state. A majority of the Court of Appeal also held that proceedings in Argentina were more appropriate, given that the company exclusively operated there.\textsuperscript{33}

\textsuperscript{30.} Brussels Convention, \textit{supra} note 1, art. 8. Art. 8 has the effect of bringing non-E.C. insurers within art. 2 in certain cases: “An insurer who is not domiciled in a Contracting State but has a branch, agency or other establishment in one of the Contracting States shall, in disputes arising out of the operations of the branch, agency or other establishment, be deemed to be domiciled in that State.”
\textsuperscript{31.} [1990] 3 W.L.R. 705 (Eng. Q.B.).
\textsuperscript{32.} Literally a “pending action elsewhere.”
A. An English Perspective

All three cases have attracted much comment and criticism. Arkwright and Berisford provoked special concern among English practitioners. Some were critical of the loss of England's flexible and commercially attuned rules on the staying of actions. Others were dismayed that, by implication, contractual clauses submitting to the jurisdiction of the courts of a non-contracting state would be undermined if defendants in such a case could no longer obtain a stay of English proceedings begun in breach of such a clause. It is clear that neither Hobhouse nor Potter JJ. thought that such a consequence would result from their rejection of a power to stay in cases of forum non conveniens.34 It is far from obvious, however, that cases involving foreign jurisdiction agreements can be so readily distinguished from those concerning other types of stay. The effect of Arkwright and Berisford was to put such jurisdiction clauses at risk, if not actually to undermine them. Certainly, the fear of such a possibility proved so powerful that one suspects it was this, more than anything, which led the Court of Appeal in Harrods to salvage the forum conveniens doctrine from displacement by the Brussels Convention, even though the case did not concern a jurisdiction clause.35

B. A Continental Perspective

The Court of Appeal's decision in Harrods, by contrast, has caused disquiet among continental European lawyers. They see in the decision, at best, a failure to respect the spirit of the Brussels Convention, at worst, an attempt to subvert it.36 They have doubts, on the one hand, about

the Court of Appeal's handling of the Convention and, on the other, about the very idea of jurisdictional discretion.

There are several ways to argue that the Brussels Convention deprives the English courts of their power to employ their traditional staying rules in a case such as Harrods, contrary to the Court of Appeal's view. The stronger argument is that once an English court has jurisdiction under the Convention, only the Convention can remove it; what the Convention giveth, the Convention taketh away. This might be justified with regard to Harrods by appealing to the apparently mandatory language of Article 2: someone domiciled in a Contracting State shall be sued there unless the Convention itself provides otherwise. Alternatively, we might say that, once an English court has jurisdiction under the Convention, a plaintiff has a right to sue in England and a defendant has a right to be sued there, rights which cannot be abrogated save as the Convention provides. Whatever form the argument takes, however, the idea that only the Convention can restrict Convention jurisdiction has dramatic consequences. It means, as the Convention does not provide for the staying of proceedings as between contracting and non-contracting states, that an English court would have no power at all to grant a stay in such a situation.

The weaker version of the anti-Harrods position argues that a contracting state's courts may stay proceedings in such a case pursuant to its national law, but only on grounds regarded as acceptable by the Convention for intra-E.C. cases. The point here is not that Convention jurisdiction can only be abrogated as provided for by the Convention but that this is permissible only in so far as it is consistent with the Convention. By this account, it would have been proper for the court in Harrods to have stayed the action had there been a related pending action in Argentina, had the case concerned immovable property situated there, or had there been an Argentinean jurisdiction clause. To have done so would have been to mirror, if not to apply, the terms, respectively, of Articles 21, 16 and 17 of the Convention. According to this argument, however, to decide, as did the Court of Appeal in Harrods, that English proceedings can be stayed merely because the forum conveniens is elsewhere, is improper. Such a ground for staying an action is not available in the Convention for intra-E.C. cases and therefore, so the argument runs, should not be allowed in a non-Brussels situation.

As for the disquiet about jurisdictional discretion itself, there is anxiety outside England about the apparent breadth and uncertainty of such an approach. The heart of this concern is that jurisdictional rules should be clearly defined and automatic, not dependent on judicial choice. Some regard such discretion as a recipe for uncertainty and arbitrariness, or simply doubt that a judge could ever be competent enough to balance justice and convenience as the doctrine of forum non conveniens requires. More compellingly, others see in jurisdictional discretion the risk that a court will be tempted to abdicate its responsibility to try a case of which it is properly seised. Put differently, it gives a
judge the power to interfere retrospectively with the rights of litigants to sue and be sued in a court which prima facie has jurisdiction over them. Such misgivings are most conspicuously encapsulated in the German Constitution which provides that "no one shall be deprived of access to his lawful judge,"\(^{37}\) an injunction which ensures, once it can be shown that a plaintiff has a right to sue somewhere, that nothing can undermine that right, least of all an exercise of judicial discretion.

C. A Via Media

In light of these concerns, the purpose of the following remarks is to place the Arkwright-Berisford-Harrods saga in perspective and to suggest how the competing interests which those cases reflect might eventually be reconciled. More specifically, proceeding by way of a critique of the Court of Appeal's handling of Harrods, the present article speaks to the anxiety of those who doubt that resort to jurisdictional discretion, and to the forum conveniens doctrine in particular, even against non-contracting states, is compatible with the Brussels Convention. Its conclusion is that, on the contrary, such discretion, and the doctrine of forum conveniens in particular, offers the best and perhaps the only means whereby the objectives of the Convention might be furthered in the English context.

Before proceeding, however, it should be noted that the present article makes some assumptions, and so begs some questions. First, it says nothing about whether the Brussels Convention should operate where both the parties in dispute are English-domiciled. Whether it should depends on how we are to understand the reference in its Preamble to the fact that the Convention's purpose is to govern the "international" jurisdiction of E.C. courts.\(^{38}\) Does this exclude from its scope cases in which both parties are English? If so, does a dispute between English domiciliaries acquire nonetheless an international dimension whenever the defendant alleges that trial should take place in another country? Whatever the solution to these intractable questions the present article assumes that these aspects of the Convention's scope are not in issue (as they were not in Harrods).

Secondly, the following discussion assumes that the issue at stake in Harrods is not merely whether a defendant in English proceedings can seek a stay on the ground that the forum conveniens is elsewhere. Rather, the issue is whether the entire corpus of English law's traditional, discretionary rules for staying proceedings can survive when an English court has jurisdiction under the Convention and it is alleged that the courts in a non-contracting state should hear the dispute instead. Without entering into any debate as to the breadth of the doctrine of forum non conveniens, the following remarks take for granted that the question begged

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37. Grundgesetz [GG], art. 101(1).
in Harrods affects cases concerning *lis alibi pendens* and foreign jurisdiction clauses as much as cases of “bare” *forum non conveniens*. All these situations share the characteristic that they require an English court to exercise jurisdictional discretion.

III. Three Misconceptions

It is important to scotch three possible misconceptions about the meaning of the Court of Appeal’s decision in Harrods. The first concerns the interface between the Brussels Convention and the common law. In this regard it is important to note that the Court of Appeal was not claiming a discretion to stay proceedings as between England and other contracting states, a situation dealt with quite differently in the Convention by Article 21.39 Nor did the court mean to say that the Convention conferred such a power upon them *vis-à-vis* non-contracting states. What they said was that the Convention is simply inapplicable to a case where a defendant seeks to stay English proceedings on the ground that the *forum conveniens* is located in a non-contracting state. A court need not, so to speak, switch exclusively into Convention mode simply because it has jurisdiction under Article 2.

A second misconception about the Court of Appeal’s approach is that it somehow represents a rejection of the Convention. In fact, as we shall see, it was the Convention itself upon which the court relied in justifying its decision.

Thirdly, there might be some misunderstanding about the nature of jurisdictional discretion itself, the role of which the Court of Appeal so stoutly protected in Harrods. Typically this takes two forms. Observers sometimes suppose that the doctrine confers an untrammelled discretion on English judges to allocate jurisdiction at will. And sometimes they assume that a discretionary power to dismiss proceedings in which a court enjoys *prima facie* jurisdiction is necessarily unjust to the disappointed plaintiff.

A. The Nature of Jurisdictional Discretion

It is easy to imagine that the doctrine of *forum non conveniens* confers on an English judge *complete* freedom to decide whether a case should be tried in England or abroad, assuming the English courts have jurisdiction in the first place. Certainly, the usual, extremely open-textured, formulations of the doctrine are apt to suggest that whether a court will entertain proceedings depends on some open-ended balancing of all the circumstances of the case. The courts’ task is said to be to locate the “appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of

This is usually taken to mean, equally unspecifically, that the *forum conveniens* is the "natural forum," which itself is broadly defined as "that with which the action had the most real and substantial connection."

