
TABLE OF CONTENTS

Foreword by Prof. mr. F.J.M. DE LY	V
Acknowledgements	VII
Abbreviations	XIX
<i>Chapter 1</i>	
Introduction	3
1.1 International Jurisdiction in Commercial Litigation	3
1.1.1 The Relevance of International Jurisdiction	4
1.1.2 Forum Selection and Forum Shopping	5
1.2 International Litigation and the Principle of Party Autonomy	7
1.2.1 Choice of Forum and Forum Fixing	8
1.2.2 The Alternative: The Success of International Arbitration	8
1.3 Unification of International Jurisdiction Rules	10
1.3.1 Regional Unification	11
1.3.2 Failed Efforts of Universal Unification: The Hague Project	14
1.3.3 Other Instruments of Unification	16
1.3.4 Desirability of Unification at an International Level	18
1.3.5 The Next Step: Progressive Unification	20
1.4 Some Difficulties Due to the Nature of Civil Jurisdiction	21
1.4.1 International Law and State Sovereignty	21
1.4.2 Jurisdiction Rules, Connecting Factors and Territoriality	22
1.4.3 Interaction with the Applicable Law	22
1.5 Problem Statement and Objective	24
1.6 Scope	24
1.7 The Comparative Approach	26
1.8 Outline	28
<i>Chapter 2</i>	
Uniform Jurisdiction Rules in Europe: The Brussels Regulation	29
2.1 From the Convention to the Regulation	29
2.2 Scope and Structure	34
2.2.1 International Element	34
2.2.2 The Substantive Scope	35
2.2.3 The Territorial Scope	36
2.2.4 Types of Jurisdiction Rules	38
2.2.5 Hierarchical Structure	42
2.2.6 A ‘Convention Double’	42
2.2.7 ‘Exorbitant’ Jurisdiction Rules	43

2.2.7.1	Nationality	44
2.2.7.2	<i>Forum Actoris</i>	45
2.2.7.3	Property	45
2.2.7.4	Presence	46
2.2.7.5	The Place of Signature	46
2.3	The Closed System of the Brussels Model	47
2.3.1	The Exclusion of the <i>Forum Non Conveniens</i> Doctrine	47
2.3.1.1	The Accession of Common Law Systems	48
2.3.1.2	The Relation between Non-Member States' Courts	50
2.3.2	The Exclusion of Anti-suit Injunctions	54
2.3.3	Forms of Discretion	55
2.3.4	The Doctrine of the Reflex Effect	57
2.3.5	The Importance of Predictability and Legal Certainty	58
2.4	Fundamental Rights	59
2.4.1	Non-discrimination on the Basis of Nationality	59
2.4.2	The Relationship between Article 6(1) ECHR and the Brussels Model	60
2.5	Defendant's Domicile – The General Jurisdiction Rule	65
2.5.1	Determination of 'Domicile' for Natural Persons	66
2.5.2	The Corporate Domicile	67
2.6	Special Branch Jurisdiction under Article 5(5)	68
2.6.1	The Autonomous Meaning of Branch-establishment	69
2.6.2	Delimiting 'Disputes Arising out of the Operations'	72
2.7	The <i>Forum Contractus</i> under Article 5(1)	74
2.7.1	Initial Justifications	75
2.7.2	The Scope of the <i>Forum Contractus</i>	78
2.7.2.1	Autonomous Concept	78
2.7.2.2	Defining 'Contractual Matters'	79
2.7.2.3	Contractual Matters versus Torts	82
2.7.2.4	Sub-classification of Contracts	83
2.7.2.5	Validity and Existence of the Contract	84
2.7.3	The Connecting Factors	85
2.7.3.1	An Autonomous Connecting Factor under Article 5(1)(b)	86
2.7.3.1.a	The place of delivery in sale of goods contracts	87
2.7.3.1.b	Contract for the provision of services	93
2.7.3.1.c	'Unless otherwise agreed'	93
2.7.3.2	The Place of Performance of the Obligation in Question under Article 5(1)(a)	94
2.7.3.2.a	The obligation in question	95
2.7.3.2.b	The systematic refusal of the characteristic obligation	98
2.7.3.2.c	The <i>Tessili</i> approach	101
2.7.3.2.d	The rejection of an autonomous determination	103
2.7.3.2.e	The role of uniform substantive law and conflicts rules	106
2.7.3.2.f	Agreed place of performance	111
2.7.4	Justifications Reviewed	111
2.8	Conclusion	113