If such open-ended formulae are all there is to the *forum conveniens* doctrine then it would be true, as continental lawyers often suppose, that the staying of actions in such cases is unpredictable, allowing the judge a free hand to allocate jurisdiction. Thus depicted, English law would be far from the certainty and precision of the Brussels Convention. In reality, however, the exercise of jurisdictional discretion or, more exactly, the framework of principle according to which it is exercised, is tolerably predictable in practice. The courts apply sensible presumptions, sometimes unstated but readily implied, as to what constitutes the most appropriate forum in a given type of case. Consider their treatment of the two areas of law which occasion most litigation. In tort proceedings the natural forum is usually regarded as that of the place where the wrong was committed, while in contract cases there is a growing tendency to regard the identity of the applicable law as an especially potent indicator of the *forum conveniens*.

When the question arises whether a plaintiff would be robbed of a significant juridical advantage, were he or she compelled to sue in a foreign forum, it is especially clear that the courts have begun to impose a discernible structure on an otherwise elusive enquiry. An invidious comparison between the quality of service offered in competing fora is, for example, impermissible. So too, disadvantages which amount to mere matters of degree are unlikely to count for this purpose; a difference in the level of damages or in the extent of discovery, will usually be irrelevant. Moreover, of those "absolute" disadvantages which are regarded as relevant, it is apparent that some will be treated by the courts as especially persuasive reasons to withhold a stay of English proceedings. The impossibility of joining a co-defendant in the alternative forum is one illustration. Others are the fact that proceedings are

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41. Id. at 987.
time barred in the alternative forum,\(^\text{47}\) and the fact that even a victorious plaintiff could not recover its costs in any foreign proceedings.\(^\text{48}\)

More obviously, perhaps, two especially important principles underpin the courts' approach to the staying of actions. First, a court will almost invariably stay English proceedings which have been brought in breach of a foreign jurisdiction clause. Strictly speaking, it is an open question whether the discretion to stay English proceedings in favor of a foreign jurisdiction clause is an application of the doctrine of forum non conveniens.\(^\text{49}\) The courts seem undecided on the issue but, whatever the correct view, the point is the same. The staying of proceedings begun in defiance of a foreign jurisdiction clause is virtually automatic in English law, reflecting the courts' respect for such agreements.\(^\text{50}\) Their discretion in such cases is hardly a hazard to certainty and justice.

Again, there is powerful evidence that a court will tend to stay English proceedings when there is a prior pending action abroad.\(^\text{51}\) This presumption is less secure than that governing the enforcement of jurisdiction agreements as the foreign proceedings will have to be some way advanced for it to operate.\(^\text{52}\) But in this situation, as elsewhere, it seems that the doctrine of forum conveniens is more rule-like and regular than discretionary and unpredictable.

Whether we dignify such regularities of judicial behavior by referring to them as presumptions, or whether we treat them as informal starting points in the forum conveniens enquiry, the effect is the same. They render the lineaments of the courts' jurisdictional discretion relatively concrete and predictable. Indeed, the record seems to support Bingham L.J.'s recent assessment of the courts' discretion in forum conveniens cases. Admitting that the final answer to the question whether one forum or another is more appropriate must always be discretionary, he said nonetheless that "Even the answer to [that question] is not wholly discretionary, since the question itself is defined by authority and

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\(^{47}\) Spiliada, [1986] 3 W.L.R. at 992-93 (assuming it is reasonable for the plaintiff to have failed to proceed abroad).


\(^{49}\) P.M. North & J.J. Fawcett, CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW 239 (11th ed. 1987); see also Berisford, [1990] 3 W.L.R. at 702 (Hobhouse J.'s treatment of the jurisdiction clause).


there is clear authoritative guidance on the matters which may and may not be considered in answering it.\textsuperscript{53}

In fact, it would be surprising if this were not so, given the background against which most matters of international jurisdiction are decided in England. The majority of such issues arise before the Commercial Court in London, a relatively small tribunal whose judges are drawn exclusively from the ranks of the court's most experienced practitioners. Those practitioners in turn tend to appear regularly in the Commercial Court, acquiring considerable insight into the thinking of the bench and much experience as to the matters which might or might not be successfully argued. The collegiality of such a system nurtures a potent conventional wisdom as to how the appropriateness of the forum is to be determined.

Again, it is important to appreciate how seriously English judges take the ever-present injunction to decide like cases alike, and unlike cases unlike. Indeed, in the present context as elsewhere, the constant process of reconciling and distinguishing past cases in an effort to identify similarities and differences between them ensures that principles are bound to emerge the more the court's discretion is exercised. Finally, it should not be forgotten that English judges, unlike many of their continental European counterparts, always give lengthy, fully reasoned judgments. This ensures that their jurisdictional discretion is almost bound to be applied consistently between different cases, because the reasoning is always entirely exposed. It also makes it relatively simple for lawyers to discern regularities in the courts' approach to such questions and lends a far greater degree of consistency to the process than those familiar with continental adjudication might suppose.

Thus presented, it is intriguing how closely English law resembles the Brussels Convention in form and spirit. English law, in the end, looks less discretionary and less unpredictable than superficially appears. Even if it is different from the Brussels regime, it is actually closer to it than might appear. Moreover, English law employs its distinctive approach to achieve many of the same policy objectives as the Convention. Preserving the security of jurisdictional agreements,\textsuperscript{54} and deferring to a court already seised of a matter so as to prevent concurrent proceedings,\textsuperscript{55} are features of English law as much as the Convention. Such objectives can be achieved under English law, however, precisely because the acceptance of jurisdiction is discretionary.

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\textsuperscript{53} Banco Atlantico S.A. v. British Bank of the Middle East, [1990] 2 Lloyd's Rep. 504, 506 (Eng. C.A.); \textit{Cf.} Nourse L.J.'s remarks to similar effect, \textit{id.} at 511:

Where an English court is asked, on the ground of \textit{forum non conveniens}, to stay an action, a start must be made somewhere; and, where the action is for breach of a contract whose existence is admitted or established, a start can only be made by identifying the proper law of the contract . . .
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\textsuperscript{54} Brussels Convention, \textit{supra} note 1, art. 17.
\textsuperscript{55} \textit{Id.} art. 21.
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B. Justice and Disappointed Plaintiffs

A final misconception about what Harrods portends for the Brussels Convention relates to the supposed injustice of depriving a plaintiff of the opportunity to sue in a forum which has prima facie jurisdiction over a plaintiff’s claim. It is sometimes said that, because a plaintiff has a right under the Convention to sue a defendant where the defendant is domiciled, it would be unjust to the plaintiff to dismiss proceedings, a result which the doctrine of forum non conveniens permits, even encourages. As we shall see, the idea of a right to sue in this context is troubling, even incoherent. There is another reason, however, why injustice to the plaintiff fails to ring true as a criticism of jurisdictional discretion. It is hardly plausible, in the real world at least, that a plaintiff would be aggrieved merely through being deprived of the chance to sue in the courts of the defendant’s domicile. Nor would it be unfair to prevent a plaintiff from vindicating a mere paper right, so to speak, to sue the defendant there. A plaintiff would rightly be aggrieved, however, and it would be unfair, if the plaintiff were deprived of a significant advantage available in the courts of the defendant’s domicile because the action there was stayed.

Suppose, for example, that no other court would have jurisdiction over the plaintiff’s claim, either because of lack of jurisdictional competence, or because the claim is time-barred in the only alternative forum. Again, what if the system for recovering costs in the alternative forum is such that the plaintiff’s net gain in the event of victory would be less abroad than in England? And what if the plaintiff would be forced to submit to a jury trial in the foreign court although in England the trial would be by judge alone? In such cases, and in others of a similar nature, it would be unjust to rob a plaintiff of the opportunity to sue in the courts of a defendant’s domicile by staying the proceedings. This is not, however, because in some abstract sense the plaintiff’s right to sue has been infringed; rather it is because the plaintiff would be disadvantaged by the stay.

If the doctrine of forum non conveniens compelled such results, its justice and credibility would indeed be jeopardized. In reality, however, instead of requiring such results, the doctrine actually guards against them. It does so, moreover, in a fashion which could hardly be more sensitive to the potential injustice of staying a plaintiff’s action. The doctrine accomplishes this by ensuring that a stay of English proceedings will not deprive a plaintiff of a significant juridical advantage by forcing the plaintiff into a foreign forum.56 In practice, this tends to mean that an English court will stay its proceedings in favor of a trial in an alternative forum on the condition that the defendant waives

whatever feature of the foreign procedure would disadvantage the plain-
tiff. Where such undertakings are impracticable, or where the defendant
refuses to comply, the stay will simply be refused and the plaintiff will be
allowed to proceed.

The English courts are developing considerable expertise in the
area of determining whether a plaintiff would be disadvantaged by a
stay. Recent examples of such a disadvantage include the existence of a
time bar in the alternative forum,\(^5\) and the difficulty of joining a co-
defendant in any foreign proceedings.\(^6\) The impossibility of recovering
costs from a defendant abroad,\(^5\) and the fact that a plaintiff would have
to proceed by way of a jury trial in the alternative forum have been simi-
larly treated.\(^6\) Moreover, the sensitivity of the English courts' approach
is implied by the importance they attach to the circumstances of particu-
lar cases when assessing any injustice to the plaintiff. The fact that the
plaintiff's claim is time-barred in the foreign forum will only count as a
disadvantage, for example, if it was reasonable for the plaintiff not to
have issued proceedings abroad in good time.\(^6\) Similarly, the fact that a
successful plaintiff’s costs are irrecoverable from a defendant in the
alternative forum will not always be a significant disadvantage. Only if
the likely award of damages is small will the impact of a plaintiff’s having
to fund its own case be so treated.\(^6\)

In light of such considerations it is hard to allege that the doctrine
of forum non conveniens causes injustice to a plaintiff who would otherwise
be entitled to sue in the courts of a defendant’s domicile. On the con-
trary, the doctrine is designed precisely to protect plaintiffs from such a
threat. In this respect, as in others, therefore, it seems that the English
doctrine is immune from the criticism that it betrays the goals of the
Brussels Convention. Indeed, it respects the ideal of justice for the
plaintiff better than the practice of invariably allowing a plaintiff to sue
in the place of the defendant's domicile; for, unlike that approach, it will
only protect a plaintiff when justice actually requires it.

IV. Harrods Justified

There is much to approve of in the Court of Appeal’s approach in
Harrods. First and foremost, it correctly reflects the spirit and intent of
the Brussels Convention itself. It was never the Convention’s purpose
to harmonize in their entirety the laws of contracting countries in rela-

57. *Spiliada*, [1986] 3 W.L.R. at 992-93 (the plaintiff must have acted reasonably
in not issuing proceedings in time); The Bintang Bolong, March 21, 1988
(unreported).
703 (Eng. Q.B. 1989).
724 (Eng. Q.B.).
tion to jurisdiction and the enforcement of foreign judgments, despite *dicta* to the contrary in other cases. Moreover, nothing in the Convention prevents national courts from using their existing rules in such matters when to do so would not be inconsistent with its terms; English courts are free to assume jurisdiction over defendants not domiciled there and to enforce judgments rendered outside the E.C. Instead, the avowed purpose of the Convention is simply to facilitate the enforcement of judgments as between contracting states. This necessitates removing the possibility of concurrent, inconsistent proceedings in more than one such country, which is why the Convention imposes a degree of uniformity between the bases of jurisdiction employed by contracting states. Such uniformity is unnecessary, however, and was never contemplated by the Convention in cases involving alternative proceedings outside the E.C. By definition, such cases do not pose the threat of conflicting E.C. judgments.

Second, as we have seen, it is the policy of the Convention, albeit as between contracting states, both to avoid a multiplicity of proceedings, and to prevent a party to a contractual jurisdiction clause from walking away from the agreement. It is precisely these policies, however, which are served *vis-à-vis* non-contracting states by allowing an English court to stay proceedings under English law's traditional rules. Indeed, to deny an English court the power to employ jurisdictional discretion, it has no power to order a stay at all, even in the presence of a foreign jurisdiction clause or *lis alibi pendens*. Whatever the case, the exercise of discretion is the only mechanism known to English law for effecting a stay of proceedings under its traditional rules.

Critics of the Court of Appeal's decision might object at this point that their hostility is not directed against the possibility of staying proceedings in a case such as *Harrods*. This might have been the strange and alarming consequence, however, had the Court of Appeal chosen to take the *Arkwright-Berisford* approach to its logical conclusion. For if an English court has no power to employ jurisdictional discretion, it has no power to order a stay at all, even in the presence of a foreign jurisdiction clause or *lis alibi pendens*. Whatever the case, the exercise of discretion is the only mechanism known to English law for effecting a stay of proceedings under its traditional rules.

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64. Art. 4; Civil Jurisdiction and Judgments Act, 1982, *supra* note 6, ch. 27, § 49.
67. Brussels Convention, *supra* note 1, arts. 21, 23.
68. *Id.* art. 17.
ceedings per se but at the discretionary form this takes in England. As we have seen, they would have the English courts stay proceedings in non-Brussels cases on an automatic basis in prescribed situations, reflecting the scheme of Articles 16, 17 and 21 of the Convention. In response, it can be said that it would be entirely feasible, of course, to introduce such an approach into English law by statute, assuming it were thought desirable. But it would be quite impossible to expect the courts to do so by themselves. The Court of Appeal in Harrods could certainly have decided that the Convention prevents staying proceedings in such cases. But they were in no position positively to redesign English law at a stroke by introducing something akin to the rules contained in Articles 16, 17 and 21. Indeed, had they done so this would have involved precisely that judicial arbitrariness which critics wrongly associate with jurisdictional discretion.

Fourth, the Brussels Convention aside, it is the policy of the common law, and sound policy by any standards, to seek to avoid multiple proceedings in the same matter in different jurisdictions. As the House of Lords indicated in *The Abidin Daver*, the duplication of proceedings is wasteful, inefficient, and leads to an “ugly rush” to judgment by the respective parties in each jurisdiction. It also exposes an English court to the awkwardness of being asked to enforce a foreign judgment which might be inconsistent with an existing English decision on the same point. Staying an English action where another more appropriate forum is available, as permitted by *Harrods* but prevented by *Arkwright* and *Berisford*, is a way to minimize such difficulties.

Fifth, it is also quite clearly the policy of the common law to uphold contractually agreed jurisdiction clauses by staying English proceedings brought in defiance of such a clause. This power might have been lost, however, had *Arkwright* and *Berisford* been followed. Indeed, in this regard the *Harrods* decision will come as a relief to those who negotiate and draft international commercial agreements. The effect of denying an English court any power to stay an action where the defendant is domiciled in England would have been seriously to undermine the stability of jurisdiction clauses in such transactions. It might have robbed the court of its power to stay proceedings on the ground that such a clause nominated the courts of another country as the chosen forum where that country was a non-contracting state. Suppose, for example, that a New York corporation had made a contract with an English company, and that agreement had included a New York jurisdiction clause. If the former had sued the latter in England then, taking *Arkwright* and *Berisford* to their logical conclusion, the court would probably have been powerless to order a stay on the ground that the agreed forum was elsewhere. Since *Harrods*, however, such clauses are once again secure.

70. Id. at 214 (per Lord Brandon).
71. Id. at 201 (per Lord Diplock); 214 (per Lord Brandon).
72. See cases cited supra note 50.
Finally, the Court of Appeal's decision successfully avoids the seductive trap of too literal an interpretation of Article 2 of the Brussels Convention. For, in the end, whatever other reasons Hobhouse and Potter JJ. might have had for deciding as they did in Arkwright and Berisford, one suspects they were forgivably beguiled by the mandatory language of Article 2 itself. As the Court of Appeal made clear, however, the wording of Article 2 must be read in context and, so read, Article 2 is quite consistent with the Court of Appeal's decision. If we read Article 2 in the light of the Convention's overall structure and purpose, it is apparent, as we have seen, that it would not further the Convention's objectives to curb the English courts' discretion as Arkwright and Berisford suggest.

V. Doubts About Harrods

To find virtue in the Court of Appeal's decision in Harrods is not, however, to endorse it wholeheartedly. The Court of Appeal's approach gives cause for concern in five respects.

A. Slight Irony

First, there is some irony in the fact that the court clearly felt that the decision was a defense of England's pragmatic, commercially-led jurisdictional rules. More precisely, although their decision was partly inspired by a desire to uphold express jurisdiction agreements, by allowing English courts to stay proceedings brought in defiance of such a clause, its effect might be the opposite. It opens the way to challenging an English jurisdiction agreement, even one which confers exclusive jurisdiction upon the English courts under Article 17, on the ground that a court elsewhere is the forum conveniens. It is highly unlikely that an English court would find that it is not the forum conveniens in such a case. But the very fact that it is open to a defendant to argue otherwise puts the plaintiff, and the court, to the trouble and expense of resolving the matter. However valuable forum non conveniens might be in identifying the appropriate forum, its use is inapt where the appropriate forum is clearly discernible.