Chapter 3

National Jurisdiction Rules in Continental Europe	117
3.1 Italy and Spain: The Influence of the Brussels Model	118
3.1.1 The Italian <i>Riforma</i>	118
3.1.2 The Spanish <i>Reforma</i>	121
3.2 The Netherlands	122
3.2.1 Introduction	122
3.2.1.1 The Need for Reform – Conformity with the Brussels Model	125
3.2.1.2 Structure and Overview	126
3.2.2 General Jurisdiction at Defendant’s Forum	129
3.2.2.1 The Domicile of Natural Persons	130
3.2.2.2 The Habitual Residence	131
3.2.2.3 The Corporate Domicile	131
3.2.2.4 The Establishment	132
3.2.3 Special Jurisdiction for Contracts	133
3.2.4 The <i>Distribution Is Attribution</i> Rule and the <i>Forum Arresti</i>	136
3.3 Switzerland	138
3.3.1 Introduction	138
3.3.2 The Contract Chapter	141
3.3.2.1 Defendant’s Forum	142
3.3.2.2 Place of Business	144
3.3.2.3 Place of Performance	145
3.3.3 The General Rule of the <i>Forum Arresti</i>	146
3.4 France	148
3.4.1 Introduction: The Duality of the French Jurisdictional Regime	148
3.4.2 The Transposition of Territorial Jurisdiction Rules	151
3.4.2.1 Defendant’s Domicile	151
3.4.2.2 Branch Jurisdiction	152
3.4.2.3 Special Jurisdiction for Contracts	153
3.4.2.4 Rejection of the <i>Forum Arresti</i>	155
3.4.3 Articles 14 and 15 of the French <i>Code Civil</i>	157
3.5 Germany	160
3.5.1 Introduction	160
3.5.2 General Jurisdiction	161
3.5.2.1 The Domicile of Natural Persons	162
3.5.2.2 The Corporate Domicile	163
3.5.3 Branch Jurisdiction	164
3.5.4 Special Jurisdiction in Contracts	166
3.5.5 Property-based Jurisdiction: The <i>Forum Patrimonii</i>	168
3.6 Conclusion	174

Chapter 4

English Common Law on International Jurisdiction	177
4.1 Sets of Jurisdictional Rules in England	177
4.2 The Structure of the English Common Law System	180

4.2.1	From Presence to Service out of the Jurisdiction	180
4.2.2	Service of Process in England	182
4.2.3	Service of Process out of England	183
4.3	The <i>Forum (Non) Conveniens</i> Doctrine	184
4.3.1	The Most Real and Substantial Connection: The Appropriateness Test	186
4.3.2	Injustice If Proceedings Were to Be Stayed	187
4.4	Defendant's Presence and the Service within the Jurisdiction	189
4.4.1	Individuals	189
4.4.2	Corporate Presence	192
4.4.2.1	Corporate Presence under the Civil Procedure Rules Regime	193
4.4.2.2	Statutory Service on Corporations According to the Companies Act	195
4.4.2.2.a	Branch-establishment under Section 690A	197
4.4.2.2.b	Place of business under Section 691	199
4.4.2.2.c	Statutory service under the Companies Act 2006	204
4.4.2.3	Concluding Remarks on Corporate Presence	205
4.5	Extended Jurisdiction by Service of Process out of the Jurisdiction	206
4.5.1	Defendant's Domicile under Rule 6.20(1)(a) CPR	206
4.5.2	Special Provisions Concerning Contracts	207
4.5.2.1	Rule 6.20(5)(a): Contract Made within the Jurisdiction	208
4.5.2.2	Rule 6.20(5)(b): Contract Made by or through an Agent	209
4.5.2.3	Rule 6.20(5)(c): The Contract Is Governed by English Law	210
4.5.2.4	Rule 6.20(7): Claim Seeks a Declaration That No Contract Exists	211
4.5.2.5	Rule 6.20(6): Breach of Contract Committed within the Jurisdiction	211
4.6	Conclusion	212
 <i>Chapter 5</i>		
The Jurisdictional Scheme of the United States		213
5.1	The Importance of State Sovereignty	214
5.1.1	Subject Matter Jurisdiction	214
5.1.2	No Direct International Jurisdiction Rules	216
5.1.3	Allocation of Jurisdiction at Interstate Level	217
5.2	The Constitutionalization of International Jurisdiction of United States Courts	219
5.2.1	Constitutional Limits to the Exercise of Jurisdiction	220
5.2.2	From 'Power' to 'Minimum Contacts' and 'Fairness'	222
5.3	The Sources for United States Jurisdiction	224
5.3.1	The States' Long-arm Statutes	225
5.3.2	The Federal Jurisdiction Statute	227
5.4	Due Process Standards	229
5.4.1	The Supreme Court's Interpretation	230

5.4.2	The Current Due Process Test for United States Jurisdiction	237
5.4.3	The ‘Minimum Contact’ Rule	238
5.4.3.1	General Contacts and Specific Contacts	239
5.4.3.2	Related Contacts, the Claim ‘Arising Out’ of Transacting Business	242
5.4.3.3	Special Contacts and Purposeful Availment	243
5.4.4	The Criteria of Fairness and Reasonableness	246
5.5	<i>Forum Non Conveniens</i>	248
5.5.1	Characteristics and Factors	249
5.5.1.1	A More Convenient Forum Available Elsewhere	252
5.5.1.2	Public and Private Factors	252
5.5.2	Deference to the Plaintiff’s Choice	254
5.5.3	Greater Deference When the Chosen Forum Is the Home Forum	255
5.5.4	Alien Plaintiffs	255
5.6	Bases for Jurisdiction of United States Courts	257
5.6.1	Traditional Jurisdiction Grounds	258
5.6.1.1	Tag-jurisdiction and Physical Presence	259
5.6.1.2	Nationality and Citizenship	262
5.6.1.3	Defendant’s Domicile or Residence	264
5.6.1.4	Place of Incorporation of Domestic Corporations	268
5.6.2	The ‘Doing Business’ Criterion	269
5.6.2.1	Doing Business and Individuals	270
5.6.2.2	Defining Doing Business	271
5.6.3	Specific Jurisdiction Based on Defendant’s Activities	276
5.6.3.1	Transacting Business Jurisdiction	278
5.6.3.2	Specific Contacts for ‘Transacting Business’ Jurisdiction	280
5.6.3.3	Meetings and Visits to the Forum	282
5.6.3.4	Long-range Communications with the Forum to Transact Business	283
5.6.3.5	Financial Transactions and Bank Accounts	285
5.6.4	Specific Jurisdiction over Contractual Disputes	286
5.6.5	Minimum Contacts through a Branch, an Agent or Subsidiary	291
5.6.5.1	The Agency Relationship	293
5.6.5.2	The <i>Alter Ego</i> : The Jurisdictional Piercing of the Corporate Veil	295
5.7	<i>Quasi in Rem</i> Jurisdiction: Jurisdiction Based on Attached Property	297
5.7.1	The <i>Pennoyer</i> Precondition of Attachment	299
5.7.2	Specific Jurisdiction	300
5.7.3	The Nature and <i>Situs</i> of Attached Property	302
5.7.4	Attachment Jurisdiction Authorized by State Law	305
5.8	Conclusion	308