B. Some Unanswered Questions

Although Harrods is probably a correct decision, the way the case was argued begs intriguing questions. It is curious, for example, that the petitioners apparently never relied upon Article 16(2) of the Convention, relating to the dissolution of corporations, which might have conferred not merely jurisdiction on the English court, but exclusive jurisdiction. It is, of course, true that Article 16(2) does not extend to

73. Article 16(2) provides that the courts of the EC country in which a corporation has its seat shall have exclusive jurisdiction "in proceedings which have as their object . . . the dissolution of companies . . . ." The relevance of Article 16 is, however, an issue before the House of Lords, see supra note 8.
the winding up of insolvent companies because matters of insolvency are excluded from the Convention. But the petitioners in Harrods sought the company's dissolution on the ground that it was "just and equitable" and its solvency was never doubted. Curious as this omission appears, however, it might be explained on two grounds. On the one hand, the company's dissolution was not the petitioners' preferred relief and not, presumably, their main concern. Their principal contention was that the majority shareholder should buy out their interest at a compensatory rate. Again, reliance on Article 16(2) might not, in the end, have improved the petitioner's case. It might not have seemed a stronger argument than reliance upon the company's domicile in England under Article 2 as the basis of the English court's jurisdiction; Article 16(2) might have appeared as vulnerable as Article 2 to the argument that the Convention does not operate vis-à-vis non-contracting states.

A more controversial issue is whether the majority shareholder in Harrods might profitably have relied on a series of decisions of the European Court of Justice to the effect that the courts of contracting states are free to apply their national procedural rules to supplement the jurisdictional rules of the Brussels Convention. Especially notable by its absence is any reference to Kongress Agentur Hagen GmbH v. Zeehaghe B.V. which would seem, at first sight, to support the idea that English courts retain a discretion to stay proceedings notwithstanding that they have jurisdiction under the Brussels Convention. The case, it must be emphasized, concerned the allocation of jurisdiction between two E.C. courts. It could be argued, however, that the decision must apply a fortiori to a case such as Harrods; if forum non conveniens operates as between E.C. countries it certainly would apply as against non-E.C. countries.

Zeehaghe had sued Hagen in the Netherlands for canceling hotel reservations it had made on behalf of a third party, another German company. Hagen sought to join the third party under Article 6(2) of the Convention which allows an E.C.-domiciled third party to be joined in proceedings in which another E.C. domiciliary is defendant. Zeehaghe objected to the joinder on the basis that it would make its action against Hagen more complicated and protracted. The Dutch Hoge Raad sought an E.C.J. ruling on the question whether it was permissible for the Dutch courts to refuse to order the third party to appear in the proceedings as guarantor of Hagen's obligations, as Zeehaghe had argued, given that Article 6(2) applied to the case. The E.C.J. ruled that a court in a Contracting state can apply its own procedural rules to determine whether

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74. Brussels Convention, supra note 1, art. 1.
75. Insolvency Act 1986, § 122.
such an action against a third party under Article 6(2) is appropriate. The only qualification is that the effectiveness of the Brussels Convention should not thereby be prejudiced.

It is tempting to find in Zeehaghe an echo of the problem raised in Harrods, because of the ambiguity surrounding what amounts to a matter of procedure in this context. More precisely, if the staying of actions is a procedural matter, and if procedural matters are saved from the Convention, it might look as though Zeehaghe preserves the ability of E.C. courts to stay proceedings under their existing rules. Closer inspection suggests otherwise, however, and the fact that no reliance was placed upon it in Harrods might be justified.

The gravamen of the Zeehaghe decision is that an E.C. country's courts may stay proceedings, even when the Convention applies, by reference only to procedural rules of a non-jurisdictional nature. Such courts may thus dismiss proceedings in accordance with rules going to the admissibility of particular claims, as distinct from rules of jurisdiction. What they may not do, however, is substitute their own rules of jurisdictional competence for those of the Convention, nor may they dismiss proceedings on the ground that another E.C. forum is more appropriate. Thus, in Zeehaghe itself, the Dutch court would not have been able to deny that it had jurisdiction over the third party under Article 6(2). Nor could it have said that Germany, the country of the third party's domicile, was a more appropriate location for proceedings against it. What the Dutch court could do, however, was refuse to allow Hagen to introduce a co-defendant on the basis that to do so would increase the complexity and duration of Zeehaghe's action against Hagen (as long as such complexity and duration were not attributable to the fact that the third party was domiciled in Germany, not the Netherlands).

What this amounts to in the English context is that a court could not deny its jurisdiction under the Convention in a case, for example, in which the defendant is English-domiciled. Nor could it stay proceedings in such a case on the basis that the courts in, say, France, were more appropriate. It would be open for an English court, however, to dismiss proceedings in which it has jurisdiction under the Convention on the ground that the proceedings are, for example, frivolous, vexatious or an abuse of the process of the court. To dismiss proceedings on such a basis is not a reflection on the court's jurisdiction but on the admissibility of the plaintiff's claim.

There are then two reasons why Zeehaghe might not have assisted the majority shareholder in Harrods. First, and perhaps conclusively, any argument from Zeehaghe is somewhat eclipsed in Harrods by the point that the Brussels Convention is simply inapplicable as against courts in non-E.C. countries. Secondly, Zeehaghe does not speak to the appropri-

\[78\] Rules of the Supreme Court Order 18, Rule 19(1); see LAWRENCE COLLINS, THE CIVIL JURISDICTION AND JUDGMENTS ACT 1982 45-46 (1983).
ateness of proceeding in one country or another, but only to the proce-
dural rules a forum can employ to refuse to admit certain claims. In the
end, therefore, it is not clear that the result in Harrods would have been
different had the parties addressed the implications either of Article 16
or of Zeehagle. But in a case of such importance it is disappointing that
such matters were apparently left unexplored.

C. The Wrong Approach?
Correct though the decision might be, it is arguable that the Court of
Appeal should not have attempted to decide the point at issue in Harrods
at all. They should have asked the E.C.J. for a ruling on the matter. It is
certainly singular that the court elected to determine such an important
question on the scope of the Brussels Convention without referring it to
the European Court for a preliminary ruling, as they had the power (but
not the duty) to do.\textsuperscript{79} The whole case turned, after all, on the Conven-
tion's proper policy and purpose.

It is easy to see why the Court of Appeal took this robust stance. By
denying the necessity of seeking a ruling they were able to give the par-
ties an immediate decision on the question at issue without the delay
and expense a reference might have involved. It is arguable, however,
that the correct approach should have been different.

The Court of Appeal might first have addressed the question
whether England or Argentina was the \textit{forum conveniens}, a matter which
was only decided subsequently, once it had been determined that the
court had the power to ask the question at all. Only if they had taken the
issue of the better forum first, however, would they have known whether
a ruling was "necessary to enable it to give judgement," which is the
Convention's criterion for deciding whether a ruling should be
sought.\textsuperscript{80} Had they determined at that stage that England was the \textit{forum
conveniens} there would, indeed, have been no need to refer the question
of the Convention's scope to Luxembourg. In that event it would have
made no difference to the outcome of the proceedings which view they
took as to the scope of the Convention; the defendant would have lost
whether there was a discretion to stay or not and for that reason a deci-
sion on the question of the Convention's scope would have been
unnecessary.

Had the Court of Appeal decided at the outset, however, that
Argentina was the \textit{forum conveniens}, then everything would have turned
on the extent of the court's power to stay proceedings in a Brussels Con-
vention case. A decision on that question would have been required in
order to reach a conclusion, and a preliminary ruling therefore should

\textsuperscript{79} Protocol on the Interpretation by the Court of Justice of the Convention of 27
September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and

\textsuperscript{80} Id. art. 2. Presumably, the same can be said of the approach of the House of
Lords which referred the questions of law in Harrods to the E.C.J. without apparently
considering the \textit{forum conveniens} issue.
have been sought. There is, of course, some force to the contrary view that a court can only exercise a power once it has decided it has the power at all. But pragmatism, not logic, normally governs the order in which points are argued and determined.

D. An Unfocused Approach

It is unfortunate that the Court of Appeal made no attempt to disengage the several discrete issues raised by the question whether forum non conveniens should surrender to the Brussels Convention. They assumed that the point in contention was whether the doctrine should always remain alive, opposite a non-E.C. forum, whenever an English court has jurisdiction under the Convention. Instead of posing such an all-or-nothing question, the court might have addressed three, more focused issues:

1. Is there a difference between a case in which both parties are E.C.-domiciled and one in which this is true only of the defendant? Suppose a defendant is English-domiciled under Article 2 but argues for a stay of proceedings on the ground that a non-E.C. country is the better forum. Is there a difference in such a case between proceedings where the plaintiff is E.C.-domiciled and those where the plaintiff is not? Arguably, it would be odd to deprive a Community plaintiff, but not a non-European plaintiff, of its prima facie right to sue here. Should forum non conveniens be retained, therefore, in the latter case but not the former?

2. Does the survival of forum non conveniens depend on the precise ground upon which an English court assumes jurisdiction? Arguably there is a difference between a case in which the courts' jurisdiction is exclusive, under Article 16 and 17 of the Convention, and where it is not, as under Article 2.

3. Does the survival of the traditional power to stay proceedings depend on the precise ground on which the stay is sought? Is a case where there is a foreign jurisdiction agreement different from one involving lis alibi pendens and are such cases different again from one in which neither of those special features is present but a defendant is claiming merely that a foreign court is more appropriate? The fact that the Court of Appeal conflated these situations is regrettable because it is sometimes claimed that the staying of actions in England should be permissible, since the advent of the Brussels Convention, in the first and second such case, but not in the third.