Chapter 6

Contrasting Approaches to International Jurisdiction	311
6.1 Civil Law versus Common Law: Preliminary Comparative Observations	311
6.1.1 Distinctive Legal Sources: Legislation versus Judge-made Law	313
6.1.2 Legal Thinking: Rule-based or Fact-based Approach	315
6.1.3 Legal Technique: <i>Ex Ante</i> or <i>Ex Post</i> Appreciation of Jurisdictional Interests	317
6.1.4 Legal Certainty and Flexibility	318
6.2 Different Starting Points for International Jurisdiction	320
6.2.1 <i>Forum Rei</i> , Presence and Due Process	320
6.2.2 Extraterritoriality and Long-arm Jurisdiction	323
6.2.3 Defendant-specific and Claim-special Jurisdiction	328
6.2.4 The Preference for Specific Jurisdiction	330
6.3 The Jurisdictional Structures: Open, Closed and Mixed Systems	331
6.3.1 The Closed Systems in European Civil Law and the Brussels Model	331
6.3.2 The Mixed English Common Law System	333
6.3.3 The Open Character of the United States Jurisdictional System	334
6.4 The Protection of Parties	335
6.4.1 The Continental European Approach	336
6.4.2 The English Common Law Approach	339
6.4.3 The American Approach	342
6.4.4 A Different Role for the <i>Favor Defensoris</i>	345
6.5 Parameters for the Regulation of Jurisdiction World-wide	347
6.5.1 The Connection with the Forum	349
6.5.2 The Focus on Defendant's Activities Giving Rise to the Contractual Claim	352
6.5.3 The Protection of Parties	353
6.5.4 State's Interest Considerations	355
6.5.5 The Balance between Legal Certainty and Flexibility	358

Chapter 7

Assessing Bases for International Jurisdiction in Contract Disputes	361
7.1 Preliminary Observations: Individuals versus Corporate Entities	362
7.1.1 Defining Corporate Presence	363
7.1.2 Corporate Domicile and Nationality: The Importance of the <i>Lex Societatis</i>	364
7.1.3 Corporate Presence, Domicile and Nationality: A Jurisdictional Overlap	367
7.1.4 Introducing the 'Corporate Home' Factors	368
7.2 Defendant's Home Court	368
7.2.1 Problems Defining the Individual's Domicile	370
7.2.1.1 The Rise of the Habitual Residence	372
7.2.1.2 Domicile versus Habitual Residence	373

7.2.2	The Corporate Home Factors	374
7.2.2.1	The Place of Incorporation and Statutory Seat	374
7.2.2.2	The Centre of Administration and Management Control	375
7.2.2.3	The Principal Place of Business	377
7.2.2.4	The Corporate Home Factors Evaluated at Unification Level	377
7.2.3	Evaluation of Defendant's Home Court	379
7.2.3.1	The Connection with the Forum	379
7.2.3.2	The Protection of Parties and Equality of Arms	381
7.2.3.3	Legal Certainty and Flexibility	382
7.3	Other Bases for General Jurisdiction over Individual Defendants	383
7.3.1	Nationality-based Jurisdiction	383
7.3.2	Tag-jurisdiction and Physical Presence	385
7.3.2.1	Exorbitant Character in Civil Law Traditions and at Unification Level	387
7.3.2.2	Evaluation	388
7.4	The Claimant's Home Court	389
7.4.1	The <i>Forum Actoris</i> at Unification Level	391
7.4.2	Evaluation	393
7.5	<i>Defendant-related</i> : Activity-based Jurisdiction	393
7.5.1	Doing Business Abroad	394
7.5.2	Place of Business and Branch	396
7.5.3	Agency	400
7.5.4	Transacting Business	401
7.5.5	The Failed Hague Compromise: Branch and Transacting Business	402
7.5.6	Subsidiaries and Other Aspects of Activity-based Jurisdiction	405
7.5.7	Evaluation of <i>Defendant-related</i> Jurisdiction: Defendant's Business Activities	407
7.5.7.1	Doing Business	407
7.5.7.2	Business-establishments and Branches	409
7.5.7.3	Transacting Business	411
7.6	<i>Claim-related</i> Bases for Contractual Claims	412
7.6.1	General Observations	412
7.6.2	Definition and Classification Problems of 'Contractual Matters'	415
7.6.3	The Connecting Factors for 'Contract-based Jurisdiction'	416
7.6.3.1	The <i>Forum Celebrationis</i> – The Place Where the Contract Was Formed	417
7.6.3.2	The Place of the Law Governing the Contract	418
7.6.3.3	The <i>Forum Solutionis</i> – Place of Performance of the Obligation in Question	419
7.6.3.4	Sale of Goods and Provision of Service: Tailored Place of Performance	423
7.6.3.5	The Place Where the Contract Was Breached	425
7.6.4	Contract Jurisdiction under Drafts of the Hague Project	427
7.7	Property-based Jurisdiction	430

7.7.1	The Nature of the (Attached) Property	433
7.7.2	The Connection with the Forum: Special or General Jurisdiction	434
7.7.3	Jurisdiction (Not) Limited to the Value of the Property	435
7.7.4	The Exorbitant Character of Property-based Jurisdiction at Unification Level	436
7.7.5	Evaluation	438
<i>Chapter 8</i>		
Correction Mechanisms: Jurisdictional Requirements and Exceptions		441
8.1	Special Correction and the Close Connection Requirement	444
8.1.1	The ‘Sufficient Connection’ Requirement	445
8.1.2	No Room for Special Connection Correction under the Brussels Model	448
8.2	General Correction Devices	450
8.2.1	The United States Due Process Requirements Compared	450
8.2.2	General Requirements under the <i>Forum Conveniens</i> Doctrine	454
8.2.3	The <i>Forum Non Conveniens</i> Exception	456
8.2.4	No General Correction in Continental Europe and the Brussels Model	461
8.3	Article 6 European Convention on Human Rights: Right of a Fair Trial	465
8.3.1	Comparing the Fair Trial Components	468
8.3.2	The Influence of Article 6(1) on National Jurisdiction Rules	471
8.3.3	International Fair Trial Considerations	472
8.4	Correction Clauses at Unification Level	474
8.4.1	The ‘Close Connection’ Requirement in the Proposed Hague Convention	474
8.4.2	Declining Jurisdiction in the Proposed Hague Convention	475
8.4.3	The Leuven/London Principles of the International Law Association	480
8.4.4	The Bruges Resolution of the <i>Institut de droit international</i>	483
8.5	Evaluation of the Need for Correction Devices	484
<i>Chapter 9</i>		
Conclusions and Propositions		487
9.1	Acceptable and Non-acceptable Grounds	488
9.1.1	General Bases for Jurisdiction	488
9.1.2	The <i>Claim-related</i> Special Jurisdiction Rule: Unsuitable at Uniform Level	490
9.1.3	The Focus on Defendant’s ‘Economic Allegiance’ to the Forum	492
9.1.3.1	Defendant’s Activities: ‘Fixed Establishment Jurisdiction’	493
9.1.3.2	Defendant’s Business Activities without a Fixed Place of Business	493
9.1.3.3	Transacting Business	494
9.1.4	Property-based Jurisdiction	495

9.2	The Need for Correction at Uniform International Level	496
9.3	Progressive Unification and the Outdated Approach of General Jurisdiction	498
9.4	A Proposal	501
9.4.1	The First Step	502
9.4.2	The Second Step: A Restricted Forum Selection	503
9.4.3	Substantial Business Activities in the Forum	504
9.5	Concluding Remarks	506
	Bibliography	507
	Table of Cases	543
	Table of Legislation	561
	Index	577