Although little in the end would have turned on such fine-tuning in Harrods itself, it is still disappointing that the Court of Appeal took such a broad-brush approach to a potentially complex issue. Certainly, it is to be hoped that the subtle wording of the questions referred to the European Court by the House of Lords will give the Court the opportunity to address these issues more comprehensively and in a more focused fashion.

E. The Domicile Point

In assessing whether the forum conveniens was in England or Argentina, none of the members of the Court of Appeal attached any particular
weight to the fact that Harrods (Buenos Aires) Ltd. was a company domiciled in England. Yet the English courts had jurisdiction in Harrods under the Brussels Convention precisely because the company was English-domiciled and because Article 2 therefore applied. This omission begs important questions about the sensitivity of the forum conveniens doctrine to the special circumstances of the Brussels Convention, to which we must now turn.

VI. Convention Jurisdiction and the Forum Conveniens

The fact that Harrods (Buenos Aires) Ltd. was English-domiciled is significant in several ways. Most obviously, domicile is a principal ground of jurisdiction under the Brussels Convention. It might have been expected that the court would have paid more respect to the Convention by recognizing that, in the Convention’s terms, England was prima facie the appropriate forum. That they did not is surprising, but it is also disappointing. After all, in a case such as Harrods, which poses the question of the relationship between jurisdiction under the Brussels Convention and the staying of actions at common law, it is necessarily the case that the court will have jurisdiction under the Convention, probably because the defendant is English-domiciled. By respecting this inevitable fact, however, when assessing the location of the forum conveniens, it might be possible to achieve some equilibrium between the Convention and the common law.

A. Convention-led Discretion: The Cases

A special approach to the doctrine of forum conveniens in cases where the court’s jurisdiction is founded on the Brussels Convention would involve recognizing a presumption—rebuttable, of course—that England is prima facie the natural forum if the defendant is English domiciled. This is entirely consistent with the way in which English courts, as we have seen, already build de facto presumptions as to the appropriate forum into their treatment of particular types of cases. Moreover, Hobhouse and Potter JJ. have already shown how such an approach might be developed. As the latter said in Arkwright, when considering the location of the forum conveniens:

In considering the exercise of the court’s discretion in this case, I start by reminding myself that the dispute is one involving the meaning and effect of a reinsurance contract made in the London market which is, on first impression at least, peculiarly appropriate to trial in this court. It is also a dispute which the Convention plainly regards as appropriate for decision in the courts of the defendant reinsurers’ domicile.81

81. [1990] 3 W.L.R. 705, 720 (Eng. Q.B. 1989) (emphasis added). More fragile authority for this approach is Banco Atlantico S.A. v. British Bank of the Middle East [1990] 2 Lloyd’s Rep. 504 (Eng. C.A.), in which Bingham L.J. remarked that “it must be rare that a corporation resists suit in its domiciliary forum. Rarely would this court refuse jurisdiction in such a case.” Id. at 510. Despite the reference to domicile, however, the relevance of the Brussels Convention to the case seems not to have
Hobhouse J. was, if anything, more explicit in Berisford. He noted that there were two factors which strongly suggested that England was the correct forum. One was the fact that the contract in Berisford contained an English jurisdiction clause. The other was that the Brussels Convention so indicated. As he said:

[T]he Convention is, and is intended to be, a codified scheme to make provision for cases to be tried in appropriate fora if, contrary to my decision in this case, the Convention does leave room for a relevant discretion, there nevertheless must be some very weighty factor to displace the jurisdiction provided for by the Convention and considered by the Convention to be the appropriate jurisdiction.

In other words, the fact that an English court has jurisdiction under the Convention is a strong reason to regard England as the forum conveniens.

This position was more recently endorsed by Parker LJ. in Owens Bank v. Bracco. One aspect of that somewhat unusual case concerned whether the courts in England or in Italy were the more appropriate to decide whether a judgment rendered in the courts of St. Vincent was tainted by fraud. It had been argued that the English court should, in its discretion, stay proceedings for the judgment's enforcement because the question of fraud was already before the Italian courts. Speaking of the factors that might influence an English court's decision whether or not to grant a stay, Parker LJ. remarked: "Although . . . this is not a [Brussels] Convention case, both the United Kingdom and Italy are . . . parties to the 1968 Convention. In our judgment the English courts should adopt a communautaire, and not a national and chauvinistic approach to the determination of this question."

Such an approach to forum non conveniens also enjoys near-direct support in the Court of Appeal's earlier decision in James North Ltd v. North Cape Ltd. This concerned, inter alia, whether on the facts an English court should exercise its discretion to allow service of process on a Scottish-domiciled defendant in proceedings for breach of contract. Scotland being a distinct law-area, the question, in effect, was one of international jurisdiction and the result of permitting service would have been to give the English court jurisdiction over the defendant. At the

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82. Not only was the defendant deemed domiciled in England under Article 2, England was also the agreed jurisdiction. The existence of such a jurisdiction agreement in an insurance contract attracts the provisions of Articles 12(2) and 17. The defendant's English domicile made it irrelevant, however, in Berisford to consider the jurisdiction agreement as a source of jurisdiction, although it was relevant to the question of the forum conveniens. Berisford, [1990] 3 W.L.R. at 695-95.

83. Id. at 702 (emphasis added).


85. Id. at 155 (citing in support the words of Bingham, L.J. in Re Harrods (Buenos Aires), Ltd., [1991] 3 W.L.R. at 418, although they were not specifically directed to the issue of ascertaining the forum conveniens).

time the issue arose, the Brussels Convention was not yet in force in the United Kingdom, nor was the Modified Convention, whereby jurisdiction is now allocated between England and Scotland along similar lines. In deciding to permit extraterritorial service against the defendant, thus allowing the plaintiff to sue in England, Stephenson L.J. had no doubt that it was correct to take account of the fact that, had the Brussels and Modified Conventions been in force, the plaintiff would have had a right prima facie to proceed in England. Had the Conventions been operative, the English court would have had jurisdiction under Article 5(1) of the Modified Convention as England was the place of performance of the contested contract. Stephenson L.J., with whom Dunn L.J. apparently agreed, accepted that the court should make allowance for the position dictated by the Brussels Convention which would shortly be implemented in England. Appealing to the principle of comity, he identified the importance of acting "in harmony with other countries of the European Economic Community" as "a matter which we are entitled to take into account in deciding how discretion should be exercised."  

If the courts in recent cases display a tendency to defer to the Brussels Convention when exercising jurisdictional discretion it is nonetheless important to appreciate the limitations of such a Convention-led approach to the common law. In The Siskina, for example, the issue was whether an English court can only grant interim relief when it has trial jurisdiction over the substance of a dispute. An argument against such a limitation was that Article 24 of the Brussels Convention, not then in force in the United Kingdom, expressly provides that a court in one E.C. country may grant interlocutory relief even if, under the Convention, another E.C. country's courts have jurisdiction as to substance, but not those of the state where such relief is sought. Lord Denning, in the Court of Appeal, was persuaded by the need for the courts to anticipate legislation on their own initiative and themselves attempt to harmonize English law with that of the E.C. The Italian courts had trial jurisdiction and, had the Brussels Convention been in force in England, Article 24 would have allowed the English courts to freeze the defendant's English assets. This communautaire approach was rejected, however, by the House of Lords. As Lords Diplock and Hailsham said, it was for Parliament, or at least the Supreme Court Rules Committee, but not for the courts, to change the law in such a fashion.

Instructive as they are, however, the objections to following the Brussels Convention which prevailed in The Siskina are no obstacle to the courts' adopting a Convention-sensitive approach to jurisdictional dis-

87. Civil Jurisdiction and Judgments Act, 1982, supra note 6, ch. 27, Sched. 4.
89. Id. at 1434.
90. [1979] 1 App. Gas. 210 (appeal taken from Eng.).
91. Id. at 233-34.
92. Id. at 258-59.
93. Id. at 262-63.
cretion. One argument, for example, in favour of treating the court with jurisdiction under the Convention as presumptively the *forum conveniens*, is that it would be inconsistent for an English court to treat such a court as the “appropriate” forum when it applies the Convention (i.e. vis-à-vis an E.C. country), but not otherwise (i.e. vis-à-vis a non-E.C. country). This could not have been a consideration in *The Siskina*, however, because the Brussels Convention was not in force in England at the time. More importantly, the *communautaire* argument in *The Siskina* involved more than merely exercising jurisdictional discretion in a particular way. If successful, it would have led to a substantive change to the Supreme Court Rules which expressly denied interim relief in the absence of trial jurisdiction. Only legislation or a change in the rules could have achieved that. By contrast, to respect the policies of the Brussels Convention when exercising jurisdictional discretion is merely to take account of all the circumstances of a given case, which is entirely consistent with the proper exercise of such discretion.

B. Convention-led Discretion in Principle

Whatever the state of the authorities, however, the final justification for a *communautaire* handling of *forum non conveniens* lies in the doctrine itself. Indeed, it is arguably what it requires or, at least, permits in a case such as *Harrods*. In a case involving the staying of actions, as we have seen, the search for the *forum conveniens* proceeds in two stages.94 First, a court will identify the natural forum, which is usually said to be that with which the dispute has the most real and substantial connection. If the natural forum is abroad, English proceedings will normally be stayed. If, however, a plaintiff can demonstrate that it would not be in the interests of justice to deprive him or her of the opportunity to sue in England, a court may proceed in one of two ways. Either it will refuse a stay, notwithstanding that the natural forum is elsewhere, or it will grant a stay subject to the defendant’s waiver of the particular advantages he would otherwise enjoy in the foreign forum.

Applying these well-established principles in the present context, the argument for a Convention-led approach to *forum non conveniens* might proceed in various ways. On the one hand, but without conviction, it could be said that if a defendant is English-domiciled, that suggests that England is the natural forum. More convincingly, it could be argued that, even if the natural forum is abroad, the second limb of the doctrine permits a court to refuse a stay in the interests of justice, other things being equal, whenever the defendant is domiciled in England. There are three possible routes to such a conclusion. It could be argued, first, that it would be unjust to deny a plaintiff’s right to sue under the Convention; second, that to dismiss proceedings would defeat a plaintiff’s legitimate expectations; and third, that to do so would unfairly disadvantage a plaintiff as regards the execution of judgments.

1. Rights and Justice

It could be said that it would be unjust to prevent a plaintiff from suing an English-domiciled defendant in England because to do so would infringe the plaintiff’s right to proceed in England under the Convention. Such an argument does not ring true in the English context, however, for two reasons. First, it is the essence of the English approach to the staying of actions that a plaintiff’s prima facie right to sue in England is apt to be abridged. Secondly, it is arguable that the correct characterization of the plaintiff’s position, adopting the traditional common law position that rights follow remedies, is that a plaintiff only has a right to litigate in England once a court has exercised its discretion not to stay the proceedings.

2. Justice and Expectations

There is, however, a more compelling way to express the deprivation a plaintiff will suffer in a Convention case in which the proceedings are stayed. It could be said that such a stay would defeat a plaintiff’s legitimate expectation that plaintiffs can pursue English-domiciled defendants in England. Such an argument might be unusual in the present context but there seems no reason why it should not be attempted. After all, given that justice is said to be the overarching consideration in forum conveniens cases, it is hard to see how an argument based on the fairness of depriving a plaintiff of a legitimate expectation might be resisted on grounds of principle. Moreover, even if it seems unlikely that an English court would refuse a stay merely to vindicate a plaintiff’s expectations, it is possible to imagine how such an argument might be buttressed and made more credible. What if the plaintiff, relying on the defendant’s English domicile, had refrained from insisting on including an English jurisdiction clause in a contract between them thereby sacrificing a more or less secure ground on which to establish jurisdiction? What if, relying on Article 2 of the Convention, the plaintiff had failed to start proceedings in the only alternative forum, in which forum any proceedings would now be time-barred? In such cases it is not merely that the plaintiff has an expectation that an English court will assume jurisdiction; it is that the plaintiff has relied thereon, thus making it unfair to deprive the plaintiff of the opportunity to sue in England.

3. Judgment and Juridical Advantage

Beyond such jurisprudential concerns, however, there might be, in some circumstances, a more robust way of preventing a stay of English proceedings in a case such as Harrods. It has long been accepted that a plaintiff can avoid a stay if, by having to proceed in a foreign forum conveniens, that plaintiff would be deprived of a significant juridical advantage. Being subject to a time-bar abroad, or being denied the

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95. Id. at 991 (per Lord Goff).
96. Id.
opportunity to recover costs in the event of victory are examples. Another, equally significant juridical disadvantage might afflict a plaintiff who is deprived of the opportunity to pursue an English-domiciled defendant in England. Suppose a plaintiff proceeds in England and obtains judgment there. Such a judgment will enjoy more or less automatic recognition and enforcement in the courts of other E.C. countries by virtue of the Brussels Convention’s enforcement provisions. If, however, a plaintiff is obliged to obtain judgment in the courts of, say, New York, because the English proceedings were stayed, that judgment will only be enforceable in E.C. countries according to their traditional rules of recognition. These rules may well be more cumbersome or less easily satisfied than the Convention’s simplified regime.

It might be possible to express the plaintiff’s difficulty in such a case in terms of expectations; plausibly, a plaintiff in dispute with an E.C.-domiciled defendant can expect to take advantage of the Convention’s enforcement provisions in the event of obtaining judgment. In more familiar idiom, however, we might say that if English proceedings were stayed the plaintiff would suffer a juridical disadvantage. If that were so an English court in such a case might decline to stay its proceedings. Alternatively, it might do so but only if the defendant were to undertake, in the event of losing, to satisfy the judgment, thereby removing the need for enforcement proceedings. In either event, the doctrine of forum non conveniens would be able to reflect the special circumstances of the Brussels Convention; the fact that the English court had jurisdiction under the Convention would justify treating it as the forum conveniens.

C. Convention-led Discretion: The Advantages

By whatever means the jurisdictional discretion is made to accommodate the special features of Brussels Convention cases, such an approach has a number of advantages.

I. Hard Cases

One advantage of such an approach is that it accommodates some difficult cases which would otherwise be hard to handle since Harrods. Take for instance the situation in which a French-domiciled plaintiff wishes to proceed in England against an English-domiciled defendant for a tort committed in, say, New York. At first sight, an English court following Harrods would have the opportunity to stay the proceedings on the basis

97. Brussels Convention, supra note 1, tit. III. An English judgment would be enforceable under the Convention whether the court assumed jurisdiction under the Convention or the traditional regime. In principle, the present argument might apply in either event.

98. As happened in the U.S.A. in Harrison v. Wyeth Laboratories, 510 F. Supp. 1 (E.D. Pa. 1980). The mere fact that, by having to obtain judgment abroad, a plaintiff would have to commence enforcement proceedings in England is unlikely to constitute a juridical disadvantage such that a stay would be refused.

that New York was the forum conveniens. Indeed, there is every reason to suppose that it would do so on the basis that the place of the tort is usually the forum conveniens.\textsuperscript{100} That would be a singular, even absurd, result, however, given that both parties are "European." But it could be avoided by saying that English law is the forum conveniens on the ground that only a Brussels Convention country could be the natural forum in such a case. Alternatively, a stay in such a case could be prevented by invoking the second limb of the Spiliada test, which halts a stay which would be unjust to the plaintiff. It could be said that it would be especially unjust to deprive a Brussels Convention plaintiff of the opportunity to sue a Brussels Convention defendant in the courts of a Brussels Convention country whose courts plainly have jurisdiction under Article 2.

2. The Decisions Explained

A Convention-sensitive approach to the staying of actions under England's traditional rules also illuminates and explains the actual results obtained in Arkwright, Berisford and Harrods. It suggests that Hobhouse and Potter JJ. were correct to indicate that they would have refused a stay in each of the earlier cases, had they accepted that they had this power. In Berisford, England was the natural forum, partly because the defendant was English-domiciled but, more compellingly, because there was an English jurisdiction clause;\textsuperscript{101} in Arkwright it was because the defendant was English-domiciled. More interestingly, however, it suggests that the Court of Appeal in Harrods was also right to grant a stay, notwithstanding that the company was domiciled in England. There are several reasons for this. First, although the company was domiciled in England, its operations and everything about the facts of the case, were plainly connected with Argentina. The company's business was entirely carried on there, the relevant documents, including the company's accounts, were in Spanish, and most of the witnesses were Spanish-speaking. Moreover, as may often happen with the domicile of corporations under the Convention, the company had no real connection with England. It was English-domiciled merely because it was incorporated there.\textsuperscript{102} Respect for the Brussels Convention could hardly have justified calling England the forum conveniens in such a case. Second, given the company's close connection with Argentina, could the petitioners have argued with any credibility that they expected England to be the only forum in which it might be dissolved? Third, as it is hard to conceive how the petitioners might have wished to invoke the Brussels Convention's enforcement provisions in such a case, there is no room in Harrods for relying on that particular species of juridical disadvantage.


\textsuperscript{101} See Berisford, [1990] 3 W.L.R. at 688.

\textsuperscript{102} Civil Jurisdiction and Judgments Act, 1982, \textit{supra} note 6, ch. 27, § 42(3).
Finally, there is an especially potent reason for ignoring the company's English domicile in *Harrods*. Although it was domiciled in England, Harrods (Buenos Aires) Ltd. was also domiciled in Argentina according to the Brussels Convention. More precisely, Section 42(3) of the Civil Jurisdiction and Judgments Act 1982 provides that a corporation is domiciled in England pursuant to the Convention either if it is incorporated and has an office there, or if its central management and control is exercised there.\textsuperscript{103} Section 42(6) applies exactly the same considerations, however, in determining whether a corporation is domiciled in a non-Contracting State. Thus, Harrods (Buenos Aires) Ltd. was domiciled in England because it was incorporated there. But it was also domiciled in Argentina because, as the Court of Appeal and both parties agreed, its management and control was exercised there. Normally it would not matter that an English-domiciled corporation is also domiciled in a non-contracting state since English domicile at once confers jurisdiction upon the English courts. In the present context, however, the importance of identifying such a dual domicile is that domicile *per se* immediately falls away as a decisive consideration in locating the *forum conveniens*. In such a case there is every justification for disregarding the fact that England has jurisdiction under the Brussels Convention when staying the proceedings at common law.

3. The Parties' Expectations Again

In the end, however, the most compelling reason for adopting a Convention-sensitive account of the doctrine of *forum non conveniens* is that it allows us to deal with a superficially attractive argument against the Court of Appeal's position in *Harrods*. It is sometimes said that jurisdictional discretion is incompatible with the Convention because the Convention gives each party an absolute, indefeasible, right to sue, or to be sued in a contracting state which has jurisdiction.\textsuperscript{104}

This alluring line of argument encounters immediate difficulties, however. On the one hand, it is unclear who precisely may claim such a right to litigate somewhere under the Convention. It hardly makes sense to accord a right to be sued in England to defendants in a case like *Harrods*, even if they are domiciled there under Article 2. As English proceedings will be the very thing they are trying to avoid by demanding a stay, it stretches credulity to argue that they have—or would wish to have—a "right" to be sued in England under the Convention. Again, even if an English defendant would prefer to be sued in England rather than in, say, New York, there is no sense in which the doctrine of *forum non conveniens* could interfere with any right the defendant might claim to be sued in England. This is for the obvious reason that the doctrine will

\textsuperscript{103} Civil Jurisdiction and Judgments Act, *supra* note 6.

\textsuperscript{104} If the Convention itself would allocate preferential jurisdiction to another contracting state, for example pursuant to Articles 5, 16, 17 or 21, then a plaintiff would only have a right to proceed in the Court thus allocated.
not be in play at all in such a case unless the defendant invokes it; English courts do not decline jurisdiction of their own motion.

Again, even if it means merely that a plaintiff has a right under the Convention to sue an English domiciliary in England, this begs an awkward question: is such a right enjoyed by all plaintiffs in English proceedings or only those who are themselves domiciled in an E.C. country? The question arises because the Preamble to the Convention speaks of the need to “strengthen in the community the legal protection of persons therein established.” This suggests that the scope of an English court’s power to stay proceedings should be defined so as to allow only E.C.-domiciled plaintiffs an absolute right to sue an English-domiciled defendant in England. This would not mean, of course, that only an E.C. plaintiff could bring proceedings in England against an English-domiciled defendant. It would mean, however, that such a plaintiff, protected by its right to sue, would not be exposed to the risk of such proceedings being stayed on the basis that a non-E.C. court is the forum conveniens. A non-E.C. plaintiff, however, perhaps a U.S. corporation, lacking an absolute right to sue in England, would be so exposed.

Such a discriminatory approach is not entirely without merit. Indeed, as we have seen, insofar as E.C. plaintiffs might have a relatively stronger claim to sue in an E.C. court than anyone else, there are grounds for favoring them in identifying the forum conveniens in cases such as Harrods. U.S. Federal practice explicitly follows this course, favouring U.S. plaintiffs over others in deciding whether to stay U.S. proceedings. Such a preference for a “local” plaintiff, however, is merely a matter of degree where the identity of the forum conveniens is concerned. It does not involve giving such persons an unfettered right to sue, while insisting that “foreign” plaintiffs should face the risk that their actions might be stayed. It would be alarmingly Euro-centric if such a position were accepted as correct and, if a rights-based argument is to be mounted at all, it must surely extend to all plaintiffs.

Even if this difficulty is surmounted, however, the argument that a plaintiff in English proceedings has an absolute right to sue an English domiciliary in England, as a criticism of the Court of Appeal’s decision in Harrods, is fatally circular. The petitioner in Harrods can be said to have a right to proceed in England under the Convention only if in fact an English court has no power to stay or dismiss its proceedings in such a case. But if the contrary is true, and the English courts enjoy such a power, then no such right exists. This, however, is the very point at

105. See supra note 65.
issue in the case. It is hardly a criticism of the Court of Appeal, there-
fore, to say that the Court ignored the petitioner’s right to sue when the
very question in dispute was whether such a right existed. In the same
way, it would be bootstrap reasoning at its least attractive to suggest that
the European Court should find the Court of Appeal to have been
wrong on the ground that the petitioners have an absolute right to pro-
ceed in England; whether they have such a right is the very question the
E.C.J. has to answer by reference to the Convention’s policy and
purpose.

It becomes difficult, therefore, to allege that a plaintiff has a right to
proceed against an English domiciliary in England. This does not mean,
however, in light of the fact that an English court has prima facie jurisdic-
tion in such a case, that such a plaintiff might not have a legitimate expec-
tation that he or she should be able to litigate in England. Indeed, as we
have observed, the fact that a plaintiff might properly have such an
expectation may well mean that it would be unfair to deprive him or her
of the opportunity to sue in England. The perfect mechanism by which to
vindicate such an expectation, however, is the doctrine of forum non
conveniens, the operation of which is always subject to the condition that
it must not be unjust to a plaintiff for his action to be stayed. Once again
it seems that the objectives of the Brussels Convention are better served
by the survival of the jurisdictional discretion of the English courts than
by its abolition. Once again it seems that by taking a Convention-sensi-
tive approach to forum conveniens, we might defuse hostility to Harrods.

VII. Harrods in the European Court

Very shortly, the European Court of Justice will have the onerous
responsibility of resolving the questions referred to it by the House of
Lords in Harrods. When it does so it will not be concerned with the mer-
its of the dispute but with providing a definitive interpretation of the
Brussels Convention. It will then be for the House of Lords to give
judgment in the light of that interpretation.

If, by their interpretation of the Convention, the European Court
were to abolish or circumscribe the jurisdictional discretion of the En-
GLISH courts in determining the issue raised in Harrods, the implications
would be serious. At one extreme, the Court might rule that no con-
tracting state has the power to stay proceedings on the basis that they
should be heard elsewhere, once they have assumed jurisdiction under
the Convention. Such a view would have far-reaching effects, not merely
for English law, but for all those E.C. countries which have traditional
rules for the staying of actions. Indeed, it is unlikely that the Court
would favour such a politically awkward stance.

A less extreme posture would be for the Court to rule that discre-
tionary grounds for the staying of actions are inconsistent with the Brus-
sels Convention although non-discretionary grounds are permissible.
On such a view, it would be acceptable automatically to stay proceedings
because of the existence of a foreign jurisdiction agreement, or of a *lis alibi pendens* abroad, but not otherwise. Such a compromise position would confine the direct impact of the ruling to England, but in the English context the consequences would nonetheless be draconian. In the short term, it would deprive the English courts of any power to stay proceedings *vis-à-vis* non-contracting states even where a jurisdiction agreement or a *lis alibi pendens* is present. This is because jurisdictional discretion is the vehicle by which all stays of proceedings are effected in England and it would not be open for an English court, much less the E.C.J., to invent non-discretionary rules for the staying of actions in cases involving foreign jurisdiction clauses or pending actions abroad.

In practical terms, if the E.C.J. were to rule that a contracting state may only stay actions *vis-à-vis* non-E.C. countries on grounds which reflect the principles examined in Articles 16, 17 and 21, English legislation would be required to bring English law into line with the Convention.

A weaker position would be for the European Court to distinguish cases in which an English court enjoys *exclusive* jurisdiction under Articles 16 and 17 from those in which a defendant is domiciled in England under Article 2. They might rule that discretion can be employed only in the latter situation. Although such a view has the attraction of compromise, it is conceptually unsatisfying. In particular, if the Convention is meant to operate only between E.C. countries, there is no justification for deferring to an English court's *exclusive* jurisdiction in a case where the appropriate forum is in a non-E.C. country.

Alternatively, the European Court might make something of the reference in the Brussels Convention's Preamble to the need to "strengthen in the community the position of persons therein established." We have observed that, in the present context, it is hard to argue from this principle that defendants should be entitled to be sued in the place of their domicile. Indeed, the protection for E.C. defendants would hardly be strengthened by depriving them of the opportunity to argue for a stay of proceedings brought against them in England. In relation to E.C.-domiciled plaintiffs, however, the Preamble might be put to better use. In particular, we have seen that an E.C. plaintiff might have a special claim, in terms of fairness and common sense, to sue an English-domiciled defendant in England. In such a situation it would be possible, in accordance with the Preamble, for the European Court to protect an E.C. plaintiff by depriving the English courts of any power to stay such proceedings, while preserving such a power in cases involving non-E.C. plaintiffs. Such an outcome is, however, unattractive. A curtailment of the English court's power to grant a stay would be detrimental to English domiciliaries and so, in that sense, actually contrary to the Convention's Preamble. It would also discriminate against non-E.C. plaintiffs who would have to face the possibility of having their actions in England stayed, a consequence which plaintiffs outside the E.C. would hardly greet with equanimity. There is, however, a more equitable and more flexible way to safeguard the interests of E.C. plaintiffs without
discriminating against non-E.C. plaintiffs. This could be achieved by preserving the English courts' discretion to grant a stay, while allowing the courts to reflect a plaintiff's European identity in their determination of the appropriate forum.

Conclusion

In conclusion, it is important to reprise and emphasize the two principal themes of the foregoing remarks. The first of these is the compatibility of England's traditional jurisdictional regime with that of the Brussels Convention. The second is the desirability of incorporating respect for the Convention into the operation of the English approach.

A. Two Compatible Regimes

In the light of the options before the European Court, the rejection of forum non conveniens is an unappealing prospect. Fortunately, a number of arguments favor its retention. We have seen, for example, how unlikely it is that the framers of the Convention could have intended to abolish completely the traditional staying rules of contracting states. Again, if predictability and certainty are considerations, we have seen how the English approach is less troublesome in this respect than is sometimes supposed. First and foremost, however, the Brussels Convention itself does not compel the abolition of the doctrine in Convention cases. This is because, in several ways, the English approach is entirely consistent with the Convention's aspirations. Most importantly, the English doctrine is compatible with the two principal aims of the Brussels Convention as set out in its Preamble. First, as the Court of Appeal said in Harrods,107 the primary purpose of the Convention is to provide a common regime for the mutual recognition of judgments as between E.C. countries. The Convention's jurisdictional rules are intended to serve that goal by harmonising the law of E.C. countries so as to remove the possibility of concurrent proceedings, and thus conflicting judgments, in more than one E.C. country. But, true to that purpose, they have no role where the question is whether the English courts or those of a non-E.C. country should entertain proceedings. Indeed, it is hard to see how rules concerning the dismissal of proceedings could lead to the danger of inconsistent judgments when the result of such dismissal is to prevent their being an English judgment at all.

Second, the survival of English law's traditional jurisdictional rules is no threat to the Convention's other stated goal, to strengthen the legal protection of persons established in the E.C. As we have seen, it is unclear whether this objective does or should involve discrimination between E.C. and non-E.C. plaintiffs. The strengthening of an E.C. party's position, however, need not necessarily be to the exclusion, much less the detriment, of others. In the present context, therefore, it

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is assumed that protection should be extended to all plaintiffs of whatever origin. This means that all plaintiffs should have the opportunity to sue defendants who are subject to Convention jurisdiction and to take advantage of the Convention’s enforcement rules in the event of obtaining judgment. More precisely, it implies that, in the event of doubt, the Convention should be interpreted so as to foster the interests of E.C. plaintiffs (and others) in this regard.

In reality, however, the English approach does not offer plaintiffs a weaker alternative to the Convention regarding the opportunity to sue and to enforce judgments. On the one hand, if a plaintiff were to sue an English domiciliary in England the doctrine of forum non conveniens could easily preserve the plaintiff’s position. In some cases an English court could treat England as presumptively the natural forum and refuse a stay on that basis. It would be proper, for example, to give special preference to an E.C. plaintiff for whom it may be especially convenient and economical to sue in England rather than, say, in Hong Kong. Alternatively, even if such a presumption were rebutted on the facts, because everything apart from the Convention located the natural forum elsewhere, a court could decline to stay proceedings on the basis that to do so would unjustly disadvantage a plaintiff. Similarly, an English court could also protect a plaintiff’s interests regarding access to the Convention’s enforcement regime. As we have seen, the threat to the plaintiff in this respect is that if forced to sue in, say, New York rather than England, it might find it harder to enforce a New York judgment in, say, France, than an English judgment, which is virtually guaranteed enforcement under the Convention throughout the E.C. An English court could protect such a plaintiff, however, albeit indirectly, by insisting that any dismissal of English proceedings should be subject to the defendant’s undertaking to satisfy any judgment obtained against it outside the E.C.

Furthermore, the English doctrine is perfectly consistent with the Convention’s other implied objectives. Indeed, it follows the Convention’s contours in many important ways. In the exercise of its jurisdictional discretion an English court could differentiate, for example, between the different bases upon which it might assume jurisdiction under the Convention, thereby reflecting the different classes of jurisdiction contained in the Convention. Thus, it might be more likely to regard England as the forum conveniens when its jurisdiction is exclusive under Articles 16 and 17 than if it were merely founded on domicile under Article 2. Again, the English approach is as sensitive as the Convention to such policies as the avoidance of concurrent proceedings and showing deference to contractual jurisdiction agreements for, as we have seen, an English court is very likely to treat a foreign forum as the forum conveniens when the parties have so agreed, or when proceedings are substantially underway there. Finally, there is every indication that the English courts are coming to regard a court which has jurisdiction under the Brussels Convention as presumptively the forum conveniens.
Indeed, they are prepared to do so even when they do not regard the Convention as being directly applicable.

In the light of such considerations it is apparent that the English approach to jurisdiction has the potential to mirror and to prosecute the objectives of the Brussels Convention. Indeed, it may provide a more subtle means of doing so than the Convention itself (it only protects the position of plaintiffs, for example, where such protection is actually necessary). Moreover, it is important to stress that the English doctrine offers a means not merely to reflect the Convention's aims, but actually to extend their scope. For while the Convention does not, or should not, operate directly in cases involving non-E.C. courts, the doctrine of *forum non conveniens* does so. Given that the doctrine embodies the essential policies of the Convention, this ensures that those policies can be projected even beyond their strictly allotted range.

It is hard to see, therefore, how the doctrine of *forum non conveniens* is inconsistent with the Brussels Convention in its essential particulars; not only does it reflect the policies of the Convention, it also extends their scope. Moreover, the significance of this conclusion can hardly be underestimated, for if, in the end, the English doctrine is compatible with the Brussels Convention, the only reason to abolish it falls away. If so, the Court of Appeal's decision in *Harrods* is ultimately vindicated.

B. A Communautaire Approach Justified

It is apparent that the English approach to jurisdiction reflects, in its nature, many important policies of the Brussels regime. It is open to question, however, whether it is desirable deliberately to build respect for the Brussels Convention into the exercise of the courts' discretion to stay proceedings in relation to non-Convention courts. After all, such a view takes for granted that the Convention does not strictly apply in such cases; it is precisely because it does not that the English courts' jurisdictional discretion survives at all. It might be asked, therefore, why an English court, in a case like *Harrods*, should pay attention to a law which is inapplicable by definition. Why should it defer to the defendant's domiciliary law when exercising jurisdictional discretion merely because the Brussels Convention regards it as important?

One answer might be that to do so is adequately justified by the doctrine of *forum non conveniens* itself, the operation of which assumes that all the facts in a case are relevant to determining the just and appropriate forum. Moreover, courts commonly give special weight to certain facts in particular types of case. It would be no more odd to give presumptive weight to the fact that an English court has jurisdiction under the Brussels Convention than to the fact that proceedings would be time-barred abroad, or that a successful plaintiff could not recover costs in the alternative form, or that the case concerns a *lis alibi pendens* or a foreign jurisdiction agreement.

Another response is that consistency alone demands that English courts should attend to the position under the Brussels Convention in
exercising their jurisdictional discretion. It is true, of course, that the law sometimes requires courts to apply inconsistent policies in different situations. But that does not mean that they should act inconsistently when they have the choice not to do so, a choice vouchsafed in the present context by the very breadth of their jurisdictional discretion.

There are, however, less technical, more tactical, reasons for incorporating respect for the Brussels Convention into the jurisdictional discretion of the English courts. Such an approach eases the tension between the competing philosophies of the common law and the Brussels Convention. It also provides a workable *modus operandi* which reconciles the operation of the two regimes. But, most importantly, it offers English law's traditional approach to jurisdiction its best defense against abolition. It is hard to see how the doctrine of *forum non conveniens* can be inconsistent with the Brussels Convention, the ultimate test of its survival, if it has the capacity to respect, indeed to extend, the Convention's policy and purpose.

It must be acknowledged, however, that such a *communautaire* attitude towards *forum non conveniens*, attractive as it is, conceals an arresting irony. For it means that, far from being a threat to the Brussels Convention, jurisdictional discretion may be its greatest ally.